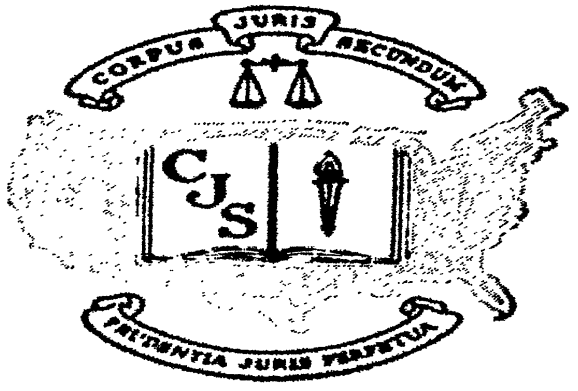
CORPUS JURIS SECUNDUM
CJS
PRUDENTIA JURIS PERPETUA

CITE BY TITLE AND SECTION

Thus

49 C.J.S. Judgments § 22

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By
The Editorial Staffs
of
THE AMERICAN LAW BOOK CO.
and
WEST PUBLISHING CO.

VOLUME XLIX

Kept to Date by Cumulative Annual Pocket Parts

Brooklyn, N. Y.
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been two-fold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
Abb.	Abbott (U.S.)
Abb.Adm.	Abbott's Admiralty (U.S.)
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)
Abb.Dec.	Abbott's Decisions (N.Y.)
Abb.N.Cas.	Abbott's New Cases (N.Y.)
Abb.Pr.	Abbott's Practice (N.Y.)
Abb.Pr.N.S.	Abbott's Practice New Series (N.Y.)
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1917]A.C.	[1917] Appeal Cases (Can.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Adams	Adams Reports (N.H.)
Add.	Addison (Pa.)
Add.Eccl.	Addams' Ecclesiastical (Eng.)
A.&E.	Adolphus & Ellis (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A.K.Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala.App.	Alabama Appellate Court
Alaska	Alaska
Alb.L.J.	Albany Law Journal
A.L.C.	American Leading Cases
Alc.&N.	Alcott & Napier (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Allen (N.B.)	Allen, New Brunswick
Alta.L.	Alberta Law
A.L.R.	American Law Reports
Am.Bankr.	American Bankruptcy (U.S.)
Ambl.	Ambler (Eng.)
A.M.C.	American Maritime Cases
Am.Corp.Cas.	American Corporation Cases
Am.Cr.	American Criminal
Am.D.	American Decisions
Am.&E.Corp.Cas.	American & English Corporation Cases
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series
Am.&Eng.Ency. Law	American and English Encyclopedia of Law
Am.&E.Eq.D.	American & English Decisions in Equity
Am.&Eng.Pat. Cas.	American and English Patent Cases
Am.&Eng.R.R. Cas.	American and English Railroad Cases
Am.Electr.Cas.	American Electrical Cases
Am.&E.R.Cas.	American & English Railroad Cases
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series
Am.J.Int.L.	American Journal of International Law
Am.L.J.	American Law Journal (Pa.)
Am.L.J.N.S.	American Law Journal New Series (Pa.)
Am.L.Rec.	American Law Record (Ohio)
Am.L.Reg.	American Law Register
Am.L.Reg.N.S.	American Law Register New Series
Am.Law Reg.(O. S.)	American Law Register Old Series
Am.L.Rev.	American Law Review
Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl.Cas.	American Negligence Cases
Am.Negl.R.	American Negligence Reports
A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Am.Prob.	American Probate
Am.Prob.N.S.	American Probate New Series
Am.Pr.	American Practice
Am.R.	American Reports
Am.R.&Corp.	American Railroad & Corporation
Am.R.Rep.	American Railway Reports
Am.S.R.	American State Reports
Am.St.R.D.	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
Ann.Cas.	American & English Annotated Cases
Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng.)
Anth.N.P.	Anthon's Nisi Prius (N.Y.)
App.D.C.	Appeal Cases (D.C.)
App.Cas.	Law Reports Appeal Cases (Eng.)
App.Div.	Appellate Division (N.Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark.Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr.C.L.R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey.	Bailey's Law (S.C.)
B.&Ad.	Barnewall & Adolphus (Eng.)
B.&Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf.Pr.	Balfour's Practice (Sc.)
Ball&B.	Ball & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S.C.)
B.&B.	Broderip & Bingham (Eng.)
B.C.	British Columbia

B.&C.	Barnewall & Cresswell (Eng.)
B.&Macn.	Browne & Macnamara (Eng.)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beav.&Wal.Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng.)
Beav.R.&C.Cas.	English Railway and Canal Cases
Beaw.Lex.Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U.S.)
Bell.	Bellewe (Eng.)
Bell App.Cas.	Bell's Appeal Cases (Sc.)
Bell Cas.	Bell's Cases (Sc.)
Bell C.C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc.Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U.S.)
Benl.	Benloe (Eng.)
Benl.&D.	Benloe & Dallison (Eng.)
B.&H.Cr.Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing.N.Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U.S.)
Bitt.W.&P.	Bittleson, Wise & Parnell (Eng.)
Black	Black (U.S.)
Blackf.	Blackford (Ind.)
Blackstone Comm.	Blackstone Commentaries
Bla.H.	Henry Blackstone's English Common Pleas (Eng.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Bland's Ch.	Bland Chancery (Md.)
Blatchf.	Blatchford (U.S.)
Blatchf.&H.	Blatchford & Howland (U.S.)
Blatchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
Bligh	Bligh (Eng.)
Bligh N.S.	Bligh New Series (Eng.)
B.Mon.	B. Monroe (Ky.)
Bond	Bond (U.S.)
Bouvier.	Bouvier's Law Dictionary
Boyce	Boyce (Del.)
B.&P.	Bosanquet & Puller (Eng.)
B.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf.Surr.	Bradford's Surrogate (N.Y.)
Brayt.	Brayton (Vt.)
B.R.C.	British Ruling Cases
Brev.	Brevard (S.C.)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El.Cas.	Brightly's Election Cases (Pa.)
Bro.Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U.S.)
Brock.Cas.	Brockenbrough's Virginia Cases
Brod.&B.	Broderip & Bingham (Eng.)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat.Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro.P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown.Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U.S.)
Buck	Buck (Eng.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr.S.Cas.	Burrows' Settlement Cas. (Eng.)
Busb.	Busbee (N.C.)
Busb.Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab.&E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai.Cas.	Caines' Cases (N.Y.)
Cal.	California
Cal.(2d)	California Reports, Second Series
Cal.App.	California Appellate Court
Cal.App.(2d)	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal.Unrep.Cas.	California Unreported Cases
Cam.Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can.Cr.Cas.	Canadian Criminal Cases
Can.Exch.	Canadian Exchequer
Can.L.J.	Canada Law Journal
Can.L.J.N.S.	Canada Law Journal New Series
Can.L.T.Occ. Notes	Canadian Law Times Occasional Notes
Can.R.Cas.	Canadian Railway Cases
Can.S.C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng.)
Car.H.&A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa.)
Cas.t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas.t.Holt	Cases temp. Holt (Eng.)
Cas.t.King	Cases temp. King (Eng.)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L.J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R.M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.Co.	Chester County (Pa.)
Chev.	Cheves (S.C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct.R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)
C.J.	Corpus Juris
C.J.Ann.	Corpus Juris Annotations
C.J.S.	Corpus Juris Secundum
C.&K.	Carrington & Kirwan (Eng.)
C.&L.	Connor & Lawson (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)
Cl.Ch.	Clarke's Chancery (N.Y.)
Clark &F.	Clark & Finnelly (Eng.)
Clark &Fin.N.S.	Clark's House of Lords Cases (Eng.)
Clarke	Clarke's Chancery (N.Y.)
Clarke &S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)
Clarke Ch.	Clarke's Chancery (N.Y.)
Clayt.	Clayton's Reports, York Assizes (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)
Clev.L.Rec.	Cleveland Law Record (Oh.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)
Cl.&F.	Clark & Finnelly (Eng.)
Clif.El.Cas.	Clifford's Southwick Election Cases
Cliff.	Clifford (U.S.)
C.L.R.	Common Law Reports (Eng.)
C.&M.	Carrington & Marshman (Eng.)
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)
Cock.&Rowe.	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N.Y.)
Code Rep.N.S.	Code Reports New Series (N.Y.)
Coff.Prob.	Coffey's Probate (Cal.)
Co.Inst.	Coke's Institutes
Coke	Coke (Eng.)
Col.Cas.	Coleman's Cases (N.Y.)
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)
Col.C.C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Col.L.Rep.	Colorado Law Reporter
Col.Law Review	Columbia Law Review
Coll.&E.Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
Com.Cas.	Commercial Cases (Eng.)
Com.L.	Commercial Law (Can.)
Comptr.Treas. Dec.	Comptroller Treasury Decisions
Comst.	Comstock (N.Y.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Con.&Law.	Connor & Lawson (Ir.)
Conf.	Conference Reports (N.C.)
Conn.	Connecticut
Conn.Surr.	Connolly's Surrogate (N.Y.)
Const.	Constitutional Reports (N.C.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)
Coop.	Cooper's Chancery (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)
Coop.t.Eld.	Cooper's Cases *tempore* Eldon (Eng.)
Co.P.C.	Coke's Reports (Eng.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)
Court.&Macl.	Courtnay & Maclean (Sc.)
Cow.	Cowen (N.Y.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp.	Cowper (Eng.)
Cox.Am.T.M.Cas.	Cox's American Trade-Mark Cases
Cox C.C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
Cox &Atk.	Cox & Atkinson (Eng.)
C.&P.	Carrington & Payne (Eng.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U.S.)
Cranch	Cranch (U.S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
Cr.App.	Criminal Appeals (Eng.)
Crawf.&D.	Crawford & Dix (Ir.)
Crawf.&D.Abr. Cas.	Crawford & Dix's Abridged Case (Ir.)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr.L.Mag.	Criminal Law Magazine
Cr.&Ph.	Craig & Phillips (Eng.)
C.Rob.	Christopher Robinson's Admiralt (Eng.)
Cro.Car.	Croke Charles (Eng.)
Cro.Eliz.	Croke Elizabeth (Eng.)
Cro.Jac.	Croke's Reports tempore James (Ja cobus) (Eng.)
Cromp.&J.	Crompton & Jervis (Eng.)
Cromp.&M.	Crompton & Meeson (Eng.)
Crosw.Pat.Cas.	Croswell's Collection of Patent Case (U.S.)
Cr.&Ph.	Craig & Phillips (Eng.)
Ct.Cl.	Court of Claims (U.S.)
Ct.Cust.&Pat. App.	Court of Customs and Patent Appeal
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U.S.)
Curt.Eccl.	Curteis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc.Ann.	Cyclopedia of Law & Procedure An notations

D

Dak.	Dakota
Dal.C.P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U.S.)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N.Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Dauph.Co.	Dauphin County (Pa.)
Dav.&M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D.B.&M.	Dunlop, Bell & Murray (Sc.)
D.C.	District of Columbia
D.Chipm.	D. Chipman (Vt.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U.S.)
Dears.&B.	Dearsley & Bell (Eng.)
Dears.C.C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G.F.&J.	De Gex, Fisher & Jones (Eng.)
De G.J.&S.	De Gex, Jones & Smith (Eng.)
De G.&J.	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordo (Eng.)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N.Y.)
Den.	Denio (N.Y.)
Den.C.C.	Denison's Crown Cases (Eng.)
Desaus.Eq.	Desaussure (S.C.)
Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev.L.	Devereux (N.C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S.)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)

D.&L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)
Dom.L.R.	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng.)
Dorion	Dorion (L.C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dougl.El.Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng.)
Dow & Cl.	Dow & Clark (Eng.)
Dow.&L.	Dowling & Lowndes (Eng.)
Dow.N.S.	Dowling, New Series (Eng.)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl.P.C.	Dowling's Practice Cases (Eng.)
Dowl.P.C.N.S.	Dowling's Practice Cases New Series (Eng.)
D.&R.	Dowling & Ryland (Eng.)
Draper	Draper (U.C.)
Drew.	Drewry (Eng.)
Drinkw.	Drinkwater (Eng.)
D.&R.Mag.Cas.	Dowling & Ryland's Magistrate Cases (Eng.)
D.&R.N.P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr.&Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr.&Wal.	Drury & Walsh (Ir.)
Dr.&War.	Drury & Warren (Ir.)
D.&Sw.	Deane & Swabey (Eng.)
Dud.Eq.	Dudley (S.C.)
Dudl.	Dudley (Ga.)
Duer	Duer's Superior Court (N.Y.)
Dunl.B.&M.	Dunlop, Bell & Murray (Sc.)
Dunlop	Dunlop (Sc.)
Dunn.	Dunning (Eng.)
Durie	Durie (Sc.)
Durn.&E.	Durnford & East (Eng.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
East.L.R.	Eastern Law Reporter (Can.)
East P.C.	East's Pleas of the Crown (Eng.)
East.T.	Eastern Term (Eng.)
E.&B.	Ellis & Blackburn (Eng.)
E.B.&E.	Ellis, Blackburn & Ellis (Eng.)
E.B.&S.	Ellis, Best & Smith (Eng.)
E.C.L.	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm.Sel.Cas.	Edmond's Select Cases (N.Y.)
E. D. Smith	E. D. Smith (N.Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N.Y.)
Edw.Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw.Adm.	Edwards' Admiralty (Eng.)
E.&E.	Ellis & Ellis (Eng.)
Enc.Pl.&Pr.	Encyclopædia of Pleading & Practice
Ency.Law.	American and English Encyclopædia of Law
Eng.Ad.	English Admiralty
Eng.C.C.	English Crown Cases
Eng.Ch.	English Chancery
Eng.Eccl.	English Ecclesiastical Reports
Eng.Ecc.R.	English Ecclesiastical Reports
Eng.Exch.	English Exchequer Reports
Eng.L.&Eq.	English Law & Equity
Eng.Rep.R.	English Reports, Full Reprint
Eng.Ry.&C.Cas.	English Railway and Canal Cases
Eng.&Ir.App.	Law Reports, English and Irish Appeal Cases
Eq.Cas.Abr.	Equity Cases Abridged (Eng.)
Eq.Rep.	Equity Reports (Eng.)
E.R.C.	English Ruling Cases
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Exch.Cas.	Exchequer Cases (Sc.)
Ex.D.	Law Reports Exchequer Division (Eng.)
Eyre	Eyre's Reports (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc.&F.	Falconer & Fitzherbert (Eng.)
Far.	Farresley (Eng.)
F.Cas.No.	Federal Cases (U.S.)
F.(Ct.Sess.)	Fraser's Court of Sessions Cases (Sc.)
F.	Federal Reporter (U.S.)
F.(2d)	Federal Reporter Second Series
F.R.D.	Federal Rules Decisions
F.Supp.	Federal Supplement
Ferg.Cons.	Ferguson's Consistory (Eng.)
F.&F.	Foster & Finlason (Eng.)
Fish.Pat.Cas.	Fisher's Patent Cases (U.S.)
Fish.Pat.R.	Fisher's Patent Reports (U.S.)
Fish.PrizeCas.	Fisher's Prize Cases (U.S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng.)
Fitzh.N.Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U.S.)
Fl.&K.	Flanagan & Kelly (Ir.)
Fonb.Eq.	Fonblanque's Equity (Eng.)
Fonbl.	Fonblanque (Eng.)
Fonbl.R.	Fonblanque's English Cases
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fost.	Foster (N.H.)
Fost.&Fin.	Foster & Finlason (Eng.)
Fount.Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng.)
Fox & S.	Fox & Smith (Ir.)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem.K.B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga.App.	Georgia Appeals
Ga.Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gal.	Gallison (U.S.)
G.Coop.	G. Cooper (Eng.)
G.&D.	Gale & Davidson (Eng.)
Geld.&M.	Geldart & Maddock (Eng.)
Gibb.Surr.	Gibbon's Surrogate (N.Y.)
Giffard	Giffard (Eng.)
Giff.&H.	Giffard and Hemming (Eng.)
Gil.	Gilfillan's Edition (Minn.)
Gilb.	Gilbert's (Eng.)
Gilb.Cas.	Gilbert's Cases (Eng.)
Gilb.C.P.	Gilbert's Common Pleas (Eng.)
Gilb.Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill&J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm.&Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U.S.)
Glasc.	Glascock (Ir.)
Glyn&J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb.	Goebel's Probate Court Cases
Gosf.	Gosford (Eng.)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Gow N.P.	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U.C.)
Grant Err.&App.	Grant's Error & Appeal (U.C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)

Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill.T.Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg.Adm.	Haggard's Admiralty (Eng.)
Hagg.Cons.	Haggard's Consistory (Eng.)
Hagg.Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)
Hale P.C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N.Y.)
Hall&T.	Hall & Twells (Eng.)
Halsbury L.Eng.	Halsbury's Law of England
Handy	Handy (Oh.)
Han.(N.B.)	Hannay's Reports, New Brunswick
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harp.Eq.	Harper (S.C.)
Harr.	Harrison's Chancery (Mich.)
Harr.(Del.)	Harrington (Del.)
Harr.(Mich.)	Harrington's Michigan Chancery Reports
Harr.&G.	Harris & Gill (Md.)
Harr.Ch.	Harrison's Chancery (Eng.)
Harr.&H.	Harrison & Hodgins (U.C.)
Harr.&J.	Harris & Johnson (Md.)
Harr.&M.	Harris & McHenry (Md.)
Harr.&R.	Harrison & Rutherford (Eng.)
Harr.&W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U.S.)
Havil.	Haviland (Pr.Edw.Isl.)
Hawaii	Hawaiian
Hawaii.Fed.	Hawaiian Federal
Hawaiian Rep.	Hawaii Reports
Hawk.P.C.	Hawkins' Pleas of the Crown (Eng.)
Hay.Exch.	Hayes Exchequer (Ir.)
Hayes	Hayes (Ir.)
Hayes&J.	Hayes & Jones (Ir.)
Hay&M.	Hay & Marriott (Eng.)
Hayw.	Haywood (N.C.)
Hayw.	Haywood (Tenn.)
Hayw.&H.	Haywood & Hazelton (U.S.)
Haz.Reg.	Hazard's Register (Pa.)
H.Bl.	Henry Blackstone (Eng.)
H.&C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem.&M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U.S.)
Hen.&M.	Henning & Munford (Va.)
Het.	Hetley (Eng.)
Het.C.P.	Hetley's Common Pleas (Eng.)
H.&H.	Horn & Hurlstone (Eng.)
Hill	Hill (N.Y.)
Hill S.C.	Hill (S.C.)
Hill &Den.	Hill & Denio (N.Y.)
Hill &Den. Supp.	Lalor's Supplement to Hill & Denio's (N.Y.)
Hilt.	Hilton (N.Y.)
Hil.T.	Hilary Term (Eng.)
H.L.Cas.	House of Lords Cases (Eng.)
H.&N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
Hodg.El.	Hodgins' Election (U.C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N.Y.)
Hoffm.Land Cas.	Hoffman's Land Cases (U.S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U.S.)
Holt Adm.Cas.	Holt's English Admiralty Cases
Holt Eq.	Holt's Equity (Eng.)
Holt K.B.	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N.Y.)
Hopk.Dec.	Hopkins' Decisions (Pa.)
Hopw.&C.	Hopwood & Coltman (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)
Hosea	Hosea (Ohio)
Houst.	Houston (Del.)
Houst.Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U.S.)
How.(Miss.)	Howard (Miss.)
How.A.Cas.	Howard's Appeal Cases (N.Y.)
How.N.P.	Howell's Nisi Prius (Mich.)
How.Pr.	Howard's Practice (N.Y.)
How.Pr.N.S.	Howard's Practice New Series (N.Y.)
How.St.Tr.	Howell's State Trials (Eng.)
Hud.&B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U.S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N.Y.)
Hurl.&Gord.	Hurlstone & Gordon (Eng.)
Hurl.&W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Idaho	Idaho
Iddings D.R.D.	Iddings Dayton Term Reports
Ill.	Illinois
Ill.App.	Illinois Appellate Court
Ill.Cir.	Illinois Circuit Court
Ind.	Indiana
Ind.App.	Indiana Appellate Court
Ind.T.	Indian Territory
Ins.L.J.	Insurance Law Journal
Int.Com.Commn.	Interstate Commerce Commission
Int.Com.Rep.	Interstate Commerce Reports
Int.Rev.Rec.	Internal Revenue Record
Iowa	Iowa
[1891] Ir.	Law Reports [1891] Irish
Ir.Ch.	Irish Chancery
Ir.C.L.	Irish Common Law
Ir.Eccl.	Irish Ecclesiastical Reports
Ired.	Iredell (N.C.)
Ir.Eq.	Irish Equity
Ir.Law Rep.	Irish Law Reports
Ir.Law &Eq.	Irish Law and Equity Reports
Ir.R.1894.	Irish Law Reports for year 1894
Ir.R.C.L.	Irish Reports Common Law
Ir.R.Eq.	Irish Reports Equity
Irv.Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac.&W.	Jacob & Walker (Eng.)
J.Bridgm.	John Bridgman (Eng.)
J.&C.	Jones & Carey (Ir.)
Jebb &B.	Jebb & Bourke (Ir.)
Jebb C.C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J.J.Marsh.	J. J. Marshall (Ky.)
J.&L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N.Y.)
Johns.Cas.	Johnson's Cases (N.Y.)
Johns.Ch.	Johnson's Chancery (N.Y.)
Johns.V.C.	Johnson's English Vice-Chancellors (Eng.)
Johns.&H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W.	Sir William Jones' English King's Bench Reports
Jones&Spen.	Jones & Spencer (N.Y.)
Journ.Jur.	Journal of Jurisprudence (Pa.)
J.P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur.N.S.	Jurist New Series (Eng.)
Just.L.R.	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem.Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keilw.	Keilway (Eng.)
Kel.C.C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga.)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes	Keyes (N.Y.)
Keyl.	Keilwey (Eng.)
K.&G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A.(Orleans)	Court of Appeal, Parish of Orleans
La.Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.L.Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing's Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L.C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
L.Ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg.Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa.)
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L.J.Exch.	Law Journal Exchequer New Series (Eng.)
L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng.)
Ll.&G.t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll.&W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf.&T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L.R.	Law Reports (U.S.)
L.R.A.	Lawyers' Reports Annotated
L.R.A.1915A.	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N.S.	Lawyers' Reports Annotated New Series
L.R.C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
L.R.Eq.	Law Reports Equity Cases (Eng.)
L.R.Exch.	Law Reports Exchequer Cases (Eng.)
L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir.	Law Reports Irish
L.R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)

L.T.Rep.N.S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw.Reg.Cas.	Lutwyche's Registration Cases (Eng.)
Luz.Leg.Obs.	Luzerne Legal Observer (Pa.)
Luz.Leg.Reg.	Luzerne Legal Register (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA.Pat.Cas.	MacArthur's Patent Cases (D.C.)
MacArth.	MacArthur's District of Columbia Reports
MacAr.&M.	MacArthur & Mackey's District of Columbia Reports
Maccl.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl.&R.	Maclean & Robinson (Eng.)
Macn.&G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph.S.&L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd.Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man.El.Cas.	Manning's Election Cases (Eng.)
Man.Exch.Pr.	Manning's Exchequer Practice (Eng.)
Man.Gr.&S.	Manning, Granger, & Scott (Eng.)
Man.L.J.	Manitoba Law Journal
Man.&Ry.	Manning & Ryland (Eng.)
Man.&Ry.Mag. Cas.	Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S.	Manning & Scott (Eng.)
Mann.Unrep.Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man.t.Wood	Manitoba temp. Wood
March	March (Eng.)
Mar.Prov.	Maritime Province Reports (Can.)
Mars.Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh.J.J.	J. J. Marshall (Ky.)
Mart.	Martin Old Series (La.)
Mart.(N.S.)	Martin, New Series (La.)
Mart.	Martin (N.C.)
Marv.	Marvel (Del.)
Mart.N.S.	Martin New Series (La.)
Mart.&Y.	Martin & Yerger (Tenn.)
Mason	Mason (U.S.)
Mass.	Massachusetts
Maule &S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng.)
McAll.	McAllister (U.S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell.&Y.	McClelland & Younge (Eng.)
McCord.	McCord (S.C.)
McCrary	McCrary (U.S.)
McG.	McGloin (La.)
McLean	McLean (U.S.)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees.&Ros.	Meeson & Roscoe (Eng.)
Mees.&W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M.&G.	Manning & Granger (Eng.)
M.&H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich.N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill.Const.	Mill's Constitutional (S.C.)
Mill.Dec.	Miller's Decisions (U.S.)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N.Y.)
Miss.	Mississippi
Miss.Dec.	Mississippi Decisions
Miss.St.Cas.	Mississippi State Cases
M.&M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo.App.	Missouri Appeals
Moak	Moak (Eng.)
Mo.A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
Mod.Cas.L.&Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont.Bank.Rep.	Montagu's English Bankruptcy Reports
Mont.L.R.	Montreal Law Reports (Can.)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont.&B.	Montagu & Bligh (Eng.)
Mont.&C.	Montagu & Chitty (Eng.)
Mont.D.&DeG.	Montagu, Deacon & De Gex (Eng.)
Montg.Co.	Montgomery County Law Reporter (Pa.)
Mont.&M.	Montagu & McArthur (Eng.)
Montr.Cond.Rep.	Montreal Condensed Reports
Montr.Leg.N.	Montreal Legal News
Montr.Q.B.	Montreal Law Reports Queen's Bench
Montr.Super.	Montreal Law Reports Superior Court
Moody C.C.	Moody's Crown Cases (Eng.)
Moore C.P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K.B.	Moore's King's Bench (Eng.)
Moore P.C.	Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S.	Moore's Privy Council New Series (Eng.)
Moore&S.	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor.Min.Rep.	Morrison's Mining Reports
Morr.	Morris (Iowa)
Morr.Bankr.Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M.&P.	Moore & Payne (Eng.)
M.&R.	Manning & Ryland (Eng.)
M.&Rob.	Moody & Robinson (Eng.)
M.&S.	Maule & Selwyn (Eng.)
Mun.Corp.Cas.	Municipal Corporation Cases
Munf.	Munford (Va.)
Murph.	Murphey (N.C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng.)
Myl.&C.	Mylne & Craig (Eng.)
Myl.&K.	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr.Reg.	National Bankruptcy Register (U.S.)
Nat.Corp.Rep.	National Corporation Reporter
Nat.L.Rep.	National Law Reporter
N.B.	New Brunswick
N.Benl.	New Benloe (Eng.)
N.B.Eq.	New Brunswick Equity
N.C.	North Carolina
N.Chipm.	N. Chipman (Vt.)
N.C.Conf.	North Carolina Conference
N.C.T.Rep.	North Carolina Term Reports
N.D.	North Dakota
N.E.	North Eastern Reporter
N.E.(2d)	North Eastern Reporter Second Series
Neb.	Nebraska
Neb.(Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels.Abr.	Nelson's Abridgment of the Common Law

Nev.	Nevada
Newb.Adm.	Newberry's Admiralty (U.S.)
Newfoundl.	Newfoundland
Newf.Sel.Cas.	Newfoundland Select Cases
New Rep.	New Reports in all Courts (Eng.)
New Sess.Cas.	New Session Cases (Eng.)
New Zeal.L.	New Zealand Law
N.H.	New Hampshire
N.J.Eq.	New Jersey Equity
N.J.Law	New Jersey Law
N.J.L.J.	New Jersey Law Journal
N.J.Misc.	New Jersey Miscellaneous
N.M.	New Mexico
N.&M.	Nevile & Manning (Eng.)
N.&Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North.Co.	Northampton County Reporter (Pa.)
Northum.	Northumberland County Legal News (Pa.)
Northumb.Co.Leg. N.	Northumberland County Legal News (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Nevile & Perry (Eng.)
N.S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N.S.Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L.R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.Y.	New York
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y.City Ct.Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y.Code Reports, N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.St.	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O.Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. (Reprint)	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Okl.	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
Ont.L.	Ontario Law
Ont.L.J.	Ontario Law Journal
Ont.L.J.N.S.	Ontario Law Journal New Series
Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

P

P.	Pacific Reporter
P.(2d)	Pacific Reporter Second Series
[1891]P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa.C.Pl.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Park.	Parker (Eng.)
Park.Cr.	Parker's Criminal (N.Y.)
Park.Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
Pars.Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa.Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Peck.El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr.&W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U.S.)
Pet.Adm.	Peters' Admiralty (U.S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
Phil.	Phillips (Eng.)
Phil.	Phillip (N.C.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig.&R.	Pigott & Rodwell (Eng.)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
Pittsb.Leg.J.	Pittsburgh Legal Journal (Pa.)
Pittsb.Leg.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
P.&K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow.Surr.	Powers' Surrogate (N.Y.)
P.R.&D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec.Ch.	Precedents in Chancery (Eng.)
Pr.Edw.Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr.Cas.	Price's Practice Cases (Eng.)
Prid.&C.	Prideaux & Cole (Eng.)
Prob.[1917]	Law Reports, Probate Division (Eng.)

Prob.Rep.	Probate Reports (Eng.)
Pr.Rep.	Practice Reports (Eng.)
P.Wms.	Peere-Williams (Eng.)
P.U.R.	Public Utilities Reports
Pyke	Pyke (Can.)

Q

Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)
[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)
Queensl.J.P.	Queensland Justice of the Peace
Queensl.L.	Queensland Law
Queensl.L.J.	Queensland Law Journal
Que.L.	Quebec Law
Que.Pr.	Quebec Practice
Que.Q.B.	Quebec Official Reports Queen's Bench
Que.Rev.Jud.	Quebec Revised Judicial
Que.Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rap.Jud.Q.C.S.	Rapport's Judiciaries de Quebec Cour Superieure
Rawle	Rawle (Pa.)
R.C.L.	Ruling Case Law
R.&Can.Cas.	Railway & Canal Cases (Eng.)
R.&Can.Tr.Cas.	Railway & Canal Traffic Cases (Eng.)
Redf.	Redfield's Surrogate (N.Y.)
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)
Redf.R.Cas.	Redfield's Railway Cases (Eng.)
Redf.Surr.	Redfield's Surrogate (N.Y.)
Reeve Eng.L.	Reeve's English Law
Reports	Reports (Eng.)
Reprint	English Reprint
Rep.t.Finch	Cases temp. Finch (Eng.)
Rep.t.Hard.	Lee's Reports *tempore* Hardwicke (Eng.)
Rep.t.Holt	Reports *tempore* Holt (English Cases of Settlement)
Res.&Eq.Judgm.	Reserved & Equity Judgments (N.S. Wales)
Rev.Crit.	Revue Critique (Can.)
Rev.de Jur.	Revue de Jurisprudence (Can.)
Rev.de Legis.	Revue de Legislation (Can.)
Rev.Leg.	Revue Legale (Can.)
Rev.Leg.N.S.	Revue Legale New Series (Can.)
Rev.Rep.	Revised Reports (Eng.)
R.I.	Rhode Island
Rice	Rice (S.C.)
Rich.	Richardson (S.C.)
Rich.C.P.	Richardson's Practice Common Pleas (Eng.)
Ridg.	Ridgeway's Reports *tempore* Hardwicke (Eng.)
Ridg.Ap.	Ridgeway's Appeal (Ir.)
Ridg.L.&S.	Ridgeway, Lapp & Schoale (Ir.)
Ridg.P.C.	Ridgeway's Parliament Cases (Ir.)
Ridg.t.Hardw.	Ridgeway temp. Hardwicke (Eng.)
Riley	Riley (S.C.)
R.&M.	Ryan & Moody (Eng.)
R.M.Charlt.	R. M. Charlton (Ga.)
Rob.	Robinson (La.)
Rob.	Robinson (Va.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)
Rob.Eccl.	Robertson's Ecclesiastical (Eng.)
Robin.App.Cas.	Robinson's Appeal Cases (Sc.)
Rob.Wm.Adm.	William Robinson's Admiralty (Eng.)
Rolle	Rolle (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)
Rolls Ct.Rep.	Rolls' Court Reports
Rom.Cas.	Romilly's Notes of Cases (Eng.)
Root	Root (Conn.)
Rose	Rose (Eng.)
Ross Lead.Cas.	Ross' Leading Cases (Eng.)
R.&R.	Russell & Ryan Crown Cases (Eng.)
Russ.	Russell (Eng.)
Russ.&C.Eq.Cas.	Russell's & Chesley's Equity Cases (N.S.)
Russ.Eq.Cas.	Russell's Equity Cases (N.S.)
Russ.&Geld.	Russell & Geldert. Nova Scotia
Russ.&M.	Russell & Mylne (Eng.)
Ry.&M.	Ryan & Moody (Eng.)

S

Salk.	Salkeld (Eng.)
Sandf.	Sandford's Superior Court (N.Y.)
Sandf.Ch.	Sandford's Chancery (N.Y.)
Sask.L.	Saskatchewan Law
Saund.	Saunders (Eng.)
Saund.&C.	Saunders & Cole (Eng.)
Sau.&Sc.	Sausse & Scully (Ir.)
S.Austr.L.	South Australia Law
Sav.	Savile (Eng.)
Sawy.	Sawyer (U.S.)
Saxt.	Saxton (N.J.)
Say.	Sayer (Eng.)
S.C.	South Carolina
[1907]S.C.	Court of Session Cases (Sc.)
Scam.	Scammon (Ill.)
S.C.Eq.	South Carolina Equity
Sch.&Lef.	Schoales & Lefroy (Ir.)
[1907]S.C.(J.)	Court of Justiciary Cases (Sc.)
Sc.Jur.	Scottish Jurist
S.C.L.	South Carolina Law
Sc.L.Rep.	Scottish Law Reporter
Scot L.T.	Scot Law Times
Scott	Scott (Eng.)
Scott N.R.	Scott's New Reports (Eng.)
Scr.L.T.	Scranton Law Times (Pa.)
Sc.Sess.Cas.	Scotch Court of Session Cases
S.Ct.	Supreme Court Reporter (U.S.)
S.D.	South Dakota
S.E.	South Eastern Reporter
Searle & Sm.	Searle & Smith (Eng.)
Sel.Cas.Ch.	Select Cases in Chancery (Eng.)
Seld.	Selden's Notes (N.Y.)
Selden	Selden (N.Y.)
Selw.	Selwyn's Nisi Prius (Eng.)
Serg.&R.	Sergeant & Rawle (Pa.)
Sess.Cas.	Court of Session Cases (Eng.)
Shan.	Shannon (Tenn.)
Shaw	Shaw (Sc.)
Shaw&D.	Shaw & Dunlop (Sc.)
Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Shaw, Dunl.&B.	Shaw, Dunlop & Bell (Sc.)
Shaw&M.	Shaw & MacLean (Sc.)
Sheld.	Sheldon (N.Y.)
Shep.Abr.	Sheppard's Abridgment
Sheph.Sel.Cas.	Shepherd's Select Cases (Ala.)
Show.	Shower (Eng.)
Show.P.C.	Shower's Parliament Cases (Eng.)
Sid.	Siderfin (Eng.)
Silv.A.	Silvernail's Appeals (N.Y.)
Silv.Sup.	Silvernail's Supreme (N.Y.)
Sim.	Simons (Eng.)
Sim.N.S.	Simons New Series (Eng.)
Sim.&St.	Simons & Stuart (Eng.)
Skin.	Skinner (Eng.)
Smale&G.	Smale & Giffard (Eng.)
Smith	Smith (Ind.)
Smith	Smith (N.H.)
Smith&B.	Smith & Batty (Ir.)
Smith K.B.	Smith's King's Bench (Eng.)
Smith Lead.Cas.	Smith's Leading Cases (Eng.)
Smith Reg.	Smith's Registration (Eng.)
Sm.&M.	Smedes & Marshall (Miss.)
Sm.&M.Ch.	Smedes & Marshall Chancery (Miss.)
Smythe	Smythe (Ir.)
Sneed	Sneed (Tenn.)
So.	Southern Reporter
Sol.J.	Solicitor's Journal (Eng.)
Sp.	Speers (S.C.)
Spinks	Spinks Admiralty (Eng.)
Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)

Spinks, P.C.	Spinks' Prize Cases (Eng.)
Spottisw.	Spottiswoode (Sc.)
Spottisw.Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U.S.)
Stair	Stair (Sc.)
Stark.	Starkie Nisi Prius (Eng.)
Stat. at L.	United States Statutes at Large
Stew.	Stewart (Ala.)
Stew.	Stewart's Reports (N.S.)
Stew.&P.	Stewart & Porter (Ala.)
Stockt.Vice-Adm.	Stockton's Vice-Admiralty (N.B.)
Story	Story (U.S.)
Str.	Strange (Eng.)
Strob.	Strobhart (S.C.)
Stuart Vice-Adm.	Stuart's Vice-Admiralty (L.C.)
Stu.M.&P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng.)
Sumn.	Sumner (U.S.)
Susq.Leg.Chron.	Susquehanna Legal Chronicle (Pa.)
S.W.	South Western Reporter
S.W.(2d)	South Western Reporter Second Series
Swab.	Swabey's Admiralty (Eng.)
Swab.&Tr.	Swabey & Tristram (Eng.)
Swan	Swan (Tenn.)
Swanst.	Swanston (Eng.)

T

Taml.	Tamlyn (Eng.)
Taney	Taney (U.S.)
Tapp.	Tappan (Oh.)
Taunt.	Taunton (Eng.)
Taylor	Taylor (N.C.)
T.B.Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee
Tenn.App.	Tennessee Appeals
Tenn.Cas.	Unreported Tennessee Cases
Tenn.Ch.	Tennessee Chancery
Tenn.Ch.A.	Tennessee Chancery Appeals
Tenn.Civ.A.	Tennessee Civil Appeals
Terr.L.	Territories Law (Northwest Territories)
Tex.	Texas
Tex.App.	Texas Court of Appeals
Tex.A.Civ.Cas.	White & Wilson's Civil Cases (Tex.)
Tex.Civ.App.	Texas Civil Appeals
Tex.Cr.	Texas Criminal
Tex.Suppl.	Texas Supplement
Tex.Unrep.Cas.	Posey's Unreported Cases (Tex.)
Thach.Cr.	Thacher's Criminal Cases (Mass.)
Thomps.&C.	Thompson & Cook (N.Y.)
Thomps.Cas.	Thompson's Cases (Tenn.)
Tinw.	Tinwald (Sc.)
T.Jones	Thomas Jones (Eng.)
T.L.R.	Times Law Reports (Eng.)
T.M.R.	Trade Mark Reports
T.&M.	Temple & Mew (Eng.)
Toth.	Tothill (Eng.)
T.R.	Term Reports (Durnford & East) (Eng.)
Transcr.A.	Transcript Appeals (N.Y.)
T.Raym.	Thomas Raymond (Eng.)
Tread.Const.	Treadway Constitutional (S.C.)
Treas.Dec.	Treasury Decisions (U.S.)
Tr.&H.Pr.	Troubat & Haly's Practice (Pa.)
Trint.T.	Trinity Term (Eng.)
Truem.Eq.Cas.	Trueman's Equity Cases (N.B.)
Tuck.Sel.Cas.	Tucker's Select Cases (Newfoundland)
Tuck.Surr.	Tucker's Surrogate (N.Y.)
T.U.P.Charlt.	T. U. P. Charlton (Ga.)
Turn.&R.	Turner & Russell (Eng.)
Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw.&G.	Tyrwhitt & Granger (Eng.)

U

U.C.	Upper Canada
U.C.Ch.	Upper Canada Chancery
U.C.Cham.	Upper Canada Chamber
U.C.C.P.	Upper Canada Common Pleas
U.C.E.&A.	Upper Canada Error and Appeal
U.C.K.B.	Upper Canada King's Bench Reports
U.C.Q.B.	Upper Canada Queen's Bench
U.C.Q.B.O.S.	Upper Canada Queen's Bench Old Series
U.S.	United States
U.S.Aviation Rep.	Aviation Reports (U.S.)
U.S.C.A.	United States Code Annotated
Utah	Utah

V

Va.	Virginia
Va.Cas.	Virginia Cases
Va.Ch.Dec.	Chancery Decisions (Va.)
Va.Dec.	Virginia Decisions
Van Ness Prize Cas.	Van Ness Prize Cases (U.S.)
Vaugh.	Vaughan (Eng.)
Vaux.	Vaux's Decisions (Pa.)
Vent.	Ventris (Eng.)
Vern.	Vernon's Cases (Eng.)
Vern.Ch.	Vernon's Chancery (Eng.)
Vern.&S.	Vernon & Scriven (Ir.)
Ves.	Vesey Senior (Eng.)
Ves.&B.	Vesey & Beames (Eng.)
Ves.Jr.	Vesey Junior (Eng.)
Ves.Jr.Suppl.	Vesey Junior Supplement (Eng.)
Ves.Suppl.	Vesey Senior Supplement (Eng.)
Vict.	Victorian
Vict.L.	Victorian Law
Vict.L.T.	Victorian Law Times
Vict.Rep.	Victorian Reports
Vict.St.Tr.	Victorian State Trials
Vin.Abr.	Viner's Abridgment (Eng.)
Virgin Islands	Virgin Islands
Vt.	Vermont

W

Walk.	Walker (Pa.)
Walk.	Walker's Chancery (Mich.)
Wall.	Wallace (U.S.)
Wall.C.C.	Wallace (U.S.)
Wall.Jr.	Wallace Junior (U.S.)
Wall.Sr.	Wallace Senior (U.S.)
Wallis	Wallis (Ir.)
Ware	Ware (U.S.)
Wash.	Washington
Wash.	Washington (Va.)
Wash.St.	Washington State
Wash.C.C.	Washington Circuit Court (U.S.)
Wash.T.	Washington Territory
Watts	Watts (Pa.)
Watts&S.	Watts & Sergeant (Pa.)
W.Bl.	William Blackstone (Eng.)
W.C.C.	Minton-Senhouse's Workmen's Compensation Cases (Eng.)
Webb, A'B.& W.I. P.& M.	Webb, A'Beckett, & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)
Web.Pat.Cas.	Webster's Patent Cases (Eng.)
Welsh	Welsh Registry Cases (Ir.)
Wend.	Wendell (N.Y.)
West	West (Eng.)
West.L.J.	Western Law Journal (Oh.)
West.L.Month.	Western Law Monthly (Oh.)
West.L.R.	Western Law Reporter (Can.)
West.L.T.	Western Law Times (Can.)
West.R.	Western Reporter
West t.Hardw.	West temp. Hardwicke (Eng.)
West.Wkly.	Western Weekly (Can.)
[1917]West.Wkly.	[1917] Western Weekly (Can.)
Whart.	Wharton (Pa.)
Wheat.	Wheaton (U.S.)
Wheel.Cr.	Wheeler's Criminal (N.Y.)
White&T.Lead. Cas.Eq.	White & Tudor's Leading Cases in Equity (Eng.)
Whitm.Pat.Cas.	Whitman's Patent Cases (U.S.)
Wight.	Wightwicke (Eng.)
Wilcox	Wilcox (Pa.)
Willes	Willes (Eng.)
Wilm.	Wilmot's Notes (Eng.)
Wils.	Wilson (Ind.)

Wils.Ch.	Wilson's Chancery (Eng.)
Wils.C.P.	Wilson's Common Pleas (Eng.)
Wils.Exch.	Wilson's Exchequer (Eng.)
Wils.P.C.	Wilson's Privy Council (Eng.)
Wils.&S.	Wilson & Shaw (Sc.)
Winch	Winch (Eng.)
Winst.	Winston (N.C.)
Wis.	Wisconsin
W.Jones	William Jones (Eng.)
W.Kel.	William Kelynge (Eng.)
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)
Wkly.N.C.	Weekly Notes of Cases (Pa.)
Wkly.Rep.	Weekly Reporter (Eng.)
Wms.Saund.	Williams Notes to Saunders' Reports
W.N.	Weekly Notes (Eng.)
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)
Wolf.&D.	Wolferstan & Dew's Election Cases (Eng.)
Woll.	Wollaston (Eng.)
Woodb.&M.	Woodbury & Minot (U.S.)
Woods	Woods (U.S.)
Woodw.	Woodward's Decisions (Pa.)
Woolw.	Woolworth (U.S.)
Words & Phrases	Words & Phrases
Wright	Wright (Oh.)
W.Rob.	William Robinson's Admiralty (Eng.)
Wr.Pa.	Wright (Pa.)
W.Va.	West Virginia
W.W.Harr.	W. W. Harrington
W.W.&D.	Willmore, Wollaston & Davidson (Eng.)
W.W.&H.	Willmore, Wollaston & Hodges (Eng.)
Wyo.	Wyoming
Wythe	Wythe's Chancery (Va.)
Wy.&W.	Wyatt & Webb (Vict.)
Wy.W.&A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B.	Year Book (Eng.)
Y.&C.Exch.	Younge & Collyer's Exchequer (Eng.)
Y.&Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y.&J.	Younge & Jervis (Eng.)
York Leg.Rec.	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal
Am.J.Int.Law	American Journal of International Law
Am.Law S.Rev.	American Law School Review
B.U.L.Rev.	Boston University Law Review
Brooklyn L.Rev.	Brooklyn Law Review
Calif.L.Rev.	California Law Review
Camb.L.J.	Cambridge Law Journal
Chi-Kent Rev.	Chicago-Kent Review
Colum.L.Rev.	Columbia Law Review
Com.L.J.	Commercial Law Journal
Cornell L.Q.	Cornell Law Quarterly
Detroit L.Rev.	Detroit Law Review
Dick.L.Rev.	Dickinson Law Review
Fed.B.A.J.	Federal Bar Association Journal
Fla.L.J.	Florida Law Journal
Fordham L.Rev.	Fordham Law Review
Geo.Wash.L.Rev.	George Washington Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ia.L.Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill.L.Rev.	Illinois Law Review
Ind.L.J.	Indiana Law Journal
J.Am.Jud.Soc.	Journal of the American Judicature Society
J.Comp.Leg.	Journal of the Society of Comparative Legislation
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law
John Marshall L. Q.	The John Marshall Law Quarterly
Kan.City L.Rev.	Kansas City Law Review
Kan.St.L.J.	Kansas State Law Journal
Ky.L.J.	Kentucky Law Journal
L.J.	Law Journal
L.Lib.J.	Law Library Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L.Rev.	Lincoln Law Review
Marq.L.Rev.	Marquette Law Review
Mass.L.Q.	Massachusetts Law Quarterly
Mercer, Beasley L.Rev.	Mercer, Beasley Law Review
Mich.L.Rev.	Michigan Law Review
Minn.L.Rev.	Minnesota Law Review
Miss.L.J.	Mississippi Law Journal
Neb.L.B.	Nebraska Law Bulletin
N.J.L.J.	New Jersey Law Journal
N.J.L.Rev.	New Jersey Law Review
N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Notre Dame Law.	Notre Dame Lawyer
N.C.L.Rev.	North Carolina Law Review
Okla.S.B.J.	Oklahoma State Bar Journal
Oreg.L.Rev.	Oregon Law Review
Phil.L.J.	Philippine Law Journal
Rocky Mt.L.Rev.	Rocky Mountain Law Review
St. John's L.Rev.	St. John's Law Review
St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
So.Calif.L.Rev.	Southern California Law Review
Temp.L.Q.	Temple Law Quarterly
Tenn.L.Rev.	Tennessee Law Review
Tex.L.Rev.	Texas Law Review
Tul.L.Rev.	Tulane Law Review
U.Chi.L.Rev.	University of Chicago Law Review
U.Cin.L.Rev.	University of Cincinnati Law Review
U.Detroit L.J.	University of Detroit Law Journal
U.Pa.L.Rev.	University of Pennsylvania Law Review
U. of Pitts.L.Rev.	University of Pittsburgh Law Review
U.Toronto L.J.	University of Toronto Law Journal
Va.L.Rev.	Virginia Law Review
Wash.L.Rev.	Washington Law Review
Wash.U.L.Q.	Washington University Law Quarterly
W.Va.L.Q.	West Virginia Law Quarterly and The Bar
Wis.L.Rev.	Wisconsin Law Review
Yale L.J.	Yale Law Journal

LIST OF TITLES

IN

CORPUS JURIS SECUNDUM

CORPUS JURIS SECUNDUM

VOLUME FORTY-NINE

JUDGMENTS

This Title includes judicial determinations of rights of parties to proceedings in courts or justice in general, interlocutory as well as final; rendition, entry, requisites, and validity of formal judgments more particularly of judgments in civil actions, and amendment and correction thereof; operation and effect of judgments in respect of persons and subject matters concluded, and of property bound by judgments, and liens created by entry, docketing, etc., of judgments; conclusiveness of judgments as against collateral attack; direct attacks on judgments by motions in arrest or to open, vacate, etc., judgments writs of error coram nobis, etc., or by actions to set aside or restrain enforcement of judgments or for other relief against them on equitable grounds; assignment of judgments; payment, satisfaction, and discharge of judgments; revival of judgments by scire facias, motion, etc.; operation and effect of judgments of courts of foreign states and countries; and enforcement of judgments in general, more particularly actions on judgments.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

II. ESSENTIALS OF EXISTENCE, VALIDITY, AND REGULARITY OF JUDGMENT—Continued

See also descriptive word index in the back of this Volume

X. AMENDING, CORRECTING, REVIEWING, OPENING, AND VACATING JUDGMENT—Continued

C. OPENING AND VACATING—Continued

1. *In General*—Continued

2. *Proceedings and Relief*—p 513

D. WRIT OF ERROR CORAM NOBIS—p 561

E. ACTION TO REVIEW JUDGMENT—p 572

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I. DEFINITION, NATURE, AND KINDS

§ 1. Definitions

A judgment may be broadly defined as the decision or sentence of the law given by a court or other tribunal as the result of proceedings instituted therein; in this sense a decision of any court is a judgment, including courts of equity, and in a criminal case a sentence is a judgment.

In its broadest sense a judgment is the decision or sentence of the law given by a court of justice or other competent tribunal as the result of proceedings instituted therein,[1] or the final consideration and determination of a court on matters submitted to it in an action or proceeding,[2] whether or not execution follows thereon.[3] More particularly it is a judicial determination that, on matters submit-

1. N.J.—**Corpus Juris cited in** Dorman v. Usbe Building & Loan Ass'n, 180 A. 413, 415, 115 N.J.Law 337.
Pa.—**Corpus Juris cited in** In re Kruska's Estate, 7 Pa.Dist. & Co. 273, 275, 7 Northumb.L.J. 281.
33 C.J. p 1047 note 1.
Particular kinds of judgments see infra §§ 8–12.

Similar definitions

(1) The affirmance by law of legal consequences attending a proved or admitted set of facts.—Berg v. Berg, 132 P.2d 871, 872, 56 Cal.App.2d 495.

(2) The conclusion of law on facts found, or admitted by the parties, or upon their default in the course of the suit.
Ky.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 880, 250 Ky. 21.
N.J.—Ross v. C. D. Mallory Corporation, 37 A.2d 766, 768, 132 N.J. Law 1.
N.C.—Eborn v. Ellis, 35 S.E.2d 238, 240, 225 N.C. 386.
Tex.—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, 1116, error dismissed.
33 C.J. p 1047 note 1 [b] (7).

(3) The judicial determination or sentence of a court on a matter within its jurisdiction.
U.S.—U. S. v. Hark, Mass., 64 S.Ct. 359, 361, 320 U.S. 531, 88 L.Ed. 290.
Md.—Schmeizl v. Schmeizl, 42 A.2d 106, 112.

(4) The final decision or sentence of the law rendered by a court with respect to a cause within its jurisdiction and coming legally before it as the result of proper proceedings rightly instituted.
Mass.—Morse v. O'Hara, 142 N.E. 40, 41, 247 Mass. 183.
Okl.—Frayer v. Crain, 163 P.2d 966, 968.

(5) The final determination of the rights of the parties.
Okl.—Protest of Gulf Pipe Line Co. of Oklahoma, 32 P.2d 42, 43, 168 Okl. 136—Dresser v. Dresser, 22 P.2d 1012, 1025, 164 Okl. 94.
Utah.—Patterick v. Carbon Water Conservancy Dist., 145 P.2d 503, 507.

(6) The final sentence of the law on matter at issue in the case as presented by the record.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855, 858.

(7) The pronouncement of a judge on issues submitted to him.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 880, 250 Ky. 21.

(8) What the court pronounces.—Linton v. Smith, 154 S.W.2d 643, 645, 137 Tex. 479—De Leon v. Texas Employers Ins. Ass'n, Tex.Civ.App., 159 S.W.2d 574, 575, error refused—Lewis v. Terrell, Tex.Civ.App., 154 S.W. 2d 151, 153, error refused—Jones v. Sun Oil Co., Civ.App., 145 S.W.2d 615, 619, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353—Corbett v. Rankin Independent School Dist., Tex.Civ.App., 100 S.W.2d 113, 115.

(9) A number of cases have followed Blackstone's definition of a judgment as the sentence of the law pronounced by the court upon the matter contained in the record.
U.S.—Karl Kiefer Mach. Co. v. U. S. Bottlers Machinery Co., 108 F.2d 469, 470.
Ill.—People ex rel. Toman v. Crane, 23 N.E.2d 337, 339, 372 Ill. 228—Blakeslee's Storage Warehouses v. City of Chicago, 17 N.E.2d 1, 3, 369 Ill. 480, 120 A.L.R. 715.
Tex.—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, 1120, error dismissed.
33 C.J. p 1047 note 1 [a].

(10) Other similar definitions.
U.S.—Allegheny County v. Maryland Casualty Co., C.C.A.Pa., 132 F.2d 894, 897, certiorari denied 63 S.Ct. 981, 318 U.S. 787, 87 L.Ed. 1154.
Ill.—General Electric Co. v. Gellman Mfg. Co., 48 N.E.2d 451, 318 Ill. App. 644.
Ky.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 880, 250 Ky. 21.
Miss.—Welch v. Kroger Grocery Co., 177 So. 41, 42, 180 Miss. 89.
N.C.—Lawrence v. Beck, 116 S.E. 424, 426, 185 N.C. 196.
Ohio.—State ex rel. Curran v. Brookes, 50 N.E.2d 995, 998, 142 Ohio St. 107.
Tex.—Jackson v. Slaughter, Civ.App., 185 S.W.2d 759, 761, refused for want of merit—Davis v. Hemphill, Civ.App., 243 S.W. 691, 693.
Wis.—In re Wisconsin Mut. Ins. Co., 6 N.W.2d 330, 331, 241 Wis. 394, certiorari denied Hinge v. Duel, 63 S.Ct. 1157, 319 U.S. 747, 87 L.Ed. 1703.
33 C.J. p 1047 note 1 [b].

Synonymous terms

(1) The term "judgment" comprehends all decrees and final orders, rendered by a court of competent jurisdiction, which determine the rights of parties affected thereby.—In re Frey's Estate, 40 N.E.2d 145, 148, 139 Ohio St. 354—33 C.J. p 1047 note 1 [c] (5).

(2) Other synonymous terms.—Samuel Goldwyn, Inc. v. United Artists Corporation, C.C.A.Del., 113 F. 2d 703, 706—33 C.J. p 1047 note 1 [c].

Mythical case

An attempt to retain the right to pass on the merits of a mythical case not then in existence, and which will exist as an independent suit, when and if it comes into existence, is not a "judgment" as that term is legally defined.—Goldsmith v. Salkey, 112 S.W.2d 165, 169, 131 Tex. 139.

2. U.S.—Karl Kiefer Mach. Co. v. U. S. Bottlers Machinery Co., C.C.A.Ill., 108 F.2d 469, 470.
Ill.—People ex rel. Toman v. Crane, 23 N.E.2d 337, 339, 372 Ill. 228—Blakeslee's Storage Warehouses v. City of Chicago, 17 N.E.2d 1, 3, 369 Ill. 480, 120 A.L.R. 715—People ex rel. Klee v. Kelly, 32 N.E.2d 923, 929, 309 Ill.App. 72—People ex rel. Keeler v. Kelly, 32 N.E.2d 922, 309 Ill.App. 133—People ex rel. Gallachio v. Kelly, 32 N.E.2d 921, 309 Ill.App. 133—People ex rel. Clennon v. Kelly, 32 N.E.2d 921, 309 Ill.App. 133—People ex rel. Salomon v. Kelly, 32 N.E.2d 920, 309 Ill.App. 133.
Tex.—Fort Worth Acid Works v. City of Fort Worth, Civ.App., 248 S.W. 822, 824, affirmed City of Fort Worth v. Fort Worth Acid Works Co., Com.App., 259 S.W. 919.

Similarly expressed

Ohio.—State ex rel. Curran v. Brookes, 50 N.E.2d 995, 998, 142 Ohio St. 107.
Okl.—State v. Walton, 236 P. 629, 632, 30 Okl.Cr. 416.
33 C.J. p 1047 note 1 [b] (4).

3. Pa.—Petition of Kariher, 131 A. 265, 270, 284 Pa. 455.

ted to a court for decision, a legal duty or liability does or does not exist,[4] or that, with respect to a claim in suit, no cause of action exists or that no defense exists.[5]

In the broad sense here defined, a decision of any court is a judgment,[6] including courts of equity,[7] admiralty,[8] and probate.[9] The judgment of a court of equity or admiralty, however, as distinguished from the judgment of a court of common law, is generally known as a "decree."[10] In a criminal case a sentence is a judgment.[11] In a narrower sense the term "judgment" is limited to a decision of a court of law.[12]

Under codes. Under most codes of procedure, judgments are defined in substance as the final determination of the rights of the parties in an action or proceeding.[13] Under codes abolishing the distinction between actions at law and suits in equity, a decree is included in the code definition of a judgment, and the final determination of a cause is a judgment whether the relief granted is equitable or legal.[14] Indeed the terms "judgment" and "decree" are more or less synonymous and interchangeable in code practice.[15]

An "adjudication" is a judgment or the entry of a decree by a court with respect to the parties in a case.[16]

§ 2. General Nature

A judgment is a judicial act which settles the issues, fixes the rights and liabilities of the parties, and determines the proceeding, and it is regarded as the sentence of the law pronounced by the court on the action or question before it.

A judgment is the judicial act of a court[17] by which it accomplishes the purpose of its creation.[18] It is a judicial declaration by which the issues are settled[19] and the rights and liabilities of the parties are fixed as to the matters submitted for decision.[20] In other words, a judgment is the end of the law;[21] its rendition is the object for which jurisdiction is

4. Wash.—In re Clark, 163 P.2d 577, 580.

5. Okl.—Frayer v. Crain, 163 P.2d 966, 968.

6. Ill.—Patterson v. Scott, 33 Ill. App. 348, affirmed 31 N.E. 433, 143 Ill. 138.
33 C.J. p 1048 note 2.

7. Cal.—Coleman v. Los Angeles County, 182 P. 440, 180 Cal. 714.
33 C.J. p 1048 note 3.

8. U.S.—U. S. v. Wonson, C.C.Mass., 28 F.Cas.No.16,750, 1 Gall. 5.

9. Ohio.—In re Frey's Estate, 40 N. E.2d 145, 148, 139 Ohio St. 354.
33 C.J. p 1048 note 5.

10. U.S.—Lamson v. Hutchings, Ill., 118 F. 321, 323, 55 C.C.A. 245, certiorari denied 23 S.Ct. 853, 189 U. S. 514, mem, 4 L.Ed. 924.
33 C.J. p 1049 note 6.
"Decree" defined see Equity § 580.

11. Wash.—In re Clark, 163 P.2d 577, 581.
33 C.J. p 1049 note 8.

12. Cal.—Coleman v. Los Angeles County, 182 P. 440, 180 Cal. 714.
33 C.J. p 1049 note 9.

13. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855, 858.
Ark.—Wann v. Reading Co., 108 S. W.2d 899, 901, 194 Ark. 541.
Idaho.—State v. McNichols, 115 P. 2d 104, 107, 62 Idaho 616.
Iowa.—Whittier v. Whittier, 23 N.W. 2d 435, 440.
Ky.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 880, 250 Ky. 21.
La.—Lacour Plantation Co. v. Jewell, 173 So. 761, 763, 186 La. 1055.
Mont.—State ex rel. Meyer v. District Court of Fourth Judicial District in and for Missoula County, 57 P.2d 778, 780, 102 Mont. 222.
N.Y.—Wood v. City of Salamanca, 45 N.E.2d 443, 445, 289 N.Y. 279.
N.D.—Universal Motors v. Coman, 15 N.W.2d 73, 73 N.D. 337.
33 C.J. p 1049 note 10.

14. Mont.—Raymond v. Blancgrass, 93 P. 648, 36 Mont. 449, 15 L.R.A., N.S., 976.
33 C.J. p 1050 note 11.

15. Wash.—Smith v. Smith, 115 P. 166, 167, 63 Wash. 288.
33 C.J. p 1050 note 12.

16. U.S.—Samuel Goldwyn, Inc. v. United Artists Corporation, C.C.A. Del., 113 F.2d 703, 706.

Hearing

An "adjudication" essentially implies a hearing by a court, after notice, of legal evidence on the factual issue involved.—Genzer v. Fillip, Tex.Civ.App., 134 S.W.2d 730, 732, error dismissed, judgment correct.

17. Ill.—People ex rel. Toman v. Crane, 23 N.E.2d 337, 339, 372 Ill. 228—Blakeslee's Storage Warehouses v. City of Chicago, 17 N.E. 2d 1, 3, 369 Ill. 480, 120 A.L.R. 715.
N.J.—Dorman v. Usbe Building & Loan Ass'n, 180 A. 413, 415, 115 N.J.Law 337.

Determination of judge

Judgments are the solemn determinations of judges on subjects submitted to them, and a judgment is not what may be rendered, but what is considered and delivered by the court.—Eborn v. Ellis, 35 S.E.2d 238, 225 N.C. 386.

Fiat

A judgment is a fiat of a court, settling the rights of the parties, and, however unjust, erroneous, or illegal the settlement may be, the parties can claim under it only that which, by its terms, the judgment awards.—Lacaze v. Hardee, La. App., 7 So.2d 719, 724.

18. Okl.—Protest of Gulf Pipe Line Co. of Oklahoma, 32 P.2d 42, 43, 168 Okl. 136.

Purpose

(1) Judgments are judicial acts with the primary objective in view of concluding controversies with as high a degree of exact justice as it is humanly possible to do.—Jackson v. Slaughter, Tex.Civ.App., 185 S.W. 2d 759, 761, refused for want of merit.

(2) Purpose of every judgment should be to limit litigation and clearly establish rights of parties as found by courts.—Cameron v. Feather River Forest Homes, 33 P.2d 884, 139 Cal.App. 373.

19. Tex.—Lewis v. Terrell, Civ.App., 154 S.W.2d 151, 153, error refused.

Imposed in invitum

A judgment is usually imposed in invitum, although it may be for the enforcement of an indebtedness previously contracted.—Cherey v. City of Long Beach, 26 N.E.2d 945, 282 N. Y. 382, 127 A.L.R. 1210.

Opinion and adjudication

Judgment reciting in substance that court, considering proof and pleadings, was of opinion and so adjudged that defendant was indebted to plaintiff in certain sum with interest and costs was "judgment."—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 250 Ky. 21.

20. Utah.—Adams v. Davies, 156 P. 2d 207, 209.

21. Kan.—**Corpus Juris quoted in**

conferred and exercised,[22] and it is the power by means of which a liability is enforced against the debtor's property.[23] A judicial judgment is not necessarily a judgment for money or thing enforceable by execution or other process; it may be a final and conclusive determination of a status, or a right, or a privilege, or the basis of action.[24] A judgment is neither an action nor a special proceeding, but is the determination of an action or proceeding.[25]

A judgment is the sentence of the law on the ultimate facts admitted by the pleadings or proved by the evidence.[26] It is not a resolve or decree of the court, but the sentence of the law pronounced by the court on the action or question before it.[27] It must be based solely on the legal rights of the litigants and not on the result of the litigation.[28]

A judgment constitutes the considered opinion of the court[29] and is a solemn record[30] and formal expression and evidence of the actual decision of a lawsuit.[31] The precedent or draft for judgment may not be treated as a judgment.[32]

Vested right of property. A judgment may constitute a vested right of property in the judgment creditor[33] within the protection of constitutional provisions discussed in Constitutional Law §§ 271–272.

§ 3. —— Entirety of Judgments

A judgment is an entirety.

It has generally been held to be the rule that a judgment must be treated as an entirety.[34] The effect of this rule as requiring that a judgment stand or fall as a whole, and the circumstances under which a judgment which is partially invalid may be enforced as far as it is valid, are discussed infra § 450.

Kansas City Life Ins. Co. v. Anthony, 52 P.2d 1208, 1211, 142 Kan. 670.
Tex.—**Corpus Juris quoted in** Williams v. Tooke, Civ.App., 116 S.W. 2d 1114, 1116, error dismissed.
33 C.J. p 1051 note 19.

A judgment is the law's last word in a judicial controversy.
U.S.—Karl Kiefer Mach. Co. v. U. S. Bottlers Machinery Co., C.C.A. Ill., 108 F.2d 469, 470.
Ala.—Hudson v. Wright, 51 So. 389, 164 Ala. 298, 137 Am.S.R. 55.
Ill.—People ex rel. Toman v. Crane, 28 N.E.2d 337, 339, 372 Ill. 228—Blakeslee's Storage Warehouses v. City of Chicago, 17 N.E.2d 1, 3, 369 Ill. 480, 120 A.L.R. 715.
N.Y.—Steinberg v. Mealey, 33 N.Y.S. 2d 650, 263 App.Div. 479.

22. Kan.—**Corpus Juris quoted in** Kansas City Life Ins. Co. v. Anthony, 52 P.2d 1208, 1211, 142 Kan. 670.
Tex.—**Corpus Juris quoted in** Williams v. Tooke, Civ.App., 116 S.W. 2d 1114, 1116, error dismissed.
33 C.J. p 1051 note 20.

23. Kan.—**Corpus Juris quoted in** Kansas City Life Ins. Co. v. Anthony, 52 P.2d 1208, 1211, 142 Kan. 670.
N.J.—Nichols v. Dissler, 31 N.J.Law 461, 473, 86 Am.D. 219.
N.Y.—Steinberg v. Mealey, 33 N.Y.S. 2d 650, 263 App.Div. 479.
Tex.—**Corpus Juris quoted in** Williams v. Tooke, Civ.App., 116 S.W. 2d 1114, 1116, error dismissed.

Existence and enforcement of indebtedness
Judgment is credit, chose in action, or incorporeal right, which declares existence of indebtedness, fixes amount due and owing, and provides means for enforcing payment thereof, although it does not create, add to, or detract from debt.—Salter v. Walsworth, La.App., 167 So. 494.

24. U.S.—In re Frischer & Co., 16 Ct.Cust.App. 191.

Affirmation of liability
A judgment is merely the affirmation of a liability, and leaves the parties to pursue remedies provided by law.—San Luis Power & Water Co. v. Trujillo, 26 P.2d 537, 540, 98 Colo. 385.

25. Iowa.—Gray v. Iliff, 30 Iowa 195, appeal dismissed 14 S.Ct. 1168, 154 U.S. 589, 38 L.Ed. 1088.
"Action" as including judgment see Actions § 1 a (1) (c).
"Proceeding" distinguished from "judgment" see Actions § 1 h (1) (b).

26. Kan.—**Corpus Juris quoted in** Kansas City Life Ins. Co. v. Anthony, 52 P.2d 1208, 1211, 142 Kan. 670.
N.C.—Lawrence v. Beck, 116 S.E. 424, 185 N.C. 196.

It is a conclusion of law from facts proved or admitted in suit.—Bell v. State Industrial Accident Commission, 74 P.2d 55, 157 Or. 653.

27. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855.
33 C.J. p 1051 note 24.

It applies the law to past or present facts
U.S.—Oklahoma City, Okl., v. Dolese, C.C.A.Okl., 48 F.2d 734.
Conn.—Eastern Oil Refining Co. v. Court of Burgesses of Wallingford, 36 A.2d 586, 130 Conn. 606.

28. R.I.—Cleveland v. Jencks Mfg. Co., 171 A. 917, 54 R.I. 218.

Set-off of errors
A correct judgment cannot be produced by a set-off of errors.—Eberhardt v. Bennett, 137 S.E. 64, 163 Ga. 796.

29. Tex.—Jackson v. Slaughter, Civ. App., 185 S.W.2d 759, 761, refused for want of merit.

30. N.J.—Dorman v. Usbe Building & Loan Ass'n, 180 A. 413, 415, 115 N.J.Law 337.

31. Cal.—Gossman v. Gossman, 126 P.2d 178, 185, 52 Cal.App.2d 184. "There are two necessary elements in any valid judgment or order of a court; (a) The court's decision or determination, usually evidenced by some oral statement or pronouncement of the court, but often by a written opinion, direction or decree; and (b) the enrollment or entry by the clerk of the court's action, or the essential part of it, upon the order book or record of the court. The first element is judicial; the latter clerical. The former involves discretion; the latter obedience."—Happy Coal Co. v. Brashear, 92 S.W. 2d 23, 28, 263 Ky. 257.

32. Ark.—Wann v. Reading Co., 108 S.W.2d 899, 194 Ark. 541.

33. N.Y.—Livingston v. Livingston, 66 N.E. 123, 173 N.Y. 377, 93 Am. S.R. 600, 61 L.R.A. 800.
33 C.J. p 1059 note 93.

34. Ill.—Hoier v. Kaplan, 145 N.E. 243, 313 Ill. 448—**Corpus Juris cited in** Coyle v. Velie Motors Corporation, 27 N.E.2d 60, 63, 305 Ill. App. 135.
Mo.—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389.
33 C.J. p 1051 note 25.

§ 4. —— Distinguished from Decisions and Findings

As a general rule, decisions, opinions, findings, or verdicts do not constitute a judgment or decree but merely form the basis on which the judgment is subsequently to be rendered.

As a general rule, the decisions, opinions, or findings of a court,[35] referee,[36] administrative board,[37] or committee[38] do not constitute a judgment or decree, but merely form the basis on which the judgment is subsequently to be rendered.[39] Under some statutes, however, the word "decision" is used as the equivalent of "judgment" and "decree,"[40] and is distinguished from the term "opinion" in that the latter term refers to a statement of reasons on which the decision or judgment rests.[41]

A verdict is not a judgment, but only the basis for a judgment, which may, or may not, be entered on it.[42] A finding is not a judgment any more than is the verdict of a jury.[43] Such findings or decision amount only to an order for judgment[44] and

35. U.S.—Baxter v. City and County of Dallas Levee Improvement Dist., C.C.A.Tex., 131 F.2d 434—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855—McGhee v. Leitner, D.C.Wis., 41 F.Supp. 674.
Ala.—Cooper v. Owen, 161 So. 98, 230 Ala. 316.
Cal.—El Centro Grain Co. v. Bank of Italy Nat. Trust & Savings Ass'n, 11 P.2d 650, 123 Cal.App. 564—Hume v. Lindholm, 258 P. 1003, 85 Cal.App. 80.
Colo.—First Nat. Bank v. Mulich, 266 P. 1110, 83 Colo. 518.
Idaho.—Blaine County Inv. Co. v. Mays, 15 P.2d 734, 52 Idaho 381.
Iowa.—Shaw v. Addison, 18 N.W.2d 796—Creel v. Hammans, 5 N.W.2d 169, 232 Iowa 95—In re Evans' Estate, 291 N.W. 460, 228 Iowa 903.
La.—Delahoussaye v. D. M. Glazer & Co., App., 182 So. 146, reheard 185 So. 644—Miller v. Morgan's La. & T. R. R. & S. S. Co., 1 La.App. 267.
Me.—Jones v. Jones, 8 A.2d 141, 136 Me. 238.
Mich.—Dolenga v. Lipka, 195 N.W. 90, 224 Mich. 276.
Mont.—**Corpus Juris quoted in** Conway v. Fabian, 89 P.2d 1022, 1028, 108 Mont. 287, certiorari denied Fabian v. Conway, 60 S.Ct. 94, 308 U.S. 578, 84 L.Ed. 484—State ex rel. King v. District Court of Third Judicial Dist., 86 P.2d 755, 107 Mont. 476—**Corpus Juris quoted in** Galiger v. McNulty, 260 P. 401, 403, 80 Mont. 339.
Okl.—**Corpus Juris cited in** Davis v. Baum, 133 P.2d 889, 891, 192 Okl. 85—Lee v. Epperson, 32 P.2d 309, 168 Okl. 220.
Tex.—Permian Oil Co. v. Smith, 73 S.W.2d 490, 129 Tex. 413, 111 A.L.R. 1152, rehearing denied 107 S.W. 2d 564, 129 Tex. 413, 111 A.L.R. 1175—Davis v. Hemphill, Civ.App., 243 S.W. 691.
33 C.J. p 1052 note 33.
"Decision" and "opinion" of court generally defined see Courts § 181 a.
The mental conclusion of the judge presiding at a trial, the oral announcement of such conclusion, his written memorandum entered in the calendar, or the abstract entered in the judgment docket do not constitute a judgment.—Rance v. Gaddis, 284 N.W. 468, 478, 226 Iowa 531—Lotz v. United Food Markets, 283 N. W. 99, 101, 225 Iowa 1397.
Actual sentence of law
Judgment purports to be actual and absolute sentence of law, as distinct from mere finding that one of parties is entitled to judgment, or from direction to effect that judgment may be entered.—American Motorists' Ins. Co. v. Central Garage, 169 A. 121, 86 N.H. 362.
An orally expressed opinion or finding by a judge does not constitute a judgment.—Moffatt v. Lewis, 11 P.2d 397, 123 Cal.App. 307—33 C. J. p 1052 note 33 [c].
Inconsistency
Decree was not void because findings of fact and conclusions of law were inconsistent with decretal portion since findings do not constitute the judgment.—Higley v. Kinsman, Iowa, 216 N.W. 673.
The judge's minutes cannot be regarded as the judgment or decree rendered by the court, but are merely a memorandum of the decision made by trial judge on his docket for guidance of the clerk in entering the decree on the journal.—Ex parte Niklaus, 13 N.W.2d 655, 144 Neb. 503.

36. Fla.—Demens v. Poyntz, 6 So. 261, 25 Fla. 654.
33 C.J. p 1053 note 34—53 C.J. p 757 notes 32–34.

37. Md.—Dal Maso v. Board of Com'rs of Prince George's County, 34 A.2d 464, 182 Md. 200.

38. Conn.—Cothren v. Olmsted, 18 A. 254, 57 Conn. 329.

39. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855, 858—**Corpus Juris cited in** Roessler & Hasslacher Chemical Co. v. U. S., 13 Ct.Cust.App. 451, 455.
D.C.—Lambros v. Young, 145 F.2d 341, 79 U.S.App.D.C. 247.
Idaho.—Blaine County Inv. Co. v. Mays, 15 P.2d 734, 52 Idaho 381.
Mont.—Lewis v. Lewis, 94 P.2d 211, 109 Mont. 42—**Corpus Juris quoted in** Conway v. Fabian, 89 P.2d 1022, 1028, 108 Mont. 287, certiorari denied Fabian v. Conway, 60 S.Ct. 94, 308 U.S. 578, 84 L.Ed. 484—**Corpus Juris quoted in** Galiger v. McNulty, 260 P. 401, 403, 80 Mont. 339.
N.H.—American Motorists' Ins. Co. v. Central Garage, 169 A. 121, 86 N.H. 362.
Okl.—Moroney v. Tannehill, 215 P. 938, 90 Okl. 224.
33 C.J. p 1053 note 36.
"Decision" synonymous with "opinion"
"Decision," as used in statute providing that a decision of a department of supreme court shall not become final until thirty days after filing thereof, is synonymous with "opinion."—In re Brown's Guardianship, 107 P.2d 1104, 6 Wash.2d 215.

40. U.S.—Rogers v. Hill, N.Y., 53 S.Ct. 731, 734, 289 U.S. 582, 77 L. Ed. 1385.

41. U.S.—Rogers v. Hill, supra.
Decision based on findings
Decision of court based on findings within statute requiring such decision, when filed, amounts to a rendition of a judgment, which is a judicial act.—McKannay v. McKannay, 230 P. 218, 68 Cal.App. 709.

42. Del.—Nelson v. Canadian Industrial Alcohol Co., 189 A. 591, 8 W. W.Harr. 165, affirmed 197 A. 477, 9 W.W.Harr. 184.
Ill.—People ex rel. Wakefield v. Montgomery, 6 N.E.2d 868, 365 Ill. 478—Mitchell v. Eareckson, 250 Ill. App. 508.
N.Y.—Fuentes v. Mayorga, 7 Daly 103, 104.
Utah.—Ellinwood v. Bennion, 276 P. 159, 73 Utah 563.

43. Ill.—Central Republic Bank & Trust Co. v. Bent, 281 Ill.App. 365.
Mont.—**Corpus Juris quoted in** Galiger v. McNulty, 260 P. 401, 403, 80 Mont. 229.
Tex.—Davis v. Hemphill, Civ.App., 243 S.W. 691.
33 C.J. p 1053 note 38.
Fact findings
Although fact findings are proper, only decretal portion of decree adjudicates parties' rights.—Higley v. Kinsman, Iowa, 216 N.W. 673.

44. Mont.—**Corpus Juris quoted in** Galiger v. McNulty, 260 P. 401, 403, 80 Mont. 229.

are subject to modification or change until embodied in a definitive written order of the court.[45]

§ 5. —— Distinguished from Rules and Orders

Judgments generally are distinguished from rules or orders in that a judgment is the final determination of the rights of the parties ending the suit whereas a rule or order is an interlocutory determination of some subsidiary or collateral matter, not disposing of the merits.

As a general rule, judgments are to be distinguished from orders or rules; one does not include the other.[46] However, certain orders have sometimes been denominated as judgments,[47] and it has been held that the character of an instrument, whether a judgment or an order, is to be determined by its contents and substance, and not by its title.[48] As distinguished from a judgment, an order is the mandate or determination of the court on some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings;[49] and the term is commonly defined in codes of procedure as every direction of a court or judge, made or entered in writing, and not included in a judgment.[50] A judgment, on the other hand, is the determination of the court on the issue presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the particular suit with relation to the subject matter in litigation, and puts an end to the suit.[51] The distinguishing characteristic of a judgment is that it is final,[52] while that of an order, when it relates to proceeding in an action, is that it is interlocutory,[53] although there are so-called interlocu-

Okl.—Lee v. Epperson, 32 P.2d 309, 168 Okl. 220.
33 C.J. p 1053 note 39.

45. Okl.—Lee v. Epperson, supra.
33 C.J. p 1053 note 40.

Reversal of oral decision
Court may enter formal written order contrary to prior oral decision. —State ex rel. Mountain Development Co. v. Superior Court for Pierce County, 67 P.2d 861, 190 Wash. 183.

46. Ala.—**Corpus Juris cited in** Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 716, 717, 229 Ala. 91.
Ill.—Robinson v. Steward, 252 Ill. App. 203.
Ohio.—McMahon v. Keller, 11 Ohio App. 410.
Okl.—Foreman v. Riley, 211 P. 495, 88 Okl. 75.
33 C.J. p 1053 note 41.

Administrative regulations pursuant to statutory authority are generally legislative and do not have attributes of judicial judgment or decree.—Sparkman v. County Budget Commission, 137 So. 809, 103 Fla. 242.

47. Mont.—State ex rel. Meyer v. District Court of Fourth Judicial Dist. in and for Missoula County, 57 P.2d 778, 102 Mont. 222.
Ohio.—Continental Automobile Mut. Ins. Co. v. Jacksick, 188 N.E. 662, 46 Ohio App. 344.
33 C.J. p 1053 note 42.

"Final order" as defined by statute is comprehended within term "judgment."—Continental Automobile Mut. Ins. Co. v. Jacksick, supra.

Dismissal for failure to prosecute action
An order dismissing plaintiffs' action for failure to bring it to trial within five years after filing of complaint was a judgment.—Colby v. Pierce, 62 P.2d 778, 17 Cal.App.2d 612.

Final disposition of cause
First order containing all necessary recitals which, with finality, disposes of cause, is regarded as "judgment."—In re McLeod's Estate, 21 P.2d 1084, 143 Or. 233.

48. Idaho.—State v. McNichols, 115 P.2d 104, 62 Idaho 616.
Mont.—State ex rel. Meyer v. District Court of Fourth Judicial District in and for Missoula County, 57 P.2d 778, 102 Mont. 222.
Or.—In re McLeod's Estate, 21 P.2d 1084, 143 Or. 233.

The word "judgment" need not be used in order to constitute the order a judgment.—State ex rel. Headley v. Industrial Commission of Ohio, Ohio App., 67 N.E.2d 70.

49. Iowa.—Whittier v. Whittier, 23 N.W.2d 435.
Nev.—Elsman v. Elsman, 2 P.2d 139, 54 Nev. 20, rehearing denied 3 P.2d 1071, 54 Nev. 20.
33 C.J. p 1053 note 43.
"Order" generally defined see Motions and Orders § 1, also 42 C.J. p 464 note 9–p 465 note 13.

Order held a finding
Order for "return of goods irrepleviable" was not itself a judgment, but was a finding that defendant was entitled to return of automobile.—Commercial Credit Corporation v. Flowers, 185 N.E. 30, 282 Mass. 316.

50. Iowa.—Whittier v. Whittier, 23 N.W.2d 435.
Okl.—Foreman v. Riley, 211 P. 495, 88 Okl. 75.
S.D.—Western Bldg. Co. v. J. C. Penney Co., 245 N.W. 909, 60 S.D. 630.
Wis.—Newlander v. Riverview Realty Co., 298 N.W. 603, 610, 238 Wis. 211, 135 A.L.R. 383.
33 C.J. p 1055 note 55.

Order as to title
An order, adjudging that title of mortgage trustee who purchased mortgaged property at foreclosure sale was merchantable, and that he recover, from person with whom he entered into contract for sale of premises, damages for refusal to complete contract, was an "order" in a "proceeding at the foot of a judgment", and was not a "judgment" under statutory definition.—Newlander v. Riverview Realty Co., supra.

51. Mo.—**Corpus Juris quoted in** Koch v. Meacham, 121 S.W.2d 279, 281, 233 Mo.App. 453.
33 C.J. p 1054 note 44—42 C.J. p 466 note 34.
"Judgment" defined generally see supra § 1.
Order granting naturalization as judgment see Aliens § 140 c.

52. Nev.—Elsman v. Elsman, 2 P.2d 139, 54 Nev. 20, rehearing denied 3 P.2d 1071, 54 Nev. 20.
N.Y.—In re Kennedy's Estate, 281 N.Y.S. 278, 156 Misc. 166.
Tex.—Vacuum Oil Co. v. Liberty Refining Co., Civ.App., 247 S.W. 597, reversed on other grounds Keystone Pipe & Supply Co. v. Liberty Refining Co., Com.App., 260 S.W. 1018.
33 C.J. p 1054 note 45.

Determination and disposition of case
An order which has effect of finally determining rights of parties, and finally disposing of case is "judgment."—State ex rel. Meyer v. District Court of Fourth Judicial Dist. in and for Missoula County, 57 P.2d 778, 102 Mont. 222.

Tax sale judgment was held "final judgment," notwithstanding recital therein that judgment "should be rendered."—Griggs v. Montgomery, Tex.Civ.App., 22 S.W.2d 688.

53. N.Y.—In re Kennedy's Estate, 281 N.Y.S. 278, 156 Misc. 166.
33 C.J. p 1054 note 46.

tory judgments, as is discussed infra § 11, and final orders, as is discussed in the C.J.S. title Motions and Orders § 2, also 42 C.J. p 468 notes 65–74.

A decision sustaining or overruling a demurrer ordinarily is an order, not a judgment,[54] although there is also some authority to the contrary.[55] An order or rule ordinarily is not founded on the whole record in the case, but is granted on a special application to the court called a "motion;" the determination of such motion is an order, not a judgment.[56] A special proceeding regularly terminates in a final order, not a judgment,[57] although the final order in a special proceeding is in effect a judgment and is sometimes referred to as such.[58]

Order for judgment. An order merely directing or authorizing the entry of judgment in the case does not constitute a judgment; to have this effect it must be so worded as to express the final sentence of the court on the matters contained in the record and to end the case at once, without contemplating any further judicial action.[59] Orders for judgment, however, have sometimes been deemed sufficient as judgments.[60]

Order for an execution. An order of a judge to the clerk to issue execution for a specific sum with costs has been held equivalent to a judgment,[61] although there is also authority to the contrary.[62]

§ 6. —— Judgments as Contracts or Obligations

Although judgments are sometimes regarded as contracts or debts of record and as obligations enforceable by contractual remedies, they are not true contracts or debts in a strict sense, and are included within those terms as used in statutes only where such is the intent of the statutes.

Broadly speaking, a judgment is an obligation for the payment of money.[63] Under the classification of all obligations into two classes, namely, those arising ex contractu and those arising ex delicto, and the further division of obligations ex contractu into simple contracts, contracts under seal or specialties, and contracts of record, it has been usual to classify judgment obligations as contracts of record.[64] Judgments have been declared to be contracts,[65] and, likewise, judgments have been de-

54. Wyo.—Greenawalt v. Natrona Impr. Co., 92 P. 1008, 16 Wyo. 226.
33 C.J. p 1054 note 49.
Interlocutory judgments on demurrer see infra § 11.

55. N.Y.—Bentley v. Jones, 4 How. Pr. 335, 3 Code Rep. 37.
33 C.J. p 1054 note 50.

56. Mo.—Pence v. Kansas City Laundry Service Co., 59 S.W.2d 633, 332 Mo. 930.
Okl.—French v. Boles, 261 P. 196, 128 Okl. 90—In re Baptiste's Guardianship, 256 P. 520, 125 Okl. 184.
33 C.J. p 1054 note 51.

57. N.Y.—People v. Moroney, 120 N. E. 149, 224 N.Y. 114.
Wis.—In re Wisconsin Mut. Ins. Co., 6 N.W.2d 330, 241 Wis. 394, certiorari denied Hinge v. Duel, 63 S.Ct. 1157, 319 U.S. 747, 87 L.Ed. 1703.
33 C.J. p 1054 note 52.

58. N.Y.—In re Kennedy's Estate, 281 N.Y.S. 278, 156 Misc. 166.
33 C.J. p 1055 note 53.

59. U.S.—**Corpus Juris quoted in** G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855.
Ariz.—Brewer v. Morgan, 263 P. 630, 33 Ariz. 225.
Cal.—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209—Prothero v. Superior Court of Orange County, 238 P. 357, 196 Cal. 439—City of Los Angeles v. Hannon, 251 P. 247, 79 Cal.App. 669.
Okl.—Lee v. Epperson, 32 P.2d 309, 168 Okl. 220.
Tex.—**Corpus Juris quoted in** Loper v. Hosier, Civ.App., 148 S.W.2d 889, 891, error dismissed, judgment correct.
33 C.J. p 1055 note 54, p 1104 note 33.

Purport
An order for a judgment is not a judgment, because it does not purport of itself to determine the rights of the parties.—Ericson v. Steiner, 6 P.2d 298, 119 Cal.App. 305—33 C.J. p 1104 note 32.

An entry in the record, ordering that plaintiff recover judgment from defendant in the amount therein stated, was not a judgment, but merely an order for judgment.—Illinois Trust & Savings Bank v. Town of Roscoe, 194 N.W. 649, 46 S.D. 477.

Judgment nisi has no more effect on parties' rights than verdict, being only order for entry of effective judgment, absent intervening proceedings.—Hodgson v. Phippin, 150 A. 118, 159 Md. 97—33 C.J. p 1055 note 54 [a].

60. Ga.—Tift v. Keaton, 2 S.E. 690, 78 Ga. 235.
N.H.—Young v. Dearborn, 27 N.H. 324.

61. Ga.—Klink v. The Cusseta, 30 Ga. 504.
Ill.—Sears v. Sears, 8 Ill. 47.

62. Colo.—Hoehne v. Trugillo, 1 Colo. 161, 91 Am.D. 703.
33 C.J. p 1104 note 36.

63. La.—Holland v. Gross, App., 195 So. 828.
N.Y.—Weinstein v. McElligott, 10 N.Y.S.2d 320, 256 App.Div. 307, reversed on other grounds 22 N.E. 2d 171, 281 N.Y. 605.
33 C.J. p 1056 note 63.

New obligation
A judgment is not a contract or an obligation of a contract but is a new obligation under which antecedent rights are to be enforced.—Tradesmens Nat. Bank & Trust Co. v. Floyd, 39 A.2d 728, 731, 156 Pa. Super. 141.

Recognition of obligation
Judgment is the recognition of the preëxistence of a debt or obligation.—Bailey v. Louisiana & N. W. R. Co., 105 So. 626, 159 La. 576—Holland v. Gross, La.App., 195 So. 828.

64. Iowa.—Chader v. Wilkins, 284 N.W. 183, 226 Iowa 417.
33 C.J. p 1056 notes 64, 67 [a].

65. La.—Butler v. Bolinger, 133 So. 778, 16 La.App. 397.
33 C.J. p 1056 note 65.
Judgments by confession see infra § 134 et seq.

Whether recovered for tort or on contract, the judgment becomes a debt which defendant is under obligation to pay, and the law implies a promise or contract on his part to pay it.
Cal.—Grotheer v. Meyer Rosenberg, 53 P.2d 996, 11 Cal.App.2d 268.
N.Y.—Gutta Percha & Rubber Mfg. Co. v. City of Houston, 15 N.E. 402, 108 N.Y. 276, 2 Am.S.R. 412, 14 N.Y.Civ.Proc. 19, 20 Abb.N.Cas. 218.

Partition judgment from which parties did not appeal could be in-

clared to be debts[66] of record,[67] or specialties.[68] It is only by a legal fiction, however, and for the purpose of enforcing the obligation by contractual remedies, that judgments can be considered as contracts.[69] Thus an action on a judgment is an action on a contract,[70] irrespective of the nature of the original transaction on which the judgment was founded,[71] and the same provisional remedies may be had as in an action on an express contract.[72]

On the other hand, the essential elements of every true contract, such as competent parties and assent, are often wanting in judgments which usually are rendered in invitum, and often against infants, lunatics, or married women.[73] Accordingly it has also been declared that judgments are not contracts[74] or debts[75] in the strict sense of these terms.

Withing meaning of constitutional and statutory provisions. The fact that a judgment is sometimes regarded as a contract is not conclusive on the question whether it is a contract within the meaning of that term as used in particular statutory or constitutional provisions, and in all such cases the intent of such provisions is determinative.[76] Accordingly, it has been held that a judgment is a contract within the meaning of statutes conferring[77] or limiting[78] the jurisdiction of a court in actions on contracts, prohibiting the assignment of choses in action not arising out of contract,[79] authorizing set-offs and counterclaims,[80] making joint contracts joint and several,[81] and prohibiting the issuance of process against the body in an action on a contract.[82] On the other hand, a judgment is not a contract or debt within statutes requiring actions on contracts to be brought in the name of the real party in interest,[83] or making trustees or stockhold-

terpreted as contract between parties.—Frazier v. Hanlon Gasoline Co., Tex.Civ.App., 29 S.W.2d 461, error refused.

Contracts of highest character

Va.—Barnes v. American Fertilizer Co., 130 S.E. 902, 144 Va. 692.

66. Iowa.—Chader v. Wilkins, 284 N.W. 183, 226 Iowa 417.
Mo.—Vitale v. Duerbeck, 92 S.W.2d 691, 338 Mo. 556.
33 C.J. p 1056 note 66.

Judgment for tort

A judgment rendered on a cause of action for a tort is nevertheless a debt.—State v. City of Mound City, 73 S.W.2d 1017, 325 Mo. 702—33 C. J. p 1056 note 66 [a], [c].

A judgment is an evidence of debt.—Oil Tool Exchange v. Schuh, 153 P.2d 976, 67 Cal.App.2d 288—33 C.J. p 1056 note 66 [e].

67. Mo.—**Corpus Juris cited in** State v. City of Mound City, 73 S.W.2d 1017, 1020, 325 Mo. 702.
33 C.J. p 1056 note 67.

68. Conn.—Barber v. International Co., 51 A. 857, 74 Conn. 652, 92 Am.S.R. 246.
33 C.J. p 1056 note 68.

69. R.I.—Everett v. Cutler Mills, 160 A. 924, 52 R.I. 330.
33 C.J. p 1057 note 69.

70. Cal.—**Corpus Juris cited in** Grotheer v. Meyer Rosenberg, 53 P.2d 996, 999, 11 Cal.App.2d 268.
Iowa.—Chader v. Wilkins, 284 N.W. 183, 226 Iowa 417.
33 C.J. p 1057 note 71.
Nature and form of action on judgment generally see infra § 851.

Assumpsit or debt

Instances of quasi or constructive contracts include judgments on which an action of assumpsit or debt may be maintained, according to the circumstances, because of a promise to pay implied by law.—**Corpus Juris quoted in** Caldwell v. Missouri State Life Ins. Co., 230 S.W. 566, 569, 148 Ark. 474—13 C.J. p 245 note 70.

71. Cal.—**Corpus Juris cited in** Grotheer v. Meyer Rosenberg, 53 P.2d 996, 999, 11 Cal.App.2d 268.
Iowa.—Chader v. Wilkins, 284 N.W. 183, 226 Iowa 417.
Okl.—Vaughn v. Osborne, 229 P. 467, 103 Okl. 59.
33 C.J. p 1057 note 72.

72. N.Y.—Gutta Percha & Rubber Mfg. Co. v. City of Houston, 15 N.E. 402, 108 N.Y. 276, 20 Abb.N. Cas. 218, 14 N.Y.Civ.Proc. 19.
33 C.J. p 1057 note 73.

73. U.S.—In re Ransford, Mich., 194 F. 658, 115 C.C.A. 560.
33 C.J. p 1057 note 74.

74. R.I.—Everett v. Cutler Mills, 160 A. 924, 52 R.I. 330.
33 C.J. p 1057 note 75.

Consent decree for injunction involving supervision of changing conditions should not be considered contract.—U. S. v. Swift & Co., App. D.C., 52 S.Ct. 460, 286 U.S. 106, 76 L.Ed. 999.

75. La.—Holland v. Gross, App., 195 So. 828.

76. U.S.—Metcalf v. City of Watertown, Wis., 9 S.Ct. 173, 128 U.S. 586, 32 L.Ed. 543.
33 C.J. p 1058 note 77.
Judgment as contract or debt within:
Constitutional:
Provisions prohibiting statutes impairing obligation of contracts see Constitutional Law § 350.
Or statutory provisions prohibiting imprisonment for debt see Arrest § 25 a, Executions § 413 a.
Rules as to joining causes of action see Actions § 83.
Statute of limitations see infra § 854.
Statutes regulating rate of interest see Interest § 40.

77. Cal.—Wallace v. Eldredge, 27 Cal. 498—Stuart v. Lander, 16 Cal. 372, 76 Am.D. 538.
Jurisdiction of courts generally see Courts § 242.

78. N.Y.—Crane v. Crane, 19 N.Y.S. 691.

79. Mo.—**Corpus Juris cited in** State v. City of Mound City, 73 S.W.2d 1017, 1020, 325 Mo. 702.
33 C.J. p 1058 note 83.
Assignment of judgments see infra § 512.

80. U.S.—Rose v. Northwest Fire & Marine Ins. Co., C.C.Or., 71 F. 649.
33 C.J. p 1058 note 84.

Contrary view

(1) A contrary rule has been followed in Illinois.—Rae v. Hulbert, 17 Ill. 572.

(2) It has been said, however, that "the weight of authority is against the view taken by the supreme court of Illinois."—Rose v. Northwest Fire & Marine Ins. Co., C.C.Or., 71 F. 649, 651.

81. U.S.—Belleville Sav. Bank v. Winslow, C.C.Mo., 30 F. 488.
33 C.J. p 1058 note 87.

82. Vt.—Stoughton v. Barrett, 20 Vt. 385—Sawyer v. Vilas, 19 Vt. 43.

83. Ala.—Wolffe v. Eberlein, 74 Ala. 99, 49 Am.R. 809.
33 C.J. p 1058 note 82.
Plaintiffs in action on judgment see infra § 857.

ers of a corporation liable for its debts,[84] or within the meaning of married women's acts.[85]

§ 7. —— Judgments as Assignments or Conveyances

In the absence of a statute to the contrary, a judgment is not an assignment and ordinarily is not effectual to pass the title to land.

A judgment is not an assignment,[86] even when entered on confession,[87] although, by statute, judgments suffered under particular circumstances may operate as an assignment for the benefit of creditors.[88] A judgment is not effectual to pass the title to land,[89] apart from statutory provision to that effect,[90] unless it substantially undertakes to vest title, as by declaring that it shall operate as a deed of conveyance, in a case where the court has jurisdiction to affect the title to land by a judgment or decree operating in rem.[91]

§ 8. Classification and Kinds

Judgments have been classified with reference to the state of the pleadings at the time of pronouncement, and the proper style of the judgment may also depend on the form of the action.

Under common-law practice, judgments usually are classified with reference to the state of the pleadings at the time judgment is pronounced, under which classification they fall into several basic groups.[92] The proper style of the judgment may also depend on the form of the action, immemorial custom having prescribed the formula of words to be employed in the judgments rendered in certain classes of proceedings.[93]

The form of judgment granted on determination of issues of law or fact is discussed infra §§ 9, 10. Numerous particular kinds of judgments are defined infra this section, and there may be found elsewhere in other connections a consideration of judgments by confession, or judgments by cognovit actionem and judgments by confession relicta verificatione, discussed infra §§ 134–137, judgments on consent, offer, or admission, discussed infra §§ 173–186, judgments by default or nil dicit, discussed infra § 187, judgments of dismissal, discontinuance, nonsuit, or retraxit, discussed in Dismissal and Nonsuit §§ 1–5, judgments non obstante veredicto, or judgments notwithstanding verdict, discussed infra §§ 59–61, judgments nunc pro tunc, discussed infra §§ 117–121, and judgments on the pleadings, discussed in the C.J.S. title Pleading § 511, also 49 C. J. p 779 note 29–p 780 note 48.

Irregular or erroneous judgment. An irregular judgment is one entered contrary to the course of the court, that is, contrary to the method of procedure and practice allowed by law in some material respect.[94] An erroneous judgment is one rendered according to the course and practice of the court, but contrary to law.[95]

84. U.S.—Chase v. Curtis, N.Y., 5 S.Ct. 554, 113 U.S. 452, 28 L.Ed. 1038.
Cal.—Larrabee v. Baldwin, 35 Cal. 155.

85. N.Y.—White v. Wood, 2 N.Y.S. 673, 49 Hun 381, 15 N.Y.Civ.Proc. 187.

86. Pa.—Breading v. Boggs, 20 Pa. 33, 37.
33 C.J. p 1059 note 95.

87. Pa.—Breading v. Boggs, supra.
Judgment by confession see infra §§ 134–172.

88. Ky.—Laughlin v. Georgetown First Nat. Bank, 47 S.W. 623, 103 Ky. 742, 20 Ky.L. 354.
33 C.J. p 1059 note 97.

89. N.C.—Proctor v. Ferebee, 36 N. C. 143, 36 Am.D. 34.
33 C.J. p 1059 note 98.

90. N.J.—Price v. Sisson, 13 N.J. Eq. 168.
N.C.—Morris v. White, 2 S.E. 254, 96 N.C. 91.

91. Mich.—Simmons v. Conklin, 88 N.W. 625, 129 Mich. 190.
33 C.J. p 1059 note 1.

92. U.S.—Derby v. Jacques, C.C. Mass., 7 F.Cas.No.3817, 1 Cliff. 425.
33 C.J. p 1059 note 3.

Judgments fall into four groups under Blackstone's classification: First, where the facts are agreed by the parties, and the law is determined by the court, as in the case of judgment on a demurrer; second, where the law is admitted by the parties and the facts are in dispute, as in the case of judgments on verdicts; third, where the facts and law are admitted by defendant, as in judgments by confession and default; fourth, where plaintiff is convinced that the facts, or the law, or both, are not sufficient to support his action, as in judgments of nonsuit, retraxit, and discontinuance.—Derby v. Jacques, C.C.Mass., 7 F. Cas.No.3,817, 1 Cliff. 425.

Judgment against plaintiff

At common law a judgment against plaintiff was on a retraxit, non pros, nonsuit, nolle prosequi, discontinuance or a judgment on an issue found by jury in favor of defendant or on demurrer.—Steele v. Beaty, 2 S.E.2d 854, 215 N.C. 680.

93. Ill.—Jackson v. Haskell, 3 Ill. 565.
33 C.J. p 1059 note 4.

Debt

Ill.—Jackson v. Haskell, supra.

94. N.M.—Ealy v. McGahen, 21 P. 2d 84, 87, 37 N.M. 246.
N.C.—Duplin County v. Ezzell, 27 S.E.2d 448, 450, 223 N.C. 531—Wynne v. Conrad, 17 S.E.2d 514, 518, 220 N.C. 355—Crowder v. Stiers, 1 S.E.2d 353, 355, 215 N. C. 123—Dail v. Hawkins, 189 S.E. 774, 211 N.C. 283—Hood ex rel. Citizens' Bank & Trust Co. v. Stewart, 184 S.E. 36, 40, 209 N. C. 424—Duffer v. Brunson, 125 S.E. 619, 620, 188 N.C. 789.
33 C.J. p 814 note 6—34 C.J. p 508 note 3.
Irregular or erroneous judgment as void or voidable see infra § 19.
Operation and effect of void and voidable judgments see infra §§ 449–452.

95. N.M.—Ealy v. McGahen, 21 P.2d 84, 87, 37 N.M. 246.
N.C.—Wynne v. Conrad, 17 S.E.2d 514, 518, 220 N.C. 355—Dail v. Hawkins, 189 S.E. 774, 211 N.C. 283—Hood ex rel. Citizens' Bank & Trust Co. v. Stewart, 184 S.E. 36, 40, 209 N.C. 424—Herbert B. Newton & Co. v. Wilson Furniture Mfg. Co., 174 S.E. 449, 450, 206 N.C. 533—Wellons v. Lassiter, 157 S.E. 434, 436, 200 N.C. 474—Finger v. Smith, 133 S.E. 186, 187, 191 N.C.

A judgment on the merits is one rendered after argument and investigation and when it is determined such party has a right, as distinct from a judgment rendered on some formal or merely technical fault or by default without trial.[96]

Judgment nihil capiat per breve or *per billam* is the form of judgment against plaintiff in an action either in bar or in abatement; literally, "that he take nothing by his writ or declaration."[97]

Judgment nisi. At common law, a judgment nisi was one entered on the return of the nisi prius record, which, according to the terms of the postea, was to become absolute unless otherwise ordered by the court within the first four days of the next succeeding term.[98]

Judgment of non pros. or *non prosequitur* is a judgment of the court on motion of defendant in a civil action in case plaintiff does not file his declaration or replication in due time.[99]

Judgment quod billa cassetur is the common-law form of judgment sustaining a plea in abatement where the proceeding is by bill, that is, by a capias instead of by original writ; literally, "that the bill be quashed."[1]

Judgment quod eat sine die is the old form of a judgment for defendant;[2] literally "that he go without day."[3]

Judgment quod recuperet is a judgment in favor of plaintiff rendered when he has prevailed on an issue in fact or an issue in law other than one arising on a dilatory plea.[4]

Judgment respondeat ouster is a form of judgment for plaintiff on an issue in law arising on a dilatory plea.[5] The judgment is that defendant answer over, and, since it is not a final judgment, the pleading is resumed and the action proceeds.[6]

A punitive judgment is one the purpose of which is to inflict a penalty or punishment as distinguishment from one granting a remedy.[7]

A self-executing judgment is a judgment that accomplishes by its mere entry the result sought, and requires no further exercise of the power of the court to accomplish its purpose.[8]

§ 9. —— Judgment on Issue of Law

A judgment on a demurrer to pleadings is on an issue of law and is the same as it would have been on an issue of fact between the parties, but a judgment sustaining or overruling a demurrer to a plea in abatement is not of a final nature.

When the pleadings terminate in a demurrer on either side, an issue of law is presented, and a judgment on such demurrer is on an issue of law.[9] On

818—Duffer v. Brunson, 125 S.E. 619, 620, 188 N.C. 789.
34 C.J. p 508 note 4—21 C.J. p 822 note 86.

When court has jurisdiction of the subject matter of the action and of the parties, a judgment giving to one of the parties more than he is entitled to receive is an erroneous judgment.—McLeod v. Hartman, 253 P. 1094, 1095, 123 Kan. 110.

96. Ky.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 880, 250 Ky. 21.

97. Black L.D.

98. Black L.D.
33 C.J. p 1059 note 4 [b].

It is otherwise defined as "one that is to be valid unless something else should be done within a given time to defeat it."—U. S. v. Winstead, D.C.N.C., 12 F. 50, 51, 4 Hughes 464.

99. N.C.—Steele v. Beaty, 2 S.E.2d 854, 856, 215 N.C. 680.
Pa.—Beveridge v. Teeter, 14 Pa.Dist. & Co. 498, 45 York Leg.Rec. 16, 26 Luz.Leg.Reg. 100.
33 C.J. p 1061 note 26.

Nolle prosequi distinguished
(1) Judgment of non pros. is not to be confused with a nol. pros. or nolle prosequi, by which plaintiff or the attorney for the state voluntarily declares that he will not further prosecute a suit or indictment, or a particular count in either.—Commonwealth v. Casey, 12 Allen, Mass., 214, 218—33 C.J. p 1061 note 26 [b].

(2) "Nolle prosequi" defined see Dismissal and Nonsuit § 4.

1. Black L.D.
33 C.J. p 1060 note 15 [a].

2. Del.—Silver v. Rhodes, 2 Del. 369, 374.
N.J.—Hale v. Lawrence, 22 N.J.Law 72, 80.
Form of judgment generally see infra § 62.

3. Black L.D., sub verbo "Sine."

4. Ky.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 880, 250 Ky. 21.
As proper judgment on issues of law or fact see infra §§ 9, 10.

5. Black L.D.
33 C.J. p 1060 note 13 [a].

6. U.S.—Philadelphia & R. Coal & Iron Co. v. Kever, N.Y., 260 F. 534, 536, 171 C.C.A. 318, certiorari denied 40 S.Ct. 13, 250 U.S. 665, 63 L.Ed. 1197.

7. U.S.—In re Merchants' Stock & Grain Co., Mo., 32 S.Ct. 339, 223 U.S. 639, 56 L.Ed. 584—In re Christensen Engineering Co., N.Y., 24 S. Ct. 729, 194 U.S. 458, 48 L.Ed. 1072.
Ga.—Hancock v. Kennedy, 95 S.E. 735, 22 Ga.App. 144.

8. Cal.—Feinberg v. Doe, 92 P.2d 640, 642, 14 Cal.2d 24.

Similarly expressed
(1) One where no process is required in order to fully execute it. —Jayne v. Drorbaugh, 17 N.W. 433, 436, 63 Iowa 711—57 C.J. p 108 note 87.

(2) One which has an intrinsic effect.—Dulin v. Pacific Wood & Coal Co., 33 P. 123, 124, 98 Cal. 304.

(3) One which is injunctional and prohibitive or which adjudicates the title to property or fixes the status of a party.—Haddick v. Polk County Dist. Ct., 145 N.W. 943, 944, 164 Iowa 417—57 C.J. p 109 note 91.

(4) Other similar definitions see 57 C.J. p 109 notes 89, 90.

9. Wis.—Douville v. Merrick, 25 Wis. 688.
Judgment on:
Demurrer to:
Evidence see the C.J.S. title Trial § 236, also 64 C.J. p 389 note 46—p 390 note 58.
Pleadings see the C.J.S. title Pleading § 274, also 49 C.J. p 461 note 94—p 465 note 81.
Pleadings see the C.J.S. title Pleading § 511, also 49 C.J. p 779 note 29—p 780 note 48.

demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue of fact joined on the same pleading, and found in favor of the same party.[10] At common law the judgment for plaintiff on a demurrer to any of the pleadings in chief is quod recuperet, that is, that he recover;[11] that for defendant is quod eat sine die, that is, that he go hence without day.[12] As is discussed in the C.J.S. title Pleading § 274, also 33 C.J. p 1060 notes 10–12, and 49 C.J. p 461 note 4–p 465 note 81, the judgment is final unless leave to amend or to plead over is given, but, since the granting of such leave is almost a matter of course, it is not now usual to enter final judgment on demurrer unless the party fails or refuses to amend or to plead over, as the case may be.

On demurrer to a plea in abatement, if the demurrer is sustained, the judgment is not final but is respondeat ouster, that is, that he answer over;[13] final judgment is rendered only on failure to plead further.[14] If the demurrer or other objection is overruled, and the dilatory plea is held sufficient in law, the judgment is that the writ or declaration be quashed,[15] but this rule of the common law has been changed by some statutes permitting plaintiff after overruling of his demurrer to take issue on the facts.[16]

§ 10. —— Judgment on Issue of Fact

Final judgment on an issue of fact, if for the plaintiff, is that he recover, but judgment for the defendant on a fact issue raised in a plea in abatement is merely that the writ or declaration be quashed.

The final judgment on an issue of fact, taken on the declaration, or a plea in bar, if for plaintiff, is quod recuperet, that is, that he recover;[17] if for defendant, the judgment is nihil capiat per breve or per billam, that is, that he take nothing by his declaration or writ.[18] Where an issue of fact on a plea in abatement is found in favor of defendant, the judgment must be cassetur breve or billa, that is, that the writ or declaration be quashed, as where a demurrer to such a plea is decided in his favor; the judgment cannot be nihil capiat, or on the merits, because the plea is not in bar of the action.[19]

10. N.J.—Hale v. Lawrence, 22 N.J. Law 72.
N.Y.—Nachod v. Hindley, 103 N.Y.S. 801, 118 App.Div. 658.

11. Wis.—Douville v. Merrick, 25 Wis. 688.
33 C.J. p 1059 note 8.
"Judgment quod recuperet" defined see supra § 8.

12. Ill.—People, for Use of O'Farrell v. Johnson, 215 Ill.App. 580.
33 C.J. p 1060 note 9.
"Judgment quod eat sine die" defined see supra § 8.

Judgment for costs
Where the petition failed to state a cause of action, the court did not err in sustaining a general demurrer thereto and in rendering a judgment against plaintiff for the cost of the action.—Franks v. Adolph Kempner Co., 217 P. 848, 91 Okl. 289.

Question of abatement
Where demurrer, as may sometimes be done, is treated as plea in abatement on ground that action is prematurely brought, judgment should show that decision was based on question of abatement, otherwise it will be presumed to be a decision on merits.—Smith v. City of Davenport, 201 N.W. 47, 198 Iowa 1295.

13. Ala.—Cravens v. Bryant, 3 Ala. 278—State v. Allen, 1 Ala. 442.
Ark.—Fulcher v. Lyon, 4 Ark. 445—Renner v. Reed, 3 Ark. 339.
Conn.—Nichols v. Heacock, 1 Root 286—Fitch v. Lothrop, 1 Root 192.
Del.—Spencer v. Dutton, 1 Harr. 75.
Ill.—Branigan v. Rose, 8 Ill. 123, followed in 8 Ill. 130—Bradshaw v. Morehouse, 6 Ill. 395—F. H. Earl Mfg. Co. v. Summit Lumber Co., 125 Ill.App. 391.
Ind.—Clarke v. Hite, 5 Blackf. 167—Atkinson v. State Bank, 5 Blackf. 84—Lambert v. Lagow, 1 Blackf. 388.
Ky.—Hay v. Arberry, 1 J.J.Marsh. 95—Moore v. Morton, 1 Bibb 234.
Me.—McKeen v. Parker, 51 Me. 389.
Mass.—Parks v. Smith, 28 N.E. 1044, 155 Mass. 26.
Miss.—Drane v. Board of Police of Madison County, 42 Miss. 264—Lee v. Dozier, 40 Miss. 477—Besancon v. Shirley, 17 Miss. 457—Lang v. Fatheree, 15 Miss. 404—Beaty v. Harkey, 10 Miss. 563.
Mo.—Wilson v. Atwood, 4 Mo. 366.
N.H.—Trow v. Messer, 32 N.H. 361.
N.J.—Garr v. Stokes, 16 N.J.Law 403.
N.C.—Casey v. Harrison, 13 N.C. 244.
Pa.—Bauer v. Roth, 4 Rawle 83—McCabe v. U. S., 4 Watts 325.
Tenn.—Straus v. Weil, 5 Coldw. 120—Rainey & Henderson v. Sanders, 4 Humphr. 447—McBee v. State, Meigs 122.
Tex.—Ritter v. Hamilton, 4 Tex. 325.
Wis.—Anderson v. Rountree, 1 Pinn. 115.
33 C.J. p 1060 note 13.
"Judgment respondeat ouster" defined see supra § 8.

There are exceptions to the rule where the plea contains matter pleadable only in abatement but commences or concludes in bar, or where matter in abatement is pleaded puis darrein continuance. In such cases the judgment is final.—Turner v. Carter, 1 Head, Tenn., 520.

14. Ala.—Massey v. Walker, 8 Ala. 167.

15. Del.—Silver v. Rhodes, 2 Del. 369.
49 C.J. p 244 note 7.
"Judgment quod billa cassetur" defined see supra § 8.

Suit prematurely brought
Trial court, after sustaining plea in abatement on ground that suit had been prematurely brought, committed error in rendering judgments that plaintiff take nothing by the suit, since such judgments without restrictions as to future prejudice to relitigate the same subject matter would afford a basis for interposing a plea of "res judicata" should such suit be refiled in the future and proper judgment was one of dismissal which would preclude an adjudication on the merits.—Reed v. Staley, Tex.Civ.App., 139 S.W.2d 851.

16. Ala.—Chilton v. Harbin, 6 Ala. 171.

17. U.S.—National Acc. Soc. v. Spiro, Tenn., 78 F. 774, 24 C.C.A. 334, certiorari denied 18 S.Ct. 944, 168 U.S. 708, 42 L.Ed. 1211.
33 C.J. p 1060 note 18.
"Judgment quod recuperet" defined see supra § 8.

18. Black L.D.

19. Fla.—McLendon v. Lurton-Hardaker Co., 91 So. 113, 83 Fla. 263.
33 C.J. p 1060 note 20.

Dismissal of cause
When a plea of abatement is sustained to plaintiff's action, the general order is one dismissing the

Where, however, the verdict is against defendant, the judgment for plaintiff is quod recuperet, or that he recover, and not respondeat ouster.[20]

§ 11. —— Final and Interlocutory Judgments

a. In general
b. When judgment becomes final

a. In General

A final judgment is one which disposes of the cause both as to the subject matter and the parties as far as the court has power to dispose of it, while an interlocutory judgment is one which reserves or leaves some further question or direction for future determination; but whether a judgment is final depends somewhat on the purpose for which, and the standpoint from which, it is being considered.

Judgments may generally be classified as either final or interlocutory.[21] In determining whether a judgment is "final," no hard and fast definition or test applicable to all situations can be given, since finality depends somewhat on the purpose for which, and the standpoint from which, the judgment is being considered, and it may be final for one purpose and not for another.[22] Generally, however, a final judgment is one which disposes of the cause both as to the subject matter and the parties as far as the court has power to dispose of it,[23] while an

cause and the dismissal order is effective only as long as the cause of abatement continues to exist.—Zarsky v. Moss, Tex.Civ.App., 193 S.W. 2d 245.

Necessity of trial on facts

Disposition, on pleas in abatement, of claims based on negligence without a trial on the facts was error.—Rose v. Baker, 183 S.W.2d 438, 143 Tex. 438.

20. Ill.—F. H. Earl Mfg. Co. v. Summit Lumber Co., 125 Ill.App. 391.
Miss.—Coleman v. Bowman, 99 So. 465, 135 Miss. 137—McNeely v. Yazoo & M. V. R. Co., 81 So. 641, 119 Miss. 897.
33 C.J. p 1060 note 21—49 C.J. p 244 note 13.

Liability established

The court's decision overruling defendant's plea in abatement on fact issue establishes defendant's liability and deprives it of trial on merits, so as to entitle plaintiff to final judgment, unless judge permits defendant to answer over by special order or action equivalent to such order.—Krinsky v. Stevens Coal Sales Co., 36 N.E.2d 411, 309 Mass. 528.

21. Cal.—Bakewell v. Bakewell, 130 P.2d 975, 21 Cal.2d 224.
Okl.—Consumers' Oil & Refining Co. v. Bilby, 217 P. 484, 91 Okl. 282.
Tenn.—Vineyard v. Vineyard, 170 S. W.2d 917, 26 Tenn.App. 232.
Final and interlocutory decrees see Equity § 582.
Finality of determination as affecting conclusiveness of adjudication see infra § 699.

22. Cal.—Anderson v. Great Republic Life Ins. Co., 106 P.2d 75, 41 Cal.App.2d 181—Howard v. Howard, 261 P. 714, 716, 87 Cal.App. 20.
Ill.—Brauer Machine & Supply Co., for Use of Bituminous Casualty Corporation v. Parkhill Truck Co., 50 N.E.2d 836, 383 Ill. 569, 148 A.L.R. 1208.

Different meanings

Although "final" is frequently used with "judgment" to distinguish from interlocutory orders or judgments in the same court, "final judgment" also describes a determination effective to conclude further proceedings in the same cause by appeal or otherwise, especially where time within which to act is limited to run from "final judgment".—Northwestern Wisconsin Elec. Co. v. Public Service Commission, 22 N.W.2d 472, 248 Wis. 479.

23. Mich.—Wurzer v. Geraldine, 256 N.W. 439, 441, 268 Mich. 286.
Okl.—Consolidated School Dist. No. 15 of Texas County v. Green, 71 P.2d 712, 714, 180 Okl. 567.
Pa.—Frank P. Miller Paper Co. v. Keystone Coal & Coke Co., 118 A. 565, 566, 275 Pa. 40.
Tenn.—Vineyard v. Vineyard, 170 S. W.2d 917, 920, 26 Tenn.App. 232.
Tex.—Lubell v. Sutton, Civ.App., 164 S.W.2d 41, 44, error refused.
Utah.—Hartford Accident & Indemnity Co. v. Clegg, 135 P.2d 919, 922, 103 Utah 414.
Vt.—**Corpus Juris cited in** State v. Green Mountain Power Corporation, 28 A.2d 698, 699.
33 C.J. p 1061 note 30.

The general test for determining whether a judgment is "final" is that, when no issue is left for future consideration except fact of compliance or noncompliance with terms of the first decree, decree is final, but, where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is "interlocutory".—Bakewell v. Bakewell, 130 P.2d 975, 978, 21 Cal.2d 224—Lyon v. Goss, 123 P.2d 11, 17, 19 Cal.2d 659.

Similar definitions

(1) A "final decree" is one in which nothing in the case is reserved by the court for further decision.—Sample v. Romine, 10 So.2d 346, 193 Minn. 706.

(2) A "final judgment" is one that brings suit to a conclusion and bars recovery in any other litigation between the same parties on the same claim.—Ranallo v. Hinman Bros. Const. Co., D.C.Ohio, 49 F.Supp. 920, 924, affirmed, C.C.A., Buckeye Union Casualty Co. v. Ranallo, 135 F.2d 921, certiorari denied 64 S.Ct. 47, 320 U.S. 745, 88 L.Ed. 442.

(3) A "final judgment" is one which finally disposes of parties' rights either on entire controversy or on some definite and separate branch thereof.—Brauer Machine & Supply Co., for Use of Bituminous Casualty Corporation v. Parkhill Truck Co., 50 N.E.2d 836, 840, 383 Ill. 569, 148 A.L.R. 1208—General Electric Co. v. Gellman Mfg. Co., 48 N.E. 2d 451, 318 Ill.App. 644.

(4) A "final judgment" is one which determines and disposes of merits by declaring that plaintiff is or is not entitled to recover by a remedy chosen.—Irving Trust Co. v. Kaplan, Fla., 20 So.2d 351, 354.

(5) A judgment is a "final" or "definitive judgment" when it settles the issues presented in the main controversy to such an extent that it will have the force of res judicata if it is not reversed on appeal.—Metairie Bank in Liquidation v. Lecler, La.App., 4 So.2d 573, 575.

(6) "Final judgments" are such as at once put an end to the action by declaring that plaintiff has or has not entitled himself to recover.
Ky.—Faulkner v. Faulkner, 110 S.W. 2d 465, 470, 270 Ky. 693.
Pa.—Frank P. Miller Paper Co. v. Keystone Coal & Coke Co., 118 A. 565, 275 Pa. 40.

(7) There must be findings of fact and conclusions of law to constitute a "final judgment" on the merits.—Hartford Accident & Indemnity Co. v. Clegg, 135 P.2d 919, 922, 103 Utah 414.

(8) Other definitions.
U.S.—In re Roney, C.C.A.Ind., 139 F.2d 175, 177—Karl Kiefer Mach. Co. v. U. S. Bottlers Machinery Co.,

interlocutory judgment is one which does not so dispose of the cause, but reserves or leaves some further question or direction for future determination.[24] Under the definition of a judgment as the

C.C.A.Ill., 108 F.2d 469, 470—Ross v. International Life Ins. Co., C.C.A.Tenn., 24 F.2d 345, 346—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855, 858—Charles Noeding Trucking Co. v. U. S., D.C.N.J., 29 F.Supp. 537, 544.

Ala.—Gandy v. Hagler, 16 So.2d 305, 307, 245 Ala. 167.

Cal.—Swarthout v. Gentry, App., 167 P.2d 501, 503—Vallera v. Vallera, 148 P.2d 694, 696, 64 Cal.App.2d 266—Potvin v. Pacific Greyhound Lines, 20 P.2d 129, 130, 130 Cal. App. 510.

Kan.—Smith v. Power, 127 P.2d 452, 454, 155 Kan. 612.

Ky.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 880, 250 Ky. 21—Caudill Coal Co. v. Charles Rosenheim & Co., 258 S.W. 315, 316, 201 Ky. 758—Blackburn v. Blackburn, 254 S.W. 915, 917, 200 Ky. 310.

Me.—Sawyer v. White, 132 A. 421, 422, 125 Me. 206.

Mich.—Wurzer v. Geraldine, 256 N. W. 439, 446, 268 Mich. 286.

Miss.—Johnson v. Mississippi Power Co., 196 So. 642, 643, 189 Miss. 67.

N.C.—Hanks v. Southern Public Utilities Co., 186 S.E. 252, 257, 210 N. C. 312—Never Fail Land Co. v. Cole, 149 S.E. 585, 588, 197 N.C. 452.

Ohio.—State ex rel. Curran v. Brookes, 50 N.E.2d 995, 998, 142 Ohio St. 107—Vida v. Parsley, App., 47 N.E.2d 663, 665.

Okl.—Methvin v. Methvin, 127 P.2d 186, 188, 191 Okl. 177.

Pa.—Sundheim v. Beaver County Building & Loan Ass'n, 14 A.2d 349, 351, 140 Pa.Super. 529.

Tex.—Lanier v. Parnell, Civ.App., 190 S.W.2d 421, 423—City of Gilmer v. Moyer, Civ.App., 181 S.W. 2d 1020, 1022—Garcia v. Jones, Civ.App., 147 S.W.2d 925, 926, error dismissed, judgment correct—Railroad Commission v. Humble Oil & Refining Co., Civ.App., 119 S.W.2d 728, error refused—Holmes v. Klein, Civ.App., 59 S.W.2d 171, 172, error dismissed—Dallas Coffee & Tea Co. v. Williams, Civ. App., 45 S.W.2d 724, 728, error dismissed.

Va.—Williams v. Dean, 9 S.E.2d 327, 329, 175 Va. 435.

25 C.J. p 1130 notes 54–56—33 C.J. p 1061 note 30 [a].

Synonymous with "final determination"

"Final judgment" is synonymous with "final determination," which means the final settling of the rights of the parties to the action beyond all appeal.—Quarture v. Allegheny County, 14 A.2d 575, 578, 141 Pa. Super. 356.

Judgments held final

(1) Judgment expressly or by necessary implication disposing of all parties and issues is final.—Southern Pac. Co. v. Ulmer, Tex.Com.App., 286 S.W. 193—Duke v. Gilbreath, Tex. Civ.App., 2 S.W.2d 324, error dismissed—Adcock v. Shell, Tex.Civ. App., 273 S.W. 900.

(2) A judgment may be "final" whether it is based on a determination of a question of law or a question of fact.—McWilliams v. Blackard, C.C.A.Ark., 96 F.2d 43.

(3) Judgment may be final although it fails to award writ of execution for its enforcement.—Reed v. Bryant, Tex.Civ.App., 291 S.W. 605.

(4) Judgment requiring defendant to pay amount into court to await determination of conflicting claims in another court was, as between the parties, final.—Graham Refining Co. v. Graham Oil Syndicate, Tex.Civ. App., 262 S.W. 142.

(5) A judgment dismissing cause as to one defendant after giving peremptory direction to find for such defendant and rendering judgment for plaintiff against another defendant on verdict for plaintiff was final disposition of issues as to former defendant.—Newdiger v. Kansas City, 114 S.W.2d 1047, 342 Mo. 252.

(6) Where a plaintiff's alternative plea was not on trial and was effectually disposed of by award, on her principal cause of action, judgment predicated on ultimate issues raised by both pleading and evidence was a "final judgment."—Connor v. Buford, Tex.Civ.App., 142 S.W.2d 592, error dismissed, judgment correct.

(7) Other judgments.

U.S.—Ashwander v. Tennessee Valley Authority, D.C.Ala., 19 F.Supp. 190, reversed on other grounds, C.C.A., Alabama Power Co. v. Tennessee Valley Authority, 92 F.2d 412.

Cal.—Ochoa v. McCush, 2 P.2d 357, 216 Cal. 426—Griffith v. List, 9 P. 2d 529, 122 Cal.App. 125.

Ill.—Gunn v. Britt, 39 N.E.2d 76, 78, 313 Ill.App. 13.

Ky.—Struve v. Lebus, 136 S.W.2d 554, 281 Ky. 407—Crawford v. Riddle, 45 S.W.2d 463, 241 Ky. 839—First State Bank v. Thacker's Adm'x, 284 S.W. 1020, 215 Ky. 186—Watts v. Noble, 262 S.W. 1114, 203 Ky. 699.

La.—Castelluccio v. Cloverland Dairy Products Co., 115 So. 796, 165 La. 606, conformed to 8 La.App. 723—Spence v. Spence, 107 So. 294, 160 La. 436.

Mo.—Chance v. Franke, 153 S.W.2d 378, 348 Mo. 402—State ex rel. Maple v. Mulloy, 15 S.W.2d 809, 322 Mo. 281.

N.C.—Nash v. City of Monroe, 158 S.E. 384, 200 N.C. 729.

Okl.—Davis v. Baum, 133 P.2d 889, 192 Okl. 85—Consolidated School Dist. No. 15 of Texas County v. Green, 71 P.2d 712, 714, 180 Okl. 567—Consumers' Oil & Refining Co. v. Bilby, 217 P. 484, 91 Okl. 282.

S.D.—Western Bldg. Co. v. J. C. Penney Co., 245 N.W. 909, 60 S.D. 630.

Tex.—Grayson v. Johnson, Civ.App., 181 S.W.2d 312—Doornbos v. Looney, Civ.App., 159 S.W.2d 155, error refused—Runyon v. Valley Pub. Co., Civ.App., 147 S.W.2d 521, error refused—Pfeifer v. Johnson, Civ. App., 70 S.W.2d 203—Bell v. Rogers, Civ.App., 58 S.W.2d 878—Stokes Bros. & Co. v. Kramer, Civ. App., 44 S.W.2d 322—Duke v. Gilbreath, Civ.App., 2 S.W.2d 324, error dismissed—Phillips v. Jones, Civ.App., 283 S.W. 298.

Utah.—Logan City v. Utah Power & Light Co., 16 P.2d 1097, 86 Utah 340, adhered to 44 P.2d 698, 86 Utah 354.

33 C.J. p 1061 note 30 [e].

24. Cal.—Swarthout v. Gentry, App., 167 P.2d 501, 503.

Okl.—Consumers' Oil & Refining Co. v. Bilby, 217 P. 484, 489, 91 Okl. 282.

Pa.—Frank P. Miller Paper Co. v. Keystone Coal & Coke Co., 118 A. 565, 566, 275 Pa. 40.

Tex.—In re Greer, Tex.Civ.App., 41 S.W.2d 351.

33 C.J. p 1061 note 30.

Similar definitions

(1) An "interlocutory decree" is one that is rendered in the progress of a lawsuit, or between the commencement and the end of the suit. —In re Byrne, 191 So. 729, 730, 193 La. 566.

(2) It is a judgment made for purpose of ascertaining some matter of fact or law, preparatory to a final decree.—Vineyard v. Vineyard, 170 S.W.2d 917, 26 Tenn.App. 232.

(3) An "interlocutory judgment" is one which determines some preliminary or subordinate point or plea, or settles some step, question or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties.—Consumers' Oil & Refining Co. v. Bilby, 217 P. 484, 489, 91 Okl. 282.

(4) A judgment which reserves for adjudication by the court at a later date some issues between the parties to the action and only partially or incompletely disposes of the parties or issues is an "interlocutory judgment."—Manley v. Ra-

final determination of the rights of the parties, as discussed supra § 1, there can be no such thing as an interlocutory judgment in the strictly technical sense of the term; such interlocutory judgments are in fact interlocutory orders.[25] The term "interlocutory judgment" is, however, a convenient one to indicate the determination of steps or proceedings in a cause preliminary to final judgment, and in such sense the term is in constant and general use even in code states.[26] In determining whether a judgment is interlocutory or final, it should be construed in accordance with the conduct of the parties and the intention of the court gathered from the language of the judgment or decree.[27]

A judgment may be final although it does not determine the rights of the parties, if it ends the particular suit,[28] such as a judgment of dismissal, nonsuit,[29] or discontinuance,[30] or a judgment abating an action.[31] Also a judgment may be final although further directions may be necessary to carry it into effect,[32] although further proceedings remain to be taken in court to make the judgment effective,[33] or

zien, Tex.Civ.App., 172 S.W.2d 798, 799—Lubell v. Sutton, Tex.Civ.App., 164 S.W.2d 41, 46, error refused.

(5) Judgment is "interlocutory" where it is one substantially disposing of merits, but leaving issue of fact to be decided or some condition to be performed, in order fully to determine the rights of the parties.—Security State Bank v. Monona Golf Club, 252 N.W. 287, 289, 213 Wis. 581.

Judgments held interlocutory

(1) Judgments based on citation by publication are "interlocutory" only until such time as their validity is actually established by proper proceeding in court of competent jurisdiction having parties in interest before it.—Seymour v. Schwartz, Tex.Civ.App., 172 S.W.2d 138.

(2) A judgment which recited that the court, on consideration of complaint, service of summons, answer, and evidence introduced by plaintiffs, found that defendant was liable to plaintiffs in amounts "that may be adjudged later by jury properly empaneled to hear the evidence pertaining to the amount of damages", etc., was an "interlocutory judgment" in which defendant's liability was properly determined and amount of damages left to be assessed.—Checker Cab Co. of Hot Springs v. Leeper, 182 S.W.2d 871, 207 Ark. 799.

(3) A decree which in the first instance is to be a "decree nisi" but is to become absolute on expiration of stipulated period after entry thereof is deemed an "interlocutory decree."—In re Hanrahan's Will, 194 A. 471, 109 Vt. 108.

(4) Other judgments.

Ala.—Indian Head Mills of Alabama v. Ashworth, 110 So. 565, 215 Ala. 348—Blankenship v. Hall, 106 So. 594, 214 Ala. 95—Hill v. Hill, 100 So. 340, 211 Ala. 293.

Nev.—Nevada First Nat. Bank of Tonopah v. Lamb, 271 P. 691, 51 Nev. 162.

Pa.—Markofski v. Yanks, 146 A. 569, 297 Pa. 74—Commonwealth v. Provident Trust Co., 92 Pittsb.Leg. J. 348, 58 York Leg.Rec. 101.

Tex.—Fisher v. Wilson, Civ.App., 185 S.W.2d 186, affirmed Wilson v. Fisher, Sup., 188 S.W.2d 150—Kline v. Power, Civ.App., 114 S.W.2d 617—McCurley v. Texas Indemnity Ins. Co., Civ.App., 62 S.W.2d 992, error refused.

Vt.—Morgan v. Gould, 119 A. 517, 96 Vt. 275.

Va.—Freezer v. Miller, 176 S.E. 159, 163 Va. 180.

33 C.J. p 1061 note 30 [f].

Process and jurisdiction

To render interlocutory judgment, it is necessary for court to find that process had been served on defendant and that court had jurisdiction of his person.—Hart v. Foster, 109 S.W.2d 504, error dismissed.

25. Mo.—**Corpus Juris cited in** Barlow v. Scott, 85 S.W.2d 504, 519.

N.D.—Universal Motors v. Coman, 15 N.W.2d 73, 73 N.D. 337.

S.D.—Western Bldg. Co. v. J. C. Penney Co., 245 N.W. 909, 60 S.D. 630.

33 C.J. p 1062 note 32.

Synonymous terms

Term "interlocutory judgment" is synonymous with term "order."—Sobieski v. City of Chicago, 241 Ill. App. 180, error dismissed 156 N.E. 279, 325 Ill. 259.

26. Ark.—Checker Cab Co. of Hot Springs v. Leeper, 182 S.W.2d 871, 207 Ark. 799.

Conn.—Preston v. Preston, 128 A. 292, 102 Conn. 96.

33 C.J. p 1062 note 33.

Statutory recognition

(1) Interlocutory judgments or decrees are expressly recognized under some statutory provisions.—In re Bailey, 40 N.Y.S.2d 746, 749, 265 App.Div. 758, affirmed 50 N.E.2d 653, 291 N.Y. 534—33 C.J. p 1062 note 33 [a].

(2) The legislative purpose, in enacting statute authorizing interlocutory judgment, was not to authorize a mere tentative or proposed judgment but one which would finally dispose of a portion of a controversy.—Kickapoo Development Corporation v. Kickapoo Orchard Co., 285 N.W. 354, 231 Wis. 458.

27. Tex.—Thomas v. International Seamen's Union of America, Civ. App., 101 S.W.2d 328.

The character of the decree or judgment is an important factor to be considered.—Karl Kiefer Mach. Co. v. U. S. Bottlers Machinery Co., C.C.A.Ill., 108 F.2d 469.

28. Cal.—Fisch & Co. v. Superior Court in and for Los Angeles County, 43 P.2d 855, 6 Cal.App.2d 21.

Tex.—Witty v. Rose, Civ.App., 148 S.W.2d 962, error dismissed.

33 C.J. p 1063 note 34.

29. Ariz.—Hartford Accident & Indemnity Co. v. Sorrells, 69 P.2d 240, 50 Ariz. 90.

Cal.—Fisch & Co. v. Superior Court in and for Los Angeles County, 43 P.2d 855, 6 Cal.App.2d 21.

Mass.—Sullivan v. Martinelli, 158 N. E. 662, 261 Mass. 261.

Tex.—Renfroe v. Johnson, 177 S.W. 2d 600, 142 Tex. 251—Ley v. Ley, Civ.App., 62 S.W.2d 503, error dismissed.

33 C.J. p 1063 note 35.

Dismissal for failure to file bond for costs

Tex.—Witty v. Rose, Civ.App., 148 S.W.2d 962, error dismissed.

30. Conn.—Foley v. George A. Douglas & Bro., 185 A. 70, 121 Conn. 377.

31. Cal.—Watterson v. Owens River Canal Co., 210 P. 625, 190 Cal. 88—San Francisco Breweries v. Superior Court in and for City and County of San Francisco, 251 P. 935, 80 Cal.App. 433.

32. U.S.—In re Casaudoumecq, D.C. Cal., 46 F.Supp. 718.

Ind.—Rooker v. Fidelity Trust Co., 151 N.E. 610, 198 Ind. 207.

Ky.—Watts v. Noble, 262 S.W. 1114, 203 Ky. 644.

Mo.—State ex rel. Maple v. Mulloy, 15 S.W.2d 809, 322 Mo. 281.

33 C.J. p 1063 note 36.

33. U.S.—In re Casaudoumecq, D.C. Cal., 46 F.Supp. 718.

Ky.—Alexander v. Tipton, 291 S.W. 1019, 218 Ky. 666.

Tex.—Lanier v. Parnell, Civ.App., 190 S.W.2d 421.

Proceedings incidental to execution

(1) Decree may be partly final and partly interlocutory; final as to determination of all issues, and inter-

although the court reserves the right to modify the judgment.[34] The finality of a judgment is not affected by the fact that it constitutes an erroneous decision as to the law or the facts.[35]

On the other hand, a judgment is not generally considered final where further judicial action is necessary in order fully and finally to settle the rights of the parties,[36] as where the judgment settles only some of several issues of law or fact,[37] or does not dispose of the case as to all the parties;[38] but judgments determining particular matters in controversy, and of such a nature that they could be immediately enforced and by their enforcement deprive the party against whom they were rendered of any benefit which he might obtain from an appeal at any subsequent stage of the proceedings, have been deemed final.[39] A judgment is not final which is to become effective only on the happening of a future event or contingency[40] or which is made subject to revision at a future specified date.[41]

A judgment ordinarily is final when rendered in pursuance of a general verdict,[42] or on submission

locutory as to mode of execution.—Perry v. West Coast Bond & Mortgage Co., 29 P.2d 279, 136 Cal.App. 557.

(2) A judgment over against principal and in favor of surety on fidelity bond was "final", notwithstanding it was made contingent on payment by surety of primary judgment against it on the bond, since all litigated rights relating to matter involved were determined and further proceedings required in complete satisfaction of decree were merely incidental to its proper execution.—American Employers' Ins. Co. v. Dallas Joint Stock Land Bank, Tex.Civ.App., 170 S.W.2d 546, error refused.

34. Tex.—Graham v. Coolidge, 70 S. W. 231, 30 Tex.Civ.App. 273.

35. Cal.—In re Gardiner's Estate, 114 P.2d 643, 45 Cal.App.2d 559.
Tex.—Snell v. Knowles, Civ.App., 87 S.W.2d 871, error dismissed.

36. Mo.—State ex rel. and to Use of Abeille Fire Ins. Co. v. Sevier, 73 S.W.2d 361, 335 Mo. 269, certiorari denied State of Missouri ex rel. and to Use of Abeille Fire Ins. Co. of Paris v. Sevier, 55 S. Ct. 99, 293 U.S. 585, 79 L.Ed. 680.
Va.—Massanutten Bank of Strasburg v. Glaize, 14 S.E.2d 285, 177 Va. 519.

Reference for judicial purpose

Generally a decree fixing liability and rights of the parties and referring the case to a master or subordinate tribunal for a judicial purpose, such as the statement of an account, on which a further decree is to be entered, is not a "final decree."—Swarthout v. Gentry, Cal. App., 167 P.2d 501.

37. Mo.—Corpus Juris quoted in Barlow v. Scott, 85 S.W.2d 504, 519.
Okl.—Hurley v. Hurley, 127 P.2d 147, 191 Okl. 194.
Tenn.—Vineyard v. Vineyard, 170 S.W.2d 917, 26 Tenn.App. 232.
Tex.—Wood v. Gulf Production Co., Civ.App., 100 S.W.2d 412—Harris v. O'Brien, Civ.App., 54 S.W.2d 277—Duke v. Gilbreath, Civ.App., 2 S.W.2d 324, error dismissed.
33 C.J. p 1063 note 38.

"A case is never finally determined when any controversial matter, a part thereof, is open and undetermined."—In re Returns From Herminie Election Dist. of Sewickley Tp., Westmoreland County, 192 A. 130, 132, 326 Pa. 321.

Specific disposition unnecessary

It is not essential to the finality of a judgment that it in express terms specifically dispose of each issue, since the fact that judgment disposes of a particular issue may be inferred from other provisions thereof, provided such inference follows as a necessary implication.—Gamble v. Banneyer, 151 S.W.2d 586, 137 Tex. 7.

Where several distinct causes of action are united in the same suit, the rule that a judgment to be final must dispose of the entire case does not apply.—Shamburger v. Glenn, Tex.Civ.App., 255 S.W. 815—33 C.J. p 1063 note 38 [d].

38. Mo.—Corpus Juris quoted in Barlow v. Scott, 85 S.W.2d 504, 519—Steiger v. City of Ste. Genevieve, 141 S.W.2d 233, 235 Mo.App. 579.
Tex.—Gathings v. Robertson, Com. App., 276 S.W. 218—Minnock v. Garrison, Civ.App., 144 S.W.2d 328—Wood v. Gulf Production Co., Civ.App., 100 S.W.2d 412—Duke v. Gilbreath, Civ.App., 2 S.W.2d 324, error dismissed.
33 C.J. p 1063 note 39.

Real parties

A judgment that fails to dispose of the real parties to the litigation, either expressly or by necessary implication, is not final.—Wilson v. Cone, Tex.Civ.App., 179 S.W.2d 784.

Disposal by implication

A judgment, to be "final," must dispose of all parties and issues in the case, but disposal of parties need not be by name, necessary implication being sufficient.—Texas Life Ins. Co. v. Miller, Tex.Civ.App., 114 S.W. 2d 600.

39. Cal.—Perry v. West Coast Bond & Mortgage Co., 29 P.2d 279, 136 Cal.App. 557.
Ky.—Watts v. Noble, 262 S.W. 1114, 203 Ky. 644.
Ohio.—Speidel v. Schaller, 55 N.E.2d 346, 73 Ohio App. 141.
Tex.—Seby v. Craven Lumber Co., Civ.App., 259 S.W. 1093.
33 C.J. p 1063 note 40.

Portion of land

Judgment awarding half of land in controversy to defendant without determining ownership of the other half was final as to half awarded.—Duval v. Duval, 291 S.W. 488, 316 Mo. 626.

40. Tex.—Echols v. Echols, Civ. App., 168 S.W.2d 282, error refused—Dodd v. Daniel, Civ.App., 89 S. W.2d 494.
Conditional judgments generally see infra § 73.

Compliance with conditions

A judgment granting plaintiff an injunction, but which requires him to comply with certain conditions imposed within a certain number of days, and provides that, in the event of plaintiff's failure so to comply, the judgment shall be for defendants, is not a final decree.—Consumers' Oil & Refining Co. v. Bilby, 217 P. 484, 91 Okl. 282.

Judgment held not contingent

Agreed provisions in judgment for suspension and postponement of issuance of order of sale under judgment until judgment debtor's default in payment of any stipulated installment of judgment debt to court clerk did not render judgment indefinite, or prevent it from being "final judgment" after its proper entry on payment of first installment as there was no further contingency on happening of which court might properly be required to perform any further judicial function in connection with case.—Grayson v. Johnson, Tex.Civ.App., 181 S.W.2d 312.

41. Tex.—Echols v. Echols, Civ. App., 168 S.W.2d 282, error refused.

42. Mo.—State v. Riley, 113 S.W. 647, 219 Mo. 667.
Pa.—In re Fulton, 51 Pa. 204.

of the entire case to the court,[43] or on submission for decision on the pleadings.[44] A judgment or decree by consent may constitute a final disposition of a cause.[45] Judgment upon demurrer to any of the pleadings in chief is generally final unless leave to amend or to plead over is given,[46] in which case the judgment is interlocutory.[47] A judgment or decree for an accounting is interlocutory in character.[48] The question whether a particular order or judgment is final or interlocutory most frequently arises as a question of appealability, and these cases are discussed in Appeal and Error §§ 94–108.

b. When Judgment Becomes Final

A judgment is generally considered final and enforceable as soon as it is entered, read, and signed in open court, but for some purposes it may not be final until a later time.

For most purposes a judgment will be considered final and enforceable by appropriate writ as soon as it is entered, read, and signed in open court,[49] notwithstanding a motion for new trial remains undisposed of,[50] that the judgment is still subject to appellate review,[51] or that an appeal is actually pending.[52] A judgment is not "final" for some purposes, however, merely because execution may be issued on it,[53] and it has been variously held that finality attaches to the judgment only at the end of the term of court at which it was entered,[54] or at the end of a specified period of time after the date of its rendition,[55] or after the time for filing motions to prevent entry of judgment has expired without such motions being filed, or, if filed, after they are determined.[56] It has also been held that a judgment becomes final only after expiration of the time allowed by law for appeal therefrom, or, if an appeal is perfected, after the judgment is upheld in the appellate court,[57] but this rule is inapplicable if the judgment is not subject to review.[58]

43. Ill.—Pease v. Roberts, 9 Ill.App. 132.
33 C.J. p 1063 note 42.

44. Wis.—Sanderson v. Herman, 85 N.W. 141, 108 Wis. 662.
33 C.J. p 1063 note 43.

45. Ala.—Payne v. Graham, 102 So. 729, 20 Ala.App. 439.
Colo.—Heil v. Hubbell, 252 P. 343, 80 Colo. 452.
Ga.—Baker v. McCord, 162 S.E. 110, 173 Ga. 819.

46. Ark.—Smart v. Alexander, 158 S.W.2d 924, 203 Ark. 1147.
Del.—Hazzard v. Alexander, 178 A. 873, 6 W.W.Harr. 512.
33 C.J. p 1063 note 44.

Provision permitting filing exceptions or statement of facts did not avoid implication that judgment disposed of case on general demurrer rather than on the merits.—Wells v. Stonerock, Tex.Com.App., 12 S.W.2d 961.

The ruling of the court on a demurrer is not a final order unless final judgment is entered thereon.—Cooper v. Knuckles, 279 S.W. 1084, 212 Ky. 608.

47. U.S.—Morris v. Dunbar, Pa., 149 F. 406, 79 C.C.A. 226.
33 C.J. p 1063 note 45.

48. Kan.—City of Eureka v. Kansas Electric Power Co., 3 P.2d 484, 133 Kan. 708.
33 C.J. p 1063 note 46.

49. Ind.—Whinery v. Kozacik, 22 N.E.2d 829, 216 Ind. 136.
Mass.—In re Keenan, 47 N.E.2d 12, 313 Mass. 186.
Time of taking effect of judgment see infra § 446.

Signing held necessary
It has been held that a judgment is not final until it is signed.—River & Rails Terminals v. Louisiana Ry. & Nav. Co., 103 So. 331, 157 La. 1085—Young v. Geter, La.App., 187 So. 830.

50. Ind.—Whinery v. Kozacik, 22 N.E.2d 829, 216 Ind. 136.
Finality of determination as affected by proceedings for relief against judgment see infra §§ 622, 623, 700–702.

51. Ohio.—Shoup v. Clemans, App., 31 N.E.2d 103.

52. U.S.—In re Maryanov, D.C.N.Y., 20 F.2d 939.
N.Y.—In re Bailey, 40 N.Y.S.2d 746, 265 App.Div. 758, affirmed 50 N.E. 2d 653, 291 N.Y. 534.

53. Okl.—Methvin v. Methvin, 127 P.2d 186, 191 Okl. 177.

54. U.S.—Reed v. South Atlantic S. S. Co. of Delaware, D.C.Del., 2 F.R.D. 475.
Pa.—Salus v. Fogel, 153 A. 547, 302 Pa. 268.

55. Fla.—Mabson v. Christ, 119 So. 131, 96 Fla. 756.
Ky.—Yung v. Yung, 171 S.W.2d 1017, 294 Ky. 369.
Tex.—Gillette Motor Transport Co. v. Wichita Falls & Southern R. Co., Civ.App., 170 S.W.2d 629, mandamus denied Wichita Falls & S. R. Co. v. McDonald, 174 S.W.2d 951, 141 Tex. 555.
Va.—Carney v. Poindexter, 196 S.E. 639, 170 Va. 233.

Judgment rendered on constructive service does not become final until two years from rendition.—Trujillo v. Piarote, 53 S.W.2d 466, 122 Tex. 173.

56. U.S.—Moss v. Kansas City Life Ins. Co., C.C.A.Mo., 96 F.2d 108.
Mo.—Lee's Summit Building & Loan Ass'n v. Cross, 134 S.W.2d 19, 345 Mo. 501—Williams v. Pemiscot County, 133 S.W.2d 417, 345 Mo. 415—Melenson v. Howell, 130 S.W. 2d 555, 344 Mo. 1137.

Motion for new trial
(1) Text rule applies with respect to pendency of motion for new trial.
Fla.—Cole v. Walker Fertilizer Co., for Use and Benefit of Walker, 1 So.2d 864, 147 Fla. 1.
Mo.—Cox v. Frank L. Schaab Stove & Furniture Co., 58 S.W.2d 700, 332 Mo. 492, transferred, see App., 67 S.W.2d 790.
Tex.—Rabinowitz v. Darnall, Com. App., 13 S.W.2d 78.

(2) Where motion for new trial was never heard, the motion was automatically overruled at the end of the next succeeding term, and the judgment then became final.—Kinney v. Yoelin Bros. Mercantile Co., 220 P. 998, 74 Colo. 295.

An unauthorized motion will not suffice to postpone finality of a judicial decision.—Lindsay v. Evans, Mo.App., 174 S.W.2d 390.

57. Ga.—Powell v. Powell, 37 S.E. 2d 191—Aud v. Aud, 35 S.E.2d 198, 199 Ga. 714—Twilley v. Twilley, 24 S.E.2d 46, 195 Ga. 297.
Okl.—Methvin v. Methvin, 127 P.2d 186, 191 Okl. 177.

Judgment is final when defendant fails to perfect appeal therefrom within time prescribed by law.
La.—Robinson v. Weiner, 105 So. 35, 158 La. 979—Albritton v. Nauls, App., 15 So.2d 126, 128.
Pa.—H. Miller & Sons' Co. v. Mt. Lebanon Tp., 163 A. 511, 309 Pa. 221.
Tex.—Bound v. Dillard, Civ.App., 140 S.W.2d 520.

58. U.S.—In re Tapp, D.C.Ky., 61 F.Supp. 594.

§ 12. —— Judgments in Rem and in Personam

A judgment in rem is an adjudication pronounced on the status of some particular subject matter, while a judgment in personam is in form and substance between the parties claiming the right in controversy and does not directly affect the status of the res.

Judgments, for certain purposes, are divided into three classes designated as "judgments in personam" or "personal judgments," "judgments in rem," and "judgments quasi in rem."[59] A judgment or decree in rem is an adjudication pronounced on the status of some particular subject matter by a tribunal having competent authority for that purpose.[60] It differs from a judgment or decree in personam in this, that the latter is in form as well as in substance between the parties claiming the right in controversy, and does not directly affect the status of the res, but only through the action of the parties.[61] Judgments quasi in rem are rendered in proceedings quasi in rem and affect not only title to the res, but likewise the right in and to it possessed by individuals.[62]

II. ESSENTIALS OF EXISTENCE, VALIDITY, AND REGULARITY OF JUDGMENT

A. IN GENERAL

§ 13. General Statement

It is essential to the validity of a judgment that it be based on, and be in conformity with, recognized principles and fundamentals of law.

It is essential to the validity of a judgment that it be based on, and be in conformity with, recognized principles and fundamentals of law.[63] Where statutory powers are conferred on a court of inferior jurisdiction, and the mode of executing those powers is prescribed, the course pointed out must be substantially pursued, or the judgments of the

59. Kan.—Union Central Life Ins. Co. v. Irrigation Loan & T. Co., 73 P.2d 72, 146 Kan. 550.

Ky.—Combs v. Combs, 60 S.W.2d 368, 249 Ky. 155, 89 A.L.R. 1095.

Actions in rem and in personam see Actions § 52.

60. Ill.—McCormick v. Blaine, 178 N.E. 195, 197, 345 Ill. 461, 77 A.L.R. 1215—Wilson v. Smart, 155 N.E. 288, 291, 324 Ill. 276—Austin v. Royal League, 147 N.E. 106, 109, 316 Ill. 188.

Ky.—Gayle v. Gayle, 192 S.W.2d 821, 822—Booth v. Copley, 140 S.W.2d 662, 666, 283 Ky. 23—**Corpus Juris quoted in** Combs v. Combs, 60 S.W. 2d 368, 369, 249 Ky. 155, 89 A.L.R. 1095.

Nev.—Perry v. Edmonds, 84 P.2d 711, 713, 59 Nev. 60.

33 C.J. p 1063 note 48—34 C.J. p 1171 note 89.

Judgments in rem generally see infra §§ 907–911.

A "special" judgment is a judgment in rem.—Smith v. Colloty, 55 A. 805, 806, 69 N.J.Law 365.

Judgments held not in rem

(1) Generally.

Conn.—Whipple v. Fardig, 146 A. 847, 109 Conn. 460.

Iowa.—Ryke v. Ream, 234 N.W. 196, 212 Iowa 126.

(2) In equity action by assignee of insured's creditor to have proceeds of life policies subjected to creditor's claim, that proceeds of one policy were on deposit in bank in another state did not make the decree one in rem rather than in personam.—In re Hazeldine's Estate, 280 N.W. 568, 225 Iowa 369.

61. Ky.—Gayle v. Gayle, 192 S.W.2d 821, 822—**Corpus Juris quoted in** Combs v. Combs, 60 S.W.2d 368, 369, 249 Ky. 155, 89 A.L.R. 1095. 33 C.J. p 1064 note 49.

The term "general judgment" has been used as synonymous with "judgment in personam."—Smith v. Colloty, 55 A. 805, 806, 69 N.J.Law 365.

Judgment held in personam

Miss.—Jones v. McCormick, 110 So. 591, 145 Miss. 566.

Judgment held not in personam

U.S.—Atchison, T. & S. F. Ry. Co. v. Wells, C.C.A.Tex., 285 F. 369, reversed on other grounds 44 S. Ct. 469, 265 U.S. 101, 68 L.Ed. 928.

The inclusion of costs in judgment against a nonresident did not render it void as a personal judgment, where the judgment recited that defendant was duly cited.—Reitz v. Mitchell, Tex.Civ.App., 256 S.W. 697.

Equity decrees operate in personam and at most only collaterally in rem.—McKinney v. Mires, 26 P.2d 169, 95 Mont. 191.

62. Ky.—Combs v. Combs, 60 S.W. 2d 368, 249 Ky. 155, 89 A.L.R. 1095.

63. U.S.—Duwamish v. U. S., 79 Ct. Cl. 530, certiorari denied 55 S.Ct. 913, 295 U.S. 755, 79 L.Ed. 1698.

Utah.—Stockyards Nat. Bank of South Omaha v. Bragg, 245 P. 966, 67 Utah 60.

Bond

Judgment is not bad because trial judge refuses to fix amount and conditions of supersedeas bond.—McCann v. Proskauer, 112 So. 621, 93 Fla. 383.

Judgment obtained at variance with practice of court or contrary to well recognized principles and fundamentals of law must fall.—Stockyards Nat. Bank of South Omaha v. Bragg, 245 P. 966, 67 Utah 60.

Legality

The requirement that judgment to be valid must be one which the court could legally render means only that judgment must be one which could have been legally rendered on the issue shown by the pleadings and evidence.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.

Judgment rendered on proceeding improperly commenced is void.—Mutual Life Ins. Co. of New York v. Prever Lumber Co., 3 N.Y.S.2d 642, 167 Misc. 662, reversed on other grounds 6 N.Y.S.2d 28, 168 Misc. 358.

Unauthorized practice of law

Fact that judgments were procured by one engaged in the illegal practice of law did not render them void or voidable.—Bump v. Barnett, Iowa, 16 N.W.2d 579.

Upholding judgment

Sound public policy demands that judgments be upheld, where it can be done without violating any statute or settled principle of law.—Betsill v. Betsill, 196 S.E. 381, 187 S.C. 50.

court will be void.[64] A court should not render a decree which is void for constitutional reasons.[65]

§ 14. Statutory Provisions and What Law Governs

The validity, force, and effect of a judgment must be determined by the laws in force at the time and in the jurisdiction where it was rendered.

The validity, force, and effect of a judgment must be determined by the laws in force at the time[66] and in the state or country where it was rendered.[67]

§ 15. Duly Constituted Court

It is essential to the validity of a judgment that it be the sentence or adjudication of a duly constituted court or judicial tribunal.

It is essential to the validity of a judgment that it be the sentence or adjudication of a duly constituted court or judicial tribunal.[68] Judicial powers are sometimes conferred on tribunals not technically courts, and decisions by such tribunals, in the exercise of powers thus conferred, are considered as judgments.[69]

Judgments of de facto courts. On principles of public policy and for the security of rights it has been held that the regular judgments of a de facto court, whose existence has afterward been pronounced unconstitutional and void, are nevertheless valid and conclusive.[70]

§ 16. —— Time and Place

a. In general
b. At chambers

a. In General

It has been held to be essential to the validity of a judgment that it be rendered by a court sitting at the time and also in the place authorized by law.

According to some authorities, it is essential to the validity of a judgment that it be rendered by a court sitting at the time[71] and also in the place[72] authorized by law, the tribunal not being otherwise a court in any legal sense,[73] and the proceedings

64. Wis.—Corpus Juris cited in State ex rel. Lang v. Civil Court of Milwaukee County, 280 N.W. 347, 349, 228 Wis. 411.
Wyo.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.
33 C.J. p 1064 note 58.
Exercise of statutory jurisdiction only as statute directs see Courts § 89.

65. Colo.—In re Special Assessments for Paving Dist. No. 3, in City of Golden, 95 P.2d 806, 105 Colo. 158.

66. Cal.—Lake v. Bonynge, 118 P. 535, 161 Cal. 120.
33 C.J. p 1064 note 59.

67. Mont.—Swift & Co. v. Weston, 289 P. 1035, 88 Mont. 40.
33 C.J. p 1064 note 60.
Foreign judgments see infra §§ 888–906.

68. Ark.—Chapman & Dewey Lumber Co. v. Andrews, 91 S.W.2d 1026, 192 Ark. 291.
Mass.—Carroll v. Berger, 150 N.E. 870, 255 Mass. 132.
33 C.J. p 1064 note 61.
Judgment on motion or summary proceedings see infra § 219.
Rendition of judgments generally see infra §§ 100–105.
Nullity of judgment results from a want of a legally organized court or tribunal.
Cal.—Hunter v. Superior Court in and for Riverside County, 97 P.2d 492, 36 Cal.App.2d 100.
Tex.—San Jacinto Finance Corporation v. Perkins, Civ.App., 94 S.W.2d 1213.
Judgments held not void
Mo.—State ex rel. Aquamsi Land Co. v. Hostetter, 79 S.W.2d 463, 336 Mo. 391.
Tex.—Hudson v. Norwood, Civ.App., 147 S.W.2d 826, error dismissed, judgment correct.

69. Me.—Longfellow v. Quimby, 29 Me. 196, 48 Am.D. 525.
33 C.J. p 1065 note 67.
Allowance of claim by assignee for benefit of creditors as equivalent to judgment see Assignments for Benefit of Creditors § 321.

70. Minn.—Burt v. Winona & St. P. R. Co., 18 N.W. 235, 31 Minn. 472.
33 C.J. p 1070 note 2.
De facto courts generally see Courts § 144.

71. Ala.—Polytinsky v. Johnston, 99 So. 839, 211 Ala. 99.
Ark.—Magnolia Petroleum Co. v. Saunders, 94 S.W.2d 703, 192 Ark. 783.
Ga.—Hicks v. Hicks, 27 S.E.2d 10, 69 Ga.App. 870.
Ill.—Wallace Grain & Supply Co. v. Cary, 24 N.E.2d 907, 308 Ill.App. 221, reversed on other grounds 28 N.E.2d 107, 374 Ill. 57.
Tex.—British General Ins. Co. v. Ripy, 106 S.W.2d 1047, 130 Tex. 101—Glasscock v. Pickens, Civ. App., 73 S.W.2d 992—Sinclair Refining Co. v. McElree, Civ.App., 52 S.W.2d 679—Engelman v. Anderson, Civ.App., 244 S.W. 650.
33 C.J. p 1065 note 72.
Validity of judgment on holiday see Holidays § 5 d.
Validity of judgment on Sunday see the C.J.S. title Sundays § 53, also 60 C.J. p 1146 note 57–p 1147 note 70.

72. Ala.—Polytinsky v. Johnston, 99 So. 839, 211 Ala. 99.
Okl.—City of Clinton ex rel. Richardson v. Keen, 138 P.2d 104, 192 Okl. 382—City of Clinton ex rel. Richardson v. Cornell, 132 P.2d 840, 191 Okl. 600.
Tex.—British General Ins. Co. v. Ripy, 106 S.W.2d 1047, 130 Tex. 101—Ferguson v. Ferguson, Civ.App., 98 S.W.2d 847.
33 C.J. p 1066 note 73.
District
(1) Ordinarily, a judgment cannot be rendered out of the district.—Killiam v. Maiden Chair Co., 161 S. E. 546, 202 N.C. 23.
(2) This rule has been held inapplicable where the parties consent thereto, although the consent should be in writing.—Killiam v. Maiden Chair Co., supra.
Signing judgment in another county
(1) It has been held that a judgment rendered at the close of the evidence at the place of trial is not rendered invalid because it was signed out of the county where trial was had, under a statute providing that judgment or decree may be rendered by the judge at any place in his district.—Swanson v. First Nat. Bank, 219 P. 784, 74 Colo. 135.
(2) Other cases see 33 C.J. p 1066 note 73 [b].

73. Ariz.—Meade v. Scribner, 85 P. 729, 10 Ariz. 33.
33 C.J. p 1066 note 74.

being, therefore, coram non judice.[74] In some cases, however, it has been held that the fact that a term of court at which a judgment was rendered was held at a time other than that prescribed or authorized by law, while rendering the judgment erroneous and constituting ground for its reversal, does not render the judgment void;[75] but a contrary view has also been taken and a judgment rendered under such circumstances has been held to be void.[76] It has been held that the mere fact that the court was held at a place other than that directed by law will not of itself render the judgment void,[77] as where the court errs with respect to the location of the county seat.[78]

The proper time for the rendition and entry of judgment is discussed infra §§ 113–116.

b. At Chambers

Judgments should be rendered in open court and not in chambers.

Judgments should be rendered in open court and not in chambers,[79] and it has been held that judgments rendered in chambers are void,[80] in the absence of statutory or constitutional provisions authorizing such action at chambers.[81]

§ 17. —— Judges

a. In general
b. Disqualified judge
c. De facto judge
d. Special judge

a. In General

Illegal constitution of the court with respect to the judge or judges sitting renders the judgment absolutely void.

Illegal constitution of the court with respect to the judge or judges sitting, as distinguished from mere disqualification of one or more of such judges, renders the judgment absolutely void.[82]

b. Disqualified Judge

In the absence of a constitutional or statutory provision forbidding a disqualified judge from acting, a judgment rendered by a disqualified judge is voidable but not void.

Where a judge is forbidden to act in a case when he is disqualified,[83] as by reason of interest,[84] relationship to parties,[85] having acted as counsel,[86]

74. Ga.—Hicks v. Hicks, 27 S.E.2d 10, 69 Ga.App. 870.
33 C.J. p 1066 note 75.

75. S.D.—Lockard v. Lockard, 110 N.W. 104, 21 S.D. 134.
33 C.J. p 1066 note 76.

Court held under color of law
This view has been adopted where the court was held under color of law at a particular time, but at time other than that actually fixed by law, there having been a change in the law which was unknown or overlooked.—Venable v. Curd, 2 Head, Tenn., 582.

76. Ala.—State v. Thurman, 88 So. 61, 17 Ala.App. 592.
33 C.J. p 1066 note 78.

77. Minn.—In re Ellis, 56 N.W. 1056, 55 Minn. 401, 43 Am.S.R. 514, 23 L.R.A. 287.
33 C.J. p 1066 note 79.

78. Ill.—Robinson v. Moore, 25 Ill. 135.

79. Tex.—Bridgman v. Moore, 183 S.W.2d 705, 143 Tex. 250.
33 C.J. p 1070 note 96.

Term time
It has been held that, if the judgment is entered in term time, it is immaterial whether court performed act of rendering judgment in private office or courtroom.—Doeppenschmidt v. City of New Braunfels, Tex.Civ.App., 289 S.W. 425.

Room of courthouse
Judgment by superior court in room in courthouse at county site other than regular courtroom has been held not void, where no legal or constitutional right of defendant was infringed, and no substantial injury to him has been done.—Walton v. Wilkinson Bolton Co., 123 S.E. 103, 158 Ga. 13.

Signing judgment
Whether judgment was signed at chambers or in open court was immaterial, since the signing of judgment involves no judicial consideration.—Baldwin v. Anderson, 13 P.2d 650, 52 Idaho 243—33 C.J. p 1070 note 96 [e].

80. Colo.—Scott v. Stutheit, 121 P. 151, 21 Colo.App. 151.
Neb.—Shold v. Van Treeck, 117 N. W. 113, 82 Neb. 99.
33 C.J. p 1070 note 96—15 C.J. p 815 note 25.

Under statute requiring judgments to be read in open court, a judgment read or signed in chambers without authorization of counsel or litigants is a nullity.—Hammond Box Co. v. Carmello Musso & Co., La.App., 172 So. 790—Green v. Frederick, 136 So. 783, 17 La.App. 605—33 C.J. p 1070 note 96 [g].

81. Wash.—Williams v. Briley, 242 P. 370, 137 Wash. 262.
33 C.J. p 1070 note 97—15 C.J. p 826 note 26.

82. Ill.—Cobb v. People, 84 Ill. 511.
33 C.J. p 1070 note 7.

83. Cal.—Giometti v. Etienne, 28 P. 2d 913, 219 Cal. 687—Cadenasso v. Bank of Italy, 6 P.2d 944, 214 Cal. 562.
Or.—Western Athletic Club v. Thompson, 129 P.2d 828, 169 Or. 514.
Tex.—Williams v. Sinclair-Prairie Oil Co., Civ.App., 135 S.W.2d 211, error dismissed, judgment correct —Weil v. Lewis, Civ.App., 2 S.W. 2d 566.
33 C.J. p 1071 note 9.

84. Mont.—Gaer v. Bank of Baker, 107 P.2d 877, 111 Mont. 204.
33 C.J. p 1071 note 9.

Judge who is stockholder of plaintiff bank is disqualified, and has no jurisdiction to render judgment which, if rendered, is void.—Cadenasso v. Bank of Italy, 6 P.2d 944, 214 Cal. 562.

85. Tex.—Postal Mut. Indemnity Co. v. Ellis, 169 S.W.2d 482, 140 Tex. 570—Weil v. Lewis, Civ.App., 2 S. W.2d 566—Stephenson v. Kirkham, Civ.App., 297 S.W. 265.
33 C.J. p 1071 note 9.

Void as to other defendants
Judgment void as to one defendant because of judge's relationship was void as to other defendants.—Weil v. Lewis, Tex.Civ.App., 2 S.W.2d 566.

86. Tex.—Williams v. Sinclair-Prairie Oil Co., Civ.App., 135 S.W.2d 211, error dismissed, judgment correct.
33 C.J. p 1071 note 9 [c].

Assistant county attorney
Where a county judge hearing sec-

or prejudice,[87] any judgment by him in disregard of the prohibition is void. Consent of parties cannot confer jurisdiction in such cases,[88] unless the statute excepts from its prohibition cases where the parties consent, in which event consent of parties removes the disqualification to act,[89] as would be the case in the absence of any express prohibition to act.[90]

Where there is no absolute prohibition of his acting, the mere fact that the judge is disqualified does not render the judgment void, although it may render it voidable or reversible.[91] There is authority, however, holding that such judgments are void even in the absence of any statutory prohibition.[92]

While it has been held that, where several judges constitute the court, and one of them is disqualified, the judgment is void, if such disqualified judge participated in the hearing and determination,[93] there is also authority to the contrary.[94] In some cases it has been held that a disqualified judge may sit, pro forma, to make a quorum without invalidating the judgment, provided he does not otherwise participate in the proceedings;[95] but there is also authority to the contrary.[96] It has been held that two judges of an appellate court may render a valid judgment where the third judge has disqualified himself.[97]

Entry of formal judgment. A judge who is disqualified in a cause may enter a formal judgment directed by the appellate court, as in such case he is not required to exercise any judgment or discretion.[98]

c. De Facto Judge

A judgment rendered by a judge de facto is valid.

A judgment rendered by a judge de facto is valid.[99] On this principle, it has been held that a judgment rendered by a properly elected judge before the legal commencement of his term of office,[1] or after the expiration of his term,[2] is valid.

ond liquor prosecution was disqualified because he had been assistant county attorney at time of first prosecution, judgment rendered on second prosecution was void.—Woodland v. State, 178 S.W.2d 528, 147 Tex.Cr. 84.

87. Ohio.—Wendel v. Hughes, 28 N. E.2d 686, 64 Ohio App. 310.
Or.—Western Athletic Club v. Thompson, 129 P.2d 828, 169 Or. 514.

88. Vt.—Watson v. Payne, 111 A. 462, 94 Vt. 299.
33 C.J. p 1071 note 10.

89. Okl.—Holloway v. Hall, 192 P. 219, 79 Okl. 163.
33 C.J. p 1071 note 12.
Knowledge of facts
Where parties to proceedings to set aside orders in statutory rehabilitation proceeding stipulated to waiver of disqualification of judge whose sister owned stock in delinquent insurer under statute relating to disqualification of judges, and waiver was not specifically limited to ownership by sister of stock, unawareness of plaintiff when signing stipulation that sister was a member of two stockholders' committees, one of which was a party to proceedings to set aside orders, did not render judgment void.—Neblett v. Pacific Mut. Life Ins. Co. of California, 139 P.2d 934, 22 Cal.2d 393, certiorari denied 64 S.Ct. 428, 320 U.S. 802, 88 L.Ed. 484.

90. N.H.—Stearns v. Wright, 51 N. H. 600.
33 C.J. p 1071 note 13.

91. Ala.—Phillips v. State, App., 24 So.2d 226.
Ind.—State ex rel. Krodel v. Gilkison, 198 N.E. 323, 209 Ind. 213.
Ohio.—Tari v. State, 159 N.E. 594, 117 Ohio St. 481, 57 A.L.R. 284.
Okl.—Mansfield, Sizer & Gardner v. Smith, 16 P.2d 1066, 160 Okl. 298—Dancy v. Owens, 258 P. 879, 126 Okl. 37—State v. Davenport, 256 P. 340, 125 Okl. 1.
S.C.—Sandel v. Crum, 125 S.E. 919, 130 S.C. 317.
33 C.J. p 1071 note 14.
At common law
U.S.—Crites v. Radtke, D.C.N.Y., 29 F.Supp. 970—In re Fox West Coast Theatres, D.C.Cal., 25 F.Supp. 250, affirmed, C.C.A., 88 F.2d 212, certiorari denied Tally v. Fox Film Corporation, 57 S.Ct. 944, 301 U.S. 710, 81 L.Ed. 1363, rehearing denied 58 S.Ct. 7, 302 U.S. 772, 82 L.Ed. 598.
Ind.—State ex rel. Krodel v. Gilkison, 198 N.E. 323, 209 Ind. 213.

92. Ky.—Hall v. Blackard, 182 S. W.2d 904, 298 Ky. 354—Commonwealth v. Murphy, 174 S.W.2d 681, 295 Ky. 466—Coquillard Wagon Works v. Melton, 125 S.W. 291, 137 Ky. 189.

93. N.Y.—Oakley v. Aspinwall, 3 N. Y. 547.
33 C.J. p 1071 note 16.
Judge necessary to make quorum
The judgment is void if the disqualified judge is necessary to make a quorum.—Stockwell v. White Lake, 22 Mich. 341.

94. N.D.—State v. Kositzky, 166 N. W. 534, 38 N.D. 616.
"The mere presence of, and participation by, a member of a judicial body disqualified to act in a particular case, does not necessarily invalidate the proceedings and judgment of that body. Particularly is this true if his presence is not necessary to constitute a quorum, or his vote does not determine the result."—State v. Kositzky, 166 N.W. 534, 535, 38 N.D. 616, L.R.A.1918D 237.

95. Utah.—Nephi Irr. Co. v. Jenkins, 32 P. 699, 8 Utah 452.
Wis.—Rogan v. Walker, 1 Wis. 597.
Pro tempore member
A decision of district court of appeal was not void because the judge who tried the case appealed from was a member of appellate tribunal pro tempore and sat on the bench when case was argued, where such judge did not participate in decision and specifically disqualified himself.—Bracey v. Gray, Cal.App., 162 P.2d 314, motion granted and certiorari denied Gray v. Bracey, 66 S.Ct. 961.

96. Wis.—Case v. Hoffman, 72 N.W. 390, 100 Wis. 314, 44 L.R.A. 728, vacated 74 N.W. 220, 100 Wis. 314, 44 L.R.A. 728, reheard 75 N.W. 945, 100 Wis. 314, 44 L.R.A. 728.

97. Tex.—Marshburn v. Stewart, Civ.App., 295 S.W. 679.

98. U.S.—Clarke v. Chicago, B. & Q. R. Co., C.C.A.Wyo., 62 F.2d 440, certiorari denied 54 S.Ct. 49, three cases, 290 U.S. 629, 78 L.Ed. 548.
33 C.J. p 1072 note 21.
Entry generally see infra § 106.

99. Colo.—Rude v. Sisack, 96 P. 976, 44 Colo. 21.
N.Y.—McLear v. Balmat, 223 N.Y.S. 76, 129 Misc. 805, reversed on other grounds 230 N.Y.S. 259, 224 App. Div. 306, modified 231 N.Y.S. 581, 224 App.Div. 366.
Ohio.—Demereaux v. State, 172 N.E. 551, 35 Ohio App. 418.
33 C.J. p 1072 note 23.

1. Va.—McCraw v. Williams, 33 Gratt. 510, 74 Va. 510.

2. Cal.—Merced Bank v. Rosenthal,

d. Special Judge

A judgment rendered by a special or substitute judge is valid where such a judge has been duly appointed and is authorized to act.

A judgment rendered by a special or substitute judge is valid where such a judge has been duly appointed and is authorized to act.[3] A judgment rendered by a special judge without proper authority is a nullity,[4] as where the appointment of a special judge was unauthorized.[5]

§ 18. Formal Proceedings

It is essential to the existence and validity of a judgment that the decision shall have been rendered in an action or proceeding before the court, in some form recognized and sanctioned by law.

It is essential to the existence and validity of a judgment that the decision shall have been rendered in an action or proceeding before the court,[6] in some form recognized and sanctioned by law.[7] The established modes of procedure must be followed,[8] although mere irregularities in the proceedings will not necessarily invalidate the judgment.[9] Accordingly, a judgment in a court of record must be based on definite and regular proceedings, which the record must disclose.[10] Likewise, as a general rule, before a valid judgment may be rendered against a defendant, he must be accorded an opportunity to be heard and present his defense,[11] and for this purpose, as discussed infra § 23, he must be given notice of the action or proceeding against him. It has been held that it is not essential to the validity of a judgment against a defendant in a civil action that he be present at any of the pro-

31 P. 849, 99 Cal. 39, reheard 33 P. 732, 99 Cal. 39.
33 C.J. p 1072 note 25.

3. Ariz.—Payne v. Williams, 56 P. 2d 186, 47 Ariz. 396.
Ark.—Moffett v. Texarkana Forest Park Paving, Sewer, and Water Dist. No. 2, 26 S.W.2d 589, 181 Ark. 474.
N.D.—Olson v. Donnelly, 294 N.W. 666, 70 N.D. 370.
Tex.—Boone v. Likens-Waddill Motor Co., Civ.App., 49 S.W.2d 979.
Power of successor judge to render judgment in proceeding begun before predecessor see Judges § 56.
Entry on record of agreement of counsel for appointment of judge ad litem has been held not essential to validity of judgment.—U. S. Fidelity & Guaranty Co. v. Tucker, 159 So. 787, 118 Fla. 430.
Failure to take oath
The failure of a special judge to take oath of office has been held not to render his judgments void.
Kan.—In re Hewes, 62 P. 673, 62 Kan. 288.
W.Va.—Tower v. Whip, 44 S.E. 179, 53 W.Va. 158, 63 L.R.A. 937.
Judge pro tempore
Where judge pro tempore was selected by agreement of parties after disqualification of district judge by affidavit of prejudice, judgment of judge pro tempore was as valid and as binding on parties as though it had been rendered by presiding judge of district.—Moruzzi v. Federal Life & Casualty Co., 75 P.2d 320, 42 N.M. 35, 115 A.L.R. 407.
Waiver of irregularity
It has been held that, where defendants waived an irregularity in the appointment of a special judge, a judgment rendered by such judge is not void.—Winters v. Allen, 62 S.W.2d 51, 166 Tenn. 281.

4. Fla.—Sapp v. McConnon & Co., 169 So. 622, 124 Fla. 879.
Ill.—Healy v. Mobile & O. R. Co., 161 Ill.App. 138.
Ind.—Herbster v. State, 80 Ind. 484.
Ky.—Coleman v. Mullins, 288 S.W. 701, 216 Ky. 761.
Mo.—Cook v. Cook, 68 S.W.2d 900, 228 Mo.App. 478.
Tex.—Younger Bros. v. Turner, Civ. App., 132 S.W.2d 632—Metropolitan Life Ins. Co. v. Painter, Civ.App., 64 S.W.2d 828—Clements v. Fort Worth & D. S. P. Ry. Co., Civ.App., 7 S.W.2d 895.
Signing at chambers
Special judge, unless duly commissioned to hold and holding court in county or courts of judicial district when signing judgment at chambers, was without authority in premises.—Bohannon v. Virginia Trust Co., 153 S.E. 263, 198 N.C. 702.

5. Ky.—Kirk v. Springton Coal Co., 124 S.W.2d 760, 276 Ky. 501.
Tex.—Bailey v. Triplett Bros., Civ. App., 278 S.W. 250.
33 C.J. p 1072 note 28.

6. N.Y.—Booth v. Kingsland Ave. Bldg. Ass'n, 46 N.Y.S. 457, 18 App. Div. 407, 408.
33 C.J. p 1072 note 29.

7. Colo.—O'Brophy v. Era Gold Min. Co., 85 P. 679, 36 Colo. 247.
Mo.—In re Buckles, 53 S.W.2d 1055, 331 Mo. 405.
33 C.J. p 1072 note 30.

8. Me.—Ex parte Davis, 41 Me. 38, 58.
33 C.J. p 1072 note 31.

9. **Failure to give notice adjourning case** was a mere irregularity, not invalidating judgment.—Intercity Carnival Co. v. Illions, 239 N.Y.S. 128, 136 Misc. 56.

10. Okl.—**Corpus Juris** quoted in, City of Sapulpa v. Young, 296 P. 418, 429, 147 Okl. 179.
33 C.J. p 1132 note 79.

11. U.S.—Sylvan Beach v. Koch, C.C.A.Mo., 140 F.2d 852—In re Noell, C.C.A.Mo., 93 F.2d 5—Smith v. Stark Trucking, D.C.Ohio, 53 F. Supp. 826—Fisher v. Jordan, D.C. Tex., 32 F.Supp. 603, reversed on other grounds, C.C.A., 116 F.2d 198, certiorari denied Jordan v. Fisher, 61 S.Ct. 734, 312 U.S. 697, 85 L. Ed. 1132.
Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.
D.C.—U. S. ex rel. Ordmann v. Cummings, 85 F.2d 273, 66 App.D.C. 107.
Ga.—Elliott v. Adams, 160 S.E. 336, 173 Ga. 312—Walton v. Wilkinson Bolton Co., 123 S.E. 103, 158 Ga. 13.
Ill.—Alward v. Borah, 44 N.E.2d 865, 381 Ill. 134—Hauser v. Power, 133 N.E. 580, 351 Ill. 36—In re Shanks' Estate, 282 Ill.App. 1.
Ky.—Jasper v. Tartar, 7 S.W.2d 236, 224 Ky. 334.
Mo.—Ex parte Irwin, 6 S.W.2d 597, 320 Mo. 20—State ex rel. National Lead Co. v. Smith, App., 134 S.W. 2d 1061.
N.J.—Redzina v. Provident Inst. for Savings in Jersey City, 125 A. 133, 96 N.J.Eq. 346.
N.Y.—Rochester Sav. Bank v. Monroe County, 8 N.Y.S.2d 107, 169 Misc. 526.
N.D.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261.
Or.—Kerns v. Couch, 17 P.2d 323, 141 Or. 147.
Pa.—In re Galli's Estate, 17 A.2d 899, 340 Pa. 561.
Tex.—Bozeman v. Arlington Heights Sanitarium, Civ.App., 134 S.W.2d 350, error refused—Moorhead v. Transportation Bank of Chicago, Ill., Civ.App., 62 S.W.2d 184.
Va.—Moore v. Smith, 15 S.E.2d 48, 177 Va. 621.
Wash.—Morley v. Morley, 230 P. 645, 131 Wash. 540.
33 C.J. p 1080 note 96.

ceedings following a proper summons to bring him before the court.[12]

§ 19. Jurisdiction

a. In general
b. Jurisdiction of person
c. Jurisdiction of subject matter or cause of action
d. Jurisdiction of question determined and relief granted

a. In General

A judgment rendered by a court having no jurisdiction is a mere nullity.

A judgment rendered by a court having no jurisdiction is a mere nullity, and will be so held and treated whenever and for whatever purpose it is sought to be used or relied on as a valid judgment.[13] Where a court is without jurisdiction, it is generally irregular to make any order in the

12. Ariz.—Potter v. Home Owners' Loan Corporation, 72 P.2d 429, 50 Ariz. 285.
Necessity of presence of parties at trial generally see the C.J.S. title Trial § 40, also 64 C.J. p 69 note 90—p 70 note 3.

13. U.S.—Green v. City of Stuart, C.C.A.Fla., 101 F.2d 309, certiorari denied 59 S.Ct. 827, 307 U.S. 626, 83 L.Ed. 1510—Albion-Idaho Land Co. v. Naf Irr. Co., C.C.A.Utah, 97 F.2d 439—In re Lake Champlain Pulp & Paper Corporation, D.C. N.Y., 20 F.2d 425.
Cal.—In re Gardiner's Estate, 114 P.2d 643, 45 Cal.App.2d 559.
Colo.—Atchison, T. & S. F. Ry. Co. v. Board of Com'rs of Fremont County, 87 P.2d 761, 95 Colo. 435.
D.C.—U. S. ex rel. Tungsten Reef Mines Co. v. Ickes, 84 F.2d 257, 66 App.D.C. 3.
Fla.—Malone v. Meres, 109 So. 677, 91 Fla. 709.
Ga.—City of Albany v. Parks, 5 S. E.2d 680, 61 Ga.App. 55.
Idaho.—East Side Lumber Co. v. Malmgren, 277 P. 554, 47 Idaho 560—Williams v. Sherman, 212 P. 971, 36 Idaho 494.
Ill.—Atkins v. Atkins, 65 N.E.2d 801, 393 Ill. 202—Martin v. Schillo, 60 N.E.2d 392, 389 Ill. 607, certiorari denied 65 S.Ct. 1572, 325 U.S. 880, 89 L.Ed. 1996—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267—People v. Brewer, 160 N.E. 76, 328 Ill. 472—Albers v. Bramberg, 32 N.E.2d 362, 308 Ill.App. 463—Jardine v. Jardine, 9 N.E.2d 645, 291 Ill.App. 152—Webster Grocer Co. v. Gammel, 1 N.E.2d 890, 285 Ill.App. 277—Eddy v. Dodson, 242 Ill.App. 503—Gary v. Senseman, 215 Ill.App. 232.
Iowa.—Stier v. Iowa State Traveling Men's Ass'n, 201 N.W. 328, 199 Iowa 113, 59 A.L.R. 1384.
Ky.—Thacker v. Phillips' Adm'r, 281 S.W. 831, 213 Ky. 687.
La.—Whitney Central Trust & Savings Bank v. Norton, 102 So. 306, 157 La. 199—Smith v. Shehee, App., 143 So. 339, amended 144 So. 750.
Me.—In re Williams' Estate, 41 A. 2d 825, 141 Me. 219—Appeal of Kelley, 1 A.2d 133, 136 Me. 7.
Md.—Fooks' Ex'rs v. Ghingher, 192 A. 732, 172 Md. 612, certiorari denied Phillips v. Ghingher, 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 561.
Mass.—Holt v. Holt, 153 N.E. 397, 257 Mass. 114.
Mich.—Ward v. Hunter Machinery Co., 248 N.W. 864, 263 Mich. 445.
Mo.—In re Buckles, 53 S.W.2d 1055, 331 Mo. 405—State ex rel. Hogan v. Meyers, App., 26 S.W.2d 816.
Mont.—Oregon Mortg. Co. v. Kunneke, 245 P. 539, 76 Mont. 117.
N.J.—Giresi v. Giresi, 44 A.2d 345—Kaufman v. Smathers, 166 A. 458, 111 N.J.Law 52—**Corpus Juris cited in** Keller v. American Cyanamid Co., 28 A.2d 41, 46, 132 N.J. Eq. 210.
N.Y.—Oberlander v. Oberlander, 39 N.Y.S.2d 139, 179 Misc. 459—**Corpus Juris quoted in** Van Buren v. Harrison, 299 N.Y.S. 485, 486, 164 Misc. 774—Clarke v. Carlisle Foundry Co., 270 N.Y.S. 351, 150 Misc. 710.
N.C.—Ward v. Agrillo, 139 S.E. 451, 194 N.C. 321—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.
Ohio.—Sampliner v. Bialosky, 25 Ohio N.P.,N.S., 161.
Okl.—O. C. Whitaker, Inc., v. Dillingham, 152 P.2d 371, 194 Okl. 421—**Corpus Juris cited in** Fitzsimmons v. Oklahoma City, 135 P.2d 340, 342, 192 Okl. 248—Hinkle v. Jones, 66 P.2d 1073, 180 Okl. 17—St. Louis-San Francisco Ry. Co. v. Bayne, 40 P.2d 1104, 170 Okl. 542—Henson v. Oklahoma State Bank, 23 P.2d 709, 165 Okl. 1—Tulsa Terminal, Storage & Transfer Co. v. Thomas, 18 P.2d 891, 162 Okl. 5.
Pa.—In re Patterson's Estate, 19 A. 2d 165, 341 Pa. 177—Mamlin v. Tener, 23 A.2d 90, 146 Pa.Super. 593—Mintz v. Mintz, 83 Pa.Super. 85.
S.D.—Hurley v. Coursey, 265 N.W. 4, 64 S.D. 131—In re Schafer's Estate, 209 N.W. 355, 50 S.D. 232, adhered to In re Schafer's Estate, 216 N. W. 948, 52 S.D. 132.
Tenn.—Johnson v. White, 106 S.W. 2d 222, 171 Tenn. 536—Ward v. Lovell, 113 S.W.2d 759, 21 Tenn. App. 560—Western Automobile Casualty Co. v. Burnell, 71 S.W.2d 474, 17 Tenn.App. 687.
Tex.—Conn v. Campbell, 24 S.W.2d 813, 119 Tex. 82—Leslie v. Griffin, Com.App., 25 S.W.2d 820—Renshaw v. Wise County, Civ.App., 142 S.W. 2d 578—Green v. Duncan, Civ.App., 134 S.W.2d 744—Galley v. Hedrick, Civ.App., 127 S.W.2d 978—Askew v. Roundtree, Civ.App., 120 S.W. 2d 117, error dismissed—Fowzer v. Huey & Philp Hardware Co., Civ.App., 99 S.W.2d 1100, error dismissed—Westerly Supply Corporation v. State, Civ.App., 89 S.W. 2d 244—**Corpus Juris cited in** Wilkinson v. Owens, Civ.App., 72 S.W. 2d 330, 335—King v. King, Civ. App., 291 S.W. 645—Glenn v. Dallas County Bois D'Arc Island Levee Dist., Civ.App., 282 S.W. 339, reversed on other grounds Dallas County Bois D'Arc Island Levee Dist. v. Glenn, Com.App., 288 S.W. 165.
Va.—**Corpus Juris cited in** Bray v. Landergren, 172 S.E. 252, 257, 161 Va. 699.
Vt.—Roddy v. Fitzgerald's Estate, 35 A.2d 668, 113 Vt. 472.
Wash.—Parr v. City of Seattle, 84 P. 2d 375, 197 Wash. 53.
W.Va.—Perkins v. Hall, 17 S.E.2d 795, 123 W.Va. 707—**Corpus Juris cited in** Pettry v. Shinn, 196 S.E. 385, 386, 120 W.Va. 20.
33 C.J. p 1073 note 33.
Jurisdiction generally see Courts §§ 15–119.
"A judgment rendered without jurisdiction is a nullity and the party against whom it is entered may ignore it and proceed as though no attempt had ever been made to render it."—Moeur v. Ashfork Livestock Co., 61 P.2d 395, 397, 48 Ariz. 298.

Other statements of rule

(1) Where a court acts without authority, its judgments are nullities.
D.C.—U. S. ex rel. Ordmann v. Cummings, 85 F.2d 273, 66 App.D.C. 107.
Fla.—Malone v. Meres, 109 So. 677, 91 Fla. 709.
N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.

(2) Judgment is void where jurisdictional fact on which court's authority to act depends is absent.—Turk v. Turk, 18 S.W.2d 1003, 230 Ky. 191.

(3) "Without jurisdiction there is no validity or vitality to the judg-

cause except to dismiss the suit.[14] The validity of a judgment depends on the jurisdiction of the court before rendition, not on what may occur subsequently.[15] It has been stated, however, that it cannot be broadly asserted that a judgment is always a nullity if jurisdiction of some sort or other is wanting.[16]

Loss of jurisdiction. Jurisdiction which has once attached may be lost, and thereby the court may be deprived of the authority to make any further order or judgment,[17] as where the case has been taken up on appeal or error,[18] or duly removed from a state court to a federal court.[19] So jurisdiction may be lost and the authority of the court terminated by the expiration of the term without judgment rendered and without a proper continuance.[20]

Error in exercise of jurisdiction. Want of jurisdiction must be distinguished from error in the exercise of jurisdiction.[21] Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void,[22] and, as discussed infra § 449, until set aside it is valid and binding

ment."—Carroll v. Berger, 150 N.E. 870, 872, 255 Mass. 132.

(4) A judgment rendered by a court without jurisdiction is not a final and binding judgment.—In re Waters' Estate, Mo.App., 153 S.W. 2d 774.

(5) A court cannot render valid judgment in case of which it has no potential jurisdiction.—Kirk v. Head, 152 S.W.2d 726, 137 Tex. 44.

(6) Where court is inherently without power to hear and determine, any judgment rendered is a mere nullity.—United Production Corporation v. Hughes, 152 S.W.2d 327, 137 Tex. 21.

14. U.S.—New Orleans Mail Co. v. Flanders, La., 12 Wall. 130, 20 L. Ed. 249.
33 C.J. p 1074 note 37.

15. Tex.—Hicks v. Sias, Civ.App., 102 S.W.2d 460, error refused.

16. U.S.—Carter v. U. S., C.C.A.Ala., 135 F.2d 858.

Necessity of record

A judgment is not void in the legal sense for want of jurisdiction unless its invalidity and want of jurisdiction appear on the record, but is merely voidable.—Jupe v. Home Owners Loan Corp., Okl., 167 P.2d 46—Edwards v. Smith, 142 P. 302, 42 Okl. 544.

Jurisdictional defects as grounds for collateral attack on judgments see infra §§ 421–427.

17. Ill.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101—Watkins v. Dunbar, 149 N.E. 14, 318 Ill. 174.
Ky.—Combs v. Deaton, 251 S.W. 638, 199 Ky. 477.
Wis.—State ex rel. Lang v. Civil Court of Milwaukee County, 280 N.W. 347, 228 Wis. 411.
33 C.J. p 1074 note 38.

Ancillary matter

Where jurisdiction to render a judgment is ended, no jurisdiction remains as to matter purely ancillary to that object.—Cutrone v. Cutrone, 29 N.Y.S.2d 405, 176 Misc. 988, affirmed 30 N.Y.S.2d 813, 262 App. Div. 992.

18. Mass.—Boynton v. Foster, 7 Metc. 415.

19. Minn.—Roberts v. Chicago, St. P. M. & O. R. Co., 51 N.W. 478, 48 Minn. 521.

20. Wis.—Witt v. Henze, 16 N.W. 609, 58 Wis. 244.
Rendition of judgment during term see supra § 16 b.

21. Mich.—**Corpus Juris quoted in** Jackson City Bank & Trust Co. v. Frederick, 260 N.W. 908, 910, 271 Mich. 538.
Wash.—In re Waters of Doan Creek, 299 P. 383, 162 Wash. 695.

22. Ala.—**Corpus Juris cited in** James v. State, 181 So. 709, 712, 28 Ala.App. 225.
Ark.—**Corpus Juris cited in** Ex parte O'Neal, 87 S.W.2d 401, 403, 191 Ark. 696.
Fla.—Childs v. Boots, 152 So. 212, 112 Fla. 277—Malone v. Meres, 109 So. 677, 91 Fla. 709.
Ga.—Lester v. Southern Security Co., 147 S.E. 529, 168 Ga. 307—**Corpus Juris cited in** Georgia Power Co. v. Friar, 171 S.E. 210, 214, 47 Ga.App. 675, affirmed 175 S.E. 807, 179 Ga. 470.
Idaho.—Baldwin v. Anderson, 299 P. 341, 50 Idaho 606, certiorari granted American Surety Co. of New York v. Baldwin, 52 S.Ct. 499, 286 U.S. 536, 76 L.Ed. 1275, and certiorari dismissed American Surety Co. v. Baldwin, 53 S.Ct. 98, 287 U. S. 156, 77 L.Ed. 231, 86 A.L.R. 298.
Ill.—Heitman Trust Co. v. Parlee, 40 N.E.2d 732, 314 Ill.App. 83—**Corpus Juris cited in** Hampton v. Grissom, 4 N.E.2d 895, 287 Ill.App. 294—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392—Knapik v. Stefek, 274 Ill.App. 19.
Ind.—Freimann v. Gallmeier, App., 63 N.E.2d 150.
Ky.—Stewart v. Sampson, 148 S.W.2d 278, 285 Ky. 447—Henderson v. Commonwealth, 251 S.W. 988, 199 Ky. 795.
Mich.—**Corpus Juris quoted in** Jackson City Bank & Trust Co. v. Frederick, 260 N.W. 908, 910, 271 Mich. 538.
N.C.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
Okl.—Protest of St. Louis-San Francisco Ry. Co., 26 P.2d 212, 166 Okl. 50.
Or.—Lytle v. Payette-Oregon Slope Irr. Dist., 152 P.2d 934, 156 A.L.R. 894.
Tex.—**Corpus Juris cited in** Texas Employers' Ins. Ass'n v. Ezell, Com.App., 14 S.W.2d 1018, 1019, rehearing denied 16 S.W.2d 523—Waples Platter Co. v. Miller, Civ.App., 139 S.W.2d 833—American Law Book Co. v. Dykes, Civ. App., 278 S.W. 247.
Wash.—**Corpus Juris quoted in** In re Waters of Doan Creek in Walla Walla County, 299 P. 383, 162 Wash. 695.
Wyo.—State v. District Court of Eighth Judicial Dist. within and for Natrona County, 260 P. 174, 37 Wyo. 169.
33 C.J. p 1079 note 82—34 C.J. p 508 note 7.
Operation and effect of void and voidable judgments see infra §§ 449–452.

Other statements of rule

(1) A judgment is not void, even though it may be erroneous if court had jurisdiction of person of defendant and of the subject matter of the suit and had power to render particular judgment which it entered, and such a judgment is valid until reversed.—People ex rel. Merrill v. Hazard, 196 N.E. 827, 361 Ill. 60.

(2) Where court of general jurisdiction has jurisdiction of subject matter and parties, no judgment it may render within the issues is void, however erroneous it may be.—City of Huntington v. Northern Indiana Power Co., 5 N.E.2d 889, 211 Ind. 502, dissenting opinion 6 N.E.2d 335, 211 Ind. 502.

(3) Where a court has jurisdiction over the person and the subject

for all purposes. Error in the determination of questions of law or fact on which the court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction.[23]

b. Jurisdiction of Person

A judgment in personam is void unless the court has jurisdiction of the persons involved.

A judgment in personam is void unless the court has jurisdiction of the persons involved.[24] The

matter, no error in the exercise of such jurisdiction can make the judgment void even if there is a fundamental error of law appearing on the face of the record and such judgment is valid until avoided.—Mahaffa v. Mahaffa, 298 N.W. 916, 230 Iowa 679.

(4) A judgment is never void for error, provided the court rendering it had jurisdiction over the person of the defendant and the subject matter of the action.—Sheridan v. Sheridan, 4 N.W.2d 735, 213 Minn. 24.

Property rights

Where a court in the exercise of its jurisdiction enters a decree affecting property rights contrary to statute, the court is guilty of error of judgment, but such error does not render the decree void, nor does the fact that the error may appear on the face of the decree itself indicate its nullity.—In re Gardiner's Estate, 114 P.2d 643, 45 Cal.App.2d 559.

23. Ala.—**Corpus Juris cited in** James v. State, 181 So. 709, 712, 28 Ala.App. 225.
Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.
Mich.—**Corpus Juris quoted in** Jackson City Bank & Trust Co. v. Frederick, 260 N.W. 908, 910, 271 Mich. 538.
Tex.—**Corpus Juris quoted in** Ferguson v. Ferguson, Civ.App., 98 S.W. 2d 847, 850.
33 C.J. p 1079 note 83.

24. U.S.—Buss v. Prudential Ins. Co. of America, C.C.A.Iowa, 126 F.2d 960—Mulcahy v. Whitehill, D.C.Mass., 48 F.Supp. 917—In re American Fidelity Corporation, D. C.Cal., 28 F.Supp. 462—Baskin v. Montedonico, D.C.Tenn., 26 F.Supp. 394, affirmed, C.C.A., 115 F.2d 837—U. S. v. U. S. Fidelity & Guaranty Co., D.C.Okl., 24 F.Supp. 961, modified on other grounds, C.C.A., 106 F.2d 804, reversed on other grounds 60 S.Ct. 653, 309 U.S. 506, 84 L.Ed. 894.
Ala.—Farrell v. Farrell, 10 So.2d 153, 243 Ala. 389—Ex parte Kelly, 128 So. 443, 221 Ala. 339—**Corpus Juris cited in** Ex parte Whitehead, 199 So. 876, 878, 29 Ala.App. 583, certiorari denied 199 So. 879, 240 Ala. 447.
Alaska.—In re Young's Estate, 9 Alaska 158.
Ariz.—Varnes v. White, 12 P.2d 870, 40 Ariz. 427.
Cal.—Hunter v. Superior Court in and for Riverside County, 97 P.2d 492, 36 Cal.App.2d 100—Northington v. Industrial Accident Commission, 72 P.2d 909, 23 Cal.App.2d 255—Ex parte Cohen, 290 P. 512, 107 Cal.App. 288—Jellen v. O'Brien, 264 P. 1115, 89 Cal.App. 505.
Conn.—O'Leary v. Waterbury Title Co., 166 A. 673, 117 Conn. 39.
D.C.—U. S. ex rel. Ordmann v. Cummings, 85 F.2d 273, 66 App.D.C. 107.
Fla.—United Brotherhood of Carpenters and Joiners of America v. Graves Inv. Co., 15 So.2d 196, 153 Fla. 529—Skipper v. Schumacker, 169 So. 58, 124 Fla. 384, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376—Coslick v. Finney, 140 So. 216, 104 Fla. 394.
Ga.—McKnight v. Wilson, 122 S.E. 702, 158 Ga. 153—W. T. Rawleigh Co. v. Greenway, 26 S.E.2d 458, 69 Ga.App. 590—Anderson v. Turner, 133 S.E. 306, 35 Ga.App. 428.
Ill.—People ex rel. Fisher v. Baltimore & O. R. Co., 61 N.E.2d 382, 390 Ill. 389—Heitman Trust Co. v. Parlee, 40 N.E.2d 732, 314 Ill.App. 83—Sunbeam Heating Co. v. Chambers, 38 N.E.2d 544, 312 Ill.App. 382—Davis v. Oliver, 25 N.E.2d 905, 304 Ill.App. 71—In re Shanks' Estate, 282 Ill.App. 1.
Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 109, 218 Ind. 468, rehearing denied 33 N.E. 2d 583, 218 Ind. 468.
Ky.—Hill v. Walker, 180 S.W.2d 93, 297 Ky. 257, 154 A.L.R. 814—Gover v. Wheeler, 178 S.W.2d 404, 296 Ky. 734—Max Ams, Inc., v. Barker, 170 S.W.2d 45, 293 Ky. 698—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691—Lowther v. Moss, 39 S.W.2d 501, 239 Ky. 290—Lorton v. Ashbrook, 295 S.W. 1027, 220 Ky. 830.
Mass.—Carroll v. Berger, 150 N.E. 870, 255 Mass. 132.
Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061.
N.Y.—Carbone v. Carbone, 2 N.Y.S. 2d 869, 166 Misc. 924—**Corpus Juris quoted in** Universal Credit Co. v. Blinderman, 288 N.Y.S. 79, 80, 158 Misc. 917—In re Killough's Estate, 265 N.Y.S. 301, 148 Misc. 73—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 168, 131 Misc. 401, affirmed 230 N.Y.S. 910, 224 App.Div. 773.
N.C.—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.
Ohio.—Terry v. Claypool, 65 N.E.2d 883, 77 Ohio App. 77—Ruckert v. Matil Realty, App., 40 N.E.2d 688—Sampliner v. Bialosky, 25 Ohio N.P.,N.S., 161.
Okl.—Fitzsimmons v. Oklahoma City, 135 P.2d 340, 192 Okl. 248—Oklahoma City v. Robinson, 65 P.2d 531, 179 Okl. 309—Moroney v. State ex rel. Southern Surety Co., 31 P. 2d 926, 168 Okl. 69—Henson v. Oklahoma State Bank, 23 P.2d 709, 165 Okl. 1—State v. Armstrong, 13 P.2d 198, 158 Okl. 290.
Tex.—Kuteman v. Ratliff, Civ.App., 154 S.W.2d 684—Olton State Bank v. Howell, Civ.App., 105 S.W.2d 287—San Jacinto Finance Corporation v. Perkins, Civ.App., 94 S. W.2d 1213—Simms Oil Co. v. Butcher, Civ.App., 55 S.W.2d 192, error dismissed—Reed v. State, Cr., 187 S.W.2d 660.
Va.—Robertson v. Commonwealth, 25 S.E.2d 352, 181 Va. 520, 146 A.L.R. 966.
33 C.J. p 1074 note 43.

Other statements of rule

(1) Jurisdiction of the person is essential to the rendition of a valid judgment.
Cal.—Jellen v. O'Brien, 264 P. 1115, 89 Cal.App. 505.
Fla.—Arcadia Citrus Growers Ass'n v. Hollingsworth, 185 So. 431, 135 Fla. 322.
Mich.—Ward v. Hunter Machinery Co., 248 N.W. 864, 263 Mich. 445.
N.M.—State ex rel. State Tax Commission v. Chavez, 101 P.2d 389, 44 N.M. 260—In re Field's Estate, 60 P.2d 945, 40 N.M. 423.
Tex.—Commander v. Bryon, Civ.App., 123 S.W.2d 1008.
Vt.—In re Hanrahan's Will, 194 A. 471, 109 Vt. 108.

(2) Jurisdiction of the party, obtained by the court in some way allowed by law, is essential to enable the court to give a valid judgment against him.—Powell v. Turpin, 29 S.E.2d 26, 224 N.C. 67—City of Monroe v. Niven, 20 S.E.2d 311, 221 N. C. 362—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465.

(3) It is essential to the efficacy of a judgment that the court have jurisdiction over the person.—Crabtree v. Ætna Life Ins. Co., 111 S.W. 2d 103, 341 Mo. 1173.

A judgment or portion thereof which attempts to settle rights of parties, over whom the court has no jurisdiction, is void as to such parties.—Barrett v. Board of Com'rs of Tulsa County, 90 P.2d 442, 185 Okl. 111.

court must have jurisdiction of plaintiff, or the person in whose favor it is rendered,[25] and also of defendant or the person against whom it is rendered.[26] Accordingly a judgment for or against one who for any reason is no longer before the court is wholly void.[27] Where a statute requires that certain actions shall be brought only in the district or county where defendant resides, it has been held that no jurisdiction of the person of defendant can be obtained in any district or county other than the one in which he resides, if defendant stands on his privilege, and a judgment against him in such other district or county is void for want of jurisdiction.[28]

Consent. Where the court has jurisdiction of the subject matter or cause of action, jurisdiction of the parties may be conferred by their consent, and in such cases the judgment is valid,[29] as where defendant waives an exemption from suit and consents to be sued,[30] or waives the privilege of being sued only in a particular place, county, or district, and consents to be sued in some other place, county, or district,[31] except where the rights of other persons would be prejudiced[32] or some rule of public policy requires that defendant shall be sued only in a designated place.[33]

c. Jurisdiction of Subject Matter or Cause of Action

A court cannot render a valid judgment unless it has jurisdiction over the subject matter of the litigation or the cause of action.

Even with full jurisdiction over the parties, no court can render a valid judgment unless it also has jurisdiction over the subject matter of the litigation or the cause of action.[34] A judgment is wholly void in cases where the subject matter is with-

25. N.Y.—In re Clark's Will, 3 N.Y.S.2d 364, 166 Misc. 909—Corpus Juris quoted in Universal Credit Co. v. Binderman, 288 N.Y.S. 79, 80, 15 Misc. 917.
33 C.J. p 1075 note 44.

26. Iowa.—Allen v. Allen, 298 N.W. 869, 230 Iowa 504, 136 A.L.R. 617.
Miss.—Bank of Richton v. Jones, 121 So. 823, 153 Miss. 796.
Mo.—Noll v. Alexander, App., 282 S.W. 739.
Neb.—Hassett v. Durbin, 271 N.W. 867, 132 Neb. 315.
Tex.—Maury v. Turner, Com.App., 244 S.W. 809.
Va.—Drewry v. Doyle, 20 S.E.2d 548, 179 Va. 715.
Wash.—Colby v. Himes, 17 P.2d 606, 171 Wash. 83.
33 C.J. p 1075 note 45.

27. N.Y.—Corpus Juris quoted in Universal Credit Co. v. Binderman, 288 N.Y.S. 79, 80, 15 Misc. 917.
33 C.J. p 1075 note 48.

28. La.—Alter v. Pickett, 24 La. Ann. 513.
33 C.J. p 1075 note 51.

29. Md.—C. I. T. Corporation v. Powell, 170 A. 740, 166 Md. 208.
33 C.J. p 1078 note 77.

30. Mass.—Hall v. Young, 8 Pick. 80, 15 Am.D. 180.
33 C.J. p 1078 note 78.

31. Tex.—Lloyds Casualty Co. of New York v. Lem, Civ.App., 62 S.W.2d 497, error dismissed.
33 C.J. p 1078 note 79.

32. Ga.—Raney v. McRae, 14 Ga. 589, 60 Am.D. 660.
33 C.J. p 1078 note 80.

33. Ga.—Central Bank v. Gibson, 11 Ga. 453.
Creditors
Where neither of defendants was domiciled in the county in which suit was brought, a judgment in favor of a creditor has been held void as to other creditors.—Anthony v. Bobo, 81 S.E. 128, 141 Ga. 440.

34. U.S.—Kernan v. Campbell, C.C.A.N.Y., 45 F.2d 123—In re American Fidelity Corporation, D.C.Cal., 28 F.Supp. 462—U. S. v. U. S. Fidelity & Guaranty Co., D.C.Okl., 24 F.Supp. 961, modified on other grounds, C.C.A., 106 F.2d 804, reversed on other grounds 60 S.Ct. 653, 309 U.S. 506, 84 L.Ed. 894.
Ala.—Farrell v. Farrell, 10 So.2d 153, 243 Ala. 389—Ex parte Kelly, 128 So. 443, 221 Ala. 339.
Ariz.—Varnes v. White, 12 P.2d 870, 40 Ariz. 427.
Ark.—Axley v. Hammock, 50 S.W.2d 608, 185 Ark. 939.
Cal.—Northington v. Industrial Accident Commission, 72 P.2d 909, 23 Cal.App.2d 255—Ex parte Cohen, 290 P. 512, 107 Cal.App. 288—Jellen v. O'Brien, 264 P.2d 1115, 89 Cal.App. 505.
Conn.—O'Leary v. Waterbury Title Co., 166 A. 673, 117 Conn. 39.
Fla.—United Brotherhood of Carpenters and Joiners of America v. Graves Inv. Co., 15 So.2d 196, 153 Fla. 529—Arcadia Citrus Growers Ass'n v. Hollingsworth, 185 So. 431, 135 Fla. 322—Skipper v. Schumacker, 169 So. 58, 124 Fla. 384, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376—Coslick v. Finney, 140 So. 216, 104 Fla. 394.
Ga.—Deans v. Deans, 137 S.E. 829, 164 Ga. 162—McKenzie v. Perdue, 19 S.E.2d 765, 67 Ga.App. 202, reversed on other grounds Perdue v. McKenzie, 21 S.E.2d 705, 194 Ga. 356, vacated McKenzie v. Perdue, 23 S.E.2d 183, 68 Ga.App. 498—Robinson v. Attapulgus Clay Co., 189 S.E. 555, 55 Ga.App. 141—Corpus Juris cited in Georgia Power Co. v. Friar, 171 S.E. 210, 214, 47 Ga.App. 675.
Hawaii.—Meyer v. Territory, 36 Hawaii 75—Wong Kwai Tong v. Choy Yin, 31 Hawaii 603.
Ill.—People ex rel. Fisher v. Baltimore & O. R. Co., 61 N.E.2d 382, 390 Ill. 389—Martin v. Schillo, 60 N.E.2d 392, 389 Ill. 607, certiorari denied 65 S.Ct. 1572, 325 U.S. 880, 89 L.Ed. 1996—Herb v. Pitcairn, 51 N.E.2d 277, 384 Ill. 237, reversed on other grounds 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L.Ed. 2005. Opinion supplemented 64 N.E.2d 318, 392 Ill. 151—Werner v. Illinois Cent. R. Co., 42 N.E.2d 82, 379 Ill. 559—Heitman Trust Co. v. Parlee, 40 N.E.2d 732, 314 Ill.App. 83—Sunbeam Heating Co. v. Chambers, 38 N.E.2d 544, 312 Ill.App. 382—Davis v. Oliver, 25 N.E.2d 905, 304 Ill. App. 71, transferred, see 20 N.E.2d 532, 371 Ill. 287—In re Shanks' Estate, 282 Ill.App. 1.
Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 109, 218 Ind. 468, rehearing denied 33 N.E. 2d 583, 210 Ind. 468—Brown v. State, 37 N.E.2d 73, 219 Ind. 251, 137 A.L.R. 679.
Kan.—Corpus Juris cited in Starke v. Starke, 125 P.2d 738, 740, 155 Kan. 331—Corpus Juris quoted in Board of Commissioners of Crawford County v. Radley, 8 P.2d 386, 387, 134 Kan. 704.
Ky.—Max Ams, Inc. v. Barker, 170 S.W.2d 45, 293 Ky. 698—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691—Lowther v. Moss, 39 S.W.2d 501, 239 Ky. 290—Lorton v. Asbrook, 295 S.W. 1027, 220 Ky. 830.
La.—Jones v. Crescent City Ice Mfg. Co., 3 La.App. 7—State ex rel. Fourroux v. Board of Directors of

held from the jurisdiction of the particular court, or is placed within the exclusive jurisdiction of another court,[35] or where the jurisdiction depends on a statute which was repealed before suit.[36] Where the jurisdiction of a court depends on the amount in controversy, a judgment for a sum in excess of the amount over which the court has jurisdiction is void.[37]

Consent of parties. Since the agreement or consent of the parties cannot give the court the right to adjudicate on any cause of action or subject matter which the law has withheld from its cognizance, any judgment rendered in such a case is void notwithstanding such consent or agreement.[38]

d. Jurisdiction of Question Determined and Relief Granted

It is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to decide, and jurisdiction to render a judgment for the particular remedy or relief which the judgment undertakes to grant.

In addition to jurisdiction of the parties and the subject matter, it is necessary to the validity of a judgment that the court should have jurisdiction of

Public Schools of Jefferson Parish, 3 La.App. 2.
Mass.—Carroll v. Berger, 150 N.E. 870, 255 Mass. 132.
Mich.—Ward v. Hunter Machinery Co., 248 N.W. 864, 263 Mich. 445.
Mo.—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061—Noll v. Alexander, App., 282 S.W. 739.
N.J.—Fidelity Union Trust Co. v. Ackerman, 191 A. 813, 121 N.J.Eq. 497, modified on other grounds 199 A. 379, 123 N.J.Eq. 556.
N.M.—State ex rel. State Tax Commission v. Chavez, 101 P.2d 389, 44 N.M. 260—In re Field's Estate, 60 P.2d 945, 40 N.M. 423.
N.Y.—Anonymous v. Anonymous, 22 N.Y.S.2d 598, 174 Misc. 906—**Corpus Juris quoted in** Van Buren v. Harrison, 299 N.Y.S. 485, 486, 164 Misc. 774—Universal Credit Co. v. Blinderman, 288 N.Y.S. 79, 158 Misc. 917—MacAffer v. Boston & M. R. R., 273 N.Y.S. 679, 242 App. Div. 140, affirmed 197 N.E. 328, 268 N.Y. 400—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 163, 131 Misc. 401, affirmed 230 N. Y.S. 910, 224 App.Div. 773.
N.C.—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.
Ohio.—Ruckert v. Matil Realty Co., App., 40 N.E.2d 688—Sampliner v. Bialasky, 25 Ohio N.P.,N.S., 161.
Okl.—Fitzsimmons v. Oklahoma City, 135 P.2d 340, 192 Okl. 248—Oklahoma City v. Robinson, 65 P.2d 531, 179 Okl. 309—Moroney v. State ex rel. Southern Surety Co., 31 P. 2d 926, 168 Okl. 69—Henson v. Oklahoma State Bank, 23 P.2d 709, 165 Okl. 1—State v. Armstrong, 13 P.2d 198, 158 Okl. 290.
S.C.—Betsill v. Betsill, 196 S.E. 381, 187 S.C. 50.
S.D.—Reddin v. Frick, 223 N.W. 50, 54 S.D. 277.
Tenn.—Manning v. Feidelson, 136 S. W.2d 510, 175 Tenn. 576.
Tex.—Campsey v. Brumley, Com. App., 55 S.W.2d 810—H. H. Watson Co. v. Cobb Grain Co., Com. App., 292 S.W. 174—Maury v. Turner, Com.App., 244 S.W. 809—Kuteman v. Ratliff, Civ.App., 154 S.W.2d 864—Commander v. Bryan, Civ.App., 123 S.W.2d 1008—Olton State Bank v. Howell, Civ.App., 105 S.W.2d 287—Reed v. State, Cr., 187 S.W.2d 660.
Va.—Robertson v. Commonwealth, 25 S.E.2d 352, 181 Va. 520, 146 A. L.R. 966—Drewry v. Doyle, 20 S.E. 2d 548, 179 Va. 715—Barnes v. American Fertilizer Co., 180 S.E. 902, 144 Va. 692.
Vt.—In re Hanrahan's Will, 194 A. 471, 109 Vt. 108.
Wash.—Colby v. Himes, 17 P.2d 606, 171 Wash. 83.
W.Va.—**Corpus Juris cited in** Hustead v. Boggess, 12 S.E.2d 514, 515, 122 W.Va. 493.
33 C.J. p 1075 note 61.

Nullity of judgment results from want of jurisdiction over the subject matter.
Cal.—Hunter v. Superior Court in and for Riverside County, 97 P. 2d 492, 36 Cal.App.2d 100.
Tex.—San Jacinto Finance Corporation v. Perkins, Civ.App., 94 S.W. 2d 1213.

General and special jurisdiction
The rule that jurisdiction is of two kinds, jurisdiction of the subject matter and jurisdiction of the person and that both must concur or judgment will be void in any case in which court has assumed to act, refers to general jurisdiction vested in court and applies to special jurisdiction only to extent court exceeds special jurisdiction granted. —Herb v. Pitcairn, 64 N.E.2d 519, 392 Ill. 138.

35. U.S.—Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F. 2d 304—**Corpus Juris cited in** U. S. v. Turner, C.C.A.N.D., 47 F.2d 86, 89.
Kan.—**Corpus Juris quoted in** Board of Commissioners of Crawford County v. Radley, 8 P.2d 386, 387, 134 Kan. 704.
33 C.J. p 1076 note 62.

36. Kan.—**Corpus Juris quoted in** Board of Commissioners of Crawford County v. Radley, 8 P.2d 386, 387, 134 Kan. 704.
Neb.—Omaha Coal, Coke & Lime Co. v. Suess, 74 N.W. 620, 54 Neb. 379.

37. Tenn.—Reynolds v. Hamilton, 77 S.W.2d 986, 18 Tenn.App. 380.
Tex.—Davis v. Jordan, Civ.App., 151 S.W.2d 291.
33 C.J. p 1076 note 68.

Separation of single cause of action
Judgments rendered in a court of limited jurisdiction in separate actions brought by landlord for separate past-due installments of rent, the total of which installments exceeded the jurisdiction of the court, was void for want of jurisdiction, in view of attempted separation of single cause of action.—F. W. Woolworth & Co. v. Zimmerman, 179 A. 474, 13 N.J.Misc. 505.

38. Ala.—Ex parte Phillips, 165 So. 80, 231 Ala. 364—Crabtree v. Miller, 155 So. 529, 229 Ala. 103.
Ark.—Hendricks v. Henson, 92 S.W. 2d 867, 192 Ark. 544.
La.—Walker v. Fitzgerald, App., 24 So.2d 263.
Mo.—In re Buckles, 53 S.W.2d 1055, 331 Mo. 405.
N.J.—Fidelity Union Trust Co. v. Ackerman, 191 A. 813, 121 N.J. Eq. 497, modified on other grounds 199 A. 379, 123 N.J.Eq. 556.
N.Y.—In re Brennan's Estate, 221 N. Y.S. 462, 129 Misc. 283.
Ohio.—Bobala v. Bobala, 33 N.E. 2d 845, 68 Ohio App. 63.
Va.—Nolde Bros. v. Chalkley, 35 S. E.2d 827.
W.Va.—**Corpus Juris cited in** Hustead v. Boggess, 12 S.E.2d 514, 515, 122 W.Va. 493.
33 C.J. p 1077 note 75.

Estoppel
(1) It has been held that, whenever there is want of authority to hear and determine subject matter of controversy, an adjudication on merits is null, and does not estop even assenting party.—Cooper v. Davis, 248 N.Y.S. 227, 231 App.Div. 527.

(2) It has been held, however, that one who invokes the jurisdiction of the court cannot object to a judgment on the ground that the court had no jurisdiction of defendant.—Fostoria v. Fox, 54 N.E. 370, 60 Ohio St. 340.

the question which its judgment assumes to decide,[39] and jurisdiction to render a judgment for the particular remedy or relief which the judgment undertakes to grant.[40] Where the court does not have such jurisdiction, the judgment is void.[41]

39. Idaho.—**Corpus Juris quoted in** Banbury v. Brailsford, 158 P.2d 826, 836—**Corpus Juris quoted in** Baldwin v. Anderson, 8 P.2d 461, 462, 51 Idaho 614—Maloney v. Zipf, 237 P. 632, 41 Idaho 30.
Kan.—**Corpus Juris quoted in** Board of Commissioners of Crawford County v. Radley, 8 P.2d 386, 387, 134 Kan. 704.
Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061—**Corpus Juris cited in** Mesendieck Grain Co. v. Folz, 50 S.W.2d 159, 161, 227 Mo.App. 24.
Ohio.—Sampliner v. Bialasky, 25 Ohio N.P.,N.S., 161.
N.M.—State ex rel. State Tax Commission v. Chavez, 101 P.2d 389, 44 N.M. 260—In re Field's Estate, 60 P.2d 945, 40 N.M. 423.
Okl.—**Corpus Juris quoted in** Hinkle v. Jones, 66 P.2d 1073, 1076, 180 Okl. 17—**Corpus Juris quoted in** Oklahoma City v. Robinson, 65 P. 2d 531, 533, 179 Okl. 309—**Corpus Juris quoted in** Whitehead v. Bunch, 272 P. 878, 879, 134 Okl. 63.
Va.—Hubbard v. Davis, 25 S.E.2d 256, 181 Va. 549—Drewry v. Doyle, 20 S.E.2d 548, 179 Va. 715.
33 C.J. p 1076 note 70.

Determination of jurisdiction

Jurisdiction to render judgment in particular action must be determined and tested by pleadings and relief sought.—Boring v. Dodd, 217 N.W. 580, 116 Neb. 366.

40. U.S.—U. S. v. U. S. Fidelity & Guaranty Co., D.C.Okl., 24 F.Supp. 961, modified on other grounds 106 F.2d 804, reversed on other grounds 60 S.Ct. 653, 309 U.S. 506, 84 L.Ed. 894.
Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344—Hill v. Favour, 84 P. 2d 575, 52 Ariz. 561—Varnes v. White, 12 P.2d 870, 40 Ariz. 427—Arizona Land & Stock Co. v. Markus, 296 P. 251, 37 Ariz. 530—Western Land & Cattle Co. v. National Bank of Arizona at Phoenix, 239 P. 299, 29 Ariz. 51.
Cal.—Jellen v. O'Brien, 264 P. 1115, 89 Cal.App. 505.
Colo.—Williams v. Hankins, 225 P. 243, 75 Colo. 136—People v. Burke, 212 P. 837, 72 Colo. 486, 30 A.L.R. 1085.
Fla.—United Brotherhood of Carpenters and Joiners of America v. Graves Inv. Co., 15 So.2d 196, 153 Fla. 529—Arcadia Citrus Growers Ass'n v. Hollingsworth, 185 So. 431, 135 Fla. 322—Skipper v. Schumacher, 169 So. 58, 124 Fla. 334, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376—Childs v. Boots, 152 So. 212, 112 Fla. 277—Coslick v. Finney, 140 So. 216, 104 Fla. 394.
Idaho.—**Corpus Juris quoted in** Banbury v. Brailsford, 158 P.2d 826, 836—**Corpus Juris quoted in** Baldwin v. Anderson, 8 P.2d 461, 462, 51 Idaho 614—Maloney v. Zipf, 237 P. 632, 41 Idaho 30.
Ill.—Hummel v. Cardwell, 62 N.E.2d 433, 390 Ill. 526, certiorari denied 66 S.Ct. 819, three cases—Toman v. Park Castles Apartment Bldg. Corporation, 31 N.E.2d 299, 375 Ill. 293—McInness v. Oscar F. Wilson Printing Co., 258 Ill.App. 161.
Kan.—**Corpus Juris quoted in** Board of Commissioners of Crawford County v. Radley, 8 P.2d 386, 387, 134 Kan. 704.
Ky.—Lowther v. Moss, 39 S.W.2d 501, 239 Ky. 290.
Mass.—New England Home for Deaf Mutes v. Leader Filling Stations Corporation, 177 N.E. 97, 276 Mass. 153.
Okl.—Fitzsimmons v. Oklahoma City, 135 P.2d 340, 192 Okl. 248—**Corpus Juris quoted in** Hinkle v. Jones, 66 P.2d 1073, 1076, 180 Okl. 17—**Corpus Juris quoted in** Oklahoma City v. Robinson, 65 P. 2d 531, 533, 179 Okl. 309—Henson v. Oklahoma State Bank, 23 P.2d 709, 165 Okl. 1—**Corpus Juris quoted in** Whitehead v. Bunch, 272 P. 878, 879, 134 Okl. 63.
Tex.—Nymon v. Eggert, Civ.App., 154 S.W.2d 157.
Utah.—Hampshire v. Woolley, 269 P. 135, 72 Utah 106.
Va.—Drewry v. Doyle, 20 S.E.2d 548, 179 Va. 715—Hubbard v. Davis, 25 S.E.2d 256, 181 Va. 549—**Corpus Juris cited in** Ætna Casualty & Surety Co. of Hartford, Conn. v. Board of Supervisors of Warren Co., 168 S.E. 617, 626, 160 Va. 11.
33 C.J. p 1076 note 71.

Court of general jurisdiction

Even a court of general jurisdiction has no power to render any judgment affecting persons or property, unless the particular judgment is brought within court's jurisdiction according to law.—Herb v. Pitcairn, 51 N.E.2d 277, 384 Ill. 237, reversed on other grounds 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U. S. 893, 89 L.Ed. 2005. Opinion supplemented 64 N.E.2d 318, 392 Ill. 151.

Jurisdiction or power to render a particular judgment does not mean that the judgment rendered must be the one that should have been rendered, since the power or jurisdiction to decide carries with it the power or jurisdiction to decide wrong as well as to decide right.—U. S. v. U. S. Fidelity & Guaranty Co., D.C.Okl., 24 F.Supp. 961, modified on other grounds, C.C.A., 106 F. 2d 804, reversed on other grounds 60 S.Ct. 653, 309 U.S. 506, 84 L.Ed. 894.

41. Cal.—Hunter v. Superior Court in and for Riverside County, 97 P.2d 492, 36 Cal.App.2d 100.
Ky.—Lorton v. Ashbrook, 295 S.W. 1027, 220 Ky. 830.
Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061—Mesendieck Grain Co. v. Folz, 50 S.W.2d 159, 161, 227 Mo.App. 24.
N.Y.—Lynbrook Gardens v. Ullmann, 36 N.Y.S.2d 888, 179 Misc. 132, affirmed 37 N.Y.S.2d 671, 265 App. Div. 859, reversed on other grounds 53 N.E.2d 353, 291 N.Y. 472, 152 A.L.R. 959, certiorari denied 64 S.Ct. 1144, 322 U.S. 742, 88 L.Ed. 1575.
Okl.—Sabin v. Levorsen, 145 P.2d 402, 193 Okl. 320, certiorari denied 64 S.Ct. 205, 320 U.S. 792, 88 L.Ed. 477, rehearing denied 64 S.Ct. 368, 320 U.S. 815, 88 L.Ed. 492—Fitzsimmons v. Oklahoma City, 135 P. 2d 340, 343, 192 Okl. 248—Moroney v. State ex rel. Southern Surety Co., 31 P.2d 926, 168 Okl. 69—State v. Armstrong, 13 P.2d 198, 153 Okl. 290—Blake v. Metz, 276 P. 762, 136 Okl. 146, followed in 276 P. 765, 136 Okl. 150—Askew v. Terrell, 243 P. 495, 113 Okl. 206—Vann v. Adkins, 234 P. 644, 109 Okl. 12—Burris v. Straughn, 232 P. 294, 107 Okl. 299—Ex parte Dawes, 239 P. 689, 31 Okl.Cr. 397.
Tex.—San Jacinto Finance Corporation v. Perkins, Civ.App., 94 S.W. 2d 1213—Reed v. State, Cr., 187 S. W.2d 660.
Wyo.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 32 Wyo. 281.
33 C.J. p 1077 note 72.

A decision, whether correct or wrong, made by a court in excess of its jurisdiction and power is void.—Spencer v. Franks, 195 A. 306, 173 Md. 73, 114 A.L.R. 263.

Manner forbidden by law

A judgment is void when the court proceeds without authority and in a manner forbidden by law with respect to matter being adjudicated, although it may have jurisdiction of parties and subject matter.—Wagner v. Peoples Building & Loan Ass'n, 167 S.W.2d 825, 292 Ky. 691—Jones v. Keen, 160 S.W.2d 164, 289 Ky. 779—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.

§ 20. Matured Cause of Action

It is essential to the validity and regularity of a judgment that the demand whereon it is rendered shall have existed as a matured cause of action at the time the action was commenced.

It is essential to the validity and regularity of a judgment that the demand whereon it is rendered shall have existed as a matured cause of action at the time the action was commenced,[42] it being a general rule that a party must recover according to his legal rights at the commencement of the action.[43]

§ 21. Definitiveness

A judgment must be definitive.

A judgment must be definitive.[44] By this is meant that the decision itself must purport to decide finally the rights of the parties on the issue submitted, by specifically denying or granting the remedy sought by the action.[45] The converse of this proposition is also true, and every definitive determination of the rights of the parties in a proceeding before a competent tribunal is a judgment.[46]

§ 22. Reasons for Judgment

Ordinarily the reasons assigned by the court for the judgment rendered do not constitute a part of the judgment.

Although it has been said that every court should state on the record the legal grounds for its judgment,[47] the reasons assigned by the court for the judgment rendered do not constitute a part of the judgment.[48] Also if the judgment given is correct, it is immaterial whether the reasons adduced for giving such a judgment are correct.[49] Therefore a judgment or decree of the court controls the written opinion, and if they are at variance, the former prevails and determines the rights of the parties.[50]

Not a judgment

When judgment roll on its face shows that court was without jurisdiction to render the particular judgment, its pronouncement is not in fact a judgment.—Hodson v. O'Keeffe, 229 P. 722, 71 Mont. 322.

Relief denied by law

A judgment granting relief which the law declares shall not be granted is void.—Moroney v. State ex rel. Southern Surety Co., 31 P.2d 926, 168 Okl. 69—State v. Armstrong, 13 P. 2d 198, 158 Okl. 290.

Special statutory powers

Where court is exercising special statutory powers, judgment in excess of statutory authority is void. —Ætna Casualty & Surety Co. of Hartford, Conn., v. Board of Sup'rs of Warren County, 168 S.E. 617, 160 Va. 11.

Transcending jurisdiction

Where court, after acquiring jurisdiction of a subject matter, transcends the limits of jurisdiction conferred, its judgment is void.—Flake v. Pretzel, 46 N.E.2d 375, 381 Ill. 498.

42. Wash.—Mondiolf v. American Bldg. Co., 145 P. 577, 83 Wash. 584. 33 C.J. p 1097 note 9.

43. N.Y.—Fults v. Munro, 95 N.E. 23, 202 N.Y. 34, 37 L.R.A.,N.S., 600, Ann.Cas.1912D 870. 33 C.J. p 1097 note 10.

Death rendering decree timely

However, where testatrix devised realty in trust for benefit of husband during his life, the trust to terminate at husband's death, and husband who elected to take against the will died during pendency of defendants' appeal in husband's partition suit, realty was to be distributed by trustee as directed by will and decree, and order directing sale of property and that trustee distribute proceeds, if premature when entered, was held to be rendered timely by husband's death.—Flynn v. Bryan, Mo., 154 S.W.2d 773.

44. Cal.—Kosloff v. Kosloff, 154 P. 2d 431, 67 Cal.App.2d 374—**Corpus Juris quoted in** Makzoume v. Makzoume, 123 P.2d 72, 74, 50 Cal.App. 2d 229. 33 C.J. p 1103 note 29.

45. Cal.—Kosloff v. Kosloff, 154 P. 2d 431, 67 Cal.App.2d 374—**Corpus Juris quoted in** Makzoume v. Makzoume, 123 P.2d 72, 74, 50 Cal.App. 2d 229.
N.Y.—Lowe v. Lowe, 192 N.E. 291, 265 N.Y. 197. 33 C.J. p 1104 note 30.

Judgment determining nothing

and leaving parties where they started is wholly ineffective.—Permian Oil Co. v. Smith, Civ.App., 47 S.W.2d 500, reversed on other grounds 73 S.W.2d 490, 129 Tex. 413, 111 A.L.R. 1152, rehearing denied 107 S.W.2d 564, 129 Tex. 413, 111 A. L.R. 1175.

46. Cal.—Kosloff v. Kosloff, 154 P. 2d 431, 67 Cal.App.2d 374—**Corpus Juris quoted in** Makzoume v. Makzoume, 123 P.2d 72, 74, 50 Cal. App.2d 229. 33 C.J. p 1104 note 31.

47. N.Y.—Newman v. Mayer, 65 N. Y.S. 294, 52 App.Div. 209, 7 N.Y. Ann.Cas. 497.
Va.—Preston v. Auditor, 1 Call. 471, 5 Va. 471.
Construction of judgments in general see infra § 436.

Constitutional requirement

(1) Where a constitutional provision requires the court to state its reasons for the judgment rendered, and this is not done, the judgment must be reversed.—Dorr v. Jouet, 20 La.Ann. 27—33 C.J. p 1105 note 43.

(2) The constitutional mandate that judges shall refer to law and adduce reasons on which definitive judgments are founded refers only to cases wherein real controversies or claims are decided or adjudicated and not to rule taken by wife for issuance of writ of fieri facias on judgment for amount of past-due and exigible alimony payments previously ordered by judgment in her suit for separation from bed and board.—Erdal v. Erdal, La.App., 26 So.2d 377.

48. Cal.—**Corpus Juris cited in** Martin v. Board of Trustees of Leland Stanford Jr. University, 99 P.2d 684, 686, 37 Cal.App.2d 481.
Ga.—Bales v. Wright, 200 S.E. 192, 59 Ga.App. 191.
Mo.—Smith v. Travelers' Protective Ass'n of America, 6 S.W.2d 870, 319 Mo. 1120.
N.C.—Gettys v. Town of Marion, 10 S.E.2d 799, 218 N.C. 266.
Okl.—McGann v. McGann, 37 P.2d 939, 169 Okl. 515.
Tex.—Davis v. Hemphill, Civ.App., 243 S.W. 691. 33 C.J. p 1104 note 38.

49. Minn.—Kipp v. Clinger, 106 N. W. 108, 97 Minn. 135. 33 C.J. p 1105 note 40.

50. Iowa.—In re Evans' Estate, 291 N.W. 460, 228 Iowa 908.
N.Y.—People ex rel. Metropolitan Trust Co. of City of New York v. Travis, 176 N.Y.S. 765, 107 Misc. 377, affirmed 180 N.Y.S. 659, 191 App.Div. 129.
Wash.—Reagh v. Shalkenbach, 56 P. 2d 673. 33 C.J. p 1104 note 39.

If the judgment is one which the court had power to make on any ground, it is not void for want of jurisdiction because it is based or made on an improper ground.[51]

B. PROCESS, NOTICE, OR APPEARANCE

§ 23. Necessity

A valid judgment may be rendered against a defendant only where he has been given notice; and accordingly a judgment which is rendered without any notice to, or service of process on the defendant, and without his voluntarily appearing, is generally void for want of jurisdiction.

As a general rule, before a valid judgment may be rendered against a defendant, he must be accorded an opportunity to be heard, as discussed supra § 18, and for this purpose he must be given notice of the action or proceeding against him,[52] and this notice cannot constitutionally be dispensed with.[53] Accordingly a judgment which is rendered without any form of notice to, or service on, defendant is wholly void for want of jurisdiction,[54] unless he voluntarily appears, as discussed infra § 26, or

Operation and effect of opinions generally see Courts § 222 b.

"Decision"

In case of a variance between the "judgment" and the "decision," the "judgment" controls.—Wo Kee & Co. v. U. S., 28 C.C.P.A.Customs 272—U. S. v. Penn. Commercial Corporation of America, 15 Ct.Cust.App. 206—Roessler & Hasslacher Chemical Co. v. U. S., 13 Ct.Cust.App. 451.

51. U.S.—Converse v. Stewart, C.C. N.Y., 192 F. 941, affirmed 197 F. 152, 118 C.C.A. 212.

52. U.S.—Sylvan Beach v. Koch, C. C.A.Mo., 140 F.2d 852—Smith v. Stark Trucking, D.C.Ohio, 53 F. Supp. 826—Fisher v. Jordan, D.C. Tex., 32 F.Supp. 608, reversed on other grounds 116 F.2d 183, certiorari denied Jordan v. Fisher, 61 S.Ct. 734, 312 U.S. 697, 85 L.Ed. 1132.

Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.

Ga.—Elliott v. Adams, 160 S.E. 336, 173 Ga. 312.

N.Y.—Rochester Sav. Bank v. Monroe County, 8 N.Y.S.2d 107, 169 Misc. 526—Cipperly v. Link, 237 N.Y.S. 106, 135 Misc. 134.

N.D.—**Corpus Juris quoted in** Baird v. Ellison, 293 N.W. 794, 801, 70 N.D. 261.

Okl.—St. Louis-San Francisco Ry. Co. v. Bayne, 40 P.2d 1104, 170 Okl. 542.

Pa.—In re Galli's Estate, 17 A.2d 899, 340 Pa. 561—In re Komara's Estate, 166 A. 577, 311 Pa. 135.

Va.—Moore v. Smith, 15 S.E.2d 48, 177 Va. 621.

Wash.—Morley v. Morley, 230 P. 645, 131 Wash. 540.

33 C.J. p 1080 note 96.

53. Cal.—Baker v. O'Riordan, 4 P. 232, 65 Cal. 368.

Minn.—Bardwell v. Collins, 46 N.W. 315, 44 Minn. 97, 20 Am.S.R. 547, 9 L.R.A. 152.

33 C.J. p 1079 note 93.

Process or notice as essential element of due process of law see Constitutional Law § 619.

Regardless of statutory provision with respect to issuance and service of process, no judgment, order, or decree is valid or binding on the party who has no notice of proceeding against him, since court must have jurisdiction of the person as well as of the subject matter and legislature is without power under constitution to dispense with notice either actual or constructive.—Maddox v. Bush, 4 So.2d 302, 191 Miss. 748—Jack v. Thompson, 41 Miss. 49.

54. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U. S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089—Mason v. Royal Indemnity Co., D.C.Ga., 35 F.Supp. 477, affirmed, C.C.A., 123 F.2d 335.

Ala.—Standard Cooperage Co. v. Grant, 117 So. 31, 217 Ala. 667—Farmers' Union Warehouse Co. v. Barnett Bros., 116 So. 810, 22 Ala. App. 524, certiorari denied 118 So. 286, 218 Ala. 165.

Ariz.—Lore v. Citizens Bank of Winslow, 75 P.2d 371, 51 Ariz. 191.

Cal.—Balaam v. Perazzo, 295 P. 330, 221 Cal. 375—Gray v. Hall, 265 P. 246, 203 Cal. 306—In re Ivory's Estate, 98 P.2d 761, 37 Cal.App.2d 22—Jones v. Noble, 39 P.2d 486, 3 Cal.App.2d 316.

D.C.—Wise v. Herzog, 114 F.2d 486, 72 App.D.C. 335.

Ga.—Winn v. Armour & Co., 193 S. E. 447, 184 Ga. 769—Henry & Co. v. Johnson, 173 S.E. 659, 178 Ga. 541—Williams v. Batten, 119 S.E. 709, 156 Ga. 620—Cherry v. McCutchen, 23 S.E.2d 587, 68 Ga. App. 682.

Hawaii.—Kim Poo Kum v. Sugiyama, 33 Hawaii 545.

Ill.—Schuster v. Elsner, 250 Ill.App. 192.

Ind.—Montgomery v. Marks, 46 N.E. 2d 912, 221 Ind. 223—Celina Mut. Casualty Co. v. Baldridge, 12 N.E. 2d 258, 213 Ind. 198.

Iowa.—Woodmen Accident Co. v. District Court in and for Marshall County, 260 N.W. 713, 219 Iowa 1326, 98 A.L.R. 1431—Des Moines Coal & Coke Co. v. Marks Inv. Co., 195 N.W. 597, 197 Iowa 589, opinion modified on rehearing 197 N. W. 628, 197 Iowa 589.

Ky.—Gayle v. Gayle, 192 S.W.2d 821—Parrish v. Ferriell, 186 S.W.2d 625, 299 Ky. 676—Jones v. Fuller, 134 S.W.2d 240, 280 Ky. 671—Gardner v. Lincoln Bank & Trust Co., 64 S.W.2d 497, 251 Ky. 109—Ely v. U. S. Coal & Coke Co., 49 S.W.2d 1021, 243 Ky. 725—Rex Red Ash Coal Co. v. Powers, 290 S.W. 1061, 218 Ky. 93—Farmers' Bank of Salvisa v. Riley, 272 S.W. 9, 209 Ky. 54.

La.—In re Webster's Tutorship, 177 So. 688, 188 La. 623—Lacour Plantation Co. v. Jewell, 173 So. 761, 186 La. 1055—Logwood v. Logwood, 168 So. 310, 185 La. 1—Nolan v. Schultze, 126 So. 513, 169 La. 1022—Gahn v. Brown, 107 So. 576, 160 La. 790—Nicol v. Jacoby, 103 So. 33, 157 La. 757—Smith v. Crescent Chevrolet Co., App., 1 So. 2d 421—Key v. Jones, App., 181 So. 631—R. P. Farnsworth & Co. v. Estrade, Cotton & Fricke, App., 166 So. 676—McClelland v. District Household of Ruth, App., 151 So. 246—Richardson v. Trustees' Loan & Guaranty Co., 132 So. 387, 15 La. App. 645—Spillman v. Texas & P. Ry. Co., 120 So. 905, 10 La.App. 379.

Md.—Piedmont-Mt. Airy Guano Co. of Baltimore v. Merritt, 140 A. 62, 154 Md. 226.

Mich.—Hafner v. A. J. Stuart Land Co., 224 N.W. 630, 246 Mich. 465.

Minn.—Beede v. Nides Finance Corporation, 296 N.W. 413, 209 Minn. 354.

Miss.—Eastman Gardiner Lumber Co. v. Carr, 166 So. 401, 175 Miss. 36—Bank of Richton v. Jones, 121 So. 823, 153 Miss. 796.

Mo.—State ex rel. Keller v. Porterfield, App., 283 S.W. 59.

Mont.—Novack v. Pericich, 300 P. 240, 90 Mont. 91—Holt v. Sather, 264 P. 108, 81 Mont. 442.

N.M.—Bourgeious v. Santa Fe Trail Stages, 95 P.2d 264, 43 N.M. 458.

N.Y.—Friedman v. Blatt, 27 N.Y.S.2d 102, 176 Misc. 401—Rochester Sav. Bank v. Monroe County, 8 N.Y.S. 2d 107, 169 Misc. 526—Bauman

otherwise waives service of process,[55] or authorizes its acceptance;[56] and in some states this rule obtains by statutory provision.[57] However, the principle that a judgment obtained without service of process or voluntary appearance is void for lack of the court's jurisdiction does not apply to a decision on a collateral question, in a case where the parties are before the court;[58] and a failure to give notice to a party who has no concern or interest in the question decided does not affect the validity of the judgment.[59] A judgment which merely determines rights may be conclusive without the service of any process for its enforcement.[60]

After amended, supplemental, or cross pleading. A judgment is void where it is rendered without the service of process, waiver, or entry of appearance, on an amended complaint or petition, which changes the cause of action,[61] or on an amended or supplemental pleading filed by defendant,[62] or on a plea of intervention.[63] Likewise, where a new or additional process is required when a cross pleading is filed, a judgment rendered on such pleading

Rubber Co. v. Karl Light & Sons, 244 N.Y.S. 448, 137 Misc. 258.

N.C.—Powell v. Turpin, 29 S.E.2d 26, 224 N.C. 67—City of Monroe v. Niven, 20 S.E.2d 311, 221 N.C. 362—Hood v. Holding, 171 S.E. 633, 205 N.C. 451—Crocker v. Vann, 135 S.E. 127, 192 N.C. 422—Clark v. Carolina Homes, 128 S. E. 20, 189 N.C. 703.

N.D.—**Corpus Juris quoted in** Baird v. Ellison, 293 N.W. 794, 801, 70 N.D. 261—Gallagher v. National Nonpartisan League, 205 N.W. 674, 53 N.D. 238.

Okl.—American Exchange Corporation v. Lowry, 63 P.2d 71, 178 Okl. 433—St. Louis-San Francisco Ry. Co. v. Bayne, 40 P.2d 1104, 170 Okl. 542—Chicago, R. I. & P. Ry. Co. v. Excise Board of Oklahoma County, 33 P.2d 1081, 168 Okl. 428—Protest of Chicago, R. I. & P. Ry. Co., 2 P.2d 935, 151 Okl. 129—Noel v. Edwards, 260 P. 58, 127 Okl. 163—Oklahoma City v. McWilliams, 236 P. 417, 108 Okl. 268—Abraham v. Homer, 226 P. 45, 102 Okl. 12.

Pa.—In re Komara's Estate, 166 A. 577, 311 Pa. 135—In re Gallagher's Estate, 167 A. 476, 109 Pa.Super. 304.

R.I.—**Corpus Juris cited in** Sahagian v. Sahagian, 137 A. 221, 222, 48 R.I. 267.

Tex.—Pure Oil Co. v. Reece, 78 S. W.2d 932, 124 Tex. 476—State Mortg. Corporation v. Traylor, 36 S.W.2d 440, 120 Tex. 148—Levy v. Roper, 256 S.W. 251, 113 Tex. 356—Burrage v. Hunt, Civ.App., 147 S.W.2d 532, error dismissed, judgment correct—Freeman v. B. F. Goodrich Rubber Co., Civ.App., 127 S.W.2d 476, error dismissed by agreement—Olton State Bank v. Howell, Civ.App., 105 S.W.2d 287—Goodman v. Mayer, Civ.App., 105 S.W.2d 281, reversed on other grounds 128 S.W.2d 1156, 133 Tex. 319—Coker v. Logan, Civ.App., 101 S.W.2d 284—**Corpus Juris cited in** Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, 158—Wilkinson v. Owens, Civ. App., 72 S.W.2d 330—Christie v. Hudspeth County Conservation and Reclamation Dist. No. 1, Civ. App., 64 S.W.2d 978—Texas Bank & Trust Co. v. Bankers' Life Co., Civ.App., 43 S.W.2d 631, error refused—Lipscomb v. Japhet, Civ. App., 18 S.W.2d 786—Belt v. McGehee, Civ.App., 9 S.W.2d 407—Adamson v. Collins, Civ.App., 286 S.W. 598—Cook v. Liberty Pipe Line Co., Civ.App., 281 S.W. 221—Watson Co., Builders, v. Bleeker, Civ.App., 269 S.W. 147.

Utah.—Parry v. Bonneville Irr. Dist., 235 P. 751, 71 Utah 202.

Va.—Preston v. Legard, 168 S.E. 445, 160 Va. 364—Johnson v. Burson, 129 S.E. 251, 143 Va. 57.

Wash.—State v. Fishing Appliances, 16 P.2d 822, 170 Wash. 426.

W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W.Va. 395—Robertson Grocery Co. v. Kinser, 116 S.E. 141, 93 W.Va. 172.

33 C.J. p 1079 note 94—34 C.J. p 533 notes 38, 39—15 C.J. p 798 note 64.

Default judgment without process see infra § 191.

Judgment by confession without process see infra § 151.

Service of process as essential to jurisdiction see Courts § 83.

Service of process on joint defendants see infra § 33.

As otherwise stated, unless a defendant has been brought into court in some way sanctioned by law, or has made a voluntary appearance in person or by attorney, a judgment rendered against him is void for want of jurisdiction.—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465—Groce v. Groce, 199 S.E. 388, 214 N.C. 398—Denton v. Vassiliades, 193 S.E. 737, 212 N.C. 513—Downing v. White, 188 S.E. 815, 211 N.C. 40.

For judicial action to affect vested rights, it must be based on notice or process whereby interested parties are brought within court's jurisdiction.—Parry v. Bonneville Irr. Dist., 263 P. 751, 71 Utah 202.

55. Ga.—Henry & Co. v. Johnson, 173 S.E. 659, 178 Ga. 541.
Hawaii.—Kim Poo Kum v. Sugiyama, 33 Hawaii 545.
La.—Key v. Jones, App., 181 So. 631.
Okl.—Protest of Chicago, R. I. & P. Ry. Co., 2 P.2d 935, 151 Okl. 129.
W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W.Va. 395—Robertson Grocery Co. v. Kinser, 116 S.E. 141, 93 W.Va. 172.
34 C.J. p 533 note 40.

56. W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W. Va. 395.

57. Ark.—Arkansas State Highway Commission v. Hammock, 148 S. W.2d 324, 201 Ark. 927.

58. Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.

59. Ohio.—Cunningham v. Bessemer Trust Co., 178 N.E. 217, 39 Ohio App. 535.

60. N.H.—Faulkner v. City of Keene, 155 A. 195, 85 N.H. 147—Walker v. Walker, 63 N.H. 321, 56 Am.R. 514.
Declaratory judgments generally see Actions § 18 d (14) (g).

61. Ohio.—Ohio Electric Ry. Co. v. U. S. Express Co., 137 N.E. 1, 105 Ohio St. 331.
Tex.—Nuckles v. J. M. Radford Grocery Co., Civ.App., 72 S.W.2d 652.
Rule not applicable where amended pleading states no new cause of action.
Okl.—City of Tulsa v. Peacock, 74 P. 2d 359, 181 Okl. 383.
Tex.—Nathan v. Brashear, Civ.App., 105 S.W.2d 328—Henson v. C. C. Slaughter Co., Civ.App., 206 S.W. 375.
33 C.J. p 1081 note 97 [d].

62. Tex.—Davis v. Wichita State Bank & Trust Co., Civ.App., 286 S.W. 584.
Plea for affirmative relief
Where defendant files pleading asking for affirmative relief after plaintiff has taken nonsuit, citation is necessary to sustain judgment for him.—Davis v. Wichita State Bank & Trust Co., Tex.Civ.App., 286 S.W. 584.
Judgment improper
Entry of judgment after overruling plea of privilege, without notice or hearing of controverting plea, is improper.—Galbraith v. Bishop, Tex. Com.App., 287 S.W. 1087.

63. Tex.—State v. Bagby's Estate, Civ.App., 126 S.W.2d 687.

against the original plaintiff,[64] or a codefendant,[65] without the service of process on, or appearance or waiver by, such plaintiff or defendant, is void, as where the cross petition is filed after the expiration of the time for such defendant to plead.[66]

§ 24. Sufficiency

a. In general
b. Personal service
c. Substituted and constructive service; publication
d. Extraterritorial service
e. Nonresidents
f. Attachment and garnishment
g. Defective process
h. Defective service

a. In General

Formal process or notice served in the manner authorized or required by law is essential to support a judgment.

Formal process or notice served in the manner authorized or required by law is essential to support a judgment;[67] mere informal knowledge of the pendency of the action is not sufficient.[68] Thus a judgment is a mere nullity where service is made on a third person, who is not authorized to accept service, instead of on the actual defendant,[69] not-

Where intervention was filed after service of citation had been had on defendants and intervener did not cause citation to issue on its cause of action and defendants made no appearance, trial court was without jurisdiction to enter judgment for intervener against defendants.—State v. Bagby's Estate, Tex.Civ.App., 126 S.W.2d 687.

64. Tex.—Early v. Cornelius, 39 S.W.2d 6, 120 Tex. 335—Holmes v. Klein, Civ.App., 59 S.W.2d 171—National Stock Yards Nat. Bank v. Valentine, Civ.App., 89 S.W.2d 907—Southern Equipment Co. v. Hallman Electric Co., Civ.App., 10 S.W.2d 261—Scarborough v. Bradley, Civ.App., 256 S.W. 349—Jarratt v. McCarty, Civ.App., 209 S.W. 712.

Necessity of process after filing cross pleading see the C.J.S. title Process § 4, also 50 C.J. p 448 note 48–p 449 note 60.

65. Cal.—Balaam v. Perazzo, 295 P. 330, 221 Cal. 375.
Ky.—Carter v. Capshaw, 60 S.W.2d 959, 249 Ky. 483—Lorton v. Ashbrook, 295 S.W. 1027, 220 Ky. 830.
Tex.—Holmes v. Klein, Civ.App., 59 S.W.2d 171, error dismissed—Flagg v. Matthews, Civ.App., 287 S.W. 299.
Effect of appearance generally see infra § 26.

66. Okl.—Blakeney v. Ashford, 81 P.2d 309, 183 Okl. 213—Vinson v. Oklahoma City, 66 P.2d 933, 179 Okl. 590—Central Nat. Bank of Okmulgee v. Sharp, 34 P.2d 241, 168 Okl. 516—O'Reilly v. Schuermeyer, 9 P.2d 923, 156 Okl. 167—Wood v. Speakman, 5 P.2d 121, 153 Okl. 180—Foster v. Conaway, 251 P. 59, 122 Okl. 80.

67. U.S.—Rettig Beverage Co. v. U. S., C.C.A.Pa., 13 F.2d 740.
Ala.—Sovereign Camp, W. O. W., v. Partridge, 127 So. 505, 221 Ala. 75.
Ark.—Gainsburg v. Dodge, 101 S.W. 2d 178, 193 Ark. 473.
Colo.—Younge v. Sutton, 61 P.2d 1370, 99 Colo. 254.
Fla.—McAllister v. McAllister, 3 So. 2d 351, 147 Fla. 647.
Ky.—**Corpus Juris cited in** Ely v. U. S. Coal & Coke Co., 49 S.W.2d 1021, 1025, 243 Ky. 725.
Mo.—In re Waters' Estate, App., 153 S.W.2d 774.
Neb.—Coffin v. Maitland, 20 N.W.2d 310.
N.J.—Hinners v. Banville, 168 A. 618, 114 N.J.Eq. 348.
N.Y.—Universal Credit Co. v. Blinderman, 288 N.Y.S. 77, 159 Misc. 802.
N.D.—**Corpus Juris quoted in** Baird v. Ellison, 293 N.W. 794, 801, 70 N.D. 261.
Okl.—State v. City of Tulsa, 5 P.2d 744, 153 Okl. 262—Oklahoma City v. McWilliams, 236 P. 417, 108 Okl. 268.
Pa.—In re Murray's Estate, Super., 45 A.2d 411—Johnston v. American Casualty Co., Com.Pl., 23 West.Co. 178.
Tenn.—Hunter v. May, 25 S.W.2d 580, 161 Tenn. 155.
Tex.—Jenness v. First Nat. Bank, Civ.App., 256 S.W. 634.
33 C.J. p 1081 note 97.
Service of process in general see the C.J.S. title Process § 25 et seq. also 50 C.J. p 467 note 86 et seq.

Formal issuance of order to show cause and appropriate service thereof on defendant was such reasonable notice of pendency of suit as to bring it within jurisdiction of court and bind defendant to order or decree.—Doan v. Collins-Doan Co., 194 A. 254, 122 N.J.Eq. 399.

Corporation and stockholders

Where court had jurisdiction over subject matter of suit against corporation, and president of corporation was served with citation, stockholders were not "necessary parties" or "proper parties" to suit, and hence notice of suit and service on them was not required for rendition of valid judgment against corporation and stockholders.—Cruse v. Mann, Tex.Civ.App., 74 S.W.2d 545, error dismissed.

68. Cal.—Peabody v. Phelps, 9 Cal. 213.
N.D.—**Corpus Juris quoted in** Baird v. Ellison, 293 N.W. 794, 801, 70 N.D. 261.
Ohio.—Haley v. Hanna, 112 N.E. 149, 93 Ohio St. 49.
33 C.J. p 1081 note 97.

69. Ky.—Missouri-Kansas Pipe Line Co. v. Hobgood, 51 S.W.2d 920, 244 Ky. 570.
La.—Waddill v. Payne, 23 La.Ann. 773—Jones v. Jones, 23 La.Ann. 304.
N.Y.—Building Trades Service Bureau v. S. W. Straus Investing Corporation, 272 N.Y.S. 73, 241 App.Div. 869—Universal Credit Co. v. Blinderman, 288 N.Y.S. 77, 159 Misc. 802.
Wash.—Wheeler v. Moore, 36 P. 1053, 10 Wash. 309.
W.Va.—State v. A. R. Kelly & Co., 33 S.E.2d 230—Nicholas Land Co. v. Crowder, 32 S.E.2d 563.
33 C.J. p 1081 note 98.

Class representative

(1) Conditions under which defendants may be bound by judgments in "class suits," and in other cases in which doctrine of virtual representation is applied, constitute exceptions to statutory provisions making service of process a condition precedent to rendition of judgment.—Southern Ornamental Iron Works v. Morrow, Tex.Civ.App., 101 S.W.2d 336.

(2) However, the equitable doctrine of class representation does not permit a plaintiff to designate certain parties as representatives of other numerous members of a voluntary unincorporated association in order to obtain personal judgments as to members not properly served in action on alleged indebtedness of the association.—Webb & Martin v. Anderson-McGriff Hardware Co., 3 S.E.2d 382, 188 Ga. 291.

withstanding defendant had knowledge of the action and the attempted service.[70] The service must be accomplished by a method which gives defendant actual or constructive notice,[71] and is reasonably calculated to afford him the constitutional protection of due process of law.[72] It must apprise defendant of what is required of him and of the consequences which may follow if he neglects to defend the action.[73]

b. Personal Service

A personal judgment which is rendered without service of process on, or legal notice to, defendant is void in the absence of a voluntary appearance or waiver.

A personal judgment rendered against a defendant without service of process on him, or other sufficient legal notice to him, is without jurisdiction and void,[74] unless he has appeared voluntarily, as discussed infra § 26, or otherwise has waived personal service,[75] or has acknowledged service,[76] or has authorized its acceptance in his behalf.[77] In a proceeding in rem, or quasi in rem, a valid personal judgment cannot be rendered against defendant without personal service of process on him, in the absence of his voluntary appearance.[78]

70. Ariz.—National Metal Co. v. Greene Consol. Copper Co., 89 P. 535, 11 Ariz. 108.
33 C.J. p 1081 note 98.

71. N.Y.—In re Renard's Estate, 39 N.Y.S.2d 968, 179 Misc. 885.
Pa.—In re Komara's Estate, 166 A. 577, 311 Pa. 135.
Constructive service generally see infra subdivision c of this section.

72. D.C.—Wise v. Herzog, 114 F.2d 486, 72 App.D.C. 335.
N.Y.—Standish v. Standish, 40 N.Y.S.2d 538, 179 Misc. 564.

73. Cal.—Peabody v. Phelps, 9 Cal. 213.
33 C.J. p 1081 note 1.
Process and service sufficient to support default judgment see infra § 191.

74. U.S.—Griffin v. Griffin, App.D.C., 66 S.Ct. 556, rehearing denied 66 S. Ct. 975—In re Gayle, C.C.A.Canal Zone, 136 F.2d 973, petition dismissed 64 S.Ct. 157, 320 U.S. 806, 88 L.Ed. 487.
Ala.—Morrison v. Covington, 100 So. 124, 211 Ala. 181—**Corpus Juris cited in** Ex parte Whistler, 199 So. 876, 878, 29 Ala.App. 583.
Ariz.—Blair v. Blair, 62 P.2d 1321, 48 Ariz. 501.
Iowa.—Stier v. Iowa State Traveling Men's Ass'n, 201 N.W. 328, 199 Iowa 118, 59 A.L.R. 1384.
Kan.—Gibson v. Enright, 9 P.2d 971, 135 Kan. 181.
Ky.—Hughes v. Hughes, 278 S.W. 121, 211 Ky. 799.
Mo.—Noell v. Missouri Pac. R. Co., 74 S.W.2d 7, 335 Mo. 687, 94 A.L.R. 684, followed in 74 S.W.2d 14.
Mont.—Holt v. Sather, 264 P. 108, 81 Mont. 442.
N.J.—Baker v. Josephson, 44 A.2d 909, 137 N.J.Eq. 377, reversed on other grounds 46 A.2d 904, 138 N. J.Eq. 107.
N.M.—State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651.
N.Y.—In re Galvin's Estate, 274 N. Y.S. 846, 153 Misc. 11.
N.C.—Dunn v. Wilson, 187 S.E. 802, 210 N.C. 493.
N.D.—**Corpus Juris cited in** Ellison v. Baird, 293 N.W. 793, 794, 70 N. D. 226—**Corpus Juris cited in** Darling & Co. v. Burchard, 284 N.W. 856, 862, 69 N.D. 212.
Ohio.—In re Blue's Estate, 32 N.E.2d 499, 67 Ohio App. 37.
Okl.—Skipper v. Baer, 277 P. 930, 136 Okl. 286.
Pa.—Potter v. Potter, Pa., 42 Dist. & Co. 42.
Tenn.—Dickson v. Simpson, 113 S. W.2d 1190, 172 Tenn. 680, 116 A.L. R. 380.
Va.—Lockard v. Whitenack, 144 S.E. 606, 151 Va. 143.
W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W.Va. 395.
Wis.—Saric v. Brlos, 19 N.W.2d 903, 247 Wis. 400.
33 C.J. p 1082 note 4—34 C.J. p 533 note 39.
Service within state see infra subdivision d of this section.
What constitutes personal service see the C.J.S. title Process §§ 25–42, also 50 C.J. p 468 note 9–p 490 note 62.

"Jurisdiction of the person" is obtained, so that a valid judgment may be rendered, when prescribed notice has been given to litigant proceeded against to enable him to appear and make defense.—Wagner v. Peoples Building & Loan Ass'n, 167 S. W.2d 825, 292 Ky. 691.

It is not within the power of any tribunal to make a binding adjudication of the rights in personam of parties not brought before it by due process of law.—National Licorice Co. v. National Labor Relations Board, 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

Actions affecting title to property within court's jurisdiction, but not seized or otherwise brought under court's direct control for disposition, and involved only incidentally because of effect on its title of decree or judgment entered, are usually held to be in personam, so as to require personal service of process on defendants.—State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651.

Personal judgment on cross petition held void
Ky.—Capper v. Short, 11 S.W.2d 717, 226 Ky. 689.

75. N.Y.—In re Galvin's Estate, 274 N.Y.S. 846, 153 Misc. 11.
W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W.Va. 395.

76. N.J.—Fidelity Union Trust Co. v. Union Cemetery Ass'n, 40 A.2d 205, 136 N.J.Eq. 15, affirmed 45 A.2d 670, 137 N.J.Eq. 455, and 45 A.2d 698, 137 N.J.Eq. 456.

Acknowledgment of service after appearance term has been held too late to preserve suit as pending action, and judgment rendered in succeeding term without other process was void.—Bolton v. Keys, 144 S.E. 406, 38 Ga.App. 573.

77. W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W. Va. 395.

78. Ga.—**Corpus Juris quoted in** Webb & Martin v. Anderson-McGriff Hardware Co., 3 S.E.2d 882, 885, 188 Ga. 291.
Ill.—Barnett v. Cook County, 26 N.E.2d 862, 373 Ill. 516—Griffin v. Cook County, 16 N.E.2d 906, 369 Ill. 380, 118 A.L.R. 1157.
Kan.—Union Central Life Ins. Co. v. Irrigation Loan & Trust Co., 73 P. 2d 72, 146 Kan. 550.
Ky.—Kitchen v. New York Trust Co., 168 S.W.2d 5, 292 Ky. 706—Bond v. Wheeler, 247 S.W. 708, 197 Ky. 437.
N.M.—State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651.
N.Y.—In re Galvin's Estate, 274 N. Y.S. 846, 153 Misc. 11.
Tenn.—Commerce Union Bank v. Sharber, 100 S.W.2d 243, 20 Tenn. App. 451.
33 C.J. p 1084 note 15.
Extent of jurisdiction of court in absence of personal service of process see Courts § 83 b (1).
Judgment in rem see infra § 908.

c. Substituted and Constructive Service; Publication

Ordinarily no valid personal judgment may be rendered against a defendant on whom the service of process was merely constructive or by publication and who did not appear.

It has been held that a state has the right to prescribe the mode of serving the process of its own courts on its own resident citizens, and that a judgment is valid, at least until set aside in a direct proceeding for that purpose, when based on such a form of citation as the law authorizes, although without actual notice to defendant.[79] However, a personal judgment on merely constructive service is not entitled to full faith and credit in the courts of another state, under the constitutional provision in that regard,[80] and the weight of authority is to the effect that no valid personal judgment may be rendered against a defendant on whom the service of process was merely constructive and who did not appear.[81]

d. Extraterritorial Service

Service of process on a nonresident beyond the territorial jurisdiction of the court from which the process issued will not support a personal judgment against the nonresident. It has also been held that extraterritorial service on a resident will not support a personal judgment against him.

It is a fundamental principle that a judgment affecting personal rights must be founded on service of process, within the territorial jurisdiction of the court on the party to be affected.[82] Accordingly, a valid personal judgment cannot be rendered against a nonresident based on process served on him beyond the limits of the state from whose courts the process issued,[83] and such a judgment cannot be

79. U.S.—Santiago v. Nogueras, Puerto Rico, 29 S.Ct. 608, 214 U.S. 260, 53 L.Ed. 989.
Ga.—Benton v. Maddox, 192 S.E. 316, 56 Ga.App. 132.
Ill.—Barnett v. Cook County, 26 N.E. 2d 862, 373 Ill. 516—Griffin v. Cook County, 16 N.E.2d 906, 369 Ill. 380, 118 A.L.R. 1157.
Ind.—Pattison v. Grant Trust & Savings Co., 144 N.E. 26, 195 Ind. 313.
Me.—Jordan v. McKay, 165 A. 902, 132 Me. 55.
Minn.—Murray v. Murray, 198 N.W. 307, 159 Minn. 111.
Mont.—Holt v. Sather, 264 P. 108, 81 Mont. 442.
N.Y.—Continental Nat. Bank of Boston v. Thurber, 26 N.Y.S. 956, 74 Hun 632, affirmed Continental Nat. Bank of Boston v. United States Book Co., 37 N.E. 823, 143 N.Y. 648—In re Auto Mut. Indemnity Co., 14 N.Y.S.2d 601.
33 C.J. p 1083 note 9.
Substituted service see the C.J.S. title Process §§ 43–53, also 50 C. J. p 490 note 64–p 496 note 99.

Judgment rendered on substituted or constructive service is as conclusive on residents of state not residents of county of suit as one rendered on personal service.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 473.

Compliance with statute

Where jurisdiction is obtained by a prescribed form of constructive notice, the statutory conditions on which the service depends must be strictly construed, and unless statute has been complied with court has no jurisdiction to render judgment.—Pinon v. Pollard, 158 P.2d 254, 69 Cal.App.2d 129.

Service held insufficient to support judgment

(1) On tenant of apartment house by leaving copy of papers in outer hall.—Clover v. Urban, 142 A. 389, 108 Conn. 13.

(2) Leaving process at apartment from which defendant had previously moved to another state.—Rogan v. Liberty Mut. Ins. Co., 25 N.E.2d 188, 305 Mass. 186.

80. Ga.—**Corpus Juris quoted in** Webb & Martin v. Anderson-McGriff Hardware Co., 3 S.E.2d 882, 885, 188 Ga. 291.
33 C.J. p 1083 note 10.

81. U.S.—Pennoyer v. Neff, Or., 95 U.S. 714, 24 L.Ed. 565—Baxter v. Continental Casualty Co., C.C.A. Mo., 48 F.2d 467, appeal dismissed 52 S.Ct. 2, 284 U.S. 578, 76 L.Ed. 502.
Cal.—Williams v. Williams, 213 P. 508, 60 Cal.App. 675.
Ga.—**Corpus Juris quoted in** Webb & Martin v. Anderson-McGriff Hardware Co., 3 S.E.2d 882, 885, 188 Ga. 291—B. Mifflin Hood Brick Co. v. Mangham, 131 S.E. 172, 161 Ga. 457—Sweet v. Awtry, 30 S.E.2d 799, 71 Ga.App. 341.
Iowa.—Security Sav. Bank v. Cimprich, 203 N.W. 24, 199 Iowa 1061.
Ky.—Bond v. Wheeler, 247 S.W. 708, 197 Ky. 437.
La.—Liles v. Barnhart, 93 So. 490, 152 La. 419.
Md.—Ortman v. Coane, 31 A.2d 320, 181 Md. 596, 145 A.L.R. 1388.
N.J.—Reichert v. United Brotherhood of Carpenters and Joiners of America, 183 A. 728, 14 N.J.Misc. 106.
N.M.—State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651.
N.Y.—Matthews v. Matthews, 219 N. Y.S. 333, 128 Misc. 309.
Utah.—Ricks v. Wade, 93 P.2d 479, 97 Utah 402.
Wyo.—Kimbel v. Osborn, 156 P.2d 279.
33 C.J. p 1083 note 11.
As to nonresidents see infra subdivision e of this section.

Under a statute providing for service by publication on nonresidents only, a judgment on such service against a resident is void.—Main v. Kick, 161 N.W. 711, 180 Iowa 50—Oziah v. Howard, 128 N.W. 364, 149 Iowa 199.

82. U.S.—Sugg v. Hendrix, C.C.A. Miss., 142 F.2d 740—De Bouchel v. Candler, D.C.Ga., 296 F. 482, 485.
Ariz.—Blair v. Blair, 62 P.2d 1321, 48 Ariz. 501.
Ky.—Kitchen v. New York Trust Co., 168 S.W.2d 5, 292 Ky. 706.
Mo.—Noell v. Missouri Pac. R. Co., 74 S.W.2d 7, 335 Mo. 687, 94 A.L.R. 684, followed in 74 S.W.2d 14.

83. U.S.—Oxley v. Sweetland, C.C.A. W.Va., 96 F.2d 33—Campbell v. City of Hickman, D.C.Ky., 45 F. Supp. 517.
Ark.—Miller v. Maryland Casualty Co., 180 S.W.2d 581, 207 Ark. 312.
Del.—Webb Packing Co. v. Harmon, 196 A. 153, 9 W.W.Harr. 22.
Fla.—Newton v. Bryan, 194 So. 282, 142 Fla. 14.
Ill.—Wickiser v. Powers, 57 N.E.2d 522, 324 Ill.App. 130.
Iowa.—Sloan-Pierce Lumber Co. v. Gardiner, 3 N.W.2d 531, 231 Iowa 1194—Fisher & Van Gilder v. First Trust Joint-Stock Land Bank of Chicago, 231 N.W. 671, 210 Iowa 531, 69 A.L.R. 1340.
La.—Evans v. Evans, 116 So. 831, 166 La. 145.
Md.—Ortman v. Coane, 31 A.2d 320, 181 Md. 596, 145 A.L.R. 1388.
N.Y.—Bank of New York v. Legget, 46 N.Y.S.2d 465, 267 App. Div. 875, appeal denied 50 N.E.2d 173, 268 App.Div. 779, appeal dismissed 56 N.E.2d 115, 292 N.Y. 702, appeal dismissed 57 N.E.2d 838, 293 N.Y. 759—Maguire v. Blodgett, 41 N.Y.S.2d 130, 265 App.

authorized constitutionally even by express statute.[84] However, such service may be sufficient to support a judgment in rem, or quasi in rem, as discussed infra §§ 908, 911. Although there is authority to the contrary,[85] it has been held that extraterritorial service on a resident of the state will not support a personal judgment,[86] and that, in the absence of statute, a personal judgment is void, even where it is based on the service of process within the state, but beyond the limits of the county or district, which comprise the territorial jurisdiction of the court.[87]

b. Nonresidents

A valid personal judgment may be rendered against a nonresident only where he is brought within the jurisdiction of the court by the service of process or notice on him within its territorial jurisdiction, or by his voluntarily appearing and submitting to its jurisdiction. Mere constructive or substituted service is not sufficient.

A valid personal judgment may be rendered against a nonresident only where he has been brought within the jurisdiction of the court by the service of process or notice made on him within its territorial jurisdiction,[88] or by such service on some one au-

Div. 670, affirmed 50 N.E.2d 300, 290 N.Y. 907—Heilbrun v. Kellogg, 1 N.Y.S.2d 193, 253 App.Div. 753, motion denied 16 N.E.2d 104, 278 N.Y. 564, motion granted 18 N.E.2d 312, 279 N.Y. 683, affirmed 18 N.E.2d 861, 279 N.Y. 773—Gore v. Pennsylvania R. Co., 259 N.Y.S. 410, 144 Misc. 639, affirmed 260 N.Y.S. 941, 236 App.Div. 881—Engel v. Engel, 22 N.Y.S.2d 445—Merkle v. Sable, 197 N.Y.S. 576.

N.C.—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465.

N.D.—Darling & Co. v. Burchard, 284 N.W. 856, 69 N.D. 212.

Ohio.—Ades v. Ades, 45 N.E.2d 416, 70 Ohio App. 487.

Okl.—Royal Neighbors of America v. Fletcher, 227 P. 426, 99 Okl. 297.

Or.—Mt. Vernon Nat. Bank v. Morse, 264 P. 439, 128 Or. 64.

Pa.—Vaughn v. Love, 188 A. 299, 324 Pa. 276, 107 A.L.R. 1336—Potter v. Potter, 42 Pa.Dist. & Co. 42—Evans v. Todd, Com.Pl., 35 Luz.Leg. Reg. 102.

Tenn.—Dickson v. Simpson, 113 S.W.2d 1190, 172 Tenn. 680, 116 A.L.R. 380—Commerce Union Bank v. Sharber, 100 S.W.2d 243, 20 Tenn.App. 451.

Tex.—Bradshaw v. Peacock, Civ.App., 191 S.W.2d 698—Knox v. Quinn, Civ.App., 164 S.W.2d 580—Eaton v. Husted, Civ.App., 163 S.W.2d 439, affirmed 172 S.W.2d 493, 141 Tex. 349—Hicks v. Sias, Civ.App., 102 S.W.2d 460, error refused—Steger v. Shofner, Civ.App., 54 S.W.2d 1013—Blair v. Carney, Civ.App., 44 S.W.2d 1031, error refused—Wilson v. Beck, Civ.App., 286 S.W. 315.

Utah.—Ricks v. Wade, 93 P.2d 479, 97 Utah 402.

Wash.—State v. Plummer, 226 P. 273, 130 Wash. 135.

33 C.J. p 1084 note 17.

In equity see Equity § 175 b.

Extraterritorial service generally see the C.J.S. title Process § 32, also 50 C.J. p 474 note 76–p 476 note 25.

Personal service out of state in lieu of publication see the C.J.S. title Process §§ 73, 74, also 50 C.J. p 542 note 80–p 545 note 54.

Courts exercise utmost care and good faith in dealing with nonresidents against whom personal judgment is sought on notice served outside state.—Fidelity & Casualty Co. of New York v. Bank of Plymouth, 237 N.W. 234, 213 Iowa 1053.

84. U.S.—Pennoyer v. Neff, Or., 95 U.S. 714, 24 L.Ed. 565.

Iowa.—Allen v. Allen, 298 N.W. 869, 230 Iowa 504, 136 A.L.R. 617.

33 C.J. p 1085 note 18.

Under "due process" clause see Constitutional Law § 619.

85. Tex.—Becker v. Becker, Civ. App., 218 S.W. 542—McCaulley v. Western National Bank, Civ.App., 173 S.W. 1000.

86. Cal.—Pinon v. Pollard, 158 P.2d 254, 69 Cal.App.2d 129.

Ill.—Barnett v. Cook County, 26 N.E.2d 862, 373 Ill. 516.

33 C.J. p 1085 note 23.

By publication and mail

Service of summons on a resident of state absent therefrom by publication and mailing of copy of summons and complaint to defendant's address outside the state did not give court jurisdiction to enter money judgment against defendant in personal injury action.—Pinon v. Pollard, 158 P.2d 254, 69 Cal.App.2d 169.

87. Neb.—Braun v. Quinn, 199 N.W. 828, 112 Neb. 485, 39 A.L.R. 411.

33 C.J. p 1085 note 27.

88. U.S.—Wilson v. Seligman, Mo., 12 S.Ct. 541, 144 U.S. 41, 36 L.Ed. 338—McQuillen v. National Cash Register Co., C.C.A.Md., 112 F.2d 377, certiorari denied 61 S.Ct. 140, 311 U.S. 695, 85 L.Ed. 456, rehearing denied 61 S.Ct. 316, 311 U.S. 729, 85 L.Ed. 474—McQuillen v. Dillon, C.C.A.N.Y., 98 F.2d 726, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424—Oxley v. Sweetland, C.C.A.W.Va., 94 F.2d 33—Chicago Joint Stock Land Bank v. Minnesota Loan & Trust Co., C.C.A.Minn., 57 F.2d 70—Beaver Board Cos. v. Imbrie, D.C. N.Y., 47 F.2d 271.

Ala.—Campbell v. State, 5 So.2d 466, 242 Ala. 215—Naff v. Fairfield-American Nat. Bank, 165 So. 224, 231 Ala. 388.

Ark.—Sinclair Refining Co. v. Bounds, 127 S.W.2d 629, 198 Ark. 149—Gainsburg v. Dodge, 101 S.W.2d 178, 193 Ark. 473.

D.C.—Densby v. Acacia Mut. Life Ass'n, 78 F.2d 203, 64 App.D.C. 319, 101 A.L.R. 863.

Del.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr. 22.

Ga.—Blount v. Metropolitan Life Ins. Co., 9 S.E.2d 65, 190 Ga. 301—Fain v. Nix, 7 S.E.2d 733, 189 Ga. 772—Coral Gables Corporation v. Hamilton, 147 S.E. 494, 168 Ga. 182—Wyse v. McKinney, 179 S.E. 860, 51 Ga.App. 204.

Ill.—Dunham v. Kauffman, 52 N.E. 2d 143, 385 Ill. 79, 154 A.L.R. 90.

Iowa.—McGaffin v. Helmts, 230 N.W. 532, 210 Iowa 108.

Ky.—Kitchen v. New York Trust Co., 168 S.W.2d 5, 292 Ky. 706.

Md.—Employers' Liability Assur. Corporation v. Perkins, 181 A. 436, 169 Md. 269.

Mass.—Harvey v. Fiduciary Trust Co., 13 N.E.2d 299, 299 Mass. 457—Durfee v. Durfee, 200 N.E. 395, 293 Mass. 472—Schmidt v. Schmidt, 182 N.E. 374, 280 Mass. 216—Kling v. McTarnahan, 178 N.E. 881, 277 Mass. 386.

Mich.—Stewart v. Eaton, 283 N.W. 651, 287 Mich. 466, 120 A.L.R. 1354.

N.M.—State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County, 96 P.2d 710, 44 N.M. 16, 126 A.L.R. 651.

N.Y.—Jackson v. Jackson, 49 N.E.2d 988, 290 N.Y. 512, 147 A.L.R. 668—Geary v. Geary, 6 N.E.2d 67, 272 N.Y. 390, 108 A.L.R. 1293—Garfein v. McInnis, 162 N.E. 73, 248 N.Y. 261—Kittredge v. Grannis, 155 N.E. 93, 244 N.Y. 132—Stoltz v. Stoltz, 238 N.Y.S. 207, 135 Misc. 713—In re Auto Mut. Indemnity Co., 14 N.Y.S.2d 601—Rodier v. Fay, 7 N.Y.S.2d 744.

N.C.—Adams & Childers v. Parker & Harrison, 138 S.E. 405, 194 N.C. 48.

Tex.—Adam v. Saenger, Civ.App., 101 S.W.2d 1046, certiorari granted

thorized to accept service in his behalf,[89] or by his voluntary appearance or submission to the jurisdiction of the court,[90] or by his otherwise waiving lack of service or jurisdiction.[91] A personal judgment rendered without such service of process or notice on the nonresident, or his voluntary appearance or waiver, is void,[92] even though he had knowledge of the pendency of the action or pro-

58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, reversed on other grounds 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, certiorari denied Saenger v. Adam, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511—Steger v. Shofner, Civ.App., 54 S.W.2d 1013—Flinn v. Krotz, Civ.App., 293 S.W. 625.

Wyo.—Closson v. Closson, 215 P. 485, 30 Wyo. 1, 29 A.L.R. 1371.

33 C.J. p 1085 note 29, p 1086 note 33, p 1075 note 58.

Extraterritorial service as insufficient see supra subdivision d of this section.

Joint defendants see infra § 33.

Jurisdiction of nonresidents generally see Courts §§ 83–87.

A state has power to provide for notice of actions against nonresidents found within its borders in such manner as it may see fit and to render personal judgments against them based thereon, provided method employed gives reasonable notice and affords fair opportunity to be heard before issues are decided.—Taplin v. Atwater, 8 N.E.2d 786, 297 Mass. 302.

Sufficiency of service

A nonresident defendant who is served in person in commonwealth with notice of pendency of action warning defendant to appear and show cause why judgment should not be rendered against him is a party to action so that a binding personal judgment may be rendered against him, since notice itself is "process" within statute permitting personal action to be maintained against nonresident who has been served with process in commonwealth.—Taplin v. Atwater, 8 N.E.2d 786, 297 Mass. 302.

Service anywhere in state sufficient

La.—Roper v. Brooks, 9 So.2d 485, 201 La. 135—Union City Transfer v. Fields, App., 199 So. 206.

As against heirs

Where no personal judgment had been obtained against nonresident for lack of personal service within state, complainants acquired no greater rights against resident heirs of nonresident where nonresident died pending appeal.—Commerce Union Bank v. Sharber, Tenn.App., 100 S.W.2d 243.

89. Ark.—Sinclair Refining Co. v. Bounds, 127 S.W.2d 629, 198 Ark. 149.

Del.—Webb Packing Co. v. Harmon, 196 A. 158, 9 W.W.Harr. 22.

La.—Mitchell v. Ernesto, App., 141 So. 818.

Md.—Employers' Liability Assur. Corporation v. Perkins, 181 A. 436, 169 Md. 269.

Attorney's acknowledgment of service

Ga.—Davis v. Davis, 21 S.E. 1002, 96 Ga. 136.

Notice to attorney, as required by statute

Ala.—Timmerman v. Martin, 176 So. 198, 234 Ala. 622.

Service on truck driver insufficient

Ark.—Coca-Cola Bottling Co. of Southeast Arkansas v. O'Neal, 104 S.W.2d 808, 193 Ark. 1143.

90. U.S.—Wilson v. Seligman, Mo., 12 S.Ct. 541, 144 U.S. 41, 36 L.Ed. 338—McQuillen v. National Cash Register Co., C.C.A.Md., 112 F.2d 877, certiorari denied 61 S.Ct. 140, 311 U.S. 695, 85 L.Ed. 450, rehearing denied 61 S.Ct. 316, 311 U.S. 729, 85 L.Ed. 474—Oxley v. Sweetland, C.C.A.W.Va., 94 F.2d 33—Chicago Joint Stock Land Bank v. Minnesota Loan & Trust Co., C.C.A.Minn., 57 F.2d 70.

Ala.—Naff v. Fairfield-American Nat. Bank, 165 So. 224, 231 Ala. 388—Stoer v. Ocklawaha River Farms Co., 138 So. 270, 223 Ala. 690.

Ark.—Gainsburg v. Dodge, 101 S.W.2d 178, 193 Ark. 473.

Cal.—Pinon v. Pollard, App., 158 P.2d 254.

Ga.—Fain v. Nix, 7 S.E.2d 733, 189 Ga. 772—Peeples v. Mullins, 168 S.E. 785, 176 Ga. 743—Irons v. American Nat. Bank, 165 S.E. 738, 175 Ga. 552, followed in 165 S.E. 741, 175 Ga. 558—Coral Gables Corporation v. Hamilton, 147 S.E. 494, 168 Ga. 182—Wyse v. McKinney, 179 S.E. 860, 51 Ga.App. 204—Rhodes v. Southern Flour & Grain Co., 163 S.E. 237, 45 Ga.App. 13.

Ky.—Kitchen v. New York Trust Co., 168 S.W.2d 5, 292 Ky. 706—Dean v. Stillwell, 145 S.W.2d 830, 284 Ky. 639.

Md.—Employers' Liability Assur. Corporation v. Perkins, 181 A. 436, 169 Md. 269.

Mass.—Harvey v. Fiduciary Trust Co., 13 N.E.2d 299, 299 Mass. 457—Schmidt v. Schmidt, 182 N.E. 374, 280 Mass. 216.

Mich.—Stewart v. Eaton, 283 N.W. 651, 287 Mich. 466, 120 A.L.R. 1354.

Mo.—Publicity Bldg. Realty Corporation v. Thomann, 183 S.W.2d 69, 353 Mo. 493—Hoffman v. Mechanics-American Nat. Bank of St. Louis, App., 287 S.W. 874.

N.Y.—Jackson v. Jackson, 49 N.E.2d 988, 290 N.Y. 512, 147 A.L.R. 668—Geary v. Geary, 6 N.E.2d 67, 272 N.Y. 390, 108 A.L.R. 1293—Kittredge v. Grannis, 155 N.E. 93, 244 N.Y. 182—Rodier v. Fay, 7 N.Y.S.2d 744.

N.C.—Southern Mills v. Armstrong, 27 S.E.2d 281, 223 N.C. 495, 148 A.L.R. 1248—Bridger v. Mitchell, 121 S.E. 661, 187 N.C. 374.

Tex.—Adam v. Saenger, Civ.App., 101 S.W.2d 1046, certiorari granted 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, reversed on other grounds 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, certiorari denied Saenger v. Adams, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511—Flinn v. Krotz, Civ.App., 293 S.W. 625.

33 C.J. p 1085 note 30, p 1086 note 33, p 1075 note 58.

Where nonresident defendant was represented by curator only and there was no personal appearance, no judgment could be rendered against him.—Robinson v. U. S., D.C.La., 33 F.2d 545, reversed on other grounds, C.C.A., U. S. v. Robinson, 40 F.2d 14.

Special appearance

If defendant appearing specially was nonresident at time of service of writ, no judgment could be rendered against him.—Bay State Wholesale Drug Co. v. Whitman, 182 N.E. 361, 280 Mass. 188.

Judgment on cross demand may be rendered against a nonresident plaintiff submitting to the jurisdiction of the court by the institution of the suit.—Andrews v. Whitehead, Tex.Civ.App., 60 S.W. 800.

91. U.S.—Wilson v. Seligman, Mo., 12 S.Ct. 541, 144 U.S. 41, 36 L.Ed. 338.

Ga.—Blount v. Metropolitan Life Ins. Co., 9 S.E.2d 65, 190 Ga. 301—Coral Gables Corporation v. Hamilton, 147 S.E. 494, 168 Ga. 182.

Md.—Employers' Liability Assur. Corporation v. Perkins, 181 A. 436, 169 Md. 269.

33 C.J. p 1086 note 34.

92. U.S.—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352—Beaver Board Cos. v. Imbrie, D.C.N.Y., 47 F.2d 271.

Ala.—Ex parte Luther, 168 So. 596, 232 Ala. 518—Ex parte Haisten, 149 So. 213, 227 Ala. 183—Ex parte Cullinan, 139 So. 255, 224 Ala. 263, 81 A.L.R. 160—Stoer v. Ocklawaha River Farms Co., 138 So. 270, 223 Ala. 690.

Del.—Hall v. Trans-Lux Daylight

ceeding.[93] It has been held that the fact that defendant is domiciled within the state does not justify the rendition of a judgment in personam against him, where the only service of process is by publication, and he is without the territorial limits of the state and does not appear.[94]

Constructive or substituted service alone, will not support a personal judgment against a nonresident,[95] unless he can be deemed to have assented to such mode of service.[96] A statute purporting to authorize a judgment against nonresidents on constructive or extraterritorial service has been held to that extent unconstitutional and void.[97] However, it has been held that constructive service, as by publication, will give the court such jurisdiction over a nonresident that its judgment, although not

Picture Screen Corporation, 171 A. 226, 20 Del.Ch. 78.
Ga.—Ford v. Southern Ry. Co., 125 S.E. 479, 33 Ga.App. 24.
La.—Krotz Springs Oil & Mineral Water Co. v. Shirk, 116 So. 488, 165 La. 1005.
Mass.—Commissioner of Banks v. Cosmopolitan Trust Co., 148 N.E. 609, 253 Mass. 205, 41 A.L.R. 658.
Miss.—Hume v. Inglis, 122 So. 535, 154 Miss. 481.
N.Y.—Sweeney v. National Assets Corporation, 246 N.Y.S. 315, 139 Misc. 223.
N.C.—Bizzell v. Mitchell, 142 S.E. 706, 195 N.C. 484—Bridger v. Mitchell, 121 S.E. 661, 187 N.C. 374.
Tex.—Hicks v. Sias, Civ.App., 102 S. W.2d 460, error refused—Steger v. Shofner, Civ.App., 54 S.W.2d 1013.

"A person residing outside the state is not required to come within its borders and submit his controversy to its courts because of notice of the suit at the place of his residence, and an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in as outside the state."—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A. Ky., 112 F.2d 352, 355.

Judgment on cross petition against nonresident defendants, where no process was issued on cross petition, is void.
Ky.—Carter v. Capshaw, 60 S.W.2d 959, 249 Ky. 483.
Tex.—Adam v. Saenger, Civ.App., 101 S.W.2d 1046, reversed on other grounds 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, certiorari denied Saenger v. Adam, 59 S.Ct. 332, 307 U.S. 628, 83 L.Ed. 1511.

Unauthorized appearance by attorney

Appearance of attorney for nonresident does not give court jurisdiction over nonresident, and personal judgment obtained against nonresident is void ab initio, if appearance was unauthorized.
N.Y.—Amusement Securities Corporation v. Academy Pictures Distributing Corporation, 295 N.Y.S. 436, 251 App.Div. 227, affirmed 294 N.Y.S. 305, 250 App.Div. 710 and 294 N.Y.S. 306, 250 App.Div. 710, motions denied 295 N.Y.S. 472, 250 App.Div. 749, affirmed 13 N.E.2d 471, 277 N.Y. 557, reargument denied 14 N.E.2d 388, 277 N.Y. 672.
Okl.—Hatfield v. Lewis, 236 P. 611, 110 Okl. 98.

93. Mich.—Stewart v. Eaton, 283 N. W. 651, 287 Mich. 466, 120 A.L.R. 1354.

94. Cal.—De La Montanya v. De La Montanya, 44 P. 345, 112 Cal. 101, 53 Am.S.R. 165, 32 L.R.A. 82.
Or.—Laughlin v. Hughes, 89 P.2d 568, 161 Or. 295.

95. U.S.—Warmsprings Irr. Dist. v. May, C.C.A.Or., 117 F.2d 802—McQuillen v. Dillon, C.C.A.N.Y., 98 F.2d 726, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424—Hamilton Michelsen Groves Co. v. Penney, C.C.A.Fla., 58 F.2d 761—Campbell v. City of Hickman, D. C.Ky., 45 F.Supp. 517.
Cal.—Comfort v. Comfort, 112 P.2d 259, 17 Cal.2d 736—Glaston v. Glaston, 160 P.2d 45, 69 Cal.App.2d 787, certiorari denied 66 S.Ct. 484—Pinon v. Pollard, 158 P.2d 254, 69 Cal.App.2d 129.
Fla.—Newton v. Bryan, 194 So. 282, 142 Fla. 14—Harris Inv. Co. v. Hood, 167 So. 25, 123 Fla. 598.
Ga.—Hirsch v. Northwestern Mut. Life Ins. Co., 13 S.E.2d 165, 191 Ga. 524—**Corpus Juris quoted in** Webb & Martin v. Anderson-McGriff Hardware Co., 8 S.E.2d 882, 885, 188 Ga. 291—Peeples v. Mullins, 168 S.E. 785, 176 Ga. 743—Edwards Mfg. Co. v. Hood, 145 S. E. 87, 167 Ga. 144—Ford v. Southern Ry. Co., 125 S.E. 479, 33 Ga. App. 24.
Ill.—Bank of Edwardsville v. Raffaelle, 45 N.E.2d 651, 381 Ill. 486, 144 A.L.R. 401—Barnett v. Cook County, 26 N.E.2d 862, 373 Ill. 516—Griffin v. Cook County, 16 N.E.2d 906, 369 Ill. 380, 118 A.L.R. 1157—Austin v. Royal League, 147 N.E. 106, 316 Ill. 188.
Ind.—Pattison v. Grant Trust & Savings Co., 144 N.E. 26, 195 Ind. 313.
Ky.—Dean v. Stillwell, 145 S.W.2d 830, 284 Ky. 639.
Miss.—Hume v. Inglis, 122 So. 535, 154 Miss. 481.
Mo.—Hoffman v. Mechanics-American Nat. Bank of St. Louis, App., 287 S.W. 874.
Nev.—Perry v. Edmonds, 84 P.2d 711, 59 Nev. 60.
N.Y.—Kellogg v. Kellogg, 203 N.Y. S. 757, 122 Misc. 734.
N.C.—Southern Mills v. Armstrong, 27 S.E.2d 281, 223 N.C. 495, 143 A.L.R. 1248—Bridger v. Mitchell, 121 S.E. 661, 187 N.C. 374.
Okl.—Royal Neighbors of America v Fletcher, 227 P. 426, 99 Okl. 297.
Or.—Laughlin v. Hughes, 89 P.2d 568, 161 Or. 295.
Pa.—Atlantic Seaboard Natural Gas Co. v. Whitten, 173 A. 305, 315 Pa. 529, 93 A.L.R. 615—Hughes v. Hughes, 158 A. 874, 306 Pa. 75.
Tenn.—Lawson v. American Laundry Machinery Co., 54 S.W.2d 712, 165 Tenn. 180—Commerce Union Bank v. Sharber, 100 S.W.2d 243, 20 Tenn.App. 451.
Tex.—Steger v. Shofner, Civ.App., 54 S.W.2d 1013—First Nat. Bank v. C. H. Meyers & Co., Civ.App., 283 S.W. 265—People's Guaranty State Bank v. Hill, Civ.App., 256 S.W. 683.
Wis.—Riley v. State Bank of De Pere, 269 S.W. 722, 223 Wis. 16.
Wyo.—Fremont Consol. Oil Co. v. Anderson, 12 P.2d 369, 44 Wyo. 313.
33 C.J. p 1085 note 31.

Service by registered mail insufficient
Ala.—Campbell v. State, 5 So.2d 466, 242 Ala. 215.
Miss.—Cudahy Packing Co. v. Smith, 2 So.2d 347, 191 Miss. 31.

Contractual rights cannot be litigated on constructive notice against nonresidents.—McKleroy v. Dishman, 142 So. 41, 225 Ala. 131.

On cross bill

A cross bill stands as original suit after dismissal of original bill, so that judgment thereon against nonresident on notice only by publication is void.—Lawson v. American Laundry Machinery Co., 54 S.W.2d 712, 165 Tenn. 180.

96. Fla.—Newton v. Bryan, 194 So. 282, 142 Fla. 14.

97. U.S.—Cella Commn. Co. v. Bohlinger, Ark., 147 F. 419, 78 C.C.A. 467, 8 L.R.A.,N.S., 537.
33 C.J. p 1086 note 35.
Under "due process" clause see Constitutional Law § 619.

enforceable beyond the state, may be satisfied out of any property of defendant found within the state,[98] and within the jurisdiction of the court,[99] and to that extent he is bound by the judgment, provided all the precedent proceedings relating to such service strictly conform to the law.[1] Nevertheless, the generally prevailing rule is that a personal judgment against a nonresident rendered on constructive service is void for all purposes, even within the state where it has been rendered,[2] unless defendant appears,[3] or unless specific property within the state has been attached, and thus subjected to the jurisdiction of the court.[4] Where neither person nor property of a nonresident is found within the state, a judgment with respect to the rights or obligations of the nonresident is without jurisdiction and wholly void.[5]

f. Attachment and Garnishment

A valid judgment in personam may be rendered against a defendant in an action begun by attachment or garnishment only where he has been personally served with process within the territorial jurisdiction of the court or has voluntarily appeared and submitted to its jurisdiction.

Where jurisdiction of an action is acquired by attachment or garnishment of defendant's property or credits, although the property or credits so attached or garnished may be subjected to, and bound by, a judgment rendered in such action, as a judgment in rem, or quasi in rem, as discussed infra §§ 908, 911, a valid general judgment in personam may be rendered against defendant only where he has been personally served with process,[6] or where he voluntarily appears in the action and thus subjects himself to the jurisdiction of the court,[7] as where he files a forthcoming or replevy bond.[8] Under some statutes, if defendant is about to remove the property from the state with the intent to hinder or delay creditors, and all the parties are before the court, a personal judgment may be rendered

98. Ala.—Turnipseed v. Blan, 148 So. 116, 226 Ala. 549.
Tex.—People's Guaranty State Bank v. Hill, Civ.App., 256 S.W. 633.
33 C.J. p 1086 note 36.

Ownership of notes and checks follows domicile of their owner, and the notes and checks do not constitute "money" or "effects" with situs independent of owner's domicile.—Steger v. Shofner, Tex.Civ. App., 54 S.W.2d 1013.

99. Ind.—Clark v. Clark, 172 N.E. 124, 202 Ind. 104.
Tenn.—Commerce Union Bank v. Sharber, 100 S.W.2d 243, 20 Tenn. App. 451.
Tex.—Wilson v. Beck, Civ.App., 286 S.W. 315.
Wyo.—Fremont Consol. Oil Co. v. Anderson, 12 P.2d 369, 44 Wyo. 313.

1. Miss.—Mercantile Acceptance Corporation v. Hedgepeth, 112 So. 872, 147 Miss. 717.
33 C.J. p 1088 note 57.

2. N.Y.—Geary v. Geary, 6 N.E.2d 67, 272 N.Y. 390, 108 A.L.R. 1293—Forster v. Forster, 46 N.Y.S.2d 320, 182 Misc. 382.
33 C.J. p 1087 note 37.

3. N.Y.—Forster v. Forster, supra.
33 C.J. p 1087 note 38.

4. U.S.—Pennoyer v. Neff, Or., 95 S.Ct. 714, 24 L.Ed. 565—Heydemann v. Westinghouse Electric Mfg. Co., C.C.A.N.Y., 80 F.2d 337.
Ariz.—Porter v. Duke, 270 P. 625, 34 Ariz. 217.
Mass.—Roberts v. Anheuser Busch Brewing Ass'n, 102 N.E. 316, 215 Mass. 341.
N.Y.—Haase v. Michigan Steel Boat Co., 132 N.Y.S. 1046, 148 App.Div. 293, appeal dismissed 104 N.E. 1131, 210 N.Y. 602—Forster v. Forster, 46 N.Y.S.2d 320, 182 Misc. 382.
N.C.—Adams & Childers v. Packer & Harrison, 138 S.E. 405, 194 N.C. 48.
Judgment in action begun by attachment or garnishment generally see infra subdivision f of this section.

Judgment held void, on service by publication, after attachment of supposed interest in realty, which did not in fact exist.—Matthews v. Curtis, 151 N.E. 778, 20 Ohio App. 209.

After dissolution of the attachment, there can be no judgment against defendant, where the jurisdiction in attachment was obtained by constructive service only.—Theo. Ascher Co. v. Dougherty, 114 S.W. 1111, 134 Mo.App. 511.

5. Ariz.—**Corpus Juris quoted in** Smith v. Normart, 75 P.2d 38, 41, 51 Ariz. 134.
33 C.J. p 1087 note 41.

6. Ala.—Oliver v. Kinney, 56 So. 203, 173 Ala. 593.
Ariz.—Brown v. First Nat. Bank of Winslow, 129 P.2d 664, 59 Ariz. 392.
Fla.—Johnson v. Clark, 193 So. 842, 145 Fla. 258.
Ga.—Collins v. Southern Finance Corporation, 180 S.E. 744, 51 Ga. App. 400.
Ill.—Bloom v. Kahl, 255 Ill.App. 456.
La.—Silverman v. Grinnell, 115 So. 789, 165 La. 587.
N.Y.—Swedosh v. Belding Hosiery Mills, 6 N.Y.S.2d 532, 168 Misc. 673.
Okl.—Davies v. Thompson, 160 P. 75, 61 Okl. 21, L.R.A.1917B 395.
Tex.—Big Four Shoe Stores Co. v. Ludlam, Civ.App., 68 S.W.2d 885.
Va.—Maryland Casualty Co. v. Parrish, 143 S.E. 750, 150 Va. 473.
33 C.J. p 1088 notes 49, 51—6 C.J. p 473 note 43.
Process or:
Appearance in garnishment proceeding generally see Garnishment § 123.
Notice in main action in general see Attachment §§ 482–490.

Judgment for excess
In order to warrant recovery in attachment proceeding exceeding value of property impounded by writ, there must be valid personal service of summons.—Purnell v. Morton Live Stock Co., 1 S.W.2d 1013, 156 Tenn. 383.

Statutory notice to, and service on, defendant in attachment take place of process and service in common-law actions, both of which subject him personally to court's jurisdiction and render him liable to judgment binding all his property.—Peacock v. J. I. Case Co., 162 S.E. 306, 44 Ga.App. 499.

7. Ala.—Oliver v. Kinney, 56 So. 203, 173 Ala. 593.
Ga.—Collins v. Southern Finance Corporation, 180 S.E. 744, 51 Ga. App. 400.
Va.—Maryland Casualty Co. v. Parrish, 143 S.E. 750, 150 Va. 473.
33 C.J. p 1088 note 53—6 C.J. p 478 notes 12, 13.

8. Ga.—Collins v. Southern Finance Corporation, 180 S.E. 744, 51 Ga. App. 400—Blakely Milling & Trading Co. v. Thompson, 128 S.E. 688, 34 Ga.App. 129—Hensley v. Minehan, 114 S.E. 647, 29 Ga.App. 251.
33 C.J. p 1088 note 53 [d], [e].
Effect of filing bond on right to proceed to judgment see Attachment § 313 b (3).

against him without the issuance of new process.[9]

Nonresidents. The same rules apply where defendant in such an action is a nonresident; a valid personal judgment may be rendered against him only where he has been personally served with process, within the jurisdiction of the court,[10] or has voluntarily appeared and submitted to the jurisdiction of the court,[11] or acknowledges service of the writ and waives the benefit of the statutes respecting absent defendants;[12] and, in the absence of such service or appearance, a judgment although expressed in general terms will be effective only against the property so attached, as discussed infra §§ 908, 911. It cannot be made the basis of further proceedings in personam against defendant.[13]

g. Defective Process

A judgment is void if it is based on a process which is so radically defective as to be equivalent to no process; but may be merely voidable if the defect is a mere irregularity which does not prevent the process from constituting legal notice to defendant.

A judgment is void where it is based on process which is so radically defective as to be equivalent to no process,[14] and this rule applies with respect to such a defect in the issuance of an alias or pluries writ.[15] A defective process, however, may be sufficient to constitute legal notice and support the judgment,[16] and if the process, although imperfect or irregular in some particulars, is sufficiently complete to constitute a legal notice to defendant, and to inform him of the essential facts he is entitled to know, the consequent judgment is not void,[17] par-

9. Ark.—Hutchison v. First Nat. Bank, 246 S.W. 484, 156 Ark. 142.

10. Ga.—Chastain v. Alford, 20 S.E. 2d 150, 67 Ga.App. 316.
Idaho.—Sunderlin v. Warner, 246 P. 1, 42 Idaho 479.
Ill.—Hogue v. Corbit, 41 N.E. 219, 156 Ill. 540, 47 Am.S.R. 232.
Iowa.—Darrah v. Watson, 36 Iowa 116.
La.—Pelican Well & Tool Supply Co. v. Johnson, 195 So. 514, 194 La. 987—Latham v. Glasscock, 108 So. 700, 160 La. 1089—Whitney Central Trust & Savings Bank v. Norton, 102 So. 306, 157 La. 199.
Miss.—Sellers v. Powell, 152 So. 492, 168 Miss. 682—Clark v. Louisville & N. R. Co., 130 So. 302, 158 Miss. 287.
Mo.—State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge, 56 S.W.2d 28, 331 Mo. 1015, 85 A.L.R. 1375, certiorari denied Ferrocarriles Nacionales De Mexico v. Rutledge, 53 S.Ct. 689, 289 U.S. 746, 77 L.Ed. 1492.
Tex.—Colby v. McClendon, Civ.App., 116 S.W.2d 505.
33 C.J. p 1089 note 59.

Judgment not "personal"

In action on note and open account accompanied by an attachment of land of nonresident defendant, judgment ordering sale of the attached property and appropriation of the proceeds to payment of the debt sued on was not erroneous as a "personal judgment" against the nonresident.—Hall v. Bradley, 160 S.W.2d 641, 290 Ky. 130.

Where garnishment is filed against resident garnishee, the court acquires jurisdiction over the garnishee and the nonresident defendant to the extent of the value of the property in the hands of the garnishee, and the court may then proceed to a trial of the issues, and if court finds that the garnishee is not indebted to defendant, power of the court further to proceed against defendant is ended.—Colby v. McClendon, Tex.Civ.App., 116 S.W.2d 505.

11. Del.—Yeatman v. Ward, Super., 36 A.2d 855.
Ga.—Chastain v. Alford, 20 S.E.2d 150, 67 Ga.App. 316.
Ill.—Kerr v. Swallow, 33 Ill. 379.
Miss.—Sellers v. Powell, 152 So. 492, 168 Miss. 682—Clark v. Louisville & N. R. Co., 130 So. 302, 158 Miss. 287.
Tex.—Minero v. Ross, Civ.App., 133 S.W. 224.

Special appearance

Nonresident defendant's appearance for sole purpose of dissolving attachment, if sustained, defeats court's jurisdiction.—Adams v. Ross Amusement Co., 161 So. 601, 182 La. 252.

12. Mass.—Richardson v. Smith, 11 Allen 134.

13. U.S.—Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., C.C.A. Ohio, 285 F. 214.
33 C.J. p 1089 note 60.

14. Fla.—Seaboard All-Florida Ry. v. Leavitt, 141 So. 886, 105 Fla. 600.
Ky.—Richardson v. Webb, 135 S.W. 2d 861, 281 Ky. 201.
La.—Dickey v. Pollock, App., 183 So. 43—Longino v. Home Ins. Co. of New York, 138 So. 687, 18 La.App. 680.
N.Y.—Greater New York Export House v. Hurtig, 267 N.Y.S. 173, 239 App.Div. 133, appeal dismissed Greater New York Export House v. Peirson, 196 N.E. 290, 265 N.Y. 500.
S.D.—**Corpus Juris quoted in** Jacobs v. Queen Ins. Co. of America, 213 N.W. 14, 51 S.D. 249.
Tex.—Wise v. Southern Rock Island Plow Co., Civ.App., 85 S.W.2d 257—Cheshire v. Palmer, Civ.App., 44 S.W.2d 438—Ross v. Sechrist, Civ. App., 275 S.W. 287—Lepp v. Ward County Water Improvement Dist. No. 2, Civ.App., 257 S.W. 916.
33 C.J. p 1090 note 67—34 C.J. p 535 notes 45, 46.

Fatal defects

(1) Failure to state the time and place for defendant's appearance.—Venetsianos v. Tamasoff, 197 A. 885, 9 W.W.Harr., Del., 180—33 C.J. p 1090 note 67 [b] (14).

(2) Making return day an impossible date.—Empire Gas & Fuel Co. v. Albright, 87 S.W.2d 1092, 126 Tex. 485—33 C.J. p 1090 note 67 [b] (1).

(3) Omission or misstatement of date of filing of petition, as required by statute.—Wise v. Southern Rock Island Plow Co., Tex.Civ.App., 85 S. W.2d 257—State v. Buckholts State Bank, Tex.Civ.App., 193 S.W. 730.

(4) Requiring appearance on a day subsequent to the date of the rendition of the judgment.—Moore v. Smith, 15 S.E.2d 48, 177 Va. 621.

(5) Other fatal defects see 33 C. J. p 1090 note 67 [b].

15. Mich.—Rood v. McDonald, 7 N. W.2d 95, 303 Mich. 634.
Mo.—Weaver v. Woodling, 272 S.W. 373, 220 Mo.App. 970.

16. Tenn.—**Corpus Juris cited in** Hunter v. May, 25 S.W.2d 589, 581, 161 Tenn. 155.

17. Iowa.—Swan v. McGowan, 231 N.W. 440, 212 Iowa 631.
Minn.—Peterson v. W. Davis & Sons, 11 N.W.2d 800, 216 Minn. 60.
N.C.—Nall v. McConnell, 190 S.E. 210, 211 N.C. 258.
Okl.—Texas Title Guaranty Co. v. Mardis, 98 P.2d 593, 186 Okl. 483.
Tex.—Rhoads v. Daly General Agency, Civ.App., 152 S.W.2d 461—Weaver v. Garrietty, Civ.App., 84 S.W.2d 878.
33 C.J. p 1091 note 68—34 C.J. p 534 note 43.
As not subject to collateral attack see infra § 422.

ticularly where defendant has waived such defects in the process.[18] Although there is also authority to the contrary,[19] it has been held that the omission of a proper seal from the process, or the use of an improper seal, merely renders the judgment defective, and not void,[20] particularly where service has been accepted and defendant has voluntarily appeared.[21]

Designation of parties. Process which is radically defective with respect to the designation of the names of the parties,[22] either plaintiff[23] or defendant,[24] will not support a judgment. On the other hand, the validity of the judgment is not affected by an inaccuracy in the designation of a party in the process if the real party intended is not misled thereby.[25] With regard to misnomer, it has been held that if process is really served on the person intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or omits to plead the misnomer in abatement, he is bound by the judgment rendered against him.[26] A similar rule applies in the case of a misnomer of plaintiff.[27]

h. Defective Service

A judgment based on a service of process which is so defective as to amount to no service at all, has been held void. If, however, the service, although defective, is sufficient to give the defendant notice of the

Opening and vacating judgment for defects in process see infra § 267.

The object of "summons" is to apprise defendant that plaintiff seeks judgment against defendant, and, when defendant is apprised of such fact and summons does not so far vary from the statutory form as to deprive defendant of any substantial right, the court acquires jurisdiction to render judgment,—Barth v. Owens, 35 N.Y.S.2d 632, 178 Misc. 628.

Errors or defects not fatal

(1) As to return day.

Ark.—United Order of Good Samaritans v. Brooks, 270 S.W. 955, 168 Ark. 570.

Okl.—Jones v. Standard Lumber Co., 249 P. 343, 121 Okl. 186.

33 C.J. p 1091 note 68 [b].

(2) Erroneous direction to wrong sheriff, who by indorsement on summons appointed sheriff to whom it should have been directed, and was properly served by latter sheriff.—Whitaker v. First Nat. Bank, 231 P. 691, 32 Wyo. 288.

(3) Misnaming the county seat of county in which action was filed.—Tyler Boat Works v. Schreiner, 153 P.2d 1004, 194 Okl. 601.

(4) Other errors or defects not fatal see 33 C.J. p 1091 note 68 [a].

Mutilation of record

Where summons was properly issued and served and made returnable to a term subsequent to the service, the unauthorized act of some one after final judgment in mutilating the record so as to indicate that it was returnable to a prior term, could not deprive the court of jurisdiction or render the judgment invalid.—Henneke v. Strack, Mo.App., 101 S.W.2d 743.

18. N.C.—Moseley v. Deans, 24 S.E. 2d 630, 222 N.C. 731.

General appearance as waiver of defects in process see Appearances § 17.

Time for objections for defects in process, and waiver or cure thereof, see the C.J.S. title Process § 113, also 50 C.J. p 595 note 50—p 599 note 4.

19. Ark.—Woolford v. Dugan, 2 Ark. 131.

Tex.—Line v. Cranfall, Civ.App., 37 S.W. 184.

33 C.J. p 1090 note 67 [c].

20. Ark.—Oliver v. Routh, 184 S.W. 843, 123 Ark. 189—Rudd v. Thompson, 22 Ark. 363.

Fla.—Benedict v. W. T. Hadlow Co., 42 So. 239, 52 Fla. 188.

Tex.—Rhoads v. Daly General Agency, Civ.App., 152 S.W.2d 461.

34 C.J. p 534 note 43 [f].

21. N.C.—Moseley v. Deans, 24 S.E. 2d 630, 222 N.C. 731.

22. Tex.—Delaware Western Constr. Co. v. Farmers' & Merchants' Nat. Bank of Gilmer, 77 S.W. 628, 33 Tex.Civ.App. 658.

33 C.J. p 1090 note 67 [e].

Designation of parties in process generally see the C.J.S. title Process § 15, also 50 C.J. p 458 note 36—p 459 note 49.

23. Fla.—Western Union Telegraph Co. v. Hiscock, 96 So. 407, 85 Fla. 480.

N.Y.—Durst v. Ernst, 91 N.Y.S. 13, 45 Misc. 627.

33 C.J. p 1090 note 67 [g].

24. Mass.—F. H. Hill & Co. v. Doe, 189 N.E. 583, 286 Mass. 187.

Tex.—Maier v. Davis, Civ.App., 72 S.W.2d 308.

W.Va.—New Eagle Gas Coal Co. v. Burgess, 111 S.E. 508, 90 W.Va. 541.

33 C.J. p 1090 note 67 [f], [h], [i], p 1092 note 72 [a].

Warning order

An affidavit for a warning order in a verified petition, alleging that defendant was a nonresident and giving his postoffice address, but not alleging a belief that he was then absent from the state, does not warrant the issuance of a warning order, and a judgment rendered thereon is void.—Leonard v. Williams, 265 S.W. 618, 205 Ky. 218—Baker v. Baker, Eccles & Co., 173 S.W. 109, 162 Ky. 683, L.R.A.1917C 171—Warrick v. McCormick, 150 S.W. 1027, 150 Ky. 800.

25. Okl.—Glenn v. Prentice, 12 P.2d 170, 158 Okl. 73.

Tex.—Gillette Motor Transport Co. v. Whitfield, Civ.App., 160 S.W.2d 290—Belknap Hardware & Mfg. Co. v. Lightfoot, Civ.App., 75 S.W. 2d 481—Beaumont, S. L. & W. R. Co. v. Daniel, Civ.App., 186 S.W. 383.

Designating defendant by trade-name rather than real name.—Belknap Hardware & Mfg. Co. v. Lightfoot, 75 S.W.2d 481.

26. Colo.—Van Buren v. Posteraro, 102 P. 1067, 45 Colo. 588, 132 Am. S.R. 199.

Ill.—Feld v. Loftis, 88 N.E. 281, 240 Ill. 105.

Mo.—Kronski v. Missouri Pac. R. Co., 77 Mo. 362.

Neb.—Jones v. Union Pac. R. Co., 120 N.W. 946, 84 Neb. 121.

N.Y.—Morison v. Laing, 117 N.Y.S. 416, 132 App.Div. 689.

Tex.—Adams v. Consolidated Underwriters, 124 S.W.2d 840, 133 Tex. 26—Abilene Telephone & Telegraph Co. v. Williams, 229 S.W. 847, 111 Tex. 102—McGhee v. Romatka, 45 S.W. 552, 92 Tex. 38—Maier v. Davis, Civ.App., 72 S.W. 2d 308.

33 C.J. p 1092 note 72.

In future litigation, defendant may be connected with the judgment by proper averments, which, when made and proved, conclude such person to the same extent as though he had been named and served in his true name.

Neb.—Jones v. Union Pac. R. Co., 120 N.W. 946, 84 Neb. 121.

Tex.—Adams v. Consolidated Underwriters, 124 S.W.2d 840, 133 Tex. 26.

27. Mass.—U. S. National Bank v. Venner, 52 N.E. 543, 172 Mass. 449.

33 C.J. p 1092 note 73.

action or proceeding, a judgment based thereon has been held merely voidable.

Where the service of process on a defendant is so defective as to amount to no service at all, a judgment based thereon has been held to be void,[28] notwithstanding he had knowledge of the suit.[29] A judgment against defendant is void, in the absence of appearance, where it is based on the service of process on another than defendant, the person named in the process,[30] although the person served bears the same name.[31] A judgment has also been held void where the service of process on a nonresident, within the jurisdiction of the court, was obtained by fraud, as where he was induced by fraud to come within the jurisdiction of the court, where he was served with process.[32] A judgment is also void where process directed to the sheriff of one county was served by the sheriff of another county.[33]

A defective service, however, may be sufficient to constitute legal notice and support a judgment.[34] If the service is merely irregular, but actually gives defendant notice of the action or proceeding, a judgment based thereon has been held not void, but at most merely voidable,[35] as where there is a mere defect or irregularity as to the time of service[36] or in failing to serve a copy of the complaint;[37] and, moreover, the judgment is not even voidable if the defect or irregularity has been waived.[38]

Substituted or constructive service. In accordance with the rule requiring the statutory provisions relating to substituted or constructive service of process to be strictly applied, unless defendant has appeared or pleaded in the case[39] a judgment has been held void where it is based on substituted or constructive service, or service by publication, which is not made in strict compliance with the essential statutory requirements relating thereto,[40] provided, under some statutes, the failure to com-

28. Fla.—State ex rel. Gore v. Chillingworth, 171 So. 649, 126 Fla. 645.
Ga.—Rhodes v. Southern Flour & Grain Co., 163 S.E. 237, 45 Ga.App. 13.
Ill.—Sunbeam Heating Co. v. Chambers, 53 N.E.2d 294, 321 Ill.App. 629.
La.—Fullilove v. Central State Bank, 107 So. 590, 160 La. 831—Quinn v. O'Neil, 121 So. 377, 10 La.App. 121.
Mo.—Coerver v. Crescent Lead & Zinc Corporation, 286 S.W. 3, 315 Mo. 276.
33 C.J. p 1092 note 76—34 C.J. p 535 note 47.
Opening or vacating judgment for defective service see infra § 267.

Defects of service held fatal

(1) Service by deputy sheriff beyond territorial confines of his own parish.—Adams v. Citizens' Bank, 136 So. 107, 17 La.App. 422.

(2) Service on nonresident suitors and witnesses in attendance on trial and immune from process.—Northwestern Casualty & Surety Co. v. Conaway, 230 N.W. 548, 210 Iowa 126, 68 A.L.R. 1465.

(3) Other fatal defects and irregularities of service see 33 C.J. p 1093 note 77.

Judgment merely voidable

It has been held that a judgment of a court of general jurisdiction is merely voidable, where service has not been obtained in the required manner, or defendant has been denied day in court by lack of proper service.—Lynch v. Collins, 233 P. 709, 106 Okl. 133.

29. Ill.—Sunbeam Heating Co. v. Chambers, 53 N.E.2d 294, 321 Ill. App. 629.
Ohio.—Haley v. Hanna, 112 N.E. 149, 93 Ohio St. 49.

30. U.S.—Elliott v. Holmes, C.C.Ill., 8 F.Cas.No.4,392, 1 McLean 466.
Cal.—Adams & Co. v. Town, 3 Cal. 247.
Tex.—Barnett v. Tayler, 30 Tex. 453—Booth v. Holmes, 2 Tex.Unrep. Cas. 232.

31. Tex.—State Mortgage Corporation v. Traylor, 36 S.W.2d 440, 120 Tex. 148.

32. U.S.—Wyman v. Newhouse, C.C. A.N.Y., 93 F.2d 313, 115 A.L.R. 460, certiorari denied 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.
Iowa.—Miller v. Acme Feed, 293 N. W. 637, 228 Iowa 861.

33. Ga.—W. T. Rawleigh Co. v. Greenway, 26 S.E.2d 458, 69 Ga. App. 590—Strauss v. Owens, 65 S. E. 161, 6 Ga.App. 415.
Ky.—Foster v. Hill, 138 S.W.2d 495, 282 Ky. 327.
Tex.—Hitt v. Bell, Civ.App., 111 S. W.2d 1164.

34. Tenn.—Hunter v. May, 25 S.W. 2d 580, 161 Tenn. 155.

35. Fla.—State ex rel. Gore v. Chillingworth, 171 So. 649, 126 Fla. 645—Voorhies v. Barnsley, 156 So. 234, 116 Fla. 191—Walker v. Carver, 112 So. 45, 93 Fla. 837.
Ky.—Ely v. U. S. Coal & Coke Co., 49 S.W.2d 1021, 243 Ky. 725.
Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.
Neb.—Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co., 69 N.W. 774, 50 Neb. 283, 61 Am. S.R. 573.
Va.—Wood v. Kane, 129 S.E. 327, 143 Va. 281.
Wash.—Atwood v. McGrath, 242 P. 648, 137 Wash. 400.
33 C.J. p 1092 note 76, p 1093 note 78.
Collateral attack see infra § 422.

36. N.C.—Nall v. McConnell, 190 S. E. 210, 211 N.C. 258.
Okl.—Goldsmith v. Owens, 68 P.2d 849, 180 Okl. 268.
Tex.—Florence v. Swails, Civ.App., 85 S.W.2d 257.
33 C.J. p 1093 note 78 [a].

37. Wash.—Munch v. McLaren, 38 P. 205, 9 Wash. 676.
34 C.J. p 534 note 44 [d].

38. Fla.—Voorhies v. Barnsley, 156 So. 234, 116 Fla. 191.
General appearance as waiver of defects in service of process see Appearances § 17.
Waiver of defects in service of process generally see the C.J.S. title Process § 113, also 50 C.J. p 596 note 59-p 599 note 11.

39. Fla.—McGee v. McGee, 22 So.2d 788—United Brotherhood of Carpenters and Joiners of America v. Graves Inv. Co., 15 So.2d 196, 153 Fla. 529.
Kan.—Union Central Life Ins. Co. v. Irrigation Loan & Trust Co., 42 P.2d 566, 141 Kan. 675.

40. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U. S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.
Fla.—McGee v. McGee, 22 So.2d 788—United Brotherhood of Carpenters and Joiners of America v. Graves Inv. Co., 15 So.2d 196, 153 Fla. 529—Klinger v. Milton Holding Co., 136 So. 526, 136 Fla. 50—

ply with the statute appears on the face of the record or judgment roll.[41] A judgment based on service by publication has been held void where the requirements of the statute were not complied with, with respect to the time of publication of the process,[42] or with respect to the affidavit for the order of publication,[43] or with respect to posting or mailing a copy of the summons, complaint, and order to defendant.[44] However, the mere fact that the affidavit is defective in the method of stating the facts, or in the degree of proof, has been held to make a judgment based thereon merely voidable.[45]

Stern v. Raymond, 116 So. 6, 95 Fla. 410.
Ill.—Martin v. Schillo, 60 N.E.2d 392, 389 Ill. 607, certiorari denied 65 S.Ct. 1572, 325 U.S. 880, 89 L.Ed. 1996.
Kan.—Union Central Life Ins. Co. v. Irrigation Loan & Trust Co., 42 P. 2d 566, 141 Kan. 675.
La.—Richardson v. Trustees' Loan & Guaranty Co., 132 So. 387, 15 La. App. 645.
Mo.—Davison v. Arne, 155 S.W.2d 155, 348 Mo. 790—Dent v. Investors' Sec. Ass'n, 254 S.W. 1080, 300 Mo. 552—Williams v. Luecke, App., 152 S.W.2d 991—Haake v. Union Bank & Trust Co., App., 54 S.W. 2d 459.
N.C.—Guerin v. Guerin, 181 S.E. 274, 208 N.C. 457.
Okl.—Locke v. Gilbert, 271 P. 247, 133 Okl. 93—Dow v. Cowley-Frye Lumber Co., 247 P. 1109, 119 Okl. 60.
Or.—Okanogan State Bank of Riverside, Wash. v. Thompson, 211 P. 933, 106 Or. 447.
Tex.—Smith v. Commercial Credit Corp., Civ.App., 137 S.W.2d 360, reversed on other grounds Commercial Credit Corp. v. Smith, 137 S.W.2d 363, 143 Tex. 612—Perez v. E. P. Lipscomb & Co., Civ.App., 267 S.W. 748.
33 C.J. p 1093 note 80.
Strict compliance with statute as to substituted service or service by publication generally see the C.J.S. title Process §§ 43, 55, also 50 C.J. p 490 note 77-p 491 note 81, p 497 note 17-p 498 note 23.

Under unconstitutional statute

Service of summons on alleged resident agent of nonresident individual would not warrant rendition of judgment against the individual as such, where the statute authorizing service on agent of nonresident individuals engaged in business within the state is unconstitutional. —Jones v. Fuller, 134 S.W.2d 240, 280 Ky. 671.

Defects held fatal

(1) Service by publication when defendants were residents of state at date of service and their residence known to plaintiff.—Perez v. E. P. Lipscomb & Co., Tex.Civ.App., 267 S.W. 748.

(2) Service by publication under order not based on affidavit for attachment, stating that defendant was nonresident, but solely on allegation or finding that she could not be summoned.—Haake v. Union Bank & Trust Co., Mo.App., 54 S.W.2d 459.

(3) Leaving summons at place which was not defendant's last and usual place of abode.—F. H. Hill Co. v. Dee, 189 N.E. 583, 286 Mass. 187.

(4) Leaving citation at house in which nonresident defendant had resided, but which was no longer his domicile.—Williams & Miller v. Jones, La.App., 180 So. 140.

(5) Service by mail.—Estok v. Estok, 157 A. 356, 102 Pa.Super. 604—Skrynski v. Zeroka, 98 Pa.Super. 469.

(6) Service on one not living at defendant's domicile.—Richardson v. Trustees' Loan & Guaranty Co., 132 So. 387, 15 La.App. 645.

(7) Service on director of corporation instead of on person named in statute.—State v. District Court of Seventh Judicial Dist. in and for Mineral County, 273 P. 659, 51 Nev. 206, followed in 273 P. 661, 51 Nev. 214, and rehearing denied 275 P. 1, 51 Nev. 330.

(8) Service on agent or attorney of a nonresident defendant.
Ala.—Woodfin v. Curry, 153 So. 620, 228 Ala. 436.
Ky.—Jones v. Fuller, 134 S.W.2d 240, 280 Ky. 671.
S.C.—Matheson v. McCormac, 195 S. E. 122, 186 S.C. 93.

(9) Other defects see 33 C.J. p 1093 note 80 [a].

41. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U. S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.
Okl.—Locke v. Gilbert, 271 P. 247, 133 Okl. 93.

42. Ariz.—Fidelity & Deposit Co. of Maryland v. Meldrum, 50 P.2d 570, 46 Ariz. 295.
Tex.—Mitchell v. Reitz, Civ.App., 269 S.W. 279.

43. U.S.—Butler v. McKey, C.C.A. Cal., 138 F.2d 373, certiorari denied 64 S.Ct. 636, 321 U.S. 780, 88 L.Ed. 1073.
Colo.—Federal Farm Mortg. Corporation v. Schmidt, 126 P.2d 1036, 109 Colo. 467.
Okl.—Robins v. Lincoln Terrace Christian Church, 75 P.2d 874, 181 Okl. 615—Morgan v. Stevens, 223 P. 865, 101 Okl. 116.
Or.—Laughlin v. Hughes, 89 P.2d 568, 161 Or. 295.
S.C.—Ray v. Pilot Fire Ins. Co., 121 S.E. 779, 128 S.C. 323.
34 C.J. p 536 note 61.

Validity of judgment rendered on citation by publication depends, not on fact that an affidavit in proper form was filed, but rather on truth of grounds set up as basis for issuance and service of citation by publication.—Smith v. Commercial Credit Corp., Civ.App., 137 S.W.2d 360, reversed on other grounds Commercial Credit Corp. v. Smith, 137 S. W.2d 363, 143 Tex. 612.

Affidavits held fatally defective

(1) Affidavit based on hearsay that defendant cannot be found within state or conceals himself to avoid service of summons.—Butler v. McKey, C.C.A.Cal., 138 F.2d 373, certiorari denied 64 S.Ct. 636, 321 U.S. 780, 88 L.Ed. 1073.

(2) Other affidavits see 33 C.J. p 1093 note 80 [b].

44. N.Y.—B. Berman, Inc. v. American Fruit Distributing Co., 186 N.Y.S. 376, 114 Misc. 345.
33 C.J. p 1093 note 80 [c].

45. U.S.—Thompson v. Thompson, App.D.C., 33 S.Ct. 129, 226 U.S. 551, 57 L.Ed. 347.
Neb.—Atkins v. Atkins, 2 N.W. 466, 9 Neb. 191.
N.Y.—Smith v. R. B. I. Bldg. Corporation, 215 N.Y.S. 1, 126 Misc. 826.
Okl.—Frost v. Davis, 79 P.2d 600, 182 Okl. 593.
Utah.—Salt Lake City v. Salt Lake Inv. Co., 134 P. 603, 43 Utah 181.
33 C.J. p 1091 note 68 [1], p 1093 note 80 [b] (9)—34 C.J. p 536 notes 58, 59.

Improvidently made

The fact that affidavit supporting request for issuance of citation by publication on ground that defendant's residence was unknown had been improvidently made, if established, would not render judgment in the proceedings void.—Commercial Credit Corp. v. Smith, 137 S.W. 2d 363, 143 Tex. 612.

"Whereabouts" instead of "residence"

The use of the word "whereabouts" in an affidavit for service by publication which states that the "whereabouts" of defendant is un-

§ 25. Return and Proof of Service

A valid judgment ordinarily may be rendered only where due service of process is shown by a return or other proof.

Although the validity of a judgment rests on the service of process rather than on the return, which is simply evidence in respect of the process,[46] a proper return, showing that process has been duly served, is ordinarily necessary in order that a valid judgment may be rendered.[47] Accordingly a judgment has been held void where the return or other proof is so faulty or defective as not to show a legal service of process,[48] although mere irregularities in the return or proof will not vitiate the judgment.[49] If the nonservice of process appears on the face of the papers or is discernible from an inspection of the record, the judgment may be treated as a nullity,[50] and it has been held that the judgment is void whether such lack of jurisdiction appears on the face of the record or is shown aliunde.[51]

§ 26. Appearance

A judgment based on the voluntary general appearance by or on behalf of the defendant is valid.

A voluntary general appearance in an action is a waiver of a want of process, or of any defects in the process or its service, or return, and gives the court full jurisdiction over his person, as discussed in Appearances § 17, and accordingly, although a defendant has not received any notice, or proper process or service thereof, a judgment in personam against him is valid and binding if a general appearance has been entered by him or on his behalf.[52] However, a judgment in personam

known, instead of the word "residence," which is used in the statute, is a mere irregularity which will not render an attachment judgment void. —Fisher v. Jordan, C.C.A.Tex., 116 F. 2d 183, certiorari denied Jordan v. Fisher, 61 S.Ct. 734, 312 U.S. 697, 85 L.Ed. 1132.

46. La.—Adler v. Board of Levee Com'rs of Orleans Levee Dist., 123 So. 605, 168 La. 877—Dickey v. Pollock, App., 183 So. 48.

"The citation itself is the important legal fact upon which the validity of the judgment rests, while the return is simply evidence in respect to that fact. The citation in a case must not be confounded with the sheriff's return, which recites his own actions in the matter of the service thereof. The citation may be good, though the return for some reason be irregular; while the return may be perfect in its recitals, yet the citation be null."—Adler v. Board of Levee Com'rs of Orleans Levee Dist., 123 So. 605, 606, 168 La. 877.

47. Ga.—Elliott v. Porch, 200 S.E. 190, 59 Ga.App. 181—Benton v. Maddox, 192 S.E. 316, 56 Ga.App. 132.

Miss.—Ex parte Latham, 136 So. 625, 161 Miss. 243.

Tex.—Wagner v. Urban, Civ.App., 170 S.W.2d 270.

33 C.J. p 1094 note 88.

In absence of return of service, there is nothing to show, in support of judgment, that court had jurisdiction, since court should not proceed in absence of service.—Benton v. Maddox, 192 S.E. 316, 56 Ga.App. 132.

Judgment is valid on face, where return of service is made in manner required by law.—Hanna v. Allen, 279 P. 1098, 153 Wash. 485.

48. Colo.—Gibbs v. Slevin, 212 P. 826, 72 Colo. 590.

Tex.—Remington-Rand Business Service v. Angelo Printing Co., Civ.App., 31 S.W.2d 1098.

Wash.—Title & Trust Co. v. Columbia Basin Land Co., 238 P. 992, 136 Wash. 63.

33 C.J. p 1094 note 84.

As invalidating default judgment see infra § 192.

A deputy sheriff's individual return to a writ of summons directed to his superior, is void, and a judgment predicated thereon is likewise null and void.—Stuckert v. Thompson, 164 S.W. 692, 181 Mo.App. 518.

Inability to find citation

Proof that attorney was unable to find original citation in clerk's office insufficiently supported allegation that judgment was void for want of legal citation.—Thompson-Ritchie Grocery Co. v. Cary, 135 So. 707, 17 La.App. 270.

Publication

Nonresident defendants, whose post office addresses were not shown by proof of publication of notices to them, were not in court, which had no power to render judgment or apply testimony against them.—Sellers v. Powell, 152 So. 492, 168 Miss. 682.

Substituted service

A return of process disclosing substituted service is insufficient to confer jurisdiction over person of defendant unless return affirmatively shows, under strict construction and unaided by reference to statute, compliance with all essential requirements of statute authorizing such service.

Mo.—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173—State ex rel. Adler v. Ossing, 79 S.W.2d 255, 336 Mo. 391.

Va.—Washburn v. Angle Hardware Co., 132 S.E. 310, 144 Va. 508.

49. Fla.—Walker v. Carver, 112 So. 45, 93 Fla. 337.

Ky.—Commonwealth ex rel. Love v. Reynolds, 146 S.W.2d 41, 284 Ky. 809.

La.—Adler v. Board of Levee Com'rs of Orleans Levee Dist., 123 So. 605, 168 La. 877.

Mo.—McEwen v. Sterling State Bank, 5 S.W.2d 702, 222 Mo.App. 660.

Ohio.—Paulin v. Sparrow, 110 N.E. 528, 91 Ohio St. 279.

Pa.—Podol v. Shevlin, 130 A. 264, 284 Pa. 32—Wood v. Kuhn, Com. Pl., 22 Erie Co. 236.

33 C.J. p 1095 note 85.

A ruling of the court that the service was valid, even though the ruling was erroneous, does not show that the court was without jurisdiction to proceed since it did not appear that service was not waived.—Pratt v. Rosa Jarmulowsky Co., 170 S.E. 365, 177 Ga. 522.

Irregularities not affecting judgment

(1) Failure to file affidavit of mailing notice to defendant served by publication, prior to rendition of judgment.—Young v. Campbell, 16 P.2d 65, 160 Okl. 265.

(2) Failure to file proof of service on defendant outside state until entry of judgment.—Winter v. Winter, 175 N.E. 533, 256 N.Y. 113.

(3) Failure to show competency of process server.—State v. Fergus County Tenth Judicial Dist. Ct., 179 P. 831, 55 Mont. 602.

(4) Other irregularities see 33 C.J. p 1091 note 68 [f].

50. N.C.—Dunn v. Wilson, 187 S.E. 802, 210 N.C. 493—Graves v. Reidsville Lodge No. 2128, 109 S.E. 29, 182 N.C. 330.

51. Tex.—Olton State Bank v. Howell, Civ.App., 105 S.W.2d 287.

52. U.S.—In re Gayle, C.C.A.Canal Zone, 136 F.2d 973, petition dismissed 64 S.C. 157, 320 U.S. 806, 88 L.Ed. 487.

against defendant is not validated by his special appearance for the purpose of objecting to the jurisdiction of the court by taking advantage of a failure of notice or defective service,[53] or for some other special purpose.[54]

By attorney. An appearance for defendant by his authorized attorney is sufficient to support a judgment against defendant.[55] If, however, the appearance was in fact unauthorized, a judgment based thereon has been held voidable,[56] and according to some decisions the judgment is wholly void[57] and subject to collateral attack, as discussed infra § 424. It has been held that a judgment rendered on the appearance of an attorney, who has acted without authority, is regular and valid,[58] the sole remedy being an action for damages against the attorney, as discussed in Attorney and Client § 147. If there was due service of process sufficient to support the judgment, as discussed supra § 24, the validity of the judgment is not affected by lack of authority of the attorney who appeared and made defense.[59]

Appearance by plaintiff. As a rule, if plaintiff fails or refuses to appear and present his case, the court may dismiss the action for want of prosecution, as explained in Dismissal and Nonsuit § 65 a,

Ala.—Morrison v. Covington, 100 So. 124, 211 Ala. 181.
Ariz.—Lore v. Citizens Bank of Winslow, 75 P.2d 371, 51 Ariz. 191—Blair v. Blair, 62 P.2d 1321, 48 Ariz. 501.
Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.
Ga.—Cherry v. McCutchen, 23 S.E.2d 587, 68 Ga.App. 682.
Hawaii.—Kim Poo Kum v. Sugiyama, 33 Hawaii 545.
Ind.—Montgomery v. Marks, 46 N.E. 2d 912, 221 Ind. 223—Celina Mut. Casualty Co. v. Baldridge, 12 N.E. 2d 258, 213 Ind. 198.
Ky.—Jones v. Fuller, 134 S.W.2d 240, 280 Ky. 671—Black v. Elkhorn Coal Corporation, 26 S.W.2d 481, 233 Ky. 588.
La.—Nolan v. Schultze, 126 So. 513, 169 La. 1022—Gahn v. Brown, 107 So. 576, 160 La. 790.
Md.—Piedmont-Mt. Airy Guano Co. of Baltimore v. Merritt, 140 A. 62, 154 Md. 226.
Mont.—Novack v. Pericich, 300 P. 240, 90 Mont. 91.
N.Y.—Bauman Rubber Co. v. Karl Light & Sons, 244 N.Y.S. 448, 137 Misc. 258.
N.C.—Powell v. Turpin, 29 S.E.2d 26, 224 N.C. 67—City of Monroe v. Niven, 20 S.E.2d 311, 221 N.C. 362—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465—Dunn v. Wilson, 187 S.E. 802, 210 N.C. 493—Hood v. Holding, 171 S.E. 633, 205 N.C. 451.
N.D.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261.
Okl.—Chicago, R. I. & P. Ry. Co. v. Excise Board of Oklahoma County, 33 P.2d 1081, 168 Okl. 428—Protest of Chicago, R. I. & P. Ry. Co., 2 P.2d 935, 151 Okl. 129—Skipper v. Baer, 277 P. 930, 136 Okl. 286.
Or.—Mt. Vernon Nat. Bank v. Morse, 264 P. 439, 128 Or. 64.
Pa.—In re Komara's Estate, 166 A. 577, 311 Pa. 135—In re Gallagher's Estate, 167 A. 476, 109 Pa.Super. 304.
R.I.—**Corpus Juris cited in** Sahagian v. Sahagian, 137 A. 221, 222, 48 R.I. 267.
Tenn.—Dickson v. Simpson, 113 S.W. 2d 1190, 172 Tenn. 680, 116 A.L.R. 380—Commerce Union Bank v. Sharber, 100 S.W.2d 243, 20 Tenn. App. 451.
Tex.—Pure Oil Co. v. Reece, 78 S.W. 2d 932, 124 Tex. 476—State Mortg. Corporation v. Traylor, 36 S.W.2d 440, 120 Tex. 148—Levy v. Roper, 256 S.W. 251, 113 Tex. 356—Eaton v. Husted, Civ.App., 163 S.W.2d 439, affirmed 172 S.W.2d 493, 141 Tex. 349—Stone v. Miller, Civ.App., 134 S.W.2d 862, error dismissed, judgment correct—Goodman v. Mayer, Civ.App., 105 S.W.2d 281, reversed on other grounds 128 S. W.2d 1156, 133 Tex. 319—Coker v. Logan, Civ.App., 101 S.W.2d 284, error refused—Glass v. Kottwitz, Civ.App., 297 S.W. 573.
Va.—Lockard v. Whitenack, 144 S. E. 606, 151 Va. 143—Beck v. Semones' Adm'r, 134 S.E. 677, 145 Va. 429.
Wis.—Saric v. Brlos, 19 N.W.2d 903, 247 Wis. 400.
33 C.J. p 1095 note 89—34 C.J. p 533 note 40.
Appearance as validating judgment:
Against nonresident see supra § 24 e.
In action begun by:
Attachment or garnishment see supra § 24 f.
Substituted or constructive service see supra § 24 c.

Appearance after judgment

Where a judgment in rem has been rendered without the appearance of defendant, his appearance after judgment for the purpose of moving for a new trial does not render the judgment a personal one.—Mayfield v. Bennett, 48 Iowa 194.

53. Md.—Ortman v. Coane, 31 A.2d 320, 181 Md. 596, 145 A.L.R. 1388.
Wash.—State v. Plummer, 226 P. 273, 130 Wash. 135.
33 C.J. p 1095 note 93.

54. Or.—Cram v. Tippery, 155 P.2d 558.

Mere physical presence by a party when a judgment is rendered against him does not make the judgment binding on him, if he had no notice or opportunity to be heard.—Elliott v. Adams, 160 S.E. 336, 173 Ga. 312.

55. Mich.—Hempel v. Bay Circuit Judge, 193 N.W. 281, 222 Mich. 553.
N.C.—Hood v. Holding, 171 S.E. 633, 205 N.C. 451.
33 C.J. p 1096 note 94.
Presumption of authority to appear see Attorney and Client § 73 a.

Where defendants' attorney was in open court when plaintiff requested leave to amend petition to state new cause of action, notwithstanding defendants subsequently withdrew their answer and were not cited on filing of amended petition, court had jurisdiction to render judgment against them thereon.—Phillips v. The Maccabees, Tex.Civ. App., 50 S.W.2d 478.

56. N.Y.—Wiley v. Moses, 42 N.Y.S. 2d 4, 266 App.Div. 801, reargument and appeal denied In re Less' Estate, 44 N.Y.S.2d 686, 266 App.Div. 968.
33 C.J. p 1096 note 95.
Unauthorized appearance as ground for:
Equitable relief see infra § 354.
Opening and vacating see infra § 267.

57. N.D.—Taylor v. Oulie, 212 N.W. 931, 55 N.D. 253.
Okl.—Street v. Dexter, 77 P.2d 707, 182 Okl. 360—Hatfield v. Lewis, 236 P. 611, 110 Okl. 98.
Tex.—Stack v. Ellis, Civ.App., 291 S.W. 919.
33 C.J. p 1096 note 97.

58. Miss.—Shirling v. Scites, 41 Miss. 644.
33 C.J. p 1096 note 2.

59. N.C.—Hatcher v. Faison, 55 S.E. 284, 142 N.C. 364.
33 C.J. p 1096 note 1.

Neither void nor voidable

Appearance by an unemployed attorney does not make a judgment void or voidable, where the case would otherwise go to judgment, since such attorney has no power to waive any rights.—Lockard v. Whitenack, 144 S.E. 606, 151 Va. 143.

but it can render no judgment against plaintiff[60] unless defendant has filed a cross action or requested affirmative relief.[61] On the other hand, if plaintiff appears and answers a cross action, a judgment may be entered thereon, although defendant did not serve him with notice of the cross action.[62]

C. PARTIES

§ 27. In General

Parties whose rights are determined are essential to a judgment.

An essential element, implied in all the definitions of a judgment which have been given, is that there must be parties whose rights are determined by the adjudication.[63] A valid judgment cannot be rendered where there is a want of necessary parties,[64] and a court cannot properly adjudicate matters involved in a suit when necessary and indispensable parties to the proceedings are not before it.[65] The absence of persons necessary to a complete settlement of the entire controversy, however, will not prevent the rendition of a valid judgment where their interests are so separable that a judgment may be rendered between the parties before the court without affecting the rights of persons who are not parties.[66] A judgment which is a mere negation of plaintiff's asserted claim is not erroneous for want of necessary parties.[67]

In the case of ex parte proceedings there are parties on only one side, as discussed in Ex 32 C.J.S. p 1145 note 75–p 1146 note 80. In the case of proceedings in rem, the parties on one side, at least, consist merely in the personification of a res, but the determinations in this class of cases are nevertheless judgments, as considered infra § 907.

To enable a judgment to be rendered the litigants must have the capacity to stand in judgment.[68] The

60. Tex.—Parr v. Chittim, Com. App., 231 S.W. 1079—Dalton v. Davis, Civ.App., 294 S.W. 1115, reversed on other grounds, Com. App., 1 S.W.2d 571—Scarborough v. Bradley, Civ.App., 256 S.W. 349.

61. Tex.—Wadell Connally Hardware Co. v. Brooks, Civ.App., 275 S.W. 168.

62. Tex.—Hall v. Morton, Civ.App., 39 S.W.2d 903, error refused.

63. Kan.—Corpus Juris quoted in City of Independence v. Hindenach, 61 P.2d 124, 129, 144 Kan. 414.
Mont.—State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, 300 P. 235, 89 Mont. 531, 82 A.L.R. 1158.
33 C.J. p 1105 note 45.
Amendment of judgment as to parties see infra § 244.
Conformity to:
Pleadings and proofs as to parties see infra § 51.
Verdict or findings as to parties see infra § 56.
Designation of parties see infra § 75.
Parties to judgment by or against executor or administrator see Executors and Administrators § 793.

Adversary proceedings required
Where real party in interest is both plaintiff and defendant, no issue is presented and decree or judgment based on such action is null and void.—O'Donnell v. U. S., C.C.A. Cal., 91 F.2d 14, reversed on other grounds U. S. v. O'Donnell, 58 S.Ct. 708, 303 U.S. 501, 82 L.Ed. 980.

64. Tex.—Belt v. Texas Co., Civ. App., 175 S.W.2d 622, error refused—Beeler v. Loock, Civ.App., 135 S.W.2d 644, error dismissed—General Exchange Ins. Corporation v. Collins, Civ.App., 110 S.W.2d 127.

Necessary parties
Grantee's heirs are necessary parties to enable court to adjudicate whether paper, in form a deed, is an absolute conveyance, or only a power of attorney.—Wingo v. Parker, 19 S.C. 9.

65. Fla.—Fain v. Adams, 121 So. 562, 97 Fla. 517.
Ill.—Hansen v. Swartz, 178 N.E. 246, 345 Ill. 609.
Mass.—Dietz v. New York Life Ins. Co., 191 N.E. 875, 287 Mass. 398.
N.Y.—U. S. Fidelity & Guaranty Co. v. Triborough Bridge Authority, 48 N.Y.S.2d 16, affirmed 59 N.Y.S. 2d 291, 269 App.Div. 978, motion granted 59 N.Y.S.2d 627, 270 App. Div. 754.
N.D.—Underwood State Bank v. Weber, 193 N.W. 602, 49 N.D. 814.
W.Va.—McDonald v. Bennett, 152 S. E. 533, 108 W.Va. 665.
Wis.—Riedel v. Preston, 246 N.W. 569, 211 Wis. 149.

Proper procedure
The court should require the absent persons to be made parties to the proceeding or dismiss it without prejudice.—White v. Walker, 10 S.W.2d 1071, 226 Ky. 326.

Sum held by stranger
The district court erred in including in amount of money judgment sum shown by parties' stipulation to be held in judgment debtor's name by corporation not party to suit wherein judgment was rendered.—O'Meara v. Williams, Tex.Civ.App., 137 S.W.2d 66, error dismissed, judgment correct.

66. Cal.—Bank of California Nat. Ass'n v. Superior Court in and for City and County of San Francisco, 106 P.2d 879, 16 Cal.2d 516.
Tex.—State Mortg. Corporation v. Garden, Civ.App., 11 S.W.2d 212.

Person held not a necessary party
Nonresidence of party claiming interest did not impair validity of decree approving release of rights in estate, nonresidents not being necessary parties to decision of question.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.

67. **Proceeding to terminate rights under deed**
A judgment in an administrator's suit to terminate defendant's rights under a deed from his intestate is not erroneous for want of necessary parties because intestate's heirs were not parties to the suit, where it is a mere negation of plaintiff's asserted claim.—Jones v. Gibbs, 130 S.W.2d 265, 133 Tex. 627, motion overruled 131 S.W.2d 957, 133 Tex. 627.

68. La.—Roe v. Caldwell, 70 So. 548, 138 La. 652—Miles v. Reclamation Oil Producing Ass'n, 3 La. App. 746.

Imprisonment of defendant pending civil suit
Where, pending a civil cause, defendant is arrested and confined in jail by virtue of a warrant issued for a criminal offense at the instance of a third person not in collusion with, or instigated by, plaintiff, plaintiff is entitled to proceed with his cause to judgment, and such judgment will not be set aside as irregular.—Peterson v. C. A. Mar-

rules governing judgments with respect to persons under a disability are discussed in Husband and Wife §§ 447–457, Infants §§ 120–124, and Insane Persons § 151. Also the rules applicable to judgments relative to persons whose personality is or has been suspended for juristic purposes are considered in titles wherein the law relative to such persons is treated, such as Bankruptcy §§ 489–491, Convicts § 7, Insolvency § 17 a (2), and Slaves § 7, also 58 C.J. p 758 note 59; and in titles discussing particular kinds or classes of actions and proceedings are considered the rules particularly applicable to parties to judgments or decrees in such actions or proceedings.

§ 28. Judgment for or against One Not a Party

A judgment can be rendered only for or against a party to the action or proceeding and not for or against one not a party: the rights and liabilities of persons not parties cannot be adjudicated.

In general a judgment can be taken only for or against a party to the action or proceeding.[69] It cannot properly be rendered for or against one who is not a party thereto,[70] or against one who is not

tin Furniture Co., 86 S.E. 1099, 144 Ga. 316.

69. Mont.—Moore v. Capital Gas Corp., 158 P.2d 302.

Jurisdiction in personam as essential to validity of judgment see supra § 19.

Service or process or appearance as essential to validity of judgment see supra §§ 23, 26.

70. U.S.—Southwell v. Robertson, D.C.Pa., 27 F.Supp. 944.

Ark.—Bryan v. Akers, 7 S.W.2d 325, 177 Ark. 681, 58 A.L.R. 1124.

Cal.—Hutchinson v. California Trust Co., 111 P.2d 401, 43 Cal.App.2d 571—Lloyd v. Los Angeles County, 107 P.2d 622, 41 Cal.App.2d 808—Overell v. Overell, 64 P.2d 483, 18 Cal.App.2d 499—Nordin v. Eagle Rock State Bank, App., 49 P.2d 336—McDonald v. Richards, 248 P. 1049, 79 Cal.App. 1.

Colo.—J. I. Case Threshing Mach. Co. v. Packer, 254 P. 779, 81 Colo. 195.

Ga.—Webb & Martin v. Anderson-McGriff Hardware Co., 8 S.E.2d 882, 188 Ga. 291.

Ill.—Schrei v. Van Alyea, 247 Ill. App. 440.

Ind.—Kist v. Coughlin, 57 N.E.2d 586, 222 Ind. 639.

Ky.—City of Hazard v. Gay, 113 S. W.2d 467, 271 Ky. 818—Farmers' Nat. Bank v. Jones, 28 S.W.2d 787, 234 Ky. 591, 70 A.L.R. 335—Ford v. Consolidated Grocery Co., 17 S.W.2d 448, 229 Ky. 510.

La.—Succession of Arnold, 152 So. 322, 178 La. 658—Erskine v. Gardiner, 110 So. 97, 162 La. 83.

Mich.—Smith v. Switzer, 287 N.W. 416, 290 Mich. 158.

Neb.—Clark v. Clark, 297 N.W. 661, 139 Neb. 446—Southern Nebraska Power Co. v. Village of Deshler, 264 N.W. 462, 130 Neb. 133.

N.Y.—Clark v. Seligman, 296 N.Y.S. 98, 163 Misc. 533—Quinn v. Ershowsky, 245 N.Y.S. 398, 138 Misc. 15.

Ohio.—Ex parte Eastman, 155 N.E. 573, 23 Ohio App. 273.

Or.—Niedermeyer, Inc., v. Fehl, 33 P.2d 960, 148 Or. 16, followed in Niedermeyer, Inc. v. Pacific Record Pub. Co., 33 P.2d 966, 147 Or. 528, and motion denied Niedermeyer, Inc., v. Fehl, 35 P.2d 477, 148 Or. 16.

Pa.—In re McGuigan's Estate, 37 A. 2d 717, 349 Pa. 581—Chiswell v. Campbell, 150 A. 90, 300 Pa. 68.

R.I.—Lawton v. Fox, 133 A. 348, 47 R.I. 359.

Tenn.—American Nat. Bank v. Bradford, App., 188 S.W.2d 971.

Tex.—Thomas v. Mullins, Civ.App., 127 S.W.2d 559, reversed on other grounds Mullins v. Thomas, 150 S. W.2d 83, 136 Tex. 215—Edwards v. Hatch, Civ.App., 106 S.W.2d 741—Baker v. Reed, Civ.App., 54 S.W. 2d 214—Underwood v. Jefferson Bank & Trust Co., Civ.App., 35 S. W.2d 766—Cunningham v. Koons, Civ.App., 33 S.W.2d 761—Jessen v. Scott, Civ.App., 14 S.W.2d 290—Cook v. Liberty Pipe Line Co., Civ.App., 281 S.W. 221—Moses v. Chapman, Civ.App., 280 S.W. 911—Tomerlin v. Krause, Civ.App., 278 S.W. 501.

W.Va.—Milam v. Settle, 32 S.E.2d 269.

33 C.J. p 1106 note 58.

Injunction:

In federal court as binding on parties defendant and those represented by them or subject to their control or in privity with them see Federal Courts § 144 d.

Not granted against persons not parties to suit see Injunctions § 214.

Judgment in:

Favor of partner not party to action see the C.J.S. title Partnership § 235, also 47 C.J. p 1011 note 15.

Replevin not proper against one not party to action see the C. J.S. title Replevin § 242, also 54 C.J. p 588 note 25.

Necessity that judgment correspond to pleadings with respect to parties see infra § 51.

Relief against person not party not granted in mandamus proceeding see the C.J.S. title Mandamus § 341, also 38 C.J. p 926 note 12.

Opportunity to be heard

(1) Person must have opportunity of being heard before court can render judgment against him.

Ill.—Hansen v. Swartz, 178 N.E. 246, 345 Ill. 609.

Mont.—Mitchell v. Banking Corporation of Montana, 22 P.2d 155, 94 Mont. 183.

(2) Notice and opportunity to be heard before being concluded by judgment as essential to due process of law see Constitutional Law §§ 569 c (2), 619, 622.

Unauthorized proceeding

(1) Judgment is void in action instituted in plaintiff's name by a stranger without authority.

U.S.—Hanover Fire Ins. Co. v. Isabel, C.C.A.Okl., 129 F.2d 111.

Okl.—Steen v. Williams, 12 P.2d 888, 158 Okl. 147.

(2) Judgment against alleged ward on cross petition in proceeding brought by alleged guardian acting under wholly void court order is erroneous.—Ruckert v. Moore, 295 S. W. 794, 317 Mo. 228.

(3) Other cases see 33 C.J. p 1106 note 58 [e].

Judgment for plaintiff as trustee for one not a party to the action is erroneous.—Rush v. Curtiss-Wright Export Corporation, 31 N.Y.S.2d 550, 263 App.Div. 69, appeal denied 32 N.Y.S.2d 1016, 263 App.Div. 868, motion denied 41 N.E.2d 173, 287 N.Y. 849.

Individual sued in representative capacity

In suit against state superintendent of insurance, to recover a fund in his possession officially, in which the superintendent as an individual defendant was stricken out, the jurisdiction of the court is limited to the res, and it has no power to charge defendant with interest beyond what he actually received.—Porter v. Beha, D.C.N.Y., 8 F.2d 65, affirmed, C.C.A., 12 F.2d 513.

Unknown or unnamed parties

Law court cannot enter judgment for unknown and unnamed parties, nor has it ancillary jurisdiction to

subject to the jurisdiction of the court.[71] A judgment so given is void in so far as it concerns the person improperly included in it,[72] whether or not such person is sui juris or under disability,[73] and, according to some authorities, is a mere nullity as to all the parties to it,[74] although other cases hold that it is not void as to those who were actually parties to the suit.[75] A judgment for one not formally a party has been held proper, however, where the case was tried and the parties acted on the understanding that such person was a party.[76] It has been held that mere service of process on a stranger to the proceedings will not support a judgment against him.[77]

Where he is not a party to the action, judgment cannot properly be rendered for or against an assignor,[78] an employee in an arbitration proceeding between his employer and labor union,[79] an insurance company in an action against the state superintendent of insurance in whose hands it has been placed for liquidation,[80] an insurer of defendant, even though insurer's attorney took over the defense and participated in the trial as fully as though insurer had been a party,[81] an officer of a defendant county,[82] an officer, agent, representative, or legal assign of a defendant corporation,[83] a party's attorney,[84] a witness,[85] or a member of a class.[86] However, there is authority which holds that, in a rep-

determine the parties entitled to the benefit of such a judgment.—McNary v. Guaranty Trust Co. of New York, D.C.Ohio, 6 F.Supp. 616.

Judgment held not in favor of one not a party

Judgment that, as between plaintiff and defendant, plaintiff is liable for payment of note to bank is not a judgment against plaintiff in favor of the bank, which was not a party to the action.—Nants v. Doherty, 262 S.W. 979, 203 Ky. 596.

71. Ill.—Austin v. Royal League, 147 N.E. 106, 316 Ill. 188.
N.Y.—MacAffer v. Boston & M. R. R., 197 N.E. 328, 268 N.Y. 400.
Ohio.—Cahill v. Fidelity & Casualty Co., 175 N.E. 39, 37 Ohio App. 444.

Where plaintiff not in court

Judgment on merits cannot be rendered where action fails because no plaintiff is in court against whom judgment can be rendered.—MacAffer v. Boston & M. R. R., 197 N.E. 328, 268 N.Y. 400.

72. U.S.—Hanover Fire Ins. Co. v. Isabel, C.C.A.Okl., 129 F.2d 111—U. S. v. Lee, D.C.Okl., 48 F.Supp. 63.
Cal.—Pennell v. Superior Court in and for Los Angeles County, 262 P. 48, 87 Cal.App. 375.
Ill.—Newberry Library v. Board of Education of City of Chicago, 55 N.E.2d 147, 387 Ill. 85.
Ky.—Chapman v. Blackburn, 175 S.W.2d 26, 295 Ky. 606—Rapp Lumber Co. v. Smith, 48 S.W.2d 17, 243 Ky. 317.
Mont.—Moore v. Capital Gas Corp., 158 P.2d 302.
N.C.—Powell v. Turpin, 29 S.E.2d 26, 224 N.C. 67—Downing v. White, 188 S.E. 815, 211 N.C. 40.
Tenn.—Charles A. Hill & Co. v. Belmont Heights Baptist Church, 69 S.W.2d 612, 17 Tenn.App. 603.
Tex.—Shaw v. Cunningham, Civ. App., 42 S.W.2d 685, error refused—Butman v. Jones, Civ.App., 24 S.W.2d 796—Lipsitz v. First Nat. Bank, Civ.App., 288 S.W. 609, affirmed, Com.App., 293 S.W. 563, modified on other grounds 296 S. W. 490.
W.Va.—Russell v. Carpenter, 23 S.E. 2d 920, 125 W.Va. 51.
33 C.J. p 1106 note 58.
Validity of judgment or decree for or against person not party to partition proceeding see the C.J.S. title Partition § 112, also 47 C.J. p 435 notes 93, 94.

Rule in misnomer inapplicable

The rule that the judgment concludes the person intended to be sued where he is actually served with process, even under a wrong name, is inapplicable where judgment is rendered against a person not a party to the suit.—Goff v. Will County Nat. Bldg. Corporation, 35 N.E.2d 718, 311 Ill.App. 207.

73. Ky.—Proctor v. Mitchell, 194 S. W.2d 177.

74. Colo.—Archuleta v. Archuleta, 123 P. 821, 52 Colo. 601.
33 C.J. p 1107 note 59.

75. Mo.—Pacific Express Co. v. Emerson, 74 S.W. 132, 101 Mo.App. 62.
33 C.J. p 1107 note 60.

76. Wash.—Bleiler v. Wolff, 161 P. 2d 145, 23 Wash.2d 368.

77. Ga.—Shearouse v. Wolfe, 36 S. E. 923, 111 Ga. 859.
33 C.J. p 1106 note 58 [b].

78. U.S.—Illinois Surety Co. v. U. S., C.C., 36 S.Ct. 321, 240 U.S. 214, 60 L.Ed. 609.

79. N.Y.—Steinberg v. D. L. Horowitz, Inc., 25 N.Y.S.2d 630, 261 App.Div. 880.

80. U.S.—Southwell v. Robertson, D.C.Pa., 27 F.Supp. 944.

81. Tex.—Rio Grande Valley Telephone Co. v. Hocut, Civ.App., 93 S.W.2d 167, error dismissed.

82. Cal.—Lloyd v. Los Angeles County, 107 P.2d 622, 41 Cal.App. 2d 808.

83. Tex.—Yoakum Mill & Elevator Co. v. Byars, Civ.App., 262 S.W. 226.

84. Cal.—Sullivan v. Gage, 79 P. 537, 145 Cal. 770—In re Levinson's Estate, 41 P. 483, 42 P. 479, 108 Cal. 450—Overell v. Overell, 64 P. 2d 483, 18 Cal.App.2d 499—Pennell v. Superior Court in and for Los Angeles County, 262 P. 48, 87 Cal. App. 375—Chavez v. Scully, 216 P. 46, 62 Cal.App. 6.
Attorney's right to summary remedy in cause for payment of fees earned therein see Attorney and Client § 194.

85. Pa.—Bell v. Feeney, Com.Pl., 59 Montg.Co. 279.

86. N.C.—Williams v. Williams, 74 N.C. 1.
33 C.J. p 1106 note 58 [f].

Judgment for member

(1) In representative action on behalf of all similarly situated, only those named as plaintiffs and who enter the action before judgment may share in recovery.—Atkins v. Trowbridge, 148 N.Y.S. 181, 162 App. Div. 629—Hendry v. Title Guarantee & Trust Co., 300 N.Y.S. 741, 165 Misc. 349, modified on other grounds 8 N.Y.S.2d 164, 255 App.Div. 497, affirmed 21 N.E.2d 515, 280 N.Y. 740.

(2) In class suit under Fair Labor Standards Act by employee as representative of class of employees to which he belongs, no judgment could be entered in favor of any employee against employer for any specific sum of money unless such employee was either a party to the suit, or had expressly designated some one to represent him in the suit, or had intervened in the suit.—Brooks v. Southern Dairies, D.C. Fla., 38 F.Supp. 588.

Judgment against member

(1) The equitable doctrine of class representation does not permit a plaintiff to designate certain parties as representatives of other numerous members of a voluntary unincorporated association in order to obtain personal judgments as to members not named.—Webb & Martin v. Anderson-McGriff Hardware Co., 3 S.E.2d 882, 188 Ga. 291.

resentative or class suit, where those joined as parties fairly represent those not joined, and their interests are the same, a judgment entered as in a class suit will be binding on all members of the class.[87]

In general the rights and liabilities of persons not parties to the action cannot be adjudicated therein,[88] since a court should not adjudicate the rights or liabilities of a person unless he is actually or constructively before it.[89] Title to property of one not a party may not be determined,[90] or a lien established and foreclosed against one not a party,[91] or the right to the proceeds of taxes levied to pay bonds determined in a suit to which bondholders are not parties,[92] or a contract with one not a party

(2) In bondholder's suit to enforce trust and alleged lien against state and numerous owners of lands, where such owners were designated as a class but not actually made parties, the court had no jurisdiction to enter decree against them or their lands.—State v. Woodruff, 150 So. 760, 170 Miss. 744.

87. Ill.—Newberry Library v. Board of Education of City of Chicago, 55 N.E.2d 147, 387 Ill. 85.

Persons bound by judgment by reason of privity or representation, although not formal parties, may be subjected to the judgment by rule.—Louisville & N. R. Co. v. Schmidt, Ky., 20 S.Ct. 620, 177 U.S. 230, 44 L.Ed. 747.

Administrators acting as plaintiffs

Where in suit by stockholders the recovery was purely representative, it was held immaterial that certain of the plaintiffs held only as administrators.—Stearns Coal & Lumber Co. v. Van Winkle, C.C.A.Ky., 221 F. 590, 137 C.C.A. 314, certiorari denied 36 S.Ct. 554, 241 U.S. 670, 60 L.Ed. 1230.

88. U.S.—Dewalt v. State Farm Mut. Automobile Ins. Co. of Bloomington, Ill., C.C.A.Mo., 99 F.2d 846, certiorari denied State Farm Mut. Automobile Ins. Co. of Bloomington, Ill. v. Dewalt, 59 S.Ct. 583, 306 U.S. 644, 83 L.Ed. 1043.

Ala.—Continental Ins. Co. of New York v. Rotholz, 133 So. 587, 222 Ala. 574.

Cal.—Potter v. Lawton, 5 P.2d 904, 118 Cal.App. 558—Moakley v. Los Angeles Pac. Ry. Co., 277 P. 883, 99 Cal.App. 74—O'Neil v. Ross, 277 P. 123, 98 Cal.App. 306.

Conn.—Lunde v. Minch, 136 A. 552, 105 Conn. 657.

Fla.—Coral Realty Co. v. Peacock Holding Co., 138 So. 622, 103 Fla. 916.

Ga.—Ware County v. Cason, 5 S.E.2d 597, 61 Ga.App. 15.

Kan.—Kansas Utilities Co. v. City of Burlington, 44 P.2d 223, 141 Kan. 926, appeal dismissed 56 S.Ct. 81, 296 U.S. 658, 80 L.Ed. 469.

Mass.—Bancroft v. Cook, 162 N.E. 691, 264 Mass. 343.

Mich.—Royal Oak Tp. v. City of Ferndale, 15 N.W.2d 707, 309 Mich. 458—Capitol Savings & Loan Co. v. Standard Savings & Loan Ass'n of Detroit, Mich., 250 N.W. 309, 264 Mich. 550—Washburn v. Waite, 250 N.W. 306, 264 Mich. 557.

Mo.—Jenkins v. John Taylor Dry Goods Co., 179 S.W.2d 54, 352 Mo. 660—McClure v. Wilson, App., 185 S.W.2d 878—Hocken v. Allstate Ins. Co., 147 S.W.2d 182, 235 Mo. App. 991—Stevens v. Hurley, 279 S.W. 723, 220 Mo.App. 1050.

N.J.—Trenton Potteries Co. v. Blackwell, 43 A.2d 831, 137 N.J.Eq. 113—Breitman v. Jaehnal, 132 A. 291, 99 N.J.Eq. 243, affirmed Breitman v. Jaehnel, 135 A. 915, 100 N.J.Eq. 559.

N.M.—Scudder v. Hart, 110 P.2d 536, 45 N.M. 76.

N.Y.—Sunshine v. Marsh, 38 N.Y.S.2d 562, 265 App.Div. 927, affirmed 50 N.E.2d 105, 290 N.Y. 775—Norman v. General American Transp. Corporation, 47 N.Y.S.2d 390, 181 Misc. 233, affirmed 45 N.Y.S.2d 929, 267 App.Div. 758.

Ohio.—National Surety Co. v. Bohn, 182 N.E. 506, 125 Ohio St. 537.

Okl.—Town of Buffalo v. Walker, 257 P. 766, 126 Okl. 6.

Pa.—Pleska v. Farley, Com.Pl., 40 Lack.Jur. 152.

S.C.—Holt v. Calhoun, 179 S.E. 501, 175 S.C. 481.

S.D.—Boots v. Null, 238 N.W. 307, 59 S.D. 109.

Tex.—General Exchange Ins. Corporation v. Young, Civ.App., 143 S.W.2d 805—Sparks v. Mince, Civ. App., 138 S.W.2d 203—Beeler v. Loock, Civ.App., 135 S.W.2d 644, error dismissed—Employers' Liability Assur. Corporation v. Neely, Civ.App., 60 S.W.2d 836, error dismissed—Stewart v. Rockdale State Bank, Civ.App., 52 S.W.2d 915, affirmed 79 S.W.2d 116, 124 Tex. 431—Scaly v. Scott, Civ.App., 11 S.W.2d 605.

Utah.—Tanner v. Provo Reservoir Co., 103 P.2d 134, 99 Utah 158.

Wash.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85—Cooney v. Cooney, 3 P.2d 540, 164 Wash. 553.

Wis.—Madden Bros. v. Jacobs, 235 N.W. 780, 204 Wis. 376.

Adjudication in partition proceeding of rights of person not party thereto see the C.J.S. title Partition § 112, also 47 C.J. p 435 note 92.

In proceeding in:
Admiralty see Admiralty § 157.
Equity see Equity § 601.

Judgment as binding only parties and privies see infra §§ 762–821.

Persons subject to ouster under judgment of ejectment see Ejectment § 122 e.

Rights of persons not parties not determined in mandamus proceeding see the C.J.S. title Mandamus § 334, also 38 C.J. p 923 note 53.

Cannot divest rights

When a person is not made a party to the suit, the court has no jurisdiction to divest him of a vested right.—Alward v. Borah, 44 N.E.2d 865, 381 Ill. 134.

Establishment of parish boundary

In hypothecary action involving land alleged by defendants to be situated in another parish than that in which suit, to which neither parish was party, was brought, decree cannot establish boundary between parishes.—Commercial Bank v. Meaux, La.App., 158 So. 688.

Judgment's effect on third person not party to the action will not be determined by the court rendering it.—Williams v. Pease, 43 P.2d 22, 181 Wash. 388—33 C.J. p 1106 note 58 [a] (2).

89. D.C.—Ducker v. Butler, 104 F.2d 236, 70 App.D.C. 103.

La.—Collins v. Cliff Oil & Gas Co., App., 177 So. 120.

Wash.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85.

90. Cal.—City of Los Angeles v. Knapp, 70 P.2d 643, 22 Cal.App.2d 211.

La.—Esparros v. Vicknair, 17 So.2d 924, 205 La. 699.

91. Tex.—Gholson v. Northside Chevrolet Co., Civ.App., 90 S.W.2d 579.

92. U.S.—Boynton v. Moffat Tunnel Improvement Dist., C.C.A.Colo., 57 F.2d 772, certiorari denied Moffat Tunnel Improvement Dist. v. Boynton, 53 S.Ct. 20, 287 U.S. 620, 77 L.Ed. 538—St. Louis-San Francisco Ry. Co. v. Blake, C.C.A.Okl., 36 F.2d 652.

Colo.—Denver Land Co. v. Moffat Tunnel Imp. Dist., 284 P. 339, 87 Colo. 1.

to the action rescinded,[93] or a note or note and mortgage canceled as to a person who is not a party to the action,[94] or a lien claim released as to members of a class who did not join as plaintiffs in the proceeding,[95] or a deed set aside where all persons interested are not parties to the proceeding,[96] or a sale of property of one not a party to the action ordered,[97] even though the owner is a corporation owned by another corporation whose shares are in suit.[98] However, the validity of mortgage bonds owned by cross defendants dismissed from the action may be adjudicated where the plaintiff in the action represents cross defendants as a trustee of such bonds.[99] Specific performance will not be decreed against a person not a party to the proceeding.[1] A judgment against a person attempted to be made a party by motion after the conclusion of the trial is erroneous.[2]

§ 29. Death of Party

a. In general
b. Joint parties

a. In General

Ordinarily a judgment rendered subsequent to a party's death is erroneous. If the party died prior to the commencement of the action the judgment is absolutely void, if he died subsequent to its institution the judgment is generally held to be voidable, but if he died after verdict or decision the judgment is generally held to be valid.

Ordinarily a judgment should not be entered for or against a party after his death;[3] and if the action is continued or revived thereafter the judgment should be for or against his representative.[4] A judgment for or against a person who was dead at the time the action was instituted is at least erroneous.[5] If the defendant was dead at the time the action was commenced the judgment will be absolutely void;[6] and like rule has been applied where one named as plaintiff died before commencement of the action,[7] although there is other authority which holds that a judgment rendered in an action begun after plaintiff's death is not void but voidable.[8]

Where the court has acquired jurisdiction of the subject matter and the person during the lifetime of a party, the prevailing rule is that a judgment rendered for or against him after his death, although erroneous and liable to be set aside, is not void but voidable;[9] but there is substantial authority to the effect that such a judgment is absolutely

93. Tenn.—Hawkins v. Byrn, 261 S.W. 980, 150 Tenn. 1.

94. Ark.—Peebles Garage v. Downey, 111 S.W.2d 454, 195 Ark. 31.
Wis.—In re Peterson's Estate, 8 N.W.2d 266, 242 Wis. 448.
Want of necessary parties as precluding judgment or decree of cancellation see Cancellation of Instruments § 52.

95. Idaho.—Brown v. Twin Falls Canal Co., 276 P. 305, 47 Idaho 402.

96. Conn.—Delaney v. Kennaugh, 136 A. 108, 105 Conn. 557.
Mich.—Goldberg v. Goldberg, 295 N.W. 194, 295 Mich. 380.
Necessary parties in action to quiet title see the C.J.S. title Quieting Title § 53, also 51 C.J. p 206 note 18–p 208 note 41.
Validity of judgment in action to quiet title where owners of land not parties see the C.J.S. title Quieting Title § 103, also 51 C.J. p 282 note 25.

97. U.S.—Gammon v. Ramsey, C.C.A.N.J., 13 F.2d 743.
Wyo.—State v. District Court of Ninth Judicial Dist. in and for Fremont County, 292 P. 897, 42 Wyo. 214, 71 A.L.R. 993, substitution of parties denied 1 P.2d 74, 43 Wyo. 173.

98. U.S.—Gammon v. Ramsey, C.C.A.N.J., 13 F.2d 743.

99. Tex.—Fidelity Trust Co. of Houston v. Highland Farms Corporation, Civ.App., 109 S.W.2d 1014, error dismissed.

1. D.C.—Thalis v. Wurdeman, 121 F.2d 70, 73 App.D.C. 322.
Decree in proceeding for specific performance not operative as to person not party or privy to proceeding see the C.J.S. title Specific Performance § 168, also 58 C.J. p 1273 notes 25–26.

2. Tex.—Rio Grande Valley Telephone Co. v. Hocut, Civ.App., 93 S.W.2d 167, error dismissed.
33 C.J. p 1106 note 58 [c].

3. N.Y.—In re Van Nostrand's Will, 29 N.Y.S.2d 857, 177 Misc. 1.
Pa.—Bautsch to Use of Schlear v. Bubbenmoyer, Com.Pl., 32 Berks Co.L.J. 233.

4. Pa.—Aiken v. Use of Mayberry v. Mayberry, 193 A. 374, 128 Pa. Super. 15.
Erroneous determination as to person in whose name the action should be revived was held not to render judgment void.—Griffin v. Proctor, 14 So.2d 116, 244 Ala. 537.
Failure to make substitution error Where parties to suit died before entry of decree failure to make substitution for them was error.—Smith v. Schmitt, 231 P. 176, 112 Or. 687.

5. N.C.—Hinkle v. Walker, 197 S.E. 129, 213 N.C. 657.

6. Cal.—Conlin v. Blanchard, 28 P.2d 12, 219 Cal. 632—In re Parsell's Estate, 213 P. 40, 190 Cal. 454, 25 A.L.R. 1561—Jones v. Walker, 118 P.2d 299, 47 Cal.App.2d 566—**Corpus Juris cited in** Garrison v. Blanchard, 16 P.2d 273, 274, 127 Cal.App. 616—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704.
Conn.—**Corpus Juris cited in** O'Leary v. Waterbury Title Co., 166 A. 673, 676, 117 Conn. 89.
Ill.—**Corpus Juris cited in** State Bank of Prairie du Rocher v. Brown, 263 Ill.App. 312, 315.
Mo.—State ex rel. Jacobs v. Trimble, 274 S.W. 1075, 310 Mo. 150—Wicoff v. Moore, 257 S.W. 474.
Tex.—Edens v. Grogan Cochran Lumber Co., Civ.App., 172 S.W.2d 730, error refused—State Mortg. Corporation v. Affleck, Civ.App., 27 S.W.2d 548, reversed on other grounds, Com.App., 51 S.W.2d 274.
Va.—Rennolds v. Williams, 136 S.E. 597, 147 Va. 196.
33 C.J. p 1108 note 69—34 C.J. p 555 note 70.

7. Minn.—Poupore v. Stone-Ordean-Wells Co., 157 N.W. 648, 132 Minn. 409.
Pa.—Lynch v. Kerns, 10 Phila. 335.

8. W.Va.—McMillan v. Hickman, 14 S.E. 227, 35 W.Va. 705.
33 C.J. p 1109 note 71—34 C.J. p 555 note 69.

9. U.S.—**Corpus Juris cited in** Streeter v. Chicago Title & Trust Co., D.C.Ill., 14 F.2d 331.
Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417—**Corpus Juris**

void,[10] even though the party died after trial.[11] If, however, plaintiff[12] or defendant[13] dies after verdict or decision it is generally held that a proper and valid judgment may be rendered on the verdict or decision. Also under statutes expressly so providing a valid judgment may properly be entered in cases where a party dies after verdict, decision, or report, or after an accepted offer to allow judgment to be taken.[14] Although such statutes have been held to be in derogation of the common law,[15] they have also been declared to be declaratory of the common law, which never allows a delay by the court to change the condition of a suit.[16] A judgment rendered subsequent to the death of a party after verdict or decision may properly be entered nunc pro tunc as of the date of the verdict or decision, as considered infra § 118; and in jurisdictions where a judgment rendered after the death of a party by a court which has acquired jurisdiction of the parties and subject matter is not void but voidable, a judgment entered as of the actual date when rendered, at a time subsequent to plaintiff's death after verdict or decision, is not void.[17] Under a statute authorizing a judgment subsequent to a party's death after verdict or decision if the court renders its opinion and directs judgment in plaintiff's favor prior to defendant's death it may, after defendant's death, order the findings filed nunc pro tunc as of the date of the opinion, as considered in the C.J.S. title Trial § 645, also 64 C.J. p 1271 note 78, and enter judgment against decedent on such findings;[18] or, if no findings are required because the case was submitted on an agreed statement of facts, the court may ren-

cited in Garrison v. Blanchard, 16 P.2d 273, 274, 127 Cal.App. 616—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704.

Ky.—Mosely v. Morgan, 252 S.W. 117, 199 Ky. 845.

Okl.—Corpus Juris cited in Adams v. Carson, 25 P.2d 653, 657, 165 Okl. 161.

Pa.—Klemstine v. Allen, 16 Pa.Dist. & Co. 221.

Tex.—Garcia v. Jones, Civ.App., 155 S.W.2d 671, error refused.

33 C.J. p 1107 note 68—34 C.J. p 555 note 67.

Effect of death of party on admiralty proceeding see Admiralty § 97.

10. Ala.—Griffin v. Proctor, 14 So. 2d 116, 244 Ala. 537—Corpus Juris cited in Martin v. Cothran, 200 So. 609, 610, 240 Ala. 619—Corpus Juris cited in McDonald v. Womack, 107 So. 812, 813, 214 Ala. 309.

La.—West v. Green, 131 So. 595, 15 La.App. 216.

Mo.—De Hatre v. Ruenpohl, 108 S.W.2d 357, 341 Mo. 749, transferred, see, App., 123 S.W.2d 243—Carter v. Burns, 61 S.W.2d 933, 332 Mo. 1128—Cole v. Parker-Washington Co., 207 S.W. 749, 276 Mo. 220, overruling State v. Riley, 118 S.W. 647, 219 Mo. 667, and Coleman v. McAnulty, 16 Mo. 173, 57 Am. D. 229.

N.Y.—In re Hirnschall's Estate, 265 N.Y.S. 36, 147 Misc. 897.

33 C.J. p 1107 note 66—34 C.J. p 555 note 68.

Abatement and revival after death of party see Abatement and Revival §§ 114–186.

Effect of dissolution of corporation on judgment for or against it see Corporations §§ 1735–1736.

Mortgage foreclosure

N.J.—In re Admiral Sampson Bldg. & Loan Ass'n of Newark, 41 A.2d 378, 136 N.J.Eq. 292.

Successor in interest

Judgment rendered after death of party should not bind those succeeding to rights of action or property of deceased.—MacAffer v. Boston & M. R. R., 197 N.E. 328, 268 N.Y. 400.

11. La.—West v. Green, 131 So. 595, 15 La.App. 216.

Judgment for costs

Kan.—Jones v. Jones, 167 P.2d 634, 161 Kan. 284.

12. W.Va.—Lively v. Griffith, 99 S.E. 512, 84 W.Va. 393.

33 C.J. p 1109 note 72.

13. Or.—Adams v. Perry, 111 P.2d 838, 168 Or. 132.

33 C.J. p 1109 note 74.

14. Cal.—Fox v. Hale & Norcross Silver Min. Co., 41 P. 328, 108 Cal. 478—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417—Copp v. Rives, 217 P. 813, 62 Cal.App. 776.

Mo.—In re Thomasson, 159 S.W.2d 626—Horner v. Nicholson, 56 Mo. 220.

N.Y.—In re Taylor's Estate, 33 N.Y.S.2d 584, 178 Misc. 217.

Va.—Green's Ex'rs v. Smith, 132 S.E. 839, 146 Va. 442, 44 A.L.R. 1175.

33 C.J. p 1109 note 75—34 C.J. p 76 note 67 [a].

Purpose of statute

(1) Its purpose is to permit entry of judgment where merits of controversy have, in substance, been passed on before death of party.—Davis v. Ross, 20 N.Y.S.2d 375, 259 App. Div. 577, reargument denied 21 N.Y.S.2d 391, 259 App.Div. 1029—In re Taylor's Will, 33 N.Y.S.2d 584, 178 Misc. 217—Nicholson v. McMullen, 28 N.Y.S.2d 287, 176 Misc. 693.

(2) It was never intended to allow a judgment to be entered against deceased which could not have been entered in his lifetime.—Nicholson v. McMullen, supra.

Actions to which applicable

(1) The statute applies generally to all ordinary civil actions, whether involving equitable or legal rights.—State v. Stratton, 19 S.W. 803, 110 Mo. 426.

(2) The statute applies only to actions not abating on death.—Grotsch v. Hassey, 231 N.Y.S. 469, 133 Misc. 373—34 C.J. p 76 note 67 [a] (1), (3).

Accepted offer to allow judgment

A judgment by default is not an "accepted offer to allow judgment."—Nicholson v. McMullen, 28 N.Y.S.2d 287, 176 Misc. 693.

Verdict, decision, or report held made

N.Y.—Davis v. Ross, 20 N.Y.S.2d 375, 259 App.Div. 577, reargument denied 21 N.Y.S.2d 391, 259 App. Div. 1029—In re Taylor's Will, 33 N.Y.S.2d 584, 178 Misc. 217.

Judgment held not proper

(1) Generally.—Nicholson v. McMullen, 28 N.Y.S.2d 287, 176 Misc. 693.

(2) Where facts concerning alleged settlement were in dispute.—Merrill v. Lehigh Valley R. Co., 282 N.Y.S. 574, 246 App.Div. 541.

15. N.Y.—Nicholson v. McMullen, 28 N.Y.S.2d 287, 176 Misc. 693.

16. Mo.—Horner v. Nicholson, 56 Mo. 220.

33 C.J. p 1109 note 76.

17. Mass.—Reid v. Holmes, 127 Mass. 326.

33 C.J. p 1109 note 78.

18. Cal.—Fox v. Hale & Norcross Silver Min. Co., 41 P. 328, 108 Cal. 478—Copp v. Rives, 217 P. 813, 62 Cal.App. 776.

der judgment after defendant's death where it was submitted prior thereto.[19]

A judgment entered nunc pro tunc after the death of plaintiff and at a time when a substitution of parties for decedent had not been made has been held void.[20] In some jurisdictions where defendant dies before judgment the court is without jurisdiction as to him until the action is revived and his representatives are brought before the court,[21] and in other jurisdictions service of notice on all persons interested in the estate of the deceased defendant is prerequisite to a valid judgment.[22]

A judgment erroneous because rendered for or against a dead person may be reversed on appeal if that fact appears on the record.[23] If such fact must be shown by evidence aliunde, the remedy is by writ of error coram nobis, or by motion or petition in the cause.[24] The right to impeach in a collateral proceeding a judgment rendered subsequent to the death of a party is considered infra § 419.

Terminated trust. A judgment cannot bestow on retiring trustees of a terminated testamentary trust continuing power to control and manage the real estate of the trust,[25] even though all the beneficiaries under the will acquiesced in or expressly consented thereto.[26]

b. Joint Parties

Whether or not a judgment for or against joint parties, rendered after the death of one of them, is void or voidable depends on the rule followed in the particular jurisdiction as to the effect of the death of a party before judgment, and on whether or not the judgment is an entirety.

Under the rule, considered infra § 33 b, that a judgment for or against several parties is an entirety and either good or bad as a whole, and where, as discussed supra subdivision a of this section, the death of a party before judgment renders the judgment void, a judgment for or against several parties jointly after the death of one of them is void as to all of them;[27] but where such death renders the judgment merely erroneous and voidable, a judgment for or against several parties jointly after the death of one of them, while not void, is erroneous and voidable as to all of them.[28] On the other hand, in jurisdictions where a judgment for or against several parties is not necessarily good or bad as an entirety, considered infra § 33 b, the death of one of such parties before judgment will render the judgment void,[29] or merely erroneous and voidable,[30] as to such deceased party, according to the locally prevailing rule, considered supra subdivision a of this section; but it will not affect the validity or regularity of the judgment as to the other parties.[31]

In jurisdictions where judgment may be taken for or against one or more of several defendants, judgment may be taken against the surviving defendant or defendants in an action against several defendants, one or more of whom dies prior to judgment.[32] The rule that judgment may be rendered against a party who dies after verdict but

19. Cal.—Copp v. Rives, supra.

20. Cal.—Boyd v. Lancaster, 90 P. 2d 317, 32 Cal.App.2d 574—Maxon v. Avery, 89 P.2d 684, 32 Cal.App. 2d 300—Scoville v. Keglor, 80 P. 2d 162, 27 Cal.App.2d 17.

21. Ky.—Murphy v. Blackburn, 16 S.W.2d 771, 229 Ky. 109.

22. Me.—Consolidated Rendering Co. v. Martin, 145 A. 896, 128 Me. 96, 64 A.L.R. 790—Trask v. Trask, 3 A. 37, 78 Me. 103—Bridgham v. Prince, 33 Me. 174.

23. Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417—Boyd v. Lancaster, 90 P.2d 317, 32 Cal.App. 2d 574.
La.—Muller v. Davis-Wood Lumber Co., 2 La.App. 359.
33 C.J. p 1109 note 77.
Judgment for heir
Judgment against lessee in favor of lessors individually and as heir at law of a deceased lessor is error, where it appears of record that lessor died after filing of suit and there was neither pleading nor proof as to condition of deceased's estate or that administration was pending, or that none was necessary.—Levine v. Finkelstein, Tex.Civ.App., 80 S.W. 2d 360.

24. Ill.—Claflin v. Dunne, 21 N.E. 834, 129 Ill. 241, 16 Am.S.R. 263.
33 C.J. p 1110 note 78.
Judgment subsequent to party's death as ground for:
Motion or petition to vacate judgment:
Generally see infra § 276.
By confession see infra § 323.
Writ of error coram nobis see infra § 312.

25. N.Y.—In re Miller's Will, 178 N.E. 555, 257 N.Y. 349.

26. N.Y.—In re Miller's Will, supra.

27. La.—McCloskey v. Wingfield, 29 La.Ann. 141.
33 C.J. p 1110 note 82.
Judgment after death of principal in action against principal and surety see the C.J.S. title Principal and Surety § 277, also 50 C.J. p 223 notes 5–6.
Judgment by confession against several parties jointly, rendered after the death of one of them, is void as to all.—State Bank of Prairie du Rocher v. Brown, 263 Ill.App. 312.

28. Ill.—Claflin v. Dunne, 21 N.E. 834, 129 Ill. 241, 16 Am.S.R. 263.
33 C.J. p 1101 note 84.
Bringing in representatives
In action claiming undivided interest in land, there could be no proper judgment as to all defendants after death of one defendant subsequent to submission of case without bringing in deceased's representatives.—Murphy v. Blackburn, 16 S.W.2d 771, 229 Ky. 109.

29. N.Y.—Hawkes v. Claffy, 107 N. Y.S. 534, 122 App.Div. 546.

30. Ohio.—Swasey v. Antram, 24 Ohio St. 87.
33 C.J. p 1110 note 87.

31. Ga.—Sanders v. Etcherson, 36 Ga. 404—Hardwick v. Hatfield, 119 S.E. 430, 30 Ga.App. 760.
33 C.J. p 1110 note 89.
Death of costipulator as not affecting right to judgment against stipulator in admiralty proceeding see Admiralty § 161.

32. Cal.—Shain v. Forbes, 23 P. 198, 82 Cal. 577—Rowe v. Chandler, 1 Cal. 167.

before judgment has been applied where one of two joint parties die after verdict.[33] In an action by several plaintiffs, the death of a plaintiff whose cause of action dies with him does not abridge the court's right to enter judgment in favor of the surviving plaintiffs.[34] Plaintiff is not entitled to judgment against a defendant as to whom the venue was proper only during the time a codefendant, who died during the pendency of the action without its revival against his administrator, was a party to the action.[35]

§ 30. Joint Parties

Under the codes and practice acts the judgment may determine the ultimate rights of all parties.

Under various codes and practice acts the court, in rendering judgment, may determine the ultimate rights of all the parties to the controversy,[36] and may render as many judgments, joint, separate, and cross, as may be necessary to adjust the rights of the several parties.[37]

§ 31. —— Plaintiffs Generally

At common law where several plaintiffs join in an action all must recover or none; but under the various statutes and practice acts judgment is authorized in favor of such plaintiffs as show themselves entitled to recover, although others fail.

At common law, and in the absence of statute changing the rule, where several plaintiffs join in a common-law action, all must recover or none, and if only some of the plaintiffs have a right of action, the suit must fail as to all.[38] The rule applies to actions on obligations alleged to be due plaintiffs jointly,[39] and in some jurisdictions has been limited to actions in which plaintiffs assert a joint right or title.[40] It has been applied to actions ex contractu in which a joint obligation or indebtedness to all plaintiffs is alleged,[41] to actions for contribution,[42] and to actions to recover land in which a joint title is alleged in the plaintiffs,[43] such as actions in ejectment.[44] On the other hand, judgment has been permitted in favor of fewer than all the plaintiffs in actions founded on tort, as an action for conversion,[45] in proceedings to cancel a chattel mortgage,[46] and in ejectment where the plaintiff entitled to recover is trustee of his coplaintiffs[47] or where a plaintiff's right to recover is barred by the statute of limitations.[48]

Under the various codes and practice acts judgment is authorized in favor of any plaintiff who shows himself entitled, although the others may fail,[49] as where the claims of the several plaintiffs are distinct, although sufficiently united by a common interest to authorize their joinder in a single suit;[50] and, even though the coplaintiffs are entitled to share in the recovery, a judgment awarding the entire recovery to one plaintiff alone is not

33. N.Y.—Long v. Stafford, 8 N.E. 522, 103 N.Y. 274.
34 C.J. p 76 note 67 [a] (5).

34. Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.

35. Ark.—Murrell v. Exchange Bank, 271 S.W. 21, 168 Ark. 645, 44 A.L.R. 1391.

36. Neb.—Whaley v. Matthews, 287 N.W. 205, 136 Neb. 767.
Death of one joint party see supra § 29.

37. Miss.—Aven v. Singleton, 96 So. 165, 132 Miss. 256.

38. Ala.—Sharpe v. McCloud, 199 So. 848, 240 Ala. 499.
Fla.—Sahlberg v. J. A. Teague Furniture Co., 130 So. 432, 100 Fla. 972.
Ga.—Powell v. Porter, 5 S.E.2d 884, 189 Ga. 440.
Ill.—Misek v. Village of La Grange, 239 Ill.App. 360.
Mo.—Yore v. Yore, 144 S.W. 847, 240 Mo. 451.
33 C.J. p 1110 note 92.
Conformity to pleadings with respect to parties see infra § 51.

39. Mo.—Dietrich v. Mothershead, App., 150 S.W.2d 565—McLaran v. Wilhelm, 50 Mo.App. 658.

40. Ala.—Henderson v. J. B. Brown Co., 28 So. 79, 125 Ala. 566.
33 C.J. p 1110 note 92 [a].

41. Fla.—Sahlberg v. J. A. Teague Furniture Co., 130 So. 432, 100 Fla. 972—Edgar v. Bacon, 122 So. 107, 97 Fla. 679.

42. Ala.—Gafford v. Tittle, 141 So. 653, 224 Ala. 605.
Mo.—Yore v. Yore, 144 S.W. 847, 240 Mo. 451.

43. Ga.—Guess v. Morgan, 26 S.E. 2d 424, 196 Ga. 265—Powell v. Porter, 5 S.E.2d 884, 189 Ga. 440—Burton v. Patton, 134 S.E. 603, 162 Ga. 610.

44. Ala.—Sharpe v. McCloud, 199 So. 848, 240 Ala. 499—McLeod v. Adams, 118 So. 636, 218 Ala. 424—Crow v. Smith, 92 So. 905, 207 Ala. 311—Salter v. Fox, 67 So. 1006, 191 Ala. 34—Whitlow v. Echols, 78 Ala. 206.
Ga.—Guess v. Morgan, 26 S.E.2d 424, 196 Ga. 265.
19 C.J. p 1092 note 2, p 1217 note 50.

45. Mo.—Walker v. Lewis, 124 S. W. 567, 140 Mo.App. 26.

46. Mo.—Harrety v. Kontos, App., 184 S.W.2d 195.

47. Ind.—Adler v. Sewell, 29 Ind. 598.

48. Ga.—Pendergrast v. Gullatt, 10 Ga. 218.

49. Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417—Wiseman v. Sklar, 285 P. 1081, 104 Cal.App. 369—Curtis v. Nye & Nissen, 261 P. 747, 86 Cal.App. 507.
Ind.—Rohan v. Gehring, 137 N.E. 288, 80 Ind.App. 46.
Miss.—Aven v. Singleton, 96 So. 165, 132 Miss. 256.
Neb.—Hoffman v. Geiger, 279 N.W. 350, 134 Neb. 643, modified on other grounds 281 N.W. 625, 135 Neb. 349.
Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 430, 147 Okl. 179.
Tex.—South Dakota-Texas Oil Co. v. Hackworth, Civ.App., 248 S.W. 813, error dismissed.
33 C.J. p 1110 note 93.
Equitable precedents controlling
The code provisions are in substance enactments of rules of equity pleading and practice and equitable precedents control their construction or effect.—Bonde v. Stern, 14 N.W.2d 249, 73 N.D. 273.

50. Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 430, 147 Okl. 179.
33 C.J. p 1111 note 94.

void.[51] The authorization for such a judgment has been held to apply in all actions, whether in law or equity,[52] and in actions ex contractu[53] and in ejectment.[54] In equity, the common-law rule has no application, and a decree may be rendered for one or more joint plaintiffs and against others, as justice and equity in the particular case may require, as discussed in Equity § 601.

A judgment against coplaintiffs is void as to a plaintiff over whom the court does not have jurisdiction;[55] but in jurisdictions where a judgment is not regarded as an entirety, which is either good or bad as to all, the invalidity of a judgment as to one of two or more coplaintiffs against whom it is rendered will not vitiate it as to the others.[56] Where an action should have been dismissed as to one of two defendants on plaintiff's motion therefor, it has been held that a judgment entered on the other defendant's cross bill cannot determine issues between plaintiff and the defendant as to whom the action should have been dismissed.[57]

Joint or several judgment; separate judgments. A judgment in favor of joint plaintiffs should be joint if their cause of action is joint;[58] but if their cause of action is several the judgment should be several.[59] Thus a joint recovery on separate, several, and independent causes of action in favor of separate plaintiffs is improper;[60] in such case a judgment which does not preserve the separate rights of each in the total recovery is illegal.[61] However, the failure to designate the amount awarded to each of the plaintiffs has been held not to be error where only one plaintiff's cause was actually tried and the judgment is for plaintiff, in the singular.[62] In some jurisdictions a judgment which does not dispose of the case as to all the plaintiffs is erroneous;[63] but under some statutes the common-law restriction against the rendition of more than one judgment in an action has been changed so as to permit the rendition of as many separate judgments as are necessary to adjust the rights of the several plaintiffs.[64]

§ 32. —— Relief as between Coplaintiffs

Under various statutes a judgment determining the ultimate rights of the plaintiffs as between themselves is authorized.

Under the statutes and practice acts in a number of jurisdictions the judgment may determine the ultimate rights of the plaintiffs as between themselves.[65]

§ 33. —— Defendants Generally

a. In general
b. Entirety of judgment
c. Process against joint defendants

a. In General

The common-law rule requiring judgment in an action against several defendants to be against all or none has generally been changed by statute so as to permit judgment against some or all of the defendants.

At common law, and in the absence of statute

51. Tex.—Chandler v. Stewart, Civ. App., 90 S.W.2d 590, error dismissed.

52. N.D.—Bonde v. Stern, 14 N.W.2d 249, 73 N.D. 273.

53. Ind.—Rohan v. Gehring, 137 N.E. 288, 80 Ind.App. 46.
N.Y.—Comerford v. Fahy Market, 198 N.Y.S. 353, 204 App.Div. 533.

54. Tenn.—Ferguson v. Prince, 190 S.W. 548, 136 Tenn. 543.
19 C.J. p 1092 note 1, p 1217 notes 51 [b], 52.

55. Cal.—Tracy v. MacIntyre, 84 P.2d 526, 29 Cal.App.2d 145.

Plaintiff not notified

A judgment against coplaintiffs for attorney fees of an attorney dismissed on a motion to substitute attorneys is void as to a plaintiff who was not notified of and did not appear at the hearing on the motion.—Tracy v. MacIntyre, supra.

56. Cal.—Tracy v. MacIntyre, supra.

57. U.S.—Sauter v. First Nat. Bank, C.C.A.Ill., 8 F.2d 121.

Effect of dismissal or nonsuit on defendant's right to affirmative relief see Dismissal and Nonsuit § 39 b.

Plaintiff's right to dismiss as to one or more codefendants see Dismissal and Nonsuit §§ 30–32.

58. Ind.—Wheeler v. Hawkins, 19 N.E. 470, 116 Ind. 515.
33 C.J. p 1126 note 22.

59. Cal.—Emery v. Pacific Employers Ins. Co., 67 P.2d 1046, 8 Cal. 2d 663.
33 C.J. p 1126 note 22.

Action under Fair Labor Standards Act

In action by employees on behalf of themselves and other employees similarly situated to recover overtime compensation under Fair Labor Standards Act, a joint judgment may not be had.—Smith v. Stark Trucking, D.C.Ohio, 53 F.Supp. 826.

60. Tex.—First Nat. Bank v. Crossett, Civ.App., 268 S.W. 997.
Wyo.—Taylor v. Stockwell, 145 P. 743, 22 Wyo. 492, rehearing denied 147 P. 328, 22 Wyo. 492.
33 C.J. p 1111 note 94 [a].

61. N.J.—Musto v. Mitchell, 146 A. 212, 105 N.J.Law 575—Wilson v. Deschner, 167 A. 670, 11 N.J.Misc. 609—Warner v. Public Service Coordinated Transport, 153 A. 711, 9 N.J.Misc. 328.

62. N.J.—Melber v. Great Atlantic & Pacific Tea Co., 167 A. 746, 11 N.J.Misc. 635.

63. Colo.—Shaw v. Brady, 251 P. 532, 80 Colo. 337.

64. Miss.—Aven v. Singleton, 96 So. 165, 132 Miss. 256.
Rendition of separate judgments against several defendants see infra § 36 c.

Plaintiff suing in double capacity

Where same party suing individually and as administratrix in one action recovers both for death benefits payable to her and sick benefits payable to decedent, judgments for the death benefits should be entered in her own name, and judgment for sick benefits entered separately in her representative capacity.—Wallace v. Patriotic Order Sons of America, Washington Camp No. 50, 189 A. 712, 125 Pa.Super. 268.

65. Cal.—Curtis v. Nye & Nissen, 261 P. 747, 86 Cal.App. 507.
In equity see Equity § 603.

changing the rule, if several defendants are joined in an action recovery ordinarily must be for or against all or none,[66] at least in an action in which the liability asserted is joint.[67] In many states, however, under the codes and practice acts therein or authorized rules of court, judgment may be given for or against one or more of several defendants, and in an action against several defendants the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.[68] Such statutes were intended to create a common procedure for both actions ex contractu and ex delicto,[69] and to apply to all actions founded on contract the same rule with regard to the right of recovery against some of the defendants which prevails at common law in the case of actions founded on torts,[70] or, as some authorities say, to adopt the rule prevailing in equity as to joint defendants.[71]

Under such statutes the court possesses chancery powers and may adapt its judgment to the rights of the parties as found from the facts established from the evidence.[72] If a plaintiff sues two or more defendants on a liability alleged to be joint, or joint and several, he is no longer compelled to establish a joint cause of action against all, but a judgment may be taken against the party or parties shown to be liable, when the others are not liable,[73] and in favor of defendant or defendants found not liable.[74] Plaintiff is not required to elect before completion of the trial whether he will ask for a joint judgment against all the defendants sued or a several judgment against one of them.[75]

A statute which authorizes judgment against such defendants as are defaulted or on trial are found liable has been held not to enable the court, on sustaining a demurrer as to one defendant, to proceed to trial and enter judgment against the remaining defendants.[76] Since an amendment cannot be made which effects an entire change of parties defendant, as discussed in the C.J.S. title Parties §§ 72, 85, also 47 C.J. p 131 note 28, p 161 note 20–p 162 note 37, if plaintiff is not entitled to recover

66. Fla.—Harrington v. Bowman, 143 So. 651, 106 Fla. 86.

67. Pa.—Bauman v. Bittner, 33 A.2d 273, 152 Pa.Super. 628.

68. Ala.—Pollard v. Rogers, 173 So. 881, 234 Ala. 92.
Ariz.—Bracker Stores v. Wilson, 103 P.2d 253, 55 Ariz. 403.
Cal.—Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., 209 P. 357, 189 Cal. 509—Weisz v. McKee, 87 P.2d 379, 31 Cal.App.2d 144, rehearing denied 88 P.2d 200, 31 Cal.App.2d 144.
Colo.—Beatty v. Resler, 118 P.2d 1084, 108 Colo. 434.
Conn.—Woodruff v. Perroti, 122 A. 452, 99 Conn. 639.
Ind.—Fidelity & Deposit Co. of Maryland v. Standard Oil Co., 199 N.E. 169, 101 Ind.App. 301.
Mich.—Rimmele v. Huebner, 157 N.W. 10, 190 Mich. 247.
Neb.—Whaley v. Matthews, 287 N.W. 205, 136 Neb. 767.
N.J.—Ordinary of State v. Bastian, 5 A.2d 463, 17 N.J.Misc. 105.
N.Y.—Reeve v. Cromwell, 287 N.Y.S. 20, 227 App.Div. 32.
Okl.—Corpus Juris quoted in City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
Or.—Anderson v. Maloney, 225 P. 318, 111 Or. 84—Fischer v. Bayer, 216 P. 1028, 108 Or. 311.
Tex.—Shaw v. Whitfield, Civ.App., 35 S.W.2d 1115—Collins v. Stilger, Civ.App., 253 S.W. 572.
33 C.J. p 1115 note 21.

Additional defendants

The statute applies to additional defendants brought on the record by scire facias proceeding where the original defendant alleges that they are jointly liable with him.—Carroll v. Kirk, 19 A.2d 584, 144 Pa.Super. 211.

69. Ark.—Berryman v. Cudahy Packing Co., 87 S.W.2d 21, 191 Ark. 533.

70. Ind.—Brandt v. Hall, 82 N.E. 929, 40 Ind.App. 651.
33 C.J. p 1117 note 25.
Common-law rule in actions of:
Contract see infra § 34.
Tort see infra § 35.

71. N.D.—Bonde v. Stern, 14 N.W. 2d 249, 73 N.D. 273.
33 C.J. p 1117 note 26.

72. Cal.—Fageol Truck & Coach Co. v. Pacific Indemnity Co., 117 P.2d 669, 18 Cal.2d 748.
Ind.—Fidelity & Deposit Co. of Maryland v. Standard Oil Co., 199 N.E. 169, 101 Ind.App. 301.

Differentiation of liability of defendants

In action against principal and guarantor who did not guarantee entire debt, judgment which allowed greater recovery against principal than against guarantor was not duplicitous.—Baten v. Thornhill, Tex.Civ.App., 145 S.W.2d 608, error refused.

Where only one satisfaction permitted

(1) Decree ordering enforcement of mortgage debt out of various properties of different defendants but providing for only one satisfaction of the debt was not contradictory.—Gray v. First Nat. Bank of Chicago, 51 N.E.2d 797, 320 Ill.App. 682, reversed on other grounds 57 N.E.2d 363, 388 Ill. 124.

(2) Judgment permitting note holder to recover from maker and maker's debtor was not objectionable as allowing double recovery, where judgment provided for crediting maker with amount collected from his debtor.—J. C. Whaley Lumber Co. v. Citizens' Nat. Bank of Lubbock, Tex.Civ.App., 57 S.W.2d 637.

73. Ga.—Farley v. Groover, 3 S.E. 2d 135, 60 Ga.App. 169.
Iowa.—Lull v. Anamosa Nat. Bank, 81 N.W. 784, 110 Iowa 537.
La.—Raphiel v. Louisiana Ry. & Nav. Co., 99 So. 459, 155 La. 590.
Mass.—Mackintosh v. Chambers, 190 N.E. 38, 285 Mass. 594.
Nev.—Ward v. Scheeline Banking & Trust Co., 22 P.2d 358, 54 Nev. 442.
Or.—Fischer v. Bayer, 210 P. 452, 108 Or. 311.
Vt.—C. E. Johnson & Co. v. Marsh, 15 A.2d 577, 111 Vt. 266, 131 A.L.R. 502—F. S. Fuller & Co. v. Morrison, 169 A. 9, 106 Vt. 22.
33 C.J. p 1115 note 24.
In actions against partners see the C.J.S. title Partnership § 235, also 47 C.J. p 1010 note 1–p 1011 note 11.

74. Mo.—Wippler v. Hohn, 110 S.W. 2d 409, 341 Mo. 780.
33 C.J. p 1127 note 26.

75. Mich.—Rimmele v. Huebner, 157 N.W. 10, 190 Mich. 247.

76. Mass.—Riley v. Burns, 22 N.E. 2d 761, 304 Mass. 15.

against the original defendant judgment cannot be had against a new defendant brought into the case, unless he consents thereto.[77]

Abatement as to some of defendants. In an action against several defendants on a joint obligation a judgment in abatement in favor of one of the defendants on his plea of privilege as to venue, applicable to himself alone, has been held to be erroneous.[78]

b. Entirety of Judgment

In some jurisdictions a judgment against several defendants is an entirety, and if erroneous or void as to any of them is equally so as to all; but in other jurisdictions the rule is otherwise.

According to some authorities a judgment against two or more defendants jointly is regarded as an entirety,[79] whether rendered in a contract or tort action,[80] so that, if it is irregular or erroneous[81] or void[82] as to any of the defendants, it is equally so as to all. According to other authorities, however, a judgment against two or more defendants is not regarded as an entirety,[83] and a judgment may be valid and enforceable as to one or some of defendants, although voidable or void as to others,[84] at least in actions ex delicto.[85] Decisions even within the same jurisdiction are sometimes in conflict as to the entirety of judgments.[86] In some of the decisions it has been stated that the common-law rule that judgments are entireties is effective only in exceptional cases,[87] that the rule has been relaxed in some cases in the interest of justice where error is found as to one party only,[88] and that the rule is not applicable to judgments in actions in rem.[89]

c. Process against Joint Defendants

(1) In general
(2) Resident and nonresident joint defendants
(3) Statutory joint judgment
(4) Statutory separate judgment

(1) In General

In an action against several defendants, only some of whom were duly served with process, judgment against all is void as to the defendants not served; and, unless the rule is changed by statute, it is void as to the others if the judgment is considered as an entirety. If judgment is rendered against only the defendants served with process, it is erroneous or voidable where the action is on a joint contract, unless the statutes provide otherwise.

In general, as discussed supra §§ 19, 23, a judgment against persons over whom the court has not acquired jurisdiction is void. Accordingly, if there

77. Ala.—Covington v. Robinson, 6 So.2d 421, 242 Ala. 337—McKelvey-Coats Furniture Co. v. Doe, 198 So. 128, 240 Ala. 135—Roth v. Scruggs, 106 So. 182, 214 Ala. 32.

Situation does not arise until the evidence is in if the plaintiff contends that both parties are liable. —McKelvey-Coats Furniture Co. v. Doe, 198 So. 128, 240 Ala. 135.

78. Fla.—Universal Credit Co. v. Beckwith, 172 So. 358, 126 Fla. 865.
Necessity for two or more defendants to plead grounds of abatement separately or jointly see Abatement and Revival § 188 c.

79. Ill.—State Bank of Prairie du Rocher v. Brown, 263 Ill.App. 312 —Sergo v. Bloch, 263 Ill.App. 198.
Mo.—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389.
33 C.J. p 1130 note 59.
Entirety of judgments generally see supra § 3.

80. Ill.—State Bank of Prairie du Rocher v. Brown, 263 Ill.App. 312.

81. Ill.—Fredrich v. Wolf, 50 N.E.2d 755, 383 Ill. 638—Sergo v. Bloch, 263 Ill.App. 198.
Mo.—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389.
33 C.J. p 1130 note 59.
Death of party see supra § 29.
Reversal as to some of the parties and affirmance as to others on appeal or writ of error see Appeal and Error §§ 1919–1922.

82. Ill.—State Bank of Prairie du Rocher v. Brown, 263 Ill.App. 312 —Berkemeier v. Dormuralt Motor Sales, 263 Ill.App. 211—Singer v. Cross, 257 Ill.App. 41.
Me.—Consolidated Rendering Co. v. Martin, 145 A. 896, 128 Me. 96, 64 A.L.R. 790.
33 C.J. p 1119 note 37, p 1130 note 59.

83. Ky.—Reed v. Runyan, 10 S.W. 2d 824, 226 Ky. 261.
Miss.—Bank of Philadelphia v. Posey, 92 So. 840, 130 Miss. 530, suggestion of error sustained on other grounds 95 So. 134, 130 Miss. 825.
33 C.J. p 1130 note 60.

84. Ky.—Reed v. Runyan, 10 S.W. 2d 824, 226 Ky. 261.
Okl.—Bledsoe v. Green, 280 P. 301, 138 Okl. 15.
Pa.—Merchants Banking Trust Co. v. Klimosky, 9 Pa.Dist. & Co. 143, 23 Sch.Leg.Rec. 78.
Tex.—U. S. Fidelity & Guaranty Co. v. Richey, Civ.App., 18 S.W.2d 231, error refused.
33 C.J. p 1130 note 60.

85. Minn.—Engstrand v. Kleffman, 90 N.W. 1054, 86 Minn. 403, 91 Am.S.R. 359.

86. Mo.—McIntosh v. Wiggins, 191 S.W.2d 637, certiorari denied 66 S.Ct. 1015—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389.
33 C.J. p 1131 note 61.
In Mississippi
(1) It has been held that a judgment at law is an entirety and is valid or invalid as a whole.—Boutwell v. Grayson, 79 So. 61, 118 Miss. 80—Carrollton Hardware & Implement Co. v. Marshall, 78 So. 7, 117 Miss. 224—Comenitz v. Bank of Commerce, 38 So. 35, 85 Miss. 662—Weis v. Aaron, 21 So. 763, 75 Miss. 138, 65 Am.S.R. 594.
(2) These cases, however, have been overruled.—Bank of Philadelphia v. Posey, 92 So. 840, 130 Miss. 530, suggestion of error sustained on other grounds 95 So. 134, 130 Miss. 825.
(3) The overruled decisions will control the validity of a judgment which affects property rights where it was rendered prior to the time they were overruled.—Bank of Philadelphia v. Posey, 95 So. 134, 130 Miss. 825.

87. Mo.—State v. Blakemore, 205 S. W. 626, 275 Mo. 695.

88. Mo.—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389—Stotler v. Chicago & A. Ry. Co., 98 S.W. 509, 200 Mo. 107.

89. Mo.—McIntosh v. Wiggins, 191 S.W.2d 637, certiorari denied 66 S.Ct. 1015.

are several defendants, all must be served with process or appear in the action in order to warrant a judgment against all;[90] and, where none was properly served with process or made an appearance in the action, a personal judgment against such defendants is void.[91] A judgment against all the defendants, some of whom were not served with process and did not appear in the action, is void as to the absent defendant or defendants,[92] and at common law and in the absence of statute changing the rule is at least erroneous and voidable as to all the defendants.[93] In jurisdictions where a judgment is considered as an entirety and if void as to one party is void as to all, discussed supra subdivision b of this section, such a judgment is absolutely void as to all.[94] However, in jurisdictions where judgments are not considered as an entirety, such a judgment is at most voidable and not void as to the defendants who were served with process or appeared;[95] and in some jurisdictions if the action is ex delicto the judgment is valid and binding against the defendants served with process.[96] Under the codes and practice acts in various jurisdictions the judgment is valid and binding against parties over whom the court had jurisdiction by proper service of process or appearance,[97] or at least it is an error or irregularity of which the defendants served cannot complain.[98]

At common law and in the absence of statute changing the rule, a judgment against only the defendants served with process or appearing is erroneous and voidable as to them in an action on a joint contract against several defendants, some of whom were not subjected to the jurisdiction of the court by due service of process or appearance,[99] it having been the rule under the early common law that, where several defendants were sued on a joint contract, plaintiff was not entitled to judgment against any of them, until all were served with process, or until those not served were prosecuted to outlawry.[1] Under some statutes the failure to obtain service of process on some of several defendants will not affect the validity of a judgment against the others in an action on a joint and several obligation;[2] and under others it has been held that in an action against several defendants on a joint obligation judgment may properly be taken against one, or fewer than all, where the other defendants were nonresidents not served with process.[3] A voluntary general appearance for defendants not served will confer jurisdiction and permit a judgment against all.[4] Statutes in derogation of the common law, and authorizing judgment jointly against all defendants on process served on only some of them, discussed infra subdivision c (3) of this section, or a several judgment against

90. Ill.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 478.

91. Ky.—Viall v. Walker, 58 S.W. 2d 415, 248 Ky. 197.

In discovery proceeding after judgment, however, the court under some statutes has been held to have jurisdiction to render personal judgment on service of summons against defendants out of county, even though none resided, or was served, within county.—Viall v. Walker, supra.

92. Ga.—Hicks v. Bank of Wrightsville, 194 S.E. 892, 57 Ga.App. 233.
Ky.—Capper v. Short, 11 S.W.2d 717, 226 Ky. 689.
Miss.—Bank of Philadelphia v. Posey, 92 So. 840, 130 Miss. 530, suggestion of error sustained on other grounds, 95 So. 134, 130 Miss. 825.
N.C.—Crocker v. Vann, 135 S.E. 127, 192 N.C. 422.
Okl.—Bledsoe v. Green, 280 P. 301, 138 Okl. 15.
Tenn.—Ridgeway v. Bank of Tennessee, 11 Humph. 523—Galbraith v. Kirby, 109 S.W.2d 1168, 21 Tenn. App. 303.
33 C.J. p 1118 note 64.
Statutory joint judgment see infra subdivision c (3) of this section.

93. Ky.—Capper v. Short, 11 S.W.2d 717, 226 Ky. 689.
33 C.J. p 1119 note 35.

94. Me.—Buffum v. Ramsdell, 55 Me. 252, 92 Am.D. 589.
33 C.J. p 1119 note 36.

95. Ky.—Capper v. Short, 11 S.W. 2d 717, 226 Ky. 689.
33 C.J. p 1119 note 38.

96. Minn.—Engstrand v. Kleffman, 90 N.W. 1054, 86 Minn. 403, 91 Am.S.R. 359.

97. Fla.—Street v. Crosthwait, 183 So. 820, 134 Fla. 158, modified on other grounds 186 So. 516, 136 Fla. 327.
Miss.—Bank of Philadelphia v. Posey, 92 So. 840, 130 Miss. 530, suggestion of error sustained on other grounds 95 So. 134, 130 Miss. 825.
Mo.—Nations v. Beard, 267 S.W. 19, 216 Mo.App. 33.
Okl.—Bledsoe v. Green, 280 P. 301, 138 Okl. 15.
Tex.—Taylor v. Hustead & Tucker, Civ.App., 248 S.W. 766, reversed on other grounds, Com.App., 257 S.W. 232.

98. Ga.—Hicks v. Bank of Wrightsville, 194 S.E. 892, 57 Ga.App. 233.
Mo.—State ex rel. Cunningham v. Haid, 40 S.W.2d 1048, 328 Mo. 208.
33 C.J. p 1119 note 40.

99. Fla.—Harrington v. Bowman, 136 So. 229, 102 Fla. 339, modified on other grounds 143 So. 651, 106 Fla. 86.
33 C.J. p 1118 note 33.
Process or appearance see supra §§ 23–26.

1. Fla.—Corpus Juris cited in Harrington v. Bowman, 143 So. 651, 653, 106 Fla. 86.
33 C.J. p 1118 note 31.

2. Ga.—Hicks v. Bank of Wrightsville, 194 S.E. 892, 57 Ga.App. 233.

3. Mass.—Alfred J. Silberstein, Inc., v. Nash, 10 N.E.2d 65, 298 Mass. 170—Lennon v. Cohen, 168 N.E. 63, 264 Mass. 414.

4. Ala.—Eaton v. Harris, 42 Ala. 491.
33 C.J. p 1119 note 41.
Collateral attack where appearance unauthorized see infra § 424.
Unauthorized appearance
Judgment against nonresident defendant on demurrer filed by other defendants and purporting to include him was void where he had not been served with process, had not voluntarily appeared or authorized any attorney to appear for him, and had not authorized any of codefendants or other persons to employ counsel for him.—Street v. Dexter, 77 P.2d 707, 182 Okl. 360.

only those served, discussed infra subdivision c (4) of this section, must be strictly construed and followed; judgment is authorized only in cases falling within the statute as thus construed.[5]

Construction of judgment. Where process is served only on some of the defendants, and judgment is taken against "defendants" without naming them, and without any appearance of those not served, the judgment will be understood to be only against those who were duly served.[6]

(2) Resident and Nonresident Joint Defendants

In the absence of a compliance with statutory requirements, a judgment against joint defendants, residents of different counties or districts, is void as to the nonresident defendants.

Under statutes authorizing the venue of actions against several defendants, who are properly joined as such, although residents of different counties, to be laid in the county where one of them resides or is summoned, discussed in the C.J.S. title Venue §§ 93–98, also 67 C.J. p 101 note 22–p 118 note 27, and permitting in such actions the issuance and service of process on the nonresident defendants, discussed in the C.J.S. title Process §§ 8, 32, also 50 C.J. p 451 notes 6–12, p 475 note 1–p 476 note 13, a judgment taken against a nonresident of the county of venue contrary to the provisions of the statute is void as to him;[7] but in jurisdictions where judgments are not considered as an entirety, discussed supra subdivision b of this section, it is not thereby made void as to parties who were properly served with process.[8] Thus a judgment against a defendant who was not summoned in the county of venue is void as to him where the resident and nonresident defendants were improperly joined in the action;[9] and it is likewise void, where a statute prohibits judgment in such case, if the action is discontinued or dismissed as to,[10] or judgment is not rendered against,[11] the defendant or defendants residing or served in the county of venue. If, however, the nonresident defendant appears and contests the court's jurisdiction over him, or otherwise enters his appearance, a judgment against him is at most erroneous or voidable.[12]

(3) Statutory Joint Judgment

Under various joint debtor acts a judgment in form against all the defendants may be rendered in an action on a joint obligation against several defendants, some of whom were not served with process, which is good as a personal judgment against the defendants served and enforceable against their separate property and the joint property of all, located within the state, but not against the individual property of those not served.

Under a class of statutes commonly known as "joint debtor acts,"[13] which have been sustained as essentially constitutional,[14] and which were enacted to supersede the necessity of proceeding to outlawry against one not found or brought into court,[15] it has been held that, where one or more defendants are sued on a joint obligation, and process is served on one or more but not on all defendants, plaintiff may proceed against those served, unless the court otherwise directs,[16] and, if successful, recover a judgment in form against all the defendants,[17] which is good as a personal judgment against de-

5. Fla.—Davis v. First Nat. Bank & Trust Co. of Orlando, 150 So. 633, 112 Fla. 485—Harrington v. Bowman, 143 So. 651, 106 Fla. 86.
33 C.J. p 1119 note 45.

6. Ark.—Neal v. Singleton, 26 Ark. 491.
33 C.J. p 1119 note 46.

7. Ky.—Hays v. Baker, 35 S.W.2d 296, 237 Ky. 265.

8. Ky.—Reed v. Runyan, 10 S.W.2d 824, 226 Ky. 261.

9. Ky.—Ramey v. Weddington, 105 S.W.2d 824, 268 Ky. 675—Willis v. Tomes, 132 S.W. 1043, 141 Ky. 431.

Collusive joinder of defendants for the sole purpose of bringing suit against a nonresident of the county of venue will render judgment against nonresident void.—Wistrom v. Forsling, 9 N.W.2d 294, 143 Neb. 294, rehearing denied and opinion modified on other grounds 14 N.W. 2d 217, 144 Neb. 638.

Joint liability not shown
Ky.—Ramey v. Weddington, 105 S. W.2d 824, 268 Ky. 675.

10. Ark.—Stiewel v. Borman, 37 S. W. 404, 63 Ark. 30.
Ky.—Ramey v. Weddington, 105 S. W.2d 824, 268 Ky. 675.
67 C.J. p 110 note 1 [b] (3).

11. Ky.—Ramey v. Weddington, supra.
33 C.J. p 1085 note 26 [a].

12. Ky.—Ramey v. Weddington, supra—Hays v. Baker, 35 S.W.2d 296, 237 Ky. 265.

13. U.S.—Hall v. Lanning, Ill., 91 U.S. 160, 168, 23 L.Ed. 271.
Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
Judgment in action on partnership obligation where some of partners not served with process see the C.J.S. title Partnership § 235, also 47 C.J. p 1011 note 22–p 1013 note 31.
Sufficiency of service of process on part of several executors or administrators see Executors and Administrators § 753.

14. Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
33 C.J. p 1119 note 48.

15. Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
33 C.J. p 1119 note 49.

16. U.S.—Hall v. Lanning, Ill., 91 U.S. 160, 23 L.Ed. 271.
Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
Or.—Chagnot v. Labbe, 69 P.2d 949, 157 Or. 280.
33 C.J. p 1120 note 50.

17. U.S.—Hall v. Lanning, Ill., 91 U.S. 160, 23 L.Ed. 271.
N.Y.—Kittredge v. Grannis, 155 N. E. 93, 244 N.Y. 182—Kirsten v. Chrystmos, 14 N.Y.S.2d 442.
Okl.—**Corpus Juris quoted in** City of Capulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
Or.—Chagnot v. Labbe, 69 P.2d 949, 157 Or. 280.
33 C.J. p 1120 note 51.

fendants who were served, or who appeared, and is enforceable against their separate property,[18] and the joint property of them and the absent defendant[19] located within the state,[20] but not against the latter's individual property.[21]

Judgment under the statute is not authorized unless the obligation sued on is the joint[22] contractual[23] obligation of all defendants. A judgment against only the defendant or defendants served is erroneous.[24] Nonresident joint debtors are within the operation of the statute, and property within the state owned jointly by nonresident and resident defendants may be subject to the judgment,[25] but a judgment under the statute against a citizen of another state, as an absent joint debtor, is wholly void in every other state, and will not be enforced or given any effect.[26] Other similar statutes limited to particular classes of cases, such as actions on bills or notes, or other designated instruments, have been enacted from time to time in different jurisdictions.[27]

Such a judgment is not good and binding as a personal judgment against the absent defendant,[28] unless made so by the statute, in which event it may operate as a personal judgment within the state where rendered,[29] subject to the right of the absent defendant to show that he was not in fact a joint debtor, and that therefore the judgment against him was void for want of jurisdiction, being unauthorized by statute.[30] It has been held that such a judgment will not support an action against him on the judgment in the state where the judgment was rendered,[31] although the rule is otherwise under some statutes,[32] and especially not in the courts of another state,[33] and is not entitled, under the constitution, to full faith and credit in other states.[34] It will not stop the running of the statute of limitations in favor of the absent defendant,[35] or merge or bar the original cause of action,[36] at least not in other states,[37] although it may so operate in the state where rendered if the statute so provides.[38] Such judgments have no other force or effect than such as has been expressly given to them by the statutes,[39] which may, and sometimes do, make the judgment prima facie evidence against the absent defendant, reserving to him the right to contest the merits and show that he ought not to have been charged,[40] while under other statutes the judgment is not even prima facie evidence of indebtedness.[41] A joint defendant not served has a right to appear voluntarily in the action against plaintiff's objection.[42] A statute providing that, when defendants

18. Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
33 C.J. p 1120 note 52.

19. N.Y.—Kittredge v. Grannis, 155 N.E. 93, 244 N.Y. 182.
Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
33 C.J. p 1120 note 52.

20. Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
33 C.J. p 1120 note 53.

21. Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
33 C.J. p 1120 note 54.

22. N.Y.—Kittredge v. Grannis, 155 N.E. 93, 244 N.Y. 182.
Or.—Chagnot v. Labbe, 69 P.2d 949, 157 Or. 280.
33 C.J. p 1121 note 55.

23. N.Y.—Kittredge v. Grannis, 155 N.E. 93, 244 N.Y. 182.
Claim held not within statute
Claim of record holder of bank stock against partnership as subsequent purchaser, for indemnity on account of assessment, was held not claim for joint indebtedness on contract, such as warranted judgment against both debtors where only one was served.—Broderick v. Adamson, 265 N.Y.S. 804, 148 Misc. 353, reversed on other grounds 268 N.Y.S. 766, 240 App.Div. 229, and modified on other grounds 269 N.Y.S. 700, 240 App.Div. 202, motion denied 193 N. E. 287, 265 N.Y. 495, and affirmed 196 N.E. 568, 267 N.Y. 538. Affirmed 277 N.Y.S. 951, 243 App.Div. 692, and 279 N.Y.S. 732, 244 App.Div. 707, reversed on other grounds 200 N. E. 811, 270 N.Y. 260. Affirmed 279 N.Y.S. 733, 244 App.Div. 708, affirmed 200 N.E. 797, 270 N.Y. 228. Modified on other grounds 285 N.Y.S. 294, 246 App.Div. 268. Affirmed in part 287 N.Y.S. 322, 247 App.Div. 711, reversed on other grounds 5 N.E.2d 833, 272 N.Y. 316.

24. Wis.—Brawley v. Mitchell, 66 N.W. 799, 92 Wis. 671.
33 C.J. p 1121 note 56.

25. N.Y.—Kittredge v. Grannis, 155 N.E. 93, 244 N.Y. 182.
33 C.J. p 1121 note 57.

26. U.S.—Goldey v. Morning News, N.Y., 15 S.Ct. 559, 156 U.S. 518, 39 L.Ed. 517.
33 C.J. p 1121 note 58.

27. Ill.—Neal v. Pennington, 65 Ill. App. 68.
33 C.J. p 1121 note 61.

28. U.S.—Hall v. Lanning, Ill., 91 U.S. 160, 23 L.Ed. 271.
33 C.J. p 1121 note 62.

29. N.J.—Harker v. Brink, 24 N.J. Law 333.
33 C.J. p 1121 note 63.

30. N.J.—Harker v. Brink, supra.

31. Cal.—Tay v. Hawley, 39 Cal. 93.
33 C.J. p 1121 note 65.

32. N.Y.—Townsend v. Carman, 6 Cow. 695, affirmed Carman v. Townsend, 6 Wend. 206.
33 C.J. p 1121 note 66.

33. U.S.—Hall v. Lanning, Ill., 91 U.S. 160, 23 L.Ed. 271.
33 C.J. p 1121 note 67.

34. U.S.—Hall v. Lanning, supra.
33 C.J. p 1121 note 68.

35. N.Y.—Maples v. Mackey, 89 N. Y. 146—Lane v. Salter, 51 N.Y. 1.

36. N.Y.—Oakley v. Aspinwall, 4 N.Y. 513.

37. Mass.—Odom v. Denny, 16 Gray 114.

38. U.S.—D'Arcy v. Ketchum, La., 11 How. 165, 13 L.Ed. 648.

39. N.Y.—Oakley v. Aspinwall, 4 N. Y. 513.
33 C.J. p 1121 note 73.

40. U.S.—D'Arcy v. Ketchum, La., 17 How. 165, 13 L.Ed. 648.
N.Y.—Townsend v. Carman, 6 Cow., 695, affirmed Carman v. Townsend, 6 Wend. 206.

41. N.Y.—Morey v. Tracey, 92 N.Y. 581.
33 C.J. p 1122 note 75.

42. N.Y.—McLoughlin v. Bieber, 56 N.Y.S. 805, 26 Misc. 143.
33 C.J. p 1122 note 76.

are joint and solidary obligors, they may be cited at the domicile of any one of them does not give the court jurisdiction to render a judgment in personam against a nonresident not found within the state.[43]

(4) Statutory Separate Judgment

Under various statutes in a joint action against several defendants, some of whom were not served with process, judgment may be rendered against those served, excluding the others, provided the statutory conditions precedent thereto are shown, which separate judgment binds the joint property of all the defendants and the individual property of those served.

Under statutes so providing if two or more persons are sued in a joint action, plaintiff may proceed against any one or more of them on service of process on them, notwithstanding there may be others not served, and recover a judgment against those served, excluding the others,[44] provided it is shown that defendants not brought in cannot be found or that it is impossible to serve process on them,[45] and that there is a joint liability or joint cause of action against all,[46] and notation of the fact of nonservice on the absent defendant is made to appear in the judgment,[47] where the statute makes such facts conditions precedent.[48] Such separate judgment binds the joint property of all the defendants and the individual property of the defendants served.[49] A several judgment may be rendered against only defendants served where the liability is joint and several,[50] or, in some jurisdictions, even though it is joint.[51]

§ 34. —— Contract Actions

At common law and in the absence of a statute changing the rule, a judgment in an action ex contractu against several defendants must be in favor of all defendants or none, unless a defendant pleads matter which goes to his personal discharge or an unnecessary and improper party was joined as defendant. Under various codes and practice acts, however, judgment may be taken against the party or parties found liable and in favor of those found not liable.

At common law, and in the absence of a statute changing the rule, if several defendants are joined in an action ex contractu, and all are brought before the court by service or appearance plaintiff must recover against all or none, and it is not competent to enter a judgment in favor of one defendant and against another.[52] Under codes and practice acts authorizing judgments to be rendered for or against one or more of several defendants, discussed generally supra § 33 a, which are applicable in actions ex contractu,[53] including actions on quantum meruit,[54] judgment in an action against several defendants on a joint, or joint and several, obligation may be taken against the party or parties shown to be liable, when the others are not liable,[55] and in favor of defendant or defendants

43. La.—Klotz v. Tru-Fruit Distributors, App., 173 So. 592.

44. Cal.—Merchants' Nat. Bank of Los Angeles v. Clark-Parker Co., 9 P.2d 826, 215 Cal. 296, 81 A.L.R. 778.
Fla.—Davis v. First Nat. Bank & Trust Co. of Orlando, 150 So. 633, 112 Fla. 485—Harrington v. Bowman, 143 So. 651, 106 Fla. 86.
Ohio.—Hoyt v. Geo. W. Stone Co., 27 Ohio N.P.,N.S., 533.
33 C.J. p 1122 notes 77, 78.

45. Ind.—Hunt v. Adamson, 4 Ind. 108.
33 C.J. p 1122 note 79.

46. Ill.—Cassady v. School Trustees, 105 Ill. 560.
33 C.J. p 1122 note 80.

47. Fla.—Davis v. First Nat. Bank & Trust Co. of Orlando, 150 So. 633, 112 Fla. 485.

48. Fla.—Davis v. First Nat. Bank & Trust Co. of Orlando, supra.
33 C.J. p 1122 note 81.

49. Ga.—Wright v. Harris, 24 Ga. 415—Denton v. Hannah, 77 S.E. 672, 12 Ga.App. 494.

50. N.M.—Leusch v. Nickel, 113 P. 595, 16 N.M. 28.
33 C.J. p 1122 note 83.

51. Cal.—Merchants' Nat. Bank of Los Angeles v. Clark-Parker Co., 9 P.2d 826, 215 Cal. 296, 81 A.L.R. 778.

52. Colo.—**Corpus Juris cited in** Beatty v. Resler, 118 P.2d 1084, 1085, 108 Colo. 434—**Corpus Juris** cited in Townsend v. Heath, 103 P.2d 691, 692, 106 Colo. 273.
Fla.—Davis v. First Nat. Bank & Trust Co. in Orlando, 150 So. 633, 112 Fla. 485—Jones v. Griffin, 138 So. 38, 103 Fla. 745—Harrington v. Bowman, 136 So. 229, 102 Fla. 339, modified on other grounds 143 So. 651, 106 Fla. 86—Merchants' & Mechanics' Bank v. Sample, 124 So. 49, 98 Fla. 759, rehearing denied 125 So. 1, 98 Fla. 759.
Mass.—Riley v. Burns, 22 N.E.2d 761, 304 Mass. 15.
33 C.J. p 1111 note 98.
Conformity to pleadings and proof see infra §§ 47–54.
Judgment against:
One or more:
Coparties in action:
Before justice of the peace see the C.J.S. title Justices of the Peace § 110, also 35 C.J. p 674 notes 87–93.
Of debt see Debt, Action of § 16.
Partners see the C.J.S. title Partnership § 235, also 47 C. J. p 1010 note 2–p 1011 note 11.
Principal and surety see the C. J.S. title Principal and Surety § 277, also 50 C.J. p 223 notes 96–1.
Defense by one party
Where one defendant or several joint defendants maintain defense which negatives plaintiff's right to recover against any defendant, plaintiff is not entitled to judgment against any defendant, although particular defendant does not appear or plead such defense.—Mackintosh v. Chambers, 190 N.E. 38, 285 Mass. 594.

53. Ariz.—Bracker Stores v. Wilson, 103 P.2d 253, 55 Ariz. 403.
Iowa.—Lull v. Anamosa Nat. Bank, 81 N.W. 784, 110 Iowa 537.
33 C.J. p 1115 note 22.

54. Or.—Fischer v. Bayer, 210 P. 452, 108 Or. 311.

55. Ariz.—Bracker Stores v. Wilson, 103 P.2d 253, 55 Ariz. 403—Reid v. Topper, 259 P. 397, 32 Ariz. 381.
Colo.—**Corpus Juris cited in** Beatty v. Resler, 118 P.2d 1084, 1085, 108 Colo. 434.
Conn.—Woodruff v. Perrotti, 122 A. 452, 99 Conn. 639.
Ind.—Fidelity & Deposit Co. of Maryland v. Standard Oil Co., 199 N.E. 169, 101 Ind.App. 301.

found not liable.[56] However, as discussed infra § 36, such statutes do not permit the rendition of a several judgment on a joint cause of action. If plaintiff sues on and shows only a joint obligation, judgment must be against all jointly liable or none,[57] except, under some statutes, where the other joint obligors are not served with process, as discussed supra § 33 c; but if the proofs show a several obligation, or a joint obligation as to two or more defendants fewer than all, a recovery may be had against those shown to be liable regardless of the fact that only a joint obligation was alleged.[58] In an action on a contract which at common law would have been joint only, but which by force of statute is joint and several, as considered in Contracts § 355 a (2), judgment may be had against him or those of the obligees sued who are shown to be liable.[59] In an action on a contract judgment may run against a party who is not a party to the contract but is liable on an independent agreement to pay the amount due under the contract.[60]

Exceptions to common-law rule. Although the common law rule has been long and well established, it is not universal, whenever a defendant pleads matter which goes to his personal discharge, or any matter that does not go to the nature of the writ, or pleads or gives in evidence a matter which is a bar to the action against himself only, and of which the others could not take advantage, judgment may be for such defendant and against the rest.[61] In such case judgment in favor of a defendant relying on a defense personal to himself does not discharge the other joint obligors.[62] It is essential to the operation of this exception that a defense insisted on by one of several joint debtors be personal to him, and not one of which the other defendants could take advantage.[63] Personal defenses within the exception to the rule include a discharge in bankruptcy[64] or insolvency;[65] the defense of the statute of limitations;[66] a release of an obligor with a reservation of the right to proceed against the remaining obligor or obligors;[67] personal disability to contract,[68] such as infancy,[69]

Me.—Arnst v. Estes, 8 A.2d 201, 136 Me. 272.

Mass.—Dindio v. Meshaka, 175 N.E. 170, 275 Mass. 112.

Mich.—Waller v. Sloan, 196 N.W. 347, 225 Mich. 600.

Mo.—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 86.

N.Y.—Reeve v. Cromwell, 237 N.Y. S. 20, 227 App.Div. 32.

Ohio.—Maus v. Jones, 172 N.E. 157, 122 Ohio St. 459.

Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.

33 C.J. p 1115 note 24.

In actions on bills and notes see Bills and Notes § 718 b.

Contribution between defendants

If defendant against whom judgment is entered is required to pay more than his proportionate share of the judgment he may seek contribution from the others.—Smude v. Amidon, 7 N.W.2d 776, 214 Minn. 266.

56. Mich.—Waller v. Sloan, 196 N. W. 347, 225 Mich. 600.

57. Colo.—**Corpus Juris quoted in** Beatty v. Resler, 118 P.2d 1084, 1085, 1086, 108 Colo. 434.

Mass.—Mackintosh v. Chambers, 190 N.E. 38, 285 Mass. 594.

Mich.—Penfold v. Slyfield, 68 N.W. 226, 110 Mich. 343.

N.Y.—Giventer v. Antonofsky, 205 N.Y.S. 287, 209 App.Div. 679.

Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.

33 C.J. p 1117 note 27.

58. Colo.—**Corpus Juris quoted in** Beatty v. Resler, 118 P.2d 1084, 1085, 1086, 108 Colo. 434.

Mass.—Alfred J. Silberstein, Inc. v. Nash, 10 N.E.2d 65, 298 Mass. 170.

Mo.—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 86.

Mont.—McCay v. Butler, 114 P.2d 517, 112 Mont. 249.

Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.

Or.—Hamm v. Basche, 80 P. 501, 22 Or. 513.

Pa.—Smith v. Walat & Stutzman, 99 Pa.Super. 147.

33 C.J. p 1117 note 27.

59. Mo.—Thomas v. Schapeler, App., 92 S.W.2d 982.

Oral contracts have been excepted from the rule.—Townsend v. Heath, 103 P.2d 691, 106 Colo. 273—Exchange Bank of Denver v. Ford, 3 P. 449, 7 Colo. 314.

60. Conn.—Meyers v. Arm, 13 A.2d 507, 126 Conn. 579.

Liability of third person assuming indebtedness under contract see Contracts § 520.

61. Fla.—Davis v. First Nat. Bank & Trust Co. of Orlando, 150 So. 633, 112 Fla. 485—Harrington v. Bowman, 143 So. 651, 106 Fla. 86—**Corpus Juris cited in** Jones v. Griffin, 138 So. 38, 39, 103 Fla. 745.

Mass.—Riley v. Burns, 22 N.E.2d 761, 304 Mass. 15—Mackintosh v. Chambers, 190 N.E. 38, 285 Mass. 594.

Pa.—Baldwin v. Ely, 193 A. 299, 127 Pa.Super. 110.

33 C.J. p 1112 note 99.

62. Pa.—Baldwin v. Ely, supra.

63. Ark.—State v. Williams, 17 Ark. 371.

33 C.J. p 1113 note 1.

64. Mass.—Riley v. Burns, 22 N.E. 2d 761, 304 Mass. 15.

33 C.J. p 1113 note 2.

In action against general and special partners see the C.J.S. title Partnership § 486, also 47 C.J. p 1316 note 21.

65. Fla.—**Corpus Juris cited in** Jones v. Griffin, 138 So. 38, 39, 103 Fla. 745.

33 C.J. p 1113 note 3.

66. Minn.—Town v. Washburn, 14 Minn. 268, 100 Am.D. 219.

33 C.J. p 1113 note 8 [c].

Recovery against defendants where action against codefendants is barred by limitations generally see the C.J.S. title Limitations of Actions § 212, also 37 C.J. p 1003 notes 73–79.

67. Pa.—Baldwin v. Ely, 193 A. 299, 127 Pa.Super. 110.

68. Fla.—Jones v. Griffin, 138 So. 38, 103 Fla. 745.

69. Fla.—**Corpus Juris cited in** Jones v. Griffin, 138 So. 38, 39, 103 Fla. 745.

Mass.—Riley v. Burns, 22 N.E.2d 761, 304 Mass. 15.

Pa.—Wharen v. Funk, 31 A.2d 450, 152 Pa.Super. 133.

33 C.J. p 1113 note 5.

Invalidity of judgment as to infant as not rendering it void as to his adult codefendants see Infants § 122 a.

insanity,[70] or coverture;[71] and other like matters.[72]

The rule has no proper application to an action against administrators as such on a contract alleged to have been made with decedent,[73] or where some of defendants are not served with process and do not appear,[74] or where the statement of claim shows a several liability against one defendant, and the action is dismissed as to the other joint defendants before submission to the jury.[75] Another exception to the rule arises when one who is an unnecessary or improper party is joined as a defendant.[76]

§ 35. —— Tort Actions

In tort actions judgment ordinarily may be rendered for or against one or more of several defendants.

In actions for tort against several defendants it has generally been held that judgment may be rendered against one or as many of defendants as the proof shows were guilty of the wrong, and in favor of those as against whom the proof fails,[77] or against some of defendants shown to be liable where plaintiff waives his right to recover against the others,[78] although there formerly was some authority to the effect that, in an action against two or more for a joint tort, recovery was required to be against all or none.[79] This is also true under codes and practice acts authorizing judgments to be rendered for or against one or more of several defendants, as considered generally supra § 33 a, which are applicable in actions for tort,[80] as are rules of court to the same effect.[81]

If it appears during the course of the proceedings that a defendant is not liable, the court may render judgment in his favor and allow the case to proceed against the others,[82] and the court's discharge of some of defendants in an action charging concurrent wrongful acts or omissions will not preclude judgment against the others.[83] Even after verdict, where a joint liability has been found to exist,[84] or where several damages have been given by the jury,[85] judgment may be rendered against one defendant alone. In jurisdictions where it is proper to grant a new trial as to part of the par-

70. Fla.—**Corpus Juris cited in** Jones v. Griffin, 138 So. 38, 39, 103 Fla. 745.
Ill.—Aten v. Brown, 14 Ill.App. 451.
Validity of judgment against insane person see Insane Persons § 151 b.

71. Fla.—**Corpus Juris cited in** Jones v. Griffin, 138 So. 38, 39, 103 Fla. 745.
33 C.J. p 1113 note 7.

72. Fla.—**Corpus Juris cited in** Jones v. Griffin, 138 So. 38, 39, 103 Fla. 745.
33 C.J. p 1113 note 8.

73. Ala.—Gray v. White, 5 Ala. 490.

74. Me.—Dennett v. Chick, 2 Me. 191, 11 Am.D. 59.
33 C.J. p 1113 note 10.

75. Ill.—Wilson v. Johnson, 178 Ill.App. 385.

76. Ill.—Mayer v. Brensinger, 54 N. E. 159, 180 Ill. 110, 72 Am.S.R. 196.
33 C.J. p 1113 note 12.

77. Ala.—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071.
D.C.—Ewald v. Lane, 104 F.2d 222, 70 App.D.C. 89, certiorari denied Lane v. Ewald, 60 S.Ct. 81, 308 U. S. 568, 84 L.Ed. 477—Gale v. Independent Taxi Owners Ass'n, 84 F. 2d 249, 65 App.D.C. 396.
Fla.—Dr. P. Phillips & Sons v. Kilgore, 12 So.2d 465, 152 Fla. 578—Stanley v. Powers, 166 So. 843, 123 Fla. 859—Seaboard Air Line Ry. Co. v. Ebert, 133 So. 104.
Ga.—Joyce v. City of Dalton, App., 36 S.E.2d 104.
Ill.—Minnis v. Friend, 196 N.E. 191, 360 Ill. 328—Rome Soap Mfg. Co. v. John T. La Forge & Sons, 54 N.E.2d 252, 322 Ill.App. 281—Koltz v. Jahaaske, 38 N.E.2d 973, 312 Ill.App. 623—Skala v. Lehon, 258 Ill.App. 252, affirmed 175 N.E. 832, 343 Ill. 602—Bunyan v. American Glycerin Co., 230 Ill.App. 351—Hibernian Banking Ass'n v. True, 228 Ill.App. 194.
Ind.—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179—Indianapolis Traction & Terminal Co. v. Holtsclaw, 81 N.E. 1084, 40 Ind.App. 311.
La.—Overstreet v. Ober, 130 So. 648, 14 La.App. 633.
Mich.—Anderson v. Conterio, 5 N.W. 2d 572, 303 Mich. 75—Walton v. Hymans, 4 N.W.2d 540, 302 Mich. 256.
Mo.—Raleigh v. Raleigh, App., 5 S. W.2d 689.
Ohio.—Smith v. Fisher, App., 32 N. E.2d 561—Ohio Power Co. v. Fittro, 173 N.E. 33, 36 Ohio App. 186.
Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 430, 431, 147 Okl. 179.
Tex.—San Antonio Gas Co. v. Singleton, 59 S.W. 920, 24 Tex.Civ. App. 341, error refused.
33 C.J. p 1113 note 13.

78. Tex.—Taylor Water Co. v. Dillard, 29 S.W. 662, 9 Tex.Civ.App. 667.

79. La.—Loussade v. Hartman, 16 La. 117.
33 C.J. p 1114 note 16 [a].
Prior to statutory change
Pa.—Polis v. Heizmann, 120 A. 269, 276 Pa. 315, 27 A.L.R. 948.

80. Ala.—Sloss-Sheffield Steel & Iron Co. v. Wilkes, 181 So. 276, 236 Ala. 173—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Sloss-Sheffield Steel & Iron Co. v. Wilkes, 165 So. 764, 231 Ala. 511, 109 A.L. R. 385.
Cal.—Rocca v. Steinmetz, 208 P. 964, 189 Cal. 426.
Iowa.—Lull v. Anamosa Nat. Bank, 110 Iowa 537, 81 N.W. 784.
Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
Or.—Anderson v. Maloney, 225 P. 318, 111 Or. 84.
Pa.—Stone v. City of Philadelphia, 153 A. 550, 302 Pa. 340—Gable v. Yellow Cab Co., 150 A. 162, 300 Pa. 37—Carroll v. Kirk, 19 A.2d 584, 144 Pa.Super. 211—Mullen v. McGeagh, 88 Pa.Super. 381—Cairns v. Spencer, 87 Pa.Super. 126—Brown v. George B. Newton Coal Co., Com.Pl., 28 Del.Co. 23.
Wash.—Eyak River Packing Co. v. Huglen, 255 P. 123, 143 Wash. 229, reheard 257 P. 638, 143 Wash. 229.
33 C.J. p 1115 note 22.

81. Mich.—Kolehmainen v. E. E. Mills Trucking Co., 3 N.W.2d 298, 301 Mich. 340—Barkman v. Montague, 298 N.W. 273, 297 Mich. 538.

82. Cal.—Rocca v. Steinmetz, 208 P. 964, 189 Cal. 426.
Me.—Arnst v. Estes, 8 A.2d 201, 136 Me. 272.

83. Mich.—Barkman v. Montague, 298 N.W. 273, 297 Mich. 538.

84. Ill.—Minnis v. Friend, 196 N.E. 191, 360 Ill. 328.

85. Ill.—Koltz v. Jahaaske, 38 N.E. 2d 973, 312 Ill.App. 623.

ties, as considered in the C.J.S. title New Trial § 12, also 46 C.J. p 78 note 31–p 80 note 55, the court may grant a new trial to one or more of several defendants if satisfied that they were wrongly convicted, and render judgment on the verdict as to the remainder.[86]

The common-law rule which requires judgment against all joint defendants or none in actions on contracts, as considered supra § 34, has no application to actions for torts,[87] except where the action is for a negligent performance of, or a negligent failure to perform, a duty arising out of a contract, in which case the rule is the same as in actions on contract, and, if a joint contract and liability are alleged, a joint liability must be shown.[88] However, where the relation of the parties is such that an issue found for one defendant necessarily inures to the benefit of his codefendant,[89] as where a defendant's culpability is the sole predicate for his codefendant's liability,[90] judgment cannot be entered for the former and against the latter; but this rule has no application where each defendant is charged with acts of negligence resulting in the injury.[91]

In jurisdictions where there is a statutory right to contribution between joint tort-feasors who are codefendants in judgment, as considered in Contribution § 11 b (5), it has been held that, where plaintiff has consented to a voluntary nonsuit as to one of two defendant joint tort-feasors, it is erroneous to render judgment against the other,[92] although, if the jury exculpate one of two joint tort-feasors sued jointly, judgment may be rendered against the other.[93] In an action for fraud against defendants jointly and severally liable therefor it is unnecessary for the judgment to provide that recovery be first had as far as possible out of the defendant primarily liable where he is hopelessly insolvent.[94]

It has been held that the judgment should be against all defendants shown to be jointly liable for the tort;[95] and in some jurisdictions it has been held that judgment must be against all joint tort-feasors who are not discharged.[96] On the other hand a joint judgment against joint defendants, some of whom are not guilty, is erroneous;[97] but there is authority which holds that as to defendant or defendants actually liable for the tort the judgment is not invalid or improper.[98] Under some statutes, where the original defendants bring additional defendants into the action, asserting that they are primarily liable, plaintiff is entitled to judgment against them the same as though they had been directly sued by him.[99]

In an action for ejectment based on a tort, judgment may be rendered against defendants served who appeared, even though a default could not properly be entered against defendants who did not appear because of plaintiff's failure to comply with a statute requiring him to file an affidavit that they were not in the military service.[1]

§ 36. —— Joint or Several Judgments

a. In general
b. Under codes and practice acts
c. Disposition of case as to all parties; separate judgments

86. Ill.—Pecararo v. Halberg, 92 N. E. 600, 246 Ill. 95.
33 C.J. p 1114 note 14.

87. Ill.—Skala v. Lehon, 258 Ill.App. 252, affirmed 175 N.E. 832, 343 Ill. 602.
Me.—Arnst v. Estes, 8 A.2d 201, 136 Me. 272.
Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 430, 431, 147 Okl. 179.

88. Ala.—Hackney v. Perry, 44 So. 1029, 152 Ala. 626.
33 C.J. p 1114 note 17.

89. Okl.—Anthony v. Covington, 100 P.2d 461, 187 Okl. 27.
33 C.J. p 1115 note 18.

Contract and tort liability based on same act

Where liability of one defendant for negligence and of another for breach of warranty were both predicated on the same tortious act, a judgment against defendant sued for negligence and in favor of defendant sued for breach of warranty was inconsistent and erroneous.—Langsan v. Loft's Inc., 25 N.Y.S.2d 318.

90. Ill.—Bunyan v. American Glycerin Co., 230 Ill.App. 351.
Okl.—Anthony v. Covington, 100 P. 2d 461, 187 Okl. 27.
Va.—Barnes v. Ashworth, 153 S.E. 711, 154 Va. 218.
33 C.J. p 1115 note 18 [a] (3), (4).

91. Ill.—Bunyan v. American Glycerin Co., 230 Ill.App. 351.

92. N.Y.—Dee v. Spencer, 251 N.Y. S. 311, 233 App.Div. 217, followed in 251 N.Y.S. 864, 233 App.Div. 894.

93. N.Y.—Price v. Ryan, 173 N.E. 907, 255 N.Y. 16, followed in 175 N.E. 297, 255 N.Y. 524.

94. N.Y.—Martin v. Gotham Nat. Bank, 221 N.Y.S. 661, 220 App.Div. 541, modified on other grounds 162 N.E. 91, 248 N.Y. 313, reargument denied 164 N.E. 565, 249 N.Y. 513.

95. La.—Collins v. Huck, 109 So. 341, 161 La. 641.

96. Mo.—Delay v. Douglas, App., 164 S.W.2d 154.

97. Fla.—Joseph v. Maxwell, 104 So. 584, 89 Fla. 396.

98. Mo.—Hatton v. Sidman, App., 169 S.W.2d 91.

99. Pa.—Sullivan v. City of Pittsburgh, 27 A.2d 270, 150 Pa.Super. 252—Ford v. City of Philadelphia, 24 A.2d 746, 148 Pa.Super. 195.

Original defendant's secondary liability immaterial

The presence or absence of the original defendant's secondary liability cannot affect the liability of the additional defendants to plaintiff as found by the jury at the trial.—Sullivan v. City of Pittsburgh, 27 A.2d 270, 150 Pa.Super. 252.

1. Cal.—B. & B. Sulphur Co. v. Kelley, 141 P.2d 908, 61 Cal.App.2d 3.

a. In General

At common law and in the absence of statute changing the rule a joint judgment is the only proper judgment in an action brought as a joint suit against several defendants; but a joint judgment cannot be rendered against defendants whose liability is several and not joint or who are not all liable.

At common law and in the absence of statute changing the rule only a joint judgment may be rendered in an action brought as a joint suit,[2] as an action ex contractu against several defendants.[3] On the other hand, a joint judgment may not be rendered against defendants who are severally and not jointly liable,[4] or where each defendant is not liable to the full extent of the verdict.[5] Also a joint judgment against two or more defendants, one of whom is not liable, is erroneous.[6]

In actions at common law for tort, while judgment may be entered against certain defendants, and in favor of others, as discussed supra § 35, the judgment must be a joint judgment for one single amount against all found liable,[7] and cannot exceed in amount that for which judgment could have been rendered under a verdict returned against a particular defendant.[8]

What constitutes. In determining the character of a judgment as joint, several, or joint and several, the circumstances with respect to the case may be considered,[9] and recourse may be had to the pleadings on which the judgment is based.[10] The identity of issues as between plaintiff and the various defendants does not determine the character of the judgment.[11] Ordinarily it is determined by the nature of the liabilities or interests involved in the litigation,[12] and this is true, although in form the judgment includes several defendants under the form of a joint judgment.[13] Thus judgments have been held to be several where the liabilities of defendants were several;[14] and as joint and several where their liabilities were joint and several,[15] although there is other authority to the effect that a judgment against several defendants in an action on a joint and several obligation is joint and not joint and several as to all defendants therein.[16] A judgment that plaintiff recover of two or more named defendants a specified sum of money is in form a joint judgment,[17] and a judgment against two or more named defendants, and each of them, constitutes a joint and several judgment.[18] However, there is authority, particularly in jurisdictions where by statute joint contracts have been made joint and several and authority given to proceed against one or more of those liable on a joint obligation, to the effect that, although a judgment is rendered against two or more parties jointly, the judgment itself is a joint and several obligation.[19]

b. Under Codes and Practice Acts

In general under the various codes and practice acts the judgment should be joint, several, or joint and several, according as the liability of the defendants against whom judgment is rendered is joint, several, or joint and several.

2. Fla.—Harrington v. Bowman, 143 So. 651, 106 Fla. 86.
Conformity to verdict or findings see infra §§ 55–58.
Joint or several judgment in action against:
Executor or administrator and other party see Executors and Administrators § 793.
Principal and surety see the C.J.S. title Principal and Surety § 277, also 50 C.J. p 223 notes 2–4.
Necessity for judgment to be either for or against all plaintiffs see supra § 31.

3. Fla.—Edgar v. Bacon, 122 So. 107, 97 Fla. 679, followed in Wright v. Tatarian, 131 So. 133, 100 Fla. 1366.

4. Md.—Union Trust Co. of Maryland v. Poor & Alexander, Inc., 177 A. 923, 168 Md. 400.

5. Md.—Union Trust Co. of Maryland v. Poor & Alexander, Inc., supra.

6. Ill.—Sergo v. Bloch, 263 Ill.App. 198.

7. Mass.—Contakis v. Flavio, 108 N. E. 1045, 221 Mass. 259.
33 C.J. p 1124 note 3.
Judgment should be joint and several in civil action for conspiracy see Conspiracy § 32.

8. Mass.—Brooks v. Davis, 1 N.E.2d 17, 294 Mass. 236.

9. Neb.—Whaley v. Matthews, 287 N.W. 205, 136 Neb. 767.
N.Y.—Schultz v. U. S. Fidelity & Guaranty Co., 94 N.E. 601, 201 N.Y. 230.
Judgment held not joint
Neb.—Whaley v. Matthews, 287 N. W. 205, 136 Neb. 767.

10. Tex.—U. S. Fidelity & Guaranty Co. v. Richey, Civ.App., 18 S.W. 2d 231, error refused.

11. N.Y.—St. John v. Andrews Inst. for Girls, 85 N.E. 148, 192 N.Y. 382.

12. N.Y.—Schultz v. U. S. Fidelity & Guaranty Co., 94 N.E. 601, 201 N.Y. 230.
33 C.J. p 1126 note 18.

13. Conn.—Gruber v. Friedman, 132 A. 395, 104 Conn. 107.
N.Y.—Schultz v. U. S. Fidelity & Guaranty Co., 94 N.E. 601, 201 N. Y. 230.

14. Conn.—Gruber v. Friedman, 132 A. 395, 104 Conn. 107.
33 C.J. p 1126 note 18 [b].

15. Tex.—U. S. Fidelity & Guaranty Co. v. Richey, Civ.App., 18 S.W. 2d 231, error refused.
33 C.J. p 1126 note 18 [a] (2).

16. Mich.—Rohrabacker v. Walsh, 135 N.W. 907, 170 Mich. 59.

17. Neb.—Farney v. Hamilton County, 75 N.W. 44, 54 Neb. 797.
33 C.J. p 1126 note 16.

18. Okl.—Tucker v. Gautier, 164 P. 2d 613.
Double recovery not indicated
Judgment that plaintiff recover of defendants, "and each of them," did not signify that full amount of recovery might be twice collected from defendants, but simply indicated joint and several character of defendant's liability.—Watson v. Hilton, 166 S.E. 589, 203 N.C. 574.

19. Kan.—**Corpus Juris cited in** Sloan v. Sheridan, 168 P.2d 545, 546.
33 C.J. p 1126 note 20.
Judgment as contract within statute making joint contracts joint and several see supra § 6.

In general under the various codes and practice acts in an action against several defendants, a joint judgment is proper against defendants whose liability is joint or arises out of joint conduct;[20] but it is improper against defendants whose liability is not joint, although each may be severally liable,[21] or where the liability of defendants and the measure of recovery are proportional.[22]

A several judgment is not ordinarily proper against defendants whose liability is on a joint obligation or other joint cause of action;[23] but such a judgment is proper in an action against several defendants who are liable on a joint and several obligation, or on a cause of action where each defendant is liable only for his own acts, or for his proportionate share of the total damage, or in a different amount from his codefendants, or in any case where separate actions might properly have been maintained.[24] The test as to whether a several judgment may be had is whether a separate action could have been maintained.[25]

A joint and several judgment is proper against defendants whose liability is joint and several,[26] but not against defendants who are individually and solely liable on different items of the total amount demanded.[27]

Where the items of damages are distinct, a joint judgment cannot be entered unless each defendant is liable to the full extent of plaintiff's demand or recovery.[28] If defendants are not all liable to the same extent on the liability sued on, the judgment may be for different amounts against them;[29] and, where one of the several defendants is not liable for all the items of damage for which recovery is allowed, a judgment against all defendants which does not segregate the damage is erroneous,[30] at least as to the party not liable for the full amount.[31] However, in an action ex contractu a joint judgment has been held proper against defendants who are liable for the same demand;[32] and, if the action is on a joint contract or obligation against several defendants who plead and defend jointly, the judgment against them must be joint and not several.[33]

Where some defendants are liable individually, while others are liable only in a representative ca-

20. Mo.—Kunst v. Walker, App., 43 S.W.2d 886.
Severance of actions as to several parties defendant see Actions § 119 b (2).

Discovery of assets
In action by administrators to discover assets, joint judgment was proper against defendants in joint possession of the concealed assets. —Kunst v. Walker, supra.

21. Ohio.—Larson v. Cleveland Ry. Co., 50 N.E.2d 163, 142 Ohio St. 20.
Pa.—First Nat. Bank v. Kendrew, 160 A. 227, 105 Pa.Super. 142.
Wash.—Argo Mfg. Co. v. Parker, 100 P. 188, 52 Wash. 100.
33 C.J. p 1125 notes 11, 12.

Harmless error
(1) Joint judgment against defendants severally and not jointly liable is harmless error.—Decker v. Trilling, 24 Wis. 610, 615—33 C.J. p 1126 note 13.

(2) In action against two defendants who are each liable on different causes sued on, one a tort and the other an agreement of indemnity against damages from the tort, a joint judgment against them for an amount not in excess of what they would have been liable for if sued in separate actions is not prejudicial to the rights of either so as to warrant a reversal.—Adams v. National Automobile Ins. Co., 133 P. 2d 657, 56 Cal.App.2d 905.

22. Mass.—Foote v. Cotting, 80 N. E. 600, 195 Mass. 55, 15 L.R.A.,N. S., 693.

23. Colo.—**Corpus Juris quoted in** Beatty v. Resler, 118 P.2d 1084, 1085, 1086, 108 Colo. 434.
Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
33 C.J. p 1117 note 27, p 1124 note 10.
Joint or several judgment in action against stockholders for corporate debt see Corporations § 702.

24. Cal.—Bakersfield Impr. Co. v. Bakersfield Theater Co., 181 P. 851, 40 Cal.App. 703.
33 C.J. p 1125 note 11.

Double recovery
Judgment against treasurer and surety for treasurer's failure to pay unsecured deposit in insolvent state bank and against bank and banking commissioner for such deposit under guaranty depository law was held not erroneous as allowing double recovery.—Bolton v. City of De Leon, Tex.Civ.App., 283 S.W. 213.

25. Okl.—**Corpus Juris quoted in** City of Sapulpa v. Young, 296 P. 418, 431, 147 Okl. 179.
33 C.J. p 1118 note 28, p 1125, note 11 [a].

26. Cal.—Gist v. Security Trust & Savings Bank, 24 P.2d 153, 218 Cal. 581.
Tex.—Murchison v. Ballard, Civ. App., 178 S.W.2d 554, error refused—Dunning v. Badger, Civ. App., 74 S.W.2d 151, error dismissed—Danciger v. Smith, Civ. App., 286 S.W. 633, error refused 289 S.W. 679, 116 Tex. 269, affirmed 48 S.Ct. 344, 276 U.S. 542, 72 L.Ed. 691.

In action against carriers for injury to property where there was evidence of damage while it was in possession of either one of defendants, and neither offered explanation of how or when damage occurred, judgment against them jointly and severally was without error.—St. Louis, S. F. & T. Ry. Co. v. J. G. Henderson Cut Stone Co., Tex.Civ.App., 275 S.W. 603.

Solidary judgment
In an action against several defendants on an obligation in solido, a solidary judgment against them is proper.—E. George Rogers & Co. v. Black, La.App., 155 So. 403.

27. Tex.—Ætna Casualty & Surety Co. v. State for Use and Benefit of City of Dallas, Civ.App., 86 S.W.2d 826, error dismissed.

28. Vt.—Murray v. Mattison, 32 A. 479, 67 Vt. 553.
33 C.J. p 1126 note 14.

29. Or.—Closset v. Portland Amusement Co., 293 P. 720, 134 Or. 414.

30. Cal.—Bloom v. Coates, 213 P. 260, 190 Cal. 458.

31. N.M.—Niblack v. Seaberg Hotel Co., 76 P.2d 1156, 42 N.M. 281.

32. Tex.—Weimer v. Prince & Prince, Civ.App., 246 S.W. 666.

33. Colo.—Beatty v. Resler, 118 P. 2d 1084, 108 Colo. 434.
La.—Byrd v. Babin, 200 So. 294, 196 La. 902.
33 C.J. p 1124 note 8.

pacity, the judgment against them should be several[34] or joint and several.[35] In an action to impose liability on heirs or devisees of a decedent for a liability of decedent, the judgment should be several against each defendant for the amount received by him from decedent, not to exceed the sum to which plaintiff is entitled;[36] and it has been held proper to make the judgment collectable in full from any of several defendants who received that amount or more from the estate and to limit it as to defendants who received less to the amount each received.[37]

Under statutes in Louisiana providing therefor, a joint judgment against several defendants in a suit on a joint obligation must be against each defendant separately for his proportion of the debt,[38] which is determined by the number of obligors;[39] and, where only one of several joint obligors is sued,[40] or the court erroneously rejects plaintiff's demand against all the joint obligors, except one,[41] the judgment against him must be for his aliquot portion of the obligation and not the entire amount thereof.

Actions ex delictu. In an action of tort against several defendants, plaintiff is entitled to a joint judgment if, and only if,[42] he shows a joint tort[43] or single cause of action against them,[44] even though one of defendants owed plaintiff a higher degree of care than did the other;[45] and, if defendants plead jointly, and a joint verdict is given against them, the judgment must be joint and not several.[46] It has also been held in some jurisdictions that defendant tort-feasors must be in pari delicto as to the tortious act and each responsible for the entire damage for a joint judgment against them to be proper;[47] and, where a primary liability for the injury rests on one defendant and a constructive or secondary liability on another defendant, and their breaches of duty to plaintiff are not through concert of action or independent but concurrent action, a joint judgment may not be rendered against them.[48]

If the liability of defendants is joint and several, the judgment should be joint and several;[49] but a joint and several judgment should not be rendered unless it is established that defendants were joint tort-feasors,[50] and is improper where it appears that defendants are not liable on the same torts but are solely and independently liable on dif-

34. Ky.—Gray v. McDowell, 5 T.B. Mon. 501.
33 C.J. p 1126 note 15.

35. Cal.—Gist v. Security Trust & Savings Bank, 24 P.2d 153, 218 Cal. 581.

36. Ky.—Ransdell v. Threlkeld, 4 Bush 347.
33 C.J. p 1125 note 11 [h] (1), (2).

37. Ky.—Clark's Adm'x v. Callahan, 288 S.W. 301, 216 Ky. 674.

38. La.—Loussade v. Hartman, 16 La. 117—Hagedorn v. Klotz, App., 185 So. 658—Simon v. Selber, 180 So. 645, 14 La.App. 642.

39. La.—Loussade v. Hartman, 16 La. 117.

Obligor's portion

Each obligor answers for an equal part of the debt, unless the parties have expressed a different intention.—Hagerdorn v. Klotz, La.App., 185 So. 658.

40. La.—Hagedorn v. Klotz, supra.

Plaintiff must show other obligors where he sues joint obligor separately, in order that the judgment may fix the proportion of the debt for which each defendant is condemned.—Hagerdorn v. Klotz, supra.

41. La.—Simon v. Selber, 180 So. 645, 14 La.App. 642.

42. Fla.—Gulf Refining Co. v. Wilkinson, 114 So. 503, 94 Fla. 664.
33 C.J. p 1126 note 24.

Essential requirements

A "joint judgment" against two or more tort-feasors is proper only where, because of their relationship, concert of action, or independent but concurrent action, each is vicariously responsible for wrongful act of the others to extent of entire damage.—Larson v. Cleveland Ry. Co., 50 N.E.2d 163, 142 Ohio St. 20.

Permissive joinder insufficient

The permissive joinder of defendants is not enough to warrant a "joint judgment" against tort-feasors unless they are joint tort-feasors.—Larson v. Cleveland Ry. Co., supra.

43. N.J.—Mogab v. Antrim Motor Co., 143 A. 864, 7 N.J.Misc. 15.
Pa.—Moraski v. Philadelphia Rapid Transit Co., 142 A. 276, 293 Pa. 224.
33 C.J. p 1126 note 23.

Immaterial injury by individual

Where seepage causing injury came principally from canal operated for joint benefit of irrigation districts, joint judgment was proper, although slight damage may have been caused by seepage from reservoir owned by only one district.—Ketcham v. Modesto Irr. Dist., 26 P. 2d 876, 135 Cal.App. 180.

Concert of action by tort-feasors makes joint judgment against them proper.—Fahrer v. Blumenthal, 190 A. 206, 125 Pa.Super. 568.

Joint employer

In action against two companies for injuries caused by person who was employee of both, judgment holding both companies liable in solido was proper.—Anderson v. George A. Hormel & Co., 136 So. 906, 18 La.App. 398.

44. Ohio.—Larson v. Cleveland Ry. Co., 50 N.E.2d 163, 142 Ohio St. 20.

45. Pa.—Moraski v. Philadelphia Rapid Transit Co., 142 A. 276, 293 Pa. 224.

46. Fla.—Seaboard Air Line Ry. Co. v. Ebert, 138 So. 4, 102 Fla. 641.
33 C.J. p 1127 note 28.

Judgment held against joint tort-feasors

Findings showing that defendants by themselves and agents acted so negligently that plaintiff had judgment showed judgment against joint tort-feasors.—Salter v. Lombardi, 3 P.2d 38, 116 Cal.App. 602.

47. Ohio.—Larson v. Cleveland Ry. Co., 50 N.E.2d 163, 142 Ohio St. 20.

48. Ohio.—Larson v. Cleveland Ry. Co., supra.

Joint judgment held improper

Ohio.—Larson v. Cleveland Ry. Co., supra.

49. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P. 2d 698, 32 Cal.App.2d 371.
La.—Williams v. Pelican Natural Gas Co., 175 So. 28, 187 La. 462.

50. Tex.—American Mortg. Corporation v. Dunnam, Civ.App., 59 S. W.2d 1095, error dismissed.

ferent torts alleged.[51] A joint judgment has been held proper against defendants, each of whom is responsible for the same sum of money,[52] or whose independent tortious acts produced a single injury, objections to the trial in one proceeding having been waived.[53]

Since joint tort-feasors are each individually liable to the party injured for the full extent of the damage done, and not only for a proportionate part, as considered in the C.J.S. title Torts § 34, also 62 C.J. p 1131 notes 52, 53, ordinarily the judgment cannot segregate or apportion the liability of the joint tort-feasors;[54] but it must be in one amount[55] and jointly and severally[56] against each and all of defendants against whom a joint liability is established.[57] However, any statutory limitation of liability applicable to any defendant, as distinguished from the full liability of other defendants, may and should be incorporated in the judgment entered on the verdict;[58] and, where a joint and several liability is established as to some of the defendants and a separate liability for only a portion of the total against others, the judgment may run against the various defendants in the amounts and according to the liabilities established.[59] Where the liability of defendant tort-feasors is direct and several, as well as joint, a judgment for different amounts against the various defendants has been held not improper.[60]

If the jury, without fixing the total amount of plaintiff's recovery, returns several verdicts or in one verdict assesses each defendant separately, it has been held that, if the same amount was assessed against each defendant, a joint judgment should be entered against all defendants for that amount, not the total,[61] or, if different amounts were assessed against the various defendants, plaintiff may enter a joint judgment against all defendants for the largest amount found against any of them.[62] There is other authority, however, which holds that, where separate verdicts for different amounts are returned against joint tort-feasors, the lesser amount being against defendant who actively committed the wrong and on whose culpability the other defendant's liability is predicated, the judgment should be for such lesser amount.[63] It has also been held that, in an action on a joint tort, if the verdict assesses each defendant separately for different amounts, judgment cannot be rendered against all the defendants for the total of the different amounts.[64]

51. Wis.—Hall v. Frankel, 197 N.W. 820, 183 Wis. 247.

52. Ga.—Regal Textile Co. v. Feil, 6 S.E.2d 908, 189 Ga. 581.

Corporation and stockholders

Joint judgment against corporation and stockholder or officer who appropriated all of corporation's assets for amount of overpayment made to corporation is proper.—Regal Textile Co. v. Feil, supra.

53. Mo.—Stein v. Rainey, 286 S.W. 53, 315 Mo. 535.

54. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371—Curtis v. San Pedro Transp. Co., 52 P.2d 528, 10 Cal.App.2d 547.

Ill.—Koltz v. Jahaaske, 38 N.E.2d 973, 312 Ill.App. 623.

Mo.—Polkowski v. St. Louis Public Service Co., 68 S.W.2d 884, 229 Mo.App. 24.

Tenn.—Donegan v. Beasley, 181 S.W.2d 379, 27 Tenn.App. 369.

33 C.J. p 1127 note 30.

55. Ill.—Koltz v. Jahaaske, 38 N.E.2d 973, 312 Ill.App. 623.

Mo.—Brown v. Reorganization Inv. Co., 166 S.W.2d 476, 350 Mo. 407—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930—Delay v. Douglas, App., 164 S.W.2d 154—Polkowski v. St. Louis Public Service Co., 68 S.W.2d 884, 229 Mo. App. 24.

Tenn.—Donegan v. Beasley, 181 S.W.2d 379, 27 Tenn.App. 369.

Tex.—Callihan v. White, Civ.App., 139 S.W.2d 129.

56. Mass.—Gross-Loge Des Deutschen Ordens Der Harugari Des Staates Massachusetts v. Cusson, 17 N.E.2d 316, 301 Mass. 332.

Tex.—Callihan v. White, Civ.App., 139 S.W.2d 129.

Double liability not imposed

Decree requiring defendant partner and an attaching creditor to pay value of partnership assets wrongfully attached did not amount to imposition of double liability.—Boyer v. Bowles, 37 N.E.2d 489, 310 Mass. 134.

57. Mass.—Gross-Loge Des Deutschen Ordens Der Harugari Des Staates Massachusetts v. Cusson, 17 N.E.2d 316, 301 Mass. 332.

Mo.—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930.

Tenn.—Donegan v. Beasley, 181 S.W.2d 379, 27 Tenn.App. 369.

Tex.—Burd v. San Antonio Southern Ry. Co., Com.App., 261 S.W. 1021.

58. Cal.—Sparks v. Berntsen, 121 P.2d 497, 19 Cal.2d 308—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

59. Mass.—Gross-Loge Des Deutschen Ordens Der Harugari Des Staates Massachusetts v. Cusson, 17 N.E.2d 316, 301 Mass. 332.

60. Cal.—Guberman v. Weiner, 51 P.2d 1141, 10 Cal.App.2d 401.

61. N.Y.—Farber v. Demino, 173 N.E. 223, 254 N.Y. 363, followed in G. A. Baker & Co. v. Polygraphic Co. of America, 193 N.E. 265, 265 N.Y. 447, reargument denied 193 N.E. 294, 265 N.Y. 508.

62. Cal.—Curtis v. San Pedro Transp. Co., 52 P.2d 528, 10 Cal.App.2d 547.

N.Y.—Farber v. Demino, 173 N.E. 223, 254 N.Y. 363, followed in G. A. Baker & Co. v. Polygraphic Co. of America, 193 N.E. 265, 265 N.Y. 447, reargument denied 193 N.E. 294, 265 N.Y. 508—Polsey v. Waldorf-Astoria, 214 N.Y.S. 600, 216 App.Div. 86.

33 C.J. p 1127 note 31.

On consolidation for trial of separate actions against master and servant for tort, the judgment against each defendant should be for the highest of different amounts assessed against the different defendants by the jury.—Kinsey v. William Spencer & Son Corporation, 300 N.Y.S. 391, 165 Misc. 143, affirmed 8 N.Y.S.2d 529, 255 App.Div. 995, affirmed 22 N.E.2d 168, 281 N.Y. 601.

63. Ark.—Wear-U-Well Shoe Co. v. Armstrong, 3 S.W.2d 698, 176 Ark. 592.

64. Miss.—Gillespie v. Olive Branch

Under some statutes several judgments may be rendered against joint tort-feasors for separate or proportionate amounts,[65] at least where defendants have severed in their defense, and separate verdicts have been found against them.[66]

In ejectment it has been held that, if there are several defendants, there may be a joint judgment against all,[67] although they are severally in exclusive possession of different parts of the premises, no request for a several judgment being made;[68] but there is other authority to the effect that a joint judgment is not proper against defendants who occupy or claim separate and distinct portions of the realty involved,[69] and that, if plaintiff is not required to elect which of several defendants in separate possession he will proceed against, judgment may be rendered against each.[70] Where defendants plead jointly in trespass for mesne profits but separate verdicts are found, there may be a judgment against one and nolle prosequi as to the other.[71] Where, however, one defendant enters subsequent to another it is error, in a joint action of ejectment and for mesne profits, to render a joint judgment against both from the time of the entry of the latter.[72]

c. Disposition of Case as to All Parties; Separate Judgments

At common law and under statutes so providing only one final judgment, which must dispose of the case as to all the parties, is proper in an action; but, under permissive statutes, separate judgments may be rendered at the same time or different times against the various defendants in actions in which several judgments are proper.

At common law, and in the absence of statute changing the rule, and under statutes expressly so providing, only one final judgment may be entered in an action, as discussed infra § 65, which must completely dispose of the whole case as to all the parties.[73] The rule is applicable in tort actions[74]

Building & Lumber Co., 164 So. 42, 174 Miss. 154.

65. Ga.—Gormley v. Slicer, 172 S. E. 21, 178 Ga. 85, answer conformed to 172 S.E. 575, 48 Ga.App. 177. 33 C.J. p 1127 note 32.

Widow and heirs of tort-feasor

Judgment against widow and heirs of deceased tort-feasor should be against each separately for his proportion of damages, but it may be against them in solido for costs.—Hunter v. Laurent, 104 So. 747, 158 La. 874.

Counterclaim in favor of defendant

Where defendants are all liable for full amount of damages established and one defendant is entitled to judgment on a counterclaim against plaintiff, judgment against all defendants for full amount of damages established will be awarded plaintiff, and also judgment will be entered against plaintiff in favor of the defendant entitled to the counterclaim for the amount thereof.—Bandych v. Ross, 26 N.Y.S.2d 830.

66. Tex.—Rowan v. Daniel, 49 S.W. 686, 20 Tex.Civ.App. 321. 33 C.J. p 1127 note 33.

67. Cal.—Ellis v. Jeans, 26 Cal. 272.

68. Cal.—Ellis v. Jeans, supra.

69. Ind.—Kennedy v. Christian, 2 Ind. 503.

70. Mo.—Norton v. Reed, 161 S.W. 842, 253 Mo. 236.

71. Pa.—Chambers v. Lapsley, 7 Pa. 24.

72. Fla.—Ashmead v. Wilson, 22 Fla. 255.

73. Fla.—Merchants' & Mechanics' Bank v. Sample, 124 So. 49, 98 Fla. 759, rehearing denied 125 So. 1, 98 Fla. 759.

Mo.—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389—State ex rel. Cunningham v. Haid, 40 S.W.2d 1048, 328 Mo. 208—Ex parte Fowler, 275 S.W. 529, 310 Mo. 339—Baker v. St. Louis, 88 S.W. 74, 189 Mo. 375—Hatton v. Sidman, App., 169 S.W.2d 91—A. M. Legg Shoe Co. v. Brown Leather Co., App., 249 S.W. 147.

Tex.—Southern Pac. Co. v. Ulmer, Com.App., 286 S.W. 193—Edmondson v. Carroll, Civ.App., 134 S.W. 2d 378, error dismissed, judgment correct—Texas Life Ins. Co. v. Miller, Civ.App., 114 S.W.2d 600—Pfeifer v. Johnson, Civ.App., 70 S.W.2d 203.

33 C.J. p 1128 note 36.

Retention of separate character for purposes of judgment of actions tried together see the C.J.S. title Trial § 6, also 64 C.J. p 37 note 31.

Single or separate judgment in consolidated action see Actions § 118 a (5).

Defendant is entitled to a judgment that will finally settle the claims of all plaintiffs and bind all parties, so that no suit may thereafter be made on the same cause of action.—Caniano v. Dependable Amusement Co., 8 A.2d 830, 123 N.J. Law 419.

Invalidity as to persons not parties

Invalidity of portion of judgment purporting to determine rights of persons not parties to the action would not affect part dealing with defendants who were before the court so as to render it interlocutory and not final.—Wood v. Gulf Production Co., Tex.Civ.App., 100 S.W.2d 412.

Judgment held to dispose of case as to all parties

(1) Generally.

Mo.—Lochmoeller v. Kiel, App., 137 S.W.2d 625.

Tex.—Pfeifer v. Johnson, Civ.App., 70 S.W.2d 203—State v. Harvey, Civ.App., 15 S.W.2d 82.

(2) A judgment which disposed of all parties named in amended pleadings on which the trial was had was a final judgment, even though it failed to dispose of parties named in supplemental pleadings who were dismissed from the cause by failure to name them in the amended pleadings subsequently filed.—Brennan v. Greene, Tex.Civ.App., 154 S.W.2d 528, error refused.

74. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

Ind.—Indianapolis Traction & Terminal Co. v. Holtsclaw, 81 N.E. 1084, 40 Ind.App. 311.

Mo.—Brown v. Reorganization Inv. Co., 166 S.W.2d 476, 350 Mo. 407—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930—Polkowski v. St. Louis Public Service Co., 68 S.W.2d 884, 229 Mo.App. 24.

Pa.—MacHolme v. Cochenour, 167 A. 647, 109 Pa.Super. 563.

Tenn.—Donegan v. Beasley, 131 S.W. 2d 379, 27 Tenn.App. 369.

One judgment record

There can be but one judgment record which must include both the judgment in favor of plaintiff

against joint tort-feasors,[75] and in actions on joint and several obligations which plaintiff has elected to enforce as a joint obligation.[76] It applies, even though the rights or liabilities of a particular defendant or defendants appear from the proceedings or are determined prior to the completion of the case,[77] where the cause of action is joint and several and defendants answer jointly,[78] and however independent of each other the respective defenses of the various defendants may be.[79] Each suit which may be brought on the individual liability of a number of persons jointly and severally liable on an obligation constitutes a separate cause within the rule against more than one final judgment in an action.[80]

Judgment should be entered as to all the defendants.[81] If a final judgment does not dispose of the case as to all the defendants, it is erroneous;[82] and in some instances it has been held that a judgment which does not do so is not a final judgment[83] but remains under the control of the court.[84] However, it has been held that in tort actions such a judgment against some only of defendants is at most a harmless irregularity, even as to defendants against whom alone it is rendered.[85] An additional judgment entered against other defendants after final judgment was entered against a defaulting defendant has been held to be merely erroneous and voidable, and not void.[86] It is unnecessary for the judgment specifically to dispose of the rights of all the parties, but it is sufficient if the rights of those not specifically disposed of are disposed of by implication.[87]

Ordinarily the entry of judgment against one or more joint defendants in jurisdictions where only one final judgment in an action is proper operates as a discontinuance of the case as to all the others, and merges the cause of action in the judgment, preventing further prosecution of it against the others in the same or subsequent actions.[88] Thus, if

against defendants found liable and that in favor of defendants found not liable.—Hundhausen v. Bond, 36 Wis. 29.

75. Mo.—Barr v. Nafziger Baking Co., 41 S.W.2d 559, 328 Mo. 423.

76. Fla.—Merchants' & Mechanics' Bank v. Sample, 124 So. 49, 98 Fla. 759, rehearing denied 125 So. 1, 98 Fla. 759.

77. Cal.—Hanna v. De Garmo, 73 P. 830, 140 Cal. 172.
33 C.J. p 1128 note 36 [a], [d].

78. N.Y.—Reade v. Halpin, 167 N. Y.S. 482, 180 App.Div. 161.

79. Tex.—Wooters v. Kauffman, 3 S.W. 465, 67 Tex. 488—Kline v. Power, Civ.App., 114 S.W.2d 617—Texas Cities Gas Co. v. Dickens, Civ.App., 133 S.W.2d 810.

80. Tex.—Comer v. Brown, Com. App., 285 S.W. 307.

81. Cal.—Rubin v. Platt Music Co., 268 P. 396, 92 Cal.App. 203.

82. Mo.—Cox v. Frank L. Schaab Stove & Furniture Co., 58 S.W.2d 700, 332 Mo. 492, transferred, see, App., 67 S.W.2d 790—Strawhun v. Farrar, App., 296 S.W. 191—Crow v. Crow, 100 S.W. 1123, 124 Mo. App. 120.
33 C.J. p 1128 note 37.

Codefendant's plea in issue

Judgment against one in action on note against defendants jointly, taken while other's plea of payment was on file, was erroneous.—Merchants' & Mechanics' Bank v. Sample, 124 So. 49, 98 Fla. 759, rehearing denied 125 So. 1, 98 Fla. 759.

83. Mo.—State v. Canterbury, 101 S.W. 678, 124 Mo.App. 241.
Tex.—Martin v. Crow, 28 Tex. 613—Gathings v. Robertson, Com. App., 276 S.W. 218—Pfeifer v. Johnson, Civ.App., 70 S.W.2d 203.

84. Tex.—Martin v. Crow, 28 Tex. 613—Gathings v. Robertson, Civ. App., 264 S.W. 173, reversed on other grounds, Com.App., 276 S.W. 218.

85. Me.—**Corpus Juris cited in** Hincks Coal Co. v. Milan, 193 A. 243, 245, 135 Me. 203.
Mo.—Jackson v. City of Malden, App., 72 S.W.2d 850.
33 C.J. p 1128 note 39.

Reason for rule

There is no contribution between tort-feasors.—Davis v. Taylor, 41 Ill. 405—33 C.J. p 1128 note 40.

86. Fla.—Merchants' & Mechanics' Bank v. Sample, 124 So. 49, 98 Fla. 759, rehearing denied 125 So. 1, 98 Fla. 759.

87. Tex.—Texas Life Ins. Co. v. Miller, Civ.App., 114 S.W.2d 600—Traders & General Ins. Co. v. Pool, Civ.App., 105 S.W.2d 492, error dismissed.

In action by husband and wife

Judgment for wife alone for personal injuries to her is final, being against husband by necessary implication.—Southern Pac. Co. v. Ulmer, Tex.Civ.App., 282 S.W. 305, affirmed, Com.App., 286 S.W. 193.

Judgment held by implication

(1) Generally.—Miller v. Texas Life Ins. Co., Tex.Civ.App., 123 S. W.2d 756, error refused.

(2) There was in effect a judgment for defendant bank, the judgment entry showing that complaint was amended by striking it out as defendant, leaving only an individual defendant, and judgment rendered being against him alone.—Richardson v. Stinson, 100 So. 209, 211 Ala. 254.

(3) Where subject matter in controversy is awarded to some of parties, fact that one or more of them get nothing is tantamount to judgment against each of them.—Roedenbeck Farms v. Broussard, 127 S. W.2d 168, 133 Tex. 126, appeal dismissed 60 S.Ct. 145, 308 U.S. 514, 84 L.Ed. 438, and Christie v. Broussard, 60 S.Ct. 145, 308 U.S. 514, 84 L.Ed. 438—Whitmire v. Powell, 125 S.W. 889, 103 Tex. 232—Pfeifer v. Johnson, Tex.Civ.App., 70 S.W.2d 203.

(4) Effect of judgment against only one defendant is to hold others not liable.—Obermeier v. Mortgage Co. Holland-America, 259 P. 1064, 123 Or. 469, modified on other grounds 260 P. 1099, 123 Or. 469, costs retaxed 262 P. 261, 123 Or. 469.

88. Miss.—Daves v. Mahorner, 41 Miss. 552.
N.J.—Coles v. McKenna, 76 A. 344, 80 N.J.Law 48—Turk v. Leitner, 194 A. 619, 15 N.J.Misc. 664.
33 C.J. p 1129 note 42.

Continuation of cause to final judgment, with concurrence of all parties except those whose pleas of privilege to be sued in the county of their residence had been sustained, amounted to abandonment of cause of action against them and their dismissal from suit.—Brown v. Gorman Home Refinery, Tex.Civ.App., 276 S.W. 787, affirmed Comer v. Brown, Com.App., 285 S.W. 307.

In tort actions

A separate judgment against one or more of several defendants amounts to an informal dismissal of the action as to the other defendants.—Seaboard Air Line Ry. Co. v.

final judgment is entered against a defaulting defendant,[89] or against a defendant who admits his liability on certain items,[90] it is improper to proceed with the trial and render another and additional judgment against other defendants.

If the rights or liabilities of a particular defendant or defendants appear from the proceedings or are determined prior to the completion of the case, final judgment as to such defendant or defendants will not be entered in the action at that time, but it will be held in abeyance until proper disposition of the entire cause has been determined when final judgment as to all the parties will be entered.[91] If, in such case, however, plaintiff desires to take judgment against defendants whose liability has been made to appear, he should obtain a severance of the action into two actions, enter judgment in one, and proceed with the other to judgment against the defendants in that action, as discussed in Actions § 119 b (2); and, if judgment is entered against one of the parties prior to severance, plaintiff must obtain a vacation of the judgment and severance of the action before he may proceed with the action and obtain judgment against the other defendant or defendants.[92]

Separate and distinct judgments cannot be rendered against defendants sued jointly,[93] even where the action is on a contract which is both joint and several.[94] Where several defendants are all liable, but for different amounts, plaintiff must elect or the court order which of them shall be discharged.[95] In such case judgment should not be entered against some only of the several defendants, unless plaintiff has previously discontinued against the other defendant or defendants.[96]

Where statutes authorize separate judgments. Separate and distinct judgments may be rendered against the several defendants under statutes which provide that more than one judgment or separate judgments may be rendered in the same cause,[97] or that, when a several judgment is proper, judgment may be given for or against one or more of defendants,[98] or that judgment may be rendered against any of defendants, severally, when plaintiff would be entitled to a judgment against such defendants if the action had been against them sev-

Evert, 138 So. 4, 102 Fla. 641—18 C.J. p 1166 note 44—33 C.J. p 1129 note 41.

89. Colo.—Exchange Bank of Denver v. Ford, 8 P. 449, 7 Colo. 314.
Fla.—Merchants' & Mechanics' Bank v. Sample, 124 So. 49, 98 Fla. 759, rehearing denied 125 So. 1, 98 Fla. 759.
N.J.—Coles v. McKenna, 76 A. 344, 80 N.J.Law 48—Turk v. Leitner, 194 A. 619, 15 N.J.Misc. 664.
Right to enter judgment against those defendants only who have defaulted see infra § 191.

90. Vt.—F. S. Fuller & Co. v. Morrison, 169 A. 9, 106 Vt. 22.
Trustee of codefendant
Judgment is unauthorized against trustee of codefendant against whom judgment on remaining items is unauthorized.—F. S. Fuller & Co. v. Morrison, supra.
Subsequent procedure
Codefendant's motion to dismiss action as against him should be granted and judgment entered in his favor to recover his costs, since jurisdiction of court over action is exhausted.—F. S. Fuller & Co. v. Morrison, supra.

91. N.Y.—Bacon v. Comstock, 11 How.Pr. 197, 199.
33 C.J. p 1128 note 86 [a], [d].
Right to enter interlocutory judgment of default where some only of defendants default see infra § 191.

92. N.Y.—Kriser v. Rodgers, 186 N.Y.S. 316, 195 App.Div. 394—Circle Cab Corporation v. Rizzuto, 295 N.Y.S. 185, 162 Misc. 547—Donner v. White, 268 N.Y.S. 56, 149 Misc. 709.
Right of final judgment in each of separate actions after severance see Actions § 122.

93. Ind.—Indianapolis Traction & Terminal Co. v. Holtsclaw, 81 N.E. 1084, 40 Ind.App. 311.
Md.—Union Trust Co. of Maryland v. Poor & Alexander, Inc., 177 A. 923, 168 Md. 400.
Pa.—MacHolme v. Cochenour, 167 A. 647, 109 Pa.Super. 563.
Tenn.—Donegan v. Beasley, 181 S.W.2d 379, 27 Tenn.App. 369.
Vt.—F. S. Fuller & Co. v. Morrison, 169 A. 9, 106 Vt. 22—Metropolitan Washing Machine Co. v. Morris, 39 Vt. 393.
33 C.J. p 1124 note 98.

94. Mass.—New York Trust Co. v. Brewster, 134 N.E. 616, 241 Mass. 155.
33 C.J. p 1124 note 99.

95. Vt.—F. S. Fuller & Co. v. Morrison, 169 A. 9, 106 Vt. 22—McKane v. Gordon & Hoar, 81 A. 637, 85 Vt. 253—Powers v. Thayer, 30 Vt. 361.
Election shown
Verdict for specified total sum and apportioning specific amount against each of several defendants does not authorize separate judgment against each defendant, and plaintiff by marking satisfied the verdict as to a defendant who paid the amount assessed against her elected to have judgment entered against such defendant and hence judgments as to the others could not stand.—MacHolme v. Cochenour, 167 A. 647, 109 Pa.Super. 563.

96. Mass.—Brooks v. Davis, 1 N.E. 2d 17, 294 Mass. 236.

97. Ill.—Kulesza v. Alliance Printers & Publishers, 47 N.E.2d 547, 318 Ill.App. 231—Shaw v. Courtney, 46 N.E.2d 170, 317 Ill.App. 422, affirmed 53 N.E.2d 432, 385 Ill. 559.
Miss.—Aven v. Singleton, 96 So. 165, 132 Miss. 256.
Dismissal, discontinuance, nolle prosequi, or nonsuit as to some of several codefendants see Dismissal and Nonsuit §§ 30–32, 52, 77 a.
Actions in which statute applicable
Statute authorizing more than one judgment in action on contract against several defendants is inapplicable to action against several defendants based on theory of tort liability.—Springer Transfer Co.. v. Board of Com'rs of Bernalillo County, 94 P.2d 977, 43 N.M. 444.
On New trial
Separate judgments may be entered against several defendants on new trial after judgment entered against them as a unit has been set aside.—Fredrich v. Wolf, 50 N.E.2d 755, 383 Ill. 638.

98. Ariz.—Bracker Stores v. Wilson, 103 P.2d 253, 55 Ariz. 403.

erally.[99] Also, where the statutes provide therefor, the court, in its discretion, may render judgment against one or more of several defendants, leaving the action to proceed against the others, whenever a several judgment may be proper.[1] A statute authorizing judgment against fewer than all of several defendants sued does not authorize the entry of separate and distinct judgments against the various defendants.[2]

Under statutes authorizing separate judgments, where it appears, either from the proceedings or during the progress of the case, that a several judgment is proper as to one or more defendants, the court may render a judgment for or against him or them, in advance of the final trial, leaving the action to proceed against the other defendants,[3] including defendants who were not served with process at that time,[4] and defendants as to whom an appeal against an improper dismissal is pending.[5] If no sufficient case is stated against one of several defendants, a final judgment may be entered disposing of the case as to him;[6] or separate judgments may be entered at the conclusion of the trial against defendants who could have been sued severally.[7] If the action is such that a several judgment would be proper, as where it is brought to enforce liability for tort,[8] or on a contract which is both joint and several,[9] judgment may be rendered against any one or more of defendants sued, without affecting or barring the remedy, at whatever stage of the case their several liability is made to appear, as where such party suffers a default, as discussed infra § 191, or submits to judgment by an offer, infra § 184, or consent, infra § 178, or confesses judgment, infra §§ 144, 164, or where plaintiff is entitled to such judgment on the allegations and admissions in the pleadings, as discussed in the C.J.S. title Pleading § 433, also 49 C.J. p 676 notes 89, 90. Also, under various statutes, it has been held proper to render separate judgments against each defendant where each is liable for only a proportionate amount of the total recovery,[10] or where the liability of each, as expressed in the contract sued on, is several and differs in extent proportionate to the respective and different interests of each,[11] or where independent acts of tort-feasors

99. Ind.—Hassler v. Hefele, 50 N. E. 361, 151 Ind. 391.

1. Cal.—Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., 209 P. 357, 189 Cal. 509—Weisz v. McKee, 87 P.2d 379, 31 Cal.App.2d 144, rehearing denied 88 P.2d 200, 31 Cal.App.2d 144—Huntoon v. Southern Trust & Commerce Bank, 290 P. 86, 107 Cal.App. 121.
N.J.—Ordinary of State v. Bastian, 5 A.2d 463, 17 N.J.Misc. 105.
Okl.—Howell v. Hart, 69 P.2d 1043, 180 Okl. 397—**Corpus Juris cited in** Corley v. French, 293 P. 177, 178, 146 Okl. 29.
Or.—Fischer v. Bayer, 210 P. 452, 108 Or. 311.
33 C.J. p 1129 note 43.

In Louisiana

Where two parties are sued, one for the payment of a note as maker, and the other for illegally retaining it, the causes of action being distinct, judgment may well be had against one and the case continued as to the other.—Regillo v. Lorente, 7 La. 140.

2. Pa.—MacHolme v. Cochenour, 167 A. 647, 109 Pa.Super. 563.
Vt.—Metropolitan Washing Machine Co. v. Morris, 39 Vt. 393.

3. Cal.—Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., 209 P. 357, 189 Cal. 509—Huntoon v. Southern Trust & Commerce Bank, 290 P. 86, 107 Cal.App. 121—Parker v. Hardisty, 202 P. 479, 54 Cal. App. 628.
Ga.—Bank of Madison v. Bell, 118 S.E. 439, 30 Ga.App. 458.
Minn.—Bank of Commerce v. Smith, 59 N.W. 311, 57 Minn. 374.
N.J.—Ordinary of State v. Bastian, 5 A.2d 463, 17 N.J.Misc. 105.
Okl.—Howell v. Hart, 69 P.2d 1043, 180 Okl. 397.
33 C.J. p 1129 note 44.

Subsequent judgment under cross petition

Ky.—Culton v. Couch, 20 S.W.2d 451, 230 Ky. 586.

Specific order for continuance unnecessary

The court need not specifically reserve its jurisdiction as to other defendants as to whom judgment is not rendered, but such jurisdiction continues automatically.—Howell v. Hart, 69 P.2d 1043, 180 Okl. 397.

Action on contractor's bond

Under Heard Act which contemplates presentation of all claims under a contractor's bond in a single action, which is to proceed as a single case, separate final judgments may be entered on the claims of the different claimants where so to enter them cannot prejudice the other claimants or the surety, as where the total of all the claims does not exceed the penalty of the bond. —Royal Indemnity Co. v. Woodbury Granite Co., 101 F.2d 689, 69 App.D. C. 364, certiorari dismissed 60 S.Ct. 63, 308 U.S. 628, 84 L.Ed. 524.

4. Cal.—Corbin v. Howard, 215 P. 920, 61 Cal.App. 715.
Minn.—First Nat. Bank of Wabasha v. Burkhardt, 73 N.W. 858, 71 Minn. 185.
Okl.—Howell v. Hart, 69 P.2d 1043, 180 Okl. 397.

5. Ark.—Berryman v. Cudahy Packing Co., 87 S.W.2d 21, 191 Ark. 533.

Statute held inapplicable

Statute providing that, in actions other than on contract wherein summons has been served on some only of defendants, plaintiff may demand a trial as to only some of defendants on discontinuing action as to others does not apply to prevent judgment against defendant after reversal on appeal of erroneous order quashing service of process as to him, where judgment was taken against his codefendant pending the appeal.—Berryman v. Cudahy Packing Co., supra.

6. Cal.—Weisz v. McKee, 87 P.2d 379, rehearing denied 88 P.2d 200, 31 Cal.App.2d 144—Huntoon v. Southern Trust & Commerce Bank, 290 P. 86, 107 Cal.App. 121.

7. S.D.—Western Twine Co. v. Wright, 78 N.W. 942, 11 S.D. 521, 44 L.R.A. 438.

8. Cal.—McNeely v. Los Angeles County Super. Ct., 173 P. 102, 36 Cal.App. 602.

9. N.J.—Ordinary of State v. Bastian, 5 A.2d 463, 17 N.J.Misc. 105.
33 C.J. p 1129 note 47.

10. Ark.—Fidelity Phenix Fire Ins. Co. v. Friedman, 174 S.W. 215, 117 Ark. 71.

11. Colo.—Irwin v. Wood, 4 P. 783, 7 Colo. 477.

have combined to cause plaintiff's injury and separate verdicts against each for varying amounts have been returned.[12]

On the other hand, if the cause of action sued on is such that the judgment must be joint and under the circumstances the case is not a proper one to go to judgment against one of the defendants liable, the court cannot properly render judgment against any of those defendants whose liability has been made to appear,[13] although the entry of judgment as to some of the defendants prior to final trial is not error of which the other defendants may complain, where it does not prejudice any defense, set-off, or counterclaim of theirs.[14] It has also been held that separate judgments are permissible only where the substantive law controlling the case is such as to impose several separable and different respective liabilities on defendants.[15]

The entry of a separate judgment against one or more defendants, under a statute authorizing it, does not merge the cause of action, as at common law, and prevent the further pursuit of judgment against the other defendants.[16] It is not binding on the other defendants;[17] but it operates as a severance of the cause of action, and after such judgment the issues made by the remaining defendants are to be heard and determined as if they had been sued alone.[18] On such final trial, a judgment may be rendered against the remaining defendant for the whole or such part of the cause of action as may be proved against him.[19] It is no objection that the various judgments are for different amounts.[20] Separate judgments against different defendants have been converted into one judgment against all the defendants in solido in order to fix the obligation inter se.[21]

On new trial as to some of codefendants. In jurisdictions where separate judgments against codefendants are authorized, separate judgments may be recovered where some of the defendants, after a joint judgment against them, obtain a new trial;[22] but, in jurisdictions where only one final judgment may be entered in an action, it has been held that, where a new or further trial is found necessary as to one defendant and the case has been correctly tried as to another, the case will be held in abeyance as to the latter until after the new trial and then one final judgment entered,[23] or it will be retried as to such defendant on the issue of amount of liability only.[24]

12. Ill.—Martin v. Blackburn, 38 N. E.2d 939, 312 Ill.App. 549.

13. Mich.—Rimmele v. Huebner, 157 N.W. 10, 190 Mich. 247.
33 C.J. p 1129 note 45.

In action on contract which is joint only, and not joint and several, a several judgment against some of defendants cannot be rendered before final trial, as it cannot be determined until such trial whether or not a several judgment is proper. —Hempy v. Ransom, 33 Ohio St. 312—Aucker v. Adams, 23 Ohio St. 543.

14. Ohio.—Hempy v. Ransom, 33 Ohio St. 312.
33 C.J. p 1128 note 38.

15. Miss.—Gillespie v. Olive Branch Building & Lumber Co., 164 So. 42, 174 Miss. 154.

16. N.J.—Ordinary of State v. Bastian, 5 A.2d 463, 17 N.J.Misc. 105.
33 C.J. p 1129 note 54.

Stockholder's statutory liability

(1) In an action against the registered owner of stock of an insolvent bank to enforce the stockholder's statutory liability for the bank's debts, judgment may be obtained against one discovered to be the real owner of the stock after judgment had been rendered against the registered owner, where the court had reserved jurisdiction of the cause.—Reconstruction Finance Corporation v. Pelts, C.C.A.Ill., 123 F.2d 503, certiorari denied Pelts v. Reconstruction Finance Corporation, 62 S.Ct. 796, 315 U.S. 812, 86 L.Ed. 1210—Ericson v. Slomer, C.C.A.Ill., 94 F.2d 437.

(2) The relationship between the real owner and the registered owner of the stock is that of trustee and cestui que trust and not that of undisclosed principal and agent.—Reconstruction Finance Corporation v. Pelts, C.C.A.Ill., 123 F.2d 503, certiorari denied Pelts v. Reconstruction Finance Corporation, 62 S.Ct. 796, 315 U.S. 812, 86 L.Ed. 1210.

17. Kan.—Davis v. Deal, 222 P. 68, 115 Kan. 12.

18. Ohio.—Hempy v. Ransom, 33 Ohio St. 312.

Character of proof required

Plaintiff must establish the allegations of his petition by proof of the same character and of the same degree as though each of defendants were defending.—Davis v. Deal, 222 P. 68, 115 Kan. 12.

19. Iowa.—Smith v. Coopers, 9 Iowa 376.
Ohio.—Hempy v. Ransom, 33 Ohio St. 312.

20. Cal.—Cole v. Roebling Constr. Co., 105 P. 255, 156 Cal. 443.

21. La.—Rosenberg v. Derbes, 109 So. 841, 161 La. 1070.

22. Cal.—Knight v. Gosselin, 12 P. 2d 454, 124 Cal.App. 290.
33 C.J. p 1126 note 19.

No double obligation

The second judgment does not create a double obligation.—Knight v. Gosselin, supra.

23. Mo.—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W. 2d 1049, 328 Mo. 782, 78 A.L.R. 930—Neal v. Curtis & Co. Mfg. Co., Mo., 41 S.W.2d 543, 328 Mo. 389.
Tex.—Alexander v. Meredith, Civ. App., 154 S.W.2d 920, certified questions dismissed 152 S.W.2d 732, 137 Tex. 37.
Right of appellate court to affirm as to some defendants and reverse as to others see Appeal and Error §§ 1919–1922.

Retrial on reversal as to some of defendants

Where, on appeal, a case is affirmed as to some of defendants and reversed and sent back for retrial as to others, the judgment on the first trial, as it was affirmed, and the judgment on the retrial have been held to constitute one final judgment so as not to violate the statute against more than one final judgment in a case.
Mo.—Shuff v. Kansas City, 282 S.W. 128, 221 Mo.App. 505.
Tex.—Compton v. Jennings Lumber Co., Civ.App., 295 S.W. 308.

24. Mo.—Barr v. Nafziger Baking Co., 41 S.W.2d 559, 328 Mo. 423—Polkowski v. St. Louis Public

Interested person not a party litigant. The mere fact that a judgment is not res judicata to an interested person who is not a party litigant does not prevent the court from rendering a judgment which is final and res judicata as to all the parties to the proceeding.[25]

§ 37. —— Relief between Codefendants

Judgment determining the ultimate rights of defendants as between themselves is authorized under various codes and practice acts, but such a judgment is not authorized at common law.

At common law, and in the absence of statute changing the rule, one defendant to a suit cannot recover a judgment against a codefendant, because the issue is as to the liability of defendants, or either of them, to plaintiff, and not as to the liability of defendants as between themselves;[26] if one defendant is entitled to contribution, indemnity, or other relief against his codefendant, it must be obtained in an independent action.[27] As between codefendants, nothing is adjudicated by a joint judgment against them, as considered infra § 440, although in equity a decree between codefendants may be rendered in proper cases, as considered in Equity § 603.

Under codes and practice acts, affirmative relief may be granted as between defendants in relation to the subject matter of the action,[28] on proper pleadings and procedure in accordance with the statute,[29] it being usually provided that a judgment may determine the ultimate rights of the parties on the same side as between themselves.[30] Such relief may be granted, even though as between the various litigants the issues are contractual as to one and tortious as to the other.[31]

Such a statute, however, does not make codefendants adversaries.[32] It permits the determination of questions of primary and secondary liability between joint tort-feasors,[33] but it does not authorize judgment as to matters not connected with the subject of plaintiff's action.[34] The judgment authorized is only such as is responsive to the issues in plaintiff's action and incidental to defendant's defense therein,[35] as a defendant is not authorized to inject into plaintiff's suit an independent suit, either at law or in equity, against his codefendant, not necessary or germane to his defense to plaintiff's suit,[36] unless a statute authorizes the determination of particular issues.[37] Under some statutes, where a defendant is impleaded as being ultimately liable, the judgment against such defendant should be in favor of the original defendant and not in favor of plaintiff, whose judgment should be against the original defendant.[38] Service of process, or notice of some sort, as by service of a copy of the answer or cross complaint praying such relief, is essential to the validity and regularity of a judgment in favor of one defendant against his codefendant.[39]

Service Co., 68 S.W.2d 884, 229 Mo.App. 24.

25. La.—Parish of Jefferson v. Texas Co., 189 So. 580, 192 La. 934, certiorari denied Texas Co. v. Parish of Jefferson, 60 S.Ct. 138, 308 U.S. 601, 84 L.Ed. 503.

26. Tex.—**Corpus Juris quoted in** Cauble v. Cauble, Civ.App., 283 S. W. 914, 919, 920.
33 C.J. p 1131 note 63.

27. Tex.—**Corpus Juris quoted in** Cauble v. Cauble, Civ.App., 283 S.W. 914, 919, 920.
33 C.J. p 1131 note 64.
Right to judgment for:
Contribution between defendant tort-feasors see Contribution § 13 g.
Indemnity see Indemnity § 28.

28. Mo.—Merz v. Tower Grove Bank & Trust Co., 130 S.W.2d 611, 344 Mo. 1150.
N.Y.—Weiner v. Mager & Throne, 3 N.Y.S.2d 918, 167 Misc. 338—Cohen v. Dugan Bros., 285 N.Y.S. 118, 134 Misc. 155.
Pa.—Ford v. City of Philadelphia, 24 A.2d 746, 148 Pa.Super. 195.
Tex.—**Corpus Juris quoted in** Cauble v. Cauble, Civ.App., 283 S.W. 914, 919, 920.
33 C.J. p 1131 note 67.

29. Mo.—Scheer v. Trust Co. of St. Louis, 49 S.W.2d 135, 330 Mo. 149.
Tex.—**Corpus Juris quoted in** Cauble v. Cauble, Civ.App., 283 S.W. 914, 919, 920.

30. N.C.—Montgomery v. Blades, 9 S.E.2d 397, 217 N.C. 654.
Tex.—**Corpus Juris quoted in** Cauble v. Cauble, Civ.App., 283 S.W. 914, 919, 920.

31. N.Y.—Weiner v. Mager & Throne, 3 N.Y.S.2d 918, 167 Misc. 338.

32. Mo.—Merz v. Tower Grove Bank & Trust Co., 130 S.W.2d 611, 344 Mo. 1150.

33. N.C.—Montgomery v. Blades, 9 S.E.2d 397, 217 N.C. 654.

34. N.C.—Montgomery v. Blades, supra.

35. Mo.—Merz v. Tower Grove Bank & Trust Co., 130 S.W.2d 611, 344 Mo. 1150—Missouri Dist. Telegraph Co. v. Southwestern Bell Telephone Co., 79 S.W.2d 257, 336 Mo. 453—Scheer v. Trust Co. of St. Louis, 49 S.W.2d 135, 330 Mo. 149.
Relief not authorized
In innocent holder's suit on note, makers could not obtain relief for payments made to payees and not credited on note.—Cohen v. Daily, Mo.App., 52 S.W.2d 199.

36. Mo.—Merz v. Tower Grove Bank & Trust Co., 130 S.W.2d 611, 344 Mo. 1150—Missouri Dist. Telegraph Co. v. Southwestern Bell Telephone Co., 79 S.W.2d 257, 336 Mo. 453.
Equities not affecting plaintiff's rights cannot be adjudicated.—Cohen v. Daily, Mo.App., 52 S.W.2d 199.

37. Mo.—Early v. Smallwood, 256 S.W. 1053, 302 Mo. 92.

38. N.Y.—Otis Elevator Co. v. Miller, 216 N.Y.S. 320, 127 Misc. 421.

39. Tex.—Stokes Bros. & Co. v. Kramer, Civ.App., 44 S.W.2d 822—**Corpus Juris quoted in** Cauble v. Cauble, Civ.App., 283 S.W. 914, 919, 920.
33 C.J. p 1132 note 70.
Process, notice, or appearance see supra §§ 23–26.

§ 38. Nominal Parties

Ordinarily judgment should be in the name of a nominal or formal party, but it is proper to show therein the real party in interest.

In general judgment must be entered in the name of plaintiff, although for the use and benefit of another,[40] and, if entered in favor of the beneficiary alone, it is irregular and erroneous.[41] Where the real parties in interest will be estopped from again asserting the claim in suit, judgment in the name of a nominal party is not error.[42] However, under statutes requiring that actions be prosecuted in the name of the real party in interest, it has been held that judgment may not be rendered in favor of a plaintiff who fails to show any remedial interest in himself, even though defendant has contested the case on the merits.[43] It has been held that a pro forma plaintiff cannot recover.[44] Judgment may be rendered against a defendant, although he is only a nominal or formal party,[45] but the judgment properly should discriminate between the actual defendants charged with liability and mere nominal or unnecessary defendants not under any liability to plaintiff.[46] In an action against a husband in which his wife, without having been served with a summons, was made a nominal party defendant on plaintiff's motion, a judgment against her is voidable.[47]

D. PLEADINGS, ISSUES, EVIDENCE, VERDICT, AND FINDINGS TO SUSTAIN JUDGMENT

§ 39. Pleadings

The necessity and sufficiency of pleadings to support a judgment are considered infra §§ 40, 41.

Examine Pocket Parts for later cases.

§ 40. —— Necessity and Sufficiency

a. Necessity

b. Sufficiency

a. Necessity

Subject to certain exceptions, pleadings have been held essential to the regularity of a judgment.

While exceptions may occur in respect of judgments by confession or consent, under principles discussed infra §§ 150, 151, 174, as a general rule pleadings are essential to support the judgment of a court of record,[48] and are as necessary a basis for a valid judgment as is evidence.[49] In this connec-

40. Ill.—McCormick v. Fulton, 19 Ill. 570.
33 C.J. p 1132 note 72.

41. Ill.—Hobson v. McCambridge, 22 N.E. 823, 130 Ill. 367.

42. Okl.—American Surety Co. of New York v. Marsh, 293 P. 1041, 146 Okl. 261.
Wash.—Weaver v. Heaton, 4 P.2d 521, 164 Wash. 674.

43. Alaska.—In re Nagao, 4 Alaska 678.
Ky.—Lytle v. Lytle, 2 Metc. 127.

44. Tex.—Lucas v. Dallas County, Civ.App., 138 S.W.2d 179—Hill v. Kelsey, Civ.App., 89 S.W.2d 1017—Avenel v. Iskovitz, Civ.App., 60 S.W.2d 895.

45. Tex.—Harris v. Musgrove, 59 Tex. 401.

46. Ky.—Cincinnati H. & D. R. Co. v. Spratt, 2 Duv. 4.
La.—Morries v. Zeller, 4 La.A., Orleans, 411.

47. Pa.—Rawlings v. Lewert, 9 Pa. Dist. & Co. 701, 28 Lack.Jur. 15, 75 Pittsb.Leg.J. 111.

48. Ala.—Brue v. Vaughn, 2 So.2d 396, 241 Ala. 322.
Ky.—Howard v. Howard, 94 S.W.2d 652, 264 Ky. 311.
La.—Bank of White Castle v. Baker, 139 So. 648, 174 La. 17.
Or.—Haberly v. Farmers' Mut. Fire Relief Ass'n, 294 P. 594, 13 Or. 32.
Tex.—City of Fort Worth v. Gause, 101 S.W.2d 221, 129 Tex. 25—Cohen v. City of Houston, Civ.App., 185 S.W.2d 450—Stone v. Boone, Civ.App., 160 S.W.2d 578, error refused—Knox v. Lyarels, Civ.App., 155 S.W.2d 435, error refused—Thomas v. Mullins, Civ.App., 127 S.W.2d 559, reversed on other grounds Mullins v. Thomas, 150 S.W.2d 83, 136 Tex. 215—Vassiliades v. Theophiles, Civ.App., 115 S.W.2d 1220, error dismissed—Texas & N. O. R. Co. v. Whisenant, Civ.App., 105 S.W.2d 706—Harris v. Goodloe, Civ.App., 58 S.W.2d 156, reversed on other grounds Goodloe & Meredith v. Harris, 94 S.W.2d 1141, 127 Tex. 583—Estes v. Hartford Accident & Indemnity Co., Civ.App., 46 S.W.2d 413, error refused—Matrimonial Mut. Ass'n of Texas v. Rutherford, Civ.App., 41 S.W.2d 719, error dismissed—Cisco & N. E. R. Co. v. Ricks, Civ.App., 33 S.W.2d 878—Smoot & Smoot v. Nelson, Civ.App., 11 S.W.2d 578—Connellee v. Witty, Civ.App., 246 S.W. 715.
Utah.—Upper Blue Bench Irr. Dist. v. Continental Nat. Bank & Trust Co., 72 P.2d 1048, 93 Utah 325—Stockyards Nat. Bank of South Omaha v. Bragg, 245 P. 966, 67 Utah 60.
Va.—Parks v. Wiltbank, 14 S.E.2d 281, 177 Va. 461.
Wis.—Stellmacher v. Sampson, 219 N.W. 343, 195 Wis. 635.
33 C.J. p 1132 note 80.

"There is no principle better settled than that a judgment or decree cannot be entered in the absence of pleadings upon which to found the same."—Rhodes v. Sewell, 109 So. 179, 180, 21 Ala.App. 441.

Matters occurring pendente lite are not adjudicated by the judgment unless brought before the court by supplemental pleading.—Grand Union Hotel v. Industrial Accident Commission, 226 P. 948, 67 Cal.App. 123.

Where no pleadings were filed in behalf of interveners, a judgment in their favor could not be sustained on direct attack on appeal.—Howe v. Keystone Pipe & Supply Co., 274 S.W. 563, 115 Tex. 158, motion for rehearing overruled 278 S.W. 177, 115 Tex. 158.

49. Ky.—Consolidation Coal Co. v. King, 244 S.W. 303, 196 Ky. 54.
Tenn.—Poster v. Andrews, 189 S.W. 2d 580.
Tex.—Street v. Cunningham, Civ. App., 156 S.W.2d 541—Lone Star Gas Co. v. Holifield, Civ.App., 150 S.W.2d 282—Birdville Independent School Dist. v. Deen, Civ.App., 141 S.W.2d 680, affirmed Deen v. Birdville Independent School Dist., 159 S.W.2d 111, 138 Tex. 339—Adams v. Impey, Civ.App., 131 S.W.2d 288—Shell Petroleum Corporation v. Liberty Gravel & Sand Co., Civ. App., 128 S.W.2d 471—Forman v. Barron, Civ.App., 120 S.W.2d 827,

tion it has been said that courts have no power to render judgment until their action is called into exercise by pleadings,[50] that the court lacks jurisdiction of the subject matter or controversy in the absence of pleadings,[51] and that a judgment rendered without pleadings in support thereof is fundamentally erroneous,[52] a nullity,[53] and void[54] rather than voidable.[55] Where pleadings are lost, judgment should not be rendered until they have been restored.[56]

A declaration, petition, or complaint is essential to the regularity of a judgment,[57] and it has been held that such a pleading is essential to the court's jurisdiction to enter judgment,[58] and that its absence will render the judgment void,[59] although objection to the absence of such a pleading may be waived.[60] Aside from judgments by confession, consent, or default, as discussed infra §§ 150, 151, 174, 199, a plea or answer may be essential to the regularity of a judgment.[61] Where the initial pleading has been filed in one division of a court, and the answer is filed in a different division, the former has been held to lack jurisdiction to enter judgment.[62]

b. Sufficiency

The pleadings should be sufficient to support the

error refused—Fidelity & Deposit Co. of Maryland v. Citizens Nat. Bank of Lubbock, Civ.App., 120 S.W.2d 113, error dismissed—Shackelford v. Neilon, Civ.App., 100 S.W.2d 1037—Shambaugh v. Anderson, Civ.App., 92 S.W.2d 530, error dismissed—Traders & General Ins. Co. v. Lincecum, Civ.App., 81 S.W.2d 549, reversed on other grounds 107 S.W.2d 585, 130 Tex. 220—Karr v. Cockerham, Civ.App., 71 S.W.2d 905, error dismissed—Texas Co. v. Wright, Civ.App., 47 S.W.2d 487—Gause-Ware Funeral Home v. McGinley, Civ.App., 41 S.W.2d 433, error refused—Casualty Reciprocal Exchange v. Allesandro, Civ. App., 34 S.W.2d 636—Humble Oil & Refining Co. v. Southwestern Bell Telephone Co., Civ.App., 2 S.W.2d 488—Flagg v. Matthews, Civ.App., 287 S.W. 299.

Va.—Potts v. Mathieson Alkali Works, 181 S.E. 521, 165 Va. 196.

33 C.J. p 1141 note 54.

Evidence as essential to support judgment see infra § 44.

A judgment cannot rest on evidence alone unsupported by pleading, unless there has been a waiver by opposite party.—Howard v. Howard, 94 S.W.2d 652, 264 Ky. 311.

Proof cannot supply omissions in allegations

Ala.—Brue v. Vaughn, 2 So.2d 396, 241 Ala. 322.

A judgment entered on evidence without pleadings is as fatally defective as a judgment on pleadings without supporting evidence.—Stone v. Boone, Tex.Civ.App., 160 S.W.2d 578, error refused—Rudolph v. Smith, Tex.Civ.App., 148 S.W.2d 225.

50. Ala.—Rhodes v. Sewell, 109 So. 179, 21 Ala.App. 441.

Tex.—Dunlap v. Southerlin, 63 Tex. 38—Fidelity & Deposit Co. of Maryland v. Citizens Nat. Bank of Lubbock, Civ.App., 120 S.W.2d 113, error refused—Continental Southland Savings & Loan Ass'n v. Panhandle Const. Co., Civ.App., 77 S.W.2d 896, error refused—Moore v. Jones, Civ.App., 278 S.W. 326—Connellee v. Witty, Civ.App., 246 S.W. 715.

51. Mo.—Owens v. McCleary, App., 273 S.W. 145.

Utah.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.

"It is fundamental that a petition or pleading of some kind is the juridical means of investing a court with jurisdiction of subject-matter to adjudicate it."—Stockyards Nat. Bank of South Omaha v. Bragg, 245 P. 966, 973, 67 Utah 60.

52. Tex.—City of Fort Worth v. Gause, 101 S.W.2d 221, 129 Tex. 25—Rudolph v. Smith, Civ.App., 148 S.W.2d 225—Williams v. Sinclair-Prairie Oil Co., Civ.App., 135 S.W.2d 211, error dismissed, judgment correct—State v. Howe, Civ. App., 91 S.W.2d 487—Penrod v. Von Wolff, Civ.App., 90 S.W.2d 859—Jones v. Womack-Henning & Rollins, Civ.App., 53 S.W.2d 635—Short v. Stephens, Civ.App., 44 S.W.2d 466.

53. Utah.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.

54. Ala.—Rhodes v. Sewell, 109 So. 179, 21 Ala.App. 441.

Colo.—Hough v. Lucas, 230 P. 789, 76 Colo. 94.

Fla.—Lovett v. Lovett, 112 So. 768, 93 Fla. 611.

Mont.—Oregon Mortg. Co. v. Kunneke, 245 P. 539, 76 Mont. 117.

Tenn.—Lewis v. Burrow, 127 S.W.2d 795, 23 Tex.App. 145.

Tex.—Jackson v. Slaughter, Civ.App., 185 S.W.2d 759, refused for want of merit—Ritch v. Jarvis, Civ. App., 64 S.W.2d 831, error dismissed—Davis v. Sloan Lumber Co., Civ.App., 37 S.W.2d 225—Mills v. Moore, Civ.App., 295 S.W. 297—Hart v. Hunter, 114 S.W. 882, 52 Tex.Civ.App. 75.

Va.—Potts v. Mathieson Alkali Works, 181 S.E. 521, 165 Va. 196.

W.Va.—Kesterson v. Brown, 119 S.E. 677, 94 W.Va. 447—Waldron v. Harvey, 46 S.E. 603, 54 W.Va. 608, 102 Am.S.R. 959.

33 C.J. p 1132 note 83—34 C.J. p 561 note 7.

55. W.Va.—Kesterson v. Brown, 119 S.E. 677, 94 W.Va. 447—Waldron v. Harvey, 46 S.E. 603, 54 W.Va. 608, 102 Am.S.R. 959.

56. Tex.—Watson Co., Builders, v. Bleeker, Civ.App., 285 S.W. 637.

33 C.J. p 1133 note 94.

57. Tex.—Safety Casualty Co. v. McGee, Civ.App., 93 S.W.2d 519, affirmed 127 S.W.2d 176, 133 Tex. 233, 121 A.L.R. 1263—Kentucky Oil Corporation v. McCandless, Civ. App., 300 S.W. 972.

33 C.J. p 1132 notes 85, 87.

58. Utah.—State v. Cragun, 20 P.2d 247, 81 Utah 457.

Wis.—Nehring v. Niemerowicz, 276 N.W. 325, 226 Wis. 285.

59. Iowa.—Jordan v. Brown, 32 N. W. 450, 71 Iowa 421.

33 C.J. p 1132 note 86.

60. Neb.—Heater v. Penrod, 89 N. W. 762, 2 Neb.Unoff. 711.

33 C.J. p 1133 note 89.

61. W.Va.—Cline v. Star Coal & Coke Co., 153 S.E. 148, 109 W.Va. 101—Del-Carbo Coal & Coke Co. v. Cunninghame, 116 S.E. 719, 93 W.Va. 12.

Unpleaded defense

A judgment based on an unpleaded defense that money sought to be garnished was exempt because constituting proceeds of insurance policy on household goods held void, as being unsupported by pleadings. —Sorenson v. City Nat. Bank, Tex. Civ.App., 273 S.W. 638.

Declinatory exceptions

Where citations to a defendant are served on the secretary of state, and defendant challenges the validity of the service and the jurisdiction of the court through declinatory exceptions, but at no time files an answer or suffers judgment to be taken by default, judgment against defendant on the merits has been held void.—Rector v. Allied Van Lines, La.App., 198 So. 516.

62. Mo.—Owens v. McCleary, App., 273 S.W. 145.

judgment, and a judgment rendered on a complaint failing to state a cause of action has been held erroneous.

As a general rule, pleadings must be sufficient to support the judgment;[63] they should be of such a character that a final judgment will be sustained by findings thereon.[64] While mere generality of the allegations is not of itself fatal to the validity of a judgment,[65] a judgment cannot be sustained by allegations which are only conclusions of law rather than averments of fact.[66] Pleadings have been held substantially defective where oral,[67] and facts presented by an unauthorized pleading do not afford a proper predicate for judgment.[68]

In determining the sufficiency of the pleadings to support the judgment it has been said that the court will consider the pleadings of both parties,[69] and that facts pleaded by the adverse party are available to either party in support of the judgment.[70] In testing the sufficiency of the complaint as a basis on which to rest the judgment, averments unsupported by the proof should be eliminated.[71] A judgment must be based on material allegations in the

63. Ariz.—Wallace v. Chappelle, 39 P.2d 985, 45 Ariz. 85.
Cal.—Kreling v. Superior Court of Los Angeles County, 118 P.2d 470, 18 Cal.2d 834—Stesel v. Santa Ana River Water Co., 94 P.2d 1052, 35 Cal.App.2d 117.
Ky.—McIntosh v. Clark, Thurmund & Richardson, 177 S.W.2d 155, 296 Ky. 358—Bank of Tollesboro v. W. T. Rawleigh Co., 291 S.W. 1039, 218 Ky. 516—National Surety Co. v. Daviess County Planing Mill Co., 281 S.W. 791, 213 Ky. 670—Elkhorn Coal Corporation v. Case, 278 S.W. 570, 212 Ky. 146—Frick Co. v. Salyers, 258 S.W. 310, 201 Ky. 763—Consolidation Coal Co. v. King, 244 S.W. 303, 196 Ky. 54.
Neb.—Domann v. Domann, 208 N.W. 669, 114 Neb. 563.
Okl.—Central Nat. Oil Co. v. Continental Supply Co., 249 P. 347, 119 Okl. 190.
Or.—U. S. Fidelity & Guaranty Co. v. Zidell-Steinberg Co., 50 P.2d 584, 151 Or. 538, modified on other grounds 51 P.2d 637, 151 Or. 538.
Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.
Tex.—John E. Quarles Co. v. Lee, Com.App., 53 S.W.2d 77, costs retaxed 67 S.W.2d 607—Cohen v. City of Houston, Civ.App., 185 S.W.2d 450—Wichita Falls & S. R. Co. v. Hesson, Civ.App., 151 S.W.2d 270, error dismissed, judgment correct—Fine v. Pratt, Civ.App., 150 S.W.2d 308—Ray v. Fowler, Civ.App., 144 S.W.2d 665, error dismissed, judgment correct—Lone Star Finance Corporation v. Schelling, Civ.App., 80 S.W.2d 358—Saner-Ragley Lumber Co. v. Spivey, Civ.App., 255 S.W. 193, modified on other grounds Spivey v. Saner-Ragley Lumber Co., Com.App., 284 S.W. 210.

Pleadings impliedly sufficient

The entry of a judgment implies that the pleadings were sufficient to sustain the judgment.—Wistrom v. Forsling, 14 N.W.2d 217, 144 Neb. 638.

Description of property

In so far as the description of property in the pleadings is insufficient to describe any property, a judgment based thereon is invalid.
Cal.—Birkhauser v. Ross, 283 P. 866, 102 Cal.App. 582.
Mo.—Barrie v. Ranson, 46 S.W.2d 186, 226 Mo.App. 554.

Contradictory allegations

A pleading alleging that acts for results of which the recovery of damages was sought were malicious and grossly negligent, and pleading alleging that acts were malicious, wrongful, willful, and wanton, were insufficient to authorize judgment based on negligence, or willful misconduct because pleadings were contradictory.—Michels v. Boruta, Tex.Civ.App., 122 S.W.2d 216.

Pleadings held sufficient

(1) Generally.
U.S.—State Bank of New York v. Henderson County, Ky., C.C.A.Ky., 85 F.2d 359, certiorari denied Henderson County, State of Kentucky, v. State Bank of New York, 59 S.Ct. 245, 281 U.S. 728, 74 L.Ed. 1144, 1145.
Ill.—Oberman v. Camden Fire Ins. Ass'n, 145 N.E. 351, 314 Ill. 264—Christenson v. Board of Charities of Illinois Conference of Ev. Lutheran Augustana Synod, 253 Ill.App. 380.
Ky.—Small v. Minton, 192 S.W.2d 184—Carter v. Templeman, 182 S.W.2d 241, 298 Ky. 272—United Mine Workers of America, Local Union 6659, v. Jones, 162 S.W.2d 17, 290 Ky. 569—Guinn v. Cross, 147 S.W.2d 375, 285 Ky. 571—Feltner v. Smith, 143 S.W.2d 505, 283 Ky. 783—Carter v. Harlan Hospital, 128 S.W.2d 174, 278 Ky. 84—Robbins v. Hopkins, 65 S.W.2d 54, 251 Ky. 413—McKinney v. Knapp, 258 S.W. 314, 201 Ky. 768.
Mo.—Women's Christian Ass'n of Kansas City v. Brown, 190 S.W.2d 900—Jones v. Campbell, App., 189 S.W.2d 124.
Neb.—Hardt v. Orr, 6 N.W.2d 589, 142 Neb. 460—Prokop v. Mlady, 287 N.W. 55, 136 Neb. 644.
Tex.—Joyce v. Anderson-Bledsoe Stave Co., Civ.App., 173 S.W.2d 315—Sparrow v. Tillman, Civ.App., 283 S.W. 877—Gulf, C. & S. F. Ry. Co. v. Kempner, Civ.App., 275 S.W. 459, reversed on other grounds, Com.App., 282 S.W. 795.

(2) Allegations as to negligence.
Ill.—Belcher v. Citizens Coach Co., App., 64 N.E.2d 747.
Ky.—Hurley v. Greif, 115 S.W.2d 284, 272 Ky. 741.

(3) Averments as to contributory negligence.—Posey v. Board of Councilmen of City of Frankfort, 184 S.W.2d 970, 299 Ky. 210—Napier v. Hurst-Snyder Hospital Co., 130 S.W.2d 771, 279 Ky. 378.

(4) Description of property.
Ga.—Cason v. United Realty & Auction Co., 131 S.E. 161, 161 Ga. 374.
Ky.—Sapp v. Likens, 192 S.W.2d 394—Souleyette v. McKee, 178 S.W.2d 833, 296 Ky. 868.

64. Nev.—Edmonds v. Perry, 140 P. 2d 566.

65. Conn.—Corden v. Zoning Bd. of Appeals of City of Waterbury, 41 A.2d 912, 131 Conn. 654.
Ky.—S. K. Jones Const. Co. v. Hendley, 5 S.W.2d 482, 224 Ky. 83.

66. Ky.—Murphy v. Blackburn, 16 S.W.2d 771, 229 Ky. 109—S. K. Jones Const. Co. v. Hendley, 5 S.W.2d 482, 224 Ky. 83.
Tex.—Wichita Falls & Southern R. Co. v. Anderson, Civ.App., 144 S. W.2d 441, error dismissed, judgment correct.

67. Tex.—Holloway v. Miller, Civ. App., 272 S.W. 562.

68. Ky.—Wells v. West, 15 S.W.2d 531, 228 Ky. 737.
Substitute pleading filed without proper procedure, as where the original petition was lost and a substitute was filed without notice to defendant and hearing as required by statute, afforded insufficient basis for judgment and a judgment based thereon was illegal.—Whorton v. Nevitt, Tex.Civ.App., 42 S.W.2d 1056.

69. Tex.—Hall v. Collins, Civ.App., 167 S.W.2d 210, affirmed Collins v. Hall, 174 S.W.2d 50, 141 Tex. 433.

70. Tex.—Bagby v. Bagby, Civ.App., 186 S.W.2d 702.

71. Cal.—White v. Covell, 227 P. 196, 66 Cal.App. 782.

pleadings.[72] Under some practice a judgment may not be entered on a cause of action asserted by reply.[73] Error in asserting the amount due in a counterclaim and cross action should be corrected by amendment thereof rather than by asserting the correct amount in reply, and a judgment based on the reply stating the correct amount cannot stand.[74]

Defects in form; irregularities. A pleading which is merely deficient in form has been held not to render the judgment void,[75] but only voidable.[76] Thus mere defects and irregularities in the pleadings will not invalidate the judgment,[77] at least where no timely objection thereto has been raised,[78] and, even though a petition does not perfectly state a cause of action, a valid judgment may be entered thereon.[79] A petition cannot be said to be so defective that no legal judgment may be entered thereon where the defect is amendable,[80] but a judgment has been held void where the petition was not amendable.[81] A judgment may be sustained despite defects in the pleadings on which it is based where the case falls within the purview of statutory provisions designed to protect judgments, such as statutes requiring a liberal construction of pleadings,[82] or statutes of jeofails.[83]

Sufficiency of pleadings as basis of judgment for defendant. If a petition or similar pleading is insufficient as a basis for judgment in favor of plaintiff, it is also insufficient to serve as the basis for a judgment for defendant.[84] Where plaintiff fails to amend, the proper judgment to enter is one simply of dismissal,[85] and the fact that the pleading fails to state a cause of action will not prevent rendition of a judgment of dismissal.[86] When issues are framed on a plea in abatement and those issues are found for defendant, resulting in a judgment for him, such judgment has been held not void even though a demurrer to the complaint was sustained, since in such a case the judgment is not dependent on a complaint to give it effect, but is dependent

72. Ill.—National Can Co. v. Weirton Steel Co., 145 N.E. 389, 314 Ill. 280.

73. Ky.—Conley v. Coburn, 179 S.W. 2d 668, 297 Ky 292—Connecticut Fire Ins. of Hartford, Conn., v. Baker, 153 S.W.2d 938, 287 Ky. 395.
Mont.—Armstrong v. Butte, A. & P. R. Co., 99 P.2d 223, 110 Mont. 133—Stillwater County v. Kenyon, 297 P. 453, 89 Mont. 354.

74. Ky.—Rogers v. Bolling, 1 S.W. 2d 989, 222 Ky. 561.

75. Ala.—Agee v. Agee's Cash Store No. 2, 100 So. 809, 211 Ala. 422.
Utah.—People's Bonded Trustee v. Wight, 272 P. 200, 72 Utah 587.

Jurisdiction of court

Where the nature of the suit invokes the actual jurisdiction of the court rendering the judgment and the petition is merely lacking in allegations as to the fullness of facts, it presents a matter for determination by the trial judge and any error committed in rendering the judgment on insufficient facts does not render the judgment void.—Rice v. Mercantile Bank & Trust Co. of Texas, Tex.Civ.App., 86 S.W. 2d 54.

76. Tex.—Jackson v. Slaughter, Civ. App., 185 S.W.2d 759, refused for want of merit—Ritch v. Jarvis, Civ.App., 64 S.W.2d 831, error dismissed—Hart v. Hunter, 114 S.W. 882, 52 Tex.Civ.App. 75.

77. U.S.—The Amaranth, C.C.A.N. Y., 68 F.2d 893.
Ala.—John E. Ballenger Const. Co. v. Joe F. Walters Const. Co., 134 So. 275, 236 Ala. 548.
Ariz.—Mosher v. Wayland, 158 P.2d 654, appeal dismissed 66 S.Ct. 58.
Cal.—Russell v. Ramm, 254 P. 532, 200 Cal. 348—Goatman v. Fuller, 216 P. 35, 191 Cal. 245—In re Dam's Estate, 14 P.2d 162, 126 Cal.App. 70—Shupe v. Evans, 261 P. 492, 86 Cal.App. 700.
Ill.—Fleming v. City of Chicago, 260 Ill.App. 496.
Kan.—Goodman v. Cretcher, 294 P. 868, 132 Kan. 142.
Ky.—Lorton v. Ashbrook, 295 S.W. 1027, 220 Ky. 830.
Mich.—Auditor General v. Olezniczak, 4 N.W.2d 679, 302 Mich. 336.
Mo.—Breit v. Bowland, App., 127 S. W.2d 71.
Okl.—Chicago, R. I. & P. Ry. Co. v. Excise Board of Oklahoma County, 33 P.2d 1081, 168 Okl. 428—Kansas City Southern Ry. Co. v. Excise Board of Le Flore County, 33 P. 2d 493, 168 Okl. 408.
Utah.—Gray's Harbor Lumber Co. v. Burton Lumber Co., 236 P. 1102, 65 Utah 333, followed in California Pine Box Distributors v. Burton Lumber Co., 236 P. 1105, 65 Utah 332.
33 C.J. p 1134 note 1, p 1144 note 73.

Name of plaintiff

Mo.—La Forge Undertaking Co. v. Bader, App., 15 S.W.2d 945.
33 C.J. p 1134 note 1 [b].

Improper designation of court

While a judgment on petition which fails properly to designate court in which it is filed and in which judgment is asked is void, nevertheless an error or mistake in addressing a petition to the wrong court can be cured by supplemental or amended petition filed before issue joined and giving the proper name and title of the court and in such case the petition will support the judgment.—Kunnes v. Kogos, 123 So. 122, 168 La. 682, 65 A.L.R. 706.

78. Fla.—Harris v. Smith, 7 So.2d 343, 150 Fla. 125.
N.C.—Hinton v. Whitehurst, 4 S.E.2d 507, 216 N.C. 241.
Tex.—Kirkpatrick v. Neal, Civ.App., 153 S.W.2d 519, error refused.

79. Okl.—Protest of St. Louis-San Francisco Ry. Co., 38 P.2d 954, 170 Okl. 11.

80. Ga.—Stowers v. Harris, 22 S.E. 2d 405, 194 Ga. 636.
Okl.—Wetzel v. Evans, 147 P.2d 133, 194 Okl. 20—Latimer v. Haste, 223 P. 879, 101 Okl. 109.
Tex.—Sovereign Camp, W. O. W. v. Piper, Civ.App., 222 S.W. 649.
Utah.—State v. Cragun, 20 P.2d 247, 81 Utah 451—People's Bonded Trustee v. Wight, 272 P. 200, 72 Utah 587.

81. Ga.—Deck v. Shields, 25 S.E.2d 514, 195 Ga. 697.

82. Or.—Siddons v. Lauterman, 109 P.2d 1049, 165 Or. 668.
33 C.J. p 1134 note 5.

83. Mich.—Ferton v. Feller, 33 Mich. 199.
34 C.J. p 510 note 35.

84. Tex.—Stewart v. Collatt, Civ. App., 111 S.W.2d 1131—Collins v. Lowe, Civ.App., 5 S.W.2d 872.

85. Tex.—Collins v. Lowe, supra.

86. Ky.—Wilson v. Louisville & N. R. Co., 77 S.W.2d 416, 257 Ky. 144.

only on the continued existence of the cause in court.[87] While defendant's pleadings must be sufficient to support the judgment rendered,[88] they may be sufficient although defective if the defect is amendable.[89] It has been held that affirmative relief cannot be granted a defendant on the basis of his answer, but that a judgment for affirmative relief must be supported by a counterclaim.[90]

Defects in petition or complaint. As a general rule, where plaintiff's declaration or complaint is defective in substance, to the extent of failing to make out a cause of action, it cannot support a judgment in his favor, and such judgment will be erroneous and reversible[91] notwithstanding no demurrer was filed,[92] or, if filed, was overruled, and defendant has answered over.[93] It has been held that failure of plaintiff's initial pleading to state a cause of action is not a jurisdictional defect,[94] and that, except where the complaint shows that the court has no jurisdiction of the parties and the subject matter[95] or fails to show affirmatively that the court has such jurisdiction,[96] a judgment rendered

87. Ala.—Box v. Metropolitan Life Ins. Co., 168 So. 216, 232 Ala. 1.

88. Fla.—Smith v. Pattishall, 173 So. 355.

Case not terminated

In action on note, where defendant's pleas failed to set out any sufficient legal defense, a judgment rendered for defendant did not constitute a legal termination of the case.—A. W. Muse Co. v. Collins, 199 S.E. 856, 58 Ga.App. 753.

Plea or answer held sufficient

Cal.—Valentine v. G. S. Donaldson Inv. Co., 260 P. 305, 86 Cal.App. 142.

Ohio.—Thacker v. Matthews, 43 N.E.2d 108, 70 Ohio App. 314.

Plea or answer held insufficient

Fla.—Merchants & Bankers Guaranty Co. v. Downs, 175 So. 704, 128 Fla. 767.

89. Tex.—Gilbert v. T. B. Allen & Co., Civ.App., 16 S.W.2d 377, error refused.

90. N.J.—Kraft v. Fassitt, 30 A.2d 574, 132 N.J.Eq. 603, reversed on other grounds 28 A.2d 537, 132 N.J.Eq. 625.

91. U.S.—Barnes v. Boyd, D.C.W.Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

Ala.—John E. Ballenger Const. Co. v. Joe F. Walters Const. Co., 184 So. 275, 236 Ala. 548—Rhodes v. Sewell, 109 So. 179, 21 Ala.App. 441.

Ark.—Wilson v. Overturf, 248 S.W. 898, 157 Ark. 385.

Cal.—Kreling v. Superior Court of Los Angeles County, 118 P.2d 470, 18 Cal.2d 884—Birkhauser v. Ross, 283 P. 866, 102 Cal.App. 582.

Fla.—McDougald v. Couey, 200 So. 391, 145 Fla. 689—**Corpus Juris cited in** East Coast Stores v. Cuthbert, 133 So. 863, 865, 101 Fla. 25—Porter v. Sprague, 126 So. 759, 99 Fla. 371.

Idaho.—Stanger v. Hunter, 291 P. 1060, 49 Idaho 723.

Ky.—Hardin Oil Co. v. Spencer, 266 S.W. 654, 205 Ky. 842.

Miss.—Smith v. Deas, 130 So. 105, 158 Miss. 111—Carrier Lumber & Mfg. Co. v. Quitman County, 124 So. 437, 156 Miss. 396, 66 A.L.R. 614, suggestion of error overruled 125 So. 416, 156 Miss. 396, 66 A.L.R. 614, followed in Matthews v. Quitman County, 127 So. 305.

Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804—Montana Auto Finance Corporation v. British & Federal Underwriters of Norwich Union Fire Ins. Soc., 232 P. 198, 72 Mont. 69, 36 A.L.R. 1495.

Neb.—Sallander v. Prairie Life Ins. Co., 200 N.W. 344, 112 Neb. 629.

N.M.—**Corpus Juris cited in** In re Field's Estate, 60 P.2d 945, 950, 40 N.M. 423.

Pa.—Greenberg v. Goldman Stores Corporation, 178 A. 528, 117 Pa. Super. 559.

Tex.—Stovall v. Finney, Civ.App., 152 S.W.2d 887—Fort Worth & Denver City Ry. Co. v. Reid, Civ.App., 115 S.W.2d 1156—Bell v. Beckum, Civ.App., 44 S.W.2d 389—Wichita County v. Allred, Civ.App., 27 S.W.2d 653—Trail v. Maphis & Day, Civ.App., 25 S.W.2d 627—Texas Electric Service Co. v. Perkins, Civ.App., 11 S.W.2d 543, affirmed, Com.App., 23 S.W.2d 320, followed in Texas Electric Service Co. v. Bradford, Civ.App., 26 S.W.2d 339—West Texas Utilities Co. v. Nunnally, Civ.App., 10 S.W.2d 391—Austin v. Fields, Civ.App., 300 S.W. 247—Texas Employers' Ins. Ass'n v. Wright, Civ.App., 297 S.W. 764, modified on other grounds, Com.App., 4 S.W.2d 31, motion denied 7 S.W.2d 72—Holloway v. Miller, Civ.App., 272 S.W. 562.

33 C.J. p 1133 note 95, p 1144 note 68.

Allegation of liability

(1) A petition or similar pleading which fails to allege some liability against a defendant does not state a cause of action within the rule requiring written pleadings in support of a judgment of a court of record.—Woodward v. Acme Lumber Co., Tex.Civ.App., 103 S.W.2d 1054—Fisk v. Warren, Tex.Civ.App., 248 S.W. 406.

(2) In an action on notes signed jointly by a husband and wife, a petition stating only that the former is the husband of the latter, and not that he executed and delivered the notes, is insufficient to sustain a judgment against him.—Fisk v. Warren, supra.

Cause of action in alternative

A pleading stating a cause of action against two parties in the alternative is insufficient to sustain a judgment against either.—Hartzell v. Bank of Murray, 277 S.W. 270, 211 Ky. 268.

Jurisdiction

The sufficiency of a petition in a court of record is not the test of jurisdiction, since the court may commit an error in holding it sufficient.—In re Warner's Estate, 288 N.W. 39, 137 Neb. 25.

92. Ala.—St. Clair County v. Smith, 20 So. 384, 112 Ala. 347.

93. Iowa.—Brown v. Cunningham, 48 N.W. 1042, 82 Iowa 512, 12 L.R.A. 583.

94. Cal.—In re Keet's Estate, 100 P.2d 1045, 15 Cal.2d 328.

Okl.—Noel v. Edwards, 260 P. 58, 127 Okl. 163—Abraham v. Homer, 226 P. 45, 102 Okl. 12.

95. Cal.—Moran v. Superior Court in and for Sacramento County, 96 P.2d 193, 35 Cal.App.2d 629.

"The law makes a distinction between a complaint which does not state a cause of action by reason of defects in the allegations therein contained, where the court has jurisdiction of the subject-matter of the action, and cases where the court has no jurisdiction of the subject-matter. If it appears from the complaint that the court had no jurisdiction of the subject-matter, the judgment of course is void, but if the court has jurisdiction of the subject-matter, its rulings upon demurrer as to the sufficiency of the complaint constitutes only errors in procedure in the trial."—Behrens v. Superior Court in and for Yuba County, 23 P.2d 428, 429, 132 Cal.App. 704.

96. Tex.—Smith v. Pegram, Civ.App., 80 S.W.2d 354, error refused—Randals v. Green, Civ.App., 258 S.W. 528.

thereon is not void merely because the complaint fails to state a cause of action,[97] as long as it apprises defendant of the nature of plaintiff's demand.[98] In this connection it has been said that jurisdiction of the court to render judgment does not depend on the sufficiency or fullness of a cause of action pleaded,[99] and that, if a cause is pleaded belonging to a general class over which the court's authority extends, jurisdiction attaches, and the court has power to determine whether the pleading is good or bad and to decide on its sufficiency as a statement of a cause of action.[1] On the other hand, it has been broadly stated in some decisions that, where a complaint or similar pleading fails to state facts constituting a cause of action, the court lacks jurisdiction to render a judgment thereon,[2] and that a judgment rendered thereon is ordinarily void,[3] at least where it rests solely on allegations of a complaint so deficient in substance as conclusively to negative the existence of a cause of action at the time of its rendition.[4] Where the facts stated in the pleadings do not justify the judgment entered, the latter is coram non judice,[5] and where a pleading is so drawn as to show that the court can have no jurisdiction of the controversy, or is a nullity, any judgment rendered thereon is void.[6]

§ 41. —— Several Counts

The more modern rule, prevailing under statute, generally regards a judgment on a general verdict as referable to good counts in a pleading and valid despite the existence of bad counts therein.

At common law, and in the absence of statute changing the rule, where the verdict is general, and one of the counts is bad, the judgment has been regarded as erroneous,[7] except where all the counts relate to the same cause of action, in which case it has been held that the rule does not apply.[8]

The modern rule, however, usually applied by virtue of statute, holds a judgment valid under such circumstances where there is one good count in the declaration or complaint,[9] the judgment being referable to the good count,[10] unless it affirmatively appears that the verdict and judgment are based only on the defective counts.[11]

It has been said that failure to require a party to exercise his right of election as between tort and contract counts in his pleading is at most a mere

Jurisdiction to enter a judgment is dependent on a complaint showing such jurisdiction.—U. S. Nat. Bank of Portland v. Humphrey, 288 P. 416, 49 Idaho 363.

97. Cal.—Moran v. Superior Court in and for Sacramento County, 96 P.2d 193, 35 Cal.App.2d 629—Ex parte Sargen, 27 P.2d 407, 135 Cal. App. 402—Behrens v. Superior Court in and for Yuba County, 23 P.2d 428, 132 Cal.App. 704—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.
Mo.—Meierhoffer v. Kennedy, 263 S. W. 416, 304 Mo. 261.
Neb.—Wistrom v. Forsling, 14 N.W. 2d 217, 144 Neb. 638.
N.M.—**Corpus Juris cited in In re** Field's Estate, 60 P.2d 945, 951, 40 N.M. 423.
Okl.—Raymer v. First Nat. Bank, 87 P.2d 1097, 184 Okl. 392—Protest of Stanolind Pipe Line Co., 32 P. 2d 869, 168 Okl. 281—Fowler v. Marguret Pillsbury General Hospital, 229 P. 442, 102 Okl. 203.
33 C.J. p 1133 note 96.

Absence of affirmative showing
Judgment of court having jurisdiction of subject matter and of parties is not void on ground that petition failed to state, or defectively stated, cause of action, unless it affirmatively appears from petition that no valid cause of action could be stated.—Schmid v. Farris, 67 P. 2d 596, 189 Okl. 445.

98. Cal.—Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., 209 P. 357, 189 Cal. 509—Moran v. Superior Court in and for Sacramento County, 96 P.2d 193, 35 Cal.App. 2d 629—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393—Roemer v. Nunes, 238 P. 820, 73 Cal. App. 368.
Okl.—Bynum v. Strain, 218 P. 883, 95 Okl. 45.
Or.—Walling v. Lebb, 15 P.2d 370, 140 Or. 691.
33 C.J. p 1133 note 96 [a] (3).

99. Mont.—State ex rel. Cook v. District Court of Ninth Judicial Dist. in and for Glacier County, 69 P.2d 746, 105 Mont. 72—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.

1. Mont.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.

2. Mont.—Hodson v. O'Keeffe, 229 P. 722, 71 Mont. 322.

3. U.S.—McLellan v. Automobile Ins. Co. of Hartford, Conn., C.C.A. Ariz., 80 F.2d 344.
Ala.—Rhodes v. Sewell, 109 So. 179, 21 Ala.App. 441.
Idaho.—Jensen v. Gooch, 211 P. 551, 36 Idaho 457—Howell v. Martin, 211 P. 528, 36 Idaho 468.
Miss.—U. S. Fidelity & Guaranty Co. v. Plumbing Wholesale Co., 166 So. 529, 175 Miss. 675.
Tex.—Wright v. Shipman, Civ.App., 279 S.W. 296.

4. Mont.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.

5. Tenn.—State v. Collier, 53 S.W. 2d 982, 164 Tenn. 163.

6. Tex.—White v. Baker, Civ.App., 118 S.W.2d 319.

7. N.H.—Glines v. Smith, 48 N.H. 259.
33 C.J. p 1134 note 7.

8. N.H.—Glines v. Smith, supra.
33 C.J. p 1134 note 9.

9. Cal.—Martin v. Pacific Southwest Royalties, 106 P.2d 443, 41 Cal.App.2d 161—Worthington v. People's State Bank of Chula Vista, 288 P. 1086, 106 Cal.App. 238.
Ill.—Standard Oil Co. v. Town of Patterson, 21 N.E.2d 12, 300 Ill. App. 385—Moore v. Jansen & Schaefer, 265 Ill.App. 459.
Ind.—Carter v. Thomas, 3 Ind. 213.
Iowa.—McCornack v. Pickerell, 294 N.W. 746, 229 Iowa 457.
Tex.—Schaff v. Sanders, Civ.App., 257 S.W. 670, affirmed, Com.App., 269 S.W. 1034.
33 C.J. p 1134 note 10.

Statutory change of common-law rule discussed
Miss.—Scott v. Peebles, 10 Miss. 546, 561.

10. Ala.—Andalusia Motor Co. v. Mullins, 183 So. 456, 28 Ala.App. 201, certiorari denied 183 So. 460, 236 Ala. 474.
33 C.J. p 1134 note 10 [a].

11. U.S.—Scull v. Roane, Ark.Super., 21 F.Cas.No.12,570c, Hempst. 103.
Ill.—Western Stone Co. v. Whalen, 51 Ill.App. 512, affirmed 38 N.E. 241, 151 Ill. 472, 42 Am.S.R. 244.
33 C.J. p 1134 note 11.

irregularity which will render the judgment voidable rather than void.[12] If there was a demurrer to a defective count, which was erroneously overruled, the judgment is invalid where the record does not show affirmatively that the judgment rests exclusively on the good counts;[13] but all counts must be bad, however, to establish invalidity where there was no demurrer.[14] Where the verdict is special, and responsive to a good count, a judgment thereon is, of course, unobjectionable.[15] Where all the counts show a good cause of action, the judgment is not bad because it was general, although, on the evidence, plaintiff was not entitled to recover on some of the counts.[16]

§ 42. Issues

Ordinarily the pleadings in a cause must evolve an issue of law or fact before a judgment can regularly be rendered.

Subject to exceptions which may occur in the case of judgments by confession, consent, or default, as discussed infra §§ 150–151, 174, 193, or following submission on an agreed statement of facts under principles considered infra § 186, it is a general rule that the pleadings in a cause must evolve an issue of law or fact before a judgment can regularly be rendered.[17] A judgment rendered without issue joined or waived is erroneous,[18] some authorities holding that such a judgment is void[19] and others that it is merely voidable.[20] When an issue is tried which is not within the pleadings, no duty rests on the trial court to render judgment thereon and its failure or refusal to do so is not erroneous.[21]

§ 43. —— Determination of All Issues

Generally a judgment must dispose of all issues in the case, either expressly or by necessary implication.

The prevailing rule under common law and statutes declaratory thereof requires a judgment to determine all issues[22] among all the parties,[23] except such issues as are waived or abandoned on the trial of the case.[24] So the judgment must be as broad as the issues and must respond to all the issues both

12. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Hill, 71 P.2d 258, 9 Cal.2d 495.

13. Ill.—Lake Shore & M. S. Ry. Co. v. Barnes, 76 N.E. 629, 166 Ind. 7, 3 L.R.A.,N.S., 778.
33 C.J. p 1135 note 12.

14. Ind.—Kelsey v. Henry, 48 Ind. 37—Dice v. Morris, 32 Ind. 238.

15. Pa.—McCredy v. James, 6 Whart. 547.
Va.—Binns v. Waddill, 32 Gratt. 588, 73 Va. 588.

16. Ala.—Jones v. Belue, 200 So. 886, 241 Ala. 22.
33 C.J. p 1135 note 15.

17. W.Va.—Kinder v. Boomer Coal & Coke Co., 95 S.E. 530, 82 W.Va. 32.
33 C.J. p 1135 note 21.

Disposition of issues presented

In the interest of certainty, judicial judgments, should be limited strictly to disposition of issues actually presented.—Singer Mfg. Co. v. National Labor Relations Board, C.C.A., 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

Record held to show joinder of issue

Ala.—Denham v. Yancey, 95 So. 201, 19 Ala.App. 45, certiorari denied Ex parte Denham, 95 So. 202, 208 Ala. 637.

18. W.Va.—Cline v. Star Coal & Coke Co., 153 S.E. 148, 109 W.Va. 101.
33 C.J. p 1135 note 22.

19. La.—Lacour Plantation Co. v. Jewell, 173 So. 761, 186 La. 1055—Rector v. Allied Van Lines, App., 198 So. 516—Robinson v. Enloe, 121 So. 320, 10 La.App. 435.
Ohio.—Binns v. Isabel, 12 Ohio Supp. 113, affirmed 51 N.E.2d 501, 72 Ohio App. 222.
33 C.J. p 1135 note 24.

20. Tenn.—Doyle v. Smith, 1 Coldw. 15.

21. Neb.—Bowman v. Cobb, 258 N.W. 535, 128 Neb. 289.

22. Cal.—Mather v. Mather, 140 P.2d 808, 22 Cal.2d 713—Nakamura v. Kondo, 223 P. 425, 65 Cal.App. 211.
Ga.—South View Cemetery Ass'n v. Hailey, 34 S.E.2d 863, 199 Ga. 478.
Mo.—Ex parte Fowler, 275 S.W. 529—Gay v. Kansas City Public Service Co., App., 77 S.W.2d 133—Nokes v. Nokes, App., 8 S.W.2d 879—Springfield Gas & Electric Co. v. Fraternity Bldg. Co., App., 264 S.W. 429.
N.Y.—Water Right & Electrical Co. v. Rockland Light & Power Co., 280 N.Y.S. 317, 245 App.Div. 739—MacIvor v. Schwartzman, 260 N.Y.S. 707, 237 App.Div. 825.
Okl.—Hurley v. Hurley, 127 P.2d 147, 191 Okl. 194—Foreman v. Riley, 211 P. 495, 88 Okl. 75.
Tex.—Southern Pac. Co. v. Ulmer, Com.App., 286 S.W. 193—Harris v. O'Brien, Civ.App., 54 S.W.2d 277.
Wyo.—Norris v. United Mineral Products Co., 158 P.2d 679.
33 C.J. p 1135 note 26.

Disputed items; remission

(1) In action on note and open account, judgment cannot be entered for admitted indebtedness reserving disputed items for subsequent trial, as this would result in two judgments in one action.—Lakin-Allen Electric Co. v. Lamb, 226 N.W. 229, 247 Mich. 590.

(2) If defendant tenders judgment for a confessed amount, however, plaintiff may take judgment for such amount, and thereby remit amount in dispute.—Grand Dress v. Detroit Dress Co., 227 N.W. 723, 248 Mich. 447.

Either party may complain of and have reversal of judgment which does not have effect of determining sole issue as to existence of contract on which plaintiff seeks to recover.—McKeel v. Mercer, 29 P.2d 939, 167 Okl. 413.

23. Mo.—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389.
Tex.—Patton v. Mitchell, Civ.App., 13 S.W.2d 146.

24. D.C.—Anderson v. Mackey, 16 D.C. 335.
Ky.—Hurley v. Hurley, 127 P.2d 147, 191 Okl. 194.
Okl.—Foreman v. Riley, 211 P. 495, 88 Okl. 75—Wells v. Shriver, 197 P. 460, 81 Okl. 108.
33 C.J. p 1136 note 28.

Counterclaim

In absence of showing that defendants pressed counterclaim, defendants will be held to have acquiesced in rendition of judgment dismissing petition without disposing of counterclaim.—City of St. Louis ex rel. and to Use of Sears v. Clark, Mo.App., 85 S.W.2d 936.

of law and fact,[25] and it must dispose of the entire subject matter of the litigation[26] and conclude all further inquiry into the issues joined by the pleadings, leaving nothing further to be done except to carry the judgment into execution.[27] In rendering judgment the court may, however, properly disregard an immaterial issue.[28] A judgment will be held sufficient if it disposes of material issues by necessary implication even though it does not do so in formal terms,[29] and as a rule it will be presumed that the court passed on all questions properly presented which under its own ruling it was possible for it to adjudge.[30]

Ordinarily judgment should not be rendered without disposing of matters raised by defendant's pleadings,[31] such as a counterclaim[32] or cross complaint,[33] unless the determination of the issue on which the judgment is based is necessarily decisive of the whole case[34] or the actions have been separated under statutes or court rules permitting such practice.[35] An answer filed by one of several defendants, which may be or become common to all, and which goes to the right of plaintiff to recover, precludes judgment against a codefendant until the issues have been disposed of by the court.[36] It has been held improper to render judgment on an intervention without at the same time acting on the principal action.[37]

25. Mo.—Magee v. Mercantile-Commerce Bank & Trust Co., 98 S.W. 2d 614, 339 Mo. 559—Lummi Bay Packing Co. v. Kryder, App., 263 S.W. 543.
Pa.—Thompson v. Emerald Oil Co., 123 A. 810, 279 Pa. 321.
Tex.—Standard Motor Co. v. Wittman, Civ.App., 271 S.W. 186—Fort Worth Acid Works v. City of Fort Worth, Civ.App., 248 S.W. 822, affirmed City of Fort Worth v. Fort Worth Acid Works Co., Com.App., 259 S.W. 919.
33 C.J. p 1136 note 27.

26. Tex.—Southern Trading Co. of Texas v. Feldman, Com.App., 259 S.W. 566—Patton v. Mitchell, Civ. App., 13 S.W.2d 146—Lindsey v. Hart, Civ.App., 260 S.W. 286.

27. Okl.—Foreman v. Riley, 211 P. 495, 88 Okl. 75.

28. Tex.—Miller v. Lemm, Com. App., 276 S.W. 211.

29. Ga.—Pittman Const. Co. v. City of Marietta, 172 S.E. 644, 177 Ga. 573.
Tex.—Medearis v. Buratti, Civ.App., 275 S.W. 617—Panhandle Grain & Elevator Co. v. Dowlin, Civ.App., 247 S.W. 873.
Judgment upheld as sufficiently disposing of all issues
Mo.—Saxbury v. Coons, 98 S.W.2d 662.
Tex.—Whisenant v. Cole, Civ.App., 285 S.W. 835—Mathis v. Overland Automobile Co. of Dallas, Civ. App., 265 S.W. 1069.

30. Ga.—South View Cemetery Ass'n v. Hailey, 34 S.E.2d 863, 199 Ga. 478.
Tex.—Cramer v. Cornell, Civ.App., 108 S.W.2d 1115, reversed on other grounds 130 S.W.2d 1023, 134 Tex. 17.
Effect of recital
Recital in judgment that issues were found for defendant means all essential issues, including those raised by denial.—Di Blasi v. Di Blasi, 163 A. 473, 116 Conn. 699.
Irrespective of whether or not pleaded, on the basis of inescapable inherency, it may be assumed that the court passed on a constitutional question involved in the decision rendered.—State ex rel. Rose v. Webb City, 64 S.W.2d 597, 333 Mo. 1127, transferred, see, App., 74 S.W. 2d 45.

31. Ky.—Jones v. Stearns, 260 S.W. 373, 202 Ky. 598.
S.C.—Watson v. Matley, 114 S.E. 412, 121 S.C. 482.
W.Va.—Rosier v. McDaniel, 28 S.E. 2d 908, 126 W.Va. 434.
33 C.J. p 1136 note 29.
Equitable defense
Ky.—Jones v. Stearns, 260 S.W. 373, 202 Ky. 598.
Plea of privilege
Trial court was unauthorized to render judgment on merits until it had finally disposed of plea of privilege; and a controverting affidavit to plea of privilege presents real issues which must be tried and disposed of before, or at time of, disposition of main cause, unless waived.—Smith v. Watson, Tex.Civ.App., 44 S.W.2d 815.

32. Ky.—Great Atlantic & Pacific Tea Co. v. Lexington-Hazard Express Co.'s Receiver, 54 S.W.2d 631, 246 Ky. 102.
Mo.—Liepman v. Rothschild, 262 S. W. 685, 216 Mo.App. 251.

33. Cal.—Browne v. T. J. Lawrence Co., 268 P. 631, 204 Cal. 424.

34. Ky.—Haywood v. Gooch, 86 S. W.2d 665, 260 Ky. 667.
Mo.—City of St. Louis ex rel. and to Use of Sears v. Clark, App., 35 S.W.2d 986.
Tex.—Threadgill v. Fagan, Civ.App., 64 S.W.2d 405—Williams v. Walker, Civ.App., 290 S.W. 299—Pomona Mut. Oil Syndicate v. Williamsport Wire Rope Co., Civ.App., 282 S.W. 958.
33 C.J. p 1136 note 30.
Necessary implication
(1) Set-off or counterclaim need not be expressly mentioned in judgment, provided it is disposed of by necessary implication.—Prim v. Latham, Tex.Civ.App., 6 S.W.2d 173, error refused.
(2) Judgment for plaintiff for amount sued for without mentioning cross action by necessary implication disposes of entire case.—Panhandle Compress & Warehouse Co. v. Best, Tex.Civ.App., 58 S.W.2d 140.
Unliquidated amount
Where plaintiffs' claim was partially unliquidated and defendants' counterclaim was also for unliquidated amount, judgment was in proper form and not for an impossible amount, judgment must be affirmed, even though no reference was made therein to the counterclaim.—Zappolo v. Lanigan, 285 N. Y.S. 863, 246 App.Div. 443, affirmed 4 N.E.2d 815, 272 N.Y. 584.

35. Tex.—Latshaw v. Barnes, Civ. App., 170 S.W.2d 531.
Segregation under civil procedure rule
Where court, under civil procedure rule, segregated cause of action arising on petition of intervention and tried that cause separate from original cause of action and cross actions, court was authorized to enter separate and final judgment on such petition without finally disposing of issues raised by original suit or cross actions.—Latshaw v. Barnes, supra.

36. Ky.—Rucker v. Baker, 177 S.W. 2d 878, 296 Ky. 505.

37. La.—Tickfaw Homegrowers' Ass'n v. Gallodoro, 132 So. 767, 15 La.App. 686.
Garnishment
Judgment awarding plaintiff in garnishment suit, two interveners and garnishee amounts totaling less than sum shown by garnishee's answer to be due third intervener on judgment, claimed by latter to be exempt from garnishment, held not erroneous as failing to dispose of amount in controversy, remainder of funds in garnishee's hands being

A failure to pass on a motion is immaterial, as the entry of judgment is in effect a final disposition of motions previously filed.[38]

Partial judgment under statute or rule. Under statutes or court rules providing that, where after answer part of plaintiff's claim is admitted or uncontested, plaintiff may have judgment for so much of his claim, subject to such terms as may be just, the intent is to enable the court of first instance to clear away portions of a claim or defense not involving disputed questions of fact by entering a partial judgment thereon.[39] Such a statute should not be so construed as to permit a judgment on part of a cause of action where the part is an incomplete fragment of an entire claim which cannot be thus divided without mutilation.[40]

§ 44. Evidence

As a general rule a judgment must be supported by legally adduced evidence of a substantial and sufficient character, and a judgment may not rest on mere speculation, surmise, or suspicion.

While exceptions may occur in respect of judgments by confession or consent, or those entered on admissions or default, under principles discussed infra §§ 162, 174, 185, 210–213, as a general rule the evidence must sustain the judgment,[41] proof being as essential to the support of a judgment as pleading.[42] The evidence must be of a substantial character,[43] sufficient to support the judgment rendered.[44] The judgment must be founded on suffi-

in effect awarded to third intervener as exempt without necessity for rendition of judgment in his favor for such amount.—Coles v. Fewel, Tex.Civ.App., 80 S.W.2d 323, error dismissed.

38. Ill.—Washington Park Club v. Baldwin, 59 Ill.App. 61.
33 C.J. p 1137 note 85.

39. N.J.—Warren Balderston Co. v. Ivory, 16 A.2d 617, 125 N.J.Law 469.

40. N.Y.—Lowe v. Lowe, 192 N.E. 291, 265 N.Y. 197.

41. Cal.—Sheehy v. Roman Catholic Archbishop of San Francisco, 122 P.2d 60, 49 Cal.App.2d 537.
Ill.—Oak Park Trust & Savings Bank v. Soulias, 8 N.E.2d 159, 284 Ill.App. 646.
Ky.—Producers' Coal Co. of Kentucky v. Barnaby, 275 S.W. 625, 210 Ky. 244—City Bank & Trust Co. of Hopkinsville v. Dark Tobacco Growers' Co-op. Ass'n, 272 S.W. 751, 209 Ky. 330.
Mo.—American Extension School of Law v. Ragland, 112 S.W.2d 110, 232 Mo.App. 763—Erie City Iron Works v. Ferer, App., 263 S.W. 1008.
N.J.—Automobile Ins. Co. of Hartford, Conn. v. Conway, 158 A. 480, 109 N.J.Eq. 628—Rich v. Inter-City Transp. Co., 165 A. 296, 11 N.J.Misc. 243.
N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.
Or.—U. S. Fidelity & Guaranty Co. v. Zidell-Steinberg Co., 50 P.2d 584, 151 Or. 538, modified on other grounds 51 P.2d 687, 151 Or. 538.
S.D.—Morrison v. Connery, 229 N.W. 392, 56 S.D. 469.
Tex.—Cohen v. City of Houston, Civ. App., 185 S.W.2d 450—Shackelford v. Neilon, Civ.App., 100 S.W.2d 1037—Motley v. Tom Green County, Civ.App., 93 S.W.2d 768, reversed on other grounds Tom Green County v. Motley, 118 S.W. 2d 306, 132 Tex. 54—Matrimonial Mut. Ass'n of Texas v. Rutherford, Civ.App., 41 S.W.2d 719, error dismissed—Gilmer v. Graham, Civ. App., 26 S.W.2d 687, reversed on other grounds, Com.App., 52 S.W. 2d 263—National Life & Accident Ins. Co. of Tennessee v. Washington, Civ.App., 295 S.W. 204—Austin Bros. Bridge Co. v. Road Dist. No. 3 of Liberty County, Civ.App., 247 S.W. 674.
Conformity of judgment to proof generally see infra §§ 47–54.

Arbitrary declaration if without evidence

A judgment, entered without hearing evidence on basic issues of fact, is only arbitrary declaration of judge, having no reference to liability involved, even though purporting to be judicial determination of judgment creditors' rights.—Burket v. Reliance Bank & Trust Co., 11 N.E. 2d 6, 367 Ill. 196.

42. Ky.—Consolidation Coal Co. v. King, 244 S.W. 303, 196 Ky. 54.
Tenn.—Poster v. Andrews, 189 S. W.2d 580.
Tex.—Birdville Independent School Dist. v. Deen, Civ.App., 141 S.W.2d 680, affirmed Deen v. Birdville Independent School Dist., 159 S.W.2d 111, 138 Tex. 339—Forman v. Barron, Civ.App., 120 S.W.2d 827, error refused—Shackelford v. Neilon, Civ.App., 100 S.W.2d 1037—Traders & General Ins. Co. v. Lincecum, Civ.App., 81 S.W.2d 549, reversed on other grounds 107 S. W.2d 585, 130 Tex. 220—Karr v. Cockerham, Civ.App., 71 S.W.2d 905, error dismissed—Morten Inv. Co. v. Trevey, Civ.App., 8 S.W.2d 527, error dismissed—Humble Oil & Refining Co. v. Southwestern Bell Telephone Co., Civ.App., 2 S. W.2d 488.
33 C.J. p 1142 note 59.

43. U.S.—U. S. v. Perry, C.C.A.Ark., 55 F.2d 819.
Miss.—Moore v. Sykes' Estate, 149 So. 789, 167 Miss. 212.
Mont.—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312.
N.M.—Jones v. Jernigan, 223 P. 100, 29 N.M. 399.

44. Ark.—Brunson v. Teague, 186 S. W. 78, 123 Ark. 594.
Fla.—Blue Lake Celery Co. v. Peyton-Lofberg Live Stock Co., 94 So. 862, 84 Fla. 675.
Ga.—Georgia Power Co. v. Woodall, 172 S.E. 76, 48 Ga.App. 85.
Idaho.—Muckle v. Hill, 187 P. 943, 32 Idaho 661.
Ill.—Hopper v. Hopper, 41 N.E.2d 786, 314 Ill.App. 572.
Ky.—Jordan v. City of Olive Hill, 162 S.W.2d 229, 290 Ky. 828.
Neb.—Macumber v. Thomas, 207 N. W. 31, 114 Neb. 290.
N.Y.—Samuel Strauss & Co. v. Katz, 206 N.Y.S. 246, 210 App.Div. 405—Raby v. Greater New York Development Co., 135 N.Y.S. 813, 151 App.Div. 72, affirmed 104 N. E. 1139, 210 N.Y. 586—Phelan v. New York Central & H. R. R. Co., 113 N.Y.S. 35—Putzel v. Fargo, 103 N.Y.S. 766—Simon v. Danziger, 98 N.Y.S. 674.
Okl.—Steiner v. Steiner, 10 P.2d 641, 156 Okl. 255—Barstow v. Chaffee, 239 P. 622, 112 Okl. 81.
Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.
Tex.—Ketch v. Weaver Bros., Com. App., 276 S.W. 676—Cohen v. City of Houston, Civ.App., 185 S.W.2d 450—Spradlin v. Gibbs, Civ.App., 159 S.W.2d 246—Corona Petroleum Co. v. Jameson, Civ.App., 146 S. W.2d 512, error dismissed, judgment correct—Christie v. Hudspeth County Conservation and Reclamation Dist. No. 1, Civ.App., 64 S.W.2d 978—Carpenter v. Parmer County, Civ.App., 51 S.W.2d 829.

cient facts legally ascertained,[45] and cannot rest on evidence of an incompetent character,[46] or which was never adduced in court,[47] such as matters not put in evidence of which the court took judicial notice.[48] A judgment may not rest on conjecture and speculation[49] or on mere surmise or suspicion,[50] nor may a judgment find support in assumptions[51] or in possibilities or probabilities falling short of actual proof.[52] While an inference of the truth of facts essential to a cause of action will support a judgment rendered in accordance with such facts,[53] the court should not base its judgment on a state of facts so inadequately developed that it cannot be determined where inference ended and conjecture began.[54] However, it is not essential to the validity of a judgment that it rest entirely on uncontradicted evidence,[55] and it is not fatal that a different conclusion might have been reached on all

Wash.—Johnson v. Goodenough, 175 P. 306, 103 Wash. 625.

33 C.J. p 1141 note 57, p 1142 note 58, p 1164 note 96—47 C.J. p 1009 note 88.

Prima facie case

Even though defendant files no answer, plaintiff in civil proceeding, whether summary or ordinary, must at least make out prima facie case before being entitled to judgment. —Grosjean v. Wallace Johnson Motor Co., La.App., 171 So. 134.

Evidence held sufficient to support judgment

(1) Generally.

U.S.—State Bank of New York v. Henderson County, Ky., C.C.A.Ky., 35 F.2d 859, certiorari denied Henderson County, State of Kentucky, v. State Bank of New York, 50 S. Ct. 245, 281 U.S. 728, 74 L.Ed. 1144, 1145.

Ky.—Small v. Minton, 192 S.W.2d 184.

Tex.—St. Louis Southwestern Ry. Co. of Texas v. Neely, Civ.App., 296 S.W. 948.

(2) Judgment foreclosing mechanics' liens held not objectionable as rendered on unverified account to admissibility of which defendants excepted, where other facts showed amount due.—Boozer v. Smith, Tex. Civ.App., 36 S.W.2d 1064, error dismissed.

(3) A judgment which did not state whether it was based on one or both counts of declaration was without error if evidence sustained either count.—Yeats v. Moody, 175 So. 719, 128 Fla. 658.

(4) Judgment solely on evidence prior to filing of amended pleadings bringing in new parties held not erroneous where court prior to judgment ordered dismissal of new parties and no new issue was raised by amendment.—McCreary v. Falconer, 44 P.2d 303, 3 Cal.2d 335.

45. Tex.—Motley v. Tom Green County, Civ.App., 93 S.W.2d 768, reversed on other grounds Tom Green County v. Motley, 118 S.W. 2d 306, 132 Tex. 54—Blalock v. Jones, Civ.App., 1 S.W.2d 400, error dismissed.

46. Mich.—Refrigerating Equipment Co. v. Finch, 242 N.W. 217, 257 Mich. 623.

Tex.—Hood v. Robertson, Civ.App., 33 S.W.2d 882.

W.Va.—Board of Trustees of Lewis Prichard Charity Fund v. Mankin Inv. Co., 193 S.E. 805, 119 W.Va. 391.

Unlawful search and seizure

A civil judgment, in the procurement of which evidence obtained through unlawful search and seizure in violation of the Fourth Amendment to federal Constitution is used, is invalid.—Rogers v. U. S., C.C.A.R. I., 97 F.2d 691.

Evidence as to unpleaded matters

(1) Evidence not based on any pleadings is incompetent and will not support a judgment, even though admitted by court without objection. —Stone v. Boone, Tex.Civ.App., 160 S.W.2d 578, error refused.

(2) Evidence adduced on an issue not made by the pleadings will not support a judgment.—Mullinax v. Snorgrass, Tex.Civ.App., 33 S.W.2d 1080, error refused.

(3) Necessity of pleadings as well as evidence to support judgment see supra § 40.

Evidence which has been stricken will not sustain a judgment.—In re Jolly's Estate, 229 Ill.App. 508.

47. Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W. 2d 1061.

Pa.—Riedrich v. Riedrich, 62 Pa. Super. 189.

Tex.—Church v. Western Finance Corporation, Civ.App., 22 S.W.2d 1074.

Unoffered exhibits

Mo.—Carroll v. Carroll, App., 237 S. W. 843—Taylor v. Fuqua, 219 S.W. 971, 203 Mo.App. 581.

48. Mo.—Hume v. Wright, 274 S.W. 741—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061.

49. U.S.—Deposit Guaranty Bank & Trust Co. v. U. S., D.C.Miss., 48 F.Supp. 369—Orrill v. Prudential Life Ins. Co. of America, D.C.Cal., 44 F.Supp. 902—Greenwood Compress & Storage Co. v. Fly, D.C. Miss., 24 F.Supp. 168, reversed on other grounds, C.C.A., 102 F.2d 600.

Ky.—Central Kentucky Natural Gas Co. v. Williams, 60 S.W.2d 580, 249 Ky. 242.

Mich.—Michigan Aero Club v. Shelley, 278 N.W. 121, 283 Mich. 401.

Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484—Furr v. Brookhaven Creamery, 192 So. 838, 188 Miss. 1.

Mo.—Locke v. Warden, App., 179 S. W.2d 624—Brinker v. Miller, App., 162 S.W.2d 295—Bauer v. Wood, 154 S.W.2d 356, 236 Mo.App. 266.

Nev.—Richards v. Vermilyea, 175 P. 188, 42 Nev. 294, rehearing denied 180 P. 121, 42 Nev. 294.

50. Cal.—De Hart v. Allen, 111 P.2d 342, 43 Cal.App.2d 479.

Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.

Existence of fact

If evidence raises only a surmise or suspicion of the existence of a fact sought to be established, a judgment will not be permitted to rest on such fact.—Shell Oil Co. v. Howth, 159 S.W.2d 483, 138 Tex. 357.

51. La.—Cali v. Cloverland Dairy Products Co., App., 21 So.2d 166.

Nev.—Richards v. Vermilyea, 175 P. 188, 42 Nev. 294, rehearing denied 180 P. 121, 42 Nev. 294.

52. La.—Evans v. Campbell, App., 9 So.2d 91.

Mich.—Michigan Aero Club v. Shelley, 278 N.W. 121, 283 Mich. 401.

Miss.—Furr v. Brookhaven Creamery, 192 So. 838, 188 Miss. 1.

Pa.—Winograd v. Coombs, 20 A.2d 315, 342 Pa. 268.

What might have been

Judgments cannot be rendered on what might have been, but there must be proof fairly tending to establish fact alleged.—Salaban v. East St. Louis & Interurban Water Co., 1 N.E.2d 731, 284 Ill.App. 358.

53. Cal.—Gish v. Los Angeles Ry. Corporation, 90 P.2d 792, 13 Cal. 2d 570.

54. Miss.—Moore v. Sykes' Estate, 149 So. 789, 167 Miss. 212.

55. Okl.—Bradley v. Little, 134 P.2d 126, 192 Okl. 121.

Function of jury

Trial court is under no duty to determine by its judgment truth or falsity of evidentiary facts, which is for jury incidentally as a means of determining its verdict.—Southern Pine Lumber Co. v. Whiteman,

the evidence adduced;[56] but a valid judgment may not be predicated on evidence that cannot be true.[57]

The insufficiency of supporting evidence has in some instances been held to render a judgment void,[58] but in others it has been regarded as rendering the judgment merely erroneous but not void.[59] It has been held that a judgment is not rendered void by irregularities in the taking of proof,[60] or by perjured testimony.[61]

§ 45. Verdict and Findings

A valid judgment must be predicated on the decision, findings, or verdict of the trial court or jury.

The issues raised by the pleadings, whether of law or fact, must be determined in favor of one party or the other before judgment can be entered; there must be either decision or findings by the court or referee[62] or the verdict of a jury.[63] Where a case is tried to the court and a jury is called to

Tex.Civ.App., 104 S.W.2d 635, error dismissed.

56. Okl.—Bradley v. Little, 134 P.2d 126, 192 Okl. 121.

57. U.S.—F. W. Woolworth Co. v. Davis, C.C.A.Okl., 41 F.2d 342, certiorari denied 51 S.Ct. 33, 282 U.S. 859, 75 L.Ed. 760.

Total disability

Evidence that an insured was totally disabled within the meaning of a war risk insurance policy could not support a judgment on the policy where such evidence could not have been true in view of the fact that it was conclusively shown that during the period of alleged total disability insured continuously followed a substantially gainful occupation.—U. S. v. Perry, C.C.A.Ark., 55 F.2d 819.

58. La.—Fields v. McAdams, App., 15 So.2d 246.
N.J.—Gimbel Bros v. Corcoran, 192 A. 715, 15 N.J.Misc. 538.
Tenn.—Lewis v. Burrow, 127 S.W.2d 795, 23 Tenn.App. 145.

Fundamental error

A judgment unsupported by testimony is fundamentally erroneous.—Norvell-Shapleigh Hardware Co. v. Lumpkin, Tex.Civ.App., 150 S.W. 1194.

59. Ky.—Starbird v. Blair, 12 S.W. 2d 693, 227 Ky. 258—Reed v. Runyan, 10 S.W.2d 824, 226 Ky. 261—Sizemore v. Hunter, 269 S.W. 542, 207 Ky. 453—Spencer v. Milliken, 4 Ky.L. 856.
N.Y.—Jordan v. Van Epps, 85 N.Y. 427—In re Jenkins, 117 N.Y.S. 74, 132 App.Div. 339.
Tenn.—Globe & Republic Ins. Co. of America v. Shields, 96 S.W.2d 947, 170 Tenn. 485.
33 C.J. p 1141 note 57 [a]—34 C.J. p 563 note 23.

Secondary evidence

Judgment based on secondary evidence is not within itself void.—Busby v. First Nat. Bank, Tex.Civ.App., 68 S.W.2d 328, error dismissed.

60. Ky.—Haddix v. Walter, 266 S. W. 631, 205 Ky. 740.

Failure to take down testimony in writing and file it was held not to render decree void.—Malone v. Meres, 109 So. 677, 91 Fla. 709.

61. Colo.—Hunt v. Hunt, 264 P. 662, 83 Colo. 282, error dismissed 49 S.Ct. 186, 278 U.S. 583, 73 L.Ed. 519.
D.C.—Hodge v. Huff, 140 F.2d 686, 78 U.S.App.D.C. 329, certiorari denied 64 S.Ct. 946, 322 U.S. 733, 88 L. Ed. 1567.
Perjury as ground for:
Collateral attack see infra § 434.
Equitable relief against judgment see infra § 374.
Opening and vacating judgment see infra § 270.

62. Cal.—Easterly v. Cook, 85 P.2d 164, 140 Cal.App. 115.
Ga.—**Corpus Juris cited in** Holton v. Lankford, 6 S.E.2d 304, 310, 189 Ga. 506.
Md.—Carozza v. Brannan, 46 A.2d 198.
N.Y.—Fuller v. Galeota, 51 N.Y.S.2d 101, 268 App.Div. 949—Donato v. Granite State Fire Ins. Co., 288 N.Y.S. 639, 248 App.Div. 736—Flagg v. Moses, 225 N.Y.S. 508, 222 App.Div. 762, motion denied 226 N.Y.S. 892, 222 App.Div. 821, and affirmed 162 N.E. 504, 248 N. Y. 509—Abell v. Hunter, 207 N.Y. S. 203, 211 App.Div. 467, affirmed 148 N.E. 765, 240 N.Y. 702—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 168, 131 Misc. 401, affirmed 230 N.Y.S. 910, 224 App. Div. 773.
Pa.—Massachusetts Bonding & Insurance Co. v. Johnston & Harder, 16 A.2d 444, 340 Pa. 253.
S.D.—Central Loan & Investment Co. v. Loiseau, 239 N.W. 487, 59 S.D. 255.
Utah.—Beneficial Life Ins. Co. v. Mason, 160 P.2d 734—Mason v. Mason, 160 P.2d 730—Evans v. Shand, 280 P. 239, 74 Utah 451.
Vt.—Town of Randolph v. Lyon, 175 A. 1, 106 Vt. 495.
33 C.J. p 1137 note 37—64 C.J. p 1223 note 32.

Findings as equivalent to verdict

For the purposes of judgment, the trial court's findings of fact have the effect of a "verdict".—Watson v. Missouri-Kansas-Texas R. Co. of Texas, Tex.Civ.App., 173 S.W.2d 357.

When findings unnecessary

Findings of fact by the court have been held unnecessary where there is a verdict.—Dye v. Russell, 40 N. W. 416, 24 Neb. 829.

Conclusions inconsistent

If findings support judgment, inconsistencies between conclusions are immaterial and do not vitiate judgment.—Klein Norton Co. v. Cohen, 290 P. 613, 107 Cal.App. 325.

63. U.S.—Connally v. Louisville & N. R. Co., C.C.A.Miss., 297 F. 180.
Ala.—Scott v. Parker, 113 So. 495, 216 Ala. 321.
Cal.—Vitimin Milling Corporation v. Superior Court in and for Los Angeles County, 33 P.2d 1016, 1 Cal. 2d 116.
Ga.—**Corpus Juris cited in** Holton v. Lankford, 6 S.E.2d 304, 310, 189 Ga. 506.
Mo.—Newdiger v. Kansas City, App., 106 S.W.2d 51, affirmed 114 S.W.2d 1047, 342 Mo. 252.
N.C.—Miller v. Dunn, 124 S.E. 746, 188 N.C. 397.
Tex.—American Nat. Ins. Co. v. Points, Civ.App., 81 S.W.2d 762, error dismissed—Dallas Coffin Co. v. Yeager, Civ.App., 19 S.W.2d 156, error dismissed—Cisco Building & Loan Ass'n v. Mason, Civ.App., 12 S.W.2d 1106—Hair v. Wichita Valley Ry. Co., Civ.App., 274 S.W. 247—Fort Worth & D. C. Ry. Co. v. Lowrie, Civ.App., 271 S.W. 263.
Va.—Scheckler v. Anderson, 29 S.E. 2d 867, 182 Va. 761.
33 C.J. p 1137 note 38.

Indispensable step

Where there was no waiver of a trial by jury, its verdict was an indispensable step in the proceedings, and trial court was without power to enter a final judgment in absence thereof.—Heath v. Moers, 199 S.E. 519, 171 Va. 397.

Approval of verdict

The trial court must approve a verdict before a judgment can be based on it.—Frakes v. Travelers Mut. Casualty Co., 84 P.2d 871, 148 Kan. 637.

make findings as to certain issues, judgment should be rendered on the basis of findings of the jury accepted by the court, plus findings of fact made by the court on other issues and conclusions of law based on all such findings.[64]

A valid judgment must rest on findings, express or implied, on all material issues.[65] The findings of the court[66] or the findings or verdict of the jury[67] must be of a character sufficient to support the judgment rendered, and ordinarily the latter may not be aided by intendment or reference to extrinsic facts.[68] Although it has been held that it must appear that there was a direct and affirmative finding on every issue of fact essential to recovery,[69] it has also been held that, where the court fails to make formal findings, every finding justified by the record and necessary to support the judgment will be implied,[70] and that a general judgment is deemed

64. Cal.—Alphonzo E. Bell Corp. v. Listle, App., 169 P.2d 462.

Matter jurisdictional

Findings on issues other than those specifically found by jury in answer to special interrogatories being necessary to support judgment, matter held jurisdictional, findings not having been waived.—Central Loan & Investment Co. v. Loiseau, 239 N.W. 487, 59 S.D. 255.

65. Mont.—Blaser v. Clinton Irrigation Dist., 53 P.2d 1141, 100 Mont. 459.

N.C.—Eborn v. Ellis, 35 S.E.2d 238, 225 N.C. 386.

Tex.—English v. Blackwood, Civ. App., 128 S.W.2d 895, error dismissed, judgment correct.

Wis.—Witt v. Wonser, 219 N.W. 344, 195 Wis. 593.

Omnibus finding that material allegations in named paragraphs of defendant's affirmative defense were not proved was insufficient to support judgment.—Gordon v. Beck, 239 P. 309, 196 Cal. 768.

General verdict

(1) Judgment cannot be supported by jury's determination on isolated issues in answer to special interrogatories without general verdict.—Central Loan & Investment Co. v. Loiseau, 239 N.W. 487, 59 S.D. 255.

(2) In action on disability clause of group life and health policy, verdict for insured for total amount of his certificate held "general verdict" which could serve as proper basis for judgment.—Equitable Life Assur. Soc. of U. S. v. Goble, 72 S.W.2d 35, 254 Ky. 614.

Special verdict

Where special verdict contains no finding on vital issue of fact, concerning which testimony is conflicting, it will not support judgment for plaintiff.—Hintz v. Jackson, 198 N. W. 475, 51 N.D. 13.

Verdict requiring entry of judgment

Although jury need not in all cases answer all issues presented, before judgment can be entered for either party, the verdict must be such as to require the entry of a judgment.—Bowen Motor Coaches v. Young, Tex.Civ.App., 138 S.W.2d 145.

Where there was no finding on certain evidence, judgment could not be held to have been based thereon.—Willard v. Glenn-Colusa Irr. Dist., 258 P. 959, 201 Cal. 726.

Judgment on merits

Fact findings are made by court only on issues raised by pleadings and evidence produced on trial, and judgments on merits are entered only on findings so made, rulings on demurrer when pleading over is not served, or motion for judgment on pleadings, agreed case, or consent of party against whom it runs.—Angers v. Sabatinelli, 1 N.W.2d 765, 239 Wis. 664—Luebke v. City of Watertown, 284 N.W. 519, 230 Wis. 512.

66. Cal.—Winstanley v. Ackerman, 294 P. 449, 110 Cal.App. 641.

Mo.—Buschow Lumber Co. v. Union Pac. R. Co., 276 S.W. 409, 220 Mo.App. 743—Kentling & Kentling v. Magers, App., 256 S.W. 528.

N.J.—Motor Finance Corporation v. Tar Asphalt Trucking Co., 21 A.2d 350, 127 N.J.Law 60.

N.Y.—Sutphen v. Morey, 212 N.Y.S. 43, 214 App.Div. 164.

Or.—State v. Warren Const. Co., 276 P. 260, 129 Or. 58.

83 C.J. p 964 note 60.

Finding supported by inadmissible evidence

Judgment based on finding supported by inadmissible evidence is erroneous.—Donnell v. Baker, Tex. Civ.App., 15 S.W.2d 120, error dismissed.

Judgment held sufficiently supported by findings

(1) Generally.

Cal.—Arena v. Bank of Italy, 228 P. 441, 194 Cal. 195.

Vt.—Campbell v. Ryan, 22 A.2d 502, 112 Vt. 238—Cooley v. Hatch, 124 A. 589, 97 Vt. 484.

(2) It has been held that a decree, finding that certain of the parties to the suit are owners of the real estate in controversy, fixing the interest of each, and decreeing partition accordingly, is not defective because without general findings of fact.—Rackemann v. Tilton, 86 N.E. 168, 236 Ill. 49.

67. Colo.—Ætna Casualty & Surety Co. v. Finance Service Corporation, 226 P. 153, 75 Colo. 432.

Ill.—Warfield v. Patterson, 135 Ill. App. 307, appeal dismissed 84 N. E. 176, 233 Ill. 147.

N.H.—Holman v. Kingsbury, 4 N.H. 104.

Tex.—Houston, E. & W. T. Ry. Co. v. Browder, Com.App., 283 S.W. 154—Union Indemnity Co. v. Colorado Nat. Bank, Civ.App., 33 S.W. 2d 257—Ratcliffe v. Ormsby, Civ. App., 298 S.W. 930, error denied Ormsby v. Ratcliffe, 1 S.W.2d 1084, 117 Tex. 242—Jaco v. W. A. Nash Co., Civ.App., 269 S.W. 1089.

Wash.—Bino v. Veenhuizen, 250 P. 450, 141 Wash. 18, 49 A.L.R. 1297.

Advisory verdict

Jury verdict, effect of which is advisory only, will not support judgment.—Central Loan & Investment Co. v. Loiseau, 239 N.W. 487, 59 S.D. 255.

Support by evidence

Unless jury's finding is supported by evidence, judgment should not be entered thereon.—Houston & T. C. R. Co. v. Pruitt, Tex.Civ.App., 293 S.W. 627.

Judgment sufficiently supported by jury findings or verdict

Cal.—Fairbanks v. Macready, 268 P. 947, 92 Cal.App. 156—Cadwallader v. Martin, 257 P. 538, 83 Cal. App. 666.

Okl.—Houser v. Ivey, 249 P. 141, 119 Okl. 42.

Tex.—Martin v. Hays, Civ.App., 36 S.W.2d 796, error refused.

68. Ala.—Capital Cab Co. v. Montgomery Fair, 104 So. 891, 20 Ala. App. 648, certiorari denied Ex parte Capital Cab Co., 104 So. 892, 213 Ala. 429.

69. Ala.—Capital Cab Co. v. Montgomery Fair, 104 So. 891, 20 Ala. App. 648, certiorari denied Ex parte Capital Cab Co., 104 So. 892, 213 Ala. 429.

Conclusion of ultimate fact

A statement in judgment or decree, entered after hearing conflicting evidence, may be regarded as conclusion of ultimate fact or at least of mixed law and fact, even though same allegation in pleading might be construed as conclusion of law.—Label v. Sullivan, 165 S.W.2d 639, 350 Mo. 286.

70. Mont.—Blaser v. Clinton Irr. Dist., 53 P.2d 1141, 100 Mont. 459.

to include a special finding on all issues necessary to sustain it.[71] While a valid judgment may not be based on findings or verdict as to an immaterial issue,[72] where the judgment otherwise finds sufficient support, the fact that some of the findings are immaterial or without the issues will not invalidate it.[73] The failure to find as to a particular issue of fact is immaterial where the fact is admitted.[74]

A judgment rendered without either verdict or findings is irregular and erroneous,[75] and has been held premature and void;[76] but the more generally accepted view is that such a judgment is merely voidable and is not absolutely void[77] and that failure of verdict and findings to support the judgment is a defect subject to waiver.[78] Since the power to decide includes the power to decide erroneously, a judgment is not void because of an erroneous finding of fact,[79] especially where such error was inadvertent and harmless and not determinative of the main issue.[80]

Decision in writing as basis for judgment. Ordinarily a judgment should be entered on the basis of a decision in writing,[81] and may not be predicated merely on the opinion,[82] oral direction,[83] or unsigned memorandum[84] of the court, or on an entry in the minutes of the clerk;[85] but absence of a decision in due form has been held not fatal to a judgment.[86]

E. CONFORMITY TO PRIOR PROCEEDINGS

§ 46. Conformity to Process

A judgment should conform to the process served, as, for example, with respect to parties and the amount of the recovery.

A judgment should conform to the writ or process served.[87] Accordingly, where process is directed to, and served on, a party as an individual, judgment may not be rendered against him in a representative capacity, and vice versa.[88] Likewise, process addressed to, and served on, an individual is not sufficient on which to base a judgment against a corporation.[89]

The amount of recovery must conform to, and is

71. Mass.—In re Rothwell's Estate, 186 N.E. 662, 283 Mass. 563—Anderson v. Bean, 172 N.E. 647, 272 Mass. 432, 72 A.L.R. 959.
Okl.—Riddle v. Brann, 131 P.2d 999, 191 Okl. 596—Staner v. McGrath, 51 P.2d 795, 174 Okl. 454.
Delay in instituting suit
A judgment for plaintiff in action for accounting and to recover her one-sixth interest in proceeds of sale of mining property was a finding against her alleged unnecessary delay in instituting action.—Scott v. Symons, 216 P. 604, 191 Cal. 441.

72. Fla.—Merchants & Bankers Guaranty Co. v. Downs, 175 So. 704, 128 Fla. 767.
N.J.—Motor Finance Corporation v. Tar Asphalt Trucking Co., 21 A.2d 350, 127 N.J.Law 60.
N.Y.—Miller v. Union Indemnity Co., 204 N.Y.S. 780, 209 App.Div. 455.
Tex.—Texas & N. O. R. Co. v. Shaw, Civ.App., 284 S.W. 600.

73. Mont.—Huffine v. Lincoln, 287 P. 629, 87 Mont. 267.

74. N.C.—Seawell v. Person, 76 S. E. 2, 160 N.C. 291.
33 C.J. p 1138 note 42.

75. Cal.—Easterly v. Cook, 35 P.2d 164, 140 Cal.App. 115.
Ga.—**Corpus Juris cited in** Holton v. Lankford, 6 S.E.2d 304, 310, 189 Ga. 506.
Tex.—American Rio Grande Land & Irrigation Co. v. Bellman, Civ. App., 272 S.W. 550.
Vt.—Town of Randolph v. Lyon, 175 A. 1, 106 Vt. 495.
33 C.J. p 964 note 57, p 1138 note 39, p 1170 note 37.

76. Cal.—Casner v. Daily News Co., 106 P.2d 201, 16 Cal.2d 410—Vitimin Milling Corporation v. Superior Court in and for Los Angeles County, 33 P.2d 1016, 1 Cal.2d 116—In re Dodds' Estate, 126 P. 2d 150, 52 Cal.App.2d 287—Easterly v. Cook, 35 P.2d 164, 140 Cal. App. 115.

77. N.C.—Ellis v. Ellis, 130 S.E. 7, 190 N.C. 418.
Okl.—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40.
Or.—**Corpus Juris cited in** Glickman v. Solomon, 12 P.2d 1017, 1018, 140 Or. 358, followed 12 P.2d 1018, 140 Or. 364, overruling Frederick & Nelson v. Bard, 134 P. 318, 66 Or. 259, and Clackamas Southern Ry. Co. v. Vick, 144 P. 84, 72 Or. 580.
Wyo.—Garber v. Spray, 164 P. 840, 25 Wyo. 52.
33 C.J. p 1138 note 40, p 1170 note 38.

78. N.Y.—Corn Exchange Bank v. Blye, 23 N.E. 805, 119 N.Y. 414.

79. U.S.—Jack v. Hood, C.C.A.Okl., 39 F.2d 594.
Findings contrary to evidence have been held not to render the judgment void.—In re Gardiner's Estate, 114 P.2d 643, 45 Cal.App.2d 559.

80. U.S.—Jack v. Hood, C.C.A.Okl., 39 F.2d 594.

81. S.D.—Sinclair Refining Co. v. Larson, 214 N.W. 842, 51 S.D. 443.

82. N.Y.—Reynolds v. Ætna Life Ins. Co., 39 N.Y.S. 885, 6 App.Div. 254.
Utah.—Wasatch Oil Refining Co. v. Wade, 63 P.2d 1070, 92 Utah 50.
Wash.—Adams v. Ernst, 95 P.2d 799, 1 Wash.2d 254.
33 C.J. p 1137 note 37 [b], [c].

83. N.Y.—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 163, 131 Misc. 401, affirmed 230 N. Y.S. 910, 224 App.Div. 773.

84. N.Y.—Corley v. Spitzer, 255 N. Y.S. 601, 235 App.Div. 703—Torge v. Loomis, 213 N.Y.S. 924; 215 App. Div. 862—Woolf v. Woolf, 215 N. Y.S. 89, 126 Misc. 868.

85. N.Y.—Electric Boat Co. v. Howey, 89 N.Y.S. 210, 96 App.Div. 410.
33 C.J. p 1137 note 37 [b].

86. N.Y.—Lyon v. Water Com'rs of City of Binghamton, 232 N.Y.S. 26, 224 App.Div. 568.

87. U.S.—Hughes v. Union Ins. Co., Md., 8 Wheat. 294, 5 L.Ed. 620.
33 C.J. p 1138 note 44.

88. Fla.—Flinn v. Lisenby, 136 So. 599, 102 Fla. 777.
Divestiture of title
Where, in trespass to try title, defendant was served as individual only, judgment divested him of title individually, but not as trustee.—Blair v. Carney, Tex.Civ.App., 44 S. W.2d 1031, error refused.

89. La.—Norwich Union Indemnity Co. v. Judlin & Whitmire, 7 La. App. 379.

limited by, the writ.[90] Accordingly, where the judgment is by default, the amount of recovery is limited to the sum specified in the summons or indorsed on the copy served,[91] and a judgment for a greater sum has been held absolutely void,[92] although such judgment has also been held to be regular and valid if it is within the sum demanded in the declaration.[93] Where, however, defendant appears and answers, the judgment is not limited to the amount indorsed on the summons.[94]

§ 47. Conformity to Pleadings and Proofs

The rules respecting conformity of judgments to the pleadings and proofs, and the applications of such rules, are considered in detail infra §§ 48–54.

Party against whom process may issue in actions against corporations see Corporations § 1308.

90. Ala.—Carroll v. Milner, 9 So. 221, 93 Ala. 301.
33 C.J. p 1138 note 45.

91. N.J.—Rips v. Levitan, 130 A. 882, 3 N.J.Misc. 1166, motion denied 132 A. 926, 4 N.J.Misc. 314.
33 C.J. p 1139 note 46.

92. Kan.—Basset v. Mitchell, 19 P. 671.
33 C.J. p 1139 note 47.

93. Ill.—Plato v. Turrill, 18 Ill. 273.
33 C.J. p 1139 note 48.

94. N.Y.—Valencia Realty Co. v. Seely, 192 A. 717, 15 N.J.Misc. 520.
33 C.J. p 1139 note 49.

95. Ind.—Indianapolis Real Estate Board v. Willson, 187 N.E. 400, 98 Ind.App. 72.
Mo.—Owens v. McCleary, App., 273 S.W. 145.
Tex.—Automobile Finance Co. v. Bryan, Civ.App., 3 S.W.2d 835—Smith v. Scott, Civ.App., 261 S.W. 1089.
Va.—Dulaney v. Smith, 149 S.E. 441, 153 Va. 118.
33 C.J. p 1139 note 51.

A court of record, in order to act, must find a basis in the pleading for its action.—Green v. Duncan, Tex.Civ.App., 134 S.W.2d 744.

96. U.S.—Sylvan Beach v. Koch, C.C.A.Mo., 140 F.2d 852.
33 C.J. p 1139 note 51 [a].
Issues broadened by consent see infra § 50.

The rule cannot be circumvented by allowing amendments to the pleadings to change a cause of action after judgment, or by giving notice of the entry of judgment, or by entertaining motions to vacate a judgment after it has been entered.—Sylvan Beach v. Koch, supra.

97. U.S.—Mutual Life Ins. Co. v. Dingley, Wash., 100 F. 408, 40 C.C.A. 459, 49 L.R.A. 132, reversed on other grounds 22 S.Ct. 937, 184 U.S. 695, 46 L.Ed. 763—U. S. v. E. H. Bailey & Co., 32 C.C.P.A. Customs 89.
Ala.—**Corpus Juris cited in** Chandler v. Price, 15 So.2d 462, 463, 244 Ala. 667.
Ariz.—White v. Hamilton, 299 P. 124, 38 Ariz. 256.
Cal.—Paulin v. Paulin, 102 P.2d 809, 39 Cal.App.2d 180.
Ga.—Westberry v. Reddish, 172 S.E. 10, 178 Ga. 116—Davis v. Flowers, 114 S.E. 200, 154 Ga. 260.
Ill.—Continental Ill. Nat. Bank & Trust Co. of Chicago v. Sever, 65 N.E.2d 385, 393 Ill. 31.
Ind.—Earl Park State Bank v. Lowmon, 161 N.E. 675, 92 Ind.App. 25—Chicago, T. H. & S. E. Ry. Co. v. Collins, 142 N.E. 634, 82 Ind.App. 41, modified on other grounds 143 N.E. 712, 82 Ind.App. 41.
Ky.—Cawood v. Cawood's Adm'x, 147 S.W.2d 88, 285 Ky. 201—City of Owingsville v. Ulery, 86 S.W. 2d 706, 260 Ky. 792—Ratliff v. Sinberg, 79 S.W.2d 717, 258 Ky. 203—**Corpus Juris cited in** Barnett v. Robinson, 79 S.W.2d 699, 700, 258 Ky. 225—McGill v. Dunaway, 71 S.W.2d 435, 254 Ky. 234—Wakenva Coal Co. v. Johnson, 28 S.W. 2d 737, 234 Ky. 558.
Mass.—Coughlin v. Coughlin, 45 N.E.2d 388, 312 Mass. 452—Geffen v. Paletz, 43 N.E.2d 133, 312 Mass. 48.
Miss.—Holmes v. Ford, 176 So. 524, 179 Miss. 673—Newell Contracting Co. v. Flynt, 161 So. 298, 172 Miss. 719, motion overruled 161 So. 743, 172 Miss. 719.
Mo.—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 859, 315 Mo. 849—McCaskey v. Duffley, 78 S.W.2d 141, 229 Mo.App. 289, transferred, see 73 S.W.2d 188, 335 Mo. 383—Texas Empire Pipe Line Co. v. Stewart, App., 35 S.W.2d 627, reversed on other grounds 55 S.W.2d 283, 331 Mo. 525—Lewis v. Scholl, App., 244 S.W. 90.
Mont.—Alley v. Peeso, 290 P. 238, 88 Mont. 1—Welch v. All Persons, Etc., 254 P. 179, 78 Mont. 370.
Neb.—Fidelity Finance Co. v. Westfall, 254 N.W. 710, 127 Neb. 56—Domann v. Domann, 208 N.W. 669, 114 Neb. 563.
Okl.—**Corpus Juris cited in** Oklahoma City v. Robinson, 65 P.2d 531, 533, 179 Okl. 309.
Pa.—Bowman v. Gum, Inc., 184 A. 258, 321 Pa. 516.
Tenn.—Fidelity-Phenix Fire Ins. Co. of New York v. Jackson, 181 S.W.2d 625, 181 Tenn. 453—Phifer v. Mutual Ben. Health & Accident Ass'n, 148 S.W.2d 17, 24 Tenn.App. 600.
Tex.—Wilke v. Finn, Com.App., 39 S.W.2d 836—Nalle v. Harrell, 12 S.W.2d 550, 118 Tex. 149—Queen Ins. Co. v. Galveston, H. & S. A. Ry. Co., Com.App., 296 S.W. 484, reheard 3 S.W.2d 419—Phelps v. Connellee, Com.App., 285 S.W. 1047—Johnson Aircrafts v. Wilborn, Civ.App., 190 S.W.2d 426—City of Beaumont v. Calder Place Corporation, 180 S.W.2d 189, reversed on other grounds 183 S.W.2d 713, 143 Tex. 244—Doughty v. DeFee, Civ. App., 152 S.W.2d 404, error refused—Rudolph v. Smith, Civ.App., 148 S.W.2d 225—Butler v. Price, Civ. App., 138 S.W.2d 301—De Walt v. Universal Film Exchanges, Civ. App., 132 S.W.2d 421, error dismissed, judgment correct—Robbins v. Robbins, Civ.App., 125 S.W. 2d 666—Fort Worth & Denver City Ry. Co. v. Reid, Civ.App., 115 S.W. 2d 1156—City of Floydada v. Gilliam, Civ.App., 111 S.W.2d 761—Jones-O'Brien, Inc., v. Lloyd, Civ. App., 106 S.W.2d 1069, error dismissed—Hartford Accident & Indemnity Co. v. Moore, Civ.App., 102 S.W.2d 441, error refused—Houston Gas & Fuel Co. v. Spradlin, Civ.App., 55 S.W.2d 1086—American Surety Co. of New York v. Alamo Iron Works, Civ.App., 29 S.W.2d 493, reversed on other grounds, Com.App., 36 S.W.2d 714—House v. Rogers, Civ.App., 23

Examine Pocket Parts for later cases.

§ 48. —— General Rules

A judgment should be supported by both the pleadings and the proofs, although in this connection substantial accordance is sufficient, and the pleadings are to be taken as a whole.

A court may not properly put on its record a judgment which is not a proper sequence to the pleadings,[95] at least without the consent of all persons affected.[96] It is a general rule that a recovery must be had, if at all, on the facts alleged in the pleadings; the judgment must conform to, and be supported by, the pleadings in the case.[97] It is likewise a general rule that facts proved but not

pleaded will not support the judgment,[98] and this is true, even though such facts are found by verdict or finding.[99] An affirmative defense not pleaded is unavailable to support the judgment.[1]

A judgment must also be sustained by the evidence adduced,[2] in connection with facts admitted by the parties in the pleadings or otherwise,[3] and facts pleaded but not proved or admitted on the trial will not support a judgment,[4] although in this connection allegations not necessary to the state-

S.W.2d 414, affirmed, Com.App., Rogers v. House, 39 S.W.2d 1111—Bray v. Bray, Civ.App., 1 S.W.2d 525—Bitter v. Bexar County, Civ. App., 266 S.W. 224, reversed on other grounds, Com.App., 11 S.W. 2d 163—Stevenson v. Barrow, Civ. App., 265 S.W. 602—Metting v. Metting, Civ.App., 261 S.W. 151, modified on other grounds 262 S. W. 188—Scott v. Lott, Civ.App., 247 S.W. 685—Scott v. State, 102 S.W.2d 434, 132 Tex.Cr. 70.

Utah.—Jeffries v. Third Judicial Dist. Court of Salt Lake County, 63 P.2d 242, 90 Utah 525—Stevens & Wallis v. Golden Porphyry Mines Co., 18 P.2d 903, 81 Utah 414—People's Bonded Trustee v. Wright, 272 P. 200, 72 Utah 587.

Vt.—Ackerman v. Carpenter, 29 A.2d 922, 113 Vt. 77.

W.Va.—George v. Male, 153 S.E. 507, 109 W.Va. 222.

Wyo.—Corpus Juris cited in Urbach v. Urbach, 73 P.2d 953, 962, 52 Wyo. 207, 113 A.L.R. 889.

13 C.J. p 798 note 65—19 C.J. p 1209 note 20, p 1240 note 19—24 C.J. p 884 note 44—26 C.J. p 570 note 23—33 C.J. p 144 note 88, p 1139 note 52, p 1141 note 53, p 1156 note 58—42 C.J. p 142 note 48—47 C.J. p 430 note 63, p 1009 note 87—51 C.J. p 360 note 70.

Unwarranted conclusion of law

A judgment cannot be based on a pleaded conclusion of law not warranted by the facts pleaded.—Hurst v. Crawford, Tex.Civ.App., 216 S.W. 284.

Elimination of aspect of bill

After complainant has been forced by demurrer to eliminate aspect of bill, he cannot be required to accept decree under that aspect.—Kelly v. Carmichael, 129 So. 81, 221 Ala. 371.

When rule inapplicable

"The rule that judgment must be in accordance with the allegations contained in the pleadings does not apply when the evidence, though admitted to prove these allegations, shows beyond dispute that a party is responsible for a wrong or has a right which is not alleged, and that further opportunity to defend would be futile and a source only of delay and possible injustice."—Equitable Life Assur. Soc. of U. S. v. Kevitt, 54 N.Y.S.2d 648, 650.

Order void on its face

It has been held that an order is not void on its face merely because it is not in accordance with the petition on which it is based.—Mueller v. Elba Oil Co., 130 P.2d 961, 21 Cal.2d 188.

98. Conn.—De Lucia v. Valente, 75 A. 150, 83 Conn. 107.

Fla.—Vance v. Bliss Properties, 149 So. 370, 109 Fla. 388.

Ill.—Walsh v. Walsh, 23 N.E.2d 341, 372 Ill. 254—Rolinitis v. Rolinitis, 167 N.E. 68, 335 Ill. 260.

Mo.—Massey-Harris Harvester Co. v. Federal Reserve Bank of Kansas City, 48 S.W.2d 158, 226 Mo. App. 916.

Tenn.—Furst & Furst v. Freels, 9 Tenn.App. 423—Harrell v. Alabama Great Southern R., 5 Tenn.App. 471.

Tex.—Starr v. Ferguson, 166 S.W.2d 130, 140 Tex. 80—Liner v. U. S. Torpedo Co., Com.App., 12 S.W.2d 552, reheard 16 S.W.2d 519—Dalton v. Davis, Com.App., 1 S.W.2d 571—Austin Bros. v. Patton, Com. App., 294 S.W. 537—Murphy v. Bain, Civ.App., 142 S.W.2d 598—Texas Employers' Ins. Ass'n v. Jenkins, Civ.App., 63 S.W.2d 563—American Surety Co. of New York v. Alamo Iron Works, Civ. App., 29 S.W.2d 493, reversed on other grounds, Com.App., 36 S.W. 2d 714—Baptist Missionary and Educational Convention of State of Texas v. Knox, Civ.App., 23 S.W.2d 781—Globe Laundry v. McLean, Civ.App., 19 S.W.2d 94—National Rys. of Mexico v. Escontrias, Civ.App., 19 S.W.2d 75—Brewton v. Butler, Civ.App., 12 S.W.2d 228—San Antonio Machine & Supply Co. v. Allen, Civ.App., 268 S.W. 532—Schaff v. Perdue, Civ.App., 254 S.W. 151—Griffith v. Gohlman, Lester & Co., Civ.App., 258 S.W. 591—Fleming-Stitzer Road Bldg. Co. v. Boyett, Civ.App., 258 S.W. 561.

W.Va.—Bringardner v. Rollins, 135 S.E. 665, 102 W.Va. 584.

33 C.J. p 1141 note 54.

99. Conn.—Farnham v. Schreiber, 149 A. 393, 111 Conn. 38.

N.C.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379.

Tex.—Butler v. Price, Civ.App., 138 S.W.2d 301—National Life & Accident Ins. Co. v. Casas, Civ.App., 36 S.W.2d 323—Dickson v. Kilgore State Bank, Civ.App., 244 S.W. 392, reversed on other grounds, Com. App., 257 S.W. 867.

33 C.J. p 1141 note 55.

1. Mass.—Nashua River Paper Co. v. Lindsay, 136 N.E. 358, 242 Mass. 206.

33 C.J. p 1144 note 75.

When reconventional demand unnecessary

Where a court is authorized to grant the relief prayed for either absolutely or on a condition, the granting of the relief only on condition is a mere refusal to grant plaintiff the full measure of relief prayed for, and no reconventional demand on the part of defendant is needed to authorize such judgment.—Francez v. Francez, 94 So. 203, 152 La. 666.

2. Colo.—Minchew v. West, 241 P. 541, 78 Colo. 254.

Ill.—Brock v. Pomeroy, 27 N.E.2d 56, 305 Ill.App. 127—Pley v. Lavette, 167 Ill.App. 494.

La.—Thompson v. State Assur. Co., Limited, of Liverpool, England, 107 So. 489, 160 La. 683.

N.Y.—Claris v. Richards, 183 N.E. 904, 260 N.Y. 419—Antonacchio v. Consolidated Foreign Exchange Corporation, 197 N.Y.S. 150, 203 App.Div. 621.

S.C.—Blease v. Charleston & W. C. Ry. Co., 144 S.E. 233, 146 S.C. 496.

Tex.—City of Beaumont v. Calder Place Corporation, Civ.App., 180 S.W.2d 189, reversed on other grounds 183 S.W.2d 713, 143 Tex. 244—Riggle v. Automobile Finance Co., Civ.App., 276 S.W. 439—Benson v. Adams, Civ.App., 274 S.W. 210, reversed on other grounds, Com.App., 285 S.W. 818—R. B. George Machinery Co. v. Spearman, Civ.App., 273 S.W. 640.

Wyo.—Finance Corporation of Wyoming v. Commercial Credit Co., 283 P. 1100, 41 Wyo. 198.

13 C.J. p 798 note 65—19 C.J. p 1210 note 21, p 1240 note 20—24 C.J. p 885 note 45—26 C.J. p 570 note 24—33 C.J. p 1141 note 57—47 C.J. p 430 note 64.

Terms of unambiguous contract

Judgment on an unambiguous written contract should be rendered according to its terms, although evidence is admitted to explain, add to, and vary its meaning.—Cease v. De Hek, 253 P. 232, 122 Kan. 699.

3. N.Y.—J. D. L. Corporation v. Bruckman, 11 N.Y.S.2d 741, 171 Misc. 3.

Tex.—Baker v. Rose, Civ.App., 179 S.W.2d 339, modified on other grounds 183 S.W.2d 438, 143 Tex. 438.

33 C.J. p 1142 note 58.

4. Ky.—Wunderlich v. Scott, 46 S. W.2d 753, 242 Ky. 481.

La.—Pitre v. Guidry, App., 147 So. 767.

ment of a cause of action and constituting mere surplusage need not be proved, it being sufficient that the judgment is supported by proof of the essential allegations.[5] In other words, the judgment must conform to, and be supported by, both the pleadings and the proofs,[6] and be in accordance with the theory of the action on which the pleadings are framed and the case was tried.[7] This rule is of universal application, and whether the action or suit is at law, in equity, or under the code, the judgment must be secundum allegata et probata.[8] Where the facts pleaded and proved by plaintiff constitute a cause of action, a judgment may be rendered in his favor,[9] notwithstanding some of the allegations made by him are not found to be true.[10]

A judgment inconsistent with admitted or conclusively established facts is erroneous;[11] a valid

N.Y.—Klepper v. Seymour House Corporation of Ogdensburg, 209 N. Y.S. 67, 212 App.Div. 277.
Tex.—New Amsterdam Casualty Co. v. Harrington, Com.App., 290 S. W. 726—Sproles v. Rosen, Civ. App., 47 S.W.2d 331, affirmed 84 S. W.2d 1001, 126 Tex. 51.
33 C.J. p 1142 note 59.

Verified account

In an action based on an itemized account the correctness of which is duly verified, and under a statute providing that in the absence of a verified denial the account should be taken as true, it is not necessary to the validity of a judgment on the account, where the required denial has not been made, that other evidence be introduced.—Cusack v. McMasters, 279 P. 329, 137 Okl. 278.

5. Mo.—Campbell v. Missouri Pac. R. Co., 25 S.W. 936, 121 Mo. 340, 42 Am.S.R. 530, 25 L.R.A. 175.
33 C.J. p 1144 note 74.

6. U.S.—Webster Eisenlohr, Inc., v. Kalodner, C.C.A.Pa., 145 F.2d 316, certiorari denied Kalodner v. Webster Eisenlohr, Inc., 65 S.Ct. 1404, 325 U.S. 867, 89 L.Ed. 1986—Drybrough v Ware, C.C.A.Ky., 111 F. 2d 548.
Cal.—Pacific Mortg. Guaranty Co. v. Rosoff, 67 P.2d 110, 20 Cal.App.2d 383.
Conn.—Tress v. Pivorotto, 133 A. 35, 104 Conn. 389.
Fla.—**Corpus Juris quoted in** Edgar v. Bacon, 122 So. 107, 109, 97 Fla. 679, followed in Wright v. Tatarian, 131 So. 133, 100 Fla. 1366.
Ga.—Griffeth v. Haygood, 161 S.E. 831, 174 Ga. 22.
Ill.—Wood v. Wood, 64 N.E.2d 385, 327 Ill.App. 557—Kohler v. Kohler, 61 N.E.2d 687, 326 Ill.App. 105—First Trust Joint Stock Land Bank of Chicago v. Cutler, 12 N.E. 2d 705, 293 Ill.App. 354.
Iowa.—Bennett v. Greenwalt, 286 N. W. 722, 226 Iowa 1113.
Ky.—Wunderlich v. Scott, 46 S.W.2d 753, 242 Ky. 481—Phelps v. Phelps, 24 S.W.2d 534, 232 Ky. 683—Adkins v. Pikeville Supplying & Planing Mill Co., 295 S.W. 440, 220 Ky. 476—Lassiter v. Farris, 259 S. W. 696, 202 Ky. 330.
Miss.—Kennington-Saenger Theatres v. State ex rel. Dist. Atty., 18 So. 2d 483, 196 Miss. 841, 153 A.L.R. 883.
Mo.—Sinclair Refining Co. v. Wyatt, 149 S.W.2d 353, 347 Mo. 862—Friedel v. Bailey, 44 S.W.2d 9, 329 Mo. 22.
Mont.—Security State Bank of Havre v. Mariette, 223 P. 114, 69 Mont. 536.
Neb.—Coleman v. Beck, 5 N.W.2d 104, 142 Neb. 13.
N.J.—Gunther v. Morey Larue Laundry Co., 29 A.2d 713, 129 N.J Law 345, affirmed 33 A.2d 893, 130 N.J. Law 557—Sivak v. City of New Brunswick, 3 A.2d 566, 122 N.J. Law 197.
N.Y.—Lifton v. Title Guarantee & Trust Co., 31 N.Y.S.2d 94, 263 App. Div. 3—Electric Equipment Corporation v. Delco Appliance Corporation, 297 N.Y.S. 498, 252 App.Div. 1—Dobbins v. Pratt Chuck Co., 206 N.Y.S. 5, 210 App.Div. 278, reversed on other grounds 151 N.E. 146, 242 N.Y. 106—People v. Roney, 230 N.Y.S. 533, 132 Misc. 746.
Pa.—In re Miller, Com.Pl., 32 Del. Co. 566.
S.C.—Jones v. Elbert, 34 S.E.2d 796, 206 S.C. 508—Parker Peanut Co. v. Felder, 34 S.E.2d 488, 207 S.C. 63—**Corpus Juris quoted in** Little v. Rivers, 185 S.E. 174, 175, 180 S. C. 149.
Tenn.—Dixie Ohio Exp. Co. v. Butler, 166 S.W.2d 614, 179 Tenn. 358.
Tex.—Page v. Key, Civ.App., 175 S. W.2d 443, error refused—Street v. Cunningham, Civ.App., 156 S.W.2d 541—Day v. Grayson County State Bank, Civ.App., 153 S.W.2d 599—Barrett v. Commercial Standard Ins. Co., Civ.App., 145 S.W.2d 315—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—Guthrie v. Gossett, Civ.App., 142 S.W.2d 410—American Nat. Ins. Co. v. Sutton, Civ.App., 130 S.W.2d 441—Humble Oil & Refining Co. v. Owings, Civ.App., 128 S.W.2d 67—Railroad Commission of Texas v. Royal Petroleum Corporation, Civ. App., 93 S.W.2d 761, error dismissed—Penrod v. Von Wolff, Civ.App., 90 S.W.2d 859—Barnhart Mercantile Co. v. Bengel, Civ.App., 77 S.W.2d 295—Perkins v. Campbell, Civ.App., 63 S.W.2d 567—Farm & Home Savings & Loan Ass'n of Missouri v. Muhl, Civ.App., 37 S. W.2d 316, error refused—Sibley v. Perkins Bros. Dry Goods Co., Civ. App., 12 S.W.2d 601—Hall v. Bradley, Civ.App., 282 S.W. 874—Griffith v. Gohlman, Lester & Co., Civ. App., 253 S.W. 591.
Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.
Va.—Richmond Engineering & Mfg. Corporation v. Loth, 115 S.E. 774, 135 Va. 110.
1 C.J. p 1009 note 7—33 C.J. p 1142 note 60—42 C.J. p 1287 note 14—51 C.J. p 269 note 25.

Relief not dependent on arguments

"It is the pleadings and the developed facts within the pleadings that courts are obliged to follow and to which the parties and counsel must be held; not arguments."—Mississippi Power & Light Co. v. Pitts, 179 So. 363, 365, 181 Miss. 344.

7. Fla.—**Corpus Juris quoted in** Edgar v. Bacon, 122 So. 107, 109, 97 Fla. 679, followed in Wright v. Tatarian, 131 So. 133, 100 Fla. 1366.
Iowa.—Bennett v. Greenwalt, 286 N. W. 722, 226 Iowa 1113.
S.C.—**Corpus Juris quoted in** Little v. Rivers, 185 S.E. 174, 175, 180 S.C. 149.
33 C.J. p 1143 note 61.

8. Fla.—**Corpus Juris quoted in** Edgar v. Bacon, 122 So. 107, 109, 97 Fla. 679, followed in Wright v. Tatarian, 131 So. 133, 100 Fla. 1366.
33 C.J. p 1143 note 62.

9. Miss.—Southeastern Exp. Co. v. Namie, 181 So. 515, 182 Miss. 447.
Wash.—Exeter Co. v. Holland Corporation, 23 P.2d 864, 172 Wash. 328.
33 C.J. p 1143 note 67.

In courts where written pleadings are not required, plaintiff is entitled to any appropriate relief on facts established, unless on the trial he has adopted and insisted on a contrary theory of the case.—Troxler v. Bevill, 3 S.E.2d 8, 215 N.C. 640.

10. Cal.—Herman v. Glasscock, 155 P.2d 912, 58 Cal.App.2d 98.

11. Cal.—California Stearns Co. v. Treadwell, 256 P. 594, 83 Cal.App. 69.
Kan.—Wright v. Jenks, 261 P. 840, 124 Kan. 604.
Ky.—Quaack v. Kentucky Title Trust Co., 105 S.W.2d 589, 268 Ky. 498.
N.Y.—Weiss v. McKinner, 59 N.Y.S.2d

judgment, inconsistent with his own allegations and admissions, cannot be rendered for a party.[12] If defendant admits liability for a particular sum, judgment should be rendered against him for at least such sum, and a judgment of nonsuit, dismissal, or the like is erroneous.[13] A judgment for a defendant who fails to answer a complaint stating a cause of action is erroneous, because the default admits the case alleged.[14] A judgment is void for inconsistency where it grants relief both to plaintiff and to defendant on inconsistent grounds.[15]

In determining whether or not the pleadings support the judgment, they must be taken as a whole,[16] and construed so as to support the judgment, if capable of such a construction.[17] Substantial accordance is sufficient;[18] and to upset a judgment for variance between it and the pleadings in a contested case, it has been held that there must be an entire abandonment of the very substance of the dispute to which defendant was summoned, and the substitution of another which he could not have anticipated, and which he had no opportunity to meet.[19] If defendant merely files an answer and defaults thereafter, a closer registry between pleading and judgment is exacted than after a contested trial.[20] The presumption is that the relief granted is authorized by the pleadings, and the burden is on him who attacks the judgment to show that it was not.[21]

§ 49. —— Limitation to Relief Sought by Pleadings

a. In general
b. Affirmative relief to defendant

a. In General

As a general rule the relief awarded should conform to that sought by the pleadings; but this rule does not always apply, particularly where there is a prayer for general relief or where the statutes have broadened the scope of permissible relief, and in many cases the court has power to grant any relief within the issues formed by the pleadings and justified by the evidence, regardless of the specific relief demanded.

Ordinarily, and in the absence of a statute to the contrary, the relief to be awarded by a judgment should be consistent with, and limited to, that sought

659—Levine v. Weiss, 16 N.Y.S.2d 1003.
Tex.—Dashiel v. Lott, Com.App., 243 S.W. 1072, rehearing denied 246 S.W. xvi—Great Southern Life Ins. Co. v. Dorough, Civ.App., 100 S.W.2d 772.
33 C.J. p 1143 note 63.

Legal effect of admitted facts

Where all the material facts are established by admissions in the pleadings, the judgment must be in accordance with the legal effect of such facts regardless of the testimony on other issues, unless by actual or implied consent the parties have tried the case on other substituted issues.—Reiff v. Mullholland, 62 N.E. 124, 65 Ohio St. 178—33 C. J. p 1143 note 65.

Indebtedness of plaintiff

(1) In action by borrowers against lender of money, where uncontroverted proof showed that plaintiffs were indebted to defendants in excess of their claim, entering judgment for plaintiff was error. —Brecht v. Bankers' Sec. Co., 133 S.E. 79, 101 W.Va. 533.

(2) In action to have chattel mortgage declared void, court properly gave defendant judgment for amount of debt which plaintiff admitted.—Wilson v. Standard Fertilizer Co., 166 S.E. 76, 203 N.C. 359.

12. Mo.—Dreckshage v. Dreckshage, 176 S.W.2d 7, 352 Mo. 78.
33 C.J. p 1156 note 59.

13. U.S.—Southern Pac. Co. v. Van Hoosear, C.C.A.Cal., 72 F.2d 903.
Ky.—Clark v. Mason, 95 S.W.2d 292, 264 Ky. 683.
N.C.—Penn v. King, 162 S.E. 376, 202 N.C. 174.
Tex.—Illinois Bankers' Life Ass'n v. Floyd, Com.App., 222 S.W. 967.
33 C.J. p 1143 note 63 [a], [b].

14. Tex.—Miller v. Nichols, Civ. App., 258 S.W. 855.
33 C.J. p 1143 note 64.

15. Mo.—King v. Brockschmidt, 3 Mo.App. 571.
33 C.J. p 1168 note 29.

16. Okl.—Corpus Juris quoted in Oklahoma Gas & Electric Co. v. Busha, 66 P.2d 64, 67, 179 Okl. 505.
S.C.—Little v. Rivers, 185 S.E. 174, 180 S.C. 149.
Tex.—Corpus Juris cited in Cavers v. Sioux Oil & Refining Co., Com. App., 49 S.W.2d 862, 868.
Utah.—La Bee v. Smith, 229 P. 88, 64 Utah 242.
33 C.J. p 1144 note 77.

Pleadings of both parties

In determining the relief which may be accorded, it is proper to take into consideration the pleadings of both parties.—Buchanan v. Davis, Tex.Com.App., 60 S.W.2d 192 —Cavers v. Sioux Oil & Refining Co., Tex.Com.App., 49 S.W.2d 862—New Home Sewing Mach. Co. v. Withrow, Tex.Civ.App., 143 S.W.2d 971—Ormsby v. Ratcliff, Tex.Civ.App., 22 S.W. 2d 504, affirmed Ormsby v. Ratcliffe, Com.App., 36 S.W.2d 1005—33 C.J. p 1168 note 28 [a] (2).

Adverse interests between codefendants may be passed on, and a decree rendered between them grounded on the pleadings and proof between plaintiff and defendants and founded on and connected with the subject matter in litigation between plaintiff and one or more of defendants, even though no cross pleadings be filed, especially where the rights as between plaintiff and one of the defendants cannot be adjudicated without determining rights as between codefendants.—Gillam v. Coline Oil Co., 277 P. 639, 136 Okl. 257.

17. Okl.—Corpus Juris quoted in Oklahoma Gas & Electric Co. v. Busha, 66 P.2d 64, 67, 179 Okl. 505.
S.C.—Little v. Rivers, 185 S.E. 174, 180 S.C. 149.
33 C.J. p 1144 note 78.

18. S.C.—Little v. Rivers, supra.
33 C.J. p 1144 note 79.

19. U.S.—Armand Co. v. Federal Trade Commission, C.C.A., 84 F.2d 973, certiorari denied 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 463, certiorari denied 57 S.Ct. 189, 299 U.S. 597, 81 L.Ed. 440, rehearing denied 57 S.Ct. 234, 299 U.S. 623, 81 L.Ed. 459.

20. U.S.—Armand Co. v. Federal Trade Commission, supra.

21. Iowa.—American Emigrant Co. v. Fuller, 50 N.W. 48, 83 Iowa 599.
33 C.J. p 1144 note 80.

by the pleadings[22] or incidental thereto.[23] Where plaintiff has asked only for specific relief, or relief as to a specific subject matter, usually no more extensive or different relief may be accorded to him.[24] However, particularly under statutes or codes in effect so providing, the demand or prayer for relief does not always or necessarily determine or limit the relief which may be granted,[25] and in many cases the rule is stated more broadly to the effect that any relief fairly within the issues formed by the pleadings and justified by the evidence may be given, regardless of the specific relief asked or the form of the action.[26] Accordingly it has been held that, notwithstanding a pleading asks for the wrong

22. U.S.—Sylvan Beach v. Koch, C. C.A.Mo., 140 F.2d 852.
Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.
Cal.—Lewis v. Kohls, App., 160 P. 2d 199.
Conn.—Shaw v. Spelke, 147 A. 675, 110 Conn. 208.
Fla.—Gralynn Laundry v. Virginia Bond & Mortgage Corporation, 163 So. 706, 121 Fla. 812.
Ga.—Burton v. Metropolitan Life Ins. Co., 172 S.E. 41, 177 Ga. 899, transferred, see 173 S.E. 922, 48 Ga.App. 828.
Idaho.—Mason v. Pelkes, 59 P.2d 1087, 57 Idaho 10, certiorari denied Pelkes v. Mason, 57 S.Ct. 319, 299 U.S. 615, 81 L.Ed. 453—Angel v. Mellen, 285 P. 461, 48 Idaho 750.
Ill.—Parker v. Gray, 148 N.E. 823, 317 Ill. 468—Wood v. Wood, 64 N.E.2d 385, 327 Ill.App. 657.
Iowa.—Federal Land Bank of Omaha v. Jefferson, 295 N.W. 855, 229 Iowa 1054, 132 A.L.R. 1282—In re Collicott's Estate, 283 N.W. 869, 226 Iowa 106.
Ky.—Jones v. York, 135 S.W.2d 404, 299 Ky. 305.
La.—Mente & Co. v. Roane Sugars, 6 So.2d 731, 199 La. 686—Peters v. Norris, 185 So. 461, 191 La. 436—Le Blanc v. Cristina, 140 So. 149, 19 La.App. 397.
Miss.—Kennington-Saenger Theatres v. State ex rel. District Attorney, 18 So.2d 483, 196 Miss. 841, 153 A. L.R. 883.
Mo.—Brown v. Wilson, 155 S.W.2d 176, 348 Mo. 653—Hecker v. Bleish, 3 S.W.2d 1003, 319 Mo. 149.
N.M.—Van Sickle v. Keck, 81 P.2d 707, 42 N.M. 450.
Pa.—Eddy v. Borough of Ashley, 125 A. 803, 281 Pa. 4.
Tex.—Crain v. Adams, Civ.App., 120 S.W.2d 290—Hake v. Dilworth, Civ.App., 96 S.W.2d 121, error dismissed—Lokey v. Elliott, Civ.App., 88 S.W.2d 126—Elgin v. Banks, Civ.App., 38 S.W.2d 149—Faison v. Faison, Civ.App., 31 S.W.2d 823, error dismissed—Community Natural Gas Co. v. Northern Texas Utilities Co., Civ.App., 13 S.W.2d 184, error dismissed—Smith v. Miller, Civ.App., 300 S.W. 953—Creager v. Beamer Syndicate, Civ. App., 274 S.W. 323.
Utah.—Voyles v. Straka, 292 P. 913, 77 Utah 171.
Wis.—In re Kehl's Estate, 254 N.W. 639, 215 Wis. 353.
Wyo.—Corpus Juris cited in Urbach v. Urbach, 73 P.2d 953, 963, 52 Wyo. 207, 113 A.L.R. 889.
33 C.J. p 1144 note 82—42 C.J. p 142 note 53—47 C.J. p 430 note 69—51 C.J. p 270 note 33.
Conformity of default judgment to pleadings and proof see infra § 214.
Relief in equity as limited by prayer for relief see Equity § 607.
"It may be that in some cases a court is warranted in decreeing to litigants rights not specifically asked for in the prayer, but we know of no rule which requires a trial court to render a judgment in favor of a litigant who does not plainly set out in some portion of his pleading the relief which he desires and to which he deems himself entitled under the law."—City of Floydada v. Gilliam, Tex.Civ.App., 111 S.W.2d 761, 763.

23. Ark.—Bentonville v. Browne, 158 S.W. 161, 108 Ark. 306.
33 C.J. p 1145 note 83.
Incidental relief in foreclosure suit
(1) It is within the power of the court in a foreclosure suit to give relief as to incidental matters not specified in the prayer, where the mortgage stipulates for such relief.—First Nat. Bank v. Meachem, Tenn. Ch., 36 S.W. 724—42 C.J. p 143 note 54.
(2) Such relief may also be given where complainant was excusably ignorant as to his right thereto.—Clark v. Mackin, 95 N.Y. 346—42 C. J. p 143 note 55.

24. La.—New Orleans Silica Brick Co. v. John Thatcher & Son, 107 So. 236, 160 La. 392.
Tex.—Railroad Commission of Texas v. Royal Petroleum Corporation, Civ.App., 93 S.W.2d 761, error dismissed—Smith v. Jaggers, Civ. App., 16 S.W.2d 969, error dismissed.
33 C.J. p 1148 note 2.

25. Ark.—Morgan v. Scott-Mayer Commission Co., 48 S.W.2d 838, 185 Ark. 637.
Cal.—Holmes v. Anderson, 265 P. 1010, 90 Cal.App. 276.
Colo.—Snell v. Public Utilities Commission, 114 P.2d 563, 108 Colo. 162—Speyer v. School Dist. No. 1, City and County of Denver, 261 P. 859, 82 Colo. 534—Pomponio v. Larsen, 251 P. 534, 80 Colo. 318.
Ga.—Anderson v. Fulton County Home Builders, 92 S.E. 934, 147 Ga. 104.
Idaho.—Schlieff v. Bistline, 15 P.2d 726, 52 Idaho 353.
Ill.—Pure Oil Co. v. Byrnes, 57 N.E. 2d 356, 388 Ill. 26—Swofford v. Swofford, 63 N.E.2d 615, 327 Ill. App. 25.
Ind.—Rooker v. Leary, 149 N.E. 358, 84 Ind.App. 77—Montgomery v. Montgomery, 140 N.E. 917, 81 Ind. App. 1.
Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 345 Mo. 650, 127 A.L.R. 163—Bentrup v. Johnson, 14 S.W.2d 537, 223 Mo.App. 299.
Mont.—Malvaney v. Yager, 54 P.2d 135, 101 Mont. 331.
N.Y.—In re Feuer Transp., 65 N.E. 2d 178, 295 N.Y. 87, reargument denied Feuer Transp. v. Local Union No. 445 of International Brotherhood of Teamsters, 66 N.E.2d 590, 295 N.Y. 821, motion denied 66 N.E.2d 593, 295 N.Y. 825—Brown Packing Co. v. Lewis, 58 N.Y.S.2d 443, 185 Misc. 445.
Okl.—Reynolds v. Wall, 72 P.2d 505, 181 Okl. 110, 113 A.L.R. 417—Owens v. Purdy, 217 P. 425, 90 Okl. 256.
Tenn.—Central Bank & Trust Co. v. Cohn, 264 S.W. 641, 150 Tenn. 375.
Utah.—Bolognese v. Anderson, 90 P.2d 275, 97 Utah 136—Jeffries v. Third Judicial Dist. Court of Salt Lake County, 63 P.2d 242, 90 Utah 525.
Prayer not determinative of right to recover
The right to recover depends, not on the prayer, but on the scope of the pleadings, and the issues made, or which might have been made, under them.—Paulsen v. Western Electric Co., 171 P. 38, 67 Okl. 309.
General law as to framing of judgment
Where the general law prescribes the manner of framing a judgment and carrying it into execution, the court may follow that manner, whether or not expressly prayed for.—Ex parte Weiler, 289 P. 645, 106 Cal.App. 485.

26. Ark.—Albersen v. Klanke, 6 S. W.2d 292, 177 Ark. 288.
Cal.—O'Melia v. Adkins, App., 166 P. 2d 293—Erskine v. Upham, 132 P. 2d 219, 56 Cal.App.2d 235—Sonnicksen v. Sonnicksen, 113 P.2d 495, 45 Cal.App.2d 46—Zimmer v. Gorelnik, 109 P.2d 34, 42 Cal.App. 2d 440—Lorraine v. Lorraine, 48 P.2d 48, 8 Cal.App.2d 687—Masero

relief, or for relief which cannot be granted, the court may grant other and appropriate relief.[27] A party is not deprived of all right to relief merely because he has sought more than he is entitled to, and judgment for less relief than demanded may be given when sustained by the pleadings and proof.[28]

A judgment which grants relief of a character not sought is not for that reason void;[29] at most it is erroneous.[30]

In contested cases, or cases in which an answer has been filed, the relief which may be granted is not limited to that demanded in the complaint or specifically prayed for, particularly under statutes in effect so providing;[31] the court may grant any relief which is consistent with the case made by the pleadings and proofs, and embraced within the issues.[32] The effect of a statute providing that, where defendant appears and answers, plaintiff shall

v. Bessolo, 262 P. 61, 87 Cal.App. 262.

Colo.—Snell v. Public Utilities Commission, 114 P.2d 563, 108 Colo. 162.

Ill.—Yakich v. Smietanka, 63 N.E.2d 718, 392 Ill. 53.

Kan.—Eberhardt Lumber Co. v. Lecuyer, 110 P.2d 757, 153 Kan. 386—Shelley v. Sentinel Life Ins. Co., 69 P.2d 737, 146 Kan. 227.

Mo.—Merz v. Tower Grove Bank & Trust Co., 130 S.W.2d 611, 344 Mo. 1150—Jones v. Campbell, App., 189 S.W.2d 124.

Mont.—Malvaney v. Yager, 54 P.2d 135, 101 Mont. 331—Outlook Farmers' Elevator Co. v. American Surety Co. of New York, 223 P. 905, 70 Mont. 8.

N.Y.—Hellstern v. Hellstern, 18 N.E.2d 296, 279 N.Y. 327—New Chester Theatre Corporation v. Bischoff, 205 N.Y.S. 641, 210 App. Div. 125—Allen v. Mattison, 14 N.Y.S.2d 711.

N.C.—Lockman v. Lockman, 16 S.E.2d 670, 220 N.C. 95—Dry v. Board of Drainage Com'rs of Cabarrus County, Drainage Dist. No. 6, 11 S.E.2d 143, 218 N.C. 356—Troxler v. Bevill, 3 S.E.2d 8, 215 N.C. 640—Virginia Trust Co. v. Webb, 173 S.E. 598, 206 N.C. 247.

Okl.—Tucker v. Porter, 72 P.2d 388, 181 Okl. 30—Harmon v. Hines, 16 P.2d 94, 160 Okl. 120—Page v. Oklahoma City, 263 P. 448, 129 Okl. 28—Rose v. First Nat. Bank, 219 P. 715, 93 Okl. 120.

S.C.—Palmetto Compress & Warehouse Co. v. Citizens & Southern Nat. Bank, 20 S.E.2d 232, 200 S.C. 20—Youmans v. Youmans, 121 S.E. 674, 128 S.C. 31.

Tex.—Honaker v. Guffey Petroleum Co., 294 S.W. 259.

33 C.J. p 1149 note 5, p 1150 note 7.

Amendments to prayer

(1) In a proper case the court will allow amendments to be made to the prayer in order to justify a judgment affording appropriate relief.—Burd v. Downing, 213 P. 287, 60 Cal.App. 493.

(2) It has also been held, however, that an amendment to the prayer of the petition is not a prerequisite to such relief.—Snehoda v. First Nat. Bank in Wichita, 224 P. 914, 115 Kan. 836.

27. Ariz.—Keystone Copper Min. Co. v. Miller, 164 P.2d 603.

Cal.—Bank of America Nat. Trust & Savings Ass'n v. Gillett, 97 P.2d 875, 36 Cal.App.2d 453—Neblett v. Neblett, 56 P.2d 969, 13 Cal.App. 2d 304.

Colo.—Pope v. Parker, 271 P. 1118, 84 Colo. 535.

La.—Prejean v. East Baton Rouge Parish Democratic Executive Committee, 19 So.2d 376, 206 La. 658.

Mo.—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275.

N.Y.—Lonsdale v. Spever, 291 N.Y.S. 495, 249 App.Div. 133—Seedman v. Benenson Realty Co., 60 N.Y.S. 2d 341, 185 Misc. 769—Brown Packing Co. v. Lewis, 58 N.Y.S.2d 443, 185 Misc. 445.

Erroneous prayer for equitable relief

If complaint states facts showing cause of action at law, court will disregard prayer for equitable relief and give plaintiff appropriate remedy in law.—Welsh v. Markham, 210 N.W. 706, 191 Wis. 310.

Compliance with statutory requirements

Where the allegations of a complaint under statute are sufficient to satisfy the statutory requirements, it is immaterial that the prayer for relief is inappropriate.—Hamilton v. Hamilton, 139 N.Y.S. 1095, 78 Misc. 557.

28. Ind.—State ex rel. Mavity v. Tyndall, 66 N.E.2d 755.

Ky.—Cooper v. McWilliams & Robinson, 298 S.W. 961, 221 Ky. 320.

La.—Martinez v. Orleans Parish School Board, 98 So. 860, 155 La. 116—Harries v. Courcier, 119 So. 905, 10 La.App. 22.

N.Y.—Vickers v. Vickers, 282 N.Y.S. 422, 156 Misc. 724.

Wash.—Washington Pulp & Paper Corporation v. Robinson, 6 P.2d 632, 166 Wash. 210.

Wyo.—Corpus Juris quoted in Urbach v. Urbach, 73 P.2d 953, 962, 52 Wyo. 207, 113 A.L.R. 889.

33 C.J. p 1145 note 84.

Less interest than entire ownership

Appropriate pleading of entire ownership in property sued for will authorize recovery of a less interest, where warranted by the proof.—Gay v. Jackman, Tex.Com.App., 254 S.W. 927—51 C.J. p 270 note 38 [a].

29. Cal.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360.

Ky.—Middleton v. Graves, 17 S.W.2d 741, 229 Ky. 640.

33 C.J. p 1148 note 2 [b].

However, it has also been held that a judgment in an action to determine adverse claims to vacant and unoccupied lands, awarding relief beyond the scope of the complaint, is not a mere irregularity, but extrajudicial and void.—Hurr v. Davis, 193 N.W. 943, 155 Minn. 456, rehearing denied 194 N.W. 379, 155 Minn. 456, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518, and error dismissed 45 S.Ct. 227, 267 U.S. 572, 69 L.Ed. 794.

Unsupported portion

Where the pleadings do not warrant a decree or part of a decree entered, and the decree or such part of it is clearly and unmistakably beyond the scope of the pleadings, then the decree or such part of it is void and not merely erroneous.—Simmons v. Yoho, 115 S.E. 851, 92 W.Va. 703.

30. Ky.—Middleton v. Graves, 17 S.W.2d 741, 229 Ky. 640.

31. Cal.—Estrin v. Superior Court in and for Sacramento County, 96 P.2d 340, 14 Cal.2d 670—Pedro v. Soares, 64 P.2d 776, 18 Cal.App.2d 600.

La.—Clesi v. National Life & Accident Ins. Co., App., 193 So. 897, affirmed 197 So. 413, 195 La. 736.

Minn.—La Rue Iron Mining Co. v. Village of Nashwauk, 222 N.W. 527, 176 Minn. 117.

Tex.—Duncan v. Green, Civ.App., 113 S.W.2d 656, error dismissed.

33 C.J. p 1146 notes 89, 92—51 C.J. p 270 note 35.

32. Cal.—Estrin v. Superior Court in and for Sacramento County, 96 P.2d 340, 14 Cal.2d 670—Zumwalt v. Hargrave, App., 162 P.2d 957—Davis v. Stewart, 127 P.2d 1014, 53 Cal.App.2d 439—York v. Beck, App., 118 P.2d 316—Martin v. Pacific Southwest Royalties, 106 P. 2d 443, 41 Cal.App.2d 161—Allen v. California Mut. Building &

not be confined to the relief demanded is merely to relieve plaintiff from any technical objection that he has not prayed for the precise relief to which, on the trial, he may seem entitled; and the relief to be granted must still conform to, and be consistent with, the case made by the pleadings and proof.[33] A demurrer has been held not an answer within the meaning of such a statute;[34] but there is also authority to the contrary.[35] Defendant's election to stand on the sufficiency of his answer, after a demurrer thereto has been sustained, is not equivalent to withdrawal of the answer, with respect to whether or not relief may be granted exceeding that demanded by the complaint.[36]

Prayer for general relief. Where a prayer for general relief is added to the demand of specific relief, the court is not limited to the specific demand, but may grant, particularly under code practice, such other appropriate relief as may be consistent with the allegations and proofs and necessary to adjust fully the equities of the case,[37] at

Loan Ass'n, 104 P.2d 851, 40 Cal. App.2d 374—Pedro v. Soares, 64 P. 2d 776, 18 Cal.App.2d 600—Samuels v. Singer, 36 P.2d 1098, 1 Cal. App.2d 545, amended and rehearing denied 37 P.2d 1050, 1 Cal.App. 2d 545—Sintzel v. Wagner, 6 P.2d 293, 119 Cal.App. 335—Murdock v. Fisher Finance Corporation, 251 P. 319, 79 Cal.App. 787—Jakovich v. Romer, 240 P. 39, 74 Cal.App. 333.

Idaho.—Schlieff v. Bistline, 15 P.2d 726, 52 Idaho 353.

Nev.—Buaas v. Buaas, 147 P.2d 495, 62 Nev. 232—Keyes v. Nevada Gas Co., 38 P.2d 661, 55 Nev. 431.

N.C.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379.

N.D.—Jacobson v. Mutual Ben. Health & Accident Ass'n, 296 N.W. 545, 70 N.D. 566.

Tex.—Hubb Diggs Co. v. Fort Worth State Bank, 298 S.W. 419, 117 Tex. 107.

33 C.J. p 1146 note 91, p 1150 note 6 —51 C.J. p 270 note 38.

"Issue"

Word "issue," as used in statute providing that court may grant plaintiff any relief embraced within issue, is broader than complaint, where answer enlarges the same by introducing new matter.—McAllister v. Union Indemnity Co., 42 P.2d 305, 2 Cal.2d 457.

Granting divorce on complaint asking separation

Even though husband's complaint asked only for separation and general relief, and no statute permits him to bring separation action, yet, where it alleged acts of cruelty entitling him to divorce, it was held sufficient for that purpose, on defendant answering.—Slettebak v. Slettebak, 201 N.W. 716, 48 S.D. 51.

33. Ky.—Perkins v. Hardwick, 121 S.W.2d 20, 275 Ky. 182.

33 C.J. p 1146 note 90.

34. Nev.—Mariner v. Milisch, 200 P. 478, 45 Nev. 193.

33 C.J. p 1148 note 96.

35. N.Y.—Pearce v. Knapp, 127 N.Y. S. 1100, 71 Misc. 324.

Wis.—Viles v. Green, 64 N.W. 856, 91 Wis. 217.

36. Wis.—Numbers v. Union Mortg. Loan Co., 247 N.W. 442, 211 Wis. 30.

37. Ark.—Realty Inv. Co. v. Higgins, 91 S.W.2d 1030, 192 Ark. 423 —Morgan v. Scott-Mayer Commission Co., 48 S.W.2d 838, 185 Ark. 637.

Cal.—Martin v. Hall, 26 P.2d 288, 219 Cal. 334—Knox v. Wolfe, App., 167 P.2d 3—Rinker v. McKinley, 149 P. 2d 859, 65 Cal.App.2d 109—Erskine v. Upham, 132 P.2d 219, 56 Cal. App.2d 235—Sonnicksen v. Sonnicksen, 113 P.2d 495, 45 Cal.App. 2d 46.

Fla.—Semple v. Semple, 105 So. 134, 90 Fla. 7.

Ga.—Taylor v. Cureton, 25 S.E.2d 815, 196 Ga. 28—Matson v. Crowe, 19 S.E.2d 288, 193 Ga. 578—Bleckley v. Bleckley, 5 S.E.2d 206, 189 Ga. 47—Bowers v. Dolen, 1 S.E.2d 734, 187 Ga. 653—Monroe v. Diamond Match Co., 185 S.E. 814, 182 Ga. 438—Sanders v. Jones, 142 S. E. 680, 166 Ga. 186—Broderick v. Reid, 139 S.E. 18, 164 Ga. 474.

Idaho.—Barker v. McKellar, 296 P. 196, 50 Idaho 226.

Ill.—Updike v. Smith, 39 N.E.2d 325, 378 Ill. 600—Browning v. Browning, 46 N.E.2d 101, 317 Ill.App. 372, transferred, see 39 N.E.2d 375, 379 Ill. 29—Kaifer v. Kaifer, 3 N.E.2d 886, 286 Ill.App. 433.

Iowa.—Wagner v. Northern Securities Co., 284 N.W. 461, 226 Iowa 568.

Kan.—Katschor v. Ley, 113 P.2d 127, 153 Kan. 569.

Ky.—Bevins v. Ford, 194 S.W.2d 657, 302 Ky. 346—National Savings & Building Ass'n v. Hutchinson, 144 S.W.2d 1029, 284 Ky. 408—Dotson v. People's Bank, 27 S.W.2d 673, 234 Ky. 138.

La.—Abadie v. Gluck's Restaurant Corporation, 121 So. 757, 168 La. 241—Lyons Planning Mills v. Guillot, App., 146 So. 700—Harris v. Henderson Land, Timber & Investment Co., 119 So. 893, 9 La. App. 279—Buckley v. Lindsey Mercantile Co., 5 La.App. 467—De Bellevue v. Couvillion, 3 La.App. 568—Levy v. Ebeyer & Winteler, 3 La.App. 500.

Mass.—J. Abrams & Co. v. Clark, 11 N.E.2d 449, 298 Mass. 542—Harvey v. Crooker, 166 N.E. 828, 267 Mass. 279.

Mich.—People's Mortg. Corporation v. Wilton, 208 N.W. 60, 234 Mich. 252.

Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 345 Mo. 650, 127 A.L.R. 163—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275—State Bank of Willow Springs v. Lillibridge, 293 S.W. 116, 316 Mo. 968—Breit v. Bowland, App., 127 S.W.2d 71—Cunningham v. Kinnerk, 74 S.W.2d 1107, 230 Mo.App. 749—Kreger Glass Co. v. Kreger, App., 49 S.W. 2d 260.

Mont.—Torelle v. Templeman, 21 P. 2d 60, 94 Mont. 149.

Neb.—Van Steenberg v. Nelson, 22 N.W.2d 414—Johnson v. Radio station W O W, 14 N.W.2d 666, 144 Neb. 406, reversed on other grounds Radio Station W O W v. Johnson, 65 S.Ct. 1475, 326 U.S. 120, 89 L.Ed. 2092, mandate conformed to 19 N.W.2d 853, motion denied 66 S.Ct. 11—School Dist. No. 70, Red Willow County, v. Wood, 13 N.W.2d 153, 144 Neb. 241 —Copass v. Wilborn, 296 N.W. 565, 139 Neb. 124—Hilton v. Clements, 291 N.W. 483, 137 Neb. 791, 138 Neb. 143—Burnham v. Bennison, 236 N.W. 745, 121 Neb. 291.

Okl.—Tucker v. Porter, 72 P.2d 338, 181 Okl. 30—Brown v. Privette, 234 P. 577, 109 Okl. 1—Owens v. Purdy, 217 P. 425, 90 Okl. 256.

Or.—McCredie v. McCredie, 294 P. 361, 134 Or. 517—Kerschner v. Smith, 256 P. 195, 121 Or. 469— Wm. H. Taylor Finance Corporation v. Oregon Logging & Timber Co., 241 P. 388, 116 Or. 440.

Tex.—Starr v. Ferguson, 166 S.W.2d 130, 140 Tex. 80—George v. Williamson, Com.App., 23 S.W.2d 675 —Morris v. Biggs & Co., Civ.App., 165 S.W.2d 915, error dismissed— Railroad Commission of Texas v. Royal Petroleum Corporation, Civ. App., 93 S.W.2d 761, error dismissed—Great Southern Life Ins. Co. v. Williams, Civ.App., 77 S.W.2d 900—Blair v. Bird, Civ.App., 20 S.W.2d 843—Sabens v. Cochrum, Civ.App., 292 S.W. 281—Hinn v. Forbes, Civ.App., 264 S.W. 190—

least where a defense has been made.[38] A general prayer for relief is not, however, a coverall,[39] and even under such a prayer the court cannot grant relief inconsistent with, or entirely different from, that which is specifically prayed for,[40] or which is beyond or inconsistent with the allegations of the pleadings or the facts proved.[41]

Materiality of variance. A material variance between the relief sought and that awarded has been held fatal to the judgment;[42] but it is otherwise where the variance is immaterial and so slight that

Mims v. Hunken, Civ.App., 262 S.W. 930, error dismissed National Compress Co. v. Hamlin, 269 S.W. 1024, 114 Tex. 375—Coward v. Booth, Civ.App., 251 S.W. 550, reversed on other grounds Booth v. Coward, Com.App., 265 S.W. 1026.

Utah.—Walker v. Singleton, 225 P. 81, 63 Utah 283.

W.Va.—Bowman v. Hartford Fire Ins. Co., 169 S.E. 443, 113 W.Va. 784.

33 C.J. p 1148 note 3—42 C.J. p 143 note 57—47 C.J. p 430 note 71—51 C.J. p 271 notes 42, 43.

Relief allowable in equity under prayer for general relief see Equity § 607 b.

Avoidance of circuity of action

Under prayer for general relief, court may render such judgment as would be given in new suit to avoid circuity of action.—Marsh v. Avegno, 3 La.App. 294.

Judgment for possession in ejectment action

There may be a judgment for possession in an ejectment action although there is no specific prayer therefor, where the complaint contains proper averments, a general prayer for relief, and there is a finding for possession.—Evans v. Schafer, 21 N.E. 448, 119 Ind. 49.

Cancellation of instruments and restitution of money paid

In suit by vendee for rescission of a contract of purchase of land, a prayer for general relief was held to justify decree of canceling contract and notes and ordering restitution of the money paid by purchaser on the property.—Loughry v. Cook, Tex.Civ.App., 263 S.W. 333.

38. Ky.—Perkins v. Hardwick, 121 S.W.2d 20, 275 Ky. 182—Hickman County Board of Drainage Com'rs v. Union Stock Land Bank, 83 S.W.2d 511, 259 Ky. 823—Young v. Barnett, 80 S.W.2d 16, 258 Ky. 330—Lincoln Bank & Trust Co. v. Arnold, 75 S.W.2d 751, 256 Ky. 80—Farley v. Gibson, 30 S.W.2d 876, 235 Ky. 164.

La.—Muse v. Sharp, App., 155 So. 300.

Mo.—Southwest Pump & Machinery Co. v. Forslund, 29 S.W.2d 165, 225 Mo.App. 262.

39. Ky.—Cawood v. Cawood's Adm'x, 147 S.W.2d 88, 285 Ky. 201.

40. U.S.—In re Wesley Corporation, D.C.Ky., 18 F.Supp. 347.

Ga.—Brockett v. Maxwell, 35 S.E.2d 906—Christopher v. Whitmire, 34 S.E.2d 100, 199 Ga. 280—Taylor v. Cureton, 25 S.E.2d 815, 196 Ga. 28.

Iowa.—Davis v. Davis, 229 N.W. 855, 209 Iowa 1186.

Ky.—Cawood v. Cawood's Adm'x, 147 S.W.2d 88, 285 Ky. 201—Jameson v. Jameson, 133 S.W.2d 923, 280 Ky. 554.

La.—Stubbs v. Imperial Oil & Gas Products Co., 114 So. 595, 164 La. 689.

Or.—Wm. H. Taylor Finance Corporation v. Oregon Logging & Timber Co., 241 P. 388, 116 Or. 440.

Tex.—Jennings v. Texas Farm Mortg. Co., 80 S.W.2d 931, 124 Tex. 593—San Antonio & A. P. Ry. Co. v. Collins, Com.App., 61 S.W.2d 84—Ellzey v. Allen, Civ.App., 172 S.W.2d 703, error dismissed—Tabb v. City of Mt. Pleasant, Civ.App., 12 S.W.2d 831—Vanlandingham v. Terry, Civ.App., 293 S.W. 252.

Va.—Winston v. Winston, 130 S.E. 784, 144 Va. 848.

33 C.J. p 1149 note 4.

Specific performance in suit for rescission

A purchaser of land whose suit for rescission and recovery of purchase price was barred was not entitled to specific performance under his prayer for general relief, since right to specific performance was inconsistent with right to rescind and might depend on wholly different facts.—Wall v. Zynda, 278 N.W. 66, 283 Mich. 260, 114 A.L.R. 1521.

41. U.S.—In re Wesley Corporation, D.C.Ky., 18 F.Supp. 347.

Cal.—Morrow v. Morrow, 105 P.2d 129, 40 Cal.App.2d 474—Petition of Furness, 218 P. 61, 62 Cal.App. 753.

Ga.—Comstock v. Tarbush, 37 S.E. 2d 148, transferred see, App., 37 S.E.2d 925—Christopher v. Whitmire, 34 S.E.2d 100, 199 Ga. 280—Taylor v. Cureton, 25 S.E.2d 815, 196 Ga. 28.

Ind.—Denney v. Peters, 10 N.E.2d 754, 104 Ind.App. 504.

Iowa.—Manassa v. Garland, 206 N. W. 33, 200 Iowa 1129.

Ky.—Cawood v. Cawood's Adm'x, 147 S.W.2d 88, 285 Ky. 201—Jameson v. Jameson, 133 S.W.2d 923, 280 Ky. 554.

Mass.—Barbour v. Sampson, 165 N. E. 14, 266 Mass. 180.

Minn.—Briggs v. Kennedy Mayonnaise Products, 297 N.W. 342, 209 Minn. 312.

Miss.—Kennington-Saenger Theatres v. State ex rel. Dist. Atty., 18 So. 2d 483, 196 Miss. 841, 153 A.L.R. 883.

Mo.—Barlow v. Scott, 85 S.W.2d 504—Fielder v. Fielder, App., 6 S. W.2d 968.

Nev.—Buaas v. Buaas, 147 P.2d 495, 62 Nev. 232.

Or.—Wm. H. Taylor Finance Corporation v. Oregon Logging & Timber Co., 241 P. 388, 116 Or. 440.

Tenn.—Merritt v. Merritt, 10 Tenn. App. 369.

Tex.—Starr v. Ferguson, 166 S.W.2d 130, 140 Tex. 80—Verschoyle v. Holifield, 123 S.W.2d 878, 132 Tex. 516—Adleson v. B. F. Dittmar Co., 80 S.W.2d 939, 124 Tex. 564—Jennings v. Texas Farm Mortg. Co., 80 S.W.2d 931, 124 Tex. 593—Arrington v. McDaniel, 14 S.W.2d 1009, questions answered 25 S.W. 2d 295, 119 Tex. 148.

51 C.J. p 271 note 41.

Specific performance in suit to quiet title

Prayer for general relief in petition to quiet title containing no allegation for affirmative equitable relief does not authorize judgment for specific performance.—Congregation B'Nai Abraham v. Arky, 20 S.W.2d 899, 323 Mo. 776.

Personal judgment in stockholder's representative action

"General relief" in a representative action by a stockholder does not comprehend a personal judgment in favor of stockholder against corporation based on debt or other liability either as part of his cause of action against corporation entitling him to sue as its representative or the corporation's cause of action against the wrongdoer.—Briggs v. Kennedy Mayonnaise Products, 297 N.W. 342, 209 Minn. 312.

Foreclosure of lien in tort action

Under prayer for general relief in action based on alleged tort and wherein relief sought was by way of damages, plaintiff was held not entitled to foreclosure of lien, where there was no alternative prayer for foreclosure.—McKee v. Mathias, Tex. Civ.App., 83 S.W.2d 744, error dismissed.

42. Ill.—Condit v. Stevenson, 13 Ill. App. 417.

plaintiff would be permitted to amend at any time without costs.[43]

Alternative relief. A judgment for alternative relief is sometimes proper where demanded,[44] but it is not proper if not asked for in the pleadings.[45] Where relief on two counts is sought in the alternative, it has been held that judgment should not be rendered on both counts.[46]

b. Affirmative Relief to Defendant

In general, an answer which has demanded no affirmative relief, such as an answer setting up merely a defense, will not support a judgment granting affirmative relief to the defendant. On proper pleadings and proof, however, a defendant may have affirmative relief in accordance with that demanded by him.

It is a general rule that where the answer prays for no affirmative relief, defendant can have none, and a judgment granting affirmative relief in such cases is erroneous because not in conformity with the issues raised by the pleadings.[47] An answer which sets up merely a defense will not support a judgment giving defendant affirmative relief;[48] but the fact that pleadings are defensive in their nature does not mean that they may not also be used as a basis for affirmative relief, where the facts pleaded are sufficient to entitle the pleader to affirmative relief, and where there is a prayer for such relief.[49] An affirmative judgment for defendant is proper where it is justified by the pleadings and proof,[50] particularly under codes and practice acts provid-

43. Mass.—Hargrave v. American Steel & Wire Co., 106 N.E. 637, 219 Mass. 6.
33 C.J. p 1145 note 87.

44. Okl.—Steiner v. Urquart, 225 P. 695, 99 Okl. 60.

45. Tex.—Jennings v. Texas Farm Mortg. Co., 80 S.W.2d 931, 124 Tex. 593.

46. Mo.—Schroll v. Noe, App., 297 S.W. 999, quashal of opinion denied State ex rel. Noe v. Cox, 19 S.W.2d 695, 323 Mo. 520.
Ohio.—Priller v. Auglaize Hotel Co., App., 36 N.E.2d 1015.

47. Conn.—Switzer v. Turansky, 124 A. 720, 101 Conn. 60.
Ga.—Greenwood v. Greenwood, 160 S.E. 392, 173 Ga. 343.
Iowa.—Liscomb State Sav. Bank v. Leise, 207 N.W. 330, 201 Iowa 353.
Kan.—Burgner-Bowman Lumber Co. v. McCord-Kistler Mercantile Co., 216 P. 815, 114 Kan. 10, 35 A.L.R. 242.
Ky.—Jacobs v. Wells, 111 S.W.2d 574, 271 Ky. 82—Dunn v. Champion, 99 S.W.2d 813, 266 Ky. 757.
La.—David v. Guilbeau, App., 180 So. 850—Stafford v. Tolmas Realty Co., App., 146 So. 61, transferred, see 139 So. 766, 174 La. 83—Halpern v. Cornelison, 133 So. 893, 16 La.App. 344.
Mich.—McCaslin v. Schouten, 292 N. W. 696, 294 Mich. 180—Reich v. Schmidt, 218 N.W. 671, 242 Mich. 130.
Miss.—Hayes v. National Surety Co., 153 So. 515, 169 Miss. 676.
Mo.—Friedel v. Bailey, 44 S.W.2d 9, 329 Mo. 22—State ex rel. Durafior Products Co. v. Pearcy, 29 S. W.2d 83, 325 Mo. 835—Chilton v. Chilton, App., 297 S.W. 457.
N.Y.—Studebaker Corporation of America v. Silverberg, 199 N.Y.S. 190.
Okl.—Reinauer v. Davis, 130 P.2d 91, 191 Okl. 366.
Pa.—The Maccabees v. Cappas, 43 A. 2d 538, 157 Pa.Super. 481.
R.I.—Siravo v. Whitman, 151 A. 893, 51 R.I. 102.
Tex.—Smith v. Blancas, Civ.App., 87 S.W.2d 781, error refused—Gaulden v. Antone, Civ.App., 279 S.W. 560—Chapman v. Sunshine Oil Corporation, Civ.App., 256 S. W. 327—Moulton v. Deloach, Civ. App., 253 S.W. 303.
33 C.J. p 1150 notes 8, 9.

Abandonment of cross action
Where cross action was set up in original and second amended answer, but not mentioned in subsequent amended answers, such cross action was abandoned, and judgment in favor of cross defendant on his cross action was erroneous.—Hinkley v. Brewer, Tex.Civ.App., 274 S.W. 227.

Overpayments
In an action for the balance due on the purchase price of property, or on a contract, defendant cannot recover an overpayment which the evidence shows he made, where he has not interposed a counterclaim or asked for such relief.
Ky.—Runyon v. Runyon, 251 S.W. 173, 199 Ky. 378.
Tex.—Branch v. Smith, Civ.App., 245 S.W. 799.

Failure of plaintiff to appear at the trial does not warrant affirmative relief in favor of defendant where there is no plea or other defense by defendant in the nature of a cross action against plaintiff.—Ellard v. Simpson, 142 S.E. 855, 166 Ga. 278.
33 C.J. p 1150 note 8 [a].

Alternative reconventional demands
Where particular relief in reconvention is demanded by defendant only in the event that certain other relief is decreed, and such other relief is not decreed, the reconventional demands of defendant, made in the alternative, necessarily fall and drop out of the case.—Tyson v. Surf Oil Co., 196 So. 336, 195 La. 248.

48. Ill.—Whitaker Paper Co. v. Galesburg Mail Co., 238 Ill.App. 600.
Ind.—Johnson v. Collins, 1 Blackf. 166.
Tex.—Dean v. Maxwell, Civ.App., 173 S.W.2d 246—Scales v. Lindsay, Civ.App., 43 S.W.2d 286, error dismissed.
Wash.—City Bond & Share v. Klement, 5 P.2d 523, 165 Wash. 408.
Wis.—Marshall v. Marshall, 284 N. W. 541, 230 Wis. 504.
33 C.J. p 1151 note 16.

49. Tex.—R. R. Stolley Corporation of Austin, Tex., v. Quebedeaux, Civ.App., 70 S.W.2d 266, error dismissed.

50. Ky.—Wagner v. Swoope, 54 S. W.2d 395, 246 Ky. 19.
Mo.—Missouri Lumber & Mining Co. v. Hassell, 298 S.W. 47—Brown v. Wilson, App., 131 S.W.2d 848, quashed on other grounds State ex rel. Brown v. Hughes, 137 S.W. 2d 544, 345 Mo. 958.
Mont.—Mather v. Musselman, 278 P. 998, 85 Mont. 352.
Okl.—Watts v. Meriwether, 84 P.2d 643, 184 Okl. 32.
S.C.—Little v. Rivers, 185 S.E. 174, 180 S.C. 149.
Tex.—Bustamante v. Haynes, Civ. App., 55 S.W.2d 137, error dismissed—Ruby v. Davis, Civ.App., 277 S.W. 430.
33 C.J. p 1150 note 10.

Accounting
Defendant may be entitled to an accounting, notwithstanding the absence of a demand therefor in his pleading, where the circumstances warrant an accounting and defendant has been led to believe throughout the trial that an accounting would be had.—Pearson v. Juarez, 248 P. 278, 78 Cal.App. 122.

Damages
(1) In a proper case, damages may be awarded to defendant although he has not specifically prayed for such relief.
Ark.—Albersen v. Klanke, 6 S.W.2d 292, 177 Ark. 288.

ing that the judgment may grant to defendant any affirmative relief to which he may be entitled.[51] Ordinarily a judgment granting defendant affirmative relief must be founded on, and be responsive to, his pleadings, and cannot rest on the pleading of some other party;[52] but a defendant may sometimes have affirmative relief against a codefendant notwithstanding he has served no pleading entitling him to such relief, where the facts justifying such relief are set forth in the complaint.[53]

In general, any affirmative relief to a defendant should be in conformity with that demanded by him.[54] The prayer for relief, however, does not necessarily determine the relief to which defendant is entitled,[55] and under some circumstances defendant's failure to ask for affirmative relief will not preclude final adjudication of the respective rights of the parties.[56]

§ 50. —— Limitation and Conformity to Issues

Judgments ordinarily must be responsive to the issues presented in the pleadings, and it has frequently been held that judgments beyond such issues are void. The issues may be broadened by consent of the parties, however, in which case the judgment may embrace the issues actually litigated.

Judgments must be responsive to the issues presented in the pleadings or litigated between the parties, and issues not so raised may not be determined.[57] Where there are several good pleas in

Ind.—Yellow Mfg. Acceptance Corporation v. Linsky, 192 N.E. 715, 99 Ind.App. 691.

(2) Defendant's right to recover damages may be settled in same action in which plaintiff asserts right to damages against defendant, when both claims involve determination of same questions of fact and consideration of same evidence, whether or not cross action is involved.—Opple v. Ray, 195 N.E. 81, 208 Ind. 450.

Counterclaim as sole defense

Where a counterclaim is the only defense set up, a judgment for defendant must necessarily allow the counterclaim.—Wise v. Rosenblatt, 12 N.Y.S. 288, 16 Daly 496.

51. N.Y.—Clegg v. American Newspaper Union, 60 How.Pr. 498, affirmed 82 Hun 162, 66 How.Pr. 411. 33 C.J. p 1151 note 15.

52. Tex.—Lee v. British & American Mortg. Co., 40 S.W. 1041, 16 Tex.Civ.App. 671.
33 C.J. p 1151 note 14.

53. S.C.—Youmans v. Youmans, 121 S.E. 674, 128 S.C. 31.

Admission of allegations of complaint

In action by insured on policy containing provision that any loss was payable to mortgagee as his interest might appear, mortgagee, who was made party defendant and filed answer admitting allegations of complaint, was entitled to proportionate share of insurer's liability notwithstanding his failure to file affirmative pleading or prayer for affirmative relief, since judgment was bar to any further right mortgagee might assert.—Commercial Union Fire Ins. Co. of New York v. Wade, 8 N.E.2d 1009, 103 Ind.App. 461.

54. La.—Succession of Markham, 156 So. 225, 180 La. 211.
Tex.—Wilkirson v. Yarbrough, Com. App., 257 S.W. 535—Golden West Oil Co. No. 1 v. Golden Rod Oil Co. No. 1, Civ.App., 285 S.W. 631, affirmed Golden Rod Oil Co. No. 1 v. Golden West Oil Co. No. 1, Com. App., 293 S.W. 167.

Failure to demur to or answer counterclaim

Plaintiff, although not having filed any demurrer or answer to counterclaim, could attack those portions of final decree granting relief on counterclaim beyond scope of the pleadings, since, even if counterclaim had been taken for confessed, it would not support a decree beyond scope of relief sought.—Medlinsky v. Premium Cut Beef Co., 57 N.E.2d 31, 317 Mass. 25.

Possession granted under prayer for general relief

Defendant's claim of ownership of house, with prayer for general relief, was held sufficient to sustain judgment for its possession.—Olcott v. Reese, Tex.Civ.App., 291 S.W. 261.

In ejectment, where the court finds for defendant on all the issues a decree should be entered as prayed in the answer.—Chouteau Land & Lumber Co. v. Chrisman, 72 S.W. 1062, 172 Mo. 610—19 C.J. p 1210 note 25.

55. Mo.—Eckhardt v. Bock, App., 159 S.W.2d 395.
N.Y.—Home Life Ins. Co. v. Klein, 25 N.Y.S.2d 215.

56. Wash.—Pratt v. Rhodes, 253 P. 640, 142 Wash. 411, reheard 256 P. 503, 142 Wash. 411.

57. U.S.—Sylvan Beach v. Koch, C.C.A.Mo., 140 F.2d 852—Deitrick v. Standard Surety & Casualty Co. of New York, C.C.A.Mass., 90 F.2d 862, affirmed 58 S.Ct. 696, 303 U.S. 471, 82 L.Ed. 962, rehearing denied 58 S.Ct. 948, 304 U.S. 588, 82 L.Ed. 1548—Goodrich Transit Co. v. City of Chicago, C.C.A.Ill., 4 F.2d 636—Ortlieb v. Baumer, D.C.N.Y., 6 F.Supp. 58.
Ala.—Pridgen v. Shadgett, 12 So.2d 395, 244 Ala. 167—Alabama Power Co. v. Owens, 181 So. 283, 236 Ala. 96.
Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.
Ark.—Evans v. U. S. Anthracite Coal Co., 21 S.W.2d 952, 180 Ark. 578.
Cal.—Ayoob v. Ayoob, App., 168 P.2d 462—Hyde v. Hagen, App., 161 P.2d 242—Berg v. Berg, 132 P.2d 871, 56 Cal.App.2d 495—Wallace v. Otis, 119 P.2d 195, 47 Cal.App.2d 814—Dreifus v. Marx, 104 P.2d 1080, 40 Cal.App.2d 461—Overell v. Overell, 64 P.2d 483, 18 Cal.App.2d 499.
Conn.—Spitz v. Abrams, 20 A.2d 616, 128 Conn. 121—Hill v. Employers' Liability Assur. Corporation, 188 A. 277, 122 Conn. 193—O'Hara v. Hartford Oil Heating Co., 138 A. 438, 106 Conn. 468.
Fla.—Gruber v. Cobey, 12 So.2d 461, 152 Fla. 591—East Coast Stores v. Cuthbert, 133 So. 863, 101 Fla. 25.
Hawaii.—**Corpus Juris cited in** Pires v. Pires, 29 Hawaii 849, 852.
Idaho.—Nielson v. Garrett, 43 P.2d 380, 55 Idaho 240—Angel v. Mellen, 285 P. 461, 48 Idaho 750.
Ind.—Old First Nat. Bank & Trust Co. of Fort Wayne v. Snouffer, 192 N.E. 369, 99 Ind.App. 325—Fox v. Wallace, 151 N.E. 835, 88 Ind.App. 235.
Iowa.—**Corpus Juris cited in** Rayburn v. Maher, 288 N.W. 136, 142, 227 Iowa 274—Bennett v. Greenwalt, 286 N.W. 722, 226 Iowa 1113—Wagner v. Northern Securities Co., 284 N.W. 461, 226 Iowa 568—Fidelity & Casualty Co. of New York v. Bank of Plymouth, 237 N.W. 234, 213 Iowa 1058.
Kan.—Penn Mut. Life Ins. Co. v. Tittel, 111 P.2d 1116, 153 Kan. 530, rehearing denied 114 P.2d 312, 153 Kan. 747—Leshure v. Zumalt, 100 P.2d 643, 151 Kan. 737—Baird v. Bureman, 26 P.2d 272, 138 Kan. 381—Devlin v. City of Pleasanton, 288 P. 595, 130 Kan. 766—Herring v. Blue Mound Mining Co., 257 P. 955, 124 Kan. 171.

bar to the whole cause of action, plaintiff cannot recover unless he succeeds on all the issues.[58] A judgment should not limit rights of the parties which are not involved in the action and which may arise or be interfered with in the future, especially when uncertainty or confusion would result;[59] and if, under the pleadings, the court is without jurisdiction to determine particular issues, it is without jurisdiction to reserve such issues for future determination.[60]

A judgment on issues not made by the pleadings is at least erroneous, and may be set aside or reversed in a proper proceeding for that purpose;[61] but many cases go further, and hold that judgments based on issues not made by the pleadings or litigated by the parties are coram non judice and void, at least in so far as they go beyond such issues,[62] on the theory that a court has no jurisdiction to pass on questions not submitted to it for

Ky.—Newsom v. Damron, 193 S.W.2d 643.
Mich.—Ward v. Hunter Machinery Co., 248 N.W. 864, 263 Mich. 445.
Mo.—Brandt v. Farmers Bank of Chariton County, 182 S.W.2d 281, 353 Mo. 259—Brown v. Wilson, 155 S.W.2d 176, 348 Mo. 658—In re Ermeling's Estate, 119 S.W.2d 755, transferred, see, App., 131 S.W.2d 912—Uhrig v. Hill-Behan Lumber Co., 110 S.W.2d 412, 341 Mo. 851—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275—Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferred, see, App., 47 S.W.2d 121—Friedel v. Bailey, 44 S.W.2d 9, 329 Mo. 22—Congregation B'Nai Abraham v. Arky, 20 S.W.2d 899, 323 Mo. 776—Ex parte Fowler, 275 S.W. 529, 310 Mo. 339—Smith v. Smith, App., 192 S.W.2d 691, followed in 192 S.W.2d 700—Riney v. Riney, App., 117 S.W.2d 698—Burns v. Ames Realty Co., App., 31 S.W.2d 274—Fielder v. Fielder, App., 6 S.W.2d 968.
Mont.—Wallace v. Goldberg, 231 P. 56, 72 Mont. 234.
Neb.—Bowman v. Cobb, 258 N.W. 535, 128 Neb. 289.
N.Y.—Helfhat v. Whitehouse, 179 N.E. 493, 258 N.Y. 274—International Photo Recording Machines v. Microstat Corp., 56 N.Y.S.2d 277, 269 App.Div. 485—In re Goebel's Estate, 33 N.Y.S.2d 549, 263 App.Div. 516—People v. Ribas, 276 N.Y.S. 551, 153 Misc. 703.
Ohio.—Licht v. Woertz, 167 N.E. 614, 32 Ohio App. 111.
Or.—Reed v. Hollister, 212 P. 367, 106 Or. 407, error dismissed Hollister v. Reed, 44 S.Ct. 333, 264 U.S. 599, 68 L.Ed. 869.
Pa.—Bradford Gasoline Co. v. Hanley Co., 173 A. 401, 315 Pa. 441.
S.C.—Parker Peanut Co. v. Felder, 34 S.E.2d 488, 207 S.C. 63.
S.D.—Severson v. Eide, 216 N.W. 581, 52 S.D. 20—Deming v. Nelson, 210 N.W. 726, 50 S.D. 484.
Tex.—Price v. Seiger, Com.App., 49 S.W.2d 729—De Walt v. Universal Film Exchanges, Civ.App., 132 S.W.2d 421, error dismissed, judgment correct—Lewis v. Gamble, Civ.App., 113 S.W.2d 659—Texas & N. O. R. Co. v. Harris, Civ.App., 101 S.W.2d 640, error dismissed—Owen v. King, Civ.App., 84 S.W.2d 743, reversed on other grounds 111 S.W.2d 695, 130 Tex. 614, 114 A. L.R. 859—Mutual Life Ins. Ass'n v. Smelley, Civ.App., 68 S.W.2d 1106—American Rio Grande Land & Irrigation Co. v. Bellman, Civ. App., 272 S.W. 550.
Va.—Drewry v. Doyle, 20 S.E.2d 548, 179 Va. 715.
Wash.—Beadle v. Barta, 128 P.2d 761, 13 Wash.2d 67.
13 C.J. p 798 note 65—19 C.J. p 1210 note 21—33 C.J. p 1151 notes 17, 19—42 C.J. p 1287 note 14.

"There is no principle better established than what is not juridically presented cannot be juridically decided."—Cooke v. Cooke, 248 P. 83, 104, 67 Utah 371.

Character of lane

Where pleadings do not raise issue, court should not determine whether or not lane over which plaintiffs claim means of access is public or private.—Lathrop v. Cary, 232 N.W. 697, 202 Wis. 237.

Failure to demur will not justify judgment on issue not within pleading.—Farnham v. Schreiber, 149 A. 393, 111 Conn. 38.

Immaterial or unsupported issues

(1) The court may ignore an immaterial issue in rendering judgment.—Walton v. Stinson, Tex.Civ. App., 140 S.W.2d 497, error refused.

(2) In rendering judgment the court may ignore an issue not supported by evidence.—Goff v. Janeway, 99 S.W. 602, 30 Ky.L. 705—28 C.J. p 1036 note 55.

Irrelevant abstract queries

Judgments may not be founded on issues outside the pleadings in answer to solicitation on irrelevant abstract legal queries propounded by the parties and argued in their briefs.—Raymond v. State Civil Service Commission, 92 P.2d 331, 104 Colo. 458.

Scope of injunctive relief

In suit for injunction, growing out of labor dispute, as defined in statute, no acts should be enjoined other than those mentioned in the complaint.—Boise Street Car Co. v. Van Avery, 103 P.2d 1107, 61 Idaho 502.

58. Ala.—Horan v. Gray & Dudley Hardware Co., 48 So. 1029, 159 Ala. 159.
33 C.J. p 1168 note 31.
59. Cal.—Cameron v. Feather River Forest Homes, 33 P.2d 884, 139 Cal.App. 373.
60. U.S.—Osage Oil & Refining Co. v. Continental Oil Co., C.C.A.Okl., 34 F.2d 585.
61. Conn.—Shaw v. Spelke, 147 A. 675, 110 Conn. 208.
Ind.—Fisher v. Rosander, 151 N.E. 12, 84 Ind.App. 694.
Iowa.—**Corpus Juris cited in** Rayburn v. Maher, 288 N.W. 136, 142, 227 Iowa 274.
Neb.—Green v. Axtell Lumber Co., 218 N.W. 401, 116 Neb. 603.
Okl.—Bishop v. Franks, 107 P.2d 358, 188 Okl. 196—Holshouser v. Holshouser, 26 P.2d 189, 166 Okl. 45.
Tex.—National Union Fire Ins. Co. of Pittsburgh v. Richards, Civ. App., 278 S.W. 488—Williams v. Borchers, Civ.App., 244 S.W. 1053.
33 C.J. p 1152 note 21.
62. U.S.—**Corpus Juris cited in** Osage Oil & Refining Co. v. Continental Oil Co., C.C.A.Okl., 34 F. 2d 585, 588.
Cal.—Wallace v. Otis, 119 P.2d 195, 47 Cal.App.2d 814.
Kan.—Southern Kansas Stage Lines Co. v. Webb, 41 P.2d 1025, 141 Kan. 476.
Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 278 Ky. 695—**Corpus Juris cited in** Dotson v. People's Bank, 27 S.W. 2d 673, 674, 234 Ky. 138—Lincoln County Board of Education v. Board of Trustees of Stanford Graded Common School Dist., 7 S.W.2d 499, 225 Ky. 21.
Mich.—Hartley v. A. I. Rodd Lumber Co., 276 N.W. 712, 282 Mich. 652.
Mo.—Riley v. La Font, 174 S.W.2d 857—**Corpus Juris cited in** Weatherford v. Spiritual Christian Union Church, 163 S.W.2d 916, 918—Brown v. Wilson, 155 S.W.2d 176, 348 Mo. 658—State ex rel. Fidelity & Deposit Co. of Maryland v. Allen, 85 S.W.2d 455—State ex rel. Gatewood v. Trimble, 62 S.W.2d 756, 333 Mo. 207—Sutton v. Anderson, 31 S.W.2d 1026, 326 Mo. 304—Hecker v. Bleish, 3 S.W.2d 1003, 319 Mo. 149—Brandt v. Farmers

decision.[63] If the excessive part of the judgment cannot be readily separated from that which is within the jurisdiction of the court by virtue of the pleadings and proof, the entire judgment has been held to be void.[64]

Issues broadened by consent. Parties may, if they so elect, depart from the issues made by the pleadings, and try other questions relating to the merits of the controversy by consent or acquiescence, and in such cases the judgment is regular and binding on them,[65] the court treating as having been made the amendment which ought to have been made conforming the pleadings to the proof,[66] notwithstanding no formal amendment of the pleadings has been filed;[67] but a mere agreement that a pleading shall be amended in a certain particular does not alter the issues until the amendment is in fact made.[68]

When an issue is tried which is not within the pleadings, no duty rests on the court to render a judgment thereon, and a refusal or failure to do so is not error.[69] Mere stipulations as to the facts of a case, or the evidence of facts, cannot make a case broader than it appears by the allegations of the pleadings, and do not entitle a party to any relief beyond that to which the averments entitle him.[70] Evidence which, although received without objection, has no legitimate relation to the issues which form the basis of the action, or is in absolute conflict with the cause of action which is set out in the complaint, may not be deemed to support a judgment at variance with the pleadings.[71]

§ 51. —— Applications of Rules in General

a. Parties
b. Property affected
c. Quieting title
d. Other applications

a. Parties

(1) In general
(2) Personal or representative capacity

(1) In General

The judgment must follow the pleadings and proof with respect to the particular plaintiffs and defendants for and against whom it is rendered.

Bank of Chariton County, App., 177 S.W.2d 667, reversed on other grounds 182 S.W.2d 281, 353 Mo. 259—Dickey v. Dickey, App., 132 S.W.2d 1026—Schell v. F. E. Ransom Coal & Grain Co., App., 79 S.W.2d 543—Texas Empire Pipe Line Co. v. Stewart, App., 35 S.W.2d 627, reversed on other grounds 55 S.W.2d 233, 331 Mo. 525—Burns v. Ames Realty Co., App., 31 S.W.2d 274—Owens v. McCleary, App., 273 S.W. 145—Raney v. Home Ins. Co., 246 S.W. 57, 213 Mo.App. 1.

Nev.—Schultz v. Mexican Dam & Ditch Co., 224 P. 804, 47 Nev. 453.

N.J.—Trenton Trust Co. v. Gane, 6 A.2d 112, 125 N.J.Eq. 389, affirmed 8 A.2d 708, 126 N.J.Eq. 273—Hackensack Trust Co. v. Kelly, 180 A. 621, 118 N.J.Eq. 587, affirmed 187 A. 195, 120 N.J.Eq. 596.

Okl.—Hinkle v. Jones, 66 P.2d 1073, 180 Okl. 17—Fuqua v. Watson, 46 P.2d 486, 172 Okl. 624—City of Seminole v. Fields, 43 P.2d 64, 172 Okl. 167—Electrical Research Products v. Haniotis Bros., 39 P.2d 42, 170 Okl. 150—Winters v. Birch, 36 P.2d 907, 169 Okl. 237—State ex rel. Shull v. Moore, 27 P.2d 1048, 167 Okl. 28—Henson v. Oklahoma State Bank, 23 P.2d 709, 165 Okl. 1—Wright v. Farmers' Nat. Bank of Oklahoma City, 243 P. 512, 116 Okl. 74—Hoffman v. Webb, 240 P. 104, 113 Okl. 150—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247.

Or.—Dean v. Dean, 300 P. 1027, 136 Or 694, 86 A.L.R. 79.

Tex.—Edinburg Irr. Co. v. Ledbetter, Civ.App., 247 S.W. 335, modified on other grounds, Com.App., 286 S.W. 185.

Wis.—Nehring v. Niemerowicz, 276 N.W. 325, 226 Wis. 285.

33 C.J. p 1152 note 22—51 C.J. p 270 note 26.

Question within court's general jurisdiction

A judgment which determines questions not within the court's jurisdiction, because not in issue, is to that extent void, although the question decided may be within the general jurisdiction of the court.—Hallgren v. Williams, Neb., 20 N.W.2d 499—Petersen v. Dethlefs, 293 N.W. 155, 139 Neb. 572.

63. Conn.—**Corpus Juris cited in** Spitz v. Abrams, 20 A.2d 616, 617, 128 Conn. 121.
33 C.J. p 1153 note 25.

64. Okl.—Central Nat. Oil Co. v. Continental Supply Co., 249 P. 347, 119 Okl. 190.

65. Cal.—Drullinger v. Erskine, App., 163 P.2d 48.
Conn.—**Corpus Juris cited in** Spitz v. Abrams, 20 A.2d 616, 617, 128 Conn. 121.
Ga.—Southern Lumber Co. v. Edwards, 117 S.E. 252, 30 Ga.App. 223.
Ky.—Lodge v. Williams, 243 S.W. 1011, 195 Ky. 773.
La.—W. J. & C. Sherrouse v. Phenix, 128 So. 536, 14 La.App. 629.
Mont.—**Corpus Juris cited in** Wallace v. Goldberg, 231 P. 56, 57, 72 Mont. 234.

Neb.—**Corpus Juris quoted in** Clark v. Clark, 297 N.W. 661, 664, 139 Neb. 446.
N.M.—Davis v. Savage, 168 P.2d 351.
N.Y.—Claris v. Richards, 183 N.E. 904, 260 N.Y. 419.
Tenn.—East Lake Lumber Box Co. v. Simpson, 5 Tenn.App. 51.
33 C.J. p 1154 note 26.

Injection of issue at own peril

Party who injects into action issues not covered by pleadings does so at peril of any judgment he may obtain.—Perez v. Wilson, 260 P. 338, 86 Cal.App. 288.

66. U.S.—Reynolds v. Stockton, 11 S.Ct. 773, 140 U.S. 254, 35 L.Ed. 464, 27 Abb.N.Cas.,N.Y., 112.
Neb.—**Corpus Juris quoted in** Clark v. Clark, 297 N.W. 661, 664, 139 Neb. 446.
N.M.—In re Field's Estate, 60 P.2d 945, 40 N.M. 423.

67. Okl.—Berglan v. Kuhlman, 77 P.2d 47, 182 Okl. 168.

68. N.J.—Jones v. Davenport, 17 A. 570, 45 N.J.Eq. 77, reversed on other grounds 19 A. 22, 46 N.J.Eq. 237.

69. Neb.—Bowman v. Cobb, 258 N.W. 535, 128 Neb. 289.

70. U.S.—**Corpus Juris cited in** Walling v. Paramount-Richards Theatres, D.C.La., 61 F.Supp. 290, 304.
Cal.—Hicks v. Murray, 43 Cal. 515.

71. Cal.—Gwinn v. Goldman, 134 P.2d 915, 54 Cal.App.2d 393.

The judgment must correspond with the pleadings and proof with respect to the parties for and against whom it is rendered.[72] A judgment for plaintiff alone cannot be sustained where the complaint or proof shows that he is not the sole owner of the claim or property involved, but that others are joint owners thereof.[73] A judgment against a defendant concerning whom no allegations are made in the declaration or complaint, or against whom no relief or judgment is sought, ordinarily is unauthorized.[74] Where the complaint asks different relief as against the different defendants, or alleges only a partial liability on the part of each of them, there cannot be a general judgment against one or all of them for the entire claim or demand.[75] A judgment against a principal may be proper on allegations and proof of acts of his agent;[76] but such a judgment cannot be rendered in the absence of any proof of the alleged agent's authority.[77]

Under appropriate pleadings and prayers, relief

72. Ala.—Milbra v. Sloss-Sheffield Steel & Iron Co., 62 So. 176, 182 Ala. 622, 46 L.R.A.,N.S., 274.
Ill.—Russell v. Ortseifen, 54 N.E.2d 612, 322 Ill.App. 695—Thomas v. Morris, 41 N.E.2d 990, 314 Ill.App. 570.
Iowa.—O. H. Dunlap & Son v. Marek, 209 N.W. 295.
Ky.—Universal Credit Co. v. Hibbard, 117 S.W.2d 583, 273 Ky. 597—Barnett v. Robinson, 79 S.W.2d 699, 258 Ky. 225.
Mont.—Montana Auto Finance Corporation v. British & Federal Underwriters of Norwich Union Fire Ins. Soc., 232 P. 198, 72 Mont. 69, 36 A.L.R. 1495.
N.J.—Kienle v. MacFulton, Inc., 174 A. 349, 12 N.J.Misc. 697.
N.Y.—Kittredge v. Grannis, 155 N. E. 93, 244 N.Y. 182—Wheeler v. Standard Oil Co. of New York, 263 N.Y.S. 272, 237 App.Div. 765, reversed on other grounds 188 N.E. 148, 263 N.Y. 34.
Or.—Chagnot v. Labbe, 69 P.2d 949, 157 Or. 280.
Tex.—Gillette Motor Transport Co. v. Whitfield, Civ.App., 160 S.W.2d 290—Travelers Ins. Co. v. Key, Civ.App., 146 S.W.2d 313—Houston Oxygen Co. v. Davis, Civ.App., 145 S.W.2d 300, reversed on other grounds 161 S.W.2d 474, 139 Tex. 1, 140 A.L.R. 868—Corpus Juris cited in Edwards v. Hatch, Civ.App., 106 S.W.2d 741, 742—Superior Fire Ins. Co. v. C. S. Lee Grain & Elevator Co., Civ.App., 261 S.W. 212—Hardin v. Palm, Civ.App., 253 S. W. 948—Mullin v. Nash-El Paso Motor Co., Civ.App., 250 S.W. 472.
Utah.—Garner v. Anderson, 248 P. 496, 67 Utah 553.
33 C.J. p 1154 note 31, p 1200 note 19.

Impropriety of joint judgment

In an action against a bank, brought jointly by two persons for whom money had been deposited in trust, where a judgment for plaintiffs jointly would not accord with the proof, the fact that the bank at the trial made no objection to the joint action cannot enable the court to enter a judgment which the law does not warrant.—Ellison v. New Bedford Five Cents Sav. Bank, 130 Mass. 48.

Failure of codefendant to file counterclaim

Where only one of two codefendants has filed counterclaim, judgment for both defendants on counterclaim is error as to defendant who did not file any counterclaim.—C. I. T. Corporation v. Watkins, 181 S.E. 270, 208 N.C. 443.

"Heirs" as including "descendants"

A pleading seeking to bring in "heirs" of certain persons as a class was held sufficient to make decree binding on descendants.—Swoope v. Darrow, 188 So. 879, 237 Ala. 692.

Intervener

In suit to recover on contract where there was no plea of intervention by an assignee who claimed a sum to be due him from plaintiffs, judgment in favor of plaintiffs and ordering defendants to pay intervener and deduct the amount from that due plaintiffs is unsupported by pleading.—Home Ins. Co., New York, v. Privitt, Tex.Civ.App., 120 S.W.2d 294, error dismissed.

Exemplary damages against principal or sureties

In an action against the principal and sureties on a bond, a judgment for exemplary damages against the principal only is not erroneous because the prayer asked such damages against principal and sureties, and the verdict was general, where such damages could not be had against the sureties.—Emerson v. Skidmore, 25 S.W. 671, 7 Tex.Civ. App. 641.

Municipal officials

Where owner of land taken by city brought action for value thereof against city officials in their official capacity, without attempting to state cause of action against them as individuals, and city entered litigation as plaintiff in consolidated condemnation proceeding, judgment against city and officers was held valid as against city, but void on face of judgment roll in so far as purported to be against individual officers.—City of Seminole v. Fields, 43 P.2d 64, 172 Okl. 167.

73. Cal.—Woodson v. Torgerson, 291 P. 663, 108 Cal.App. 386.
33 C.J. p 1154 note 33.

74. Ohio. Fourth & Central Trust Co. v. Aker Bros., 177 N.E. 602, 39 Ohio App. 247.
Tex.—O'Brien v. Greene Production Co., Civ.App., 151 S.W.2d 900—Earnhardt Development Co. v. Ray, Civ.App., 51 S.W.2d 732.
33 C.J. p 1155 note 37.
Judgment for or against one not party see supra § 28.

Judgment against firm

Where individuals of firm only were sued, and cause of action was not alleged, or relief sought, against firm, judgment against the firm and individuals as partners, as well as against individuals, was unauthorized.—Lingwiler v. Anderson, Tex. Civ.App., 270 S.W. 1052.

Husband's joinder in answer

Where defendant's husband joined in answering suit for injuries, it was held that judgment might be rendered against him, although no relief was asked against him by plaintiff. —Dickey v. Jackson, Tex.Civ.App., 293 S.W. 584, reversed on other grounds, Com.App., 1 S.W.2d 577.

75. Neb.—Trester v. Pike, 83 N.W. 676, 60 Neb. 510.
33 C.J. p 1155 note 34.

Relief sought only in alternative

Where judgment against a defendant is sought only in the event it is found that he was not authorized to represent a codefendant, and it is found that he had such authority, judgment on such cause of action cannot be rendered against both defendants.—Saner-Ragley Lumber Co. v. Spivey, Tex.Civ.App., 255 S.W. 193, judgment modified on other grounds Com.App., Spivey v. Saner-Ragley Lumber Co., 284 S.W. 210.

Judgment against single defendant held proper

A complaint alleging performance of services for defendant and others at their request, and an agreement of defendant to pay therefor, supports a judgment against him alone. —Delafield v. San Francisco & S. M. R. Co., 40 P. 958, 5 Cal.Unrep. 71.

76. Wash.—Reed v. National Grocery Co., 238 P. 990, 136 Wash. 7.

77. La.—Melde Tile Roofing Co. v. Martinez, 139 So. 72, 19 La.App. 91.

may be granted to one defendant as against a codefendant;[78] but the court should not go beyond the pleadings to decree relief as between codefendants.[79]

The principle of idem sonans may be invoked to obviate a variance in the names of the parties,[80] and, where, on an inspection of the whole record, the identity of the parties named in the judgment and the pleading is clear, the apparent variance will be held to be a clerical misprision and immaterial, or at least amendable.[81] A variance may be waived.[82]

Ejectment. A judgment in ejectment must conform to the pleadings and proofs with respect to the parties involved.[83] This applies where the action is predicated on a joint demise,[84] and whether the action is the statutory or the common-law action of ejectment.[85] A judgment for all the plaintiffs cannot be given where the proof shows title in some,[86] or title in part of the premises in one;[87] and it has been held that, if the proof does not show a joint interest in all who join as plaintiffs, the action must fail as to all,[88] although it has also been held that this rule does not apply where an equitable defense has been filed.[89] In some jurisdictions, however, a failure to prove title as to some of the plaintiffs will not prevent a recovery by the others in whom title is shown.[90] A judgment for plaintiffs may be predicated on a declaration alleging that the lessors jointly and severally demised, and proof of a tenancy in common, there being nothing impracticable in joint and several demises of the same land.[91]

A judgment may be rendered for or against one or more or all codefendants, in so far as the issues, proof, and record may justify it.[92]

(2) Personal or Representative Capacity

Judgment for or against a party ordinarily must be in the capacity, personal or representative, in which he sues or is sued.

Generally the judgment should be for and against the parties in the capacity in which they sue and are sued.[93] Where an individual cause of action is alleged, but plaintiff describes himself as suing in a representative capacity, he may nevertheless recover in his individual right on proof of the individual cause of action alleged, the allegations as to his representative character being rejected as mere descriptio personæ.[94] Where, however, plaintiff alleges a cause of action accruing to him only in a representative capacity, and sues in such a capacity, proof of a cause of action belonging to him as an individual is a variance, amounting to a failure of

78. S.C.—Youmans v. Youmans, 121 S.E. 674, 128 S.C. 31.
Tex.—McCart v. Scruggs, Civ.App., 26 S.W.2d 173, modified on other grounds, Com.App., 28 S.W.2d 537.

79. Idaho.—Van Sicklin v. Mayfield Land & Livestock Co., 241 P. 1022, 41 Idaho 673.
S.D.—Barry v. G. L. Wood Farm Mortg. Co., 211 N.W. 688, 50 S.D. 652.
Tex.—Galloway v. Moeser, Civ.App., 32 S.W.2d 1067—Douglas Oil Co. v. State (California Case), Civ.App., 70 S.W.2d 452—Western Medical Arts Bldg. Corporation v. Bryan, Civ.App., 5 S.W.2d 862, error dismissed—San Antonio Southern Ry. Co. v. Burd, Civ.App., 246 S.W. 1060, modified on other grounds, Com.App., Burd v. San Antonio Southern R. Co., 261 S.W. 1021.

Absence of claim of adverse title
A decree was held void in so far as it awarded rights in land to some defendants as against other defendants, where they had not claimed any title adverse to each other.—Deming v. Nelson, 210 N.W. 726, 50 S.D. 484.

80. Iowa.—Mallory v. Riggs, 39 N.W. 886, 76 Iowa 748.
33 C.J. p 1201 note 20.

81. Okl.—**Corpus Juris quoted in** Serter v. Newton State Bank & Trust Co., Okl., 295 P. 209, 210, 147 Okl. 136.
Tex.—**Corpus Juris cited in** Greene v. Ellerding, Civ.App., 291 S.W. 271, 272—Robinson v. Watkins, Civ.App., 271 S.W. 288.
Wash.—Wetzel v. Clise, 268 P. 161, 148 Wash. 75.
33 C.J. p 1201 note 21, p 1168 note 28 [b] (1).

Entry of judgment in correct corporate name
If corporation were known by another name than that set forth in pleadings, or were mistakenly named in pleadings, there being no corporation of the name set forth, judgment against corporation in its correct name would be warranted.—Wichita Falls & Southern Ry. Co. v. Foreman, Tex.Civ.App., 109 S.W.2d 549.

82. Ill.—Edwards v. Warner, 111 Ill.App. 32.
33 C.J. p 1201 note 22.

83. Ga.—Shaddix v. Watson, 61 S.E. 823, 130 Ga. 764.
19 C.J. p 1209 note 20 [f].

84. U.S.—Garrard v. Reynold, Ky., 4 How. 123, 11 L.Ed. 903.
19 C.J. p 1217 note 52½.

85. Ga.—Callaway v. Irvin, 51 S.E. 477, 123 Ga. 344.
19 C.J. p 1217 note 52⅛.

86. Cal.—Tormey v. Pierce, 42 Cal. 335.
19 C.J. p 1217 notes 52¼, 52⅜.

87. Mich.—Lynch v. Kirby, 36 Mich. 238.

88. Ga.—McGlamory v. McCormick, 24 S.E. 941, 99 Ga. 148.
19 C.J. p 1217 note 52½.

89. Ga.—Milner v. Vandivere, 12 S.E. 879, 86 Ga. 540.

90. Ill.—Whitham v. Ellsworth, 102 N.E. 223, 259 Ill. 243.
19 C.J. p 1217 note 52⅛.

91. Ky.—Courtney v. Shropshire, 3 Litt. 265.
19 C.J. p 1217 note 52⅛.

92. Ala.—Simmons v. Sharpe, 42 So. 441, 148 Ala. 217.
19 C.J. p 1217 note 55.

93. U.S.—Gonzalez v. Roman Catholic Archbishop of Manila, Phil. Islands, 50 S.Ct. 5, 280 U.S. 1, 74 L.Ed. 131.
Minn.—Briggs v. Kennedy Mayonnaise Products, 297 N.W. 342, 209 Minn. 312.
Tex.—Rockhold v. Lucky Tiger Oil Co., Civ.App., 4 S.W.2d 1046, error dismissed.
33 C.J. p 1155 note 39.

94. U.S.—Newberry v. Robinson, C.C.N.Y., 36 F. 841.
33 C.J. p 1155 note 40.

proof, and it has been held that he cannot recover.[95] Similarly, where plaintiff sues in his individual capacity and the proof shows a right to recover only in a representative capacity, it has been held that there is a fatal variance.[96] A defense good against plaintiff in his individual capacity is not necessarily a bar to a judgment for plaintiff in his representative capacity.[97]

A personal judgment against a defendant who is sued only in his official or representative capacity,[98] or a judgment against one in his representative capacity when he is sued only in his individual capacity,[99] is defective. Where the pleadings are ambiguous as to the capacity in which plaintiff sues, or defendant is sued, the theory on which the case was tried controls the judgment.[1]

Executors and administrators. It has been held that, if an executor or administrator sues as such, he cannot recover in his individual right;[2] but there are also cases in which an individual recovery by one who sued as executor or administrator has been regarded as permissible.[3] If a person sues individually, he cannot recover as executor or administrator.[4] If an action is brought against a person individually, judgment cannot be rendered against him as the personal representative of another.[5] Similarly, as a general rule, where one is sued as executor or administrator, no personal judgment may be rendered against him,[6] although there are cases in which it has been regarded as permissible to render a personal judgment against one so sued.[7]

A plaintiff cannot object to a decree because it was rendered against him in the name and capacity in which he sued.[8] Where a party is sued as personal representative, any judgment in his favor should be in his representative, rather than in his individual, capacity.[9]

b. Property Affected

A judgment affecting property should be limited to that described in the pleadings and proof, and, according to some authorities, a judgment affecting other property is void.

A judgment affecting property should be limited to the property described in the pleadings,[10] and judgments affecting other property have been held

95. Ill.—Stokes v. Riley, 11 N.E. 877, 121 Ill. 166.
33 C.J. p 1155 note 41.

96. Mo.—Vaughan v. St. Louis & S. F. R. Co., 164 S.W. 144, 177 Mo. App. 155.
33 C.J. p 1155 note 42.

97. N.Y.—Scranton v. Farmers' & Mechanics' Bank, 33 Barb. 527, affirmed 24 N.Y. 424.

98. Cal.—Reed v. Molony, 101 P.2d 175, 38 Cal.App.2d 405.
Mo.—Baird v. National Health Foundation, 144 S.W.2d 850, 235 Mo. App. 594.
33 C.J. p 1155 note 44.

99. Conn.—Joseph v. Donovan, 164 A. 498, 116 Conn. 160.
33 C.J. p 1155 note 45.

1. U.S.—Fortier v. New Orleans Nat. Bank, La., 5 S.Ct. 234, 112 U. S. 439, 28 L.Ed. 764.
33 C.J. p 1155 note 46.

2. Cal.—Rogers v. Schlotterback, 138 P. 728, 167 Cal. 35.
24 C.J. p 885 note 49.

3. La.—Childress v. Davis, 15 La. 492.
24 C.J. p 885 note 50, 33 C.J. p 1155 note 40.

4. Me.—Hayes v. Rich, 64 A. 659, 101 Me. 314, 115 Am.S.R. 314.
24 C.J. p 885 note 51.

5. Ala.—Singleton v. Gayle, 3 Port. 270.
24 C.J. p 885 note 52.

6. Neb.—Burton v. Williams, 88 N. W. 765, 63 Neb. 431.
24 C.J. p 885 note 53.

7. Tenn.—Braden v. Hollingsworth, 3 Humphr. 19.
24 C.J. p 886 notes 54, 55.

8. Vt.—Sowles v. Sartwell, 56 A. 282, 76 Vt. 70.

9. La.—Succession of Moore, App., 193 So. 222.

10. U.S.—Baten v. Kirby Lumber Corporation, C.C.A.Tex., 103 F.2d 272.
Ala.—Alford v. Rodgers, 6 So.2d 409, 242 Ala. 370—Parker v. Duke, 157 So. 436, 229 Ala. 361.
Ariz.—Williams v. Earhart, 273 P. 728, 34 Ariz. 565.
Cal.—Alpha Stores v. Croft, 140 P. 2d 688, 60 Cal.App.2d 349—Judson v. Herrington, 130 P.2d 802, 55 Cal. App.2d 476.
Ga.—Tinsley v. Commercial Credit Co., 164 S.E. 454, 45 Ga.App. 297.
Idaho.—Nielson v. Garrett, 43 P.2d 380, 55 Idaho 240.
Mo.—Pioneer Cooperage Co. v. Dillard, 59 S.W.2d 642, 332 Mo. 798—Wilkinson v. Lieberman, 37 S.W. 2d 533, 327 Mo. 420—Garrison v. City of Ozark, App., 248 S.W. 975.
Tex.—Martin v. Abbott, Civ.App., 24 S.W.2d 488—Stevenson v. Barrow, Civ.App., 285 S.W. 840, reversed on other grounds, Com.App., 291 S.W. 1101—Holasek v. Janek, Civ.App., 244 S.W. 285.
W.Va.—George v. Male, 153 S.E. 507, 109 W.Va. 222.
19 C.J. p 1209 note 20 [a], [b]—33 C. J. p 1168 note 32—47 C.J. p 430 note 65—51 C.J. p 269 note 25 [c], [d].

Judgments held proper

(1) Where there was no question as to what land was in dispute and land was fully described in the decree covering land in controversy, decree was not erroneous because not in conformity with pleadings.—Arnd v. Harrington, 287 N.W. 292, 227 Iowa 43.

(2) In action to establish title to strip of land between fence and alleged true boundary line inside fence, a judgment embracing less land than that claimed in pleadings was proper, where land recovered was located precisely as contended for by plaintiffs' petition, except as respects width of strip.—Humble Oil & Refining Co. v. Owings, Tex.Civ.App., 128 S.W.2d 67.

(3) A judgment providing for the return of certain tires was held proper under pleadings dealing with the "equipment" of a certain gasoline station.—Haley v. Traeger, 268 P. 459, 92 Cal.App. 360.

(4) Where description of land in decree vesting title did not follow that in the bill, but included the tract in question and land could be ascertained, there was held to be a sufficient description.—Gaylor v. Gaylor, 1 Tenn.App. 645.

(5) Other cases.
Ga.—Cason v. United Realty & Auction Co., 131 S.E. 161, 161 Ga. 374.
Tex.—Wells v. Laird, Civ.App., 57 S.W.2d 395, error refused—Stevenson v. Barrow, Civ.App., 285 S.W. 840, reversed on other grounds, Com.App., 291 S.W. 1101.

to be void[11] although as to this there is also authority to the contrary.[12] It has been held that the fact that a description in a judgment fixing the boundaries of land involved in a litigation differed from the description in the pleadings was immaterial where there was evidence to support the description in the judgment.[13]

A judgment should also be supported by the proof as to the property involved,[14] and hence a judgment following a description in the complaint which is not supported by the evidence cannot stand.[15]

c. Quieting Title

Actions to quiet title are governed by the general rules with respect to conformity of the judgment with the pleadings and proofs, including the rules as to the granting of affirmative relief to a defendant.

The rule requiring the relief afforded by the judgment to conform to the case made out by the pleadings and proofs has been applied in actions to quiet title.[16] It is error to grant a decree quieting plaintiff's title on proof of facts showing merely a right to specific performance,[17] and, where the bill contains only statutory averments, relief cannot be granted on general principles of equity.[18] Under the broad provisions of some statutes, plaintiff may so frame his petition as to authorize either legal or equitable relief.[19]

Affirmative relief not authorized by the pleadings and proof cannot be granted to defendant,[20] and in some jurisdictions it has been held that the court cannot decree that defendant has the superior title where he files no cross complaint[21] and does not pray for such relief;[22] but in others it has been held that defendant's title may be declared superior if the facts justify it, although he files no cross complaint or otherwise asks for such relief.[23] If defendants set up equities and pray for judgment and for general relief, an award of affirmative

11. Tenn.—Central Sav. Bank v. Carpenter, 37 S.W. 278, 97 Tenn. 437.
33 C.J. p 1168 note 33.

12. Tex.—Williamson v. Wright, 1 Tex.Unrep.Cas. 711.
33 C.J. p 1169 note 34.

13. Cal.—Dreyer v. Cole, 292 P. 123, 210 Cal. 339.

14. Ill.—Osmonson v. Buck, 162 N. E. 142, 331 Ill. 25.

Concession by party

A judgment awarding plaintiff land to which he concedes he is making no claim, and to which defendant appears to have a better title, is erroneous.—Hecker v. Bleish, 3 S. W.2d 1008, 319 Mo. 149.

15. Neb.—Cushing v. Conness, 95 N. W. 855, 4 Neb. (Unoff.) 668.

16. Cal.—Baar v. Smith, 255 P. 827, 201 Cal. 87—Bartholomae Oil Corporation v. Delaney, 296 P. 690, 112 Cal.App. 314.
Mo.—Congregation B'Nai Abraham v. Arky, 20 S.W.2d 899, 323 Mo. 776.
N.M.—Otero v. Toti, 273 P. 917, 33 N.M. 613.
N.C.—Johnston v. Johnston, 12 S. E.2d 248, 218 N.C. 706.
Utah.—Bolognese v. Anderson, 90 P. 2d 275, 97 Utah 136—Bertolina v. Frates, 57 P.2d 346, 89 Utah 238.
51 C.J. p 269 note 25 [a]-[g].

Jurisdictional facts

Although defendant's occupancy of the land was not alleged in the pleadings, it was nevertheless jurisdictional, and the court having found as a fact that defendant was in actual possession when the suit was commenced, the bill was properly dismissed.—Dolph v. Norton, 123 N. W. 13, 158 Mich. 417.

Taxes, penalties, and costs

In action for possession of, and to quiet title to, realty, portion of judgment allowing personal recovery against defendant for accumulated taxes, penalties, and costs, and decreeing lien against property, was held void where issue as to such part of judgment was not raised by pleadings or evidence.—Fuqua v. Watson, 46 P.2d 486, 172 Okl. 624.

Cancellation of deed as cloud on title

Where the clear purpose of a bill is to relieve plaintiff's land from the incubus of a mortgage foreclosure sale, allegations which show the invalidity of the sale as against plaintiff, coupled with a prayer for general relief, are sufficient to warrant cancellation of the deed as a cloud on title, although the special prayer was for redemption and reconveyance to the mortgagor.—Dixie Grain Co. v. Quinn, 61 So. 886, 181 Ala. 208.

Under statute authorizing determination of adverse claims

Where the complaint embraces every averment necessary to sustain an action to quiet title under the general provisions of the statute relating to such actions, a judgment quieting title is proper, although the action was brought under another statute authorizing an action to determine adverse claims by one in adverse possession of the property who has paid taxes thereon during a designated period.—Ernst v. Tiel, 197 P. 809, 51 Cal.App. 747.

Judgments held within pleadings and issues

Cal.—District Bond Co. v. Pollack, 121 P.2d 7, 19 Cal.2d 304.
Mo.—Ebbs v. Neff, 30 S.W.2d 616, 325 Mo. 1132.
Mont.—Thomson v. Nygaard, 41 P.2d 1, 98 Mont. 529.
Okl.—Simmons v. Howard, 276 P. 718, 136 Okl. 118.

17. Mo.—Congregation B'Nai Abraham v. Arky, 20 S.W.2d 899, 323 Mo. 776.
Utah.—Hennefer v. Hays, 47 P. 90, 14 Utah 324.

18. Ala.—First Ave. Coal & Lumber Co. v. King, 69 So. 549, 193 Ala. 438—Fowler v. Alabama Iron & Steel Co., 45 So. 635, 154 Ala. 497.

19. Mo.—Murphy v. Barron, 205 S. W. 49, 275 Mo. 282.
51 C.J. p 270 note 29.

20. N.D.—Brown v. Comonow, 114 N.W. 728, 17 N.D. 84.
51 C.J. p 276 note 30.

21. Cal.—Hungarian Hill Gravel Min. Co. v. Moses, 58 Cal. 168.
Ky.—Spradlin v. Patrick, 64 S.W. 840, 23 Ky.L. 1156.

22. Tex.—State v. Black, 297 S.W. 213, 116 Tex. 615, 53 A.L.R. 1181.
51 C.J. p 276 note 32.

23. Mich.—Miller v. Steele, 109 N. W. 37, 146 Mich. 123.
51 C.J. p 276 note 33.

Relief based on plaintiff's pleading

Where the statute authorizes the court to determine the title and interests of all the parties, and plaintiff's prayer asks that this be done, it is proper for the court, if title is found to be in defendant, so to determine, without any prayer on the latter's part.—Himmelberger-Harrison Lumber Co. v. Jones, 119 S.W. 366, 220 Mo. 190—51 C.J. p 276 note 34.

relief is proper, without a prayer for "affirmative relief" in those terms.[24]

d. Other Applications

The rules governing conformity of judgments with the pleadings, issues, and proofs have been applied in a great variety of cases, the propriety of the particular relief granted depending on all the facts and circumstances.

The rules with respect to the necessity that judgments conform to, and be sustained by, the pleadings and proofs, the relief sought, and the issues, have been applied in numerous cases in addition to those already considered; and, following such rules, the relief granted under the circumstances has been held proper in actions or judgments for or relating to accounts or accounting,[25] annulment of marriage,[26] antenuptial agreements,[27] attorney's fees,[28] bonds,[29] breach of marriage promise,[30] building contracts,[31] cancellation of instruments,[32] commissions,[33] deeds,[34] dower,[35] easements,[36] ejectment,[37] establishment or priority of liens,[38] executors and administrators,[39] foreclosure,[40] improvements,[41] in-

24. Tex.—McCullough v. Rucker, 115 S.W. 323, 53 Tex.Civ.App. 89.

25. Cal.—Nelson v. Abraham, App., 162 P.2d 833—Sly v. Abbott, 264 P. 507, 89 Cal.App. 209—Miller v. Superior Court of California in and for Los Angeles County, 210 P. 832, 59 Cal.App. 340.
Ga.—Grant v. Hart, 30 S.E.2d 271, 197 Ga. 662.
Mo.—Welch-Sandler Cement Co. v. Mullins, App., 31 S.W.2d 36—Logeman Mfg. Co. v. Logeman, App., 298 S.W. 1040.
Tex.—Zimmerman v. Millan, Civ. App., 141 S.W.2d 394—Samuels v. Finkelstein, Civ.App., 25 S.W.2d 923, error dismissed.

26. Cal.—Figoni v. Figoni, 295 P. 339, 211 Cal. 354.

27. Ill.—Parker v. Gray, 148 N.E. 323, 317 Ill. 468.
Kan.—Baldwin v. Baldwin, 96 P.2d 614, 150 Kan. 807.

28. Cal.—Martin v. Pacific Southwest Royalties, 106 P.2d 443, 41 Cal.App.2d 161.
La.—Wild v. Standard General Realty Co., App., 145 So. 58, affirmed 149 So. 114, 177 La. 664.
Tex.—Rychener v. McGuire, Civ. App., 66 S.W.2d 413.

29. Tex.—De Zavala v. Scanlan, Com.App., 65 S.W.2d 489.

30. Tenn.—Poster v. Andrews, 189 S.W.2d 580.

31. Cal.—Karlik v. Peters, 288 P. 363, 106 Cal.App. 126.
9 C.J. p 892 note 51.

32. Cal.—Empire Lease & Royalty Co. v. Jones, 8 P.2d 512, 121 Cal. App. 23.
Ga.—Cason v. United Realty & Auction Co., 131 S.E. 161, 161 Ga. 374.
Mich.—Drinski v. Drinski, 15 N.W. 2d 714, 309 Mich. 479.
Okl.—Exchange Bank of Perry v. Nichols, 164 P.2d 867.
Tex.—Sabens v. Cochrum, Civ.App., 292 S.W. 281.

Fraud as "actual" or "constructive"

Where petition for cancellation of lease recited facts and prayed for a decree declaring the lease to be illegal and void because of fraud, and ordering cancellation thereof and for such other, further, and different relief as equity and justice might require, a holding that constructive fraud existed was within petition, although neither "actual" nor "constructive" was used in connection with charge of fraud.—Johnson v. Radio Station W O W, 14 N. W.2d 666, 144 Neb. 406, reversed on other grounds 65 S.Ct. 1475, 326 U. S. 120, 89 L.Ed. 2092, motion denied 66 S.Ct. 11.

Inability to surrender stock

Where a petition for the cancellation of stock contained a prayer for general relief, it authorized a judgment for the value of the stock which a stockholder was ordered to surrender for cancellation, but which he was unable to surrender because he had transferred it to a brokerage firm.—McCombs Producing & Refining Co. v. Ogle, 254 S.W. 425, 200 Ky. 208.

33. Ark.—Core v. Henley, 16 S.W.2d 579, 179 Ark. 488.
Conn.—Nocera v. La Mattina, 145 A. 271, 109 Conn. 539.
Tex.—Murchison v. Ballard, Civ. App., 173 S.W.2d 554, error refused—Jones v. Bledsoe, Civ.App., 293 S.W. 204.

34. Ga.—Few v. Adams, 117 S.E. 335, 30 Ga.App. 197.
Ill.—Burroughs v. Mefford, 56 N.E. 2d 845, 387 Ill. 461—Hayes v. Miniter, 139 N.E. 74, 308 Ill. 22.
Mo.—Presbyterian Orphanage of Missouri v. Fitterling, 114 S.W.2d 1004, 342 Mo. 299—Mayberry v. Clark, 297 S.W. 39, 317 Mo. 442.
Tex.—Green v. Duncan, Civ.App., 134 S.W.2d 744.

35. Ark.—Less v. Less, 249 S.W. 583, 158 Ark. 255.

36. Ill.—Stowell v. Prentiss, 154 N. E. 120, 323 Ill. 309, 50 A.L.R. 584.
Ky.—Wilson v. Trent, 38 S.W.2d 429, 238 Ky. 551.

37. Ariz.—Keystone Copper Min. Co. v. Miller, 164 P.2d 603.
Ky.—Parkey v. Arthur, 53 S.W.2d 921, 245 Ky. 525.
Mo.—Marsden v. Nipp, 30 S.W.2d 77, 325 Mo. 822.
Application of rules with respect to parties in action of ejectment see supra subdivision a (1) of this section.

38. Idaho.—Gillette v. Oberholtzer, 264 P. 229, 45 Idaho 571.
Iowa.—Holden v. Voelker, 293 N.W. 33, 228 Iowa 589.
Ky.—Smith v. Sellers, 284 S.W. 1034, 215 Ky. 181.

39. Cal.—Tarien v. Katz, 15 P.2d 493, 216 Cal. 554, 85 A.L.R. 334.
Ga.—Sangster v. Toledo Mfg. Co., 19 S.E.2d 723, 193 Ga. 685.
Mo.—Reed v. Tedford, App., 72 S. W.2d 207.
24 C.J. p 884 notes 44 [a]–[e].
Personal or representative capacity see supra subdivision a (2) of this section.

40. Ga.—Ten-Fifty Ponce de Leon Co. v. Citizens' & Southern Nat. Bank, 153 S.E. 751, 170 Ga. 642.
Tex.—Stoutz v. Amarillo Bank & Trust Co., Civ.App., 81 S.W.2d 778, error dismissed.
Utah.—Meissner v. Ogden, L. & I. Ry. Co., 233 P. 569, 65 Utah 1.
Wash.—Beadle v. Barta, 123 P.2d 761, 13 Wash.2d 67.
42 C.J. p 142 note 53 [f], p 143 note 57 [a], [b].

Rights of purchaser at foreclosure

Where there was an actual controversy before the court as to the rights of purchaser in property purchased at foreclosure sale, judgment declaring purchaser at foreclosure sale to be the owner of the property subject only to right of redemption, and that his title thereto subject to such right be quieted against any and all claims of persons claiming property by adverse possession, was proper.—Snyder v. Pine Grove Lumber Co., 105 P.2d 369, 40 Cal.App.2d 660.

41. Mo.—Sutton v. Anderson, 31 S. W.2d 1026, 326 Mo. 304.

junctive relief,[42] insurance,[43] leases or rents,[44] notes,[45] oil or gas leases or royalties,[46] partnerships,[47] partition,[48] patents,[49] personal injuries,[50] quo warranto,[51] rescission,[52] services rendered,[53] specific performance,[54] trespass,[55] trusts,[56] and other matters.[57]

42. Cal.—Knox v. Wolfe, App., 167 P.2d 3—Sharp v. Big Jim Mines, 103 P.2d 430, 39 Cal.App.2d 435.
Mo.—Meder v. Wilson, App., 192 S.W.2d 606.

Use of private way

Decree enjoining use of a private way over defendants' land connecting plaintiffs' tracts was not beyond pleading of injunction suit, where decree only determined plaintiffs' title to an easement and not title to a fee.—Fassold v. Schamburg, 166 S.W.2d 571, 350 Mo. 464.

43. Kan.—Dobrauc v. Concordia Fire Ins. Co., 10 P.2d 875, 135 Kan. 297.
La.—Richmond v. New York Life Ins. Co., App., 25 So.2d 94.
Mo.—Homan v. Employers Reinsurance Corporation, 136 S.W.2d 289, 345 Mo. 650, 127 A.L.R. 163—Nick v. Travelers Ins. Co., App., 185 S.W.2d 326—De Mott v. Great American Ins. Co. of New York, 131 S.W.2d 64, 234 Mo.App. 31.
N.Y.—Borszewski v. Bukowski, 260 N.Y.S. 643, 145 Misc. 680.
Tex.—Georgia Home Ins. Co. v. Trice, Civ.App., 70 S.W.2d 356, error dismissed—Northern Assur. Co. v. Herd, Civ.App., 276 S.W. 884. 33 C.J. p 144 note 33 [a].

Change of beneficiary

Allegation that change of beneficiary of life policy was inequitable, unjust, voidable, and ought to be set aside was held sufficient to support decree for first beneficiary as against contention that decree did not conform to pleadings because no fraud was found.—Travelers' Ins. Co. v. Gebo, 170 A. 917, 106 Vt. 155.

44. La.—Chambers v. Vega, 137 So. 879, 18 La.App. 736.
N.Y.—Longo v. Sparano, 196 N.Y.S. 344, 119 Misc. 402.
S.C.—Stackhouse v. Pure Oil Co., 180 S.E. 188, 176 S.C. 318.

45. Iowa.—Iowa State Sav. Bank of Malvern v. Young, 244 N.W. 271, 214 Iowa 1287, 84 A.L.R. 1400, rehearing denied 245 N.W. 864, 84 A.L.R. 1400.
Kan.—Illinois Life Ins. Co. v. Young, 235 P. 104, 118 Kan. 808, certiorari denied Young v. Stillwell, 46 S.Ct. 21, 269 U.S. 560, 70 L.Ed. 412.
Ky.—Board of Education of Pulaski County v. Nelson, 88 S.W.2d 17, 261 Ky. 466.
Or.—Boyce v. Toke Point Oyster Co., Consol., 25 P.2d 930, 145 Or. 114.
Tex.—Dashiel v. Lott, Com.App., 243 S.W. 1072.

Alternative prayer for balance on open account

In action on notes, where evidence showed payment of notes but existence of undisputed balance due payee on open account, payee was entitled to judgment for balance on open account under amended complaint praying for such relief in alternative.—Federal Rubber Co. v. M. M. Stewart Co., 41 P.2d 158, 180 Wash. 625.

Individual obligation of codefendant

Where petition in action against defendants, as partners, on a note executed by codefendant and payable to plaintiff, copied the note in hæc verba and contained prayer for general relief, and petition showed on its face that note as drawn was an individual obligation of codefendant, petition was sufficient to support a judgment against codefendant.—Poynor v. Adams, Tex.Civ.App., 135 S.W.2d 722.

46. Kan.—Flitch v. Boyle, 89 P.2d 909, 149 Kan. 834—McDermed v. Ackley, 44 P.2d 274, 141 Kan. 818.
Tex.—Caldwell-Guadalupe Pick-Up Stations v. Gregg, Civ.App., 276 S.W. 342, modified on other grounds Gregg v. Caldwell-Guadalupe Pick-Up Stations, Com.App., 286 S.W. 1083.

47. La.—Blanchard v. Patterson, 119 So. 902, 9 La.App. 706.

48. Ky.—Howard v. Carmichael, 85 S.W.2d 852, 237 Ky. 462.
Mo.—Virgin v. Kennedy, 32 S.W.2d 91, 326 Mo. 400.
Tex.—Bowles v. Bryan, Civ.App., 277 S.W. 760.

49. U.S.—General Motors Corporation v. Leer Auto Supply Co., C.C.A.N.Y., 60 F.2d 902.

50. Ala.—City of Birmingham v. Smith, 163 So. 611, 231 Ala. 95.
Ky.—Harmon v. Rose, 32 S.W.2d 57, 235 Ky. 701.
Tex.—Caddo Warehouse & Transfer Co. v. Riley, Civ.App., 7 S.W.2d 137, error dismissed.

51. Fla.—City of Auburndale v. State ex rel. Landis, 184 So. 787, 135 Fla. 172.

52. La.—Houston-Long Co. v. Faircloth, 137 So. 591, 18 La.App. 423.

Judgment fixing damages to vendor for failure of consideration may be entered under complaint for rescission and evidence showing value of property and consideration.—Masero v. Bessolo, 262 P. 61, 87 Cal. App. 262.

53. Cal.—Maxwell v. Jimeno, 265 P. 885, 89 Cal.App. 612—Rosener v. Hanlon Dry Dock & Shipbuilding Co., 236 P. 183, 71 Cal.App. 767.
La.—McCook v. Comegys, 125 So. 134, 169 La. 312.
Tex.—Reymershoffer v. Ray, Civ. App., 85 S.W.2d 1102, error refused.

54. Cal.—Roark v. Southern Trust & Commerce Bank, 288 P. 110, 105 Cal.App. 521.
Wis.—In re Shinoe's Estate, 250 N.W. 505, 212 Wis. 481.

Option to purchase

A judgment decreeing specific performance of an option to purchase contained in a lease was not void merely because complaint failed specifically to allege that option specified adequate consideration or that the contract was fair, where issue of adequacy was conceded by the conduct of defendants at the trial and findings of adequacy and fairness were supported by evidence.—Drullinger v. Erskine, Cal.App., 168 P.2d 48.

55. Ky.—Siler v. Cannon, 130 S.W.2d 742, 279 Ky. 328—Chapman v. Majestic Collieries Co., 288 S.W. 299, 216 Ky. 652.

56. Cal.—Webb v. Vercoe, 258 P. 1099, 201 Cal. 754, 54 A.L.R. 1200.

57. U.S.—Municipal Excavator Co. v. Siedhoff, C.C.A.Kan., 15 F.2d 10.
Ariz.—Betts v. Lightning Delivery Co., 22 P.2d 827, 42 Ariz. 105.
Cal.—Estrin v. Superior Court in and for Sacramento County, 96 P.2d 340, 14 Cal.2d 670—Peak v. Republic Truck Sales Corporation, 230 P. 948, 194 Cal. 732—Wiley v. Wright, 79 P.2d 196, 26 Cal.App.2d 303—Burd v. Downing, 213 P. 287, 60 Cal.App. 493.
Conn.—Heneault v. Papas, 121 A. 273, 99 Conn. 164.
Ga.—Phillips v. Whelchel, 170 S.E. 480, 177 Ga. 489—Stover v. Atlantic Ice & Coal Corporation, 125 S.E. 837, 159 Ga. 357—Powell v. Blackstock, 13 S.E.2d 503, 64 Ga.App. 442.
Idaho.—Angel v. Mellen, 285 P. 461, 48 Idaho 750.
Ill.—Johnson v. Watson, 33 N.E.2d 130, 309 Ill.App. 440—Martin J. Hecht, Inc., v. Steigerwald, 24 N.E.2d 394, 302 Ill.App. 556.
Ind.—Hosanna v. Odishoo, 193 N.E. 599, 208 Ind. 132, rehearing denied 195 N.E. 72, 208 Ind. 132—Waggoner v. Honey, 169 N.E. 349, 91 Ind.App. 81.
Ky.—Ben Humpich Sand Co. v. Moore, 69 S.W.2d 996, 253 Ky. 667—Consolidation Coal Co. v. Riddle, 248 S.W. 530, 198 Ky. 256.
La.—Sanders De Hart v. Continental Land & Fur Co., 17 So.2d 827, 205 La. 569.
Mass.—Gallup v. Barton, 47 N.E.2d 921, 313 Mass. 379.
Mich.—Wesorick v. Winans, 269 N.W. 609, 277 Mich. 589—Hogan v.

On the other hand, following the rules with respect to conformity of judgments with the pleadings, proofs, and issues, particular relief has been held improper in actions or judgments for or relating to accounting,[58] adverse possession,[59] attorneys' fees,[60] cancellation of instruments,[61] checks,[62] commissions,[63] condemnation of property,[64] conversion,[65] deeds and conveyances,[66] ejectment,[67] exec-

Whitcomb, 206 N.W. 328, 233 Mich. 403.
Minn.—Child v. Washed Sand & Gravel Co., 233 N.W. 586, 181 Minn. 559.
Mo.—Timmonds v. Wilbur, 260 S.W. 1004—Fielder v. Fielder, App., 6 S.W.2d 968—Sanders v. Sheets, App., 287 S.W. 1069—Menefee v. Scally, App., 247 S.W. 259.
Okl.—Cusack v. McMasters, 279 P. 329, 137 Okl. 278.
S.C.—In re Bugg's Estate, 51 S.E. 263, 71 S.C. 439.
Utah.—Jeffries v. Third Judicial Dist. Court of Salt Lake County, 63 P.2d 242, 90 Utah 525.
Wash.—Robinson v. Puget Electric Welding Co., 299 P. 405, 162 Wash. 626.
33 C.J. p 1168 note 28 [a] (1), [b].

Reformation

It has been held that reformation need not have been asked for specifically in the pleading to permit the court to enforce a contract as actually made, although not in accordance with a copy attacked as fraudulent.—Hornick v. Union Pac. R. Co., 118 P. 60, 85 Kan. 568, 38 L.R.A.,N.S., 826, Ann.Cas.1913A 208.

58. Conn.—Steinmetz v. Steinmetz, 7 A.2d 915, 125 Conn. 663.
Fla.—Garden Suburbs Golf & Country Club v. Pruitt, 24 So.2d 898.
Mo.—Palmer v. Marshall, App., 24 S.W.2d 229.
N.Y.—Hauenstein v. Fisher, 34 N.Y.S.2d 902, 264 App.Div. 825—Clarkson v. Lusher, 5 N.Y.S.2d 631, 255 App.Div. 705, resettled In re Lusher's Will, 7 N.Y.S.2d 1012, 255 App.Div. 860.
Okl.—Bishop v. Franks, 107 P.2d 358, 188 Okl. 196.

Profit from resale

Where, at the time a suit against a company and some of its stockholders for accounting was instituted, one defendant had not yet acquired a deed of trust to the corporation's property, and no supplemental bill was filed, it could not have been contemplated by the pleadings that the holder of the trust deed should be required to account for any profit from resale after foreclosure, and a judgment requiring him to so account was without the scope of the pleadings, and void.—Lewis v. School, Mo.App., 244 S.W. 90.

Personal judgment against corporate director

Where complaint by stockholders alleged that director failed to account for proceeds of stock and appropriated other money of corporation and prayed an accounting, personal judgment against director exceeded relief prayed for.—Angel v. Mellen, 285 P. 461, 43 Idaho 750.

Claim not referred to in complaint

In action for accounting by landowner on contract for building houses, judgment including amount based on claim not referred to in complaint could not be sustained.—Austin v. Harry E. Jones, Inc., 44 P. 2d 667, 6 Cal.App.2d 493.

59. Tex.—Stevenson v. Barrow, Civ. App., 265 S.W. 602.

60. Cal.—Swanson v. Hempstead, 149 P.2d 404, 64 Cal.App.2d 681.
Tex.—Thompson v. Kleinman, Civ. App., 259 S.W. 593.

61. Ala.—Smith v. Smith, 114 So. 192, 216 Ala. 570.
Ga.—Land Development Corporation v. Union Trust Co. of Maryland, 180 S.E. 836, 180 Ga. 785—De Loach v. Purcell, 143 S.E. 424, 166 Ga. 862.
Ind.—Denney v. Peters, 10 N.E.2d 754, 104 Ind.App. 504.
Ky.—Inez Deposit Bank v. Pinson, 122 S.W.2d 1031, 276 Ky. 84.
La.—Switzer v. Driscoll, App., 183 So. 57.
Mo.—McKay v. Snider, 190 S.W.2d 886.
Tex.—Dallas Joint Stock Land Bank v. King, Civ.App., 167 S.W.2d 245, error refused—Home Ben. Ass'n v. Allee, Civ.App., 128 S.W.2d 417—Armstrong v. Murray Tool & Supply Co., Civ.App., 31 S.W.2d 1101.

Bar of future action

A recital in a judgment denying plaintiff's claim for forfeiture and cancellation of lease that it should not be a bar to any future action for damages or specific performance, being an adjudication of a matter not presented by the pleadings, is erroneous.—Masterson v. Amarillo Oil Co., Tex.Civ.App., 253 S.W. 908.

Money damages held improper

Where wife, prior to divorce, contracted with husband and executed deed of community property to him, and after divorce instituted action to annul contract and deed for fraud, a judgment awarding plaintiff money damages and directing defendant to pay plaintiff support money for child was void, as without the issues.—Stanley v. McKenzie, 240 P. 1033, 29 Ariz. 288.

Cancellation not sought

Where both parties to suit sought construction and specific performance of contract, and neither attacked its validity nor sought its cancellation, court erred in canceling it.—Kentucky & West Virginia Power Co. v. Gilliam, 276 S.W. 983, 210 Ky. 820.

Establishment and foreclosure of liens

In suit to cancel purported deed on ground it was in fact a mortgage, that part of judgment which fixed a tax lien and foreclosed it and foreclosed a vendor's lien was erroneous, where neither party sought the fixing of tax lien or foreclosure of tax lien and vendor's lien.—Duncan v. Green, Tex.Civ.App., 113 S.W.2d 656, error dismissed.

62. Mo.—Massey-Harris Harvester Co. v. Federal Reserve Bank of Kansas City, 48 S.W.2d 158, 226 Mo.App. 916.
Tex.—Street v. Cunningham, Civ. App., 156 S.W.2d 541.

Notice of dishonor

Judgment based on holding that failure to give notice of dishonor of checks was fatal to recovery was properly reversed, where no plea raised question of discharge by failure to give notice of dishonor.—Comer v. Brown, Tex.Com.App., 285 S.W. 307.

63. Tex.—McClory v. Schneider, Civ.App., 51 S.W.2d 738, error dismissed—Smyth v. Conner, Civ. App., 280 S.W. 600—John Christensen & Co. v. McNeil, Civ.App., 251 S.W. 351.

64. Ky.—City of Owingsville v. Ulery, 86 S.W.2d 706, 260 Ky. 792.

65. Tex.—Lewis v. Gamble, Civ. App., 113 S.W.2d 659—Meador v. Wagner, Civ.App., 70 S.W.2d 794, error dismissed.

66. R.I.—Nelson v. Streeter, 13 A. 2d 256, 65 R.I. 13.
Tex.—Long v. McCoy, Civ.App., 294 S.W. 633, affirmed McCoy v. Long, Com.App., 15 S.W.2d 234, rehearing denied 17 S.W.2d 783.

Absence of interest in land

Where only issues before court were existence of alleged indebtedness and whether quitclaim deed was intended as mortgage, portion of judgment adjudging that plaintiff had no interest whatever in land was held void.—State ex rel. Shull v. Moore, 27 P.2d 1048, 167 Okl. 28.

67. Mo.—Riley v. La Font, 174 S.W. 2d 857—Brown v. Wilson, 155 S.W. 2d 176, 348 Mo. 658.
19 C.J. p 1209 note 20 [c]–[e], p 1240 note 19 [a].

Improvements

Adjudication that defendant in ejectment is entitled to nothing for improvements is erroneous, where no such issue is made by pleadings.

utors and administrators,[68] fixtures,[69] foreclosure,[70] foreign judgments,[71] forfeiture,[72] gifts,[73] guaranties,[74] injunctive relief,[75] insurance,[76] interpleader,[77] leases or rents,[78] notes,[79] partition,[80] partnerships,[81] personal injuries,[82] quo warranto,[83] receiv-

—Lester v. Tyler, Mo., 69 S.W.2d 633.

68. Ky.—Stimson's Ex'x v. Tharp, 144 S.W.2d 1031, 284 Ky. 389.
24 C.J. p 884 note 44 [a].
Personal or representative capacity see supra subdivision a (2) of this section.

69. Ky.—Tabor v. Tabor, 280 S.W. 134, 213 Ky. 312.

70. N.Y.—Brockport Nat. Bank v. Webaco Oil Co., 12 N.Y.S.2d 652, 257 App.Div. 68, reargument denied 14 N.Y.S.2d 495, 257 App.Div. 1043.
N.C.—Richardson v. Satterwhite, 150 S.E. 116, 197 N.C. 609.
Ohio.—Lebanon Production Credit Ass'n v. Feldhaus, App., 34 N.E.2d 463.
Tex.—Smith v. Jaggers, Civ.App., 16 S.W.2d 969, error dismissed.
Vt.—Freedley v. Edwin Shuttleworth Co., 130 A. 691, 99 Vt. 25.
33 C.J. p 1139 note 52 [b] (1), [e] —42 C.J. p 142 notes 48, 53 [c], [e].

Extent of interest foreclosed

In action to foreclose vendor's lien where only evidence of defendant's interest was in deed from plaintiff to defendant, judgment foreclosing an interest less than described in deed was error.—Smith v. Totton, Civ.App., 98 S.W.2d 1019, affirmed Totton v. Smith, 113 S.W.2d 517, 131 Tex. 219.

71. Cal.—Morrow v. Morrow, 105 P. 2d 129, 40 Cal.App.2d 474.

72. Ill.—Penkala v. Tomczyk, 148 N.E. 64, 317 Ill. 356.

73. Mo.—Riney v. Riney, App., 117 S.W.2d 698.

74. La.—Exchange Nat. Bank of Shreveport v. Holomon Bros., 123 So. 603, 168 La. 870.

75. Cal.—Sharp v. Big Jim Mines, 103 P.2d 436, 39 Cal.App.2d 435.
Idaho.—Boise Street Car Co. v. Van Avery, 103 P.2d 1107, 61 Idaho 502.
Mich.—Ottney v. Taylor, 13 N.W.2d 280, 308 Mich. 252.
Mo.—Finley v. Smith, 178 S.W.2d 326, 352 Mo. 465—Fugel v. Becker, 2 S.W.2d 743.
Neb.—Hallgren v. Williams, 20 N. W.2d 499.
Pa.—Ebur v. Alloy Metal Wire Co., 155 A. 280, 304 Pa. 177.

Vacation of judgment

In suit to enjoin enforcement of judgment, court's attempt to vacate judgment was held nugatory, since it was unauthorized by pleadings.—Baria v. Taylor, 57 S.W.2d 858.

Personal judgment; order of sale

In suit to restrain sale under trust deed, judgment against mortgagor personally and ordering sale was held not warranted under pleadings.—Farm & Home Savings & Loan Ass'n of Missouri v. Muhl, Tex.Civ. App., 37 S.W.2d 316, error refused.

76. Ky.—London & Provincial Marine & Fire Ins. Co. of London, England, v. Mullins, 95 S.W.2d 588, 264 Ky. 780—Fidelity Mut. Life Ins. Co. v. Hembree, 41 S.W.2d 649, 240 Ky. 97.
Mo.—Smith v. Smith, App., 192 S. W.2d 691, followed in 192 S.W.2d 700.
N.J.—Magliano v. Metropolitan Life Ins. Co., 34 A.2d 296, 21 N.J.Misc. 394.
Tex.—Drane v. Jefferson Standard Life Ins. Co., 161 S.W.2d 1057, 139 Tex. 101—Home Ins. Co. v. Scott, Civ.App., 152 S.W.2d 413, error dismissed—Snyder Local Mut. Life Ass'n, Group One, v. Lemond, Civ.App., 116 S.W.2d 829, error refused—National Aid Life Ass'n v. Bailey, Civ.App., 54 S.W. 2d 206—Fidelity Union Fire Ins. Co. v. Barnes, Civ.App., 293 S.W. 279.
Wis.—Schmidt v. La Salle Fire Ins. Co. of New Orleans, 245 N.W. 702, 209 Wis. 576.
33 C.J. p 1139 note 52 [b] (3), p 1168 note 28 [c]—37 C.J. p 656 note 13.

Disability

Where an accident policy provides indemnity for partial and total disability, if insured sues for the indemnity payable for a total disability he cannot, in the same action, recover indemnity for a partial disability which succeeded his total disability.—Rayburn v. Pennsylvania Casualty Co., 54 S.E. 283, 141 N.C. 425.

Fraud

Where issue of fraud was irrelevant because not pleaded, finding thereon for insurer sued for premiums would not support judgment for insurer.—American Nat. Ins. Co. v. Villegas, Tex.Civ.App., 32 S.W.2d 1109.

77. Cal.—Van Orden v. Golden West Credit & Adjustment Co., 9 P.2d 572, 122 Cal.App. 132.

78. Ky.—Key v. Hays, 166 S.W.2d 850, 292 Ky. 423.
La.—Harper v. Sid Simmons Drilling Co., 114 So. 647, 164 La. 767.
Me.—Bemis v. Bradley, 139 A. 593, 126 Me. 462, 69 A.L.R. 1399.
Mo.—Dreckshage v. Dreckshage, 176 S.W.2d 7, 352 Mo. 78—McCaskey v. Duffley, 78 S.W.2d 141, 229 Mo. App. 289.
N.Y.—Kilmer Park Const. Co. v. Lehrer, 270 N.Y.S. 156, 150 Misc. 673.
Pa.—Normile v. Martell, 95 Pa.Super. 139.
Tex.—Wafford v. Branch, Com.App., 267 S.W. 260—Gulf Refining Co. v. Smith, Civ.App., 81 S.W.2d 155.

Indemnification

In action against lessor and lessee for damages to nearby property, lessor was not entitled to judgment over against lessee on ground that lease contained an indemnification clause in its favor, where the pleadings raised no such issue.—Boyle v. Pennsylvania R. Co., 31 A.2d 89, 346 Pa. 602.

79. Ky.—Beaver Petroleum Corporation v. Whitney, 278 S.W. 565, 212 Ky. 222.
La.—W. J. & C. Sherrouse v. Phenix, 128 So. 536, 14 La.App. 629.
Tex.—Chastain v. Gilbert, Civ.App., 145 S.W.2d 938—Butler v. Price, Civ.App., 138 S.W.2d 301—Metropolis Co. v. Texas Publication House, Civ.App., 44 S.W.2d 403—Stack v. Ellis, Civ.App., 291 S.W. 919—Standard Motor Co. v. Wittman, Civ.App., 271 S.W. 186—Blankenbeckler v. Kuykendall, Civ.App., 256 S.W. 323.

Material alteration

Where notes were rendered void by material alteration by payee, judgment in amount of notes was held erroneous, since there was no pleading or claim based on original obligation evidenced by the notes.—Jones v. Jones, 71 S.W.2d 999, 254 Ky. 475.

80. Ga.—Hatton v. Johnson, 121 S. E. 404, 157 Ga. 313.
Tex.—Johnson v. Bussey, Civ.App., 95 S.W.2d 990, error refused—Security Realty & Development Co. v. Jenkins, Civ.App., 80 S.W.2d 999 —Vanlandingham v. Terry, Civ. App., 293 S.W. 252.
47 C.J. p 430 note 69.

81. Mo.—McCrosky v. Burnham, App., 282 S.W. 158.

Personal judgment against manager of partnership was unauthorized, where complaint did not allege that he was a partner or that he had any interest in business and asked for no relief against him except that any interest he might have should be foreclosed.—State ex rel. Veatch v. Franklin, 98 P.2d 724, 163 Or. 500.

82. Tex.—St. Louis, B. & M. Ry. Co. v. Price, Civ.App., 244 S.W. 642, affirmed, Com.App., 269 S.W. 422.

83. **Corporate nature of body**

A judgment in quo warranto cannot be sustained where it is against respondents as officers of an unin-

ers,[84] recovery of purchase price of property,[85] replevin,[86] rescission,[87] services rendered,[88] specific performance,[89] statutory penalties,[90] taxes or assessments,[91] trespass,[92] trusts,[93] wages and penalties,[94] workmen's compensation,[95] and other matters.[96]

§ 52. —— Nature and Form of Action

In general the judgment is limited by the nature of the action; but in code states, where the common-law forms of pleading have been abolished, the form or name of the action does not control the relief which may be granted.

In general the scope of the judgment is limited by the nature or character of the action.[97] At

corporated body and the issue raised by the pleadings is whether the relators are entitled to the offices in an incorporated body which are claimed and held by respondents. —Commonwealth v. Grim, 99 A. 156, 255 Pa. 40.

84. Tex.—Commercial Standard Ins. Co. v. Moeller, Civ.App., 78 S.W. 2d 283.

85. Cal.—Young v. Lial, 17 P.2d 170, 128 Cal.App. 246.
Ga.—Whitten v. McMillan, 128 S.E. 211, 34 Ga.App. 33.
La.—Stafford v. Tolmas Realty Co., App., 146 So. 61—Jackson v. Harris, 136 So. 166, 18 La.App. 484, reinstated 137 So. 655, 18 La.App. 484.
Tex.—Bancroft v. Brown, Civ.App., 283 S.W. 206—Holloway v. Miller, Civ.App., 272 S.W. 562.

Return of property

In an action for the balance due on the purchase price of property in which defendant asks only for damages, or for a return of payments made, and in which the only issue is whether there should be a money judgment in favor of one party against the other, a money judgment for defendant coupled with an adjudication that the property be returned to plaintiff is improper.—Cresci v. Gandy, 124 A. 68, 99 N.J. Law 417—Union Garage Co. v. Wilner, 120 A. 4, 98 N.J.Law 441.

Balance due seller

In seller's action for purchase price, verdict for buyer on his counterclaim for fraud was unwarranted, where, if utmost amount shown as damages were subtracted from price remaining unpaid, there would still be a remainder in seller's favor.—Gross v. Reiners, 124 A. 811, 100 Conn. 732.

86. Tenn.—Sartain v. Dixie Coal & Iron Co., 266 S.W. 313, 150 Tenn. 633.
33 C.J. p 1139 note 52 [b] (2), (4).

87. Tex.—Bailey v. Mann, Civ.App., 248 S.W. 469.

88. Tex.—Burnell v. Schmidt, Civ. App., 104 S.W.2d 551—Barnhart Mercantile Co. v. Bengel, Civ.App., 77 S.W.2d 295.

89. La.—Derbes v. Rogers, 110 So. 84, 162 La. 49.

90. Tex.—Jennings v. Texas Farm Mortgage Co., 80 S.W.2d 931, 124 Tex. 593—Gibson v. Hicks, Civ. App., 47 S.W.2d 691, error refused —National Casualty Co. v. Mahoney, Civ.App., 296 S.W. 335.

91. U.S.—Degener v. Anderson, C.C. A.N.Y., 77 F.2d 859.
La.—State ex rel. Porterie v. Gulf, Mobile & Northern R. Co., 184 So. 711, 191 La. 163.
Mo.—State ex rel. Kansas City v. School Dist. of Kansas City, 62 S.W.2d 813, 333 Mo. 288.
Tex.—Ostrom v. State, Civ.App., 88 S.W.2d 1084.

92. La.—Bruning v. City of New Orleans, 115 So. 733, 165 La. 511.
Tex.—Dalton v. Davis, Com.App., 1 S.W.2d 571—Martin v. Grogan-Cochran Lumber Co., Civ.App., 176 S.W.2d 730—First State Bank in Caldwell v. Stubbs, Civ.App., 48 S.W.2d 446.

93. Cal.—Juranek v. Juranek, 84 P. 2d 195, 29 Cal.App.2d 276.
Conn.—Waterbury Trust Co. v. Porter, 38 A.2d 598, 131 Conn. 206—Zitkov v. Gorsky, 137 A. 751, 106 Conn. 287.
S.D.—Colteaux v. First Trust & Savings Bank, 218 N.W. 151, 52 S.D. 443.
Tex.—Norris v. Stoneham, Civ.App., 46 S.W.2d 363.

94. Kan.—Southern Kansas Stage Lines Co. v. Webb, 41 P.2d 1025, 141 Kan. 476.

95. La.—Prudhome v. Cedar Grove Refining Co., App., 157 So. 158.

96. Ariz.—Price v. Sunfield, 112 P. 2d 210, 57 Ariz. 142.
Ark.—Hunt v. Road Improvement Dist. No. 12 of Woodruff County, 270 S.W. 961, 168 Ark. 266.
Colo.—Buchhalter v. Myers, 276 P. 972, 85 Colo. 419.
Ga.—Ramey v. McCoy, 179 S.E. 730, 180 Ga. 521.
Ill.—Kohler v. Kohler, 61 N.E.2d 687, 326 Ill. 105—Baxter v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 26 N.E.2d 179, 304 Ill.App. 117.
Kan.—Old Peoples Home of Illinois Conference of Methodist Episcopal Church, Quincy, Ill., v. Miltner, 89 P.2d 874, 149 Kan. 847.
Ky.—Braun v. Smith, 178 S.W.2d 940, 297 Ky. 162—Key v. Hays, 166 S.W.2d 850, 292 Ky. 423—Jameson v. Jameson, 133 S.W.2d 923, 280 Ky. 554—Berry v. Riess, 121 S.W.2d 942, 276 Ky. 114—Chesapeake & O. Ry. Co. v. City of Olive Hill, 21 S.W.2d 127, 231 Ky. 65—Rex Red Ash Coal Co. v. Powers, 290 S.W. 1061, 218 Ky. 93.
Mo.—Verdon v. Silvara, 274 S.W. 79, 308 Mo. 607.
N.Y.—Claris v. Richards, 183 N.E. 904, 260 N.Y. 419.
Or.—City of Portland v. Hurst, 28 P.2d 217, 145 Or. 415—Robinson v. Oregon City Sand & Gravel Co., 20 P.2d 1073, 143 Or. 177.
S.C.—Griggs v. Griggs, 19 S.E.2d 477, 199 S.C. 295.
S.D.—Hunt v. Dolphin, 223 N.W. 64, 54 S.D. 261.
Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253—Saner-Whiteman Lumber Co. v. Texas & N. O. Ry. Co., Com. App., 288 S.W. 127, rehearing denied 288 S.W. 1063—Spradlin v. Gibbs, Civ.App., 159 S.W.2d 246—International Order of Twelve Knights and Daughters of Tabor v. Fridia, Civ.App., 91 S.W.2d 404—W. L. Moody Cotton Co. v. Polley, Civ.App., 66 S.W.2d 807—Carder v. Knippa Mercantile Co., Civ. App., 1 S.W.2d 462, error dismissed—San Antonio Southern Ry. Co. v. Burd, Civ.App., 246 S.W. 1060, modified on other grounds Burd v. San Antonio Southern R. Co., Com.App., 261 S.W. 1021.
33 C.J. p 1139 note 52 [b], p 1151 note 17 [b], [c], 19 [a], p 1152 note 21 [a], [c].

97. Ky.—Commonwealth v. Kentucky Jockey Club, 33 S.W.2d 987, 238 Ky. 739.
Tex.—Forman v. Barron, Civ.App., 120 S.W.2d 827, error refused.
Tort or contract see infra § 53.

In rem or in personam

An action in rem will not support a judgment in personam.
N.Y.—Sturcke v. Link, 26 N.Y.S.2d 748, 176 Misc. 93.
S.C.—Parker Peanut Co. v. Felder, 34 S.E.2d 488, 207 S.C. 63.

Assumpsit; moneys had and received

Where an action in assumpsit would not lie, judgment for plaintiff could not be supported by count for moneys had and received.—Schweitzer v. Bank of America N. T. & S. A., 109 P.2d 441, 42 Cal.App.2d 536.

Goods sold and delivered; indebitatus assumpsit

The fact that the declaration sought to recover for goods sold and delivered did not prevent recovery in indebitatus assumpsit, where it

common law a judgment must be warranted by the form of the action.[98] Thus it has been held that a judgment in debt is erroneous where the declaration is in assumpsit[99] or in case,[1] or in replevin;[2] and similarly that, where the declaration is in debt, a judgment in assumpsit[3] or in damages[4] is erroneous; but, by the practice of the majority of states, a judgment in damages on a declaration in debt will be good, the objection being merely technical,[5] and, vice versa, a judgment entered in debt instead of in damages is good.[6] On a declaration in trespass, a recovery in case has been permitted.[7]

In code states, the common-law forms of pleading having been abolished, it is the duty of the courts to give such judgment as the pleadings and evidence warrant, without regard to the form or name of the action.[8]

§ 53. —— Grounds of Action or Defense

As a general rule, a judgment for a plaintiff must be based on the cause of action which he has alleged, and not on some theory inconsistent with, or totally different from, that suggested in his pleading. Similarly, a defendant ordinarily must prevail according to the case made by his answer.

Relief to, or a recovery by, plaintiff must be based on, and justified by, facts alleged in his pleading.[9] Unless defendant, by his silence or conduct, has acquiesced in the trial of the new and different cause of action on which the judgment proceeded, as discussed supra § 50, a plaintiff ordinarily must recover, if at all, on the cause of action which he has alleged, and a judgment in his favor must be based on the theory or ground of liability on which in his pleadings he has placed his right to recover.[10]

also alleged that plaintiff paid out money at defendant's request, which was supported by the evidence introduced.—Campbell v. Willis, 290 F. 271, 53 App.D.C. 296.

98. Minn.—Gervais v. Powers, 1 Minn. 45.
33 C.J. p 1155 note 48.

99. Ark.—Jones v. Robinson, 8 Ark. 484.
33 C.J. p 1155 note 49.

1. Ky.—Lynch v. Freeland, Ky. Dec. 269.

2. R.I.—Warren v. Leiter, 52 A. 76, 24 R.I. 36.
33 C.J. p 1155 note 51.

3. Colo.—Anderson v. Sloan, 1 Colo. 484.
33 C.J. p 1155 note 52.

4. Ill.—Ross v. Taylor, 63 Ill. 215.
33 C.J. p 1155 note 53.

5. Vt.—Carver v. Adams, 40 Vt. 552.
33 C.J. p 1156 note 54.

6. Ala.—Perdue v. Burnett, Minor p 138.
Ky.—Jenkins v. Yeates, 2 J.J.Marsh. 48.

7. Pa.—Miller v. Lehigh County, 5 Pa.Dist. 588.
33 C.J. p 1156 note 56.

8. U.S.—Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14.
Conn.—Makusevich v. Gotta, 139 A. 780, 107 Conn. 207.
Or.—Weith v. Klein, 228 P. 902, 136 Or. 201.
Tex.—Dittmar v. Alamo Nat. Co., 118 S.W.2d 298, 132 Tex. 44.
33 C.J. p 1156 note 57.

9. Ariz.—White v. Hamilton, 299 P. 124, 38 Ariz. 256—City of Yuma v. English, 226 P. 531, 26 Ariz. 438.
Cal.—Bridge v. New Amsterdam Casualty Co., 19 P.2d 76, 129 Cal.App. 355—Westervelt v. McCullough, 228 P. 734, 68 Cal.App. 198—Imperial Water Co. No. 4 v. Meserve, 217 P. 553, 62 Cal.App. 603.
Conn.—Masterton v. Lenox Realty Co., 15 A.2d 11, 127 Conn. 25—Frosch v. Sears, Roebuck & Co., 199 A. 646, 124 Conn. 300—Mazziotti v. Di Martino, 130 A. 844, 103 Conn. 491.
Ga.—Mendel v. Converse & Co., 118 S.E. 586, 30 Ga.App. 549.
Ind.—Indianapolis Real Estate Board v. Willson, 187 N.E. 400, 98 Ind.App. 72.
Minn.—Hurr v. Davis, 193 N.W. 943, 155 Minn. 456, rehearing denied 194 N.W. 379, 155 Minn. 456, certiorari denied 44 S.Ct. 36, 263 U.S. 709, 68 L.Ed. 518, and error dismissed 45 S.Ct. 227, 267 U.S. 572, 69 L.Ed. 794.
Mo.—Bragg v. Specialty Shoe Machinery Co., 34 S.W.2d 184, 225 Mo.App. 902.
Mont.—Kramlich v. Tullock, 277 P. 411, 84 Mont. 601.
N.Y.—Garfinkel & Steinberg Corporation v. Bandlers Sutphin, Inc., 299 N.Y.S. 536, 252 App.Div. 858—Blackwell v. Glidden Co., 203 N.Y.S. 380, 208 App.Div. 317, affirmed 147 N.E. 188, 239 N.Y. 545—MacLeold v. Miller, 201 N.Y.S. 108.
N.C.—Barron v. Cain, 4 S.E.2d 618, 216 N.C. 282.
Tenn.—Polk v. Chattanooga Wagon & Body Co., 2 Tenn.App. 415.
Tex.—Jackson v. Cloer, Civ.App., 93 S.W.2d 353—Smoot & Smoot v. Nelson, Civ.App., 11 S.W.2d 578—Hall v. First Nat. Bank, Civ.App., 252 S.W. 828, modified on other grounds 254 S.W. 522.
Utah.—Stevens & Wallis v. Golden Porphyry Mines Co., 18 P.2d 903, 81 Utah 414.
33 C.J. p 1156 note 60, p 1157 note 61.

Cause or theory asserted in reply

(1) Ordinarily a judgment may not be rendered on a cause of action asserted in a reply.
Ky.—Hacker v. Clay County, 165 S.W.2d 172, 291 Ky. 614.
Mo.—Regal Realty & Investment Co. v. Gallagher, 188 S.W. 151.
33 C.J. p 1156 note 60 [d].

(2) Where plaintiff in his complaint sought recovery of land on the theory that a deed to him was an absolute conveyance, and defendant in his answer claimed that the deed was in fact a mortgage, and, where plaintiff in his reply sought foreclosure if the deed were found to be a mortgage, it was held that a judgment directing foreclosure was justified where the court found that the deed was a mortgage.—Church v. Brown, 272 P. 511, 150 Wash. 173.

New complaint

If court permits filing of new complaint to conform to proof, judgment should relate to new pleading.—Bakersfield Sandstone Brick Co. v. Cascade Oil Co., 23 P.2d 423, 132 Cal.App. 633.

Liability as indorser

Defendants could not be held as indorsers on note where pleading showed that action was not brought on note.—Kern v. Henry, 31 P.2d 454, 138 Cal.App. 46.

10. U.S.—State Street Trust Co. v. U. S., D.C.Mass., 37 F.Supp. 846, affirmed, C.C.A., U. S. v. State Street Trust Co., 124 F.2d 948.
Ala.—Chandler v. Price, 15 So.2d 462, 244 Ala. 667.
Ariz.—Jones v. Stanley, 233 P. 593, 27 Ariz. 381.
Ill.—Wood v. Wood, App., 64 N.E.2d 385—First Trust Joint Stock Land Bank of Chicago v. Cutler, 12 N.E.2d 705, 293 Ill.App. 354—Streeter v. Humrichouse, 261 Ill.App. 556.
Ind.—City of Muncie v. Horlacher, 53 N.E.2d 631, 222 Ind. 302.
La.—Hope v. Madison, 188 So. 711, 192 La. 593.

Plaintiff cannot set up one cause of action in his complaint and recover on proof of another and a different cause of action; nor can he recover on some theory not suggested in his declaration or complaint.[11] It is particularly true that recovery on

Me.—Morrison v. Union Park Ass'n, 149 A. 804, 129 Me. 38.
Minn.—Consumers' Grain Co. v. Wm. Lindeke Roller Mills, 190 N.W. 65, 153 Minn. 231.
Mo.—Pinet v. Pinet, App., 191 S.W.2d 362—Palmer v. Marshall, App., 24 S.W.2d 229.
N.Y.—Jno. Dunlop's Sons v. Alpren, 212 N.Y.S. 307, 214 App.Div. 339—Varda v. Lynch, 196 N.Y.S. 641, 203 App.Div. 539—Carroll v. Dryolin Corporation, 45 N.Y.S.2d 77, 182 Misc. 260—Rochester Poster Adv. Co. v. Smithers, 224 N.Y.S. 711, 130 Misc. 676, reversed on other grounds 231 N.Y.S. 315, 224 App. Div. 435—Siegler v. Bischof, 53 N. Y.S.2d 657—Kirkpatrick Home for Childless Women v. Kenyon, 196 N.Y.S. 475, affirmed 199 N.Y.S. 851, 206 App.Div. 728.
N.C.—Balentine v. Gill, 11 S.E.2d 456, 218 N.C. 496—Wallace v. Wallace, 188 S.E. 96, 210 N.C. 656.
Ohio.—Thompson v. Thompson, 181 N.E. 272, 42 Ohio App. 164.
Pa.—In re Miller, Com.Pl., 32 Del. Co. 566.
Tex.—Nu-Enamel Paint Co. of Texas v. Culmore, Civ.App., 72 S.W.2d 390—Tinsley v. Metzler, Civ.App., 44 S.W.2d 820, error dismissed—Gibbs v. Corbett, Civ.App., 292 S. W. 260—Superior Fire Ins. Co. v. C. S. Lee Grain & Elevator Co., Civ.App., 261 S.W. 212—Trott v. Flato, Civ.App., 244 S.W. 1085.
33 C.J. p 1157 note 62, p 1158 note 66, p 1159 note 67.

Estoppel

Where a complaint failed to allege facts constituting an estoppel, a judgment on that ground cannot be upheld, whether a cause of action could or could not have been maintained, had it been pleaded.—Gibraltar Realty Co. v. Security Trust Co., 136 N.E. 636, 192 Ind. 502.

Failure of consideration

In action by purchaser for rescission of contract, relief could not be granted for failure of consideration where such failure was not pleaded. —Clancy v. Becker-Arbuckle-Wright Corporation, 29 P.2d 868, 137 Cal. App. 43.

Interest in land

Petition alleging an agreement to purchase land and divide profits on resale, but not alleging that plaintiff was to have any interest in the land, would not support a judgment for a portion of the land still unsold.—Carothers v. Creighton, Tex. Civ.App., 101 S.W.2d 631.

11. U.S.—Storm Waterproofing Corporation v. L. Sonneborn Sons, D. C.Del., 28 F.2d 115—Durabilt Steel Locker Co. v. Berger Mfg. Co., D. C.Ohio, 21 F.2d 139.
Colo.—Rio Grande Fuel Co. v. Colorado Central Power Co., 63 P. 2d 470, 99 Colo. 395.
Conn.—Conzelman v. City of Bristol, 188 A. 659, 122 Conn. 218.
Fla.—Gruber v. Cobey, 12 So.2d 461, 152 Fla. 591—Foye Tie & Timber Co. v. Jackson, 97 So. 517, 86 Fla. 97.
Ga.—Southern Lumber Co. v. Edwards, 117 S.E. 252, 30 Ga.App. 223.
Ill.—Jacksonville Hotel Bldg. Corporation v. Dunlap Hotel Co., 264 Ill. App. 279, modified on other grounds 183 N.E. 397, 350 Ill. 451.
Ind.—Gibraltar Realty Co. v. Security Trust Co., 136 N.E. 636, 192 Ind. 502—Denney v. Peters, 10 N. E.2d 754, 104 Ind.App. 504—Nesbitt v. Miller, 188 N.E. 702, 98 Ind. App. 195.
Kan.—Harveyville State Bank v. Lee, 234 P. 982, 118 Kan. 269.
Ky.—Smith v. Collins, 251 S.W. 979, 199 Ky. 770.
Me.—Page v. Bourgon, 22 A.2d 577, 138 Me. 113.
Mo.—Smith v. Thompson, 161 S.W. 2d 232, 349 Mo. 396—State ex rel. Kennedy v. Remmers, 101 S.W.2d 70, 340 Mo. 126—Zamora v. Woodmen of the World Life Ins. Soc., App., 157 S.W.2d 601—Wasson v. Dow, App., 251 S.W. 69.
Mont.—Outlook Farmers' Elevator Co. v. American Surety Co. of New York, 223 P. 905, 70 Mont. 8.
N.Y.—Kew Gardens Corporation v. Ciro's Plaza, 26 N.Y.S.2d 553, 261 App.Div. 576—Douglass v. Wolcott Storage & Ice Co., 295 N.Y.S. 675, 251 App.Div. 79—Berger v. Eichler, 207 N.Y.S. 147, 211 App.Div. 479—Security Bank of New York v. Finkelstein, 145 N.Y.S. 5, 160 App. Div. 315, affirmed 112 N.E. 1076, 217 N.Y. 707—Bernstein v. East 167th Street Corporation, 293 N. Y.S. 109, 161 Misc. 836—Rosenblum v. Pas Holding Corporation, 28 N.Y.S.2d 589.
Or.—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213, followed in Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 222.
S.D.—Metropolitan Life Ins. Co. v. Frick, 245 N.W. 921, 61 S.D. 9.
Tex.—Johnson Aircrafts v. Wilborn, Civ.App., 190 S.W.2d 426—City of Temple v. Mitchell, Civ.App., 180 S.W.2d 959—City State Bank in Wellington v. Wellington Independent School Dist., Civ.App., 173 S.W.2d 733, affirmed 178 S.W.2d 114, 142 Tex. 344—Chamblin v. Webb, Civ.App., 155 S.W.2d 676—Strack v. Strong, Civ.App., 114 S. W.2d 313, error dismissed—Stuard v. Vick, Civ.App., 9 S.W.2d 494, error dismissed—Rockhold v. Lucky Tiger Oil Co., Civ.App., 4 S.W.2d 1046, error dismissed—American Law Book Co. v. Dykes, Civ.App., 4 S.W.2d 630—First State Bank of Wortham v. Bland, Civ. App., 291 S.W. 650—C. A. Bryant Co. v. Hamlin Independent School Dist., Civ.App., 274 S.W. 266.
Wis.—Lee v. Pauly Motor Truck Co., 190 N.W. 819, 179 Wis. 139.
33 C.J. p 1157 note 62, p 1159 note 67.

Public or private way

In a suit brought on the theory of the existence of a private way, judgment cannot be based on the theory that the road or way was a public one.
Cal.—Hare v. Craig, 276 P. 336, 206 Cal. 753.
Utah.—Thornley Land & Livestock Co. v. Morgan Bros. Land & Livestock Co., 17 P.2d 826, 81 Utah 317.

Contract as oral or written

(1) Judgment on wholly written contract has no support in pleadings declaring on partly written contract. —C. A. Bryant Co. v. Hamlin Independent School Dist., Civ.App., 18 S. W.2d 750, certified questions answered 14 S.W.2d 53, 118 Tex. 255.

(2) In suit to recover for interference with contract, where plaintiff alleged a contract in writing, plaintiff was not entitled to relief for interference with an oral contract collateral to written contract.—Tompkins v. Sullivan, 48 N.E.2d 15, 313 Mass. 459.

Negligence; trespass

(1) Where the allegations and trial are based exclusively on the theory of negligence, recovery on a ground other than negligence is not permissible.
Conn.—Epstein v. City of New Haven, 132 A. 467, 104 Conn. 283.
N.Y.—Rock v. Radice Electric Co., 225 N.Y.S. 659, 131 Misc. 51.
33 C.J. p 1158 note 66 [a] (1), (5), (7), p 1159 note 67 [a] (2).

(2) A judgment based on negligence is not supported by allegations solely of trespass.
Mo.—Mawson v. Vess Beverage Co., App., 173 S.W.2d 606.
Tex.—Michels v. Crouch, Civ.App., 122 S.W.2d 211.
33 C.J. p 1159 note 67 [a] (10), (11).

Nature of tenancy

Where plaintiffs alleged and trial proceeded on theory that defendants were hold-over tenants for one year, it was error to grant judgment for plaintiffs on ground that tenancy was from month to month and that proper notice of intention to quit

an inconsistent theory will not be permitted.[12] In some jurisdictions, however, a party is entitled to any relief appropriate to the facts alleged and proved, irrespective of the theory on which they may be alleged;[13] and the fact that a party has pleaded an erroneous theory does not bar him from recovering if the facts he has pleaded support a proper theory of recovery.[14]

Proof of a different cause of action from that alleged in the declaration or complaint amounts to a failure of proof, and is not a mere variance;[15] but, where the substantial facts creating the liability are alleged and proved, a recovery may be had, although they are alleged inaccurately in detail, because this does not amount to a change of theory or a recovery on grounds not alleged.[16] Where recovery is sought on several grounds, a judgment supported by one of the grounds is proper notwithstanding the failure to establish the other grounds of liability;[17] but in such case the judgment must be supported by all the elements of at least one of the different grounds of recovery.[18]

Ordinarily defendant must prevail, if at all, according to the case made by his answer;[19] but this

had not been given.—McAuley v. Cresci, 19 N.Y.S.2d 221.

Recovery under different statutory provision

(1) Plaintiff cannot sue on one statute and sustain verdict justifiable only on different statute.—Batterton v. Pima County, 271 P. 720, 34 Ariz. 347.

(2) However, although facts proved did not make out breach of warranty under subdivision of statute on which plaintiff relied, but made out breach of warranty under another subdivision, plaintiff was held entitled to judgment.—Ryan v. Progressive-Grocery Stores, 175 N.E. 105, 255 N.Y. 338, 74 A.L.R. 339.

Retention of property

Buyer's complaint to recover price of property after rescission for breach of warranty and offer to return did not authorize judgment based on breach of warranty permitting buyer to keep the property. —Schmelzer v. Winegar, 216 N.Y.S. 507, 217 App.Div. 194.

12. Ark.—H. V. Beasley Music Co. v. Cash, 262 S.W. 656, 164 Ark. 572.
Colo.—Cattell v. Denver State Bank, 225 P. 271, 75 Colo. 150.
N.Y.—Lunger v. New York Life Ins. Co., 225 N.Y.S. 730, 131 Misc. 42.
33 C.J. p 1160 note 68.

Affirmance of contract

Where purchaser elected to affirm contract and sued for damages for breach, the court was without authority to render judgment for cancellation of deed and a return of the purchase price.—Freeman v. Anderson, Tex.Civ.App., 119 S.W.2d 1081.

Rescission; fraud

Decree for rescission of sale of stock was unauthorized where purchaser sued for damages for fraud. —Bondurant v. Raven Coal Co., Mo. App., 25 S.W.2d 566.

Property as community or separate

Judgment for plaintiff on finding that property awarded her was separate property required reversal, where her pleadings alleged that it was community property.—Bray v. Bray, Tex.Civ.App., 1 S.W.2d 525.

13. Cal.—Estrin v. Superior Court in and for Sacramento County, 96 P.2d 340, 14 Cal.2d 670—Lucas v. Associacao Protectora Uniao Madeirense Do Estado Da California, 143 P.2d 53, 61 Cal.App.2d 344—Bank of America Nat. Trust & Savings Ass'n v. Casady, 59 P.2d 444, 15 Cal.App.2d 163—Lacey v. McConnell, 48 P.2d 161, 9 Cal.App. 2d 6.

Accounting

If plaintiff has a cause of action of which court has jurisdiction, and accounting is necessary to determine his rights, accounting will be ordered regardless of erroneous legal theory on which the action is based. —Nelson v. Abraham, Cal.App., 162 P.2d 833.

14. Cal.—Mannon v. Pesula, 139 P. 2d 336, 59 Cal.App.2d 597.

15. Wash.—McLachlan v. Gordon, 150 P. 441, 86 Wash. 282.
33 C.J. p 1158 note 64.

16. Va.—Lawson v. Conoway, 16 S. E. 564, 37 W.Va. 159, 18 L.R.A. 627, 38 Am.S.R. 17.
33 C.J. p 1160 note 69.

Actions on notes

(1) Judgment for plaintiff was not erroneous on ground that plaintiff declared on promissory note and proved defendant indebted on bills of exchange.—Ætna Inv. Corporation v. Barnes, Mo.App., 52 S.W.2d 221.

(2) Where complaint was based on note given for money loaned, contention that judgment was entered for money loaned, and hence was improper, was without merit.—Cassetta v. Baima, 288 P. 330, 106 Cal.App. 196.

17. Ala.—Robinson v. Solomon Bros. Co., 155 So. 553, 229 Ala. 137.
Ind.—American Carloading Corporation v. Gary Trust & Savings Bank, 25 N.E.2d 777, 216 Ind. 649.
Ky.—Peck v. Trail, 65 S.W.2d 83, 251 Ky. 377.
Wis.—Krier Preserving Co. v. West Bend Heating & Lighting Co., 225 N.W. 200, 198 Wis. 595.

18. Tex.—West Texas Utilities Co. v. Dunlap, Civ.App., 175 S.W.2d 749.

19. U.S.—El Dorado Terminal Co. v. General American Tank Car Corporation, C.C.A.Cal., 104 F.2d 903, reversed on other grounds 60 S.Ct. 325, 308 U.S. 422, 84 L.Ed. 361, rehearing denied 60 S.Ct. 465, 309 U.S. 694, 84 L.Ed. 1035.
Cal.—Brown v. Sweet, 272 P. 614, 95 Cal.App. 117.
Ga.—Alliance Ins. Co. v. Williamson, 137 S.E. 277, 36 Ga.App. 497—Stewart v. Hardin, 101 S.E. 716, 24 Ga.App. 611.
Ill.—Rosenthal v. Board of Education of City of Chicago, 110 N.E. 579, 270 Ill. 380—Thulin v. Anderson, 154 Ill.App. 41.
Iowa.—Hornish v. Overton, 221 N.W. 483, 206 Iowa 780.
La.—Homes v. James Buckley & Co., 116 So. 218, 165 La. 874.
Mass.—Shattuck v. Wood Memorial Home, 66 N.E.2d 568—Pollard v. Ketterer, 108 N.E. 1086, 221 Mass. 317.
Mo.—Lebrecht v. New State Bank, Woodward, Okl., 205 S.W. 273, 199 Mo.App. 642—White v. United Brothers and Sisters of Mysterious Ten, App., 180 S.W. 406.
N.Y.—Marshall v. Sackett & Wilhelms Co., 151 N.Y.S. 1045, 166 App.Div. 141—Continental Bank & Trust Co. of New York v. Goodner, 49 N.Y.S.2d 747—Junco v. La Cabana, Inc., 20 N.Y.S.2d 781, affirmed 25 N.Y.S.2d 779, 261 App. Div. 803.
Or.—Wolf v. Hougham, 125 P. 801, 62 Or. 264.
Pa.—Gliwa v. U. S. Steel Corporation, 185 A. 584, 322 Pa. 225, certiorari denied 57 S.Ct. 117, 299 U.S. 593, 81 L.Ed. 437—McCormick v. Harris, 196 A. 885, 130 Pa.Super. 175.
Tex.—Dashiel v. Lott, Com.App., 243 S.W. 1072—Chastain v. Gilbert, Civ.App., 145 S.W.2d 938—Wardy v. Casner, Civ.App., 103 S.W.2d 772, error dismissed—Sproles v. Rosen, Civ.App., 47 S.W.2d 331, affirmed 84 S.W.2d 1001, 126 Tex. 51—Bennett v. Giles, Civ.App., 12 S.W.2d 843—

is not unqualifiedly true,[20] and, where the burden of proof is on plaintiff, defendant is entitled to take advantage of a failure of proof, regardless of the pleadings.[21]

Tort or contract. A pleading sounding in tort will not support a judgment based on a contract,[22] and conversely, under a pleading on a cause of action sounding in contract, a recovery as for a tort is erroneous.[23] It has been held that these rules have not been changed by code provisions;[24] but it has also been held that, under statutes abolishing forms of action and requiring that merits only shall be considered, recovery may be had in contract, if the allegations and proof support such a right, although the declaration sounds in tort.[25] Where a pleading sets forth two causes of action, one in contract and the other in tort, and defendant has not requested a separation of the causes, plaintiff may recover on either one which he may prove,[26] although he may not recover on both.[27]

General and special assumpsit. Plaintiffs who sue on a special or express contract ordinarily cannot recover on an implied contract, such as a quantum meruit, and vice versa,[28] although in some cases such recovery has been permitted.[29] Where the declaration or complaint contains counts or allegations seeking recovery on an implied contract apart from the special contract, a recovery thereon may be had.[30] Under the common counts no recovery may be had for breach of a special contract.[31]

Legal or equitable. Under codes and practice acts it has frequently been made the duty of the court to grant such relief as the complaint and the proof thereunder show plaintiff entitled to receive, without any distinction between law and equity.[32] The relief granted, however, must nevertheless be consistent with the case made by the complaint.[33] If

Oscar v. Sackville, Civ.App., 253 S.W. 651.
33 C.J. p 1161 note 75.

Failure of consideration; fraud
Where defense pleaded in an action on contract was failure of consideration, but case was submitted to jury on theory of fraudulent representations whereby defendant was fraudulently induced to execute contract sued on, judgment for defendant could not stand.—Chamblin v. Webb, Tex.Civ.App., 155 S.W.2d 676.

Right of way
In action to quiet title to land encumbered with right of way, judgment for designated defendants could not be sustained on ground that suit established way of necessity, where such right was not alleged or adjudicated.—Bertolina v. Frates, 57 P.2d 346, 89 Utah 238.

Deduction of premium
Insurer, defending on single theory that policy was void, was not entitled to deduction for unpaid premium.—Masson v. New England Mut. Life Ins. Co., 260 P. 367, 85 Cal.App. 633.

20. N.Y.—Whiting v. Glass, 111 N. E. 1032, 217 N.Y. 333.
33 C.J. p 1161 note 76.

Inability to plead laches
Where the theory that plaintiff's case was based on fraud was first disclosed by his reply and was not indicated by the complaint so that defendant could not plead laches, although he was entitled to do so, defendant was nevertheless entitled to insist on such defense if there was evidence to support it.—Crosby v. Robbins, 182 P. 122, 56 Mont. 179.

21. Wash.—Easter v. Hall, 40 P. 728, 12 Wash. 160.
33 C.J. p 1161 note 77.

22. U.S.—Johnston v. Venturini, C.C.A.Pa., 294 F. 336.
Tex.—Joe B. Winslett, Inc. v. City of Hamlin, Civ.App., 56 S.W.2d 237—McFaddin v. Sims, 97 S.W. 335, 43 Tex.Civ.App. 598.
33 C.J. p 1161 note 78.

Fraud
Judgment cannot be rendered as on contract or in assumpsit where the complaint is in fraud.
Mich.—Barber v. Kolowich, 277 N. W. 189, 283 Mich. 97.
N.Y.—Smith v. Cohen, 175 N.E. 361, 256 N.Y. 33.
33 C.J. p 1161 note 78 [b].

Conversion
Plaintiff electing to sue in conversion could not recover in assumpsit for money had and received.—Maxol Syndicate v. N. T. Hegeman Co., 245 N.Y.S. 99, 138 Misc. 179.

23. Tex.—Joe B. Winslett, Inc. v. City of Hamlin, Civ.App., 56 S.W. 2d 237.
33 C.J. p 1161 note 79.

24. N.Y.—Degraw v. Elmore, 50 N. Y. 1.
33 C.J. p 1162 note 80.

25. Miss.—Southeastern Exp. Co. v. Namie, 181 So. 515, 182 Miss. 447.

26. Colo.—Erisman v. McCarty, 236 P. 777, 77 Colo. 289.

27. Colo.—Erisman v. McCarty, supra.

28. Ind.—Indianapolis Real Estate Board v. Willson, 187 N.E. 400, 98 Ind.App. 72.
Me.—Dufour v. Stebbins, 145 A. 893, 128 Me. 133.
N.Y.—Sears v. Hetfield, 221 N.Y.S. 494, 220 App.Div. 723.
33 C.J. p 1160 note 70.

Recovery held proper
A contract to act as defendant's business agent, although not contemplating lawsuits, necessarily included services in connection therewith if necessary, as in procuring witnesses, and hence recovery for such services was on the express contract pleaded and not on an implied contract.—Crawford's Adm'r v. Ross, 186 S.W.2d 797, 299 Ky. 664.

29. Cal.—Warder v. Hutchison, 231 P. 563, 69 Cal.App. 291.
33 C.J. p 1161 note 71.

30. S.C.—Cleveland v. Butler, 78 S. E. 31, 94 S.C. 406.
33 C.J. p 1161 note 72.

31. Mich.—Cook v. Dade, 158 N.W. 175, 191 Mich. 561.
33 C.J. p 1161 note 73.

32. Cal.—Waters v. Woods, 42 P.2d 1072, 5 Cal.App.2d 483—Arbuckle v. Clifford F. Reid, Inc., 4 P.2d 978, 118 Cal.App. 272.
Okl.—Fernow v. Gubser, 162 P.2d 529—Owens v. Purdy, 217 P. 425, 90 Okl. 256.
33 C.J. p 1162 note 83.

Enforcement of legal rights according to rules of law
Where, although plaintiff asks equitable relief, he alleges and proves only such facts as entitle him to strict legal rights, court will enforce his legal rights, but only according to strict rules of law.—Grant v. Hart, 14 S.E.2d 860, 192 Ga. 153.

33. Mo.—Congregation B'Nai Abraham v. Arky, 20 S.W.2d 899, 323 Mo. 776—Bragg v. Specialty Shoe Machinery Co., 34 S.W.2d 134, 225 Mo.App. 902.
33 C.J. p 1162 note 84.

the complaint is framed solely for equitable relief, even under the code, where the same court administers both systems of law and equity, the party must maintain his equitable action on equitable grounds or fail, even though he may prove a good cause of action at law on the trial.[34] Averment of an equitable cause of action and proof of only a legal cause of action has been held to be a variance amounting to a failure of proof;[35] but, where an equitable cause of action is established, the judgment may award legal relief, as for example, by way of damages, in lieu of equitable relief which in the particular case is impracticable or inequitable.[36] Where the facts alleged will support either legal or equitable relief, or both,[37] or where, by acquiescence and failure to object, the issues have been broadened so as to include the legal cause of action,[38] a judgment on the legal cause of action is proper, although the equity fails. Where the complaint alleges only a cause of action at law, and the proof fails to establish the cause of action alleged, equitable relief ordinarily will not be awarded, although it appears that plaintiff would be entitled thereto on a properly framed complaint;[39] but equitable relief may be granted, although only legal relief is prayed, where both the allegations and the proofs show that plaintiff is entitled to equitable relief.[40]

§ 54. —— Amount of Recovery

a. In general
b. Interest

a. In General

The judgment must conform to the pleadings and proof with respect to the amount of the recovery, although a recovery for more than the sum demanded may be proper where permitted by statute, or where by consent of the parties the pleadings have been enlarged by the evidence. An excessive judgment, although erroneous and subject to correction, is not on that account void.

In amount, as in other respects, a judgment must conform to, and be supported by, the pleadings[41] and the proof.[42] A judgment for more than the

34. Or.—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213, followed in Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 222.
33 C.J. p 1162 note 85.

35. N.Y.—Jackson v. Strong, 118 N. E. 512, 222 N.Y. 149.
33 C.J. p 1163 note 86.

36. Ill.—Stella v. Mosele, 27 N.E. 2d 559, 305 Ill.App. 577.
33 C.J. p 1163 note 87.
Retention of jurisdiction by equity to afford legal relief see Equity § 69.

37. U.S.—Hagar v. Townsend, C.C. N.Y., 67 F. 433, affirmed 72 Fed. 949, 19 C.C.A. 256.
33 C.J. p 1163 note 89.

38. N.Y.—Fairchild v. Lynch, 42 N. Y Super. 265.
33 C.J. p 1163 note 90.
Issues broadened by consent see supra § 50.

39. N.C.—McFarland v. Cornwell, 66 S.E. 454, 151 N.C. 428.
33 C.J. p 1163 note 92.

40. N.Y.—Hale v. Omaha Nat. Bank, 49 N.Y. 626.
33 C.J. p 1163 note 93.

41. Ky.—Asher v. Pioneer Coal Co., 283 S.W. 954, 214 Ky. 505.
La.—Ethridge-Atkins Corporation v. Abraham, App., 160 So. 817—Unity Plan Finance Co., v. Green, App., 148 So. 297, annulled on other grounds 151 So. 85, reversed on other grounds 155 So. 900, 179 La. 1070—Bird v. Johnson, 133 So. 516, 16 La.App. 155.
N.Y.—Universal Steel Export Co. v. N. & G. Taylor Co., 203 N.Y.S. 331, 208 App.Div. 308, affirmed 147 N.E. 209, 239 N.Y. 594.
N.C.—**Corpus Juris quoted in** Simms v. Sampson, 20 S.E.2d 554, 559, 221 N.C. 379.
Pa.—Zuber v. Rinko, Com.Pl., 10 Sch. Reg. 159.
Tex.—New York Life Ins. Co. v. English, 72 S.W. 58, 96 Tex. 263—Kaufman Oil Mill v. Republic Nat. Bank & Trust Co., Civ.App., 43 S. W.2d 269.
33 C.J. p 1163 note 95.

Absence of issue limiting plaintiffs' interest
Where defendant had withdrawn an answer alleging as a pro tanto defense that the two plaintiffs were not the only heirs of the ancestor under whom they claimed, without reiterating that allegation in the amended answer, the court, on finding for plaintiffs, properly adjudged them to be the owners of the entire interest in the property involved, since there was no issue limiting their interest.—Asher v. Gibson, 248 S.W. 862, 198 Ky. 285.

In partition
(1) As a general rule plaintiff should not be awarded a greater share of the property than he claims. —Carr v. Langford, Civ.App., 144 S. W.2d 612, affirmed Langford v. Carr, 159 S.W.2d 107, 138 Tex. 330—47 C. J. p 430 note 66.

(2) However, the fact that complainant alleges himself to be entitled to a smaller interest in the lands than that to which he is really entitled under the facts alleged by him has been held to be no bar to a decree vesting in him his proper share. Ky.—King v. Middlesborough Townlands Co., 50 S.W. 37, 106 Ky. 73, 20 Ky.L. 1859, rehearing denied and opinion extended 106 Ky. 73, 50 S.W. 1108, 20 Ky.L. 1859.
N.Y.—Lamb v. Lamb, 14 N.Y.S. 206, affirmed 30 N.E. 133, 131 N.Y. 227.

Reservation of issue for further determination
Where determination of lessors' liability for sublessee's trespass was reserved for further adjudication, amount of lessors' liability was not limited by amount sought in original and amended petition.—Davis v. Kentland Coal & Coke Co., 57 S.W. 2d 542, 247 Ky. 642.

Judgments held proper
Conn.—Winsor v. Hawkins, 37 A.2d 222, 130 Conn. 669.
Tex.—Shropshire v. Jones, Civ.App., 129 S.W.2d 480—Hill v. Willett, Civ.App., 281 S.W. 1110—Decatur Land, Loan & Abstract Co. v. Rutland, Civ.App., 185 S.W. 1064.

42. N.C.—**Corpus Juris quoted in** Simms v. Sampson, 20 S.E.2d 554, 559, 221 N.C. 379.
Tex.—Zaunbrecher v. Trim, Civ. App., 31 S.W.2d 839—Fidelity Union Fire Ins. Co. v. Barnes, Civ. App., 293 S.W. 279.
W.Va.—De Stubner v. United Carbon Co., 28 S.E.2d 593, 126 W.Va. 363.
33 C.J. p 1164 note 96.

Erroneous basis of value
Judgment in amount based on price contended for by neither party to action for balance due on merchandise sold at price to be fixed on future date was erroneous, legal rights of parties and interest of public at large demanding finding on

mount admitted or established to be due cannot tand.[43] Ordinarily a judgment cannot properly be endered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration or complaint,[44] plus, as discussed infra subdivision b of this section, interest in proper cases, and costs,[45] notwithstanding the evidence may prove a greater debt or a greater

basis of value in keeping with contention of one side or other.—Maxwell Planting Co. v. A. P. Loveman & Co., 102 So. 45, 212 Ala. 228.

Rents or damages

(1) A judgment awarding rents or substantial damages in an action of ejectment should be based on testimony as to their value.—Hahn v. Cotton, 37 S.W. 919, 136 Mo. 216—19 C.J. p 1240 note 15.

(2) However, in some jurisdictions, it seems, no further proof is required, where an allegation of, and claim for, damages in a verified complaint is not controverted.—Patterson v. Ely, 19 Cal. 28.

43. Cal.—King v. San Jose Keystone Mining Co., 127 P.2d 286, 53 Cal. App.2d 40—Robinson v. Arthur R. Lindburg, Inc., 35 P.2d 1057, 140 Cal.App. 669.
Ga.—Fred Didschuneit & Son v. Enochs Lumber & Mfg. Co., 156 S. E. 720, 42 Ga.App. 527.
Ky.—Equitable Life Assur. Soc. of U. S. v. Austin, 72 S.W.2d 716, 255 Ky. 23.
Mo.—Hecker v. Bleish, 3 S.W.2d 1008, 319 Mo. 149—Vogt v. United Rys. Co. of St. Louis, App., 251 S.W. 416.
N.Y.—Nassau Suffolk Lumber & Supply Corporation v. Bruce, 38 N.Y. S.2d 73, 265 App.Div. 879, appeal denied 39 N.Y.S.2d 618, 265 App. Div. 1002.
N.C.—**Corpus Juris quoted in** Simms v. Sampson, 20 S.E.2d 554, 559, 221 N.C. 379.
Or.—Olds v. Von der Hellen, 270 P. 497, 127 Or. 276.
Tex.—Leftwich v. Summers, Civ. App., 89 S.W.2d 1091—Southwestern Bell Telephone Co. v. Burris, Civ.App., 68 S.W.2d 542.
Wash.—Babare v. Rodman, 226 P. 1015, 130 Wash. 317.
33 C.J. p 1164 note 97—19 C.J. p 1240 note 16.

Agreed valuation

Where the agreed valuation of loss of goods sustained by a shipper was a certain amount, it was error to enter judgment for a larger amount.—Lancaster v. Houghton, Tex.Civ.App., 249 S.W. 1103, error dismissed 45 S.Ct. 194, 266 U.S. 590, 69 L.Ed. 456.

Mortgage as security for future debts

In absence of proof of agreement to make the mortgage security for debts subsequently contracted, in awarding decree for amount of the mortgage only there was no error.—Hoy v. Biladeau, 223 P. 241, 110 Or. 591.

Judgments held not excessive

Cal.—Estrin v. Fromsky, 127 P.2d 603, 53 Cal.App.2d 253—Du Pont v. Allen, 294 P. 409, 110 Cal.App. 541.
Ill.—Simpson v. Heberlein, 259 Ill. App. 579.
Tenn.—Gore v. McDaid, 178 S.W.2d 221, 27 Tenn.App. 111.
Tex.—Dallas Coffin Co. v. Roach, Civ. App., 93 S.W.2d 548, error dismissed—Stephens v. Reik, Civ. App., 247 S.W. 627.

44. U.S.—Williamson v. Chicago Mill & Lumber Corporation, C.C.A. Ark., 59 F.2d 913—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363.
Ala.—Wyatt v. Drennen Motor Co., 125 So. 649, 220 Ala. 413—Gowan v. Wisconsin-Alabama Lumber Co., 110 So. 31, 215 Ala. 231.
Cal.—Merced Irr. Dist. v. San Joaquin Light & Power Corporation, 29 P.2d 343, 220 Cal. 196—**Corpus Juris quoted in** Meisner v. McIntosh, 269 P. 612, 205 Cal. 11—Frost v. Mighetto, 71 P.2d 932, 22 Cal. App.2d 612—Monterey Park Commercial & Savings Bank v. Bank of Hollywood, 13 P.2d 976, 125 Cal. App. 402—Adjustment Corporation v. Marco, 279 P. 1006, 100 Cal.App. 338—Capitol Woolen Co. v. Berger, 262 P. 351, 87 Cal.App. 500.
Ill.—Klatz v. Pfeffer, 164 N.E. 224, 333 Ill. 90—Shealy v. Schwerin, 46 N.E.2d 184, 317 Ill.App. 375—Burns v. Kaylor, 264 Ill.App. 469.
Ky.—Fidelity & Casualty Co. of New York v. Breathitt County, 123 S. W.2d 250, 276 Ky. 173.
La.—Reimers v. Hebert, 111 So. 91, 162 La. 772—Cuba v. Lykes Brothers-Ripley S. S. Co., App., 193 So. 411—Huff v. Fitzsimmons, 132 So. 257, 15 La.App. 441.
Miss.—Watkins v. Blass, 145 So. 348, 164 Miss. 325.
Mont.—Clifton, Applegate & Toole v. Big Lake Drain Dist. No. 1, Stillwater County, 267 P. 207, 82 Mont. 312—Harbolt v. Hensen, 253 P. 257, 73 Mont. 228.
Nev.—Donohue v. Pioche Mines Co., 277 P. 980, 51 Nev. 403, rehearing denied 279 P. 759, 51 Nev. 402.
N.J.—Goldberger v. City of Perth Amboy, 197 A. 267, 16 N.J.Misc. 84—Bozza v. Leonardis, 131 A. 87, 3 N.J.Misc. 1186.
N.Y.—Cavagnaro v. Bowman, 34 N. Y.S.2d 637, 264 App.Div. 118, appeal denied 36 N.Y.S.2d 187, 264 App.Div. 853—Smith v. Dairymen's League Co-op. Ass'n, 58 N.Y.S.2d 376.
Or.—Leonard v. Bennett, 106 P.2d 542, 165 Or. 157—Haberly v. Farmers' Mut. Fire Relief Ass'n, 293 P. 590, 135 Or. 32, rehearing denied 294 P. 594, 135 Or. 32.
Pa.—Porter v. Zeuger Milk Co., 7 A. 2d 77, 136 Pa.Super. 48.
Tenn.—Mullins v. Greenwood, 6 Tenn.App. 327.
Tex.—Denman v. Stuart, 176 S.W.2d 730, 142 Tex. 129—Savage Oil Co. v. Johnson, Civ.App., 141 S.W.2d 994, error dismissed, judgment correct—Federal Underwriters Exchange v. Popnoe, Civ.App., 140 S. W.2d 484, error dismissed—Dallas Ry. & Terminal Co. v. Wells, Civ. App., 60 S.W.2d 485, error refused —Bell v. Beckum, Civ.App., 44 S. W.2d 389—Dalton v. Realty Trust Co., Civ.App., 13 S.W.2d 398—Osceola Oil Co. v. Stewart Drilling Co., Civ.App., 246 S.W. 698, reversed on other grounds, Com.App., 258 S.W. 806.
Wis.—In re Kehl's Estate, 254 N.W. 639, 215 Wis. 353.
19 C.J. p 1240 note 16—33 C.J. p 1164 note 1—42 C.J. p 1300 note 83.

Double indemnity

Where an insurance policy provides for the payment of a double indemnity for injuries sustained under specified conditions, the double indemnity cannot be recovered unless specially claimed in the complaint.—Crowder v. Continental Casualty Co., 91 S.W. 1016, 115 Mo.App. 535.

Cumulative recovery

(1) In a suit on a contract for cutting and loading timber, where plaintiffs alleged that they were to pay the expense out of their profits, a recovery of both profits and expenses was erroneous as cumulative.—Brunson v. Hamilton Ridge Lumber Corporation, 115 S.E. 624, 122 S. C. 436.

(2) In proceeding under writ of seizure, where judgment is taken for amount sued for with interest, and property seized was valued in judgment at such amount, rendering further judgment for damages for depreciation of property was error.—Willsford v. Meyer-Kiser Corporation, 104 So. 293, 139 Miss. 387.

45. Tex.—Christian v. Parmer County, Civ.App., 293 S.W. 234.
33 C.J. p 1166 note 3.

Absence of specific claim for costs

(1) The costs that are properly recovered as such in the judgment as an incident to the main adjudication are ordinarily not required to be specifically claimed in the pleadings.—State v. Barrs, 99 So. 668, 87 Fla. 168.

(2) A statutory allowance as costs may be included in the judg-

amount of damage than was alleged by plaintiff.[46] A judgment for more than the amount originally claimed or demanded, however, may be proper where by consent or without objection of the parties the pleadings are enlarged by the evidence and are deemed amended so as to conform to the testimony;[47] and, where the averment of the amount of damages is deemed immaterial or surplusage, the judgment may exceed the damages claimed.[48] Further, under some statutory provisions, where defendant has appeared and answered, the amount of the judgment may be greater than the sum demanded, should the case justify it.[49] A judgment which includes an item of damages not within the issues raised by the pleadings[50] or established by the evidence[51] is erroneous. Where a bill of particulars is filed, a recovery is in general limited by the amount therein specified.[52]

The validity of a judgment usually is not affected by the mere fact that recovery is for a sum less than the claim originally asserted.[53] Thus single damages are recoverable, although the declaration

ment, although not claimed in the declaration.—Paddock v. Missouri Pac. R. Co., 60 Mo.App. 328.

Costs held improper

(1) Plaintiff, in action to foreclose land contract, who prayed for possession and foreclosure of defendant's rights and for "such other and equitable relief as may be just and equitable," was held under statute not entitled to recover costs of defendant who put in appearance but made no defense.—Doolittle v. Highlands Sheep Co., 200 N.W. 381, 184 Wis. 625.

(2) In suit to set aside deed, court erred in taxing costs against defendant, although plaintiff recovered a money judgment, where such judgment was proved solely by concessions of defendant as a witness, no costs were incurred therein, no claim had been made for it in petition, and no dispute had existed between parties over it.—Dunning v. Benson, 204 N.W. 260, 200 Iowa 121.

46. Cal.—Brown v. Ball, 12 P.2d 28, 123 Cal.App. 758.
La.—Vincent v. Cooper, App., 24 So. 2d 503—Nona Mills Co. v. W. W. Gary Lumber Co., App., 127 So. 425, annulled 132 So. 257, 15 La. App. 560.
S.C.—Carolina Veneer & Lumber Co. v. American Mut. Liability Ins. Co., 24 S.E.2d 153, 202 S.C. 103.
Tex.—Hartford Accident & Indemnity Co. v. Moore, Civ.App., 102 S. W.2d 441, error refused—Traders & General Ins. Co. v. Lincecum, Civ.App., 81 S.W.2d 549, reversed on other grounds 107 S.W.2d 585, 130 Tex. 220.
33 C.J. p 1166 note 5.

47. Cal.—Yule v. Miller, 252 P. 733, 80 Cal.App. 609.
La.—Ethridge-Atkins Corporation v. Abraham, App., 160 So. 817.
Tex.—Foxworth-Galbraith Lumber Co. v. Southwestern Contracting Corporation, Civ.App., 165 S.W.2d 221, error refused.
Issues broadened by consent see supra § 50.

43. Mont.—Loeb v. Kamak, 1 Mont. 152.
33 C.J. p 1166 note 4.

49. Idaho.—Berg v. Aumock, 59 P. 2d 726, 56 Idaho 798.
Mo.—Bieser v. Woods, 150 S.W.2d 524, 236 Mo.App. 126, transferred, see 147 S.W.2d 656, 347 Mo. 437.
Wis.—City of Wauwatosa v. Union Free High School Dist. of Town and City of Wauwatosa, 252 N.W. 351, 214 Wis. 35.
33 C.J. p 1166 note 10.
Limitation of default judgment to amount demanded see infra § 214.

Amendment increasing amount

Where, in an action on a policy, plaintiff filed an amended petition increasing the original amount sued for, it was held not error to permit recovery in the increased amount, defendant having admitted that plaintiff's claim amounted to such sum.—Investors' Mortg. Co. v. Marine & Motor Ins. Co. of America, 99 So. 486, 155 La. 627.

Statutory double damages

In an action brought under a statute allowing double damages, where plaintiff alleges that he has been damaged in a certain amount for which he asks judgment and for all other and proper relief according to the statute, the court may render judgment for double the actual damages assessed by the jury, although there was no formal prayer in the complaint for double damages.—Carpenter v. Chicago & A. R. Co., 95 S. W. 985, 119 Mo.App. 204.

In California

(1) The supreme court has held that recovery in excess of the amount demanded in the complaint is unauthorized, although an answer has been filed.—Meisner v. McIntosh, 269 P. 612, 205 Cal. 11.

(2) However, there is some lower court authority holding that a judgment in excess of the amount demanded is not erroneous where an answer has been filed.—McKesson v. Hepp, 217 P. 802, 62 Cal.App. 619—Kimball v. Swenson, 196 P. 781, 51 Cal.App. 361.

(3) Amount erroneously demanded in cross complaint was held immaterial, where relief granted was consistent with law and embraced within issues.—Du Pont v. Allen, 294 P. 409, 110 Cal.App. 541.

50. Idaho.—Independent School Dist. No. 22 of Washington County v. Weiser Nat. Bank, 263 P. 997, 45 Idaho 554.
Ky.—Johnson v. Engle, 67 S.W.2d 938, 252 Ky. 634.
Mo.—Zweifel v. Lee-Schermen Realty Co., App., 173 S.W.2d 690.
Okl.—Electrical Research Products v. Haniotis Bros., 89 P.2d 42, 170 Okl. 150.
Tex.—Albaugh-Wright Lumber Co. v. Henderson, Civ.App., 33 S.W.2d 228.

Particular items held not allowable

(1) Loss of rent.—Love v. Nashville Agr. & Normal Inst., 6 Tenn. App. 104.

(2) Uncollected premiums.—Fidelity-Phenix Fire Ins. Co. of New York v. Jackson, 181 S.W.2d 625, 181 Tenn. 453.

(3) Market value of accessories.—Brooks Supply Co. v. First State Bank of Electra, Tex.Civ.App., 292 S.W. 631.

51. Mo.—Zweifel v. Lee-Schermen Realty Co., App., 173 S.W.2d 690.

52. Fla.—Florida East Coast Ry. Co. v. Acheson, 140 So. 467, 102 Fla. 15, certiorari denied 52 S.Ct. 407, 285 U.S. 551, 76 L.Ed. 941.
Ill.—McNeff v. White Eagle Brewing Co., 13 N.E.2d 493, 294 Ill.App. 37.
33 C.J. p 1166 note 8.

53. Ala.—Jones v. Belue, 200 So. 886, 241 Ala. 22.
Cal.—Marsh v. Arch Rib Truss Co., 133 P.2d 412, 56 Cal.App.2d 811.
Ill.—Yellow Cab Co. v. Newberry Library, 252 Ill.App. 584.

Recovery for partial loss

Recovery may be had for a partial insurance loss, although the declaration claims for a total loss and there is no proof of an abandonment.—Watson v. Insurance Co. of North America, 4 Dall., Pa., 283, 1 L.Ed. 835.

Recovery pro tanto

Where part of charge set forth in the declaration and proved shows right of action, plaintiff is entitled to recover pro tanto.—Pickett v.

or complaint improperly claims treble damages under a statute.[54] A judgment for less than the proof requires, however, is erroneous,[55] and, where plaintiff is entitled to the entire amount sued for or else to nothing at all, a judgment for a part only is erroneous.[56]

Ad damnum clause. According to some authorities, the amount of recovery is limited by the ad damnum clause of the pleading.[57] According to others, a judgment for the amount shown due by the declaration or petition may be given, although it is greater than the damages laid in the ad damnum clause proper.[58] Where the judgment is greater than the amount shown due by the pleading, it is erroneous, although within the amount laid in the ad damnum clause.[59]

Attorney's fees. An allowance of attorney's fees must be supported by the pleadings[60] and proof.[61] Even where an allowance for attorney's fees is proper, the allowance should not be in excess of the amount demanded or prayed,[62] and in any event, where attorney's fees are not involved in the action or embraced by the pleadings, the judgment should not award as such fees more than the amount required to be taxed as costs.[63]

Installment payments. In a suit on an obligation payable in installments, a judgment awarding recovery for installments falling due between the filing of the suit and the date of the judgment must be supported by the pleadings;[64] but, under appropriate pleadings, the inclusion of such installments in the judgment has been held proper.[65]

Set-off or counterclaim. In the absence of an agreement by the parties,[66] the court should not allow set-offs, credits, or deductions because of matters not pleaded or litigated.[67] The amount of a set-off or counterclaim asserted by defendant cannot exceed that set forth or claimed in his plead-

Kuchan, 153 N.E. 667, 323 Ill. 138, 49 A.L.R. 499.

54. Colo.—Cramer v. Oppenstein, 27 P. 713, 16 Colo. 495.
33 C.J. p 1166 note 12.

55. Mo.—Cable v. Metropolitan Life Ins. Co., 128 S.W.2d 1123, 233 Mo. App. 1093.
N.C.—**Corpus Juris quoted in** Simms v. Sampson, 20 S.E.2d 554, 559, 221 N.C. 379.
33 C.J. p 1164 note 98.

56. N.Y.—Community Oil Co. v. Guido, 62 N.Y.S.2d 465.
33 C.J. p 1164 note 99.

57. Fla.—Woods-Hoskins-Young Co. v. Stone & Baker Const. Co., 114 So. 366, 94 Fla. 586.
Mass.—Sullivan v. Jordan, 36 N.E.2d 337, 310 Mass. 12.
Mich.—Detroit Trust Co. v. Lange, 255 N.W. 320, 267 Mich. 69—Daines v. Tarabusi, 229 N.W. 422, 250 Mich. 217.

58. Ky.—Gilbert v. Berryman, 255 S.W. 839, 200 Ky. 824.
Tex.—Cretien v. Kincaid, Civ.App., 84 S.W.2d 1094, affirmed Kincaid v. Cretien, 111 S.W.2d 1098, 130 Tex. 513—Goodrich v. First Nat. Bank, Civ.App., 70 S.W.2d 609, error refused.
33 C.J. p 1166 notes 4 [a] (2), 6.

59. U.S.—H. H. Hornfeck & Sons v. Anderson, C.C.A.N.Y., 60 F.2d 38.
Mich.—Walz v. Peninsular Fire Ins. Co. of America, 191 N.W. 230, 221 Mich. 326, reheard 194 N.W. 124, 223 Mich. 417.
33 C.J. p 1166 note 7.

60. Cal.—Atkins v. Hughes, 282 P. 787, 208 Cal. 508—McCain v. Burch, 267 P. 748, 92 Cal.App. 141.
Ill.—Peterson v. Evans, 6 N.E.2d 520, 288 Ill.App. 623.
La.—Huff v. Fitzsimmons, 132 So. 257, 15 La.App. 441.
Mo.—Burns v. Ames Realty Co., App., 31 S.W.2d 274.
Tex.—Himes v. Himes, Civ.App., 55 S.W.2d 181.
Utah.—Skeen v. Smith, 286 P. 633, 75 Utah 464.
33 C.J. p 1164 note 1 [d].

Attorney's fees held proper
Idaho.—Colorado Nat. Bank of Denver v. Meadow Creek Live Stock Co., 211 P. 1076, 36 Idaho 509.
Tex.—East Texas Title Co. v. Parchman, Civ.App., 116 S.W.2d 497, error dismissed.
33 C.J. p 1166 note 13 [a].

61. Fla.—Jackson v. Walker, 126 So. 746.
Mo.—Globe American Corporation v. Miller, 131 S.W.2d 340, 234 Mo. App. 253.
33 C.J. p 1164 note 1 [d] (4).

62. Cal.—Hartke v. Abbott, 6 P.2d 578, 119 Cal.App. 439.
Kan.—Wellington v. Mid-West Ins. Co., 212 P. 892, 112 Kan. 687.

63. Ky.—Logan County Fiscal Court v. Childress, 243 S.W. 1038, 196 Ky. 1.

64. Tenn.—Phifer v. Mutual Ben. Health & Accident Ass'n, 148 S.W. 2d 17, 24 Tenn.App. 600.

65. Wis.—Numbers v. Union Mortg. Loan Co., 247 N.W. 442, 211 Wis. 30.

Payment of annuity until satisfaction of judgment
Where insured prayed for monthly annuity accruing until judgment and for general relief, court could properly direct that insurer pay until satisfaction of judgment.—Manuel v. Metropolitan Life Ins. Co., La.App., 139 So. 543.

66. Minn.—Colby v. Street, 193 N. W. 34, 155 Minn. 157.

Offer by plaintiff to make deduction
Although defendant, sued for wrongful detention of an automobile repaired by him, did not counterclaim for the amount due for repairs, but plaintiff offered to deduct such amount from the damages allowed, the amount due for repairs should be deducted from the judgment.—Ledwell v. Entire Service Corporation, 231 N.Y.S. 365, 224 App. Div. 433, affirmed 170 N.E. 138, 252 N.Y. 548.

67. Cal.—Hesse v. Commercial Credit Co., 275 P. 970, 97 Cal.App. 600.
Minn.—Colby v. Street, 193 N.W. 34, 155 Minn. 157.
Miss.—S. M. Weld & Co. v. Austin, 65 So. 247, 107 Miss. 279.
N.J.—Automobile Ins. Co. of Hartford, Conn. v. Conway, 158 A. 480, 109 N.J.Eq. 628.
Tex.—Moss v. Thompson, Civ.App., 72 S.W.2d 375—American Grocery Co. v. Union Sugar Co., Civ.App., 246 S.W. 418.

Credit for payment by codefendant
In conversion, where a third party's lien on converted chattel is paid by codefendant of converter, such payment cannot be credited to converter, where pleadings authorize no such relief.—Brooks Supply Co. v. Gallinger, Tex.Civ.App., 279 S. W. 524.

Damage not shown
Judgment authorizing defendants to set off against notes for pasturage shortage in acreage must be reversed, in absence of evidence of damage by shortage.—Hutchison v. Hamilton, Tex.Com.App., 14 S.W.2d 823.

ings,[68] notwithstanding the proof shows that he is entitled to more.[69]

Effect of excessiveness; correction. A judgment which is merely excessive under the pleadings and proofs, although erroneous and liable to be reversed, is not on that account void,[70] and, where the excess is very small, the maxim de minimis non curat lex applies.[71] An excessive judgment may generally be corrected by modification either in the trial court or on appeal,[72] and usually the party recovering an excessive judgment is permitted to remit the excess and take a judgment for the proper amount.[73]

b. Interest

An allowance of interest should be supported by the pleadings and proof; but in some instances interest has been held allowable, although the complaint contained no prayer therefor and the judgment was thereby brought above the ad damnum clause.

In order that a party may be entitled to interest, he should make such a case by his pleadings and proof as calls for its allowance.[74] Where such a case is made out, however, an allowance of interest is proper;[75] and it has been held that, where interest is allowable, judgment therefor may be rendered, although interest is not demanded or prayed for in the complaint,[76] thereby bringing the judgment above the ad damnum clause.[77] A judgment allowing interest must be in conformity with the pleadings and proof with respect to the rate of interest[78] and the date from which it is to be computed.[79]

68. Ala.—Bradford v. Lawrence, 94 So. 103, 208 Ala. 248.
N.J.—Metropolitan Lumber Co. v. Mullor, 129 A. 148.

A reconventional demand cannot be allowed in an amount exceeding that claimed.—Continental Supply Co. v. Hoell, 129 So. 522, 170 La. 898—Homes v. James Buckley & Co., 116 So. 218, 165 La. 874—Lady Ester Lingerie Corp. v. Goldstein, La.App., 21 So.2d 398.

Judgment held proper
N.C.—Casper v. Walker, 188 S.E. 99, 210 N.C. 838.

69. Ky.—Pictorial Review Co. v. Smith, 300 S.W. 871, 222 Ky. 329.

70. U.S.—Huddleston v. Dwyer, C.C. A.Okl., 145 F.2d 311.
Ga.—Lang v. South Georgia Inv. Co., 144 S.E. 149, 38 Ga.App. 430.
Mass.—Sullivan v. Jordan, 36 N.E.2d 387, 310 Mass. 12.
Mich.—**Corpus Juris cited in** Barancik v. Schreiber, 224 N.W. 348, 349, 246 Mich. 361.
Mont.—Thompson v. Chicago, B. & Q. R. Co., 253 P. 813, 78 Mont. 170.
Mo.—Drake v. Kansas City Public Service Co., 41 S.W.2d 1066, 226 Mo.App. 365, rehearing denied 54 S.W.2d 427.
Vt.—Santerre v. Sylvester, 189 A. 159, 108 Vt. 435.
33 C.J. p 1167 note 14.

Not jurisdictional
Error in granting judgment in excess of amount alleged in ad damnum clause of declaration is not jurisdictional.—Detroit Trust Co. v. Lange, 255 N.W. 320, 267 Mich. 69.

71. Mich.—Bowen v. Rutland School Dist. No. 9, 36 Mich. 149.
33 C.J. p 1167 note 16.

72. Ala.—Lister v. Vowell, 25 So. 564, 122 Ala. 264.
33 C.J. p 1167 note 18.

73. Mass.—Sullivan v. Jordan, 36 N.E.2d 387, 310 Mass. 12.
Tex.—Hartford Accident & Indemnity Co. v. Moore, Civ.App., 102 S.W.2d 441, error refused.
33 C.J. p 1167 note 20.

74. La.—Crowe v. Equitable Life Assur. Soc. of U. S., 154 So. 52, 179 La. 444—Roussel v. Railways Realty Co., 115 So. 742, 165 La. 536—Merchants' & Farmers' Bank & Trust Co. v. Hammond Motors Co., 113 So. 763, 164 La. 57.
Mo.—Kansas City v. Halvorson, 177 S.W.2d 495, 352 Mo. 280—Motor Acceptance v. Clayton, App., 119 S.W.2d 996.
Nev.—Gray v. Coykendall, 6 P.2d 442, 53 Nev. 466.
Okl.—Central Nat. Oil Co. v. Continental Supply Co., 249 P. 347, 119 Okl. 190.
Tex.—West Lumber Co. v. Henderson, Com.App., 252 S.W. 1044—Texas & N. O. R. Co. v. Lide, Civ. App., 144 S.W.2d 685, error dismissed—Lone Star Finance Corporation v. Schelling, Civ.App., 80 S.W.2d 358—Berryman v. Norfleet, Civ.App., 41 S.W.2d 722, error dismissed—Humble Oil & Refining Co. v. Kishi, Civ.App., 299 S.W. 687—Brooks Supply Co. v. First State Bank of Electra, Civ.App., 292 S.W. 631—Sparrow v. Tillman, Civ. App., 283 S.W. 877—Kuehn v. Kuehn, Civ.App., 259 S.W. 290.
33 C.J. p 1168 note 26.

Failure to attach note or pray for interest thereon
Judgment should not include interest, where note sued on was not attached to petition, it was not alleged that note bore interest, and no interest was prayed for.—Sentney v. Sinclair, 286 P. 269, 130 Kan. 360.

75. U.S.—Anglo California Nat. Bank of San Francisco v. Lazard, C.C.A.Cal., 106 F.2d 693, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 84 L.Ed. 521—Brown Paper Mill Co. v. Frazier, C.C.A.La., 76 F.2d 65—Alabama Chemical Co. v. International Agr. Corporation, C.C. A.Ala., 35 F.2d 907, certiorari denied 50 S.Ct. 240, 281 U.S. 727, 74 L.Ed. 1144.
Ga.—Lang v. South Georgia Inv. Co., 144 S.E. 149, 38 Ga.App. 430.
Tex.—Leath v. Prince, Civ.App., 278 S.W. 865.
33 C.J. p 1166 note 2.

76. Cal.—Deaux v. Trinidad Bean & Elevator Co., 47 P.2d 535, 8 Cal. App.2d 149.
Mich.—Hollingsworth v. Liberty Life Ins. Co. of Illinois, 127 N.W. 908, 241 Mich. 675.

Where an answer has been filed, the court may allow interest, although it was not prayed for in the complaint, if it is consistent with the case made by the complaint and embraced within the issues.—Perry v. Magneson, 279 P. 650, 207 Cal. 617.

77. Mich.—Thomson Spot Welder Co. v. Oldberg Mfg. Co., 240 N.W. 93, 256 Mich. 447—Hollingsworth v. Liberty Life Ins. Co. of Illinois, 217 N.W. 908, 241 Mich. 675.

78. Mo.—Krause v. Spurgeon, App., 256 S.W. 1072.
Tex.—Douglas v. Smith, Civ.App., 297 S.W. 767.
33 C.J. p 1168 note 26 [b].

79. Ky.—Furnace Gap Coal Co. v. White, 74 S.W.2d 4, 255 Ky. 351.
Mo.—Von Schleinitz v. North Hotel Co., 23 S.W.2d 64, 323 Mo. 1110.
S.C.—Molony & Carter Co. v. Pennell & Harley, 169 S.E. 283, 169 S.C. 462.
33 C.J. p 1168 note 26 [b].

Due date
Where petition alleged sale of stock of goods on specified date, and that balance due was to be paid a certain number of days thereafter, judgment allowing interest from the date payment was to be made was in accord with pleadings.—Kavunedas v. Long, 265 S.W. 790, 205 Ky. 321.

§ 55. Conformity to Verdict, Decision, and Findings in General

a. In general
b. Special verdict, decision, or findings

a. In General

A judgment must be supported by, and conform to, the verdict, decision, or findings in all substantial particulars.

It is a well-established principle of law, applicable to both cases tried by the court[80] and cases tried by a jury,[81] that the judgment must be supported by,[82] and conform to,[83] the verdict, decision, or findings in all substantial particulars. In accord-

80. N.Y.—Troughton v. Digmore Holding Co., 173 N.Y.S. 659, 105 Misc. 638.
Tex.—El Continental Pub. Co. v. Blumenthal, Civ.App., 63 S.W.2d 1056.

81. **Constitutional guaranty of jury trial** is violated if the judgment does not conform to the verdict.—North v. Atlas Brick Co., Tex.Com.App., 13 S.W.2d 59, motion granted in part 16 S.W.2d 519.

82. U.S.—El Dorado Terminal Co. v. General American Tank Car Corporation, C.C.A.Cal., 104 F.2d 903, reversed on other grounds 60 S.Ct. 325, 308 U.S. 422, 84 L.Ed. 361, rehearing denied 60 S.Ct. 465, 309 U.S. 694, 84 L.Ed. 1035.
Cal.—Berg v. Berg, 132 P.2d 871, 56 Cal.App.2d 495—Alphonzo E. Bell Corporation v. Listle, 130 P.2d 251, 55 Cal.App.2d 300—Mardesich v. C. J. Hendry Co., 125 P.2d 595, 51 Cal.App.2d 567—Kittle Mfg. Co. v. Davis, 47 P.2d 1089, 8 Cal.App.2d 504—Magarian v. Moser, 42 P.2d 385, 5 Cal.App.2d 208—Mitchell v. Rasey, 33 P.2d 1056, 139 Cal.App. 350—Cameron v. Feather River Forest Homes, 33 P.2d 884, 139 Cal.App. 373—Nestor v. Burr, 12 P.2d 479, 124 Cal.App. 369—McCain v. Burch, 267 P. 748, 92 Cal.App. 141.
Conn.—Gulf Oil Corporation of Pennsylvania v. Newton, 31 A.2d 462, 130 Conn. 37.
Fla.—Hoyt v. Evans, 109 So. 311, 91 Fla. 1053.
Idaho.—Hand v. Twin Falls County, 236 P. 536, 40 Idaho 638.
Ind.—Gibraltar Realty Co. v. Security Trust Co., 136 N.E. 636, 192 Ind. 502—Indianapolis Real Estate Board v. Willson, 187 N.E. 400, 98 Ind.App. 72.
Mass.—Perkins v. Becker's Conservatories, 61 N.E.2d 833.
N.Y.—J. C. Whritenour Co. v. Colonial Homes Co., 205 N.Y.S. 299, 209 App.Div. 676.
N.C.—Glenn v. Gate City Life Ins. Co., 18 S.E.2d 113, 220 N.C. 672.
N.D.—**Corpus Juris quoted in** Mielcarek v. Riske, 21 N.W.2d 218, 221.
Okl.—Winters v. Birch, 36 P.2d 907, 169 Okl. 237.
Or.—Maeder Steel Products Co. v. Zanello, 220 P. 155, 109 Or. 562.
Tex.—City of Temple v. Mitchell, Civ.App., 180 S.W.2d 959—Braddock v. Brockman, Civ.App., 29 S.W.2d 811—Weathered v. Meek, Civ. App., 258 S.W. 516.
33 C.J. p 1170 note 37.

The pleadings may be considered in connection with the verdict, and facts admitted therein may be considered in aid of the verdict in order to support the judgment.—Law v. Coleman, 159 S.E. 679, 173 Ga. 68—33 C.J. p 1174 notes 66, 67.

Judgments held supported by verdict or findings
Cal.—Mirich v. Underwriters at Lloyd's London, 149 P.2d 19, 64 Cal.App.2d 522—Smoll v. Webb, 130 P.2d 773, 55 Cal.App.2d 456—Honsberger v. Durfee, 130 P.2d 189, 55 Cal.App.2d 68—Murray v. Babb, 86 P.2d 146, 30 Cal.App.2d 301—Easterly v. Cook, 35 P.2d 164, 140 Cal.App. 115—McConville v. Superior Court within and for Los Angeles County, 248 P. 553, 78 Cal.App. 203—Rosener v. Hanlon Dry Dock & Shipbuilding Co., 236 P. 183, 71 Cal.App. 767—Munford v. Humphreys, 229 P. 860, 68 Cal.App. 530.
Conn.—Butler v. Solomon, 18 A.2d 685, 127 Conn. 613.
Ga.—Odom v. Attaway, 162 S.E. 279, 173 Ga. 883—Cason v. United Realty & Auction Co., 131 S.E. 161, 161 Ga. 374.
Ind.—Peru Heating Co. v. Lenhart, 95 N.E. 680, 48 Ind.App. 319.
Ky.—Asher v. Gibson, 250 S.W. 860, 199 Ky. 175.
N.C.—In re Escoffery, 3 S.E.2d 425, 216 N.C. 19.
Tex.—Starr v. Schoellkopf Co., 113 S.W.2d 1227, 131 Tex. 263.

83. U.S.—Mutual Ben. Health & Accident Ass'n v. Thomas, C.C.A. Ark., 123 F.2d 353—Manjon v. Lebron, C.C.A.Puerto Rico, 23 F.2d 266.
Alaska.—**Corpus Juris cited in** Mitchell v. Beaver Dredging Co., 8 Alaska 566, 582.
Ariz.—Rodriquez v. Childress, 272 P. 921, 34 Ariz. 489.
Ark.—Missouri Pacific Transp. Co. v. Sharp, 108 S.W.2d 579, 194 Ark. 405—Powers v. Wood Parts Corporation, 44 S.W.2d 324, 184 Ark. 1032.
Cal.—Prothero v. Superior Court of Orange County, 238 P. 357, 196 Cal. 489—Cappelmann v. Young, App., 165 P.2d 950—Berg v. Berg, 132 P.2d 871, 56 Cal.App.2d 495—Gossman v. Gossman, 126 P.2d 178, 52 Cal.App.2d 184—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698—Leeper v. Ginsberg, 85 P.2d 548, 29 Cal.App. 2d 722—Magarian v. Moser, 42 P. 2d 385, 5 Cal.App.2d 208—Nestor v. Burr, 12 P.2d 479, 124 Cal.App. 369—Holland v. Bank of Italy Nat. Trust & Savings Ass'n, 1 P.2d 1031, 115 Cal.App. 472—Slater v. Mayzie, 230 P. 453, 69 Cal.App. 87.
Colo.—Mooney v. Carter, 160 P.2d 390—Meyer v. Milliken, 76 P.2d 420, 101 Colo. 564, certiorari denied Milliken v. Meyer, 59 S.Ct. 63, 305 U.S. 598, 83 L.Ed. 379, reversed on other grounds 61 S.Ct. 339, 311 U.S. 457, 84 L.Ed. 278, 132 A.L.R. 1395, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143, mandate conformed to 111 P.2d 282, 107 Colo. 295.
Ga.—Gray v. Junction City Mfg. Co., 22 S.E.2d 847, 195 Ga. 33—Law v. Coleman, 159 S.E. 679, 173 Ga. 68—Dinsmore v. Holcomb, 144 S.E. 780, 167 Ga. 20—Betts v. Mathews, 34 S.E.2d 729, 72 Ga.App. 678—Frank E. Wood Co. v. Colson, 158 S.E. 533, 43 Ga.App. 265—Georgia Motor Sales v. Wade, 138 S.E. 797, 37 Ga.App. 24.
Idaho.—Radermacher v. Eckert, 128 P.2d 426, 63 Idaho 531.
Ill.—De Leuw, Cather & Co. v. City of Joliet, App., 64 N.E.2d 779.
Ind.—Scheiring v. Baker, 177 N.E. 866, 202 Ind. 678—Elliott v. Gardner, 46 N.E.2d 702, 113 Ind.App. 47—Feuerstein v. Baumeister, 8 N.E.2d 412, 103 Ind.App. 432—Fisher v. Rosander, 151 N.E. 12, 84 Ind.App. 694—Mansfield v. Hinckle, 139 N.E. 700, 81 Ind.App. 6.
Ky.—Equitable Life Assur. Soc. of U. S. v. Goble, 72 S.W.2d 35, 254 Ky. 614—Meraman v. Caldwell, 8 B.Mon. 32, 46 Am.D. 537.
Mont.—**Corpus Juris quoted in** Morse v. Morse, 154 P.2d 982, 984.
Neb.—Crete Mills v. Stevens, 253 N. W. 453, 120 Neb. 794.
N.Y.—In re Braasch's Ex'rs, 202 N. Y.S. 844, 208 App.Div. 745—Brown v. Shyne, 206 N.Y.S. 310, 123 Misc. 851—Basile v. Basile, 197 N.Y.S. 668, 120 Misc. 63—Troughton v. Digmore Holding Co., 173 N.Y.S. 659, 105 Misc. 638.
N.C.—White v. Dixie Fire Ins. Co., Greensboro, 36 S.E.2d 923—Yancey v. North Carolina State Highway and Public Works Commission, 19 S.E.2d 489, 221 N.C. 185—Page Supply Co. v. Horton, 17 S.E.2d 493, 220 N.C. 373—Sitterson

ance with this principle it has been held that, where the verdict grants alternative forms of relief, the judgment must make like provision.[84] So, where the verdict is joint, the judgment must be joint[85] unless plaintiff remits the damages as to one of defendants[86] or dismisses the action as to him,[87] or the court grants him a new trial;[88] and, where the verdict is several, the judgment must be several.[89]

As a qualification of the rule it may be stated that the judgment should conform to the real and substantial finding rather than to the literal form of expression of the verdict.[90] Where the finding reported could not possibly be arrived at without also finding another fact not expressed but necessarily included in the verdict, judgment can be rendered as though that fact had been positively found.[91] Superfluous matter in a verdict may be disregarded;[92] and, where the verdict or finding is on an

v. Sitterson, 131 S.E. 641, 191 N. C. 319, 51 A.L.R. 760—Durham v. Davis, 88 S.E. 435, 171 N.C. 308.
N.D.—**Corpus Juris quoted in** Mielcarek v. Riske, 21 N.W.2d 218, 221.
Okl.—Winters v. Birch, 36 P.2d 907, 169 Okl. 237—Kuhl Motor Co. v. Wade, 1 P.2d 704, 151 Okl. 83.
Or.—Maeder Steel Products Co. v. Zanello, 220 P. 155, 109 Or. 562.
Tenn.—Allen v. Melton, 99 S.W.2d 219, 20 Tenn.App. 387.
Tex.—Totton v. Smith, 113 S.W.2d 517, 131 Tex. 219—North v. Atlas Brick Co., Com.App., 13 S.W. 2d 59, motion granted in part 16 S.W.2d 519—Deal v. Craven, Com. App., 277 S.W. 1046—St. Louis Southwestern Ry. Co. of Texas v. Seale & Jones, Com.App., 267 S. W. 676—Johnson Aircrafts v. Wilborn, Civ.App., 190 S.W.2d 426—Hamill & Smith v. Ogden, Civ.App., 163 S.W.2d 725—Day v. Grayson County State Bank, Civ.App., 153 S.W.2d 599—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—Taylor v. Jones, Civ.App., 135 S.W.2d 767, error dismissed, judgment correct—Strack v. Strong, Civ.App., 135 S.W.2d 754, error dismissed, judgment correct—Chaffin v. Drane, Civ.App., 131 S.W.2d 672—Friske v. Graham, Civ.App., 128 S.W.2d 139—Humble Oil & Refining Co. v. Owings, Civ.App., 128 S. W.2d 67—Ostrom v. Jackson, Civ. App., 127 S.W.2d 987—Jones-O'Brien, Inc., v. Loyd, Civ.App., 106 S.W.2d 1069, error dismissed—Southern Underwriters v. Gariepy, Civ.App., 105 S.W.2d 760, error dismissed—Southern Pine Lumber Co. v. Whiteman, Civ. App., 104 S.W.2d 635, error dismissed—Boyle v. Fisher, Civ.App., 103 S.W.2d 866, error dismissed—Texas & N. O. R. Co. v. Harris, Civ.App., 101 S.W.2d 640, error dismissed—Farmers & Merchants Nat. Bank v. Arrington, Civ.App., 98 S.W.2d 378—Amarillo Transfer & Storage Co. v. De Shong, Civ. App., 82 S.W.2d 381—Parks v. Hines, Civ.App., 68 S.W.2d 364, affirmed Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289—Smith v. El Paso & N. E. R. Co., Civ.App., 67 S.W.2d 362, error dismissed—Citizens' Nat. Bank v. E. V. Graham & Co., Civ.App., 25 S.W.2d 636—Sociedad Union Mexicana La Constructora v. De Orona, Civ.App., 288 S.W. 1111—Rogers v. City of Fort Worth, Civ.App., 275 S.W. 214—Standard Motor Co. v. Wittman, Civ.App., 271 S.W. 186—Schaff v. Wilson, Civ.App., 269 S. W. 140—Brown v. Knox, Civ.App., 261 S.W. 791, affirmed Knox v. Brown, Com.App., 277 S.W. 91—Metting v. Metting, Civ.App., 261 S.W. 151, reheard 262 S.W. 188—Weathered v. Meek, Civ.App., 258 S.W. 516.
Vt.—Ackerman v. Carpenter, 29 A.2d 922, 113 Vt. 77—Scampini v. Rizzi, 172 A. 619, 106 Vt. 281.
13 C.J. p 798 note 66—19 C.J. p 1210 notes 26, 27, 30, p 1240 note 21—24 C.J. p 885 note 47—26 C.J. p 570 note 25—28 C.J. p 1036 note 54—33 C.J. p 144 note 84, p 1169 note 36—38 C.J. p 1190 note 6—42 C.J. p 142 note 51, p 1287 note 15—47 C.J. p 430 notes 74, 76, 77, p 1009 note 87.

When intention of jury is clear from language of verdict considered in connection with pleadings and evidence the court must make the judgment conform thereto.—Yeoman v. Sherry, 52 P.2d 555, 10 Cal.App. 2d 567—Curtis v. San Pedro Transp. Co., 52 P.2d 528, 10 Cal.App.2d 547.

The form of the verdict as recorded, rather than the verdict which the jury actually returned into court, governs in determining whether or not the judgment conforms to the verdict.—Grammer v. Wiggins-Meyer S. S. Co., 270 P. 759, 126 Or. 694.

Judgments held in conformity to verdict or findings

(1) Generally.

Ala.—Lawler v. Hyde, 161 So. 523, 230 Ala. 467.
Ariz.—Golden Eagle-Bobtail Mines v. Valley Nat. Bank, 138 P.2d 289, 60 Ariz. 400—Holcomb v. Clark, 234 P. 1075, 27 Ariz. 573.
Cal.—Gray v. Magee, 292 P. 157, 108 Cal.App. 570—Fink & Schindler Co. v. Gavros, 257 P. 156, 83 Cal.App. 582.
Ga.—Brown v. O'Neal, 1 S.E.2d 601, 59 Ga.App. 560.
Mass.—Birnbaum v. Pamoukis, 17 N.E.2d 885, 301 Mass. 559.
Tex.—Tipton v. Tipton, Civ.App., 140 S.W.2d 865, error dismissed, judgment correct.
Wash.—Deming v. Jones, 24 P.2d 85, 173 Wash. 644—Rich v. Kruger, 228 P. 1012, 130 Wash. 656.
33 C.J. p 1169 note 36 [c].

(2) Where jury found two separate verdicts, one for plaintiff on its complaint, and the other for defendant on her counterclaim, court's action in subtracting judgment based on verdict rendered for defendant on counterclaim from judgment in favor of plaintiff and rendering corrected judgment for the difference held proper as against contention that the judgment was unwarranted because not based upon a verdict of the jury.—Creek v. Lebo Inv. Co., 48 P.2d 792, 97 Colo. 250.

84. Cal.—Benson v. Olender, 246 P. 345, 77 Cal.App. 287.
85. Ark.—Spears v. McKinnon, 270 S.W. 524, 168 Ark. 357.
Tex.—Citizens' Railway & Light Co. v. Case, Civ.App., 138 S.W. 621.
33 C.J. p 1171 note 40.
86. Ala.—Golding v. Hall, 9 Port. 169.
87. Ill.—Siltz v. Springer, 85 N.E. 748, 236 Ill. 276.
88. Iowa.—Terpenning v. Gallup, 8 Iowa 74.
33 C.J. p 1171 note 43.
89. Colo.—Bartlett v. Hammond, 230 P. 109, 76 Colo. 171.
Pa.—Wise v. Frey, Com.Pl., 22 West. Co.L.J. 176.
19 C.J. p 1210 note 29—33 C.J. p 1171 note 44.
90. Tex.—F. H. Vahlsing, Inc., v. Hartford Fire Ins. Co., Civ.App., 108 S.W.2d 947, error dismissed.
33 C.J. p 1174 note 62.

A trifling variance will not vitiate the judgment.—Camden v. Haskill, 3 Rand. 462, 24 Va. 462.

Fact that ultimate fact was contained in "conclusions of law," rather than "findings of fact," held immaterial.—Bogan v. Hynes, C.C.A. Cal., 65 F.2d 524, certiorari denied 54 S.Ct. 126, 290 U.S. 690, 78 L.Ed. 594.

91. Ga.—Gray v. Junction City Mfg. Co., 22 S.E.2d 847, 195 Ga. 33.
33 C.J. p 1174 note 63.
92. Cal.—Slayden v. O'Dea, 218 P. 395, 191 Cal. 785.

immaterial issue[93] or an issue of law,[94] judgment need not, and should not, be rendered thereon. On the other hand, the validity of a judgment will not be affected by incorporating immaterial matters therein.[95]

One real exception to the rule that judgments must conform to the verdict or findings consists of cases where a judgment is rendered non obstante veredicto, discussed infra §§ 59–61. Another exception exists in cases where trial by jury is not a matter of right and the verdict or findings of a jury are merely advisory,[96] as in equity cases.[97]

Failure of the judgment to conform to the verdict has been held not to render the judgment void or inoperative,[98] and the proper remedy in such case is by a motion to modify the judgment,[99] or according to some authority,[1] but not other,[2] by appeal or writ of error.

After direction of a verdict, it has been held that the court may render the judgment demanded by the undisputed evidence, even though the directed verdict is insufficient to support the judgment.[3]

Conformity to conclusions of law. While it has been held that the trial court's conclusions of law must be predicated on, and find support in, the court's fact findings, and the judgment must follow the conclusions of law,[4] it has also been held that the judgment need not conform to findings or conclusions of law,[5] except where it is entered by the clerk on a decision without further judicial action by the court.[6]

Conformity to report of referee. If the report of a referee or master is accepted by the court, or sustained against exceptions, or judgment is entered thereon pursuant to statute, the judgment must conform to its findings and conclusions; to

Ind.—Mullet v. Blaine, 16 N.E.2d 981, 105 Ind.App. 666.
Ohio.—Seal v. Gobel, 31 Ohio Cir.Ct. 286.
33 C.J. p 1174 note 64.

Attempted apportionment of damages, following lump-sum verdict against defendants jointly liable, treated as surplusage.
Ill.—Fitzgerald v. Davis, 237 Ill.App. 488.
Mont.—Bowman v. Lewis, 102 P.2d 1, 110 Mont. 435.

Recital that third party was entitled to part of recovery held not required to be included in judgment.—Gosnell v. Camden Fire Ins. Ass'n of Camden, N. J., Mo.App., 109 S.W.2d 59.

Matter not properly disregarded
Where judgment ordered that the verdict on specified issues should be set aside and that verdict on all remaining issues should be undisturbed and allowed to stand, if the court intended merely to strike out answers to the specified issues and to hold as matter of law that they were surplusage, it failed to do so.—Page Supply Co. v. Horton, 17 S.E.2d 493, 220 N.C. 373.

93. Tex.—St. Paul Fire & Marine Ins. Co. v. Huff, Civ.App., 172 S.W. 755.
33 C.J. p 1174 note 69.

Immaterial findings do not affect judgment
Mont.—Rutherford v. J. B. Long & Co., 240 P. 821, 74 Mont. 420.

94. Tex.—Sovereign Camp W. O. W. v. Wagnon, Civ.App., 164 S.W. 1082.

95. Mich.—Burkle v. Ingham Cir. Judge, 4 N.W. 192, 42 Mich. 513—Taylor v. Gladwin, 40 Mich. 232.

The mere addition of descriptive matter not found in the verdict is surplusage and immaterial.—Oliver's Garage v. Lowe, 103 So. 586, 212 Ala. 602—33 C.J. p 1174 note 65.

96. N.Y.—McClave v. Gibb, 52 N.E. 186, 157 N.Y. 413—People ex rel. Flannery v. Worthing, 31 N.Y.S.2d 79, 177 Misc. 545.

97. Wyo.—Jones v. Chicago, B. & Q. R. Co., 147 P. 508, 23 Wyo. 148.
33 C.J. p 1174 note 60.
Effect of jury verdict in equity see Equity § 510.

98. Ala.—Herren v. Shelnutt, 110 So. 697, 21 Ala.App. 589, certiorari denied 110 So. 699, 215 Ala. 355.
N.M.—In re Field's Estate, 60 P.2d 945, 40 N.M. 423.
N.Y.—Corn Exch. Bank v. Blye, 23 N.E. 805, 119 N.Y. 414.

The defect may be waived
N.Y.—Corn Exch. Bank v. Blye, supra.

Failure to conform to verdict and complaint held to affect validity of judgment so as to preclude appeal thereon.—Spears v. Wise, 65 So. 786, 187 Ala. 346—19 C.J. p 1210 note 31.

99. Ind.—Elliott v. Gardner, 46 N.E. 2d 702, 113 Ind.App. 47—S. J. Peabody Lumber Co. v. Northam, 184 N.E. 794, 96 Ind.App. 197—Tri Lake Const. Co. v. Northam, 184 N.E. 792, 96 Ind.App. 183.
N.M.—In re Field's Estate, 60 P.2d 945, 40 N.M. 423.
N.Y.—Kenney v. Apgar, 93 N.Y. 539.
19 C.J. p 1211 note 37—33 C.J. p 1170 note 37 [d], p 1171 note 45.
Amendment of judgment to conform to verdict or findings see infra § 243.

1. Ky.—Lykins v. Hamrick, 137 S.W. 852, 144 Ky. 80.
N.M.—In re Field's Estate, 60 P.2d 945, 40 N.M. 423.

2. N.Y.—Kenney v. Apgar, 93 N.Y. 539—People v. Goff, 52 N.Y. 434.

3. Tex.—Zachary v. City of Uvalde, Com.App., 42 S.W.2d 417—Zachary v. Home Owners Loan Corporation, Civ.App., 117 S.W.2d 153, error dismissed.

4. Utah.—Mason v. Mason, 160 P. 2d 730—Beneficial Life Ins. Co. v. Mason, 160 P.2d 734—Parrott Bros. Co. v. Ogden City, 167 P. 807, 50 Utah 512.
33 C.J. p 1173 note 53 [c].

5. Cal.—Mason v. Del Valle, 1 P. 2d 419, 213 Cal. 30—Liuzza v. Brinkerhoff, 33 P.2d 976, 29 Cal. App.2d 1—Delmuto v. Superior Court in and for San Joaquin County, 6 P.2d 1007, 119 Cal.App. 590.
33 C.J. p 1173 note 53.

Findings of fact will prevail over conclusions of law.—Mount v. Dillon, 138 S.W.2d 59, 200 Ark. 153.

Erroneous conclusions of law
A judgment supported by the facts found will not be reversed because not in conformity with erroneous conclusions of law.—Freeman v. Robinson, 131 N.E. 75, 238 Mass. 449—33 C.J. p 1173 note 55.

Finding on mixed question of law and fact
(1) The jury's finding on a mixed question of law and fact has been held to be binding on the court in rendering judgment.—Lemm v. Miller, Tex.Civ.App., 245 S.W. 90, reversed on other grounds Miller v. Lemm, Com.App., 276 S.W. 211.
(2) However, the contrary has also been held.—Hubert v. Collard, Tex.Civ.App., 141 S.W.2d 677, error dismissed, judgment correct.

6. Cal.—Broder v. Conklin, 33 P. 211, 93 Cal. 360.

depart from it in any essential matter will be reversible error.[7]

b. Special Verdict, Decision, or Findings

Whenever the judgment is based on a special verdict, decision, or findings, they must be sufficiently comprehensive, certain, and consistent to sustain the judgment and justify it as a matter of law.

Whenever the judgment is based on a special verdict, decision, or findings, they must be sufficiently comprehensive, certain, and consistent to sustain the judgment and justify it as a matter of law.[8] As a general rule special findings cannot be aided by the evidence,[9] and the court cannot render a judgment on an issue submitted to the jury but not determined by their verdict,[10] no matter how clear and undisputed the evidence may be;[11] where the issues submitted to the jury are not determinative

7. Ga.—Owen v. S. P. Richards Paper Co., 3 S.E.2d 660, 188 Ga. 258.
Mass.—Battista v. F. W. Woolworth Co., 57 N.E.2d 552, 317 Mass. 179.
Tex.—Farley v. Ward, 1 Tex. 646.
24 C.J. p 885 note 48—33 C.J. p 1173 note 58—34 C.J. p 237 note 8.

Judgment held properly rendered in accordance with findings.—Levoysky v. Horvitz, 30 N.E.2d 411, 307 Mass. 475.

8. U.S.—United Gas Public Service Co. v. Pardue, C.C.A.La., 73 F.2d 929.
Kan.—Hajny v. Robinson Milling Co., 134 P.2d 398, 156 Kan. 506.
N.C.—Morris v. Y. & B. Corporation, 153 S.E. 335, 198 N.C. 719—Merchants' Nat. Bank v. Carolina Broom Co., 125 S.E. 12, 188 N.C. 508.
Tex.—International-Great Northern R. Co. v. Casey, Com.App., 46 S.W. 2d 669—Rodriguez v. Higginbotham-Bailey-Logan Co., Civ.App., 144 S.W.2d 993, reversed on other grounds 160 S.W.2d 234, 138 Tex. 476—Kimbrow v. Fort Worth & D. C. R. Co., Civ.App., 86 S.W.2d 78, affirmed Fort Worth & D. C. Ry. Co. v. Kimbrow, 112 S.W.2d 712, 131 Tex. 117—Parks v. Hines, Civ.App., 68 S.W.2d 364, affirmed Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289—Tips v. Barneburg, Civ. App., 276 S.W. 932.
33 C.J. p 1171 note 47.

Findings should be liberally construed to support the judgment, if possible.—Clavey v. Loney, 251 P. 232, 80 Cal.App. 20—33 C.J. p 1172 note 50 [b].

Where the findings are ambiguous, the court is authorized to examine not only the charge, but the pleadings and evidence, and if, by an examination of the record, the intention of the verdict can be ascertained such verdict, so construed, constitutes the proper basis for judgment.—Vincent v. Bell, Tex.Civ. App., 22 S.W.2d 753, error dismissed.

Inconsistent findings

(1) It has been held that a judgment cannot be based on inconsistent findings.
Cal.—Los Angeles & Arizona Land Co. v. Marr, 200 P. 1051, 187 Cal. 127.
Tex.—Maryland Casualty Co. v. Howie, Civ.App., 94 S.W.2d 220, error dismissed—Schaff v. Wilson, Civ.App., 269 S.W. 140—First Nat. Bank v. Chapman, Civ.App., 255 S. W. 807.

(2) However, in cases of equitable cognizance it has been held that the decree rendered will be upheld, even though findings are inconsistent, if one or more supports the decree.—State ex rel. Corbett v. Superior Court for King County, Department No. 10 thereof, 48 P.2d 617, 183 Wash. 373—Ingle v. Ingle, 48 P. 2d 576, 183 Wash. 234—Silverstone v. Hanley, 104 P. 767, 55 Wash. 458—Howey v. Bingham, 44 P. 886, 14 Wash. 450.

(3) Separate findings should be considered together as being the aggregate finding of facts, where such consideration will tend to eliminate apparent inconsistency between the findings.—Pryor v. Pryor, Okl., 168 P.2d 375.

Verdict or findings held sufficient
Cal.—Matmor Olive Co. v. Du Bois, 150 P.2d 816, 65 Cal.App.2d 467—Mirich v. Underwriters at Lloyd's London, 149 P.2d 19, 64 Cal.App.2d 522—Klutts v. Rupley, 137 P.2d 496, 58 Cal.App.2d 560—Gordon v. Santa Cruz Portland Cement Co., App., 130 P.2d 232—Winchester v. General Cab Co., 57 P.2d 206, 13 Cal.App.2d 551—Metcalf v. Metropolitan Life Ins. Co., 37 P.2d 115, 1 Cal.App.2d 481, rehearing denied 38 P.2d 401, 1 Cal.App.2d 481—Kohner v. National Surety Co., 287 P. 510, 105 Cal.App. 430—Merkle v. Merkle, 258 P. 969, 85 Cal.App. 87.
Ga.—Sangster v. Toledo Mfg. Co., 19 S.E.2d 723, 193 Ga. 685.
Ind.—Menser v. Marshall Farmers' Home Fire Ins. Co., 121 N.E. 831, 70 Ind.App. 211.
Mo.—Spallo v. Royal Ins. Co., Limited, of Liverpool, App., 125 S.W. 2d 967—Cantley v. American Surety Co. of New York, 38 S.W.2d 739, 225 Mo.App. 1146.
Tex.—American Nat. Ins. Co. v. Hammond, Civ.App., 91 S.W.2d 432, error dismissed—Hartford Accident & Indemnity Co. v. Shaw, Civ. App., 8 S.W.2d 196, error dismissed.
Wis.—State ex rel. Litzen v. Dillett, 7 N.W.2d 599, 242 Wis. 107, rehearing denied 9 N.W.2d 80, 242 Wis. 107—Delap v. Liebenson, 208 N.W. 937, 190 Wis. 73.

Verdict or findings held insufficient
(1) Generally.
Cal.—Rossini v. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., 188 P. 564, 182 Cal. 413—Smith v. Young, 122 P.2d 624, 50 Cal.App.2d 152.
Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253—Robertson v. Connecticut General Life Ins. Co., Civ.App., 140 S.W.2d 936—Federal Underwriters Exchange v. Dorman, Civ.App., 137 S.W.2d 100, error dismissed, judgment correct—American Nat. Ins. Co. v. Briggs, Civ.App., 90 S. W.2d 602, error dismissed—Wagstaff v. North British & Mercantile Ins. Co., Civ.App., 88 S.W.2d 550, error dismissed—Connecticut General Life Ins. Co. v. Lockwood, Civ.App., 84 S.W.2d 245, error dismissed—Huey v. American Nat. Ins. Co., Civ.App., 45 S.W.2d 340, reversed on other grounds American Nat. Ins. Co. v. Huey, Com. App., 66 S.W.2d 690—Harris v. Western Union Telegraph Co., Civ. App., 281 S.W. 877—Compton v. Jennings Lumber Co., Civ.App., 266 S.W. 569—Kansas City Life Ins. Co. v. Jinkens, Civ.App., 202 S.W. 772.

(2) In view of inadequate instruction.—Humbird Cheese Co. v. Fristad, 242 N.W. 158, 208 Wis. 283

Statement in judgment that no satisfactory evidence was offered why attorney's lien should be canceled was held conclusion not overcoming finding that attorney participated in satisfaction of judgment, destroying lien.—Holbrook v. McKee, 266 P. 137, 147 Wash. 386.

9. Tex.—Southern Pine Lumber Co. v. Whiteman, Civ.App., 104 S.W.2d 635, error dismissed—Tips v. Barneburg, Civ.App., 276 S.W. 932.
33 C.J. p 1171 note 48.

10. Tex.—Magnolia Petroleum Co. v. Connellee, Com.App., 14 S.W.2d 1020.
33 C.J. p 1171 note 49.

Theory of case not passed on by jury held not to afford basis for rendering judgment.—Baker v. Reed, Tex.Civ.App., 54 S.W.2d 214.

11. Cal.—Corpus Juris cited in

of the controversy, a judgment rendered thereon is erroneous.[12]

If the special verdict, decision, or findings are sufficient, the judgment must follow and accord with them,[13] and, as a general rule, cannot go beyond them in awarding relief or settling the rights of the parties.[14] This rule has been held to apply even though the special verdict, decision, or findings

Slater v. Mayzie, 230 P. 453, 455, 69 Cal.App. 87.

33 C.J. p 1171 note 49.

12. N.C.—Brown v. Daniel, 13 S.E. 2d 623, 219 N.C. 349.

13. U.S.—Texas Compensation Ins. Co. v. Heard, C.C.A.Tex., 93 F.2d 543—Great Lakes Boat Building Corporation v. Jasperson, C.C.A. Ill., 71 F.2d 415.

Cal.—Cappelmann v. Young, App., 165 P.2d 950—People v. Robin, 133 P.2d 436, 56 Cal.App.2d 885—Hall v. Citizens Nat. Trust & Savings Bank of Los Angeles, 128 P.2d 545, 53 Cal.App.2d 625—Hogberg v. Landfield, 278 P. 907, 99 Cal.App. 360.

Colo.—Meyer v. Milliken, 76 P.2d 420, 101 Colo. 564, certiorari denied Milliken v. Meyer, 59 S.Ct. 63, 305 U.S. 598, 83 L.Ed. 379, reversed on other grounds 61 S.Ct. 339, 311 U. S. 457, 84 L.Ed. 278, 132 A.L.R. 1395, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143, mandate conformed to 111 P.2d 232, 107 Colo. 295.

Ga.—Fleming v. Collins, 9 S.E.2d 157, 190 Ga. 210—Law v. Coleman, 159 S.E. 679, 173 Ga. 68—Hill v. Farmers' Bank of Forsyth, 121 S.E. 682, 157 Ga. 457.

Idaho.—Boise Street Car Co. v. Van Avery, 103 P.2d 1107, 61 Idaho 502.

Ind.—City of Muncie v. Horlacher, 53 N.E.2d 631, 222 Ind. 302.

Kan.—Lawson v. Lawrence Oil & Gas Co., 12 P.2d 711, 135 Kan. 740—Black v. Black, 256 P. 995, 123 Kan. 608—Custer v. Royse, 204 P. 995, 110 Kan. 397.

Miss.—McCraven v. Doe, 23 Miss. 100.

Mo.—Bondurant v. Raven Coal Co., App., 25 S.W.2d 566.

N.C.—Twitty v. Cochran, 199 S.E. 29, 214 N.C. 265.

Okl.—Pryor v. Pryor, 168 P.2d 875—Davis v. Mose, 239 P. 447, 112 Okl. 38.

Tex.—Edmiston v. Texas & N. O. R. Co., 138 S.W.2d 526, 135 Tex. 67—North v. Atlas Brick Co., Com. App., 13 S.W.2d 59, motion granted in part 16 S.W.2d 519—Prideaux v. Roark, Com.App., 291 S.W. 868—Hart v. Wilson, Com.App., 288 S.W. 133—Deal v. Craven, Com. App., 277 S.W. 1046—Knox v. Brown, Com.App., 277 S.W. 91, motion overruled 277 S.W. 619—Massie v. Hutcheson, Com.App., 270 S. W. 544—Barton v. Wood, Civ.App., 162 S.W.2d 147, error refused—Texas Employers Ins. Ass'n v. Schaffer, Civ.App., 161 S.W.2d 328, error refused—Weston v. Duggan, Civ.App., 160 S.W.2d 1010—Rodriguez v. Higginbotham-Bailey-Logan Co., Civ.App., 144 S.W.2d 993, reversed on other grounds 160 S. W.2d 234, 138 Tex. 476—Pearlstone-Ash Grocery Co. v. Rembert Nat. Bank of Longview, Civ.App., 135 S.W.2d 559, error refused—Magnolia Petroleum Co. v. Wheeler, Civ.App., 132 S.W.2d 456, error dismissed, judgment correct—American Nat. Ins. Co. v. Sutton, Civ.App., 130 S.W.2d 441—McCray Refrigerator Sales Corporation v. Johnson, Civ.App., 121 S.W.2d 410, error dismissed—Traders & General Ins. Co. v. Milliken, Civ.App., 110 S.W.2d 108—Hartford Accident & Indemnity Co. v. Moore, Civ. App., 102 S.W.2d 441, error refused—Texas & N. O. R. Co. v. Harris, Civ.App., 101 S.W.2d 640, error dismissed—Southern Old Line Life Ins. Co. v. Mims, Civ.App., 101 S. W.2d 396, error dismissed—Garcia v. Garcia, Civ.App., 94 S.W.2d 864—Johnson v. Washington Nat. Ins. Co., Civ.App., 78 S.W.2d 696—Barnhart Mercantile Co. v. Bengel, Civ. App., 77 S.W.2d 295—Means v. Floyd West & Co., Civ.App., 74 S. W.2d 518—Parks v. Hines, Civ. App., 68 S.W.2d 364, affirmed Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289—Texas Interurban Ry. v. Hughes, Civ.App., 34 S.W.2d 1103, affirmed Texas Interurban Ry. Co. v. Hughes, Com.App., 53 S.W.2d 448—J. R. Milam Co. v. First Nat. Bank, Civ.App., 29 S.W.2d 480, error dismissed—Vincent v. Bell, Civ.App., 22 S.W.2d 753, error dismissed—Maledon v. Texas Employers' Ins. Ass'n, Civ.App., 11 S.W.2d 627, reversed on other grounds Texas Employers' Ins. Ass'n v. Maledon, Com.App., 27 S. W.2d 151—Perez v. Houston & T. C. R. Co., Civ.App., 5 S.W.2d 782—Sociedad Union Mexicana La Constructora v. De Orona, Civ.App., 288 S.W. 1111—Rumbo v. Rumbo, Civ.App., 286 S.W. 957—S. Y. Matthews & Son v. Manning, Civ.App., 284 S.W. 314—Jeffers v. Dent, Civ. App., 280 S.W. 347—Fulwiler v. Daniel, Civ.App., 279 S.W. 603—Connellee v. Magnolia Petroleum Co., Civ.App., 279 S.W. 597, reversed on other grounds Magnolia Petroleum Co. v. Connellee, Com. App., 11 S.W.2d 158, followed in Magnolia Petroleum Co. v. Akin, 11 S.W.2d 1113, and rehearing denied 14 S.W.2d 1020 and 20 S. W.2d 758—Rogers v. City of Fort Worth, Civ.App., 275 S.W. 214—Liverpool & London & Globe Ins. Co. v. Cabler, Civ.App., 271 S.W. 441—Dowd v. Klock, Civ.App., 268 S.W. 234, reversed on other grounds Klock v. Dowd, Com.App., 280 S.W. 194—Davis v. Morris, Civ. App., 257 S.W. 328, corrected on motion to recall mandate 259 S. W. 592, and reversed on other grounds, Com.App., 272 S.W. 1103—St. Paul Fire & Marine Ins. Co. v. Huff, Civ.App., 172 S.W. 755.

Utah.—Beneficial Life Ins. Co. v. Mason, 160 P.2d 734—Mason v. Mason, 160 P.2d 730.

Wis.—State ex rel. Litzen v. Dillett, 9 N.W.2d 80, 242 Wis. 107—State ex rel. Litzen v. Dillett, 7 N.W.2d 599, 242 Wis. 107, rehearing denied 9 N.W.2d 80, 242 Wis. 107.

33 C.J. p 1172 note 50.

Informal statements of court

(1) A judgment need not conform to informal statements of the court if it conforms to its formal findings. —O'Brien v. Quirk, 204 Ill.App. 448.

(2) Court's informal statement held not necessarily at variance with finding in decree.—Manney v. McClure, 233 P. 158, 76 Colo. 539.

Judgments held to conform to findings, etc.

Ark.—Sinclair Refining Co. v. Henderson, 122 S.W.2d 580, 197 Ark. 319.

Cal.—Matmor Olive Co. v. Du Bois, 150 P.2d 816, 65 Cal.App.2d 467—Honsberger v. Durfee, 130 P.2d 189, 55 Cal.App.2d 68—Clavey v. Loney, 251 P. 232, 80 Cal.App. 20.

Ga.—Sangster v. Toledo Mfg. Co., 19 S.E.2d 723, 193 Ga. 685—Bank of Louisville, Ga., v. Wheeler, 134 S.E. 753, 162 Ga. 635.

Okl.—Churchill v. Roberts, 225 P. 535, 98 Okl. 295.

Or.—Myers v. Olds, 252 P. 342, 121 Or. 249.

Tex.—Sproles v. Rosen, 84 S.W.2d 1001, 126 Tex. 51—Alexander v. Stock Yards Nat. Bank of Fort Worth, Civ.App., 154 S.W.2d 997, error refused—Jackson v. Wolff & Marx Co., Civ.App., 116 S.W.2d 467—Merritt v. King, Civ.App., 66 S.W.2d 464, error refused—First State Bank of Three Rivers v. Petrucha, Civ.App., 38 S.W.2d 138, error dismissed—Seale v. Schultz, Civ.App., 3 S.W.2d 563, error dismissed—Jones v. Bledsoe, Civ. App., 293 S.W. 204—Casey v. State, Civ.App., 289 S.W. 428.

Wash.—Shockley v. Travelers Ins. Co., 137 P.2d 117, 17 Wash.2d 736.

14. Ga.—Fleming v. Collins, 9 S.E. 2d 157, 190 Ga. 210.

Idaho.—Boise Street Car Co. v. Van

were against the undisputed proof or without evidence to support them.[15] The rule does not, however, require that judgment be rendered in accordance with immaterial findings, or findings on facts not within the issues raised by the pleadings;[16] nor does it require that no judgment be rendered unless the verdict contains a finding of all the facts on which it may be based.[17] On the contrary, the judgment may be based on the verdict rendered by the jury on the special issues submitted to it, together with the facts admitted in the pleadings, or established by the undisputed evidence,[18] and such facts as are incident to the issues on which the jury made findings which have support in the evidence.[19]

Where there is both a general and a special verdict, judgment should be rendered on the general verdict[20] unless the special findings are inconsistent therewith.[21]

§ 56. —— For and Against Whom

With respect to the parties for and against whom it is given, a judgment must follow and conform to the verdict, decision, or findings.

With respect to the parties for and against whom it is given, as in other particulars, a judgment must follow and conform to the verdict, decision, or findings,[22] according to the decisions on the ques-

Avery, 103 P.2d 1107, 61 Idaho 502.
N.C.—Sparks v. Sparks, 140 S.E. 300, 194 N.C. 809.
Ohio.—Pennsylvania R. Co. v. Vitti, 146 N.E. 94, 111 Ohio St. 670.
Tex.—Magnolia Petroleum Co. v. Connellee, Com.App., 14 S.W.2d 1020—McCuistion v. James, Civ. App., 46 S.W.2d 717.
33 C.J. p 1172 note 51.

Court cannot render judgment on different theory from that submitted to jury.—Great American Ins. Co. v. Marbury, Tex.Civ.App., 297 S. W. 584.

15. Tex.—Edmiston v. Texas & N. O. R. Co., 138 S.W.2d 526, 135 Tex. 67—Massie v. Hutcheson, Com. App., 270 S.W. 544—Texas Employers Ins. Ass'n v. Schaffer, Civ. App., 161 S.W.2d 328, error refused —Weston v. Duggan, Civ.App., 160 S.W.2d 1010—Traders & General Ins. Co. v. Milliken, Civ.App., 110 S.W.2d 108—Liverpool & London & Globe Ins. Co. v. Cabler, Civ. App., 271 S.W. 441—U. S. Fidelity & Guaranty Co. v. Dowdle, Civ. App., 269 S.W. 119.
33 C.J. p 1172 note 50 [d].

If the verdict is also without support in the pleadings of the party in whose favor it is rendered, as well as without support in the evidence, then the court may disregard it and enter a judgment contrary thereto.—Johnson v. Breckenridge-Stephens Title Co., Tex.Com.App., 257 S.W. 223—Rogers v. City of Fort Worth, Tex.Civ.App., 275 S.W. 214.

16. Cal.—Berg v. Berg, 132 P.2d 871, 56 Cal.App.2d 495.
Tex.—Sproles v. Rosen, 84 S.W.2d 1001, 126 Tex. 51—Magnolia Petroleum Co. v. Connellee, Com. App., 11 S.W.2d 158—Miller v. Lemm, Com.App., 276 S.W. 211—Allied Underwriters v. Harrell, Civ.App., 143 S.W.2d 621, error dismissed, judgment correct—Kimbrow v. Fort Worth & D. C. R. Co., Civ.App., 86 S.W.2d 78, affirmed Fort Worth & D. C. Ry. Co. v. Kimbrow, 112 S.W.2d 712, 131 Tex. 117—Barnhart Mercantile Co. v. Bengel, Civ.App., 77 S.W.2d 295—Atlas Brick Co. v. North, Civ.App., 2 S.W.2d 980, reversed on other grounds, North v. Atlas Brick Co., Com.App., 13 S.W.2d 59, motion granted in part 16 S.W.2d 519—Casey v. State, Civ.App., 289 S.W. 428—Battle v. Wolfe, Civ.App., 283 S.W. 1073—Liverpool & London & Globe Ins. Co. v. Cabler, Civ.App., 271 S.W. 441—Crowley v. Chapman, Civ.App., 260 S.W. 231—Smith & Lawson v. Taylor, Civ. App., 249 S.W. 519—Baker v. Coleman Abstract Co., Civ.App., 248 S. W. 412—Ferguson v. Kuehn, Civ. App., 246 S.W. 674—Dickson v. Kilgore State Bank, Civ.App., 244 S. W. 392, reversed on other grounds, Com.App., 257 S.W. 867—Stark v. George, Civ.App., 237 S.W. 948, reversed on other grounds, Com. App., 252 S.W. 1053.
33 C.J. p 1172 note 52.

Finding held not immaterial
Tex.—Hart v. Wilson, Com.App., 288 S.W. 133.

Findings without support in evidence and outside issues held not to afford basis for valid judgment.—Devlin v. City of Pleasanton, 288 P. 595, 130 Kan. 766.

17. Ga.—Allen v. Allen, 31 S.E.2d 483, 198 Ga. 269—Law v. Coleman, 159 S.E. 679, 173 Ga. 68.

18. Ga.—Allen v. Allen, 31 S.E.2d 483, 198 Ga. 269—Law v. Coleman, 159 S.E. 679, 173 Ga. 68.
Tex.—Southern Pine Lumber Co. v. Whiteman, Civ.App., 104 S.W.2d 635, error dismissed—Richardson v. Kent, Civ.App., 47 S.W.2d 420—Great American Ins. Co. v. Marbury, Civ.App., 297 S.W. 584.

Judgment based on issue not submitted to jury and not controverted held not erroneous.—Graham Hotel Co. v. Garrett, Tex.Civ.App., 33 S.W. 2d 522, error dismissed.

19. Tex.—Richardson v. Kent, Civ. App., 47 S.W.2d 420.

An implied finding on an issue submitted to, and not determined by, the jury cannot be made the basis of judgment.—J. R. Milam Co. v. First Nat. Bank, Tex.Civ.App., 29 S.W.2d 480, error dismissed.

20. Idaho.—Geddes v. Davis, 210 P. 584, 36 Idaho 201.
33 C.J. p 1173 note 56.

21. Ind.—Earl Park State Bank v. Lowmon, 161 N.E. 675, 92 Ind.App. 25—Scottish Union & National Ins. Co. v. B. E. Linkenhelt & Co., 121 N.E. 373, 70 Ind.App. 324.
Kan.—Behymer v. Milgram Food Stores, 101 P.2d 912, 151 Kan. 921 —Hogan v. Santa Fe Trail Transp. Co., 85 P.2d 28, 148 Kan. 720, 120 A.L.R. 521.
33 C.J. p 1173 note 56.

Court looks to pleadings, general verdict, and jury's answers to interrogatories in determining what is proper judgment.—Earl Park State Bank v. Lowmon, 161 N.E. 675, 92 Ind.App. 25.

Facts found held not inconsistent with general verdict.
Ind.—L. S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 220 Ind. 86, rehearing denied 41 N.E.2d 195, 356, 220 Ind. 86.
Kan.—Preston v. Kansas Central Indemnity Co., 243 P. 300, 120 Kan. 297.

22. Cal.—Meador v. Parsons, 19 Cal. 294—Tarpey v. Curran, 228 P. 62, 67 Cal.App. 575.
Conn.—Endut v. Borodenko, 145 A. 27, 109 Conn. 577.
Ind.—Feuerstein v. Baumeister, 8 N. E.2d 412, 103 Ind.App. 432.
Mo.—White v. Meiderhoff, App., 281 S.W. 98.
Ohio.—State ex rel. Fulton v. Ach, 24 N.E.2d 462, 62 Ohio App. 439—Spieker v. Board of Rapid Transit Com'rs of City of Cincinnati, 174 N.E. 15, 37 Ohio App. 102.
Tex.—Peveto v. Smith, 133 S.W.2d 572, 134 Tex. 308—Fleming Oil Co. v. Watts, Civ.App., 193 S.W.2d 979 —Corpus Juris cited in Walker v. Taylor, Civ.App., 56 S.W.2d 251,

tion, as reasonably construed[23] in the light of the pleadings and evidence and settled principles of law.[24] The judgment must be rendered in favor of the party indicated by the verdict provided his pleadings are sufficient to sustain it.[25] A judgment must be for plaintiff on a finding in his favor,[26] and for defendant on a finding in his favor.[27] Where the finding is against all defendants, the judgment must be entered against all,[28] except those properly dismissed from the action after verdict,[29] and, where it is in favor of all defendants, the judgment likewise must be entered in favor of them all.[30]

Although there is also contrary authority,[31] it has been held that a verdict against one or more of several defendants authorizes the entry of a judgment in favor of defendants not mentioned in it,[32] and a verdict in favor of a defendant charged as primarily liable has been held to authorize a judgment in favor of defendants secondarily liable.[33] When the verdict is for plaintiff on one count only, a judgment for defendant on the other counts has been held proper.[34] In designating the parties the use of the singular for the plural or vice versa will not amount to a variance between the verdict and judgment, where it is evidently a mistake and does not cast obscurity on the decision,[35] but the use of the plural to designate all the parties on one side requires the entry of a judgment in favor of all such parties, and a judgment in favor of only one of them is erroneous.[36] An obvious misnomer in the verdict may be corrected in the judgment without constituting a variance.[37] So a party described in the pleadings as a corporation may be so described in the judgment, although the verdict fails to do so.[38]

§ 57. —— Amount

Generally a judgment must be rendered for the amount indicated by the verdict or findings.

A judgment must be rendered for the amount indicated by the verdict or findings,[39] in the absence

252—First Nat. Bank v. Harris Bros. Grain Co., Civ.App., 254 S. W. 119—Branch v. Smith, Civ.App., 245 S.W. 799.
Wash.—Shew v. Hartnett, 208 P. 60, 121 Wash. 1.
33 C.J. p 1174 note 71.

Judgment held not inconsistent with verdict, decision, or findings.
Cal.—Taylor v. Odell, 122 P.2d 919, 50 Cal.App.2d 115.
Tex.—Burd v. San Antonio Southern Ry. Co., Com.App., 261 S.W. 1021.

Dismissal as to one plaintiff
Under verdict for plaintiffs, except named plaintiff, defendant was entitled to dismissal of complaint as against such named plaintiff.—Eclipse Lumber Co. v. Davis, 207 N. W. 238, 201 Iowa 1283, opinion corrected on other grounds 209 N.W. 307.

23. Ohio.—Spieker v. Board of Rapid Transit Com'rs of City of Cincinnati, 174 N.E. 15, 37 Ohio App. 102.
Wash.—Shew v. Hartnett, 208 P. 60, 121 Wash. 1.

Verdict against one defendant acting as agent of codefendant held to authorize judgment against both in view of instructions.—Mixon v. Southern Ry. Co., 133 S.E. 45, 139 S.C. 343.

24. Cal.—Curtis v. San Pedro Transp. Co., 52 P.2d 528, 10 Cal. App.2d 547.

25. Cal.—Metropolis Trust & Savings Bank v. Monnier, 147 P. 265, 169 Cal. 592.
33 C.J. p 1174 note 72.

Where plaintiff's attorney admitted failure to make out case against certain defendants, and as to them consented to dismissal, judgment against such defendants on general verdict for plaintiff was erroneous.—Manson-Jacobs Co. v. Schlesinger, 206 N.Y.S. 277, 210 App.Div. 434.

26. Ill.—Rose v. Meyer, 25 N.E.2d 413, 303 Ill.App. 365.
33 C.J. p 1175 note 73.

27. Ill.—Leon v. Mutual Ben. Health & Accident Ass'n, 55 N.E.2d 557, 323 Ill.App. 203.
33 C.J. p 1175 note 74.

If only conclusion deducible from facts found calls for judgment for defendant, judgment for plaintiff is erroneous as a matter of law.—Endut v. Borodenko, 145 A. 27, 109 Conn. 577.

28. Ala.—Harris v. White, 101 So. 751, 212 Ala. 54.
Ind.—Feuerstein v. Baumeister, 8 N. E.2d 412, 103 Ind.App. 432.
33 C.J. p 1175 note 75.

Judgment held not objectionable as not being in accordance with verdict against all defendants.—Tomerlin v. Krause, Tex.Civ.App., 278 S. W. 501.

Defect held not to void judgment
In an action against defendants jointly and severally liable, a judgment on a verdict for plaintiffs mistakenly entered against only one of the defendants has been held not void.—Power v. Crown Stage Co., 256 P. 457, 82 Cal.App. 660.

29. Tex.—Johnson v. Moss, Civ. App., 108 S.W.2d 1110, error dismissed.

30. Cal.—Butler v. Estrella Raisin Vineyard Co., 56 P. 1040, 124 Cal. 239.

31. Cal.—Keller v. Smith, 19 P.2d 541, 130 Cal.App. 128.

32. Pa.—Carroll v. Kirk, 19 A.2d 534, 144 Pa.Super. 211.
33 C.J. p 1175 note 77.

33. D.C.—Hoagland v. Chestnut Farms Dairy, 72 F.2d 729, 63 App. D.C. 357.

34. Mo.—Buckman v. Missouri, K. & T. R. Co., 73 S.W. 270, 100 Mo.App. 30.

35. Ark.—Missouri Pacific Transp. Co. v. Sharp, 108 S.W.2d 579, 194 Ark. 405.
Fla.—Davis v. Ivey, 112 So. 264, certiorari denied Mellon v. Ivey, 48 S.Ct. 17, 275 U.S. 526, 72 L.Ed. 407.
Mo.—Mehlstaub v. Michael, 287 S.W. 1079, 221 Mo.App. 807.
33 C.J. p 1175 note 79.

36. Fla.—Baker & Holmes Co. v. Indian River State Bank, 55 So. 836, 61 Fla. 106.

37. Ky.—Pittsburg, C. C. & St. L. R. Co. v. Darlington, 111 S.W. 360, 129 Ky. 266, 33 Ky.L. 818.

38. Ala.—Oliver's Garage v. Lowe, 103 So. 586, 212 Ala. 602.

39. Cal.—San Francisco Credit Clearing House v. MacGowan, 246 P. 347, 77 Cal.App. 308.
N.Y.—Costello v. New York Cent. & H. R. R. Co., 144 N.E. 514, 238 N.Y. 240.
N.C.—Johnson v. Metropolitan Life Ins. Co., 14 S.E.2d 405, 219 N.C. 445.
Tex.—Prideaux v. Roark, Com.App., 291 S.W. 868.
33 C.J. p 1175 note 83.

Judgments held in conformity with, or supported by, verdict or findings.

of a statute permitting the court to disregard the verdict or findings,[40] and a judgment for either a greater[41] or a smaller[42] amount than indicated by the verdict or findings, without the consent of the party adversely affected,[43] is erroneous unless there is a mere error in computation of the amount, and sufficient data is given from which the court may compute the correct amount,[44] or the pleadings and evidence are insufficient to support the verdict or findings,[45] or, according to some cases, where the jury have mistakenly failed to follow the instructions given them,[46] although as to this there is also authority to the contrary.[47] A small variance in amount between the verdict and the judgment may, however, be disregarded as immaterial.[48] Ordinarily a judgment for a specified amount cannot regularly be entered on a verdict which does not assess the amount;[49] but where the amount can be ascertained by mere computation, or is undisputed, it is not reversible error for the court to make the computation and to enter judgment on the verdict for the amount thus ascertained.[50]

Excessive verdict. Where the verdict is supported in some amount, it has been held that the court must enter judgment on the verdict, even though it considers the amount unjust or excessive.[51] It has also been held, however, that if the verdict is excessive and the excess is remitted, judgment for the residue may be entered on the verdict.[52]

Attorney's fees. Where the obligation sued on provides for the payment of a definite sum as at-

Cal.—Llano Inv. Co. v. Minton, 214 P. 855, 190 Cal. 752—Churchill v. Peters, 134 P.2d 841, 57 Cal.App.2d 521—State Compensation Ins. Fund v. Rothwell, 284 P. 943, 103 Cal.App. 607.

Or.—Grammer v. Wiggins-Meyer S. S. Co., 270 P. 759, 126 Or. 694.

40. **Only on motion and notice** can the court disregard the jury's finding under a statute so providing.—St. Louis, B. & M. Ry. Co. v. Simmonds, Civ.App., 50 S.W.2d 343, modified on other grounds Simmonds v. St. Louis B. & M. Ry. Co., 91 S.W.2d 332, 127 Tex. 23.

41. U.S.—Mutual Ben. Health & Accident Ass'n v. Thomas, C.C.A. Ark., 123 F.2d 353—Detroit City Gas Co. v. Syme, C.C.A.Mich., 109 F.2d 366.

Ark.—Powers v. Wood Parts Corporation, 44 S.W.2d 324, 184 Ark. 1032.

Colo.—Greenwald v. Molloy, 166 P. 2d 983.

Ga.—Mercer v. Nowell, 175 S.E. 12, 179 Ga. 37.

Ill.—Koltz v. Jahaaske, 38 N.E.2d 973, 312 Ill.App. 623.

Ind.—Wisconsin Nat. Life Ins. Co. v. Meixel, 51 N.E.2d 78, 221 Ind. 650.

Mich.—Dirkes v. Lenzen, 214 N.W. 81, 239 Mich. 270.

Miss.—Tonkel v. Moore, 137 So. 189, 162 Miss. 83.

N.Y.—Stern v. Rona, 61 N.Y.S.2d 563—La Valley v. Stanford, 56 N.Y. S.2d 359.

Tex.—Bridwell v. Bernard, Civ.App., 159 S.W.2d 981, error refused—Rountree Motor Co. v. Smith Motor Co., Civ.App., 109 S.W.2d 296, error dismissed—Barnhart Mercantile Co. v. Bengel, Civ.App., 77 S.W.2d 295—Magnolia Petroleum Co. v. Dodd, Civ.App., 52 S.W.2d 670, set aside on other grounds 81 S.W.2d 653, 125 Tex. 125—St. Louis, B. & M. Ry. Co. v. Simmonds, Civ.App., 50 S.W.2d 343, modified on other grounds Simmonds v. St. Louis B. & M. Ry. Co., 91 S.W.2d 332, 127 Tex. 23—Southwest Nat. Bank of Dallas v. Hill, Civ.App., 297 S.W. 1096.

33 C.J. p 1175 note 84.

Judgment for future payments authorized

In action on disability clause of insurance policy, judgment awarding plaintiff amount found by jury to be then due and directing future payments as long as disability continued, the case being retained on the docket for further proceedings, held authorized as against contention that judgment was not in conformity with verdict.—Mutual Life Ins. Co. of New York v. McElrath, 87 S.W.2d 619, 261 Ky. 321—Equitable Life Assur. Soc. of U. S. v. Goble, 72 S.W.2d 35, 254 Ky. 614.

Costs held improperly incorporated in judgment.—Jay-Em Service Stations v. Watts, 8 N.Y.S.2d 489, 255 App.Div. 995.

42. Cal.—**Corpus Juris cited in** Cappelmann v. Young, App., 165 P. 2d 950, 954—Harlow v. Motor Coach Co., 17 P.2d 748, 128 Cal. App. 487.

Ill.—Koltz v. Jahaaske, 38 N.E.2d 973, 312 Ill.App. 623.

Minn.—Rieke v. St. Albans Land Co., 231 N.W. 222, 180 Minn. 540.

Ohio.—Weinberg v. Schaller, 171 N. E. 346, 34 Ohio App. 464.

Tex.—Hawkeye Securities Ins. Co. v. Cashion, Civ.App., 278 S.W. 298—Owenwood Oil Corporation v. Sweet, Civ.App., 263 S.W. 641.

33 C.J. p 1176 note 85.

Defendant held not entitled to complain of such judgment.—Schaff v. Lynn, Tex.Civ.App., 253 S.W. 590.

43. Ill.—Koltz v. Jahaaske, 38 N.E. 2d 973, 312 Ill.App. 623.

33 C.J. p 1176 note 86.

44. Ind.—Dawson v. Shirk, 1 N.E. 292, 102 Ind. 184.

33 C.J. p 1176 note 87.

45. Tex.—Twichell v. Klinke, Civ. App., 272 S.W. 283.

Where the verdict is greater than the amount alleged, it has been held that judgment should be entered for the latter sum.—Dorsett v. Crew, 1 Colo. 18—33 C.J. p 1176 note 90.

46. Wis.—Schweitzer v. Connor, 14 N.W. 922, 57 Wis. 177.

33 C.J. p 1176 note 88.

47. Ky.—Dunn v. Blue Grass Realty Co., 173 S.W. 1122, 163 Ky. 384.

33 C.J. p 1176 note 89.

48. Tex.—Brown v. Montgomery, Civ.App., 31 S.W. 1079.

33 C.J. p 1176 note 91.

49. Ohio.—Worst v. Colonial Sav. Bank & Trust Co., 11 Ohio App. 308.

Pa.—Allen v. Flock, 2 Penr. & W. 159.

33 C.J. p 1176 note 92.

50. Ga.—Mercer v. Nowell, 175 S. E. 12, 179 Ga. 37—Rich v. Belcher, 158 S.E. 643, 43 Ga.App. 377.

Kan.—Gartner v. Hays, 222 P. 72, 115 Kan. 88.

Wis.—Feelyater v. Chicago, M. & St. P. Ry. Co., 190 N.W. 193, 178 Wis. 362.

33 C.J. p 1176 note 93.

Judgment for amount shown by uncontradicted evidence should be rendered by court where jury fails to bring verdict in such amount.—Ellerson Floral Co. v. Chesapeake & O. Ry. Co., 141 S.E. 834, 149 Va. 809.

In an action on a liquidated demand a general verdict for plaintiff supports a judgment for the full amount sued for.—Rogers v. Bryan, Tex.Civ.App., 270 S.W. 1066.

51. Minn.—Rieke v. St. Albans Land Co., 231 N.W. 222, 180 Minn. 540.

52. Kan.—Traders State Bank of Glen Elder v. Wooster, 154 P.2d 1017, 159 Kan. 337.

Wash.—Young v. Rummens, 210 P. 198, 121 Wash. 635.

33 C.J. p 1176 note 95.

torney's fees, on a verdict in favor of plaintiff for the principal and interest it has been held that it is not error for the court in rendering judgment to add the attorney's fees provided for in such obligation.[53]

§ 58. —— Interest

As a general rule the judgment must be supported by, and conform to, the verdict, decision, or findings with respect to the allowance of interest and the amount thereof.

As a general rule the judgment must be supported by, and conform to, the verdict, decision, or findings with respect to the allowance of interest and the amount thereof,[54] and if the jury do not allow interest in their verdict the court cannot allow it.[55] Also, where the date from which interest runs is a matter for the jury to determine, if the jury, while allowing interest, fail to fix the date from which it is to run the court cannot do so.[56] Interest may be allowed, however, on the verdict from the time of its return,[57] and, where statutory authority therefor exists, on the judgment, even though the verdict is silent thereon.[58]

The rule barring the inclusion of interest in the judgment where the verdict fails to allow it has been held to apply even where the issue of interest is not submitted to the jury.[59] It has been held, however, that where no issue as to interest is submitted to the jury and the right thereto exists as a matter of law, and there is no dispute as to the amount thereof, the court may allow interest in its judgment even though the verdict is silent.[60] Where there is no issue as to the date from which interest is to run, it has been held that the court in its judgment may fix such time in accordance with the rules of substantive law.[61]

Interest may be included in the judgment where the verdict or finding with regard to it is sufficiently certain and definite as to amount,[62] or if, without specifying the amount of the interest allowed, it contains data from which it can be calculated with certainty and precision;[63] but where the amount is not definite and certain,[64] and cannot be made certain,[65] the court is not authorized to render

53. Okl.—Hope v. Gordon, 50 P.2d 669, 174 Okl. 368.

54. Ga.—Ivester v. Brown, 121 S.E. 241, 157 Ga. 376.
Mo.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091.
33 C.J. p 1177 note 99.

Date from which interest runs

Where verdict allowed "interest from date," judgment should allow interest only from date of verdict.—Miller v. Farmers' Mut. Fire Ins. Ass'n of North Carolina, 155 S.E. 254, 199 N.C. 594.

55. Ala.—**Corpus Juris quoted in** W. T. Raleigh Co. v. Hannon, 22 So.2d 603, 605.
Fla.—Shoup v. Waits, 107 So. 769, 91 Fla. 378.
Ky.—Parsley v. Parsley, 6 S.W.2d 234, 224 Ky. 254—Wright v. Harlan Fuel Co., 283 S.W. 944, 214 Ky. 602.
Mo.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091.
N.C.—Davis v. Doggett, 194 S.E. 283, 212 N.C. 589.
Tex.—Bain Peanut Co. of Texas v. Pinson, Com.App., 292 S.W. 203, set aside on other grounds 294 S.W. 536—St. Louis Southwestern Ry. Co. of Texas v. Seale & Jones, Com.App., 267 S.W. 676—Lone Star Finance Corporation v. Schelling, Civ.App., 80 S.W.2d 358—Buelin v. Smith, Civ.App., 294 S.W. 317, reversed on other grounds Bulin v. Smith, Com.App., 1 S.W.2d 591—Brooks Supply Co. v. First State Bank of Electra, Civ.App., 292 S.W. 631—Williams v. Walker, Civ.App., 290 S.W. 299—Lancaster v. Norris, Civ.App., 271 S.W. 401, reversed on other grounds Norris v. Lancaster, Com.App., 280 S.W. 574—Gamer Paper Co. v. Tuscany, Civ.App., 264 S.W. 132—Joseph v. Bostick, Civ.App., 264 S.W. 129, reversed on other grounds, Com.App., 276 S.W. 672—Mack International Motor Truck Corporation v. Coonrod, Civ.App., 264 S.W. 129.
33 C.J. p 1177 note 1.

Rule held applicable to special issue verdicts

Tex.—Atkinson v. Jackson Bros., Civ.App., 259 S.W. 280, modified on other grounds, Com.App., 270 S.W. 848.

Interest is presumed to be included in a general verdict for a gross sum where the question of interest was not reserved by the court and there is nothing in the record to indicate that the jury omitted interest, and the court cannot in such case add it.—Enterprise Seed Co. v. Leonard Seed Co., 230 P. 633, 96 Okl. 122.

56. N.C.—Acme Mfg. Co. v. McQueen, 127 S.E. 246, 189 N.C. 311.

57. Ky.—Wright v. Harlan Fuel Co., 283 S.W. 944, 214 Ky. 602.
33 C.J. p 1177 note 2.

58. Ga.—Lang v. South Georgia Inv. Co., 144 S.E. 149, 38 Ga.App. 430.

59. Tex.—Davis v. Morris, Com.App., 272 S.W. 1103—Thompson v. Van Natta, Civ.App., 277 S.W. 711—Fort Worth & D. C. Ry. Co. v. Ryan, Civ.App., 271 S.W. 397.

60. Ga.—Allen v. Allen, 31 S.E.2d 433, 198 Ga. 269.
Miss.—Collins v. Carter, 125 So. 89, 155 Miss. 600.
Tex.—Ewing v. Foley, Inc., 280 S.W. 499, 115 Tex. 222, 44 A.L.R. 627—Shield Co. v. Carter, Civ.App., 58 S.W.2d 1068—Acme Brick Co. v. Turpin, Civ.App., 22 S.W.2d 322, error dismissed—Automobile Underwriters of America v. Radford, Civ.App., 293 S.W. 869, affirmed, Com.App., 299 S.W. 852—Miller v. Miller, Civ.App., 292 S.W. 917.
Wis.—In re Draper's Estate, 203 N.W. 360, 187 Wis. 347.

61. Ky.—Hack v. Lashley, 245 S.W. 851, 197 Ky. 117.

62. Mich.—Bell v. Ardis, 38 Mich. 609.

63. Iowa.—Grimes Sav. Bank v. McHarg, 236 N.W. 418, 213 Iowa 969, certiorari denied McHarg v. Grimes Sav. Bank, 53 S.Ct. 5, 287 U.S. 599, 77 L.Ed. 522.
Okl.—**Corpus Juris cited in** Fletcher v. Allen, 157 P.2d 452, 453, 195 Okl. 307.
33 C.J. p 1177 note 3.

A general verdict, such as, "We the jury find for plaintiff," has been held sufficient to support a judgment for interest in an action on a contract.—Darden v. Matthews, 22 Tex. 320—West v. L. W. Sweet, Inc., Tex. Civ.App., 292 S.W. 251.

64. Mich.—Bell v. Ardis, 38 Mich. 609.

65. Okl.—Fletcher v. Allen, 157 P. 2d 452, 195 Okl. 307.

a judgment for interest. If the specification of interest is insufficient, a judgment for the principal amount found, without interest, is supported by the verdict.[66] Error in calculation of interest may generally be corrected by amendment or modification of the judgment in the trial court or on appeal.[67]

§ 59. Judgment Non Obstante Veredicto

A judgment non obstante veredicto is a judgment given for one party notwithstanding the finding of a verdict in favor of the other party, and a motion for judgment non obstante veredicto means a motion for judgment notwithstanding the entire verdict, the purpose being to avoid a new trial and to secure a final judgment in favor of the movant.

In its broadest sense a judgment non obstante veredicto is a judgment given for one party notwithstanding the finding of a verdict in favor of the other party.[68] A motion for judgment non obstante veredicto means a motion for judgment notwithstanding the entire verdict.[69] The purpose of the motion is to avoid a new trial and to secure a final judgment in favor of the movant.[70] The motion is wholly separate and distinct from a motion for a new trial,[71] and it has been distinguished from a motion in arrest of judgment.[72] Moreover it is not construable as a motion to amend the verdict.[73]

Although, as discussed infra §§ 60–61, the practice with respect to granting judgment non obstante veredicto is general and well settled, in a few jurisdictions it is narrowly limited in application.[74]

66. Neb.—Wiseman v. Ziegler, 60 N.W. 320, 41 Neb. 886.

67. Ala.—Spence v. Rutledge, 11 Ala. 590.
33 C.J. p 1177 note 7.

68. Ind.—Inter State Motor Freight System v. Henry, 88 N.E.2d 909, 111 Ind.App. 179.
33 C.J. p 1178 note 9.
Judgment on special findings against general verdict distinguished see infra § 60 e.

Particular judgment construed as not a judgment non obstante veredicto authorized by statute, where judgment and motion showed that judgment was rendered on verdict notwithstanding jury's failure to answer issue.—Davis v. Bond, 158 S.W.2d 297, 138 Tex. 206.

69. Tex.—Myers v. Crenshaw, 137 S.W.2d 7, 134 Tex. 500.

70. Iowa.—Miller v. Southern Surety Co., 229 N.W. 909, 209 Iowa 1221.

71. Iowa.—Miller v. Southern Surety Co., supra—Cownie v. Kopf, 202 N.W. 517, 199 Iowa 737.
Alternative motion for new trial see infra § 61 a.
Motion for new trial generally see the C.J.S. title New Trial §§ 139–146 also 46 C.J. p 314 note 58 et seq.

72. Mo.—King v. Kaw-Mo Wholesale Grocer Co., 175 S.W. 77, 188 Mo.App. 235, 239.
33 C.J. p 1178 note 9 [b].
Arrest of judgment generally see infra §§ 87–99.

Distinction

"It is true that in some respects the two motions are similar. For example, both are directed only to material defects in the record. However, there are also important distinctions. The party filing a motion for judgment notwithstanding the verdict asks the court to do something more than merely to arrest the judgment. Such a motion requests the court to go farther and render judgment in plaintiff's favor notwithstanding the verdict which has been found against him. A party filing a motion in arrest of judgment does not ask the court for a judgment in his favor, but only asks that the judgment be arrested, and alleges that the party in whose favor the verdict was rendered is not entitled to the judgment of the court because of some insufficiency in the record proper."—First Nat. Bank v. Dunbar, 72 S.W.2d 821, 824, 230 Mo.App. 687.

73. Mo.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091.

74. Puerto Rico.—Erwin v. Nater, 6 Puerto Rico Fed. 690.
33 C.J. p 1178 note 11.
Judgment non obstante veredicto in federal courts see Federal Courts § 144 f.

In action under Federal Employers' Liability Act state court may render judgment notwithstanding verdict.
Minn.—Robertson v. Chicago, R. I. & P. Ry. Co., 230 N.W. 585, 180 Minn. 578, certiorari denied 51 S.Ct. 31, 282 U.S. 854, 75 L.Ed. 756—Marshall v. Chicago, R. I. & P. R. Co., 157 N.W. 638, 133 Minn. 460.
Pa.—Casseday v. Baltimore & O. R. Co., 22 A.2d 663, 343 Pa. 342.

In Missouri

Motion for judgment notwithstanding verdict, despite code, is not obsolete, nor is it regulated by statute regarding motions for new trial and in arrest of judgment, but rather by rules of common law.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091—33 C.J. p 1178 note 11 [b].

In Texas

(1) Under the former practice the judgment was required to follow the verdict, and the court was without power to render judgment notwithstanding the verdict on a material issue.—Vogel v. Allen, 13 S.W.2d 340, 118 Tex. 196—Fitch v. Lomax, Com.App., 16 S.W.2d 530, 66 A.L.R. 758—North v. Atlas Brick Co., Com.App., 13 S.W.2d 59, motion granted in part 16 S.W.2d 519—Magnolia Petroleum Co. v. Connellee, Com.App., 11 S.W.2d 158, followed in Magnolia Petroleum Co. v. Akin, 11 S.W.2d 1113, and rehearing denied Magnolia Petroleum Co. v. Connellee, 14 S.W.2d 1020, and 20 S.W.2d 758—Morris v. Jackson, Com.App., 296 S.W. 486—Deal v. Craven, Com.App., 277 S.W. 1046—Nalle v. Walenta, Civ.App., 102 S.W.2d 1070—Magnolia Petroleum Co. v. Beck, Civ.App., 41 S.W.2d 488, error dismissed—Bertrand v. Mutual Motor Co., Civ.App., 38 S.W.2d 417, error refused—Westex Theaters v. Williams, Civ.App., 35 S.W.2d 253—Jones v. Prine, Civ.App., 29 S.W.2d 446—Carter v. Portwood, Civ.App., 26 S.W.2d 422, error dismissed—Peeler v. Smith, Civ.App., 18 S.W.2d 938, affirmed Smith v. Peeler, Com.App., 29 S.W.2d 975—Murray Tool Co. v. Root & Fehl, Civ.App., 16 S.W.2d 316, reversed on other grounds Root & Fehl v. Murray Tool Co., Com.App., 26 S.W.2d 139, 75 A.L.R. 902—Southwest Nat. Bank of Dallas v. Hill, Civ.App., 297 S.W. 1096—Garrison Tie & Timber Co. v. Parrott, Civ.App., 293 S.W. 701—Sorenson v. City Nat. Bank, Civ.App., 293 S.W. 638—Potomac Ins. Co. v. Easley, Civ.App., 293 S.W. 346, reformed and affirmed, Com.App., 1 S.W.2d 263—Reese v. Reese, Civ.App., 289 S.W. 1023—Lyon v. Gray, Civ.App., 288 S.W. 545—Rogers v. City of Fort Worth, Civ.App., 275 S.W. 214—Dowd v. Klock, Civ.App., 268 S.W. 234, reversed on other grounds Klock v. Dowd, Com.App., 280 S.W. 194—Bateman v. Cleghorn, Civ.App., 266 S.W. 422—Branch v. Wafford, Civ.App., 254 S.W. 389, affirmed Wafford

§ 60. —— When and for Whom Granted

a. In General; Pleading as Basis for Judgment

At common law, and in the absence of statute providing otherwise, a judgment notwithstanding the verdict may be rendered when, and only when, the pleadings entitle the party against whom the verdict is rendered to a judgment and where the party against whom such judgment is rendered is precluded from recovery by some matter not subject to amendment, or which could not be supplied on a new trial.

Originally, at common law, a judgment non obstante veredicto could be entered only when the plea confessed the cause of action and set up matters in avoidance which were insufficient, although found true, to constitute either a defense or a bar to the action.[75] In such a case plaintiff was entitled to a judgment in his favor notwithstanding a verdict for defendant.[76] Thus a judgment non obstante veredicto at common law was merely one species of a judgment on the pleadings.[77] Some statutes expressly provide for the rendering of

v. Branch, Com.App., 267 S.W. 260—Thornton v. Athens Nat. Bank, Civ.App., 252 S.W. 278—Compton v. Skeeters, Civ.App., 250 S.W. 201—33 C.J. p 1178 note 11 [f].

(2) Court could, however, ignore jury's findings where under no view of pleadings and evidence was plaintiff entitled to recover.—Vogel v. Allen, 13 S.W.2d 340, 118 Tex. 196—Magnolia Petroleum Co. v. Connellee, Com.App., 11 S.W.2d 158, followed in Magnolia Petroleum Co. v. Akin, 11 S.W.2d 1113, and rehearing denied Magnolia Petroleum Co. v. Connellee, 14 S.W.2d 1020, and 20 S.W.2d 758—Spence v. National Life & Accident Ins. Co., Civ.App., 59 S.W.2d 212—Ellis County v. McKay, Civ.App., 56 S.W.2d 310—Sproles v. Rosen, Civ.App., 47 S.W.2d 331, affirmed 84 S.W.2d 1001, 126 Tex. 51—Bertrand v. Mutual Motor Co., Civ.App., 38 S.W.2d 417, error refused.

(3) Disregard of findings on immaterial issues was not violation of rule prohibiting rendition of judgment non obstante veredicto.—Klock v. Dowd, Com.App., 280 S.W. 194—Chaison v. Stark, Civ.App., 29 S.W.2d 500, reversed on other grounds Stark v. Chaison, Com.App., 50 S.W.2d 776—Atlas v. Byers, Civ.App., 21 S.W.2d 1080—Long v. McCoy, Civ.App., 294 S.W. 633, affirmed McCoy v. Long, Com.App., 15 S.W.2d 234, rehearing denied 17 S.W.2d 783—Yardley v. Houston Oil Co. of Texas, Civ.App., 288 S.W. 861—Sheek v. Texas Co., Civ.App., 286 S.W. 336—McGee v. Cage, Civ.App., 283 S.W. 283.

(4) Furthermore, rule prohibiting judgments non obstante veredicto was not violated by giving of summary instructions or withdrawing case from jury.—Adams v. Houston Nat. Bank, Com.App., 1 S.W.2d 878—Noble v. Empire Gas & Fuel Co., Civ.App., 20 S.W.2d 849, affirmed Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451.

(5) However, the Texas practice has been modified by statute, as discussed infra § 60, and judgment notwithstanding the verdict is authorized in certain cases.

In Utah

A motion for judgment notwithstanding the verdict is not recognized as proper.—Morrison v. Perry, 140 P.2d 772, 104 Utah 151—Kirk v. Salt Lake City, 89 P. 458, 32 Utah 143, 12 L.R.A.,N.S., 1021.

75. Ariz.—**Corpus Juris quoted in** Eads v. Commercial Nat. Bank of Phoenix, 266 P. 14, 15, 33 Ariz. 499, 62 A.L.R. 183.

Fla.—**Corpus Juris cited in** Dudley v. Harrison, McCready & Co., 173 So. 820, 823, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338—**Corpus Juris cited in** Atlantic Coast Line R. Co. v. Canady, 165 So. 629, 630, 122 Fla. 447—**Corpus Juris cited in** Pillet v. Ershick, 126 So. 784, 788, 99 Fla. 488.

Idaho.—Prairie Flour Mill Co. v. Farmers' Elevator Co., 261 P. 673, 45 Idaho 229.

Ill.—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill.App. 14—Capelle v. Chicago & N. W. R. Co., 280 Ill.App. 471—Modern Woodmen of America v. Blair, 263 Ill.App. 337—Manufacturers' Finance Trust v. Stone, 251 Ill.App. 414.

Minn.—Anderson v. Newsome, 258 N.W. 157, 193 Minn. 157—Funkley v. Ridgway, 197 N.W. 280, 158 Minn. 265.

Mo.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091.

N.C.—**Corpus Juris cited in** Johnson v. Metropolitan Life Ins. Co., 14 S.E.2d 405, 406, 219 N.C. 445—**Corpus Juris cited in** Jernigan v. Neighbors, 141 S.E. 586, 195 N.C. 231.

Okl.—Rohland v. International Harvester Co. of America, 76 P.2d 1078, 182 Okl. 200.

Or.—Snyder v. Portland Ry., Light & Power Co., 215 P. 337, 107 Or. 673.

Pa.—**Corpus Juris cited in** Commonwealth v. Heller, 24 A.2d 460, 462, 147 Pa.Super. 68.

Tex.—**Corpus Juris cited in** Traders & General Ins. Co. v. Milliken, Civ.App., 110 S.W.2d 108—**Corpus Juris cited in** Stallings v. Federal Underwriters Exchange, Civ.App., 108 S.W.2d 449, 451—Spence v. National Life & Accident Ins. Co., Civ.App., 59 S.W.2d 212.

33 C.J. p 1178 note 12.

76. Ariz.—**Corpus Juris quoted in** Eads v. Commercial Nat. Bank of Phoenix, 266 P. 14, 15, 33 Ariz. 499, 62 A.L.R. 183.

Minn.—Anderson v. Newsome, 258 N.W. 157, 193 Minn. 157—Funkley v. Ridgway, 197 N.W. 280, 158 Minn. 265.

Pa.—**Corpus Juris cited in** Commonwealth v. Heller, 24 A.2d 460, 462, 147 Pa.Super. 68.

33 C.J. p 1178 note 12, p 1179 note 13.

77. Colo.—**Corpus Juris cited in** Board of Com'rs of Costilla County v. Wood, 250 P. 860, 861, 80 Colo. 279.

Del.—Burton v. Delaware Poultry Co., 15 A.2d 440, 2 Terry 68.

Fla.—**Corpus Juris cited in** Dudley v. Harrison, McCready & Co., 173 So. 820, 823, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338.

Ga.—**Corpus Juris cited in** Snyder v. Elkan, 199 S.E. 891, 894, 187 Ga. 164.

Ill.—Malewski v. Mackiewich, 282 Ill.App. 593—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill.App. 14—Capelle v. Chicago & N. W. R. Co., 280 Ill.App. 471.

judgment on the pleadings irrespective of the verdict,[78] and in some jurisdictions the right to file a motion for judgment notwithstanding the verdict is purely statutory[79] and judgment may be rendered only after full compliance with the statute.[80]

In the absence of a statute providing otherwise, such a judgment may be rendered only when the pleadings entitle the party against whom the verdict is rendered to a judgment,[81] and only where the

Ky.—Roe v. Gentry's Ex'x, 162 S. W.2d 208, 290 Ky. 598.
Minn.—Anderson v. Newsome, 258 N. W. 157, 193 Minn. 157—Funkley v. Ridgway, 197 N.W. 280, 158 Minn. 265.
N.J.—**Corpus Juris cited in** Rospond v. Decker, 162 A. 725, 726, 109 N. J.Law 458.
N.C.—Page Supply Co. v. Horton, 17 S.E.2d 493, 220 N.C. 373—Johnson v. Metropolitan Life Ins. Co., 14 S.E.2d 405, 219 N.C. 445—MacMillan Buick Co. v. Rhodes, 2 S.E.2d 699, 215 N.C. 595—Little v. Martin Furniture Co., 158 S.E. 490, 200 N.C. 731—Art Bronze & Iron Works v. Beaman, 155 S.E. 166, 199 N.C. 537.
Ohio.—J. & F. Harig Co. v. City of Cincinnati, 22 N.E.2d 540, 61 Ohio App. 314—Lehman v. Harvey, 187 N.E. 28, 45 Ohio App. 215, petition dismissed 187 N.E. 201, 127 Ohio St. 159—Schmidt v. Austin, 159 N.E. 850, 26 Ohio App. 240.
Or.—Snyder v. Portland Ry., Light & Power Co., 215 P. 887, 107 Or. 673.
Tenn.—Citizens' Trust Co. v. Service Motor Car Co., 297 S.W. 735, 154 Tenn. 507—Jamison v. Metropolitan Life Ins. Co., 145 S.W.2d 553, 24 Tenn.App. 398—National Life & Accident Ins. Co. v. American Trust Co., 68 S.W.2d 971, 17 Tenn. App. 516.
Vt.—Nadeau v. St. Albans Aerie No. 1205 Fraternal Order of Eagles, 26 A.2d 93, 112 Vt. 397—Johnson v. Hardware Mut. Casualty Co., 1 A. 2d 817, 109 Vt. 481.
33 C.J. p 1179 note 16.
Judgment on pleadings see the C.J. S. title Pleading §§ 424–449, also 49 C.J. p 666 note 81 et seq.

Tested by pleadings

Judgment notwithstanding verdict is to be tested by pleadings.—De Boer v. Olmsted, 260 P. 108, 82 Colo. 369.

78. Ill.—McNeill v. Harrison & Sons, 2 N.E.2d 959, 286 Ill.App. 120.
Iowa.—Parriott v. Levis, 195 N.W. 578, 196 Iowa 875.
Or.—Snyder v. Portland Ry., Light & Power Co., 215 P. 887, 107 Or. 673.
33 C.J. p 1179 note 18.

Cause of action arising prior to statute

The amended statute providing that when, on statements in the pleadings, or on the evidence received on the trial, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against him, determined the procedural rights of parties in an action filed after the statute's effective date, even though the cause of action arose prior to the effective date.—Miller v. Star Co., 15 N.E.2d 151, 57 Ohio App. 485.

Common-law practice held adopted by statute

Neb.—Hamaker v. Patrick, 244 N.W. 420, 123 Neb. 809.

Plaintiff's objection to legal sufficiency of denial in answer by motion for judgment notwithstanding the verdict came too late, and the overruling of such motion by the trial court did not constitute error under statute authorizing judgment notwithstanding the verdict where, on statements in pleading, a party is entitled by law to judgment in his favor.—Shoemaker v. Standard Oil Co., 20 N.E.2d 520, 135 Ohio St. 262.

Statutes held mandatory

Ky.—Ernst v. Pike, 124 S.W.2d 553, 282 Ky. 680.
Ohio.—Central Community Chautauqua System v. Rentschler, 166 N. E. 698, 31 Ohio App. 525.

In Florida

(1) It has been held that granting of motions for judgments non obstante veredicto is governed by common-law principles and statute providing that appellate court reversing order granting new trial should direct final judgment to be entered for party who had obtained verdict, unless motion for judgment non obstante veredicto should be made and prevail, did not change grounds or scope of motions for judgments non obstante veredicto as they existed at time statute was adopted.—Dudley v. Harrison, McCready & Co., 173 So. 820, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338.

(2) Where, however, action for injuries to child at railroad crossing was predicated on alleged negligence of railroad's employees and evidence showed that employees were not negligent, refusal to sustain defendant railroad's motion for judgment notwithstanding verdict for child was held reversible error.—Atlantic Coast Line R. Co. v. Canady, 165 So. 629, 122 Fla. 447.

79. Iowa.—In re Larimer's Estate, 283 N.W. 430, 225 Iowa 1067.

Inapplicable statutes

The act of 1805 providing for the payment of a jury fee, and the entry of judgment on a verdict, has no reference to a judgment non obstante veredicto entered directly by the court under the Act of 1905.—McClelland v. West Penn Appliance Co., 1 A.2d 491, 132 Pa.Super. 471.

80. Tex.—Nalle v. Walenta, Civ. App., 102 S.W.2d 1070.

81. Ark.—Powers v. Wood Parts Corporation, 44 S.W.2d 324, 184 Ark. 1032—**Corpus Juris cited in** Oil Fields Corporation v. Cubage, 24 S.W.2d 328, 329, 180 Ark. 1018.
Colo.—**Corpus Juris cited in** Board of Com'rs of Costilla County v. Wood, 250 P. 860, 861, 80 Colo. 279.
Conn.—Gesualdi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.
Del.—Burton v. Delaware Poultry Co., 15 A.2d 440, 2 Terry 68.
Ga.—**Corpus Juris cited in** Snyder v. Elkan, 199 S.E. 891, 894, 187 Ga. 164.
Iowa.—K. O. Lee & Son Co. v. Sundberg, 291 N.W. 146, 227 Iowa 1375.
Ky.—Roe v. Gentry's Ex'x, 162 S.W. 2d 208, 290 Ky. 598—World Fire & Marine Ins. Co. v. Tapp, 151 S.W. 2d 428, 286 Ky. 650—Stone v. Smith, 151 S.W.2d 71, 286 Ky. 468—Wheeldor v. Regenhardt Const. Co., 145 S.W.2d 527, 284 Ky. 603—Slusher v. Hubble, 72 S.W.2d 39, 254 Ky. 595—Auto Livery Co. v. Stone, 36 S.W.2d 349, 237 Ky. 686—Sachs v. Hensley, 294 S.W. 1073, 220 Ky. 226—Insurance Co. of North America v. Gore, 284 S.W. 1107, 215 Ky. 487.
Minn.—Timmins v. Pfeifer, 230 N. W. 260, 180 Minn. 1.
Mo.—Thomas v. Land, 30 S.W.2d 1035, 225 Mo.App. 216.
Neb.—Wolfinger v. Shaw, 287 N.W. 63, 136 Neb. 604—Winterson v. Pantel Realty Co., 282 N.W. 393, 135 Neb. 472—Le Bron Electrical Works, Inc. v. Pizinger, 270 N.W. 683, 132 Neb. 164.
N.C.—Little v. Martin Furniture Co., 158 S.E. 490, 200 N.C. 731—Art Bronze & Iron Works v. Beaman, 155 S.E. 166, 199 N.C. 537—**Corpus Juris cited in** Jernigan v. Neighbors, 141 S.E. 586, 195 N.C. 231.
Ohio.—Matcoski v. City of Canton, 6 N.E.2d 795, 54 Ohio App. 234—Lehman v. Harvey, 187 N.E. 28, 45 Ohio App. 215, error dismissed 187 N.E. 201, 127 Ohio St. 159.
Or.—Clarkson v. Wong, 42 P.2d 763, 150 Or. 406, motion denied 45 P. 2d 914, 150 Or. 406—Bernstein v. Berg, 262 P. 247, 123 Or. 343.

party against whom such judgment is rendered is precluded from recovery by some matter not subject to amendment, or which could not be supplied on a new trial,[82] and where the defect in the pleading was not cured by the verdict;[83] but under such circumstances it is proper to enter judgment for the party entitled notwithstanding the verdict against him.[84] A proceeding for a motion non obstante veredicto must be founded on substantial insufficiency of the pleading on which the verdict surely rested,[85] and the defect must be such that no cause of action or defense is stated in the pleading.[86]

When rendered for plaintiff. A judgment non obstante veredicto may be rendered for plaintiff where the issue determined for defendant is immaterial,[87] provided the case is not one calling for a repleader, within the rules discussed hereinafter in this subsection, and where the plea or answer sets up facts insufficient in law to constitute a defense,[88] or

Tenn.—Stevens v. Moore, 139 S.W.2d 710, 24 Tenn.App. 61.

W.Va.—Clise v. Prunty, 163 S.E. 864, 112 W.Va. 181—Gray v. Norfolk & W. Ry. Co., 130 S.E. 139, 99 W. Va. 575—Zogg v. Kern Oil & Gas Co., 117 S.E. 620, 94 W.Va. 17—Dunbar Tire & Rubber Co. v. Crissey, 114 S.E. 804, 92 W.Va. 419.

33 C.J. p 1180 note 20.

Verdict responsive to pleadings

In ejectment action, where defendant entered plea of not guilty and special plea of adverse possession of part of premises, verdict for plaintiff as to part described in the special plea was responsive to the plea of general issue as limited by the second plea, and hence would not furnish basis for judgment non obstante veredicto on ground that verdict was on special plea only and that special plea was bad.—Wicker v. Williams, 189 So. 30, 137 Fla. 752.

Defects cured by adverse pleading

Judgment on pleading, notwithstanding verdict not stating facts warranting recovery, is unauthorized unless defects are cured by adverse party's pleading.—Ernst v. Pike, 24 S.W.2d 553, 232 Ky. 680.

In Oklahoma

The trial court is without jurisdiction to enter judgment non obstante veredicto unless the party in whose favor such judgment is rendered would be entitled to judgment on the pleadings or the jury has returned special findings of fact contrary to the general verdict.—Garrett v. Kennedy, 145 P.2d 407, 193 Okl. 605—National Mut. Casualty Co. v. Harmon, 113 P.2d 597, 189 Okl. 53—Mason v. McNeal, 100 P.2d 451, 187 Okl. 31—Martin v. National Bank of Claremore, 77 P.2d 40, 182 Okl. 217—Rohland v. International Harvester Co. of America, 76 P.2d 1078, 182 Okl. 200—Dunham v. Chemical Bank & Trust Co., 71 P.2d 468, 180 Okl. 537—Myrick v. City of Tulsa, 54 P.2d 330, 175 Okl. 647—Queen Ins. Co. of America v. Baker, 50 P.2d 371, 174 Okl. 273—Diamond v. Enid Milling Co., 299 P. 440, 149 Okl. 61—Beesley v. Wm. A. Nicholson Co., 298 P. 607, 148 Okl. 270—City of Ardmore v. Hill, 293 P. 554, 146 Okl. 200—State v. Hinkle, 287 P. 722, 143 Okl. 33—St. Louis-San Francisco Ry. Co. v. Eakins, 284 P. 866, 141 Okl. 256—Spruce v. Chicago, R. I. & P. Ry. Co., 281 P. 536, 139 Okl. 123—Eldridge v. Vance, 280 P. 570, 138 Okl. 201—Beard v. W. T. Rawleigh Co., 277 P. 657, 136 Okl. 165—Thompson v. Florence, 274 P. 671, 135 Okl. 116—St. Louis-San Francisco Ry. Co. v. Bell, 273 P. 243, 134 Okl. 251—Bartels v. Suter, 266 P. 753, 130 Okl. 7—First Nat. Bank v. Russell, 262 P. 205, 128 Okl. 222—Marble Sav. Bank v. First State Bank of Vanoss, 261 P. 913, 128 Okl. 165—Maryland Casualty Co. v. Ballard, 259 P. 528, 126 Okl. 270—Odom v. Cedar Rapids Sav. Bank, 244 P. 758, 114 Okl. 126—Stapleton Motor Sales Co. v. Oates, 235 P. 513, 109 Okl. 173—Schaap v. Williams, 225 P. 910, 99 Okl. 21—Montie Oil Co. v. Nichols, 224 P. 542, 98 Okl. 75—Dill v. Johnston, 222 P. 507, 94 Okl. 264—McAlester v. Bank of McAlester, 218 P. 839, 95 Okl. 193—Hanna v. Gregg, 217 P. 434, 92 Okl. 34—Hyatt v. Vinita Brass Works, 214 P. 706, 89 Okl. 171—First Nat. Bank v. Ball, 209 P. 322, 87 Okl. 162—33 C.J. p 1180 note 20.

82. Ariz.—Eads v. Commercial Nat. Bank of Phœnix, 266 P. 14, 33 Ariz. 499, 62 A.L.R. 183.

Cal.—Gallagher v. California Pacific Title & Trust Co., 57 P.2d 195, 13 Cal.App.2d 482.

Conn.—Gesualdi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.

Fla.—Johnston v. Campbell, 129 So. 765, 100 Fla. 393.

Minn.—Anderson v. Newsome, 258 N.W. 157, 193 Minn. 157—Dreelan v. Karon, 254 N.W. 433, 191 Minn. 330—Nadeau v. Maryland Casualty Co., 212 N.W. 595, 170 Minn. 326.

N.Y.—Soper v. Soper, 5 Wend. 112.

Pa.—Hawck v. Scranton Real Estate Co., 44 Pa.Co. 321, 17 Lack.Jur. 90.

33 C.J. p 1180 note 21.

83. Ariz.—Eads v. Commercial Nat. Bank of Phœnix, 266 P. 14, 33 Ariz. 499, 62 A.L.R. 183.

Ky.—Forsythe v. Rexroat, 27 S.W. 2d 695, 234 Ky. 173.

33 C.J. p 1180 note 22.

84. Conn.—Gesualdi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.

Ky.—Brannon v. Scott, 156 S.W.2d 164, 288 Ky. 334—Franklin County v. Bailey, 63 S.W.2d 622, 250 Ky. 528.

Ohio.—Workman v. Thompson, 47 N. E.2d 996, 141 Ohio St. 287—Frank v. Cincinnati Traction Co., 7 Ohio N.P.,N.S., 143.

Okl.—Hiebert v. Koenig, 138 P.2d 534, 192 Okl. 376—Montie Oil Co. v. Nichols, 224 P. 542, 98 Okl. 75—Dill v. Johnston, 222 P. 507, 94 Okl. 264—Hyatt v. Vinita Brass Works, 214 P. 706, 89 Okl. 171.

Tenn.—Wood v. Imperial Motor Co., 5 Tenn.App. 246—Elbinger Shoe Co. v. Thomas, 1 Tenn.App. 161.

33 C.J. p 1180 note 23.

Motion held properly denied where sufficiency of affidavit of merits, attacked by motion for judgment notwithstanding verdict, following vacation of judgment by confession, was not before court when motion was heard.—Renfrow v. Kramer, 173 N.E. 390, 341 Ill. 398.

85. Ala.—City of Birmingham v. Andrews, 132 So. 877, 222 Ala. 362.

86. Iowa.—Millard v. Herges, 236 N.W. 89, 213 Iowa 279, modified on other grounds 238 N.W. 604.

Petition held to state cause of action as against motion for judgment notwithstanding verdict.—Jensen v. Incorporated Town of Magnolia, 257 N.W. 584, 219 Iowa 209.

Answer held sufficient on motion for judgment notwithstanding verdict.—Persia Sav. Bank v. Wilson, 243 N.W. 581, 214 Iowa 993.

87. U.S.—Newton v. Glenn, C.C.A. Miss., 149 F.2d 879.

Ala.—**Corpus Juris cited in** City of Birmingham v. Andrews, 132 So. 877, 878, 222 Ala. 362.

Fla.—Bond v. Hewitt, 149 So. 606, 111 Fla. 180.

33 C.J. p 1181 note 26.

Right of a plaintiff to a judgment notwithstanding the verdict see infra subdivision h of this section.

88. Fla.—Norwich Union Indemnity Co. v. Willis, 168 So. 418, 124 Fla. 137, 127 Fla. 238—Berger v. Mabry, 151 So. 302, 113 Fla. 31.

Minn.—Funkley v. Ridgway, 197 N. W. 280, 158 Minn. 265.

19 C.J. p 1210 note 26 [e] (1)—33 C.J. p 1181 note 28.

where on the whole record it appears that the right of the case is with plaintiff.[89] Where there is a good plea or answer filed, plaintiff is not, under common-law principles, entitled to a judgment non obstante veredicto.[90]

When rendered for defendant. A judgment non obstante veredicto may be rendered for defendant where plaintiff's pleadings are insufficient to support a judgment in his favor, as where the declaration states no cause of action,[91] and the defect is not cured by the answer,[92] or where plaintiff fails to reply to a good plea of new matter,[93] or where the verdict for plaintiff was surely on a count which did not state a substantial cause of action;[94] but it has been held that defendant is not entitled to judgment non obstante veredicto where a demurrer to the petition should have been sustained but was overruled.[95] Under the rule that a motion for judgment notwithstanding the verdict must be based on the pleadings, defendant is not entitled to such judgment where plaintiff's pleadings show a good cause of action in him, and avoid the defense pleaded.[96]

Repleader. A party is not entitled to a judgment non obstante veredicto in every case where the issue determined against him by the verdict is immaterial. Thus a plaintiff is entitled to judgment non obstante veredicto where the issue is immaterial or the plea bad only where a repleader is unnecessary to do justice between the parties.[97] A judgment non obstante veredicto is always on the merits, and therefore is never rendered except where it is clear that the defense is without merits in whatever form pleaded.[98] Such a judgment will

Motion held equivalent to demurrer to answer

Ohio.—Commercial Credit Co. v. Bishop, 170 N.E. 658, 34 Ohio App. 217.

89. U.S.—Newton v. Glenn, C.C.A. Miss., 149 F.2d 879.
33 C.J. p 1181 note 29.

90. Minn.—Funkley v. Ridgway, 197 N.W. 280, 158 Minn. 265.
Mo.—Wilcox v. Erwin, App., 49 S. W.2d 677.
Ohio.—Commercial Credit Co. v. Bishop, 170 N.E. 658, 34 Ohio App. 217.
Okl.—Dunham v. Chemical Bank & Trust Co., 71 P.2d 468, 180 Okl. 537—First Nat. Bank v. Savere, 270 P. 33, 132 Okl. 191—Maryland Casualty Co. v. Ballard, 259 P. 528, 126 Okl. 270—Odom v. Cedar Rapids Sav. Bank, 244 P. 758, 114 Okl. 126.
Or.—Snyder v. Portland Ry., Light & Power Co., 215 P. 887, 107 Or. 673.
Tex.—Continental Southland Savings & Loan Ass'n v. Panhandle Const. Co., Civ.App., 77 S.W.2d 896, error refused.
33 C.J. p 1181 note 30.
Evidence as basis for judgment notwithstanding the verdict see infra subdivision b of this section.

91. Cal.—Galiano v. Pacific Gas & Electric Co., 67 P.2d 988, 20 Cal. App.2d 534.
Ky.—Slusher v. Hubble, 72 S.W.2d 39, 254 Ky. 595.
Pa.—Casseday v. Baltimore & O. R. Co., 22 A.2d 663, 343 Pa. 342.
33 C.J. p 1181 note 31.
Right of a defendant to a judgment notwithstanding the verdict see infra subdivision h of this section.

Subject to general demurrer

The statute authorizing trial court to render judgment notwithstanding the verdict was not intended to enable a defendant to have a judgment on the merits of a cause merely because plaintiff's pleading might be subject to general demurrer.—Citizens State Bank of Houston v. Giles, Tex.Civ.App., 145 S.W.2d 899, error dismissed.

In Oregon

(1) There is authority supporting the text rule.—Benicia Agricultural Works v. Creighton, 28 P. 775, 30 P. 676, 21 Or. 495.

(2) But, where question whether complaint stated facts sufficient to constitute cause of action was raised by objection to introduction of testimony, by motion for nonsuit, and by motion for directed verdict, court, as matter of practice, should have refused to entertain motion on same ground for judgment notwithstanding verdict.—Borg v. Utah Const. Co., 242 P. 600, 117 Or. 22—Scibor v. Oregon-Washington R. & Navigation Co., 140 P. 629, 70 Or. 116.

92. Ky.—Slusher v. Hubble, 72 S.W. 2d 39, 254 Ky. 595.

93. Ky.—Hack v. Lashley, 245 S.W. 851, 197 Ky. 117.
33 C.J. p 1182 note 32.

In Florida

The rule of the text, while recognized generally as the prevailing rule, was not held to be applicable in that jurisdiction.—**Corpus Juris quoted in** Dudley v. Harrison, McCready & Co., 173 So. 820, 822, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338—**Corpus Juris cited in** Atlantic Coast Line R. Co. v. Canady, 165 So. 629, 630, 122 Fla. 447—**Corpus Juris cited in** Pillet v. Ershick, 126 So. 784, 785, 788, 99 Fla. 483.

94. Ala.—City of Birmingham v. Andrews, 132 So. 877, 222 Ala. 362.

95. Ky.—S. K. Jones Const. Co. v. Hendley, 5 S.W.2d 482, 484, 224 Ky. 83.

Reason for rule

"It is readily apparent that the trial court should not mislead the appellee [plaintiff] by overruling the demurrer to the petition as amended, thus holding it to be sufficient, and then sustain the motion for a verdict on the pleadings, thus holding it to be defective. This court is committed to the doctrine that in this situation the first error of the trial court will be corrected upon the appeal. Hence the judgment must be reversed, with direction that the demurrer to the petition as amended be sustained."—S. K. Jones Const. Co. v. Hendley, supra.

96. Iowa.—Crouch v. National Live Stock Remedy Co., 217 N.W. 557, 205 Iowa 51.
N.C.—Johnson v. Metropolitan Life Ins. Co., 14 S.E.2d 405, 219 N.C. 445.
Okl.—Myrick v. City of Tulsa, 54 P.2d 330, 175 Okl. 647.
Tenn.—**Corpus Juris quoted in** Citizens' Trust Co. v. Service Motor Car Co., 297 S.W. 735, 736, 154 Tenn. 507.
33 C.J. p 1182 note 33.
Evidence as basis for judgment notwithstanding the verdict see infra subdivision b of this section.

97. Mo.—Shreve v. Whittlesey, 7 Mo. 473.
Va.—Green v. Bailey, 5 Munf. 246, 19 Va. 246.
33 C.J. p 1182 note 35.

Repleader and judgment non obstante veredicto distinguished

N.Y.—Otis v. Hitchcock, 6 Wend. 433, 434.
33 C.J. p 1182 note 34 [a].

98. Or.—Snyder v. Portland Ry., Light & Power Co., 215 P. 887, 107 Or. 673.
33 C.J. p 1182 note 36.

not be rendered where there is substantially a material issue or a good defense, although the pleading is technically defective.[99] If the finding is decisive of the merits, it cures the issue.[1] Where the pleading contains matters which, if well pleaded, might form a good bar or justification, the court will not give judgment non obstante veredicto, but will award a repleader.[2]

Basing motion on records of case. At common law and, in the absence of statutes providing otherwise, a judgment non obstante veredicto must be based solely on matters appearing on the record,[3] and has nothing to do with alleged procedural errors.[4] It cannot be granted on affidavit[5] but only on the face of the pleadings,[6] and, as shown infra subdivision b (1) of this section, the court may not look to the evidence in determining the motion.

Discretion of court. The granting of a judgment notwithstanding the verdict rests very much in the discretion of the court.[7]

Form and requisites of judgment. The judgment rendered in granting the motion should recite the filing of a proper motion, the giving of reasonable notice, that hearing was had, that the parties appeared in person or by attorney, the action of the court on the motion, and entry of judgment after its disposition.[8]

b. Evidence as Basis for Judgment

(1) In general
(2) Particular matters affecting right to remedy
(3) Scope of inquiry in general
(4) Consideration of evidence in passing on motion
(5) Discretion of court

(1) In General

In the absence of statutes providing otherwise, a judgment notwithstanding the verdict must be granted on the record, and the court may not look to the evidence in determining a motion for such judgment; accordingly such a judgment cannot be rendered merely because the verdict is against the weight of the evidence. In some jurisdictions, however, such a judgment may

99. Ala.—**Corpus Juris cited in** City of Birmingham v. Andrews, 132 So. 877, 878, 222 Ala. 362.
Conn.—Gesualdi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.
Fla.—Johnston v. Campbell, 129 So. 765, 100 Fla. 393.
Ill.—Modern Woodmen of America v. Blair, 263 Ill.App. 387.
Neb.—Hamaker v. Patrick, 244 N. W. 420, 123 Neb. 809.
Or.—Clarkson v. Wong, 42 P.2d 763, 150 Or. 406, motion denied 45 P. 2d 914, 150 Or. 406.
Tex.—Williams v. Texas Employers Ins. Ass'n, Civ.App., 135 S.W.2d 262, error refused.
33 C.J. p 1182 note 37.

1. Ill.—Rothschild v. Bruscke, 23 N.E. 419, 131 Ill. 265.

2. Ala.—**Corpus Juris cited in** City of Birmingham v. Andrews, 132 So. 877, 878, 222 Ala. 362.
Conn.—Gesualdi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.
Fla.—Bond v. Hewitt, 149 So. 606, 111 Fla. 180—Johnston v. Campbell, 129 So. 765, 100 Fla. 393.
33 C.J. p 1182 note 39.
Repleader generally see the C.J.S. title Pleading § 338, also 49 C.J. p 580 note 73 et seq.

3. Fla.—Tolliver v. Loftin, 21 So. 2d 359.
Ill.—Modern Woodmen of America v. Blair, 263 Ill.App. 387.
Kan.—**Corpus Juris quoted in** Hoy v. Griffin, 22 P.2d 449, 453, 137 Kan. 872.
Ky.—Wheeldon v. Regenhardt Const. Co., 145 S.W.2d 527, 284 Ky. 603.
Mo.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091—First Nat. Bank v. Dunbar, 72 S.W.2d 821, 230 Mo. App. 687.
Neb.—Hamaker v. Patrick, 244 N.W. 420, 123 Neb. 809.
Ohio.—Board of Education of Addyston Village School Dist. v. Nolte Tillar Bros. Const. Co., 49 N.E.2d 99, 71 Ohio App. 469.
Pa.—Hershberger v. Hershberger, 29 A.2d 95, 345 Pa. 439—Murphy v. Wolverine Express, 38 A.2d 511, 155 Pa.Super. 125—Columbia Fur Co. v. Needro, 97 Pa.Super. 389—Maher v. Washington Nat. Ins. Co., Com.Pl., 29 Del.Co. 267—Maize v. United Ben. Life Ins. Co., Com. Pl., 94 Pittsb.Leg.J. 44.
Tenn.—Stevens v. Moore, 139 S.W.2d 710, 24 Tenn.App. 61.
33 C.J. p 1183 note 42.

Entire record may be considered.—Paul v. Prudential Ins. Co. of America, Ohio App., 64 N.E.2d 124,

4. Mo.—First Nat. Bank v. Dunbar, 72 S.W.2d 821, 230 Mo.App. 687.
Pa.—Hershberger v. Hershberger, 29 A.2d 95, 345 Pa. 439—Murphy v. Wolverine Express, 38 A.2d 511, 155 Pa.Super. 125.
33 C.J. p 143 note 80 [b] (2), p 1182 note 36 [a].

5. Kan.—**Corpus Juris quoted in** Hoy v. Griffin, 22 P.2d 449, 453, 137 Kan. 872.
33 C.J. p 1183 note 43.

Refusal to consider affidavits tendered by defendant or to permit them to be filed after continuance was refused was not error where much of contents of affidavits appeared to be amplification of affiants' testimony given at trial.—Moller-Vandenboom Lumber Co. v. Boudreau, 85 S.W.2d 141, 231 Mo.App. 1127.

6. Fla.—Okeechobee Co., for Use and Benefit of Hamrick, v. Norton, 6 So.2d 632, 149 Fla. 651.
Ill.—McNeill v. Harrison & Sons, 2 N.E.2d 959, 286 Ill.App. 120—Modern Woodmen of America v. Blair, 263 Ill.App. 387.
Kan.—**Corpus Juris quoted in** Hoy v. Griffin, 22 P.2d 449, 453, 137 Kan. 872.
Neb.—Hamaker v. Patrick, 244 N.W. 420, 123 Neb. 809.
Ohio.—Thompson v. Rutledge, 168 N. E. 547, 32 Ohio App. 537.
Or.—Bernstein v. Berg, 262 P. 247, 123 Or. 343—Borg v. Utah Const. Co., 242 P. 600, 117 Or. 22.
W.Va.—Clise v. Prunty, 163 S.E. 864, 112 W.Va. 181—Gray v. Norfolk & W. Ry. Co., 130 S.E. 139, 99 W.Va. 575—Zogg v. Kern Oil & Gas Co., 117 S.E. 620, 94 W.Va. 17—Dunbar Tire & Rubber Co., v. Crissey, 114 S.E. 804, 92 W.Va. 419.
33 C.J. p 1183 note 45.

7. Conn.—Gesualdi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.
33 C.J. p 1180 note 24, p 1181 note 25.
Discretion of court as to judgment based on evidence see infra subdivision b (5) of this section.

8. Tex.—Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289—Gentry v. Central Motor Co., Civ.App., 100 S.W. 2d 215.
Judgment held proper in form
Tex.—Walters v. Southern S. S. Co., Civ.App., 113 S.W.2d 320, error dismissed.

be entered on undisputed evidence or where the verdict is not sustained by any evidence; and the common-law remedy has been modified and extended by statutes in some jurisdictions.

At common law and in the absence of statutes providing otherwise, a judgment non obstante veredicto must be granted, if at all, on the record, and the court may not look to the evidence in determining a motion for such judgment.[9] The proper remedy for a wrong or mistaken verdict on the facts is by motion for a new trial, not by motion for a judgment non obstante veredicto.[10] Accordingly such a judgment cannot be rendered merely because the verdict is against the weight of the evidence,[11] although there are intimations that such a judgment notwithstanding the verdict may be entered

9. Fla.—Tolliver v. Loftin, 21 So.2d 359—Heuacker v. Farrelly, 176 So. 98, 129 Fla. 239—Dudley v. Harrison, McCready & Co., 173 So. 820, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338.
Ill.—Malewski v. Mackiewich, 282 Ill.App. 593—Modern Woodmen of America v. Blair, 263 Ill.App. 387.
Ind.—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179.
Kan.—**Corpus Juris quoted in** Hoy v. Griffin, 22 P.2d 449, 453, 137 Kan. 872.
Ky.—World Fire & Marine Ins. Co. v. Tapp, 151 S.W.2d 428, 286 Ky. 650—Wheeldon v. Regenhardt Const. Co., 145 S.W.2d 527, 284 Ky. 603.
Neb.—LeBron Electrical Works v. Pizinger, 270 N.W. 683, 132 Neb. 164—Hamaker v. Patrick, 244 N.W. 420, 123 Neb. 809—Bielfeldt v. Grand Island Transit Co., 243 N.W. 76, 123 Neb. 368.
Ohio.—Lehman v. Harvey, 187 N.E. 28, 45 Ohio App. 215, petition dismissed 187 N.E. 201, 127 Ohio St. 159.
Okl.—National Mut. Casualty Co. v. Harmon, 113 P.2d 597, 189 Okl. 53—Martin v. National Bank of Claremore, 77 P.2d 40, 182 Okl. 217—Hanna v. Gregg, 217 P. 434, 92 Okl. 34.
Tenn.—**Corpus Juris quoted in** Citizens' Trust Co. v. Service Motor Car Co., 297 S.W. 735, 736, 154 Tenn. 507—Stevens v. Moore, 139 S.W.2d 710, 24 Tenn.App. 61—Dunn v. Moore, 123 S.W.2d 1095, 22 Tenn. App. 412.
W.Va.—Clise v. Prunty, 163 S.E. 864, 112 W.Va. 181—Gray v. Norfolk & W. Ry. Co., 130 S.E. 139, 99 W. Va. 575—Zogg v. Kern Oil & Gas Co., 117 S.E. 620, 94 W.Va. 17—Dunbar Tire & Rubber Co. v. Crissey, 114 S.E. 804, 92 W.Va. 419, overruling Weeks v. Chesapeake & O. Ry. Co., 69 S.E. 805, 68 W.Va. 284, McMillan v. Middle States Coal & Coke Co., 57 S.E. 129, 61 W.Va. 531, 11 L.R.A.,N.S., 840, Ruffner Bros. v. Dutchess Ins. Co., 53 S.E. 943, 59 W.Va. 432, 115 Am.S.R. 924, 8 Ann.Cas. 866, Anderson v. Tug River Coal & Coke Co., 53 S.E. 713, 59 W.Va. 301, and Maupin v. Scottish Union & National Ins. Co., 45 S.E. 1003, 58 W.Va. 557.
33 C.J. p 1183 note 47.
Reserving questions of fact see infra subdivision d of this section.

Finding of fact

A judgment notwithstanding the verdict may not be based on the trial court's finding of fact.—Rice v. Builders Material Co., 2 S.E.2d 527, 120 W.Va. 585—Sponduris v. Rameih, 199 S.E. 457, 120 W.Va. 536.

10. Cal.—Silva v. Market St. Ry. Co., 123 P.2d 904, 50 Cal.App.2d 796—Takahashi v. White Truck & Transfer Co., 59 P.2d 161, 15 Cal. App.2d 107.
Fla.—Okeechobee Co., for Use and Benefit of Hamrick, v. Norton, 6 So.2d 632, 149 Fla. 651—Dudley v. Harrison, McCready & Co., 173 So. 820, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338.
Ill.—Schwickrath v. Lowden, 46 N.E. 2d 162, 317 Ill.App. 431—Pohl v. Fazzi, 22 N.E.2d 402, 301 Ill.App. 622.
Kan.—Underhill v. Motes, 165 P.2d 218—**Corpus Juris quoted in** Hoy v. Griffin, 22 P.2d 449, 453, 137 Kan. 872.
Minn.—Manning v. Chicago Great Western R. Co., 229 N.W. 566, 179 Minn. 411.
Neb.—Bielfeldt v. Grand Island Transit Co., 243 N.W. 76, 123 Neb. 368.
Ohio.—Holmes v. Employers' Liability Assur. Corporation, Limited, of London, England, 43 N.E.2d 746, 70 Ohio App. 239—Kelley v. Columbus Ry., Power & Light Co., 24 N.E.2d 290, 62 Ohio App. 397.
Pa.—Kindt v. Reading Co., 43 A.2d 145, 352 Pa. 419—MacDonald v. Pennsylvania R. Co., 36 A.2d 492, 348 Pa. 558—Kotlikoff v. Master, 27 A.2d 85, 345 Pa. 258—Iacovino v. Caterino, 2 A.2d 828, 332 Pa. 556—Osche v. New York Life Ins. Co., 187 A. 396, 324 Pa. 1—Hartig v. American Ice Co., 137 A. 867, 290 Pa. 21—Thomas v. Pennsylvania R. Co., 119 A. 717, 275 Pa. 579—Murphy v. Wolverine Express, 38 A.2d 511, 155 Pa.Super. 125—Jann v. Linton's Lunch, 29 A.2d 219, 150 Pa.Super. 653—Szidor v. Greek Catholic Union of Russian Brotherhoods of U. S., 21 A. 2d 104, 145 Pa.Super. 251—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170—Adams v. Metropolitan Life Ins. Co., 7 A.2d 544, 136 Pa.Super. 454—Moore v. W. J. Gilmore Drug Co., 200 A. 250, 131 Pa.Super. 349—McCommon v. Johnson, 187 A. 445, 123 Pa.Super. 581—Evans v. Stewart, 157 A. 515, 103 Pa.Super. 549—Carroll v. Reuben H. Donnelly Corp., 53 Pa.Dist. & Co. 142—Piacine v. National Life Ins. Co., 14 Pa.Dist. & Co. 21—States v. Pappas, 9 Pa.Dist. & Co. 460, 18 Del.Co. 106—Condel v. Savo, Com. Pl., 46 Lack.Jur. 89—In re Dughlaski's Estate, Orph., 29 North.Co. 174.
Tenn.—**Corpus Juris quoted in** Citizens' Trust Co. v. Service Motor Car Co., 297 S.W. 735, 736, 154 Tenn. 507.
Tex.—Casey v. Jones, Civ.App., 189 S.W.2d 515—Ward v. Strickland Civ.App., 177 S.W.2d 79, error refused—Wilson v. Hagins, Civ.App., 25 S.W.2d 916, affirmed, Com.App., 50 S.W.2d 797—Atchison, T. & S. F. Ry. Co. v. Hix, Civ.App., 291 S. W. 281.
Utah.—Buhler v. Maddison, 140 P.2d 933, 105 Utah 39.
Wash.—Moore v. Keesey, 163 P.2d 164—Hayden v. Colville Valley Nat. Bank, 89 P.2d 376, 180 Wash. 220, rehearing denied 43 P.2d 32.
W.Va.—Clise v. Prunty, 163 S.E. 864, 112 W.Va. 181—Gray v. Norfolk & W. Ry. Co., 130 S.E. 139, 99 W.Va. 575—Zogg v. Kern Oil & Gas Co., 117 S.E. 620, 94 W.Va. 17—Dunbar Tire & Rubber Co. v. Crissey, 114 S.E. 804, 92 W.Va. 419.
Wyo.—Caldwell v. Roach, 12 P.2d 376, 44 Wyo. 319.
33 C.J. p 1184 notes 49 [a], 50.
Verdict contrary to, or not sustained by, evidence as ground for new trial generally see the C.J.S. title New Trial §§ 69–77, also 46 C.J. p 170 note 41 et seq.

11. Ariz.—Durham v. Firestone Tire & Rubber Co., 55 P.2d 648, 47 Ariz. 280—Welch v. United Mut. Ben. Ass'n, 36 P.2d 256, 44 Ariz. 198.
Cal.—Silva v. Market St. Ry. Co., 123 P.2d 904, 50 Cal.App.2d 796—Takahashi v. White Truck & Transfer Co., 59 P.2d 161, 15 Cal.App.2d 107.
Fla.—Tolliver v. Loftin, 21 So.2d 359—Talley v. McCain, 174 So. 841, 128 Fla. 418—Dudley v. Harrison, McCready & Co., 173 So. 820, 127 Fla. 687, rehearing denied 174 So.

tered on undisputed evidence or where the verdict is not sustained by any evidence whatever.[12]

729, 128 Fla. 333—**Corpus Juris cited in** Pillet v. Ershick, 126 So. 784, 788, 99 Fla. 483.

Ill.—Neering v. Illinois Cent. R. Co., 50 N.E.2d 497, 383 Ill. 366, mandate conformed to 53 N.E.2d 271, 321 Ill.App. 625—Hunt v. Vermilion County Children's Home, 44 N.E.2d 609, 381 Ill. 29—Hedden v. Farmers Mut. Re-Ins. Co. of Chicago, Ill., 60 N.E.2d 110, 325 Ill. App. 335—Schwickrath v. Lowden, 46 N.E.2d 162, 317 Ill.App. 431—Gant v. McDowell, 38 N.E.2d 530, 312 Ill.App. 378—Gnat v. Richardson, 35 N.E.2d 409, 311 Ill.App. 242, affirmed 39 N.E.2d 337, 378 Ill. 626—Modern Woodmen of America v. Blair, 263 Ill.App. 387.

Kan.—Underhill v. Moes, 165 P.2d 218—**Corpus Juris quoted in** Hoy v. Griffin, 22 P.2d 449, 453, 137 Kan. 872.

Ky.—Roe v. Gentry's Ex'x, 162 S.W. 2d 208, 290 Ky. 598.

N.H.—Bryson v. Carroll, 41 A.2d 240, 93 N.H. 287—Exeter Banking Co. v. Taylor, 160 A. 733, 85 N.H. 458.

N.C.—Jernigan v. Neighbors, 141 S. E. 586, 195 N.C. 231.

Ohio.—Wilkeson v. Erskine & Son, 61 N.E.2d 201, 145 Ohio St. 218—Maryland Casualty Co. v. Frederick Co., 53 N.E.2d 795, 142 Ohio St. 605—Workman v. Thompson, 47 N.E.2d 996, 141 Ohio St. 287—Beck v. Wuerdeman, App., 62 N. E.2d 516—Kelley v. Columbus Ry., Power & Light Co., 24 N.E.2d 290, 62 Ohio App. 397.

Okl.—National Mut. Casualty Co. v. Harmon, 113 P.2d 597, 189 Okl. 53—Martin v. National Bank of Claremore, 77 P.2d 40, 182 Okl. 217.

Or.—Kelley v. Stout Lumber Co., 263 P. 881, 123 Or. 647.

Pa.—Campdon v. Continental Assur. Co., 157 A. 464, 305 Pa. 253—Murphy v. Wolverine Express, 38 A. 2d 511, 155 Pa.Super. 125—Blair to Use of Davis v. Adamchick, 21 A.2d 107, 145 Pa.Super. 125—Radziewicz v. Philadelphia & Reading Ry. Co., 94 Pa.Super. 327.

Tenn.—**Corpus Juris quoted in** Citizens' Trust Co. v. Service Motor Car Co., 297 S.W. 735, 736, 154 Tenn. 507—Jamison v. Metropolitan Life Ins. Co., 145 S.W.2d 553, 24 Tenn.App. 398—Dunn v. Moore, 123 S.W.2d 1095, 22 Tenn.App. 412—National Life & Accident Ins. Co. v. American Trust Co., 68 S.W. 2d 971, 17 Tenn.App. 516.

Tex.—Deal v. Craven, Com.App., 277 S.W. 1046—Johnson v. Moody, Civ. App., 104 S.W.2d 583, error dismissed—Spence v. National Life & Accident Ins. Co., Civ.App., 59 S. W.2d 212.

Wash.—Hayden v. Colville Valley Nat. Bank, 39 P.2d 376, 180 Wash. 220, rehearing denied 43 P.2d 32—Lydon v. Exchange Nat. Bank, 235 P. 27, 134 Wash. 188.

W.Va.—Clise v. Prunty, 163 S.E. 864, 112 W.Va. 181—Gray v. Norfolk & W. Ry. Co., 130 S.E. 139, 99 W.Va. 575—Zogg v. Korn Oil & Gas Co., 117 S.E. 620, 94 W.Va. 17—Dunbar Tire & Rubber Co. v. Crissey, 114 S.E. 804, 92 W.Va. 419.

Wis.—Volland v. McGee, 294 N.W. 497, 236 Wis. 358, rehearing denied 295 N.W. 635, 236 Wis. 358—Viereg v. Southwestern Wisconsin Gas Co., 248 N.W. 775, 212 Wis. 394.

33 C.J. p 1183 note 48.

Trial by judge

Judge, having as trier of fact found for plaintiff, could not, although he subsequently changed his mind respecting weight of evidence, enter judgment for defendant, unless plaintiff was contributorily negligent as matter of law.—Evans v. Stewart, 157 A. 515, 103 Pa.Super. 549.

Correct practice

After receiving verdict, entering judgment notwithstanding the verdict, when the real ground of the judgment is that it is not supported by the evidence, is not strictly correct, since a motion for judgment notwithstanding the verdict admits the finding of the verdict to be true and the court on such motion grants judgment on grounds other than those decided by the jury. In such a situation the strictly proper practice is to move to set aside verdict because not supported by the evidence, and grant judgment on ground that motion for a directed verdict should have been granted, or, if no such motion was made, on ground that the evidence failed to support a cause of action.—Shumway v. Milwaukee Athletic Club, 20 N.W.2d 123, 247 Wis. 393.

12. Cal.—In re Stone's Estate, 138 P.2d 710, 59 Cal.App.2d 263—Maggini v. West Coast Life Ins. Co., 29 P.2d 263, 136 Cal.App. 472—Perkins v. Pacific Fruit Exchange, 22 P.2d 535, 132 Cal.App. 278—Peters v. California Building-Loan Ass'n, 2 P.2d 439, 116 Cal.App. 143.

Colo.—Bashor v. Bashor, 85 P.2d 732, 103 Colo. 232, 120 A.L.R. 1507.

Fla.—Atlantic Coast Line R. Co. v. Canady, 165 So. 629, 122 Fla. 447.

Ill.—Schneiderman v. Interstate Transit Lines, 60 N.E.2d 908, 326 Ill.App. 1—Gant v. McDowell, 38 N.E.2d 530, 312 Ill.App. 378—Jenkins v. Equitable Life Assur. Soc. of U. S., 27 N.E.2d 877, 304 Ill. App. 633—Root v. Wentworth, 27 N.E.2d 651, 305 Ill.App. 493.

Kan.—**Corpus Juris quoted in** Hoy v. Griffin, 22 P.2d 449, 453, 137 Kan. 872.

Me.—Pierson v. Pierson, 178 A. 617, 133 Me. 367.

Mass.—Rose v. Silveira, 63 N.E.2d 895.

Mich.—First Nat. Bank & Trust Co. of Ann Arbor v. Wuerth, 247 N.W. 784, 262 Mich. 691—Peckinpaugh v. H. W. Noble & Co., 227 N.W. 540, 248 Mich. 668—Wehling v. Linder, 226 N.W. 880, 248 Mich. 241—In re Schulte's Estate, 211 N.W. 56, 237 Mich. 147.

Minn.—Powell v. Turnlund, 221 N.W. 241, 175 Minn. 361—Neal's v. Chicago, R. I. & P. Ry. Co., 218 N. W. 125, 173 Minn. 587.

Miss.—Boyle Gin Co. v. W. F. Moody & Co., 193 So. 917, 188 Miss. 44.

N.H.—Tufts v. White, 26 A.2d 679, 92 N.H. 158.

N.Y.—Dickerson v. Long Island R. Co., 42 N.Y.S.2d 335, 266 App.Div. 852, appeal denied 44 N.Y.S.2d 344, 266 App.Div. 921—Clark v. Harnischfeger Sales Corporation, 264 N.Y.S. 873, 238 App.Div. 493.

N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561—Snyder v. Northern Pac. Ry. Co., 285 N.W. 450, 69 N.D. 266—Kron v. Bodmer, 249 N.W. 772, 63 N.D. 686—Johnson v. Mau, 236 N.W. 472, 60 N.D. 757—Odou & Arnold v. Benson, 228 N.W. 312, 59 N.D. 101—Mercantile Protective Bureau v. Specht, 225 N.W. 794, 58 N.D. 239—Dahl v. Minneapolis, St. P. & S. S. M. Ry. Co., 223 N.W. 37, 57 N.D. 538—National Cash Register Co. v. Midway City Creamery Co., 222 N.W. 36, 57 N.D. 356—Volk v. Hirning, 220 N.W. 446, 56 N.D. 937—Northern Trust Co. v. Havelock Equity Exch. 199 N.W. 763, 51 N.D. 346.

Ohio.—Workman v. Thompson, 47 N. E.2d 996, 141 Ohio St. 287—Spann v. W. U. Tel. Co., App., 62 N.E.2d 576—Wilms v. Klein, App., 49 N. E.2d 76—Brazis v. National Telephone Supply Co., App., 48 N.E.2d 873.

Pa.—Cutler v. Peck Lumber Mfg. Co., 37 A.2d 739, 350 Pa. 8—Gourley v. Boyle, 29 A.2d 523, 346 Pa. 113—Master v. Goldstein's Fruit & Produce, 23 A.2d 443, 344 Pa. 1—Casseday v. Baltimore & O. R. Co., 22 A.2d 663, 343 Pa. 342—Borits v. Tarapchak, 12 A.2d 910, 338 Pa. 289—Kennedy v. Southern Pennsylvania Traction Co., 3 A.2d 395, 333 Pa. 406—Golder v. Bogash, 198 A. 149, 329 Pa. 350—Richardson v. Frick Co., 197 A. 151, 329 Pa. 148—James v. Columbia County Agricultural, Horticultural & Mechanical Ass'n, 184 A. 447, 321 Pa. 465—Dangelo v. Pennsylvania R. Co., 152 A. 743, 301 Pa. 579—Manning v. Baltimore & O. R. Co., 146 A.

Moreover the common-law remedy has been modified and extended in some jurisdictions by stat-

30, 296 Pa. 380—Gray v. Pennsylvania R. Co., 141 A. 621, 293 Pa. 28—Muia v. Herskovitz, 128 A. 828, 283 Pa. 163—Nolder v. Pennsylvania R. Co., 123 A. 507, 278 Pa. 495—Garland v. Craven, 41 A.2d 140, 156 Pa.Super. 351—Guyton v. City of Pittsburgh, 38 A.2d 383, 155 Pa.Super. 76—Roslik v. City of Pittsburgh, 38 A.2d 353, 155 Pa. Super. 150—Dick v. West Penn Rys. Co., 33 A.2d 792, 153 Pa.Super. 281—Pischke v. Borough of Dormont, 33 A.2d 480, 153 Pa.Super. 205—Mayer v. Pennsylvania R. R., 33 A.2d 474, 153 Pa.Super. 186—Williams v. Overly Mfg. Co., 34 A.2d 52, 153 Pa.Super. 347—Bell v. Anderson, 17 A.2d 647, 143 Pa.Super. 56—Foell Packing Co. v. Harris, 193 A. 152, 127 Pa.Super. 494—Hahn v. Anderson, 187 A. 450, 123 Pa.Super. 442, modified on other grounds 192 A. 489, 326 Pa. 463—Rittle v. Zeller, 100 Pa.Super. 516—Sklaroff v. Philadelphia Rapid Transit Co., 100 Pa.Super. 237—Feinstein v. Philadelphia Rapid Transit Co., 100 Pa.Super. 182—Costolo v. School Dist. of Springhill Tp., 99 Pa.Super. 259—Hatch v. Robinson, 99 Pa.Super. 141—Gottlieb v. Scranton Ry. Co., 99 Pa.Super. 7—Coleman v. City of Scranton, 99 Pa.Super. 3—Klein v. City of Pittsburgh, 97 Pa.Super. 56—Pittsburgh Transportation Co. v. Pennsylvania R. Co., 96 Pa. Super. 302—Brody v. Pittsburgh Rys. Co., 96 Pa.Super. 265—Siglin v. Haiges, 95 Pa.Super. 588—Walker v. Reading Transit & Light Co., 95 Pa.Super. 461—Kalter v. Philadelphia Rapid Transit Co., 95 Pa.Super. 116—Gimbel v. Ætna Life Ins. Co., 95 Pa.Super. 1—Radziewicz v. Philadelphia & Reading Ry. Co., 94 Pa.Super. 327—Chachkin v. Accommodation Ice & Coal Co., 92 Pa.Super. 416—Thompson v. Hedrick, 91 Pa.Super. 41—Fraser v. Freedman, 87 Pa.Super. 454—Highland v. Russell Car & Snow Plow Co., 87 Pa.Super. 235, affirmed 135 A. 759, 283 Pa. 230, affirmed 49 S.Ct. 314, 279 U.S. 253, 73 L.Ed. 688—Wagner v. London Guaranty & Accident Co., Limited, 86 Pa.Super. 542—Stone v. Stone, 85 Pa.Super. 346—Zieger v. Philadelphia Rapid Transit Co., 84 Pa.Super. 541—Barshay v. American Ice Co., 84 Pa.Super. 538—Sussman Bros. v. Meier, 80 Pa.Super. 78—Meyercord Co. v. P. H. Butler Co., 79 Pa.Super. 473—McEntee v. New York Life Ins. Co., 79 Pa.Super. 457—Wetzel v. Pittsburg Rys. Co., 55 Pa.Super. 22—Cherry v. Mitosky, 53 Pa.Dist. & Co. 135—Johnson v. Pittsburgh Rys. Co., 34 Pa.Dist. & Co. 209, 86 P.L.J. 585—Schmuck v. Heilman, 14 Pa.Dist. & Co. 449, 44 York Leg. Rec. 181, affirmed 161 A. 420, 106 Pa.Super. 12—Miller v. Devine, Com.Pl., 54 Dauph.Co. 418—Myers v. Metropolitan Life Ins. Co., Com. Pl., 52 Dauph.Co. 318, affirmed 33 A.2d 253, 152 Pa.Super. 507—Taylor v. Reading Co., Com.Pl., 51 Dauph.Co. 69, affirmed 27 A.2d 901, 149 Pa.Super. 171—Gates v. Finkelstein, Com.Pl., 50 Dauph.Co. 361—Buffington v. Snyder, Com.Pl., 48 Dauph.Co. 30—Porter v. Philadelphia Suburban Transp. Co., Com. Pl., 28 Del.Co. 581—Lundy v. Devitt, Com.Pl., 28 Del. 210—Theiss v. Moreland, Com.Pl., 22 Erie Co. 154—DiLorens v. Pittsburgh & L. E. R. Co., Com.Pl., 8 Fay.L.J. 166—Keating v. Wagner, Com.Pl., 42 Lack.Jur. 84—Schenker v. Indemnity Ins. Co. of North America, Com.Pl., 2 Monroe L.R. 141, 10 Som.Leg.J. 180, affirmed 16 A.2d 304, 340 Pa. 81—Leedom v. Philadelphia Transp. Co., Com.Pl., 58 Montg.Co. 392—Deiffenderfer v. Weidner, Com.Pl., 14 Northumb. Leg.J. 176—Clark v. Pennsylvania Power & Light Co., Com.Pl., 14 Northumb.Leg.J. 29, affirmed 6 A.2d 892, 336 Pa. 75—Colella v. Bartoletti, Com.Pl., 94 Pittsb.Leg.J. 142—Berger v. Roberts, Com.Pl., 93 Pittsb.Leg.J. 473—Weldon v. Pittsburgh Rys. Co., Com.Pl., 93 Pittsb. Leg.J. 88—Paradine v. Wynett, Com.Pl., 93 Pittsb.Leg.J. 75—Ridley v. Pucci, Com.Pl., 89 Pittsb. Leg.J. 292—Doerr v. Rands, Com. Pl., 88 Pittsb.Leg.J. 579, affirmed 16 A.2d 377, 340 Pa. 183—Metz v. Pittsburgh Rys. Co., Com.Pl., 87 Pittsb.Leg.J. 484, affirmed 7 A.2d 505, 135 Pa.Super. 534—Dyer v. Peoples Natural Gas Co., Com.Pl., 87 Pittsb.Leg.J. 115—Coral Gables v. Farrell, Com.Pl., 86 Pittsb.Leg. J. 623—Carey v. Berwager, Com. Pl., 53 York Leg.Rec. 203.

S.D.—Christensen v. Krueger, 278 N. W. 171, 66 S.D. 66—Larsen v. Johnson, 197 N.W. 230, 47 S.D. 202.

Vt.—Nadeau v. St. Albans Aerie No. 1205 Fraternal Order of Eagles, 26 A.2d 93, 112 Vt. 397—Farrell v. Greene, 2 A.2d 194, 110 Vt. 87—Johnson v. Hardware Mut. Casualty Co., 1 A.2d 817, 109 Vt. 481—City of Rutland v. Town of Wallingford, 194 A. 360, 109 Vt. 186.

Va.—Wade v. Chesapeake & O. Ry. Co., 193 S.E. 491, 169 Va. 448.

Wis.—Patterson v. Chicago, St. P. M. & O. Ry. Co., 294 N.W. 63, 236 Wis. 205—McKee v. Oconto Nat. Bank, 248 N.W. 404, 212 Wis. 351—Depner v. U. S. Nat. Bank, 232 N.W. 851, 202 Wis. 405—First Wisconsin Nat. Bank of Milwaukee v. Town of Catawba, 197 N.W. 1013, 183 Wis. 220—Twist v. Minneapolis, St. P. & S. S. M. Ry. Co., 190 N.W. 449, 178 Wis. 513.

33 C.J. p 1184 note 49—12 C.J. p 869 note 92.

Trial court's finding, notwithstanding verdict, held justified under evidence

La.—Lehon v. New Orleans Public Service, 123 So. 172, 10 La.App. 715.

After special verdict

(1) A judge may enter judgment notwithstanding the verdict after a special verdict, since such motion must be considered on the testimony prior to submission of the cause to jury.—Dzikowski v. Michigan Cent. R. R., 276 N.W. 470, 282 Mich. 337—In re Cotcher's Estate, 264 N. W. 325, 274 Mich. 154—Jacob v. Gratiot Central Market, 255 N.W. 331, 267 Mich. 262.

(2) So, where defendant moved for directed verdict, and, at plaintiff's request, case was submitted to jury with leave to defendant to move for judgment, if verdict should be otherwise than as would have been directed, and general verdict was returned for plaintiff and special findings were made favorable to plaintiff, defendant's motion for judgment notwithstanding the verdict was not improperly granted, on ground that the special findings were binding on defendant because the motion was directed only against the general verdict.—Jasper v. Wells, 144 P.2d 505, 173 Or. 114.

(3) The rule that motion for judgment notwithstanding verdict is usually a concession that special findings are supported by evidence, although applicable where motion is on ground that verdict was contrary to special answers, would not be applicable to contentions that evidence failed to establish defense and that judgment should be for plaintiff under the law, the evidence and the admitted facts.—Lewis v. Dodson, 100 P.2d 640, 151 Kan. 632.

Where evidence presented questions of fact, dismissal of complaint after rendition of verdict for plaintiff was error.—Sullivan v. Central Hanover Bank & Trust Co., 63 N. E.2d 76, 294 N.Y. 497.

In Arkansas

(1) After verdict has been entered, but before entry of judgment, if court finds that no testimony has been offered to sustain the verdict, and that no cause of action has been shown to exist, the court has jurisdiction so to declare and direct judgment which shall be entered.—Stanton v. Arkansas Democrat Co., 106 S.W.2d 584, 194 Ark. 135—33 C.J. p 1184 note 49.

(2) But plaintiff was held not en-

utes[13] which govern the entry of judgment notwithstanding the verdict,[14] and under some of which a judgment may be entered, notwithstanding the verdict, in favor of the party who was entitled to have a verdict directed in his favor;[15] but under such statutes judgment notwithstanding the verdict

titled to judgment non obstante veredicto, although there was no testimony to sustain verdict for defendant, where verdict was not special, and case was not reserved by court for future judgment or consideration, and there was no statement in pleadings to justify court in entering judgment in favor of plaintiff, Crawford & M. Dig. §§ 6271, 6273, being inapplicable.—Jackson v. Carter, 278 S.W. 32, 169 Ark. 1154.

In Nebraska

Applying the rule that the trial court has the right and power to vacate, set aside, amend, or correct any judgments or orders made by it at the same term, it has been held that, where court overruled plaintiff's motion for directed verdict and submitted case to jury which returned verdict for defendant, and plaintiff filed motion for judgment notwithstanding verdict, court had jurisdiction at same term to sustain plaintiff's motion in part and enter judgment for plaintiff for a portion of amount claimed.—Leon v. Kitchen Bros. Hotel Co., 277 N.W. 823, 134 Neb. 137, 115 A.L.R. 1078.

In Oklahoma

(1) The court is not authorized to render a judgment notwithstanding the verdict because there is an entire lack of evidence to justify the verdict in favor of the prevailing party.—St. Louis-San Francisco Ry. Co. v. Eakins, 284 P. 866, 141 Okl. 256—Thompson v. Florence, 274 P. 671, 135 Okl. 116—St. Louis-San Francisco Ry. Co. v. Bell, 273 P. 243, 134 Okl. 251—Odom v. Cedar Rapids Sav. Bank, 244 P. 758, 114 Okl. 126—McAlester v. Bank of McAlester, 218 P. 839, 95 Okl. 193—Barnes v. Universal Tire Protector Co., 165 P. 176, 63 Okl. 292.

(2) There is also, however, some authority to the contrary.—Schafer v. Midland Hotel Co., 171 P. 337, 69 Okl. 201.

In Washington

(1) The trial court may enter judgment notwithstanding the verdict in favor of either party where it is warranted by the undisputed evidence.—Morris v. Chicago, M., St. P. & P. R. Co., 97 P.2d 119, 1 Wash.2d 587, opinion adhered to 100 P.2d 19, 1 Wash.2d 587—Bobst v. Hardisty, 91 P.2d 567, 199 Wash. 304.

(2) A motion for judgment notwithstanding the verdict is properly granted where as a matter of law there is neither evidence nor reasonable inference from the evidence sustaining the verdict.—Richey & Gilbert Co. v. Northwestern Natural Gas Corporation, 134 P.2d 444, 16 Wash.2d 631—Belcher v. Lentz Hardware Co., 125 P.2d 643, 13 Wash.2d 523—Van Nostern v. Richey & Gilbert Co., 99 P.2d 608, 2 Wash.2d 663—Femling v. Star Pub. Co., 84 P.2d 1008, 195 Wash. 395—Turnquist v. Rosaia Bros., 83 P.2d 353, 196 Wash. 434—Steen v. Polyclinic, 81 P.2d 846, 195 Wash. 666—Stevich v. Department of Labor and Industries, 47 P.2d 32, 182 Wash. 401—Christiansen v. Anderson, 37 P.2d 889, 179 Wash. 368—Clark v. King, 34 P.2d 1105, 178 Wash. 421—Hanson v. Washington Water Power Co., 5 P.2d 1025, 165 Wash. 497—Wade v. North Coast Transp. Co., 5 P.2d 935, 165 Wash. 418—Dailey v. Phœnix Inv. Co., 285 P. 657, 155 Wash. 597—Birk v. City of Bremerton, 241 P. 678, 137 Wash. 119—Reynolds v. Morgan, 235 P. 800, 134 Wash. 358—Maddux v. Gray, 222 P. 470, 128 Wash. 149—Fortier v. Robillard, 212 P. 1083, 123 Wash. 599—Rieper v. General Cigar Co., 209 P. 849, 121 Wash. 427—33 C.J. p 1180 note 24 [a].

(3) A mere scintilla will not support verdict against such motion.—Kelly v. Drumheller, 272 P. 731, 150 Wash. 185.

(4) So, where there is no substantial evidence in support of the verdict, it is within the power of the court, notwithstanding the verdict, to direct a judgment in favor of any or all of the parties against whom the evidence fails.—Eyak River Packing Co. v. Huglen, 255 P. 123, 143 Wash. 229, affirmed 257 P. 638, 143 Wash. 229.

(5) A trial court, convinced after submission of supposed fact issues to jury and return of verdict, that there was no disputed fact question for jury, may not only grant motion for judgment notwithstanding verdict, but make findings in support of money judgment for moving party, if such judgment is proper under undisputed evidence.—W. T. Rawleigh Co. v. Graham, 103 P.2d 1076, 4 Wash.2d 407, 127 A.L.R. 596.

13. Minn.—Wilcox v. Schloner, 23 N.W.2d 19.
33 C.J. p 1183 note 47 [d], p 1184 note 51.

In Idaho

Judgment notwithstanding verdict was not permissible prior to statute authorizing practice.—Helgeson v. Powell, 34 P.2d 957, 54 Idaho 667—Prairie Flour Mill Co. v. Farmers' Elevator Co., 261 P. 673, 45 Idaho 229.

In Virginia

(1) Under the statute empowering the court to enter such final judgment as to it shall seem right and proper when the verdict of a jury in a civil action is set aside as contrary to the evidence, or without evidence to support it, if there is sufficient evidence before the court to decide the case on its merits, the trial court, in determining whether the jury's verdict should be set aside, need not consider evidence as on demurrer thereto.—Flannagan v. Northwestern Mut. Life Ins. Co., 146 S.E. 353, 152 Va. 38.

(2) Evidence and reasonable and proper inferences favorable to prevailing party, however, will be accepted as true.—Parsons v. Parker, 170 S.E. 1, 160 Va. 310—Bivens v. Manhattan for Hire Car Corporation, 159 S.E. 395, 156 Va. 483.

(3) Where there is nothing inherently incredible in testimony of witnesses which is sufficient to take case to jury, trial court will not substitute its view of case for jury and render a judgment notwithstanding the verdict.—Hoover v. J. P. Neff & Son, 31 S.E.2d 265, 183 Va. 56—Parsons v. Parker, 170 S.E. 1, 160 Va. 310.

(4) Power to enter judgment notwithstanding verdict depends on there being certain and sufficient evidence in case to decide it on its merits.—Dexter-Portland Cement Co. v. Acme Supply Co., 133 S.E. 788, 147 Va. 758.

(5) Evidence was held to warrant trial court in setting aside verdict as plainly contrary to evidence and entering judgment notwithstanding the verdict.—Noland v. Fowler, 18 S.E.2d 251, 179 Va. 19—Vandenbergh & Hitch v. Buckingham Apartment Corporation, 123 S.E. 561, 142 Va. 397.

14. S.D.—Kerr v. Staufer, 238 N.W. 156, 59 S.D. 83.
Tex.—Happ v. Happ, Civ.App., 160 S.W.2d 227, error refused.

15. Ariz.—McCauley v. Steward, 164 P.2d 465.
Cal.—In re Leahy's Estate, 54 P.2d 704, 5 Cal.2d 301—Hunton v. California Portland Cement Co., 123 P.2d 947, 50 Cal.App.2d 684—Van Rennes v. Southern Counties Gas Co. of California, 113 P.2d 238, 44 Cal.App.2d 880—Scott v. George A. Fuller Co., 107 P.2d 55, 41 Cal. App.2d 501—Goldenzwig v. Shaddock, 88 P.2d 933, 31 Cal.App.2d 719—Hubbert v. Aztec Brewing Co., 80 P.2d 135, 26 Cal.App.2d 664, followed in Cerezo v. Aztec Brewing Co., 80 P.2d 198, 26 Cal.App.2d 754, rehearing denied Hubbert v. Aztec Brewing Co., 80 P.2d 1016, 26 Cal.App.2d 664—Galiano v. Pa-

cific Gas & Electric Co., 67 P.2d 388, 20 Cal.App.2d 534—Collins v. Nelson, 61 P.2d 479, 16 Cal.App.2d 535—In re Smethurst's Estate, 59 P.2d 830, 15 Cal.App.2d 322—Tracey v. L. A. Paving Co., 41 P. 2d 942, 4 Cal.App.2d 700—Kerby v. Elk Grove Union High School Dist., 36 P.2d 431, 1 Cal.App.2d 246—Crone v. City of El Cajon, 24 P. 2d 846, 133 Cal.App. 624—City and County of San Francisco v. Superior Court in and for City and County of San Francisco, 271 P. 121, 94 Cal.App. 318—Wayland v. Latham, 264 P. 766, 89 Cal.App. 55.

Colo.—First Nat. Bank of Denver v. Henning, 150 P.2d 790, 112 Colo. 523—Fincher v. Edwin M. Bosworth & Co., 238 P. 38, 77 Colo. 496.

Idaho.—Petersen v. Bannock County, 102 P.2d 647, 61 Idaho 419—Hendrix v. City of Twin Falls, 29 P.2d 352, 54 Idaho 130.

Ill.—Carrell v. New York Cent. R. Co., 52 N.E.2d 201, 348 Ill. 599—Lathrop v. Goodyear Tire & Rubber Co., 60 N.E.2d 41, 325 Ill.App. 281—Christensen v. Frankland, 58 N.E.2d 289, 324 Ill.App. 391—Ebert v. City of Chicago, 58 N.E.2d 193, 324 Ill.App. 315—Best v. Mid-West Const. Corporation, 50 N.E.2d 867, 320 Ill.App. 341—Casper v. City of Chicago, 50 N.E.2d 858, 320 Ill.App. 269—Douglas v. Athens Market Corporation, 49 N.E.2d 834, 320 Ill.App. 40—Haynes v. Holman, 49 N.E.2d 324, 319 Ill.App. 396—Sturgeon v. Quarton, 44 N.E.2d 766, 316 Ill.App. 308—Bituminous Casualty Corporation v. City of Virginia, 41 N.E.2d 342, 314 Ill. App. 238—Mader v. Mandel Bros. Dep't Store, 41 N.E.2d 327, 314 Ill. App. 263—Kanne v. Metropolitan Life Ins. Co., 34 N.E.2d 732, 310 Ill.App. 524—Trust Co. of Chicago v. Metropolitan Life Ins. Co., 31 N.E.2d 328, 303 Ill.App. 328—Marley v. Henzler, 24 N.E.2d 587, 303 Ill.App. 73—Feinberg v. Chicago, B. & Q. R. Co., 21 N.E.2d 26, 300 Ill.App. 278—Farmer v. Alton Building & Loan Ass'n, 13 N.E.2d 652, 294 Ill.App. 206—Malewski v. Mackiewich, 282 Ill.App. 593—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill. App. 14.

Md.—Hajewski v. Baltimore County Com'rs, 40 A.2d 316—Clautice v. Murphy, 26 A.2d 406, 180 Md. 553.

Mich.—Blundy v. Ætna Life Ins. Co. of Hartford, Conn., 11 N.W.2d 908, 307 Mich. 332—Ruby v. Buxton, 3 N.W.2d 913, 305 Mich. 64—Merritt v. Huron Motor Sales, 276 N.W. 464, 282 Mich. 322—In re Lane's Estate, 274 N.W. 714, 281 Mich. 70—Krushew v. Meitz, 268 N.W. 736, 276 Mich. 553—In re Cotcher's Estate, 264 N.W. 325, 274 Mich. 154—Richards v. F. C. Matthews & Co., 239 N.W. 381, 256 Mich. 159—King v. Bird, 222 N.W. 183, 245 Mich. 93—West v. Detroit Terminal R. R., 201 N.W. 955, 229 Mich. 590.

Minn.—Reiter v. Porter, 13 N.W.2d 372, 216 Minn. 479—Krause v. Chicago, St. P., M. & O. Ry. Co., 290 N.W. 294, 207 Minn. 175—Brulla v. Cassady, 289 N.W. 404, 206 Minn. 398—Selover v. Selover, 277 N.W. 205, 201 Minn. 562—Slawson v. Northern States Power Co., 276 N. W. 275, 201 Minn. 313—Plotnik v. Lewis, 261 N.W. 867, 195 Minn. 130—Paulson v. Fisk, 261 N.W. 182, 194 Minn. 507—First Nat. Bank v. Fox, 254 N.W. 8, 191 Minn. 318—Flower v. King, 250 N.W. 43, 189 Minn. 461—Diddams v. Empire Milking Mach. Co., 240 N.W. 895, 185 Minn. 270—Meisenhelder v. Byram, 227 N.W. 426, 178 Minn. 417—Street v. Rosebrock, 217 N. W. 939, 173 Minn. 522—Opperud v. Byram, 217 N.W. 379, 173 Minn. 378—Hawley Lumber Co. v. Nordling, 209 N.W. 484, 168 Minn. 70—Funkley v. Ridgway, 197 N.W. 280, 158 Minn. 265—Capretz v. Chicago Great Western R. Co., 195 N.W. 531, 157 Minn. 29—Clough v. Chicago, M. & St. P. Ry. Co., 191 N.W. 923, 154 Minn. 515.

N.D.—Cunningham v. Great Northern Ry. Co., 14 N.W.2d 753, 73 N. D. 315—Nelson v. Scherling, 300 N.W. 803, 71 N.D. 337.

Ohio.—Magyar v. Prudential Ins. Co. of America, 15 N.E.2d 144, 133 Ohio St. 563—Spann v. W. U. Tel. Co., App., 62 N.E.2d 576—Brooks v. Sentle, 58 N.E.2d 234, 74 Ohio App. 231—Massachusetts Mut. Life Ins. Co. v. Hauk, 51 N.E.2d 80, 72 Ohio App. 131—Garber v. Chrysler Corporation, App., 50 N. E.2d 416—Arthurs v. Citizens' Coal Co., App., 47 N.E.2d 654—Kelley v. Columbus Ry., Power & Light Co., 24 N.E.2d 290, 62 Ohio App. 397.

Pa.—Rodia v. Metropolitan Life Ins. Co., 47 A.2d 152—Garrett v. Moore-McCormack Co., 23 A.2d 503, 344 Pa. 69, reversed on other grounds 63 S.Ct. 246, 317 U.S. 239, 87 L. Ed. 239—White v. Consumer's Finance Service, 15 A.2d 142, 339 Pa. 417—In re Olshefski's Estate, 11 A.2d 487, 337 Pa. 420—Summit Hotel Co. v. National Broadcasting Co., 8 A.2d 302, 336 Pa. 182, 124 A.L.R. 968—McDonough v. Borough of Munhall, 200 A. 638, 331 Pa. 468—Smith v. Penn Tp. Mut. Fire Ass'n of Lancaster County, 186 A. 130, 323 Pa. 93—James v. Columbia County Agricultural, Horticultural & Mechanical Ass'n, 184 A. 447, 321 Pa. 465—Shapiro v. City of Philadelphia, 159 A. 29, 306 Pa. 216—Gray v. Pennsylvania R. Co., 141 A. 621, 293 Pa. 28—West v. Manatawny Mut. Fire & Storm Ins. Co., 120 A. 763, 277 Pa. 102—Stierheim v. Bechtold, 43 A.2d 916, 158 Pa.Super. 107—Schroeder Bros. v. Sabell, 40 A.2d 170, 156 Pa.Super. 267—Hoefner v. Franklin Trust Co., 24 A.2d 457, 147 Pa.Super. 404—Albright v. Metropolitan Life Ins. Co., 17 A. 2d 709, 143 Pa.Super. 158—Roeper v. Monarch Life Ins. Co., 11 A.2d 184, 138 Pa.Super. 283—Mitchell v. Ellmaker, 4 A.2d 592, 134 Pa. Super. 583—Arndt v. Brockhausen, 191 A. 362, 126 Pa.Super. 269—Ellsworth v. Husband, 181 A. 90, 119 Pa.Super. 245—Milano v. Fayette Title & Trust Co., 96 Pa.Super. 310—Riddel v. Philadelphia Rapid Transit Co., 94 Pa.Super. 371—Granato v. Wise, 94 Pa.Super. 346—Aaron v. Smith, 90 Pa.Super. 565—Hawk v. Hawk, 88 Pa.Super. 581—Camp v. Commonwealth Title Insurance & Trust Co., 87 Pa. Super. 507—Humbert v. Meyers, 83 Pa.Super. 496—Teller v. Hood, 81 Pa.Super. 443—Tyrrell v. Philadelphia Rapid Transit Co., 79 Pa.Super. 346—Landy v. Philadelphia Life Ins. Co., 78 Pa.Super. 47—Wille v. London Guarantee & Accident Co., 49 Pa.Dist. & Co. 93, 32 Del.Co. 18—Piacine v. National Life Ins. Co., 14 Pa.Dist. & Co. 21—Wanamaker v. Beamesderfer, 3 Pa.Dist. & Co. 699, 26 Dauph.Co. 120—Kaylor v. Central Trust Co. of Harrisburg, 54 Dauph.Co. 366, affirmed 36 A.2d 825, 154 Pa.Super. 633—Harper v. Trainer Borough. Com.Pl., 33 Del.Co. 229—Jacobs v. Reading Co., Com.Pl., 31 Del.Co. 449—Hoover v. Montgomery, Com. Pl., 29 Del.Co. 466—Soder v. Hayward, Com.Pl., 21 Erie Co. 99, 52 York Leg.Rec. 49—Keating v. Wagner, Com.Pl., 42 Lack.Jur. 84—Farrante v. Orrico, Com.Pl., 20 Leh.L.J. 239, affirmed 35 A.2d 575, 154 Pa.Super. 165—McCormack v. Jermyn, Com.Pl., 37 Luz.Leg.Reg. 295—Stein v. Taylor, Com.Pl., 56 Montg.Co. 199—Eyster v. Lehigh Valley R. Co., Com.Pl., 14 Northumb.Leg.J. 153—Pischke v. Borough of Dormont, Com.Pl., 91 Pittsb.Leg.J. 559, affirmed 33 A.2d 480, 153 Pa.Super. 205—Seibert v. City of Pittsburgh, Com.Pl., 90 Pittsb.Leg.J. 599, 34 Mun.L.R. 89—Schupp v. Yagle, Com.Pl., 90 Pittsb.Leg.J. 589, affirmed 27 A.2d 539, 149 Pa.Super. 464—White v. Oswald Werner & Sons Co., Com. Pl., 88 Pittsb.Leg.J. 199—Gaskins v. Metropolitan Life Ins. Co., Com. Pl., 7 Sch.Reg. 13—Mammorella v. Peca, Com.Pl., 4 Sch.Reg. 445, 52 York Leg.Rec. 8—Rugens v. Jones, Com.Pl., 54 York Leg.Rec. 8.

S.C.—Bohumir Kryl Symphony Band v. Allen University, 12 S.E.2d 712, 196 S.C. 173.

S.D.—Deutscher v. Broadhurst, 12 N. W.2d 807—Gordinier v. Continental Assur. Co., 7 N.W.2d 298—Strain v. Shields, 256 N.W. 268, 63 S.D. 60—Kerr v. Staufer, 238 N.W. 156, 59 S.D. 33.

Tex.—Yarbrough v. Booher, 174 S. W.2d 47, 141 Tex. 420, 150 A.L.R. 1369—Neyland v. Brown, 170 S.W. 2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253—Super-Cold Southwest Co. v. Elkins, 166 S.W.2d 97, 140 Tex. 48—Rodriguez v. Higginbotham-Bailey-Logan Co., 160 S.W.2d 234, 138 Tex. 476—Sovereign Camp, W. O. W. v. Shuford, 124 S.W.2d 341, 132 Tex. 376—Green v. Ligon, Civ.App., 190 S.W.2d 742, error refused, no reversible error—McKemie v. Waldrop, Civ.App., 190 S.W.2d 384—Talley v. Bass-Jones Lumber Co., Civ.App., 173 S.W.2d 276, error refused—Huie v. Lay, Civ.App., 170 S.W.2d 823—D-Bar Ranch v. Maxwell, Civ.App., 170 S.W.2d 303, error refused—Smith v. Safeway Stores, Civ.App., 167 S. W.2d 1044—Gatlin v. Southwestern Settlement & Development Corporation, Civ.App., 166 S.W.2d 150, error refused—Manley v. Holt, Civ. App., 161 S.W.2d 857, error refused —Boatman v. C. S. Hamilton Motor Co., Civ.App., 152 S.W.2d 390 —Carrell v. Dallas Railway & Terminal Co., Civ.App., 151 S.W.2d 869, error dismissed, judgment correct—Skelly Oil Co. v. Johnston, Civ.App., 151 S.W.2d 863, error refused—Barrett v. Commercial Standard Ins. Co., Civ. App., 145 S.W.2d 315—Heath v. Elliston, Civ.App., 145 S.W.2d 243, error dismissed, judgment correct —Dallas Ry. & Terminal Co. v. Glenn, Civ.App., 144 S.W.2d 961, error dismissed, judgment correct —Le Master v. Fort Worth Transit Co., Civ.App., 142 S.W.2d 908, reversed on other grounds, Sup., 160 S.W.2d 224, 138 Tex. 512—Kimmell v. Tipton, Civ.App., 142 S.W.2d 421—McAfee v. Travis Gas Corporation, Civ.App., 131 S.W.2d 139, reversed on other grounds 153 S.W.2d 442, 137 Tex. 314—Moran v. Stanolind Oil & Gas Co., Civ. App., 127 S.W.2d 1012, error dismissed, judgment correct—Gumm v. Chalmers, Civ.App., 127 S.W.2d 942, modified on other grounds Chalmers v. Gumm, 154 S.W.2d 640, 137 Tex. 467—Collins v. Griffith, Civ.App., 125 S.W.2d 419, error refused—Whiteman v. Harris, Civ.App., 123 S.W.2d 699, error refused—Hamilton v. Travelers Ins. Co., Civ.App., 116 S.W.2d 414, error refused—Walters v. Southern S. S. Co., Civ.App., 113 S.W.2d 320, error dismissed—Sheppard v. City and County of Dallas Levee Improvement Dist., Civ.App., 112 S. W.2d 253—Panhandle Const. Co. v. Continental Southland Savings & Loan Ass'n, Civ.App., 110 S.W. 2d 632, error dismissed—Johnson v. Moody, Civ.App., 104 S.W.2d 583, error dismissed—James v. Texas Employers Ins. Ass'n, Civ. App., 98 S.W.2d 425, reversed on other grounds Texas Employers' Ins. Ass'n v. James, 118 S.W.2d 293, 131 Tex. 605—Jackson v. Schoenmann, Civ.App., 94 S.W.2d 225—Cain v. Dickson, Civ.App., 78 S.W.2d 1095—Bacle v. Pickens, Civ.App., 78 S.W.2d 260, affirmed Pickens v. Backle, 104 S.W.2d 482, 129 Tex. 610, rehearing denied 105 S.W.2d 212, 129 Tex. 610—Ackerson v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 77 S.W.2d 559, error refused—Freeman v. Schwenker, Civ.App., 73 S.W.2d 609—Waitz v. Uvalde Rock Asphalt Co., Civ.App., 58 S.W.2d 884—Southern Travelers' Ass'n v. Wright, Civ.App., 20 S. W.2d 1093, reversed on other grounds, Com.App., 34 S.W.2d 823.

Wyo.—O'Mally v. Eagan, 2 P.2d 1063, 43 Wyo. 233, 77 A.L.R. 582, rehearing denied O'Malley v. Eagan, 5 P.2d 276, 43 Wyo. 350.

33 C.J. p 1185 note 52.

Purpose of rule

The rule permitting judgment notwithstanding verdict when motion for directed verdict should have been sustained has for its purpose the giving of an opportunity to the trial court to correct its error in failing to sustain a motion for a directed verdict.—Friedman v. Colonial Oil Co., Iowa, 18 N.W.2d 196.

Incontrovertible physical facts rule

(1) Where physical facts are such that it is impossible for accident to have happened in manner claimed, judge may set aside verdict for plaintiff and order one for defendant.

Mich.—Brenner v. Dykstra, 286 N. W. 623, 289 Mich. 301—Nelson v. Linderman, 284 N.W. 693, 288 Mich. 186—Dzikowski v. Michigan Cent. R. R., 276 N.W. 470, 282 Mich. 337.

Minn.—Karras v. Great Northern Ry. Co., 208 N.W. 655, 167 Minn. 140.

Pa.—Weiner v. Philadelphia Rapid Transit Co., 165 A. 252, 310 Pa. 415—Hawk v. Pennsylvania R. Co., 160 A. 862, 307 Pa. 214—Adams v. Gardiner, 160 A. 589, 306 Pa. 576—Folger v. Pittsburgh Rys. Co., 139 A. 858, 291 Pa. 205 —Brett v. Philadelphia Transp. Co., 36 A.2d 230, 154 Pa.Super. 429.

(2) The rule applies only in clearest of cases and never where there are variable and doubtful estimates and where testimony of witnesses is needed in order to apply evidence to the issue.—Mautino v. Piercedale Supply Co., 13 A.2d 51, 338 Pa. 435.

(3) Testimony of plaintiff in automobile accident case as to respective location of vehicles before collision was held not to warrant judgment notwithstanding verdict, on ground of opposition to incontrovertible physical facts, in view of different testimony given by plaintiff's witnesses.—Hoff v. Tavani, 170 A. 384, 111 Pa.Super. 567.

Test of right to judgment notwithstanding verdict is whether, at close of trial, trial court should have given binding instructions.—Pfeiffer v. Kraske, 11 A.2d 555, 139 Pa.Super. 92—McDonough v. Borough of Munhall, 193 A. 326, 127 Pa.Super. 226, reversed on other grounds 200 A. 638, 331 Pa. 468—Hahn v. Anderson, 187 A. 450, 123 Pa.Super. 442, modified on other grounds 192 A. 489, 326 Pa. 463—Lessy v. Great Atlantic & Pacific Tea Co., 183 A. 657, 121 Pa.Super. 440—Ellsworth v. Husband, 181 A. 90, 119 Pa.Super. 245.

Failure to object to immaterial testimony

The fact that there was no objection made to certain immaterial testimony at the time it was given would not preclude the trial court from sustaining motion for judgment non obstante veredicto.—In re Rentfro's Estate, 79 P.2d 1042, 103 Colo. 400.

Procedure held regular

There was nothing irregular in trial court's procedure in receiving jury's attempt to answer three special issues of fact, in discharging jury, which had answered one of the inquiries with a report that the others could not be agreed on, and in then granting judgment non obstante veredicto in plaintiff's favor on ground that plaintiff's prior motion for peremptory instruction made at close of all evidence had been well taken and should have been granted instead of overruled, and judgment was not subject to objection that there had been a further trial of cause in the sense that additional evidence and argument had been heard by court subsequent to discharge of jury and that court had entered judgment on the verdict. —Hutchison v. East Texas Oil Co., Tex.Civ.App., 167 S.W.2d 205, error refused.

Power similar to that of appellate court

Power of trial court to render judgment non obstante veredicto is the same power exercised by appellate court when it reverses and renders a case, where trial court erroneously refuses a peremptory instruction.—Johnson v. Moody, Tex.Civ. App., 104 S.W.2d 583, error dismissed.

In Oklahoma

The court is not authorized to render a judgment notwithstanding the verdict because the evidence shows as a matter of law that the court should have directed a verdict in favor of the losing party.—St. Louis-San Francisco Ry. Co. v. Eakins, 284 P. 866, 141 Okl. 256—Thompson v. Florence, 274 P. 671, 135 Okl. 116—St. Louis-San Francisco Ry.

is not warranted merely because the trial court, in its discretion, ought to have granted a new trial.[16]

(2) Particular Matters Affecting Right to Remedy

(a) Motion for directed verdict as prerequisite to relief

(b) Sufficiency of evidence to raise jury question

(c) Other matters

(a) Motion for Directed Verdict as Prerequisite to Relief

Under some statutes it is prerequisite to a judgment notwithstanding the verdict that the moving party has moved to direct a verdict in his favor at the close of the testimony.

It is a prerequisite to a judgment notwithstanding the verdict, under some statutes, that the moving party has moved to direct a verdict in his favor at the close of the testimony,[17] but it has been held that the motion for a directed verdict need not be in correct technical form,[18] although a mere statement by counsel that he intended to ask for an instructed verdict[19] or that he thought a motion for

Co. v. Bell, 273 P. 243, 134 Okl. 251—Odom v. Cedar Rapids Sav. Bank, 244 P. 758, 114 Okl. 126—McAlester v. Bank of McAlester, 218 P. 839, 95 Okl. 193.

16. Minn.—Building Ass'n of Duluth Odd Fellows v. Van Nispen, 20 N.W.2d 90—Mardorf v. Duluth-Superior Transit Co., 261 N.W. 177, 194 Minn. 537.
33 C.J. p 1186 note 58.

17. Cal.—In re Caldwell's Estate, 16 P.2d 139, 216 Cal. 694—In re Yale's Estate, 4 P.2d 153, 214 Cal. 115—Cushman v. Cliff House, 250 P. 575, 79 Cal.App. 572—Machado v. Weston, 14 P.2d 907, 126 Cal. App. 661—In re Easton's Estate, 5 P.2d 635, 118 Cal.App. 659.
Idaho.—Helgeson v. Powell, 34 P.2d 957, 54 Idaho 667.
Md.—Hajewski v. Baltimore County Com'rs, 40 A.2d 316.
Mich.—Forman v. Prudential Ins. Co. of America, 16 N.W.2d 696, 310 Mich. 145.
Minn.—Wilcox v. Schloner, 23 N.W. 2d 19—Johnson v. Whitney, 14 N. W.2d 765, 217 Minn. 468—Raspler v. Seng, 11 N.W.2d 440, 215 Minn. 596—Callahan v. City of Duluth, 267 N.W. 361, 197 Minn. 403—Gendler v. S. S. Kresge Co., 263 N.W. 925, 195 Minn. 578—Olson v. Heise, 260 N.W. 227, 194 Minn. 280, rehearing denied 261 N.W. 476, 194 Minn. 280—Anderson v. Newsome, 258 N.W. 157, 193 Minn. 157—Donnelly v. Stepka, 257 N.W. 505, 193 Minn. 11—Romann v. Bender, 252 N.W. 80, 190 Minn. 419—Krocak v. Krocak, 249 N.W. 671, 189 Minn. 346—Timmins v. Pfeifer, 230 N.W. 260, 180 Minn. 1—Johnson v. Hegland, 222 N.W. 272, 175 Minn. 592—Wilcox v. Wiggins, 207 N.W. 23, 166 Minn. 124—Yencho v. Kruly, 197 N.W. 752, 158 Minn. 408—Friedland v. Hacking, 197 N.W. 751, 158 Minn. 389—Funkley v. Ridgway, 197 N.W. 280, 158 Minn. 265—Young v. Yeates, 190 N.W. 791, 153 Minn. 366.
N.D.—Baird v. Stephens, 228 N.W. 212, 58 N.D. 812—Gross v. Miller, 200 N.W. 1012, 51 N.D. 755—Carson State Bank v. Grant Grain Co., 197 N.W. 146, 50 N.D. 558—Ennis v. Retail Merchants' Ass'n Mut. Fire Ins. Co., 156 N.W. 234, 33 N.D. 20.
33 C.J. p 1186 note 59.

Counterclaim

Plaintiffs' motion for a judgment notwithstanding verdict was properly granted despite plaintiffs' failure to move for a directed verdict on defendant's counterclaim since plaintiffs' motion for a directed verdict on his complaint automatically included the counterclaim pleaded by defendant as a defense in his answer, and there is no requirement that it be especially mentioned in a motion for a directed verdict made by plaintiff on his complaint.—Doyle v. McPherson, 97 P.2d 249, 36 Cal. App.2d 81.

Motion held sufficient

Cal.—In re Ross' Estate, 22 P.2d 22, 131 Cal.App. 635.

Proposition not raised

Where plaintiff's motion for judgment notwithstanding the verdict pursuant to rule was based on a proposition not raised in plaintiff's motion for a directed verdict, situation was the same as though plaintiff had made no motion for a directed verdict and plaintiff had no right to the remedy.—Friedman v. Colonial Oil Co., Iowa, 18 N.W.2d 196.

Judgment held erroneous where record disclosed that no request for peremptory instruction was made.—Hall v. Barrett, Tex.Civ.App., 126 S.W.2d 1045.

In Pennsylvania

(1) Party presenting no written point for binding instructions was in no position to move for judgment non obstante veredicto.—Roberts v. Washington Trust Co., 170 A. 291, 313 Pa. 584, certiorari denied 54 S.Ct. 778, 292 U.S. 608, 78 L.Ed. 1469, and rehearing denied 54 S.Ct. 857, 292 U.S. 613, 78 L.Ed. 1472—Traders' Securities Co. v. Kalil, 162 A. 499, 107 Pa.Super. 215—Commonwealth v. Keller, 162 A. 474, 106 Pa. Super. 458—Pennsylvania R. Co. v. Osborn, 161 A. 756, 106 Pa.Super. 45—Carl v. Grand Union Co., 161 A. 429, 105 Pa.Super. 371—Smith v. Graham, 101 Pa.Super. 604—Good Fellowship Building & Loan Ass'n, v. Crown Building & Loan Ass'n, 101 Pa.Super. 393—Loder v. Hamilton Tp., 100 Pa.Super. 103—Petroleum Fuel Engineering Co. v. Hemphill, 94 Pa.Super. 362—Thomas F. Leonard Co. v. Scranton Coca-Cola Bottling Co., 90 Pa.Super. 360—Peterson v. Coles, 81 Pa.Super. 277—Ransberry v. Fulmer, 80 Pa.Super. 512—Standard Brewing Co. v. Knapp Co., 79 Pa.Super. 252—Waugaman v. Henry, 75 Pa.Super. 94—Tomko v. Union Township, 44 Pa.Co. 631, 12 Sch.Leg.Reg. 341—Roney v. Thompson, Com.Pl., 27 Del.Co. 589—Diehl v. Central Printing Co., Com. Pl., 33 Luz.Leg.Reg. 430—Mammorella v. Peca, Com.Pl., 4 Sch.Reg. 445, 52 York Leg.Rec. 8—Acks v. Axe, Com.Pl., 52 York Leg.Rec. 41.

(2) Defect in that points of law on which motion for judgment non obstante veredicto was based were presented by oral request is not cured by order correcting record nunc pro tunc.—Thomas F. Leonard Co. v. Scranton Coca-Cola Bottling Co., 90 Pa.Super. 360.

(3) Motion for judgment for defendant, made after plaintiff rested, and followed by presentation of defendant's case, is not according to statute.—Updegrave v. Alex, 94 Pa. Super. 29.

(4) Procedure prescribed by statute respecting entry of judgment on whole record was not intended as substitute for nonsuit.—Updegrave v. Alex, supra.

(5) Record was held to disclose that, as basis for judgment notwithstanding verdict, defendant had submitted written points for binding instructions.—Weigand v. Standard Motor Co., 167 A. 493, 109 Pa.Super. 256.

18. Md.—Atlantic Refining Co. v. Forrester, 25 A.2d 667, 180 Md. 517.

19. Cal.—In re Caldwell's Estate, 16 P.2d 139, 216 Cal. 694.

a directed verdict would be in order[20] is not sufficient. There is no sufficient compliance with the statute where the motion for directed verdict was made, over objection of opposing counsel, after the jury had returned its verdict;[21] and the deficiency cannot be corrected by a nunc pro tunc order.[22] A requested instruction for a verdict and the refusal thereof are not equivalent to a motion for a directed verdict and an order denying the motion which, by statute, are made prerequisite to a judgment notwithstanding the verdict.[23]

(b) Sufficiency of Evidence to Raise Jury Question

A judgment notwithstanding the verdict will not be entered where the evidence raises an issue for the jury, as where there is evidence reasonably tending to support the verdict or where there is a substantial conflict in the evidence.

A judgment notwithstanding the verdict will not be entered where the evidence raises an issue for the jury,[24] as where there is evidence reasonably tending to support the verdict;[25] and a like rule ap-

20. Cal.—Hallinan v. Prindle, 29 P. 2d 202, 220 Cal. 46.

21. Minn.—Wilcox v. Schloner, 23 N.W.2d 19.

22. Minn.—Wilcox v. Schloner, supra.

23. Cal.—Hallinan v. Prindle, 29 P. 2d 202, 220 Cal. 46—In re Caldwell's Estate, 16 P.2d 139, 216 Cal. 694—Machado v. Weston, 14 P.2d 907, 126 Cal.App. 661—In re Easton's Estate, 5 P.2d 635, 118 Cal.App. 659.

24. U.S.—Shane v. Commercial Casualty Ins. Co., D.C.Pa., 48 F.Supp. 151, affirmed, C.C.A., Shane v. Barger, 132 F.2d 544.

Colo.—De Boer v. Olmsted, 260 P. 108, 82 Colo. 369.

Ill.—Belcher v. Citizens Coach Co., 57 N.E.2d 659, 324 Ill.App. 226—Vieceli v. Cummings, 54 N.E.2d 717, 322 Ill.App. 559—Janelunas v. John Hancock Mut. Life Ins. Co., 9 N.E.2d 257, 291 Ill.App. 604—Hicks v. Swift & Co., 1 N.E.2d 918, 285 Ill.App. 1.

Mich.—Thelen v. Mutual Benefit Health & Accident Ass'n, 7 N.W. 2d 128, 304 Mich. 17—Freedman v. Burton, 274 N.W. 766, 281 Mich. 208—Davis v. Belmont Creamery Co., 274 N.W. 749, 281 Mich. 165—In re Lane's Estate, 274 N.W. 714, 281 Mich. 70.

Minn.—Solberg v. Minneapolis St. Ry. Co., 7 N.W.2d 926, 214 Minn. 274—Weber v. St. Anthony Falls Water Power Co., 7 N.W.2d 339, 214 Minn. 1.

N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561—Olstad v. Stockgrowers Credit Corporation, 266 N.W. 109, 66 N.D. 416.

Ohio.—Flynn v. Sharon Steel Corporation, 50 N.E.2d 819, 142 Ohio St. 145—Chenoweth v. Cary, App., 31 N.E.2d 716, appeal dismissed 23 N.E.2d 949, 136 Ohio St. 123.

Or.—Parker v. Pettit, 138 P.2d 592, 171 Or. 481.

Pa.—Dempsey v. First Nat. Bank of Scranton, 46 A.2d 160, 353 Pa. 473—Reiser v. Smith, 195 A. 56, 328 Pa. 292—Naugle v. Reading Co., 21 A.2d 109, 145 Pa.Super. 341—Kissinger v. Pittsburgh Rys. Co., 180 A. 137, 119 Pa.Super. 110—Letvin v. Phœnix Ins. Co., 87 Pa. Super. 402—Groskin v. Knight, 8 Pa.Dist. & Co. 413, affirmed 138 A. 843, 290 Pa. 274—Bayer v. Cronauer, Com.Pl., 37 Luz.Leg.Reg. 261.

S.D.—Mills v. Armstrong, 13 N.W.2d 726.

Tex.—Casey v. Jones, Civ.App., 189 S.W.2d 515—Maryland Casualty Co. v. Stewart, Civ.App., 164 S.W. 2d 800, error refused—Johnson v. Stickney, Civ.App., 152 S.W.2d 921—Citizens State Bank of Houston v. Giles, Civ.App., 145 S.W.2d 899, error dismissed—Barrett v. Commercial Standard Ins. Co., Civ. App., 145 S.W.2d 315—Gumm v. Chalmers, Civ.App., 127 S.W.2d 942, modified on other grounds Chalmers v. Gumm, 154 S.W.2d 640, 137 Tex. 467—Johnson v. Moody, Civ.App., 104 S.W.2d 583, error dismissed—Christopher v. City of El Paso, Civ.App., 98 S.W. 2d 394, error dismissed—Spence v. National Life & Accident Ins. Co., Civ.App., 59 S.W.2d 212.

38 C.J. p 1184 note 51 [c] (2), p 1185 note 56.

25. Fla.—Norwich Union Indemnity Co. v. Willis, 168 So. 418, 124 Fla. 137, 127 Fla. 238.

Idaho.—In re Randall's Estate, 70 P.2d 389, 58 Idaho 143.

Ill.—Berg v. New York Cent. R. Co., 62 N.E.2d 676, 391 Ill. 52—Todd v. S. S. Kresge Co., 52 N.E.2d 206, 384 Ill. 524—Neering v. Illinois Cent. R. Co., 50 N.E.2d 497, 383 Ill. 366, mandate conformed to 53 N.E.2d 271, 321 Ill.App. 625—Gnat v. Richardson, 39 N.E.2d 337, 378 Ill. 626—Walaite v. Chicago, R. I. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59—Anderson v. Krancic, 66 N. E.2d 316, 328 Ill.App. 364—Dickinson v. Rockford Van Orman Hotel Co., 63 N.E.2d 257, 326 Ill.App. 686—Hedden v. Farmers Mut. Re-Ins. Co. of Chicago, Ill., 60 N.E.2d 110, 325 Ill.App. 335—Molitor v. Chicago Title & Trust Co., 59 N.E. 695, 325 Ill.App. 124—Hauck v. First Nat. Bank of Highland Park, 55 N.E.2d 565, 323 Ill.App. 300—Bone v. Publix Great States Theatres, 54 N.E.2d 98, 322 Ill.App. 178—Leif v. Fleming, 52 N.E.2d 606, 321 Ill.App. 297—Schwickrath v. Lowden, 46 N.E.2d 162, 317 Ill. App. 431—Gleason v. Cunningham, 44 N.E.2d 940, 316 Ill.App. 286—Lomax v. Brooks, 43 N.E.2d 421, 315 Ill.App. 567—Gant v. McDowell, 38 N.E.2d 530, 312 Ill.App. 378—Ramming v. Belt Ry. Co. of Chicago, 36 N.E.2d 275, 311 Ill.App. 367—Taylor v. Municipal Employes Ins. Ass'n of Chicago, 34 N.E.2d 126, 310 Ill.App. 388—Delling v. Lake View Hospital Ass'n and Training School for Nurses, 33 N.E.2d 915, 310 Ill.App. 155—Boyda Dairy Co. v. Continental Casualty Co., 20 N.E.2d 339, 299 Ill.App. 469—Delyda v. Metropolitan Life Ins. Co., 18 N.E.2d 562, 298 Ill.App. 623—Gardiner v. Richardson, 11 N.E.2d 824, 293 Ill. App. 40—McNeill v. Harrison & Sons, 2 N.E.2d 959, 286 Ill.App. 120.

Kan.—Underhill v. Motes, 165 P.2d 218, 160 Kan. 679—Groom v. Bertoglio, 54 P.2d 992, 143 Kan. 296.

Mich.—Richards v. F. C. Matthews & Co., 239 N.W. 381, 256 Mich. 159—Lewis v. Beaverton Power Co., 204 N.W. 768, 231 Mich. 585—In re Knox's Estate, 190 N.W. 238, 220 Mich. 469.

Minn.—Building Ass'n of Duluth Odd Fellows v. Van Nispen, 20 N.W.2d 90, 220 Minn. 504—Kundiger v. Prudential Ins. Co. of America, 17 N.W.2d 49, 219 Minn. 25—Kundiger v. Metropolitan Life Ins. Co., 15 N.W.2d 487, 218 Minn. 273—Eklund v. Kapetas, 11 N.W.2d 805, 216 Minn. 79—Solberg v. Minneapolis St. Ry. Co., 7 N.W.2d 926, 214 Minn. 274—Goldfine v. Johnson, 294 N.W. 459, 208 Minn. 449—Peterson v. Minnesota Power & Light Co., 288 N.W. 588, 206 Minn. 268—Armstrong v. Brown Bros., Kootz & Co., 277 N.W. 348, 202 Minn. 26—Mardorf v. Duluth-Superior Transit Co., 261 N.W. 177, 194 Minn. 537—Olson v. Heise, 260 N.W. 227, 194 Minn. 280, rehearing denied 261 N.W. 476, 194 Minn. 280—Kingsley v. Alden, 259 N.W. 7, 193 Minn. 503—Stebbins v. Friend, Crosby & Co., 258 N.W.

824, 193 Minn. 446—Donnelly v. Stepka, 257 N.W. 505, 193 Minn. 11—First Nat. Bank v. Fox, 254 N. W. 8, 191 Minn. 318—Thom v. Northern Pac. Ry. Co., 252 N.W. 660, 190 Minn. 622—Stritzke v. Chicago Great Western Ry. Co., 251 N.W. 532, 190 Minn. 323—Trovatten v. Hanson, 213 N.W. 536, 171 Minn. 130—Jepson v. Central Business Men's Ass'n, 209 N. W. 487, 168 Minn. 19—Nelson v. Johnson, 209 N.W. 320, 167 Minn. 430—Farmers' & Merchants' State Bank of New York Mills v. National Surety Co., 203 N.W. 969, 163 Minn. 257—Automotive Co. v. National Fire Ins. Co. of Hartford, 202 N.W. 32, 162 Minn. 34—Dairy Region Land Co. v. Paulson, 199 N.W. 398, 160 Minn. 42—Thomas Keating Co. v. Inland Steel Co., 195 N.W. 1016, 157 Minn. 243—Stoneman v. Smyth, 190 N. W. 605, 153 Minn. 331.

Mo.—American Employers Ins. Co. of Boston, Mass., v. Manufacturers & Mechanics Bank of Kansas City, 85 S.W.2d 174, 229 Mo.App. 994.

N.D.—Maloney v. City of Grand Forks, 15 N.W.2d 769, 73 N.D. 445—Equity Elevator & Trading Co. v. Farmers' & Merchants' Bank, 250 N.W. 529, 64 N.D. 95—Hughes v. Wachter, 238 N.W. 776, 61 N.D. 513—McDonnell v. Monteith, 231 N.W. 854, 59 N.D. 750—Vallely v. Devaney, 194 N.W. 903, 49 N.D. 1107.

Ohio.—Wilkeson v. Erskin & Son, 61 N.E.2d 201, 145 Ohio St. 213—Paul v. Prudential Ins. Co. of America, App., 64 N.E.2d 124—Morgan v. Hunsicker, App., 60 N.E.2d 509—Reitenour v. McClain, App., 57 N. E.2d 78—Wilms v. Klein, App., 49 N.E.2d 76—Holmes v. Employers' Liability Assur. Corporation, Limited, of London, England, 43 N.E.2d 746, 70 Ohio App. 239—Lehrer v. Cleveland Ry. Co., 20 Ohio N.P.,N.S., 481.

Okl.—Stanfield v. Lincoln, 1 P.2d 387, 150 Okl. 289—Reid v. Reid, 241 P. 797, 115 Okl. 58—Oklahoma Products Co. v. Cotton Products Co., 239 P. 656, 111 Okl. 257.

Or.—French v. State Industrial Accident Commission, 68 P.2d 466, 156 Or. 443.

Pa.—Kummerlen v. Pustilnik, 45 A. 2d 27—Cherry v. Mitosky, 45 A.2d 23—Kindt v. Reading Co., 43 A. 2d 145, 352 Pa. 419—Carden v. Philadelphia Transp. Co., 41 A.2d 667, 351 Pa. 407—Young v. Bradford County Telephone Co., 38 A. 2d 47, 350 Pa. 62—MacDonald v. Pennsylvania R. Co., 36 A.2d 492, 348 Pa. 558—Ashworth v. Hannum, 32 A.2d 407, 347 Pa. 393—Frew v. Barto, 26 A.2d 905, 345 Pa. 217—Brown v. George, 25 A.2d 691, 344 Pa. 399—Wascavage v. Susquehanna Collieries Co., 23 A.2d 509, 343 Pa. 529—Srednick v. Sylak, 23 A.2d 333, 343 Pa. 486—Morton v. Borough of Dormont, 22 A. 2d 738, 343 Pa. 432—Welch v. Sultez, 13 A.2d 399, 338 Pa. 583—Pearlman v. Metropolitan Life Ins. Co., 9 A.2d 432, 336 Pa. 444—Powell v. Ligon, 5 A.2d 373, 334 Pa. 250—Kennedy v. Southern Pennsylvania Traction Co., 3 A.2d 395, 333 Pa. 406—Iacovino v. Caterino, 2 A.2d 828, 332 Pa. 556—Voltz v. General Motors Acceptance Corporation, 2 A.2d 697, 332 Pa. 141—Hahn v. Anderson, 192 A. 489, 326 Pa. 463—Murray v. City of Clairton, 191 A. 618, 326 Pa. 180—Smith v. Penn Tp. Mut. Fire Ass'n of Lancaster County, 186 A. 130, 323 Pa. 93—Majewski v. Lempka, 183 A. 777, 321 Pa. 369—Walters v. Western & Southern Life Ins. Co., 178 A. 499, 318 Pa. 382—Strong v. Jarka Corporation of Philadelphia, 176 A. 732, 317 Pa. 317—Brzyski v. Schreiber, 171 A. 614, 314 Pa. 353—Keck v. Philadelphia Rapid Transit Co., 171 A. 478, 314 Pa. 389—Ferguson v. Charis, 170 A. 131, 313 Pa. 164—Vlasich v. Baltimore & O. R. Co., 161 A. 70, 307 Pa. 255—Guilinger v. Pennsylvania R. Co., 155 A. 293, 304 Pa. 140—Kellogg v. Pennsylvania R. Co., 155 A. 296, 304 Pa. 149—Darlington v. Bucks County Public Service Co., 154 A. 501, 303 Pa. 288—Freedom Oil Works Co. v. Williams, 152 A. 741, 302 Pa. 51—Kuhns v. New York Life Ins. Co., 147 A. 76, 297 Pa. 418—Statler v. Pennsylvania R. Co., 145 A. 861, 296 Pa. 222—Kent v. General Chemical Co., 131 A. 588, 285 Pa. 34—Dunn v. Hatch Motors Co., 126 A. 349, 281 Pa. 224—Maisel v. Patrick Corr & Sons, 121 A. 61, 277 Pa. 331—Davis v. Carroll-Porter Boiler & Tank Co., 119 A. 742, 276 Pa. 71—Moyer v. Pittsburgh, M. & B. Ry. Co., 119 A. 469, 275 Pa. 363—Ondo v. Greek Catholic Union of Russian Brotherhoods of U. S. A., 38 A.2d 370, 155 Pa.Super. 492—Hindes v. City of Pittsburgh, 38 A.2d 420, 155 Pa.Super. 314—Holland v. Kohn, 38 A.2d 500, 155 Pa.Super. 95—Dick v. West Penn Rys. Co., 33 A.2d 792, 153 Pa. Super. 281—Shugats v. Metropolitan Life Ins. Co., 33 A.2d 650, 153 Pa.Super. 51—Trostel v. Reading Steel Products Corporation, 31 A.2d 909, 152 Pa.Super. 273—Gerber v. Jones, 30 A.2d 534, 151 Pa.Super. 489—Smith v. Coca Cola Bottling Co., 33 A.2d 488, 152 Pa.Super. 445—Smolinsky v. Metropolitan Life Ins. Co., 26 A.2d 131, 149 Pa.Super. 72—Moyer v. Reading Co., 24 A.2d 48, 147 Pa.Super. 178—Watson v. Metropolitan Life Ins. Co., 21 A.2d 503, 145 Pa.Super. 369—Blair, to Use of Davis, v. Adamchick, 21 A. 2d 107, 145 Pa.Super. 125—Szidor v. Greek Catholic Union of Russian Brotherhoods of U. S., 21 A.2d 104, 145 Pa.Super. 251—Steingart v. Kaney, 19 A.2d 499, 144 Pa.Super. 534—Hanrahan v. John Hancock Mut. Life Ins. Co., 18 A.2d 512, 143 Pa.Super. 557—Willetts v. Butler Tp., 15 A.2d 392, 141 Pa.Super. 394—Mitchell v. First Nat. Bank, 7 A.2d 513, 136 Pa.Super. 467—Johnson v. Staples, 5 A.2d 433, 135 Pa.Super. 274—Quinter v. Bloch, 197 A. 539, 130 Pa.Super. 348—Kovacs v. Ajhar, 196 A. 876, 130 Pa.Super. 149—Tomko v. Feldman, 194 A. 338, 128 Pa.Super. 429—Lessy v. Great Atlantic & Pacific Tea Co., 183 A. 657, 121 Pa.Super. 440—Young v. Yellow Cab Co., 180 A. 63, 118 Pa.Super. 495—Rzasa v. Gorniak, 174 A. 659, 115 Pa.Super. 47—Klein v. Weissberg, 174 A. 636, 114 Pa.Super. 569—Williams v. Southern Mut. Ins. Co. of Lancaster County, 164 A. 128, 108 Pa. Super. 148, affirmed 166 A. 582, 312 Pa. 114—Turner v. Philadelphia Rapid Transit Co., 100 Pa. Super. 291—Loder v. Hamilton Tp., 100 Pa.Super. 103—Smith v. Walat & Stutzman, 99 Pa.Super. 147—Columbia Fur Co. v. Needro, 97 Pa.Super. 389—Robert M. Green & Sons Co. v. Hazlett & Johnston, 96 Pa.Super. 460—Tompkins v. Headley, 96 Pa.Super. 133—Wright v. Borough of Bellefonte, 95 Pa.Super. 196—Kaufman v. Lehman, 94 Pa.Super. 306—Curry v. Wolstencroft, 93 Pa.Super. 13—Boley & Boley v. Borough of Glassport, 91 Pa.Super. 247—Philadelphia Inquirer Co. v. Sabia, 90 Pa.Super. 266—Donovan v. People's Natural Gas Co., 84 Pa.Super. 51—Jones v. East Fayette Coal Co., 83 Pa. Super. 341—Voltz v. Erie County, 81 Pa.Super. 467—Harris & Konick v. Gottlieb, 81 Pa.Super. 186—Molinaro v. Davis, 80 Pa.Super. 597—Robert J. Ward & Co. v. Miller, 80 Pa.Super. 259—Flood v. Connor, 80 Pa.Super. 54—Hawkins v. Philadelphia Rapid Transit Co., 79 Pa.Super. 453—Weaver v. Collins' Adm'x, 79 Pa.Super. 289—Harter v. Altoona & Logan Valley Electric Ry. Co., 79 Pa.Super. 25—Swartz v. Stein & Levy, 78 Pa. Super. 515—Fissell v. Hines, 78 Pa.Super. 179—Cloud v. Philadelphia & West Chester Traction Co., 78 Pa.Super. 85, followed in 78 Pa.Super. 92—Clark v. Neshannock Stone Co., 41 Pa.Super. 34—Barnhart v. Herring, 54 Pa.Dist. & Co. 526—DeCheck v. Clancy, 53 Pa.Dist. & Co. 618, 93 Pittsb.Leg. J. 305, 59 York Leg.Rec. 87—Rosenberger v. Butz, 37 Pa.Dist. & Co. 406, 18 Leh.L.J. 355—Honesdale Nat. Bank v. Klein, 37 Pa. Dist. & Co. 370, 41 Lack.Jur. 191—Wade v. Cleavenger, 34 Pa.Dist. & Co. 297, 86 Pittsb.Leg.J. 627—Dommes v. Zuroski, Com.Pl., 35 Berks Co. 429, affirmed 38 A.2d 73,

350 Pa. 206—Parsons v. Motor Freight Express, Com.Pl., 35 Berks Co. 245—Bekelja v. James E. Strates Shows, Inc., Com.Pl., 56 Dauph.Co. 317—Sanders v. Brown, Com.Pl., 54 Dauph.Co. 272—Anstine v. Pennsylvania R. Co., Com.Pl., 52 Dauph.Co. 372—West v. Morgan, Com.Pl., 52 Dauph.Co. 361, affirmed 27 A.2d 46, 345 Pa. 61—McKenzie Co. v. Fidelity & Deposit Co. of Maryland, Com.Pl., 52 Dauph.Co. 210—Frew v. Barto, Com.Pl., 52 Dauph.Co. 147, affirmed 26 A.2d 905, 345 Pa. 217—Greiner v. Turby, Com.Pl., 52 Dauph.Co. 131—McGarvey v. Mages, Com.Pl., 50 Dauph.Co. 128—Pote v. Dauphin Deposit Trust Co., Com.Pl., 49 Dauph.Co. 307—Eckenrode v. Produce Trucking Co., Com.Pl., 49 Dauph.Co. 271—Weiser v. Michlovitz, Com.Pl., 48 Dauph. 106—Pennell v. Bainbridge, Com.Pl., 47 Dauph.Co. 224—Webb v. Hess, Com.Pl., 46 Dauph.Co. 84—Stuart v. Ashenfelter, Com.Pl., 46 Dauph. Co. 31—McLaughlin v. Southern Pennsylvania Traction Co., Com.Pl., 32 Del.Co. 252—Freeman v. MacDonald, Com.Pl., 31 Del.Co. 165—Fidelity-Philadelphia Trust Co. v. Dreslin, Com.Pl., 30 Del.Co. 351—Bair v. Newgeon, Com.Pl., 29 Del.Co. 544—Hoover v. Montgomery, Com.Pl., 29 Del.Co. 466—Maher v. Washington Nat. Ins. Co., Com.Pl., 29 Del.Co. 267—Struchen v. Thomas, Com.Pl., 23 Erie Co. 253—Trebucza v. Nelson, Com.Pl., 22 Erie Co. 4—Palmer v. City of Erie, Com.Pl., 20 Erie Co. 400, affirmed 9 A.2d 378, 337 Pa. 5—Morrison v. Gordon, Com.Pl., 20 Erie Co. 350—Madigan v. H. B. Sproul Constr. Co., Com.Pl., 44 Lack.Jur. 73, 4 Monroe L.R. 123—Grabin v. Caffrey, Com.Pl., 42 Lack.Jur. 194—Keating v. Wagner, Com.Pl., 42 Lack.Jur. 84—Snyder v. Passen, Com.Pl., 42 Lack.Jur. 39—Crystal & Son v. Gerson, Com.Pl., 41 Lack. Jur. 185—Glidden Co. v. Sullum, Com.Pl., 40 Lack.Jur. 191—Fegley v. Vogel-Ritt, Inc., Com.Pl., 21 Leh.L.J. 306—Hamm v. Teyka, Com.Pl., 18 Leh.L.J. 218—Palaschak v. Borro, Com.Pl., 36 Luz.Leg. Reg. 361—Fierro v. Friel, Com. Pl., 35 Luz.Leg.Reg. 186—Wildoner v. Sutton, Com.Pl., 34 Luz.Leg. Reg. 118—Szusta v. Krawiec, Com. Pl., 34 Luz.Leg.Reg. 61, affirmed 19 A.2d 495, 144 Pa.Super. 530—Watson v. Metropolitan Life Ins. Co., Com.Pl., 33 Luz.Leg.Reg. 463—Morris v. White, Com.Pl., 33 Luz.Leg.Reg. 437—Wereszinski v. Prudential Ins. Co. of America, Com.Pl., 32 Luz.Leg.Reg. 412—Harr v. Gaydos, Com.Pl., 32 Luz. Leg.Reg. 169—Schenker v. Indemnity Ins. Co. of North America, Com.Pl., 2 Monroe L.R. 141, 10 Som.Leg.J. 180, affirmed 16 A.2d 304, 340 Pa. 81—Bruno v. Buffalo Amusement Co., Com.Pl., 56 Montg. Co. 51—Wissahickon Building & Loan Ass'n v. Du Bois, Com.Pl., 54 Montg.Co. 404—Silvamo v. Metropolitan Life Ins. Co., Com.Pl., 14 Northumb.L.J. 321, reversed on other grounds 5 A.2d 423, 135 Pa. Super. 260—Diggan v. York-Buffalo Motor Express, Com.Pl., 13 Northumb.Leg.J. 381—Ciaffoni v. Middlebrook, Com.Pl., 94 Pittsb. Leg.J. 16—Humenick v. Carfagna, Com.Pl., 94 Pittsb.Leg.J. 6, 59 York Leg.Rec. 163—Urben v. Pittsburgh Rys. Co., Com.Pl., 93 Pittsb.Leg.J. 439—Kuhn v. Massachusetts Mut. Life Ins., Com.Pl., 89 Pittsb.Leg.J. 544—Smith v. Prudential Ins. Co., Com.Pl., 87 Pittsb.Leg.J. 367—Vallino v. Klein, Com.Pl., 87 Pittsb.Leg.J. 227—Wargovich v. Metropolitan Life Ins. Co., Com.Pl., 86 Pittsb.Leg.J. 459, affirmed 7 A.2d 568, 136 Pa. Super. 421—Spern v. Globe & Republic Ins. Co., Com.Pl., 85 Pittsb. Leg.J. 774—Hoy v. Wolfgang, Com.Pl., 7 Sch.Reg. 77—Schulkind v. Dropkin, Com.Pl., 7 Sch.Reg. 17—Gaidos v. McCans, Com.Pl., 22 Wash.Co. 140—Mellon v. Singer Sewing Mach. Co., Com.Pl., 22 Wash.Co. 75, affirmed 25 A.2d 807, 344 Pa. 390—Mesko v. Prudential Ins. Co., Com.Pl., 20 Wash.Co. 133—Sutherland v. Bellairt, Com.Pl., 20 Wash.Co. 103—Stage v. Dailey, Com.Pl., 20 Wash.Co. 51—Kirr v. Suwak, 20 Wash.Co. 1, affirmed 9 A.2d 735, 336 Pa. 561—Dinch v. Pennsylvania R. Co., Com.Pl., 19 Wash.Co. 174—Snee v. Dunn, Com. Pl., 19 Wash.Co. 94—Carnegie v. Townsend, Com.Pl., 18 Wash.Co. 190—White v. Davies, Com.Pl., 18 Wash.Co. 179—McElfresh v. O'Brien, Com.Pl., 18 Wash.Co. 114—Dunmire v. Fitzgerald, Com.Pl., 27 West.Co. 223—Zuliskey v. Prudential Ins. Co. of America, Com. Pl., 27 West.Co. 173—Bittner v. Greensboro Gas Co., Com.Pl., 27 West.Co. 129—Shaffer v. Johnston, Com.Pl., 23 West.Co. 67—Richey v. York County Nat. Bank, Com.Pl., 53 York Leg.Rec. 145, affirmed 15 A.2d 737, 142 Pa.Super. 236.

S.C.—Cooper & Griffin v. Bridwell, 181 S.E. 56, 177 S.C. 219.

Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253—Dallas County v. Miller, 166 S.W.2d 922, 140 Tex. 242—Rodriguez v. Higginbotham-Bailey-Logan Co., 160 S.W.2d 234, 138 Tex. 476—Le Master v. Fort Worth Transit Co., 160 S.W.2d 224, 138 Tex. 512—Dickson v. Kilgore State Bank, Com.App., 257 S.W. 867—Barrick v. Gillette, Civ.App., 187 S.W.2d 683—Texas Prudential Ins. Co. v. Knighten, Civ.App., 186 S. W.2d 843—Ward v. Strickland, Civ. App., 177 S.W.2d 79, error refused—Shield Co. v. Cartwright, Civ. App., 172 S.W.2d 108, affirmed 177 S.W.2d 954, 142 Tex. 324—Warren v. Schawe, Civ.App., 163 S.W.2d 415, error refused—Happ v. Happ, Civ.App., 160 S.W.2d 227, error refused—Curington v. Parks, Civ. App., 158 S.W.2d 839—Elkins v. Super-Cold Southwest Co., Civ. App., 157 S.W.2d 946, reversed on other grounds Super-Cold Southwest Co. v. Elkins, 166 S.W.2d 97, 140 Tex. 48—Carrell v. Dallas Railway & Terminal Co., Civ.App., 151 S.W.2d 869, error dismissed, judgment correct—Walker v. Texas & N. O. R. Co., Civ.App., 150 S.W.2d 853, error dismissed, judgment correct—Citizens State Bank of Houston v. Giles, Civ.App., 145 S.W.2d 899, error dismissed—Marlett v. Brownfield, Civ.App., 145 S.W.2d 636—Heath v. Elliston, Civ.App., 145 S.W.2d 243, error dismissed, judgment correct—Justiss v. Naquin, Civ.App., 137 S.W. 2d 72, error dismissed, judgment correct—Dutton v. Kinsey, Civ. App., 124 S.W.2d 446—Whiteman v. Harris, Civ.App., 123 S.W.2d 699, error refused—McCray Refrigerator Sales Corporation v. Johnson, Civ.App., 121 S.W.2d 410, error dismissed—Thompson v. Jones, Civ.App., 116 S.W.2d 778—Arnim v. Rauch, Civ.App., 113 S.W.2d 699, reversed by agreement—Clark v. Price, Civ.App., 112 S. W.2d 256, error dismissed—Draper v. Presley, Civ.App., 111 S.W.2d 1124, error dismissed—Robinson v. Fort Worth Hospitals Holding Corporation, Civ.App., 109 S.W.2d 1077, error dismissed—Johnson v. Moody, Civ.App., 104 S.W.2d 583, error dismissed—McClendon v. Southwestern Life Ins. Co., Civ. App., 98 S.W.2d 866—Mitchell v. Heard, Civ.App., 98 S.W.2d 832—Duvall v. Kansas City Life Ins. Co., Civ.App., 96 S.W.2d 793, modified on other grounds and rehearing denied 104 S.W.2d 10, affirmed Kansas City Life Ins. Co. v. Duvall, 104 S.W.2d 11, 129 Tex. 287—J. S. Curtiss & Co. v. White, Civ. App., 90 S.W.2d 1095. Error dismissed by agreement—Joiner v. Joiner, Civ.App., 87 S.W.2d 903, reversed on other grounds 112 S.W. 2d 1049, 131 Tex. 27—Amarillo Transfer & Storage Co. v. De Shong, Civ.App., 82 S.W.2d 381—St. Louis, B. & M. Ry. Co. v. Little, Civ.App., 81 S.W.2d 122—Newton v. McCarrick, Civ.App., 75 S. W.2d 472, error dismissed—Freeman v. Schwenker, Civ.App., 73 S. W.2d 609—Guinn v. Coates, Civ. App., 67 S.W.2d 621—White Sewing Mach. Co. v. Armstrong, Civ. App., 30 S.W.2d 362, error dismissed—Schwabe v. Kemp & Coldwell, Civ.App., 20 S.W.2d 273, error refused—Jopling v. Caldwell-Degenhardt, Civ.App., 292 S.W. 958, reversed on other grounds Benton

plies where there is a conflict in the evidence,[26] | even though the conflict is such that the trial court

Land Co. v. Jopling, Com.App., 300 S.W. 28—Lee v. Lewis, Civ.App., 287 S.W. 115, affirmed, Com.App., 298 S.W. 408.

Vt.—Collins v. Fogg, 8 A.2d 684, 110 Vt. 465—Northeastern Nash Automobile Co. v. Bartlett, 136 A. 697, 100 Vt. 246.

Va.—Standard Dredging Co. v. Barnalla, 163 S.E. 367, 158 Va. 367.

Wash.—Carlson v. Wolski, 147 P.2d 291, 20 Wash.2d 328—Ballard v. Yellow Cab Co., 145 P.2d 1019, 20 Wash.2d 67—Flyzik v. Travelers Ins. Co., 145 P.2d 539, 20 Wash.2d 35—Codd v. Westchester Fire Ins. Co., 128 P.2d 968, 14 Wash.2d 600, 151 A.L.R. 316—Briggs v. United Fruit & Produce, 119 P.2d 687, 11 Wash.2d 466—Griffin v. Cascade Theatres Corporation, 117 P.2d 651, 10 Wash.2d 574—Moen v. Chestnut, 113 P.2d 1030, 9 Wash.2d 93—Corbaley v. Pierce County, 74 P.2d 993, 192 Wash. 688—De Nune v. Tibbitts, 73 P.2d 521, 192 Wash. 279—Caylor v. B. C. Motor Transp., 71 P.2d 162, 191 Wash. 365—Young v. Smith, 7 P.2d 1, 166 Wash. 411—Beglinger v. Shields, 2 P.2d 681, 164 Wash. 147—Fleming v. Buerkli, 293 P. 462, 159 Wash. 460—Collins v. Barmon, 260 P. 245, 145 Wash. 383—Tonkon v. Small, 255 P. 1033, 143 Wash. 665—Wimmer v. Parsons, 251 P. 868, 141 Wash. 422—Lian v. Huglen, 251 P. 585, 141 Wash. 369—Stickney v. Congdon, 250 P. 32, 140 Wash. 670—Blouen v. Quimpere Canning Co., 247 P. 940, 139 Wash. 436—Bridgeport State Bank v. Union Warehouse & Milling Co., 242 P. 13, 137 Wash. 190—Hudson v. Pacific Northwest Traction Co., 238 P. 982, 136 Wash. 4—Heaton v. Smith, 235 P. 958, 134 Wash. 450, reheard 240 P. 362, 136 Wash. 695—Lydon v. Exchange Nat. Bank, 235 P. 27, 134 Wash. 188—Hansen v. Sandvik, 222 P. 205, 128 Wash. 60—Metropolitan Club v. Massachusetts Bonding & Insurance Co., 220 P. 818, 127 Wash. 320—Rieper v. General Cigar Co., 209 P. 849, 121 Wash. 427.

Wis.—Wisconsin Tel. Co. v. Russell, 7 N.W.2d 825, 242 Wis. 247—Perkie v. Carolina Ins. Co., 6 N.W.2d 195, 241 Wis. 378—Cranston v. Railway Express Agency, 297 N.W. 418, 237 Wis. 479—Koscuik v. Sherf, 272 N.W. 8, 224 Wis. 217—Scory v. La Fave, 254 N.W. 643, 215 Wis. 21—Twist v. Minneapolis, St. P. & S. S. M. Ry. Co., 190 N.W. 449, 178 Wis. 513.

33 C.J. p 1184 note 49 [a], p 1185 note 56.

Test

Respecting sufficiency of evidence, test whether evidence supports verdict or requires granting judgment non obstante veredicto does not differ perceptibly.—Maylink v. Minnehaha Co-op. Oil Co., 291 N.W. 572, 67 S.D. 187—Wolff v. Stenger, 239 N.W. 181, 59 S.D. 231.

Verdict representing sum admittedly due

Refusal to enter judgment notwithstanding verdict for plaintiff was not error where part of amount of judgment for plaintiff was admitted by defendant to represent sum admittedly due.—Commonwealth Trust Co. of Pittsburgh v. Hachmeister Lind Co., 181 A. 787, 320 Pa. 233.

In negligence action which was tried by judge without a jury, where testimony in the record might have supported a finding of negligence of defendant or a finding that plaintiff was contributorily negligent, court in banc was without authority to enter judgment non obstante veredicto in favor of plaintiff.—Moore v. W. J. Gilmore Drug Co., 200 A. 250, 131 Pa.Super. 349.

In California

(1) The right of the trial court to render a judgment notwithstanding the verdict is the same as its right to grant a nonsuit.—In re Green's Estate, 154 P.2d 692, 25 Cal.2d 535—Neel v. Mannings, Inc., 122 P.2d 576, 19 Cal.2d 647—In re Arnold's Estate, 107 P.2d 25, 16 Cal.2d 573—In re Finkler's Estate, 46 P.2d 149, 3 Cal.2d 584—Ferran v. Southern Pac. Co., 44 P.2d 533, 3 Cal.2d 350—Card v. Boms, 291 P. 190, 210 Cal. 200—McKellar v. Pendergast, 156 P.2d 950, 68 Cal.App.2d 485—Megee v. Fasulis, 134 P.2d 815, 57 Cal.App.2d 275—In re Hettermann's Estate, 119 P.2d 788, 48 Cal.App.2d 363—Van Rennes v. Southern Counties Gas Co. of California, 113 P.2d 238, 44 Cal.App.2d 880—Funari v. Gravem-Inglis Baking Co., 104 P.2d 44, 40 Cal.App.2d 25—Hubbert v. Aztec Brewing Co., 80 P.2d 185, 26 Cal.App.2d 664, followed in Cerezo v. Aztec Brewing Co., 80 P.2d 198, 26 Cal.App.2d 754, and rehearing denied Hubbert v. Aztec Brewing Co., 80 P.2d 1016, 26 Cal.App.2d 664—Myers v. Southern Pac. Co., 58 P.2d 387, 14 Cal.App.2d 287, hearing denied, Sup., 59 P.2d 1001—Boysen v. Porter, 52 P.2d 582, 10 Cal.App.2d 431—Tracey v. L. A. Paving Co., 41 P.2d 942, 4 Cal.App.2d 700—Kerby v. Elk Grove Union High School Dist., 36 P.2d 431, 1 Cal.App.2d 246—Tomlinson v. Kiramidjian, 24 P.2d 559, 133 Cal.App. 418.

(2) It may not render such judgment if there is any substantial evidence in support of the verdict.—Brandenburg v. Pacific Gas & Elec. Co., 165 P.2d 41, 169 P.2d 909—Rice v. California Lutheran Hospital, 163 P.2d 860—In re Green's Estate, 154 P.2d 692, 25 Cal.2d 535—Gray v. Southern Pac. Co., 135 P.2d 593, 145 P.2d 561, 23 Cal.2d 632—Neel v. Mannings, Inc., 122 P.2d 576, 19 Cal.2d 647—In re Arnold's Estate, 107 P.2d 25, 16 Cal.2d 573—Anderson v. I. M. Jameson Corporation, 59 P.2d 962, 7 Cal.2d 60—Ferran v. Southern Pac. Co., 44 P.2d 533, 3 Cal.2d 350—Card v. Boms, 291 P. 190, 210 Cal. 200—McKellar v. Pendergast, 156 P.2d 950, 68 Cal.App.2d 485—Lenning v. Chiolo, 147 P.2d 410, 63 Cal.App.2d 511—Sunseri v. Dime Taxi Corporation, 135 P.2d 654, 57 Cal.App.2d 926—Megee v. Fasulis, 134 P.2d 815, 57 Cal.App.2d 275—Shannon v. Thomas, 134 P.2d 522, 57 Cal.App.2d 187—Gardner v. Marshall, 132 P.2d 833, 56 Cal.App.2d 62—Pease v. San Diego Unified School Dist., 128 P.2d 621, 54 Cal.App.2d 20—Matherne v. Los Feliz Theatre, 128 P.2d 59, 53 Cal.App.2d 660—Turner v. Lischner, 126 P.2d 156, 52 Cal.App.2d 273—Silva v. Market St. Ry. Co., 123 P.2d 904, 50 Cal.App.2d 796—In re Shields' Estate, 121 P.2d 795, 49 Cal.App.2d 293—In re Bucher's Estate, 120 P.2d 44, 48 Cal.App.2d 465—In re Hettermann's Estate, 119 P.2d 788, 48 Cal.App.2d 263—Van Rennes v. Southern Counties Gas Co. of California, 113 P.2d 238, 44 Cal.App.2d 880—Funari v. Gravem-Inglis Baking Co., 104 P.2d 44, 40 Cal.App.2d 25—Page v. Cudahy Packing Co., 87 P.2d 913, 31 Cal.App.2d 282—Francesconi v. Belluomini, 83 P.2d 298, 28 Cal.App.2d 701—Collins v. Nelson, 61 P.2d 479, 16 Cal.App.2d 535—In re Barton's Estate, 60 P.2d 471, 16 Cal.App.2d 246, motion denied 67 P.2d 695, 20 Cal.App.2d 648—Myers v. Southern Pac. Co., 58 P.2d 387, 14 Cal.App.2d 287, hearing denied, Sup., 59 P.2d 1001—Lam Ong v. Pacific Motor Trucking Co., 51 P.2d 1112, 10 Cal.App.2d 329—Tracey v. L. A. Paving Co., 41 P.2d 942, 4 Cal.App.2d 700—Kerby v. Elk Grove Union High School Dist., 36 P.2d 431, 1 Cal.App.2d 246—Crone v. City of El Cajon, 24 P.2d 846, 133 Cal.App. 624—Tomlinson v. Kiramidjian, 24 P.2d 559, 133 Cal.App. 418—Landers v. Crescent Creamery Co., 5 P.2d 934, 118 Cal.App. 707—Callahan v. Harm, 277 P. 529, 98 Cal.App. 568—33 C.J. p 143 note 80 [b] (3).

26. U.S.—Shane v. Commercial Casualty Ins. Co., D.C.Pa., 48 F.Supp. 151, affirmed, C.C.A., Shane v. Barger, 132 F.2d 544—Boult v. Maryland Casualty Co., C.C.A.Miss., 111 F.2d 257, certiorari denied Maryland Casualty Co. v. Boult, 61 S.Ct. 35, 311 U.S. 672, 85 L.Ed. 432.

Cal.—Hunt v. United Bank & Trust Co., 291 P. 184, 210 Cal. 108—Leplat v. Raley Wiles Auto Sales,

would be justified in granting a new trial notwithstanding it.[27] It has been held, however, that to deprive the court of the right to exercise the power to grant a motion for judgment notwithstanding the verdict there need not be an absence of conflict, but there must be a substantial conflict in the evidence,[28] and that the motion may be granted where the evidence is such that it is clearly insufficient to support the verdict.[29]

(c) Other Matters

A judgment notwithstanding the verdict will not be entered where a motion for a directed verdict was properly denied, or for a variance or failure of proof which may be remedied if a new trial is granted, or where it is not clear that the moving party is entitled to judgment as a matter of law on the merits, or because the verdict is tainted with prejudice or caprice.

A judgment notwithstanding the verdict will not ordinarily be entered where a motion for a directed verdict was properly denied,[30] although such a judgment may be granted where a directed verdict was properly denied because the grounds therefor were not sufficiently stated.[31] Furthermore, it has also been held that a motion for such a judgment may not be granted after the trial court erroneously denied a motion for a peremptory instruction,[32] although this rule does not apply where the court of its own motion entered a peremptory instruction and did not overrule a motion for a peremptory instruction.[33] A judgment notwithstanding the verdict will not be granted for a variance unless it appears that an amendment of the complaint cannot properly be made,[34] or for a failure of proof, where it reasonably appears that the defect in proof can be remedied if a new trial is granted,[35] or where it is not clear on the whole record that the moving party is entitled to judgment as a matter of law, on

145 P.2d 350, 62 Cal.App.2d 628—Van Rennes v. Southern Counties Gas Co. of California, 113 P.2d 238, 44 Cal.App.2d 880—In re Barton's Estate, 60 P.2d 471, 16 Cal.App.2d 246, motion denied 67 P.2d 695, 20 Cal.App.2d 648.

Colo.—De Boer v. Olmsted, 260 P. 108, 82 Colo. 369.

D.C.—McWilliams v. Shepard, 127 F. 2d 18, 75 U.S.App.D.C. 334.

Ill.—Hirning v. Contracting & Material Co., 38 N.E.2d 793, 312 Ill.App. 655.

Mich.—Malone v. Newhouse, 227 N. W. 750, 248 Mich. 516—Freeman v. Millen, 205 N.W. 122, 232 Mich. 271.

Minn.—Wright v. Post, 208 N.W. 538, 167 Minn. 130.

N.D.—Froemke v. Otter Tail Power Co., 276 N.W. 146, 68 N.D. 7.

Ohio.—Magyar v. Prudential Ins. Co. of America, 15 N.E.2d 144, 133 Ohio St. 563—Lent v. New York, C. & St. L. Ry. Co., 44 N.E.2d 295, 69 Ohio App. 514—Nobles v. Toledo Edison Co., 36 N.E.2d 995, 67 Ohio App. 414.

Pa.—Sefton v. Valley Dairy Co., 28 A.2d 313, 345 Pa. 324—Hostetler v. Kniseley, 185 A. 300, 322 Pa. 248—Johnson v. Staples, 5 A.2d 433, 135 Pa.Super. 274—Swartz v. Stein & Levy, 78 Pa.Super.Ct. 515—Preston v. Schroeder, Com.Pl., 27 Del. Co. 350—Landis v. Conestoga Transp. Co., Com.Pl., 48 Lanc.Rev. 481, 11 Som. 302, affirmed 36 A.2d 465, 349 Pa. 97—Kuhn v. Conestoga Transp. Co., Com.Pl., 48 Lanc. Rev. 491, affirmed Landis v. Conestoga Transp. Co., 36 A.2d 465, 349 Pa. 97—Freas v. Campbell, Com. Pl., 48 Lanc.Rev. 464—Hershkowitz v. Atlantic Refining Co., Com. Pl., 32 Luz.Leg.Reg. 367—John v. Pittsburgh Rys. Co., Com.Pl., 92 Pittsb.Leg.J. 585, affirmed 36 A. 2d 818, 349 Pa. 159—Smolinsky v. Metropolitan Life Ins. Co., 7 Schuyl.Leg.Reg. 276, reversed on other grounds 26 A.2d 131, 149 Pa. Super. 72.

Wash.—Wilcox v. Hubbard, 282 P. 218, 154 Wash. 344—Duggins v. International Motor Transit Co., 280 P. 50, 153 Wash. 549—Crary v. Coffin, 268 P. 881, 148 Wash. 287—Ticknor v. Seattle-Renton Stage Line, 247 P. 1, 139 Wash. 354, 47 A.L.R. 252.

27. Cal.—Hunt v. United Bank & Trust Co., 291 P. 184, 210 Cal. 108—Van Rennes v. Southern Counties Gas Co. of California, 113 P. 2d 238, 44 Cal.App.2d 880—In re Barton's Estate, 60 P.2d 471, 16 Cal.App.2d 246, motion denied 67 P.2d 695, 20 Cal.App.2d 648.

Ill.—Pope v. Illinois Terminal R. Co., 67 N.E.2d 284, 329 Ill.App. 62.

28. Cal.—In re Smethurst's Estate, 59 P.2d 830, 15 Cal.App.2d 322.

29. Cal.—In re Smethurst's Estate, supra.

30. Cal.—Locke v. Meline, 48 P.2d 176, 8 Cal.App.2d 482—Tracey v. L. A. Paving Co., 41 P.2d 942, 4 Cal.App.2d 700.

Md.—Alexander v. Tingle, 30 A.2d 737, 181 Md. 464.

Minn.—Farm Mortgage & Loan Co. v. Pederson, 205 N.W. 286, 164 Minn. 425—O'Halloran v. Chicago, B. & Q. R. Co., 195 N.W. 144, 156 Minn. 471.

N.D.—Ennis v. Retail Merchants' Ass'n Mut. Fire Ins. Co., 156 N. W. 234, 33 N.D. 20.

S.C.—Bohumir Kryl Symphony Band v. Allen University, 12 S.E.2d 712, 196 S.C. 173.

Tex.—Barrett v. Commercial Standard Ins. Co., Civ.App., 145 S.W.2d 215.

31. Cal.—In re Fleming's Estate, 251 P. 637, 199 Cal. 750.

32. Ky.—Roe v. Gentry's Ex'x, 162 S.W.2d 208, 290 Ky. 598—Franklin Fire Ins. Co. of Philadelphia v. Cook's Adm'r, 287 S.W. 553, 216 Ky. 15—Baskett v. Coombs' Adm'r, 247 S.W. 1118, 198 Ky. 17.

33 C.J. p 1184 note 50 [a] (4).

33. Ky.—Weikel v. Alt, 27 S.W.2d 684, 234 Ky. 91.

34. Ky.—Old 76 Distillery Co. v. Morris, 28 S.W.2d 474, 234 Ky. 389.

Pa.—American Products Co. of Pennsylvania v. Franklin Quality Refining Co., 119 A. 414, 275 Pa. 332.

33 C.J. p 1185 note 54.

Manner of raising question

Fact that defendant made a motion for nonsuit and later a motion for binding instructions, where neither contained any reference to variance, did not entitle defendant to raise question of variance for first time on motion for judgment non obstante veredicto, since such question must be specifically raised, either when evidence is offered, when motion for nonsuit is made, or point for binding instruction submitted.—Sipior v. U. S. Glass Co., 200 A. 938, 132 Pa.Super. 208.

Variance held not fatal

Ky.—Old 76 Distillery Co. v. Morris, 28 S.W.2d 474, 234 Ky. 389.

35. Minn.—Kundiger v. Prudential Ins. Co. of America, 17 N.W.2d 49, 219 Minn. 25—Anderson v. Newsome, 258 N.W. 157, 193 Minn. 157—Knight Soda Fountain Co. v. Dirnberger, 256 N.W. 657, 192 Minn. 387—Dreelan v. Karon, 254 N.W. 433, 191 Minn. 330—First Nat. Bank v. Fox, 254 N.W. 8, 191 Minn. 318—Drake v. Connolly, 235 N.W. 614, 183 Minn. 89—Manning v. Chicago Great Western R. Co.,

the merits,[36] or where any other reason exists precluding a binding direction.[37] The moving party is not required to offer evidence in order to complain, by motion for judgment non obstante veredicto, of the sufficiency of the evidence to support the verdict.[38] The fact that a verdict is tainted with prejudice or caprice does not authorize a trial court to substitute its fact findings for the tainted jury verdict and render judgment accordingly.[39]

(3) Scope of Inquiry in General

On a motion based on the evidence for judgment notwithstanding the verdict, the only question presented is whether or not the evidence is sufficient to justify the verdict on any theory, and the scope of inquiry does not reach other matters.

Where the trial court in passing on a motion for judgment notwithstanding the verdict may consider the evidence, the scope of inquiry on such a motion does not reach a defect in the pleadings,[40] or the court's rulings on the admission and rejection of evidence,[41] or the manner and form in which issues

229 N.W. 566, 179 Minn. 411—Garbisch v. American Ry. Express Co., 225 N.W. 432, 177 Minn. 494—Nadeau v. Maryland Casualty Co., 212 N.W. 595, 170 Minn. 326—Schendel v. Chicago, M. & St. P. Ry. Co., 210 N.W. 70, 168 Minn. 152—Herman v. Wabash Ry. Co., 189 N.W. 934, 153 Minn. 195.

N.D.—Nelson v. Scherling, 300 N.W. 803, 71 N.D. 337—Olstad v. Stockgrowers Credit Corporation, 266 N. W. 109, 66 N.D. 416—Donahue v. Boynton, 242 N.W. 530, 62 N.D. 182.

S.D.—Froke v. Watertown Gas Co., 1 N.W.2d 590, 68 S.D. 266.

Wyo.—Caldwell v. Roach, 12 P.2d 376, 44 Wyo. 319.

33 C.J. p 1185 note 55.

Rule recognized and held inapplicable to particular case

Minn.—Clough v. Chicago, M. & St. P. Ry. Co., 191 N.W. 923, 154 Minn. 515.

36. Cal.—Tracey v. L. A. Paving Co., 41 P.2d 942, 4 Cal.App.2d 700.

Ky.—Pope v. Upton, 186 S.W.2d 900, 299 Ky. 690.

Minn.—Manning v. Chicago Great Western R. Co., 229 N.W. 566, 179 Minn. 411—Neumann v. Interstate Power Co., 228 N.W. 342, 179 Minn. 46—Arcadia Park Ass'n v. Anderson, 225 N.W. 441, 177 Minn. 487—Nadeau v. Maryland Casualty Co., 212 N.W. 595, 170 Minn. 326.

N.D.—Sax Motor Co. v. Mann, 10 N. W.2d 242, 72 N.D. 595—Armstrong v. McDonald, 4 N.W.2d 191, 72 N. D. 28—Sax Motor Co. v. Mann, 299 N.W. 691, 71 N.D. 221—Olstad v. Stockgrowers Credit Corporation, 266 N.W. 109, 66 N.D. 416—Donahue v. Boynton, 242 N.W. 530, 62 N.D. 182—First Sec. Bank v. Bagley Elevator Co., 237 N.W. 648, 212 N.D. 227—Sheffield v. Stone-Ordean-Wells Co., 190 N.W. 315, 49 N.D. 142.

Or.—Bach v. Chezem, 124 P.2d 710, 168 Or. 535.

Pa.—Devling Bros. v. Horn, 188 A. 347, 324 Pa. 481—Roberts v. Washington Trust Co., 170 A. 291, 313 Pa. 584, certiorari denied 54 S. Ct. 778, 292 U.S. 608, 78 L.Ed. 1469, and rehearing denied 54 S.Ct. 857, 292 U.S. 613, 78 L.Ed. 1472—Mitchell v. City of New Castle, 119 A. 485, 275 Pa. 426—Meehan v. Shreveport-Eldorado Pipe Line Co., 164 A. 364, 107 Pa.Super. 580—McDonald v. Eller, 81 Pa.Super. 172—Del Vecchio v. Greco, 80 Pa. Super. 423—Shatz v. American Ry. Express Co., 80 Pa.Super. 335—Kline v. Moyer, Com.Pl., 32 Berks Co. 100—Webb v. Hess, Com.Pl., 46 Dauph.Co. 84—Bowhall v. Wooleyhan Transport Co., Com.Pl., 29 Del.Co. 314—Arnold v. Tokheim, Com.Pl., 21 Erie Co. 146—Palmer v. City of Erie, Com.Pl., 20 Erie Co. 400, affirmed 9 A.2d 378, 337 Pa. 5—Supervisors of Manheim Tp. v. Workman, Com.Pl., 48 Lanc. Rev. 362, affirmed Supervisors of Manheim Tp., Lancaster County v. Workman, 35 A.2d 283, 154 Pa. Super. 146—Peoples Sav. & Trust Co. v. Nescopeck M. F. I. Co., Com. Pl., 38 Luz.Leg.Reg. 139—Edwards v. Delaware, L. & W. R. Co., Com. Pl., 37 Luz.Leg.Reg. 257—Miners Sav. Bank, Pittston v. Pace, Com. Pl., 37 Luz.Leg.Reg. 241—Scranton Electric Co. v. School Dist. of Avoca, Com.Pl., 37 Luz.Leg.Reg. 179, affirmed 37 A.2d 725, 155 Pa. Super. 270—Rinkievich v. Sovereign Camp, W. O. W., Com.Pl., 34 Luz.Leg.Reg. 387—Diehl v. Central Printing Co., Com.Pl., 33 Luz.Leg. Reg. 430—Sell v. Fahs, Com.Pl., 55 Montg.Co. 372—Zurawski v. Tp. of Upper Merion, Com.Pl., 54 Montg.Co. 396—Seier v. Brunner, Com.Pl., 28 North.Co. 81—Skinner v. Koehler, Com.Pl., 93 Pittsb.Leg. J. 347—Lane v. Samuels, Com.Pl., 92 Pittsb.Leg.J. 494, affirmed 39 A.2d 626, 350 Pa. 446—Sells v. City of Pittsburgh, Com.Pl., 91 Pittsb. Leg.J. 479—Perrus v. Cudahy Packing Co., Com.Pl., 90 Pittsb. Leg.J. 595—Samber v. Hahn, Com. Pl., 90 Pittsb.Leg.J. 465—Arrow Press Corporation v. Allegheny County, Com.Pl., 90 Pittsb.Leg.J. 37—Cashok v. Metropolitan Life Ins. Co., 89 Pittsb.Leg.J. 579—Rebel v. Standard Sanitary Mfg. Co., Com.Pl., 89 Pittsb.Leg.J. 17, affirmed 16 A.2d 534, 340 Pa. 313—McBride v. Ault, Com.Pl., 88 Pittsb.Leg.J. 439—Barna v. United Russian Orthodox Brotherhood, Co., 88 Pittsb.Leg.J. 245—Automobile Finance Co. v. Anderson, Com. Pl., 27 West.Co. 227—Shaw v. Malone, Com.Pl., 55 York Leg.Rec. 150—Zinn v. Bentz, Com.Pl., 55 York Leg.Rec. 149—Wildwood Strand Realty Co. v. Skipper, Com. Pl., 54 York Leg.Rec. 131.

S.D.—Mills v. Armstrong, 13 N.W. 2d 726.

Tex.—Graves v. Hartford Accident & Indemnity Co., 161 S.W.2d 464, 138 Tex. 589—Ward v. Strickland, Civ. App., 177 S.W.2d 79, error refused—Happ v. Happ, Civ.App., 160 S. W.2d 227, error refused—Corona Petroleum Co. v. Jameson, Civ. App., 146 S.W.2d 512, error dismissed, judgment correct—Kaiser v. Newsom, Civ.App., 108 S.W.2d 755, error dismissed—Amarillo Transfer & Storage Co. v. De Shong, Civ.App., 82 S.W.2d 381.

33 C.J. p 1186 note 57.

37. Pa.—Hostetler v. Kniseley, 185 A. 300, 322 Pa. 248—Johnson v. Staples, 5 A.2d 433, 135 Pa.Super. 274.

38. Tex.—Universal Life & Accident Ins. Co. v. Beaty, Civ.App., 177 S.W.2d 244.

39. Tex.—Happ v. Happ, Civ.App., 160 S.W.2d 227, error refused.

40. Idaho.—Helgeson v. Powell, 34 P.2d 957, 54 Idaho 667.

Ill.—Farmer v. Alton Building & Loan Ass'n, 13 N.E.2d 652, 294 Ill. App. 206.

Tex.—Shaw v. Porter, Civ.App., 190 S.W.2d 396.

41. Ill.—Farmer v. Alton Building & Loan Ass'n, 13 N.E.2d 652, 294 Ill.App. 206.

Mich.—Finch v. W. R. Roach Co., 295 N.W. 324, 295 Mich. 589.

Pa.—Magaro v. Metropolitan Edison Co., 197 A. 550, 130 Pa.Super. 323—Ozanich v. Metropolitan Life Ins. Co., 180 A. 67, 119 Pa.Super. 52, reargument refused and supplemented 180 A. 576, 119 Pa.Super. 52—Koller v. Benecassa, 14 Pa.Dist. & Co. 474, 22 Berks Co. 299—Stepanavage v. Gibbs, Com. Pl., 36 Berks Co. 233, 58 York Leg.

ere submitted,[42] or the question whether plaintiffs were persons authorized to bring the suit,[43] or questions not raised at the trial,[44] the only question presented being whether or not the evidence is sufficient to justify the verdict on any theory.[45] A motion for judgment notwithstanding the verdict has been held, in effect, to review the court's ruling in denying a motion for a directed verdict.[46] Under some statutes it has been held that the motion must be based on pleadings and evidence,[47] and not on arguments made by counsel to the jury.[48] The court does not determine questions of fact based on disputed evidence;[49] it merely reviews the whole case on the record and does subsequently what it would have been proper to do under a request for a binding direction.[50]

(4) Consideration of Evidence in Passing on Motion

Where, in passing on a motion for judgment notwithstanding the verdict, the trial court may consider the evidence, it may not weigh all the evidence of both sides or judge of the credibility of the witnesses, but must give to the successful party at the trial the benefit of every favorable fact and inference fairly deducible from the testimony, and accept the evidence tending to support the verdict as true.

Where, in passing on a motion for judgment notwithstanding the verdict, the court may consider the evidence, it is required to be governed by the rules which govern it in passing on a motion for a directed verdict;[51] such motions have the same effect,[52] and the power of the court is the same in both cases.[53] These motions present only a question of law as to whether or not, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the party against whom the motion is directed, there is a total failure or lack of evidence to prove any necessary element of his case;[54] and all reasonable

Rec. 95—Smyth v. Bluestone, Co., 88 Pittsb.Leg.J. 597.

Tex.—Shaw v. Porter, Civ.App., 190 S.W.2d 396.

33 C.J. p 1183 note 47 [b].

Error in permitting plaintiff to refresh his memory from records made by his employees before testifying was held not ground for judgment for defendant notwithstanding verdict for plaintiff.—Gordon v. Blizard, 163 A. 43, 106 Pa.Super. 112.

42. Tex.—Griffay v. Robbins, Civ. App., 91 S.W.2d 1160, error dismissed.

43. Tex.—Chalmers v. Gumm, 154 S.W.2d 640, 137 Tex. 467.

44. Pa.—Bowhall v. Wooleyhan Transport Co., Com.Pl., 29 Del.Co. 314—Renfro v. Smith, 52 York 45, affirmed 7 A.2d 7, 135 Pa.Super. 578.

Defense of laches and waiver could not be raised for first time in defendants' motion for judgment non obstante veredicto.—Mesh v. Citrin, 300 N.W. 870, 299 Mich. 527.

Ultra vires contract

Claim made for first time on motion for judgment notwithstanding the verdict that alleged contract was ultra vires was held not entitled to be considered.—Yakima Fruit Growers' Ass'n v. Hall, 40 P.2d 123, 180 Wash. 365.

45. Minn.—Fink v. Northern Pac. Ry. Co., 203 N.W. 47, 162 Minn. 365.

Particular questions raised

(1) Where seller's action against corporation for purchase price of goods allegedly bought by corporation's agent without authority was submitted to the jury solely on question of ratification, corporation's motion for judgment notwithstanding verdict for seller raised the questions both of ratification and of estoppel.—Cudahy Bros. Co. v. West Michigan Dock & Market Corporation, 280 N.W. 93, 285 Mich. 18.

(2) Where violation of statute respecting automobile lights was involved, but no calendars were offered in evidence, court, on motion for judgment non obstante veredicto, could, in its discretion, permit question whether or not accident occurred within hour after sunset to be raised.—Kovalchik v. Demo, 94 Pa.Super. 167.

46. N.D.—Bormann v. Beckman, 19 N.W.2d 455, 73 N.D. 720—Olson v. Ottertail Power Co., 256 N.W. 246, 65 N.D. 46, 95 A.L.R. 418—Ennis v. Retail Merchants' Ass'n Mut. Fire Ins. Co., 156 N.W. 234, 33 N.D. 20.

47. Pa.—Brown v. George, 25 A.2d 691, 344 Pa. 399.

48. Pa.—Brown v. George, supra.

49. Pa.—Hostetler v. Kniseley, 185 A. 300, 322 Pa. 248.

50. Pa.—Hostetler v. Kniseley, supra.

51. Ill.—Neering v. Illinois Cent. R. Co., 50 N.E.2d 497, 383 Ill. 366, mandate conformed to 53 N.E.2d 271, 321 Ill.App. 625—Merlo v. Public Service Co. of Northern Illinois, 45 N.E.2d 665, 381 Ill. 300, followed in 45 N.E.2d 677, 381 Ill. 336—In re Klockowski's Estate, 58 N.E.2d 250, 324 Ill.App. 523—Berg v. New York Cent. R. Co., 55 N.E.2d 394, 323 Ill.App. 221, affirmed 62 N.E.2d 676, 391 Ill. 52—Kreger v. George W. Diener Mfg. Co., 53 N.E.2d 26, 321 Ill.App. 302—Periolet v. City Nat. Bank & Trust Co. of Chicago, 53 N.E.2d 22, 321 Ill.App. 303—Carrell v. New York Cent. R. Co., 47 N.E.2d 130, 317 Ill.App. 481, affirmed 52 N.E.2d 201, 384 Ill. 599—Sturgeon v. Quarton, 44 N.E.2d 766, 316 Ill. App. 308—Kaznowski v. City of La Salle, 43 N.E.2d 852, 316 Ill. App. 115—Baker v. Granite City, 37 N.E.2d 372, 311 Ill.App. 586—Geiselman v. Strubhar, 23 N.E.2d 383, 302 Ill.App. 23—Scherb v. Randolph Wells Auto Park, 22 N.E.2d 796, 301 Ill.App. 298—Le Menager v. Northwestern Steel & Wire Co., 22 N.E.2d 710, 301 Ill. App. 260—Oliver v. Kelley, 21 N.E.2d 649, 300 Ill.App. 487—Boyda Dairy Co. v. Continental Casualty Co., 20 N.E.2d 339, 299 Ill.App. 469—Wells v. Wise, 18 N.E.2d 750, 298 Ill.App. 252—Emge v. Illinois Cent. R. Co., 17 N.E.2d 612, 297 Ill.App. 344—Farmer v. Alton Building & Loan Ass'n, 13 N.E.2d 652, 294 Ill.App. 206—Gardiner v. Richardson, 11 N.E.2d 824, 293 Ill.App. 40—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill.App. 14.

52. Ill.—Tidholm v. Tidholm, 62 N.E.2d 473, 391 Ill. 19—Weinstein v. Metropolitan Life Ins. Co., 60 N.E.2d 207, 389 Ill. 571—Hunt v. Vermilion County Children's Home, 44 N.E.2d 609, 381 Ill. 29—Christensen v. Frankland, 58 N.E.2d 289, 324 Ill.App. 391—Larimore v. Larimore, 20 N.E.2d 902, 299 Ill. App. 547.

Ohio.—J. & F. Harig Co. v. City of Cincinnati, 22 N.E.2d 540, 61 Ohio App. 314.

53. Ill.—Merlo v. Public Service Co. of Northern Illinois, 45 N.E.2d 665, 381 Ill. 300, followed in 45 N.E.2d 677, 381 Ill. 336.

54. Ill.—Berg v. New York Cent. R. Co., 62 N.E.2d 676, 391 Ill. 52—Weinstein v. Metropolitan Life

doubts must be resolved in favor of the verdict.[55] Thus, in passing on the motion, the trial court may not weigh all the evidence of both sides or judge of the credibility of the witnesses, as it may do on a motion for a new trial, but must give to the successful party at the trial the benefit of every favorable fact and inference fairly deducible from the testimony, and accept the evidence tending to support the verdict as true,[56] unless on the face of

Ins. Co., 60 N.E.2d 207, 389 Ill. 571—Millikin Nat. Bank of Decatur v. Shellabarger Grain Products Co., 58 N.E.2d 892, 389 Ill. 196, conformed to 61 N.E.2d 589, 326 Ill.App. 72—Todd v. S. S. Kresge Co., 52 N.E.2d 206, 384 Ill. 524—Neering v. Illinois Cent. R. Co., 50 N.E.2d 497, 383 Ill. 366, mandate conformed to 53 N.E.2d 271, 321 Ill.App. 625—Knudson v. Knudson, 46 N.E.2d 1011, 382 Ill. 492—Merlo v. Public Service Co. of Northern Illinois, 45 N.E.2d 665, 381 Ill. 300, followed in 45 N.E.2d 677, 381 Ill. 336—Walaite v. Chicago, R. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59—Froehler v. North American Life Ins. Co. of Chicago, 27 N.E.2d 833, 374 Ill. 17—Carrell v. New York Cent. R. Co., 52 N.E.2d 201, 348 Ill. 599—Anderson v. Krancic, 66 N.E.2d 316, 328 Ill. App. 364—Yordy v. Farmers Auto. Ins. Ass'n, 65 N.E.2d 619, 328 Ill. App. 312—De Leuw, Cather & Co. v. City of Joliet, 64 N.E.2d 779, 327 Ill.App. 453—Huffman v. Gould, 64 N.E.2d 773, 327 Ill.App. 428—Dickinson v. Rockford Van Orman Hotel Co., 63 N.E.2d 257, 326 Ill.App. 686—Hedden v. Farmers Mut. Re-Ins. Co. of Chicago, Ill., 60 N.E.2d 110, 325 Ill.App. 335—Wilkerson v. Cummings, 58 N.E.2d 280, 324 Ill.App. 331—In re Klockowski's Estate, 58 N.E.2d 250, 324 Ill.App. 523—Ebert v. City of Chicago, 58 N.E.2d 198, 324 Ill. App. 315—Belcher v. Citizens Coach Co., 57 N.E.2d 659, 324 Ill. App. 226—Van Hoorebecke v. Iowa Illinois Gas & Electric Co., 57 N.E.2d 652, 324 Ill.App. 88—Hauck v. First Nat. Bank of Highland Park, 55 N.E.2d 565, 323 Ill.App. 300—Paolinelli v. Dainty Foods Manufacturers, 54 N.E.2d 759, 322 Ill. App. 586—Fitch v. Thomson, 54 N.E.2d 623, 322 Ill.App. 703—Bone v. Publix Great States Theatres, 54 N.E.2d 98, 322 Ill.App. 178—Gill v. Lewin, 53 N.E.2d 336, 321 Ill.App. 633—Gomez v. Rosenblatt, 53 N.E.2d 279, 321 Ill.App. 631—Leif v. Fleming, 52 N.E.2d 606, 321 Ill. App. 297—Collins v. City of Chicago, 52 N.E.2d 473, 321 Ill.App. 73—Kouba v. City of Chicago, 51 N.E. 2d 617, 320 Ill.App. 435—Best v. Mid-West Const. Corporation, 50 N.E.2d 867, 320 Ill.App. 341—Campbell v. Goldblatt Bros., 49 N.E.2d 817, 320 Ill.App. 138—Hansen v. Henrici's Inc., 49 N.E.2d 737, 319 Ill.App. 458—Egner v. Fruit Belt Service Co., 47 N.E.2d 486, 318 Ill. App. 87—Schwickrath v. Lowden, 46 N.E.2d 162, 317 Ill.App. 431—Zwierzycki v. Metropolitan Life Ins. Co., 45 N.E.2d 76, 316 Ill.App. 345—Gordon v. Peters, 39 N.E.2d 680, 313 Ill.App. 261—Crump v. Montgomery Ward & Co., 39 N.E. 2d 411, 313 Ill.App. 151—Morris v. Silver, 38 N.E.2d 840, 312 Ill.App. 472—Baker v. Granite City, 37 N. E.2d 372, 311 Ill.App. 586—Reed v. Lyford, 36 N.E.2d 610, 311 Ill.App. 486—Brumit v. Wasson, 33 N.E.2d 740, 310 Ill.App. 264—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583, reversed on other grounds 36 N.E.2d 555, 377 Ill. 405—Russell v. Richardson, 24 N.E.2d 185, 302 Ill. App. 589—Scherb v. Randolph Wells Auto Park, 22 N.E.2d 796, 301 Ill.App. 298—Larimore v. Larimore, 20 N.E.2d 902, 299 Ill.App. 547—Wells v. Wise, 18 N.E.2d 750, 298 Ill.App. 252—Malewski v. Mackiewich, 282 Ill.App. 593.

55. Minn.—Solberg v. Minneapolis St. Ry. Co., 7 N.W.2d 926, 214 Minn. 274.

56. U.S.—Palmer v. Moren, D.C.Pa., 44 F.Supp. 704.

Cal.—Brandenburg v. Pacific Gas & Elec. Co., 169 P.2d 909—In re Green's Estate, 154 P.2d 692, 25 Cal.2d 535—Neel v. Mannings, Inc., 122 P.2d 576, 19 Cal.2d 647—Ferran v. Southern Pac. Co., 44 P.2d 533, 3 Cal.2d 350—McKellar v. Pendergast, 156 P.2d 950, 68 Cal. App.2d 485—Shannon v. Thomas, 134 P.2d 522, 57 Cal.App.2d 187—Gardner v. Marshall, 132 P.2d 833, 56 Cal.App.2d 62—Pease v. San Diego Unified School Dist., 128 P. 2d 621, 54 Cal.App.2d 20—Matherne v. Los Feliz Theatre, 128 P.2d 59, 53 Cal.App.2d 660—Turner v. Lischner, 126 P.2d 156, 52 Cal.App. 2d 273—In re Bucher's Estate, 120 P.2d 44, 48 Cal.App.2d 465—In re Hettermann's Estate, 119 P.2d 788, 48 Cal.App.2d 263—Van Rennes v. Southern Counties Gas Co. of California, 113 P.2d 238, 44 Cal.App. 2d 880—Page v. Cudahy Packing Co., 87 P.2d 913, 31 Cal.App.2d 282—In re Barton's Estate, 60 P.2d 471, 16 Cal.App.2d 246, motion denied 67 P.2d 695, 20 Cal.App.2d 648—In re Smethurst's Estate, 59 P. 2d 830, 15 Cal.App.2d 322—Myers v. Southern Pac. Co., 58 P.2d 387, 14 Cal.App.2d 287, hearing denied, Sup., 59 P.2d 1001—Lam Ong v. Pacific Motor Trucking Co., 51 P. 2d 1112, 10 Cal.App.2d 329—Smyth v. Harris & Devine, 38 P.2d 862, 3 Cal.App.2d 194—Kerby v. Elk Grove Union High School Dist., 36 P.2d 431, 1 Cal.App.2d 246.

Idaho.—Carson v. Talbot, 129 P.2d 901, 64 Idaho 198—Stearns v. Graves, 111 P.2d 882, 62 Idaho 312—Hobbs v. Union Pac. R. Co., 108 P.2d 841, 62 Idaho 58—Manion v. Waybright, 86 P.2d 181, 59 Idaho 643—Hendrix v. City of Twin Falls, 29 P.2d 352, 54 Idaho 130.

Ill.—Osborn v. Leuffgen, 45 N.E.2d 622, 381 Ill. 295—Pope v. Illinois Terminal R. Co., 67 N.E.2d 284, 329 Ill.App. 62—Berg v. New York Cent. R. Co., 55 N.E.2d 394, 323 Ill.App. 221, affirmed 62 N.E.2d 676, 391 Ill. 52—Collins v. City of Chicago, 52 N.E.2d 473, 321 Ill. App. 73—Gill v. Lewin, 53 N.E.2d 336, 321 Ill.App. 633—Guess v. New York Cent. R. Co., 49 N.E.2d 652, 319 Ill.App. 522—Jacobsen v. Cummings, 48 N.E.2d 603, 318 Ill. App. 464—Freeman v. Leader Mercantile Co., 40 N.E.2d 548, 313 Ill. App. 652—Baker v. Granite City, 37 N.E.2d 372, 311 Ill.App. 586—Gnat v. Richardson, 35 N.E.2d 409, 311 Ill.App. 242, affirmed 39 N.E.2d 337, 378 Ill. 626—Partridge v. Enterprise Transfer Co., 30 N.E.2d 947, 307 Ill.App. 386—Goodrich v. Sprague, 26 N.E.2d 884, 304 Ill. App. 556, reversed on other grounds Sprague v. Goodrich, 32 N.E.2d 897, 376 Ill. 80—Cooper v. Safeway Lines, 26 N.E.2d 632, 304 Ill.App. 302—Geiselman v. Strubhar, 23 N.E.2d 383, 302 Ill.App. 23—Le Menager v. Northwestern Steel & Wire Co., 22 N.E.2d 710, 301 Ill.App. 260—Ruzgis v. Richardson, 14 N.E.2d 968, 295 Ill.App. 376—Gardiner v. Richardson, 11 N. E.2d 824, 293 Ill.App. 40—McCarthy v. Rorrison, 283 Ill.App. 129.

Mich.—Jacob v. Gratiot Central Market Co., 255 N.W. 331, 267 Mich. 262—West v. Detroit Terminal R. R., 201 N.W. 955, 229 Mich. 590—Butzin v. Bonk, 6 N. W.2d 765, 303 Mich. 522—Neesley v. Lord, 297 N.W. 226, 297 Mich. 163—Dzikowski v. Michigan Cent. R. R., 276 N.W. 470, 282 Mich. 337.

Minn.—Johnson v. Evanski, 22 N.W. 2d 213—Kundiger v. Metropolitan Life Ins. Co., 15 N.W.2d 487, 218 Minn. 273—Solberg v. Minneapolis St. Ry. Co., 7 N.W.2d 926, 214 Minn. 274—Goldfine v. Johnson, 294 N.W. 459, 208 Minn. 449—Fredrickson v. Arrowhead Co-op. Creamery Ass'n, 277 N.W. 345, 202 Minn. 12—Mardorf v. Duluth-Superior Transit Co., 261 N.W. 177, 194 Minn. 537—Thom v. Northern

Pac. Ry. Co., 252 N.W. 660, 190 Minn. 622.

N.D.—Nelson v. Scherling, 300 N.W. 803, 71 N.D. 337—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561—Olstad v. Stockgrowers Credit Corporation, 266 N.W. 109, 66 N.D. 416.

Pa.—In re Stewart's Estate, 47 A. 2d 204—Chidester v. City of Pittsburgh, 47 A.2d 130—Heenan v. Kelly, 46 A.2d 229, 359 Pa. 549—Luckenbaugh v. Haughawout, 46 A.2d 163, 353 Pa. 528—Holstein v. Kroger Grocery & Baking Co., 34 A.2d 491, 348 Pa. 183—Ashworth v. Hannum, 32 A.2d 407, 347 Pa. 393—Earll v. Wichser, 30 A.2d 803, 346 Pa. 357—Rea v. Pittsburgh Rys. Co., 25 A.2d 730, 344 Pa. 421—Wascavage v. Susquehanna Collieries Co., 23 A.2d 509, 343 Pa. 529—Wuerfel v. Metropolitan Life Ins. Co., 22 A.2d 747, 343 Pa. 291—Snyderwine v. McGrath, 22 A.2d 644, 343 Pa. 245—Mamic v. Pittsburgh & W. V. Ry. Co., 19 A.2d 404, 341 Pa. 486—Sorrentino v. Graziano, 17 A.2d 373, 341 Pa. 113—Usher v. Pittsburgh & L. E. R. Co., 16 A.2d 387, 340 Pa. 234—Hardiman v. Pittsburgh Rys. Co., 14 A.2d 72, 339 Pa. 79—Welch v. Sultez, 13 A.2d 399, 338 Pa. 583—Iacovino v. Caterino, 2 A.2d 828, 332 Pa. 556—Lanciano v. Brown, 1 A.2d 246, 331 Pa. 497—Derr v. Rich, 200 A. 599, 331 Pa. 502—Shoemaker v. Williams, 200 A. 255, 131 Pa.Super. 546—Carter v. Pittsburgh Rys. Co., 194 A. 900, 327 Pa. 586—Kline v. Moyer, 191 A. 43, 325 Pa. 357, 111 A.L.R. 406—Delair v. McAdoo, 188 A. 181, 324 Pa. 392—Vetter v. Great Atlantic & Pacific Tea Co., 185 A. 613, 322 Pa. 449—O'Farrell v. Mawson, 182 A. 538, 320 Pa. 316—Texas Co. v. Bituminous Service Co., 177 A. 763, 318 Pa. 34—Haverkamp v. Sussman, 176 A. 206, 317 Pa. 187—Bowman v. Press Pub. Co., 175 A. 483, 316 Pa. 531—Graff v. Scott Bros., 172 A. 659, 315 Pa. 262—Christ v. Hill Metal & Roofing Co., 171 A. 607, 314 Pa. 375—Kulka v. Nemirovsky, 170 A. 261, 314 Pa. 134—Ferguson v. Charis, 170 A. 131, 313 Pa. 164—Conley v. Simmons, 167 A. 575, 312 Pa. 249—McCracken v. Curwensville Borough, 163 A. 217, 309 Pa. 98, 86 A.L.R. 1379—Vlasich v. Baltimore & O. R. Co., 161 A. 70, 307 Pa. 255—Hawk v. Pennsylvania R. Co., 160 A. 862, 307 Pa. 214—Adams v. Gardiner, 160 A. 589, 306 Pa. 576—Lasater v. Conestoga Traction Co., 160 A. 447, 306 Pa. 500—Simon v. Philadelphia Rapid Transit Co., 160 A. 111, 306 Pa. 466—Rodgers v. Saxton, 158 A. 166, 305 Pa. 479, 80 A.L.R. 280—Unterreiner v. Borough of Turtle Creek, 157 A. 682, 305 Pa. 341—Galliano v. East Penn Electric Co., 154 A. 805, 303 Pa. 493—Sollenberger v. Pennsylvania R. Co., 139 A. 127, 290 Pa. 415—Roberts v. Freihofer Baking Co., 129 A. 574, 283 Pa. 573—Mardo v. Valley Smokeless Coal Co., 123 A. 779, 279 Pa. 209—Kuneck v. Conti, 121 A. 324, 277 Pa. 455—Kreuer v. Union Nat. Bank of McKeesport, 119 A. 921, 276 Pa. 201—Davis v. Carroll-Porter Boiler & Tank Co., 119 A. 742, 276 Pa. 71—Vunak v. Walters, 43 A.2d 536, 157 Pa.Super. 660—Hindes v. City of Pittsburgh, 38 A.2d 420, 155 Pa. Super. 314—Weismiller v. Farrell, 34 A.2d 45, 153 Pa.Super. 366—Blair, to Use of Davis, v. Adamchick, 21 A.2d 107, 145 Pa.Super. 125—Steingart v. Kaney, 19 A.2d 499, 144 Pa.Super. 534—Adams v. Armour & Co., 16 A.2d 142, 142 Pa. Super. 280—Roncace v. Welsh, 14 A.2d 616, 141 Pa.Super. 170—McCandless v. Krut, 14 A.2d 181, 140 Pa.Super. 183—Frumkin v. Mayer, 11 A.2d 767, 139 Pa.Super. 139—Pfeiffer v. Kraske, 11 A.2d 555, 139 Pa.Super. 92—Acton v. Pennsylvania-Reading Seashore Lines, 11 A.2d 203, 138 Pa.Super. 605—Korenkiewicz v. York Motor Express Co., 10 A.2d 864, 138 Pa.Super. 210—Boliver v. City of Philadelphia, 9 A.2d 193, 137 Pa.Super. 437—Adams v. Metropolitan Life Ins. Co., 7 A.2d 544, 136 Pa.Super. 454—Mitchell v. First Nat. Bank, 7 A.2d 513, 136 Pa.Super. 467—Moore v. Baltimore & O. R. Co., 7 A.2d 162, 136 Pa.Super. 182—Johnson v. Staples, 5 A.2d 433, 135 Pa. Super. 274—Bateman v. Zorocoff, 2 A.2d 574, 133 Pa.Super. 245—Pellegrini v. Coll, 2 A.2d 491, 133 Pa.Super. 294—Marron v. Elmquist, 200 A. 207, 132 Pa.Super. 12—Ross v. Pennsylvania Underwriters Co., 187 A. 62, 123 Pa.Super. 484—Kovacs v. Ajhar, 196 A. 876, 130 Pa.Super. 149—Iaquinto v. Notarfrancesco, 195 A. 169, 129 Pa. Super. 121—O'Brien v. Borough of Jeannette, 194 A. 314, 128 Pa.Super. 443—Peters v. Colonial Life Ins. Co. of America, 193 A. 460, 128 Pa.Super. 21—Krein v. Steigerwald, 193 A. 390, 128 Pa.Super. 51—Fox v. Shoemaker, 193 A. 353, 127 Pa.Super. 264—McDonough v. Borough of Munhall, 193 A. 326, 127 Pa.Super. 226, reversed on other grounds 200 A. 638, 331 Pa. 468—Bradley v. Rhodes, 188 A. 564, 124 Pa.Super. 161—Hahn v. Anderson, 187 A. 450, 123 Pa.Super. 442, modified on other grounds 192 A. 489, 326 Pa. 463—Lessy v. Great Atlantic & Pacific Tea Co., 183 A. 657, 121 Pa.Super. 440—Morris v. Kauffman, 182 A. 758, 120 Pa.Super. 515—Hummel v. Quaker City Cabs, 182 A. 658, 120 Pa.Super. 527—Kaminski v. Bradley, 182 A. 150, 120 Pa.Super. 297—Ford v. Reinoehl, 182 A. 120, 120 Pa.Super. 285—Lawrence v. Winterbottom, 181 A. 852, 120 Pa.Super. 292—Anderson v. Supplee Wills Jones Milk Co., 181 A. 368, 119 Pa.Super. 386—Martinez v. Pinkasiewicz, 180 A. 153, 118 Pa.Super. 200—Kissinger v. Pittsburgh Rys. Co., 180 A. 137, 119 Pa.Super. 110—Young v. Yellow Cab Co., 180 A. 63, 118 Pa. Super. 495—Zoeller v. Smallstig, 179 A. 755, 118 Pa.Super. 265—Woodsum v. City of McKeesport, 179 A. 891, 118 Pa.Super. 205—Dunn v. Dunn, 179 A. 795, 118 Pa. Super. 533—James v. Columbia County Agricultural, Horticultural & Mechanical Ass'n, 178 A. 326, 117 Pa.Super. 277, reversed on other grounds 184 A. 447, 321 Pa. 465—McDougall v. Schaab, 178 A. 168, 117 Pa.Super. 285—Magri v. McCurdy, 177 A. 349, 117 Pa.Super. 32—Haas v. Fitzpatrick, 177 A. 326, 117 Pa.Super. 21—Smallberger v. Carroll, 176 A. 867, 116 Pa.Super. 429—Beresin v. Pennsylvania R. Co., 176 A. 774, 116 Pa.Super. 291—Lewin v. Freihofer Baking Co., 176 A. 58, 115 Pa.Super. 558—Glou v. Security Ben. Ass'n, 173 A. 883, 114 Pa.Super. 139—Kelso v. Philadelphia Rapid Transit Co., 170 A. 436, 112 Pa.Super. 124—Scull v. Moross, 170 A. 366, 111 Pa.Super. 531—Brown v. Bahl, 170 A. 346, 111 Pa.Super. 598—Taylor v. Philadelphia Rural Transit Co., 170 A. 327, 111 Pa.Super. 575—Luft v. Da Costa, 164 A. 137, 107 Pa.Super. 553—Hohman v. Borough of North Braddock, 156 A. 705, 102 Pa.Super. 330—Smart v. Bell Telephone Co. of Pennsylvania, 83 Pa.Super. 419—Creavy v. Ritter, 52 Pa.Dist. & Co. 666, 46 Lack.Jur. 109—Clime v. Prudential Ins. Co. of America, 50 Pa.Dist. & Co. 433—Wool v. Johannes Keller Bldg. & Loan Ass'n, 16 Pa. Dist. & Co. 519, affirmed 163 A. 38, 106 Pa.Super. 492—Kobylis v. Philadelphia & R. R. Co., 27 Pa. Dist. 3, affirmed 104 A. 595, 261 Pa. 350—Marko v. Henry, Com.Pl., 35 Berks Co. 75—Walborn v. Epley, Com.Pl., 33 Berks Co. 117, affirmed 24 A.2d 668, 148 Pa.Super. 417—Municipal Band of Harrisburg v. Aurand, Com.Pl., 54 Dauph. Co. 428—Kaylor v. Central Trust Co. of Harrisburg, Com.Pl., 54 Dauph.Co. 366, affirmed 36 A.2d 825, 154 Pa.Super. 633—Taylor v. Reading Co., Com.Pl., 51 Dauph.Co. 69, affirmed 27 A.2d 901, 149 Pa. Super. 171—Eckenrode v. Produce Trucking Co., Com.Pl., 49 Dauph. Co. 271—Ensinger v. Hetrick, Com. Pl., 49 Dauph.Co. 135—Webb v. Hess, Com.Pl., 46 Dauph.Co. 84—Harper v. Trainer Borough, Com. Pl., 33 Del.Co. 229—Hartley v. Navickis, Com.Pl., 33 Del.Co. 161—Guarente v. Long, Com.Pl., 33 Del. Co. 124—Reese v. Jonas, Com.Pl., 32 Del.Co. 532, 12 Som. 157—Yarnall v. Railway Express Agency,

Com.Pl., 32 Del.Co. 535—Pritchard v. Philadelphia Suburban Transp. Co., Com.Pl., 32 Del.Co. 383—Kelly v. Carpenter, Com.Pl., 32 Del.Co. 277—Rymer v. Devon, Com.Pl., 32 Del.Co. 271—Wright v. Moyer, Com.Pl., 32 Del.Co. 79—Freas B. Snyder & Co. v. Media-69th St. Mortgage Pool, Com.Pl., 32 Del.Co. 36—Jacobs v. Reading Co., Com.Pl., 31 Del.Co. 449—Daly v. Yeadon Borough, Com.Pl., 31 Del.Co. 380—Murray v. Finnigan, Com.Pl., 31 Del.Co. 186—Freeman v. MacDonald, Com.Pl., 31 Del.Co. 165—Bradley v. Yeadon Borough, Com.Pl., 31 Del.Co. 142—White v. Southern Pennsylvania Bus Co., Com.Pl., 31 Del.Co. 67—Hill v. Terrizzi, Com.Pl., 30 Del.Co. 503—Barbano v. Barbano, Com.Pl., 30 Del.Co. 195, affirmed 16 A.2d 649, 142 Pa.Super. 371—Bair v. Newgeon, Com.Pl., 29 Del.Co. 544—Hoover v. Montgomery, Com.Pl., 29 Del.Co. 466—Sabatelli v. Scull, Com.Pl., 29 Del.Co. 456—Bradley v. Harrison, Com.Pl., 29 Del.Co. 275—Koch v. Shillady, Com.Pl., 29 Del.Co. 238—Johns v. Foley, Com.Pl., 29 Del.Co. 38—Porter v. Philadelphia Suburban Transp. Co., Com.Pl., 28 Del.Co. 581—Phillips v. Aronimink Transp. Co., Com.Pl., 28 Del.Co. 467—Yorkshire Worsted Mills v. National Transit Co., Com.Pl., 28 Del.Co. 402—Laycott v. McCready, Com.Pl., 28 Del.Co. 333—Berberian v. Allsman, Com.Pl., 28 Del.Co. 374—Turkington v. Jones, Com.Pl., 28 Del.Co. 256—Lundy v. Devitt, Com.Pl., 28 Del.Co. 210—Roney v. Thompson, Com.Pl., 27 Del.Co. 589—Penn Dairies v. Central Drug, Com.Pl., 27 Del.Co. 371—Preston v. Schroeder, Com.Pl., 27 Del.Co. 350—Randolph v. Freystown Mut. Fire Ins. Co., Com.Pl., 27 Del.Co. 285—Keller v. Mazzie, Com.Pl., 26 Erie Co. 318—Snyder v. Coleman, Com.Pl., 26 Erie Co. 234—Glover v. Stoeltzlen, Com.Pl., 26 Erie Co. 178—Willman v. Peck, Com.Pl., 26 Erie Co. 156—Cotterman v. Hughes, Com.Pl., 23 Erie Co. 341—Theiss v. Moreland, Com.Pl., 22 Erie Co. 154—Graham v. Lee, Com.Pl., 22 Erie Co. 66—Fuller v. Heller, Com.Pl., 21 Erie Co. 270—Shollenberger v. Werren, Com.Pl., 20 Erie Co. 33—Murphy v. Wellbrock, Com.Pl., 46 Lack.Jur. 277—McVeigh v. Scranton-Spring Brook Water Service Co., Com.Pl., 46 Lack.Jur. 177—Condel v. Savo, Com.Pl., 46 Lack.Jur. 89—Walker v. Hornbeck, Com.Pl., 45 Lack.Jur. 257—Cutler v. Peck Lumber Mfg. Co., Com.Pl., 45 Lack.Jur. 25, reversed on other grounds 37 A.2d 739, 350 Pa. 8—Weaver v. Scranton Bus Co., Com.Pl., 44 Lack.Jur. 233—Dickson v. Bliss, Com.Pl., 42 Lack.Jur. 25—Todd v. Pickel, Com.Pl., 49 Lanc.L.Rev. 139—Fegley v. Vogel-Ritt, Inc., Com.Pl., 21 Leh.L.J. 306—Bauer v. Finger, Com.Pl., 19 Leh.L.J. 222—Piershalski v. Croop, Com.Pl., 34 Luz.Leg.Reg. 353—Hasker v. Mease, Com.Pl., 59 Montg.Co. 364—Stein v. Taylor, Com.Pl., 56 Montg.Co. 199—Valentine v. Fisher, Com.Pl., 55 Montg. Co. 192—Stewart v. Crawford, Com.Pl., 55 Montg.Co. 164—Hasserick v. Walker, Com.Pl., 55 Montg.Co. 60—National Chair Co. v. Barrall, Com.Pl., 15 Northumb. L.J. 26, affirmed 21 A.2d 36, 342 Pa. 389—Samber v. Hahn, Com.Pl., 90 Pittsb.Leg.J. 465—Waldron v. Equitable Life Assur. Soc., Com.Pl., 90 Pittsb.Leg.J. 335—Smolinsky v. Metropolitan Life Ins. Co., Com.Pl., 7 Sch.Leg.Reg. 276, reversed on other grounds 26 A.2d 131, 149 Pa.Super. 72—Howells v. Reading Co., Com.Pl., 10 Sch.Reg. 179—Murphy v. Fetter, Com.Pl., 7 Sch.Reg. 54—Mahmde v. Reading Co., Com.Pl., 7 Sch.Reg. 33—Huey v. Blue Ridge Transp. Co., Com.Pl., 24 Wash.Co. 147—Jones v. Davis, Com.Pl., 24 Wash.Co. 63—Hall v. Spriggs, Com.Pl., 22 Wash.Co. 166—Klosky v. Gowern, Com.Pl., 21 Wash.Co. 92—Romonoski v. Harris, Com.Pl., 20 Wash.Co. 85—Kelly v. Ray, Com.Pl., 20 Wash.Co. 82—Cullen v. Keystone Transfer Co., Com.Pl., 19 Wash.Co. 192—Snee v. Dunn, Com.Pl., 19 Wash.Co. 94—McElfresh v. O'Brien, Com.Pl., 18 Wash.Co. 114—Slezycki v. Waitas, Com.Pl., 26 West.Co. 92—Wise v. Frey, Com.Pl., 22 West.Co. 176—Cunningham v. Pennsylvania R. Co., Com.Pl., 58 York Leg.Rec. 49—Miller v. Stump, Com.Pl., 58 York Leg.Rec. 1—Shaw v. Malone, Com.Pl., 55 York Leg.Rec. 150—Zinn v. Bentz, Com.Pl., 55 York Leg.Rec. 149—Arnold v. Frey, Com.Pl., 52 York.Leg.Rec. 163.

S.C.—Drag v. Ellis, 36 S.E.2d 73.

S.D.—Strain v. Shields, 256 N.W. 268, 63 S.D. 60.

Tex.—Traders & General Ins. Co. v. Bass, Civ.App., 193 S.W.2d 848, refused no reversible error—Shield Co. v. Cartwright, Civ.App., 172 S.W.2d 108, affirmed 177 S.W.2d 954, 142 Tex. 324—Warren v. Schawe, Civ.App., 163 S.W.2d 415, error refused.

Wash.—Geri v. Bender, 168 P.2d 144—Ziniewicz v. Department of Labor and Industries, 161 P.2d 315, 23 Wash.2d 436—Ruff v. Fruit Delivery Co., 157 P.2d 730, 22 Wash.2d 708—Mathers v. Stephens, 156 P.2d 227, 22 Wash.2d 364—Omeitt v. Department of Labor and Industries, 152 P.2d 973, 21 Wash.2d 684—Carroll v. Union Pac. R. Co., 146 P.2d 813, 20 Wash.2d 191—White v. Fenner, 133 P.2d 270, 16 Wash.2d 226—Billingsley v. Rovig-Temple Co., 133 P.2d 265, 16 Wash.2d 202—Griffin v. Cascade Theatres Corporation, 117 P.2d 651, 10 Wash.2d 574—Peterson v. Mayham, 116 P.2d 259, 10 Wash.2d 111—Fosdick v. Middendorf, 115 P.2d 679, 9 Wash.2d 616—Morris v. Chicago, M., St. P. & P. R. Co., 97 P.2d 119, 1 Wash.2d 587, opinion adhered to 100 P.2d 19, 1 Wash.2d 587—Steen v. Polyclinic, 81 P.2d 846, 195 Wash. 666—Hamilton v. Cadwell, 81 P.2d 815, 195 Wash. 683—Corbaley v. Pierce County, 74 P.2d 993, 192 Wash. 688—Caylor v. B. C. Motor Transp., 71 P.2d 162, 191 Wash. 365—Chess v. Reynolds, 66 P.2d 297, 189 Wash. 547—Boyd v. Cole, 63 P.2d 931, 189 Wash. 81—Mitchell v. Cadwell, 62 P.2d 41, 188 Wash. 257—Larpenteur v. Eldridge Motors, 55 P.2d 1064, 185 Wash. 530—Shumaker v. Charada Inv. Co., 49 P.2d 44, 183 Wash. 521—Mitchell v. Rice, 48 P.2d 949, 183 Wash. 402—Hayden v. Colville Valley Nat. Bank, 39 P.2d 376, 180 Wash. 220, rehearing denied 43 P.2d 32—Gaskill v. Amadon, 38 P.2d 229, 179 Wash. 375—Green v. Langnes, 32 P.2d 565, 177 Wash. 536—Mutual Life Ins. Co. of New York v. Campbell, 16 P.2d 836, 170 Wash. 485—Hansen v. Continental Casualty Co., 287 P. 894, 156 Wash. 691—Marsten v. Bill Warner, Inc., 254 P. 850, 143 Wash. 58—Metropolitan Club v. Massachusetts Bonding & Insurance Co., 220 P. 818, 127 Wash. 320.

Impeachment of witness

(1) In passing on motion for judgment notwithstanding verdict for plaintiff, court had no right to pass on credibility of witnesses, to consider any purported impeachments, weight thereof, or weight of testimony.—Vieceli v. Cummings, 54 N.E.2d 717, 322 Ill.App. 559.

(2) A court is not justified in ignoring a verdict merely because witnesses for plaintiff may have made contradictory statements as to the cause of results established, or because experts testified that death could not have been caused as contended by plaintiff.—Kundiger v. Metropolitan Life Ins. Co., 15 N.W.2d 487, 218 Minn. 273.

(3) However, the rule that explanatory, conflicting, or contradictory evidence must be excluded from consideration in passing on motion for judgment notwithstanding verdict does not mean that, where a witness contradicts himself on a material point, court must consider only that part of his testimony on that point which favors party for whom he testifies.—Fitch v. Thomson, 54 N.E.2d 628, 322 Ill.App. 703.

Uncorroborated testimony

In passing on motion for judgment non obstante veredicto, trial judge could not disregard witness' testimony merely because it was not corroborated.—Szidor v. Greek

ıch evidence it should be inherently incredible;[57] nd evidence not in conflict with such evidence, and 'hich is not inherently incredible, will also be ac-epted as true.[58] The successful party at the trial ; not entitled to favorable inferences from a lack f testimony,[59] or from broad general statements 'hich are opposed by definite evidence from his wn witnesses.[60]

If there is in the record evidence which, stand-ng alone, tends to prove the material allegations of the pleadings of the party opposed to the motion, it should be denied, even though on the entire record the evidence may preponderate against the party in opposition to such motion, so that a verdict in his favor could not stand when tested by a motion for a new trial;[61] and no contradictory evidence of any kind will justify a judgment notwithstanding the verdict for plaintiff except uncontradicted evidence of facts consistent with every fact which his evidence tends to prove, but showing af-

'atholic Union of Russian Brotherıoods of U. S., 21 A.2d 104, 145 Pa. Super. 251—Jeske v. City of Pittsburgh, 168 A. 323, 110 Pa.Super. 274.

Facts found by jury admitted

A motion for judgment notwithstanding verdict admits for purpose of motion the existence of facts found by jury and asserts that, taking verdict at its face, judgment should go the other way.—Wisconsin Tel. Co. v. Russell, 7 N.W.2d 825, 242 Wis. 247—Volland v. McGee, 294 N.W. 497, 236 Wis. 358, rehearing denied 295 N.W. 635, 236 Wis. 358.

Evidence admitted for special purpose

Where insurer denied liability on life policy on ground of insured's misrepresentation in application that he had not been attended by a physician during previous three years, denial of motion for judgment notwithstanding verdict for beneficiary on ground that proofs of death furnished by beneficiary proved falsity of representation was held not error, where proofs were offered and admitted specially and not as truth of matters therein asserted.—Fickes v. Prudential Ins. Co. of America, 184 A. 754, 321 Pa. 474.

Testimony of moving party's witness cannot be used as basis of judgment notwithstanding verdict.—Smith v. Penn Tp. Mut. Fire Ass'n of Lancaster County, 186 A. 130, 323 Pa. 93.

Evidence adduced by movant favorable to contestant

The party contesting a motion for judgment notwithstanding the verdict is entitled to the benefit of any favorable evidence introduced by the moving party.

Cal.—Card v. Boms, 291 P. 190, 210 Cal. 200.

Ill.—Relaco Rosin Products v. National Casein Co., 64 N.E.2d 243, 327 Ill.App. 334—Fricke v. St. Louis Bridge Co., 32 N.E.2d 1016, 309 Ill.App. 279—Scherb v. Randolph Wells Auto Park, 22 N.E.2d 796, 301 Ill.App. 298.

Pa.—Cherry v. Mitosky, 45 A.2d 23, 353 Pa. 401—Holland v. Kohn, 38 A.2d 500, 155 Pa.Super. 95—Berry v. Eastman, 40 A.2d 102, 156 Pa. Super. 349—Herchelroth v. Jaffe, 35 A.2d 594, 154 Pa.Super. 54—Dixon v. Metropolitan Life Ins. Co., 7 A.2d 549, 136 Pa.Super. 573—Hoff v. Tavani, 170 A. 384, 111 Pa.Super. 567.

Wash.—Hurst v. Peterson, 64 P.2d 788, 189 Wash. 169.

Evidence of contestant unfavorable to him

On motion for judgment notwithstanding the verdict, even though contestant's evidence is in some respects unfavorable to him, he is not bound by unfavorable part thereof, but is entitled to have his case considered on basis of evidence which is most favorable to his position.—Moen v. Chestnut, 113 P.2d 1030, 9 Wash.2d 93.

57. Cal.—In re Hettermann's Estate, 119 P.2d 788, 48 Cal.App.2d 263.

Evidence that has no probative force may not be considered in passing on motion.—Knudson v. Knudson, 46 N.E.2d 1011, 382 Ill. 492.

Parts of evidence unbelievable

Where trial court finds that parts of plaintiff's testimony are wholly unbelievable, the court should grant new trial after verdict for plaintiff instead of judgment non obstante veredicto.—Szidor v. Greek Catholic Union of Russian Brotherhoods of U. S., 21 A.2d 104, 145 Pa.Super. 251.

58. Va.—Bivens v. Manhattan for Hire Car Corporation, 159 S.E. 395, 156 Va. 483.

59. Mich.—West v. Detroit Terminal R. R., 201 N.W. 955, 229 Mich. 590.

60. Mich.—West v. Detroit Terminal R. R., supra.

61. Ill.—Berg v. New York Cent. R. Co., 62 N.E.2d 676, 391 Ill. 52—Tidholm v. Tidholm, 62 N.E.2d 473, 391 Ill. 19—Weinstein v. Metropolitan Life Ins. Co., 60 N.E.2d 207, 389 Ill. 571—Knudson v. Knudson, 46 N.E.2d 1011, 382 Ill. 492—Merlo v. Public Service Co. of Northern Illinois, 45 N.E.2d 665, 381 Ill. 300, followed in 45 N.E.2d 677, 381 Ill. 336—Hunt v. Vermilion County Children's Home, 44 N.E.2d 609, 381 Ill. 29—Walaite v. Chicago, R. I. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59—De Leuw, Cather & Co. v. City of Joliet, 64 N.E.2d 779, 327 Ill.App. 453—Anderson v. Krancic, 66 N.E.2d 316, 328 Ill.App. 364—Dickinson v. Rockford Van Orman Hotel Co., 63 N.E.2d 257, 326 Ill.App. 686—Hauck v. First Nat. Bank of Highland Park, 55 N.E.2d 565, 323 Ill.App. 300—Van Hoorebecke v. Iowa Illinois Gas & Electric Co., 57 N.E.2d 652, 324 Ill.App. 88—Gill v. Lewin, 53 N.E.2d 336, 321 Ill.App. 633—Hanson v. Blatt, 53 N.E.2d 143, 321 Ill.App. 364—Guess v. New York Cent. R. Co., 49 N.E.2d 652, 319 Ill.App. 522—Egner v. Fruit Belt Service Co., 47 N.E.2d 486, 318 Ill.App. 37—Hohimer v. Fricke, 46 N.E.2d 169, 317 Ill.App. 372—Zwierzycki v. Metropolitan Life Ins. Co., 45 N.E.2d 76, 316 Ill.App. 345—Adams v. Chicago & E. R. Co., 41 N.E.2d 991, 314 Ill.App. 404—Freeman v. Leader Mercantile Co., 40 N.E.2d 548, 313 Ill.App. 652—Bryant v. Taylor, 40 N.E.2d 545, 313 Ill.App. 650—Osborn v. Leuffgen, 38 N.E.2d 370, 312 Ill.App. 251, affirmed 45 N.E.2d 622, 381 Ill. 295—Baker v. Granite City, 37 N.E.2d 372, 311 Ill.App. 586—Gnat v. Richardson, 35 N.E.2d 409, 311 Ill.App. 242, affirmed 39 N.E.2d 337, 378 Ill. 626—Kanne v. Metropolitan Life Ins. Co., 34 N.E.2d 732, 310 Ill.App. 524—Brumit v. Wasson, 33 N.E.2d 740, 310 Ill.App. 264—Cooper v. Safeway Lines, 26 N.E.2d 632, 304 Ill.App. 302—Fricke v. St. Louis Bridge Co., 32 N.E.2d 1016, 309 Ill.App. 279—Roussin v. Kirkbride, 31 N.E.2d 833, 308 Ill.App. 366—Rose v. Meyer, 25 N.E.2d 413, 303 Ill.App. 365—Valant v. Metropolitan Life Ins. Co., 23 N.E.2d 922, 302 Ill.App. 196—Geiselman v. Strubhar, 23 N.E.2d 383, 302 Ill.App. 23—Le Menager v. Northwestern Steel & Wire Co., 22 N.E.2d 710, 301 Ill.App. 260—Larimore v. Larimore, 20 N.E.2d 902, 299 Ill.App. 547—Wells v. Wise, 18 N.E.2d 750, 298 Ill.App. 252—Gregory v. Merriam, 14 N.E.2d 268, 294 Ill.App. 483—Schiff v. Peck, 6 N.E.2d 509, 288 Ill.App. 625—McCarthy v. Rorrison, 283 Ill.App. 129—Capelle v. Chicago & N. W. R. Co., 280 Ill.App. 471.

firmatively a complete defense.[62] This requires consideration of the evidence, but precludes any examination of the weight of the evidence in order to determine its preponderance.[63] It is wholly immaterial on which side the weight of the evidence preponderates.[64]

In entering judgment non obstante veredicto, it has been held that the judgment must be entered on the evidence in the record as it existed at the close of the trial.[65] Under this rule the trial court may not on motion for judgment notwithstanding the verdict eliminate evidence on the ground that it was improperly received at the trial and then dispose of the case on the basis of the diminished record;[66] neither may it insert offers of evidence which should have been admitted but were excluded,[67] or receive evidence on the hearing of the motion which was not offered at the trial.[68]

(5) Discretion of Court

Although there is also authority to the contrary, it has been held that the granting of a judgment notwithstanding the verdict rests very much in the discretion of the trial court.

Although there is authority holding that a motion for judgment notwithstanding the verdict involves no element of judicial discretion,[69] and may not be granted unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from the evidence to sustain the verdict,[70] it has also been held that the granting of

62. Ill.—Berg v. New York Cent. R. Co., 62 N.E.2d 676, 391 Ill. 52—Tidholm v. Tidholm, 62 N.E.2d 473, 391 Ill. 19—Weinstein v. Metropolitan Life Ins. Co., 60 N.E.2d 207, 389 Ill. 571—Merlo v. Public Service Co. of Northern Illinois, 45 N.E.2d 665, 381 Ill. 300, followed in 45 N.E.2d 677, 381 Ill. 336—Hunt v. Vermilion County Children's Home, 44 N.E.2d 609, 381 Ill. 29—De Leuw, Cather & Co. v. City of Joliet, 64 N.E.2d 779, 327 Ill.App. 453—Dickinson v. Rockford Van Orman Hotel Co., 63 N.E.2d 257, 326 Ill.App. 686.

63. Ill.—Knudson v. Knudson, 46 N.E.2d 1011, 382 Ill. 492—Van Hoorebecke v. Iowa Illinois Gas & Electric Co., 57 N.E.2d 652, 324 Ill. App. 88—Gill v. Lewin, 53 N.E.2d 336, 321 Ill.App. 633—Egner v. Fruit Belt Service Co., 47 N.E.2d 486, 318 Ill.App. 37—Walaite v. Chicago, R. I. & P. Ry. Co., 28 N.E.2d 149, 306 Ill.App. 5, reversed on other grounds 33 N.E.2d 119, 376 Ill. 59—Russell v. Richardson, 24 N.E.2d 185, 302 Ill.App. 589—Valant v. Metropolitan Life Ins. Co., 23 N.E.2d 922, 302 Ill.App. 196—Geiselman v. Strubhar, 23 N.E.2d 383, 302 Ill.App. 23—Scherb v. Randolph Wells Auto Park, 22 N.E.2d 796, 301 Ill.App. 298—Le Menager v. Northwestern Steel & Wire Co., 22 N.E.2d 710, 301 Ill.App. 260—Oliver v. Kelley, 21 N.E.2d 649, 300 Ill.App. 487—Painter v. Keeshin Motor Express Co., 18 N.E.2d 65, 297 Ill.App. 557—Emge v. Illinois Cent. R. Co., 17 N.E.2d 612, 297 Ill.App. 344—Farmer v. Alton Building & Loan Ass'n, 13 N.E.2d 652, 294 Ill.App. 206—Gardiner v. Richardson, 11 N.E.2d 824, 293 Ill. App. 40—Schiff v. Peck, 6 N.E.2d 509, 288 Ill.App. 625—McNeill v. Harrison & Sons, 2 N.E.2d 959, 286 Ill.App. 120—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill.App. 14—Capelle v. Chicago & N. W. R. Co., 280 Ill.App. 471.

64. Ill.—Merlo v. Public Service Co. of Northern Illinois, 45 N.E.2d 665, 381 Ill. 300, followed in 45 N.E.2d 677, 381 Ill. 336.

65. Pa.—Henry Shenk Co. v. City of Erie, 43 A.2d 99, 352 Pa. 481—Kotlikoff v. Master, 27 A.2d 35, 345 Pa. 258—Heffron v. Prudential Ins. Co. of America, 8 A.2d 491, 137 Pa.Super. 69—Youngwood Building & Loan Ass'n v. Henry, 8 A.2d 427, 137 Pa.Super. 124—Dixon v. Metropolitan Life Ins. Co., 7 A.2d 549, 136 Pa.Super. 573—Huffman v. Simmons, 200 A. 274, 131 Pa.Super. 370—Moore v. W. J. Gilmore Drug Co., 200 A. 250, 131 Pa.Super. 349—Kuhn v. Conestoga Transp. Co., Com.Pl., 48 Lanc.Rev. 491, affirmed Landis v. Conestoga Transp. Co., 36 A.2d 465, 349 Pa. 97—Landis v. Conestoga Transp. Co., Com.Pl., 48 Lanc.Rev. 481, 11 Som. 302, affirmed 36 A.2d 465, 349 Pa. 97—In re Dughlaski's Estate, Orph., 29 North.Co. 174.

66. Pa.—Cherry v. Mitosky, 45 A.2d 23, 353 Pa. 401—Henry Shenk Co. v. City of Erie, 43 A.2d 99, 352 Pa. 481—Hershberger v. Hershberger, 29 A.2d 95, 345 Pa. 439—Kotlikoff v. Master, 27 A.2d 35, 345 Pa. 258—Stevenson v. Titus, 2 A.2d 853, 332 Pa. 100—Murphy v. Wolverine Express, 38 A.2d 511, 155 Pa.Super. 125—Schock v. Penn Tp. Mut. Fire Ins. Ass'n of Lancaster County, 24 A.2d 738, 148 Pa.Super. 81—Heffron v. Prudential Ins. Co. of America, 8 A.2d 491, 137 Pa.Super. 69—Youngwood Building & Loan Ass'n v. Henry, 8 A.2d 427, 137 Pa.Super. 124—Dixon v. Metropolitan Life Ins. Co., 7 A.2d 549, 136 Pa.Super. 573—Huffman v. Simmons, 200 A. 274, 131 Pa.Super. 370—Squire v. Merchants' Warehouse Co., 196 A. 915, 130 Pa.Super. 8—Ozanich v. Metropolitan Life Ins. Co., 180 A. 67, 119 Pa.Super. 52, reargument refused and supplemented 180 A. 576, 119 Pa. Super. 52—In re Dughlaski's Estate, Orph., 29 North.Co. 174.

67. Pa.—Henry Shenk Co. v. City of Erie, 43 A.2d 99, 352 Pa. 481—Kotlikoff v. Master, 27 A.2d 35, 345 Pa. 258—Youngwood Building & Loan Ass'n v. Henry, 8 A.2d 427, 137 Pa.Super. 124—Dixon v. Metropolitan Life Ins. Co., 7 A.2d 549, 136 Pa.Super. 573—Huffman v. Simmons, 200 A. 274, 131 Pa.Super. 370—In re Dughlaski's Estate, Orph., 29 North.Co. 174.

68. Mich.—McGuire v. Armstrong, 255 N.W. 745, 268 Mich. 152.

69. Wash.—Richey & Gilbert Co. v. Northwestern Natural Gas Corporation, 134 P.2d 444, 16 Wash.2d 631—Wiggins v. North Coast Transp. Co., 98 P.2d 675, 2 Wash.2d 446—Knight v. Trogdon Truck Co., 71 P.2d 1003, 191 Wash. 646—Chess v. Reynolds, 66 P.2d 297, 189 Wash. 547—Lydon v. Exchange Nat. Bank, 235 P. 27, 134 Wash. 188.

33 C.J. p 1180 note 24 [a].

70. Wash.—Moore v. Keesey, 163 P.2d 164—Ziniewicz v. Department of Labor and Industries, 161 P.2d 315, 23 Wash.2d 436—Mathers v. Stephens, 156 P.2d 227, 22 Wash.2d 364—Omeitt v. Department of Labor and Industries, 152 P.2d 973, 21 Wash.2d 684—Simmons v. Cowlitz County, 120 P.2d 479, 12 Wash.2d 84—Griffin v. Cascade Theatres Corporation, 117 P.2d 651, 10 Wash.2d 574—Peterson v. Mayham, 116 P.2d 259, 10 Wash.2d 111—Moen v. Chestnut, 113 P.2d 1030, 9 Wash.2d 93—Letres v. Washington Co-op. Chick Ass'n, 111 P.2d 594, 8 Wash.2d 64—Anderson v. Harrison, 103 P.2d 320, 4 Wash.2d 265—Wiggins v. North Coast Transp. Co., 98 P.2d 675, 2 Wash.2d 446—Pyle v. Wilbert, 98 P.2d 664, 2 Wash.2d 429—Gibson v. Spokane United Rys., 84 P.2d 349, 197 Wash. 58—Steen v. Polyclinic, 81 P.2d 846, 195 Wash. 666—Lew-

such a judgment rests very much in the discretion of the court;[71] and accordingly the court is not bound to enter such judgment in every case in which it is later convinced it should have given binding instructions at the trial.[72] Although the court is under a duty to grant judgment notwithstanding the verdict when the right to such a judgment is clear,[73] judgment notwithstanding the verdict is to be granted cautiously,[74] and only when it clearly appears from the record that the party obtaining the verdict was not entitled thereto.[75] Where justice will be promoted thereby, a motion for such judgment may be denied, and the party remitted to his remedy by motion for a new trial.[76]

c. On Motion to Disregard Special Issue Jury Finding

Under some statutes the court is authorized to disregard any special issue jury finding that has no support in the evidence and thus enter judgment notwithstanding a part of the verdict; but the right may be exercised only in the manner and under the circumstances prescribed by the statutes.

Under some statutes the court is authorized on proper motion to disregard any special issue jury finding that has no support in the evidence,[77] but this right may be exercised only in the manner and under the circumstances prescribed by the statutes.[78] A motion to disregard one or more of the

is v. Coleman, 79 P.2d 633, 194 Wash. 674—Corbaley v. Pierce County, 74 P.2d 993, 192 Wash. 688—Kedziora v. Washington Water Power Co., 74 P.2d 898, 193 Wash. 51—Knight v. Trogdon Truck Co., 71 P.2d 1003, 191 Wash. 646—Gross v. Partlow, 68 P.2d 1034, 190 Wash. 489—Chess v. Reynolds, 66 P.2d 297, 189 Wash. 547—Mootz v. Spokane Racing & Fair Ass'n, 64 P.2d 516, 189 Wash. 225—Boyd v. Cole, 63 P.2d 931, 189 Wash. 81—Larpenteur v. Eldridge Motors, 55 P.2d 1064, 185 Wash. 530—Shumaker v. Charada Inv. Co., 49 P.2d 44, 183 Wash. 521—Engdal v. Owl Drug Co., 48 P.2d 232, 183 Wash. 100—Stevich v. Department of Labor and Industries, 47 P.2d 32, 182 Wash. 401—Tjosevig v. Butler, 38 P.2d 1022, 180 Wash. 151—Green v. Langnes, 32 P.2d 565, 177 Wash. 536—Reeve v. Arnoldo, 30 P.2d 943, 176 Wash. 679—Hart v. Hogan, 24 P.2d 99, 173 Wash. 598—Carroll v. Western Union Telegraph Co., 17 P.2d 49, 170 Wash. 600—Sears v. Lydon, 13 P.2d 475, 169 Wash. 92—Haydon v. Bay City Fuel Co., 9 P.2d 98, 167 Wash. 212—Nelson v. Booth Fisheries Co., 6 P.2d 388, 165 Wash. 521—Phelan v. Jones, 4 P.2d 516, 164 Wash. 640—Hopkins v. Lotus Cafe, 297 P. 178, 161 Wash. 493—Haan v. Heath, 296 P. 816, 161 Wash. 128—Fleming v. Buerkli, 293 P. 462, 159 Wash. 460—Dailey v. Phoenix Inv. Co., 285 P. 657, 155 Wash. 597—Wieber v. City of Everett, 283 P. 1085, 155 Wash. 167—Lee v. Gorman Packing Corporation, 282 P. 205, 154 Wash. 376—Kelly v. Drumheller, 272 P. 731, 150 Wash. 185—Crary v. Coffin, 268 P. 881, 148 Wash. 287—Fisher v. Tacoma Ry. & Power Co., 268 P. 180, 148 Wash. 122—Cushman v. Standard Oil Co. of California, 260 P. 996, 145 Wash. 481—Chalenor v. Mutual Life Ins. Co. of New York, 259 P. 383, 145 Wash. 139—Eyak River Packing Co. v. Huglen, 255 P. 123, 143 Wash. 229, reheard 257 P. 638, 143 Wash. 229—White v. Rigg, 254 P. 459, 143 Wash. 46—Stickney v. Congdon, 250 P. 32, 140 Wash. 670—Karr v. Mahaffay, 248 P. 801, 140 Wash. 236—Allingham v. Long-Bell Lumber Co., 241 P. 298, 136 Wash. 681—Reynolds v. Morgan, 235 P. 800, 134 Wash. 358—Crooks v. Rust, 226 P. 262, 130 Wash. 88—Fortier v. Robillard, 212 P. 1083, 123 Wash. 599.

33 C.J. p 1180 note 24 [a].

71. Conn.—Gesualdi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.
Pa.—Klein v. F. W. Woolworth Co., 163 A. 532, 309 Pa. 320—Standard Oil Co. of N. J. v. Graham Oil Transport Corp., 41 A.2d 414, 157 Pa.Super. 41—Schroeder Bros. v. Sabeli, 40 A.2d 170, 156 Pa.Super. 267—Bunn v. Furstein, 34 A.2d 924, 153 Pa.Super. 637—Schmidt v. Pittsburgh Rys. Co., 193 A. 67, 127 Pa.Super. 161.
Tex.—Spence v. National Life & Accident Ins. Co., Civ.App., 59 S.W.2d 212.

33 C.J. p 1180 note 24.

72. Pa.—Standard Oil Co. of N. J. v. Graham Oil Transport Corp., 41 A.2d 414, 157 Pa.Super. 41—Schroeder Bros. v. Sabelli, 40 A.2d 170, 156 Pa.Super. 267—Bunn v. Furstein, 34 A.2d 924, 153 Pa.Super. 637.

73. Minn.—First Nat. Bank v. Fox, 254 N.W. 8, 191 Minn. 318.
Pa.—Schroeder Bros. v. Sabelli, 40 A.2d 170, 156 Pa.Super. 267.

74. Minn.—First Nat. Bank v. Fox, 254 N.W. 8, 191 Minn. 318.

75. Minn.—First Nat. Bank v. Fox, supra.
Pa.—Kissinger v. Pittsburgh Rys. Co., 180 A. 137, 119 Pa.Super. 110.

76. Pa.—Athas v. Fort Pitt Brewing Co., 157 A. 677, 305 Pa. 350—Pringle v. Smith, 133 A. 33, 286 Pa. 152—March v. Philadelphia & West Chester Traction Co., 132 A. 355, 285 Pa. 413—Schroeder Bros. v. Sabeli, 40 A.2d 170, 156 Pa.Super. 267—Bunn v. Furstein, 34 A.2d 924, 153 Pa.Super. 637—Szidor v. Greek Catholic Union of Russian Brotherhoods of U. S., 21 A.2d 104, 145 Pa.Super. 251—Ellsworth v. Husband, 181 A. 90, 119 Pa.Super. 245—Blassotti v. Greensboro Gas Co., 96 Pa.Super. 162—Cameron v. Doyno, 10 Pa.Dist. & Co. 593—Rich v. Boguszinski, 10 Pa.Dist. & Co. 217, 24 Luz.Leg.Reg. 333—Reick v. Maple Hill Cemetery Ass'n, Com.Pl., 31 Luz.Leg.Reg. 213.

33 C.J. p 1181 note 25.

77. Tex.—Myers v. Crenshaw, 137 S.W.2d 7, 134 Tex. 500—Hearn v. Hanlon-Buchanan, Inc., Civ.App., 179 S.W.2d 364, error refused—Smith v. Safeway Stores, Civ.App., 167 S.W.2d 1044—Heath v. Ellisston, Civ.App., 145 S.W.2d 243, error dismissed, judgment correct—Ronsley v. City of Fort Worth, Civ.App., 140 S.W.2d 257, error dismissed, judgment correct—Pearlstone-Ash Grocery Co. v. Rembert Nat. Bank of Longview, Civ.App., 135 S.W.2d 559, error refused—Jones v. Liberty Mut. Ins. Co., Civ.App., 131 S.W.2d 776, error dismissed, judgment correct—Foster v. National Bondholders Corporation, Civ.App., 123 S.W.2d 506, error dismissed—James v. Texas Employers' Ins. Ass'n, Civ.App., 98 S.W.2d 425, reversed on other grounds Texas Employers' Ins. Ass'n v. James, 118 S.W.2d 293, 131 Tex. 605—Beckner v. Barrett, Civ.App., 81 S.W.2d 719, error dismissed—Smith v. El Paso & N. E. R. Co., Civ.App., 67 S.W.2d 362, error dismissed—Sproles v. Rosen, Civ.App., 47 S.W.2d 331, affirmed 84 S.W.2d 1001, 126 Tex. 51.

Prior to statute trial court was without authority to set aside jury's finding to an issue raised by pleadings, even though such finding was against undisputed proof or was not supported by evidence.—Edmiston v. Texas & N. O. R. Co., 138 S.W.2d 526, 135 Tex. 67.

78. Tex.—Edmiston v. Texas & N. O. R. Co., supra—Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289—Lath-

special issue jury findings is of a character similar to that of a motion for judgment notwithstanding the entire verdict;[79] it is a motion for judgment notwithstanding a part of the verdict,[80] and often is referred to as a motion for a judgment non obstante veredicto.[81]

d. On Point Reserved

Under the practice in some jurisdictions judgment notwithstanding the verdict may be entered according to the court's decision on a reserved point of law.

The practice prevails in some jurisdictions of taking a verdict subject to the decision of a reserved point of law by the court; the judgment is then entered for one party or the other according to the decision of the reserved point.[82] Where the verdict of the jury and the decision by the court of the point reserved are both in favor of plaintiff, the judgment should be entered for plaintiff on the verdict, and not on the point reserved.[83] Where the verdict is for plaintiff, and the reserved point is determined for defendant, the judgment is entered for defendant non obstante veredicto.[84] Where the verdict is for defendant, a judgment cannot be rendered for plaintiff, although the point reserved is determined in his favor, as in such case there is nothing to support the judgment,[85] and a fortiori defendant is entitled to judgment on the verdict where the point reserved is also determined in his favor.[86] Where it is uncertain whether the jury found their verdict on the facts relating to which the question of law was reserved or on other facts also submitted to them, a judgment non obstante veredicto may not be rendered.[87] A statute providing that, where a party requests a directed verdict, the court may reserve its decision and submit the case to the jury and then enter a judgment non obstante veredicto if the verdict is against the party making the request has no application where the verdict is for the party making the request, and an order granting a motion for judgment non obstante veredicto in such case is a nullity.[88]

Nature of questions reserved. The point reserved must be solely a question of law, and a question of fact or a mixed question of law and fact may not be reserved.[89] The question whether there is any evidence in the case to support a recovery is a question of law and may be reserved, but the question whether there is sufficient evidence to support a recovery where the evidence is conflicting may not be reserved.[90] The reservation may not be as to whether on the whole case plaintiff is entitled to recover.[91]

Sufficiency of reservation. The reservation of controlling legal questions should always be made

am v. Coca-Cola Bottling Co., Civ. App., 175 S.W.2d 426—Dedear v. James, Civ.App., 172 S.W.2d 535, error refused—Gatlin v. Southwestern Settlement & Development Corporation, Civ.App., 166 S. W.2d 150, error refused—Walker v. Scott, Civ.App., 164 S.W.2d 586, reversed on other grounds Scott v. Walker, 170 S.W.2d 718, 141 Tex. 181—Bailey v. Walker, Civ.App., 163 S.W.2d 864, error refused—Perry v. Citizens Life Ins. Co., Civ.App., 163 S.W.2d 743—Happ v. Happ, Civ.App., 160 S.W.2d 227, error refused—Rudolph v. Smith, Civ.App., 148 S.W.2d 225—Jennison v. Darnielle, Civ.App., 146 S. W.2d 788, error dismissed—Corona Petroleum Co. v. Jameson, Civ. App., 146 S.W.2d 512, error dismissed, judgment correct—American Nat. Ins. Co. v. Sutton, Civ. App., 130 S.W.2d 441—Phlying v. Security Ben. Ass'n, Civ.App., 129 S.W.2d 358, error dismissed, judgment correct—Friske v. Graham, Civ.App., 128 S.W.2d 139—Lewis v. Martin, Civ.App., 120 S.W.2d 910, error refused—Traders & General Ins. Co. v. Milliken, Civ.App., 110 S.W.2d 108—Howard v. Howard, Civ.App., 102 S.W.2d 473, error refused—Jordan v. City of Lubbock, Civ.App., 88 S.W.2d 560, error dismissed—Bell v. Henson, Civ. App., 74 S.W.2d 455, error dismissed—Smith v. El Paso & N. E. R. Co., Civ.App., 67 S.W.2d 362, error dismissed—Coleman v. Rollo, Civ.App., 50 S.W.2d 391, error dismissed.

79. Tex.—Myers v. Crenshaw, 137 S.W.2d 7, 134 Tex. 500.

80. Tex.—Myers v. Crenshaw, supra.

81. Tex.—Myers v. Crenshaw, supra.

82. Mich.—Forman v. Prudential Ins. Co. of America, 16 N.W.2d 696, 310 Mich. 145—Cullen v. Voorhies, 205 N.W. 177, 232 Mich. 420.
N.Y.—Schaffer v. Schaffer, 269 N.Y. S. 288, 241 App.Div. 687.
Pa.—Eckenrode v. Produce Trucking Co., Com.Pl., 49 Dauph.Co. 271—Wanamaker v. Beamesderfer, 3 Pa. Dist. & Co. 699, 26 Dauph.Co. 120.
33 C.J. p 1186 note 60.

Effect of finding

Jury's finding had no effect on motion for judgment notwithstanding verdict where motion for directed verdict, reserved under statute, was made before submission to jury. —King v. Bird, 222 N.W. 133, 245 Mich. 93.

Statute authorizing practice held not repealed

Mich.—Vandenberg v. Kaat, 238 N. W. 220, 252 Mich. 187.

83. Pa.—Ringle v. Pennsylvania R. Co., 30 A. 492, 164 Pa. 529, 44 Am.S.R. 628.
33 C.J. p 1186 note 61.

84. U.S.—Goehrig v. Stryker, C.C. Pa., 174 F. 897.
Pa.—Hays v. Oil City, 11 A. 63, 8 Pa. Cas. 185.

85. Pa.—Ringle v. Pennsylvania R. Co., 30 A. 492, 164 Pa. 529, 44 Am. S.R. 628.
33 C.J. p 1186 note 63.

86. U.S.—Bohem v. Atlantic City R. Co., C.C.Pa., 174 F. 302.

87. Pa.—Keifer v. Eldred Tp., 20 A. 592, 110 Pa. 1.

88. Mich.—Jonescu v. Orlich, 189 N. W. 919, 220 Mich. 89.

89. U.S.—Casey v. Pennsylvania Asphalt Pav. Co., C.C.Pa., 109 F. 744, affirmed 144 F. 189, 52 C.C.A. 145.

Fla.—Corpus Juris cited in Talley v. McCain, 174 So. 841, 842, 128 Fla. 418.

33 C.J. p 1186 note 66.

90. Pa.—Butts v. Armor, 30 A. 357, 164 Pa. 73, 26 L.R.A. 213.
33 C.J. p 1187 note 67.

91. Pa.—Keifer v. Eldred Tp., 20 A. 592, 110 Pa. 1—Clark v. Wilder, 25 Pa. 314.
33 C.J. p 1187 note 68.

a matter of record at the time, and the record must show the question of law distinctly stated and properly reserved.[92] The facts, as well as the questions of law arising thereon which are reserved, must be stated in the record.[93]

e. On Special Findings against General Verdict

A judgment on the special findings of a jury, but against their general verdict, is not really a judgment non obstante veredicto, although often inaccurately so called.

A judgment on the special findings of a jury, but against their general verdict, is not really a judgment non obstante veredicto, although often inaccurately so called. A motion for judgment non obstante veredicto is a motion for judgment on the pleadings without regard to the verdict; but a motion for a judgment on the special finding of the facts, notwithstanding the general verdict, has no reference whatever to the pleadings in the cause, and proceeds on the theory that the special finding of facts by the jury is so inconsistent with their general verdict that the former should control the latter and the court should give judgment accordingly.[94] The practice in respect of special findings is considered in the C.J.S. title Trial §§ 563, 564, also 64 C.J. p 1177 note 94 et seq.

f. In Particular Proceedings

The rules regulating the granting of motions for judgment notwithstanding the verdict apply generally to proceedings in which issues were submitted to, and determined by, a jury.

The rules regulating the granting of motions for judgment notwithstanding the verdict have been held to be applicable to probate proceedings tried before a jury[95] and to condemnation proceedings where a jury was demanded and not waived,[96] but they have been held not to apply to a case tried by the court without a jury[97] or in an equity suit with respect to a jury's verdict which is merely advisory,[98] although it has also been held that judgment in an equitable action submitted on the pleadings should go for the party entitled thereto by the pleadings notwithstanding the verdict against him,[99] and that the trial court has power to enter judgment notwithstanding the verdict in a law action where defendant invoked the equity powers of the court so that the jury's verdict was merely advisory.[1] Also the rule has been held inapplicable to issues submitted to, but not found by, the jury,[2] or where there was no verdict,[3] as where the court rendered judgment after the jury disagreed as to issues submitted to them and were discharged.[4] Where, in accordance with the rules stated supra subdivision a of this section, the motion is based wholly on defective pleadings, a motion for judgment notwithstanding the verdict is inappropriate in a proceeding where no formal pleadings are required or had,[5] and a denial of the motion has been held not to be error in a case in which a general denial to allegations of a claim is interposed by operation of law.[6]

g. Amount of Verdict

A motion for judgment in a larger amount than the verdict is a motion non obstante veredicto and may be granted in some jurisdictions where under the pleadings and proof the plaintiff is entitled to the larger amount if entitled to recover at all; but the fact that the amount of the verdict is inadequate or excessive does not warrant judgment for the opposite party notwithstanding the verdict.

A motion for judgment in a larger amount than the verdict is a motion non obstante veredicto although not so designated.[7] At common law and

92. Pa.—Buckley v. Duff, 8 A. 823, 111 Pa. 223.
33 C.J. p 1187 note 69.

93. Pa.—Buckley v. Duff, supra.
33 C.J. p 1187 note 70.

94. Conn.—Gesualdi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.
Kan.—Packer v. Fairmont Creamery Co., 146 P.2d 401, 158 Kan. 191.
Okl.—Corpus Juris quoted in Oklahoma Gas & Electric Co. v. Busha, 66 P.2d 64, 67, 179 Okl. 505.
33 C.J. p 1187 note 71.

95. Cal.—In re Hettermann's Estate, 119 P.2d 788, 48 Cal.App.2d 263.
The word "judgment" in rule relating to judgment notwithstanding verdict has no narrow, technical meaning, and it includes a decision or determination on issues from orphans' court or in any other proceeding at law, corresponding to a judgment in ordinary action at law.—Schmeizl v. Schmeizl, Md., 42 A.2d 106.

96. Cal.—City and County of San Francisco v. Superior Court in and for City and County of San Francisco, 271 P. 121, 94 Cal.App. 818.

97. Ill.—Reardon v. Abraham Lincoln Life Ins. Co., 7 N.E.2d 388, 288 Ill.App. 633.

98. Ill.—Shipman v. Moseley, 49 N.E.2d 662, 319 Ill.App. 443.
Okl.—Luke v. Patterson, 139 P.2d 175, 192 Okl. 631, 48 A.L.R. 679.
S.D.—South Dakota Wheat Growers' Ass'n v. Sieler, 230 N.W. 805, 57 S.D. 101.

99. Ky.—First Nat. Bank of Jackson v. Strong, 15 S.W.2d 477, 228 Ky. 604.

1. Neb.—Oft v. Dornacker, 269 N.W. 418, 131 Neb. 644.
Wash.—Benedict v. Hendrickson, 143 P.2d 326, 19 Wash.2d 452.

2. Tex.—Miller v. Fenner, Beane & Ungerleider, Civ.App., 89 S.W.2d 506, error dismissed—Handy v. Olney Oil & Refining Co., Civ.App., 68 S.W.2d 313, error refused.

3. Tex.—Fitts v. Carpenter, Civ. App., 124 S.W.2d 420.

4. Tex.—Slay v. Burnett Trust, 187 S.W.2d 377, 143 Tex. 621—Fitts v. Carpenter, Civ.App., 124 S.W.2d 420.

5. Mo.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091.

6. Iowa.—In re Larimer's Estate, 288 N.W. 430, 225 Iowa 1067.

7. Colo.—De Boer v. Olmsted, 260 P. 108, 82 Colo. 369.

under some statutes plaintiff who has recovered a verdict cannot have judgment non obstante veredicto for a greater amount.[8] Such a judgment has been held proper, however, where under the pleadings and proof plaintiff is entitled to the larger amount if he is entitled to recover at all,[9] but the court cannot render such judgment where plaintiff is not entitled under the pleadings and proof to recover the larger amount,[10] it being held that such judgment may be entered only where the evidence supporting it is uncontradicted and unimpeached so that a verdict could have been entered in the exact amount of the judgment.[11] Failure of the court to grant a new trial has been held to furnish no ground for entry of judgment for the amount of damages claimed notwithstanding a verdict for a smaller amount.[12]

The fact that a verdict is rendered for an amount much smaller than that to which the party is entitled, if entitled to recover at all, has been held not to be sufficient to entitle the opposite party to a judgment notwithstanding the verdict unless such party is entitled to a judgment on the pleadings without regard to such verdict.[13] The fact that the verdict is excessive does not warrant judgment for defendant notwithstanding the verdict.[14]

h. Party Entitled

At common law only the plaintiff could move for a judgment notwithstanding the verdict, but under the prevailing modern practice either the plaintiff or the defendant may have such a judgment in a proper case.

At common law a judgment non obstante veredicto could be entered only on the application of plaintiff for judgment in his favor, and never in favor of defendant.[15] Where plaintiff's pleadings would not support a judgment on a verdict in his favor, defendant's sole remedy was by motion in arrest of judgment.[16] By virtue either of statute or relaxation of the early common-law rule, however, the generally prevailing rule now is that either plaintiff or defendant may have a judgment non obstante veredicto in a proper case.[17]

8. Or.—Snyder v. Portland Ry., Light & Power Co., 215 P. 887, 107 Or. 673.

Interest

(1) In the absence of any provision therefor in the statutes empowering the court to enter judgment notwithstanding the verdict, the court is without power to enter judgment including interest where the jury's verdict allowed recovery without interest.—Daly v. Savage, 160 N.E. 881, 27 Ohio App. 133.

(2) Allowance of interest generally see supra § 58.

9. Ariz.—Fornara v. Wolpe, 226 P. 203, 26 Ariz. 383.
Ill.—Paschall v. Reed, 51 N.E.2d 342, 320 Ill.App. 390.
N.D.—Fargo Loan Agency v. Larson, 207 N.W. 1003, 53 N.D. 621.
Pa.—Stierheim v. Bechtold, 43 A.2d 916, 158 Pa.Super. 107.

10. Ark.—Moore v. Rogers Wholesale Grocery Co., 8 S.W.2d 457, 177 Ark. 993—Fulbright v. Phipps, 3 S.W.2d 49, 176 Ark. 356.
Kan.—Manhardt v. Sheridan's Estate, 92 P.2d 76, 150 Kan. 264.
Wash.—Richey & Gilbert Co. v. Northwestern Natural Gas Corporation, 134 P.2d 444, 16 Wash.2d 631.

Conflicting evidence

Judgment notwithstanding verdict, for amount larger than awarded plaintiff, is unauthorized under conflicting evidence sufficient to support verdict for either party.—McGuire & Cavender v. Robertson, 32 S.W.2d 624, 182 Ark. 759.

11. Colo.—Peterson v. Rawalt, 86 P.2d 465, 95 Colo. 368.

12. Ark.—Powers v. Wood Parts Corporation, 44 S.W.2d 324, 184 Ark. 1032.

13. Okl.—Dill v. Johnston, 222 P. 507, 94 Okl. 264—Hyatt v. Vinita Brass Works, 214 P. 706, 89 Okl. 171.

14. Pa.—Darlington v. Bucks County Public Service Co., 154 A. 501, 303 Pa. 288—Long v. Great Atlantic & Pacific Tea Co., Com.Pl., 29 Del.Co. 512.
33 C.J. p 1184 note 50 [a] (1).

15. U.S.—Newton v. Glenn, C.C.A. Miss., 149 F.2d 879.
Ala.—**Corpus Juris cited in** City of Birmingham v. Andrews, 132 So. 877, 222 Ala. 362.
Colo.—David v. Gilbert, 274 P. 821, 85 Colo. 184.
Fla.—Tolliver v. Loftin, 21 So.2d 359—Peavy-Wilson Lumber Co. v. Baker, 4 So.2d 333, 148 Fla. 296—**Corpus Juris cited in** Dudley v. Harrison, McCready & Co., 173 So. 820, 823, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338—**Corpus Juris cited in** Atlantic Coast Line R. Co. v. Canady, 165 So. 629, 630, 122 Fla. 447.
Ill.—McNeill v. Harrison & Sons, 2 N.E.2d 959, 286 Ill.App. 120—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill.App. 14—Capelle v. Chicago & N. W. R. Co., 280 Ill.App. 471—Royal Mfg. Co. v. Garfield Sanitary Felt Co., 238 Ill.App. 425.
Ind.—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179.
Mo.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091—Blodgett v. Koenig, 284 S.W. 505, 314 Mo. 262—First Nat. Bank v. Dunbar, 72 S.W.2d 821, 230 Mo.App. 687.
N.J.—**Corpus Juris cited in** Rospond v. Decker, 162 A. 725, 726, 109 N.J. Law 458.
N.C.—**Corpus Juris cited in** Johnson v. Metropolitan Life Ins. Co., 14 S.E.2d 405, 406, 219 N.C. 445—**Corpus Juris cited in** Jernigan v. Neighbors, 141 S.E. 586, 195 N.C. 231.
Or.—Snyder v. Portland Ry., Light & Power Co., 215 P. 887, 107 Or. 673.
Vt.—Nadeau v. St. Albans Aerie No. 1205, Fraternal Order of Eagles, 26 A.2d 93, 112 Vt. 397—Johnson v. Hardware Mut. Casualty Co., 1 A.2d 817, 109 Vt. 481.
33 C.J. p 1179 note 14.

16. U.S.—Newton v. Glenn, C.C.A. Miss., 149 F.2d 879.
Fla.—**Corpus Juris cited in** Weis-Patterson Lumber Co. v. King, 177 So. 313, 321, 131 Fla. 342—**Corpus Juris cited in** Dudley v. Harrison, McCready & Co., 173 So. 820, 823, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338.
Ind.—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179.
Mo.—Blodgett v. Koenig, 284 S.W. 505, 314 Mo. 262—First Nat. Bank v. Dunbar, 72 S.W.2d 821, 230 Mo.App. 687.
N.J.—**Corpus Juris cited in** Rospond v. Decker, 162 A. 725, 726, 109 N.J.Law 458.
33 C.J. p 1179 note 15.
Arrest of judgment see infra §§ 87–99.

17. Ala.—**Corpus Juris quoted in** City of Birmingham v. Andrews, 132 So. 877, 222 Ala. 362.

Joint defendants. Where there is a verdict against two or more joint defendants, it has been held that the court may enter a judgment notwithstanding the verdict in favor of one of them and refuse such judgment as to the others.[18]

i. Waiver and Estoppel

The right to move for a judgment notwithstanding the verdict may be waived.

The right to move for a judgment non obstante veredicto may be waived,[19] as by failing to assert it,[20] and it is waived where a material issue found by the verdict was litigated by acquiescence or consent, although not pleaded;[21] but it is not waived by failing to demur to an insufficient pleading,[22] by asking for a peremptory instruction,[23] by asking for a stay of proceedings after verdict,[24] or by the filing of a motion for a new trial.[25] Parties requesting submission of special issues are not estopped to urge judgment non obstante veredicto.[26]

§ 61. —— Motion for Judgment

a. In general
b. Time for motion
c. Notice of motion and hearing thereon
d. Form and requisites
e. Hearing and determination of motion

a. In General

A motion for judgment notwithstanding the verdict must be made in the trial court by the party entitled thereto, and the motion may request, in the alternative, a new trial.

A motion for judgment notwithstanding the verdict must be made in the trial court,[27] by the party entitled thereto,[28] and be served on the adverse party in accordance with statutory requirements.[29] It is not the duty of the court so to reward a litigant on its own motion,[30] although it has been held that the trial court may act on its own motion.[31]

Ark.—**Corpus Juris cited in** Oil Fields Corporation v. Cubage, 24 S.W.2d 328, 329, 180 Ark. 1018.
Conn.—Gesualdi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.
Ill.—Farmer v. Alton Building & Loan Ass'n, 13 N.E.2d 652, 294 Ill. App. 206—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill.App. 14—Capelle v. Chicago & N. W. R. Co., 280 Ill.App. 471.
Ind.—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179.
Minn.—Bolstad v. Paul Bunyan Oil Co., 9 N.W.2d 346, 215 Minn. 166—Brossard v. Koop, 274 N.W. 241, 200 Minn. 410.
N.C.—**Corpus Juris cited in** Johnson v. Metropolitan Life Ins. Co., 14 S.E.2d 405, 406, 219 N.C. 445—**Corpus Juris cited in** Jernigan v. Neighbors, 141 S.E. 586, 195 N.C. 231.
Ohio.—Miller v. Star Co., 15 N.E.2d 151, 57 Ohio App. 485—Thompson v. Rutledge, 168 N.E. 547, 32 Ohio App. 537.
Vt.—Nadeau v. St. Albans Aerie No. 1205, Fraternal Order of Eagles, 26 A.2d 93, 112 Vt. 397—Johnson v. Hardware Mut. Casualty Co., 1 A.2d 817, 109 Vt. 481.
33 C.J. p 1179 note 17–p 1180 note 19.
Circumstances under which plaintiff or defendant may have judgment notwithstanding the verdict generally see supra subdivision a of this section.

18. Pa.—Lang v. Hanlon, 157 A. 788, 305 Pa. 378, followed in 157 A. 790, two cases, 305 Pa. 385, and 157 A. 791, 305 Pa. 385—Wright v. City of Scranton, 194 A. 10, 128 Pa. Super. 185—Brown v. George B. Newton Coal Co., Com.Pl., 28 Del. Co. 23.

19. Ky.—Hack v. Lashley, 245 S.W. 851, 197 Ky. 117.
Okl.—Montie Oil Co. v. Nichols, 224 P. 542, 98 Okl. 75.
33 C.J. p 1183 note 40.

20. Ky.—Hack v. Lashley, 245 S.W. 851, 197 Ky. 117.

21. Iowa.—Birmingham Sav. Bank of Birmingham v. Keller, 215 N.W. 649, 205 Iowa 271, opinion corrected on other grounds on rehearing 217 N.W. 874, 205 Iowa 271.
Kan.—Thogmartin v. Koppel, 65 P. 2d 571, 145 Kan. 347.
Neb.—Lebron Electrical Works v. Pizinger, 270 N.W. 683, 132 Neb. 164.
Pa.—Ogden v. Belfield, 82 Pa.Super. 534.
33 C.J. p 1183 note 41.

22. Iowa.—Persia Sav. Bank v. Wilson, 243 N.W. 581, 214 Iowa 993.

23. Ky.—Roe v. Gentry's Ex'x, 162 S.W.2d 208, 290 Ky. 598.

24. Mich.—Powers v. Vaughan, 20 N.W.2d 196, 312 Mich. 297.

25. Iowa.—Cownie v. Kopf, 202 N. W. 517, 199 Iowa 737.
Ohio.—Massachusetts Mut. Life Ins. Co. v. Hauk, 51 N.E.2d 30, 72 Ohio App. 131.

26. Tex.—Hightower v. Pruitt, Civ. App., 77 S.W.2d 754, error dismissed.

27. N.D.—Coughlin v. Ætna Life Ins. Co., 194 N.W. 661, 49 N.D. 948.
Pa.—West v. Manatawny Mut. Fire & Storm Ins. Co., 120 A. 763, 277 Pa. 102.
Tex.—Edmiston v. Texas & N. O. R. Co., 138 S.W.2d 526, 135 Tex. 67—Southland Life Ins. Co. v. Barrett, Civ.App., 172 S.W.2d 997, error refused—D-Bar Ranch v. Maxwell, Civ.App., 170 S.W.2d 303, error refused—Rudolph v. Smith, Civ. App., 148 S.W.2d 225—McCaskill v. Davis, Civ.App., 134 S.W.2d 738—Phlying v. Security Ben. Ass'n, Civ.App., 129 S.W.2d 358, error dismissed, judgment correct—Texas Employers' Ins. Ass'n v. Bauer, Civ.App., 128 S.W.2d 840, error dismissed, judgment correct—Valley Dredging Co. v. Sour Lake State Bank, Civ.App., 120 S.W.2d 875, error dismissed—Buford v. Connor, Civ.App., 118 S.W.2d 451—James v. Texas Employers Ins. Ass'n, Civ.App., 96 S.W.2d 425, reversed on other grounds Texas Employers' Ins. Ass'n v. James, 118 S.W.2d 293, 131 Tex. 605—Jordan v. City of Lubbock, Civ. App., 88 S.W.2d 560, error dismissed—Amarillo Transfer & Storage Co. v. De Shong, Civ.App., 82 S.W. 2d 381—Coleman v. Rollo, Civ. App., 50 S.W.2d 391, error dismissed.
33 C.J. p 1187 note 73.

28. Ky.—Hack v. Lashley, 245 S. W. 851, 197 Ky. 117.
Party entitled see supra § 60 h.

29. Tex.—Seastrunk v. Walker, Civ. App., 156 S.W.2d 996, error refused—Citizens State Bank of Houston v. Giles, Civ.App., 145 S.W.2d 899, error dismissed.

30. Ky.—Hack v. Lashley, 245 S.W. 851, 197 Ky. 117.

31. Cal.—Goldenzwig v. Shaddock, 88 P.2d 933, 31 Cal.App.2d 719.
Ohio.—Brooks v. Sentle, 58 N.E.2d 234, 74 Ohio App. 231.
33 C.J. p 1187 note 75.
In Texas
(1) The court is not authorized to

Alternative motion for new trial. The motion for judgment notwithstanding the verdict does not take the place of a motion for a new trial,[32] although a party may make his motion in the alternative, for judgment notwithstanding the verdict or, in case that is denied, for a new trial.[33] A motion asking for a judgment non obstante veredicto and for a new trial cannot be granted in the same case and between the same parties, since they are mutually exclusive,[34] such a motion will be treated as though filed in the alternative.[35] The movant is entitled only to alternative relief,[36] and the action of the trial court in sustaining a motion for judgment notwithstanding the verdict after granting a new trial is erroneous,[37] for, where the trial court grants a new trial, the verdict ceases to exist and a motion for judgment non obstante veredicto cannot be granted.[38] Also, if there is no abuse of discretion in granting a new trial, it is not error to refuse judgment non obstante veredicto.[39] It has been held, however, that where, following judgment for plaintiff, defendants file a motion for judgment notwithstanding the verdict, and also a motion for a new trial, the trial court should pass on both motions.[40]

b. Time for Motion

A motion for judgment notwithstanding the verdict must be made within the time limited by statute, and should generally be made before entry of judgment on the verdict.

A motion for judgment notwithstanding the verdict must be made within the time specified by statute;[41] if the motion is not filed within such time, the verdict of the jury must stand.[42] The motion

render a judgment notwithstanding the verdict unless its jurisdiction so to do is invoked by motion.—Henderson v. Soash, Civ.App., 157 S.W. 2d 161—Great American Indemnity Co. v. Dabney, Civ.App., 128 S.W.2d 496, error dismissed, judgment correct—Valley Dredging Co. v. Sour Lake State Bank, Civ.App., 120 S. W.2d 875, error dismissed—Copeland v. Brannan, Civ.App., 70 S.W.2d 660.

(2) However, judgment for plaintiff notwithstanding verdict for defendants was held authorized, even in absence of proper motion and notice thereof, where defendants had notice of motion, plaintiff sought to exclude evidence of parol agreement as contradicting defendants' written guaranty contract, and jury found no fraud in execution and delivery of such contract.—Frank L. Smith Tire Store v. Firestone Tire & Rubber Co., Civ.App., 68 S.W.2d 577, error refused.

32. Ala.—City of Birmingham v. Andrews, 132 So. 877, 222 Ala. 362.

Motion for new trial following motion for judgment non obstante veredicto generally see the C.J.S. title New Trial § 5, also 46 C.J. p 66 notes 16–18.

33. Minn.—McManus v. Duluth, 179 N.W. 906, 147 Minn. 200.

33 C.J. p 1188 note 79.

34. Pa.—Manone v. Culp, 39 A.2d 1, 350 Pa. 319—Boushelle v. Baltimore & Ohio R. Co., Com.Pl., 28 Del.Co. 160.

35. Pa.—Manone v. Culp, 39 A.2d 1, 350 Pa. 319.

36. Okl.—Spruce v. Chicago, R. I. & P. Ry. Co., 281 P. 586, 139 Okl. 123.

37. Okl.—Spruce v. Chicago, R. I. & P. Ry. Co., supra.

38. Pa.—Cimino v. Laub, 43 A.2d 446, 157 Pa.Super. 371—German v. Riddell, 27 A.2d 680, 149 Pa.Super. 647.

39. Pa.—Athas v. Fort Pitt Brewing Co., 157 A. 677, 305 Pa. 350—March v. Philadelphia & West Chester Traction Co., 132 A. 355, 285 Pa. 413—Blassotti v. Greensboro Gas Co., 96 Pa.Super. 162.

40. Ill.—Dahlberg v. Chicago City Bank & Trust Co., 33 N.E.2d 747, 310 Ill.App. 231—Brumit v. Wasson, 33 N.E.2d 740, 310 Ill.App. 264.

Pa.—Wolon v. Welsh, No. 2, 19 Pa. Dist. & Co. 322.

41. Ill.—Kauders v. Equitable Life Assur. Soc. of U. S., 19 N.E.2d 630, 299 Ill.App. 152.

Iowa.—In re Larimer's Estate, 283 N.W. 430, 225 Iowa 1067—Miller v. Southern Surety Co., 229 N.W. 909, 209 Iowa 1221.

Pa.—Pyle v. Finnessy, 118 A. 568, 275 Pa. 54.

Wash.—Hinz v. Crown Willamette Paper Co., 27 P.2d 576, 175 Wash. 315.

Finality of judgment

(1) Under some statutes an action is terminated when the time for an appeal from the judgment has expired, and the trial court has no authority thereafter to entertain a motion for judgment notwithstanding the verdict over the objection of the adverse party, unless the final character has been suspended by proceedings commenced within the time allowed by law for appeal from the judgment.—Bratberg v. Advance-Rumely Thresher Co., 238 N.W. 552, 61 N.D. 452, 78 A.L.R. 1338—Coughlin v. Ætna Life Ins. Co., 194 N.W. 661, 49 N.D. 948.

(2) The final character of a judgment is not suspended because a motion for a directed verdict is made on the trial of the cause.—Coughlin v. Ætna Life Ins. Co., supra.

Motion held timely as filed and served within two days after verdict within statutory requirement, where alternative motion for judgment notwithstanding verdict or new trial was filed the day following return of verdict and on the same day a copy of motion was mailed to opposing counsel who had returned to his home in another town, although opposing counsel did not accept service of motion until third day after verdict.—Mathers v. Stephens, 156 P.2d 227, 22 Wash.2d 364.

Subsequent term

(1) In action for personal injuries in which actual and punitive damages were sought, and jury returned verdict for punitive damages only and motion for new trial was marked "heard" by consent, court was without jurisdiction to grant motion for judgment notwithstanding verdict at subsequent term at which motion was made for first time.—Burns v. Babb, 3 S.E.2d 247, 190 S.C. 508.

(2) Date of rendition of judgment being that of entry at term succeeding trial term, motion for judgment notwithstanding verdict was held properly made at succeeding term.—State v. Scott, 247 P. 699, 35 Wyo. 108.

Time for setting aside verdict

Where plaintiff's motion for judgment notwithstanding verdict which found plaintiff guilty of negligence, was urged on ground that as a matter of law plaintiff was not guilty of negligence under evidence, the motion was, in effect, one to set aside verdict for insufficiency of evidence and, therefore, under statute, it could not be granted by trial court after expiration of statutory time for setting aside verdict.—Volland v. McGee, 294 N.W. 497, 236 Wis. 358, rehearing denied 295 N. W. 635, 236 Wis. 358.

42. Wash.—Corbaley v. Pierce

may, of course, be made after verdict,[43] and must be made before entry of judgment on the verdict,[44] unless motion after entry of judgment on the verdict is authorized by statute[45] or a valid order of the trial court.[46] The right to be heard on the motion is not barred, however, by reason of a judgment having been inadvertently and prematurely entered,[47] the trial court being authorized to set aside such judgment for the purpose of considering the motion;[48] and it may be assumed where the motion was granted after judgment on the verdict that the former judgment was vacated.[49] The motion should be made before a motion for a new trial.[50] After the verdict has been set aside, a motion for judgment non obstante veredicto is too late.[51]

c. Notice of Motion and Hearing Thereon

Unless waived, reasonable and timely notice of the motion and hearing thereon must be given the adverse party, and the time for hearing must be set.

When required by mandatory statute, the adverse party must be given reasonable[52] and timely[53] notice of the motion and hearing thereon, and the time for hearing must be set;[54] but such notice may be waived by the parties by express agreement or conduct expressing waiver or acquiescence.[55] Failure to file a duly served notice of motion with the clerk until after the hearing of the motion does not affect the jurisdiction of the court to hear the mo-

County, 74 P.2d 993, 192 Wash. 688.

43. Ark.—**Corpus Juris cited in** Oil Fields Corporation v. Cubage, 24 S.W.2d 328, 329, 180 Ark. 1018.
Mo.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091.
33 C.J. p 1187 note 76.

44. Ark.—**Corpus Juris cited in** Oil Fields Corporation v. Cubage, 24 S.W.2d 328, 329, 180 Ark. 1018—Chaney v. Missouri Pac. R. Co., 267 S.W. 564, 167 Ark. 172.
Cal.—Machado v. Weston, 14 P.2d 907, 126 Cal.App. 661—**Corpus Juris cited in** Cushman v. Cliff House, 250 P. 575, 576, 79 Cal.App. 572.
Fla.—Tolliver v. Loftin, 21 So.2d 359—**Corpus Juris cited in** Talley v. McCain, 174 So. 841, 843, 128 Fla. 418—**Corpus Juris cited in** Edgar v. Bacon, 122 So. 107, 109, 97 Fla. 679, followed in Wright v. Tatarian, 131 So. 133, 100 Fla. 1366.
Iowa.—Cownie v. Kopf, 202 N.W. 517, 199 Iowa 737.
Mo.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091—Brown & Bigelow v. J. F. Laughead & Co., App., 118 S.W.2d 74.
N.D.—Lemke v. Merchants Nat. Bank & Trust Co., 262 N.W. 246, 66 N.D. 48—**Corpus Juris cited in** Olson v. Ottertail Power Co., 256 N.W. 246, 247, 65 N.D. 46, 95 A. L.R. 418.
Okl.—Peoples Electric Co-op. v. Broughton, 127 P.2d 850, 191 Okl. 229.
S.D.—First Nat. Bank v. Thompson, 227 N.W. 81, 55 S.D. 629.
Tex.—**Corpus Juris cited in** Rowan v. Allen, Civ.App., 113 S.W.2d 322, 323, reversed on other grounds 134 S.W.2d 1022, 134 Tex. 215—Robbins v. Robbins, Civ.App., 125 S.W.2d 666.
33 C.J. p 1187 note 77.

45. Cal.—Sales v. Stewart, 26 P.2d 44, 134 Cal.App. 661.
Ill.—Denny v. Goldblatt Bros., 18 N. E.2d 555, 298 Ill.App. 325.
N.D.—Lemke v. Merchants Nat. Bank & Trust Co., 262 N.W. 246, 66 N.D. 48.

46. Iowa.—Pomerantz v. Pennsylvania-Dixie Cement Corporation, 237 N.W. 443, 212 Iowa 1007.

47. Ark.—Stanton v. Arkansas Democrat Co., 106 S.W.2d 584, 194 Ark. 135.
Mich.—Powers v. Vaughan, 20 N.W. 2d 196, 312 Mich. 297—Forman v. Prudential Ins. Co. of America, 16 N.W.2d 696, 310 Mich. 145.

48. Mich.—Powers v. Vaughan, 20 N.W.2d 196, 312 Mich. 297—Forman v. Prudential Ins. Co. of America, 16 N.W.2d 696, 310 Mich. 145—Strausser v. Sovereign Camp, W. O. W., 278 N.W. 101, 283 Mich. 370—Freedman v. Burton, 274 N. W. 766, 281 Mich. 208.

Prior judgment nullified

Where clerk entered judgment for plaintiff on verdict and thereafter the court, which had reserved decision on motion for a directed verdict, had a judgment entered for defendant non obstante veredicto, the judgment for defendant was a nullification of that entered for plaintiff.—Stanaback v. McFadden, 196 N. W. 526, 225 Mich. 452.

49. Ariz.—Watson v. Southern Pac. Co., 152 P.2d 665.

50. Ill.—Blair v. Modern Woodmen of America, 271 Ill.App. 121.
33 C.J. p 1188 note 78.

51. Minn.—Hemstad v. Hall, 66 N. W. 366, 64 Minn. 136.

52. N.D.—Bratberg v. Advance-Rumely Thresher Co., 238 N.W. 552, 61 N.D. 452, 78 A.L.R. 1338.
Tex.—Wheeler v. Wallace, Civ.App., 167 S.W.2d 1043—Bright v. Wieland, Civ.App., 127 S.W.2d 372, error refused 128 S.W.2d 1137, 133 Tex. 323—Copeland v. Lampton, Civ.App., 125 S.W.2d 1110—Kaiser v. Newsom, Civ.App., 108 S.W.2d 755, error dismissed—Gentry v. Central Motor Co., Civ.App., 100 S. W.2d 215—Amarillo Transfer & Storage Co. v. De Shong, Civ.App., 82 S.W.2d 381.

What constitutes reasonable notice

Reasonable notice of filing of motion for judgment non obstante veredicto, required by statute, is not restricted to service of notice by sheriff, constable, or other person competent to testify, as provided elsewhere in statute, although service by such persons would be reasonable as a matter of law; and, where copy of motion for judgment non obstante veredicto was transmitted by mail, accepted by opposing parties who agreed to the date for hearing, appeared, and at no time questioned the sufficiency of notice prior to judgment, or that they should have been served in writing by the sheriff, as provided by statute, and who were fully prepared in time for the hearing and did not claim to have been injured, notice was reasonable within contemplation of statute.—Johnson v. Moody, Tex.Civ.App., 104 S.W.2d 583, error dismissed.

53. N.D.—Bratberg v. Advance-Rumely Thresher Co., 238 N.W. 552, 61 N.D. 452, 78 A.L.R. 1338.
Tex.—D-Bar Ranch v. Maxwell, Civ. App., 170 S.W.2d 303, error refused.

Where motion is filed and presented on same date without waiver of notice by the adverse party, a motion for judgment notwithstanding verdict should be overruled.—Rowan v. Allen, Civ.App., 113 S.W.2d 322, reversed on other grounds 134 S.W. 2d 1022, 134 Tex. 215.

54. Tex.—Kaiser v. Newsom, Civ. App., 108 S.W.2d 755, error dismissed.

55. Tex.—Johnson v. Moody, Civ. App., 104 S.W.2d 583, error dismissed.

tion where both parties were present by their counsel and took part in the hearing without objection.[56]

d. Form and Requisites

A motion for judgment notwithstanding the verdict must sufficiently disclose its nature and apprise the court and the adverse party of the grounds therefor and state the reason why it should be granted.

Although no special form of motion or notice is required,[57] the motion should be in writing[58] and must sufficiently disclose its nature[59] and apprise the court and the adverse party of the grounds therefor and state the reason why the motion should be granted.[60] A motion to disregard special issue jury findings should designate the findings which the court is called on to disregard.[61] A motion which is too broad,[62] or which fails to point out clearly the alleged defect in the pleading, as required by statute,[63] may properly be denied. A motion filed by all defendants may be read in connection with, and aided by, a motion filed by one defendant where defendants are making a common defense and both motions are presented to the court at the same time.[64] The motion may be amended when authorized by the trial court in the exercise of its discretion.[65]

e. Hearing and Determination of Motion

The court should rule on a motion for judgment notwithstanding the verdict with reasonable promptness, and may, in its discretion, refuse to permit a continuance thereof. Statutory requirements as to procedure should be observed.

The court should rule on a motion for judgment notwithstanding the verdict with reasonable promptness[66] and before the expiration of the time for appeal;[67] but it has been held that the trial court does not lose jurisdiction to enter a judgment non obstante veredicto by its failure to make a decision on the motion until after the time limited by court rule.[68] The motion should be disposed of before a motion for a new trial.[69] It has been held that the motion may not be heard in vacation, in the absence of an agreement of the parties to that effect.[70] Refusal to permit a continuance of the motion is within the discretion of the trial judge.[71] When required by statute, the trial court should have all the evidence taken on the trial duly certified and enter such judgment as should have been entered on that evidence,[72] but irregularity in failing to have such evidence certified before entry of judgment has been held to be cured by subsequent certification, reargument, reconsideration, and court order affirming the original judgment.[73] On plain-

56. Minn.—Wenell v. Shapiro, 260 N.W. 503, 194 Minn. 368.

57. Tex.—Sheppard v. City and County of Dallas Levee Improvement Dist., Civ.App., 112 S.W.2d 253—Parks v. Hines, Civ.App., 68 S.W.2d 364, affirmed Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289.

58. Tex.—Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289—Amarillo Transfer & Storage Co. v. De Shong, Civ.App., 82 S.W.2d 381.

59. Tex.—Amarillo Transfer & Storage Co. v. De Shong, Civ.App., 82 S.W.2d 381.

60. Tex.—Aman v. Cox, Civ.App., 164 S.W.2d 744—Amarillo Transfer & Storage Co. v. De Shong, Civ. App., 82 S.W.2d 381—Parks v. Hines, Civ.App., 68 S.W.2d 364, affirmed Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289.

Motion held sufficient

Ill.—Bicek v. Royall, 30 N.E.2d 747, 307 Ill.App. 504.

Tex.—Myers v. Crenshaw, 137 S.W. 2d 7, 134 Tex. 500—Becker v. Lindsley, Civ.App., 154 S.W.2d 892, error refused—Walker v. Texas & N. O. R. Co., Civ.App., 150 S.W.2d 853, error dismissed, judgment correct—Landers v. Overaker, Civ. App., 141 S.W.2d 451, error dismissed, judgment correct—Walters v. Southern S. S. Co., Civ.App., 113 S.W.2d 320, error dismissed—Cosey v. Supreme Camp of American Woodmen, Civ.App., 103 S.W.2d 1076, error dismissed.

Motion held insufficient

Iowa.—Dailey v. Standard Oil Co., 235 N.W. 756, 213 Iowa 244.

61. Tex.—Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289.

62. Minn.—Glencoe Bank v. Cain, 95 N.W. 308, 89 Minn. 473.
33 C.J. p 1188 note 84.

63. Iowa.—In re Larimer's Estate, 283 N.W. 430, 225 Iowa 1067—Cownie v. Kopf, 202 N.W. 517, 199 Iowa 737.

64. Tex.—Myers v. Crenshaw, 137 S.W.2d 7, 134 Tex. 500.

65. Tex.—Johnson v. Moody, Civ. App., 104 S.W.2d 583, error dismissed.

66. Iowa.—Nelson v. Conroy Sav. Bank, 194 N.W. 204, 196 Iowa 391.

67. Iowa.—Nelson v. Conroy Sav. Bank, supra.

68. Mich.—Hart v. Grand Trunk Western R. Co., 270 N.W. 704, 278 Mich. 343.

Rule construed to accomplish purpose of encouraging speedy ending of litigation, instead of requiring retrial of long case, because of noncompliance therewith, when result must be same.—Cullen v. Voorhies, 205 N.W. 177, 232 Mich. 420.

Failure to make decision on motion to direct verdict until after required time does not divest circuit court of jurisdiction to order judgment non obstante.—Sliwinski v. Gootstein, 208 N.W. 47, 234 Mich. 74.

Alternative motion held timely

Wash.—Lasher v. Wheeler, 87 P.2d 982, 198 Wash. 205.

69. Ill.—Stein v. Chicago & G. T. R. Co., 41 Ill.App. 38.

Ky.—Marshall v. Davis, 91 S.W. 714, 122 Ky. 413, 28 Ky.L. 1327.
33 C.J. p 1188 note 78.

70. Iowa.—Scribner v. Rutherford, 22 N.W. 670, 65 Iowa 551.

Effect of agreement

Where counsel for both parties, in accordance with county court rule, filed praecipes directing case to be placed on argument list on particular date in vacation, and single judge presiding at motion court while other judges were on vacation heard arguments on the rules for judgment non obstante veredicto without objection by either counsel, defendant could not object that motion was not heard by court in banc. —O'Hara v. City of Scranton, 19 A. 2d 114, 342 Pa. 137.

71. Mo.—Moller-Vandenboom Lumber Co. v. Boudreau, 85 S.W.2d 141, 231 Mo.App. 1127.

72. Pa.—Balch v. Shick, 24 A.2d 548, 147 Pa.Super. 273.

73. Pa.—Ellsworth v. Husband, 181 A. 90, 119 Pa.Super. 245.

iff's motion for judgment non obstante veredicto, t has been held that the court will not consider the evidence and charges to the jury further than to ascertain whether it appears clearly from the entire case that the verdict was surely on an immaterial plea.[74] No motion to set aside the verdict is required before entry of judgment notwithstanding the verdict;[75] and particularly it is not necessary to set the verdict aside before rendering judgment contrary thereto when the case is submitted on special issues, since in such case the jury finds the facts only, and does not find a verdict for either party.[76] At common law the procedure was to enter the verdict on the record, and then to enter the judgment non obstante veredicto;[77] but a motion for judgment non obstante, although not specifically passed on, is disposed of by entry of judgment on the verdict[78] or by granting a new trial.[79] It has been held that the trial court has jurisdiction to prescribe conditions with reference to the granting or refusal to grant the motion for judgment notwithstanding the verdict.[80] In an action based on negligence and breach of implied warranty, it has been held that the court is not authorized to sustain defendant's motion as to all negligence counts and overrule it on the question of implied warranty.[81]

III. FORM AND CONTENTS OF JUDGMENT, AND RELIEF AWARDED

§ 62. In General

a. Form and contents generally
b. Self-sufficiency
c. Language of judgment

a. Form and Contents Generally

Strict formality ordinarily is not essential to the validity of a judgment, and substantial compliance with statutory requirements is sufficient.

The form of a judgment ordinarily is regulated by the practice of the court in which the judgment is rendered,[82] and under the procedure of some courts a duty rests on the successful litigant to see that the judgment is sufficient in form and substance.[83]

To constitute a judgment there must be an express adjudication to that effect,[84] but, subject to the requirements of statute or court rule or practice, no particular form is required in a court proceeding to render its order a judgment,[85] provided the rights of the parties may be ascertained therefrom.[86]

Generally the sufficiency of a judgment rests in its substance rather than in its form,[87] and, although an informal judgment may be open to criticism,[88] strict formality ordinarily is not essential to the validity of a judgment, and, if the record entry is sufficient in substance, mere irregularity or want of technical form will not render it invalid.[89] Even

74. Ala.—City of Birmingham v. Andrews, 132 So. 877, 222 Ala. 362.

75. Tex.—James v. Texas Employers Ins. Ass'n, Civ.App., 98 S.W.2d 425, reversed on other grounds Texas Employers' Ins. Ass'n v. James, 118 S.W.2d 293, 131 Tex. 605.

76. Tex.—Smith & Lawson v. Taylor, Civ.App., 249 S.W. 519.

77. U.S.—Newton v. Glenn, C.C.A. Miss., 149 F.2d 879.

78. Mich.—Fidelity & Deposit Co. of Maryland v. Verheyden, 220 N.W. 750, 243 Mich. 544.
Ohio.—Hard v. Harris, 24 Ohio Cir. Ct. 714.

79. Ohio.—J. & F. Harig Co. v. City of Cincinnati, 22 N.E.2d 540, 61 Ohio App. 314.

80. Wash.—Lasher v. Wheeler, 87 P.2d 982, 198 Wash. 205.

81. Ill.—Haut v. Kleene, 50 N.E.2d 855, 320 Ill.App. 378.

82. Ga.—Sullivan v. Douglas Gibbons, Inc., 2 S.E.2d 89, 187 Ga. 764.
Form and contents of judgments in federal courts see Federal Courts § 144 a.
Form and sufficiency of judgment on consent, offer or admission see infra § 177.
Court has power to control the form of judgments.—Rau v. Manko, 17 A.2d 422, 341 Pa. 17.
"Irregular judgment" is one rendered contrary to the course and practice of the court.—Mitchell v. Mitchell, 190 S.E. 487, 211 N.C. 308.

83. Mo.—Davis v. Cook, 85 S.W.2d 17, 337 Mo. 33—Commission Row Club v. Lambert, App., 161 S.W.2d 732.
Application relating to contents of judgment should be made on settlement of judgment, and not on motion for separate order.—Brown v. O'Neil, 209 N.Y.S. 221, 124 Misc. 486.

84. Tex.—Bartlett v. Buckner, Civ. App., 295 S.W. 214.

85. Ill.—Gould v. Klabunde, 63 N.E.2d 258, 326 Ill.App. 643.
Ind.—Shafer v. Shafer, 37 N.E.2d 69, 219 Ind. 97.
Utah.—Ellinwood v. Bennion, 276 P. 159, 73 Utah 563.
Date of judgment see infra § 81.
Description of property see infra § 80.
Designation of amount of recovery see infra §§ 76–79.
Designation of parties see infra § 75.
Signature see infra § 85.
Judgment should be simple sentence of law on material ultimate facts admitted by pleadings or found by court.—Scott v. Superior Court within and for Los Angeles County, 256 P. 603, 83 Cal.App. 25.

86. Cal.—Pista v. Resetar, 270 P. 453, 205 Cal. 197.

87. Cal.—Pista v. Resetar, 270 P. 453, 205 Cal. 197—Avakian v. Dusenberry, 58 P.2d 1306, 15 Cal.App. 2d 55.
Ind.—Shafer v. Shafer, 37 N.E.2d 69, 21 Ind. 97.
Iowa.—Whittier v. Whittier, 23 N.W.2d 435.

88. Ill.—People v. Miller, 144 Ill. App. 630.

89. U.S.—U. S. Fidelity & Guaranty Co. v. Sanitary Dist. of Rockford, for Use of Rockford Lumber & Fuel Co., C.C.A.Ill., 63 F.2d 827.
Cal.—Pista v. Resetar, 270 P. 453, 205 Cal. 197.

where the form of a judgment is prescribed by statute, a departure from it is not necessarily fatal to the adjudication,[90] a substantial compliance with statutory provisions with respect to form being sufficient.[91]

A record is sufficient as a judgment provided it appears therefrom that it was intended as such,[92] and corresponds with the statutory definition of a judgment,[93] and provided it appears therefrom that it is a judicial determination or act[94] of a designated court[95] of a specified term,[96] and if the time, place, parties, matter in dispute, and the result are clearly stated, or may be certainly ascertained therefrom.[97] An entry lacking these essentials is a mere nullity.[98]

Adjudication of issues. To be sufficient as a judgment, the entry must show that the issues between the parties have been adjudicated,[99] and show with certainty the matters determined.[1]

Determining provisions in advance. Before an action is ready for judgment it is not proper to bind the court by an order granted on special motion requiring it to enter particular provisions in the judgment.[2] By virtue of statute or rule of

Ga.—House v. Tennessee Chemical Co., 125 S.E. 446, 159 Ga. 306.
33 C.J. p 1188 note 87, p 1191 note 7.

Caption

The absence of, or any defect in, the caption of a judgment does not invalidate it.
Ala.—Taunton v. Dobbs, 199 So. 9, 240 Ala. 287.
Tenn.—Phillips v. Cottage Grove Bank & Trust Co., 8 Tenn.App. 98.
Tex.—Whisenant v. Thompson Bros. Hardware Co., Civ.App., 120 S.W. 2d 316.

Indorsement on back of judgment is not an essential part of the proceedings.—Whisenant v. Thompson Bros. Hardware Co., supra.

Mistake in official designation of judge rendering decree was an irregularity not affecting its validity. —House v. Tennessee Chemical Co., 125 S.E. 446, 159 Ga. 306.

Clear meaning

Mere clerical errors and omissions in judgment are not fatal if, by reference to other parts of record, meaning is clear.—Smith v. Commissioner of Internal Revenue, C.C.A., 67 F.2d 167.

Motion

Mere irregularity in form may be taken advantage of only by motion. —Bennett v. Couchman, 48 Barb., N.Y., 73.

90. Ga.—Lester v. Brown, 57 Ga. 79.
Ill.—Olson v. Whiffen, 175 Ill.App. 182.

91. Ala.—State v. Hasty, 63 So. 559, 184 Ala. 121, 50 L.R.A.,N.S., 553, Ann.Cas.1916B 703.
S.D.—In re Mulligan's Estate, 243 N. W. 102, 60 S.D. 74.
33 C.J. p 1189 note 89.

92. Ind.—Shafer v. Shafer, 37 N.E. 2d 69, 219 Ind. 97.
Iowa.—Whittier v. Whittier, 23 N. W.2d 435.
33 C.J. p 1189 note 91.
Sufficiency and contents of entry of judgment see infra § 109.

93. Ind.—Shafer v. Shafer, 37 N.E. 2d 69, 219 Ind. 97.
Iowa.—Whittier v. Whittier, 23 N. W.2d 435.

94. Ala.—Gandy v. Hagler, 16 So.2d 305, 245 Ala. 167.
Ind.—Shafer v. Shafer, 37 N.E.2d 69, 219 Ind. 97.
Ky.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 250 Ky. 21.
33 C.J. p 1189 note 92.
Necessity for rendition of judgment see infra § 100.
Necessity for rendition by duly constituted court see supra § 15.

Determination of rights of parties

Iowa.—Whittier v. Whittier, 23 N. W.2d 435.

95. Ky.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 250 Ky. 21.
Wyo.—McDonald v. Mulkey, 210 P. 940, 29 Wyo. 99.
33 C.J. p 1189 note 93.

96. Wyo.—McDonald v. Mulkey, supra.

97. Ala.—Taunton v. Dobbs, 199 So. 9, 240 Ala. 287.
Ky.—Bell Grocery Co. v. Booth, 61 S.W.2d 879, 250 Ky. 21.
33 C.J. p 1189 note 94.
Certainty in judgments see infra § 72.
Definitiveness in judgments see supra § 21.

Summary judicial statements of rule

(1) If a writing claimed to be a judgment corresponds with the statutory definition of a judgment, if it appears to have been intended by some competent tribunal as the determination of the rights of the parties to an action, and if it shows in intelligent language the relief granted, its claim to confidence will not be lessened by want of technical form, or by the absence of language commonly deemed especially appropriate to formal judicial records.
Ind.—Shafer v. Shafer, 37 N.E.2d 69, 219 Ind. 97.
Iowa.—Whittier v. Whittier, 23 N.W. 2d 435.

(2) Other statements see 33 C.J. p 1189 note 94.

Presumption as to place

A judgment which showed on its face that it was rendered in a designated court and that it was rendered, read, and signed in open court was not void because it did not state the place where court was held or where judgment was signed, since it would be presumed that the court was held at the place fixed therefor by law.—Smith v. Crescent Chevrolet Co., La.App., 1 So.2d 421.

Excerpts from minutes need not be inserted in judgment.—Gettys v. Town of Marion, 10 S.E.2d 799, 218 N.C. 266.

Sufficiency for review purposes

Decree should be framed so as to enable aggrieved party to prosecute, without hindrance, review of adverse provisions.—Ochoa v. McCush, 2 P.2d 357, 216 Cal. 426.

98. Ill.—Fray v. National Fire Ins. Co. of Hartford, 255 Ill.App. 209, affirmed 173 N.E. 479, 341 Ill. 431.
Wyo.—State v. Scott, 247 P. 699, 35 Wyo. 108.
33 C.J. p 1190 note 95, p 1191 note 6.

Insufficient entries

(1) A notation on municipal court record of case, "Motion for new trial overruled. Judgment rendered as per finding of" certain date, did not constitute "judgment" of such court. —Mesloh v. Home Furnace Co., Ohio App., 44 N.E.2d 379.

(2) Judge's act in signing journal entry without final determination of parties' rights does not constitute "judgment."—Abernathy v. Huston, 26 P.2d 939, 166 Okl. 184.

(3) Recital in clerk's minutes that court rendered judgment for defendants as per journal entry to be filed and transcribed into record does not constitute judgment.—News Dispatch Printing & Audit Co. v. Board of Com'rs of Carter County, 270 P. 2, 132 Okl. 216.

99. Ark.—Melton v. St. Louis, I. M. & S. R. Co., 139 S.W. 289, 99 Ark. 433.
33 C.J. p 1190 note 1.

1. Or.—Dray v. Crich, 3 Or. 298.
33 C.J. p 1191 note 2.

2. N.Y.—East River Sav. Inst. v. Bucki, 28 N.Y.S. 325, 77 Hun 329.

court, however, an interlocutory judgment may state the substance of the final judgment to which the party will be entitled,[3] the court not being confined to the interlocutory judgment, or foreclosed thereby, in directing final judgment.[4]

Inferior court judgments. A much smaller degree of technicality and formality is required in judgments of inferior courts than is exacted with respect to the judgments of courts of record,[5] and judgments of such courts are scrutinized with less severity.[6]

Order or memoranda for judgment. It must appear that that which is offered as the record of a judgment is really such, and not an order for a judgment or mere memoranda from which the judgment is to be drawn.[7] The question whether remarks made by the court at the conclusion of a trial or hearing constitute a decision on the matter before it, or a mere announcement or memorandum of the decision which the court contemplates making, depends on the intention of the court.[8] An oral statement of the court merely intended to acquaint the parties of views intended to be embodied in the judgment is not the pronouncement of a judgment,[9] and cannot affect the correctness or validity of the judgment as rendered.[10]

b. Self-Sufficiency

A judgment should be complete in itself.

A judgment should be complete in itself[11] and contain within its four corners the mandate of the court,[12] without extraneous references,[13] and leaving open no matters of description or designation out of which contention may arise as to the meaning.[14] It should not leave open any judicial question to be determined by others,[15] and must contain sufficient facts to enable the clerk to issue an execution thereon, by an inspection of its entry, without reference to other entries.[16] To be complete,

3. N.Y.—Hebblethwaite v. Flint, 82 N.Y.S. 471, 83 App.Div. 163.
33 C.J. p 1193 note 34.

4. N.Y.—Hebblethwaite v. Flint, supra.

5. Ill.—Johnson v. Gillett, 52 Ill. 358.
33 C.J. p 1190 note 96.

6. Idaho.—Cornell v. Mason, 262 P. 8, 46 Idaho 112.

7. Utah.—Ellinwood v. Bennion, 276 P. 159, 73 Utah 563.
33 C.J. p 1190 note 97.

Formal decree contemplated
Clerk's entry, "The court, being fully advised, finds for plaintiff," was held not to be a final decree, in view of subsequent proceedings showing parties contemplated formal decree.—Shaw v. Morrison, 260 P. 666, 145 Wash. 420.

8. Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734.

Résumé of findings
Where court, after taking case under advisement, sent counsel a statement containing a résumé of court's findings informing counsel what the findings and judgment would be, such statement was not a copy of a judgment.—Sloan v. Dunlap, Mo., 194 S.W.2d 32.

9. Mo.—Marsden v. Nipp, 30 S.W.2d 77, 325 Mo. 822.

Direction to reporter
(1) Court's remark, in action to remove county commissioner, ordering removal of defendant, and directing reporter to let record so show, together with statement that verdict would include costs, was held not to constitute judgment of removal on verdict, where verdict had not been returned, but was merely an indication of what it would be.—State v. Scott, 247 P. 699, 35 Wyo. 108.

(2) This is particularly true because it is not the reporter's duty to record judgments, and he has neither custody nor control of official court records in which judgments are recorded.—State v. Scott, supra.

10. Cal.—Gates v. Green, 90 P. 189, 151 Cal. 65.

Memorandum opinion which was voluntary, not requested by either party, and not made in pursuance of statute, is no part of judgment, and cannot be used to impeach its sufficiency.—City of St. Louis v. Senter Commission Co., 73 S.W.2d 389, 335 Mo. 489.

11. Ala.—Gandy v. Hagler, 16 So.2d 305, 245 Ala. 167—Jasper Land Co. v. Riddlesperger, 140 So. 624, 25 Ala.App. 45.
Miss.—Berryhill v. Berryhill, 23 So. 2d 889—Todd v. Todd, Miss., 20 So.2d 827, 197 Miss. 819.
Wash.—Andreas v. Bates, 128 P.2d 300, 14 Wash.2d 322.
33 C.J. p 1190 note 98.

Any instructions court feels justified in giving under the law and facts should be set forth in the judgment.—Andreas v. Bates, supra.

Validity of judgment
(1) A judgment depends for validity on its own terms and extraneous documents may not be written into it by inference or reference.—Edwards v. Edwards, 157 P.2d 616, 113 Colo. 390.

(2) Imperfections of one judgment may not be corrected by reference to another.—Hopkins v. Duggar, 87 So. 103, 204 Ala. 626—33 C.J. p 1190 note 98.

12. Mass.—Carroll v. Hinchley, 56 N.E.2d 608, 316 Mass. 724.

13. Miss.—Berryhill v. Berryhill, 23 So.2d 889—Todd v. Todd, 20 So.2d 827, 197 Miss. 819.

Description of written instrument
Failure to describe written instrument referred to in judgment renders judgment nonenforceable with respect to such instrument.—In re Kauffman's Estate, 147 P.2d 11, 63 Cal.App.2d 655.

Memorandum decision
It is not good practice to attempt by reference to incorporate into the judgment parts of a memorandum decision.—Andreas v. Bates, 128 P. 2d 300, 14 Wash.2d 322.

Reference to master's report
A decree enjoining defendant from interfering with rights of plaintiffs as lot owners to use plot on lake as park, in so far as it purported to incorporate by reference a lengthy master's report, was improper.—Carroll v. Hinchley, 56 N.E.2d 608, 316 Mass. 724.

14. Mass.—Carroll v. Hinchley, supra.
Miss.—Berryhill v. Berryhill, 23 So. 2d 889—Todd v. Todd, 20 So.2d 827, 197 Miss. 819.

15. Miss.—Berryhill v. Berryhill, 23 So.2d 889—Todd v. Todd, 20 So.2d 827, 197 Miss. 819.

16. Tenn.—The Mollie Hamilton v. Paschal, 9 Heisk. 203—Boyken v. State, 3 Yerg. 426.
33 C.J. p 1190 note 99.

Determination of rights
A judgment should determine the respective rights of the parties, so that the ministerial officers can with

however, it has been held that the judgment need only identify the parties and set forth the relief granted,[17] provided it also appears therefrom to have been made by the court in whose records its entry is written.[18] It has also been held that every judgment of a court of justice must either be perfect in itself or capable of being made perfect by reference to the pleadings or to the papers on file in the case, or else to other pertinent entries on the court docket.[19]

c. Language of Judgment

Apart from statute, no particular form of words is necessary to constitute a judgment, although the English language ordinarily is required to be used.

Although it has been held that, as a matter of practice, established precedents with respect to the language of a judgment should be followed,[20] apart from statute no particular form of words is necessary to constitute a judgment,[21] provided the words used are such as to indicate a final determination of the rights of the parties and the relief granted or denied.[22] The word "recover" is not essential to the existence of a judgment,[23] but it is the appropriate and approved word to use.[24] A judgment for defendant may be sufficient although it fails to provide that defendant go without day.[25] The use of words in the past instead of the present tense in entering a judgment is wholly immaterial.[27]

By virtue of constitutional or statutory provisions, judgments ordinarily are required to be expressed in the English language.[27]

In the Philippine Islands, judgments were required to be in Spanish.[28]

§ 63. What Law Governs

The form of a judgment is governed by the law of the state in which it is rendered.

The language and form of the record of a judgment are regulated by the law of the state and the practice of the court in which it is rendered.[29] Hence a record which is good in the court where rendered is sufficient in another court, although it would have been insufficient had it been rendered in the latter court.[30] The operation and effect of foreign judgments is discussed infra §§ 888–906.

§ 64. Necessity of Writing

As a general rule a judgment must be reduced to writing.

Although, as discussed infra § 102, a judgment is rendered and exists as such when it is orally announced from the bench, and before it has been reduced to writing and entered by the clerk, as a general rule a judgment must be reduced to writing,[31] and cannot exist merely in the memory of the officers of the court.[32] A statutory provision[33]

certainty execute the judgment without the necessity of determining facts not stated therein.—Hendryx v. W. L. Moody Cotton Co., Tex.Civ. App., 257 S.W. 305.

17. Miss.—Simpson v. Phillips, 141 So. 897, 164 Miss. 256.

18. Miss.—Simpson v. Phillips, supra.

19. Ala.—Burgin v. Sugg, 97 So. 216, 210 Ala. 142.
33 C.J. p 1190 note 98 [a] (2)–(5).

20. Cal.—Hentig v. Johnson, 96 P. 390, 8 Cal.App. 221.
33 C.J. p 1192 note 19.
Form of judgment
(1) Judgment for plaintiffs.—Pierce v. Wilson, 48 Ind. 298—33 C. J. p 1192 note 17.
(2) Judgment for defendants.—Jones v. Hoppie, 9 Mo. 173—33 C.J. p 1192 note 18.
(3) Judgment for defendant on demurrer.—Jasper Mercantile Co. v. O'Rear, 20 So. 583, 112 Ala. 247—33 C.J. p 1192 note 18 [c].

21. Colo.—Scott v. Woodhams, 246 P. 1027, 79 Colo. 528, followed in 246 P. 1029, 79 Colo. 532.
Ind.—City of La Porte v. Organ, 32 N.E. 342, 5 Ind.App. 369.
Iowa.—Whittier v. Whittier, 23 N.W. 2d 435.
Utah.—Ellinwood v. Bennion, 276 P. 159, 73 Utah 563.
33 C.J. p 1192 notes 20, 22.
Judgment on motion for dismissal or nonsuit see Dismissal and Nonsuit § 72.

22. Cal.—Starr Piano Co. v. Martin, 7 P.2d 383, 119 Cal.App. 642.
Utah.—Ellinwood v. Bennion, 276 P. 159, 73 Utah 563.
"Ordered, adjudged and decreed"
(1) Use of the words "ordered, adjudged and decreed" will be sufficient.—Hentig v. Johnson, 96 P. 390, 8 Cal.App. 221—33 C.J. p 1192 note 21.
(2) "Adjudged, ordered and decreed" must precede final action of court in order to constitute judgment by decree.—Sussman v. Sussman, 163 S.E. 69, 158 Va. 382.

23. Wis.—Potter v. Eaton, 26 Wis. 382.
33 C.J. p 1192 note 23.

24. Ind.—Needham v. Gillaspy, 49 Ind. 245—La Porte v. Organ, 32 N.E. 342, 5 Ind.App. 369.

25. Minn.—Ætna Ins. Co. v. Swift, 12 Minn. 437.
33 C.J. p 1193 note 25.

26. Ala.—Tankersley v. Silburn, Minor p 185.

27. La.—Maxent v. Maxent, 1 La. 438.
Mo.—State v. Cockrell, 217 S.W. 524, 280 Mo. 269.
33 C.J. p 1193 note 30.

28. Philippine.—Gaspar v. Molina, 5 Philippine 197.
33 C.J. p 1193 note 31.

29. U.S.—Woodbridge & Turner Engineering Co. v. Ritter, C.C.Pa., 70 F. 677.
33 C.J. p 1191 note 9.

30. U.S.—Woodbridge & Turner Engineering Co. v. Ritter, supra.
Ill.—Schertz v. Chester First Nat. Bank, 47 Ill.App. 124.

31. Ga.—Hutcheson v. Hutcheson, 30 S.E.2d 107, 197 Ga. 603—McRae v. Smith, 137 S.E. 390, 164 Ga. 23.
Ohio.—Krasny v. Metropolitan Life Ins. Co., 54 N.E.2d 952, 143 Ohio St. 284.
Tenn.—Corpus Juris cited in Broadway Motor Co. v. Public Fire Ins. Co., 12 Tenn.App. 278, 280.
33 C.J. p 1191 note 13.
Necessity of entry see infra § 107.

32. Iowa.—Balm v. Nunn, 19 N.W. 810, 63 Iowa 641.
33 C.J. p 1191 note 14.

33. Mo.—Young v. Young, 65 S.W. 1016, 165 Mo. 624, 88 Am.S.R. 440.
33 C.J. p 1192 note 16.

or court rule[34] that judgments must be in writing is imperative, and a decision of the court, not reduced to writing or entered on the minutes, is not effective as a judgment.

§ 65. One or More Judgments in Same Case

Except as otherwise permitted by statute or rule of court, there can be only one final judgment in any one action.

In the absence of a statute to the contrary it is a general rule that there can be only one final judgment in any action[35] at law,[36] and that is the one which, in effect, ends the suit and finally determines the rights of the parties with relation to the matter in controversy.[37] The rule is followed no matter how many counts the complaint contains,[38] and even though there be separate hearings on different

34. Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552—Chiricahua Ranches Co. v. State, 39 P.2d 640, 44 Ariz. 559.

Jury and nonjury cases

Ariz.—Chiricahua Ranches Co. v. State, supra.

Sufficiency

Where written judgment was signed by trial judge and filed with clerk on same day that judgment was rendered by the court, rendition of judgment and filing of formal written judgment were "simultaneously" performed within requirement of court rule.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.

35. Cal.—Nicholson v. Henderson, 153 P.2d 945, 25 Cal.2d 375—Bakewell v. Bakewell, 130 P.2d 975, 21 Cal.2d 224—Bank of America Nat. Trust & Savings Ass'n v. Superior Court of Los Angeles County, 128 P.2d 357, 20 Cal.2d 697—De Vally v. Kendall De Vally Operalogue Co., 32 P.2d 638, 220 Cal. 742—Middleton v. Finney, 6 P.2d 938, 214 Cal. 523, 78 A.L.R. 1104—Nolan v. Smith, 70 P. 166, 137 Cal. 360—Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co., 33 P. 633, 98 Cal. 577—Vallera v. Vallera, 148 P.2d 694, 64 Cal.App.2d 266—Potvin v. Pacific Greyhound Lines, 20 P.2d 129, 130 Cal.App. 510.

Mass.—Beauvais v. Springfield Institute for Savings, 20 N.E.2d 957, 303 Mass. 136, 124 A.L.R. 611.

Mo.—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930—Barr v. Nafziger Baking Co., 41 S.W.2d 559, 328 Mo. 423—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389—State ex rel. Cunningham v. Haid, 40 S.W.2d 1048, 328 Mo. 208—Hatton v. Sidman, App., 169 S.W.2d 91—Ray v. Missouri Christian College, App., 93 S.W.2d 1030—Gay v. Kansas City Public Service Co., App., 77 S.W.2d 133—First Nat. Bank v. Dunbar, 72 S.W.2d 821, 230 Mo.App. 687—City of St. Louis ex rel. and to Use of Sears v. Clark, App., 35 S.W.2d 986—Springfield Gas & Electric Co. v. Fraternity Bldg. Co., App., 264 S.W. 428—A. M. Legg Shoe Co. v. Brown Leather Co., App., 249 S.W. 147.

Nev.—Nevada First Nat. Bank of Tonopah v. Lamb, 271 P. 691, 51 Nev. 162.

N.Y.—Donner v. White, 268 N.Y.S. 56, 149 Misc. 709.

Okl.—Davis v. Baum, 133 P.2d 889, 192 Okl. 85—Methvin v. Methvin, 127 P.2d 186, 191 Okl. 177.

Or.—Durkheimer Inv. Co. v. Zell, 90 P.2d 213, 161 Or. 434.

Tex.—Comer v. Brown, Com.App., 285 S.W. 307—Stolpher v. Bowen Motor Coaches, Civ.App., 190 S.W. 2d 376—Lubell v. Sutton, Civ.App., 164 S.W.2d 41, error refused—Stout v. Oliveira, Civ.App., 153 S.W.2d 590, error refused—Alexander v. Meredith, Civ.App., 154 S.W.2d 920, certified questions dismissed 152 S.W.2d 732, 137 Tex. 37—Booth v. Amicable Life Ins. Co., Civ. App., 143 S.W.2d 336, error dismissed, judgment correct—Kline v. Power, Civ.App., 114 S.W.2d 617—Leavens v. Smith, Civ.App., 104 S.W.2d 534—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W. 2d 724, error dismissed—Colburn v. Ward, Civ.App., 40 S.W.2d 878, error dismissed.

33 C.J. p 1127 note 35, p 1193 note 37.

Joint or several judgment see supra § 36.

Amendment to judgment

Where judgment disposed of plaintiff merely as individual, amendment disposing of him both personally and as trustee constituted part of first judgment, and did not create two separate judgments against plaintiff.—Rachford v. Builders' Lumber Co., Tex.Civ.App., 278 S.W. 225.

Piecemeal determination improper

(1) It is not presumed court will dispose of case piecemeal, by successive final judgments.—Los Angeles Auto Tractor Co. v. Superior Court within and for Los Angeles County, 271 P. 863, 94 Cal.App. 433.

(2) To attempt to adjudicate the rights of one party by a single judgment and those of the other by a separate judgment, when the controversy is between only two parties, and concerns only a single piece of property, is simply an attempt to dispose of the case piecemeal, which is not permissible.—Nicholson v. Henderson, 153 P.2d 945, 25 Cal.2d 375.

Merger of prior orders

In proceeding to cancel naturalization certificate, all prior orders were merged into final decree which superseded any inconsistent order or provision thereof.—Sourino v. U. S., C.C.A.Ga., 86 F.2d 309, certiorari denied 57 S.Ct. 491, 300 U.S. 661, 81 L.Ed. 869.

Judgment held one judgment

Cal.—Martin v. Board of Trustees of Leland Stanford Jr. University, 99 P.2d 684, 37 Cal.App.2d 481.

Résumé of findings informing counsel what findings and judgment would be is not a judgment which can be relied on in connection with judgment subsequently pronounced as violating the rule.—Sloan v. Dunlap, Mo., 194 S.W.2d 32.

36. Mass.—Noyes v. Bankers Indemnity Ins. Co., 30 N.E.2d 867, 307 Mass. 567.

N.Y.—Chippewa Credit Corporation v. Strozewski, 19 N.Y.S.2d 457, 259 App.Div. 187—Kriser v. Rodgers, 186 N.Y.S. 816, 195 App.Div. 394.

37. Cal.—De Vally v. Kendall De Vally Operalogue Co., 32 P.2d 638, 220 Cal. 742—Nolan v. Smith, 70 P. 166, 137 Cal. 360—Stockton Combined Harvester and Agricultural Works v. Glens Falls Ins. Co., 33 P. 633, 98 Cal. 577.

After judgment of nonsuit

Order granting defendant's motion for final judgment for plaintiff's failure to amend declaration within time, entered before case wherein plaintiff had been granted nonsuit was reinstated, was held invalid as judgment on merits when case was not before court.—Keith v. Yazoo & M. V. R. Co., 145 So. 227, 164 Miss. 566.

Disposition by implication

Rule requiring only one "final judgment" to be rendered in any cause is met if parties and issues are disposed of by necessary implication.—Pfeifer v. Johnson, Tex. Civ.App., 70 S.W.2d 203.

Order noting notice of appeal was not a final judgment within rule.—Morris v. Hall, Tex.Civ.App., 248 S. W. 1100.

38. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Superior

issues[39] or one trial and separate findings on the different issues.[40] The rule is particularly true where one judgment is all that is necessary to dispose of the entire controversy.[41] It follows as a necessary consequence of the general rule that, when a final judgment has once been entered, no second or different judgment may be rendered between the same parties and in the same suit, until the first shall have been vacated and set aside or reversed on appeal or error.[42] Where for any reason recovery of some amount is had by both parties, it has been held that the different amounts should be set off against each other and but one judgment rendered for the balance.[43] It has been held, however, to be the better practice, where the court has sustained a motion for a nonsuit and a motion for a directed verdict on a counterclaim, to

Court of Los Angeles County, 128 P.2d 357, 20 Cal.2d 697.

39. Mo.—McCreary v. Bates, App., 176 S.W.2d 298—Springfield Gas & Electric Co. v. Fraternity Bldg. Co., App., 264 S.W. 429.

Judgment on first and second trials together was held to constitute final judgment.—Compton v. Jennings Lumber Co., Tex.Civ.App., 295 S.W. 308.

40. Mo.—Springfield Gas & Electric Co. v. Fraternity Bldg. Co., App., 264 S.W. 429.

41. Cal.—Nicholson v. Henderson, 153 P.2d 945, 25 Cal.2d 375.

Disposition of case as to all parties by same or different judgments see supra § 36.

42. Ala.—Boshell v. Boshell, 118 So. 553, 218 Ala. 320.

Ga.—Loughridge v. City of Dalton, 143 S.E. 393, 166 Ga. 323.

Idaho.—Horne v. Beaton, 269 P. 89, 46 Idaho 541.

Ind.—Southern Colonization Co. v. Sanford, 149 N.E. 655, 83 Ind.App. 626.

Kan.—Lervold v. Republic Mut. Fire Ins. Co., 45 P.2d 839, 142 Kan. 43, 106 A.L.R. 673.

Ky.—Hammonds v. Luster's Adm'r, 82 S.W.2d 500, 259 Ky. 383.

La.—Sentell v. Texas & P. Ry. Co., App., 146 So. 353.

Mass.—Noyes v. Bankers Indemnity Ins. Co., 30 N.E.2d 867, 307 Mass. 567.

Mo.—Irwin v. Burgan, 28 S.W.2d 1017, 325 Mo. 309—Mitchell v. Dabney, App., 71 S.W.2d 165, transferred, see 58 S.W.2d 731, 332 Mo. 410.

N.M.—Shortle v. McCloskey, 46 P.2d 50, 39 N.M. 273.

N.Y.—Empire Produce Co. v. Ring, 232 N.Y.S. 82, 225 App.Div. 6—Kriser v. Rodgers, 186 N.Y.S. 316, 195 App.Div. 394.

N.C.—Nash v. City of Monroe, 158 S.E. 384, 200 N.C. 729.

Or.—Oxman v. Baker County, 234 P. 799, 115 Or. 436.

Tex.—Bernstein v. Hibbs, Civ.App., 20 S.W.2d 838, error dismissed.

33 C.J. p 1193 note 37.

Operation and effect of conflicting judgments see infra § 445.

Reservation of power

(1) Reservation of power to enter future judgments was held error, since action must be concluded by single judgment.—Schwasnick v. Blandin, C.C.A.Vt., 65 F.2d 354.

(2) However, on equity principles, where trustees in 1911 sought judicial interpretation of will and an authorization to retain preferred stock belonging to trust estate and court granted such authority and retained jurisdiction of matter, supplemental judgment in 1915 authorizing exchange of preferred stock for common stock of another company was held binding on answering defendants.—In re Ferguson's Will, 258 N.W. 295, 193 Minn. 235.

First judgment void

(1) The entry of a void judgment has been held not to limit the jurisdiction of court to treat it as a nullity and proceed to enter a second judgment.—Parrish v. Ferriell, 186 S.W.2d 625, 299 Ky. 676—33 C.J. p 1193 note 37 [b].

(2) Before the second judgment can be considered valid it must appear that the first judgment was void.—Mullins v. Thomas, 150 S.W. 2d 83, 136 Tex. 215.

(3) Delay in filing the first judgment until date on which second judgment was filed was held not to prevent the second judgment from being a nullity.—Mullins v. Thomas, supra.

Additional judgment for costs cannot be entered after original judgment dismissing complaint without adjudication of costs.—Empire Produce Co. v. Ring, 232 N.Y.S. 82, 225 App.Div. 6.

Legal and equitable relief

(1) Where administratrix brought action based on fraud which had allegedly induced deceased stockholder to assign stock and a money judgment was entered on an additional count for equitable relief limited to a single recovery, such procedure was improper since, under the blended system of law and equity, only one money judgment was necessary.—Dellefield v. Blockdel Realty Co., C.C.A.N.Y., 128 F.2d 85.

(2) Other cases involving legal and equitable relief see 33 C.J. p 1193 note 37 [d].

Single adjudication of separate and distinct sums does not create separate and distinct judgment as to each sum.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.

Provision for enforcement

(1) In proceeding supplemental to execution, after entry of original decree, court was authorized to enter supplemental decree containing additional provisions for enforcing it.—Pappas v. Taylor, 244 P. 393, 138 Wash. 31.

(2) Provision for enforcement of judgment generally see infra § 82.

43. Tex.—General Motors Acceptance Corporation v. Bodenheim, Civ.App., 37 S.W.2d 312.

33 C.J. p 1194 note 38.

Counterclaim

(1) Under some statutes a single judgment should be rendered where plaintiff prevails on case and defendant on counterclaim.—State ex rel. Duraflor Products Co. v. Pearcy, 29 S.W.2d 83, 325 Mo. 335.

(2) Under provisions of statutes providing that, where a counterclaim is established by "defendant" which is less than plaintiff's demand, plaintiff must have judgment for residue only, the word "defendant" means a single defendant.—Bandych v. Ross, 26 N.Y.S.2d 330.

Effect of cross action

(1) Cross action has been held not an ancillary proceeding but an independent suit in which a final judgment could be rendered without awaiting a decision in the original suit.—Adam v. Saenger, Tex.Civ. App., 101 S.W.2d 1046, reversed on other grounds 58 S.Ct. 454, 303 U. S. 59, 82 L.Ed. 649, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, mandate conformed to Tex. Civ.App., 119 S.W.2d 687, certiorari denied Saenger v. Adam, 59 S.Ct. 332, 307 U.S. 628, 83 L.Ed. 1511.

(2) It has also been held, however, that but one judgment should be entered in an original and a cross suit.

Iowa.—Union Mercantile Co. v. Chandler, 57 N.W. 595, 90 Iowa 650.

N.Y.—Simpson v. McKay, 3 Thomps. & C. 65.

33 C.J. p 1194 note 38 [b].

enter the orders separately and not as a part of the judgment for defendant.[44]

The general rule has been held to have application only to parties to an action whose interests are identical,[45] and not to prevent the court from granting judgment to plaintiff in an action and postponing determination of claims between defendants which do not affect the rights of plaintiff.[46] The entry of an interlocutory decree followed by the entry of a decree rendering the former final does not violate the rule.[47]

Statutes or rules of court in a number of jurisdictions permit departure from the general rule,[48] as, for example, statutes, discussed supra § 36, which permit separate judgments to be entered as to different defendants. Under other statutes, where only part of a claim is controverted, or where defendant admits, or offers to allow judgment as to, part of the claim, judgment may be entered for such part, and subsequently another judgment may be entered for the amount found due, if any, on further litigation.[49] Where separate judgments are properly rendered in the same action, the fact that they are written on the same paper does not affect their validity.[50]

§ 66. Several Causes Tried Together

Where several causes are tried as one action, separate judgments in each may and should be entered.

Where several causes are tried and submitted together, it is not proper to render a general judgment, but separate judgments should be entered in the separate cases.[51] In a penal action to recover on several distinct offenses, judgment must be rendered separately on each specific offense.[52]

§ 67. Nature and Extent of Relief

At common law equitable relief cannot be awarded in an action at law. It is otherwise in jurisdictions in which law and equity are administered by the same courts, such courts having a broad discretion in the manner of granting relief and forming their decrees.

A court can render only such judgment in a case as does not transcend the extent and character of judgments which are applicable to the class of cases to which the case under consideration belongs.[53] However, the fact that relief of a particular sort has not been given previously is not conclusive that it should not be granted, although ordinarily it is highly persuasive to such effect.[54] The court cannot by its judgment give one of the parties a right which he did not otherwise have.[55]

As a general rule, specific or equitable relief cannot be recovered in an action at law under the common law or where law and equity are administered as separate systems of jurisprudence.[56] The sole remedy the court is competent to give is a judgment for money damages as a recompense for the injury suffered.[57] On the other hand, in jurisdictions in which the formal distinction between courts of law and equity has been abolished by code or practice,

44. Colo.—Charles v. Sprott, 224 P. 222, 75 Colo. 90.

45. Cal.—Howe v. Key System Transit Co., 246 P. 39, 198 Cal. 525.

46. Cal.—Rowley v. Davis, 147 P. 958, 169 Cal. 678.
Relief between codefendants see supra § 37.

47. Tex.—Lubell v. Sutton, Civ. App., 164 S.W.2d 41, error refused.

48. Ill.—Zimmerman v. Bankers Life & Cas. Co., 58 N.E.2d 267, 324 Ill.App. 370—Kuleza v. Alliance Printers & Publishers, 47 N.E.2d 547, 318 Ill.App. 231—Shaw v. Courtney, 46 N.E.2d 170, 317 Ill.App. 422, affirmed 53 N.E.2d 432, 385 Ill. 559—National Builders Bank of Chicago v. Simons, 31 N.E.2d 269, 307 Ill.App. 552.

Legislature has power to authorize the rendition and entry of separate judgments.—Beauvais v. Springfield Institute for Savings, 20 N.E.2d 957, 303 Mass. 136, 124 A.L.R. 611.

49. Ill.—Zimmerman v. Bankers Life & Casualty Co., 58 N.E.2d 267, 324 Ill.App. 370.
Ky.—Weikel v. Alt, 27 S.W.2d 684, 234 Ky. 91—O'Connor v. Henderson Bridge Co., 27 S.W. 251, 983, 95 Ky. 633—Maxwell v. Dudley, 13 Bush 403.
33 C.J. p 1194 note 39.
Judgment on:
Admission in pleadings see infra § 185.
Offer see infra §§ 179–184.

50. La.—Lay v. Pugh, 119 So. 456, 9 La.App. 183.

51. Pa.—Fisher v. Diehl, 40 A.2d 912, 156 Pa.Super. 476.
33 C.J. p 1194 note 40.
Single or separate judgments on consolidation of actions see Actions § 113 a (5).

Joinder of causes under statute
The authority conferred by statute to join several causes of action in one action, as discussed in Actions §§ 77–98, has been held to carry with it the authority to enter separate judgments in such an action.—Lewis v. Bricker, 209 N.W. 832, 235 Mich. 656.

Judgment on general verdict
Entry of judgment on general verdict in action based on several causes of action and counterclaims thereto is not error, although jury might, if proper instructions were asked and allowed, have returned separate verdicts.—McGrew Mach. Co. v. One Spring Alarm Clock Co., 245 N.W. 263, 124 Neb. 93.

52. N.J.—Bloodgood v. Vandeveer, 3 N.J.Law 928.

53. Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.
Neb.—Boring v. Dodd, 217 N.W. 580, 116 Neb. 366.

54. D.C.—Thomas v. Peyser, 113 F.2d 369, 73 App.D.C. 155.

55. Pa.—Koenig v. Curran's Restaurant & Baking Co., 159 A. 553, 306 Pa. 345.

Action on contract
Rights of litigants in suit on contract cannot be enlarged by court's judgment order, or decree, which can only adjudicate relations established by parties as between themselves. —Koenig v. Curran's Restaurant & Baking Co., 159 A. 553, 306 Pa. 345.

56. N.J.—Knight v. Electric Household Utilities Corporation, 30 A.2d 585, 133 N.J.Eq. 87, affirmed 36 A.2d 201, 134 N.J.Eq. 542.
33 C.J. p 1055 note 57.

57. Va.—Orange & A. R. Co. v. Fulvey, 17 Gratt. 366, 58 Va. 366.
33 C.J. p 1056 note 57.

and in which the same court administers law and equity, a judgment may award such legal and equitable and specific relief as the case warrants.[58] In such jurisdictions the court possesses a broad discretion in the manner of granting relief and forming its decrees[59] in order to adapt the relief to the circumstances of the particular case.[60] It will administer such relief as the exigencies of the case demand[61] as of the close of the trial[62] or entry of the decree,[63] provided a sufficient foundation for the suit existed at the time when it was commenced.[64] The court will endeavor to dispose finally of the litigation so as to preclude further litigation between the parties on the same subject matter.[65]

While plaintiff may be entitled to several or different reliefs in one cause of action,[66] double or excessive relief may not be awarded.[67] Ordinarily the court will not hand over property which is

58. Ky.—Black Motor Co. v. Hensley, 98 S.W.2d 281, 266 Ky. 110.
Okl.—Wetzel v. Evans, 147 P.2d 133, 194 Okl. 20—Clark v. Armstrong & Murphy, 72 P.2d 362, 180 Okl. 514.
Joinder of legal and equitable causes under code practice see Actions § 94.

59. Ill.—Quitman v. Dowd, 23 N.E.2d 207, 301 Ill.App. 403.
Ind.—Newman v. Newman, 48 N.E.2d 455, 221 Ind. 432.
Wash.—Hanley v. Most, 115 P.2d 933, 9 Wash.2d 429.

Alternative relief

Where a contractor was entitled to relief sought in its complaint praying for a refund of taxes paid on gasoline used in trucks not capable of being operated upon a public highway, and prayer for relief was in the alternative, it was for the trial court to determine in what form it should be accorded.—Mason-Walsh-Atkinson-Kier Co. v. Case, 97 P.2d 165, 2 Wash.2d 33.

Decree pro forma

In granting or refusing pro forma decree, court may grant or dismiss petition as seems best.—In re Henry County Mut. Burial Ass'n, 77 S.W.2d 124, 229 Mo.App. 300.

Declaration of rights

Where plaintiff sought, among other things, to have rights of parties declared, and declaration of rights appeared in findings, judgment was not deficient for failure to disclose such declaration of rights on its face, since findings may be read in connection with judgment.—Ampuero v. Luce, 157 P.2d 899, 68 Cal.App.2d 811.

60. Fla.—Nichols v. Bodenheim, 146 So. 86, 659, 107 Fla. 25.
Ind.—Newman v. Newman, 48 N.E.2d 455, 221 Ind. 432.
Minn.—Beliveau v. Beliveau, 14 N.W.2d 360, 217 Minn. 235.
N.Y.—Shanik v. Empire Power Corp., 58 N.Y.S.2d 176, affirmed 62 N.Y.S.2d 760, 270 App.Div. 925.

Preservation of rights

Court may render decree saving rights of parties not before it.—Charles A. Hill & Co. v. Belmont Heights Baptist Church, 69 S.W.2d 612, 17 Tenn.App. 603.

61. Kan.—Frey v. Willey, 166 P.2d 659, 161 Kan. 196.
La.—Mayer Godchaux Co. v. Regan, 137 So. 547, 18 La.App. 579.
N.Y.—Bloomquist v. Farson, 118 N.E. 855, 222 N.Y. 375—Turner v. Hygiene Waterproofing Co., 5 N.Y.S.2d 669, 255 App.Div. 716, affirmed 23 N.E.2d 548, 281 N.Y. 731—In re Beall's Will, 54 N.Y.S.2d 869, 184 Misc. 881—Chase Nat. Bank of City of New York v. Manila Electric Co., 40 N.Y.S.2d 385, 180 Misc. 483—Chemical Bank & Trust Co. v. Adam Schumann Associates, 268 N.Y.S. 674, 150 Misc. 221.
Ohio.—State ex rel. Ohio Nat. Bank of Columbus v. City of Parma, 6 N.E.2d 756, 132 Ohio St. 220, 257.
Okl.—Doss Oil Royalty Co. v. Texas Co., 137 P.2d 934, 192 Okl. 359.

Disposition of rights of parties

Decree or judgment disposes of rights of parties as they presently exist, and as they appear from evidence in case.—Ward v. Prospect Manor Corporation, 206 N.W. 856, 188 Wis. 534, 46 A.L.R. 364.

Equities must be balanced by the court in determining whether equitable relief will be granted.—Folts v. Globe Life Ins. Co., 223 N.W. 797, 117 Neb. 723.

Interlocutory judgment

Judgment in action to establish title to realty should have been interlocutory, where issue tried was whether defendant was liable to account and evidence relating to many items to determine amount of recovery was lacking.—Waters v. Hall, 218 N.Y.S. 31, 218 App.Div. 149.

Relief must be granted or denied according to the facts and equitable considerations presented at the trial.—Devon Knitwear Co. v. Levinson, 19 N.Y.S.2d 102, 173 Misc. 779.

Money judgment

A court exercising equitable powers has power to render a money judgment when conditions forbid the enforcement of the more direct remedies invoked in the equitable process.—In re Rubin's Estate, 5 N.Y.S.2d 129, 168 Misc. 81.

Court is not bound by narrow limitations, but may afford relief justified by facts.—Dolin v. Sussman, 255 N.Y.S. 618, 143 Misc. 323.

62. N.Y.—Smith v. Bouton, 223 N.Y.S. 164, 221 App.Div. 317—City of Glens Falls v. Standard Oil Co. of New York, 215 N.Y.S. 354, 127 Misc. 104.

63. Mass.—Fashioncraft, Inc., v. Halpern, 48 N.E.2d 1, 313 Mass. 385.

64. N.Y.—City of Glens Falls v. Standard Oil Co. of New York, 215 N.Y.S. 354, 127 Misc. 104.
Time to which relief in equity relates generally see Equity § 600.

65. Cal.—Sonnicksen v. Sonnicksen, 113 P.2d 495, 45 Cal.App.2d 46.
N.Y.—Shanik v. Empire Power Corp., 58 N.Y.S.2d 176, affirmed 62 N.Y.S.2d 760, 270 App.Div. 925.
Wash.—Hanley v. Most, 115 P.2d 933, 9 Wash.2d 429.

Adjudication in one judgment

All controversies of parties arising out of a particular transaction may be adjudicated in one judgment.—Mergenthaler v. Mergenthaler, 160 P.2d 121, 69 Cal.App.2d 525—Dobbins v. Horsfall, 136 P.2d 35, 58 Cal.App.2d 23.

Decree determining case

Court properly rendered decree determining case, tried as suit in equity after defendants set up that plaintiffs' deed to land, for possession of which action was originally commenced, was in effect a mortgage, as there was nothing further to try in law action.—Colahan v. Smyth, 81 P.2d 112, 159 Or. 569.

66. Utah.—Peay v. Gasav of Provo, Inc., 39 P.2d 1041, 88 Utah 85.

67. Tex.—Jones v. Rainey, Civ.App., 168 S.W.2d 507, error refused—Wichita Falls Electric Co. v. Huey, Civ.App., 246 S.W. 692.

Double relief illustrated

In an action for damages for breach of contract to furnish electric lighting facilities and for mandamus to compel performance of such contract, an award of damages based on a continuing and indefinite failure to perform and grant of mandamus without taking it into consideration in assessing damages, was erroneous as giving double relief.—Wichita Falls Electric Co. v. Huey, supra.

the subject of a suit to one of the parties to collect and distribute among the interested parties.[68]

Unenforceable judgments. A court will not render a judgment which cannot be enforced by any process known to law.[69]

Specification in judgment. The entry of a judgment must show the nature of the relief granted[70] or denied,[71] its extent,[72] and, as discussed infra § 75, the parties for and against whom it is rendered. A general judgment for defendant is not objectionable where there is no doubt that the judgment denies the relief sought.[73] It is improper, however, for the judgment to purport to grant relief as prayed for in the petition where damages were also prayed for but not granted.[74]

Prospective damages. A judgment in an action for damages reciting that plaintiff had been damaged in a specified amount is not objectionable as providing for prospective damages.[75]

§ 68. —— Amount of Recovery

The recovery of double damages is not favored.

The recovery of double damages is not favored.[76] The adding of interest to the amount of a verdict for plaintiff has been held not to be error where the court has reserved for itself the computation of interest.[77]

Designation of the amount of the recovery is considered infra §§ 76–79.

§ 69. —— Personal Judgment in Proceedings by Attachment or in Rem

A personal or general judgment cannot as a general rule be effectively rendered in a proceeding in rem, as by attachment, unless jurisdiction of the person has also been obtained by personal service or by an appearance.

Although some statutes contemplate the rendition of a judgment, personal in form, even where no jurisdiction has been obtained over defendant's person,[78] as a general rule, in a proceeding in rem in which the court's jurisdiction is founded solely on the presence of the particular thing involved in the suit, as by attachment, no personal judgment can be rendered against the owner or defendant beyond the property involved.[79] It has been held, however, that a personal or general judgment in such a case is not absolutely void,[80] but that it can have no effect further than to bind the property attached.[81]

Where jurisdiction acquired over person. Where the court has acquired jurisdiction over defendant's person by personal service or his voluntary appearance it is usually proper to render a personal judgment against him,[82] even though the writ of attachment issued in the case is bad.[83] If the parties are before the court, a decree in personam

68. Mass.—National Radiator Corporation v. Parad, 8 N.E.2d 794, 297 Mass. 314.

69. Cal.—Johnson v. Malloy, 16 P. 228, 74 Cal. 430.
Mont.—Allen v. Montana Refining Co., 227 P. 582, 71 Mont. 105.

70. Tex.—Fair v. Miller, Civ.App., 69 S.W.2d 558, error dismissed.
Utah.—Ellinwood v. Bennion, 276 P. 159, 73 Utah 563.
33 C.J. p 1191 note 8.

71. Utah.—Ellinwood v. Bennion, supra.

72. U.S.—Smith v. Smith, Colo., 247 F. 461, 159 C.C.A. 515.
33 C.J. p 1191 note 4.

73. Mo.—Jones v. Reeves, App., 41 S.W.2d 605.

74. Tex.—Fair v. Miller, Civ.App., 69 S.W.2d 558, error dismissed.

75. Ohio.—Licht v. Woertz, 167 N.E. 614, 32 Ohio App. 111.

76. Mass.—Lawrence v. O'Neill, 58 N.E.2d 140, 317 Mass. 393.
Assessment of multiple damages see Damages § 195.
Statutory provisions for multiple damages see Damages § 128.

77. Colo.—Wood v. Hazelet, 237 P. 151, 77 Colo. 442.

78. Mich.—Hitchcock v. Hahn, 27 N. W. 600, 60 Mich. 459.
6 C.J. p 484 note 89.

79. U.S.—The Chickie, C.C.A.Pa., 141 F.2d 80—Gershowitz v. Lane Cotton Mills, D.C.Tex., 21 F.Supp. 579.
Ga.—Wilby v. McRae, 191 S.E. 662, 56 Ga.App. 140.
La.—Nottingham v. Hoss, 141 So. 391, 19 La.App. 643.
Okl.—Consolidated Flour Mills Co. of Kansas v. Sayre Wholesale Grocer Co., 56 P.2d 781, 176 Okl. 482.
Attachment or garnishment as basis for judgment generally see supra § 24.
Jurisdiction of the person as prerequisite to judgment in personam generally see supra § 19.
Costs
Text rule applies to judgment for costs.—The Chickie, C.C.A.Pa., 141 F. 2d 80—Gershowitz v. Lane Cotton Mills, D.C.Tex., 21 F.Supp. 579.

80. Me.—Parker v. Prescott, 29 A. 1007, 86 Me. 241.
6 C.J. p 484 note 90.

81. N.J.—Skratt v. Carnera, 175 A. 366, 12 N.J.Misc. 826.
Okl.—Consolidated Flour Mills Co. of Kansas v. Sayre Wholesale Grocer Co., 56 P.2d 781, 176 Okl. 482.
6 C.J. p 485 note 91.
Effect of judgment in main action of attachment proceeding see Attachment § 497 g.
"A judgment, though in the form of a personal one, against the defendant, has no effect beyond the property attached. No suit can be maintained on the judgment in any court; nor can it be used as evidence in any other proceeding not affecting the property; nor can the costs . . . be collected out of any other property."—Gershowitz v. Lane Cotton Mills, D.C.Tex., 21 F. Supp. 579, 580.

82. Miss.—Travellers' Ins. Co. v. Inman, 128 So. 877, 157 Miss. 810—Branham v. Drew Grocery Co., 111 So. 155, 145 Miss. 627.
6 C.J. p 485 note 92.
Process, notice, or appearance as essential to valid judgment see supra §§ 23–26.
Notice of attachment under statute confers jurisdiction to grant a personal judgment.—Whitten v. McMillan, 128 S.E. 211, 34 Ga.App. 33—Johnson v. Walter J. Wood Stove Co., 64 S.E. 287, 6 Ga.App. 65.

83. Pa.—Linahan v. Lawson, 43 Pa. Co. 533.

may be rendered and obedience thereto enforced even though the res involved in the suit is beyond the court's jurisdiction.[84]

§ 70. —— Affirmative Relief to Defendant

As discussed supra § 49, affirmative relief cannot be awarded defendant in an action unless he has filed an appropriate pleading seeking such relief.

Examine Pocket Parts for later cases.

§ 71. Recitals

a. In general
b. Jurisdictional recitals
c. Verdict and facts or findings

a. In General

A judgment does not reside in its recitals, and ordinarily need not recite on its face matters which appear from other parts of the judgment roll.

Mere recitals are not indispensable parts of judgments.[85] The judgment or decree does not reside in its recitals, but in the mandatory or decretal portion thereof,[86] which adjudicates and determines the issues in the case and defines and settles the rights and interests of the parties as far as they relate to the subject matter of the controversy.[87]

Matters which appear from other parts of the judgment roll need not be recited in the judgment itself.[88] Hence, while as discussed supra §§ 47–58, a judgment or decree must conform to the pleadings and findings in the case, if it does so conform a statement to that effect in the decree itself is not necessary,[89] nor need the judgment of a court of record recite on its face that it was rendered after due proof.[90] The validity of the judgment is not affected by recitals which precede the judgment.[91]

If reasons and rulings are required to be incorporated in the decree in the interest of clarity, they should be concisely set out.[92]

b. Jurisdictional Recitals

Except as statute or court rule may otherwise provide, the judgment of a court of general jurisdiction need not, as a general rule, contain a recital of the jurisdictional facts.

Except as statute or court rule may otherwise provide,[93] the judgment of a court of general jurisdiction is not, as a general rule, required to contain a recital of the jurisdictional facts,[94] and failure of such a judgment in an ordinary action at law to contain a recital of such facts does not vitiate the judgment,[95] nor does error in the recital

84. U.S.—Wallace v. Motor Products Corporation, C.C.A.Mich., 25 F.2d 655, certiorari granted 49 S. Ct. 21, 278 U.S. 589, 73 L.Ed. 522, certiorari dismissed 49 S.Ct. 417, 279 U.S. 859, 73 L.Ed. 999.

Decree does not operate on res

U.S.—Wallace v. Motor Products Corporation, supra.

85. Cal.—Jacobs v. Norwich Union Fire Ins. Soc., 40 P.2d 899, 4 Cal. App.2d 1.

Mich.—Ombrello v. Duluth, S. S. & A. Ry. Co., 233 N.W. 357, 252 Mich. 396.

86. U.S.—McGhee v. Leitner, D.C. Wis., 41 F.Supp. 674—Eckerson v. Tanney, D.C.N.Y., 235 F. 415, affirmed 243 F. 1007, 156 C.C.A. 663.

Iowa.—Creel v. Hammans, 5 N.W.2d 169, 232 Iowa 95.

Mich.—**Corpus Juris quoted in** Ombrello v. Duluth, S. S. & A. Ry. Co., 233 N.W. 357, 359, 252 Mich. 396.

Mont.—**Corpus Juris quoted in** Conway v. Fabian, 89 P.2d 1022, 1028, 108 Mont. 287, certiorari denied Fabian v. Conway, 60 S.Ct. 94, 308 U.S. 578, 84 L.Ed. 484—Blaser v. Clinton Irr. Dist., 53 P.2d 1141, 100 Mont. 459—**Corpus Juris quoted in** Galiger v. McNulty, 260 P. 401, 80 Mont. 339.

Wis.—In re Corse's Will, 217 N.W. 726, 195 Wis. 88.

Construction of judgment with respect to recitals see infra § 437.

87. Iowa.—Creel v. Hammans, 5 N.W.2d 169, 232 Iowa 95.

88. Idaho.—**Corpus Juris cited in** Karlson v. National Park Lumber Co., 269 P. 591, 46 Idaho 595.

33 C.J. p 1194 note 42.

Compliance with statute

A law or decretal judgment, based on evidences of indebtedness specified in statute requiring person bringing suit thereon to allege or prove that such instruments have been assessed for taxation, is neither void nor voidable merely because it does not recite that statute has been complied with.—Crickmer v. Thomas, 200 S.E. 353, 120 W.Va. 769—Newhart v. Pennybacker, 200 S.E. 350, 120 W.Va. 774, concurring opinion 200 S.E. 754, 120 W.Va. 774.

Theory of damages

A statement in a judgment specifying what the damages awarded thereby were for is improper.—Brown v. Shyne, 206 N.Y.S. 310, 123 Misc. 851.

89. Vt.—Ackerman v. Carpenter, 29 A.2d 922, 113 Vt. 77.

90. Ga.—Wade v. Hurst, 84 S.E. 65, 143 Ga. 26.

Miss.—Simpson v. Phillips, 141 So. 897, 164 Miss. 256.

91. Cal.—Potasz v. Potasz, 155 P.2d 895, 68 Cal.App.2d 20.

92. Mich.—Rhines v. Consumers' Power Co., 242 N.W. 898, 259 Mich. 236.

Making opinion part of decree was held improper.—Rhines v. Consumers' Power Co., supra.

Errors in recitals held immaterial

Ga.—Barber v. Smith, 26 S.E.2d 478, 69 Ga.App. 624.

Mont.—Blaser v. Clinton Irr. Dist., 53 P.2d 1141, 100 Mont. 459.

N.C.—Richert v. James Supply Co., 138 S.E. 345, 194 N.C. 11.

93. Ala.—De Jarnette v. Dreyfuss, 51 So. 932, 166 Ala. 138.

33 C.J. p 1195 note 47.

94. Ind.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind. 672.

95. Wash.—In re Dingman, 188 P. 755, 110 Wash. 513.

33 C.J. p 1195 note 46.

Resort to record

(1) Where court had jurisdiction of subject matter and potential jurisdiction of parties, and judgment did not recite service of process, entire record could be looked to, to ascertain if actual jurisdiction had been acquired.—Johnson v. Cole, Tex.Civ.App., 138 S.W.2d 910, error refused.

(2) On question of validity of the judgment, recourse may be had to affidavits in judgment roll to determine whether showing made for or-

of such facts have such effect.[96] It has been held that, where service of process on defendant was constructive only, the judgment should recite facts sufficient to show compliance with the statute.[97]

The necessity for a record showing of jurisdictional facts in courts of inferior or limited jurisdiction is discussed in Courts § 105.

c. Verdict and Facts or Findings

As a general rule a judgment need not incorporate in its recitals the verdict or findings of fact on which it is founded.

While a judgment ordinarily should refer to, and state the result of, the verdict, decision, or report which authorizes it,[98] in accordance with any statute or rule of court,[99] generally it is not necessary to go further and incorporate in the recitals of the judgment the verdict,[1] or the findings,[2] or the evidentiary facts.[3] It is sufficient if the facts essential to sustain the judgment are stated in the pleadings[4] and ascertained by the judgment.[5]

Mere findings or conclusions of law have been held to have no place in a judgment;[6] and, even where a statute requires findings and conclusions to be made, the better practice is to include them in a separate instrument.[7] A judgment and the findings, however, may be incorporated in the same instrument without affecting the validity of the judgment[8] where no separate findings or conclusions are requested or filed.[9]

While under code practice a recital of the facts in an equitable decree is usual and proper,[10] only the decretal part of the decree determines the rights

der of publication of summons was sufficient to confer jurisdiction on court.—Bell v. McDermoth, 246 P. 805, 198 Cal. 594.

96. Mont.—Blaser v. Clinton Irr. Dist., 53 P.2d 1141, 100 Mont. 459.
Tex.—Anderson v. Zorn, 131 S.W. 835, 62 Tex.Civ.App. 547.

97. Ill.—Trevor v. Colgate, 54 N.E. 909, 181 Ill. 139.
33 C.J. p 1195 note 53.

98. Tex.—**Corpus Juris cited in** Walker v. Taylor, Civ.App., 56 S.W.2d 251, 252.
33 C.J. p 1195 note 55.

99. Tex.—Doornbos v. Looney, Civ. App., 159 S.W.2d 155, error refused.
33 C.J. p 1195 note 54.

Sufficiency of compliance

(1) Substantial compliance with the rules of civil procedure requiring the judgment to recite carefully the findings on which it is based has been held sufficient.—Doornbos v. Looney, supra.

(2) It has also been held that the fact that a judgment did not recite the findings on which it was based did not render judgment defective where the matter was not called to trial court's attention and trial court was not requested to file findings of fact or conclusions of law.—J. R. Phillips Inv. Co. v. Road Dist. No. 18 of Limestone County, Tex.Civ.App., 172 S.W.2d 707, error refused.

1. Tex.—Christner v. Mayer, Civ. App., 123 S.W.2d 715, error dismissed, judgment correct.
33 C.J. p 1195 note 56.

It is not improper to copy a verdict in the judgment.—Christner v. Mayer, supra.

2. Fla.—J. Schnarr & Co. v. Virginia-Carolina Chemical Corporation, 159 So. 39, 118 Fla. 258—Bowery v. Babbit, 128 So. 801, 99 Fla. 1151.
Ill.—Pease v. Kendall, 63 N.E.2d 2, 391 Ill. 193—Ritholz v. Andert, 33 N.E.2d 632, 309 Ill.App. 576.
Wyo.—State v. District Court of Eighth Judicial Dist. within and for Natrona County, 260 P. 174, 37 Wyo. 169.
33 C.J. p 1195 note 57.

However, it has also been held that a judgment should specially recite the facts on which it is predicated.—De Santo v. De Nicola, 122 A. 708, 99 Conn. 717.

Judgment should contain nothing but a statement that the court has made its findings of fact and conclusions of law and then decree the relief to which the plaintiff is entitled.—City Bank Farmers' Trust Co. v. Cannon, 38 N.Y.S.2d 245, 265 App. Div. 863, affirmed 51 N.E.2d 674, 291 N.Y. 125, 157 A.L.R. 1424, motion denied 59 N.E.2d 445, 293 N.Y. 858.

Where jury trial waived

Fla.—J. Schnarr & Co. v. Virginia-Carolina Chemical Corporation, 159 So. 39, 118 Fla. 258.

3. Ill.—Chicago Title & Trust Co. v. Ward, 163 N.E. 319, 332 Ill. 126.

Certificate of evidence

It is not necessary that there be a certificate of evidence to support decree.—Pease v. Kendall, 63 N.E. 2d 2, 391 Ill. 193.

4. Tex.—Cook v. Hancock, 20 Tex. 2.
33 C.J. p 1195 note 58.

5. Ill.—Gromer v. Molby, 52 N.E.2d 772, 385 Ill. 283—Chicago Title & Trust Co. v. Ward, 163 N.E. 319, 332 Ill. 126.
33 C.J. p 1195 note 58.

6. Ill.—Lazarus v. Allied Finishing Specialties Co., 45 N.E.2d 516, 316 Ill.App. 667.
Iowa.—**Corpus Juris cited in** Van Alstine v. Hartnett, 231 N.W. 448, 449, 210 Iowa 999.
N.Y.—Bianchi v. Leon, 112 N.E. 724, 218 N.Y. 647—Lehigh Valley R. Co. v. Canal Board, 97 N.E. 964, 204 N.Y. 471, Ann.Cas.1913C 1228—City Bank Farmers Trust Co. v. Cannon, 38 N.Y.S.2d 245, 265 App. Div. 863, affirmed 51 N.E.2d 674, 291 N.Y. 125, 157 A.L.R. 1424, motion denied 59 N.E.2d 445, 293 N.Y. 858—People v. Reinforced Paper Bottle Corporation, 27 N.Y.S. 2d 14, 176 Misc. 268.

Findings which are not conclusive between the parties should not be contained in the judgment.—Minneapolis-Honeywell Regulator Co. v. Thermoco, Inc., C.C.A.N.Y., 116 F. 2d 845.

Improper form

Judgment incorporating findings of fact preceded by words, "it is ordered and decreed," was not in proper form.—Seaside Home for Crippled Children v. Atlantic Beach Associates, 150 N.E. 550, 241 N.Y. 550.

7. S.D.—In re Mulligan's Estate, 243 N.W. 102, 60 S.D. 74.

8. Iowa.—**Corpus Juris cited in** Van Alstine v. Hartnett, 231 N.W. 448, 449, 210 Iowa 999.
33 C.J. p 1195 note 60.

Error with respect to recital of facts does not vitiate judgment.
Iowa.—Woods v. Allen, 98 N.W. 499, 122 Iowa 695.
Mont.—Blaser v. Clinton Irr. Dist., 53 P.2d 1141, 100 Mont. 459.

Not an adjudication

Finding of fact, although followed by judgment, is not binding adjudication of court.—In re Cohen's Estate, 246 N.W. 780, 216 Iowa 649.

9. Tex.—Gillette v. Davis, Civ.App., 15 S.W.2d 1085—Cunningham v. Buel, Civ.App., 287 S.W. 683.

Error in finding
Tex.—Gillette v. Davis, Civ.App., 15 S.W.2d 1085.

10. U.S.—McGhee v. Leitner, D.C. Wis., 41 F.Supp. 674.

of the parties and constitutes the final judgment in the case.[11]

§ 72. Certainty

A judgment must be definite and certain.

A judgment must be definite and certain[12] in itself,[13] or capable of being made so by proper construction.[14] It must fix clearly the rights and liabilities of the respective parties to the cause,[15] and be such as defendant may readily understand and be capable of performing,[16] and such as to admit of enforcement,[17] to constitute an estoppel between the parties,[18] to enable the clerk to issue execution

11. U.S.—McGhee v. Leitner, supra.
Construction and operation of recitals in judgment see infra § 437.

12. U.S.—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715.
Ark.—Brotherhood of Locomotive Firemen and Enginemen v. Simmons, 79 S.W.2d 419, 190 Ark. 480.
Idaho.—Vollmer v. Vollmer, 273 P. 1, 47 Idaho 135—Hand v. Twin Falls County, 236 P. 536, 40 Idaho 638.
Ky.—Alexander v. Hendricks, 258 S. W. 81, 201 Ky. 677.
La.—Simon v. Hulse, 124 So. 845, 12 La.App. 450.
Miss.—Nicholas Bus & Trailer Co. v. Fuller, 22 So.2d 243.
N.C.—Barham v. Perry, 171 S.E. 614, 205 N.C. 428.
Okl.—Moroney v. Tannehill, 215 P. 938, 90 Okl. 224.
Tex.—Thomas v. Mullins, Civ.App., 127 S.W.2d 559, reversed on other grounds Mullins v. Thomas, 150 S. W.2d 83, 136 Tex. 215.
W.Va.—Barnhard v. Barnhard, 154 S.E. 874, 109 W.Va. 375.
33 C.J. p 1195 note 62.
Certainty:
In description of property see infra § 80.
In designation of:
Amount see infra §§ 76–79.
Parties see infra § 75.
Of decrees see Equity § 598.
Definitiveness see supra § 21.

"At least reasonable legal certainty" is required.—Emery v. Succession of Martel, La.App., 10 So.2d 267, 269.

Judgments held invalid for uncertainty
Ala.—Jasper Land Co. v. Riddlesperger, 140 So. 624, 25 Ala.App. 45.
Tex.—City of Beaumont v. Calder Place Corporation, Civ.App., 180 S. W.2d 189, reversed on other grounds 183 S.W.2d 713, 143 Tex. 244—Snowden v. Glaspy, Civ.App., 127 S.W.2d 508.
33 C.J. p 1195 note 62 [c].

Judgments held not invalid for uncertainty
(1) Generally.
U.S.—Mueller v. Mueller, C.C.A.Ark., 124 F.2d 544, certiorari dismissed 62 S.Ct. 1288, 316 U.S. 649, 86 L. Ed. 1732.
Ariz.—Peterson v. Overson, 79 P.2d 958, 52 Ariz. 203.
Cal.—Niles v. Louis H. Rapoport & Sons, 128 P.2d 50, 53 Cal.App.2d 644—Scott v. Allen, 41 P.2d 371, 4 Cal.App.2d 621—Straus v. Straus, 41 P.2d 218, 4 Cal.App.2d 461, modified on other grounds and rehearing denied 42 P.2d 378, 4 Cal.App. 2d 461—Williams v. Blue Bird Laundry Co., 259 P. 484, 85 Cal. App. 388.
Colo.—Sherman v. Randle, 245 P. 717, 79 Colo. 243.
Ill.—Little v. Chicago Nat. Life Ins. Co., 7 N.E.2d 326, 289 Ill.App. 433.
Iowa.—Hansen v. Bowers, 223 N.W. 891, 208 Iowa 545.
Ky.—Trivette v. Consolidation Coal Co., 177 S.W.2d 868, 296 Ky. 529—Kirk v. Cassady, 288 S.W. 1045, 217 Ky. 87.
Tex.—Grayson v. Johnson, Civ.App., 181 S.W.2d 312—Reese v. Carey Bros., Civ.App., 286 S.W. 307.
33 C.J. p 1195 note 62 [b].

(2) A judgment was not unintelligible because it provided in substance that it should inure to heirs and assigns of party obtaining it. —Wilson v. Cone, Tex.Civ.App., 179 S.W.2d 784.

(3) Judgment directing escrow holder to deliver on payment of balance due under contract was held not inconsistent or subject to charge of favoring both parties.—Reid v. Van Winkle, 252 P. 189, 31 Ariz. 267.

13. Ala.—Gandy v. Hagler, 16 So.2d 305, 245 Ala. 167—Jasper Land Co. v. Riddlesperger, 140 So. 624, 25 Ala.App. 45.
Ga.—Hutcheson v. Hutcheson, 30 S. E.2d 107, 197 Ga. 603.
Tex.—Burrage v. Hunt Production Co., Civ.App., 114 S.W.2d 1228, error dismissed.
33 C.J. p 1195 note 62 [a] (1).

14. Ga.—Hutcheson v. Hutcheson, supra.
33 C.J. p 1195 note 62.

15. Mass.—Johnson's Case, 136 N.E. 563, 242 Mass. 489.
Okl.—Moroney v. Tannehill, 215 P. 938, 90 Okl. 224.
Pa.—In re Rockett's Estate, 35 A.2d 303, 348 Pa. 445.
Tex.—Steed v. State, 183 S.W.2d 458, 143 Tex. 82.
33 C.J. p 1195 note 62.

Discretion of parties
The enforcement of a judgment should never be left to the discretion of the parties to whom it is addressed, or of the law officer charged with its execution.
Idaho.—People v. Cothern, 210 P. 1000, 36 Idaho 340.
La.—Emery v. Succession of Martel, App., 10 So.2d 267.

Judgment held sufficiently certain
Cal.—Bacigalupi v. Western Machinery Co., 26 P.2d 701, 135 Cal.App. 242.

Public interest requires that adjudications of the courts shall so completely and precisely compose the controversy at hand as to dispel and allay misunderstanding, discourage litigation, and invite repose.—Cundy v. Weber, 300 N.W. 17, 68 S. D. 214.

The rights of parties under mandatory judgment, whereby they may be subjected to punishment as contemnors for violation of its provisions, should not rest on implication or conjecture, but language declaring such rights or imposing burdens should be clear, and unequivocal.—Plummer v. Superior Court of City and County of San Francisco, 124 P.2d 5, 20 Cal.2d 158.

16. Mo.—Stith v. J. J. Newberry Co., 79 S.W.2d 447, 336 Mo. 467.
Tex.—Wilson v. Cone, Civ.App., 179 S.W.2d 784.
33 C.J. p 1195 note 62.

17. Cal.—Morris v. George, 135 P. 2d 195, 57 Cal.App.2d 665—In re McDonald's Estate, 99 P.2d 1115, 37 Cal.App.2d 521.
Ky.—Alexander v. Hendricks, 258 S. W. 81, 201 Ky. 677.
Mass.—Johnson's Case, 136 N.E. 563, 242 Mass. 489.
Mo.—Bishop v. Bishop, App., 151 S. W.2d 553.
N.C.—State v. Wilson, 4 S.E.2d 440, 216 N.E. 130—Barham v. Perry, 171 S.E. 614, 205 N.C. 428.
Tex.—City of Beaumont v. Calder Place Corporation, Civ.App., 180 S.W.2d 189, reversed on other grounds 183 S.W.2d 713, 143 Tex. 244—Johnson v. Stickney, Civ.App., 152 S.W.2d 921—Thomas v. Mullins, Civ.App., 127 S.W.2d 559, reversed on other grounds Mullins v. Thomas, 150 S.W.2d 83, 136 Tex. 215—Burrage v. Hunt Production Co., Civ.App., 114 S.W.2d 1228, error dismissed—Guerra v. Contreras, Civ.App., 52 S.W.2d 295.
Utah.—Garrison v. Davis, 54 P.2d 439, 88 Utah 358—Ellinwood v. Bennion, 276 P. 159, 73 Utah 563.
33 C.J. p 1195 note 62 [a] (2).

18. Cal.—In re McDonald's Estate, 99 P.2d 1115, 37 Cal.App.2d 521.
33 C.J. p 1195 note 62 [a] (3).

thereon,[19] and to enable a law officer to levy execution.[20] Where the record entry is wholly uncertain, repugnant, or contradictory, the judgment is at least erroneous, and it may be void.[21] An obscure judgment entry may, however, be construed with reference to the pleadings and record, and, where on the whole record its sense can be clearly ascertained, the judgment will be upheld.[22]

§ 73. Conditional Judgments

As a general rule, a judgment must not be conditioned on any contingency; but, in a number of instances, as where equitable relief is awarded, conditional judgments have been sustained.

A conditional judgment is one whose enforceability, or force, depends on the performance or nonperformance of certain acts to be done in the future by one of the parties,[23] as where a judgment is given for plaintiff, to be stricken out if defendant pays the amount named, or files a bond, within a certain time.[24]

It is a general rule that judgment must not be conditioned on any contingency,[25] and it has been

19. Mo.—Bishop v. Bishop, App., 151 S.W.2d 553.
33 C.J. p 1195 note 62 [a] (4).

20. Mass.—Johnson's Case, 136 N.E. 563, 242 Mass. 489.
Mo.—Bishop v. Bishop, App., 151 S.W.2d 553.
Tex.—Steed v. State, 133 S.W.2d 458, 143 Tex. 82—McCombs v. Red, Civ. App., 86 S.W.2d 648, error dismissed.

21. Cal.—Young v. Enfield, 20 P.2d 701, 217 Cal. 662—Morris v. George, 135 P.2d 195, 57 Cal.App. 2d 665.
Idaho.—Hand v. Twin Falls County, 236 P. 536, 40 Idaho 638.
Ky.—Alexander v. Hendricks, 258 S.W. 81, 201 Ky. 677.
Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County, 167 P.2d 648.
N.C.—Barham v. Perry, 171 S.E. 614, 205 N.C. 428.
Pa.—In re Rockett's Estate, 35 A.2d 303, 348 Pa. 445.
Tex.—Hatton v. Burgess, Civ.App., 167 S.W.2d 260, error refused—Burrage v. Hunt Production Co., Civ.App., 114 S.W.2d 1228, error dismissed—McCombs v. Red, Civ. App., 86 S.W.2d 648, error dismissed.
Utah.—Garrison v. Davis, 54 P.2d 439, 88 Utah 358.
33 C.J. p 1196 note 63.

22. Ala.—Floyd v. Jackson, 164 So. 121, 26 Ala.App. 575—Peppers v. Agee Mercantile Co., 149 So. 876, 25 Ala.App. 548.
Cal.—Vasiljevich v. Radanovich, 31 P.2d 802, 138 Cal.App. 97.
Ky.—Oglesby v. Prudential Ins. Co. of America, 82 S.W.2d 824, 259 Ky. 620—Nunnelley v. Nunnelley, 54 S.W.2d 931, 246 Ky. 250—Dodson v. Powell, 215 S.W. 82, 185 Ky. 387.
Tenn.—**Corpus Juris quoted in** Fleming v. Kemp, 178 S.W.2d 397, 399, 27 Tenn.App. 150.
Tex.—Banister v. Eades, Civ.App., 282 S.W. 351—Prince v. Frost-Johnson Lumber Co., Civ.App., 250 S.W. 785.
33 C.J. p 1196 note 64.
Construction of judgment with reference to pleadings see infra § 438.
Date of judgment may be made certain by recitation in order overruling motion to set aside judgment.—Eggleston v. Primrose Petroleum Co., Tex.Civ.App., 47 S.W.2d 359, error dismissed.
Orders or papers considered
Only orders or papers in cause that may be consulted to supply omissions in final judgment to render it sufficiently certain are such parts of record as were in existence and formed part of it at time judgment was rendered.—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.

23. N.C.—Hagedorn v. Hagedorn, 135 S.E. 768, 210 N.C. 164—Killian v. Maiden Chair Co., 161 S.E. 546, 202 N.C. 23.
12 C.J. p 406 note 90.
Conditional decrees see Equity § 584.
Conditional judgment:
Against garnishee see Garnishment § 255.
As affecting application of doctrine of res judicata see infra § 621.
In criminal cases see Criminal Law § 1581.
Definitiveness see supra § 21.
Judgment nisi see supra §§ 5, 8.
Elimination of condition
Where a judgment contains a condition sure to happen, or alternatives, one or the other of which a party is bound to elect, the happening or election making the judgment absolutely certain and definite eliminates the condition.—Parish v. McConkie, 85 P.2d 1001, 84 Utah 396.
Perfection or acquisition of title
Where enforceability or validity of judgment is conditioned on plaintiff's perfecting or acquiring title to property, judgment is conditional.—Zintsmaster v. Werner, C.C.A.Pa., 41 F.2d 634.
Judgments held not conditional
(1) Permitting company to withdraw petition on understanding that it would abandon claim to money in hands of receiver was not erroneous as conditional judgment.—Killian v. Maiden Chair Co., 161 S.E. 546, 202 N.C. 23.
(2) Intimation of judge, in action for damages for diverting and polluting water, that he would reduce or set aside verdict, if defendant would agree to install sewerage disposal plant, did not constitute judgment, signed after announcement that defendant could not accept court's offer, conditional.—Cook v. Town of Mebane, 131 S.E. 407, 191 N.C. 1.
(3) Other judgments.—Grayson v. Johnson, Tex.Civ.App., 181 S.W.2d 312—33 C.J. p 1196 note 65 [a].

24. N.C.—Hagedorn v. Hagedorn, 135 S.E. 768, 210 N.C. 164—Killain v. Maiden Chair Co., 161 S.E. 546, 202 N.C. 23.
21 C.J. p 406 note 90 [a].

25. U.S.—**Corpus Juris cited in** United States v. Bauman, D.C. Or., 56 F.Supp. 109, 117.
Ariz.—**Corpus Juris cited in** Peterson v. Overson, 79 P.2d 958, 959, 52 Ariz. 203.
Ark.—Brotherhood, etc., v. Simmons, 79 S.W.2d 419, 190 Ark. 480.
Or.—**Corpus Juris quoted in** Bell v. State Industrial Accident Commission, 74 P.2d 55, 57, 157 Or. 653.
Tex.—**Corpus Juris cited in** Dodd v. Daniel, Civ.App., 89 S.W.2d 494, 495.
33 C.J. p 1196 note 65—12 C.J. p 406 note 90 [a].
Facts as of time of rendition controlling
(1) Judgments take their validity and binding force from court's action, based on facts existing at time of their rendition, not from what may happen in the future.—Brotherhood of Locomotive Firemen & Enginemen v. Simmons, 79 S.W.2d 419, 190 Ark. 480.
(2) It would be an anomaly for the court to mould a judgment so as to make it binding only to the extent that some later judgment or verdict might determine.—Jarecky v. Arnold, 182 S.E. 66, 51 Ga.App. 954.
Interlocutory requirement of payment
Judgments containing interlocutory provisions, requiring payment of money and maturing before main decree can be reviewed, are not fa-

held that a conditional judgment is wholly void.[26] It has been said, however, that modern practice has relaxed this rule,[27] and in a number of cases conditional judgments have been rendered and sustained,[28] especially when there is an equitable phase of the action,[29] or where equitable relief is awarded,[30] or where it is necessary to protect the interests of defendant;[31] and a court has been held empowered to direct an entry of a judgment "secured by appeal" on such terms as it may deem fit.[32]

§ 74. Alternative Judgments

As a general rule a judgment should not be in the alternative, although under some circumstances, such as in actions for the specific recovery of property, an alternative judgment may be proper.

An alternative judgment is a judgment, for one thing or another, which does not specifically and in a definitive manner determine the rights of the parties,[33] as where it requires one of the parties to perform one or more alternative propositions.[34] As a general rule judgments cannot be in the alternative,[35] and it has been held that an alternative judgment is wholly void,[36] especially where further action of the court is necessary.[37] It has also been said, however, that modern practice has relaxed this rule,[38] and it has been held that, if the judg-

vored, since they place the losing party at a great disadvantage.—Alamitos Land Co. v. Shell Oil Co., 17 P.2d 998, 217 Cal. 213—Ochoa v. McCush, 2 P.2d 357, 216 Cal. 426.

26. Ariz.—**Corpus Juris cited in** Peterson v. Overson, 79 P.2d 958, 959, 52 Ariz. 203.
N.C.—Hagedorn v. Hagedorn, 185 S. E. 768, 210 N.C. 164—Killain v. Maiden Chair Co., 161 S.E. 546, 202 N.C. 23.
Or.—**Corpus Juris quoted in** Bell v. State Industrial Accident Commission, 74 P.2d 55, 57, 157 Or. 653.
Utah.—Parish v. McConkie, 35 P.2d 1001, 84 Utah 396.
33 C.J. p 1196 note 66.

Failure to object to a conditional judgment must be taken as an acquiescence to its form.—Walters v. Munore, 17 Md. 501—33 C.J. p 1197 note 69.

27. Ariz.—Peterson v. Overson, 79 P.2d 958, 52 Ariz. 203.

Statutory requirement as to form

Under a statute providing that the judgment shall conform to the pleadings, the nature of the case proved, and the verdict, and be so framed as to give the party all the relief to which he may be entitled in law or equity, a judgment, although conditional in form, is sufficient, if it is of such a nature that it may be determined therefrom definitely what rights and obligations pertain to the respective parties.—Peterson v. Overson, supra.

28. Cal.—Fageol Truck & Coach Co. v. Pacific Indemnity Co., 117 P.2d 669, 18 Cal.2d 748—Seegar v. Odell, 115 P.2d 977, 18 Cal.2d 409, 136 A.L.R. 1291.
Mo.—Culver v. Smith, 82 Mo.App. 390.
Tex.—Rutt v. Cravens, Dargan & Co., Civ.App., 72 S.W.2d 312.
33 C.J. p 1197 note 70.
Compliance with terms and conditions see infra § 447.

Subjection to rights of third person

Judgment for defendant, subject to rights of third person, not party to action, who has attached funds in plaintiff's hands, was not erroneous, since plaintiff need not pay judgment until such person's rights are adjudicated.—Ward v. Blair, 21 S.W. 2d 123, 231 Ky. 96.

29. Okl.—Powell v. C. I. T. Corporation, 142 P.2d 976, 193 Okl. 292.
Imposition of conditions in framing decree see Equity § 602.

Inherent power

A court has been held to have inherent power to make proper orders which are necessary to protect its decrees, and under this power a conditional judgment may be proper.
Mo.—Benton v. Alcazar Hotel Co., 194 S.W.2d 20.
N.J.—Luparelli v. U. S. Fire Ins. Co., 188 A. 451, 117 N.J.Law 342, affirmed 194 A. 135, 118 N.J.Law 565.

Protection against lost instrument

"Such is the character of the trial court's action when an action of legal cognizance is based upon a lost instrument and the instrument lost is of such a character as to require indemnity to protect against it if it should be found by, or otherwise fall into the hands of, third parties."—Powell v. C. I. T. Corporation, 142 P.2d 976, 977, 193 Okl. 292.

30. Cal.—Seegar v. Odell, 115 P.2d 977, 18 Cal.2d 409, 136 A.L.R. 1291.
Pa.—Clements v. Stoudt, Com.Pl., 26 North.Co. 315.

31. Cal.—Seeger v. Odell, 115 P.2d 977, 18 Cal.2d 409, 136 A.L.R. 1291.

Double payment

Defendant may be protected against danger of double payment by proper conditions in judgment.—Dunlevy Packing Co. v. Juderman, 1 La.App. 476.

32. N.Y.—Bergen v. Stewart, 28 How.Pr. 6.
Compliance with terms and conditions see infra § 447.

33. N.C.—**Corpus Juris quoted in** State v. Wilson, 4 S.E.2d 440, 442, 216 N.C. 130.
33 C.J. p 1197 note 71.
Alternative judgment:
In actions for exchange of property see Exchange of Property § 16 e.
In garnishment proceedings see Garnishment § 246.
Definitiveness see supra § 21.
Imposition of alternative sentence see Criminal Law § 1581.

Finding of court

Where the finding of the court is alternative, the judgment necessarily partakes of the same character.—Battel v. Lowery, 46 Iowa 49.

34. N.C.—State v. Wilson, 4 S.E.2d 440, 216 N.C. 130.

35. Ariz.—**Corpus Juris cited in** Peterson v. Overson, 79 P.2d 958, 959, 52 Ariz. 203.
N.Y.—Bandych v. Ross, 26 N.Y.S.2d 830.
N.C.—State v. Wilson, 4 S.E. 440, 216 N.C. 130.
Or.—Bell v. State Industrial Accident Commission, 74 P.2d 55, 157 Or. 653.
Utah.—**Corpus Juris cited in** Parish v. McConkie, 35 P.2d 1001, 1003, 84 Utah 396.
33 C.J. p 1103 note 29 [b] (2), p 1197 note 71.

36. Or.—**Corpus Juris quoted in** Bell v. State Industrial Accident Commission, 74 P.2d 55, 57, 157 Or. 653.
33 C.J. p 1103 note 29 [b] (2), p 1196 note 66, p 1197 note 71 [a] (2).

37. Iowa.—Battel v. Lowry, 46 Iowa 49.

Function of court

Where the selection of alternative propositions involves a function which may only be performed by the court, it is incapable of enforcement.—State v. Wilson, 4 S.E.2d 440, 216 N.C. 130.

38. Ariz.—Peterson v. Overson, 79 P.2d 958, 52 Ariz. 203.

Effect of statute

Under a statute providing that the judgment shall conform to the pleadings, the nature of the case proved, and the verdict, and be so framed as to give the party all the relief to which he may be entitled

ment is definite and certain, it may be in the alternative,[39] especially in actions for the specific recovery of property where the judgment may be for the property or its value,[40] such as in actions in detinue, discussed in Detinue § 22 b (1), or in replevin, as discussed in the C.J.S. title Replevin § 251, also 54 C.J. p 596 note 66.

§ 75. Designation of Parties

a. In general
b. Plaintiffs
c. Defendants
d. Names and misnomers

a. In General

A judgment must designate the parties for and against whom it is rendered; but it may be saved from uncertainty in this respect by reference to the caption, record, pleadings, or process.

A judgment must designate the parties for and against whom it is rendered, or it will be void for uncertainty;[41] and it has been said that the name of the person intended must appear by appellation or cognomen on the face of the judgment.[42] The designation of the parties should be made with sufficient certainty to enable the clerk to issue execution;[43] this may be done either by naming them correctly or by describing them in such terms as will identify them with certainty.[44]

The parties need not be designated by name in the judgment where the entry of judgment in connection with the record of the cause leaves no doubt as to the parties for or against whom it was rendered,[45] or if from the entire judgment roll it can be determined with sufficient certainty against whose property execution should issue.[46] Thus, as discussed in subdivisions b and c of this section, a judgment expressed to be merely for or against "plaintiff" or "defendant" will be sufficient if the names of the parties thus designated can be ascertained without ambiguity from the record. Reference may be made to the caption, record, pleadings, and process, in aid of the judgment, so as to eliminate uncertainty.[47]

The fact that a descriptive word or phrase is added to a party's name in a judgment neither affects the validity of the judgment nor changes the legal rights and relations which it engenders.[48]

in law or equity, a judgment, although alternative in form, is sufficient, where rights and obligations may be definitely determined therefrom.—Petersen v. Overson, supra.

39. Miss.—Nichols Bus & Trailer Co. v. Fuller, 22 So.2d 243.
Tex.—Glenn Nichols Land Co. v. Prince, Civ.App., 262 S.W. 533.

Choice of alternatives

(1) A judgment in the alternative may give the right of option to judgment debtor to do a specified act or suffer judgment for a designated sum.
Utah.—Parish v. McConkie, 35 P.2d 1001, 84 Utah 396.
Wash.—State v. Smith, 167 P. 91, 98 Wash. 100, reheard 169 P. 468, 98 Wash. 100.

(2) Effect of election see infra § 447.

Necessity of election

Court may require defendant to elect one of the alternatives if he has not made his election within the prescribed time.—Parish v. McConkie, 35 P.2d 1001, 84 Utah 396.

Time of election

(1) Failure of judgment debtor to exercise his option, within time fixed in judgment, constitutes an election to keep property and to submit to judgment for its value.—State v. Smith, 167 P. 91, 98 Wash. 100, reheard 169 P. 468, 98 Wash. 100.

(2) Where the findings order a judgment giving one party an alternative, such party need not indicate his choice of alternatives until the judgment is entered.—National Council K. L. S. v. Silver, 164 N. W. 1015, 138 Minn. 330.

40. Miss.—**Corpus Juris cited in** Nicholas Bus & Trailer Co. v. Fuller, 22 So.2d 243, 244.
Wash.—State v. Smith, 167 P. 91, 98 Wash. 100, reheard 169 P. 468, 98 Wash. 100.
33 C.J. p 1197 note 73.

41. Ariz.—Ackel v. Ackel, 110 P. 2d 238, 57 Ariz. 14, 133 A.L.R. 549, rehearing denied 111 P.2d 628, 57 Ariz. 118, 133 A.L.R. 556—Brown v. Brown, 300 P. 1007, 38 Ariz. 459.
Ill.—City of Chicago v. Simon, 41 N.E.2d 555, 314 Ill.App. 404—Fray v. National Fire Ins. Co. of Hartford, 255 Ill.App. 209, affirmed 173 N.E. 479, 341 Ill. 481.
Pa.—Clineff v. Rubash, 190 A. 543, 126 Pa.Super. 82.
33 C.J. p 1197 note 76.
Certainty generally see supra § 72.
Construction of judgment with respect to parties see infra § 440.
Parties to judgments generally see supra §§ 27–38.

42. Cal.—Seaboard Surety Corporation of America v. Superior Court in and for Los Angeles County, 296 P. 633, 112 Cal.App. 248.

Surety

Judgment in claim and delivery against "the sureties on" undertaking, without naming surety, was not a "judgment" against surety.—Seaboard Surety Corporation of America v. Superior Court in and for Los Angeles County, supra.

43. Ala.—Turner v. Dupree, 19 Ala. 198.
33 C.J. p 1197 note 77.

44. La.—Frey v. Fitzpatrick-Cromwell Co., 32 So. 437, 108 La. 125.
33 C.J. p 1197 note 78.

Clerical error in the title of a case will not, however, render the judgment invalid.—Ewing v. Hatfield, 17 Ind. 513.

45. Tex.—Rosser v. Hale, Civ.App., 235 S.W. 968.
33 C.J. p 1198 note 79.

46. Tex.—Bendy v. W. T. Carter & Bro., Civ.App., 5 S.W.2d 579, affirmed, Com.App., 14 S.W.2d 813.

47. Fla.—Brandt v. Brandt, 189 So. 275, 138 Fla. 243.
Ill.—Goodman v. Tri-State Mut. Life Ass'n, 48 N.E.2d 214, 318 Ill.App. 388.
Ky.—Reed v. Runyan, 10 S.W.2d 824, 226 Ky. 261.
Tex.—**Corpus Juris cited in** Wood v. Gulf Production Co., Civ.App., 100 S.W.2d 412, 416—Smith v. Switzer, Civ.App., 270 S.W. 879.
33 C.J. p 1198 note 81.

48. Pa.—Wilson v. Vincent, 150 A. 642, 300 Pa. 321.
Wash.—German-American Mercantile Bank v. Ripley, 214 P. 160, 124 Wash. 322.
33 C.J. p 1199 note 93.

Incorrect designation as officer

However, judgment in action against named person designated as

b. Plaintiffs

Plaintiff must be designated in the judgment with sufficient certainty to permit identification. A judgment for or against "plaintiff," when there are several plaintiffs, or reciting "plaintiffs" when there is only one, is not void if the persons intended can otherwise be identified.

Plaintiff must be designated in the judgment with sufficient certainty to permit of his identification, or the judgment will be void.[49] A judgment expressed to be merely for or against "plaintiff" or "plaintiffs" is sufficient if the names of the parties thus designated can be ascertained without ambiguity from the record.[50] A judgment for or against "plaintiff," when there are several plaintiffs in the case, or one which describes the parties as "plaintiffs" when there is only one, will not be void if the record shows clearly, and without doubt, for and against whom the judgment was intended to run.[51] A judgment against "plaintiffs" is good against all the plaintiffs against whom it could have been properly rendered;[52] but, where there are two or more plaintiffs in the action, a judgment intended to apply to fewer than all must specify which one is, or which ones are, meant.[53]

A judgment in favor of the individual members of a firm as plaintiffs is not voided by the fact that the name of the firm is misstated therein.[54] Likewise, a judgment for plaintiffs in an action by a partnership is not void for failure to name the partners, their names not being in the petition;[55] nor does failure of a judgment on a claim bond to designate whether claimant is a partnership or a corporation render the judgment invalid.[56]

Representative capacity. Where the judgment is for or against a plaintiff in a representative capacity, that fact must be sufficiently indicated,[57] and judgment may properly be entered for or against him in his representative capacity.[58] If words added to plaintiff's name are merely descriptio personae, judgment may be entered for or against him individually.[59] In a suit by one plaintiff for the use of another, a judgment for defendant is a judgment against plaintiff of record only, and not against the use-plaintiff;[60] and a judgment in favor of a nominal plaintiff for the use of the estate of a named deceased will not be set aside on the ground that it does not show for whom it was rendered.[61]

Judgment in the name of a public official, acting for the use of the public, has been held not to be void merely because he ceased to hold office prior to the date on which judgment was rendered.[62]

Conformity of the judgment to the pleadings and proof with respect to the personal or representative capacity of the parties is discussed supra § 51.

c. Defendants

Mistakes or inaccuracies in designating the defendants will generally be treated as mere irregularities, not invalidating the judgment, where the persons intended can be clearly ascertained from the record.

director general of railroads, and who was neither director general nor agent of president, was held void.—U. S. ex rel. Rauch v. Davis, 8 F.2d 907, 56 App.D.C. 46, certiorari denied 46 S.Ct. 352, 270 U.S. 653, 70 L.Ed. 782.

49. Ala.—Patterson v. Mobile Cir. Ct., 11 Ala. 740.
33 C.J. p 1197 note 76.
Ascertainment from record see supra subdivision a of this section.
Error in entry of judgment
The insertion of the names of the parties in the entry of the final judgment is unnecessary if there is enough in it to connect it with the other parts of the record in which the names are entered, so as to make the judgment a part of the record, and hence, if the clerk in making the entry errs in the name of plaintiff, it will be immaterial, and the judgment will be good.—Grimball v. Mississippi & A. R. Co., 11 Miss. 38.
Designation as heirs, descendants, or legatees
A judgment which describes the parties plaintiff as the heirs, descendants, or legatees of a person named is not void for uncertainty, although they are not named individually, if the record in the case shows who are meant; but otherwise such a judgment is void for uncertainty.—Parsons v. Spencer, 83 Ky. 305—33 C.J. p 1199 notes 89, 90.

50. Tex.—**Corpus Juris cited in** Wood v. Gulf Production Co., Civ. App., 100 S.W.2d 412, 416.
33 C.J. p 1198 note 80.

51. Ill.—Lurie v. Brewer, 248 Ill. App. 525.
Or.—Johnson v. Shasta View Lumber & Box Co., 265 P. 438, 130 Or. 519.
Tex.—Still v. Barton, Civ.App., 76 S.W.2d 783, error dismissed.
33 C.J. p 1198 note 82.

52. Cal.—Goland v. Peter Nolan & Co., 60 P.2d 183, 15 Cal.App.2d 696.

53. Ill.—Aultman v. Wirth, 45 Ill. App. 614.

54. Tex.—Bailey v. Crittenden, Civ. App., 44 S.W. 404.

55. Tex.—Corder v. Steiner, Civ. App., 54 S.W. 277.

56. Ala.—Keller v. Ray Motor Co., 114 So. 422, 22 Ala.App. 252.

57. Wis.—Prichard v. Bixby, 37 N. W. 228, 71 Wis. 422.
33 C.J. p 1199 note 91.
Several capacities
Where the evidence shows that plaintiff is suing in several capacities, judgment in his favor, without designating in which capacity he recovered, is irregular but not void. —Realty Trust Co. v. Koger, Tex. Civ.App., 70 S.W.2d 448, error refused.

58. Conn.—Lomas & Nettleton Co. v. Isaacs, 127 A. 6, 101 Conn. 614.
Tex.—Miller v. Dunagan, Civ.App., 99 S.W.2d 434.

59. Ill.—Wells v. George W. Durst Chevrolet Co., 173 N.E. 92, 341 Ill. 108.
Tenn.—Lawhorn v. Wellford, 168 S. W.2d 790, 179 Tenn. 625.

60. Ky.—Herdon v. Bartlett, 7 T.B. Mon. 449.
Md.—Boor v. Wilson, 48 Md. 305.

61. Tex.—Dowell v. Mills, 32 Tex. 440.
Nominal parties generally see supra § 38.

62. Cal.—Weadon v. Shahen, 123 P. 2d 88, 50 Cal.App.2d 254.

It has been held not to be mandatory that a judgment specifically name defendants,[63] and failure to state their names has been held an irregularity that may be removed by proof.[64] Also, a judgment expressed to be merely for or against "defendant" or "defendants" is sufficient if the names of the parties thus designated can be ascertained without ambiguity from the record.[65] The erroneous entering up of a judgment against one of several defendants has been held a mere clerical misprision,[66] and a judgment for or against "defendant," where there are several, or one reciting "defendants," where there is only one, has been held not to be void, if the record as a whole shows clearly, and without doubt, for and against whom the judgment is intended to be rendered;[67] but in other cases a judgment against "the defendant," where there are several, has been held to be bad as to all for uncertainty.[68] Where there are two or more defendants, a judgment intended to apply to fewer than all must specify which one is, or which ones are, meant, and failure to do so will invalidate it,[69] except where the record shows which one of the several is meant.[70]

A judgment against "defendants" will be presumed to be against all the defendants against whom it could have been properly rendered,[71] that is, it will be limited to those defendants who have been served with process,[72] or who have appeared,[73] or against whom the verdict was found.[74] A judgment entered against a named defendant "et al.," and based on a decision directing judgment against the "defendant" without specifying which defendant was intended, is fatally defective.[75]

A statement that judgment was rendered in favor of plaintiff sufficiently shows that it was rendered against the lone defendant,[76] and, where there are more than one defendant, such a judgment will be presumed to be against all the defendants.[77]

Representative capacity. Where the judgment is for or against a defendant in a representative capacity, that fact must be sufficiently indicated,[78] Conformity of the judgment to the pleadings and proof with respect to the personal or representative capacity of the parties is discussed supra § 51.

d. Names and Misnomers

As a general rule each party to a judgment should be designated therein by his full Christian name and surname. A judgment may be vitiated by a misnomer of the parties therein, which renders it uncertain.

As a general rule, each party to a judgment should be designated therein by both his true Christian name and surname in full.[79] A misnomer of the Christian name of a party may render the judgment erroneous,[80] but the use of an erroneous Christian name may not be fatal where there is no uncertainty as to the person intended.[81] Likewise,

63. La.—Glen Falls Indemnity Co. v. Manning, App., 168 So. 787.

Adjudication against defendant not mentioned

Where a judgment does not mention one of several defendants, but adjudges the subject matter of the controversy to others, and such defendant gets nothing, it is in effect a judgment against him.—Whitmire v. Powell, 125 S.W. 889, 103 Tex. 232.

Omitting name of cestui que trust

Judgment for principal defendant in suit to set aside deeds was not invalid for omitting name of minor defendant, for whom principal defendant was trustee.—Bushman v. Barlow, 15 S.W.2d 329, 321 Mo. 1052.

64. Tex.—Smith v. Switzer, Civ. App., 270 S.W. 879.

65. Tex.—**Corpus Juris cited in** Wood v. Gulf Production Co., Civ. App., 100 S.W.2d 412, 416.
33 C.J. p 1198 note 80.

Designation as heirs, descendants, or legatees

A judgment which describes defendants as the heirs, descendants, or legatees of a person is not void for uncertainty, although they are not named individually, if the record in the case shows who are meant, but otherwise such a judgment is void for uncertainty.—Stevenson v. Flournoy, 13 S.W. 210, 89 Ky. 561, 11 Ky.L. 745—33 C.J. p 1199 notes 89, 90.

66. Ala.—Russell v. Erwin, 41 Ala. 292.
33 C.J. p 1198 note 79 [a].

67. Mo.—**Corpus Juris quoted in** Mehlstaub v. Michael, 287 S.W. 1079, 1083, 221 Mo.App. 807.
33 C.J. p 1198 note 82.

Recital as to citation

Where judgment recited that "defendant" was duly cited, but afterward plural was used in judgment, recitation was sufficient to show that both defendants were duly cited.—Smith v. Switzer, Tex.Civ.App., 270 S.W. 879.

68. Idaho.—Holt v. Gridley, 63 P. 188, 7 Idaho 416.
33 C.J. p 1198 note 83.

69. Idaho.—Holt v. Gridley, supra. Ill.—People v. Jamison, 157 Ill.App. 546.

70. N.J.—Nordstrom v. Payne, 91 A. 592, 86 N.J.Law 361.
33 C.J. p 1199 note 88.

71. Cal.—**Corpus Juris quoted in** Minehan v. Silveria, 21 P.2d 617, 618, 131 Cal.App. 317.
33 C.J. p 1198 note 84.

72. Okl.—Hale v. Independent Powder Co., 148 P. 715, 46 Okl. 135.
33 C.J. p 1199 note 85.

73. Ky.—Rosenberg v. Dahl, 172 S.W. 113, 162 Ky. 92, Ann.Cas.1916C 1110.
33 C.J. p 1199 note 85.

74. Miss.—Lamar v. Williams, 39 Miss. 342.
33 C.J. p 1198 note 84, p 1199 note 86.

75. N.Y.—Mare v. Pinkard, 230 N.Y.S. 765, 133 Misc. 83.

76. Mich.—Aldrich v. Maitland, 4 Mich. 205.

77. Tex.—International & G. N. R. Co. v. Dawson, Civ.App., 193 S.W. 1145.

78. Ga.—Wadley v. Oertel, 78 S.E. 912, 140 Ga. 326.
Tex.—Clapp v. Walters, 2 Tex. 130.
33 C.J. p 1199 note 91.

79. Mo.—State v. Johnson, 239 S.W. 844, 293 Mo. 302.
33 C.J. p 1200 note 99.
Misnomer of corporation see Corporations § 1341 a.

80. Ala.—Mosaic Templars of America v. Flanagan, 115 So. 860, 22 Ala.App. 377.

81. Ill.—Lewis v. West Side Trust & Savings Bank of Chicago, 30 N.

the omission of the Christian name of one of the parties may render the judgment erroneous,[82] but such an omission is not necessarily fatal where no uncertainty results therefrom.[83]

A judgment may be vitiated by a misnomer of the parties therein,[84] at least where the misnomer renders it uncertain,[85] unless the defect is waived,[86] or cured by other parts of the record.[87] A defendant who is sued by a wrong name, but with due service of process on him, who fails to plead the misnomer, and who suffers a judgment to be taken against him in such name, may be connected with the judgment by proper averments and will be bound by it.[88]

Assumed, fictitious, or trade names. Since, as discussed in the C.J.S. title Names § 9, also 45 C.J. p 376 note 4, in the absence of a statute to the contrary a person has a right to be known by any name he chooses, a judgment for or against a person in an assumed or trade name is valid.[89] Where defendant is equally well-known by two names, a judgment against him in either name is valid.[90] Since, as considered in the C.J.S, title Parties § 98, also 47 C.J. p 175 note 93, a party may usually be sued in a fictitious name if the correct name is unknown, and if the complaint is amended by inserting his true name when discovered, the judgment following it will be valid.[91]

Judgments against married women describing them by their husbands' initials or Christian names, preceded by the designation Mrs., have been sustained.[92]

Use of initials. Initials only in connection with the surname may be insufficient;[93] but the use of initials in lieu of the Christian name has been held to render the judgment merely irregular, and not void,[94] and such designation may be sufficient where the party, by habitually signing his name in that

E.2d 767, 307 Ill.App. 473, transferred, see 25 N.E.2d 818, 373 Ill. 245, and reversed on other grounds 36 N.E.2d 573, 377 Ill. 384.
Tex.—Whittinghill v. Oliver, Civ. App., 38 S.W.2d 896, error dismissed.
33 C.J. p 1200 note 2.

Suing defendant by wrong name or omitting his full name does not render a subsequent judgment void, if defendant was served with process, the mistake or omission being matter of abatement only.—State v. Collier, 23 S.W.2d 397, 160 Tenn. 403.

82. Pa.—George v. McCutcheon, 8 Pa.Dist. 591.

83. Ind.—Meyer v. Wilson, 76 N.E. 748, 166 Ind. 651.
33 C.J. p 1200 note 1.

84. N.Y.—Wilber v. Widner, 1 Wend. 55.

The misspelling of plaintiff's name in a judgment by the clerk is not fatal.—I. Droege & Sons Foundry Co. v. Robert Fields Sales Agency, 104 S.W. 1007, 31 Ky.L. 1247.

Nonsuable entity

Where a judgment is recovered in the name of and only against a so-called defendant, which is a nonsuable entity, the judgment does not only not operate against its general manager, but is void.—May v. Clanton, 95 So. 30, 208 Ala. 588.

85. Miss.—Delta Cotton Oil Co. v. Planters' Oil Mill, 107 So. 764, 142 Miss. 591.

86. Ill.—Edwards v. Warner, 111 Ill.App. 32.

87. Tex.—Jones v. S. G. Davis Motor Car Co., Civ.App., 224 S.W. 701.
33 C.J. p 1200 note 17.

88. Ala.—**Corpus Juris quoted in** Naftel Dry Goods Co. v. Mitchell, 101 So. 653, 654, 212 Ala. 32.
Tex.—**Corpus Juris cited in** Mattocks v. Lloyd Oil Corporation of Texas, Civ.App., 45 S.W.2d 440, error refused—Wieser v. Thompson Grocery Co., Civ.App., 8 S.W.2d 1100.
33 C.J. p 1200 note 18.

89. Ga.—Becker v. Truitt, 154 S.E. 262, 170 Ga. 757—Eslinger v. Herndon, 124 S.E. 169, 158 Ga. 828, dissenting opinion 124 S.E. 900, 158 Ga. 828—Executive Committee of Baptist Convention v. Smith, 161 S.E. 143, 44 Ga.App. 184, affirmed 165 S.E. 573, 175 Ga. 543.
Iowa.—Thompson v. Brownlee, 1 N.W.2d 239, 231 Iowa 406.
Tex.—Hicks v. Glenn, Civ.App., 155 S.W.2d 828.
33 C.J. p 1200 note 11.

Doing business in name of another

Suit in which petition denominated defendant as "J. H. Taylor, Broker, a business owned and operated by R. E. Stinson," and in which citation was served on R. E. Stinson, against whom judgment was entered, was not a nullity, and R. E. Stinson could not escape binding effect of judgment because of such appellation.—Stinson v. King, Tex. Civ.App., 83 S.W.2d 398, error dismissed.

True owner

In order to secure a valid judgment against the true owner, when trading under an assumed name, it has been held that the pleadings should aver the name of the true owner, the proof should sustain the allegation, and judgment should be entered against defendant in his or its true name.—Leckie v. Seal, 170 S.E. 844, 161 Va. 215.

90. Mich.—Field v. Plummer, 42 N.W. 849, 75 Mich. 437.
N.Y.—Isaacs v. Mintz, 11 N.Y.S. 423.

91. Cal.—City and County of San Francisco v. Burr, 36 P. 771, 4 Cal.Unrep. 634.
33 C.J. p 1200 note 14.

Effect of appearance

A judgment was held valid, although defendant was designated in the summons by a fictitious first name, his true first name being unknown, where he was the person intended and served, and he appeared and answered.—In re Dehnert, D.C. N.Y., 295 F. 763.

92. Pa.—Althouse v. Hunsberger, 6 Pa.Super. 160.
33 C.J. p 1200 note 99 [a].

Designation as "et ux"

The designation of one of the defendants, who is the wife of the other defendant, as "et ux" in indorsements on the back of the judgment, and in the caption of the judgment, does not render the judgment invalid.—Whisenant v. Thompson Bros. Hardware Co., Tex. Civ.App., 120 S.W.2d 316.

Variance

Since petition alleged plaintiff's name as Mrs. G. C. B., wife of G. C. B., deceased, contention that judgment should not be entered for her for the reason that the evidence showed her name to be Ole Mae B., will be overruled.—Texas Power & Light Co. v. Bristow, Tex.Civ.App., 213 S.W. 702, error refused.

93. Del.—Dickerson v. Kelley, 50 A. 512, 19 Del. 69.
Mo.—Vincent v. Means, 82 S.W. 96, 184 Mo. 327.
33 C.J. p 1200 note 4.

94. Tex.—Wilson v. Hamman, Civ. App., 49 S.W.2d 991.
33 C.J. p 1200 note 8.

style, has made it his business name,[95] or if the defect is supplied by other parts of the record,[96] or if it appears that there is no other person of the same name and initials.[97]

Since, as discussed in the C.J.S. title Names § 4, also 45 C.J. p 369 note 35, the law recognizes only one Christian name, as a general rule the omission of a party's middle name or initial, or a mistake with regard thereto, is immaterial,[98] at least if the identity of the party intended is satisfactorily established and it is shown that he received proper notice of the action.[99]

§ 76. Designation of Amount

The amount of a judgment must be specified with certainty and should be expressed in words rather than in figures.

A judgment for money must specify with definiteness and certainty the amount for which it is rendered,[1] and should be so worded as to avoid the possibility of a double recovery;[2] there can be no judgment payable by installments.[3] It has been said that a judgment includes all amounts for which execution may properly issue.[4] A judgment for an amount left blank,[5] or otherwise wholly uncertain,[6] is at least erroneous, and according to a number of decisions such a judgment is void;[7] but according to other authority failure sufficiently to designate the amount renders the judgment merely irregular and erroneous, and not void.[8]

Form and sufficiency of designation generally. A judgment should state the precise amount for which it is rendered, and not leave it to be ascertained by calculation; but if such data are given that the amount may be ascertained with certainty the judgment will be upheld.[9] A judgment for a sum to be thereafter ascertained by a ministerial officer is erroneous[10] except where the reference is merely to calculate and state an amount already definitely fixed by the data given in the judgment.[11] It is sufficient if the sum recovered can be definitely as-

95. Neb.—Oakley v. Pegler, 46 N. W. 920, 30 Neb. 628.
33 C.J. p 1200 note 5.

96. Ala.—Lampkin v. Louisville & N. R. Co., 17 So. 448, 106 Ala. 287.
Neb.—Fisk v. Gulliford, 95 N.W. 494, 1 Neb., Unoff., 494.

97. Neb.—Oakley v. Pegler, 46 N. W. 920, 30 Neb. 628.

98. La.—Jaubert Bros. v. Landry, App., 15 So.2d 158.
Minn.—Ueland v. Johnson, 80 N.W. 700, 77 Minn. 543, 77 Am.S.R. 698.
Tex.—Jeffus v. Mullins, Civ.App., 78 S.W.2d 1023.
33 C.J. p 1200 note 10.

99. Cal.—Langley v. Zurich General Accident & Liability Ins. Co., 275 P. 963, 97 Cal.App. 434.
Tenn.—Finley v. First State Bank, 13 Tenn.App. 128.

1. U.S.—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715—**Corpus Juris cited in** U. S. v. Bauman, D.C.Or., 56 F.Supp. 109, 117.
Cal.—Wallace v. Wallace, 295 P. 1061, 111 Cal.App. 500—D'Arcy v. D'Arcy, 264 P. 497, 89 Cal.App. 86.
Ga.—Hutcheson v. Hutcheson, 30 S. E.2d 107, 197 Ga. 603.
Idaho.—**Corpus Juris cited in** Hand v. Twin Falls County, 236 P. 536, 538, 40 Idaho 638.
Ind.—Kist v. Coughlin, 57 N.E.2d 199, 222 Ind. 639, modified on other grounds 57 N.E.2d 586, 222 Ind. 639.
Or.—Bell v. State Industrial Accident Commission, 74 P.2d 55, 157 Or. 653—Ex parte Teeters, 280 P. 660, 130 Or. 631.
33 C.J. p 1201 note 28.

Judgments held sufficiently certain
(1) A judgment holding that defendant was liable to plaintiffs for amount of premiums paid on insurance policies and referring cases to clerk to determine the amount of premiums, was not void for uncertainty of amount.—Battle v. National Life & Accident Ins. Co., 157 S.W. 2d 817, 178 Tenn. 283.
(2) Other judgments.
Cal.—Niles v. Louis H. Rapoport & Sons, 128 P.2d 50, 53 Cal.App.2d 644.
La.—Paul v. Tabony, 5 La.App. 44.
Tex.—Grayson v. Johnson, Civ.App., 181 S.W.2d 312.
33 C.J. p 1201 note 23 [b].

Judgments held uncertain
(1) Portion of judgment ordering that defendant reimburse codefendant for all sums expended for tax deed described in complaint and subsequent taxes thereon, if any, without fixing amount, in absence of any allegation, proof, or finding thereof, will be stricken on appeal as too indefinite and uncertain.—Hand v. Twin Falls County, 236 P. 536, 40 Idaho 638.
(2) Other judgments.—Guerra v. Contreras, Tex.Civ.App., 52 S.W.2d 295—33 C.J. p 1201 note 23 [c].

2. Tex.—National Reserve Ins. Co. v. McCrory, Civ.App., 160 S.W.2d 972.

Double judgment held not shown
Cal.—Dodson v. Greuner, 82 P.2d 741, 28 Cal.App.2d 418.

3. U.S.—U. S. v. Bauman, D.C.Or., 56 F.Supp. 109.

4. Del.—Nelson v. Canadian Industrial Alcohol Co., 197 A. 477, 9 W. W.Harr. 184.

5. Or.—School Dist. No. 1 v. Astoria Constr. Co., 190 P. 969, 97 Or. 238.
33 C.J. p 1202 note 24.

6. La.—Russo v. Fidelity & Deposit Co., 56 So. 506, 129 La. 554.
33 C.J. p 1202 note 25.

7. Miss.—**Corpus Juris cited in** Harris v. Worsham, 143 So. 851, 852, 164 Miss. 74.
Tex.—McCombs v. Red, Civ.App., 86 S.W.2d 648, error dismissed.
33 C.J. p 1202 note 26.

8. Iowa.—Lind v. Adams, 10 Iowa 398, 77 Am.D. 123.
33 C.J. p 1202 note 27.

9. U.S.—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715.
Ga.—Hutcheson v. Hutcheson, 30 S. E.2d 107, 197 Ga. 603—Moody v. Muscogee Mfg. Co., 68 S.E. 604, 134 Ga. 721, 20 Ann.Cas. 301.
Ky.—Caudill Coal Co. v. Charles Rosenheim & Co., 258 S.W. 315, 201 Ky. 758.
Tex.—Beam v. Southwestern Bell Tel. Co., Civ.App., 164 S.W.2d 412, error refused—**Corpus Juris cited in** Scanlan v. Gulf Bitulithic Co., Civ.App., 27 S.W.2d 877, 880, reversed on other grounds, Com. App., 44 S.W.2d 967, 80 A.L.R. 852.
33 C.J. p 1202 note 28.
Construction as to amount see infra § 442.

10. Tex.—Hendryx v. W. L. Moody Cotton Co., Civ.App., 257 S.W. 305.
33 C.J. p 1202 note 29.

11. Tex.—Hendryx v. W. L. Moody Cotton Co., supra.
33 C.J. p 1202 note 29, p 1203 note 30.

certained by an inspection of the record,[12] but matter dehors the record cannot be considered.[13] The amount for which a judgment is rendered may be fixed by reference to the pleadings in the case[14] or to the verdict.[15]

A judgment may be for several sums separately, or in one gross sum aggregating all the items,[16] and a mere error in aggregating items may be disregarded as surplusage.[17] A judgment for one amount to be discharged by the payment of a larger amount is erroneous,[18] as is also, except in the case of penal bonds, a judgment for one amount to be discharged by a smaller amount.[19] Where judgment is recovered for compensatory and punitive damages, the court is not required to specify how much is for the one and how much for the other in the absence of a statute so requiring.[20]

Specifying denomination. In specifying the amount of recovery, a judgment should contain some word or character indicating the denomination of money intended.[21] Judgments for a numerical amount without any word or sign indicating what units of value are intended have been held erroneous[22] or void,[23] particularly in the case of judgments for taxes;[24] but in some states such judgments are upheld where it appears clearly from the record what was intended.[25]

Words and figures. The amount of a judgment should be expressed in words rather than figures,[26] as being less liable to alteration or mistake,[27] and it has been held insufficient and erroneous to enter the amount in figures;[28] but a judgment for a sum of money expressed only in figures has been held not void,[29] and according to some decisions not even erroneous.[30]

§ 77. —— Interest

Where interest is a separate part of the judgment, it should be stated with certainty; but if sufficient data are given for definite calculation, the judgment will be upheld.

Ordinarily interest due on the demand on which the action is brought should be calculated and the judgment rendered for the aggregate amount of the demand and interest,[31] and, sometimes by virtue of statutory provisions, the fact that this results in allowing compound interest has been held no objection;[32] but where the recovery of interest is by way of damages it has been held that the amounts of the debt and the interest shall be kept separate and apart and not be given in a lump sum in the judgment.[33] Where interest enters into a judgment as a separate part thereof, it must be stated

12. U.S.—Pope v. U. S., Ct.Cl., 65 S.Ct. 16, 323 U.S. 1, 89 L.Ed. 3.
33 C.J. p 1203 note 31.

13. Miss.—Harris v. Worsham, 143 So. 851, 164 Miss. 74.
33 C.J. p 1203 note 32.

14. Miss.—Ladnier v. Ladnier, 1 So. 492, 64 Miss. 368.
33 C.J. p 1203 note 33.

Where action was on an adjudicated liability, the clerk properly entered judgment as on a suit for a "liquidated sum."—Whipple v. Mahler, 10 N.W.2d 771, 215 Minn. 578.

15. Ala.—Ellis v. Dunn, 3 Ala. 632.
33 C.J. p 1203 note 34.

16. Cal.—Harvey v. De Garmo, 18 P.2d 971, 129 Cal.App. 487.
33 C.J. p 1203 note 35.

17. Cal.—Weadon v. Shahen, 123 P. 2d 88, 50 Cal.App.2d 254.
33 C.J. p 1203 note 36.

18. Ky.—Fowler v. Cowper, Ky.Dec. 58.

19. Mo.—Steinback v. Lisa, 1 Mo. 228.
Va.—Ross v. Gill, 1 Wash. 87, 1 Va. 87.
Judgment on penal bonds see Bonds §§ 126–127.

20. Puerto Rico.—Aviles v. Rafael Toro Sons, Ltd., 27 Puerto Rico 616.
R.I.—Hambly v. Hayden, 40 A. 417, 20 R.I. 558.

21. Miss.—Carr v. Anderson, 24 Miss. 188.
33 C.J. p 1203 note 41.

22. Ill.—Avery v. Babcock, 35 Ill. 175.

23. Ill.—Carpenter v. Sherfy, 71 Ill. 427.
33 C.J. p 1203 note 43.

24. U.S.—Woods v. Freeman, Ill., 1 Wall. 398, 17 L.Ed. 543.
33 C.J. p 1203 note 44.

25. Iowa.—Therme v. Berthenoid, 77 N.W. 497, 106 Iowa 697.
33 C.J. p 1203 note 45.

26. Ill.—Linder v. Monroe, 33 Ill. 388.

27. Ala.—Tankersley v. Silburn, Minor p 185.

28. N.J.—Smith v. Miller, 8 N.J.L. 175, 14 Am.D. 418.
33 C.J. p 1204 note 48.

29. Ala.—Davis v. McCary, 13 So. 665, 100 Ala. 545.
33 C.J. p 1204 note 49.

30. Iowa.—Therme v. Berthenoid, 77 N.W. 497, 106 Iowa 697.
33 C.J. p 1204 notes 49, 50.

31. U.S.—Women's Catholic Order of Foresters v. Special School Dist. of North Little Rock, Pulaski County, C.C.A.Ark., 105 F.2d 716—Laurent v. Anderson, C.C.A.Ky., 70 F.2d 819—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F. 2d 715.
Mass.—Brennan v. Bonnoyer, 66 N. E.2d 17—Landry v. Gomes, 173 N. E. 428, 273 Mass. 225.
Mo.—Fine Art Pictures Corporation v. Karzin, App., 29 S.W.2d 170.
Okl.—Whale v. Rice, 49 P.2d 737, 173 Okl. 530.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Davy Burnt Clay Ballast Co., Civ.App., 288 S.W. 855.
33 C.J. p 1204 note 52.

Judgment held sufficiently certain
Tex.—Senterfitt v. Bradley, Civ.App., 60 S.W.2d 815.

32. Ga.—Grant v. Hart, 30 S.E.2d 271, 197 Ga. 662.
Ind.—Stanton v. Woodcock, 19 Ind. 273.

Successive decrees
Carrying prior decree into final decree with interest thereon to date of latter, resulting in compound interest, held improper.—Wollenberger v. Hoover, 179 N.E. 42, 346 Ill. 511.

33. Ill.—People ex rel. Klee v. Kelly, 32 N.E.2d 923, 309 Ill.App. 72—People ex rel. Keeler v. Kelly, 32 N.E.2d 922, 309 Ill.App. 133—People ex rel. Gallachio v. Kelly, 32 N.E.2d 921, 309 Ill.App. 133—People ex rel. Clennon v. Kelly, 32 N.

with definiteness and certainty,[34] and while it has been held that the exact amount should be stated in the judgment in dollars and cents,[35] it has also been held that, if sufficient data are given for its calculation with certainty, the judgment will be upheld.[36] Thus it has been held sufficient if the amount of interest in the judgment can be definitely and certainly fixed by an inspection of the pleadings[37] or the record.[38]

Although it has been held that the rate of interest[39] and the time from which interest begins to run[40] must be expressly recited in the judgment, it has also been held, sometimes by virtue of statutory provisions, that a provision in the judgment for interest is not required,[41] and, therefore, ordinarily it is not necessary to state the rate of interest,[42] and, of course, provisions for interest in contravention of statute are erroneous.[43]

Where the judgment is to bear the same rate of interest as the debt on which it is founded, it is erroneous to fix any other rate of interest;[44] and usually it is necessary for the rate to be expressed in the judgment,[45] although the judgment may be aided by the record in this respect.[46]

§ 78. —— Costs, Allowances, and Attorney's Fees

Usually judgment is given for a sum certain, with costs to be taxed, and the clerk subsequently taxes the costs and inserts them in the judgment.

Costs, when authorized, are a part of the judgment,[47] and judgment usually is given for a sum certain, with costs to be taxed, and the clerk subsequently taxes the costs and inserts them in the judgment, in a blank left for that purpose, or indorses them on the execution.[48] Failure to fill the

E.2d 921, 309 Ill.App. 133—People ex rel. Salomon v. Kelly, 32 N.E.2d 920, 309 Ill.App. 133—Spooner v. Warner, 2 Ill.App. 240.

33 C.J. p 1204 notes 54–56.

34. Fla.—Skinner Mfg. Co. v. Douville, 54 So. 810, 61 Fla. 429.

33 C.J. p 1205 note 63.

Judgment held certain

U.S.—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715.

35. Mass.—Boyer v. Bowles, 54 N.E. 2d 925, 316 Mass. 90.

36. U.S.—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715.

Del.—Nelson v. Canadian Industrial Alcohol Co., 197 A. 477, 9 W.W. Harr. 184.

33 C.J. p 1205 notes 64, 67.

37. Tex.—Hill v. Lyles, Civ.App., 81 S.W. 559.

38. Ala.—Dinsmore v. Austill, Minor p 89.

N.H.—Wilbur v. Abbot, 58 N.H. 272.

39. Kan.—Priest v. Kansas City Life Ins. Co., 230 P. 529, 117 Kan. 1, modified on other grounds 237 P. 938, 119 Kan. 23, 41 A.L.R. 1100.

33 C.J. p 1205 note 65.

40. Kan.—Priest v. Kansas City Life Ins. Co., supra.

33 C.J. p 1205 note 66.

Judgment held not void

Ky.—McKim v. Smith, 172 S.W.2d 634, 294 Ky. 335.

41. Cal.—Glenn v. Rice, 162 P. 1020, 174 Cal. 269.

Ohio.—Smith v. Miller, 22 N.E.2d 846, 61 Ohio App. 514.

33 C.J. p 1205 note 58.

Insertion by clerk

(1) Jury not having been directed by court to add interest to damages found, and jury not having added interest from date of writ, clerk was unauthorized to add interest from date of writ.—Landry v. Gomes, 173 N.E. 428, 273 Mass. 225.

(2) Interest on recovery for breach of contract prior to decision must be added to judgment by trier of facts, not by clerk.—Klausner v. Queens Fur Dressing Co., 224 N.Y.S. 333, 130 Misc. 579.

(3) Addition by clerk of court of interest on judgment for time from commencement of action until entry of judgment, without court order or adjudication, held error, since only interest which can be added to costs, without court order, is that for period from time of verdict or report until judgment is finally entered.—Malliet v. Super Products Co., 259 N.W. 106, 218 Wis. 145.

42. Kan.—Simmons v. Garrett, McC. p 82.

33 C.J. p 1205 note 59.

43. Kan.—Simmons v. Garrett, supra.

33 C.J. p 1205 note 60.

44. Tex.—Southland Life Ins. Co. v. Stone, Civ.App., 112 S.W.2d 336.

45. Ind.—Smith v. Tatman, 71 Ind. 171.

33 C.J. p 1205 note 61.

46. Mo.—Catron v. Lafayette County, 28 S.W. 331, 125 Mo. 67.

33 C.J. p 1205 note 62.

47. N.Y.—Steinberg v. Mealey, 33 N.Y.S.2d 650, 263 App.Div. 479.

Nature of costs generally see Costs § 1.

Costs are but an incident to the judgment and do not add to its force or effect.

U.S.—Silverman v. Central Amusement Co., D.C.D.C., 49 F.Supp. 364.

Cal.—Slater v. Superior Court of Contra Costa County, 115 P.2d 32, 45 Cal.App.2d 757, rehearing denied Slater v. Superior Court in and for Contra Costa County, 115 P.2d 865, 45 Cal.App.2d 757.

N.Y.—Steinberg v. Mealey, 33 N.Y.S. 2d 650, 263 App.Div. 479.

Two trials

Where, after a finding for plaintiff in an action in assumpsit, a new trial is granted by an appellate court and the case is again tried in the lower court within a year after the remittitur is filed, resulting in a verdict for defendant, it is not proper for defendant to enter judgment twice, once for costs on the ground that the judgment for plaintiff had been reversed, and the other time generally on the basis of the second trial, the latter judgment being sufficient to carry with it any and all costs allowed by the various statutes in favor of defendant.—Cockcroft v. Metropolitan Life Ins. Co., 31 Pa.Dist. & Co. 159.

Trial and appellate courts

The statute providing for inclusion of costs in judgment has reference to judgments of both the trial and appellate courts.—Da Rouch v. District Court of Third Judicial Dist. in and for Salt Lake County, 79 P.2d 1006, 95 Utah 227, 116 A.L.R. 1147.

48. Okl.—Bierschenk v. Klein, 33 P. 2d 371, 183 Okl. 494.

33 C.J. p 1206 notes 75, 76.

Judgment held sufficient

Judgment that defendant recover amount of detinue bond from plaintiff and his sureties, to be applied on costs, and all costs exceeding such amount from plaintiff, will support execution as to latter, even though costs are divided in amount.—Clifton v. Gay, 109 So. 168, 21 Ala.App. 412, certiorari denied 109 So. 170, 215 Ala. 22.

blank for costs does not affect the regularity of the judgment in other respects,[49] or, at least, it is only an irregularity, and does not render the judgment void or inoperative.[50] A judgment is unaffected by the taxation of costs until the actual entry of the costs therein.[51] In some jurisdictions the amount of the costs must be specified in the judgment,[52] and, where the space for the amount of costs is left blank, no judgment for costs is rendered.[53] It has been held correct to enter judgment for a specified amount, including costs,[54] or from which the other party's costs have been deducted.[55]

Where the right to costs is waived or lost,[56] or there is no court order or direction with regard thereto,[57] the clerk has been held to have no authority to insert them in the judgment. Judgment rendered for costs only has been held not a proper judgment,[58] especially where the space for the amount thereof is left blank.[59] Allowances granted by the judgment must be certain in amount.[60]

Allowances for fees of referees and stenographers requiring judicial action by the court become component parts of the judgment and must be embraced therein.[61]

Attorney's fees. It has been held that attorney's fees or commissions should be entered as a separate item and not included in the judgment for the principal obligation.[62] However, an attorney's fee or commission, stipulated for in the contract or obligation in suit is part of the principal debt, and may be incorporated in the judgment as a part of the recovery.[63]

§ 79. —— Medium of Payment

a. Domestic or foreign money
b. Coin or currency

a. Domestic or Foreign Money

A judgment should be rendered for domestic dollars and cents, and not for foreign money.

A judgment should be rendered for domestic dollars and cents, and not for foreign money.[64] Foreign currency is regarded merely as a commodity, and in an action on a demand due in foreign currency the judgment should be entered for its value in domestic money.[65]

b. Coin or Currency

(1) In general
(2) Effect of contract
(3) Conformity to pleadings, issues, and verdict

(1) In General

In the absence of a contract stipulating for payment in coin, it is usually held that the judgment should be entered generally, and that a judgment for coined dollars or gold is erroneous.

In the absence of a contract stipulating for payment in coin, it is usually held that the judgment should be entered generally, and that a judgment

49. Mass.—East Tennessee Land Co. v. Leeson, 69 N.E. 351, 185 Mass. 4.
33 C.J. p 1206 note 78.

50. Ind.—Cauthorn v. Bierhaus, 38 N.E. 314, 44 Ind.App. 362.
33 C.J. p 1206 note 79.

51. Minn.—Leyde v. Martin, 16 Minn. 38.

52. Neb.—Kissinger v. Staley, 62 N.W. 55, 44 Neb. 783.
33 C.J. p 1206 note 73.

Filing memorandum

If principal debt and fees are combined in judgment entered on note, memorandum should be filed showing on what terms and conditions judgment is entered.—Webster v. People's Loan, Savings & Deposit Bank of Cambridge, 152 A. 815, 160 Md. 57.

53. Kan.—Costello v. Wilhelm, 18 Kan. 229.
Or.—In re Young, 116 P. 95, 59 Or. 348, Ann.Cas.1913B 1310, rehearing denied 116 P. 1060, 59 Or. 348.

54. N.J.—Hay v. Imley, 3 N.J.Law 401.
33 C.J. p 1205 note 71.

Costs merged in judgment

U.S.—Massachusetts Bonding & Insurance Co. v. Clymer Mfg. Co., C.C.A.Colo., 48 F.2d 513.

Inclusion presumed

N.Y.—Great American Indemnity Co. v. Audlane Realty Corporation, 296 N.Y.S. 655, 163 Misc. 301.

55. N.Y.—Coatsworth v. Ray, 52 N.Y.S. 498, 28 N.Y.Civ.Proc. 6.
33 C.J. p 1206 note 72.

56. Idaho.—Cantwell v. McPherson, 29 P. 102, 3 Idaho, Hasb., 321.

57. Wis.—Luebke v. City of Watertown, 284 N.W. 519, 230 Wis. 512.

58. Ill.—Duncan v. National Bank of Decatur, 1 N.E.2d 902, 285 Ill. App. 305.

59. Wyo.—Mosher v. Vinta County, 2 Wyo. 462.
33 C.J. p 1206 note 82.

60. Mo.—Garner v. Hays, 8 Mo. 436.
Tex.—Watson v. Williamson, Civ. App., 76 S.W. 793.

61. Mo.—Niedringhaus v. Wm. F. Niedringhaus Inv. Co., App., 54 S.W.2d 79, transferred, see Niedringhaus v. Niedringhaus, 52 S.W.2d 395, 330 Mo. 1089, and certiorari quashed State ex rel. Williams v. Daues, 66 S.W.2d 137, 334 Mo. 91.

62. Md.—Webster v. People's Loan, Savings & Deposit Bank of Cambridge, 152 A. 815, 160 Md. 57.

"Together with" as used in judgment awarding to plaintiff principal sum together with attorney's fees in designated sum, together with plaintiff's costs and disbursements, was equivalent of "in addition to" and judgment awarded plaintiff attorney's fees and costs over and above the principal sum.—Gray v. Tarbox, 127 P.2d 669, 14 Wash.2d 237.

63. Ga.—Patterson v. Alapaha Bank, 99 S.E. 141, 23 Ga.App. 622.
33 C.J. p 1206 note 84.

64. Pa.—Pennsylvania R. Co. v. Cameron, 124 A. 638, 280 Pa. 453, 33 A.L.R. 1281.
Puerto Rico.—Cayol v. Balseiro, 1 Puerto Rico 253.
33 C.J. p 1206 note 86.

65. U.S.—Thornton v. National City Bank of New York, C.C.A.N.Y., 45 F.2d 127.
33 C.J. p 1206 note 87.

for coined dollars or gold is erroneous.[66] Thus it has been held that, in actions for torts, judgments for damages cannot be for gold coin,[67] unless authorized by statute.[68] Where gold coin is lost or converted, it has been held in some cases that the judgment should be entered for gold dollars,[69] while in other cases it has been said that the judgment should be for the face or value of the gold coin in currency.[70]

Void or voidable. A judgment for gold or silver coin in a case where such a judgment is not authorized is irregular and erroneous, but it is not in any event void.[71]

Costs and interest. It has been held in several cases not involving express contracts, that, although judgment for the principal sum is properly rendered payable in gold, the judgment for costs must be rendered payable in currency;[72] but there is authority for the rule that, where a contract is made payable in a specific kind of money, the judgment enforcing it may enforce the payment of costs and interest in the kind of money mentioned in the contract, for the reason that costs and interest become a component part of the judgment.[73]

(2) Effect of Contract

Generally judgments in suits on contracts payable in coin should be entered for coined dollars.

In a number of early decisions the provision in a contract for payment in coin or a particular kind of coin was held to be of no effect, and contracts containing such provisions were held to amount to nothing more than contracts to pay the nominal value in any money which was a legal tender, and consequently the judgments to be entered thereon were required to be for money generally, without specifying the kind.[74] In other cases it was held that the judgment on a contract calling for gold or silver should be for the value of the coin in currency,[75] while in still other cases it was held that the judgment should be in the alternative, for the coin or its value in currency.[76]

Subsequently the validity of express contracts to pay coined dollars of a kind specified was sustained in the federal courts as not being within the legal tender acts, and the doctrine was established that such contracts can be satisfied only by the tender or payment of coined dollars of the kind specified, and that judgments in suits brought on such contracts should be entered for coined dollars and parts of dollars.[77] These decisions of the United States supreme court are controlling on the state courts, and in effect overrule all previous inconsistent decisions.[78] They have been followed in practically every state decision since rendered, and the rule is now well established.[79] The rule established by the foregoing cases, however, does not prevent the rendition of a judgment for the value of the coin in currency where the creditor consents to or seeks such recovery.[80]

Early statutes. Before the present established doctrine became settled by the decisions, it was specifically incorporated in the statutes of some of the states and decisions construing and applying such statutes are considered in 33 C.J. p 1208 note 4.

Coin or equivalent. It has been held that the judgment on a contract payable in coin or its equivalent in currency should be in the alternative, for coin or currency.[81] In other cases it has been held that the judgment should not be rendered in the alternative for coin or currency, but should be in currency for an amount equal to the face value plus the premium of the coin,[82] while in still other

In Philippine Islands

(1) Judgments rendered in the Philippine Islands should be in Philippine money.—Behn v. Rosatzin, 5 Philippine 660—Gaspar v. Molina, 5 Philippine 197.

(2) If rendered in Mexican currency it may be changed on appeal to Philippine money.—Causin v. Ricamora, 5 Philippine 31, 4 Off.Gaz. 218.

66. Ill.—Belford v. Woodward, 41 N.E. 1097, 158 Ill. 122, 29 L.R.A. 593.
33 C.J. p 1207 note 89.

67. Cal.—Livingston v. Morgan, 53 Cal. 23.
33 C.J. p 1207 note 90.

68. Nev.—Treadway v. Sharon, 7 Nev. 37.
33 C.J. p 1207 note 91.

69. Mass.—Independent Ins. Co. v. Thomas, 104 Mass. 192.
33 C.J. p 1207 note 92.

70. Ind.—State Bank v. Burton, 27 Ind. 426.
33 C.J. p 1207 note 93.

71. Tex.—Flournoy v. Healy, 31 Tex. 590.
33 C.J. p 1209 note 19.

72. Cal.—More v. Del Valle, 28 Cal. 170.
33 C.J. p 1209 note 17.

73. Cal.—Carpentier v. Atherton, 25 Cal. 564.

74. Ala.—Glover v. Robbins, 49 Ala. 219, 20 Am.R. 272.
33 C.J. p 1208 note 96.

75. Pa.—Dutton v. Pallaret, 52 Pa. 109, 91 Am.D. 135, affirmed 14 S. Ct. 1200, 154 U.S. 563, 19 L.Ed. 165.
33 C.J. p 1208 note 97.

76. Ky.—Glass v. Pullen, 6 Bush 346.
33 C.J. p 1208 note 98.

77. U.S.—Trebilcock v. Wilson, Iowa, 12 Wall. 687, 20 L.Ed. 460.
33 C.J. p 1208 note 99.

78. U.S.—Trebilcock v. Wilson, supra.
33 C.J. p 1208 note 1.

79. U.S.—Gregory v. Morris, Wyo., 96 U.S. 619, 24 L.Ed. 740.
33 C.J. p 1208 note 2.

80. U.S.—Gregory v. Morris, supra.
33 C.J. p 1208 note 3.

81. Ga.—Atkinson v. Lanier, 69 Ga. 460.
33 C.J. p 1209 note 6.

82. N.C.—Dunn v. Barnes, 73 N.C. 273.
33 C.J. p 1209 note 7.

cases it has been held that the judgment should be for gold alone,[83] or simply for the amount of money found due without specifying the kind of money in which payment should be made.[84]

(3) Conformity to Pleadings, Issues, and Verdict

Judgments for a specific kind of coin must conform to the pleadings, verdict, and findings.

Judgments for a specific kind of coin must be supported by the case made by the pleadings.[85] Where the pleadings or process do not specify gold, a judgment by default or nil dicit for gold is erroneous,[86] but is regular and proper where supported by the declaration or complaint.[87] A coin judgment must likewise be sustained by the verdict or findings,[88] and, equally so, a general judgment.[89] Where the verdict is for gold or legal tender in the alternative, a judgment for legal tender only is not in accordance with the verdict.[90]

§ 80. Description of Property

A judgment affecting the title to property must describe it with sufficient certainty to identify it; the judgment may be aided by intendments and additional data drawn from the record.

Where a judgment affects the title to property, real or personal, the property must be described specifically and with certainty[91] to enable execution of the court's mandate;[92] an impossible,[93] wrong,[94] or uncertain[95] description, or the absence of a description,[96] renders the judgment erroneous or void. Ordinarily the judgment should follow the complaint in its description of the property involved,[97] but variances which do not affect the identity of the property are immaterial.[98] The description is sufficient where the property which is the subject of the judgment is described with sufficient certainty to identify it.[99]

The judgment may be aided by intendments and additional data drawn from the pleadings and oth-

83. Cal.—Burnett v. Stearns, 33 Cal. 468.
33 C.J. p 1209 note 8.

84. Cal.—Reese v. Stearns, 29 Cal. 273.

85. Ill.—Belford v. Woodward, 41 N.E. 1097, 158 Ill. 122, 29 L.R.A. 593.
33 C.J. p 1209 notes 10, 11.

86. Cal.—Wallace v. Eldredge, 27 Cal. 495—Lamping v. Hyatt, 27 Cal. 99.
Ill.—Belford v. Woodward, 41 N.E. 1097, 158 Ill. 122, 29 L.R.A. 593.

87. Cal.—Harding v. Cowing, 28 Cal. 212—Wallace v. Eldredge, 27 Cal. 498.

88. Cal.—McDonald v. Mission View Homestead Assoc., 51 Cal. 210.
33 C.J. p 1209 note 14.

89. Cal.—Carpentier v. Small, 35 Cal. 346.
33 C.J. p 1209 note 15.

90. Mont.—Knox v. Gerhauser, 8 Mont. 267.

91. Cal.—**Corpus Juris cited in** Newport v. Hatton, 231 P. 987, 996, 195 Cal. 132.
Ga.—Winslow v. O'Pry, 56 Ga. 138—Clinch v. Ferril, 48 Ga. 365.
Ky.—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.
Mo.—Tillman v. Hutcherson, 154 S.W.2d 104, 348 Mo. 473—Williams v. Pemiscot County, 133 S.W.2d 417, 345 Mo. 415.
33 C.J. p 1209 note 20.

Certainty of description of property in:
Decree see Equity § 593.
Judgment in:
Detinue see Detinue § 22 b (1).
Ejectment see Ejectment § 112 a.
Forcible entry and detainer see Forcible Entry and Detainer § 69.
Quieting title see the C.J.S. title Quieting Title § 103, also 51 C.J. p 282 notes 31–35.
Replevin see the C.J.S. title Replevin § 241, also 54 C.J. p 587 note 16–p 588 note 24.
Trespass to try title see the C. J.S. title Trespass to Try Title § 65, also 63 C.J. p 1203 notes 32–46.

Clarity as in deed
A judgment adjudicating title to realty must be as clear and explicit as a deed which purports to convey real property.—People v. Rio Nido Co., 85 P.2d 461, 29 Cal.App.2d 486.

92. Ill.—Gerlach v. Walsh, 41 Ill. App. 83.
Tex.—Humble Oil & Refining Co. v. Manziel, Civ.App., 187 S.W.2d 149, refused for want of merit.

93. Cal.—**Corpus Juris cited in** Newport v. Hatton, 231 P. 987, 996, 195 Cal. 132.
Ill.—Gerlach v. Walsh, 41 Ill.App. 83.

94. Cal.—**Corpus Juris cited in** Newport v. Hatton, 231 P. 987, 996, 195 Cal. 132.
33 C.J. p 1210 note 22.

95. Cal.—**Corpus Juris cited in** Newport v. Hatton, 231 P. 987, 996, 195 Cal. 132.
33 C.J. p 1210 notes 23, 24.

Judgment good unless reversed
"While a judgment which does not fully describe the land may be reversed as erroneous on appeal, such a judgment, if the land is so described that it may be identified, is good until reversed."—Grooms v. National Bank of Kentucky, 292 S.W. 513, 515, 218 Ky. 846.

96. Cal.—**Corpus Juris cited in** Newport v. Hatton, 231 P. 987, 996, 195 Cal. 132.
Ky.—Alexander v. Hendricks, 258 S.W. 81, 201 Ky. 677.
33 C.J. p 1210 note 23.

97. Tex.—Humble Oil & Refining Co. v. Manziel, Civ.App., 187 S.W.2d 149, refused for want of merit.
33 C.J. p 1210 note 32.

98. Cal.—McLean v. Ladewig, 37 P.2d 502, 2 Cal.App.2d 21.
33 C.J. p 1210 note 33.

99. Cal.—People v. Rio Nido Co., 85 P.2d 461, 29 Cal.App.2d 486.
Ky.—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.
Tex.—Moore v. Unknown Heirs of Gilchrist, Civ.App., 273 S.W. 308.
33 C.J. p 1210 note 25.

The office of description in a judgment is to furnish means of identification of the land.—Greer v. Greer, Tex., 191 S.W.2d 848—Trout v. Grubbs, Tex.Civ.App., 1 S.W.2d 950, 951.

Test of uncertainty
"We do not see how a judgment can be pronounced a nullity for uncertainty of description unless the court can see that nothing is described. Those claiming under it must rely on the description, it is true, but whether or not the description is defective must be tested by rules of evidence ordinarily applied to the subject."—Newport v. Hatton, 231 P. 987, 996, 195 Cal. 132—McLean v. Ladewig, 37 P.2d 502, 504, 2 Cal.App.2d 21.

er parts of the record,[1] or even, in some cases, by extrinsic documentary evidence.[2] Words of misdescription may be rejected as surplusage, if the property is otherwise sufficiently identified.[3] A description of property in the judgment by a reference to the pleadings is sufficient[4] unless the reference introduces a new element of uncertainty[5] or the description referred to is itself insufficient.[6] Such a reference is to the amended complaint, if there is one.[7] A reference to the report of a commissioner for a description may be sufficient.[8] In some cases a description by reference has been held insufficient.[9]

§ 81. Date

A judgment should show with certainty the time of its rendition, but the omission of a date does not render it void.

A judgment should show with certainty the time of its rendition,[10] but need not specify the particular hour.[11] The omission of the date, however, is a mere irregularity, and will not render the judgment void.[12] A clerical error may be shown so as to support the judgment.[13] As appears infra § 113, the date may be fixed by reference to the record of proceedings in the case.

§ 82. Provisions for Enforcement

Ordinarily a judgment need not contain provisions for its enforcement, although their inclusion does not necessarily invalidate a judgment.

The office of a judgment is fully performed when it declares and adjudicates the existence or nonexistence of the liability sought to be established; it is not concerned with the means of enforcing the liability declared,[14] which are discussed infra §§ 585–591. Ordinarily a judgment need not order execution or other process provided by law for its enforcement,[15] although to do so does not necessarily render an otherwise valid judgment void[16] or erroneous;[17] and in some cases the clause with regard to enforcement may be disregarded as mere surplusage.[18]

A money judgment should be simply that one party or the other recover the amount awarded,

Description of land held sufficiently certain

(1) Generally.

Ga.—Cason v. United Realty & Auction Co., 131 S.E. 161, 161 Ga. 874.

Ky.—Grooms v. National Bank of Kentucky, 292 S.W. 513, 218 Ky. 846.

Tex.—Dearing v. City of Port Neches, Civ.App., 65 S.W.2d 1105, error refused.

33 C.J. p 1210 note 25 [a].

(2) Fact that judgment incorporated two descriptions of land involved in suit held not reversible error where descriptions in judgment merely followed alternative descriptions contained in plaintiff's petition.—Wells v. Thompson, Tex.Civ. App., 84 S.W.2d 312, error dismissed.

(3) Reference to mining property by its popular name, "Good Luck Mine," was held a sufficient description.—McLean v. Ladewig, 37 P.2d 502, 2 Cal.App.2d 21.

Description of land held insufficient

Cal.—People v. Rio Nido Co., 85 P. 2d 461, 29 Cal.App.2d 486.

Mo.—Tillman v. Hutcherson, 154 S. W.2d 104, 348 Mo. 473.

33 C.J. p 1210 note 25 [b].

Description of personalty held insufficient

N.C.—Barham v. Perry, 171 S.E. 614, 205 N.C. 428.

33 C.J. p 1210 note 25 [d].

1. Ala.—Floyd v. Jackson, 164 So. 121, 26 Ala.App. 575.
Cal.—**Corpus Juris cited in** Newport v. Hatton, 231 P. 987, 996, 195 Cal. 132—Cuthbert Burrell Co. v. Shirley, 148 P.2d 85, 64 Cal.App.2d 52 —McLean v. Ladewig, 37 P.2d 502, 2 Cal.App.2d 21.
Ga.—Jones v. Empire Furniture Co., 150 S.E. 563, 40 Ga.App. 556.
Tex.—City Nat. Bank of San Saba v. Penn, Civ.App., 92 S.W.2d 532 —Moore v. Unknown Heirs of Gilchrist, Civ.App., 273 S.W. 308.
33 C.J. p 1210 note 29.

Description held insufficient

Cal.—People v. Rio Nido Co., 85 P.2d 461, 29 Cal.App.2d 486.

2. Cal.—**Corpus Juris cited in** Newport v. Hatton, 231 P. 987, 996, 195 Cal. 132.
33 C.J. p 1210 note 30.

3. N.Y.—Laverty v. Moore, 33 N.Y. 658.
33 C.J. p 1210 note 22 [b].

4. Iowa.—Foster v. Bowman, 7 N. W. 513, 55 Iowa 237.
33 C.J. p 1210 note 34.

5. Ky.—Lawless v. Barger, 9 Bush 665.
33 C.J. p 1210 note 35.

6. La.—Williams v. Kelso, 7 La. 406.

7. Cal.—Kelly v. McKibben, 54 Cal. 192.

8. Ky.—Four Mile Land & Coal Co. v. Slusher, 55 S.W. 555, 107 Ky. 664, 21 Ky.L. 1427—Posey v. Green, 78 Ky. 162.

9. Ky.—Neff v. Covington Stone & Sand Co., 55 S.W. 697, 108 Ky. 457, 21 Ky.L. 1454, 56 S.W. 723, 22 Ky. L. 139.
33 C.J. p 1211 note 39.

10. Ind.—Bevington v. Buck, 18 Ind. 414.
33 C.J. p 1211 note 41.
Presumption as to date of entry see infra § 113.

11. Del.—Wilson v. Greenwood, 10 Del. 519.

12. Neb.—**Corpus Juris cited in** Martin v. Sanford, 261 N.W. 136, 140, 129 Neb. 212.
33 C.J. p 1211 note 43.

13. Neb.—**Corpus Juris cited in** Martin v. Sanford, 261 N.W. 136, 140, 129 Neb. 212.
Tex.—Sloan v. Thompson, 23 S.W. 613, 4 Tex.Civ.App. 419.

14. Cal.—**Corpus Juris cited in** Jordan v. Williams Irr. Dist., 57 P.2d 566, 569, 13 Cal.App.2d 465.
Ind.—Walters v. Cantner, 60 N.E.2d 138.
33 C.J. p 1211 note 48.

15. Colo.—**Corpus Juris cited in** Scott v. Woodhams, 246 P. 1027, 1028, 79 Colo. 528, followed in 246 P. 1029, 79 Colo. 532.
N.Y.—Brown v. Father Divine, 18 N. Y.S.2d 544, 173 Misc. 1029, affirmed 23 N.Y.S.2d 116, 260 App. Div. 443, reargument denied 24 N.Y.S.2d 991, 260 App.Div. 1006.
Tex.—Darlington v. Allison, Civ. App., 12 S.W.2d 839, error dismissed.
33 C.J. p 1211 note 49.

16. Ill.—McBane v. People, 50 Ill. 503.

17. Minn.—Belknap v. Van Riper, 79 N.W. 103, 76 Minn. 268.

18. Wis.—Sharpe v. First Nat. Bank, 264 N.W. 245, 220 Wis. 506.
33 C.J. p 1211 note 51.

without any direction as to how the money should be paid by the debtor or made by the officer;[19] after judgment the law, and not the court, directs what proceedings shall be had for the purpose of satisfying the amount adjudged to be due.[20] However, a judgment may be adapted to the proportionate liabilities of the several defendants in the action,[21] or may direct the order in which levy should be made on the properties of several parties defendant,[22] or, in the case of a debt payable by installments, the judgment may be so framed as to provide for its payment at successive periods, as the installments fall due,[23] or may order the payment of the amount presently due, with leave to plaintiff to take out executions for the succeeding installments.[24] Under some statutes, in cases where defendant is subject to arrest on execution, plaintiff is entitled to have the judgment state that fact as the basis for the issuance of a body execution,[25] which, as discussed in Executions § 417 b, may not otherwise lawfully issue; but even so it has been held improper to insert in the judgment a provision for the issuance of an execution against the person.[26]

Limitation to particular property. A general judgment should not limit its collection to particular property or funds[27] unless the contract of the parties contemplates such limitation.[28] Where, however, a judgment in rem or quasi in rem is involved, enforcement should be limited to the particular property in question;[29] where property is in custody of the court by attachment or garnishment, the judgment may provide for enforcement out of such property.[30]

Stay of execution. A judgment may provide that execution shall be stayed in a proper case.[31] A stay, furthermore, may be written into a judgment by operation of law.[32] However, where not within the power of the court to make, that part of a judgment staying execution has been held void.[33]

Waiver of statutory benefits. If the action is on a written obligation which waives the benefit of valuation or appraisement laws, the judgment may contain provisions giving effect to the waiver;[34] where, however, there was no statutory authorization of judgments prohibiting the stay of execution, a waiver of the stay laws has been disregarded by the court.[35]

Under codes and practice acts it may be proper to insert provisions or directions as to performance or enforcement of the judgment.[36]

§ 83. Exceptions and Saving Clauses

A judgment on the merits cannot be rendered without prejudice to the parties' rights to bring another action on the same grounds.

A judgment on the merits cannot, and should not, purport to be rendered without prejudice to the rights of the parties to bring another action on the

19. Del.—Schwander v. Feeney's, 29 A.2d 369.
33 C.J. p 1211 note 52.

20. Tex.—Darlington v. Allison, Civ.App., 12 S.W.2d 339.
33 C.J. p 1211 note 53.

Lien of judgment

(1) The lien of a judgment need not be declared in terms, as it exists by law independently of any provision therefor in the judgment. —Nygren v. Nygren, 60 N.W. 885, 42 Neb. 408—33 C.J. p 1212 note 66.

(2) Lien of judgment generally see infra §§ 454–511.

21. Ind.—Douglass v. Howland, 11 Ind. 554.
Tex.—Eastland v. Fuller, Civ.App., 261 S.W. 386.

22. Tex.—City Nat. Bank of San Saba v. Penn, Civ.App., 92 S.W. 2d 532.

23. Ind.—Wolfe v. Wilsey, 28 N.E. 1004, 2 Ind.App. 549.

24. N.Y.—Libby v. Rosekrans, 55 Barb. 202.
33 C.J. p 1211 note 56.

25. N.Y.—Rion Co. v. Zuckerman, 17 N.Y.S.2d 40, 173 Misc. 3—Wilson & Co., Inc., v. Hershkowitz, 298 N.Y.S. 14, 163 Misc. 721—Pacific Finance Corporation v. Trombino, 24 N.Y.S.2d 297.
33 C.J. p 1211 note 59.

Judgment held sufficient

Ill.—Brandtjen & Kluge v. Forgue, 20 N.E.2d 616, 299 Ill.App. 585.

26. N.Y.—Curtiss v. Jebb, 96 N.E. 120, 203 N.Y. 538.

27. N.J.—**Corpus Juris cited in** Justice v. Justice, 12 A.2d 893, 894, 127 N.J.Eq. 374.
33 C.J. p 1212 note 62.

28. N.Y.—Pellas v. Motley, 38 N.E. 100, 143 N.Y. 657.
33 C.J. p 1211 note 54, p 1212 note 64.

Transaction held not to contemplate limitation of collection to particular property.—Justice v. Justice, 12 A.2d 893, 127 N.J.Eq. 374.

29. Mo.—State v. Vogel, 14 Mo.App. 187.

30. Tex.—Studebaker Harness Co. v. Gerlach Mercantile Co., Civ.App., 192 S.W. 545.
33 C.J. p 1212 note 65.

31. Ala.—**Corpus Juris cited in** Bailey Realty & Loan Co. v. Bunting, 19 So.2d 609, 610, 246 Ala. 152.
N.H.—Judkins v. Union Mutual Fire Ins. Co., 39 N.H. 172.

32. Ala.—Bailey Realty & Loan Co. v. Bunting, 19 So.2d 609, 246 Ala. 152.

33. Ark.—International Shoe Co. v. Waggoner, 64 S.W.2d 82, 188 Ark. 59—Taylor v. O'Kane, 49 S.W.2d 400, 185 Ark. 782.

34. Ind.—Shaw v. Tatham, 15 Ind. 377.
33 C.J. p 1212 note 68.
Waiver of appraisement laws:
By debtor see Executions § 106 b (2)
In mortgage foreclosures see the C.J.S. title Mortgages § 722, also 42 C.J. p 188 notes 14–17.

35. Ind.—McLane v. Elmer, 4 Ind. 239—Develin v. Wood, 2 Ind. 102.

36. Iowa.—King v. Nelson, 94 N.W. 1095, 120 Iowa 606.
33 C.J. p 1212 note 70.

Provision held unauthorized

Cal.—Niles v. Louis H. Rapoport & Sons, 128 P.2d 50, 53 Cal.App.2d 644.

same grounds.[37] It is not common practice to include words indicating that a judgment in an action at law is without prejudice, even though it is entered on a nonsuit or for some other reason is not conclusive of the merits of the case.[38]

The reservation of control over equity decrees for the purpose of enforcement is discussed in Equity § 616.

§ 84. Surplusage

Surplusage in a judgment does not necessarily render it invalid.

Surplusage in a judgment, whether it consists of merely superfluous provisions or directions,[39] or of matters which follow as the legal consequences of the judgment, whether or not they are incorporated in it,[40] or of unauthorized provisions,[41] does not necessarily invalidate the judgment.

§ 85. Signing by Judge or Clerk

Except where statute or rule of court provides otherwise, ordinarily neither the judge nor the clerk of the court need sign a judgment.

While it has been held that a judgment need not be signed by the judge of the court rendering the judgment,[42] and that his failure to sign the judgment will not invalidate it,[43] it has also been held, sometimes by virtue of statutory provisions, that judgments must be signed by the judge,[44] provided the judgments are final judgments.[45] Although it has been held that the failure of the judge to sign a judgment will render the judgment invalid or of no effect,[46] some cases have held that statutes re-

37. Ind.—Evans v. Schafer, 86 Ind. 135.
33 C.J. p 1212 note 71.

Right to sue for attorney's fees
In action for rent of lost battery, recovery being rent and value of battery, court erred in not granting plaintiff's prayer for reservation of right to sue for attorney's fees.—Chambers v. Vega, 137 So. 879, 18 La.App. 736.

38. Mass.—Amory v. Kelley, 84 N.E.2d 507, 309 Mass. 162.

39. Miss.—Sternberg Dredging Co. v. Screws, 166 So. 754, 175 Miss. 383—Jackson v. Redding, 139 So. 317, 162 Miss. 323, overruling suggestion of error 138 So. 295, 162 Miss. 323.
Pa.—**Corpus Juris quoted in** Altoona Trust Co. v. Fockler, 165 A. 740, 742, 311 Pa. 426.
33 C.J. p 1212 note 74.
Harmless error in judgments as surplusage see Appeal and Error § 1794 a.

Statements treated as surplusage
Wyo.—Holly Sugar Corporation v. Fritzler, 296 P. 206, 42 Wyo. 446.

40. Pa.—**Corpus Juris quoted in** Altoona Trust Co. v. Fockler, 165 A. 740, 742, 311 Pa. 426.
33 C.J. p 1212 note 74.

41. Cal.—In re San Joaquin Light & Power Corporation, 127 P.2d 29, 52 Cal.App.2d 814.
Ill.—Schaefer v. People, 20 Ill.App. 605.
Ky.—Parrish v. Ferriell, 186 S.W.2d 625, 299 Ky. 676.
Pa.—**Corpus Juris quoted in** Altoona Trust Co. v. Fockler, 165 A. 740, 742, 311 Pa. 426.
33 C.J. p 1212 note 74.

Reference to party as "trustee"
Where pleadings and issues did not permit of reference to plaintiff as fiduciary, word "trustee" appearing after plaintiff's name was deemed mere surplusage.—Greenwood Lumber Co. v. Roberts, 44 N.E.2d 1002, 112 Ind.App. 377.

42. Ga.—**Corpus Juris quoted in** Sullivan v. Douglas Gibbons, Inc., 2 S.E.2d 89, 90, 187 Ga. 764.
33 C.J. p 1213 note 75.
Signing of decree in equity see Equity § 591.

Approval of court
Statute requiring full entries of orders and proceedings of courts of record to be read in open court contemplates that judgments entered do not become pronouncements of court until approved by court.—Stanton v. Arkansas Democrat Co., 106 S.W.2d 584, 194 Ark. 135.

43. U.S.—Hyman v. McLendon, C.C.A.S.C., 140 F.2d 76, certiorari denied 64 S.Ct. 1055, 322 U.S. 739, 88 L.Ed. 1572.
Cal.—Brown v. Superior Court of California in and for Los Angeles County, 234 P. 409, 70 Cal.App. 732.
Ga.—**Corpus Juris quoted in** Sullivan v. Douglas Gibbons, Inc., 2 S.E.2d 89, 90, 187 Ga. 764.
Ind.—Cadwell v. Teany, 157 N.E. 51, 199 Ind. 634, certiorari denied Cadwell v. Teaney, 48 S.Ct. 601, 277 U.S. 605, 72 L.Ed. 1011.
Neb.—Ex parte Niklaus, 13 N.W.2d 655, 144 Neb. 503.
33 C.J. p 1213 note 75.

44. Idaho.—Faris v. Burroughs Adding Mach. Co., 282 P. 72, 48 Idaho 310.
Ky.—Clark v. Mason, 95 S.W.2d 292, 264 Ky. 683.
La.—Isom v. Stevens, App., 148 So. 270.
33 C.J. p 1213 note 76.

Time of signing
(1) The failure of party, in whose favor court decides, to file formal written judgment within five days after decision, as required by court rule, does not deprive court of jurisdiction to sign judgment after such period, but merely requires such party to go back and comply with rule.—Cahn v. Schmitz, 108 P.2d 1006, 56 Ariz. 469.

(2) Statute providing for signing of judgments within three days from date of rendition held to contemplate that judgments should not become effective until the three days had expired, or until application for new trial filed within the three days had been denied.—Haas v. Buck, 162 So. 181, 182 La. 566.

(3) While a motion for new trial is pending, judge is without right to sign the judgment, and, if he does so, his action is without legal effect.—Maison Blanche Co. v. Mefsut, La.App., 177 So. 824.

Sufficiency of signature
(1) A judge ought to sign his name, and not write his initials, to indicate a judgment of court.—Volpe v. Sensatini, 144 N.E. 104, 249 Mass. 132.

(2) Capital letter "S" held not sufficient signature of judge to judgment.—Automobile Sec. Corporation v. Vecino, 120 So. 427, 10 La.App. 10.

(3) Other illustrations see 33 C.J. p 1213 note 76 [a].

Place of signature
Tex.—Bridgman v. Moore, 183 S.W.2d 705, 143 Tex. 250.

45. La.—Viator v. Heintz, 10 So.2d 690, 201 La. 884—River & Rails Terminals v. Louisiana Ry. & Nav. Co., 103 So. 331, 157 La. 1085—State v. Johnson, 12 La. 547—Mossler Acceptance Co. v. Moliere, App., 181 So. 228—Hotard v. Dupont, 1 La.App. 646.
33 C.J. p 1213 note 76 [c].

46. Ill.—Miller v. Miller, 35 N.E.2d 62, 376 Ill. 628.
Ky.—Clark v. Mason, 95 S.W.2d 292, 264 Ky. 683—Shuey v. Hoffman, 81 S.W.2d 727, 235 Ky. 490.

quiring a judge's signature are directory merely, and not mandatory, and that a failure to comply therewith will not render the judgment void.[47]

The absence of a signature may be cured by the signing of the judgment at a later date,[48] and, as between the parties, subsequent proceedings on such judgment are valid.[49]

Clerk's signature. In absence of specific provision therefor, by statute or rule of court, the signature of the clerk is not required.[50] It is required in some jurisdictions, however, that judgments shall be signed or attested by the clerk;[51] but the omission of the clerk to sign the judgment is a mere irregularity which may be corrected at any time, and does not render the judgment void.[52]

§ 86. Nonsuit or Judgment on Merits

Whether a judgment should be one of nonsuit or a judgment of dismissal without prejudice or whether the judgments should be one on the merits depends in general on whether the case has been tried and submitted on the merits.

The phrase "judgment of nonsuit" is frequently applied to the disposition of a case by nonsuit.[53] In general such a judgment decides nothing with respect to the merits of the claim on which action is brought,[54] whether or not the judgment contains a reservation of the right again to sue on the same cause of action,[55] and merely leaves the situation with respect to the cause of action involved as though no suit in that regard had ever been brought.[56] Accordingly, in general it is not proper, on the grant of a nonsuit, to enter a judgment on the merits.[57] So, where plaintiff fails to prove his case, or, in other words, where the court decides that he has given no evidence which would warrant a verdict or finding in his favor, in general the proper judgment to be entered is one of nonsuit,[58] and a judgment on the merits is improper

La.—Succession of Meyers, 133 So. 897, 16 La.App. 675.
33 C.J. p 1214 note 77.

Judgment confirming order

Judgment, not appealed from, deciding that question whether order should be set aside was res judicata under previous judgments, had effect of confirming order, even though judgments were not signed. —Succession of Harrison, 123 So. 120, 168 La. 675.

47. Ind.—Bailer v. Dowd, 40 N.E.2d 325, 219 Ind. 634.
33 C.J. p 1214 note 78.

48. Cal.—De Arman v. Connelly, 25 P.2d 24, 134 Cal.App. 173.
Ky.—Cunningham v. Grey, 111 S.W. 2d 579, 271 Ky. 84—Shuey v. Hoffman, 81 S.W.2d 727, 235 Ky. 490—Union Gas & Oil Co. v. Indian-Tex. Petroleum Co., 263 S.W. 1, 203 Ky. 521.

Presumption

It would be assumed that record was signed by judge either at same term or the next succeeding one as contemplated by statute.—Concannon v. Blackman, 6 N.W.2d 116, 232 Iowa 722.

Signing by successor

Action of succeeding judge in signing unsigned judgment of dismissal, written by predecessor in office, who presided at case, was authorized.—Lee v. Lee, 11 S.W.2d 956, 226 Ky. 776.

49. Ky.—Cunningham v. Grey, 111 S.W.2d 579, 271 Ky. 84—Shuey v. Hoffman, 81 S.W.2d 727, 235 Ky. 490.

50. Cal.—Clink v. Thurston, 47 Cal. 21.
33 C.J. p 1214 note 81.

51. N.Y.—Knapp v. Roche, 82 N.Y. 366.
33 C.J. p 1214 note 79.

Effect of clerk's signature

The signature of the clerk to the judgment is merely his certificate that it was entered by the court.
Ga.—Sullivan v. Douglas Gibbons, Inc., 2 S.E.2d 89, 187 Ga. 764.
Wis.—Egaard v. Dahlke, 85 N.W. 369, 109 Wis. 366.

52. S.C.—Hardin v. Melton, 4 S.E. 805, 28 S.C. 38, rehearing denied 9 S.E. 423, 28 S.C. 38.
33 C.J. p 1214 note 80.

53. Mass.—Gill v. Stretton, 10 N.E. 2d 185, 298 Mass. 342.

Form and contents of judgment

(1) Where a nonsuit is allowed as a basis for a writ of error, a proper form of entry of judgment is "that the plaintiff being solemnly called came not, whereupon the plaintiff suffered a nonsuit; and it is therefore considered by the Court that the plaintiff take nothing by his writ and that the defendant go hence without day and recover of the plaintiff his costs."—Spiker v. Hester, 135 So. 502, 101 Fla. 288.

(2) Order reciting in court's minutes style and number of case followed with term "nonsuit" has been regarded as a valid judgment of nonsuit.—Keith v. Yazoo & M. V. R. Co., 145 So. 227, 164 Miss. 566.

(3) Judgment of nonsuit need not adjudge costs, in view of statute providing that, in case of nonsuit, defendant shall recover costs.—Keith v. Yazoo & M. V. R. Co., supra.

54. La.—McCook v. Comegys, 125 So. 134, 169 La. 312.
Mont.—Roecher v. Commercial Nat. Bank, 289 P. 388, 87 Mont. 570—McKeon v. Kilduff, 281 P. 345, 85 Mont. 562.

55. La.—McCook v. Comegys, 125 So. 134, 169 La. 312.

Judgment with reservation proper

Judgment of nonsuit in an action for contract price of certain article, with reservation of right to sue on quantum meruit, was not error.—McCook v. Comegys, supra.

56. La.—McCook v. Comegys, supra.

57. Mont.—Roecher v. Commercial Nat. Bank, 289 P. 388, 87 Mont. 570—McKeon v. Kilduff, 281 P. 345, 85 Mont. 562.

Accord and satisfaction

Where complaint alleged an oral contract and plaintiff testified that a settlement was arrived at, by terms of which plaintiff was to receive a certain sum, which was shortly thereafter paid, and plaintiff's attorney testified to an agreement which amounted to an accord and satisfaction, a nonsuit was granted on the merits rather than without prejudice.—Will v. Will & Baumer Candle Co., 46 N.Y.S.2d 532.

58. La.—Anchor Post Fence Co. v. Watson, 154 So. 50, 179 La. 439—Bank of Bienville v. Fidelity & Deposit Co. of Maryland, 135 So. 26, 172 La. 687—Maddox v. Robbert, 115 So. 905, 165 La. 694—Bayard v. Baldwin Lumber Co., 103 So. 290, 157 La. 994—State v. Bell, 96 So. 669, 153 La. 823—Young v. Thompson, App., 189 So. 487—Andrews v. Foster, App., 169 So. 103, amended on other grounds 170 So. 563—Elmwood Land Development Co. v. Verret Lands, App., 159 So. 606—Brooks-Mays & Co. v. Alfred, 140 So. 166, 19 La. App. 549—Kruebbe Co. v. Kidd-Russ Realty Co., 133 So. 462, 16

where there has been no real consideration and determination, on the merits, of the issues involved.[59] However, a judgment of nonsuit is not the proper judgment and there should be a final judgment for defendant when defendant successfully controverts plaintiff's evidence, or proves that no such facts exist as are alleged by plaintiff,[60] or where plaintiff's evidence establishes that he has no right of action against defendant.[61]

In code practice, a judgment for defendant frequently takes the form of a dismissal of the action.[62] While the view has been taken that a judgment is contradictory in terms where it purports to determine the merits and also to dismiss the cause,[63] a judgment of dismissal expressly providing that the dismissal is on the merits usually is treated as a judgment on the merits, where the case was actually submitted and tried on the merits.[64] In general, a judgment of dismissal without prejudice is improper where the cause has been tried and submitted on the merits.[65] A dismissal based on findings of fact, made contrary to plaintiff's allegations, is a judgment on the merits.[66] So a judgment for defendant on a directed verdict may properly be a judgment on the merits.[67] Under various other circumstances, the propriety of a judgment of dismissal with prejudice has been recognized.[68]

Where there is a dismissal which is not based

La.App. 121—Sarrett v. Globe Indemnity Co., 8 La.App. 324—Louisiana Ry. & Nav. Co. v. Lawrence, 1 La.App. 440.

N.Y.—Jules Maes & Co. v. W. R. Grace & Co., 147 N.E. 177, 239 N.Y. 519—Watkins v. Pacific Finance Corporation, 20 N.Y.S. 599, 259 App.Div. 685—Wagner Trading Co. v. Radillo, 198 N.Y.S. 13, 205 App.Div. 833—Leach v. Sibley, Lindsay & Curr Co., 15 N.Y.S.2d 287.

33 C.J. p 1214 note 82.

Directed verdict improper

Judgment of nonsuit, instead of directed verdict for defendant, should be entered, where plaintiff fails to make out prima facie case.—Ross v. Durrence, 160 S.E. 370, 173 Ga. 457—McCaskey Cash Register Co. v. Bank of Villa Rica, 199 S.E. 828, 58 Ga.App. 676.

59. Tex.—Spann Bros. Auto Supply Co. v. Miles, Civ.App., 135 S.W.2d 1016.

60. La.—Robinson v. Washington Fidelity Nat. Life Ins. Co., 134 So. 115, 16 La.App. 280.

Mo.—St. Louis Law Printing Co. v. Aufderheide, 45 S.W.2d 548, 226 Mo.App. 680.

Or.—Wolke v. Schmidt, 228 P. 921, 112 Or. 99.

Wash.—Williams v. Pease, 43 P.2d 22, 181 Wash. 388.

33 C.J. p 1215 note 83.

Failure to amend pleading

Judgment rejecting plaintiff's demands was proper, where court found that accident to plaintiff could not have occurred as alleged and plaintiff had failed to change her position when opportunity was given to amend.—Phillips v. Shreveport Rys. Co., La.App., 163 So. 845.

Reconventional demand

(1) Where the issue with respect to a reconventional demand by defendant was fully litigated at the trial and evidence was adduced thereon by both parties, trial court should have made a definite decision disposing of the reconventional demand, instead of rendering judgment of nonsuit.—Cardino v. Scroggins, La.App., 185 So. 109.

(2) A judgment of dismissal of plaintiff's action making no mention of reconventional demand of defendant for damage to truck was equivalent to dismissal of such demand.—Henderson v. Marmande, La.App., 177 So. 827.

61. La.—Lewis v. Young Friends of Hope Benev. Ass'n, App., 151 So. 109.

N.Y.—Scheuer v. Martin, 293 N.Y.S. 558, 250 App.Div. 46—Tanner v. Tennenbaum, 256 N.Y.S. 562, 235 App.Div. 173—Hulse v. West, 203 N.Y.S. 799, 122 Misc. 719, affirmed 207 N.Y.S. 854, 211 App.Div. 858—Leach v. Sibley, Lindsay & Curr Co., 15 N.Y.S.2d 287.

After election

Where plaintiff, on being required at trial to elect between inconsistent causes of actions and remedies, was free to elect either to rescind contract or to sue for breach and elected to sue for rescission, judgment correctly dismissing complaint improperly contained provision that judgment was without prejudice to right to commence action for breach of contract, where plaintiff at time of election had knowledge of all facts with respect to defendants' conduct.—Scheuer v. Martin, 293 N.Y.S. 558, 250 App.Div. 46.

62. Ind.—Casto v. Eigeman, 70 N.E. 807, 162 Ind. 506.

33 C.J. p 1215 notes 84, 85.

Necessity for order of nonsuit or dismissal

Judgment of dismissal can be entered only on order of nonsuit or dismissal.—State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, 300 P. 235, 89 Mont. 531, 82 A.L.R. 1153.

63. Tex.—City of Abilene v. Fryar, Civ.App., 143 S.W.2d 654.

64. Idaho.—Bentley v. Kasiska, 283 P. 897, 49 Idaho 416.

Dismissal "with prejudice"

Or.—Roles v. Roles Shingle Co., 81 P.2d 180, 147 Or. 365.

Recital improperly stricken

Where the cause was actually decided on the merits, it was improper to strike from a judgment reciting that the action "is hereby dismissed on the merits" the words "on the merits."—McElroy v. Board of Education of City of Minneapolis, 238 N.W. 681, 184 Minn. 357.

65. Cal.—Milo v. Prior, 292 P. 647, 210 Cal. 569—Slack v. Metropolitan Trust Co. of California, 48 P.2d 755, 9 Cal.App.2d 87.

W.Va.—Parsons v. Riley, 10 S.E. 806, 33 W.Va. 464.

Effect of phrase "without prejudice"

"Without prejudice" provision in judgment in action tried and submitted on merits was not severable from entire judgment and qualified every part thereof.—Milo v. Prior, 292 P. 647, 210 Cal. 569.

66. N.Y.—Oakes Mfg. Co. v. New York, 99 N.E. 540, 206 N.Y. 226.

33 C.J. p 1215 note 85.

67. Ga.—Morris v. Georgia Power Co., 15 S.E.2d 730, 65 Ga.App. 180.

33 C.J. p 1215 note 86.

68. **Plea of res judicata**

(1) Where defendant's plea of res judicata lies, a judgment of dismissal with prejudice is proper.—Scofield v. Scofield, 3 P.2d 794, 89 Colo. 409.

(2) The view has been taken that, where plaintiff sought recovery on two contracts, one written and the other oral, and a plea of res judicata was properly sustained as to the written contract only, and it appeared that, with respect to the oral contract, the amount claimed was below the jurisdiction of the trial court, the judgment should have been a judgment of dismissal for want of jurisdictions, but that a judgment that plaintiff take nothing by his suit had the same effect.—Baronian v. Sealy Oil Mill & Mfg.

on the merits, a judgment on the merits is not proper,[69] as, for example, where there is a dismissal without any evidence having been offered and without the submission of any issues for determination.[70] Where a judgment of dismissal is granted merely for failure of plaintiff's evidence, in general it is not a judgment on the merits.[71] It has been held, however, that a judgment of dismissal with prejudice, instead of a judgment of nonsuit, may be proper where plaintiff has introduced all evidence that it is possible for him to offer,[72] and that it is permissible to render a judgment for defendant, on deciding the cause on the merits, notwithstanding defendant's motion for nonsuit made at the close of plaintiff's evidence has been denied and defendant has offered no evidence.[73] On dismissal of the action for failure of plaintiff's pleading to state a cause of action, it ordinarily is not proper to grant an affirmative judgment on the merits in favor of defendant.[74]

IV. ARREST OF JUDGMENT

§ 87. Nature of Remedy

Arrest of judgment is the staying of, or refusal to render, a judgment after verdict, for an intrinsic matter appearing on the face of the record, which would render the judgment, if given, erroneous or reversible.

Arrest of judgment is the act of staying a judgment, or refusing to render judgment, in actions at law after verdict, for some matter intrinsic, appearing on the face of the record, which would render the judgment, if given, erroneous or reversible.[75] Usually the purpose of a motion in arrest of judgment is to prevent the entry of judgment on the verdict because of some defect in the record proper.[76] The power to arrest judgment is inherent

Co., Tex.Civ.App., 9 S.W.2d 292, error dismissed.

Failure to remedy defective pleading

Judgment of dismissal with prejudice was proper, where pleadings in second action contained same defects which, in prior action, supreme court had pointed out but which plaintiff did not remedy.—Burson v. Adamson, 25 P.2d 723, 93 Colo. 301.

69. N.Y.—Gaffey v. Newfield, 148 N.Y.S. 772, 163 App.Div. 66—Kilmer Park Const. Co. v. Lehrer, 270 N.Y.S. 156, 150 Misc. 673.
33 C.J. p 1215 note 87 [a].

Dismissal for failure to prosecute suit

Tex.—Zachary v. Overton, Civ.App., 157 S.W.2d 405, error refused—Burton-Lingo Co. v. Lay, Civ.App., 142 S.W.2d 448.

70. Cal.—Campanella v. Campanella, 269 P. 433, 204 Cal. 515.
N.Y.—Freedman v. Sirota, 96 N.Y.S. 812, 109 App.Div. 874—Kruger v. Persons, 64 N.Y.S. 841, 52 App.Div. 50.

Counterclaim

N.Y.—Roach v. Lorence, 150 N.Y.S. 151, 164 App.Div. 733.
33 C.J. p 1215 note 87 [a] (2).

71. N.D.—Williams v. City of Fargo, 247 N.W. 46, 63 N.D. 182.
Tex.—Reeves v. Bomar, Civ.App., 157 S.W. 275.
33 C.J. p 1215 notes 87, 88.

Dismissal with prejudice improper

Wash.—Linton v. State, 52 P.2d 1237, 185 Wash. 97.

In equity

(1) If a bill in equity is not dismissed on the merits, the decree of dismissal should contain the words "without prejudice," in order to reserve to complainant the privilege to assert his right in a subsequent suit.
U.S.—Franz v. Buder, C.C.A.Mo., 11 F.2d 854, certiorari denied Buder v. Franz, 47 S.Ct. 459, 273 U.S. 756, 71 L.Ed. 876.
Fla.—Bishpam v. Mayo, 151 So. 45, 112 Fla. 115.
Md.—Bailey v. Bailey, 30 A.2d 249, 181 Md. 385.
Tex.—Texas Employers' Ass'n v. Cashion, Civ.App., 130 S.W.2d 1112, error refused.
33 C.J. p 1215 note 87 [b].

(2) If the cause has not been heard on the merits and the bill is dismissed under a rule for further proceedings, it is not necessary to state expressly in the decree that it is without prejudice to the rights of complainant.—Bailey v. Bailey, 30 A.2d 249, 181 Md. 385.

72. Wash.—Caldwell v. Williams, 60 P.2d 28, 187 Wash. 501.

Dismissal without requiring proof by defendant

Court, having determined that plaintiff failed to make case, properly entered judgment of dismissal instead of putting defendant to proof.—White-Dulany Co. v. Craigmont State Bank, 279 P. 621, 48 Idaho 100.

73. **Reason for rule**

In upholding judgment for defendant where plaintiff made the claim that he was entitled to judgment in view of defendant's failure to offer evidence after the motion for nonsuit was overruled, the court pointed out that, in ruling on a motion for nonsuit, all testimony introduced by plaintiff must be taken as true, whereas in deciding the case on the merits, no such rule prevails.—Price v. Mason-McDuffie Co., 122 P.2d 971, 50 Cal.App.2d 320.

74. Mont.—Teters v. Montana Eastern Pipe Line Co., 159 P.2d 515.
33 C.J. p 1144 note 72.

Where contract construed

Where complaint set out contract relied on by plaintiff in hæc verba, court was obliged to construe it in measuring sufficiency of complaint, and having found that complaint stated no cause of action because contract was not open to construction contended for by plaintiff, properly entered judgment for defendants on merits, instead of order dismissing action.—Teters v. Montana Eastern Pipe Line Co., supra.

75. Ind.—Smith v. Dodds, 35 Ind. 452.
Tenn.—Corpus Juris quoted in Speer v. Pierce, 77 S.W.2d 77, 78, 18 Tenn.App. 351.
34 C.J. p 31 note 2.

Other definitions

Ind.—Smith v. Dodds, 35 Ind. 452, 459.

In nature of general demurrer

"At common law, a motion in arrest of judgment was in the nature of a belated general demurrer based upon unamendable defects appearing upon the face of the pleadings."—Grogan v. Deraney, 143 S.E. 912, 913, 38 Ga.App. 287.

76. Ga.—Underwood v. D. C. Heath & Co., 12 S.E.2d 464, 64 Ga.App. 180—Turner v. Shackleford, 158 S.E. 439, 43 Ga.App. 271—Grogan v. Deraney, 143 S.E. 912, 38 Ga. App. 287.
Md.—Phoebus v. Sterling, 198 A. 717, 174 Md. 394.
Mo.—Stephens v. D. M. Oberman Mfg. Co., 70 S.W.2d 899, 334 Mo. 1078—Porter v. Chicago, R. & Q.

in courts of general common-law jurisdiction,[77] but in some jurisdictions the remedy by arrest of judgment no longer prevails in civil cases,[78] and the use of this remedy is sometimes regulated or restricted by statute or rules of court.[79]

Other motions or remedies compared and distinguished. A motion for a new trial differs from a motion in arrest of judgment in that the motion for a new trial is based on the facts and the rulings of the court, while the motion in arrest is based on the record,[80] and such motions are also distinguishable with respect to the purpose of each.[81] A motion for a venire de novo has been compared with, and distinguished from, a motion in arrest of judgment,[82] from a motion to set aside a judgment,[83] and also from an independent proceeding to annul a judgment for fraud.[84] A motion in arrest does not have the effect of a demurrer to the evidence.[85] A motion for judgment non obstante veredicto has been distinguished from a motion in arrest, as discussed supra § 59.

§ 88. Grounds of Arrest

In general, a judgment may be arrested only for errors and defects which are apparent on the face of the record and which are of a substantial nature.

As a general rule, judgment can be arrested only for errors or defects which are apparent on the face of the record[86] or because of some matter which properly should appear of record but does not.[87]

R. Co., 28 S.W.2d 1035, 325 Mo. 381—Stevens v. D. M. Oberman Mfg. Co., 79 S.W.2d 516, 229 Mo.App. 627.

77. Ind.—Pillsbury Flour Mills Co. v. Walsh, 110 N.E. 96, 60 Ind.App. 76.
34 C.J. p 31 note 3.

78. Ark.—Collier v. Newport Water, Light & Power Co., 139 S.W. 635, 100 Ark. 47, Ann.Cas.1913D 458.
34 C.J. p 31 note 4.

79. Ga.—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287.

Determination as to character of motion

Where the statute which provides for motion in arrest does not define its function, the common law must be looked to for the purpose of determining the character of the motion.—City of St. Louis v. Senter Commission Co., 102 S.W.2d 103, 340 Mo. 633.

80. Ga.—Underwood v. D. C. Heath & Co., 12 S.E.2d 464, 64 Ga.App. 180—Turner v. Schackleford, 158 S.E. 439, 43 Ga.App. 271—Maddox Coffee Co. v. McHan, 95 S.E. 736, 22 Ga.App. 198—Garfield Oil Mills Co. v. Stephens, 85 S.E. 983, 16 Ga. App. 655.
Ill.—Wallace v. Curtice, 36 Ill. 156.
34 C.J. p 31 note 2 [a]—46 C.J. p 65 note 5.

81. Ga.—Underwood v. D. C. Heath & Co., 12 S.E.2d 464, 64 Ga.App. 180—Turner v. Schackleford, 158 S.E. 439, 43 Ga.App. 271.

82. Ind.—Phillips v. Gammon, 124 N.E. 699, 188 Ind. 497.
64 C.J. p 1102 note 71.
Venire de novo in general see the C.J.S. title Trial § 519, also 64 C.J. p 1103 notes 64–88.

83. Mo.—Gilstrap v. Felts, 50 Mo. 428.
34 C.J. p 31 note 2 [a].

Motion treated as one in arrest

Mo.—Sutton v. Anderson, 31 S.W.2d 1026, 326 Mo. 304.
N.J.—Morris Plan Industrial Bank of New York v. Kemeny, 8 A.2d 769, 123 N.J.Law 389.

Time for motion

(1) Under the terms of some statutes, a motion in arrest of judgment is distinguishable from a statutory motion to set aside a judgment in that the motion in arrest must be made during the term at which the judgment is obtained, while a motion to set aside may be made at any term within the statute of limitations.—Artope v. Barker, 74 Ga. 462—J. S. Schoffield's Sons Co. v. Vaughan, 150 S.E. 569, 40 Ga.App. 568—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287—Garfield Oil Mills v. Stephens, 85 S.E. 983, 16 Ga. App. 655—Maddox Coffee Co. v. McHan, 95 S.E. 736, 22 Ga.App. 198.

(2) It has been stated that a petition to set aside a verdict and judgment based on alleged defects appearing on the face of the record was in the nature of a motion in arrest of judgment.—Oliver v. Fireman's Ins. Co., 155 S.E. 227, 42 Ga.App. 99.

84. Ga.—Simpson v. Bradley, 5 S.E.2d 893, 189 Ga. 316, mandate conformed to 6 S.E.2d 424, 61 Ga.App. 495, certiorari denied 60 S. Ct. 1105, 310 U.S. 643, 84 L.Ed. 1410, rehearing denied 61 S.Ct. 56, 311 U.S. 725, 85 L.Ed. 472.

85. Mo.—Span v. Jackson, Walker Coal & Mining Co., 16 S.W.2d 190, 322 Mo. 158.

86. D.C.—Walls v. Guy, 4 F.2d 444, 55 App.D.C. 251.
Fla.—Peavy-Wilson Lumber Co. v. Baker, 4 So.2d 333, 148 Fla. 296—Adams v. Elliott, 174 So. 731, 128 Fla. 79—Hull v. Laine, 173 So. 701, 127 Fla. 433—Harrington v. Bowman, 136 So. 229, 102 Fla. 339, modified on other grounds 143 So. 651, 106 Fla. 86.
Ill.—Smithers v. Henriquez, 15 N.E. 2d 499, 368 Ill. 588—Welch v. City of Chicago, 154 N.E. 226, 323 Ill. 498.
Mass.—Vallavanti v. Armour & Co., 162 N.E. 689, 264 Mass. 337—Pizer v. Hunt, 148 N.E. 801, 253 Mass. 321.
Mo.—Span v. Jackson, Walker Coal & Mining Co., 16 S.W.2d 190, 322 Mo. 158—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091—Burman v. Vezeau, 85 S.W.2d 217, 231 Mo. App. 1109.
N.J.—Van Demark v. Sartorius, 7 A. 2d 168, 122 N.J.Law 503—Paradise v. Great Eastern Stages, 176 A. 711, 114 N.J.Law 365.
Tenn.—Scott v. National Life & Accident Ins. Co., 64 S.W.2d 53, 16 Tenn.App. 31—Earheart v. Hazlewood Bros., 15 Tenn.App. 454—Highland Coal & Lumber Co. v. Cravens, 8 Tenn.App. 419—Southern Ry. Co. v. Bruback, 6 Tenn. App. 493—**Corpus Juris cited in** Mosley v. Robert Orr & Co., 6 Tenn.App. 243, 245—Wood v. Imperial Motor Co., 5 Tenn.App. 246—Elbinger Shoe Co. v. Thomas, 1 Tenn.App. 161.
Vt.—Raithel v. Hall, 124 A. 586, 97 Vt. 469.
34 C.J. p 31 note 7.

Motion in arrest is a proper method for attacking errors appearing on the face of the record proper.—La Rue v. Bloch, 255 S.W. 321, 215 Mo. App. 501.

In Connecticut

(1) Strictly speaking, motions in arrest of judgment are for matters appearing on the record.—Pickens v. Miller, 177 A. 573, 119 Conn. 553—Greco v. Keenan, 161 A. 100, 115 Conn. 704—34 C.J. p 31 note 7 [c] (1).

(2) It has been stated that a motion, called a motion in arrest, lies to set aside the verdict for matters dehors the record.—Hamilton v. Pease, 38 Conn. 115—34 C.J. p 31 note 7 [c].

87. Ill.—Cella v. Chicago & W. I. R. Co., 75 N.E. 373, 217 Ill. 326.
34 C.J. p 31 note 8.

A judgment after verdict can be arrested only for substantial faults[88] and, where substantial justice has been done, and the reasons urged are purely technical, a motion in arrest will not be granted.[89] It is a general rule that judgment will not be arrested for mere matters of form,[90] clerical errors,[91] or defects which are cured by the verdict or by the finding of the court[92] or by the admissions of the adverse party,[93] or which have been waived by going to trial.[94] It has been stated broadly that, as a general rule, judgment cannot be arrested if it appears on the whole record for which party judgment should be given.[95]

In some jurisdictions the grounds for arrest of judgment are to a greater or less extent covered by statute and local rules.[96]

§ 89. —— Jurisdiction and Venue

Want of jurisdiction of the subject matter is ground for arrest of judgment.

A judgment may be arrested where the court had no jurisdiction,[97] provided the want of jurisdiction is apparent on the record.[98] In general, an objection based on alleged want of jurisdiction over the person of defendant is not available on a motion in arrest, where there has been a general appearance and pleading to the merits by him.[99] A wrong venue merely has been held not ground for arresting the judgment,[1] but, in an action against several defendants, only one of whom is a resident of the county in which the action is brought, where a verdict is returned against the nonresident defendants only, judgment against such defendants may and must be arrested.[2]

§ 90. —— Process

A fatal defect in the writ or process may be ground for arrest of judgment, but a mere irregularity, a clerical mistake, or a defect which is waived or cured by subsequent action, has been held not ground for arrest of judgment.

A fatal defect in the writ or process by which the suit is begun may be taken advantage of by motion in arrest,[3] but not a mere irregularity or clerical mistake in the process,[4] or such a defect as may be waived by appearance and submitting to trial[5] or such as is cured by the verdict[6] or judgment.[7] Failure duly to serve defendant with proc-

88. Ill.—Pittsburg, C. C. & St. L. R. Co. v. City of Chicago, 144 Ill. App. 293, affirmed 89 N.E. 1022, 242 Ill. 178, 134 Am.S.R. 316, 44 L.R.A., N.S., 858.
34 C.J. p 32 note 16.

89. Tenn.—Waterhouse v. Sterchi, 7 Tenn.Civ.A. 483.

90. Mo.—Stid v. Missouri Pac. R. Co., 109 S.W. 663, 211 Mo. 411.
34 C.J. p 32 note 9.

91. Ill.—Shipherd v. Field, 70 Ill. 438.
34 C.J. p 32 note 10.

92. Ind.—Powell v. Bennett, 30 N.E. 518, 131 Ind. 465.
34 C.J. p 32 note 11.

93. Ga.—Mobley v. Hansen, 106 S.E. 582, 26 Ga.App. 522.

94. Mo.—Howell v. Sherwood, 147 S. W. 810, 242 Mo. 513.
34 C.J. p 32 note 13.

95. R.I.—Cranston Prob. Ct. v. Sprague, 3 R.I. 205.
34 C.J. p 32 note 14.

96. Fla.—Harrington v. Bowman, 136 So. 229, 102 Fla. 339, modified on other grounds 143 So. 651, 106 Fla. 86.
Ga.—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636—Wofford v. Vandiver, 34 S.E.2d 579, 72 Ga.App. 623—Smith v. Franklin Printing Co., 187 S.E. 904, 54 Ga.App. 904.
34 C.J. p 32 note 17.

Defects before verdict

(1) Under the terms of some statutes a judgment may not be arrested for any defect in the record that is aided by the verdict or amendable as a matter of form.
Ga.—Auld v. Schmelz, 34 S.E.2d 860, 199 Ga. 633—Wrenn v. Allen, 180 S.E. 104, 180 Ga. 613—Smith v. Franklin Printing Co., 187 S.E. 904, 54 Ga.App. 904.
Md.—Hajewski v. Baltimore County Com'rs, 40 A.2d 316.

(2) A statutory provision that a judgment shall not be arrested for a cause existing before the verdict or finding, unless such cause affects the jurisdiction of the court does not prevent relief of surety on poor debtor's recognizance with respect to amount for which execution should issue on a judgment entered on debtor's default after his discharge in bankruptcy.—Di Ruscio v. Popoli, 169 N.E. 548, 269 Mass. 482.

97. Ind.—McClure v. White, 9 Ind. 208.
1 C.J. p 36 note 23—15 C.J. p 826 note 7—34 C.J. p 32 note 19.

Right to arrest not shown

In an action to establish and construe a will and to enjoin defendants from further contesting such will, which was an action of equitable jurisdiction and, in effect, an action to quiet title of plaintiffs as devisees and legatees, as well as an action to construe the will, it was held that, where it was necessary to determine heirship of certain parties in order to determine such parties' relation to the action, and their rights under the will, defendants and contestants were not entitled to have the judgment arrested because of the alleged want of jurisdiction of the court to determine heirship, especially where defendants were not harmed by such determination.—Sager v. Moltz, 139 N.E. 687, 80 Ind.App. 122.

98. Mass.—Roberts v. Fogg, 138 N. E. 333, 244 Mass. 310.

99. Ga.—Olshine v. Bryant, 189 S.E. 572, 55 Ga.App. 90.
34 C.J. p 33 note 21.
Effect of general appearance with respect to:
Jurisdiction of the person in general see Appearances § 17.
Validity of judgment see supra § 26.

1. Mass.—Gilbert v. Nantucket Bank, 5 Mass. 97.
34 C.J. p 33 note 22.

2. Ga.—Warren v. Rushing, 87 S.E. 775, 144 Ga. 612—Pickron v. Garrett, App., 35 S.E.2d 540—Turner v. Shackelford, 145 S.E. 913, 39 Ga. App. 49—Christian v. Terry, 138 S.E. 244, 36 Ga.App. 815.

3. Ga.—Neal v. Gordon, 60 Ga. 112—Hartridge v. McDaniel, 20 Ga. 398.

4. Mass.—Prescott v. Tufts, 7 Mass. 209.
34 C.J. p 33 note 24.

5. Mass.—Foot v. Knowles, 4 Metc. 386.
34 C.J. p 33 note 25.

6. N.C.—Dudley v. Carmolt, 5 N.C. 339.

7. Ga.—Love v. National Liberty Ins. Co., 121 S.E. 648, 157 Ga. 259.

ess may furnish ground for a motion of this kind[8] unless service of process is waived.[9]

§ 91. —— Parties

Motions in arrest of judgment based on misnomer, misjoinder, or nonjoinder of parties ordinarily will be denied.

Motions in arrest of judgment based on a defect,[10] such as a misjoinder,[11] misnomer,[12] or nonjoinder[13] of parties, ordinarily will be denied. Where misjoinder of parties, however, is apparent on the face of the record, it may be ground for arresting the judgment,[14] and a like rule applies where there is a nonjoinder of a necessary party.[15] As a general rule judgment may be arrested where the record shows that a joint owner or joint obligee or obligor has not been joined,[16] but, under some statutes, this may be a defect curable by verdict so as to warrant overruling a motion in arrest.[17]

Death of party. The death of one of several plaintiffs or defendants before judgment, being matter dehors the record, is not properly matter to be moved in arrest of judgment.[18]

§ 92. —— Pleadings in General

a. General considerations
b. Misjoinder of causes of action
c. Joinder of good and bad counts

a. General Considerations

Failure of plaintiff's pleading to allege facts essential to his cause of action may be ground for arrest of judgment.

Except where such defects are amendable, cured, or waived, as discussed infra this section, if a declaration or complaint entirely omits the allegation of facts essential to plaintiff's right of recovery, or plaintiff's title or cause of action appears from the declaration itself to be defective and bad in law, so that his pleadings could not support a judgment in his favor, the judgment may be arrested on motion of defendant,[19] even though the objection is

8. Mo.—State v. Fisher, 130 S.W. 35, 230 Mo. 325, Ann.Cas.1912A 970.
34 C.J. p 33 note 27.

Failure to serve one of several joint defendants
Fla.—Harrington v. Bowman, 143 So. 651, 106 Fla. 86.

9. Ga.—Hendrix v. Cawthorn, 71 Ga. 742.

Matters not constituting waiver
It has been held that failure to serve one of several joint defendants is not waived by the other defendants merely by joining issue or failing to object before filing motion in arrest.—Harrington v. Bowman, 143 So. 651, 106 Fla. 86.

10. Tenn.—Southern Ry. Co. v. Brubeck, 6 Tenn.App. 493.
33 C.J. p 33 note 29.

11. D.C.—F. H. Smith Co. v. Low, 18 F.2d 817, 57 App.D.C. 167.
Ga.—Love v. National Liberty Ins. Co., 121 So. 648, 157 Ga. 259.
Iowa.—Miller v. Keokuk & D. M. R. Co., 16 N.W. 567, 63 Iowa 680.
34 C.J. p 33 note 30.

Parties and causes of action
It has been held that, where there is a misjoinder both of causes of action and of parties, the defect may be taken advantage of by motion in arrest, if facts appear in the petition.—McPherson v. Commercial Building & Securities Co., 218 N.W. 306, 206 Iowa 562.

12. Me.—State v. Knowlton, 70 Me. 200.
Tex.—Wieser v. Thompson Grocery Co., Civ.App., 8 S.W.2d 1100.
34 C.J. p 33 note 31.

13. Tex.—De Perez v. Everett, 11 S. W. 388, 73 Tex. 431.
1 C.J. p 127 note 90, p 129 note 8, p 130 note 12—30 C.J. p 1046 note 92—34 C.J. p 33 notes 32, 33 [a].

14. Ala.—Poole v. Griffith, 112 So. 447, 216 Ala. 120.
Mass.—Clough v. Cromwell, 149 N.E. 686, 254 Mass. 132.
30 C.J. p 1046 note 91—34 C.J. p 33 note 34.

15. Mo.—Fenske v. Epperly, 282 S. W. 81, 222 Mo.App. 38.
1 C.J. p 125 note 80, p 127 note 91, p 129 note 9—34 C.J. p 34 note 35.

16. Fla.—Langford v. King Lumber & Manufacturing Co., 181 So. 395, 132 Fla. 143.
N.J.—Ordinary of State v. Bastian, 5 A.2d 463, 17 N.J.Misc. 105.
1 C.J. p 129 note 10—9 C.J. p 89 note 1, p 92 note 56—34 C.J. p 33 note 33.

17. Ga.—Henderson v. Ellarbee, 131 S.E. 524, 35 Ga.App. 5.

18. Ark.—Crow v. State, 23 Ark. 684.
34 C.J. p 34 note 36.

19. Ala.—Alabama Power Co. v. Curry, 153 So. 634, 228 Ala. 444.
Fla.—Dudley v. Harrison, McCready & Co., 173 So. 820, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338.
Ga.—Auld v. Schmelz, 34 S.E.2d 860, 199 Ga. 633—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636—Wrenn v. Allen, 180 S.E. 104, 180 Ga. 613—Smith v. Franklin Printing Co., 187 S.E. 904, 54 Ga.App. 385.
Ill.—Scott v. Freeport Motor Cas. Co. of Freeport, 58 N.E.2d 618, 324 Ill.App. 529, reversed on other grounds 64 N.E.2d 542, 392 Ill. 332—Waxenberg v. J. J. Newberry Co., 23 N.E.2d 574, 302 Ill.App. 128—Randall Dairy Co. v. Pevely Dairy Co., 274 Ill.App. 474—Laughlin v. North America Benefit Corporation, 244 Ill.App. 391—Misek v. Village of La Grange, 239 Ill. App. 360—Harris v. Piggly Wiggly Stores, 236 Ill.App. 392.
Ind.—Sager v. Moltz, 139 N.E. 687, 80 Ind.App. 122—City of Lafayette v. West, 87 N.E. 550, 43 Ind.App. 325.
Iowa.—Millard v. Herges, 236 N.W. 89, 213 Iowa 279, modified on other grounds 238 N.W. 604.
Me.—Milo v. Milo Water Co., 152 A. 616, 129 Me. 463.
Mo.—Span v. Jackson, Walker Coal & Mining Co., 16 S.W.2d 190, 322 Mo. 158—Gannaway v. Pitcairn, App., 109 S.W.2d 78.
Tenn.—Curtis v. Kyte, 106 S.W.2d 234, 21 Tenn.App. 115.
34 C.J. p 34 note 38—19 C.J. p 1212 note 73 [a].
Sufficiency of defenses as ground for motion see infra § 96.

Joint liability
In suit on note against defendants jointly, where pleadings do not show joint liability on face, motion in arrest of judgment on joint verdict should be sustained.—Prosser v. Orlando Bank & Trust Co., 111 So. 516, 93 Fla. 177.

Action against married woman
Where the liability of a married woman is not shown in the pleadings, the defect may be taken advantage of by motion to arrest judgment.—Sheppard v. Kindle, 8 Humphr., Tenn., 80—30 C.J. p 1046, note 89.

made for the first time by the motion in arrest,[20] and, under some statutes, motions in arrest are predicated solely on defects in the pleading.[21] Judgment will not be arrested for any defect in the pleadings which would not have been fatal on general demurrer,[22] but not every defect available on demurrer will warrant arresting the judgment; greater strictness is shown on a motion of this kind than on a demurrer,[23] the motion being denied if the issue joined is such that the court can presume that the defects or omissions were supplied by proof at the trial.[24] The judgment cannot be arrested because the complaint fails to anticipate and negative defenses.[25] The question of the propriety of allowing an amendment to be made in the pleadings cannot be raised on motion in arrest.[26] Duplicity in the pleadings is not ground for arrest,[27] and mere error or irregularity with respect to filing or serving pleadings is not ground for arresting the judgment.[28] Taking issue on an immaterial allegation is not ground for arrest of judgment.[29]

Necessity and effect of demurrer. In some jurisdictions the fact that defendant does not demur to plaintiff's pleading does not necessarily preclude a motion in arrest based on defects in such pleading,[30] but in other jurisdictions, sometimes by virtue of statutory provision, judgment will not be arrested for any defect that should have been objected to by demurrer.[31] particularly if enough appears to show for whom the judgment should be rendered.[32] According to some cases, a motion in arrest of judgment will not be entertained after the overruling of a demurrer to the declaration,[33] at least where the motion is based on any exceptions which might have been considered on the demurrer,[34] and a fortiori matter which was objected to by demurrer and decided on cannot afterward be urged in arrest of judgment.[35] It has been held or recognized, however, that a motion in arrest may lie, even though the objection relied on was raised and decided on a prior demurrer,[36] or, at least, that the motion may lie where the defect on

20. Mo.—Mehlstaub v. Michael, 287 S.W. 1079, 221 Mo.App. 807.

21. Iowa.—Millard v. Herges, 236 N.W. 89, 213 Iowa 279, modified on other grounds 238 N.W. 604.

22. Mo.—Span v. Jackson, Walker Coal & Mining Co., 16 S.W.2d 190, 322 Mo. 158—Woods v. State, 10 Mo. 438.
Vt.—Johnson v. Hardware Mut. Casualty Co., 1 A.2d 817, 109 Vt. 481—Raithel v. Hall, 124 A. 586, 97 Vt. 469.
34 C.J. p 35 note 42.

23. U.S.—Louisville & N. R. Co. v. Ward, Ill., 61 F. 927, 10 C.C.A. 166.
Ga.—Rollins v. Personal Finance Co., 175 S.E. 609, 49 Ga.App. 365.
Ill.—Randall Dairy Co. v. Pevely Dairy Co., 274 Ill.App. 474.
Ind.—City of Lafayette v. West, 87 N.E. 550, 43 Ind.App. 325.
34 C.J. p 34 note 41, p 35 notes 43, 44, 45 [a].
Liberal construction of pleadings see infra § 98.

Reason for rule

Because of the doctrine of aider, waiver, and amendments, declaration which might be bad as against demurrer is not necessarily considered bad on motion in arrest of judgment.—Pillet v. Ershick, 126 So. 784, 99 Fla. 483.

24. N.H.—Smith v. Eastern R. Co., 35 N.H. 356.
46 C.J. p 35 note 44.

25. Tenn.—Allen v. Word, 6 Humphr. 284.
34 C.J. p 36 note 51.

26. Md.—Le Strange v. State, 58 Md. 26.

27. Mo.—Pickering v. Mississippi Valley Nat. Tel. Co., 47 Mo. 457.
34 C.J. p 36 note 54.

28. Fla.—Ball v. Holland, 79 So. 635, 76 Fla. 268.
34 C.J. p 36 note 55.

29. Conn.—Robbins v. Wolcott, 19 Conn. 356.
34 C.J. p 36 note 56.

30. Ga.—Harbin v. Hunt, 105 S.E. 842, 151 Ga. 60—Rubenstein v. Lee, 192 S.E. 85, 56 Ga.App. 49.
34 C.J. p 36 note 59 [b].

31. Ind.—Wright v. J. R. Watkins Co., 159 N.E. 761, 86 Ind.App. 695—Ernsting v. Stegman, 156 N.E. 520, 86 Ind.App. 213—Sager v. Moltz, 139 N.E. 687, 80 Ind.App. 122—Malone v. Kitchen, 137 N.E. 562, 79 Ind.App. 119.
34 C.J. p 35 note 45.

Departure

Where replication and bill of particulars set forth facts which were in accordance with subsequent proof, but which were at variance with facts stated in the complaint, and there was no demurrer, the judgment was not subject to arrest.—Belisomo v. Ceresa, 251 P. 531, 80 Colo. 325.

32. Ohio.—Jordan v. James, 5 Ohio 88.
35 C.J. p 35 note 45.

33. Colo.—Freas v. Engelbrecht, 3 Colo. 377.
34 C.J. p 36 note 57.

34. Vt.—White v. Central Vermont R. Co., 89 A. 618, 87 Vt. 330, affirmed Central Vermont R. Co. v. White, 35 S.Ct. 865, 238 U.S. 507, 59 L.Ed. 1433, Ann.Cas.1916B 252.
34 C.J. p 36 note 57.

In Illinois

(1) The rule stated in the text has been recognized.—Langan v. Enos Fire Escape Co., 84 N.E. 267, 233 Ill. 308—Reed v. Zellers, 273 Ill.App. 18—34 C.J. p 36 note 57, p 38 note 70 [b].

(2) According to some cases, however, the objection that the declaration is so totally defective that it does not support the judgment or that the declaration does not state a cause of action may be availed of by a motion in arrest, even after a demurrer has been overruled and defendant has pleaded over.—Grimmer v. Friederich, 45 N.E. 498, 164 Ill. 245—Stearns v. Cope, 109 Ill. 340—Randall Dairy Co. v. Pevely Dairy Co., 274 Ill.App. 474.

In Indiana

(1) The rule has been recognized in view of a statutory provision.—Hedekin Land & Improvement Co. v. Campbell, 112 N.E. 97, 184 Ind. 643—34 C.J. p 35 note 45.

(2) In some earlier cases, however, the view was taken that a motion in arrest would lie even though a prior demurrer had been overruled.—Stewart v. Terre Haute & I. R. Co., 2 N.E. 208, 103 Ind. 44—Newman v. Perrill, 73 Ind. 153.

35. Md.—Davis v. Carroll, 18 A. 965, 71 Md. 568.
34 C.J. p 36 note 58.

36. Iowa.—Decatur v. Simpson, 88 N.W. 839, 115 Iowa 348.
34 C.J. p 36 note 59.

which it is based was not raised by the prior demurrer.[37]

Defects amendable, waived, or cured. If the defect in the pleadings is merely formal and therefore amendable, or such as may be waived by going to trial without objection, or consists only in a faulty or inartificial manner of setting out a title or cause of action or defense which appears to be good in law, it cannot be reached by motion in arrest.[38] A motion in arrest of judgment will not be granted because of any failure or defect in the pleadings which could have been amended, the amendments being considered as made for the purposes of the motion,[39] or for any defect or omission which may be considered as having been waived by defendant,[40] or cured by the plea or answer[41] or by the verdict or finding,[42] the general rule with regard to omissions being that although the petition may be defective, if it appears that the verdict could not have been given or judgment rendered without proof of the matter omitted to be stated, the defect will be cured or waived and the judgment will not be arrested.[43] According to some cases, however, if a fact essential to plaintiff's right of action is neither expressly stated nor necessarily implied from the facts which are stated, a verdict will not cure the defect, and judgment will be arrested.[44]

37. Tenn.—Hydes Ferry Turnpike Co. v. Yates, 67 S.W. 69, 108 Tenn. 428.
34 C.J. p 36 note 59.

38. Iowa.—Kirchner v. Dorsey & Dorsey, 284 N.W. 171, 226 Iowa 283 —**Corpus Juris cited in** Pomerantz v. Pennsylvania-Dixie Cement Corporation, 287 N.W. 443, 444, 212 Iowa 1007—Ellers v. Frieling, 234 N.W. 275, 211 Iowa 841—Nelson v. Higgins, 218 N.W. 509, 206 Iowa 672.
Mo.—Mehlstaub v. Michael, 287 S. W. 1079, 221 Mo.App. 807.
34 C.J. p 34 note 41.

Negligence

(1) A petition containing a general averment of negligence is good as against a motion in arrest.
Ind.—City of Lafayette v. West, 87 N.E. 550, 43 Ind.App. 325.
Iowa.—Kirchner v. Dorsey & Dorsey, 284 N.W. 171, 226 Iowa 283.

(2) A general averment of negligence in doing or omitting a particular act, unless it is too general to give defendants reasonable notice of negligence charged, is good as against a motion in arrest of judgment, since under those allegations facts constituting negligence may be shown.—Bates v. City of McComb, 179 So. 737, 181 Miss. 336.

(3) In an action for personal injuries based on alleged negligence of defendant a declaration which states facts fairly raising a question for decision by a jury on the existence of a duty, violation of that duty, injury to plaintiff because of that violation, and due care by plaintiff is a sufficient declaration as against a motion in arrest of judgment.—Paris v. East St. Louis Ry. Co., 275 Ill.App. 241.

Action of ejectment

Motion in arrest of judgment because the ejectment against the casual ejector was wrongfully entitled was overruled where the declaration to which the real defendant pleaded was properly entitled.—Huidekoper v. Burrus, Pa., 12 F.Cas.No.6,849, 1 Wash.C.C. 257.

Declaration, petition, or complaint sufficient as against motion in arrest

Ala.—Drummonds v. Donahoo, 114 So. 277, 22 Ala.App. 215.
Del.—Terry v. Pennsylvania R. Co., 156 A. 787, 5 W.W.Harr. 1.
Fla.—Pillet v. Ershick, 126 So. 784, 99 Fla. 483.
Ga.—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636—Rubenstein v. Lee, 192 S.E. 85, 56 Ga.App. 49.
Ill.—Connett v. Winget, 30 N.E.2d 1, 374 Ill. 531, mandate conformed to 34 N.E.2d 878, 310 Ill.App. 533 —Powell v. Myers Sherman Co., 32 N.E.2d 663, 309 Ill.App. 12—Cohen v. Fineman, 13 N.E.2d 848, 294 Ill.App. 606—Paris v. East St. Louis Ry. Co., 275 Ill.App. 241.
Ind.—Wright v. J. R. Watkins Co., 159 N.E. 761, 86 Ind.App. 695.
Ky.—Phillips v. Phillips, 7 B.Mon. 268.
Mo.—Mehlstaub v. Michael, 287 S.W. 1079, 221 Mo.App. 807.
Vt.—Raithel v. Hall, 124 A. 586, 97 Vt. 469.

39. Ga.—Auld v. Schmelz, 34 S.E. 2d 860, 199 Ga. 633—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636 —Wrenn v. Allen, 180 S.E. 104, 180 Ga. 613—Pattillo v. Mangum, 177 S.E. 604, 179 Ga. 784—Smith v. Franklin Printing Co., 187 S.E. 904, 54 Ga.App. 385—Oliver v. Fireman's Ins. Co., 155 S.E. 227, 42 Ga.App. 99.
Iowa.—Baehr-Shive Realty Co. v. Stoner-McCray System, 268 N.W. 53, 221 Iowa 1186.
34 C.J. p 38 note 69—30 C.J. p 1046 note 89 [b].

Informal amendment

U.S.—U. S. v. Trollinger, C.C.A.Va., 81 F.2d 167, certiorari dismissed Trollinger v. U. S., 57 S.Ct. 757, 299 U.S. 617, 81 L.Ed. 455.
Ga.—Guthrie v. Spence, 191 S.E. 188, 55 Ga.App. 669—Oliver v. Fireman's Ins. Co., 155 S.E. 227, 42 Ga.App. 99—Henderson v. Ellarbee, 131 S.E. 524, 35 Ga.App. 5.

Damages

Where a general cause of action is set out and not demurred to, the judgment will not be arrested, although the elements of damages are insufficiently alleged, since the defect was amendable.—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636—Moss v. Fortson, 27 S.E. 745, 99 Ga. 496.

40. Ind.—Wright v. J. R. Watkins Co., 159 N.E. 761, 86 Ind.App. 695.
Iowa.—Nelson v. Higgins, 218 N.W. 509, 206 Iowa 672.
Mo.—Gannaway v. Pitcairn, App., 109 S.W.2d 78.
Tenn.—Life & Casualty Ins. Co. of Tennessee v. City of Nashville, 137 S.W.2d 287, 175 Tenn. 688.
34 C.J. p 38 note 70.

41. Ohio.—McFeely v. Vantyle, 2 Ohio 197.
34 C.J. p 34 notes 38, 39.

42. U.S.—New York Underwriters' Ins. Co. v. Portwood, C.C.A.Mo., 50 F.2d 897.
Ga.—Auld v. Schmelz, 34 S.E.2d 860, 199 Ga. 633—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636—Wrenn v. Allen, 180 S.E. 104, 180 Ga. 613 —Pattillo v. Mangum, 177 S.E. 604, 179 Ga. 784—Rubenstein v. Lee, 192 S.E. 85, 56 Ga.App. 49—Smith v. Franklin Printing Co., 187 S.E. 904, 54 Ga.App. 385—Rollins v. Personal Finance Co., 175 S.E. 609, 49 Ga.App. 365—McBride v. Sconyers, 167 S.E. 809, 46 Ga.App. 235.
Me.—Inhabitants of Town of Milo v. Milo Water Co., 152 A. 616, 129 Me. 463.
Tenn.—Curtis v. Kyte, 106 S.W.2d 234, 21 Tenn.App. 115.
24 C.J. p 830 note 74—34 C.J. p 38 note 71.

43. Mo.—Gannaway v. Pitcairn, App., 109 S.W.2d 78.
34 C.J. p 39 note 72.

44. Tenn.—Curtis v. Kyte, 106 S.W. 2d 234, 21 Tenn.App. 115.
34 C.J. p 39 note 73.

b. Misjoinder of Causes of Action

Subject to various qualifications and limitations, a misjoinder of causes of action may be ground for arrest of judgment.

Subject to statutory provisions changing or qualifying the rule,[45] a misjoinder of counts or causes of action, with damages assessed entire, is ground for arresting the judgment,[46] but it is otherwise where one of the counts or causes so joined is stricken out or withdrawn from the jury,[47] or where the damages have been separately assessed on the several counts.[48] Where the verdict rests wholly on one count, the judgment will not be arrested for misjoinder of counts.[49] Under some statutes, where there are several causes of action stated in one count, the objection must be taken by demurrer or motion to strike, or it will be considered waived or cured by verdict and cannot be raised by motion in arrest of judgment.[50]

c. Joinder of Good and Bad Counts

Where a general verdict for the plaintiff is taken on several counts, judgment will not be arrested if there is a good count to which the verdict can be applied.

At common law, especially in various earlier cases, it has been held or recognized that, if a general verdict for plaintiff is taken on several counts in plaintiff's pleading, and one of the counts is fatally defective, the judgment will be arrested on motion, although other counts not subject to objection were covered by the verdict.[51] Under the rule now quite generally prevailing, however, either by virtue of statute or judicial decision, the judgment will not be arrested if there is one good count to which the verdict can be applied, that is, a motion in arrest will not prevail unless all the counts are so defective as not to have been cured by the verdict;[52] and a like rule applies where the case is tried before the court.[53]

§ 93. —— Variance

As a general rule a motion in arrest of judgment may not be based on the ground of an alleged variance.

As a general rule a motion in arrest of judgment may not be based on the ground of an alleged variance,[54] either where the variance is between the writ or præcipe and the declaration or complaint,[55] or between the declaration or complaint and the proof.[56] There apparently is authority for the view that the objection that a judgment does not conform to the verdict should be raised by a motion in arrest.[57]

§ 94. —— Jury

A judgment may be arrested on the ground that the jury was illegally constituted, but not, as a general rule, for objections with respect to qualification or competency of jurors.

A judgment may be arrested where the jury was illegally constituted,[58] but not, as a general rule,

45. Ill.—Randall Dairy Co. v. Pevely Dairy Co., 274 Ill.App. 474.
34 C.J. p 36 note 60.

46. Del.—Knight v. Industrial Trust Co., 193 A. 723, 8 W.W.Harr. 480.
Pa.—Pettit v. Sanger, 2 Pearson 84.
34 C.J. p 36 note 61, p 37 note 67 [a] (2).

Misjoinder both of causes of action and of parties

It has been stated that misjoinder both of causes of action and parties may be taken advantage of by motion in arrest if facts appear in petition.—McPherson v. Commercial Building & Securities Co., 218 N.W. 306, 206 Iowa 562.

47. Mass.—Richmond v. Whittlesey, 2 Allen 230.
34 C.J. p 37 note 62.

48. Ky.—Louisville & Portland Canal Co. v. Rowan, 4 Dana 606.
Vt.—Haskell v. Bowen, 44 Vt. 579.

Cure of defect

On a motion in arrest of judgment the court, if holding that the counts were not properly joined, might cure the defect by permitting plaintiff to remit damages on one of the counts, where special verdict rendered the damages separable.—Wilson Bros. Garage v. Larrow, 98 A. 902, 90 Vt. 413.

49. Conn.—Sellick v. Hall, 47 Conn. 260.
Pa.—Wenburg v. Homer, 6 Binn. 307.

50. Mo.—Sebek v. Wells, App., 18 S.W.2d 518.
34 C.J. p 37 note 65.
Duplicity as ground for motion see supra subdivision a of this section.

51. Ill.—St. Louis Cons. Coal Co. v. Scheiber, 47 N.E. 1052, 167 Ill. 539.
34 C.J. p 37 note 67.

Husband and wife as joint parties

Md.—Hemming v. Elliott, 7 A. 110, 66 Md. 197.
30 C.J. p 1046 note 90.

52. Ill.—Randall Dairy Co. v. Pevely Dairy Co., 274 Ill.App. 474—Fickerle v. Herman Seekamp, Inc., 274 Ill.App. 310.
Tenn.—Tallent v. Fox, 141 S.W.2d 485, 24 Tenn.App. 96.
34 C.J. p 37 note 68.

No request for separate verdict

Ill.—Smithers v. Henriquez, 4 N.E. 2d 793, 287 Ill.App. 95, affirmed 15 N.E.2d 499, 368 Ill. 588.

In an action of ejectment after issue joined on the title only and a verdict for plaintiff for the land on one of the counts in the declaration mentioned, it was no ground for arrest of judgment that the two counts laid demises of the same land to different persons.—Throckmorton v. Cooper, 3 Munf. 93, 17 Va. 93.

53. Ind.—Lester v. Hinkle, 153 N.E. 179, 90 Ind.App. 193.

54. Ill.—Donley v. Dougherty, 97 Ill.App. 544.
34 C.J. p 39 note 81.

55. W.Va.—Swindell v. Harper, 41 S.E. 117, 51 W.Va. 381.
34 C.J. p 39 note 82.

56. Md.—Montgomery Bus Lines v. Diehl, 148 A. 453, 158 Md. 233.
Tenn.—**Corpus Juris cited in** Mosley v. Robert Orr & Co., 6 Tenn.App. 243, 245.
34 C.J. p 39 note 83.

57. Mo.—Lee v. Wilkins, 79 Mo.App. 159.

Ground for arrest not shown

Ga.—Atlantic Coast Line R. Co. v. Morgan, 8 S.E.2d 393, 190 Ga. 98.

58. Mo.—Cox v. Moss, 53 Mo. 432.
34 C.J. p 39 note 85.

for objections to the qualification or competency of jurors[59] or because of the misconduct of a juror.[60] Where an issue of fact is tried by the court which regularly should have been tried by a jury, the judgment will be arrested unless the record shows that a jury was waived.[61]

In Connecticut, where so-called motions in arrest may be grounded on matters dehors the record, as discussed supra § 88, judgment may be arrested for the misconduct, disqualification, or incompetency of a juror,[62] provided the objecting party was ignorant of the matter relied on until after verdict, and therefore did not waive it by going on with the trial without objection.[63]

§ 95. —— Verdict and Findings

A motion in arrest of judgment is a proper method of raising objections based on defects in a verdict appearing on the face of the record; but such a motion does not reach defects or irregularities in the verdict which are merely formal or inconsequential.

In general a motion in arrest of judgment is a proper method of raising objections based on defects in a verdict appearing on the face of the record.[64] Such a motion does not, however, reach a merely formal or inconsequential defect or irregularity in the verdict;[65] but it will reach a verdict which appears from the record to be materially defective.[66] A motion in arrest may be based on the ground that the verdict is not responsive to the issues, or that it differs in a material respect from the pleadings and the issues formed thereon,[67] except where the part of the issue not found is immaterial or bad.[68] A motion in arrest of judgment lies where the verdict is rendered on an immaterial issue, not decisive of the merits of the cause,[69] or

Number of jurors

(1) If the case is tried in a court of record before a smaller number of jurors than the party is entitled to, and his consent does not expressly appear of record, he may take advantage of the objection by motion in arrest.—Ray v. Collins, Mo.App., 274 S.W. 1098—34 C.J. p 39 note 85 [a] (1).

(2) It was held, however, that a recital in the record showed that there was a waiver of a full jury.—Ray v. Collins, supra.

59. Vt.—Atkinson v. Allen, 12 Vt. 619, 36 Am.D. 361.
34 C.J. p 40 note 87.

Motion properly denied

Fla.—Adams v. Elliott, 174 So. 731, 128 Fla. 79.

60. Pa.—Hoar v. Flegal, 1 Pennyp. 208.
34 C.J. p 40 note 88.

61. Mo.—Dilly v. Omaha & St. L. R. Co., 55 Mo.App. 123.
34 C.J. p 40 note 92.

62. Conn.—Galligan v. City of Waterbury, 122 A. 119, 99 Conn. 164.
34 C.J. p 40 note 90.

Matters held insufficient basis of motion

(1) Motion in arrest was properly overruled, where finding showed no misconduct of juror and claimed misconduct was too trivial for consideration, was not occasioned by prevailing party, and did not prejudice appellant.—Wood v. Kenney, 132 A. 451, 104 Conn. 738.

(2) Other matters regarded as insufficient.—Nichols v. Bronson, 2 Day, Conn., 211—Apthorp v. Backus, Kirby, Conn., 407, 1 Am.D. 26—34 C.J. p 40 note 90 [a].

63. Conn.—Bailey v. Trumbull, 31 Conn. 581.
34 C.J. p 40 note 91.

64. Fla.—Frost v. Durschlag, 157 So. 188, 117 Fla. 100—Fayter v. Shore, 153 So. 511, 114 Fla. 115.
Mo.—Midwest Nat. Bank & Trust Co. v. Parker Corn Co., 245 S.W. 217, 211 Mo.App. 418.

65. Ga.—Bishop v. Pendley Lumber Co., 32 S.E. 237, 141 Ga. 826.
34 C.J. p 40 note 94.

Defendant not specifically named in verdict

The trial court's giving of peremptory direction to find for one of two defendants and jury's verdict for plaintiff disposed of all issues and parties, although such direction was not submitted to jury and verdict did not specifically name other defendant, where jury was instructed that verdict should be against latter defendant, if certain facts were found, so that court did not err in overruling such defendant's motion in arrest of judgment.—Newdiger v. Kansas City, 114 S.W.2d 1047, 342 Mo. 252.

66. Md.—Cohen v. Karp, 122 A. 524, 143 Md. 208.
Mo.—Caruthersville Plumbing & Auto Co. v. Lloyd, App., 279 S.W. 230.
34 C.J. p 40 note 95.

Defect not appearing of record

In a case in which the rule stated in the text was recognized, it was held that a motion for an order setting aside and vacating verdict on ground that verdict was nullity, in that jury had not unanimously agreed thereon, if accorded status of motion in arrest of judgment, was properly denied, where alleged fault on which it was based did not appear on face of record.—Van Demark v. Sartorius, 7 A.2d 168, 122 N.J.Law 503.

67. Fla.—Hull v. Laine, 173 So. 701, 127 Fla. 433.
Mo.—Boudreau v. Myers, App., 54 S.W.2d 998—Caruthersville Plumbing & Auto Co. v. Lloyd, App., 279 S.W. 230.
34 C.J. p 40 note 96, p 41 note 99.

Issues raised by counterclaim

Motion in arrest of judgment on verdict finding issues for defendant, without disposing of issues raised by counterclaim, was properly granted.—Greco v. Keenan, 161 A. 100, 115 Conn. 704.

Several defendants

(1) Motion in arrest of judgment should have been granted where a verdict was for both defendants for the excess of one defendant's separate set-off against plaintiff's joint and several demand.—Cohen v. Karp, 122 A. 524, 143 Md. 208.

(2) Other cases see 34 C.J. p 40 note 96 [c].

Case not within rule

The chancellor did not err in overruling complainants' motion in arrest of judgment on the ground that verdict and judgment on issue submitted to jury were not responsive to the pleadings, where the question thus submitted was raised in complainants' bill and denied by the answer.—Adams v. Winnett, 156 S.W.2d 353, 25 Tenn.App. 276.

68. Mo.—Moffett v. Turner, 23 Mo. App. 194.
34 C.J. p 41 note 97.

69. Conn.—Palmer v. Seymour, Kirby 139.
34 C.J. p 41 note 99.

Inability to determine for whom judgment to be given

If an issue is so immaterial that the court cannot determine from the finding on it for which party judgment should be given, the judgment should be arrested.—Scott v. Freeport Motor Cas. Co. of Freeport, 58 N.E.2d 618, 324 Ill.App. 529, revers

where the verdict is insufficient to sustain a judgment.[70] According to some cases, a general verdict on several counts or pleas properly joined, although erroneous in not specifying on which plea it is based, or in not stating that it is based on all the pleas, is not, in the absence of instructions to make separate findings, ground for arresting judgment.[71]

Failure to make findings where findings are necessary is ground for arresting the judgment,[72] but in some jurisdictions failure of the jury to find for defendant on common counts notwithstanding the court's direction so to find is not ground for arrest of judgment for plaintiff on another count.[73]

§ 96. —— Miscellaneous

Generally speaking, an error of law based on the interpretation of the record proper is ground for arrest of judgment, but ordinarily a matter of defense which might have been pleaded is not a basis for arrest.

Broadly speaking, any error of law based on interpretation of the record proper may be reached by motion in arrest.[74] The omission of steps proper or necessary to be taken before the trial, but which do not affect the jurisdiction of the court, in general afford no ground for a motion in arrest,[75] nor does the denial of a motion for a continuance, to which no exception was taken.[76] Constitutionality of the statute fixing the time for holding a term of court cannot be questioned by motion in arrest after verdict,[77] and a like rule has been applied with respect to the constitutionality of a statute creating the court where the question was first raised by the motion in arrest.[78] In some jurisdictions a discontinuance which is evidenced by the verdict may be reached by a motion in arrest.[79]

Defenses. Generally speaking, a judgment will not be arrested because of any matter which defendant might have pleaded and relied on as a defense to the action, whether by plea in bar[80] or in abatement,[81] except such as go to the jurisdiction, discussed supra § 89. In general, on a motion in arrest, defendant may not urge matters of defense which have been put in issue and have been passed on by the court and jury[82] or which do not appear on the face of the record.[83] Although, where the verdict is against plaintiff, a motion in arrest based on the alleged insufficiency of defendant's plea has been held not available to plaintiff,[84] under some statutes it has been held that a motion in arrest is available to plaintiff to test the sufficiency of a defense pleaded as affirmative matter.[85]

The premature commencement of the action[86] or the fact that the cause of action declared on accrued subsequent to the date of the writ[87] has been regarded as ground for a motion in arrest of judgment unless there is nothing in the record to show prematurity.[88]

ed on other grounds 64 N.E.2d 542, 392 Ill. 332.

70. Mo.—Wright v. Hannan & Everitt, Inc., 81 S.W.2d 303, 336 Mo. 732.
34 C.J. p 41 note 1.

71. Ga.—Ball v. Powers, 62 Ga. 757.
Mass.—Richmond v. Whittlesey, 2 Allen 230.
Tex.—Byrne v. Lynn, 44 S.W. 311, 544, 18 Tex.Civ.App. 252.
Finding on all issues intended
Motion in arrest of judgment was properly overruled where, by the verdict, a finding on all the issues evidently was intended.—Hayes v. Virginia Mut. Protective Ass'n, 76 Va. 225.

72. Mo.—Winkelman v. Maddox, 95 S.W. 308, 119 Mo.App. 658—Grimes v. Sprague, 86 Mo.App. 245.
34 C.J. p 41 note 2.

73. Md.—Rosenthal v. Heft, 150 A. 850, 159 Md. 302.

74. Mo.—Reed v. Nicholson, 93 Mo. App. 29.
34 C.J. p 41 note 11.
Attorney's fees
Where a judgment includes attorney's fees which are not recoverable in the action, it is not error to arrest the judgment in so far as it provides for the recovery of such fees.—Love v. National Liberty Ins. Co., 121 S.E. 648, 157 Ga. 259.
Ground for arrest of judgment not shown
Ga.—Felker v. Johnson, 7 S.E.2d 668, 189 Ga. 797.
N.H.—Lavigne v. Lavigne, 119 A. 869, 80 N.H. 559.

75. Mo.—Gilstrap v. Felts, 50 Mo. 428.
34 C.J. p 41 note 12.

76. Md.—Phoebus v. Sterling, 198 A. 717, 174 Md. 394.

77. Mo.—Browning v. Powers, 44 S.W. 224, 142 Mo. 322.

78. Mo.—Howell v. Sherwood, 147 S.W. 810, 242 Mo. 513.

79. Fla.—Harrington v. Bowman, 143 So. 651, 106 Fla. 86.

80. Tenn.—Corpus Juris quoted in Hammett v. Vogue, Inc., 165 S.W. 2d 577, 579, 580, 179 Tenn. 284.
34 C.J. p 41 note 4.
Defense of statute of limitations see the C.J.S. title Limitations of Actions § 351, also 37 C.J. p 1211 note 26.
Coverture cannot be set up after judgment in arrest thereof.—Smith v. Pegram, Tex.Civ.App., 80 S.W.2d 354, error refused.

81. Tenn.—Corpus Juris quoted in Hammett v. Vogue, Inc., 165 S.W. 2d 577, 579, 580, 179 Tenn. 284.
34 C.J. p 41 note 5.

82. Ga.—Olshine v. Bryant, 189 S.E. 572, 55 Ga.App. 90.

83. D.C.—Walls v. Guy, 4 F.2d 444, 55 App.D.C. 251.

84. Tenn.—Wood v. Imperial Motor Co., 5 Tenn.App. 246—Elbinger Shoe Co. v. Thomas, 1 Tenn.App. 161.

85. Ill.—Scott v. Freeport Motor Cas. Co. of Freeport, 64 N.E.2d 542, 392 Ill. 332.

86. Iowa.—Reeves v. Lamm, 94 N. W. 839, 120 Iowa 283.
34 C.J. p 41 note 7.
Action on insurance policy
Iowa.—Woodcock v. Hawkeye Ins. Co., 66 N.W. 764, 97 Iowa 562.
26 C.J. p 571 notes 34, 35.
Right not waived
Mere silence, when making other objections, did not operate as a waiver of the right to present a motion in arrest.—Woodcock v. Hawkeye Ins. Co., 66 N.W. 764, 97 Iowa 562.

87. Ohio.—Chapline v. Tope, Tapp. p 282.
34 C.J. p 41 note 8.

88. Mo.—Burman v. Vezeau, 85 S.W. 2d 217, 231 Mo.App. 1109.

Evidence. For the purpose of a motion in arrest, the record does not include the evidence taken at the trial, as discussed infra § 98, and it is no ground for arresting a judgment that there was error in the admission of evidence at the trial,[89] or that the evidence was insufficient to sustain the verdict or findings.[90] The fact that a verdict was obtained by perjury is not ground for arrest of judgment, where such fact does not appear on the face of the record.[91]

Trial. A motion in arrest of judgment ordinarily cannot be based on any matters which took place at the trial of the cause, or on irregularities or failure to follow the rules of procedure in the conduct of such trial.[92]

§ 97. Motions in Arrest

a. General considerations
b. Time for moving and for deciding motion

a. General Considerations

Usually a motion in arrest of judgment is made by defendant. The motion ordinarily should set forth the specific grounds on which it is based.

While some statutes authorize either party to make a motion in arrest of judgment,[93] it is usually made by defendant.[94] The motion need not be made in writing[95] unless a statute or court rule so requires.[96] The motion should point out the specific grounds on which it is based,[97] although, according to some cases, this is not indispensable.[98] The motion is subject to amendment.[99] No pleading or written answer is required in opposition to the motion.[1]

The mere fact that the moving party denominates his motion a motion in arrest does not make it such a motion.[2] On the other hand, the fact that a motion is denominated a motion in arrest may be sufficient in connection with other supporting facts to show that the motion is one in arrest.[3] According to some cases, a motion by defendant in the form of a motion non obstante veredicto may be treated as a motion in arrest if it assigns grounds sufficient to arrest the judgment.[4] A verdict is subject to review by the trial court pending a ruling on a motion in arrest.[5]

89. U.S.—Clary v. Hardeeville Brick Co., C.C.S.C., 100 F. 915.
34 C.J. p 39 note 77.

90. Conn.—Pickens v. Miller, 177 A. 573, 119 Conn. 553.
Ill.—Smithers v. Henriques, 15 N.E. 2d 499, 368 Ill. 588.
Iowa.—Kirk v. Litterst, 32 N.W. 106, 71 Iowa 71.
Md.—Montgomery Bus Lines v. Diehl, 148 A. 453, 158 Md. 233.
N.H.—Lowell v. Sabin, 15 N.H. 29.
34 C.J. p 39 notes 78, 79.

91. Ga.—Grogan v. Deraney, 143 S. E. 912, 38 Ga.App. 287.

92. Vt.—Boville v. Dalton Paper Mills, 85 A. 623, 86 Vt. 305.
34 C.J. p 39 note 75.

Defect of record

In view of a statutory provision that either party may move in arrest of judgment for any defect not amendable which appears on the face of the record or pleadings, the overruling of a motion in arrest of judgment was not error where the motion complained of alleged errors committed on the trial, but not of any defect of record in the verdict and decree.—Anderson v. Garmon, 21 S.E.2d 61, 194 Ga. 128.

Charge to jury

Tenn.—Earheart v. Hazlewood Bros., 15 Tenn.App. 454.

93. Ill.—Scott v. Freeport Motor Cas. Co. of Freeport, 58 N.E.2d 618, 324 Ill.App. 529, reversed on other grounds 64 N.E.2d 542, 392 Ill. 332.

94. Ga.—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568.
34 C.J. p 41 note 17.

Except in cases of set-off and counterclaim, a motion in arrest should be made by defendant.—Wood v. Imperial Motor Co., 5 Tenn.App. 246—Elbinger Shoe Co. v. Thomas, 1 Tenn.App. 161.

Effect of statute

At common law, and by the practice which prevailed prior to the enactment of the Civil Practice Act, it was generally considered that a motion in arrest was available only to defendant.—Scott v. Freeport Motor Casualty Co. of Freeport, 64 N.E.2d 542, 392 Ill. 332.

95. Ind.—Fall v. Hazelrigg, 45 Ind. 576, 15 Am.R. 278—Chicago & S. E. R. Co. v. Wheeler, 42 N.E. 489, 14 Ind.App. 62.

96. Ind.—Nichols v. State, 63 N.E. 783, 28 Ind.App. 674.
34 C.J. p 42 note 20.

97. Ill.—Edward Hines Lumber Co. v. Manta, 18 N.E.2d 761, 298 Ill. App. 624.
Mo.—City of St. Louis v. Senter Commission Co., 102 S.W.2d 103, 340 Mo. 633—Tiefenbrunn v. Dickerson, App., 161 S.W.2d 428.
Pa.—Puritan Rubber Co. v. Erie Foundry Co., Com.Pl., 24 Erie Co. 86, 56 York Leg.Rec. 89.
34 C.J. p 42 note 21.

Incorporation by reference

(1) It seems that the motion may be sufficiently definite where, by reference, it incorporates statements contained in another motion presented to the court, which constitute a sufficient basis of a motion in arrest. —Mosley v. Robert Orr & Co., 6 Tenn.App. 243.

(2) Under such a motion, however, judgment will not be arrested where the other motion does not set forth sufficient grounds for arrest.—Scott v. National Life & Accident Ins. Co., 64 S.W.2d 53, 16 Tenn.App. 31—Earheart v. Hazlewood Bros., 15 Tenn. App. 454.

98. Ind.—Fall v. Hazelrigg, 45 Ind. 576, 15 Am.R. 278.
34 C.J. p 42 note 22.

99. Fla.—Sedgwick v. Dawkins, 16 Fla. 198.
Ga.—Union Compress Co. v. Leffler, 50 S.E. 483, 122 Ga. 640.
34 C.J. p 42 note 23.

1. Conn.—Raymond v. Bell, 18 Conn. 81.
34 C.J. p 42 notes 19 [a], 24.

Objection improper

Ill.—Reid v. Chicago Rys. Co., 231 Ill.App. 58.

2. Md.—Phoebus v. Sterling, 198 A. 717, 174 Md. 394.

3. Mo.—Sutton v. Anderson, 31 S. W.2d 1026, 326 Mo. 804.
N.J.—Morris Plan Industrial Bank of New York v. Kemeny, 8 A.2d 769, 123 N.J.Law 389.

4. Vt.—Trow v. Thomas, 41 A. 652, 70 Vt. 580.
34 C.J. p 42 note 21 [b].

5. Iowa.—Johnston v. Calvin, 5 N. W.2d 840, 232 Iowa 531.

There can be only one motion in arrest of judgment as of right,[6] unless possibly one motion has been sustained, and thereafter further proceedings on the merits are had,[7] although the court may consider a second motion if it chooses to do so;[8] but such successive motions are not favored.[9]

b. Time for Moving and for Deciding Motion

A motion in arrest of judgment should be made after verdict and before judgment or within the time fixed by statute or rule of court.

The proper time for moving in arrest of judgment is after verdict or finding and before judgment thereon,[10] and at the same term of court,[11] or within the time fixed by statute or rule of court.[12] As a general rule the motion cannot be made after the end of the term of court at which the verdict was returned[13] or, under some statutes, at which the judgment was rendered.[14] Laches may bar the motion.[15] In some jurisdictions a motion in arrest may be sustained only after the verdict has been approved or after the time for making objections to the verdict has elapsed.[16] The trial court should rule on the motion with reasonable promptness and before the expiration of the time to appeal.[17]

It has been held or recognized that a timely motion in arrest of judgment may be made after a motion for a new trial and may be determined after the disposition of the motion for a new trial.[18] Since, however, an order for a new trial vacates the verdict, as shown in the C.J.S. title New Trial § 210, also 46 C.J. p 436 note 75, thereafter a motion in arrest is ineffective,[19] and there should not be a ruling on such motion.[20] According to some cases it is not the regular or correct practice to make a motion in arrest of judgment and a motion for a new trial at the same time,[21] but it has also been held that making two motions at the same time is not necessarily improper practice,[22] and, where the two motions are made at the same time, it is proper to determine them at the same time,[23] so that the order in which they may be considered by the court becomes immaterial,[24] although it is ap-

6. Mass.—Boston Bar Ass'n v. Casey, 116 N.E. 541, 227 Mass. 46.

7. Mass.—Boston Bar Ass'n v. Casey, supra.

8. Mass.—Boston Bar Ass'n v. Casey, supra.
34 C.J. p 42 note 27.

9. Mass.—Boston Bar Ass'n v. Casey, supra.

10. Fla.—Hull v. Laine, 173 So. 701, 127 Fla. 433—Harrington v. Bowman, 136 So. 229, 102 Fla. 339, modified on other grounds 143 So. 651, 106 Fla. 86.
Ind.—Phillips v. Gammon, 124 N.E. 699, 188 Ind. 497—McDaniels v. McDaniels, App., 62 N.E.2d 876—Geyer v. Spencer, 192 N.E. 769, 99 Ind.App. 418.
N.J.—**Corpus Juris cited in** Morris Plan Industrial Bank of New York v. Kemeny, 8 A.2d 769, 771, 123 N.J.Law 389.
34 C.J. p 42 note 32.

Motion made at close of plaintiff's evidence
Failure to renew, at the close of all the evidence, a motion which was made at the close of plaintiff's evidence and which was called a motion in arrest of judgment waived objections based on the ruling on the motion made at the close of plaintiff's evidence.—Layne-Bowler Chicago Co. v. City of Glenwood, C.C.A.Iowa, 134 F.2d 889.

11. Fla.—Hull v. Laine, 173 So. 701, 127 Fla. 433.
Ga.—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287.
34 C.J. p 42 note 32, p 43 note 34.

12. Iowa.—Andrew v. Commercial State Bank, 221 N.W. 809, 206 Iowa 1070—Nelson v. Higgins, 218 N.W. 509, 206 Iowa 672.
Md.—Lichtenberg v. Joyce, 39 A.2d 789, 183 Md. 689—Washington & R. Ry. Co. v. Sullivan, 110 A. 478, 136 Md. 202.
Mo.—Sutton v. Anderson, 31 S.W.2d 1026, 326 Mo. 304—State ex rel. Conant v. Trimble, 277 S.W. 916, 311 Mo. 128.
Pa.—Fiscle v. Kissinger, 53 Pa.Super. 453—Puritan Rubber Mfg. Co. v. Erie Foundry Co., Com.Pl., 24 Erie Co. 86, 56 York Leg.Rec. 89.
Tenn.—Feldman v. Clark, 284 S.W. 353, 153 Tenn. 373.
34 C.J. p 42 note 33.

Motion held timely
Mo.—Young v. Sangster, 16 S.W.2d 92, 322 Mo. 802.

Motion held not timely
Mo.—Schwettman v. Sander, App., 7 S.W.2d 301.

13. Fla.—Hull v. Laine, 173 So. 701, 127 Fla. 433.
34 C.J. p 43 note 34.

After term in which judgment entered
Ill.—Osineski v. Consolidated Coal Co. of St. Louis, 227 Ill.App. 68.

14. Ga.—J. S. Schoffield's Sons Co. v. Vaughan, 150 S.E. 569, 40 Ga. App. 568—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287.
34 C.J. p 43 note 34.

15. Ga.—Raney v. McRae, 14 Ga. 589, 40 Am.D. 660.
34 C.J. p 43 note 35.

16. Mo.—Porter v. Chicago, B. & Q. R. Co., 28 S.W.2d 1035, 325 Mo. 381.

17. Iowa.—Nelson v. Conroy Sav. Bank, 194 N.W. 204, 196 Iowa 391.

18. Mo.—Porter v. Chicago, B. & Q. R. Co., 28 S.W.2d 1035, 325 Mo. 381.
Tenn.—Feldman v. Clark, 284 S.W. 353, 153 Tenn. 373.
34 C.J. p 43 note 37—46 C.J. p 65 note 7 [a].
Whether moving in arrest of judgment waives right to move for new trial see C.J.S. title New Trial § 5, also 46 C.J. p 65 notes 6–10.

19. Mo.—Carnes v. Thompson, 48 S.W.2d 903—Porter v. Chicago, B. & Q. R. Co., 28 S.W.2d 1035, 325 Mo. 381.

No basis for judgment
If a new trial has been granted, there is no verdict on which to base a judgment to which a motion in arrest might apply.
Ga.—Habersham v. Wetter, 59 Ga. 11.
Mo.—Porter v. Chicago, B. & Q. R. Co., 28 S.W.2d 1035, 325 Mo. 381.

20. Mo.—Carnes v. Thompson, 48 S.W.2d 903.

21. Ill.—Wallace v. Curtiss, 36 Ill. 156.
46 C.J. p 65 note 14.

22. W.Va.—Gerling v. Agricultural Ins. Co., 20 S.E. 691, 39 W.Va. 689.
46 C.J. p 65 note 11.

23. W.Va.—Gerling v. Agricultural Ins. Co., supra—Sweeney v. Baker, 13 W.Va. 158, 31 Am.R. 757.

24. W.Va.—Gerling v. Agricultural Ins. Co., 20 S.E. 691, 39 W.Va. 689.

parently the practice of some courts in such case to hear the motion in arrest first.[25] In some jurisdictions, where a motion in arrest and a motion for new trial are filed, neither has precedence over the other in any respect, so that they may both be overruled or granted, as the case may be, at one and the same time.[26]

Extending time for filing. A motion to extend the time for making a motion in arrest of judgment is a special motion which is subject to a rule of court providing that orders may not be made on special motions without notice.[27] An order, made while a motion for judgment was held in abeyance, extending the time in which a motion in arrest of judgment might be made has been regarded as a nullity on the ground that, when such order was made, there was no entry in the court journal to which the order could apply.[28]

§ 98. —— Hearing and Determination

A motion in arrest of judgment must be determined on the record proper, and extraneous matters will not be considered; every reasonable intendment and implication will obtain in favor of the pleadings.

A motion in arrest of judgment serves in some measure the office of a demurrer and ordinarily should be governed by the principles relating to a demurrer,[29] even when made after default; the default admits nothing except what is properly pleaded.[30] The motion must be determined on the record proper[31] and cannot be aided by extraneous matters; affidavits, evidence, or the judge's recollection of the course of the trial cannot be considered.[32]

Motions in arrest are not favored,[33] and the declaration, petition, or complaint is to be given the benefit of a liberal construction[34] to cure any ambiguity or looseness of description,[35] and every doubt is to be resolved in its favor.[36] Pleadings are given the benefit of every reasonable intendment and implication,[37] and the courts will go a long way in sustaining plaintiff's pleading as against a motion in arrest.[38] Also the verdict is to be given the benefit of every favorable intendment.[39] As a gen-

25. U.S.—Turner v. Foxall, D.C., 24 F.Cas. No. 14, 255, 2 Cranch C.C. 324.

26. Tex.—Goodman v. Republic Inv. Co., Civ.App., 215 S.W. 466.

27. Mich.—McConnell v. Merriam, 203 N.W. 661, 231 Mich. 184.

28. Mich.—McConnell v. Merriam, supra.

29. Md.—Washington & Baltimore Turnpike Road v. State, 19 Md. 239, affirmed 3 Wall. 210, 18 L.Ed. 180—State v. Greenwell, 4 Gill & J. 407.

30. Ill.—Bragg v. Chicago, 73 Ill. 152.
34 C.J. p 43 note 40.

31. Ill.—Smithers v. Henriques, 15 N.E.2d 499, 368 Ill. 588—Welch v. City of Chicago, 154 N.E. 226, 323 Ill. 498.
Mo.—McGannon v. Millers' Nat. Ins. Co., 71 S.W. 160, 171 Mo. 143, 94 Am.S.R. 778—Tiefenbrunn v. Dickerson, App., 161 S.W.2d 428.
Tenn.—Speer v. Pierce, 77 S.W.2d 77, 18 Tenn.App. 351—Earheart v. Hazlewood Bros., 15 Tenn.App. 454.
34 C.J. p 43 note 41.

Matters included in record

(1) Record contains process and all pleadings, postea, and judgment, but does not include court's charge, bills of exceptions, and bills of particulars.—Paradise v. Great Eastern Stages, 176 A. 711, 114 N.J.Law 365.

(2) For the purpose of a motion in arrest, the record does not include the evidence taken at the trial.
Ill.—Scott v. Freeport Motor Casualty Co. of Freeport, 64 N.E.2d 542, 392 Ill. 332—Smithers v. Henriquez, 15 N.E.2d 499, 368 Ill. 588—Welch v. City of Chicago, 154 N.E. 226, 323 Ill. 498.
Md.—Montgomery Bus Lines v. Diehl, 148 A. 458, 158 Md. 233.
N.J.—Paradise v. Great Eastern Stages, 176 A. 711, 114 N.J.Law 365.
Tenn.—Scott v. National Life & Accident Ins. Co., 64 S.W.2d 53, 16 Tenn.App. 31—Earheart v. Hazlewood Bros., 15 Tenn.App. 454—Highland Coal & Lumber Co. v. Cravens, 8 Tenn.App. 419—Corpus Juris cited in Moseley v. Robert Orr & Co., 6 Tenn.App. 243, 245.
34 C.J. p 39 note 79, p 43 note 41.

(3) In some jurisdictions the verdict in a common-law action is a part of the record proper for purposes of a motion in arrest.—Harrington v. Bowman, 143 So. 651, 106 Fla. 86.

32. Conn.—Lentine v. McAvoy, 136 A. 76, 105 Conn. 528.
D.C.—Walls v. Guy, 4 F.2d 444, 55 App.D.C. 251.
Mo.—Tiefenbrunn v. Dickerson, App., 161 S.W.2d 428—Ray v. Collins, App., 274 S.W. 1098.
N.J.—Paradise v. Great Eastern Stages, 176 A. 711, 114 N.J.Law 365.
34 C.J. p 43 note 41, p 31 note 7 [a].

Affidavits amplifying testimony at trial

Whether certain affidavits should be considered was regarded as a matter within the sound discretion of the trial judge, and refusing to consider such affidavits was not error where much of contents of affidavits appeared to be amplification of affiants' testimony given at trial.—Moller-Vandenboom Lumber Co. v. Boudreau, 85 S.W.2d 141, 231 Mo. App. 1127.

33. Fla.—Harrington v. Bowman, 136 So. 229, 102 Fla. 339, modified on other grounds 143 So. 651, 106 Fla. 86.
Mass.—Piser v. Hunt, 148 N.E. 801, 253 Mass. 321.
34 C.J. p 43 note 42.

34. Ga.—Stowers v. Harris, 22 S.E. 2d 405, 194 Ga. 636.
Ill.—Randall Dairy Co. v. Pevely Dairy Co., 274 Ill.App. 474.
Mo.—Mehlstaub v. Michael, 287 S.W. 1079, 221 Mo.App. 807.

35. Md.—State v. Greenwell, 4 Gill & J. 407.
34 C.J. p 36 note 47.

36. D.C.—Washington Railway & Electric Co. v. Perry, 47 App.D.C. 90.

37. Fla.—Pillett v. Ershick, 126 So. 784, 99 Fla. 483.
Ill.—Paris v. East St. Louis Ry. Co., 275 Ill.App. 241—Randall Dairy Co. v. Pevely Dairy Co., 274 Ill.App. 474.
Mo.—Mehlstaub v. Michael, 287 S.W. 1079, 221 Mo.App. 807.
34 C.J. p 36 note 48, p 43 note 43.

38. Mo.—Mace v. Vendig, 23 Mo. App. 253.
S.C.—Jordan v. Boone, 39 S.C.L. 523.
34 C.J. p 35 note 46.

39. U.S.—Calvey v. U. S., D.C.Pa., 27 F.Supp. 359.
Ga.—Rubenstein v. Lee, 192 S.E. 85, 56 Ga.App. 49—David v. Marbut-

eral rule it will be presumed after verdict that every material fact alleged in the declaration, or fairly inferable from what is alleged, was proved on the trial,[40] that the proof was confined to that part of the declaration which supported a recovery,[41] and that the verdict was for such damages as were recoverable under the declaration;[42] but it cannot be presumed that a cause of action was proved where none was stated, and where a material fact is omitted, which cannot be implied in, or inferred from, the finding of those which are stated, the verdict will not cover the defect.[43]

Granting or denying a motion for the continuance of the hearing of a motion in arrest is within the sound discretion of the trial judge.[44] The ruling of the court should be decisive, and responsive to the motion.[45] If several defendants join in the motion, in general it must be sustained or overruled as to all.[46] Where the judgment is not an entirety, it may be arrested in part.[47]

According to some cases, entry of judgment operates as an overruling of the motion, as discussed infra § 115.

§ 99. —— Operation and Effect of Arrest

An amendment, new trial, venire de novo, or repleader may be permitted after the grant of a motion in arrest of judgment.

The granting of a motion in arrest of judgment at common law has been held to prevent the entry of a final judgment in the cause, unless it is made conditional on an amendment or such other action as will remove the cause of arrest,[48] and to operate as a discontinuance and dismissal of defendant.[49] However, it has also been held that the granting of the motion does not terminate the case,[50] and that an amendment, new trial, venire de novo, or repleader may be granted,[51] notwithstanding the order in arrest is unconditional.[52] Furthermore it has been held or recognized that, where judgment has been arrested, and plaintiff feels himself aggrieved and wishes to test the decision of the court thereon, he may move for a judgment against himself which will be ordered as a matter of course, on which he may bring his writ of error.[53]

It has been held that, whether or not the judgment was properly arrested, the arrest stands as the

Williams Lumber Co., 122 S.E. 906, 32 Ga.App. 157.

40. Ga.—Stowers v. Harris, 22 S.W. 2d 405, 194 Ga. 636—Rollins v. Personal Finance Co., 175 S.E. 609, 49 Ga.App. 365.
34 C.J. p 43 note 44.

Defective statement of cause of action
If averments in declaration contain reasonable certainty of meaning and show a substantial, although defectively stated, cause of action, and defendant does not demur but goes to trial under general issue, defects in averments will be presumed to have been supplied by the proof.—Curtis v. Kyte, 106 S.W.2d 234, 21 Tenn.App. 115.

41. Ind.—Hamm v. Romine, 98 Ind. 77.
34 C.J. p 43 note 43 [a] (2).

42. Vt.—Packard v. Slack, 32 Vt. 9.
34 C.J. p 43 note 43 [a] (1).

43. N.H.—Bedell v. Stevens, 28 N. H. 118.
34 C.J. p 43 note 45.

44. **Discretion not abused**
Mo.—Moller-Vandenboom Lumber Co. v. Boudreau, 85 S.W.2d 141, 231 Mo.App. 1127.

45. Conn.—Bird v. Bird, 2 Root 411—Worthington v. Dewit, 1 Root 182.
34 C.J. p 43 note 46.

46. Ind.—Van Gundy v. Carrigan, 30 N.E. 933, 4 Ind.App. 333.
34 C.J. p 43 note 47.

47. Ga.—Lester v. Piedmont & Arlington Life Ins. Co., 55 Ga. 475.
34 C.J. p 43 note 48.

48. Mo.—State v. Fisher, 130 S.W. 35, 230 Mo. 325, Ann.Cas.1912A 970.
34 C.J. p 44 note 52.

49. Ala.—**Corpus Juris cited in** City of Birmingham v. Andrews, 132 So. 877, 222 Ala. 362.
Colo.—**Corpus Juris cited in** Foote v. Larimer County Bank & Trust Co., 259 P. 1031, 1032, 82 Colo. 323.
Mo.—**Corpus Juris cited in** Stephens v. D. M. Oberman Mfg. Co., 70 S.W.2d 899, 901, 334 Mo. 1078.
34 C.J. p 44 note 54.

Failure to appeal
(1) Where motion for new trial was overruled, and defendant's motion in arrest of judgment was sustained, plaintiff's failure to appeal from latter order would end case.—Stephens v. D. M. Oberman Mfg. Co., 70 S.W.2d 899, 334 Mo. 1078—Porter v. Chicago, B. & Q. R. Co., 28 S.W.2d 1035, 325 Mo. 381.

(2) In such case, under some statutes plaintiff might commence a new action within one year.—Stephens v. D. M. Oberman Mfg. Co., supra.

50. Conn.—Greco v. Keenan, 161 A. 100, 115 Conn. 704.

51. Conn.—Betts v. Hoyt, 13 Conn. 469.
Fla.—Hull v. Laine, 173 So. 701, 127 Fla. 433.
Ill.—Scott v. Freeport Motor Casualty Co. of Freeport, 64 N.E.2d 542, 392 Ill. 332.
Ind.—Bucklen v. Cushman, 44 N.E. 6, 145 Ind. 51.
Mo.—O'Toole v. Loewenstein, 160 S. W. 1016, 177 Mo.App. 662.
34 C.J. p 44 note 53.

Same judgment entered
Under some statutes after arrest of judgment on motion of defendant, plaintiff may amend his pleading and have the same judgment entered, where a cause of action was stated inaptly or imperfectly and the same amendment might have been made before trial.—Stephens v. D. M. Oberman Mfg. Co., 70 S.W.2d 899, 334 Mo. 1078.

Defective verdict, constituting basis of motion in arrest of judgment, should be set aside.—Greco v. Keenan, 161 A. 100, 115 Conn. 704.

52. Mo.—Stephens v. D. M. Oberman Mfg. Co., 70 S.W.2d 899, 334 Mo. 1078.

53. Ala.—**Corpus Juris cited in** City of Birmingham v. Andrews, 132 So. 877, 222 Ala. 362.
Mo.—**Corpus Juris cited in** Stephens v. D. M. Oberman Mfg. Co., 70 S. W.2d 899, 901, 334 Mo. 1078.
34 C.J. p 44 note 56.

order of court until modified or set aside.[54] It has also been held, however, that an order sustaining a motion in arrest after the verdict has been set aside is ineffectual for any purpose.[55]

V. RENDITION, ENTRY, RECORD, AND DOCKETING

§ 100. Rendition Generally

The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law on the facts in controversy as ascertained by the pleadings and verdict or findings, as distinguished from the ministerial act of entering the judgment.

The rendition of a judgment is the judicial act of the court[56] in pronouncing the sentence of the law on the facts in controversy as ascertained by the pleadings and verdict or findings,[57] as distinguished from the entry of the judgment,[58] which, as

54. Pa.—Myers v. Filley, 12 Pa. Dist. 562.
34 C.J. p 44 note 55.

55. Mo.—Porter v. Chicago, B. & Q. R. Co., 28 S.W.2d 1035, 325 Mo. 381.

56. Ark.—**Corpus Juris quoted in** McConnel v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.
Del.—**Corpus Juris cited in** Hazzard v. Alexander, 178 A. 873, 875, 6 W. W.Harr. 512.
Ill.—Wallace Grain & Supply Co. v. Cary, 24 N.E.2d 907, 303 Ill.App. 221, reversed on other grounds 28 N.E.2d 107, 374 Ill. 57.
N.C.—Eborn v. Ellis, 35 S.E.2d 238, 225 N.C. 386.
Okl.—Peoples Electric Co-op. v. Broughton, 127 P.2d 850, 191 Okl. 229.
Or.—In re Gerhardus' Estate, 239 P. 829, 831, 116 Or. 113.
Tex.—Hudgins v. T. B. Meeks Co., Civ.App., 1 S.W.2d 681.
33 C.J. p 1064 note 62—34 C.J. p 44 note 57, p 1181 note 80 [b].

57. U.S.—Continental Oil Co. v. Mulich, C.C.A.Kan., 70 F.2d 521—**Corpus Juris cited in** In re Hurley Mercantile Co., C.C.A.Tex., 56 F.2d 1023, 1024, certiorari denied Atascosa County State Bank of Jourdanton, Texas, v. Coppard, 52 S.Ct. 580, 286 U.S. 555, 76 L.Ed. 1290.
Ala.—Du Pree v. Hart, 8 So.2d 183, 242 Ala. 690—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91.
Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.
Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.
Colo.—Sarchet v. Phillips, 78 P.2d 1096, 102 Colo. 318.
Del.—**Corpus Juris cited in** Hazzard v. Alexander, 178 A. 873, 875, 6 W.W.Harr. 512.
Ga.—Deck v. Deck, 20 S.E.2d 1, 193 Ga. 739.
Ill.—Wickiser v. Powers, 57 N.E.2d 522, 324 Ill.App. 130.
Ind.—State ex rel. Bernard v. Geckler, 189 N.E. 842, 98 Ind.App. 436.
Miss.—**Corpus Juris cited in** Welch v. Kroger Grocery Co., 177 So. 41, 42, 180 Miss. 89.
Neb.—Luikart v. Bredthauer, 271 N. W. 165, 132 Neb. 62.
N.H.—Tuttle v. Tuttle, 196 A. 624, 89 N.H. 219.
N.M.—**Corpus Juris cited in** State v. Capital City Bank, 246 P. 899, 900, 31 N.M. 430.
N.Y.—Vogel v. Edwards, 27 N.E.2d 806, 283 N.Y. 118—Application of Gleit, 33 N.Y.S.2d 629, 631, 178 Misc. 198—Humnicki v. Pitkowa, 277 N.Y.S. 417, 154 Misc. 407—Langrick v. Rowe, 212 N.Y.S. 240, 126 Misc. 256—Darvick v. Darvick, 36 N.Y.S.2d 58.
Okl.—**Corpus Juris cited in** Taliaferro v. Batis, 252 P. 845, 846, 123 Okl. 59.
Or.—Jones v. Thompson, 164 P.2d 718—**Corpus Juris quoted in** Haberly v. Farmers' Mut. Fire Relief Ass'n, 287 P. 222, 223, 135 Or. 32.
Tenn.—Jackson v. Jarratt, 52 S.W.2d 137, 138, 165 Tenn. 76.
Tex.—Linton v. Smith, 154 S.W.2d 643, 137 Tex. 479—De Leon v. Texas Employers Ins. Ass'n, Civ.App., 159 S.W.2d 574, error refused—Lewis v. Terrell, Civ.App., 154 S. W.2d 151, error refused—Jones v. Sun Oil Co., Civ.App., 145 S.W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353—Sloan v. Richey, Civ.App., 143 S.W.2d 119, error dismissed, judgment correct—Perry v. Perry, Civ.App., 122 S.W.2d 726—Cleburne Nat. Bank v. Bowers, Civ.App., 113 S.W.2d 578—Corbett v. Rankin Independent School Dist., Civ.App., 100 S.W.2d 113—Hudgins v. T. B. Meeks Co., Civ.App., 1 S.W.2d 681—Kittrell v. Fuller, Civ.App., 281 S.W. 575.
Wash.—Beetchenow v. Bartholet, 298 P. 335, 162 Wash. 119.
Wis.—Netherton v. Frank Holton & Co., 205 N.W. 388, 189 Wis. 461, order denying motion to dismiss appeal vacated on other grounds 206 N.W. 919, 189 Wis. 461, mandate vacated 207 N.W. 953, 189 Wis. 461.
34 C.J. p 44 note 57.
Decision or findings by court generally see the C.J.S. title Trial §§ 602–606, 609–612, also 64 C.J. p 122 note 28–p 1227 note 98, p 1227 note 12–p 1231 note 69.
Verdict or findings by jury generally see the C.J.S. title Trial § 485, also 64 C.J. p 1053, note 53–p 1056 note 20.

58. U.S.—**Corpus Juris cited in** U. S. v. Rayburn, C.C.A.Iowa, 91 F.2d 162, 164.
Ala.—Du Pree v. Hart, 8 So.2d 183, 242 Ala. 690.
Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.
Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.
Del.—**Corpus Juris cited in** Hazzard v. Alexander, 178 A. 873, 875, 6 W. W.Harr. 512.
Ga.—Deck v. Deck, 20 S.E.2d 1, 193 Ga. 739.
N.Y.—Application of Gleit, 33 N.Y.S. 2d 629, 178 Misc. 198.
Or.—**Corpus Juris quoted in** Haberly v. Farmers' Mut. Fire Relief Ass'n, 287 P. 222, 223, 135 Or. 32—In re Gerhardus' Estate, 239 P. 829, 116 Or. 113.
Tenn.—Jackson v. Jarratt, 52 S.W.2d 137, 165 Tenn. 76.
Tex.—Sloan v. Richey, Civ.App., 143 S.W.2d 119, error dismissed, judgment correct.
Wash.—Beetchenow v. Bartholet, 298 P. 335, 162 Wash. 119.
34 C.J. p 45 note 58.

Entry not included in rendition

To render judgment is to return or give judgment; and it cannot be said that the phrase, in any of its forms, includes the idea of making a written entry or record of a judgment. —State ex rel. Bernard v. Geckler, 189 N.E. 842, 98 Ind.App. 436.

Exercise of discretion

Rendition of judgment involves exercise of discretion as to its terms, while entry of judgment is ministerial function.—Lasby v. Burgess, 18 P.2d 1104, 93 Mont. 349.

Rendition of judgment is an independent fact, distinct in point of time from entry of judgment in minutes of court, and from order of court on motion for new trial.—Kittrell v. Fuller, Tex.Civ.App., 281 S. W. 575.

Separate acts

Rendition and entry of a judgment are separate acts and different in their nature.—Wallace Grain & Supply Co. v. Cary, 24 N.E.2d 907, 303

discussed infra § 106, is the ministerial act of spreading it at large upon the record. On its rendition, and without entry, a judgment is final, valid, and enforceable, as between the parties,[59] in the absence of any statute to the contrary,[60] although for many purposes, as is discussed infra § 107, entry of the judgment is also essential.

§ 101. —— Authority and Duty of Court

Where the cause has been heard and determined and the case is ripe for judgment, it is the duty of the court to render judgment.

Where the cause has been heard and determined and the case is ripe for judgment, it is the duty of the court to render judgment,[61] and performance of this duty may be compelled by mandamus, as discussed in the C.J.S. title Mandamus § 97, also 38 C.J. p 634 note 43–p 636 note 68. It has also been held that a court has no discretion to refuse to give judgment declaring a right properly pleaded and well established by the evidence,[62] since, where good grounds exist for granting relief, judgment is given to the party entitled thereto as a matter of right and not of grace.[63] Where a case is submitted to the jury on special issues, judgment must usually be rendered on the verdict returned,[64] although the court in the exercise of its discretion may set aside a verdict without first rendering judgment.[65] Where the court tries the case without a jury and finds facts entitling one of the parties to a judgment, he has the right to have such a judgment rendered and it is error to refuse it.[66] Similarly it is error for a judge to refuse to enter judgment in accordance with his decision on a question of law, unless the entry thereof is discretionary for some recognized reason.[67] The authority and duty of the court to render judgment may also arise by reason of the confession, default, consent, offer, or admission of the parties, discussed infra §§ 134–218, or the report of a referee before whom the cause was tried, discussed infra § 105.

The court may not render judgment in violation of a prescribed mode of procedure, as against proper and timely objection;[68] and statutory procedure, made a condition precedent to the exercise of judicial power, is mandatory, governing the court's power to render a judgment.[69] Statutes providing

Ill.App. 221, reversed on other grounds 28 N.E.2d 107, 374 Ill. 57.

59. U.S.—**Corpus Juris cited in** U. S. v. Rayburn, C.C.A.Iowa, 91 F. 2d 162, 164—Continental Oil Co. v. Mulich, C.C.A.Kan., 70 F.2d 521.
Ala.—**Corpus Juris cited in** Du Pree v. Hart, 8 So.2d 183, 186, 242 Ala. 690.
Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.
Del.—**Corpus Juris cited in** Hazzard v. Alexander, 178 A. 873, 875, 6 W. W.Harr. 512.
Ill.—Wickiser v. Powers, 57 N.E.2d 522, 324 Ill.App. 130.
Miss.—**Corpus Juris cited in** Welch v. Kroger Grocery Co., 177 So. 41, 42, 180 Miss. 89.
Neb.—Pontiac Improvement Co. v. Leisy, 14 N.W.2d 884, 144 Neb. 705.
Or.—**Corpus Juris quoted in** Haberly v. Farmers' Mut. Fire Relief Ass'n, 287 P. 222, 223, 135 Or. 32.
34 C.J. p 45 note 60.
Execution before entry see Executions § 9.

60. Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.
Del.—**Corpus Juris cited in** Hazzard v. Alexander, 178 A. 873, 875, 6 W. W.Harr. 512.
Or.—**Corpus Juris quoted in** Haberly v. Farmers' Mut. Fire Relief Ass'n, 287 P. 222, 223, 135 Or. 32.

61. Miss.—Mohundro v. Board of Sup'rs of Tippah County, 165 So. 124, 174 Miss. 512.
N.C.—Rutherford Hospital v. Florence Mills, 120 S.E. 212, 186 N.C. 554—Lawrence v. Beck, 116 S.E. 424, 185 N.C. 196.
Tex.—Brannon v. Wilson, Civ.App., 260 S.W. 201.
33 C.J. p 46 note 63.
Ex parte entry
Trial court was without authority to authorize an ex parte entry of judgment against defendant on failure to fulfill the oral terms of settlement entered into at pretrial conference, where the oral terms did not include stipulation for entry of judgment without notice in event of such failure.—Sonn v. Campbell, 56 N.Y.S.2d 286.
Motions by strangers
The trial court's power to render judgment between parties properly before it is not affected by motions filed in the cause by strangers thereto.—Pennington Grocery Co. v. Ortwein, 88 P.2d 331, 184 Okl. 501.

62. Cal.—Majors v. Majors, App., 161 P.2d 494.
Failure to comply with order
Plaintiff, although no longer entitled to costs because of failure timely to comply with order to prepare and cause to be entered a judgment in his favor, was nevertheless still entitled to the judgment on the merits originally awarded by the court, and court erred in ordering plaintiff's complaint dismissed on the merits.—Brunner v. Cauley, 22 N.W.2d 481, 248 Wis. 530.

63. Cal.—Majors v. Majors, App., 161 P.2d 494.

64. Kan.—Mitchell v. Derby Oil Co., 232 P. 224, 117 Kan. 520.
Tex.—Simmonds v. St. Louis, B. & M. Ry. Co., Com.App., 29 S.W.2d 989—Ellzey v. Allen, Civ.App., 172 S.W.2d 703, error dismissed—Employers Casualty Co. v. Hicks Rubber Co., Civ.App., 160 S.W.2d 96, error granted—Le Master v. Fort Worth Transit Co., Civ.App., 142 S.W.2d 908, reversed on other grounds 160 S.W.2d 224, 138 Tex. 512—Freeman v. Schwenker, Civ. App., 73 S.W.2d 609—Smith v. El Paso & N. E. R. Co., Civ.App., 67 S.W.2d 362, error dismissed—Dowd v. Klock, Civ.App., 268 S.W. 234, reversed on other grounds Klock v. Dowd, Com.App., 280 S.W. 194.
Arbitrary refusal improper
Trial judge may not arbitrarily refuse to render judgment on verdict on special issues covering all facts necessary for judgment.—Cortimeglia v. Davis, 292 S.W. 875, 116 Tex. 412.

65. Tex.—Smith v. El Paso & N. E. R. Co., Civ.App., 67 S.W.2d 362, error dismissed.

66. N.Y.—Outwater v. Moore, 26 N. E. 329, 124 N.Y. 66.
Utah.—Parrott Bros. Co. v. Ogden City, 167 P. 807, 50 Utah 512.

67. Ohio.—Sanda v. Coverson, 171 N.E. 89, 122 Ohio St. 238.

68. Fla.—Beverette v. Graham, 135 So. 847, 101 Fla. 566.

69. Okl.—Rock Island Implement Co. v. Pearsey, 270 P. 846, 133 Okl. 1.

that the clerk shall enter each day's proceedings in the order-book of the court and that the judge shall sign them have been held not to limit the jurisdiction of the court to render a judgment but merely to prescribe the manner in which it shall be recorded.[70]

Who may render judgment. Since the rendition of a judgment is a judicial act of the court, as discussed supra § 100, as a general rule it must be performed as such by the judge or magistrate who holds or presides in such court, and not by a ministerial officer of the court.[71] Thus, in the absence of statutory provision to the contrary, the decision must be rendered by the judge and not by the clerk of the court, in order to constitute it a judgment.[72] In some jurisdictions, however, as discussed in Clerks of Courts § 36, the clerks of certain courts possess statutory authority to exercise designated judicial powers, and under such statutes judgments rendered by clerks have all the force and effect of judgments rendered by the judge;[73] but this authority does not deprive the court of jurisdiction to render judgments in such cases since the authority of the clerk is concurrent with, and additional to, that of the judge.[74]

§ 102. —— Mode and Sufficiency

In the absence of a statute to the contrary, a judgment is rendered when it is orally announced by the court, or where a general verdict is returned and recorded, or where a special verdict or findings are returned, by the announcement of the decision and its entry in the minutes.

Statutory provisions with respect to the mode and sufficiency of rendering judgment are controlling.[75] Generally, a judgment is rendered and exists as such when it is orally announced from the bench, and before it has been reduced to writing and entered by the clerk.[76] The custom, however, of drawing a formal judgment and having the judge sign it is usually observed,[77] particularly where it contains special provisions requiring settlement by the court unless agreed on by the parties;[78] but, unless required by statute or rule of court,[79] a formal writing is unnecessary.[80] Settlement on no-

70. Ind.—Baller v. Dowd, 40 N.E.2d 325, 219 Ind. 624.

71. N.C.—Eborn v. Ellis, 35 S.E.2d 238, 225 N.C. 386.
33 C.J. p 1064 note 63.

72. Pa.—School Dist. of Haverford Tp., to Use of Tedesco v. Herzog, 171 A. 455, 314 Pa. 161—Rhinehart v. Jordan, 169 A. 151, 313 Pa. 197.
33 C.J. p 1065 note 64.

73. N.C.—Williams v. Williams, 130 S.E. 113, 190 N.C. 478—Caldwell v. Caldwell, 128 S.E. 329, 189 N.C. 805.

74. N.C.—Caldwell v. Caldwell, supra.

75. Wis.—Stahl v. Gotzenberger, 45 Wis. 121.
34 C.J. p 46 note 75, p 48 note 86.

76. Ariz.—Griffith v. State Mut. Building & Loan Ass'n, 51 P.2d 246, 46 Ariz. 359—Kinnison v. Superior Court of Pima County, 46 P.2d 1037, 46 Ariz. 133—Maricopa County Municipal Water Conservation Dist. No. 1 v. Roosevelt Irr. Dist., 6 P.2d 893, 39 Ariz. 357.
Ind.—Baller v. Dowd, 40 N.E.2d 325, 219 Ind. 624.
Iowa.—Street v. Stewart, 285 N.W. 204, 226 Iowa 960.
Kan.—Gates v. Gates, 163 P.2d 395, 160 Kan. 428.
Wis.—Zbikowski v. Straz, 294 N.W. 541, 236 Wis. 161—State ex rel. Wingenter v. Circuit Court for Walworth County, 248 N.W. 418, 211 Wis. 561—Karshian v. Milwaukee Electric Ry. & Light Co., 212 N.W. 643, 192 Wis. 269.
33 C.J. p 1191 note 15.

Necessity of writing generally see supra § 64.

Completely announced
"A judgment is not rendered until it has been completely announced."—Corder v. Corder, Tex. Civ.App., 189 S.W.2d 100, 102, error refused.

77. Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.
34 C.J. p 46 note 73.

Perusal by judge or counsel
To prevent error, a trial judge should either peruse a decree drawn by counsel or have it done by opposing counsel, and then direct its entry by a notation thereon signed by him.—Vanderpool v. Stewart, 279 S.W. 645, 212 Ky. 378.

Duty of counsel
(1) The duty of preparing orders and decrees in conformity with judicial determinations rests on counsel.—Parmly v. Parmly, 1 A.2d 646, 16 N.J.Misc. 447, affirmed 5 A.2d 789, 125 N.J.Eq. 545.

(2) Entry on docket by trial court was held not to constitute "rendition of judgment" precluding trial court from entering judgment at a subsequent term, where at time of making entry question arose as to what judgment should be and court directed counsel to prepare decree but instructed clerk not to enter it in order book until further directed.—Doty v. Dowd, 153 N.E. 431, 85 Ind. App. 182.

78. Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.
34 C.J. p 46 note 74.
Settlement of decrees in equity see Equity § 590.
Settlement of orders see the C.J.S. title Motions and Orders § 58, also 42 C.J. p 532 note 82–p 533 note 89.

79. Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.
34 C.J. p 46 note 75.

Failure to file judgment
The failure of party, in whose favor court decides, to file formal written judgment within five days after decision, as required by court rule, does not deprive court of jurisdiction to render or sign judgment after such period, but merely requires such party to go back and comply with rule.—Cahn v. Schmitz, 108 P. 2d 1006, 56 Ariz. 469.

80. Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.
34 C.J. p 46 note 76.
Signature by judge see supra § 85.

An entry in minute book ordering that cause be dismissed is real judgment of dismissal, and subsequent formal judgment is mere memorial or record thereof, irrespective of judge's signature thereto.—E. Clemens Horst Co. v. Federal Mut. Liability Ins. Co., 71 P.2d 599, 22 Cal.App. 2d 548.

Entry on back of petition was held to evidence final disposition of cause.—O'Connell v. Remington, 128 A. 710, 102 Conn. 401.

tice is not required unless specially directed.[81] The return and recording of a general verdict under the direction of the court are generally a sufficient rendition of judgment; no further action on the part of the court is necessary,[82] and, as discussed infra § 108, it is the ministerial duty of the clerk to enter the proper judgment on the verdict. Where a special verdict or special findings are returned, the announcement of the decision in open court and its entry in the minutes constitute the rendition of the judgment.[83]

Notice of rendition of judgment is unnecessary[84] except where required by statute.[85] The purpose of notice required by a statute before rendition of judgment, in a case wherein judgment is not rendered at the hearing, but taken under advisement, is to give an opportunity to attorneys to make objections and exceptions to the decision.[86] The notice must be given by the court,[87] which has authority to direct the manner of service not inconsistent with existing rules made by paramount rule making authority.[88] Where this power has not been exercised, it has been held that the statute regarding service of a notice of a hearing of any kind rather than the statute relating to the service of pleadings and papers is applicable.[89]

§ 103. —— Reading in Open Court

In some jurisdictions it is required that all judgments be read and signed in open court, but failure to comply with this requirement does not invalidate the judgment.

In some jurisdictions it is required that all entries of judgment shall be read in open court before being signed by the judge.[90] It is not necessary for the judgment to recite that it was read in open court,[91] but that fact must appear affirmatively somewhere on the record,[92] although it has been held that, in the absence of anything appearing to the contrary, it will be presumed in support of the judgment that this requirement has been observed.[93] Failure to comply with this requirement, however, does not invalidate the judgment,[94] but merely holds it in abeyance until it is read and signed and made executory;[95] and a judgment not read and signed may be made final and definitive by its voluntary execution by the parties.[96]

§ 104. —— Application and Order for Judgment

Unless required by statute no special application and order for judgment are necessary, but such a motion is not improper and may be necessary where the judgment is not a matter of course, and in the absence of statute no notice of such a motion is required. The order for judgment should direct the clerk to enter a judgment in the form and terms specified.

At common law, it was necessary to enter a rule nisi for judgment on the verdict, so as to afford an

81. Colo.—Graybill v. Cornelius, 246 P. 1029, 79 Colo. 498.
34 C.J. p 47 note 77.
Notice of entry see infra § 112.
Submission of journal entry
(1) Defeated litigant is not entitled to submission of formal judgment entry to him.—Hanson v. S. & L. Drug Co., 212 N.W. 781, 203 Iowa 384.
(2) The journal entry of a judgment is not required to be submitted so that an attorney interested in the litigation shall thereby be informed of what has transpired in the lawsuit, since it is attorney's duty to keep advised of the trial as it proceeds and to participate in it to extent of interests of his client.—Wiseman v. Richardson, 113 P.2d 605, 154 Kan. 245.

82. Or.—**Corpus Juris quoted in** Haberly v. Farmers' Mut. Fire Relief Ass'n, 287 P. 222, 223, 135 Or. 32.
Tex.—Bridgman v. Moore, 133 S.W.2d 705, 143 Tex. 250.
Wyo.—**Corpus Juris quoted in** State v. Scott, 247 P. 699, 706, 35 Wyo. 108.
34 C.J. p 47 note 78.

83. Cal.—Benway v. Benway, 159 P. 2d 682, 69 Cal.App.2d 574—Gossman v. Gossman, 126 P.2d 178, 52 Cal.App.2d 184—Lind v. Baker, 119 P.2d 806, 48 Cal.App.2d 234—Magarian v. Moser, 42 P.2d 385, 5 Cal. App.2d 208.
34 C.J. p 48 note 83.
Necessity of findings
Orally ordered judgment entered in minutes was not rendition of judgment in the absence of the findings required by statute, and court could change it.—Tilden Lumber & Mill Co. v. Bacon Land Co., 3 P.2d 350, 116 Cal.App. 689.

84. Mo.—McCormick v. Stephens, 124 S.W. 1076, 141 Mo.App. 236.
34 C.J. p 47 note 77 [a], p 61 note 27.

85. N.M.—R. V. Smith Supply Co. v. Black, 88 P.2d 269, 43 N.M. 177.
34 C.J. p 61 note 26.

86. N.M.—R. V. Smith Supply Co. v. Black, supra.

87. N.M.—R. V. Smith Supply Co. v. Black, supra.

88. N.M.—R. V. Smith Supply Co. v. Black, supra.

89. N.M.—R. V. Smith Supply Co. v. Black, supra.

90. Ind.—Brant v. Lincoln Nat. Life Ins. Co. of Fort Wayne, 198 N.E. 785, 209 Ind. 268.

La.—Jackson v. Swift & Co., App., 151 So. 816.
34 C.J. p 48 note 87.
Rendition in open court see supra § 16.

91. La.—Woodlief v. Logan, 28 So. 716, 50 La.Ann. 438.
34 C.J. p 49 note 88.
Jurisdictional recitals see supra § 71.

92. La.—Richardson v. Turner, 28 So. 158, 52 La.Ann. 1613.
34 C.J. p 49 note 89.

93. Ind.—Indiana, B. & W. R. Co. v. Bird, 18 N.E. 837, 116 Ind. 217, 9 Am.S.R. 842.
N.Y.—Clapp v. Hawley, 97 N.Y. 610.
Presumptions as to jurisdiction on collateral attack see infra § 425.

94. Ind.—Cadwell v. Teany, 157 N. E. 51, 199 Ind. 634, certiorari denied Cadwell v. Teaney, 48 S.Ct. 601, 277 U.S. 605, 72 L.Ed. 1011.
La.—Jackson v. Swift & Co., App., 151 So. 816.
Statute held directory
Ind.—Brant v. Lincoln Nat. Life Ins. Co. of Fort Wayne, 198 N.E. 785, 209 Ind. 268.

95. La.—Jackson v. Swift & Co., App., 151 So. 816.

96. La.—Jackson v. Swift & Co., supra.

opportunity to move for a new trial or in arrest.[97] Usually no special application and order for judgment are now necessary,[98] unless required by statute,[99] the judgment being rendered and entered as a matter of course on the verdict or decision.[1] It is the duty of the court to give judgment on the verdict or decision without a motion for that purpose,[2] even in the case of a special verdict or special findings.[3] A formal motion for judgment, however, even if not necessary, is not improper,[4] particularly where it is to be entered on a special verdict or special findings,[5] and, where the judgment is not a matter of course, an application or motion therefor may be necessary.[6] Both parties may present motions for judgment on the findings in a case submitted on special issues.[7] The party desiring to show cause why judgment should not be entered should do so on the hearing of the motion for judgment.[8]

Notice of application or motion. Unless required by statute, no notice of application for judgment is necessary,[9] and it is not error for the court to sign a judgment or decree without notice to the parties.[10] An application for judgment is not a motion within statutes prescribing the notice to be given on a motion.[11] Where, however, a motion for judgment is necessary, notice thereof is usually required to be given to the opposite party,[12] although failure or insufficiency of the notice will not vitiate a judgment otherwise regular, to which the moving party was clearly entitled,[13] and, of course, notice may be waived by the party entitled thereto.[14]

Determination of application or motion. Error prior to verdict is sufficient ground for denial of a motion for judgment on the verdict;[15] and, where the record does not show a rendition of a verdict, a judge, not in office at the time of the supposed proceedings, may properly deny a motion for judgment on the verdict.[16] The refusal of the court to order judgment on special jury findings which are in irreconcilable conflict, in effect, sets the verdict aside.[17] A motion for judgment on special findings and a motion for a new trial differ both as to content and relief sought.[18] A motion for a new trial does not waive a pending motion for judgment on the verdict,[19] or concede the right of the opposite party to a judgment on the verdict, unless a new trial is granted.[20] Under some statutes a trial court has no power to render judgment on a jury's special verdict until a pending motion for a new trial has been passed on and overruled.[21]

97. Md.—Heiskell v. Rollins, 32 A. 249, 81 Md. 397.
34 C.J. p 49 note 91.
On report of referee see infra § 105.

98. Ill.—Woodward v. Ruel, 188 N. E. 911, 355 Ill. 163.
S.C.—Joiner v. Bevier, 152 S.E. 652, 155 S.C. 340.
Tex.—White v. Haynes, Civ.App., 60 S.W.2d 275, error dismissed.
34 C.J. p 49 note 92.

99. N.D.—Gould v. Duluth & D. El. Co., 54 N.W. 316, 3 N.D. 96.
34 C.J. p 49 note 93.

1. S.C.—Joiner v. Bevier, 152 S.E. 652, 155 S.C. 340.
34 C.J. p 49 note 94.
Entry by clerk see infra § 106.

Single conclusion

Where verdict was interpretative of but single conclusion, motion for judgment was not essential to authorize court to render necessary order carrying verdict into effect.—White v. Haynes, Tex.Civ.App., 60 S.W.2d 275, error dismissed.

2. Ind.—Masterson v. Southern R. Co., App., 81 N.E. 730.
34 C.J. p 49 note 95.

3. Ind.—Carthage Turnp. Co. v. Overman, 48 N.E. 874, 875, 19 Ind. App. 309.
34 C.J. p 49 note 96.

4. Mich.—Knack v. Wayne Cir. Judge, 111 N.W. 161, 147 Mich. 485.
34 C.J. p 49 note 97.

5. Iowa.—Jolly v. Doolittle, 149 N. W. 890, 169 Iowa 658.
34 C.J. p 49 note 98.

6. N.Y.—Maicas v. Leony, 2 N.Y.S. 931, 50 Hun 178, 22 Abb.N.Cas. 1, modified on other grounds 20 N.E. 586, 113 N.Y. 619, 2 Silv.A. 153, 22 Abb.N.Cas. 465.
34 C.J. p 49 note 99.
Motion for judgment non obstante veredicto see supra § 61.

7. Tex.—Cortimeglia v. Herron, Civ. App., 281 S.W. 305.

8. Mich.—McConnell v. Merriam, 203 N.W. 661, 231 Mich. 184.

9. Ill.—Woodward v. Ruel, 188 N.E. 911, 355 Ill. 163.
34 C.J. p 50 note 2.

10. Ill.—Woodward v. Ruel, supra.
34 C.J. p 50 note 3.

Agreement to give notice

Fact that counsel breached alleged promise to notify opposing counsel with respect to motion for judgment did not impair court's jurisdiction to grant motion.—Albright v. Moeckley, Iowa, 237 N.W. 309.

11. N.Y.—Parker v. Linden, 13 N.Y. S. 95, 59 Hun 359.
34 C.J. p 50 note 4.
Necessity for notice of motion generally see the C.J.S. title Motions and Orders, also 42 C.J. p 480 notes 73–77.

12. Wis.—Massing v. Ames, 36 Wis. 409.
34 C.J. p 50 note 5.

Notice held sufficient

Notice that contractor would move for mandatory injunction for payment of judgment was sufficient to notify that city contractor would ask for judgment for balance due under contract.—City of Owensboro v. Nolan, 46 S.W.2d 490, 242 Ky. 342.

13. Wis.—Pormann v. Frede, 39 N. W. 385, 72 Wis. 226.

14. Ky.—Millett v. Millett, 6 Ky. Op. 431.
N.Y.—Bartlett v. Lundin, 169 N.Y.S. 891, 182 App.Div. 117.

15. N.C.—Powers v. Wilmington, 99 S.E. 102, 177 N.C. 361.

16. W.Va.—Charleston Trust Co. v. Todd, 131 S.E. 638, 101 W.Va. 31.

17. Tex.—First Nat. Bank v. Chapman, Civ.App., 255 S.W. 807.

18. Tex.—Cortimeglia v. Herron, Civ.App., 281 S.W. 305.

19. Ind.—Leslie v. Merrick, 99 Ind. 180—Voris v. Star City Bldg. & Loan Ass'n, 50 N.E. 779, 20 Ind. App. 630.

20. Ind.—Cincinnati, I., St. L. & C. R. Co. v. Grames, 34 N.E. 613, 8 Ind.App. 112, motion for leave to withdraw petition granted 37 N.E. 421, 8 Ind.App. 112.

21. Ohio.—Boedker v. Warren E. Richards Co., 176 N.E. 660, 124 Ohio St. 12—Globe Indem. Co. v. Schmitt, 63 N.E.2d 169, 76 Ohio App. 85.

Order for judgment. The application for judgment, if successful, should be followed by an order of court directing the clerk to enter a judgment in the form and terms specified,[22] taking in every phase of the case that is ripe for judgment,[23] and a mere expression of the court's opinion that a designated party is entitled to recover is not sufficient.[24] It has been held that the order for judgment does not become final until signed by the judge,[25] but according to other authority the signature of the judge to the order is unnecessary.[26]

§ 105. —— On Report of Referee

Under some statutes the report of the referee directing judgment constitutes the decision and judgment of the court, and it is the ministerial duty of the clerk to enter judgment precisely in accordance with the directions of the report; but, in the absence of statute or in cases not within the scope of the statutory authority, application to the court for judgment on the report must be made.

A reference is a mode of trial authorized in some cases, and a judgment rendered on a report of a referee is equally valid as when founded on a verdict or a decision of the court,[27] although it has also been held that, in the absence of statutory authority, a judgment must be rendered on the decision of the court or the verdict of a jury, and cannot be based on the report of a referee,[28] and that in any case a judgment cannot be rendered on the report of a referee where the referee is not given authority to hear and determine the issues but is simply required to take proof of all the material facts and to report them to the court with his opinion thereon.[29]

Under some statutes, where a reference of the whole case to a referee to hear and determine is authorized, the report of the referee directing judgment for one party or the other constitutes the decision and judgment of the court,[30] and it is the

22. Mass.—Treblas v. New York Life Ins. Co., 196 N.E. 908, 291 Mass. 138.
34 C.J. p 50 note 11.

Grant of stay

An oral direction by the judge, granting "ten days' stay," when directing entry of judgment, is generally to be regarded as meaning merely a stay of execution.—Gersman v. Levy, 108 N.Y.S. 1107, 57 Misc. 156.

Judge's findings as order

Where, after an order of judgment for defendant was reversed, case was heard on same "statement of agreed facts," judge's finding for plaintiff and assessing damages of one dollar would be regarded as an order for judgment.—King Features Syndicate v. Cape Cod Broadcasting Co., Mass., 64 N.E.2d 925.

Statute held inapplicable

Statute prohibiting actual entry of judgment until pending exceptions are disposed of is inapplicable to order for judgment pending exceptions to refusal to recommit auditor's reports.—Treblas v. New York Life Ins. Co., 196 N.E. 908, 291 Mass. 138.

Order notwithstanding exceptions

An order for the entry of judgment on finding notwithstanding exceptions seasonably filed, but not acted on by judge, is proper.—Bath Iron Works v. Savage, 159 N.E. 445, 262 Mass. 123.

23. Pa.—Federal Land Bank of Baltimore v. King, 143 A. 500, 294 Pa. 86.

24. N.Y.—Hall v. Beston, 43 N.Y.S. 304, 13 App.Div. 116.
34 C.J. p 50 note 12.

25. Ky.—Wolff v. Niagara Fire Ins. Co., 32 S.W.2d 548, 236 Ky. 1.

26. Or.—Oxman v. Baker County, 234 P. 799, 115 Or. 436.
Pa.—Secretary of Banking v. Miller, Com.Pl., 40 Lack.Jur. 17.

27. Cal.—Sandoval v. Salazar, 207 P. 937, 57 Cal.App. 756.
Ga.—McCoy v. Johnson, 131 S.E. 475, 161 Ga. 638.
N.Y.—In re National Surety Co., 26 N.Y.S.2d 370, 176 Misc. 53—Feeter v. Heath, 11 Wend. 477.
Wash.—State ex rel. Bloom v. Superior Court in and for King County, 18 P.2d 510, 171 Wash. 536.
34 C.J. p 50 note 14.
Operation and effect of report of referee generally see the C.J.S. title References § 140, also 53 C.J. p 757 note 30—p 758 note 43.
Judgments on awards see Arbitration and Award §§ 124, 129.
Time of entry of judgment on report see infra § 113.

Special verdict

(1) Findings of referee have effect of special verdicts if they are sustained by trial court, and, if so sustained, they are binding if there is any substantial evidence to support them.—City of St. Louis v. Parker-Washington Co., 196 S.W. 767, 271 Mo. 229, certiorari denied 38 S.Ct. 11, 245 U.S. 651, 62 L.Ed. 531—Reinecke v. Jod, 56 Mo. 386.

(2) Statute providing that on confirmation of the report judgment may be entered thereon as on a special verdict does not apply where the court does not confirm the report, but sustains exceptions thereto and makes independent findings.—State ex rel. Kimbrell v. People's Ice Storage & Fuel Co., 151 S.W. 101, 246 Mo. 168.

If the report is lost, judgment may be rendered on a copy of it.—Little v. Gardner, 5 N.H. 415, 22 Am.D. 468.

Form of action immaterial

Where a cause is tried by a referee, judgment must be rendered according to the facts reported, regardless of the form of action, if the court can allow an amendment to the declaration which will adapt it to the facts.—Camp v. Barber, 88 A. 812, 87 Vt. 235, Ann.Cas.1917A 451.

Entry of judgment on report held proper

(1) Generally.—Bank of Marlinton v. Pocahontas Development Co., 106 S.E. 881, 88 W.Va. 414.

(2) In actions not referrable under statute, if the parties refer the cause to referees by stipulation, and if the submission provides that a judgment may be entered on the report or award, and judgment is entered accordingly, the parties are concluded by their agreement, and cannot be heard to allege that the reference and judgment were not warranted by law.—Green v. Patchin, N.Y., 13 Wend. 293, 295—Yates v. Russell, N. Y., 17 Johns. 461—Monroe Bank v. Widner, N.Y., 11 Paige 529, 43 Am. D. 768.

28. Ohio.—Eldridge v. Woolsey, 4 Ohio Dec., Reprint, 45, Clev.L.Rec. 59.

29. N.Y.—Sullivan v. Sullivan, 41 N.Y.Super. 519, 52 How.Pr. 453.

30. N.Y.—Ward v. Branson, 110 N. Y.S. 335, 126 App.Div. 508.
34 C.J. p 50 note 17.

General reference

Where a reference is general, findings in report of referees form sufficient basis to support the judgment of the court.—Blalock v. Dunger, 272 P. 1048, 205 Cal. 782—Board of Education of San Francisco United

ministerial duty of the clerk to enter the appropriate judgment thereon without confirmation or further directions by the court,[31] and without notice,[32] unless notice is required by law,[33] precisely as in the case of a general verdict by a jury, or the decision of the court in a case tried without a jury, as discussed supra § 102. In form, the judgment is to be entered as though pronounced by the court[34] and must be precisely in accordance with the directions of the report, as discussed supra § 55.

If the report does not sufficiently direct the particular form and terms of the judgment to be entered, the court has power to supply the deficiency,[35] provided the referee has made findings adequate for final judgment,[36] and application must be made to the court to frame or settle the judgment to be entered,[37] because the clerk cannot act judicially,[38] and, as discussed supra § 101, the rendition of a judgment is a judicial act which usually must be performed by a judicial officer of the court. In such cases a judgment entered by the clerk on the report without direction of the court is wholly void, and not merely irregular.[39]

The practice of entering judgment as of course by the clerk on the report of a referee is limited to the cases in which it is authorized by statute, and is subject to all statutory exceptions, qualifications, and provisions.[40] In the absence of statute authorizing the entry of judgment by the clerk on the report of a referee, or in cases not within the scope of the statutory authority, the proper practice is to make application to the court for judgment on the report, on such notice as may be required, after exceptions and objections to the report have been passed on, and the report has been confirmed.[41] Thereupon the court properly pronounces judgment on the report.[42] In the absence of statutory authority therefor the referee has no power to render judgment.[43] After confirmation, errors of the referee cannot be considered in opposition to a motion for judgment on the report, the only remedy for such errors being an application to set aside the report and for a new trial.[44] The judgment framed or settled by the court must be the one directed in the report of the referee; the court has no power or authority to give directions which require the entry of a judgment substantially different from

School Dist. v. Mulcahy, 123 P.2d 114, 50 Cal.App.2d 518.

31. Cal.—Lewis v. Grunberg, 270 P. 181, 205 Cal. 158.
N.Y.—Corr v. Hoffman, 176 N.E. 383, 256 N.Y. 254.
34 C.J. p 50 note 17.
Entry by clerk see infra § 106.

32. Colo.—Terpening v. Holton, 12 P. 189, 9 Colo. 206.
34 C.J. p 51 note 18.

33. N.D.—Gould v. Duluth & D. El. Co., 54 N.W. 816, 3 N.D. 96.
34 C.J. p 51 note 19.

34. N.Y.—Hancock v. Hancock, 22 N.Y. 568.

35. N.Y.—In re Thompson, 288 N.Y.S. 897, 247 App.Div. 605.
34 C.J. p 51 note 24.
Sufficiency of direction of judgment in report of referee see the C.J.S. title References § 139, also 53 C.J. p 754 note 97.

36. N.Y.—Hinds v. Kellogg, 13 N.Y.S. 922, affirmed 30 N.E. 1148, 133 N.Y. 536.
S.C.—Brown v. Rogers, 61 S.E. 440, 80 S.C. 289.

37. N.Y.—Matter of Baldwin, 34 N.Y.S. 435, 87 Hun 372.
34 C.J. p 51 note 26.

38. N.Y.—Matter of Baldwin, 34 N.Y.S. 435, 87 Hun 372, 25 N.Y.Civ. Proc. 6, 2 N.Y.Ann.Cas. 187—Maicas v. Leony, 2 N.Y.S. 831, 50 Hun 178, 22 Abb.N.Cas. 1, modified on other grounds 20 N.E. 586, 113 N.Y. 619, 2 Silv.A. 153, 22 Abb.N.Cas. 465.

39. N.Y.—Matter of Baldwin, 4 N.Y.S. 372, 87 Hun 372, 25 N.Y.Civ. Proc. 6, 2 N.Y.Ann.Cas. 187.
34 C.J. p 51 note 29.

40. N.Y.—Matter of Potter, 8 N.Y.S. 261, 44 Hun 197.
34 C.J. p 52 note 31.

41. N.J.—Clayton v. Levy, 9 A. 755, 49 N.J.Law 577.
34 C.J. p 52 note 32.
Objections and exceptions to, and confirmation of, referee's report see the C.J.S. title References §§ 150, 164, 195, also 53 C.J. p 768 note 43–p 769 note 63, p 772 note 7–p 773 note 17, p 786 note 20–p 787 note 44.

42. Conn.—Di Francesco v. Moomjian, 143 A. 900, 108 Conn. 515.
Mo.—O'Reilly v. Cleary, 8 Mo.App. 186.
N.Y.—Saal v. South Brooklyn R. Co., 106 N.Y.S. 996, 122 App.Div. 864.
Order for judgment
(1) Orders held proper.—Chehames v. Lafayette Square Restaurant, 85 N.E.2d 482, 306 Mass. 618—Walsh v. Cornwell, 172 N.E. 855, 272 Mass. 555.

(2) Where cases were referred to an auditor who filed a report and it was stipulated that his findings of fact should be final, auditor's report was in effect a "case stated" and action of judge allowing motion for judgment on the auditor's report was an order for judgment in each case.—Union Old Lowell Nat. Bank v. Paine, Mass., 61 N.E.2d 666.
Payment of claims
Where an audit is confirmed, the approved practice is also to pass an order to pay the claims which were thereby allowed; but the judgment of the court is effectually pronounced on a claim by confirming the auditor's report, if no steps are taken to revoke or overrule it.—Lee v. Boteler, 12 Gill & J., Md., 233.
Supplemental report
In action for damages, where case was referred to an auditor whose findings of fact were to be final, and auditor's ultimate finding for defendant in supplemental report was not vitiated by any error of law appearing on face of supplemental report or on as much of original report as was not superseded by supplemental report, the ultimate finding was conclusive that plaintiff did not prove that it had a cause of action, and hence ordering judgment for defendant was proper, although auditor's original report found that plaintiff could recover.—Old Mill Point Club v. Paine, 33 N.E.2d 257, 303 Mass. 505.

The party in whose favor the referee finds is entitled to have judgment entered on the report.—Holt v. Kirby, 39 Me. 164.

43. Cal.—Sandoval v. Salazar, 207 P. 937, 57 Cal.App. 756.
53 C.J. p 742 note 69.

44. N.J.—Clayton v. Levy, 9 A. 755, 49 N.J.Law 577.

that prescribed in the referee's report[45] without setting aside the referee's findings and making a finding of fact to sustain the court's judgment.[46]

§ 106. Entry Generally

a. General statement
b. What constitutes entry

a. General Statement

Entry of judgment is the ministerial or clerical act of spreading the judgment at large on the record as distinguished from the judicial act of giving or pronouncing judgment.

Although it has been said that courts act judicially in entering their judgments,[47] the great weight of authority is that the entry of judgment is a ministerial or clerical act,[48] required to be done by the clerk of the court, as discussed infra § 108, and consists of placing a judgment previously rendered on the record,[49] by which enduring evidence of the judicial act is afforded.[50] While the term "entry of judgment" is sometimes used in a general sense so as to include rendition of judgment,[51] it is most often used in a more limited and precise sense as meaning the ministerial act of spreading the judgment at large on the record as distinguished from the judicial act of giving or pronouncing judgment.[52] There must be a compliance with statutes

45. N.Y.—In re Thompson, 288 N. Y.S. 897, 247 App.Div. 605.
34 C.J. p 51 note 30.

46. N.C.—Greer v. Board of Com'rs of Watauga County, 135 S.E. 862, 192 N.C. 714—Davis v. Davis, 113 S.E. 613, 184 N.C. 108.

Trial or another reference

After setting aside a referee's report, it has been held that the court cannot enter a judgment without a further trial or another reference.

Iowa.—Lyons v. Harris, 34 N.W. 864, 73 Iowa 292.
Mich.—Rice v. Benedict, 13 Mich. 75.
Okl.—Kingfisher Imp. Co. v. Board of Com'rs of Jefferson County, 168 P. 824, 825, 66 Okl. 220.

47. Miss.—Mohundro v. Board of Sup'rs of Tippah County, 165 So. 124, 174 Miss. 512.

48. U.S.—**Corpus Juris cited in** U. S. v. Rayburn, C.C.A.Iowa, 91 F.2d 162, 164.
Ala.—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91.
Cal.—Brown v. Superior Court of California in and for Los Angeles County, 234 P. 409, 70 Cal.App. 732.
Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205.
Ga.—Deck v. Deck, 20 S.E.2d 1, 193 Ga. 789.
Ill.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101—Wallace Grain & Supply Co. v. Cary, 24 N.E.2d 907, 303 Ill.App. 221, reversed on other grounds 28 N.E.2d 107, 374 Ill. 57.
Mich.—Motyka v. Detroit, G. H. & M. Ry. Co., 244 N.W. 897, 260 Mich. 396.
Miss.—**Corpus Juris cited in** Welch v. Kroger Grocery Co., 177 So. 41, 42, 180 Miss. 89.
N.H.—Tuttle v. Tuttle, 196 A. 624, 89 N.H. 219.
N.Y.—Application of Gleit, 33 N.Y.S. 2d 629, 178 Misc. 198—In re Pardee's Estate, 16 N.Y.S.2d 10, affirmed 18 N.Y.S.2d 413, 259 App.Div. 101.
Okl.—Peoples Electric Co-op. v. Broughton, 127 P.2d 850, 191 Okl. 229—Abernathy v. Huston, 26 P.2d 939, 166 Okl. 184.
Or.—Jones v. Thompson, 164 P.2d 718.
Tenn.—Jackson v. Jarratt, 52 S.W. 2d 137, 165 Tenn. 76.
Tex.—Linton v. Smith, 154 S.W.2d 643, 137 Tex. 479—Lewis v. Terrell, Civ.App., 154 S.W.2d 151, error refused—Jones v. Sun Oil Co., Civ.App., 145 S.W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353—Sloan v. Richey, Civ. App., 143 S.W.2d 119, error dismissed, judgment correct—Perry v. Perry, Civ.App., 122 S.W.2d 726—Cleburne Nat. Bank v. Bowers, Civ.App., 113 S.W.2d 578, conforming to answer to certified question 112 S.W.2d 717, 130 Tex. 637—Corbett v. Rankin Independent School Dist., Civ.App., 100 S.W.2d 113—Hudgins v. T. B. Meeks Co., Civ.App., 1 S.W.2d 681—Kittrell v. Fuller, Civ.App., 281 S.W. 575—Ex parte McGraw, 277 S.W. 699, 700, 102 Tex.Cr. 105.
Wash.—Beetchenow v. Bartholet, 298 P. 335, 162 Wash. 119.
Wis.—Netherton v. Frank Holton & Co., 205 N.W. 388, 189 Wis. 461, order vacated denying motion to dismiss appeal 206 N.W. 919, 189 Wis. 461, mandate vacated 207 N.W. 953, 189 Wis. 461.
34 C.J. p 55 note 60.
Entry and enrollment of decrees see Equity § 592.
Entry of judgments in federal courts see Federal Courts § 144 a.

49. U.S.—**Corpus Juris cited in** United States v. Rayburn, C.C.A. Iowa, 91 F.2d 162, 164.
Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.
Ill.—Wallace Grain & Supply Co. v. Cary, 24 N.E.2d 907, 303 Ill.App. 221, reversed on other grounds 28 N.E.2d 107, 374 Ill. 57.
Mich.—Motyka v. Detroit, G. H. & M. Ry. Co., 244 N.W. 897, 260 Mich. 396.
N.H.—Tuttle v. Tuttle, 196 A. 624, 89 N.H. 219.
Tex.—Ex parte McGraw, 277 S.W. 699, 102 Tex.Cr. 105.
34 C.J. p 55 note 62.

Entry as to invalidity

A court entering a judgment which is void for want of jurisdiction has the jurisdiction to journalize the invalidity of the judgment by appropriate entry without being moved to do so by anyone.—State ex rel. Ehmann v. Schneider, Ohio App., 67 N.E.2d 117.

50. Ala.—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91.
D.C.—Conrad v. Medina, Mun.App., 47 A.2d 562.
N.H.—Tuttle v. Tuttle, 196 A. 624, 625, 89 N.H. 219.
N.Y.—Application of Gleit, 33 N.Y.S. 2d 629, 178 Misc. 198.
Tex.—Linton v. Smith, 154 S.W.2d 643, 137 Tex. 479—Lewis v. Terrell, Civ.App., 154 S.W.2d 151, error refused—Jones v. Sun Oil Co., Civ. App., 145 S.W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353—Sloan v. Richey, Civ. App., 143 S.W.2d 119, error dismissed, judgment correct—Perry v. Perry, Civ.App., 122 S.W.2d 726—Cleburne Nat. Bank v. Bowers, Civ.App., 113 S.W.2d 578, conforming to answer of certified question 112 S.W.2d 717, 130 Tex. 637—Corbett v. Rankin Independent School Dist., Civ.App., 100 S.W.2d 113—Hudgins v. T. B. Meeks Co., Civ. App., 1 S.W.2d 681—Kittrell v. Fuller, Civ.App., 281 S.W. 575.

51. Ohio.—Sanda v. Coverson, 171 N.E. 39, 122 Ohio St. 238.
Tex.—Smith v. El Paso & N. E. R. Co., Civ.App., 67 S.W.2d 362, error dismissed.

52. Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.

or rules of court regulating the entry of judgments.[53]

b. What Constitutes Entry

A judgment is entered when it is spread at large on the record, and under some statutes not until then, but under other statutes it has been held entered when a properly formulated entry is delivered to the clerk to be entered, although it is not actually transcribed on the record.

A judgment is entered when it is spread at large on the record,[54] and under some statutes not until then.[55] Until judgment forms signed by the judge and filed with the clerk are recorded, they are nothing more than directions to the clerk to enter judgment in the form specified; until such direction is obeyed, the judgment is not entered.[56] A fortiori, the filing of a mere memorandum, or the making of a skeleton entry in the minutes, giving the terms of the judgment directed, does not constitute entry of the judgment.[57] Under some statutes, however, a judgment is entered when a signed copy of it is delivered to the clerk and filed by him, although not actually transcribed on the record,[58] or when the judgment is duly signed and filed by the clerk.[59] So it has been held that a judgment is in law entered, at least for some purposes, at the time a proper entry thereof is formulated and given to the clerk to be entered of record.[60]

§ 107. —— Necessity

Although as between the parties a duly rendered judgment may be valid and effective without entry, and its enforcement does not always depend on its entry, the statutes generally require judgments to be entered and for many purposes they are not complete, perfect, and effective until this is done.

As a general rule, the decisions of all courts must be preserved in writing in some record provided for that purpose.[61] Where a statute so requires, judgments should be entered,[62] and for many purposes a judgment is not complete, perfect, and effective

Del.—**Corpus Juris cited in** Hazzard v. Alexander, 178 A. 873, 875, 6 W.W.Harr. 512.
Ind.—State ex rel. Bernard v. Geckler, 189 N.E. 842, 98 Ind.App. 436.
N.Y.—Langrick v. Rowe, 212 N.Y.S. 240, 126 Misc. 256.
Or.—**Corpus Juris quoted in** Haberly v. Farmers' Mut. Fire Relief Ass'n, 287 P. 222, 223, 135 Or. 32—In re Gerhardus' Estate, 289 P. 829, 116 Or. 113.
Tex.—Kittrell v. Fuller, Civ.App., 281 S.W. 575.
34 C.J. p 45 note 59, p 52 note 39.

53. Ariz.—Southwestern Freight Lines v. Shafer, 111 P.2d 625, 57 Ariz. 111.

54. Iowa.—Lotz v. United Food Markets, 283 N.W. 99, 225 Iowa 1397.
34 C.J. p 55 note 63.
Form and contents of judgment see supra §§ 62–86.

Mere refusal of motion for judgment non obstante veredicto was not equivalent to entry of judgment for prevailing party, since judgment on verdict must be entered by court or by its officer at court's express direction.—Lamberton Nat. Bank of Franklin v. Shakespeare, 184 A. 669, 321 Pa. 449.

55. Iowa.—Street v. Stewart, 285 N.W. 204, 226 Iowa 960—Lotz v. United Food Markets, 283 N.W. 99, 225 Iowa 1397.
34 C.J. p 55 note 64.
Book or place of entry see infra § 110.

56. Utah.—Ellinwood v. Bennion, 276 P. 159, 73 Utah 563.
34 C.J. p 55 note 65.

Judge's signature to blank forms of decree was at most order that decree be entered when blanks were filled by clerical staff of registry and before such filling order for decree was not entered.—Ambrozewicz v. Lane, 186 N.E. 51, 283 Mass. 141.

57. U.S.—**Corpus Juris cited in** Hargis v. Swope, D.C.Ky., 25 F. Supp. 166, 169.
Cal.—Jackson v. Thompson, 110 P. 2d 470, 43 Cal.App.2d 150.
Iowa.—Street v. Stewart, 285 N.W. 204, 226 Iowa 960.
Wyo.—State v. Scott, 247 P. 699, 35 Wyo. 108.
34 C.J. p 55 note 66.
Order or memoranda for judgment see supra § 62.

58. N.Y.—Edelstein v. Oxman, 13 N.Y.S.2d 95, 171 Misc. 552.
Wash.—Cinebar Coal & Coke Co. v. Robinson, 97 P.2d 128, 1 Wash.2d 620—Mathison v. Anderson, 182 P. 622, 107 Wash. 617.
34 C.J. p 56 note 68.

59. N.Y.—Waterbury v. Nassor, 224 N.Y.S. 179, 180, 130 Misc. 200.
Wis.—Netherton v. Frank Holton & Co., 206 N.W. 919, 921, 189 Wis. 461.

60. Ohio.—Hower Corp. v. Vance, 59 N.E.2d 377, 144 Ohio St. 443—Amazon Rubber Co. v. Morewood Realty Holding Co., 142 N.E. 363, 109 Ohio St. 291.
34 C.J. p 56 note 69.

Filing of journal entry, approved by judge and counsel for interested litigants, is an entry of judgment, even though date of actually spreading entry on journal may have been some time thereafter.—Columber v. City of Kenton, 145 N.E. 12, 13, 111 Ohio St. 211.

Whenever any relief other than for money only or costs or that there be no recovery is granted, a form of judgment must be first settled and approved in writing by trial court, and such judgment becomes effective on its filing with the clerk for recording in the civil order book.—Southwestern Freight Lines v. Shafer, 111 P.2d 625, 57 Ariz. 111.

61. Ala.—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91.
Fla.—Magnant v. Peacock, 24 So.2d 314.
Ky.—National Life & Accident Ins. Co. v. Hedges, 27 S.W.2d 422, 233 Ky. 840.
Miss.—Evans v. State, 108 So. 725, 144 Miss. 1.
N.J.—Lyczak v. Marguilies, 151 A. 64, 8 N.J.Misc. 549, affirmed 162 A. 590, 109 N.J.Law 352.
34 C.J. p 52 note 42.
Necessity for entry of judgments by confession see infra § 165.
Necessity for writing see supra § 64.

Judgment appearing in minutes signed by judge is that of which clerk is required to keep record.—De Zavala v. Scanlan, Tex.Com.App., 65 S.W.2d 489.

62. N.M.—Animas Consol. Mines Co. v. Frazier, 69 P.2d 927, 41 N.M. 389.
N.Y.—Cole v. Vincent, 242 N.Y.S. 644, 229 App.Div. 520.
34 C.J. p 53 note 47.

One of the purposes of statute relating to recordation of judgments is to preserve by putting in an enduring form that which has been done.—Street v. Stewart, 285 N.W. 204, 226 Iowa 960.

until it has been duly entered.[63] Thus it has been broadly held that judgments take effect only from the date of entry,[64] and that there is no judgment until it is entered of record.[65]

Entry of a judgment is generally required for the purpose of initiating the right to take an appeal, or to sue out a writ of error to review such judgment, and of limiting the time within which such right may be exercised, as discussed in Appeal and Error § 445, or within which the judgment may be enforced, as considered infra §§ 854, 871, or for the creation of a judgment lien, as discussed infra § 466. A judgment is not final, in the sense that it cannot be withdrawn or changed by the court, until it has been entered;[66] on entry, it passes beyond control of the court, except to vacate or modify it in accordance with the usual rules.[67] After a judgment has been duly rendered, a direction to the clerk to withhold the journal entry from record does not vacate, open, or modify it.[68] In order that a judgment may be admitted as evidence in another action, it is necessary that it should first have been entered of record.[69] Entry of the judgment is also necessary to authorize the clerk to make up the judgment roll, and to docket the judgment, as discussed infra §§ 123, 126.

As between the parties, a judgment duly rendered may be valid and effective, although not entered, that is, the neglect or failure of the clerk to make a proper entry of the judgment, or his defective or

Statute held mandatory

Ohio.—Brown v. L. A. Wells Const. Co., 56 N.E.2d 451, 143 Ohio St. 580.

Statute held directory

Okl.—Ashinger v. White, 232 P. 850, 106 Okl. 19.

63. U.S.—**Corpus Juris cited in** United States v. Rayburn, C.C.A. Iowa, 91 F.2d 162, 164.

Ala.—**Corpus Juris cited in** Du Pree v. Hart, 8 So.2d 183, 186, 242 Ala. 690—Lewis v. Martin, 98 So. 635, 210 Ala. 401.

Ark.—**Corpus Juris quoted in** McConnell v. Bourland, 299 S.W. 44, 48, 175 Ark. 253.

Cal.—Lind v. Baker, 119 P.2d 806, 48 Cal.App.2d 234.

Del.—**Corpus Juris cited in** Hazzard v. Alexander, 178 A. 873, 875, 6 W.W.Harr. 512.

Ga.—Hutcheson v. Hutcheson, 30 S. E.2d 107, 197 Ga. 603—**Corpus Juris cited in** Tanner v. Wilson, 192 S.E. 425, 428, 184 Ga. 628.

Iowa.—Street v. Street, 285 N.W. 204, 226 Iowa 960.

Neb.—Luikart v. Bredthauer, 271 N. W. 165, 132 Neb. 62.

Ohio.—Amazon Rubber Co. v. Morewood Realty Holding Co., 142 N.E. 363, 109 Ohio St. 291—State ex rel. Egbert v. Leiser, 36 N.E.2d 874, 67 Ohio App. 350.

Or.—In re Gerhardus' Estate, 289 P. 829, 116 Or. 113.

33 C.J. p 964 note 61—34 C.J. p 54 note 48.

Attacking void judgment

A void judgment may not be attacked until it has been entered, since a court may speak only through its records, and it is necessary to enter a judgment to give it vitality.—Prasse v. Prasse, 115 S.W. 2d 807, 342 Mo. 888.

64. Ariz.—Southwestern Freight Lines v. Shafer, 111 P.2d 625, 57 Ariz. 111.

Cal.—Lind v. Baker, 119 P.2d 806, 48 Cal.App.2d 234—Marsh Bros. & Gardenier v. U. S. Fidelity & Guaranty Co., 275 P. 886, 97 Cal.App. 474.

N.M.—**Corpus Juris cited in** State v. Capital City Bank, 246 P. 899, 900, 31 N.M. 430.

34 C.J. p 55 note 57.

Date of judgment see infra § 113.

65. U.S.—In re Ackermann, C.C.A. Ohio, 82 F.2d 971.

Cal.—Lane v. Pellissier, 283 P. 810, 208 Cal. 590.

Fla.—Magnant v. Peacock, 24 So.2d 814—Foster v. Cooper, 194 So. 331, 142 Fla. 148—**Corpus Juris cited in** Dupree v. Elleman, 191 So. 65, 68, 139 Fla. 809.

N.M.—Quintana v. Vigil, 125 P.2d 711, 46 N.M. 200—Animas Consol. Mines Co. v. Frazier, 69 P.2d 927, 41 N.M. 389—**Corpus Juris cited in** State v. Capital City Bank, 246 P. 899, 900, 31 N.M. 430.

N.D.—Groth v. Ness, 260 N.W. 700, 65 N.D. 580.

Ohio.—Hower Corp. v. Vance, 59 N. E.2d 377, 144 Ohio St. 443—Krasny v. Metropolitan Life Ins. Co., 54 N.E.2d 952, 143 Ohio St. 284—Amazon Rubber Co. v. Morewood Realty Holding Co., 142 N.E. 363, 109 Ohio St. 291—Cox v. Cox, 141 N. E. 220, 108 Ohio St. 473—State ex rel. Merion v. Van Sickle, App., 59 N.E.2d 383—**Corpus Juris cited in** Vance v. Hower Corporation, 57 N.E.2d 812, 815, 74 Ohio App. 99—State ex rel. Egbert v. Leiser, 36 N.E.2d 874, 67 Ohio App. 350—In re Lowry's Estate, 35 N.E.2d 154, 66 Ohio App. 437.

Tex.—Sigler v. Realty Bond & Mortgage Co., 138 S.W.2d 537, 135 Tex. 76—Ex parte Rains, 257 S.W. 217, 113 Tex. 428.

34 C.J. p 55 note 58.

A vacation decree does not become effective until it has been signed and entered of record.—Jelks v. Jelks, 181 S.W.2d 235, 207 Ark. 475.

Entry at county seat

Judgment and findings of circuit judge which were signed in chambers in city which was not county seat were not effective until filed in office of clerk of circuit court in county seat and recorded in court's minutes.—State ex rel. Landis v. City of Auburndale, 163 So. 698, 121 Fla. 836.

Neither docket entries nor affidavits are effective

Tex.—Hamilton v. Empire Gas & Fuel Co., 110 S.W.2d 561, 134 Tex. 377.

66. Ariz.—**Corpus Juris quoted in** Brewer v. Morgan, 263 P. 630, 632, 33 Ariz. 225.

Cal.—Lind v. Baker, 119 P.2d 806, 48 Cal.App.2d 234—Magarian v. Moser, 42 P.2d 385, 5 Cal.App.2d 208.

Ga.—Blakely Hardwood Lumber Co. v. Reynolds Bros. Lumber Co., 160 S.E. 775, 173 Ga. 602.

Mass.—Ambrozewicz v. Lane, 186 N. E. 51, 283 Mass. 141.

N.M.—Quintana v. Vigil, 125 P.2d 711, 46 N.M. 200.

Tenn.—Broadway Motor Co. v. Public Fire Ins. Co., 12 Tenn.App. 278.

34 C.J. p 54 note 52.

Announcement not of record

Court could enter decree without formal order setting aside previous conclusion announced from bench, but not included in record of case.—Rogers v. Shell Petroleum Corporation, Tex.Civ.App., 45 S.W.2d 748, error dismissed.

67. Tenn.—Broadway Motor Co. v. Public Fire Ins. Co., 12 Tenn.App. 278.

34 C.J. p 54 note 53.

68. Okl.—Taliaferro v. Batis, 252 P. 845, 123 Okl. 59.

69. Ala.—**Corpus Juris cited in** Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 716, 717, 229 Ala. 91.

Neb.—Luikart v. Bredthauer, 271 N. W. 165, 132 Neb. 62.

34 C.J. p 54 note 54.

Pleading and proving judgment see infra §§ 822–848.

inaccurate entry of it, at least in the absence of statute to the contrary, will not deprive it of the force of a judicial decision.[70] The enforcement of a judgment does not depend on its entry,[71] or docketing, as discussed infra § 126; and, as discussed in Executions § 9 if the judgment has been duly rendered, a valid execution generally may be issued and levied, without either entry or docketing of the judgment, unless specially required by statute.

§ 108. —— Authority and Duty

a. Of clerk
b. Of parties

a. Of Clerk

In entering judgments the clerk acts merely as an agent to write out and place on the record those judgments which he is authorized and required by law to enter, and, except where statutes provide otherwise, he may not enter judgment without formal judicial rendition or specific direction of the court.

In entering judgments, the clerk acts in a purely ministerial capacity, and exercises no judicial functions;[72] he acts merely as an agent to write out and place on the record judgments which he is authorized and directed by law to enter.[73] Provided the cause is ripe for entry of judgment, and there is no stay or order to the contrary, the clerk is authorized, and it is his ministerial duty, to enter on the record all judgments rendered by the court,[74] and certain judgments authorized by statute in specified

70. U.S.—In re Ackermann, C.C.A. Ohio, 82 F.2d 971—Continental Oil Co. v. Mulich, C.C.A.Kan., 70 F. 2d 521.
Ark.—American Inv. Co. v. Hill, 292 S.W. 675, 173 Ark. 468.
Cal.—Brown v. Superior Court of California in and for Los Angeles County, 234 P. 409, 70 Cal.App. 732.
Conn.—D'Andrea v. Rende, 195 A. 741, 123 Conn. 377.
D.C.—Conrad v. Medina, Mun.App., 47 A.2d 562.
Ga.—Deck v. Deck, 20 S.E.2d 1, 193 Ga. 739.
Ill.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101—Prange v. City of Marion, 48 N.E.2d 980, 319 Ill.App. 186.
Iowa.—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 232 Iowa 1226, stating Ohio law.
Miss.—**Corpus Juris cited in** Welch v. Kroger Grocery Co., 177 So. 41, 42, 180 Miss. 89.
Mo.—Marsden v. Nipp, 30 S.W.2d 77, 325 Mo. 822.
Neb.—Luikart v. Bredthauer, 271 N. W. 165, 132 Neb. 62—Crete Mills v. Stevens, 235 N.W. 453, 120 Neb. 794.
N.M.—**Corpus Juris cited in** State v. Capital City Bank, 246 P. 899, 900, 31 N.M. 430.
N.Y.—Langrick v. Rowe, 212 N.Y.S. 240, 126 Misc. 256.
Ohio.—Hower Corp v. Vance, 59 N.E. 2d 377, 144 Ohio St. 443—Amazon Rubber Co. v. Morewood Realty Holding Co., 142 N.E. 363, 109 Ohio St. 291.
Tex.—Sloan v. Richey, Civ.App., 143 S.W.2d 119, error dismissed, judgment correct—Perry v. Perry, Civ. App., 122 S.W.2d 726—**Corpus Juris cited in** Turley v. Tobin, Civ. App., 7 S.W.2d 949, 952, error refused—Hudgins v. T. B. Meeks Co., Civ.App., 1 S.W.2d 681.
Wash.—**Corpus Juris cited in** Cinebar Coal & Coke Co. v. Robinson, 97 P.2d 128, 131, 1 Wash.2d 620.
W.Va.—**Corpus Juris cited in** Beacom v. Board of Canvassers of Cabell County, 10 S.E.2d 793, 795, 122 W.Va. 468.
34 C.J. p 52 note 43.

Interest on judgment

Plaintiff in whose favor a verdict is returned cannot be deprived of interest on his judgment by the failure of the clerk to enter the judgment as the law directs.—Koontz v. Weide, 208 P. 651, 111 Kan. 709.

71. Conn.—D'Andrea v. Rende, 195 A. 741, 123 Conn. 377.
Kan.—Gates v. Gates, 163 P.2d 895, 160 Kan. 428.
34 C.J. p 58 note 44.

Judgment is complete when signed by court and passed to clerk for filing or to some other person to be presented to clerk.—Beetchenow v. Bartholet, 298 P. 335, 162 Wash. 119.

72. U.S.—In re Staples, D.C.Okl., 1 F.Supp. 620.
Cal.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.
Mont.—Lasby v. Burgess, 18 P.2d 1104, 93 Mont. 349.
Okl.—Moroney v. Tannehill, 215 P. 933, 90 Okl. 224.
Or.—**Corpus Juris cited in** State v. Tolls, 85 P.2d 366, 373, 160 Or. 317, 119 A.L.R. 1370.
Tex.—Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 115 Tex. 537.
34 C.J. p 59 note 97.
Authority to render judgment in certain cases see supra § 101.
Entry in vacation see infra § 114.

Several judgment

Under a statute providing that, when a several judgment is proper, the court in its discretion may render judgment against one or more defendants, leaving the action to proceed against the others, the discretion is a judicial one, to be exercised by the court and not by the clerk.—Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., 209 P. 357, 189 Cal. 509.

73. U.S.—In re Staples, D.C.Okl., 1 F.Supp. 620.
Okl.—Moroney v. Tannehill, 215 P. 933, 90 Okl. 224.
34 C.J. p 59 note 98.

Strict conformity to statute

(1) Clerk in entering final judgments must proceed in strict conformity to statute.
Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.
Utah.—First Nat. Bank v. Boley, 61 P.2d 621, 90 Utah 341, followed in Boley v. District Court of Second Judicial Dist. in and for Morgan County, 61 P.2d 624, 90 Utah 347.
Wyo.—Kimbel v. Osborn, 156 P.2d 279.

(2) Where record failed to disclose that clerk notified parties of court's determination to reserve decision in accordance with the statutory mandate, judgment and subsequent judgment vacating prior judgment were invalid, and hence aggrieved party might apply to court for entry of judgment as of such date subsequent to application as court might determine.—Steinhauser v. Friedman, 170 A. 630, 12 N.J.Misc. 167.

Surrender of obligation

(1) The purpose of a statute prohibiting the entry of judgment on a written obligation unless the obligation is surrendered to the clerk is to retire the instrument from circulation.—Jensen v. Martinsen, 291 N.W. 422, 228 Iowa 307.

(2) Clerk was authorized to enter judgment where there was substantial compliance with such a statute. —Selby v. McDonald, 259 N.W. 485, 219 Iowa 828.

74. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P.

cases where judicial action is not necessary, such as judgments by confession, default, consent, offer, or admission, as discussed infra §§ 161, 176, 183, 185, 205. Such authority extends only to the entering of the judgment exactly as it was rendered by the court, without addition, diminution or change of any kind;[75] and a judgment entered by a clerk who had no authority to enter it at all, or to enter it in the form in which it was entered, is void.[76]

Where an application and order for judgment are necessary, as considered supra § 104, the clerk has no authority to enter judgment until an order for judgment has been made, whereupon it becomes his duty to enter judgment in accordance with such order.[77] In some states statutes prescribing the procedure on the coming in of a verdict in a trial by jury expressly make it the duty of the clerk to enter a judgment in conformity with the verdict, unless a different direction is given by the court, or it is otherwise specially prescribed by law.[78] Such entry is theoretically in accordance with the direction of the court,[79] although in actual practice the entry is usually made by the clerk without any specific direction of the court to that effect.[80] Such statutes have been held to apply only to legal actions, where the verdict, if accepted by the court, disposes of the whole case, and the appropriate judgment follows as a matter of course; the statute has no application to equitable actions, where the court must specifically declare the nature of the judgment to be entered.[81] Also, where a special verdict or special findings are returned, the clerk has no authority to enter a judgment thereon; the court must first render the proper judgment on the facts found, as a judicial act.[82]

In cases tried by the court, a decision accompanied by directions for entry of the proper judgment is sufficient to authorize entry by the clerk of the judgment directed;[83] but a general decision or finding not embodying such specific directions is not a rendition of judgment and the clerk is not authorized to enter judgment thereon until the court has

2d 698, 32 Cal.App.2d 871—Brown v. Superior Court of California in and for Los Angeles County, 234 P. 409, 70 Cal.App. 732.
Miss.—**Corpus Juris cited in** Welch v. Kroger Grocery Co., 177 So. 41, 42, 180 Miss. 89.
Tenn.—Wind Rock Coal & Coke Co. v. Robbins, 1 Tenn.App. 734.
34 C.J. p 55 note 61, p 59 note 1.

Bench note on verdict impliedly directed clerk to enter judgment on minutes unless otherwise ordered by court.—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 716, 229 Ala. 91.

Noncompliance with order

Where plaintiff failed to comply with order to prepare and cause to be entered a judgment in his favor, circuit court clerk could prepare and enter judgment in accordance with order but without costs to either party and circuit court could direct clerk to do so.—Brunner v. Cauley, 22 N.W.2d 481, 248 Wis. 530.

75. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P. 2d 698, 32 Cal.App.2d 871.
N.Y.—Merchants' Transfer & Storage Co. v. Lippman, 238 N.Y.S. 310, 135 Misc. 724—Marc v. Pinkard, 230 N.Y.S. 765, 133 Misc. 83.
Okl.—Moroney v. Tannehill, 215 P. 938, 90 Okl. 224.
34 C.J. p 59 note 6.
Amendment to cure clerical errors see infra § 237.

76. Ga.—Deck v. Deck, 20 S.E.2d 1, 193 Ga. 739.
Idaho.—Stewart Wholesale Co. v. Ninth Judicial District in and for Bonneville County, 240 P. 597, 41 Idaho 572.
N.C.—Moore v. Moore, 31 S.E.2d 690, 224 N.C. 552.
Okl.—Moroney v. Tannehill, 215 P. 938, 90 Okl. 224.
Pa.—Lamberton Nat. Bank of Franklin v. Shakespeare, 184 A. 669, 321 Pa. 449—School Dist. of Haverford Tp., to Use of Tedesco v. Herzog, 171 A. 455, 314 Pa. 161—Rhinehart v. Jordan, 169 A. 151, 313 Pa. 197.
34 C.J. p 60 note 7.

Previous judicial action

A purported judgment entered by court clerk without previous judicial action of court is void.—City of Clinton ex rel. Richardson v. Cornell, 132 P.2d 340, 191 Okl. 600—Abernathy v. Bonaparte, 26 P.2d 947, 166 Okl. 192—Abernathy v. Huston, 26 P.2d 939, 166 Okl. 184.

77. Pa.—Watkins v. Neff, 184 A. 625, 287 Pa. 202—Gedrich v. Yaroscz, 156 A. 575, 102 Pa.Super. 127—Garman v. Cambria Title, Savings & Trust Co., 88 Pa.Super. 525.
34 C.J. p 60 note 9.

Whether judgment shall be entered

After verdict has been returned, but before entry of judgment thereon, the court has jurisdiction to determine whether or not judgment shall be entered and if so what judgment.—Stanton v. Arkansas Democrat Co., 106 S.W.2d 534, 194 Ark. 135.

78. Iowa.—Pease v. Citizens' State Bank of Earlham, 228 N.W. 83, 210 Iowa 831.
Kan.—Degnan v. Young Bros. Cattle Co., 103 P.2d 918, 152 Kan. 250.
Neb.—Crete Mills v. Stevens, 235 N.W. 453, 120 Neb. 794.
Ohio.—State ex rel. Van Stone v. Carey, 65 N.E.2d 166, 76 Ohio App. 478.
Okl.—Peoples Electric Co-op. v. Broughton, 127 P.2d 850, 191 Okl. 229.
Tex.—Bridgman v. Moore, 133 S.W. 2d 705, 143 Tex. 250.
34 C.J. p 60 note 11.

79. Or.—**Corpus Juris quoted in** Haberly v. Farmers' Mut. Fire Relief Ass'n, 287 P. 222, 223, 135 Or. 32.
Wyo.—**Corpus Juris quoted in** State v. Scott, 247 P. 699, 706, 35 Wyo. 108.
34 C.J. p 47 note 80.

80. Or.—**Corpus Juris quoted in** Haberly v. Farmers' Mut. Fire Relief Ass'n, 287 P. 222, 223, 135 Or. 32.
Wyo.—**Corpus Juris quoted in** State v. Scott, 247 P. 699, 706, 35 Wyo. 108.
34 C.J. p 47 note 81.

81. Idaho.—Stewart Wholesale Co. v. District Court of Ninth Judicial Dist., in and for Bonneville County, 240 P. 597, 41 Idaho 572.
34 C.J. p 60 note 12.

82. Tex.—Bridgman v. Moore, 133 S.W.2d 705, 143 Tex. 250—Continental Casualty Co. v. Simpson, Civ.App., 6 S.W.2d 387.
Wyo.—**Corpus Juris cited in** State v. Scott, 247 P. 699, 706, 35 Wyo. 108.
34 C.J. p 47 note 82.

83. Cal.—Benway v. Benway, 159 P. 2d 682, 69 Cal.App.2d 574.
34 C.J. p 48 note 84.

judicially declared what judgment shall be entered.[84] Some statutes provide that the clerk shall enter all judgments under the direction of the judge.[85]

Entry of judgment on noncompliance with conditional order. Under the practice of some courts the clerk has power to enter a judgment under a conditional order of the court, on proof of a noncompliance with the condition.[86] However, an order of the court declaring that judgment will be entered unless one party complies with certain conditions within a specified time has been held not to authorize judgment by the clerk.[87]

b. Of Parties

Ordinarily it is the right and duty of the successful party to cause judgment to be entered, and, should he neglect this duty, the unsuccessful party may obtain an order directing him to do so.

No one is entitled to have a judgment entered until it has been rendered.[88] The party in whose favor a verdict is found will ordinarily be entitled to the entry of a judgment on it, after the time allowed to move in arrest or for a new trial, unless exceptions or points of law have been reserved for the decision of the court.[89] Ordinarily it is the duty of the successful party to cause the judgment to be entered,[90] and to see that it is entered correctly.[91] Where the successful party fails to enter judgment, the unsuccessful party may obtain an order directing him to do so,[92] or the court may, in its discretion, direct that, unless judgment is so entered within a time specified, the defeated party may enter it.[93] The exercise of such discretion is not reviewable on appeal.[94]

§ 109. —— Sufficiency and Contents; Defects and Irregularities

The journal entry of judgment should show the court, the term, and the date of entry, and the judgment as entered should conform to, and be supported by, the judgment actually rendered, although a clerical error, misdescription, irregularity, omission, or other defect not going to the jurisdiction of the court ordinarily will not vitiate the judgment.

As a general rule, the journal entry of judgment should show the court, the term, and the date of entry,[95] and the judgment as entered should conform to, and be supported by, the judgment actually rendered.[96] In the entry or record of a judgment, a clerical error, misdescription, irregularity, omission, or other defect not going to the jurisdiction of the court will not vitiate the judgment or give it an effect which it would not have had if correctly entered,[97] provided there is enough in

84. Cal.—Wheeler v. Superior Court in and for City and County of San Francisco, 255 P. 275, 82 Cal.App. 202.
34 C.J. p 48 note 85.

85. Tex.—Bridgman v. Moore, 183 S.W.2d 705, 183 Tex. 250.
34 C.J. p 60 note 13.
Direction for entry
Where judgment was one for the recovery of money only, any formal written judgment settled and signed by the trial judge was mere "surplusage," and, where record clearly showed the intention of trial judge to render judgment on verdict, court's attempt to follow rule no longer in force should be construed as direction to enter judgment for money only.—Southwestern Freight Lines v. Shafer, 111 P.2d 625, 57 Ariz. 111.
Limitation on authority of clerk
Such a statute does not deprive the court itself of power to enter its own judgment, but limits the authority of the clerk to enter a judgment.—Dauphin v. Landrigan, 205 N.W. 557, 187 Wis. 633.

86. N.Y.—Hecla Cons. Gold Min. Co. v. O'Neill, 22 N.Y.S. 130, 23 N.Y. Civ.Proc. 143, affirmed 42 N.E. 723, 148 N.Y. 724—Hanna v. Dexter, 15 Abb.Pr. 135.

87. Pa.—Gedrich v. Yaroscz, 156 A. 575, 102 Pa.Super. 127.

88. Cal.—San Jose Ranch Co. v. San Jose Land & Water Co., 58 P. 824, 126 Cal. 322.
R.I.—Girard v. Sawyer, 9 A.2d 854, 64 R.I. 48.

89. Iowa.—Hanson v. S. & L. Drug Co., 212 N.W. 731, 203 Iowa 384.
N.C.—Lawrence v. Beck, 116 S.E. 424, 185 N.C. 196.
Tex.—Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 115 Tex. 537.
34 C.J. p 46 note 65.
Judgment non obstante veredicto on point reserved see supra § 60 d.
Pendency of motion for new trial, or in arrest of judgment see infra § 115.

90. Mo.—Peterson v. City of St. Joseph, 156 S.W.2d 691, 348 Mo. 954.
34 C.J. p 60 note 16.

91. Pa.—Wood v. Reynolds, 7 Watts & S. 406.
34 C.J. p 61 note 17.

92. Ark.—Herrod v. Larkins, 36 S. W.2d 667, 183 Ark. 509.
N.Y.—Herschcovitz v. Kleinman, 233 N.Y.S. 285, 133 Misc. 685.
34 C.J. p 61 note 18.

93. N.Y.—Wilson v. Simpson, 84 N. Y. 674.
Pa.—Bekelja v. James E. Strates Shows, Com.Pl., 54 Dauph.Co. 170.
34 C.J. p 61 note 19.

94. N.Y.—Wilson v. Simpson, 84 N. Y. 674.

95. Wyo.—McDonald v. Mulkey, 210 P. 940, 29 Wyo. 99.

96. Cal.—Platnauer v. Sacramento Super. Ct., 163 P. 237, 32 Cal.App. 463.
Ga.—Deck v. Deck, 20 S.E.2d 1, 193 Ga. 739.
Sufficiency of judgment entries with respect to form and contents see supra §§ 62–85.
Amendment and correction of:
Judgment see infra §§ 236–264.
Record see Courts §§ 231–236.
The entry should evidence with clarity the action taken by the court.—General Exchange Ins. Corporation v. Appling, Tex.Civ.App., 144 S.W.2d 699.
Entry held in conformity with judgment
Cal.—Martin v. Board of Trustees of Leland Stanford Jr. University, 99 P.2d 684, 37 Cal.App.2d 481.
Entry held not in conformity with judgment
Where order for judgment set forth amount of damages each plaintiff was to recover, judgment lumping the sums together was erroneous.—Schwandt v. Milwaukee Electric Railway & Transport Co., 12 N.W.2d 18, 244 Wis. 251.

97. Ariz.—Intermountain Building & Loan Ass'n v. Allison Steel Mfg. Co., 22 P.2d 413, 42 Ariz. 51.

the entry or record to constitute a judgment.[98] Such irregularities may be waived by the adverse party.[99] A judgment entry showing alterations, interlineations, or erasures is not necessarily void, particularly in the absence of suspicious circumstances or where such alterations, interlineations, or erasures are explained by other parts of the record.[1] It is sometimes provided by statute that informality in entering a judgment, or in making up the record, shall not in any way impair or affect the judgment.[2]

A judgment should be entered as of the date, or as part of the proceedings, of the day on which it was rendered,[3] notwithstanding the entry is not actually made until after that date;[4] but the time at which the record is actually made should appear.[5]

§ 110. —— Book or Place of Entry

Entry must be made in the book of record designated by statute, but failure to do so will not impair the validity and operation of the judgment as between the parties.

As a general rule, entry of a judgment must be made in the judgment book, journal, or other designated book of record,[6] in accordance with the statutory provisions in that respect.[7] Where the clerk is directed by law to keep certain books for the entry of judgments, or to record judgments in a book specially designated by statute for that purpose, or to enter different kinds of judgments or decrees in different books, and deviates from the course prescribed, the validity and operation of the judgment are not impaired thereby as between the parties,[8] although it may be otherwise as to third persons who are misled, or who fail to receive the notice which a proper entry would have afforded them,[9] and as discussed infra § 465, entry in the wrong book may prevent the judgment from becoming a lien.

Statutes providing separate books for different classes of entries have been held to be directory only, and a judgment entered in any of the books of record of the court is valid.[10] Under a statutory

Pa.—Coral Gables v. Kerl, 6 A.2d 275, 334 Pa. 441, 122 A.L.R. 903—Casey Heat Service Co. v. Klein, Com.Pl., 46 Lack.Jur. 257.

Tex.—Panhandle Const. Co. v. Lindsey, 72 S.W.2d 1068, 123 Tex. 613—Sloan v. Richey, Civ.App., 148 S.W.2d 119, error dismissed, judgment correct—Corbett v. Rankin Independent School Dist., Civ.App., 100 S.W.2d 113—City of Panhandle v. Bickle, Civ.App., 81 S.W.2d 843, error dismissed.

Wyo.—McDonald v. Mulkey, 210 P. 940, 29 Wyo. 99.

34 C.J. p 56 note 73.

Entry in wrong record book see infra § 110.

Failure to comply with court rules prescribing procedure to be followed in preparation and approval of journal entries and recording thereof does not nullify valid judgment once it has become effective.—Gates v. Gates, 163 P.2d 395, 160 Kan. 428.

Description in judgment in former case

Where rights of respective parties to action for recovery of land depended on what was actually decreed in a former case instituted in the same court, and there was a material difference in the description of property as set forth in original papers and as revealed in minutes, the original decree and not what appeared on minutes would be taken as evidencing what actually constituted the pronouncement of the court.—Deck v. Deck, 20 S.E.2d 1, 193 Ga. 739.

98. Miss.—Davis v. Hoopes, 33 Miss. 173.

Sufficiency of entry to show judgment see supra § 62.

99. N.Y.—White v. Bogart, 73 N.Y. 256.

1. Ky.—Parrish v. Ferriel, 186 S.W.2d 625, 299 Ky. 676.

34 C.J. p 57 note 76.

2. N.Y.—New York City Baptist Mission Soc. v. Tabernacle Baptist Church, 41 N.Y.S. 976, 10 App. Div. 288.

34 C.J. p 57 note 77.

3. Iowa.—Puckett v. Gunther, 114 N.W. 34, 137 Iowa 647.

34 C.J. p 57 note 78.

4. Kan.—Miller v. Phillips, 141 P. 297, 92 Kan. 662.

Wyo.—Hahn v. Citizens' State Bank, 171 P. 389, 25 Wyo. 467, petition denied 172 P. 705, 25 Wyo. 467.

5. Iowa.—Hoffman-Bruner Granite Co. v. Stark, 108 N.W. 329, 132 Iowa 100.

34 C.J. p 57 note 80.

6. U.S.—Corpus Juris cited in U. S. v. Rayburn, C.C.A.Iowa, 91 F.2d 162, 164.

Iowa.—Lotz v. United Food Markets, 283 N.W. 99, 225 Iowa 1397.

Ky.—Second Nat. Bank of Paintsville v. Blair, 186 S.W.2d 796, 299 Ky. 650—Gorman v. Lusk, 134 S.W.2d 598, 280 Ky. 692—National Life & Accident Ins. Co. v. Hedges, 27 S.W.2d 422, 233 Ky. 340—Ewell v. Jackson, 110 S.W. 360, 129 Ky. 214, 33 Ky.L. 673.

N.Y.—Cole v. Vincent, 242 N.Y.S. 644, 229 App.Div. 520.

Okl.—Wilson & Co. v. Shaw, 10 P.2d 448, 157 Okl. 34.

34 C.J. p 57 note 82.

Legal evidence of judgment

Under statute requiring that all judgments and orders be entered in record book, entry made by clerk in record book is legal evidence of judgment or order.—Street v. Stewart, 285 N.W. 204, 226 Iowa 960.

7. Cal.—Lane v. Pellissier, 283 P. 310, 203 Cal. 590.

Ind.—Brant v. Lincoln Nat. Life Ins. Co. of Fort Wayne, 198 N.E. 785, 209 Ind. 268.

Iowa.—Street v. Stewart, 285 N.W. 204, 226 Iowa 960.

34 C.J. p 55 note 64 [a], p 57 note 83.

Decisions of probate court

In statute governing recitals in, and entry and filing of, "orders and decrees" of probate court, the quoted phrase was intended to cover all decisions of the probate court in probate proceedings whether technically referred to as "orders," "decrees," or "judgments."—Carroll v. Carroll, 108 P.2d 420, 16 Cal.2d 761, certiorari denied 62 S.Ct. 74, 314 U.S. 611, 81 L.Ed. 491.

8. Fla.—Foster v. Cooper, 194 So. 331, 142 Fla. 148—Corpus Juris cited in Dupree v. Elleman, 191 So. 65, 68, 139 Fla. 809.

Kan.—Gates v. Gates, 163 P.2d 395, 160 Kan. 428.

Wis.—Netherton v. Frank Holton & Co., 206 N.W. 919, 189 Wis. 461, vacated on other grounds 207 N.W. 953, 189 Wis. 461.

34 C.J. p 57 note 84.

9. Utah.—Robinson v. Salt Lake City, 109 P. 817, 37 Utah 520.

34 C.J. p 58 note 85.

10. U.S.—Sprigg v. Stump, C.C.Or., 8 F. 207, 7 Sawy. 280.

requirement that judgments shall be entered in a "judgment book," separate books are not required for the entry of judgments in legal and equitable actions.[11] Separate unbound sheets of paper may constitute a judgment book within the meaning of the statute;[12] but an entry in books which are not books of record is insufficient.[13] The judgment "docket," as discussed infra § 127, is not the judgment book in which judgments are required to be entered.[14] The calendar of the judge or trial docket is not a record of the court, and an entry therein does not constitute an entry of judgment.[15]

§ 111. —— Signature of Record

The failure of the judge to sign the record as directed by statute has been held not to make the judgment a nullity, although there is also authority to the contrary.

While the minutes or records of courts are generally required to be authenticated by the signature of the judge, as discussed in Courts § 226, it has generally been held that the failure of the judge to sign the record as directed by statute does not make the judgment a nullity, and that it is at most irregular and erroneous, but not void,[16] although it has also been held that no judgment has any force in the absence of an official signing of the order book by the judge.[17]

§ 112. —— Notice of Entry

Notice of rendition or entry of judgment is not essential to its validity or regularity unless made so by statute or rule of court.

As a general rule, notice of the entry of a judgment is not essential to its validity and regularity,[18]

Or.—State v. MacElrath, 89 P. 803, 49 Or. 294.

11. N.Y.—Whitney v. Townsend, 67 N.Y. 40.
34 C.J. p 58 note 88.

12. Cal.App.—Corpus Juris quoted in In re Hullen, 12 P.2d 487, 488, 124 Cal.App. 271.
34 C.J. p 58 note 89.

13. Ark.—Holloway v. Berenzen, 188 S.W.2d 298, 208 Ark. 349.
34 C.J. p 58 note 90.

14. Iowa.—State v. Wieland, 251 N.W. 757, 217 Iowa 887.
34 C.J. p 58 note 92.

15. Ark.—Holloway v. Berenzen, 188 S.W.2d 298, 208 Ark. 349.
Iowa.—Lotz v. United Food Markets, 283 N.W. 99, 225 Iowa 1397.
34 C.J. p 58 note 93.

Memorandum book

Under statute providing that judgments and orders must be entered on record of court, judge's calendar is in nature of memorandum book designed to promote convenience of judge and clerk and is not place for final repose of judgments and orders.—Street v. Stewart, 285 N.W. 204, 226 Iowa 960.

Notation in judge's trial docket reading, "Jury verdict on special issues for plaintiff," without indication of court's approval, is not tantamount to entry of judgment.—Nevitt v. Wilson, 285 S.W. 1079, 116 Tex. 29, 48 A.L.R. 355.

16. Okl.—Smith v. First Nat. Bank, 36 P.2d 27, 169 Okl. 90.
Tex.—Corpus Juris quoted in Crum v. Fillers, 6 Tenn.App. 547, 558.
34 C.J. p 58 note 96.

Signing of judgment by judge or clerk see supra § 85.

Time of signing

(1) Special judge may at any time after entering judgment sign record, and, if he refuses to do so, may be mandated.—Cadwell v. Teany, 157 N.E. 51, 199 Ind. 634, certiorari denied Cadwell v. Teaney, 48 S.Ct. 601, 277 U.S. 605, 72 L.Ed. 1011.

(2) Fact that judgment file was not signed until judge who tried case had ceased to hold office was immaterial.—Goldberg v. Krayeske, 128 A. 27, 102 Conn. 137.

17. Ky.—Hazelip v. Doyel, 85 S.W. 2d 685, 260 Ky. 313—National Life & Accident Ins. Co. v. Hedges, 27 S.W.2d 422, 233 Ky. 340—Sublett v. Gardner, 137 S.W. 864, 144 Ky. 190—Elwell v. Jackson, 110 S.W. 360, 129 Ky. 214, 33 Ky.L. 673.

Presiding judge or his successor

It is essential to the validity of a judgment that it shall be entered on the order book provided for the purpose and signed by the presiding judge or his successor.—Gorman v. Lusk, 134 S.W.2d 593, 280 Ky. 692.

Time and place of signing

(1) A special judge who directed the entry of a judgment and signed the order book in a county outside the district in which the cause was pending has the authority to direct entry of judgment "nunc pro tunc," or to ratify the unauthorized entry by the clerk and sign the order book in the county in which the cause was pending, or elsewhere in the district.—Gross' Adm'x v. Couch, 166 S.W.2d 879, 292 Ky. 304.

(2) Where quarterly court's record showed that judgment had been rendered, but judge failed to sign it, and present judge signed judgment nunc pro tunc, it became valid judgment effective from date it was rendered, and all steps taken in effort to enforce it were validated.—Hoffman v. Shuey, 2 S.W.2d 1049, 223 Ky. 70, 58 A.L.R. 842.

(3) The fact that judge signed all orders entered at subsequent term of circuit court, relative to a case, did not validate unsigned judgment entered on order book at preceding term.—Second Nat. Bank of Paintsville v. Blair, 186 S.W.2d 796, 299 Ky. 650.

(4) On the other hand, it has also been held that, where presiding judge did not sign minutes either during or on last day of regular term and minutes were not signed until last day of second extension of term, final judgment shown on minute book to have been rendered during regular term was invalid and case remained on docket as a pending and untried case.—Jackson v. Gordon, 11 So.2d 901, 194 Miss. 268.

18. U.S.—In re Anton, D.C.Minn., 11 F.Supp. 645.
Idaho.—Fite v. French, 80 P.2d 360, 54 Idaho 104.
Minn.—Wilcox v. Hedwall, 248 N.W. 709, 186 Minn. 504.
Mo.—Nordquist v. Armourdale State Bank, 119 S.W.2d 553, 225 Mo.App. 186.
Okl.—Moroney v. Tannehill, 215 P. 938, 90 Okl. 224.
S.D.—Lasell v. Yankton County, 7 N.W.2d 880.
34 C.J. p 61 note 27.

Notice of rendition see supra § 102.

Settlement of judgment on notice see supra § 102.

In absence of law or agreement requiring it, proceeding to judgment without notice is not fraud.—Davis v. Cox, Tex.Civ.App., 4 S.W.2d 1008, error dismissed.

Court rule held inapplicable

A court rule requiring all "papers filed in a cause" to be served on attorney for adverse party or party himself did not use quoted words as embracing the judgment pronounced by court, and hence did not require service of copy of judgment on anyone.—Jones v. Thompson, Or., 164 P.2d 718.

unless made so by statute[19] or rule of court,[20] although notice may be required for certain purposes, such as to limit the time for appeal or writ of error, as considered in Appeal and Error § 447. Since parties are not charged with notice of entry of judgment prior to the term to which the cause has been definitely continued,[21] the entry of judgment without notice prior to that term is premature.[22]

Where notice is required, it must be sufficient to comply with the statute,[23] and it has been held that it may be served by mail;[24] but the notice has been held to be ineffectual where it is filed before the entry of judgment.[25] The parties may waive their right to notice.[26]

§ 113. Time of Rendition and Entry

a. In general

b. Prematurity

c. Delay

d. Judgment on report of referee

e. Date of judgment

a. In General

In some jurisdictions, judgment may and should be entered immediately on the filing of the decision or the return of the verdict.

As a general rule, a judgment should be rendered at the time appointed therefor.[27] The time of entering judgment is a matter of practice within the discretion of the court.[28] The entry of judgment immediately or forthwith on the filing of a decision or the return of a verdict is contemplated by the statutes or practice in some jurisdictions;[29] and in

19. Ky.—Parrish v. Ferriell, 136 S.W.2d 625, 299 Ky. 676—Estes v. Woodford, 55 S.W.2d 396, 246 Ky. 485.

34 C.J. p 61 note 26.

Entry in appearance docket

A judgment to be valid must first be entered in the appearance docket so as to provide notice to other party.—McClelland v. West Penn Appliance Co., 1 A.2d 491, 132 Pa.Super. 471.

Order for judgment by nonresident judge

Clerk receiving order for judgment in case tried by nonresident judge was under duty to notify parties and attorneys and enter judgment accordingly.—Brewer v. Morgan, 263 P. 630, 33 Ariz. 225.

20. Ariz.—Davis v. Chilson, 62 P.2d 127, 48 Ariz. 366—Harrington v. White, 61 P.2d 392, 48 Ariz. 291—Ross v. White, 50 P.2d 12, 46 Ariz. 304.

Judgments to which applicable

Rule requiring notice applies only to judgments for money only or costs or that there be no recovery.—Southwestern Freight Lines v. Shafer, 111 P.2d 625, 57 Ariz. 111.

21. Mo.—Nordquist v. Armourdale State Bank, 19 S.W.2d 553, 225 Mo. App. 186.

22. Mo.—Nordquist v. Armourdale State Bank, supra.

23. N.Y.—Murphy v. Hitchcock, 274 N.Y.S. 386, 242 App.Div. 773.

Notice held sufficient

(1) Notice indorsed on copy of judgment informing defendants that such judgment was entered by within named court was sufficient.—Murphy v. Hitchcock, supra.

(2) Notice that plaintiff would at specified time and place move named judge of circuit court to enter in designated case a judgment, a copy of which was attached to notice, which notice was served on counsel of record for defendant two days before date specified for entry of judgment satisfied statutory requirements as to notice of entry of judgment at term time or in vacation at any place within district.—Parrish v. Ferriell, 136 S.W.2d 625, 299 Ky. 676.

(3) Where record showed only that service of notice of entry of judgment took place on the day on which judgment was entered and did not disclose the hour at which either event took place, notice of entry of judgment was shown not to have been served prematurely, where the substantial rights of the parties were not affected.—Kahn v. Smith, 142 P.2d 13, 23 Cal.2d 12.

24. Cal.—Department of Social Welfare v. Gandy, 132 P.2d 241, 56 Cal.App.2d 209—Labarthe v. McRae, 97 P.2d 251, 35 Cal.App.2d 734.

25. Cal.—Jameson v. Warren, 267 P. 372, 91 Cal.App. 590.

26. Cal.—Prothero v. Superior Court of Orange County, 238 P. 357, 196 Cal. 439.

Ky.—Lawrence v. First State Bank of Dry Ridge, 132 S.W.2d 60, 279 Ky. 775.

27. N.C.—Killian v. Maiden Chair Co., 161 S.E. 546, 202 N.C. 23—State v. Humphrey, 120 S.E. 85, 186 N.C. 533.

Tex.—Bridgman v. Moore, 183 S.W.2d 705, 143 Tex. 250—Rouff v. Boyd, Civ.App., 16 S.W.2d 403.

Duly constituted court as essential to validity or regularity of judgment see supra §§ 15–17.

28. Mich.—Harvey v. McAdams, 32 Mich. 472.

29. Pa.—Bekelja v. James E. Strates Shows, Com.Pl., 54 Dauph. Co. 170.

Wis.—Davison v. Brown, 67 N.W. 42, 93 Wis. 85.

34 C.J. p 62 note 62 [a], p 64 note 61 [e] (1).

Statute of limited application

A statute providing that, when trial by jury has been had, judgment shall be entered by the clerk immediately in conformity with the verdict does not apply where the court withdraws the case from the jury.—Barth v. Harris, 168 P. 401, 95 Wash. 166.

Construction of "forthwith"

(1) The word "forthwith," as used in such statutes, has been construed to mean "instanter."—Hull v. Mallory, 14 N.W. 374, 56 Wis. 355.

(2) According to the weight of authority, however, the word, as used in such statutes, means "in a reasonable time."—Sluga v. Walker, 81 N.W. 282, 9 N.D. 103—26 C.J. p 1000 note 80 [a]—34 C.J. p 64 note 61 [a] (1).

(3) Under the latter construction, where a verdict was returned between noon and one o'clock P. M. on Saturday, while the justice was hearing another case, a rendition of judgment thereon on the Monday morning following was in due time.—Sorenson v. Swenson, 56 N.W. 650, 55 Minn. 58, 43 Am.S.R. 472.

Immediate rendition and subsequent entry

In some jurisdictions, in cases tried before a jury, when the jury returns its verdict, the rendition of judgment on the verdict, consisting of an entry by the trial judge on the trial docket of a memorandum of the verdict and judgment, follows as a matter of course; but the minutes of the court evidencing the judgment may be, and usually are, written at a future time and dated as of date of rendition of judgment.—Mt. Vernon-Woodberry

such jurisdictions the court has authority,[30] or the clerk has a duty,[31] to enter the judgment, and the successful party is entitled to have the judgment entered[32] at such time, provided the verdict or decision disposes of the case,[33] and there is no stay of proceedings,[34] or direction to the contrary by the court.[35] Even in such jurisdictions, however, a judgment entered at a later date is not necessarily invalid, as discussed infra subdivision c (1) of this section. Some statutes contemplate the entry of judgment immediately following the denial of a motion for judgment notwithstanding the verdict.[36]

A statute, supplementary to other statutes,[37] and intended to speed up the disposition of cases,[38] which authorizes a judge of a court, not of continuous session, to enter, on reasonable notice to the parties, a judgment in any proceeding wherein a trial by jury is not required, is of limited effect.[39] A rule of civil procedure, adopted under statutory authority, and providing for entry of judgment by the clerk forthwith on receipt by him of the court's direction to enter judgment for money only, or that there be no recovery, is accorded effect when applicable.[40]

Validity of judgment rendered on legal holiday see Holidays § 5 d. Validity of judgment entered on Sunday see the C.J.S. title Sundays § 53, also 60 C.J. p 1146 note 57–p 1147 note 70.

b. Prematurity

A judgment is premature when it is rendered or entered before the case is ripe for final judgment. A judgment so rendered or entered has been held improper and erroneous, but not void.

It is improper and erroneous to render or enter judgment prematurely,[41] this being true where judgment is rendered or entered before the case is ripe for final judgment, because of proceedings remaining to be taken or matters remaining to be determined before the judgment can be put in its final shape,[42] or where there is a violation of a statute prohibiting the entry of judgment until a certain time after the commencement of the action, or the reception of the verdict, or the filing of the decision, or until the lapse of a term or terms.[43] How-

Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91.

"Within the day" means within twenty-four hours

Or.—Fuller v. Blanc, 77 P.2d 440, 160 Or. 50.

34 C.J. p 64 note 61 [e] (2).

Judgment notwithstanding verdict

Ohio.—J. & F. Harig Co. v. City of Cincinnati, 22 N.E.2d 540, 61 Ohio App. 314.

30. Ill.—Evaniski v. Mt. Olive & Staunton Coal Co., 223 Ill.App. 33.

31. Iowa.—Cox v. Southern Surety Co., 226 N.W. 114, 208 Iowa 1252.

Kan.—Koontz v. Weide, 208 P. 651, 111 Kan. 709.

Tenn.—McAlester v. Monteverde, 115 S.W.2d 257, 22 Tenn.App. 14.

34 C.J. p 62 note 32 [a].

32. Conn.—Ireland v. Connecticut Co., 152 A. 614, 112 Conn. 452.

34 C.J. p 62 note 33.

33. Cal.—**Corpus Juris cited in** Rosslow v. Janssen, 29 P.2d 287, 288, 136 Cal.App. 467, followed in Rosslow v. Mulcrevy, 29 P.2d 289, 136 Cal.App. 787.

34 C.J. p 62 note 34.

Where all issues of fact have been determined by the findings of the jury, the court at special term may grant motion for judgment after jury verdict at trial term on framed issues submitted by special term justice.—Burrows v. Oscar Scherer & Bros., 235 N.Y.S. 24, 134 Misc. 147.

Issues not affecting plaintiff

Plaintiff was entitled to judgment on jury's verdict for him without awaiting determination of issues between defendants and tenant impleaded by answers.—Schroeder v. City and County Sav. Bank of Albany, 46 N.Y.S.2d 46, 267 App.Div. 206, modified on other grounds 57 N.E.2d 57, 293 N.Y. 370, motion denied 57 N.E.2d 842, 293 N.Y. 764.

34. Wis.—Wheeler v. Russell, 67 N.W. 43, 93 Wis. 135.

34 C.J. p 62 note 35.

Stay of proceedings see infra § 116.

35. Wis.—Davidson v. Brown, 67 N.W. 42, 93 Wis. 85.

34 C.J. p 62 note 37.

Reservation of case for future argument or consideration

Kan.—Koontz v. Weide, 208 P. 651, 111 Kan. 709.

36. Cal.—Woods v. Walker, 136 P.2d 72, 57 Cal.App.2d 968.

37. Ky.—Jackson v. Jackson, 179 S.W.2d 197, 297 Ky. 85.

38. Ky.—Jackson v. Jackson, supra.

39. Ky.—Wright v. Owens, 122 S.W.2d 498, 275 Ky. 692.

40. Ariz.—Fagerberg v. Denny, 112 P.2d 531, 57 Ariz. 183—Southwestern Freight Lines v. Shafer, 111 P.2d 625, 57 Ariz. 111.

41. Ark.—Stanton v. Arkansas Democrat Co., 106 S.W.2d 584, 194 Ark. 135.

Ky.—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416.

Or.—Herrick v. Wallace, 236 P. 471, 114 Or. 520.

Reversal of judgment prematurely rendered see Appeal and Error § 1892.

Setting aside judgment prematurely entered see infra § 278.

42. U.S.—Donnelly Garment Co. v. National Labor Relations Board, C.C.A., 123 F.2d 215—Chidester v. City of Newark, C.C.A.N.J., 117 F.2d 981.

Ky.—Kim v. Smith, 172 S.W.2d 634, 294 Ky. 835—Horton v. Horton, 92 S.W.2d 373, 263 Ky. 413.

Mass.—Barton v. City of Cambridge, 61 N.E.2d 330.

Miss.—Schilling v. U. S. Fidelity & Guaranty Co., 152 So. 887, 169 Miss. 275.

N.Y.—Fuentes v. Kosower, 25 N.Y.S.2d 586, 261 App.Div. 878, motion granted 27 N.Y.S.2d 463, 261 App.Div. 1057—O'Brien v. Lehigh Valley R. Co., 27 N.Y.S.2d 540, 176 Misc. 404.

Pa.—Dunlap Printing Co. v. Ryan, 119 A. 714, 275 Pa. 556.

Wash.—Patterson v. Zuger, 60 P.2d 69, 187 Wash. 285—Pelly v. Behneman, 12 P.2d 422, 168 Wash. 465.

34 C.J. p 63 notes 44–48.

Unexpired continuance or adjournment

Mo.—Nordquist v. Armourdale State Bank, 19 S.W.2d 553, 225 Mo.App. 186.

34 C.J. p 63 notes 44 [f], 47.

Verdict taken subject to opinion of court

N.Y.—Jackson v. Fitzsimmons, 6 Wend. 546.

43. Ky.—Stockholders First Nat. Bank v. First Nat. Bank's Receiver, 174 S.W. 473, 163 Ky. 790.

34 C.J. p 62 note 43.

ever, the mere premature entry of a judgment is not a jurisdictional defect,[44] and, therefore, does not avoid the judgment,[45] but at most makes it irregular and voidable,[46] and the prematurity may be waived.[47] According to some authorities, a judgment rendered before the appearance term is a mere nullity;[48] but it has also been held that a judgment entered before the succeeding term at which the case is triable is merely erroneous.[49]

There are cases in which judgments are claimed to be premature, but are held not to be so.[50] A judgment on a verdict disposes, ipso facto, of a motion to set aside the verdict.[51]

Prior to last day of term. In states wherein, as discussed infra subdivision e of this section, a judgment ordinarily is regarded as rendered on the last day of the term, the court or presiding justice may, notwithstanding the general rule, enter, or order the entry of, judgment at any time after the decision and during the term.[52]

Prior to determination of costs. There is authority both for the view that judgment should not be entered until all costs are taxed and properly adjusted[53] and for the view that, costs being merely incident to judgment, a controversy over disbursements should not delay entry of judgment.[54]

c. Delay

(1) In general
(2) Expiration of trial term
(3) Expiration of judge's term of office

(1) In General

Statutes limiting the time for entering judgment are directory only, and a failure to comply therewith does not invalidate a judgment subsequently entered. Except in a few states, a like conclusion is reached as to constitutional or statutory provisions limiting the time for rendering judgment.

Where the constitution or a statute requires rendition of the judgment within a limited time, it has been held that the court loses authority over the case at the expiration of that time, so that a judgment thereafter rendered is void for want of jurisdiction,[55] as in the case of a failure of the judge to comply with a statutory direction to render his decision within a certain number of days after the case is submitted to him.[56] However, it has also been held that compliance with provisions of this kind is not jurisdictional,[57] that such a provision is merely

44. Mont.—State v. District Court of Fourth Judicial Dist. in and for Missoula County Department No. 2, 282 P. 1042, 86 Mont. 193.
Nev.—**Corpus Juris quoted in** State ex rel. Newitt v. Fourth Judicial Dist. Court in and for Elko County, 121 P.2d 442, 444, 61 Nev. 164.
34 C.J. p 63 note 50.
Immunity from collateral attack see infra § 433.

45. Ky.—McKim v. Smith, 172 S.W. 2d 634, 294 Ky. 835—Spencer v. Martin Mining Co., 88 S.W.2d 39, 259 Ky. 697.
Nev.—**Corpus Juris quoted in** State ex rel. Newitt v. Fourth Judicial Dist. Court in and for Elko County, 121 P.2d 442, 444, 61 Nev. 164.
N.M.—Field v. Otero, 290 P. 1015, 35 N.M. 68—Dallam County Bank v. Burnside, 249 P. 109, 31 N.M. 537.
Okl.—**Corpus Juris cited in** Orr v. Johnson, 149 P.2d 993, 994, 194 Okl. 287.
34 C.J. p 63 note 50.

Where court has jurisdiction, premature entry of judgment is not void.—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416.

Subsequent judgment

Judgment which was prematurely entered before proof had been taken on issue made by pleadings would not affect validity of judgment subsequently entered after proof had been taken on issue.—Horton v. Horton, 92 S.W.2d 373, 263 Ky. 413.

46. Mich.—Wark-Gilbert Co. v. Lamb, 227 N.W. 723, 248 Mich. 581.
Mont.—State v. District Court of Fourth Judicial Dist. in and for Missoula County Department No. 2, 282 P. 1042, 86 Mont. 193.
Nev.—**Corpus Juris quoted in** State ex rel. Newitt v. Fourth Judicial Dist. Court in and for Elko County, 121 P.2d 442, 444, 61 Nev. 164.
N.M.—Field v. Otero, 290 P. 1015, 35 N.M. 68—Dallam County Bank v. Burnside, 249 P. 109, 31 N.M. 537.
Okl.—**Corpus Juris cited in** Orr v. Johnson, 149 P.2d 993, 994, 194 Okl. 287.
34 C.J. p 63 note 50.

47. Ky.—Spencer v. Martin Mining Co., 88 S.W.2d 39, 259 Ky. 697.
34 C.J. p 63 notes 43 [l] (3), 44 [c].

48. Ga.—Napier v. Varner, 101 S.E. 579, 149 Ga. 585.
34 C.J. p 63 note 51.

Third party claimants

Where proceeding to foreclose mortgage and to renew dormant judgment was filed during October term, return term for case was next term; hence, judgment rendered in October term was void for want of jurisdiction as to third party claimants to mortgaged land, notwithstanding defendant made waiver with reference to judgment at first term and process.—Penn Mut. Life Ins. Co. v. Troup, 170 S.E. 359, 177 Ga. 456.

49. Miss.—Willsford v. Meyer-Kiser Corporation, 104 So. 293, 139 Miss. 337.

50. Ariz.—Aldous v. Intermountain Building & Loan Ass'n of Arizona, 284 P. 353, 36 Ariz. 225.
Cal.—Lind v. Baker, 119 P.2d 806, 48 Cal.App.2d 234.
R.I.—Rhode Island Rug Works v. General Baking Co., 128 A. 676.
S.D.—Ryan v. Sioux Gun Club, 2 N. W.2d 681, 68 S.D. 345.
Tex.—Smith v. Smith, Civ.App., 186 S.W.2d 287, refused for want of merit—Jones v. Bledsoe, Civ.App., 293 S.W. 204.
34 C.J. p 62 note 38 [a]; p 63 note 44 [e], [g], p 64 note 61 [e] (5).

51. Ill.—Home Flax Co. v. Beebe, 48 Ill. 138.

52. N.H.—Tuttle v. Tuttle, 196 A. 624, 89 N.H. 219.
Vt.—Downer v. Battles, 152 A. 805, 103 Vt. 201.

53. S.C.—Black v. B. B. Kirkland Seed Co., 161 S.E. 489, 163 S.C. 222.

54. Or.—Lyon v. Mazeris, 132 P.2d 982, 170 Or. 222.

55. Iowa.—Tomlinson v. Litze, 47 N.W. 1015, 82 Iowa 32, 31 Am.S.R. 458.
34 C.J. p 64 note 53.

56. Idaho.—McGary v. Steele, 119 P. 448, 20 Idaho 753.
34 C.J. p 64 note 54.

57. Ariz.—Johnson v. Johnson, 52 P. 2d 1162, 46 Ariz. 535—Williams v. Williams, 243 P. 402, 29 Ariz. 588.

directory,[58] and that disregard thereof renders the judgment at most irregular and erroneous, but not void,[59] and that, being for the benefit of the parties, it may be waived by them.[60] In the absence of such constitutional or statutory directions the court has authority to take a case under advisement for a reasonable length of time before rendering its decision,[61] and, while it is under a duty to decide a case within a reasonable time after submission,[62] it has jurisdiction to render a decision at whatever time it reaches a conclusion.[63]

Entry of a judgment, considered as a ministerial act, may be made after the time fixed by statute for rendition of a judgment.[64] Statutes relating to the time of entry have been considered as directory,[65] so that the validity of a judgment subsequently entered is not affected by failure to comply with the statute.[66] Judgment may be entered on a verdict or decision at any time thereafter,[67] and it is the right of a party to have a judgment so entered unless the lapse of time is unreasonably great,[68] or unless some independent right has intervened,[69] or the adverse party has suffered damage or lost a right by reason of the delay,[70] so long as the court has not lost jurisdiction of the case.[71] Mere delay does not work a loss of jurisdiction to render or enter a judgment.[72] The presumption of pay-

Cal.—Farmers & Merchants Nat. Bank of Los Angeles v. Peterson, 55 P.2d 867, 5 Cal.2d 601.
N.D.—Bruegger v. Cartier, 126 N.W. 491, 20 N.D. 72.
Wash.—Bickford v. Eschbach, 9 P. 2d 376, 167 Wash. 357.
34 C.J. p 64 note 55.

58. Cal.—Farmers & Merchants Nat. Bank of Los Angeles v. Peterson, 55 P.2d 867, 5 Cal.2d 601—Sannes v. McEwan, 10 P.2d 81, 122 Cal. App. 265—City of Los Angeles v. Hannon, 251 P. 247, 79 Cal.App. 669.
Pa.—Huron v. Schomaker, 1 A.2d 537, 132 Pa.Super. 462.

59. Cal.—Farmers & Merchants Nat. Bank of Los Angeles v. Peterson, 55 P.2d 867, 5 Cal.2d 601.
Conn.—Spelke v. Shaw, 169 A. 787, 117 Conn. 639—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.
La.—Matthews v. Spears, App., 24 So.2d 195.
Nev.—Ratliff v. Sadlier, 299 P. 674, 53 Nev. 292.
N.D.—Bruegger v. Cartier, 126 N.W. 491, 20 N.D. 72.
Or.—Kellogg v. Kellogg, 263 P. 685, 123 Or. 639.
34 C.J. p 64 note 56.

60. N.Y.—Keating v. Serrell, 5 Daly 278.
34 C.J. p 64 note 57.
Consent assumed
Where no timely advantage is taken of the delay, parties will be assumed to have consented thereto. —Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.
Waiver not shown
Failure of defendant to object to further consideration of case after expiration of session, or to claim lack of jurisdiction until adverse judgment was rendered was held not waiver of error in rendering judgment during session next following that at which trial was commenced.—Spelke v. Shaw, 169 A. 787, 117 Conn. 639.

61. Mich.—Krebs v. Senig, 93 N.W. 875, 132 Mich. 346.
34 C.J. p 64 note 58.

62. Ill.—Friend v. Borrenpohl, 161 N.E. 110, 329 Ill. 528.

63. U.S.—Ewert v. Thompson, C.C. A.Okl., 281 F. 449.
Okl.—Moroney v. Tannehill, 215 P. 938, 90 Okl. 224.

64. Utah.—Kolb v. Peterson, 168 P. 97, 50 Utah 450.
34 C.J. p 64 note 60.

65. Cal.—Hume v. Lindholm, 258 P. 1003, 85 Cal.App. 80.
Colo.—General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland v. Cohen, 216 P. 522, 73 Colo. 459.
Idaho.—Glennon v. Fisher, 10 P.2d 294, 51 Idaho 732.
Mont.—Coover v. Davis, 121 P.2d 985, 112 Mont. 605.
Or.—Fuller v. Blanc, 77 P.2d 440, 160 Or. 50.
34 C.J. p 65 note 62.

66. Colo.—General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v. Cohen, 216 P. 522, 73 Colo. 459.
Iowa.—Selby v. McDonald, 259 N.W. 485, 219 Iowa 823.
Mont.—Coover v. Davis, 121 P.2d 985, 112 Mont. 605.
Or.—Fuller v. Blanc, 77 P.2d 440, 160 Or. 50.
34 C.J. p 64 note 61 [a] (2), [c] (3), (4), [e] (4), p 65 note 62.
Judgment voidable
A judgment entered after time required by law has been held voidable.—Tanner v. Wilson, 192 S.E. 425, 184 Ga. 628.

67. Minn.—**Corpus Juris quoted in** Industrial Loan & Thrift Corporation v. Benson, 21 N.W.2d 99, 101.
Ohio.—Baylor v. Killinger, 186 N.E. 512, 44 Ohio App. 523.
Okl.—Sloan v. Kohler, 88 P.2d 644, 184 Okl. 511.
34 C.J. p 65 note 63.
During valid extension of term
Ky.—Happy Coal Co. v. Brashear, 92 S.W.2d 23, 263 Ky. 257.

68. Ariz.—Cahn v. Schmitz, 108 P. 2d 1006, 56 Ariz. 469.
Minn.—**Corpus Juris quoted in** Industrial Loan & Thrift Corporation v. Benson, 21 N.W.2d 99, 101.
Okl.—Dusbabek v. Bowers, 43 P.2d 97, 173 Okl. 53, rehearing denied 47 P.2d 141, 173 Okl. 53.
34 C.J. p 65 note 64.
Pressure of other business not excuse for further delay
U.S.—In re Maxwell, C.C.A.Tex., 100 F.2d 749.

69. Minn.—**Corpus Juris quoted in** Industrial Loan & Thrift Corporation v. Benson, 21 N.W.2d 99, 101.
Okl.—Dusbabek v. Bowers, 43 P.2d 97, 173 Okl. 53, rehearing denied 47 P.2d 141, 173 Okl. 53.
Wash.—State v. French, 171 P. 527, 100 Wash. 552.

70. Ill.—Wallace Grain & Supply Co. v. Cary, 28 N.E.2d 107, 374 Ill. 57.

71. Ariz.—Cahn v. Schmitz, 108 P. 2d 1006, 56 Ariz. 469.
Minn.—**Corpus Juris quoted in** Industrial Loan & Thrift Corporation v. Benson, 21 N.W.2d 99, 101.
34 C.J. p 65 note 66.

72. Ariz.—Cahn v. Schmitz, 108 P. 2d 1006, 56 Ariz. 469.
Ill.—**Corpus Juris cited in** Wallace Grain & Supply Co. v. Cary, 28 N. E.2d 107, 108, 374 Ill. 57—Siegle v. Mitchell, 249 Ill.App. 116.
Okl.—**Corpus Juris quoted in** Dusbabek v. Bowers, 43 P.2d 97, 173 Okl. 53, rehearing denied 47 P. 2d 141, 173 Okl. 53.
Tex.—Public Service Employees Credit Union v. Procter, Civ.App., 155 S.W.2d 643, error dismissed.
34 C.J. p 65 note 67.
Entry of judgment previously ordered
Entry in December of judgment then filed may be deemed entry of the judgment ordered in preceding January to be entered, and so not beyond jurisdiction of court.—Wixom v. Davis, 246 P. 1041, 198 Cal. 641.

ment arising under the statute of limitations from expiration of the statutory period relates only to the remedy by action, and does not prevent entry of judgment on a decision or verdict after expiration of the statutory time.[73]

Duly constituted court as essential to the validity and regularity of a judgment is discussed supra §§ 15–17.

A rule of court requiring a judgment to be filed or formally written out at, or within, a prescribed time, or forbidding the rendition of judgment, over objection, within a designated number of days of the close of the term, has been held to have the force of law,[74] and should be complied with,[75] provided it is in effect at the time,[76] is applicable,[77] and has not been waived,[78] but disregard thereof has been held not to make the judgment void.[79]

After adjournment. The entry of an order adjourning court sine die does not prevent the entry of judgment on a subsequent day in the period during which the court, by virtue of statute, remains open for the transaction of business.[80] Under a statute expressly so providing, judgment on a verdict may be entered within a prescribed number of days after adjournment of court.[81]

After death of party. If the court renders a judgment during the lifetime of a party, the clerk may perform the ministerial act of entering it and recording it after his death.[82]

Death of a party as affecting the validity of a judgment generally is discussed supra § 29.

(2) Expiration of Trial Term

A judgment may not be invalid because it is not rendered or entered until after the expiration of the trial term.

Where regular terms are provided by law, judgments may properly be rendered only during such terms.[83] While there is authority holding that a judgment rendered after the expiration of the term is void,[84] it has also been indicated that such a judgment is not wholly void, but only irregular or erroneous.[85] It has been held that, where the parties expressly[86] or impliedly[87] consent, a judgment may be rendered after expiration of the term; but,

Absence of prior legal judgment

Where parties by stipulation removed the record of a cause from one district to another, and after decision at trial the record was returned by the clerk without authority to the first county, and on memorandum thereon judgment was entered, and on certiorari it was determined that it was entered without authority, on recovery of the record by the trial district, the court did not lose jurisdiction to enter judgment on its decision nine months thereafter.—Morley v. McDonald, 118 A. 582, 98 N.J.Law 275.

73. Minn.—**Corpus Juris quoted in** Industrial Loan & Thrift Corporation v. Benson, 21 N.W.2d 99, 101.
N.Y.—Puls v. New York L. & W. R. Co., 104 N.Y.S. 374, 54 Misc. 303.

74. Tex.—Rowe v. Gohlman, 98 S.W. 1077, 44 Tex.Civ.App. 315.

75. Conn.—Appeal of Bulkeley, 57 A. 112, 76 Conn. 454.
34 C.J. p 64 note 61 [d], p 65 note 70 [a] (8).

Rule held sufficiently complied with
Ariz.—Griffith v. State Mut. Building & Loan Ass'n, 51 P.2d 246, 46 Ariz. 359.

76. Ariz.—Mosher v. Dye, 39 P.2d 639, 44 Ariz. 555.

77. Tex.—Richards v. Howard, Civ. App., 218 S.W. 95.
34 C.J. p 65 note 70 [a] (2), (4), (6), (7).

78. Tex.—Rowe v. Gohlman, 98 S.W. 1077, 44 Tex.Civ.App. 315.

79. Tex.—Meredith v. Flanagan, Civ. App., 202 S.W. 787.

80. Ala.—Hanover Fire Ins. Co. v. Street, 176 So. 350, 234 Ala. 537.

81. Ga.—Sullivan v. Douglas Gibbons, Inc., 2 S.E.2d 89, 187 Ga. 764.

82. Cal.—In re Cook's Estate, 19 P. 431, 77 Cal. 220, 11 Am.S.R. 267, 1 L.R.A. 567—Franklin v. Merida, 50 Cal. 289.

83. Conn.—Whitaker v. Cannon Mills Co., 45 A.2d 120—Gruskay v. Simenauskas, 140 A. 724, 107 Conn. 380.
33 C.J. p 1067 note 81.

Term divided into sessions

Where a term of court is divided into sessions, the judgment must be rendered according to statute at the same session in which case is tried or the next succeeding one.—Whitaker v. Cannon Mills Co., Conn., 45 A. 2d 120.

Entry

It has been held that, if a judgment is ordered and its terms prescribed by the court during a term, it is a judgment rendered in term time, although the entry thereof is not in fact prepared and transcribed on the journal until after the close of the term.—Iliff v. Arnott, 8 P. 525, 31 Kan. 672—33 C.J. p 1067 note 86.

84. Tex.—Glasscock v. Pickens, Civ. App., 73 S.W.2d 992—Texas Mut. Life Ins. Ass'n v. Laster, Civ.App., 69 S.W.2d 496—Rouff v. Boyd, Civ. App., 16 S.W.2d 403—Engelman v. Anderson, Civ.App., 244 S.W. 650.
33 C.J. p 1067 note 82.

After expiration of term in which case is tried, court ordinarily lacks jurisdiction to proceed further with case, and any judgment it renders is void.—Foley v. George A. Douglas & Bro., 185 A. 70, 121 Conn. 377.

Absence of order extending term

A judgment, rendered on jury's verdict at second term after that at which trial began and verdict was returned, was unauthorized, in absence of order extending term.—British General Ins. Co. v. Ripy, 106 S.W.2d 1047, 130 Tex. 101.

85. Conn.—Lawrence v. Cannavan, 56 A. 556, 76 Conn. 303.
33 C.J. p 1067 note 83.

A constitutional provision requiring that superior courts shall be at all times open for the transaction of business, except for trial of issues of fact requiring a jury, has been held not to invalidate a judgment signed and entered after the expiration of the term.—Shackelford v. Miller, 91 N.C. 181.

86. Conn.—Whitaker v. Cannon Mills Co., 45 A.2d 120.
N.C.—Killian v. Maiden Chair Co., 161 S.E. 546, 202 N.C. 23.
33 C.J. p 1067 note 84.

Form

Consent to entry of judgment out of term should be in writing.—Killian v. Maiden Chair Co., 161 S.E. 546, 202 N.C. 23.

87. Conn.—Whitaker v. Cannon Mills Co., 45 A.2d 120.

where such judgments are deemed absolutely void, consent cannot confer jurisdiction.[88] It has been held that a valid judgment may be rendered at a subsequent term under some circumstances,[89] as where the court takes a case under advisement to the next succeeding term.[90]

Entry. Although, in some states, or under some statutes, a judgment is a nullity unless entered on the records of the court during the term at which it was rendered,[91] it has been held that a judgment may not be invalid because it is entered after the trial term,[92] as where it is entered at a succeeding term[93] and no final judgment has been previously rendered[94] or entered.[95] Also, where the clerk failed to perform his ministerial duty of entering on the record the judgment on a verdict or decision, the judgment may be entered at a subsequent term,[96] it being permissible for the court at such term to direct entry of the judgment,[97] or the duty may be performed by the clerk at his own instance at any time,[98] except in some jurisdictions wherein the clerk has no authority to enter a judgment after the term without the consent or order of the court,[99] or without the consent or agreement of the adverse party and without statutory notice.[1]

Where a judgment has been continued by curia advisare vult, and is not given until the term succeeding that at which the verdict was rendered, the judgment must not only be signed, but must be entered, as of such succeeding term.[2] Under a court rule, a judgment awarded after the expiration of a term at which it was ripe for judgment must be entered as of the last day of that term.[3]

N.C.—Molyneux v. Huey, 81 N.C. 106.

Waiver

(1) Lack of jurisdiction of court to render judgment after expiration of term next succeeding term at which trial was commenced does not pertain to subject matter but to the parties, and hence may be waived.—Whitaker v. Cannon Mills Co., Conn., 45 A.2d 120.

(2) Defendant who filed pleadings and participated in further hearing after expiration of time allowed by statute for rendering judgment waived statutory requirement, and hence could not claim that judgment was invalid for lack of jurisdiction.—Whitaker v. Cannon Mills Co., supra.

88. Kan.—Packard v. Packard, 7 P. 628, 34 Kan. 53.

89. Tex.—Shellhammer v. Caruthers, Civ.App., 99 S.W.2d 1054, error dismissed—White v. Haynes, Civ. App., 60 S.W.2d 275, error dismissed—Spencer v. Citizens' State Bank of Woodville, Civ.App., 28 S.W.2d 1104, error dismissed—Brannon v. Wilson, Civ.App., 260 S.W. 201.
33 C.J. p 1067 note 87.

Retention of jurisdiction

A judgment rendered at a subsequent term, when the district court has retained jurisdiction to dispose of issues not determined by a former judgment, is valid.—Hoffman v. Hoffman, 135 P.2d 887, 156 Kan. 647.

90. Iowa.—Bookhart v. New Amsterdam Casualty Co., 286 N.W. 417, 226 Iowa 1186.
Kan.—Hoffman v. Hoffman, 135 P.2d 887, 156 Kan. 647.
Tex.—Miller & Babbs v. Hall, Civ. App., 62 S.W.2d 165, error dismissed.
33 C.J. p 1067 note 87.

91. Ala.—McLeod v. Home Pattern Co., 102 So. 597, 20 Ala.App. 430.
34 C.J. p 66 note 78.
Time for rendition of judgment generally see supra § 16.

92. U.S.—Sourino v. U. S., C.C.A. Ga., 86 F.2d 309, certiorari denied 57 S.Ct. 491, 300 U.S. 661, 81 L.Ed. 869—Westchester Fire Ins. Co. v. Bringle, C.C.A.Tenn., 86 F.2d 262.
Colo.—Denver Nat. Bank v. Grimes, 47 P.2d 862, 97 Colo. 158, 100 A. L.R. 994.
Fla.—Fawcett v. Weaver, 163 So. 561, 121 Fla. 245.
Tex.—J. G. Smith Grain Co. v. Payne, Civ.App., 290 S.W. 841.

Motion to enter judgment on verdict could be entertained by court after term at which verdict was rendered, particularly where such motion was a renewal of motion made at term at which verdict was rendered.—Hart v. National Casket Co., 293 N.Y.S. 155, 161 Misc. 728.

93. Ky.—Union Gas & Oil Co. v. Indian-Tex Petroleum Co., 263 S.W. 1, 203 Ky. 521.
Tex.—Scott v. Gardner, Civ.App., 159 S.W.2d 121, error refused—Parnell v. Barron, Civ.App., 261 S.W. 529.

Case taken under advisement

U.S.—Fleischmann Const. Co. v. U. S., to Use of Forsberg, Va., 46 S. Ct. 284, 270 U.S. 349, 70 L.Ed. 624.
Ala.—Edmonds v. Standard Brands, 171 So. 751, 233 Ala. 315.

Part of issues undecided

Where jury answered one issue during term, but court had not, at end of term, decided issues withdrawn, court could enter judgment at following term.—Atlas v. Byers, Tex.Civ.App., 21 S.W.2d 1080.

94. Ala.—Edmonds v. Standard Brands, 171 So. 751, 233 Ala. 315—Ex parte French, 147 So. 681, 226 Ala. 297.

Order sustaining demurrer

Where an order of trial court which sustained defendant's demurrer to petition was not final, such court had power to enter final order or judgment at the same or in subsequent terms.—Miracle v. Marshall, 111 S.W.2d 399, 271 Ky. 18.

95. Tex.—Manley v. Razien, Civ. App., 172 S.W.2d 798.

Where court cannot enter final judgment without additional parties and, therefore, retains jurisdiction, court may at subsequent term enter proper judgment.—Marshall v. McNeill, 5 P.2d 859, 134 Kan. 197.

96. Tenn.—McAlester v. Monteverde, 115 S.W.2d 257, 22 Tenn.App. 14.

97. Tex.—Carwile v. Cameron, 114 S.W. 100, 102 Tex. 171.
34 C.J. p 66 note 75.

98. Ill.—Wickiser v. Powers, 57 N. E.2d 522, 324 Ill.App. 130.
34 C.J. p 66 note 76, p 65 note 71 [a].

Directing judgment not to be entered

The court is without jurisdiction at a subsequent term to direct that the judgment shall not be written up by the clerk.—People v. Petit, 107 N.E. 830, 266 Ill. 628—Wickiser v. Powers, 57 N.E.2d 522, 324 Ill. App. 130.

99. Ky.—Shepherd v. Shepherd, 107 S.W. 273, 128 Ky. 87, 32 Ky.L. 942.
34 C.J. p 66 note 77.

Notice

Ky.—Parrish v. Ferriell, 186 S.W.2d 625, 299 Ky. 676.

1. Ky.—Green v. Blankenship, 91 S.W.2d 996, 263 Ky. 29—Lamereaux v. Dixie Motor Co., 91 S.W.2d 993, 263 Ky. 67.

2. N.J.—Thorpe v. Corwin, 20 N.J. Law 311.

3. U.S.—U. S. Shipping Board Emer-

(3) Expiration of Judge's Term of Office

A judgment entered after the expiration of the term of office of the judge who rendered it may be valid where there was a valid rendition thereof prior to the expiration of the judge's term of office.

Where a judgment was actually rendered before the expiration of the term of office of the judge trying the case, it is immaterial that it was not entered of record until afterward, the judicial act being the rendition of the judgment, and its entry being merely ministerial.[4] However, a valid decision cannot be entered after the expiration of the judge's term,[5] and the invalidity of the decision is not affected by the fact that it is ordered filed by his successor and is filed,[6] and a judgment rendered in vacation cannot be made binding by entry after death of the judge, by direction of his successor.[7] Under a statute prohibiting the rendition or entry of judgment until the filing of a decision, a judgment is invalid where the decision and judgment pursuant thereto, although signed before, were not filed until after, the expiration of the judge's term of office.[8]

d. Judgment on Report of Referee

The time for rendition or entry of, or making a motion for, judgment on the report of a referee varies under the statutes or practice of particular states.

Statutes limiting the time within which a motion for judgment on a referee's report may be made have been held to be mandatory, and the court cannot extend the time.[9] In some states, the successful party is entitled to judgment at once on the report of a referee,[10] but, under the practice of a particular state, judgment on the report of referees is, in the absence of exception filed to the report, entered as a matter of course at the term succeeding their appointment;[11] and, under a statute providing that judgment shall not be entered on the report until a certain number of days have elapsed, a judgment entered within that time is irregular,[12] although not void.[13] A judgment not rendered until nine days after a motion to modify findings of the referee has been held not premature.[14]

e. Date of Judgment

As a general rule a judgment takes effect from the day it is actually rendered or entered.

By the common law, followed in some of the states, sometimes by virtue of statutory provisions, all judgments rendered at a given term of court are presumed to have been rendered on the first day of that term,[15] and at the earliest possible hour of that day when, according to the course of the court, it might have been rendered;[16] but this rule is inapplicable in a case where judgment could not have been rendered on the first day of the term.[17] In other states a judgment is regarded as rendered on the last day of the term unless the contrary is shown.[18] In still another state, under statutes and

gency Fleet Corporation v. Atlantic Corporation, C.C.A.Mass., 16 F. 2d 27.

Judgment of prior term

A judgment in a case heard in January, signed Feb. 11, 1941, out of term and out of county by consent of the parties, and which was docketed Febr. 14, 1941, when docketed, became a judgment as of the January term, 1941.—Crow v. McCullen, 17 S.E.2d 107, 220 N.C. 306.

4. Fla.—State ex rel. Watts v. Sandler, 199 So. 356, 145 Fla. 425.
N.Y.—Anstendig v. Dinnerson, 264 N. Y.S. 680, 147 Misc. 827.
34 C.J. p 67 note 96.

After death of judge

Ministerial act of entering judgment on record may be performed after death of judge signing judgment.—Beetchenow v. Bartholet, 298 P. 835, 162 Wash. 119.

5. Cal.—Connolly v. Ashworth, 83 P. 60, 98 Cal. 205.
6. Cal.—Connolly v. Ashworth, supra.
7. Miss.—Wilson v. Rodewald, 61 Miss. 228.
8. S.D.—Klundt v. Hemenway, 244 N.W. 377, 60 S.D. 248.
9. Wis.—Miami County Nat. Bank v. Goldberg, 105 N.W. 816, 126 Wis. 432.
34 C.J. p 69 note 22.
10. N.C.—Reed v. Farmer, 69 N.C. 539.
34 C.J. p 70 note 23.
11. Del.—Georgetown Trust Co. v. Marvel, 162 A. 659, 5 W.W.Harr. 210.
12. S.D.—Wood v. Saginaw Gold Min. & Mill. Co., 105 N.W. 101, 20 S.D. 161.
34 C.J. p 70 notes 24 [b], 25.
13. N.Y.—Hill v. Watson, 2 How.Pr. 153.
34 C.J. p 70 note 25.
14. Or.—Trummer v. Konrad, 51 P. 447, 32 Or. 54.
15. N.C.—Norwood v. Thorp, 64 N. C. 682.
34 C.J. p 70 note 27.
16. Miss.—Clark v. Duke, 59 Miss. 575.
34 C.J. p 70 note 28.
17. Va.—Withers v. Carter, 4 Gratt. 407, 45 Va. 407, 50 Am.D. 78.
34 C.J. p 70 note 27 [a], [b].

Judgment nunc pro tunc

Such a statute does not apply to a judgment signed out of term and a judgment nunc pro tunc, although by agreement, is not allowed to take effect by relation to the prejudice of third parties.—Con-Es-Tee Chemical Co. v. Long, 114 S.E. 465, 184 N.C. 398.

18. Vt.—Downer v. Battles, 152 A. 805, 103 Vt. 201.
34 C.J. p 70 note 29, p 583 note 63.

Variable practice

The practice of having only one judgment day for the term is not invariable.—Tuttle v. Tuttle, 196 A. 624, 89 N.H. 219.

Rule of court

(1) Under a rule of court, where a cause was ripe for judgment at a certain term, but no judgment was entered at any time during the term, a judgment entered after the term is to be regarded as entered as of the last day of the term.—U. S. Shipping Board Emergency Fleet Corporation v. Atlantic Corporation, C.C.A.Mass., 16 F.2d 27.

(2) A rule of court, providing that "where judgment shall be omitted to be entered upon a verdict it shall be considered as entered on the last day of the term," can have no application to verdicts incapable of supporting judgments.—Pressed Steel Car Co. v. Steel Car Forge Co., Pa., 149 F. 182, 79 C.C.A. 130.

rules of court directing the clerk to enter, on a certain day in each week, judgments in civil actions and proceedings ripe for judgment, a case goes to judgment automatically on the first judgment day after it becomes ripe for judgment,[19] and, in view of the law, the judgment is rendered when it ought to be entered,[20] even though the clerk fails to enter the judgment on that date.[21]

In a majority of states, however, the date of a judgment is the day on which it is actually rendered[22] or entered;[23] and may be fixed by reference to the record of the proceedings in the case,[24] or extrinsic evidence may be given of the day on which the judgment was rendered.[25] Under, and in accordance with, the majority rule, a judgment is deemed to be rendered on the date when it is ordered[26] or pronounced[27] by the court, or when the trial judge in open court declares his decision of law on the matters in issue,[28] or when a formal order granting a motion for judgment on the verdict is signed,[29] or, in the absence of contrary indication, when the clerk certifies that he has received the judgment for record.[30] It may be dated back to the time when the court directed judgment to be entered,[31] but is not valid if postdated, at least, not until the arrival of the day named.[32] A judgment filed out of office hours with the clerk is considered as legally and properly filed in his office at the hour legally fixed for the opening of his office on the following business day.[33]

Time of rendition or entry as fixing time for appeal is discussed in Appeal and Error § 445.

§ 114. —— In Vacation

Unless authorized by statute, a judgment rendered during vacation is void. A judgment properly rendered generally may be entered by the clerk in vacation.

Unless authorized by statute,[34] a judgment rendered during vacation is void for want of jurisdiction.[35] Some statutes conferring judicial powers

19. Mass.—Petition of McGonigle, 57 N.E.2d 926, 317 Mass. 262—Home Finance Trust v. Rantoul Garage Co., 14 N.E.2d 153, 300 Mass. 86.

Conversely, lack of ripeness for judgment prevents the case from going to judgment automatically.—Barton v. City of Cambridge, Mass., 61 N.E.2d 330—Krinsky v. Stevens Coal Sales Co., 36 N.E.2d 411, 309 Mass. 528—Lynn Gas & Electric Co. v. Creditors' Nat. Clearing House, 130 N.E. 111, 237 Mass. 505—Hosmer v. Hoitt, 36 N.E. 835, 161 Mass. 173—Norcross v. Crabtree, 36 N.E. 673, 161 Mass. 55.

Ripeness for judgment

(1) A case is ripe for judgment within contemplation of such provisions when, under last entry, case seems to have been brought to final determination and everything seems to have been done that ought to be done before the entry of a final adjudication on the rights of the parties.—Home Finance Trust v. Rantoul Garage Co., 14 N.E.2d 153, 300 Mass. 86—American Woodworking Machinery Co. v. Forbush, 79 N.E. 770, 193 Mass. 455.

(2) A case is normally ripe for judgment when all appears to have been done with regard to the action that should have been done.—Ahern v. Towle, 39 N.E.2d 561, 310 Mass. 695.

(3) A case may be ripe for judgment, even though there are undisposed of motions on the files of the court.—Dalton-Ingersoll Co. v. Fiske, 55 N.E. 468, 175 Mass. 15.

20. Mass.—Sullivan v. Jordan, 36 N.E.2d 387, 310 Mass. 12.

21. Mass.—Hacking v. Co-ordinator of Emergency Relief Dept. of New Bedford, 48 N.E.2d 41, 313 Mass. 413—Krinsky v. Stevens Coal Sales Co., 36 N.E.2d 411, 309 Mass. 528—Sullivan v. Jordan, 36 N.E.2d 387, 310 Mass. 12—Home Finance Trust v. Rantoul Garage Co., 14 N.E.2d 153, 300 Mass. 86.

22. Fla.—State ex rel. Watts v. Sandler, 199 So. 356, 145 Fla. 425.

Miss.—**Corpus Juris cited in** Johnson v. Mississippi Power Co., 196 So. 642, 643, 189 Miss. 67.

34 C.J. p 70 note 30.

Time when judgment takes effect see infra § 446.

23. Iowa.—State v. Beaton, 178 N.W. 1, 190 Iowa 216, rehearing denied 180 N.W. 166, 190 Iowa 216.

34 C.J. p 55 note 57, p 70 note 30.

As between the parties, a judgment is secured when the entry thereof is made in the appearance docket of the court.—Lynch v. Bishop, 21 Pa.Dist. & Co. 313.

24. Miss.—Johnson v. Mississippi Power Co., 196 So. 642, 189 Miss. 67.

Neb.—**Corpus Juris quoted in** Martin v. Sanford, 261 N.W. 136, 140, 129 Neb. 212.

34 C.J. p 70 note 31.

25. Neb.—**Corpus Juris quoted in** Martin v. Sanford, 261 N.W. 136, 140, 129 Neb. 212.

34 C.J. p 70 note 32.

26. Tenn.—Southern Mortg. Guaranty Corporation v. King, 77 S.W.2d 810, 168 Tenn. 309.

Date of filing of memorandum directing judgment

Conn.—Mazulis v. Zeldner, 164 A. 713, 116 Conn. 314.

When the order book is signed, the judgment dates back to the time of entry.—Lawrence v. First State Bank of Dry Ridge, 132 S.W.2d 60, 279 Ky. 775.

27. Ill.—Cosgrove v. Highway Commissioner of Town of Rockville, 281 Ill.App. 406.

Miss.—Johnson v. Mississippi Power Co., 196 So. 642, 189 Miss. 67.

Tenn.—Southern Mortg. Guaranty Corporation v. King, 77 S.W.2d 810, 168 Tenn. 309.

28. Tex.—Universal Life Ins. Co. v. Cook, Civ.App., 133 S.W.2d 791.

29. Wis.—Osmundson v. Lang, 290 N.W. 125, 233 Wis. 591.

30. Tex.—City of Wichita Falls v. Brown, Civ.App., 119 S.W.2d 407, error dismissed.

31. N.Y.—Clark v. Clark, 34 N.E. 513, 138 N.Y. 653.

Vt.—Starbird v. Moore, 21 Vt. 529.

32. N.Y.—Smith v. Coe, 30 N.Y. 477.

33. N.Y.—Hathaway v. Howell, 54 N.Y. 97.

34 C.J. p 62 note 41.

34. Vt.—Leonard v. Willcox, 142 A. 762, 101 Vt. 195.

33 C.J. p 1068 note 89, p 1069 note 90—15 C.J. p 816 note 26.

In Georgia

The judges of the superior court cannot exercise any power out of term time, unless the authority to do so is expressly granted by law, or an order has been taken in term conferring authority to render a judgment in vacation.—Sammons v. Nabers, 197 S.E. 284, 186 Ga. 161—33 C.J. p 1068 note 89 [d].

35. Ga.—Rogers v. Toccoa Power Co., 131 S.E. 517, 161 Ga. 524, 44 A.L.R. 534—Walton v. Wilkinson Bolton Co., 123 S.E. 103, 158 Ga. 13—Wright v. Cannon, 198 S.E.

on judges in vacation have been held unconstitutional.[36]

In some jurisdictions where the rendition of judgments in vacation is not authorized, judgments rendered at such a time have been held void, although the parties had expressly consented to such rendition.[37] Under some statutes, however, where the parties to the action consent, a judgment may be rendered during vacation.[38] Where this is the case, a judgment so rendered by consent is not only binding on the parties, but is valid even as to third persons in the absence of proof of fraud or collusion.[39]

Entry. A judgment entered in vacation by a court or judge has been held a nullity[40] unless its entry at such time by the court or judge is authorized by statute,[41] the power, if any, of a court or judge to enter judgment in vacation being purely statutory.[42] A contention that the court was without jurisdiction to enter judgment in vacation is without merit where the record does not disclose that the judgment was entered in vacation.[43]

In a majority of jurisdictions, a judgment properly rendered may be entered by the clerk in vacation,[44] provided the clerk does not act merely from his own recollection, but is guided by some memoranda, such as the minutes and docket entries of the court's proceeding.[45] However, a judgment neither rendered by the court nor pronounced by law attempted to be entered by the clerk in vacation is void[46] as being an attempted exercise of judicial powers by a ministerial officer.[47] In some jurisdictions, the clerk has no power or authority to enter a judgment in vacation,[48] although duly pronounced by the court in term time,[49] even at the express direction of the judge,[50] or even in cases where there is a docket memorandum sufficient to authorize a judgment nunc pro tunc at a subsequent term.[51]

§ 115. —— Pendency of Motion for New Trial or in Arrest

After verdict, it is regular in some jurisdictions, and irregular in others, to enter judgment before expiration of the time for applying for a new trial or pending disposition of a timely motion for a new trial. A motion in arrest of judgment should be disposed of before rendition of judgment.

At common law,[52] and under the statutes or practice of some jurisdictions,[53] a judgment after verdict should not be entered before expiration of the

301, 58 Ga.App. 268—Kelley v. Pafford, 121 S.E. 866, 31 Ga.App. 697.
Ill.—Gary v. Senseman, 215 Ill.App. 232.
Miss.—Union Motor Car Co. v. Farmer, 118 So. 425, 151 Miss. 734.
Tex.—Sinclair Refining Co. v. McElree, Civ.App., 52 S.W.2d 679.
33 C.J. p 1067 note 88—15 C.J. p 815 note 25.

A vacation hearing is coram non judice and a judgment rendered thereat is void, in absence of any waiver or estoppel or an order passed in term time expressly granting authority to render a judgment in vacation or the giving of written notice of the vacation hearing.—Sammons v. Nabers, 197 S.E. 284, 186 Ga. 161.

Judgments or decrees held not void

(1) Judgment has been held not invalid because rendered in vacation where judgment was not filed or entered until court reconvened, which entry amounted to confirmation of findings of fact and law in vacation and to rendition of judgment in open court.—Morrow v. Scroggins, 70 S.W.2d 551, 188 Ark. 1038.

(2) Where district court kept regular term open by specific order until adjournment sine die, recess between meetings during term was not "vacation"; hence, decree was not void as rendered in vacation.—Wallace v. Clements, 248 N.W. 53, 124 Neb. 691.

36. Mo.—State v. Woodson, 61 S.W. 252, 161 Mo. 444.
33 C.J. p 1069 note 91.
37. Okl.—Dunn v. Carrier, 135 P. 337, 40 Okl. 214.
33 C.J. p 1069 note 92.
38. Tex.—Doeppenschmidt v. City of New Braunfels, Civ.App., 289 S.W. 425.
33 C.J. p 1069 notes 93, 94.
39. La.—New Orleans v. Gauthreaux, 32 La.Ann. 1126.
33 C.J. p 1070 note 95.
40. Ind.—Isaacs v. Fletcher American Nat. Bank, 185 N.E. 154, 98 Ind.App. 111.
Vt.—Saund v. Saund, 138 A. 867, 100 Vt. 387.

Judgment rendered and entered in vacation

Ky.—Beliles v. Whittaker, 251 S.W. 190, 199 Ky. 431.
41. Ill.—Friend v. Borrenpohl, 161 N.E. 110, 329 Ill. 528.
Vt.—Morgan v. Gould, 119 A. 517, 96 Vt. 275.
W.Va.—McGibson v. Roane County Court, 121 S.E. 99, 95 W.Va. 338.

Notice to parties

Ky.—Lawrence v. First State Bank of Dry Ridge, 132 S.W.2d 60, 279 Ky. 775—City of Owensboro v. Nolan, 46 S.W.2d 490, 242 Ky. 342.
42. Vt.—Saund v. Saund, 138 A. 867, 100 Vt. 387.
43. Ill.—Chicago Title & Trust Co. v. Cohen, 1 N.E.2d 717, 284 Ill.App. 181.
44. Colo.—Wilson v. Collin, 102 P. 21, 45 Colo. 412.
34 C.J. p 66 note 82.
Judgment:
By confession see infra § 166.
By default see infra § 207.
45. Md.—Montgomery v. Murphy, 19 Md. 576, 81 Am.D. 652.
34 C.J. p 66 note 83.
46. Colo.—Sieber v. Frink, 2 P. 901, 7 Colo. 148.
34 C.J. p 67 note 88.
47. Cal.—Stearns v. Aguirre, 7 Cal. 443.
Colo.—Sieber v. Frink, 2 P. 901, 7 Colo. 148.
48. Ala.—Campbell v. Beyers, 66 So. 651, 189 Ala. 307.
34 C.J. p 67 note 90.
49. Ind.—Mitchell v. St. John, 98 Ind. 598.
34 C.J. p 67 note 91.
50. Ind.—Passwater v. Edwards, 44 Ind. 343.
34 C.J. p 67 note 92.
51. Ala.—Wynn v. McCraney, 46 So. 854, 156 Ala. 630.
52. Ga.—City of Macon v. Herrington, 32 S.E.2d 517, 198 Ga. 576.
34 C.J. p 62 note 80.
53. Ohio.—Dellenbarger v. Hunger, 24 Ohio Cir.Ct. 722.
34 C.J. p 68 note 6.

Statute applies only to trial by jury or by the court where a jury is waived.—Noonan v. Noonan, Ohio App., 42 N.E.2d 671.

time within which a motion for a new trial may be made, and, if it is signed or entered before the expiration of such time,[54] or pending disposition of a timely motion for a new trial,[55] it is irregular, but not void.[56] In other jurisdictions, a judgment entered pending a motion for a new trial, or before expiration of the time within which such a motion may be made, is in all respects regular, valid, and in accordance with the customary practice.[57] Necessarily, a judgment before disposition of a timely motion for a new trial is at most a mere judgment nisi and is not final until the motion is overruled.[58]

Where a motion for a new trial has been entered on the docket and a time fixed for filing a report of the evidence, on failure to file the report of evidence, the case may be stricken from the law docket, and judgment entered on the verdict.[59] Also, where judgment has been withheld pending a motion for a new trial, judgment may be entered up immediately on overruling of the motion;[60] but the court, having granted a new trial, cannot rescind the order and render judgment on the verdict at a subsequent term.[61] When an order is entered dispensing with the necessity of a motion for a new trial, the defeated party may not postpone the final determination of the cause by filing such motion.[62]

A motion in arrest of judgment should be disposed of before rendition of judgment,[63] but failure to do so is harmless error where the motion is ill-founded,[64] and entry of judgment has been held to be, ipso facto, a disposition of the motion.[65]

§ 116. —— Stay of Proceedings

A motion to stay the entry of judgment may and should be denied where the stay is not authorized or warranted.

Where, apart from a motion for a stay of proceedings, the case is ripe for judgment, such motion is in effect a motion to stay the entry of judgment.[66] Unauthorized opposition to a motion to stay the entry of judgment is not a sufficient ground for granting the motion;[67] and under some statutes a stay of entry of judgment on a verdict until determination of an appeal from an order denying a motion for judgment notwithstanding the verdict is not authorized[68] where the case is not reserved for further argument or consideration and the verdict is not defective.[69] It is irregular to render a judgment while an order staying proceedings in the case remains unrevoked and unexpired, but the judgment is not for that reason void.[70]

§ 117. Nunc pro Tunc Entry

The object and office of a nunc pro tunc entry of a judgment are to exhibit correctly on the record a judgment previously rendered and not carried into the record or not properly and adequately recorded.

In connection with judgments, the object or purpose, and office, function, or province, of a nunc pro tunc entry are to make the record speak the truth[71] by recording or correctly evidencing an act done[72]

54. Md.—Heiskell v. Rollins, 82 A. 249, 81 Md. 397.
34 C.J. p 68 notes 4, 7.

55. Mo.—Stith v. J. J. Newberry Co., 79 S.W.2d 447, 336 Mo. 467.
34 C.J. p 68 note 8.

Judgment cannot be entered until court overrules motion
Ohio.—State ex rel. Van Stone v. Carey, 65 N.E.2d 166, 76 Ohio App. 478.

56. Ohio.—M. J. Rose Co. v. Ross, 154 N.E. 346, 23 Ohio App. 23.
34 C.J. p 68 note 9.

57. Fla.—Winn & Lovett Grocery Co. v. Luke, 24 So.2d 310.
Ga.—National Bank of Wilkes v. Maryland Casualty Co., 146 S.E. 739, 167 Ga. 737.
N.Y.—O'Brien v. Lehigh Valley R. Co., 27 N.Y.S.2d 540, 176 Misc. 404.
34 C.J. p 68 note 11.

58. Fla.—Talley v. McCain, 174 So. 841, 128 Fla. 418.
Ind.—Kensinger v. Schaal, 161 N.E. 262, 200 Ind. 275.
La.—Auto-Lee Stores v. Ouachita Valley Camp No. 10, W. O. W., 171 So. 62, 185 La. 876.
34 C.J. p 68 note 11, p 69 note 12.

59. Me.—Goodwin v. Small, 43 A. 507, 92 Me. 588.

60. Okl.—Thompson v. Nickle, 239 P. 649, 113 Okl. 44.
34 C.J. p 69 note 15.

Denial of new trial on counterclaim
Where order denying new trial on counterclaim was not and could not be appealed from, verdict for plaintiff on counterclaim was held in abeyance awaiting final disposition in trial court of whole case after which it would be trial court's duty to enter proper judgment.—First Nat. Bank v. Dunbar, 72 S.W.2d 821, 230 Mo.App. 687.

61. Ark.—Brooks v. Hanauer, 22 Ark. 174.
Tex.—Wells v. Melville, 25 Tex. 337.

62. Colo.—Dickson v. Horn, 1 P.2d 86, 89 Colo. 234—Swanson v. First Nat. Bank, 219 P. 784, 74 Colo. 135.

Motion properly disregarded
Colo.—Swanson v. First Nat. Bank, supra.

63. Ill.—Stevenson v. Sherwood, 22 Ill. 233, 74 Am.D. 140.

64. Mo.—Warren v. Chicago, B. & Q. R. Co., 99 S.W. 16, 122 Mo.App. 254.
Ohio.—Young v. State, 6 Ohio 435.

65. Ill.—McIntyre v. People, 38 Ill. 514.
34 C.J. p 69 note 19.

66. Mass.—Henry L. Sawyer Co. v. Boyajian, 52 N.E.2d 851, 315 Mass. 757.

67. Mass.—Henry L. Sawyer Co. v. Boyajian, supra.

68. Cal.—Woods v. Walker, 136 P.2d 72, 57 Cal.App.2d 968—Woods v. Rechenmacher, 127 P.2d 614, 53 Cal.App.2d 294.

69. Cal.—Woods v. Rechenmacher, supra.

70. Wis.—Davison v. Brown, 67 N. W. 42, 93 Wis. 85.
34 C.J. p 69 note 20.

71. Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.
Ohio.—Herman v. Ohio Finance Co., 32 N.E.2d 28, 66 Ohio App. 164.
Minn.—Wilcox v. Schloner, 23 N.W. 2d 19.
Okl.—Hawks v. McCormack, 71 P.2d 724, 180 Okl. 569.

72. Ga.—Chandler v. Hammett,

or judgment rendered[73] by the court at a former time and not carried into the record, or not properly or adequately recorded.[74] It is not the object, office, or province of such an entry to alter a judgment actually rendered,[75] or to correct an erroneous decision or judgment;[76] and, generally speaking, the object or office of the entry is only to supply matters of evidence or to correct clerical mispris-sions,[77] and not to supply omitted judicial action;[78] but, as discussed infra § 118, there are some situations in which a judgment may be rendered, as well as entered, nunc pro tunc.

Mere delay in the entry of a judgment as of the day of its rendition does not make the entry nunc pro tunc where it does not purport to be a nunc pro tunc entry and it is made before the close of the term.[79] Indeed, it has been held that, where a statute contemplates that judgments will not be written by the clerk during the term of court at which they are rendered, a judgment rendered on a certain date, and properly entered in the minutes of the court on that date, is in no sense a nunc pro tunc judgment because it is not formally written in the record by the clerk until several months thereafter.[80] However, it has also been held that, where the prevailing party was entitled to have the judgment entered when a motion for new trial was denied, the judgment entered at a subsequent term becomes by operation of law a judgment nunc pro tunc as of the date of the denying of the motion for new trial, if the order denying the motion was entered in term time.[81]

§ 118. —— Power to Order and Grounds Therefor in General

a. General considerations
b. State of proceedings
c. Death of party or dissolution of corporation

a. General Considerations

All courts of record possess inherent power to direct the entry of judgment nunc pro tunc in proper cases; and, subject to certain considerations, the exercise of this power rests largely in the sound discretion of the court.

There is an inherent common-law power in the courts, independent of any statute, to cause the en-

App., 36 S.E.2d 184—Dunn v. Southern Bell Telephone & Telegraph Co., 175 S.E. 261, 49 Ga.App. 264.
Ky.—Benton v. King, 250 S.W. 1002, 199 Ky. 307.
Va.—Gandy v. Elizabeth City County, 19 S.E.2d 97, 179 Va. 340.
Wash.—State v. Melhorn, 82 P.2d 158, 195 Wash. 690.
34 C.J. p 71 note 33 [a] (1).

73. Ga.—Chandler v. Hammett, App., 36 S.E.2d 184.
Tex.—Universal Life Ins. Co. v. Cook, Civ.App., 188 S.W.2d 791—Huggins v. Johnston, Civ.App., 3 S.W.2d 937, affirmed 35 S.W.2d 638, 120 Tex. 21.
34 C.J. p 71 note 33 [a] (6).

Proper record exhibition of judgment

Object of nunc pro tunc entry is to have judgment properly exhibited of record in order to constitute legal evidence thereof.—Hannon v. Henson, Tex.Civ.App., 7 S.W.2d 613, affirmed, Com.App., 15 S.W.2d 579.

Putting finding or adjudication on record

Office and function of nunc pro tunc judgment are to put on record and to render effective finding or adjudication of court actually or inferentially made, but by oversight or evident mistake not made of record. —Charlton & Lucas County Nat. Bank v. Taylor, 240 N.W. 740, 213 Iowa 1206.

74. Kan.—State ex rel. Hedrick v. Hartford Accident & Indemnity Co. of Hartford, Conn., 114 P.2d 812, 154 Kan. 79.

75. Kan.—Bush v. Bush, 150 P.2d 168, 158 Kan. 760.

Date of opinion

Appellate court will require decree enjoining sale of medical product to be construed as of date of opinion, where alleged changes in formula making product substantially different from that alleged to be infringed were made between filing of opinion and entry of final decree.—Belmont Laboratories v. Heist, 154 A. 19, 303 Pa. 7.

Amendments nunc pro tunc see infra § 258.

76. Ga.—Chandler v. Hammett, App., 36 S.E.2d 184—Dunn v. Southern Bell Telephone & Telegraph Co., 175 S.E. 261, 49 Ga.App. 264.
Ohio.—Herman v. Ohio Finance Co., 32 N.E.2d 28, 66 Ohio App. 164.

Judgment correcting erroneous judgment distinguished

A judgment nunc pro tunc entered for the purpose of correcting the court's records so as to accord with the judgment of the court as actually rendered, or to supply a record of proceedings actually had but omitted from the records, is distinguishable from a judgment entered to correct an erroneous judgment.—Jones v. Sun Oil Co., Civ.App., 145 S.W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353.

77. Cal.—Albori v. Sykes, 65 P.2d 84, 18 Cal.App.2d 619—Schroeder v. Superior Court of California in and for Alameda County, 239 P. 65, 73 Cal.App. 687.

Purpose is merely to correct record of judgment

Kan.—Bush v. Bush, 150 P.2d 168, 158 Kan. 760.
Minn.—Hampshire Arms Hotel Co. v. Wells, 298 N.W. 452, 210 Minn. 286.

Office is to supply something omitted from record

Wyo.—Barrett v. Whitmore, 226 P. 452, 31 Wyo. 301, rehearing denied 228 P. 502, 32 Wyo. 1.

78. Ga.—Chandler v. Hammett, App., 36 S.E.2d 184.
Minn.—Wilcox v. Schloner, 23 N.W. 2d 19—Hampshire Arms Hotel Co. v. Wells, 293 N.W. 452, 210 Minn. 286.
34 C.J. p 71 note 36 [a] (2).

79. Mo.—Harrison v. Slaton, 49 S. W.2d 31.

Nunc pro tunc by consent

Where judgment was tendered by defendant at February term, but court reserved judgment and counsel agreed that judgment might be signed at later date, judgment signed at May term was judgment nunc pro tunc by consent and related back to February term.—Sutton v. Davis, 171 S.E. 738, 205 N.C. 464.

80. Ill.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101.

81. Fla.—Fawcett v. Weaver, 163 So. 561, 121 Fla. 245.

try of judgments nunc pro tunc[82] in proper cases[83] and in furtherance of justice.[84] This power belongs to all courts of record,[85] and includes appellate courts as discussed in Appeal and Error § 1956, as well as trial courts.[86] However, such power must be exercised by the court;[87] it does not appertain to the clerk of a court, who has no authority to enter a judgment nunc pro tunc without an order of court to that effect.[88]

Where the court is without jurisdiction to amend the minutes on the judge's docket nunc pro tunc, it is likewise without jurisdiction to order a judgment nunc pro tunc in conformity with an amended minute entry.[89] The court may not, by a nunc pro tunc judgment, grant relief neither sought nor given in the original suit,[90] nor may it, in entering such judgment, alter the record so as to show, contrary to the truth, that certain facts existed on a particular date.[91] A purported nunc pro tunc entry of judgment is erroneous where it fails to disclose the ground on which the court acts or what the entry is intended to correct.[92]

82. U.S.—Miami County Nat. Bank of Paola, Kan. v. Bancroft, C.C.A. Kan., 121 F.2d 921.
Cal.—Norton v. City of Pomona, 53 P.2d 952, 5 Cal.2d 54.
Colo.—**Corpus Juris cited in** Perdew v. Perdew, 64 P.2d 602, 604, 99 Colo. 544.
Ill.—Chicago Wood Piling Co. v. Anderson, 39 N.E.2d 702, 313 Ill.App. 242.
Iowa.—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 232 Iowa 1226—Yost v. Gadd, 288 N.W. 667, 227 Iowa 621—Arnd v. Poston, 203 N. W. 260, 199 Iowa 931.
Kan.—Bush v. Bush, 150 P.2d 168, 158 Kan. 760—Elliott v. Elliott, 114 P.2d 823, 154 Kan. 145—Victory Life Ins. Co. v. Freeman, 65 P.2d 559, 145 Kan. 296.
Ky.—Benton v. King, 250 S.W. 1002, 199 Ky. 307.
Ohio.—National Life Ins. Co. v. Kohn, 11 N.E.2d 1020, 133 Ohio St. 111—Ruby v. Wolf, 177 N.E. 240, 39 Ohio App. 144.
Or.—In re Potter's Estate, 59 P.2d 253, 154 Or. 167.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537—Dowdle v. U. S. Fidelity & Guaranty Co., Com.App., 255 S.W. 988—Jones v. Sun Oil Co., Civ.App., 145 S.W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353—White v. Haynes, Civ.App., 60 S.W.2d 275, error dismissed.
Wash.—Garrett v. Byerly, 284 P. 343, 155 Wash. 351, 68 A.L.R. 254.
W.Va.—Chaney v. State Compensation Com'r, 33 S.E.2d 284.
34 C.J. p 71 note 89.

83. Cal.—Corbett v. Corbett, 298 P. 819, 113 Cal.App. 595.
Ill.—Chicago Wood Piling Co. v. Anderson, 39 N.E.2d 702, 313 Ill.App. 242.
Ky.—Brannion v. Scott, 156 S.W.2d 164, 288 Ky. 334.
Ohio.—National Life Ins. Co. v. Kohn, 11 N.E.2d 1020, 133 Ohio St. 111—State ex rel. Marzluf v. Beightler, App., 57 N.E.2d 180—Herman v. Ohio Finance Co., 32 N.E.2d 28, 66 Ohio App. 164.
Okl.—**Corpus Juris cited in** Hawks v. McCormack, 71 P.2d 724, 725, 180 Okl. 569.
Tenn.—Jackson v. Jarratt, 52 S.W.2d 137, 165 Tenn. 76.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537—Kveton v. Farmers Royalty Co., Civ. App., 161 S.W.2d 583—Matthews v. Looney, Civ.App., 100 S.W.2d 1061, reversed on other grounds 123 S. W.2d 871, 132 Tex. 313.
34 C.J. p 71 note 39.

84. Cal.—**Corpus Juris quoted in** Corbett v. Corbett, 298 P. 819, 821, 113 Cal.App. 595.
Colo.—**Corpus Juris cited in** Perdew v. Perdew, 64 P.2d 602, 604, 99 Colo. 544.
Ill.—Chicago Wood Piling Co. v. Anderson, 39 N.E.2d 702, 313 Ill.App. 242.
Minn.—Wilcox v. Schloner, 23 N.W. 2d 19—Hampshire Arms Hotel Co. v. Wells, 293 N.W. 452, 210 Minn. 286.
N.Y.—Karpuk v. Karpuk, 31 N.Y.S.2d 769, 177 Misc. 729.
Ohio.—Brown v. L. A. Wells Const. Co., 56 N.E.2d 451, 143 Ohio St. 580.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S. W. 296, 301, 115 Tex. 537.
34 C.J. p 71 note 39, p 73 note 53.

85. U.S.—Miami County Nat. Bank of Paola, Kan., v. Bancroft, C.C. A.Kan., 121 F.2d 921.
Cal.—Corbett v. Corbett, 298 P. 819, 113 Cal.App. 595.
Kan.—Elliott v. Elliott, 114 P.2d 823, 154 Kan. 145—Victory Life Ins. Co. v. Freeman, 65 P.2d 559, 145 Kan. 296.
Ky.—Vansant v. Watson, 19 S.W.2d 994, 230 Ky. 316.
Ohio.—Heacock v. Byers, 169 N.E. 295, 120 Ohio St. 621.
Okl.—**Corpus Juris cited in** Hawks v. McCormack, 71 P.2d 724, 725, 180 Okl. 569.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.
34 C.J. p 71 note 40.
In criminal prosecution see Criminal Law § 1597.
In divorce case see Divorce § 163 d.
Probate court see Courts § 309.

86. Cal.—Scoville v. Keglor, 80 P. 2d 162, 27 Cal.App.2d 17, motion denied 64 P.2d 212, 29 Cal.App.2d 66.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.
34 C.J. p 71 note 40.

87. Ky.—Vansant v. Watson, 19 S. W.2d 994, 230 Ky. 316.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S. W. 296, 301, 115 Tex. 537.
34 C.J. p 71 note 41.

Court in which judgment rendered
Tex.—Trotti v. Kinnear, Civ.App., 144 S.W. 326.

Court in which entry is to be made
Ind.—Willard v. Loucks, 175 N.E. 256, 97 Ind.App. 131.

Special judge or successor
(1) A special judge, who directed the entry of a judgment and signed the order book in a county outside the district in which the cause was pending, has the authority to direct entry of judgment "nunc pro tunc" or to ratify the unauthorized entry by the clerk and sign the order book in the county in which the cause was pending, or elsewhere in the district. —Gross' Adm'x v. Couch, 166 S.W.2d 879, 292 Ky. 304.

(2) The successor of a special judge who rendered a judgment but failed to sign the order book could validate the judgment by entry of a signed nunc pro tunc order.—Gorman v. Lusk, 134 S.W.2d 598, 280 Ky. 692.

88. Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.
34 C.J. p 71 note 41.

89. Mo.—Haycraft v. Haycraft, App., 141 S.W.2d 170.

90. Tex.—Huggins v. Johnston, Civ. App., 8 S.W.2d 937, affirmed 35 S. W.2d 688, 120 Tex. 21.

91. Iowa.—Chariton & Lucas County Nat. Bank v. Taylor, 240 N.W. 740, 213 Iowa 1206.
Minn.—Wilcox v. Schloner, 23 N.W. 2d 19.

92. Ohio.—Herman v. Ohio Finance Co., 32 N.E.2d 28, 66 Ohio App. 164.

The power of the court to enter judgment nunc pro tunc should be used sparingly[93] and only when the right of the moving party to ask it is clear;[94] relief by entry nunc pro tunc will not be granted where the failure to enter the judgment at the proper time was due to the party's own carelessness or negligence.[95] Since the object of allowing entries nunc pro tunc is the furtherance of justice, a judgment ordinarily will not be directed to be entered nunc pro tunc unless it is shown that some injury or injustice will result from a refusal to do so,[96] and particularly not to enable one party to gain an advantage over the other party to which he would not have been entitled at the proper time for entering the judgment.[97]

So too such an entry will not be allowed where it will prejudice the rights of third persons who are without notice of the original rendition of the judgment;[98] and, as a general rule, the entry of a judgment nunc pro tunc will be made only on such conditions, express or implied, as will preserve the rights of third persons who have no notice.[99] However, it does not lie in the mouth of a party to object on the ground that third persons will be affected;[1] and, an entry nunc pro tunc, within the power of the court to direct, is not erroneous where a party to the action is not prejudiced or deprived of any legal right[2] and intervening rights are not disturbed thereby.[3] A void judgment should not be entered nunc pro tunc.[4] Subject to the foregoing considerations, a motion for entry of judgment nunc pro tunc ordinarily is addressed very largely to the sound discretion of the court,[5] and should be granted or refused as justice may require in view of the circumstances of the particular case.[6]

b. State of Proceedings

A judgment can be entered nunc pro tunc only in a case which was ripe for judgment at the date to which the judgment is to relate back. A judgment may, if justice so requires, be both rendered and entered nunc pro tunc.

The power to enter a judgment nunc pro tunc can

Order for entry upheld

Order, directing judgment to be entered nunc pro tunc, which was made for the purpose of cleaning up an obvious contradiction and equivocation in the court's minutes and which stated that earlier minute order was inadvertently made, was not required to state that minute order failed to speak truth, where it was obvious from inspection that minute order failed to speak truth and to express court's intention.—Berkowitz v. Wolfberg, 48 P.2d 723, 8 Cal.App. 2d 795.

93. N.Y.—Karpuk v. Karpuk, 31 N. Y.S.2d 769, 177 Misc. 729.

94. N.Y.—Karpuk v. Karpuk, supra.

95. Cal.—Corbett v. Corbett, 298 P. 819, 113 Cal.App. 595.
Colo.—**Corpus Juris cited in** Perdew v. Perdew, 64 P.2d 602, 604, 99 Colo. 544.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S. W. 296, 301, 115 Tex. 537.
34 C.J. p 73 note 52.

96. Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.
34 C.J. p 71 note 42.

Basis of entry

(1) Basis of entry of judgment nunc pro tunc is to prevent an injustice.—Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 115 Tex. 537.

(2) There was no basis for a nunc pro tunc entry of judgment where the antedating was not for the preservation of the fruits of the litigation which would otherwise be lost to the prevailing party, or for the correction of a deficiency in recordation of a previous decision.—Mather v. Mather, 140 P.2d 808, 22 Cal.2d 713.

97. Ohio.—Johnson v. Harlan, 15 Ohio App. 247.
Tenn.—**Corpus Juris quoted in** Jackson v. Jarratt, 52 S.W.2d 137, 139, 165 Tenn. 76.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.
34 C.J. p 72 note 43.

98. Cal.—**Corpus Juris quoted in** Corbett v. Corbett, 298 P. 819, 821, 113 Cal.App. 595.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S. W. 296, 301, 115 Tex. 537.
34 C.J. p 73 note 54.

Vested rights of innocent persons

Ky.—Benton v. King, 250 S.W. 1002, 199 Ky. 307.

99. Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.
34 C.J. p 73 note 55.

1. Neb.—Hyde v. Michelson, 72 N. W. 1035, 52 Neb. 680, 66 Am.S.R. 533.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.

2. N.D.—Stoddard v. Atchison, 210 N.W. 3, 54 N.D. 519.

3. Okl.—Tiger v. Coker, 68 P.2d 509, 180 Okl. 175.
Judgment actually rendered by court but not entered by clerk see infra subdivision b of this section.

4. Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537—Lepp v. Ward County Water Improvement Dist. No. 2, Civ.App., 257 S.W. 916.
34 C.J. p 72 note 44.

5. Colo.—**Corpus Juris cited in** Perdew v. Perdew, 64 P.2d 602, 604, 99 Colo. 544.
Mo.—**Corpus Juris quoted in** In re Kellam's Estate, 53 S.W.2d 401, 404, 227 Mo.App. 291.
Tenn.—**Corpus Juris quoted in** Jackson v. Jarratt, 52 S.W.2d 137, 139, 165 Tenn. 76.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S. W. 296, 301, 115 Tex. 537.
34 C.J. p 72 note 46.

Making or refusing of order for entry of nunc pro tunc judgment rests in the sound discretion of court.—Mitchell v. Federal Land Bank of St. Louis, 174 S.W.2d 671, 206 Ark. 253.

6. Cal.—Norton v. City of Pomona, 53 P.2d 952, 5 Cal.2d 54.
Mo.—**Corpus Juris quoted in** In re Kellam's Estate, 53 S.W.2d 401, 404, 227 Mo.App. 291.
Tenn.—**Corpus Juris quoted in** Jackson v. Jarratt, 52 S.W.2d 137, 139, 165 Tenn. 76.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.
34 C.J. p 72 note 47.

Entry of judgment nunc pro tunc held proper

Cal.—Horton v. Horton, 116 P.2d 605, 18 Cal.2d 579.
Colo.—Wright v. Muehlberg, 242 P. 634, 78 Colo. 461.
Tex.—Southern Surety Co. v. Texas Oil Clearing House, Civ.App., 283 S.W. 229.

be exercised only in a case where the cause was ripe for judgment at the date to which the judgment is to relate back, that is, where the case was in such a condition at that date that a final judgment could have been then entered immediately.[7]

Prior rendition of judgment. In the exercise of its continuing power over its records, and its unquestioned authority to make them speak the truth,[8] a court may order the entry nunc pro tunc of a judgment which has been actually rendered, but has not been entered on the record, in consequence of any accident or mistake, or the neglect or omission of the clerk,[9] where the fact of rendition is satisfactorily established,[10] the position of the parties has not changed,[11] and no intervening rights will be prejudiced.[12] In certain classes of cases[13] a judgment nunc pro tunc presupposes a judgment actually rendered at the proper time, but not entered,[14] and it is a general rule that a judgment nunc pro tunc cannot regularly be entered unless such judgment has been in fact previously rendered.[15]

Discretion held not abused

Okl.—Davis v. Ball, 96 P.2d 34, 186 Okl. 39.

7. Cal.—**Corpus Juris cited in** Leavitt v. Gibson, 43 P.2d 1091, 1096, 1098, 3 Cal.2d 1091—Corbett v. Corbett, 298 P. 819, 113 Cal. App. 595.

Colo.—**Corpus Juris cited in** Feuquay v. Industrial Commission, 111 P.2d 901, 902, 107 Colo. 336.

Ill.—**Corpus Juris quoted in** Citizens' Securities & Inv. Co. v. Dennis, 236 Ill.App. 307, 309.

Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S. W. 296, 301, 115 Tex. 537—**Corpus Juris quoted in** Hannon v. Henson, Civ.App., 7 S.W.2d 613, 619, affirmed, Com.App., 15 S.W.2d 579.

Wash.—Garrett v. Byerly, 284 P. 343, 155 Wash. 351, 68 A.L.R. 254.

34 C.J. p 72 note 51.

Nothing remaining to be done by court

It may be said that a case is ripe for judgment, within the rule, when nothing remains to be done by the court that rendered the judgment to authorize the clerk to record it in the minutes.—Hannon v. Henson, Tex.Civ.App., 7 S.W.2d 613, affirmed, Com.App., 15 S.W.2d 579.

8. Okl.—Bowling v. Merry, 217 P. 404, 91 Okl. 176.

Tex.—Dowdle v. U. S. Fidelity & Guaranty Co., Com.App., 255 S.W. 388.

34 C.J. p 74 note 60.

9. U.S.—Wolfe v. Murphy, C.C.A. Iowa, 113 F.2d 775, certiorari denied 61 S.Ct. 138, 311 U.S. 200, 85 L.Ed. 454.

Cal.—Corbett v. Corbett, 298 P. 819, 113 Cal.App. 595.

Ky.—Brannon v. Scott, 156 S.W.2d 164, 288 Ky. 334.

Minn.—Wilcox v. Schloner, 28 N.W. 2d 19.

Mo.—Campbell v. Spotts, 55 S.W.2d 986, 331 Mo. 974.

Okl.—Woodmansee v. Woodmansee, 278 P. 278, 137 Okl. 112—Bowling v. Merry, 217 P. 404, 91 Okl. 176.

Tenn.—Gillespie v. Martin, 109 S.W. 2d 93, 172 Tenn. 28—Hedges-Walsh-Weidner Co. v. Haley, 55 S. W.2d 775, 165 Tenn. 486—Jackson v. Jarratt, 52 S.W.2d 137, 165 Tenn. 76.

Tex.—Dowdle v. U. S. Fidelity & Guaranty Co., Com.App., 255 S.W. 388—Turley v. Tobin, Civ.App., 7 S.W.2d 949, error refused.

Va.—Dickenson County v. West Dante Supply Co., 134 S.E. 552, 145 Va. 513.

W.Va.—Chaney v. State Compensation Com'r, 33 S.E.2d 284.

34 C.J. p 74 note 61.

Prevailing party has right to have judgment entered nunc pro tunc as of the day of its rendition, where it has been rendered, but not recorded.

Ind.—In re Saric, 149 N.E. 434, 197 Ind. 1.

Tex.—Bowie Sewerage Co. v. Watson, Civ.App., 274 S.W. 179.

10. Ky.—Gorman v. Lusk, 134 S.W. 2d 598, 280 Ky. 692—Happy Coal Co. v. Brashear, 92 S.W.2d 23, 263 Ky. 257—Hazelip v. Doyel, 85 S. W.2d 685, 260 Ky. 313.

Tex.—Hannon v. Henson, Com.App., 15 S.W.2d 579.

34 C.J. p 74 note 61.

Sufficiency of evidence of basis for nunc pro tunc entry see infra § 120.

11. Tex.—Hudgins v. T. B. Meeks Co., Civ.App., 1 S.W.2d 681.

12. Ky.—Hazelip v. Doyel, 85 S.W. 2d 685, 260 Ky. 313.

Ohio.—Brown v. L. A. Wells Const. Co., 56 N.E.2d 451, 143 Ohio St. 580.

Tex.—Hannon v. Henson, Com.App., 15 S.W.2d 579—Hudgins v. T. B. Meeks Co., Civ.App., 1 S.W.2d 681.

34 C.J. p 74 note 61.

13. Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.

34 C.J. p 71 note 38.

14. U.S.—The Princess Sophia, D. C.Wash., 36 F.2d 591.

Iowa.—Chariton & Lucas County Nat. Bank v. Taylor, 240 N.W. 740, 213 Iowa 1206.

Ohio.—Helle v. Public Utilities Commission of Ohio, 161 N.E. 232, 118 Ohio St. 434.

Okl.—**Corpus Juris cited in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315.

Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537—Hannon v. Henson, Com.App., 15 S.W. 2d 579—**Corpus Juris cited in** Universal Life Ins. Co. v. Cook, Civ. App., 138 S.W.2d 791, 792—King v. Cash, Civ.App., 174 S.W.2d 503—Stewart v. Gibson, Civ.App., 154 S.W.2d 1002—**Corpus Juris cited in** Davis v. Moore, Civ.App., 131 S. W.2d 798, 801—Texas & P. Ry. Co. v. Bussing, Civ.App., 130 S.W.2d 416.

34 C.J. p 71 note 38, p 72 note 48.

15. U.S.—Rardin v. Messick, C.C.A. Ill., 78 F.2d 643.

Ariz.—**Corpus Juris cited in** Stephens v. White, 51 P.2d 921, 925, 46 Ariz. 426.

Colo.—Perdew v. Perdew, 64 P.2d 602, 99 Colo. 544.

Minn.—Hampshire Arms Hotel Co. v. Wells, 298 N.W. 452, 210 Minn. 286.

Mo.—Cross v. Greenaway, 152 S.W.2d 43, 347 Mo. 1103.

Okl.—**Corpus Juris cited in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315.

Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537—**Corpus Juris cited in** Universal Life Ins. Co. v. Cook, Civ.App., 138 S. W.2d 791, 792—Stewart v. Gibson, Civ.App., 154 S.W.2d 1002—**Corpus Juris cited in** Davis v. Moore, Civ. App., 131 S.W.2d 798, 801.

Wash.—State v. Mehlhorn, 82 P.2d 158, 195 Wash. 690.

34 C.J. p 72 note 48, p 77 note 73.

Restriction to judicial action actually taken

The power of a court to enter a judgment nunc pro tunc is restricted to placing in the record evidence of judicial action which has been actually taken.

Ky.—Benton v. King, 250 S.W. 1002, 199 Ky. 307.

Ohio.—Herman v. Ohio Finance Co., 32 N.E.2d 28, 66 Ohio App. 164.

Nunc pro tunc entry at subsequent term

(1) The entry of a judgment nunc pro tunc at a subsequent term is not authorized unless, in fact, the judgment was rendered at a previous term.

There are other cases, however, in which a judgment may be both rendered and entered nunc pro tunc,[16] an exception to the general rule, equally well established, being that a judgment may be both rendered and entered nunc pro tunc where the delay was caused solely by the court itself, or by the process of the law,[17] and not by the fault of the prevailing party.[18] Stated more fully, the rule respecting delay caused by the court is that, whenever delay in entering a judgment is caused by the action of the court, as in holding the case under advisement, judgment nunc pro tunc will be allowed as of the time when the party would otherwise have been entitled to it, if justice requires it.[19] The occasion for the application of this rule arises most frequently where a party dies pending the delay, discussed infra subdivision c of this section, but other circumstances may justify and require rendition and entry nunc pro tunc.[20] Judgment on a general verdict may be rendered[21] or entered[22] nunc pro tunc.

The subsequent amendment or correction, in respect of either clerical or judicial errors, of a judgment which has been both rendered and entered is discussed infra §§ 236–264.

c. Death of Party or Dissolution of Corporation

A judgment may be entered nunc pro tunc as of a date anterior to the death of a party or the dissolution of a corporation which was a party where the case had been tried and was ripe for judgment at the time of such death or dissolution.

If judgment on a verdict is delayed by a motion in arrest of judgment, or for a new trial, or other proceeding, or if a case tried by the court is held under advisement, or delayed by exceptions, and meanwhile one of the parties dies, the court may enter judgment nunc pro tunc as of a time when the party was still alive,[23] such as of the date of

Ill.—Wallace Grain & Supply Co. v. Cary, 24 N.E.2d 907, 303 Ill.App. 221, reversed on other grounds 28 N.E.2d 107, 374 Ill. 57—Brown v. Hamsmith, 247 Ill.App. 358.

Mo.—Campbell v. Spotts, 55 S.W.2d 986, 331 Mo. 974—State ex rel. Holtkamp v. Hartmann, 51 S.W. 2d 22, 330 Mo. 686.

Tex.—Universal Life Ins. Co. v. Cook, Civ.App., 188 S.W.2d 791—Texas & P. Ry. Co. v. Bussing, Civ. App., 130 S.W.2d 416.

(2) This is true of a judgment on a special issue verdict.—Universal Life Ins. Co. v. Cook, Tex.Civ.App., 188 S.W.2d 791—Waggoner v. Davis, Tex.Civ.App., 261 S.W. 482.

(3) The refusal of a trial judge to enter a written judgment nunc pro tunc, conformably to an oral announcement rendered at a previous term, will not be reversed, since such oral announcement does not constitute a judgment.—Foy v. McCrary, 121 S.E. 804, 157 Ga. 461.

Error

It was erroneous for the court, entering judgment on day after findings were signed, to order judgment entered nunc pro tunc as of date case was submitted.—Sherwood v. Thomas, 12 P.2d 676, 124 Cal.App. 450.

Rendition of additional judgment for an item which could have been included in the judgment originally rendered is not authorized as a nunc pro tunc entry after the original final judgment has been affirmed and remanded for execution.—State v. Industrial Commission of Ohio, 155 N.E. 798, 116 Ohio St. 261.

16. Colo.—**Corpus Juris cited in** Perdew v. Perdew, 64 P.2d 602, 604, 99 Colo. 544.

Tenn.—Jackson v. Jarratt, 52 S.W.2d 137, 165 Tenn. 76.

Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.

W.Va.—Chaney v. State Compensation Com'r, 33 S.E.2d 284.

17. Okl.—**Corpus Juris cited in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315.

Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537—Stewart v. Gibson, Civ.App., 154 S.W. 2d 1002.

18. Cal.—Corbett v. Corbett, 298 P. 819, 113 Cal.App. 595.

Okl.—**Corpus Juris cited in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315.

Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537—Stewart v. Gibson, Civ.App., 154 S.W. 2d 1002.

34 C.J. p 72 note 50.

19. Cal.—Norton v. City of Pomona, 53 P.2d 952, 5 Cal.2d 54.

Minn.—Hampshire Arms Hotel Co. v. Wells, 298 N.W. 452, 210 Minn. 286.

Okl.—**Corpus Juris cited in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315.

Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S. W. 296, 301, 115 Tex. 537.

34 C.J. p 73 note 57.

20. Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.

34 C.J. p 74 note 59, p 76 note 67 [b].

Repeal of statute after verdict

Mass.—Finnegan v. Checker Taxi Co., 14 N.E.2d 127, 300 Mass. 62.

34 C.J. p 74 note 59 [a].

Delay result of mutual understanding

Colo.—**Corpus Juris cited in** Perdew v. Perdew, 64 P.2d 602, 604, 99 Colo. 544.

34 C.J. p 74 note 59 [c].

Claim of exceptions

Where case had not gone to judgment because defendant had filed claim of exceptions which was pending, judgment could be entered nunc pro tunc when time for filing bill of exceptions expired, as of time when exceptions ceased to have vitality.—Patrick v. Dunbar, 200 N.E. 896, 294 Mass. 101.

21. N.C.—La Barbe v. Ingle, 161 S.E. 486, 201 N.C. 814.

22. N.J.—Epps v. Bowen, 191 A. 110, 118 N.J.Law 50.

Tenn.—Wind Rock Coal & Coke Co. v. Robbins, 1 Tenn.App. 734.

34 C.J. p 72 note 48 [c].

23. Cal.—Norton v. City of Pomona, 53 P.2d 952, 5 Cal.2d 54—In re Pillsbury's Estate, 166 P. 11, 175 Cal. 454, 3 A.L.R. 1396.

Mass.—Noyes v. Bankers Indemnity Ins. Co., 30 N.E.2d 867, 307 Mass. 567—Rosenblum v. Ginis, 9 N.E. 2d 525, 297 Mass. 493—Fenelon v. Fenelon, 138 N.E. 334, 244 Mass. 14.

Minn.—Hampshire Arms Hotel Co. v. Wells, 298 N.W. 452, 210 Minn. 286.

Or.—In re Potter's Estate, 59 P.2d 253, 154 Or. 167.

Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.

Wash.—Garrett v. Byerly, 284 P. 348, 155 Wash. 351, 68 A.L.R. 254.

33 C.J. p 1109 note 72—34 C.J. p 75 note 62.

submission,[24] the date of the finding,[25] or the date of the order for judgment;[26] but it is essential to the entry of judgment nunc pro tunc as of a date anterior to the death of a party that the cause shall have been ripe for judgment at the time of death of the party,[27] that the delay shall not have been due to the fault of the prevailing party,[28] that innocent third persons acquiring rights since the death of the party will not be injured,[29] and that the personal representative of decedent shall have been substituted as a party.[30] While it has been held that this practice does not extend to cases of tort which do not survive,[31] the better opinion is that it is immaterial whether or not the cause of action would survive; in either case the judgment may be rendered nunc pro tunc.[32]

Dissolution of corporation. Where a corporation is a party, and it is dissolved, or its charter expires, after the action has been tried and the case taken under advisement by the court, the judgment may be entered, nunc pro tunc, as of a time prior to such dissolution.[33]

§ 119. —— Time of Entry

Lapse of time ordinarily does not affect the exercise by the court of its power to direct the entry of a judgment nunc pro tunc.

In the absence of statutory limitations[34] the right, authority, power, or jurisdiction of the court to direct entry of a judgment nunc pro tunc is not lost or barred by lapse of time, but may be exercised at any time,[35] unless intervening rights are affect-

Evidence received

Trial court had right to file decision for plaintiffs in action for fraud nunc pro tunc as of date before death of one defendant, although cause was not actually submitted before such date, where all evidence had been received and plaintiffs' brief and defendants' reply served and delivered to judge and time allowed for plaintiffs' reply had expired and no extension of time was granted.—Leavitt v. Gibson, 43 P. 2d 1091, 3 Cal.2d 90.

Judgment after death of party generally see supra § 29.

Abatement on death of party after verdict, decision, or interlocutory judgment and before final judgment see Abatement and Revival § 126.

24. Iowa.—Chariton & Lucas County Nat. Bank v. Taylor, 240 N.W. 740, 213 Iowa 1206.

25. Mass.—Beacon Trust Co. v. Wright, 192 N.E. 70, 288 Mass. 1.

26. Cal.—Norton v. City of Pomona, 53 P.2d 952, 5 Cal.2d 54.

27. Cal.—Norton v. City of Pomona, supra—In re Pillsbury's Estate, 166 P. 11, 175 Cal. 454, 3 A.L.R. 1396.

Ill.—Citizens' Securities & Inv. Co. v. Dennis, 236 Ill.App. 307.

Or.—In re Potter's Estate, 59 P.2d 253, 154 Or. 167.

Wash.—Garrett v. Byerly, 284 P. 343, 155 Wash. 351, 68 A.L.R. 254.

Modification of rule

It has been stated that modern practice has resulted in some modification of the rule, but this statement was made in a case where the cause was in a condition for judgment at the time of the death of the party.—Leavitt v. Gibson, 43 P.2d 1091, 3 Cal.2d 90.

Ripeness for judgment as necessary to nunc pro tunc entry generally see supra subdivision b of this section.

28. Wash.—Garrett v. Byerly, 284 P. 343, 155 Wash. 351, 68 A.L.R. 254.

29. Wash.—Garrett v. Byerly, supra.

30. Cal.—Boyd v. Lancaster, 90 P.2d 317, 32 Cal.App.2d 574—Maxon v. Avery, 89 P.2d 684, 32 Cal.App.2d 300—Scoville v. Keglor, 80 P.2d 162, 27 Cal.App.2d 17, motion denied 84 P.2d 212, 29 Cal.App.2d 66.

Contra Saddler v. California Bank, 242 P. 1035, 75 Cal.App. 488.

31. Ill.—Wilcox v. International Harvester Co., 116 N.E. 151, 273 Ill. 465.

32. Cal.—In re Pillsbury's Estate, 166 P. 11, 175 Cal. 454, 3 A.L.R. 1396.

Mass.—De Marco v. Pease, 149 N.E. 208, 253 Mass. 499.

34 C.J. p 76 note 66.

Judgment including exemplary damages

Entry of judgment nunc pro tunc after death of one of defendants was not erroneous, although judgment included exemplary damages, where, at time of death, cause was in such condition that judgment could have been entered against defendants both for compensatory and exemplary damages.—Leavitt v. Gibson, 43 P. 2d 1091, 3 Cal.2d 90.

33. Wis.—Shakman v. U. S. Credit System Co., 66 N.W. 528, 92 Wis. 366, 53 Am.S.R. 920, 32 L.R.A. 383.

34 C.J. p 76 note 68.

34. Mo.—Pepple v. Stacy, App., 282 S.W. 451.

Tex.—Corpus Juris quoted in Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.

34 C.J. p 78 note 80.

Entry in vacation

In at least one state, by reason of statute, a judgment cannot be entered after adjournment of the court, nunc pro tunc, except on an order of the court, and this order can be made only at a subsequent term of the court. In other words, a judge has no authority to enter judgment nunc pro tunc during vacation.—Stanolind Oil & Gas Co. v. McKenzie, Tex.Civ.App., 115 S.W.2d 1204, error dismissed—34 C.J. p 78 note 80 [c].

35. Ind.—Corpus Juris cited in Miller v. Muir, 58 N.E.2d 496, 504, 115 Ind.App. 335.

Iowa.—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 232 Iowa 1226—Yost v. Gadd, 288 N.W. 667, 227 Iowa 621—Arnd v. Poston, 203 N. W. 260, 199 Iowa 931.

Neb.—Brandeen v. Lau, 201 N.W. 665, 113 Neb. 84.

N.C.—Ipock v. North Carolina Joint Stock Land Bank of Durham, 175 S.E. 127, 206 N.C. 791.

Okl.—Woodmansee v. Woodmansee, 278 P. 278, 137 Okl. 112—Bowling v. Merry, 217 P. 404, 91 Okl. 176.

Tenn.—Wind Rock Coal & Coke Co. v. Robbins, 1 Tenn.App. 734.

Tex.—Murphy v. Boyt, 168 S.W.2d 631, 140 Tex. 382—Sigler v. Realty Bond & Mortgage Co., 133 S.W.2d 537, 135 Tex. 76—Corpus Juris quoted in Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537—Kveton v. Farmers Royalty Holding Co., Civ.App., 161 S.W.2d 533—Corpus Juris cited in Nalle v. Walenta, Civ.App., 102 S.W.2d 1070, 1072—Matthews v. Looney, Civ.App., 100 S.W.2d 1061, reversed on other grounds 123 S. W.2d 871, 132 Tex. 313.

34 C.J. p 77 note 78.

Entry pending appeal

Mich.—Curth v. New York Life Ins. Co., 265 N.W. 749, 274 Mich. 513.

34 C.J. p 77 note 78 [a].

Case is regarded as pending until judgment rendered is correctly recorded.—Dunn v. Cravens, Dargan & Co., Tex.Civ.App., 97 S.W.2d 242.

ed.[36] Thus judgment may be entered nunc pro tunc even after the term[37] in which the judgment was rendered,[38] or at a subsequent term,[39] without any showing of diligence[40] or excuse for delay,[41] although long unexplained delay in moving may be ground for denial of the application for entry nunc pro tunc.[42] The limitation applicable to proceedings to vacate, correct, or modify judgments have no application to a motion for entry of a judgment nunc pro tunc.[43]

§ 120. —— Proceedings to Obtain

a. In general
b. Notice of application
c. Evidence

a. In General

An order for the entry of judgment nunc pro tunc may be made by the court on its own motion or on a motion or other proper request or application by a party or interested person.

The entry of a judgment nunc pro tunc may be ordered by the court on its own motion[44] or on a proper request or application,[45] such as a motion,[46] made by a party[47] or any interested person,[48] in the court of original jurisdiction.[49] Persons who are not parties to the judgment are not necessary parties to the proceeding,[50] and they will not be permitted to intervene for the purpose of questioning the correctness of the judgment.[51] Formal pleadings are unnecessary and inappropriate.[52] The sufficiency of the motion cannot be tested by demurrer or motion to strike out;[53] but a demurrer to an answer to the motion is properly sustained where the answer is defective and subject to demurrer.[54]

The motion should be determined in a summary manner.[55] The case, according to the decisions

33. Ind.—In re Saric, 149 N.E. 434, 197 Ind. 1.
Okl.—Woodmansee v. Woodmansee, 278 P. 278, 137 Okl. 112—Bowling v. Merry, 217 P. 404, 91 Okl. 176.
Tex.—Kveton v. Farmers Royalty Holding Co., Civ.App., 161 S.W.2d 583—Matthews v. Looney, Civ.App., 100 S.W.2d 1061, reversed on other grounds 123 S.W.2d 871, 132 Tex. 313.

37. Mo.—In re Kellam's Estate, 56 S.W.2d 401, 327 Mo.App. 291—Lakin v. Blum, App., 43 S.W.2d 853.
In vacation
Nunc pro tunc order by special judge correcting judgment was not required to be entered in regular term time or at a time when there was a called special session.—O'Mara v. Town of Mt. Vernon, 185 S.W.2d 675, 299 Ky. 401.

38. Kan.—Bush v. Bush, 150 P.2d 168, 158 Kan. 760—Schneider v. Schneider, 78 P.2d 16, 147 Kan. 621.

39. Ind.—**Corpus Juris cited in** Miller v. Muir, 56 N.E.2d 496, 504, 115 Ind.App. 335.
Neb.—Wescott v. Mathers, 263 N. W. 231, 129 Neb. 846.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537—Jones v. Sun Oil Co., Civ.App., 145 S. W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353.
34 C.J. p 78 note 79.

40. Iowa.—Risser v. Martin, 53 N. W. 270, 86 Iowa 392.
Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.

41. Iowa.—Yost v. Gadd, 288 N.W. 667, 227 Iowa 621.

42. Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.
34 C.J. p 78 note 83.

43. Tex.—**Corpus Juris quoted in** Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 301, 115 Tex. 537.
34 C.J. p 78 note 85.

44. Iowa.—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 232 Iowa 1226.
Tex.—Dowdle v. U. S. Fidelity & Guaranty Co., Com.App., 255 S.W. 688—Kveton v. Farmers Royalty Holding Co., Civ.App., 161 S.W.2d 583—Jones v. Sun Oil Co., Civ. App., 145 S.W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353—**Corpus Juris cited in** Nalle v. Walenta, Civ.App., 102 S. W.2d 1070, 1072—Matthews v. Looney, Civ.App., 100 S.W.2d 1061, reversed on other grounds 123 S. W.2d 871, 132 Tex. 313—Martin v. Abbott, Civ.App., 24 S.W.2d 488.
34 C.J. p 78 note 86.

45. Tex.—Kveton v. Farmers Royalty Holding Co., Civ.App., 161 S. W.2d 583—Matthews v. Looney, Civ.App., 100 S.W.2d 1061, reversed on other grounds 123 S.W.2d 871, 132 Tex. 313.
34 C.J. p 78 note 87.

46. U.S.—Wolfe v. Murphy, C.C.A. Iowa, 113 F.2d 775, certiorari denied 61 S.Ct. 138, 311 U.S. 200, 85 L.Ed. 454.
Ind.—Miller v. Muir, 56 N.E.2d 496, 115 Ind.App. 335.
S.C.—Brown v. Coward, 21 S.C.L. 4.
34 C.J. p 78 note 87.

47. U.S.—Wolfe v. Murphy, C.C.A. Iowa, 113 F.2d 775, certiorari denied 61 S.Ct. 138, 311 U.S. 700, 85 L.Ed. 454.
Tex.—**Corpus Juris cited in** Nalle v. Walenta, Civ.App., 102 S.W.2d 1070, 1072—Martin v. Abbott, Civ. App., 24 S.W.2d 488.
34 C.J. p 78 note 88 [d].

48. Ind.—Freestone v. State, 176 N. E. 877, 98 Ind.App. 523.
34 C.J. p 78 note 88.
Person holding under purchaser of property involved
Ga.—Ogletree v. Bray, 68 S.E. 789, 135 Ga. 34.

49. La.—Riccobono v. Kearney, 114 So. 707, 164 La. 844.

50. Ind.—Urbanski v. Manns, 87 Ind. 585.

51. Ala.—Hillens v. Brinsfield, 21 So. 208, 113 Ala. 604.

52. Ind.—Urbanski v. Manns, 87 Ind. 585.
34 C.J. p 78 note 91.
Complaint will be treated as motion
Ind.—Miller v. Muir, 56 N.E.2d 496, 115 Ind.App. 335.
34 C.J. p 77 note 78 [a].

53. Ind.—Latta v. Griffith, 57 Ind. 329.
34 C.J. p 79 note 92.

54. Ga.—Tanner v. Wilson, 198 S.E. 77, 58 Ga.App. 229.

55. Ind.—Urbanski v. Manns, 87 Ind. 585.
Hearing
(1) The hearing of the motion may be had in chambers and in a county different from that in which the verdict was obtained.—Chapman v. Chatooga Oil Mill Co., 96 S.E. 579, 22 Ga.App. 446.

(2) In a case where a hearing was held, it was said that the court has power to enter a judgment nunc pro tunc without a hearing, if no records are changed and no different judgment is entered.—Jones v. Sun Oil Co., Civ.App., 145 S.W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353.

on the question, is not to be retried,[56] and no inquiry will be permitted into the merits of the original action or the facts already established by the judgment.[57] In so far as the judgment is concerned, the court may properly inquire only as to whether any judgment was pronounced or rendered,[58] and, if it was, what judgment was, rather than what judgment might or ought to have been, rendered,[59] and whether it was omitted from the record.[60] The court is not called on to construe the judgment, but only to enter of record such judgment as was formerly rendered and not entered of record as rendered.[61] Furthermore, the court is without authority to set aside the judgment or prevent its enforcement, even though it is erroneous as a matter of law.[62]

b. Notice of Application

The practice varies in different jurisdictions as to requiring the giving of notice of an application for entry of a judgment nunc pro tunc.

In some jurisdictions a judgment may be entered nunc pro tunc without notice[63] where the motion is based on matters of record, which cannot be disputed by the opposite party,[64] or where no different judgment is entered.[65] However, where it becomes necessary to look beyond the record, and hear other evidence, notice must be given to the adverse party,[66] and the customary practice in a number of jurisdictions is to require the giving of notice of all applications for entry of judgment nunc pro tunc.[67] It has been held that a judgment nunc pro tunc directed without notice to anyone is not void;[68] but it has also been held that such a judgment entered at a subsequent term is invalid.[69]

c. Evidence

An order for entry of a judgment nunc pro tunc may be authorized or justified by record evidence; and, according to the generally accepted rule, it must be based on some entry, note, or memorandum in the records or quasi records of the court.

In order that a judgment may be entered nunc pro tunc, it is necessary that there be evidence that a judgment was actually rendered,[70] except, of course, cases where the judgment may be both rendered and entered nunc pro tunc.[71] Record evi-

(3) In another case, however, one of the grounds on which the entry nunc pro tunc of a judgment was held erroneous was the absence of an order setting the motion for hearing at a future date.—Merrick v. Merrick, 71 S.W.2d 4, 254 Ky. 145.

Submission to jury

(1) Court generally determines whether judgment sought to be entered nunc pro tunc was actually made; but it has discretion to submit the question to a jury.—Lummus v. Alma State Bank, Tex.Civ. App., 4 S.W.2d 195.

(2) Defendant who, in contesting plaintiff's motion for nunc pro tunc judgment, failed to request submission of defensive issue, raised by answer waived submission.—Martin v. Abbott, Tex.Civ.App., 24 S.W.2d 488.

56. Tex.—Coast v. Coast, Civ.App., 135 S.W.2d 790.

57. N.C.—Creed v. Marshall, 76 S.E. 270, 160 N.C. 394.
34 C.J. p 79 note 94.

58. Tex.—Matthews v. Looney, Civ. App., 100 S.W.2d 1061, reversed on other grounds 128 S.W.2d 871, 132 Tex. 313.

59. Tex.—Coleman v. Zapp, 151 S.W. 1040, 105 Tex. 491—Coast v. Coast, Civ.App., 135 S.W.2d 790—Dunn v. Cravens, Dargan & Co., Civ.App., 97 S.W.2d 242.

60. Tex.—Hannon v. Henson, Civ. App., 7 S.W.2d 613, affirmed, Com. App., 15 S.W.2d 579.

61. Ark.—Lourance v. Lankford, 153 S.W. 592, 106 Ark. 470, Ann.Cas. 1915A 520.

62. Tex.—Hannon v. Henson, Civ. App., 7 S.W.2d 613, affirmed, Com. App., 15 S.W.2d 579.

63. Okl.—Mayer v. Keener, 163 P. 2d 991, 195 Okl. 658.

64. Ala.—Morrison v. Covington, 100 So. 124, 211 Ala. 181.
Okl.—Mayer v. Keener, 163 P.2d 991, 195 Okl. 658.
34 C.J. p 79 note 96.

65. Iowa.—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 232 Iowa 1226.
Tex.—Jones v. Sun Oil Co., Civ.App., 145 S.W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 356.

66. W.Va.—McClain v. Davis, 16 S. E. 629, 37 W.Va. 330, 18 L.R.A. 634.
34 C.J. p 79 note 97.

67. Ind.—Miller v. Muir, 56 N.E.2d 496, 115 Ind.App. 335.
34 C.J. p 79 note 98.

In vacation

Ky.—Merrick v. Merrick, 71 S.W.2d 4, 254 Ky. 145.

Notice held insufficient

Cal.—Mather v. Mather, 140 P.2d 808, 22 Cal.2d 713.

Summons treated as notice

Ind.—Miller v. Muir, 56 N.E.2d 496, 115 Ind.App. 335.

Lack of notice is waived by appearance.—Arnd v. Poston, 203 N.W. 260, 199 Iowa 931—34 C.J. p 79 note 98 [c].

68. Mo.—Smith v. Kiene, 132 S.W. 1052, 231 Mo. 215.
34 C.J. p 79 note 99.

69. Tex.—Henneman Grain & Seed Co. v. Hill, Civ.App., 68 S.W.2d 525—Stevenson v. Fisk, Civ.App., 65 S.W.2d 507.

70. Okl.—**Corpus Juris quoted in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315.
34 C.J. p 79 note 1.

Clear and convincing proof that the judgment which it is sought to have entered is the one pronounced in the cause is necessary.—Wind Rock Coal & Coke Co. v. Robbins, 1 Tenn.App. 734.

Evidence held sufficient

Kan.—Elliott v. Elliott, 114 P.2d 823, 154 Kan. 145.
Tex.—Dunn v. Cravens, Dargan & Co., Civ.App., 97 S.W.2d 242.
34 C.J. p 79 note 1 [b].

Supplying formality

Where a judgment for plaintiffs entered by prothonotary at plaintiffs' request was vulnerable to attack because trial court, in overruling defendant's motion for judgment non obstante veredicto, failed to certify the evidence and direct that judgment be entered for plaintiffs, and thereafter plaintiffs applied for a rule to show cause why judgment should not be stricken and a valid one entered nunc pro tunc, trial court, in passing on plaintiffs' application, was not reviewing the original order but was supplying a required formality and it was not required to consider the evidence or rehear the merits.—Balch v. Shick, 24 A.2d 548, 147 Pa.Super. 273.

71. Okl.—**Corpus Juris quoted in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315.

dence may be sufficient to authorize or justify the entry of judgment nunc pro tunc;[72] and, according to the generally accepted rule, the evidence to justify the entry of a judgment nunc pro tunc must be record evidence, that is, some entry, note, or memorandum from the records or quasi records of the court, which shows in itself, without the aid of parol evidence, that the alleged judgment was rendered.[73] However, according to some authorities, an entry nunc pro tunc may be ordered on any evidence that is sufficient and satisfactory, whether it is parol or otherwise.[74] Other authorities have held that, when the fact that a judgment was formerly rendered is established by record evidence, it is proper to admit parol proof for the purpose of showing its date, character, and terms, and the relief granted.[75]

Great caution will be exercised in basing a nunc pro tunc entry on parol evidence.[76] Parol evidence is admissible to establish extrinsic facts sufficient to defeat the application.[77] Both parties are bound by a decision of the trier of facts resolving a conflict in the testimony as to matters alleged in opposition to the entry.[78]

An order for nunc pro tunc entry of a judgment need not set out the evidence on which it is based.[79] The presumption is that such an order made at a subsequent term was based on competent evidence.[80]

§ 121. —— Operation and Effect

Except as to the rights of third persons, a valid judgment which is properly entered nunc pro tunc is retrospective and has the same force and effect as though it had been entered at the time when the judgment was originally rendered.

Except as to the rights of third persons, a judgment nunc pro tunc is retrospective, and has the same force and effect, to all intents and purposes, as though it had been entered at the time when the judgment was originally rendered.[81] It aids and

72. Ky.—Gorman v. Lusk, 134 S.W. 2d 598, 280 Ky. 692.
Mo.—In re Kellam's Estate, 58 S.W. 2d 401, 227 Mo.App. 291—Pepple v. Stacy, App., 282 S.W. 451.
Tenn.—Wind Rock Coal & Coke Co. v. Robbins, 1 Tenn.App. 734.
34 C.J. p 79 note 3 [a]–[c], [e], [f].

Anything in record
Right to enter a nunc pro tunc judgment exists when there is anything in record which shows that a judgment was announced by court. —Arnd v. Poston, 203 N.W. 260, 199 Iowa 931.

Entries on docket, or memoranda on minutes of judge
Ala.—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91.
Tex.—Bradford v. Powell, Civ.App., 163 S.W.2d 684, reversed in part on other grounds 166 S.W.2d 346, 139 Tex. 638—Community Natural Gas Co. v. Henley, Civ.App., 11 S.W.2d 207, reversed on other grounds, Com.App., 24 S.W.2d 10.
34 C.J. p 79 note 3 [c].

Written opinion
Ky.—Lee v. Lee, 11 S.W.2d 956, 226 Ky. 776.
34 C.J. p 79 note 3 [f].

Official reporter's shorthand notes which are part of record
Iowa.—Arnd v. Poston, 203 N.W. 260, 199 Iowa 931.

73. Ala.—Du Pree v. Hart, 8 So.2d 183, 242 Ala. 690.
Ill.—Wallace Grain & Supply Co. v. Cary, 24 N.E.2d 907, 303 Ill.App. 221, reversed on other grounds 28 N.E.2d 107, 374 Ill. 57—Wiggins v. Union Trust Co. of East St. Louis, 266 Ill.App. 560—Brown v. Hamsmith, 247 Ill.App. 358.
Ind.—**Corpus Juris cited in** Indianapolis Life Ins. Co. v. Lundquist, 53 N.E.2d 338, 340, 222 Ind. 359.
Ky.—Brannon v. Scott, 156 S.W.2d 164, 288 Ky. 334—Bowling v. Evans, 98 S.W.2d 916, 266 Ky. 242 —**Corpus Juris quoted in** Hoffman v. Shuey, 2 S.W.2d 1049, 1053, 223 Ky. 70, 58 A.L.R. 842.
Mo.—Campbell v. Spotts, 55 S.W.2d 986, 331 Mo. 974.
Tenn.—Gillespie v. Martin, 109 S.W. 2d 98, 172 Tenn. 28.
34 C.J. p 79 note 3.

Oral announcement of the court's decision or judgment is not a sufficient basis for the entry of a judgment nunc pro tunc.—Du Pree v. Hart, 8 So.2d 183, 242 Ala. 690—34 C.J. p 79 note 3 [i].

Judge's recollection
An entry of judgment nunc pro tunc cannot be made simply on the judge's recollection of having rendered such a judgment, or of its terms or amount.
Ky.—Brannon v. Scott, 156 S.W.2d 164, 288 Ky. 334.
Mo.—Campbell v. Spotts, 55 S.W.2d 986, 331 Mo. 974.
34 C.J. p 79 note 3 [j].

74. Ark.—Brooks v. Baker, 187 S.W. 2d 169, 208 Ark. 654—Mitchell v. Federal Land Bank of St. Louis, 174 S.W. 671, 206 Ark. 253.
Okl.—**Corpus Juris quoted in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315—Bowling v. Merry, 217 P. 404, 91 Okl. 176.
Tex.—Jones v. Sun Oil Co., Civ.App., 145 S.W.2d 615, reversed on other grounds 153 S.W.2d 571, 137 Tex. 353.
34 C.J. p 81 note 4.

Agreed judgment
Tex.—Kluck v. Spitzer, Civ.App., 54 S.W.2d 1063.

75. N.H.—Frink v. Frink, 43 N.H. 508, 80 Am.D. 189, 82 Am.D. 172.
34 C.J. p 81 note 5.

76. Ark.—Brooks v. Baker, 187 S.W. 2d 169, 208 Ark. 654—Mitchell v. Federal Land Bank of St. Louis, 174 S.W.2d 671, 206 Ark. 253.
Okl.—**Corpus Juris quoted in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315.
34 C.J. p 81 note 6.

Character of parol evidence
The parol evidence should be clear, decisive, unequivocal, and of sufficient character and weight to overcome the written memorial.—Brooks v. Baker, 187 S.W.2d 169, 208 Ark. 654—Mitchell v. Federal Land Bank of St. Louis, 174 S.W.2d 671, 206 Ark. 253—Midyett v. Kerby, 195 S.W. 674, 129 Ark. 301.

77. Okl.—**Corpus Juris quoted in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315.
34 C.J. p 81 note 7.

Want of jurisdiction
It may be shown that judgment was void for lack of jurisdiction.—Coast v. Coast, Tex.Civ.App., 135 S. W.2d 790.

78. Tex.—Coast v. Coast, supra.

79. Mo.—Pepple v. Stacy, App., 282 S.W. 451.

80. Okl.—**Corpus Juris quoted in** McQuiston v. Tyler, 97 P.2d 552, 554, 186 Okl. 315—Bowling v. Merry, 217 P. 404, 91 Okl. 176.
34 C.J. p 81 note 8.

81. U.S.—Wolfe v. Murphy, C.C.A. Iowa, 113 F.2d 775, certiorari de-

cures proceedings which otherwise would be defective and irregular for want of a proper entry of judgment to sustain them.[82] A nunc pro tunc entry of record is competent evidence of the facts which it recites,[83] it is conclusive on any other court in which the record is offered in evidence,[84] and it cannot be impeached collaterally, as discussed infra § 402.

The effects of an entry nunc pro tunc, however, will be confined to the rights and interests of the original parties, and it will not be allowed to prejudice the intervening rights of third persons without notice.[85] Also, where a judgment is void, it is not validated by a nunc pro tunc entry,[86] and the court's approval of such entry is of no effect.[87] The court may not, by a declaration of retroactive effect, make a judgment take effect as of a date when the case was not ready for judgment;[88] a judgment which, by the order for its entry, is shown to have been rendered on the date stated therein, cannot, by a subsequent provision of the order, be made to take effect as of an earlier date;[89] and a direction of a judgment nunc pro tunc becomes of no effect when the court, in rendering the judgment, dates the judgment as of the day it is filed.[90] A final judgment which has been entered is not affected by a subsequent attempt to enter a different judgment nunc pro tunc.[91] It has been held that a judgment is not effective as of the date to which it expressly relates back if such effectiveness would deny to any proper party the right of review by a higher court.[92]

§ 122. Judgment Roll or Record

The filing of a judgment roll or record consisting of a more or less formal account of the proceedings is generally required by the statutes in the various jurisdictions.

The ancient common-law method of perpetuating judgments was by engrossing the proceedings on parchment, which was called the judgment roll, and constituted the record and the only evidence of the judgment.[93] This practice has been largely, if not entirely, discontinued and other methods have been adopted in the various jurisdictions.[94] Under some statutes a formal judgment roll is required to be made up by attaching together, and filing with the clerk, the necessary papers.[95] Under others a judgment record, which is substantially equivalent to a judgment roll, is required to be made up by copying

nied 61 S.Ct. 138, 311 U.S. 700, 85 L.Ed. 454.
Ala.—Poole v. Griffith, 112 So. 447, 216 Ala. 120.
Cal.—Corbett v. Corbett, 293 P. 319, 113 Cal.App. 595.
Colo.—**Corpus Juris cited in** Dickson v. Horn, 1 P.2d 96, 97, 89 Colo. 234.
Ind.—Miller v. Muir, 56 N.E.2d 496, 115 Ind.App. 335.
Iowa.—Arnd v. Poston, 203 N.W. 260, 199 Iowa 931—Brooks v. Owen, 202 N.W. 505, 200 Iowa 1151, modified on other grounds 206 N.W. 149.
Ky.—Gorman v. Lusk, 134 S.W.2d 598, 280 Ky. 692—**Corpus Juris quoted in** Hoffman v. Shuey, 2 S.W.2d 1049, 1052, 223 Ky. 70, 58 A.L.R. 842.
Okl.—In re Cannon's Guardianship, 77 P.2d 64, 182 Okl. 171.
Tenn.—**Corpus Juris quoted in** Crum v. Fillers, 6 Tenn.App. 547, 558.
34 C.J. p 81 note 9.

82. Ky.—Gorman v. Lusk, 134 S.W.2d 598, 280 Ky. 692—**Corpus Juris quoted in** Hoffman v. Shuey, 2 S.W.2d 1049, 1052, 223 Ky. 70, 58 A.L.R. 842.
Tenn.—**Corpus Juris quoted in** Crum v. Fillers, 6 Tenn.App. 547, 558.
34 C.J. p 82 note 10 [a].
Validation of execution see Executions § 9.

83. Ind.—Cogswell v. State, 65 Ind. 1.
Okl.—**Corpus Juris quoted in** In re Cannon's Guardianship, 77 P.2d 64, 66, 182 Okl. 171—Bowling v. Merry, 217 P. 404, 91 Okl. 176.

84. Okl.—**Corpus Juris quoted in** In re Cannon's Guardianship, 77 P.2d 64, 66, 182 Okl. 171.
34 C.J. p 82 note 13.

85. U.S.—In re Ackermann, C.C.A. Ohio, 82 F.2d 971.
Ky.—**Corpus Juris quoted in** Hoffman v. Shuey, 2 S.W.2d 1049, 1052, 223 Ky. 70, 58 A.L.R. 842.
N.C.—Con-Es-Tee Chemical Co. v. Long, 114 S.E. 465, 184 N.C. 398.
Tenn.—**Corpus Juris quoted in** Crum v. Fillers, 6 Tenn.App. 547, 558.
Purchaser or encumbrancer in good faith
(1) In general.—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 232 Iowa 1226.
(2) Person perfecting lien based on preëxisting debt between time of original judgment and nunc pro tunc entry is not bona fide purchaser.—In re Ackermann, C.C.A.Ohio, 82 F.2d 971.
Prejudice to intervening rights of third persons as preventing entry nunc pro tunc entirely or otherwise than on conditions preserving such rights see supra § 118.

86. Ohio.—Ludlow v. Johnston, 3 Ohio 553, 17 Am.D. 609.
34 C.J. p 82 note 10 [b].

87. Pa.—Gedrich v. Yaroscz, 156 A. 575, 102 Pa.Super. 127.

88. Va.—Gandy v. Elizabeth City County, 19 S.E.2d 97, 179 Va. 340.
Ripeness of case for judgment at date to which judgment is to relate back as essential to nunc pro tunc entry see supra § 118 b.

89. W.Va.—Baker v. Gaskins, 24 S.E.2d 277, 125 W.Va. 326.

90. Cal.—Mather v. Mather, 140 P.2d 808, 22 Cal.2d 713.

91. Tex.—Brennan v. Greene, Civ.App., 154 S.W.2d 523, error refused.
Stated otherwise, and more broadly, a nunc pro tunc order is ineffective to alter as of a prior date the action then taken.—State ex rel. Hedrick v. Hartford Accident & Indemnity Co. of Hartford, Conn., 114 P.2d 312, 154 Kan. 79.

92. Ohio.—Porter v. Lerch, 193 N.E. 766, 129 Ohio St. 47.
Harmless error in entry nunc pro tunc see Appeal and Error § 1795.
Nunc pro tunc entry as affecting commencement of limitation for appeal see Appeal and Error § 445.

93. Ind.—**Corpus Juris cited in** Town of Flora v. Indiana Service Corporation, 53 N.E.2d 161, 163, 222 Ind. 253.
N.Y.—Croswell v. Byrnes, 9 Johns. 237.
Okl.—Dime Savings & Trust Co. v. Able, 94 P.2d 334, 185 Okl. 461.
34 C.J. p 82 note 17.
Court records generally see Courts §§ 225–237.

94. Cal.—Hahn v. Kelly, 34 Cal. 391, 424, 94 Am.D. 742.

95. Idaho.—Witt v. Beals, 169 P. 182, 31 Idaho 84.
34 C.J. p 82 note 19.
Contents of judgment roll see infra § 125.

the proceedings with more or less detail into books kept for that purpose.[96] In some jurisdictions neither a judgment roll nor a formal judgment record is required, and the record of the judgment consists of the filed papers supplemented by the entries made by the clerk.[97] Even very informal memoranda by the clerks have in some instances been deemed sufficient as the record of a judgment;[98] and, for some purposes at least, the clerk's files and minutes have been held to constitute the record until such time as the record is fully extended or the judgment roll made up.[99]

The validity of a judgment does not depend on making up the formal judgment roll or judgment record,[1] although this may be necessary for certain purposes, such as to enable the judgment to be regularly docketed, as discussed infra § 126, so as to become a lien, as discussed infra § 463, or to support an execution, as discussed in Executions § 9, or to limit the time for an appeal or writ of error, as considered in Appeal and Error § 445. The term "judgment roll" is strictly applicable only to civil cases,[2] although the term has been applied to the record in a criminal prosecution.[3] In probate proceedings there is, strictly speaking, no judgment roll,[4] but whenever proceedings are so akin to a civil action as to necessitate the papers which are declared by a statute to constitute the judgment roll in a civil action, they may be held to constitute the judgment roll for the purpose of appeal.[5]

§ 123. —— Time of Making and Filing

Generally the clerk is required to make up the judgment roll immediately after entry of the judgment.

Under most statutes the clerk is required to make up the judgment roll immediately after the entry of the judgment.[6] Until the judgment is entered in accordance with the rules discussed supra §§ 106–112, there is no authority to make and file a judgment roll.[7]

§ 124. —— By Whom Made and Filed

The duty of making and filing the judgment roll usually rests on the clerk, but the attorney for the successful party may, and under some statutes must, prepare the judgment roll for the clerk to file.

Although the making and filing of the judgment roll is usually made the duty of the clerk,[8] in actual practice it is generally made up by the attorney of the successful party.[9] Under some statutes it is the duty of such attorney to prepare and furnish the judgment roll to the clerk,[10] except that the clerk must attach thereto necessary original papers on file;[11] but the clerk may, at his option, make up the entire judgment roll.[12] In the absence of statute so requiring, the successful party cannot be compelled to furnish a judgment roll.[13] In any event, when properly made up, the judgment roll must be filed by the clerk.[14]

96. Neb.—Colonial & W. S. Mortg. Co. v. Foutch, 47 N.W. 929, 31 Neb. 282.
34 C.J. p 82 note 20.

"Record" defined

"A judicial record is a precise history of a suit from its commencement to its termination, including the conclusion of law thereon drawn by the proper officer for the purpose of perpetuating the exact state of facts."
Neb.—Burge v. Gandy, 59 N.W. 359, 41 Neb. 149.
Okl.—Dime Savings & Trust Co. v. Able, 94 P.2d 834, 835, 185 Okl. 461.

97. Ill.—Stevison v. Earnest, 80 Ill. 513.
34 C.J. p 82 note 21.

98. U.S.—Cromwell v. Bank of Pittsburgh, C.C.Pa., 6 F.Cas.No.3,409, 2 Wall.Jr. 569.
34 C.J. p 83 note 22.

99. Ala.—Ansley v. Carlos, 9 Ala. 973.
34 C.J. p 83 note 23.

1. S.C.—Connor v. McCoy, 65 S.E. 257, 83 S.C. 165.
34 C.J. p 83 note 25.

Necessity of entry of judgment see supra § 107.

Effect of delay

Where a memorandum of decision constitutes a judgment of the court, the subsequent clerical action in writing out the judgment file relates back to the time the memorandum was filed, so that, no matter how long such action is postponed, it cannot be regarded as the rendering of a different and later judgment.—Goldberg v. Krayeske, 128 A. 27, 102 Conn. 137.

2. Wis.—Green Lake County v. Waupaca County, 89 N.W. 549, 113 Wis. 425.

3. U.S.—Ball v. U. S., Alaska, 147 F. 32, 78 C.C.A. 126.

4. Utah.—In re Kelsey, 43 P. 106, 12 Utah 393.

5. Utah.—In re Kelsey, supra.
34 C.J. p 83 note 35.

6. Minn.—Rockwood v. Davenport, 35 N.W. 377, 37 Minn. 533, 5 Am. S.R. 872.
34 C.J. p 83 note 36.

Undated record of judgment is not void.—McDonald v. Mulkey, 210 P. 940, 29 Wyo. 99.

7. Utah.—Robinson v. Salt Lake City, 109 P. 817, 37 Utah 520.
34 C.J. p 83 note 38.

8. Minn.—Rockwood v. Davenport, 35 N.W. 377, 37 Minn. 533, 5 Am. S.R. 872.
34 C.J. p 83 note 39.

9. N.Y.—Dailey v. Northern New York Utilities, 221 N.Y.S. 52, 129 Misc. 183.
34 C.J. p 83 note 40.

10. N.Y.—Dailey v. Northern New York Utilities, supra—McWilliams, Inc. v. Ætna Insurance Co., 198 N.Y.S. 681, 120 Misc. 117.
34 C.J. p 83 note 41.

11. N.Y.—Knapp v. Roche, 82 N.Y. 366—Heinemann v. Waterbury, 18 N.Y.Super. 686.

12. N.Y.—Knapp v. Roche, 82 N.Y. 366—Dailey v. Northern New York Utilities, 221 N.Y.S. 52, 129 Misc. 183.

13. N.Y.—Heinemann v. Waterbury, 18 N.Y.Super. 686.

14. N.Y.—Dailey v. Northern New York Utilities, 221 N.Y.S. 52, 129 Misc. 183.
34 C.J. p 83 note 24.

§ 125. —— Contents and Sufficiency

a. In general
b. Particular matters
c. Amendment of the roll
d. Signature

a. In General

In general the judgment roll or record properly includes all papers necessary to support the judgment or specified by statute, and any matters involving the merits of the action and necessarily affecting the judgment.

The record proper, or technical record, corresponds with the common-law judgment roll,[15] and a judgment roll should contain only such papers as constitute a part of that record.[16] Unless a particular matter is in its nature a proper matter of record in the case, it cannot be made such by being inserted in, and attested as part of, the record, or judgment roll, by the clerk.[17] In a general sense, all the files and minutes of the court are often spoken of, in modern times, as records of courts, and this use of the term tends to lead to a confusion of ideas.[18] The record is said to be a memorial or history of the proceedings in a cause,[19] but this is not to be taken to mean that such record necessarily or usually embraces all the proceedings, for there are many proceedings during the progress of a case of which no minute or record is made.[20]

Generally speaking, it may be said that the judgment roll or record properly comprises all the proceedings on which the judgment is founded and to which, as matter of record, it necessarily refers.[21] It includes all papers necessary to support the judgment[22] or specified by the statute,[23] and generally any matters involving the merits of the action and necessarily affecting the judgment,[24] but not interlocutory rulings or the proceedings on collateral or incidental issues in the case[25] unless made part of the record by bill of exceptions which, as appears infra subdivision b of this section, constitutes a part of the judgment roll or record, or by order of court.[26] Where the statute specifies the contents of the judgment roll, matters not specified form no part of it, and need not,[27] and should not,[28] be included. On the other hand, failure to include all the necessary or proper papers does not affect the validity of the judgment.[29]

Substantial compliance with the requirements of the statute as to the manner of making up and filing

15. Idaho.—Evans v. District Court of Fifth Judicial Dist., 293 P. 323, 50 Idaho 60.
Okl.—Dime Savings & Trust Co. v. Able, 94 P.2d 834, 185 Okl. 461.
34 C.J. p 83 note 46.

16. Mont.—Featherman v. Granite County, 72 P. 972, 28 Mont. 462.

17. Cal.—Colton Land & Water Co. v. Swartz, 33 P. 878, 99 Cal. 278.
34 C.J. p 84 note 50.

18. Cal.—Hahn v. Kelly, 34 Cal. 391, 94 Am.D. 742.
34 C.J. p 84 note 52.

19. Okl.—Dime Savings & Trust Co. v. Able, 94 P.2d 834, 185 Okl. 461.
34 C.J. p 84 note 53.

20. Conn.—Nichols v. Bridgeport, 27 Conn. 459.
N.Y.—Hoe v. Sanborn, 24 How.Pr. 26, affirmed 36 N.Y. 93.
34 C.J. p 84 note 54.

21. Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205.
Okl.—Sabin v. Levorsen, 145 P.2d 402, 193 Okl. 320, certiorari denied 64 S.Ct. 205, 320 U.S. 792, 88 L.Ed. 477, rehearing denied 64 S.Ct. 368, 320 U.S. 815, 88 L.Ed. 492—Dime Savings & Trust Co. v. Able, 94 P.2d 834, 185 Okl. 461—Leonard v. Tulsa Building & Loan Ass'n, 88 P.2d 875, 184 Okl. 558—Shaw v. Grumbine, 278 P. 311, 137 Okl. 95—State Bank of Dakoma v. Weaber, 256 P. 50, 125 Okl. 186—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247—Mitchell v. White, 233 P. 746, 106 Okl. 218.
34 C.J. p 84 note 57.

Record held sufficient

Where county court's record showed on its face a petition stating a cause of action, a waiver of summons, and a voluntary appearance by defendant, recital that evidence was heard, and a judgment against defendant, record was sufficient to show jurisdictional facts.—Wallace v. Peterson, 284 N.W. 866, 136 Neb. 39.

A placita for the term at which judgment was entered is sufficient to show the legal organization of the court.—Calbreath v. Beckwith, 260 Ill.App. 7—Leafgreen v. Leafgreen, 127 Ill.App. 184.

Errors of law committed by court of general jurisdiction in exercising jurisdiction over subject matter submitted to court by constitution or statutes are not reflected in judgment roll.—Chicago, R. I. & P. Ry. Co. v. Co-operative Pub. Co., 247 P. 974, 119 Okl. 76—Chicago, R. I. & P. Ry. Co. v. Oklahoma State Bank of Atoka, 247 P. 31, 118 Okl. 129.

22. N.Y.—Gerity v. Seeger & Guernsey Co., 57 N.E. 290, 163 N.Y. 119.
34 C.J. p 84 note 58.

23. Okl.—Sabin v. Levorsen, 145 P. 2d 402, 193 Okl. 320, certiorari denied 64 S.Ct. 205, 320 U.S. 792, 88 L.Ed. 477, rehearing denied 64 S. Ct. 368, 320 U.S. 815, 88 L.Ed. 492—Dime Savings & Trust Co. v. Able, 94 P.2d 834, 185 Okl. 461—Leonard v. Tulsa, 88 P.2d 875, 184 Okl. 558—Shaw v. Grumbine, 278 P. 311, 137 Okl. 95—State Bank of Dacoma v. Weaber, 256 P. 50, 125 Okl. 186—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247—Mitchell v. White, 233 P. 746, 106 Okl. 218.
34 C.J. p 84 note 59.

24. S.D.—Rapids City First Nat. Bank v. McGuire, 80 N.W. 1074, 12 S.D. 226, 76 Am.S.R. 598, 47 L.R.A. 413.
34 C.J. p 85 note 60.

25. Idaho.—Bissing v. Bissing, 115 P. 827, 19 Idaho 777.
34 C.J. p 85 note 61.

26. N.Y.—Dr. David Kennedy Corp. v. Kennedy, 59 N.E. 133, 165 N.Y. 353.
34 C.J. p 85 note 63.

27. Cal.—Brown v. Caldwell, 108 P. 874, 13 Cal.App. 29.
34 C.J. p 85 note 64.

28. N.Y.—Schrader v. Franckel, 99 N.Y.S. 137, 113 App.Div. 395.
34 C.J. p 85 note 65.

Motion to strike

The unsuccessful party may move to strike out irrelevant papers, but he should specify the papers claimed to be unnecessarily included in the judgment roll and point out wherein they were improperly included. —Peters v. Berkeley, 219 N.Y.S. 709, 219 App.Div. 261.

29. N.Y.—Decker v. Dutcher, 231 N. Y.S. 397, 156 Misc. 488, reversed on other grounds 239 N.Y.S. 553, 247 App.Div. 689.

a judgment roll is sufficient,[30] but necessary[31]. Provisions regulating the mode of making up and filing a judgment roll have been deemed merely directory.[32] A defective judgment roll is not a nullity,[33] nor does it invalidate the judgment, which continues to be supported by the usual presumptions.[34] A variance between an order as entered in his minutes by the clerk and such order as drawn up and inserted in the judgment roll is, it has been held, a matter of mere irregularity.[35] Failure to fasten the proper papers together, as required by statute, does not prevent such papers from constituting the judgment roll.[36] Ordinarily copies may be used in lieu of original papers in making up judgment rolls.[37]

b. Particular Matters

Whether or not a particular matter is a proper or necessary part of the judgment roll or record depends on statutory requirements and whether or not it is necessary to support the judgment.

Whether or not a particular matter is a proper or necessary part of the judgment roll or record depends on statutory provisions and on whether or not such matter is necessary to support the judgment.[38]

Process, proof of service, and appearance. The writ, summons, or original process,[39] together with the necessary indorsement thereon,[40] and proof of service,[41] are proper and necessary parts of the judgment roll or record, at least where there is a default for want of an appearance or answer.[42] Proof of service of process, however, need not appear in the roll or record where defendant entered a general appearance in the action, or pleaded to the declaration or complaint,[43] or, it has been held, where the judgment contains a recital of due service.[44] Where the service is by publication, neither the affidavit nor the order for publication is a part of the judgment roll or record,[45] and their absence, therefore, does not show invalidity of the judgment

30. N.Y.—Sears v. Burnham, 17 N. Y. 445.
34 C.J. p 85 note 66.

31. N.Y.—Townshend v. Wesson, 11 N.Y.Super. 342.
Wis.—Douville v. Merrick, 25 Wis. 688.

32. N.Y.—Stimson v. Huggins, 16 Barb. 658, 9 How.Pr. 86.
N.C.—Brown v. Harding, 89 S.E. 222, 171 N.C. 686.

33. N.Y.—Miller v. White, 59 Barb. 434, 10 Abb.Pr.,N.S., 835, reversed on other grounds 50 N.Y. 137.

34. Minn.—Herrick v. Butler, 14 N. W. 794, 30 Minn. 156.
34 C.J. p 85 note 72.

35. N.Y.—Martin v. Lott, 4 Abb.Pr. 365.

36. S.C.—Melchers v. Moore, 40 S.E. 773, 62 S.C. 386.
34 C.J. p 85 note 69.

37. Minn.—State v. Sargent, 177 N. W. 633, 145 Minn. 443.

38. Cal.—Copp v. Rives, 217 P. 813, 62 Cal.App. 776.
34 C.J. p 89 note 86.

Matters held properly included

(1) Return by proper officer, in cases involving validity of judgments.—Eidson v. McDaniel, 114 So. 204, 216 Ala. 610.

(2) Award of arbitrators and agreement of parties owning adjoining lands respecting construction of dam, filed in court.—Cruse's Ex'r v. Haggard, 44 S.W.2d 290, 241 Ky. 442.

(3) Motion for a new trial.—Green v. Stevens, 1 Ky.Op. 36.

(4) Other matters.—McDonald v. Mulkey, 210 P. 940, 29 Wyo. 99—34 C.J. p 89 note 86 [a].

Matters held not properly included

(1) Motion for substitution of parties.—Savoy Oil Co. v. Emery, 277 P. 1029, 137 Okl. 67.

(2) Motion for revivor.—Dime Savings & Trust Co. v. Able, 94 P.2d 834, 185 Okl. 461—Adams v. Carson, 25 P. 2d 653, 165 Okl. 161—Savoy Oil Co. v. Emery, supra.

(3) Motion to set aside default and affidavits in support thereof.—Madsen v. Hodson, 256 P. 792, 69 Utah 527—Cornelius v. Mohave Oil Co., 239 P. 475, 66 Utah 22.

(4) Notice of motion to dismiss declaratory judgment action.—Sievers v. Pacific Gas & Electric Co., 134 P.2d 850, 57 Cal.App.2d 455.

(5) Notation on back of record.—Grasso v. Frattolillo, 149 A. 838, 111 Conn. 209.

(6) Mortgage canceled and merged into judgment.—Bledsoe v. Green, 280 P. 301, 133 Okl. 15.

(7) Matter of beginning and ending of terms of court.—Salt Lake City v. Industrial Commission, 22 P. 2d 1046, 82 Utah 179.

(8) Minutes made by trial judge on his trial docket.—Gates v. Gates, 163 P.2d 395, 160 Kan. 428.

(9) Other matters.—Malaquias v. Novo, 188 P.2d 729, 59 Cal.App.2d 225—34 C.J. p 89 note 86 [b].

Notice of controverting affidavit

Failure of record to contain copy of service on defendant of notice of affidavit controverting his plea of privilege was not fatal to judgment overruling plea of privilege where judgment disclosed that trial court found that attorney appeared for defendant at hearing on plea of privilege.—Thomas v. Driver, Tex.Civ. App., 55 S.W.2d 187, error dismissed.

39. Ill.—Sherman & Ellis v. Journal of Commerce and Commercial Bulletin, 259 Ill.App. 453.
Ohio.—Terry v. Claypool, 65 N.E.2d 883, 77 Ohio App. 77.
Tex.—Litton v. Waters, Civ.App., 161 S.W.2d 1095, error refused.
34 C.J. p 85 note 77.

40. Va.—Nadenbush v. Lane, 4 Rand. 413, 25 Va. 413.

41. Ohio.—Terry v. Claypool, 65 N. E.2d 883, 77 Ohio App. 77.
34 C.J. p 85 note 79.

42. N.Y.—Issem v. Slater, 27 N.Y.S. 2d 871, 262 App.Div. 59, reargument denied 29 N.Y.S.2d 505, 262 App.Div. 834, appeal dismissed 37 N.E.2d 144, 286 N.Y. 703.
34 C.J. p 85 note 80.

Amended complaint

Judgment roll must disclose that amended complaint was served or service thereof was waived, where judgment was by default.—Griffith v. Montana Wheat Growers' Ass'n, 244 P. 277, 75 Mont. 466.

43. N.Y.—Issem v. Slater, 27 N.Y. S.2d 871, 262 App.Div. 59, reargument denied 29 N.Y.S.2d 505, 262 App.Div. 834, appeal dismissed 37 N.E.2d 144, 286 N.Y. 703.
34 C.J. p 85 note 82.

Acceptance of service

Where defendant's acceptance of service is relied on, record must show that court ascertained by proof that defendant had accepted service of summons and when.—Williams v. Chase Nat. Bank of New York, 174 So. 783, 234 Ala. 238—Kent v. Kent, 139 So. 240, 224 Ala. 183.

44. Okl.—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572.

45. Utah.—Intermill v. Nash, 75 P.

on the face of the judgment roll;[46] and even if inserted, they could not be considered.[47] Where the judgment recites that service was proper, proof of mailing copies of the petition and notice of publication to defendant is not a necessary part of the roll or record.[48] The affidavit of publication of the writ or summons is a necessary part of the roll or record,[49] and some cases hold that the affidavit and order for publication must also be included as constituting part of the proof of service of process.[50] A formal appearance filed in the action is a part of the record;[51] but, when not included in the statutory enumerations of matters forming part of the judgment roll, a notice of appearance has been held to be not a part of such roll.[52]

Pleadings. Both under express statutory provision and in the absence thereof, the pleadings in the case, or copies thereof, are a proper and necessary part of the judgment roll or record.[53] Thus the declaration, petition, or complaint,[54] and the plea or answer,[55] or demurrer,[56] and a replication or reply,[57] are parts of the record proper and should be included in the judgment roll. It has been held, however, that the omission of a pleading, while an irregularity, will not vitiate the judgment or execution.[58] Where defendant does not answer or otherwise plead to the declaration but makes default, that fact must appear.[59] Pleadings which have been withdrawn[60] or superseded by amended pleadings[61] need not be included in the roll or record, and if improperly incorporated therein may be stricken out on motion.[62] It is not necessary to include in the judgment roll the answer of a defendant as to whom the action was discontinued.[63]

Bill of particulars. It is only where a bill of particulars involves the merits, or of necessity affects the judgment, that it should be made part of the judgment roll.[64]

Evidence. In common-law cases, the evidence, including papers acted on only as a matter of evidence, unless made so by bill of exceptions or some substitute therefor, forms no part of the record.[65]

Orders. Unless they involve the merits of the action and necessarily affect the judgment, or are expressly provided for by statute, orders entered in the cause are not properly a part of the judgment roll or record,[66] although they may be made part of the record by direction of the court.[67]

2d 157, 94 Utah 271—Hoagland v. Hoagland, 57 P. 20, 19 Utah 103.
34 C.J. p 86 note 84.

46. Utah.—Intermill v. Nash, 75 P. 2d 157, 94 Utah 271.
34 C.J. p 86 note 85.

47. Cal.—People v. Temple, 87 P. 414, 103 Cal. 447.

48. Okl.—Washburn v. Culbertson, 75 P.2d 190, 181 Okl. 476—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572.

49. U.S.—Neff v. Pennoyer, C.C.Or., 17 F.Cas.No.10,083, 3 Sawy. 274, affirmed 95 U.S. 714, 24 L.Ed. 565.
34 C.J. p 86 note 87.

50. Cal.—People v. Herod, 295 P. 383, 111 Cal.App. 246.
34 C.J. p 86 notes 88, 89 [a].

51. Ill.—Baldwin v. McClelland, 38 N.E. 143, 152 Ill. 42.

52. Cal.—Lyons v. Roach, 23 P. 1026, 84 Cal. 27.
34 C.J. p 86 note 91.

53. Cal.—Sievers v. Pacific Gas & Electric Co., 134 P.2d 850, 57 Cal. App.2d 455.
Tex.—Hatch v. Kubena, Civ.App., 190 S.W.2d 175, reversed on other grounds Kubena v. Hatch, Sup., 193 S.W.2d 175.
34 C.J. p 86 note 92.

A frivolous pleading on which judgment is ordered is not stricken out, but remains on the record and becomes a part of the judgment roll. —Commercial Bank v. Spencer, 76 N. Y. 155.

54. Okl.—Excise Board of Carter County v. Chicago, R. I. & P. Ry. Co., 3 P.2d 1037, 152 Okl. 120.
34 C.J. p 86 note 94.

55. N.Y.—Hatcher v. Rocheleau, 18 N.Y. 86.
34 C.J. p 86 note 95.

56. N.Y.—Thornton v. St. Paul & Chicago R. Co., 6 Daly 511.
34 C.J. p 86 note 96.

57. N.Y.—Graham v. Schmidt, 3 N. Y.Super. 74.
34 C.J. p 86 note 97.

58. N.Y.—Renouil v. Harris, 4 N.Y. Super. 641, 2 Code Rep. 71.
34 C.J. p 86 note 99.

59. Idaho.—Harpold v. Doyle, 102 P. 158, 16 Idaho 671.
34 C.J. p 86 note 2.

60. N.Y.—Hatcher v. Rocheleau, 18 N.Y. 86.
34 C.J. p 86 note 3.

61. N.Y.—Brown v. Saratoga R. Co., 18 N.Y. 495.
34 C.J. p 87 note 4.

62. N.Y.—Dexter v. Dustin, 24 N.Y. S. 129, 70 Hun 515.

63. N.Y.—Bohnhoff v. Fischer, 132 N.Y.S. 603, 147 App.Div. 672.

64. N.Y.—Arrow S. S. Co. v. Bennett, 26 N.Y.S. 948, 23 N.Y.Civ. Proc. 234.
34 C.J. p 87 note 7.

65. Me.—Kirby v. Wood, 16 Me. 81.
W.Va.—Anderson v. Doolittle, 18 S. E. 724, 38 W.Va. 629.

66. Cal.—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704.
34 C.J. p 87 note 13.

Orders part of judgment roll or record

(1) Order amending a pleading. —Borden v. Lynch, 87 P. 609, 34 Mont. 503.

(2) Other orders.—Powell v. May, 74 P. 80, 29 Mont. 71—34 C.J. p 87 note 16 [a].

Orders not part of judgment roll or record

(1) Court's order confirming or modifying findings of referee to ascertain fact necessary to enable court to determine action.—National Brass Works v. Weeks, 268 P. 412, 92 Cal.App. 318.

(2) Minute order dismissing foreclosure action as to plaintiff's vendor.—Wendt v. Gates, 283 P. 312, 102 Cal.App. 342, followed in Wendt v. Stump, 283 P. 313, 102 Cal.App. 794.

(3) Other orders.
Cal.—Woods v. Hyde, 222 P. 163, 64 Cal.App. 433.
Utah.—Madsen v. Hodson, 256 P. 792, 69 Utah 527.
34 C.J. p 87 note 16 [b].

67. N.Y.—Dr. David Kennedy Corp. v. Kennedy, 59 N.E. 133, 165 N.Y. 353.
34 C.J. p 87 note 15.

The verdict, decision, findings, or report on which the judgment is founded, is a proper and necessary part of the judgment roll or record,[68] but in a number of instances exceptions have been made to this rule.[69] Where defendant in an action has appeared and issue has been joined, it must appear from the judgment roll how that issue has been disposed of so as to authorize the court to proceed to judgment.[70]

A bill of exceptions constitutes a part of the judgment roll or record in most jurisdictions;[71] but it is otherwise under some statutes.[72] Where the statute so provides, if judgment is taken after a trial the judgment roll must contain "the exceptions or case then on file."[73]

Judgment. The judgment roll or record must contain, of course, a copy of the final judgment,[74] and also a copy of any interlocutory judgment rendered in the cause,[75] unless, by amendment of pleadings or otherwise, the interlocutory judgment has been superseded or become functus officio.[76]

Costs. Papers used on taxation of costs do not constitute any part of the judgment roll or record.[77]

Appeal papers and subsequent proceedings. Under a statute so providing, if a judgment of affirmance is rendered on appeal to a designated appellate court, the judgment roll consists of a copy of the judgment annexed to the papers on which the appeal was heard.[78]

c. Amendment of the Roll

The judgment roll may be corrected by amendment or by the addition of proper papers.

All papers incorporated into the judgment roll and required to form part of it may be detached by the clerk, and any amendments made which are necessary to make it conform with accuracy to the proceedings that have been had.[79] If necessary or proper papers are omitted in the judgment roll, such papers may be added.[80]

d. Signature

Failure of the clerk to sign the judgment as required is at most an irregularity which does not affect the validity of the judgment and is subject to correction.

Although the clerk of the court should attest the judgment roll or entry by his signature, his failure to do so is at most an irregularity, and does not affect the validity of the judgment.[81] It is a clerical error[82] which the court may and should allow to be corrected at any time nunc pro tunc.[83] Un-

68. Nev.—McGill v. Lewis, 118 P. 2d 702, 61 Nev. 40.
83 C.J. p 1195 note 62 [c]—34 C.J. p 87 note 17.

69. **Findings of fact**
(1) The incorporation of court's findings of facts into judgment was unnecessary.—Wann v. Reading Co., 108 S.W.2d 899, 194 Ark. 541.
(2) Findings form no part of the judgment roll in a case of default.—Cook's Estate, 17 P. 923, 77 Cal. 220, 11 Am.S.R. 267, 1 L.R.A. 567, reheard 19 P. 431, 77 Cal. 220—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal. App. 393.
Conclusions of law form no part of the judgment roll.
Ark.—Wann v. Reading Co., 108 S. W.2d 899, 194 Ark. 541.
Cal.—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.
Opinion
(1) Opinion of circuit court in divorce proceedings was not part of the judgment roll and was not an "order" or part of the record.—Goodman v. Goodman, 105 P.2d 1091, 165 Or. 141.
(2) Other holdings.—Werner v. Babcock, 116 P. 357, 24 Nev. 42—34 C.J. p 87 note 17 [d].
Verdict
(1) A judgment is not void merely because the roll does not contain a copy of the verdict.—Hoe v. Sanborn, 24 How.Pr. 26, affirmed 36 N.Y. 93—34 C.J. p 88 note 18.
(2) A verdict need not be copied in the judgment, but may be so copied, and in such case is evidence that it was recognized and approved by the court.—Weathered v. Meek, Tex.Civ.App., 258 S.W. 516.
(3) Other holdings.—Empire Coal Co. v. Goodhue, 76 So. 31, 200 Ala. 265, 266—34 C.J. p 87 note 17 [h].

70. Ky.—Mead v. Nevill, 2 Duv. 280.
N.Y.—Thomas v. Tanner, 14 How.Pr. 426.

71. Or.—Tatum v. Massie, 44 P. 494, 29 Or. 140.
34 C.J. p 88 note 20.
Bill filed too late
A bill of exceptions, filed after time granted for preparation and filing thereof, is not part of record, where no extension of time was prayed for or granted.—Yuknavich v. Yuknavich, 58 N.E.2d 447, 115 Ind. App. 530.

72. Idaho.—Haas v. Teters, 113 P. 96, 19 Idaho 182.
34 C.J. p 88 note 21.

73. N.Y.—Wilcox v. Hawley, 31 N. Y. 648.
34 C.J. p 88 note 22.

74. Nev.—First Nat. Bank v. Abel, 41 P.2d 1061, 56 Nev. 6.
34 C.J. p 88 note 23.
In replevin action
Judgment for damages for detention and costs only need be entered on court rolls, plaintiff having recovered replevined goods.—Crowe v. Peaslee-Gaulbert Co., 37 F.2d 216.

75. Cal.—In re Broome, 147 P. 270, 169 Cal. 604.
34 C.J. p 88 note 24.

76. N.Y.—Redman v. Hendricks, 3 N.Y.Super. 32.
34 C.J. p 88 note 25 [a].

77. N.Y.—Cook v. Dickerson, 8 N.Y. Super. 679.
34 C.J. p 88 note 26.

78. N.Y.—Haydorn v. Carroll, 121 N.E. 463, 225 N.Y. 84.
34 C.J. p 88 note 27.

79. Conn.—Brown v. Woodward, 53 A. 112, 75 Conn. 254.
34 C.J. p 88 note 30.
Amending judgment see infra §§ 236–264.

80. N.Y.—Decker v. Dutcher, 231 N. Y.S. 897, 156 Misc. 488, reversed on other grounds 289 N.Y.S. 553, 247 App.Div. 689.
34 C.J. p 88 note 31.

81. N.Y.—Lythgoe v. Lythgoe, 41 N.E. 89, 145 N.Y. 641.
34 C.J. p 88 note 32.

82. N.Y.—Van Alstyne v. Cook, 25 N.Y. 489—Lythgoe v. Lythgoe, 27 N.Y.S. 1063, 75 Hun 147, affirmed 41 N.E. 89, 145 N.Y. 641.

83. N.Y.—Van Alstyne v. Cook, 25 N.Y. 489.

der some statutes, signing of the roll by the clerk is not required.[84]

§ 126. Docketing

In most jurisdictions the clerk is required to docket the judgment by making the proper entries in a book alphabetically arranged, so that interested third persons may have official notice of the judgment.

The docket of a judgment is a brief writing or statement of the judgment made from the record or roll, kept by the clerk in a book alphabetically arranged, pursuant to statutory requirements.[85] As in case of entry of a judgment, discussed supra § 106, the docketing of a judgment is a ministerial act to be performed by the clerk,[86] and necessarily implies the preëxistence of a judgment to be docketed.[87]

It is the duty of the clerk or prothonotary of the court to docket the judgment by entering it in the proper book.[88] It is, however, the duty of the plaintiff or judgment creditor to see that his judgment is properly docketed.[89] The docket is no part of the record of the court,[90] and hence does not import verity,[91] as in the case of the judgment roll or record proper, discussed infra § 132; a docket notation may not be used to supply a deficiency in the record of the court.[92]

Purpose and necessity. The judgment docket is intended to afford to interested persons official notice of the existence of judgments.[93] As discussed infra § 463, in some states judgments are required to be docketed in order that they may attach as liens, and, in some jurisdictions, as discussed in Executions § 9, docketing is a prerequisite to the issuance of an execution. The failure to docket the judgment, however, does not destroy it, or deprive it of the usual consequences of a judgment,[94] and erroneous or false entries made by the clerk do not conclude the parties, or impair the validity of the judgment.[95] An undocketed judgment is valid and conclusive as between the parties[96] and may be relied on as an estoppel.[97]

Time of docketing. The test of the right to docket a judgment is the right to issue execution on it immediately,[98] but it is not necessary that a judgment should be presently payable in order to permit of being docketed.[99] As a general rule, a judgment cannot regularly be docketed until it has been entered and the judgment roll filed.[1] The docketing without a preceding entry in the judgment book is of no avail, even though a judgment roll has been filed with what purports to be a copy of a judgment in it.[2] For some purposes a judgment may be docketed nunc pro tunc,[3] although, of course, not so as to prejudice the rights of innocent third persons.[4] Since docketing is a ministerial, as distinguished

84. N.Y.—Goelet v. Spofford, 55 N.Y. 647.

85. N.Y.—Cole v. Vincent, 242 N.Y.S. 644, 229 App.Div. 520.
34 C.J. p 89 note 38.
Docketing justices' judgments see the C.J.S. title Justices of the Peace § 125, also 35 C.J. p 709 note 5–p 717 note 15.
Filing transcript in another county see infra § 129 a.

86. N.Y.—Vogel v. Edwards, 27 N.E.2d 806, 283 N.Y. 118—Humnicki v. Pitkowa, 277 N.Y.S. 417, 154 Misc. 407—Darvick v. Darvick, 36 N.Y.S.2d 58.
34 C.J. p 89 note 41.

87. U.S.—In re Boyd, C.C.Or., 3 F. Cas.No.1,746, 4 Sawy. 262.
Cal.—Ridgley v. Abbott Quicksilver Min. Co. of Illinois, 79 P. 833, 7 Cal.Unrep.Cas. 200.
Docketing of decree
The determination of the rights of the parties to a special proceeding in a surrogate's court is a decree which, when docketed, has the effect of a judgment.—In re Murray's Estate, 288 N.Y.S. 346, 248 App.Div. 167, reversed on other grounds 5 N.E.2d 717, 272 N.Y. 228.

88. N.Y.—Cole v. Vincent, 242 N.Y.S. 644, 229 App.Div. 520.
34 C.J. p 90 note 64.

89. Pa.—Wood v. Reynolds, 7 Watts & S. 406.
34 C.J. p 90 note 65.
Delivery of transcript
Where a money judgment is to be entered in judgment docket of clerk of court rendering judgment, it is unnecessary for judgment plaintiff to procure from clerk a certified copy or transcript of judgment and then deliver it back to clerk for entry in judgment docket.—Watson v. Strohl, 46 N.E.2d 204, 220 Ind. 672.

90. Ark.—Holloway v. Berenzen, 188 S.W.2d 298.
Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Johnson, 93 N.E. 683, 49 Ind.App. 126, rehearing denied 95 N.E. 610, 49 Ind.App. 126.
34 C.J. p 89 note 43.

91. N.Y.—Booth v. Farmers' & Mechanics' National Bank, 4 Lans. 301, reversed on other grounds 50 N.Y. 396.

92. Ark.—Holloway v. Berenzen, 188 S.W.2d 298.

93. N.C.—Henry v. Sanders, 193 S.E. 15, 212 N.C. 239.
34 C.J. p 89 note 46.

94. N.Y.—Warren v. Garlipp, 213 N.Y.S. 476, 126 Misc. 103, reversed on other grounds 216 N.Y.S. 466, 217 App.Div. 55.
N.C.—Henry v. Sanders, 193 S.E. 15, 212 N.C. 239.
34 C.J. p 89 note 49.

95. Pa.—In re Celenza's Estate, 17 Pa.Dist. & Co. 4, 46 York Leg.Rec. 141.
34 C.J. p 90 note 50.

96. Cal.—Hastings v. Cunningham, 39 Cal. 137.
34 C.J. p 90 note 51.

97. N.Y.—Sheridan v. Andrews, 49 N.Y. 478.

98. N.Y.—De Agreda v. Mantel, 1 Abb.Pr. 130.
34 C.J. p 90 note 53.

99. N.Y.—Harris v. Elliott, 57 N.E. 406, 163 N.Y. 269.
34 C.J. p 90 note 54.

1. Cal.—Ridgley v. Abbott Quicksilver Min. Co. of Illinois, 79 P. 833, 7 Cal.Unrep.Cas. 200.
34 C.J. p 90 note 55.

2. Minn.—Rockwood v. Davenport, 35 N.W. 377, 37 Minn. 533, 5 Am.S.R. 872.
34 C.J. p 90 note 56.

3. Wis.—Drake v. Harrison, 33 N.W. 81, 69 Wis. 99, 2 Am.S.R. 717.
34 C.J. p 90 note 57.

4. Pa.—Hickman's Estate, 40 Pa. Super. 244.

from a judicial, act, a judgment may be docketed on a nonjuridical day.[5]

Sufficiency of entry. In determining the sufficiency of a docket entry, the whole entry must be considered, and if from the whole, the amount and date of the judgment, the parties to it, and the court in which it was rendered, appear, the entry will be held sufficient.[6] Substantial compliance with the statute is sufficient.[7]

§ 127. —— Book or Place of Entry

A judgment is docketed in a judgment docket or "docket book," which is separate and distinct from the "judgment book" in which judgments are "entered."

A judgment, in order to be docketed, must be entered in the book kept for that purpose, and usually known as the judgment docket or "docket book,"[8] which is a separate and distinct book from that known as the "judgment book,"[9] in which, as appears supra § 110, judgments are required to be entered.

§ 128. —— Index

In addition to docketing, an index of judgments is generally required.

It is usually required that, in addition to the docket of judgments, there shall be an index thereof,[10] and, as discussed infra § 464, substantial compliance with such requirement is generally held necessary to constitute the judgment a lien as against third persons.

§ 129. Filing Transcript

a. In another county or district
b. In superior court

a. In Another County or District

A transcript of a judgment rendered in one county may be filed in another county, but the court to which the judgment is thus transferred has no power over it except to enforce it.

For certain limited purposes, such as lien, execution, and revival, judgments rendered in one county may be in effect transferred to another county or counties by the filing of a transcript of the record of such judgment in such counties, in accordance with statutory provisions.[11] A transcript thus entered in another county does not become a judgment of the court to which it is transferred, but only a quasi judgment for certain limited purposes, such as lien, execution, and revival.[12] The merits

5. U.S.—In re Worthington, C.C. Wis., 30 F.Cas.No.18,051, 7 Biss. 455.

6. Wis.—Hesse v. Mann, 40 Wis. 560.

7. N.M.—Corpus Juris cited in Breece v. Gregg, 18 P.2d 421, 422, 36 N.M. 246.
34 C.J. p 90 note 66.

"Name at length"
A statute requiring clerk in docketing judgment to enter "name at length of the judgment debtor," merely required clerk to enter name in docket book as he finds it in judgment, without abbreviations.—H. R. & C. Co. v. Smith, 208 N.Y.S. 396, 212 App.Div. 173, affirmed 151 N.E. 448, 242 N.Y. 267, 45 A.L.R. 554.

8. N.Y.—Cole v. Vincent, 242 N.Y.S. 644, 229 App.Div. 520.
33 C.J. p 1040 note 19—34 C.J. p 90 note 61.

"Judgment docket" defined
A list of the judgments entered in a given court, methodically kept by the clerk or other proper officer, open to public inspection and intended to afford official notice to interested parties of the existence or lien of judgments.—Black L.D.

"Docket book" defined
A docket book is a public record prescribed by statute for the express purpose, among other things, of receiving the entry of judgments.—Beuerlein v. Hodges, 10 N.Y.S. 505, 506.

"Docket entry" distinguished
The term "docket entry" as used in statute has been held to refer to the entries in the minute book or docket that the clerk is required, by statute, to keep, and not the entries in a judgment docket book which the clerk was not required to keep, but which might properly be kept, if the judge so ordered, as a convenient index of the judgment debtors.—Funk v. Lamb, 92 N.W. 8, 87 Minn. 348, 352.

9. N.Y.—Cole v. Vincent, 242 N.Y.S. 644, 229 App.Div. 520.
34 C.J. p 90 note 62.

10. N.C.—Henry v. Sanders, 193 S. E. 15, 212 N.C. 239.
34 C.J. p 91 note 68.

Manner of indexing
(1) "It is the county clerk's duty to provide books, ruled in columns, convenient for making the entries under the initial letter of the surname, only, of the judgment debtor. . . . It is the practice, however, to provide books with columns appropriate to the entry of judgments in accordance with the initial letter of the given names as well as the surnames of judgment debtors. While this is not required by law, if the county clerk undertakes to do it, he must use reasonable care to index such given name in its proper column so that no one may be misled thereby. Nevertheless a judgment entered in accordance with the requirements of the statute is a sufficient and legal judgment though the given name of the judgment debtor may not appear in the proper column."—Cole v. Vincent, 242 N.Y.S. 644, 647, 229 App.Div. 520.

(2) Designation of parties as plaintiff and defendant in ad sectam index should coincide with order for judgment not entered in appearance docket.—Trestrail v. Johnson, 146 A. 150, 297 Pa. 49.

11. U.S.—Oil Well Supply Co. v. Wickwire, D.C.Ill., 52 F.Supp. 921.
Pa.—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, 5 A.2d 139, 333 Pa. 344—Schmitt v. Wyoming Valley Public Service Co., 37 Pa. Dist. & Co. 135, 33 Luz.Leg.Reg. 302—Price v. Adamkiewicz, Com. Pl., 34 Luz.Leg.Reg. 464.
Wash.—Cugini v. Apex Mercury Min. Co., 165 P.2d 82.
34 C.J. p 91 note 74.

Transcript as basis of:
Execution see Executions § 64.
Lien see infra § 462.

Land in several counties
Partition of lands in several counties must be recorded in each county.—McCauley v. Brooks, 147 A. 898, 84 N.H. 207.

12. Okl.—Chandler v. Cummins, 81 P.2d 651, 183 Okl. 5—McAusland v. Williams, 54 P.2d 622, 177 Okl. 25.
Pa.—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, 5 A.2d 139, 333 Pa. 344—Frew v. Heinbach, Com.Pl., 9 Sch.Reg. 91.
34 C.J. p 91 note 76.

or validity of a judgment thus transferred cannot be inquired into by the court to which it is taken; it is there only for purposes of enforcement and satisfaction.[13] If it is desired to enter the judgment in a third county, it must be done by transcript from the original judgment, not from the transcript entered in the second county.[14] Generally a judgment must have been docketed or recorded in the county where rendered, in order to be entitled to be filed or docketed in another county.[15]

It is the duty of the clerk of the county where the judgment was rendered, on request and payment of fees, to furnish a transcript containing all the facts necessary to make a perfect docket of the judgment,[16] and the clerk of the county in which such transcript is presented must file it and docket the judgment.[17] The transcript will not be vitiated by mere clerical errors,[18] but there must be compliance with statutory requirements,[19] and the transcript must be sufficiently full to give reasonably certain and definite information to subsequent purchasers or lienors.[20]

b. In Superior Court

(1) In general
(2) Operation and effect

(1) In General

In many jurisdictions, subject to statutory requirements and limitations as to the mode and time of doing so, a transcript of a judgment rendered by a justice of the peace or other inferior court may be filed and docketed in a superior court.

By statute in many jurisdictions, and subject to the statutory requirements and limitations, a transcript of a judgment rendered by a justice of the peace or other inferior court may be filed and docketed in the office of the clerk of a superior court.[21] If the statute contemplates the filing of a complete transcript of the justice's record, it is not satisfied by a mere abstract of the judgment;[22] but other-

Parent judgment controls

Where judgment is entered by filing of exemplified copy of judgment on record in another county, defendant need concern himself only with validity of parent judgment.—Altoona Trust Co. v. Fockler, 165 A. 740, 311 Pa. 426.

Suit to restrain execution

The circuit court of the county in which the transcript of a judgment of the circuit court of another county was filed, and in which the circuit clerk issued execution, had jurisdiction in action by judgment debtor to restrain execution, as against contention that circuit court of such county had no jurisdiction to enjoin or stay proceedings on judgment of circuit court of another county, since, when transcript of judgment was filed with clerk of circuit court of county in which action was brought, it became, at least for purposes of execution, a judgment in such county.—Brick v. Sovereign Grand Lodge of Accepted Free Masons of Arkansas, 117 S.W.2d 1060, 196 Ark. 872.

13. Okl.—Chandler v. Cummins, 81 P.2d 651, 183 Okl. 5—McAusland v. Williams, 54 P.2d 622, 177 Okl. 25.
Pa.—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, 5 A.2d 139, 333 Pa. 344—Taylor v. Tudor & Free, 81 Pa.Super. 306—Hollinger v. Breigner, 9 Pa.Dist. & Co. 660, 40 Lanc.L.Rev. 47, 39 York Leg. Rec. 176—Price v. Adamkiewicz, Com.Pl., 34 Luz.Leg.Reg. 464—Frew v. Heinbach, Com.Pl., 9 Sch. Reg. 91.
34 C.J. p 91 note 77.

14. Md.—Brunsman v. Crook-Kries Co., 101 A. 1019, 130 Md. 661.
34 C.J. p 91 note 78.

15. N.C.—McAden v. Banister, 63 N. C. 478.

16. N.Y.—Sears v. Burnham, 17 N.Y. 445.

17. N.Y.—Sears v. Burnham, supra —People v. Keenan, 31 Hun 625.

What constitutes filing

Where certified transcript of judgment was mailed to circuit court clerk of another county for filing, but clerk did not file or return transcript but wrote plaintiff's attorney that filing fee was five dollars, and requested attorney to take care of fee as soon as possible, and attorney immediately mailed clerk five dollars, which was received by clerk two days after first letter from plaintiff's attorney and clerk then indorsed transcript as "filed," transcript was not filed until so indorsed; hence during the intervening two days transcript was not "constructive notice" to assignees of oil and gas leases from judgment debtor.—Oil Well Supply Co. v. Wickwire, D. C.Ill., 52 F.Supp. 921.

18. U.S.—Lamprey v. Pike, C.C. Minn., 28 F. 30.
Pa.—Frew v. Heinbach, Com.Pl., 9 Sch.Reg. 91.
34 C.J. p 92 note 82.

Identical language

Transcript of justice's judgment was not fatally defective because not in identical language of justice's docket.—Filbert v. Dean, 200 N.W. 326, 199 Iowa 321.

19. Pa.—Hollinger v. Breigner, 9 Pa.Dist. & Co. 660, 40 Lanc.L.Rev. 47, 39 York.Leg.Rec. 176.
34 C.J. p 92 note 83.

20. Tex.—Gullett Gin Co. v. Oliver, 14 S.W. 451, 78 Tex. 182.
34 C.J. p 92 note 84.

Transcript held sufficient

Where a judgment foreclosing a mechanic's lien is entered in a county other than the one in which the property is located, and such judgment docketed in the county where the property is, it is immaterial that no mention of the lien was made in the docket where the judgment and the decree in full were filed in the clerk's office.—Sugg v. Pollard, 115 S.E. 153, 184 N.C. 494.

Interest rate

Where transcript of judgment of justice of peace was so vague and ambiguous as to leave doubt whether judgment bore interest at six or eight per cent, it should be treated as containing no recital with respect to interest, and subject to legal statutory rate.—Filbert v. Dean, 200 N. W. 326, 199 Iowa 321.

21. Ark.—Davis v. Bank of Atkins, 167 S.W.2d 876, 205 Ark. 144.
Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.
N.J.—United Stores Realty Corporation v. Asea, 142 A. 38, 102 N.J.Eq. 600.
N.C.—Essex Inv. Co. v. Pickelsimer, 187 S.E. 813, 210 N.C. 541.
Pa.—Sadrovitz v. Saylor, Com.Pl., 20 Leh.L.J. 37—Berlin v. Denci, Com.Pl., 25 West. 117.
Wash.—State ex rel. Adjustment Department of Olympia Credit Bureau v. Ayer, 114 P.2d 168, 9 Wash. 2d 188.
34 C.J. p 92 note 85.

22. Or.—White v. Espey, 28 P. 71, 21 Or. 328.
34 C.J. p 92 note 89.

wise the transcript is sufficient if it shows all the essential elements of a judgment,[23] and particularly the jurisdiction of the inferior court,[24] the date of the judgment,[25] the names of the parties,[26] and the amount of the recovery.[27] It has been held that several judgments may be embraced in one transcript, and that it is not necessary to certify each judgment separately.[28] Only the judgment debtor may complain of inefficiency or irregularity in the filing of the transcript; a stranger to the action has no right to do so.[29]

Certificate and authentication. It is necessary that the transcript should be certified as correct by the justice or other court from which it is taken, and authenticated in accordance with the directions of the statute.[30]

Time for filing. Subject to any statutory restriction of the time within which the transcript of the judgment of an inferior court may be filed in a superior court,[31] it may be done at any time during the effective life of the judgment.[32] As a general rule it is necessary that there should be a judgment actually rendered and still in force,[33] which has not become dormant[34] or barred by the statute of limitations,[35] and is not so old as to be invalidated by the presumption of payment after twenty years.[36] It has been held that the transcript may be filed before the time to appeal from the judgment has expired,[37] or after an appeal is pending,[38] except in some jurisdictions, where the transcript may not be filed after an appeal has been taken.[39]

Affidavit of creditor. The effect of some statutes is to require the judgment creditor, on filing a transcript from a justice or other inferior court, to make and file an affidavit of the amount remaining due and unpaid on the judgment, or that the judgment is due and unpaid, and that it cannot be satisfied from the goods and chattels of the debtor; this requirement is jurisdictional and the affidavit is indispensable.[40]

(2) Operation and Effect

Transferring a judgment by transcript from an inferior to a superior court makes it the judgment of the latter for purposes of enforcement and with respect to remedies by direct attack; but the power of the superior court extends only to the transcribed judgment and the lower court retains some control over its own judgment.

In a strict sense, the transfer of a judgment from an inferior court to a superior court by the filing of a transcript or abstract does not actually make the judgment a judgment of the higher court.[41] It is generally held, however, that a transferred judgment becomes to all intents and purposes a judgment of the superior court,[42] at least for the pur-

23. Ind.—Chicago & A. R. Co. v. Summers, 14 N.E. 733, 113 Ind. 10, 3 Am.S.R. 616.
34 C.J. p 92 note 90.

24. Mich.—Wedel v. Green, 38 N.W. 638, 70 Mich. 642.
34 C.J. p 92 note 91.

25. Minn.—Funk v. Lamb, 92 N.W. 8, 87 Minn. 348.
34 C.J. p 92 note 92.

26. Minn.—Funk v. Lamb, supra.
34 C.J. p 92 note 93.

27. Minn.—Funk v. Lamb, supra.
34 C.J. p 92 note 94.

28. Mo.—Jeffries v. Wright, 51 Mo. 215.
Pa.—Williams v. McCandless, 14 Pa. 185.

29. Colo.—Second Industrial Bank v. Marshall, 289 P. 598, 87 Colo. 541.

30. Colo.—Ferrier v. Morris, 122 P. 2d 880, 109 Colo. 154.
34 C.J. p 93 note 96.

31. **Statutes construed**
The statute requiring any clerk of city court of Buffalo to issue, on demand, a transcript of a judgment at any time within twenty years after its rendition, and requiring clerk of Erie County to docket transcript thus issued, prevails over section of justice court act which limits time for issuing and filing a transcript of a justice court judgment to six years after its rendition.—Shackman v. Osborne, 13 N.Y.S.2d 854, 257 App.Div. 1037.

32. N.Y.—Stanley Funding Corporation v. Kotcher, 41 N.Y.S.2d 877.
34 C.J. p 93 note 98.

33. N.Y.—Stephens v. Santee, 51 Barb. 532.
34 C.J. p 93 note 99.

34. Neb.—Farmers' State Bank v. Bales, 90 N.W. 945, 64 Neb. 870.
34 C.J. p 93 note 1.

35. N.Y.—Matter of Murphy, 135 N.Y.S. 23, 150 App.Div. 460.
34 C.J. p 93 note 2.

36. Pa.—Light v. Steckbeck, 19 Pa. Co. 654.

37. Ill.—Dawson v. Cunning, 50 Ill. App. 286.
Miss.—Minshew v. Davidson, 38 So. 315, 86 Miss. 354.

38. Wis.—Steckmesser v. Graham, 10 Wis. 37.

39. Pa.—Vockroth v. Thomas, 11 Pa. Dist. 487.
34 C.J. p 93 note 6.

40. Mich.—Shepard v. Schrutt, 128 N.W. 772, 163 Mich. 485.
34 C.J. p 93 note 8.

41. Ark.—Miller v. Brown, 281 S.W. 904, 170 Ark. 949.
N.Y.—Wixom v. Randazo, 273 N.Y.S. 783, 152 Misc. 171.
34 C.J. p 93 note 10.

Mere statutory judgment
The filing of a transcript in the county clerk's office does not make a judgment of the justice's court or any inferior court a judgment rendered by the county court, but only a statutory judgment of such court; such judgment continues to be not a judgment of a court of record.—Dieffenbach v. Roch, 20 N.E. 560, 112 N.Y. 621, 2 L.R.A. 829—Quackenbush v. Johnston, 293 N.Y.S. 123, 249 App. Div. 452—Agro v. Herman, 37 N.Y.S.2d 225, 179 Misc. 530—Tiffany v. Mitchell, 26 N.Y.S.2d 551, 176 Misc. 64.

42. U.S.—Paley v. Solomon, D.C.D.C., 59 F.Supp. 887.
Ark.—Davis v. Bank of Atkins, 167 S.W.2d 876, 205 Ark. 144.
Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.
Mo.—Mahen v. Tavern Rock, 87 S.W.2d 562, 327 Mo. 391.
N.Y.—Tiffany v. Mitchell, 26 N.Y.S. 2d 551, 176 Misc. 64—Lowry v. Himmler, 239 N.Y.S. 347, 136 Misc. 215.
N.C.—Brooks v. Brooks, 16 S.E.2d 403, 220 N.C. 16—Essex Inv. Co. v. Pickelsimer, 187 S.E. 813, 210 N.C. 541.
Pa.—Caverly v. Helfrich, Com.Pl., 38 Luz.Leg.Reg. 121.
Wash.—**Corpus Juris quoted in** State ex rel. Adjustment Department of

pose of enforcement,[43] and with respect to remedies by direct attack;[44] and the higher court may thereafter issue process on it,[45] modify it, or grant other relief against it,[46] vacate it, or strike it off the docket for cause shown.[47] Such power is limited to the transcript judgment and record in the superior court; the superior court cannot open or vacate the judgment of the inferior court,[48] and, while it has been held that the filing of the transcript divests the lower court of all jurisdiction over the case and the judgment,[49] so that no further proceedings for the enforcement of the judgment may be taken therein,[50] nevertheless the inferior court does retain some control of its judgment,[51] including the power to modify[52] or vacate[53] it, notwithstanding the prior filing of a transcript of it in a superior court. A void or invalid judgment of an inferior court cannot be validated by the filing of a transcript thereof in a superior court.[54]

§ 130. Recording

Under some statutes judgments, or certain kinds of judgments, are required to be recorded.

Under some statutes judgments, or certain kinds of judgments, are required to be recorded in the office of the register of deeds, or other like officer.[55]

§ 131. Lost or Destroyed Records

Lost or destroyed court records may be restored, and this rule applies to voidable, but not to void, judgments.

Where any record of a court has been lost or destroyed, such court has jurisdiction and power to reestablish or restore it in proper proceedings for that purpose.[56] While a voidable judgment may be

Olympia Credit Bureau v. Ayer, 114 P.2d 168, 170, 9 Wash.2d 188.
34 C.J. p 93 note 11.

43. Ark.—Miller v. Brown, 231 S.W. 904, 170 Ark. 949.
Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.
Minn.—Keys v. Schultz, 2 N.W.2d 549, 212 Minn. 109.
N.Y.—Gilmore v. De Witt, 10 N.Y.S.2d 903, 256 App.Div. 1046—Quackenbush v. Johnston, 293 N.Y.S. 123, 249 App.Div. 452—Tiffany v. Mitchell, 26 N.Y.S.2d 551, 176 Misc. 64—Dunn v. Seidenschwarz, 18 N.Y.S.2d 264, 173 Misc. 495—Wixom v. Randazo, 273 N.Y.S. 783, 152 Misc. 171—Ellias v. Thomas Furniture Works, 212 N.Y.S. 127, 125 Misc. 683.
Wash.—**Corpus Juris quoted in** State ex rel. Adjustment Department of Olympia Credit Bureau v. Ayer, 114 P.2d 168, 170, 9 Wash.2d 188.
34 C.J. p 94 note 12.

44. Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.

45. Minn.—Keys v. Schultz, 2 N.W. 2d 549, 212 Minn. 109.
Mo.—Mahen v. Tavern Rock, 67 S.W.2d 562, 327 Mo. 391.
34 C.J. p 94 note 13.

46. N.Y.—Wixom v. Randazo, 273 N.Y.S. 783, 152 Misc. 171.
Wash.—**Corpus Juris quoted in** State ex rel. Adjustment Department of Olympia Credit Bureau v. Ayer, 114 P.2d 168, 170, 9 Wash.2d 188.
34 C.J. p 94 note 14.

47. Del.—McCoy v. Hickman, 15 A. 2d 427, 1 Terry 587—Commercial Realty Incorporation v. Jackson, 166 A. 657, 5 W.W.Harr. 395—Weintraub v. Rudnick, 143 A. 456, 4 W.W.Harr. 111.
N.Y.—Quackenbush v. Johnston, 293 N.Y.S. 123, 249 App.Div. 452—Agro v. Herman, 37 N.Y.S.2d 225, 179 Misc. 530—Lowry v. Himmler, 239 N.Y.S. 347, 136 Misc. 215.
Pa.—Webber v. Dolan, 17 Pa.Dist. & Co. 93.
Wash.—**Corpus Juris quoted in** State ex rel. Adjustment Department of Olympia Credit Bureau v. Ayer, 114 P.2d 168, 170, 9 Wash.2d 188.
34 C.J. p 94 note 15.

48. N.Y.—Norell Holding Corp. v. Putter, 54 N.Y.S.2d 474, 269 App. Div. 754—Gilmore v. De Witt, 10 N.Y.S.2d 903, 256 App.Div. 1046—Quackenbush v. Johnston, 293 N.Y.S. 123, 249 App.Div. 452—Agro v. Herman, 37 N.Y.S.2d 225, 179 Misc. 530.
Pa.—Taylor v. Tudor & Free, 81 Pa. Super. 306—Sasso's, Inc. v. Angelo, Com.Pl., 33 Luz.Leg.Reg. 142.
34 C.J. p 94 note 17.

49. Ark.—Davis v. Bank of Atkins, 167 S.W.2d 876, 205 Ark. 144.
N.C.—Essex Inv. Co. v. Pickelsimer, 187 S.E. 813, 210 N.C. 541.
Wash.—**Corpus Juris quoted in** State ex rel. Adjustment Department of Olympia Credit Bureau v. Ayer, 114 P.2d 168, 170, 9 Wash.2d 188.
34 C.J. p 93 note 9.

50. Del.—McCoy v. Hickman, 15 A. 2d 427, 1 Terry 587—Weintraub v. Rudnick, 143 A. 456, 4 W.W.Harr. 111.

51. U.S.—Paley v. Solomon, D.C.D. C., 59 F.Supp. 887.
N.J.—Westfield Trust Co. v. Court of Common Pleas of Morris County, 183 A. 165, 116 N.J.Law 191—Westfield Trust Co. v. Cherry, 183 A. 165, 116 N.J.Law 190.

52. Pa.—In re Ashman, 67 A. 342, 218 Pa. 512.

53. Minn.—Keys v. Schultz, 2 N.W. 2d 549, 212 Minn. 109.
34 C.J. p 95 note 19.

54. Del.—McCoy v. Hickman, 15 A. 2d 427, 1 Terry 587—Weintraub v. Rudnick, 143 A. 456, 4 W.W.Harr. 111.
Mont.—Novack v. Pericich, 300 P. 240, 90 Mont. 91.
N.Y.—Lowry v. Himmler, 239 N.Y.S. 347, 136 Misc. 215.

55. U.S.—Clinchfield Coal Corp. v. Steinman, Va., 213 F. 557, 130 C.C.A. 137.
34 C.J. p 95 note 20.
Lien as dependent on recording see infra § 463.
Two sets of records
Single clerk when required to serve as district and county clerk must keep two sets of records, and record of judgment in minutes of district court would not be substantial compliance with statute requiring it to be recorded in office of county clerk.—Permian Oil Co. v. Smith, 73 S.W.2d 490, 129 Tex. 413, 111 A.L.R. 1152, rehearing denied 107 S.W.2d 564, 129 Tex. 413, 111 A.L.R. 1152.

56. Ky.—Carter v. Capshaw, 60 S.W.2d 959, 249 Ky. 483.
Supplying lost or destroyed records generally see the C.J.S. title Records §§ 42–52, also 53 C.J. p 634 note 59–p 642 note 39.
Alleging substance of lost record
A motion alleging the names of the parties to a judgment, the court in which and the date when it was rendered, the amount thereof, that it was rendered on a described bond, and that the record of the judgment was destroyed by fire sufficiently alleges the substance of the destroyed record.—Spears v. Work, 29 Ind. 502.
Notice
Lost or destroyed judgments may be restored or proved at common law, but in every such case the opposite party should be notified, in order that he may appear for his own pro-

restored,[57] there is authority that a void judgment should not be restored;[58] and it has been held that in a proceeding to restore a destroyed judgment it may be shown that there was a good defense to the original action and that defendant was deprived of the opportunity of asserting it without fault of his own and by reason of plaintiff's fraud.[59] Under some statutes in such a proceeding the judgment debtor may set forth any new matters arising subsequent to the judgment which operate in whole or in part to extinguish or set it aside.[60] An application to supply a lost record cannot be made the means of getting on the record a judgment or decree which never was entered there, or of completing a record imperfectly entered.[61] To establish a destroyed judgment, the burden of proof is on the party claiming under it,[62] and the evidence must be clear and convincing.[63]

§ 132. Verity and Conclusiveness of Record

The judgment roll or record proper imports absolute verity and is conclusive evidence of its contents, but such records are not evidence, except as between the parties and their privies, of the facts recited therein.

Although the judgment record is occasionally said to be presumptively true,[64] the authorities are almost universally agreed that the judgment roll, or record proper, is of such uncontrollable credit and verity as to admit of no averment, plea, or proof to the contrary; it is conclusive evidence of the facts which it recites and cannot be contradicted[65] in a collateral proceeding.[66] Under the doctrine of res judicata, discussed infra § 592 et seq., only parties and privies are bound by a judgment as an adjudication, but no one, whether or not a party or a privy, may impeach the record of a judgment considered simply as a record.[67] Thus the actual rendition and existence of a judgment are conclusively shown by the record as against the whole world.[68] Beyond this, records are not evidence of the facts recited, except as between the parties or their privies.[69] A question as to a matter of record must be tried by the record itself if in existence.[70] If the record is of the same court, the trial is on inspection by the court,[71] and it is error to submit the question to a jury.[72] The rule that record imports absolute verity is subject to the qualifications that one portion of a record may be limited, explained, or qualified by another portion thereof,[73]

tection.—George v. Middough, 62 Mo. 549.

Restoration of whole record

It is not sufficient to restore a part only of the lost record, such as the final judgment, but the restoration must be of the whole record, including the summons, pleadings, etc., as the court can determine the legal effect of a judgment only from an inspection of the whole record.—Vail v. Iglehart, 69 Ill. 332.

Right to apply

Allegations that petitioner is described in a judgment, sought to be restored on record, as the person in whose favor it was rendered, sufficiently show his interest and right to maintain the proceeding to restore the record, and express allegations that failure to restore the record will result in damage to the petitioner is not necessary.—Russell v. Lillja, 90 Ill. 327.

57. Ill.—Vail v. Iglehart, supra.

58. Ill.—Vail v. Iglehart, supra.
53 C.J. p 641 note 17.

59. Ark.—Guess v. Amis, 14 S.W. 900, 54 Ark. 1.
53 C.J. p 642 note 18.

60. Kan.—Davidson v. Beers, 25 P. 359, 45 Kan. 365.

61. Ala.—Box v. Delk, 47 Ala. 729.

62. Ky.—Carter v. Capshaw, 60 S.W.2d 959, 249 Ky. 483.

63. Ky.—Carter v. Capshaw, supra.

64. Mo.—Petet v. McClanahan, 249 S.W. 917, 297 Mo. 677—Calnane v. Calnane, 17 S.W.2d 566, 567, 223 Mo.App. 381.
"The judgment entered in the record is presumed to be the one actually rendered by the court, and this presumption obtains no matter how erroneous the judgment so entered may be, unless such presumption be overcome by evidence" in the record.—Calnane v. Calnane, supra.

65. Ala.—Hopkins v. Poellnitz, 170 So. 774, 233 Ala. 172—Ex parte McDermott, 141 So. 659, 224 Ala. 684.
Conn.—Varanelli v. Luddy, 32 A.2d 61, 130 Conn. 74—Holtz v. Riddell, 126 A. 333, 101 Conn. 416.
Fla.—Malone v. Meres, 109 So. 677, 91 Fla. 709.
Iowa.—Engelbercht v. Davison, 213 N.W. 225, 204 Iowa 1394—Hanson v. S. & L. Drug Co., 212 N.W. 731, 203 Iowa 384.
N.J.—In re Schlemm's Estate, 22 A.2d 364, 130 N.J.Eq. 295.
N.Y.—Franz v. Nigri, 249 N.Y.S. 218, 232 App.Div. 150.
Tenn.—Page v. Turcott, 167 S.W.2d 350, 179 Tenn. 491.
Tex.—Gulf, C. & S. F. Ry. Co. v. Canty, 285 S.W. 296, 115 Tex. 537—Cohen v. City of Houston, Civ. App., 135 S.W.2d 456.
34 C.J. p 95 note 22.
Judge's notes cannot be used to impeach journal entry of judgment.—Sparks v. Nech, 26 P.2d 586, 138 Kan. 343.

66. Puerto Rico.—Colón v. Registrar of Caguas, 27 Puerto Rico 519.
Vt.—Cootey v. Remington, 189 A. 151, 108 Vt. 441.
34 C.J. p 95 note 23.
Collateral attack:
On records of courts generally see Courts § 237.
Or judgment see infra §§ 401–435.

67. Ala.—Simmons v. Shelton, 21 So. 309, 112 Ala. 284, 57 Am.S.R. 39.
34 C.J. p 96 note 25.

68. Vt.—Spencer v. Dearth, 43 Vt. 98, 105.
34 C.J. p 96 note 26.

69. Ky.—Sublett v. Gardner, 137 S.W. 864, 144 Ky. 190.
34 C.J. p 96 note 27.
"The mere clerical act of entering the judgment upon the minutes gives it no additional immunity from an attack made in the proper manner and at the proper time."—Hannon v. Henson, Tex.Civ.App., 7 S.W.2d 613, 619, affirmed, Com.App., 15 S.W.2d 579.

70. Me.—Ames v. Young, 75 A. 66, 105 Me. 543.
Pa.—Adams v. Betz, 1 Watts 425, 26 Am.D. 79.

71. Pa.—Adams v. Betz, supra.

72. Pa.—Adams v. Betz, supra.
34 C.J. p 96 note 30.

73. Mo.—Halstead v. Mustion, 66 S.W. 253, 166 Mo. 483.
34 C.J. p 96 note 31.
Conflict in record generally see infra § 443.

and that extraneous evidence is admissible to point out and correct a clerical mistake in the record.[74]

§ 133. Record as Notice

As a general rule the record of a judgment properly entered and docketed is notice of that which it contains or recites, as well as of facts fairly inferable from its recitals.

Although there is authority to the contrary,[75] the general rule is that the record of a judgment properly entered and docketed is notice of that which it contains or recites,[76] as well as of such facts as may be fairly inferred from its recitals,[77] to the parties,[78] their privies,[79] and to third persons.[80] The notice is prospective and not retrospective.[81] Unless there is compliance with the statutory requirements as to the record or docketing, it will be ineffectual as notice,[82] but substantial compliance is sufficient, and mere irregularities do not affect its operation as notice.[83]

VI. JUDGMENT BY CONFESSION

A. IN GENERAL

§ 134. Definition, Nature, and Distinctions

Judgment by confession is a method of securing the entry of judgment on the debtor's or obligor's confession and acknowledgment of his liability, without the formalities of an ordinary proceeding.

The phrase "judgment by confession" or "confession of judgment" has a popular as well as a technical signification.[84] As popularly understood, it signifies an acknowledgment of indebtedness, on which it is contemplated that a judgment may and will be rendered;[85] the entry of a judgment on the admission or confession of a debtor or obligor without the formality, time, or expense involved in an ordinary proceeding.[86] It is not a plea,[87] but is an affirmative act, consented to by defendant in person, or by his attorney, with the leave of the court,[88] and is essentially a voluntary act;[89] it is a voluntary submission to the jurisdiction of the court, giving by consent and without the service of process what could otherwise be obtained by summons and complaint, and other formal proceedings,[90] and hence an admission in answer in inter-

74. Tex.—Croom v. Winston, 43 S. W. 1072, 18 Tex.Civ.App. 1.
34 C.J. p 96 note 32.
Amending clerical errors see infra § 237.

75. Wis.—R. F. Gehrke Sheet Metal Works v. Mahl, 297 N.W. 373, 237 Wis. 414—Bartz v. Paff, 69 N.W. 297, 95 Wis. 95, 37 L.R.A. 848.

76. Ill.—Mitchell v. Mitchell, 159 N. E. 274, 328 Ill. 136.
34 C.J. p 96 note 33.

77. Ind.—Johnson v. Hess, 25 N.E. 445, 126 Ind. 298, 9 L.R.A. 471.
Mo.—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S.W. 2d 865.
Pa.—**Corpus Juris quoted in** First Nat. Bank v. Walker, 145 A. 804, 806, 296 Pa. 192—**Corpus Juris quoted in** Lambert v. K-Y Transp. Co., 172 A. 180, 182, 113 Pa.Super. 82.

78. Ill.—Mitchell v. Mitchell, 159 N. E. 274, 328 Ill. 136.
34 C.J. p 96 note 35.

79. Idaho.—Smith v. Kessler, 127 P. 172, 22 Idaho 589.

80. Cal.—McGee v. Hoffman, 139 P. 298, 46 Cal.App. 508.
Va.—Citizens' Nat. Bank v. Manoni, 76 Va. 302.

81. N.Y.—Ackerman v. Hunsicker, 85 N.Y. 43, 39 Am.R. 621.
34 C.J. p 96 note 38.

82. Tex.—Myers v. Crenshaw, Civ. App., 116 S.W.2d 1125, affirmed 137 S.W.2d 7, 134 Tex. 500.
34 C.J. p 96 note 39.

83. S.D.—Muller v. Flavin, 83 N.W. 687, 13 S.D. 595.
34 C.J. p 96 note 40.

84. Mich.—Kinyon v. Fowler, 10 Mich. 16.
Amendment, opening, and vacating confessed judgments see infra §§ 320–327.

85. Va.—Bank of Chatham v. Arendall, 16 S.E.2d 352, 178 Va. 183.
34 C.J. p 97 note 43.

Confession distinguished from judgment

The expression "confession of judgment" as used in the statute has reference to the act of defendant whereby he admits or confesses the right of plaintiff to take judgment against him, and not to the entering up, or rendition of, the judgment itself which is rendered on defendant's confession.—Thomas v. Bloodworth, 160 S.E. 709, 44 Ga.App. 44.

86. Iowa.—Cuykendall v. Doe, 105 N.W. 698, 129 Iowa 453, 113 Am.S. R. 472, 3 L.R.A.,N.S., 449.
12 C.J. p 413 note 38.
Confession of judgment distinguished from assignment for benefit of creditors see Assignments For Benefit of Creditors § 4.

87. Que.—Fearing Whiton Mfg. Co. v. Melzer, 15 Que.Pr. 414.

88. Md.—Montgomery v. Murphy, 19 Md. 576, 81 Am.D. 652.
Consent or ratification of creditor see infra § 148.

89. Miss.—Grand Lodge Colored K. P. v. Barlow, 67 So. 152, 108 Miss. 663.
34 C.J. p 97 note 47.

90. Kan.—Brooks v. National Bank of Topeka, 113 P.2d 1069, 153 Kan. 831.
34 C.J. p 97 note 48.
"A confessed judgment is predicated upon the assent of the parties. It is created by private agreement without the intervention of the normal processes of litigation."—American Cities Co. v. Stevenson, 60 N. Y.S.2d 685, 688.

Judgment based on testimony

A judgment disclosing on its face that it is based on oral testimony of witnesses sworn and examined in open court is not a judgment by confession, despite defendant's acknowledgment of service and offer to confess in a stated sum indorsed on the summons.—Smith Perry Electric Co. v. Beavers, 269 P. 320, 132 Okl. 44.

Method of being sued

The confession of a judgment is but one of the ways and processes by which a person may be sued.—Commonwealth ex rel. Bradford County v. Lynch, 23 A.2d 77, 146 Pa.Super. 469—O'Hara v. Manley, 12 A.2d 820, 140 Pa.Super. 39—Aid Soc. of Congregation of Shomo Habrith v. Fogelman, Pa.Com.Pl., 35 Berks Co.L.J. 178.

rogatories is not a confession of judgment since such an admission is not a voluntary act.[91] A judgment for want of a sufficient affidavit of defense is not a judgment by confession.[92]

Judgment by consent distinguished. A judgment by consent is distinguished from a judgment by confession, in that its special characteristic is the settlement between the parties of the terms, amount, or conditions of the judgment to be rendered;[93] the first presupposes an agreement of the parties as a basis for it, and the latter an act of defendant alone.[94] They also differ in that the court exercises a certain amount of supervision over the entry of judgments by confession, and equitable jurisdiction over their subsequent status.[95]

Judgment by default distinguished. The terms "judgment by default" and "judgment by confession" are not synonymous.[96] A judgment by confession is one in which defendant confesses his liability, whereas a judgment by default is one which results from the fact that defendant either has no defense to make, or does not appear to make it.[97] In effect, however, a judgment by default is equivalent to a judgment on confession,[98] and plaintiff may waive a judgment by default and substitute a judgment by confession.[99]

§ 135. Classes

Judgments by confession are valid at common law.

Judgments by confession are recognized at common law,[1] and such judgments have been held to be constitutional.[2]

Confession of judgment after action is brought and confession without action are discussed in the sections immediately following.

§ 136. —— Confession after Action Brought

a. In general
b. By cognovit actionem
c. By confession relicta verificatione

a. In General

Judgments by confession after action brought fall into two classes, judgments by cognovit actionem and judgments by confession relicta verificatione.

Judgments by confession after action brought are divided into two classes, the one a judgment by cognovit actionem and the other a judgment by confession relicta verificatione.[3] In either of these cases the judgment must be tested by rules and principles known to the common law, and is not governed by the statutes authorizing the confession of judgments without action, so that if good at common law it is not impeachable for the lack of an affidavit, statement of the origin of the indebtedness, or other supports required by those statutes.[4]

b. By Cognovit Actionem

(1) In general
(2) Requisites and sufficiency of cognovit

(1) In General

At common law and under statutes declaratory of the common law, a judgment by cognovit actionem is a judgment entered on the defendant's acknowledgment and confession of the justness of plaintiff's cause of action, such confession being made after service of process and before entry of a plea.

At common law, and under statutes declaratory of the common law, in the case of a judgment by cognovit actionem, defendant after service of process, instead of entering a plea, acknowledges and confesses that plaintiff's cause of action is just and

91. La.—Hanna v. His Creditors, 12 Mart. 32.

92. Pa.—Abeles v. Powell, 6 Pa.Super. 123.

93. Ark.—Houpt v. Bohl, 75 S.W. 470, 71 Ark. 330.
34 C.J. p 97 note 54.
Judgment by consent generally see infra §§ 173–186.

A stipulation for the entry of judgment was not a "confession of judgment."—Ray v. Ridpath, 291 P. 546, 145 Okl. 69.

Judgment held not invalid

In suit to cancel judgment procured by Small Loan Act licensee for violation of provision prohibiting licensee from taking any confession of judgment, recital in judgment that it was rendered on borrower's consent and motion did not show that judgment was based on confession of judgment.—Nolan v. Southland Loan & Investment Co., 169 S.E. 370, 177 Ga. 59.

94. N.C.—**Corpus Juris cited in** Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 496, 201 N.C. 440.
34 C.J. p 97 note 55.

95. N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.

96. Ky.—**Corpus Juris cited in** Board of Supervisors, City of Somerset, v. Pinnell, 166 S.W.2d 882, 883, 292 Ky. 364.
Pa.—Crider v. Cassell, Com.Pl., 59 York Leg.Rec. 182.
Tenn.—Marshall v. Johnson Hardware Co., 5 Tenn.App. 369.
34 C.J. p 97 note 56.

97. Mo.—Wade v. Swope, 81 S.W. 471, 107 Mo.App. 375.
34 C.J. p 97 note 56.
Judgments by default generally see infra §§ 187–218.

98. N.Y.—Kieley v. Reinhardt, 108 N.Y.S. 1012.
34 C.J. p 130 note 79.

99. Md.—Clammer v. State, 9 Gill 279.

1. Ill.—Lock v. Leslie, 248 Ill.App. 438.

2. U.S.—Bower v. Casanave, D.C.N.Y., 44 F.Supp. 501.

3. Ga.—Information Buying Co. v. Miller, 161 S.E. 617, 173 Ga. 786
—Thomas v. Bloodworth, 160 S.E. 709, 44 Ga.App. 44.
34 C.J. p 97 note 59.

4. La.—Goodwill v. Elkens, 25 So. 317, 51 La.Ann. 531.
34 C.J. p 97 note 60.

rightful;[5] and such a judgment may be entered by cognovit under a warrant of attorney to confess judgment,[6] the warrant in such case being the means by which the power to confess judgment is given the attorney, and the cognovit the instrument by which the confession is made.[7] In modern code practice, the only method of obtaining a judgment by confession is the one authorized by statute,[8] and a judgment by cognovit entered solely by authority of a warrant of attorney to confess judgment has been held to be void.[9] As discussed in the C.J.S. title Pleading § 433, also 49 C.J. p 676 notes 84–90, an answer admitting or confessing the cause of action pleaded in the complaint is authorized, and will support a judgment on the pleadings; but such judgment on the pleadings is not a "judgment by confession," except in a loose sense of the term.[10] A cognovit may be good as an admission in pais.[11] Under some statutes a cognovit provision incorporated in a bond, note, or other instrument evidencing the debt or obligation is valid and enforceable.[12]

Conditional cognovit. Entry of a valid judgment may be made dependent on the compliance with certain conditions mentioned in the cognovit,[13] such as that judgment shall not be entered until a later term,[14] although it has been held that in such a case judgment may be entered at the present term with a stay of execution until the prescribed time has elapsed.[15]

(2) Requisites and Sufficiency of Cognovit

The cognovit must sufficiently show confession of the justice of the claim and consent to the entry of judgment, must be certain as to the amount, and must be properly signed.

The cognovit must contain sufficient to show a confession of the justice of plaintiff's claim and that defendant, either expressly or impliedly, consents to the entry of judgment thereof,[16] must be certain and specific as to the amount confessed,[17] and must be signed by, or in the name of, the attorney.[18] A judgment by confession is not affected by the fact that the cognovit was prepared before the

5. Ga.—**Corpus Juris cited in** Information Buying Co. v. Miller, 161 S.E. 617, 619, 173 Ga. 736—Thomas v. Bloodworth, 160 S.E. 709, 44 Ga.App. 44.
N.J.—Fortune Building & Loan Ass'n v. Codomo, 7 A.2d 880, 122 N.J. Law 565.
Pa.—Commonwealth v. Central R. Co. of N. J., Com.Pl., 57 Dauph.Co. 255.
Wis.—Park Hotel Co. v. Eckstein-Miller Auto Co., 193 N.W. 998, 181 Wis. 72.
34 C.J. p 97 note 51, p 98 note 62—11 C.J. p 949 notes 62, 63.

"Narr and cognovit"

(1) The "narr and cognovit law" authorizes judgment on notes by attorney's confession that amount thereof, together with interest and costs, constitutes legal and just claim; "narr" is an abbreviation of the Latin word, "narratio," which means the complaint or petition, and "cognovit" is also Latin, meaning that defendant has confessed judgment and the justice of the claim.—Dyer v. Johnson, Tex.Civ.App., 19 S.W.2d 421, stating Illinois law, error dismissed.

(2) The only difference between "judgment on narr and cognovit" and one in suit brought by summons is that in former, summons is unnecessary because maker of note authorizes appearance and waives summons.—Schwartz v. Schwartz, 8 N.E.2d 668, 366 Ill. 247, 112 A.L.R. 325.

A "statement of confession," or "cognovit," oftentimes referred to as a "power of attorney," or simply as a "power," is the written authority of the debtor and his direction to the clerk of the district court, or justice of the peace, to enter judgment against debtor as stated therein.—Blott v. Blott, 290 N.W. 74, 227 Iowa 1103.

6. Ill.—Sukowitz v. Hinko, 40 N.E. 2d 345, 314 Ill.App. 195.
N.C.—Bonnett-Brown Corporation v. Coble, 142 S.E. 772, 195 N.C. 491.
34 C.J. p 98 note 63.
Warrant or power of attorney to confess judgment see infra §§ 152–157.

Distinction stated

"We think it clear that in this state the distinction between a judgment on cognovit actionem and what is colloquially called a 'confessed judgment' is that in the former case an action has been begun in invitum by the issue of process at the very least . . . and in the latter case, i. e., 'confession of judgment,' and subject to the statute in that regard, judgment is entered on bond and warrant without process."—Fortune Building & Loan Ass'n v. Codomo, 7 A.2d 880, 881, 122 N.J.L. 565.

Amicable actions may be entered in ejectment and judgment entered thereon under power of attorney on defendant's confession.—Equipment Corporation of America v. Primos Vanadium Co., 132 A. 860, 285 Pa. 432.

7. Ill.—Campbell v. Goddard, 7 N.E. 640, 117 Ill. 251.
34 C.J. p 98 note 70.

8. Utah.—Utah Nat. Bank v. Sears, 44 P. 832, 13 Utah 172.
Wis.—Park Hotel Co. v. Eckstein-Miller Auto Co., 193 N.W. 998, 181 Wis. 72.

9. Utah.—Utah Nat. Bank v. Sears, 44 P. 832, 13 Utah 172.

10. Mo.—Aull v. Day, 34 S.W. 578, 133 Mo. 337—Adler v. Anderson, 42 Mo.App. 189.

11. Cal.—Hirschfield v. Franklin, 6 Cal. 607.

12. Mo.—State ex rel. Robb v. Shain, 149 S.W.2d 812, 347 Mo. 928.

Effect

The cognovit feature inserted in note is not a condition affecting payment; it merely applies to the means of collection.—Union Properties v. McHenry, App., 44 N.E.2d 744, affirmed 50 N.E.2d 315, 142 Ohio St. 136.

13. S.C.—Keep v. Leckie, 42 S.C.L. 164.
34 C.J. p 98 notes 73, 74.

14. N.Y.—Hecox v. Ellis, 19 Wend. 157.
34 C.J. p 98 note 75.

15. Iowa.—McClish v. Manning, 3 Greene 223.

16. Ill.—Keith v. Kellogg, 97 Ill. 147.
34 C.J. p 98 note 78.
Requisites and sufficiency of confession generally see infra §§ 146–151.

17. N.Y.—Nichols v. Hewit, 4 Johns. 423.
34 C.J. p 98 note 79.

18. Ill.—Hall v. Jones, 32 Ill. 38.
Pa.—Philadelphia v. Toll, 2 Wkly.N. C. 226.
34 C.J. p 98 note 80.

cause of action accrued, where the judgment is not entered until after accrual.[19]

The caption of a cognovit is not an essential part, and if defective may be treated as surplusage.[20]

c. By Confession Relicta Verificatione

A confession relicta verificatione occurs where a defendant withdraws or abandons a plea which has already been made in the action, and confesses the justness of the plaintiff's cause of action.

In the case of a confession relicta verificatione, defendant, after pleading and before trial, both confesses plaintiff's cause of action and withdraws or abandons his plea or other allegation, whereupon judgment is entered against him without proceeding to trial.[21] Where such a confession is properly made, it is the duty of the court to render judgment on it.[22] Where the parties appear and defendant withdraws his plea, and plaintiff proves his cause of action and a judgment is thereupon rendered in his favor, it is a judgment on proof of the cause of action made to the court and not a judgment on confession.[23]

Retraction of confession. Where such confession is made by defendant through a mistake of fact as to the contents of the pleadings he may, on discovery of his error, retract his confession at any time before it has been recorded.[24]

§ 137. —— Confession without Action

Under appropriate statutory provisions, a judgment by confession may be entered without any action or suit having been instituted against the confessor; but such practice is unknown at common law.

Under some statutes provision is made for the entry of a judgment by confession without the institution of an action or suit against the one so confessing.[25] These statutes have no application to judgments by confession made after action has been brought and process has been regularly served.[26] In the absence of such a statute, a confession of judgment cannot be entered before the commencement of an action,[27] confession of judgment without an action being unknown at common law.[28]

§ 138. Debts or Claims for Which Judgment May Be Confessed

In order to be valid, a confession of judgment must be for a debt which is justly due or to become due.

A judgment by confession cannot be entered in any case where a statute prescribes a different and exclusive form of proceeding;[29] and, where a statute prescribes the debts or claims on which a judgment by confession may be entered, in order to be valid the judgment must be based on an obligation falling within the purview of the statute.[30] The confession must be for a debt which is justly due or to become due;[31] but although the debt should be a legal one, this does not mean that the demand must be one against which the debtor could set up no defenses in an action at law brought to recover such demand.[32] Thus it is no objection to a confessed judgment that the claim for which it is given is barred by the debtor's discharge in bankruptcy,[33] and even though a part of the claim on which the judgment is confessed is founded only on a moral obligation, such as an oral assumption of indebtedness, which under the statute of frauds would not be enforceable at law, the judgment is nevertheless good.[34]

Claim barred by limitation. If the claim is an honest one, it is no objection to a confessed judgment that the claim for which it is given would be barred by the statute of limitations,[35] since, as discussed in the C.J.S. title Limitations of Actions §

19. Ill.—Blake v. Freeport State Bank, 52 N.E. 957, 178 Ill. 182.
34 C.J. p 99 note 81.

20. Ill.—Cassen v. Brown, 74 Ill. App. 346—Browne v. Cassem, 74 Ill.App. 305.

21. Ga.—Information Buying Co. v. Miller, 161 S.E. 617, 173 Ga. 786—Thomas v. Bloodworth, 160 S.E. 709, 44 Ga.App. 44.
34 C.J. p 99 note 83.

22. Okl.—Towery v. Buck, 196 P. 693, 81 Okl. 38.

23. W.Va.—Holliday v. Myers, 11 W. Va. 276.

24. Ga.—Smith v. Simms, 9 Ga. 413.

25. Pa.—Shure v. Goodinate Co., 14 Pa.Dist. & Co. 209, 79 Pittsb.Leg. J. 16, affirmed Shure v. Goodimate Co., 153 A. 757, 302 Pa. 457.
Tex.—Johnson v. Cole, Civ.App., 138 S.W.2d 910, error refused.

26. Ill.—Little v. Dyer, 27 N.E. 905, 138 Ill. 272, 32 Am.S.R. 140.
34 C.J. p 99 note 89.

27. Ga.—Whitley v. Southern Wholesale Corporation, 164 S.E. 903, 45 Ga.App. 445—Information Buying Co. v. Miller, 161 S.E. 617, 173 Ga. 786.
Pa.—Commonwealth v. Central R. Co. of N. J., Com.Pl., 57 Dauph.Co. 255.

28. Ga.—Information Buying Co. v. Miller, 161 S.E. 617, 173 Ga. 786.

29. Ill.—Willer v. French, 27 Ill. App. 76, affirmed 18 N.E. 811, 126 Ill. 611, 9 Am.S.R. 651, 2 L.R.A. 717.
34 C.J. p 99 note 91.

30. Wis.—Park Hotel Co. v. Eckstein-Miller Auto Co., 193 N.W. 998, 181 Wis. 72.

31. Okl.—Western Paint & Chemical Co. v. Board of Com'rs of Garfield County, 18 P.2d 888, 161 Okl. 300.
34 C.J. p 99 note 93.
Under warrant or power of attorney see infra §§ 152–157.

32. La.—Kiernan v. Jackson, 35 So. 798, 111 La. 645.
34 C.J. p 99 note 93.

33. N.Y.—Dewey v. Moyer, 72 N.Y. 70, affirmed 103 U.S. 301, 26 L.Ed. 394.

34. Pa.—Keen v. Kleckner, 42 Pa. 529.

35. U.S.—Wright v. Wright, C.C. Pa., 103 F. 580.
34 C.J. p 99 note 96.
Exercise of power of attorney after claim is barred see infra § 156.

24, also 37 C.J. p 721 note 15–p 722 note 38, defendant is not obliged to interpose the statute, but has the right to waive such defense.

§ 139. —— Debts Not Matured

Whether judgment may be confessed for a debt not yet matured depends on the language of the statute or constitutional provision under which such judgment is sought.

Where a statute provides that a confession of judgment may be for a debt due or to become due, judgment may be confessed on a debt or obligation which is existing but is not yet payable or not yet matured.[36] Where, however, the statutes provide that a judgment may be confessed for a debt justly due and owing, the debt must be one which is actually existing and due at the time the confession of judgment is made.[37] The same is true where a constitutional provision prohibits the confession of judgment by any document under private signature executed before the maturity of the obligation sued on.[38]

§ 140. —— Contingent Liabilities

Judgment may be confessed to secure against contingent liabilities only in jurisdictions in which judgment may be confessed for debts not yet matured.

Where judgment may be confessed for debts due or to become due, as discussed supra § 139, a judgment may be confessed for the purpose of securing plaintiff against a future contingent liability;[39] and some statutes have made express provision for such judgments.[40] Where, however, a confession can be only for an existing debt, judgment cannot be confessed to secure against contingent liabilities.[41]

§ 141. —— Future Advances

A judgment by confession to secure future advances is valid in jurisdictions in which judgment may be confessed for an obligation not yet due.

In those jurisdictions where judgment may be confessed for an obligation not yet due, discussed supra § 139, a judgment by confession may be made to secure future advances and liabilities agreed to be made to the debtor to the extent of the amount or the judgment,[42] where this arrangement forms a part of the original agreement between the parties.[43] Such a judgment cannot, as against third persons, cover new and distinct engagements subsequently entered into by the parties, and not included within the original agreement;[44] and it has been held that it will not cover advances made or responsibilities incurred, after a subsequent judgment has intervened.[45] Where the creditor gives out a statement of the amount then due, to enable the debtor to borrow from another, he is estopped to claim beyond that amount.[46]

§ 142. —— For Tort

At common law a judgment on a tort claim may be entered by cognovit after action brought; it cannot be entered without action under statute, unless expressly permitted by the statute.

A judgment by confession for a claim arising out of a tort, at common law, could be entered by cognovit after action was commenced,[47] but could not be entered on a bond and warrant of attorney, without process.[48] Unless included in the provisions of the statute, it cannot be entered under a statute which provides for confessions of judgment without action.[49]

§ 143. Who May Confess Judgment

A confession of judgment may be made only by the defendant himself or some person duly authorized to act for him in that behalf.

A confession of judgment may be made only by defendant himself,[50] or by some person duly au-

36. Wis.—Port Huron Engine & Thresher Co. v. Clements, 89 N.W. 160, 113 Wis. 249.
34 C.J. p 99 note 1.
Time for exercising warrant or power of attorney see infra § 154 e.

37. N.J.—Modern Security Co. of Philadelphia v. Fleming, 142 A. 649, 6 N.J.Misc. 730.
34 C.J. p 100 note 3.

38. La.—Phillips v. Bryan, 184 So. 88, 172 La. 269—Taylor v. Shreveport Fertilizer Works, App., 197 So. 164.

39. Pa.—Commonwealth ex rel. Bradford County v. Lynch, 23 A.2d 77, 146 Pa.Super. 469.
34 C.J. p 100 note 5.

40. N.Y.—Marks v. Reynolds, 12 Abb.Pr. 402.
34 C.J. p 100 note 6.

41. N.J.—Sterling v. Fleming, 24 A. 1001, 53 N.J.Law 652.
34 C.J. p 100 note 7.

42. Md.—First Mortg. Bond Homestead Assoc. v. Mehlhorn, 105 A. 526, 133 Md. 439, 3 A.L.R. 844.
34 C.J. p 100 note 9.

43. N.Y.—Truscott v. King, 6 Barb. 346, reversed on other grounds 6 N.Y. 147.
34 C.J. p 100 note 10.

44. N.Y.—Averill v. Loucks, 6 Barb. 19.

45. N.Y.—Brinkerhoff v. Martin, 5 Johns.Ch. 320.

46. Pa.—Ter-Hoven v. Kerns, 2 Pa. 96.

47. N.Y.—Burkham v. Van Saun, 14 Abb.Pr.,N.S., 163.

48. Ill.—Willer v. French, 27 Ill. App. 76, affirmed 18 N.E. 811, 126 Ill. 611, 9 Am.S.R. 651, 2 L.R.A. 717.
34 C.J. p 100 note 15.
Construction and operation of warrant or power generally see infra § 154.

49. N.Y.—Burkham v. Van Saun, 14 Abb.Pr.,N.S., 163.
34 C.J. p 100 note 16.

50. Pa.—Melnick v. Hamilton, 87 Pa.Super. 575.
34 C.J. p 100 note 18.
Any debtor has a right to confess judgment in favor of his creditor.—

thorized to act for him in that behalf,[51] as by a warrant or power of attorney, as discussed infra § 152 et seq. Defendant will not be bound by an unauthorized confession of judgment made by another on his behalf,[52] unless he ratifies it.[53] It is immaterial to the validity of the judgment that defendant confessing it is an officer of the court in which it is entered; a judgment against himself may be confessed by the clerk[54] or by the judge of the court.[55]

The authority of particular representatives to confess judgment for another is treated in appropriate places in this work; thus for a discussion of confession of judgment by an agent generally see Agency § 117, by an attorney see Attorney and Client § 86, by a corporation see Corporations § 1341 b, by an executor or administrator see Executors and Administrators §§ 149, 794, by a guardian see Guardian and Ward § 182, by a married woman see Husband and Wife §§ 448, 552, by an officer or agent of a corporation see Corporations § 1067, and by a partner see the C.J.S. title Partnership § 165, also 47 C.J. p 880 note 70–p 881 note 95.

§ 144. —— Joint or Several Debtors or Defendants

One of several joint debtors may confess judgment for himself alone; but, if he attempts without authority to confess for himself and others, the confession of judgment is void as to the others although valid as to him.

A judgment by confession against joint debtors or joint defendants must be joined in or authorized by all of the debtors or defendants, and one joint debtor or joint defendant cannot confess judgment, so as to make it binding on a codebtor or codefendant who does not properly authorize or join in the confession.[56] One joint debtor or joint defendant, however, may confess judgment for himself alone,[57] provided he is not induced to do so by any improper motive, or by any intent to injure or embarrass his codefendants;[58] but his confessed judgment will remain interlocutory until the trial and determination of the issues as to the other defendants.[59] Although a confession of judgment by one only, for himself and others, is void as to the ones who do not join therein, and a joint judgment cannot be entered on it,[60] it has been held valid and enforceable as to the one making the confession.[61]

Several liability. Where two or more persons are severally liable for the same debt, they may make several confessions of judgment,[62] but, as discussed infra § 164, a joint judgment cannot be entered against them on their separate confessions.

§ 145. In Whose Favor Confessed

A judgment may be confessed in favor of any person who is the legal owner of the debt or claim in question.

A judgment may be confessed in favor of any person who is the legal owner of the debt or claim in question,[63] such as an assignee or trustee for the benefit of various creditors;[64] and may be confessed in favor of the state as creditor as well as an individual.[65]

B. REQUISITES AND VALIDITY OF CONFESSION GENERALLY

§ 146. In General

In the absence of a statute providing otherwise, any admission of the plaintiff's claim that leaves no issue to be tried is sufficient to constitute a confession of judgment.

Knight v. Peoples Nat. Bank of Lynchburg, 29 S.E.2d 364, 182 Va. 380.

51. Pa.—Melnick v. Hamilton, 87 Pa.Super. 575—Commonwealth v. Central R. Co. of N. J., Com.Pl., 57 Dauph.Co. 255—Yellow Mfg. Credit Corporation v. Rooney, Com.Pl., 9 Sch.Reg. 119.
34 C.J. p 100 note 19.

52. Neb.—Custer County v. Chicago, B. & Q. R. Co., 87 N.W. 341, 62 Neb. 657.
34 C.J. p 101 note 21.

53. Puerto Rico.—Blas v. Colón, 8 Puerto Rico 76.

54. Va.—Smith v. Mayo, 5 S.E. 276, 83 Va. 910.

55. Ga.—Thornton v. Lane, 11 Ga. 459.

56. Pa.—Koenig v. Curran's Restaurant & Baking Co., 159 A. 553, 306 Pa. 345.
34 C.J. p 101 note 26.

57. Pa.—Koenig v. Curran's Restaurant & Baking Co., supra.
34 C.J. p 101 note 27.

58. Va.—Virginia & T. Coal & Iron Co. v. Fields, 26 S.E. 426, 94 Va. 102.

59. W.Va.—Hoffman v. Bircher, 22 W.Va. 537.
34 C.J. p 101 note 29.

60. Cal.—Chapin v. Thompson, 20 Cal. 681.
34 C.J. p 101 note 30.

61. Pa.—Koenig v. Curran's Restaurant & Baking Co., 159 A. 553, 306 Pa. 345.
34 C.J. p 101 note 31.

62. N.Y.—Kirby v. Fitzgerald, 31 N. Y. 417.
34 C.J. p 101 note 32.

63. Ill.—Shepherd v. Wood, 73 Ill. App. 486.
Confession of judgment by husband in favor of wife see Husband and Wife § 160.
For whom judgment may be confessed under warrant or power of attorney see infra § 154.
Accommodation signers who paid note by giving payee a new note and took assignment of old note could not take judgment by confession against one of principals, since suit may not be maintained on note by one comaker who has paid note or to whom it has been assigned, against another comaker.—Gillham v. Troeckler, 26 N.E.2d 413, 304 Ill. App. 596.

64. Pa.—Breading v. Boggs, 20 Pa. 33.
34 C.J. p 101 note 36.

65. N.C.—State v. Love, 23 N.C. 264.

Unless required by statute, no particular form is necessary to a confession of judgment; any admission of the claim that leaves no issue to be tried is sufficient.[66] In order to authorize an immediate judgment thereon the confession must be absolute and unconditional;[67] but it may be made conditional, and in that case it can be enforced only on compliance with the conditions or in accordance therewith.[68] It is no objection that several different debts to the same creditor are included in the one confession[69] or that it is given to one person as trustee for numerous small creditors, all the debts being justly due.[70] It has been held to be essential that defendant confess, or authorize his attorney to confess for him, such judgment as plaintiff would be entitled to recover in the event of a successful termination of similar adverse proceedings.[71]

Good faith. A confession of judgment must be made in good faith;[72] if it is fictitious and fraudulent, and does not affect the relation of the parties, it cannot have the effect of a confession of judgment.[73]

§ 147. Compliance with Statutory Provisions Generally

Statutes providing for the confession of judgments otherwise than at common law are to be strictly construed and there must be a strict compliance with such statutes.

The subject of confession of judgments is now to a great extent regulated by statute, and where these statutes provide for the confession of judgments without action, or make regulations otherwise than according to the course of the common law, they are to be strictly construed, and a strict compliance with their provisions must be shown in order to sustain the judgment,[74] but, where there has been strict compliance with the statute, nothing further is necessary to support the judgment.[75] Thus there must be a strict compliance with a statutory provision that the confession of judgment must be signed by the party making it and by witnesses[76] or that the debtor shall appear in person and confess the judgment.[77] Where, however, the statutory provision is merely declaratory of the common law, only a substantial compliance therewith is required;[78] and where the statute provides for a proceeding in a court having general common-law jurisdiction, but does not give the details and particulars of the proceeding, these may be pursued according to the principles of the common law.[79] It has also been held that, where a trial court has jurisdiction and authority to give the relief granted, and where without the filing of an answer the parties appear in court and agree as to what the judgment should be, the judgment is not void even though there has not been a full compliance with all

66. Ark.—Firestone Tire & Rubber Co. v. Webb, 182 S.W.2d 941, 207 Ark. 820.
Pa.—R. S. Noonan, Inc., v. Hoff, 38 A.2d 53, 350 Pa. 295.
34 C.J. p 101 note 40.
Nature, necessity, requisites, and sufficiency of statement of indebtedness see infra §§ 158, 159.
Confession need not be in writing, where summons has been properly issued and served; judgment rendered on defendant's oral statement to go ahead and take judgment constituted judgment by confession.—Æolian Co. of Missouri v. Smith-Medcalf & Co., Mo.App., 7 S.W.2d 447.

67. Ark.—Shepard v. Dudley, 201 S.W. 1112, 132 Ark. 603.
La.—State v. Judge Fourth Dist. Ct., 1 McG. 11.

68. N.C.—Wood v. Bagley, 34 N.C. 23.
34 C.J. p 101 note 42.

69. U.S.—Odell v. Reynolds, Ohio, 70 F. 656, 17 C.C.A. 317.
34 C.J. p 101 note 43.

70. Pa.—Breading v. Boggs, 20 Pa. 33.

71. Pa.—Grakelow v. Kidder, 95 Pa. Super. 250—Pittsburgh Terminal Coal Corporation v. Potts, 92 Pa. Super. 1, followed in Pittsburgh Terminal Coal Corporation v. McClements, 92 Pa.Super. 29, and Hillman Gas Coal Co. v. Bozicevich, 92 Pa.Super. 39.

72. N.J.—Jones v. Naughright, 10 N.J.Eq. 298.

73. Wash.T.—Connoly v. Cunningham, 5 P. 473, 2 Wash.T. 242.
34 C.J. p 102 note 46.

74. Del.—Farrell v. Maryland Credit Finance Corporation of Maryland, Thomas Hughes, Inc., 127 A. 879, 2 W.W.Harr. 569.
Md.—Webster v. People's Loan, Savings & Deposit Bank of Cambridge, 152 A. 815, 160 Md. 57.
N.J.—**Corpus Juris cited in** Rollenhagen v. Stevenson, 43 A.2d 173, 174—Modern Security Co. of Philadelphia v. Fleming, 142 A. 649, 6 N.J.Misc. 730.
N.Y.—Williams v. Mittlemann, 20 N.Y.S.2d 690, 259 App.Div. 697, appeal denied 22 N.Y.S.2d 822, 260 App.Div. 811—American Cities Co. v. Stevenson, 60 N.Y.S.2d 685.
Pa.—Kirk Johnson & Co. v. Wilson, 18 Pa.Dist. & Co. 672.
Wis.—Chippewa Valley Securities Co. v. Herbst, 278 N.W. 872, 227 Wis. 422.
34 C.J. p 102 notes 50, 55.
Repeal by implication
The statute authorizing recovery of deficiency after mortgage foreclosure sale and authorizing obligor on bond to file answer in suit on the bond disputing amount of deficiency did not repeal statute authorizing judgments by confession.—Chambers v. Boldt, 8 A.2d 73, 123 N.J.Law 111.
Process
Statute regulating procedure where judgment is entered without the service of process has no application to a judgment by confession entered in a proceeding instituted by the service of process.—Johnson v. Cole, Tex.Civ.App., 138 S.W.2d 910, error refused.

75. Del.—Money v. Hart, 159 A. 437, 5 W.W.Harr. 115.
34 C.J. p 102 note 51.

76. La.—Erwin v. Walton, 4 Rob. 328.
Mich.—Beach v. Botsford, 1 Dougl. 199, 40 Am.D. 145.

77. Ohio.—Rosebrough v. Ansley, 35 Ohio St. 107.

78. Va.—Saunders v. Lipscomb, 19 S.E. 450, 90 Va. 647.
Statute held declaratory of common law
Ill.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137.

79. N.J.—Stewart v. Walters, 38 N.J.Law 274.

the statutory requirements as to the confession of judgments.[80] Under some statutes judgments in amicable actions are not statutory,[81] and the statutes relating to judgments entered by the prothonotary, discussed infra § 154 f, are inapplicable to judgments confessed in amicable actions in which plaintiff and defendant appear by counsel.[82]

§ 148. Consent or Ratification of Creditor

A confession of judgment is not binding on the plaintiff unless he consents to it or ratifies it.

In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto;[83] if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it.[84] The validity of the judgment dates only from such acceptance, and therefore it will not affect the priority of other creditors who came in between the entry of the judgment and its acceptance.[85] Where plaintiff would, under no circumstances, be entitled to any judgment different from that which defendant offers to confess, which offer he rejects, it has been held that the action may be dismissed.[86]

Manner of consent or acceptance. The creditor's consent to, or acceptance of, the judgment, if not express, may be implied from the circumstances of his dealing with it,[87] as from the fact that he attempts to enforce it.[88] In the absence of anything appearing to the contrary, the creditor's consent may be presumed from the record[89] or from the fact that the judgment confessed operates to his benefit,[90] but the creditor's mere silence or failure to object on being informed of the judgment does not amount to an acceptance of it, although it is admissible as evidence tending to prove his acceptance.[91] The knowledge and consent of the creditor's attorney, in whose hands he has placed the matter, is sufficient to make it binding on the creditor.[92]

§ 149. Process, Appearance, and Pleading

The requirements as to process, appearance, and pleading in the case of a confession after action is instituted are discussed infra § 150, and in the case of a confession without action infra § 151.

Examine Pocket Parts for later cases.

§ 150. —— Confession after Action

A judgment of confession after action is instituted must be based on the service of process on, or an appearance by, the defendant.

It is essential to the validity of a confession of judgment after action brought that process should have been regularly served on defendant, or service accepted by him, or that an appearance should have been entered by him in person or by a duly authorized attorney for him,[93] and that there should be

80. Kan.—Brooks v. National Bank of Topeka, 113 P.2d 1069, 153 Kan. 881.

81. Pa.—Peerless Soda Fountain Service Co. v. Lipschutz, 101 Pa. Super. 568—Vesta Coal Co. v. Stiddard, 92 Pa.Super. 37—Vesta Coal Co. v. Jones, 92 Pa.Super. 30, followed in Chartiers Creek Coal Co. v. Bielski, 92 Pa.Super. 38—Pittsburgh Terminal Coal Corporation v. Potts, 92 Pa.Super. 1, followed in Pittsburgh Terminal Coal Corporation v. McClements, 92 Pa.Super. 29, and Hillman Gas Coal Co. v. Bozicevich, 92 Pa.Super. 39.

Agreement that action be amicable

Defendant in amicable action must have agreed that it should be amicable as distinguished from adverse proceeding.—Grakelow v. Kidder, 95 Pa.Super. 250—Pittsburgh Terminal Coal Corporation v. Potts, 92 Pa.Super. 1, followed in Pittsburgh Terminal Coal Corporation v. McClements, 92 Pa.Super. 29, and Hillman Gas Coal Co. v. Bozicevich, 92 Pa.Super. 39.

82. Pa.—Finance & Guaranty Co. v. Mittleman, 93 Pa.Super. 277—Vesta Coal Co. v. Stiddard, 92 Pa. Super. 37—Vesta Coal Co. v. Jones, 92 Pa.Super. 30, followed in Chartiers Creek Coal Co. v. Bielski, 92 Pa.Super. 38—Hillman Coal & Coke Co. v. Metcalfe, 92 Pa.Super. 14—Pittsburgh Terminal Coal Corporation v. Potts, 92 Pa.Super. 1, followed in Pittsburgh Terminal Coal Corporation v. McClements, 92 Pa. Super. 29, and Hillman Gas Coal Co. v. Bozicevich, 92 Pa.Super. 39.

Actions are not statutory

Actions resulting in confessed judgments are not statutory.—Hillman Coal & Coke Co. v. Metcalfe, 92 Pa.Super. 14.

83. Okl.—Universal Supply & Machinery Co. v. Construction Machinery Co., 16 P.2d 865, 160 Okl. 209.
34 C.J. p 102 note 58.

84. Vt.—Mason v. Ward, 67 A. 820, 80 Vt. 290, 130 Am.S.R. 987.
34 C.J. p 102 note 59.

85. Ark.—Lowenstein v. Caruth, 28 S.W. 421, 59 Ark. 588.
34 C.J. p 102 note 60.

86. Colo.—Denver First Nat. Bank v. Hotchkiss, 114 P. 810, 49 Colo. 593.
34 C.J. p 103 notes 67–69.

87. Md.—Barker v. Ayres, 5 Md. 202.
34 C.J. p 102 note 61.

88. S.D.—Corpus Juris cited in Banton v. Dakota Lodge No. 1, I. O. O. F., Inc., 292 N.W. 874, 67 S.D. 333.
34 C.J. p 102 note 62.

89. Ind.—Kennard v. Carter, 64 Ind. 31.

90. Pa.—Clawson v. Eichbaum, 2 Grant 130—McCalmont v. Peters, 13 Serg. & R. 196.

91. Ind.—Haggerty v. Juday, 58 Ind. 154.
34 C.J. p 102 note 65.

92. Ind.—Chapin v. McLaren, 5 N. E. 688, 105 Ind. 563.

93. Ga.—Information Buying Co. v. Miller, 161 S.E. 617, 173 Ga. 786.
N.J.—Fortune Building & Loan Ass'n v. Codomo, 7 A.2d 880, 122 N.J.Law 565.
34 C.J. p 103 note 71.

Subsequent process

Where plaintiff failed within statutory time to file bill pursuant to process executed on defendant, but later filed bill and matured suit on new process subsequently issued, and returned, executed on same defend-

an appearance by plaintiff, or at least his consent to the entry of judgment;[94] and although a declaration or some statement of plaintiff's claim should generally be filed, before or at the same time as the confession,[95] in some jurisdictions, where a writ is properly issued, the confession may be founded thereon and a formal declaration is not necessary.[96] It has also been held that, where defendant has agreed to the commencement of an amicable action and the confession of judgment therein, the method in which the action is commenced is immaterial.[97]

§ 151. —— Confession without Action

Process, appearance, or pleading is generally not required where a confession of judgment is made without action.

In case of a confession without action, it is not necessary that any process should be issued or served on defendant, or any appearance entered by or for him other than the appearance for the purpose of confessing the judgment,[98] but, where the statute requires defendant to appear personally in court and confess judgment, a valid judgment cannot be confessed without such appearance.[99]

As a general rule it is not essential to such a confession that a declaration or complaint should be filed,[1] and, if a declaration is filed, it is immaterial whether or not it will stand the test of technical principles.[2] On the other hand, under some statutes if the confession is made under a warrant of attorney without defendant personally appearing, a declaration,[3] which under some statutes should be duly verified,[4] must be filed.

C. UNDER WARRANT OR POWER OF ATTORNEY

§ 152. In General

Subject to statutory exceptions, a judgment by confession may generally be entered on a warrant or power of attorney.

In most jurisdictions a judgment by confession may be entered on a written authority, called a warrant or power of attorney, by which the debtor empowers an attorney to enter an appearance for him, waive process, and confess judgment against him for a designated amount,[5] and such practice is not regarded as being against public policy,[6] except in a few jurisdictions.[7] The power to confess

ant, decree pro confesso taken against defendant on his failure to appear, decree will not be disturbed on bill of review for manner in which suit was instituted and prosecuted.—Watkins v. Watkins, 129 S.E. 395, 99 W.Va. 495.

94. Ill.—Thayer v. Finley, 36 Ill. 262.

95. Ill.—Desnoyers Shoe Co. v. Litchfield First Nat. Bank, 58 N.E. 994, 188 Ill. 312.
34 C.J. p 103 note 73.
Pleadings held sufficient
Pleadings containing allegations that defendant had made fraudulent representation regarding financial backing of corporation, thereby inducing creditors to extend credit to corporation, were sufficient to support confession of judgment against defendant.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

96. U.S.—McNeil v. Cannon, C.C.D.C., 16 F.Cas.No.8,913, 1 Cranch.C.C. 127.
34 C.J. p 103 note 74.

97. Pa.—Vesta Coal Co. v. Stiddard, 92 Pa.Super. 37—Vesta Coal Co. v. Jones, 92 Pa.Super. 30, followed in Chartiers Creek Coal Co. v. Bielski, 92 Pa.Super. 38—Hillman Coal & Coke Co. v. Metcalfe, 92 Pa.Super. 14—Pittsburgh Terminal Coal Corporation v. Potts, 92 Pa.Super. 1, followed in Pittsburgh Terminal Coal Corporation v. McClements, 92 Pa.Super. 29, and Hillman Gas Coal Co. v. Bozicevich, 92 Pa.Super. 39.

98. U.S.—**Corpus Juris cited in** Federal Deposit Ins. Corporation v. Steinman, D.C.Pa., 53 F.Supp. 644, 651—Bower v. Casanave, D.C.N.Y., 44 F.Supp. 501.
Ill.—**Corpus Juris cited in** Lock v. Leslie, 248 Ill.App. 438, 443.
La.—Jeffcoat v. Hammons, App., 160 So. 182.
Mass.—**Corpus Juris cited in** Ferranti v. Lewis, 171 N.E. 232, 234, 271 Mass. 186.
N.C.—Bonnett-Brown Corporation v. Coble, 142 S.E. 772, 195 N.C. 491.
Pa.—Union Acceptance Co. v. Grant Motor Sales Co., 5 Pa.Dist. & Co. 407, 23 Luz.Leg.Reg. 89, 2 Som.Co. Leg.J. 260, 39 York Leg.Rec. 141—Colonial Trust Co. v. Crailsheimer, Com.Pl., 87 Pittsb.Leg.J. 207.
34 C.J. p 103 note 75.

99. Ohio.—Rosebrough v. Ansley, 35 Ohio St. 107.
34 C.J. p 103 note 76.

1. Ind.—Agard v. Hawks, 24 Ind. 276.
Pa.—Melavage v. Akelaites, 8 Pa. Dist. & Co. 111, 22 Sch.L.R. 201, 40 York Leg.Rec. 115—Union Acceptance Co. v. Grant Motor Sales Co., 5 Pa.Dist. & Co. 407, 23 Luz. Leg.Reg. 89, 2 Som.Co.Leg.J. 260, 39 York Leg.Rec. 141.
34 C.J. p 103 note 77.

2. Ark.—Choat v. Bennett, 11 Ark. 313—Thompson v. Foster, 6 Ark. 208.

3. Ill.—Shumway v. Shumway, 192 N.E. 578, 357 Ill. 477.
Declaration held sufficient
Ill.—First Nat. Bank v. Royer, 273 Ill.App. 158.

4. Ohio.—Sidney First Nat. Bank v. Reid, 31 Ohio St. 435.
34 C.J. p 104 note 80.

5. U.S.—Withers v. Starace, D.C.N.Y., 22 F.Supp. 773.
Del.—Rhoads v. Mitchell, Super., 47 A.2d 174.
Md.—John B. Colt Co. v. Wright, 159 A. 743.
Pa.—Commonwealth v. Central R. Co. of N. J., Com.Pl., 57 Dauph.Co. 255—Nash Sales & Service v. Broody, 33 Luz.Leg.Reg. 158, 9 Som.Co.Leg. J. 326.
34 C.J. p 104 note 82—67 C.J. p 603 note 29.
Validity of warrant executed by an infant see infants § 23.
Statute held valid
N.J.—Levin v. Wenof, 146 A. 739, 7 N.J.Misc. 603.

6. Pa.—Rochester & Pittsburgh Coal & Iron Co., 7 Pa.Dist. & Co. 312.
34 C.J. p 104 note 83.

7. W.Va.—Farquhar v. De Haven, 75 S.E. 65, 70 W.Va. 738, Ann.Cas. 1914A 640, 40 L.R.A.,N.S., 956.
34 C.J. p 104 note 84.

judgment by warrant of attorney comes from the common law,[8] and is governed thereby except in so far as the old rules of the common law have been modified by statute and the decisions of the courts of last resort.[9]

The legislature has the power to determine what judgments may be entered on warrants or powers of attorney.[10] Thus, under some statutes, a judgment by confession may not be entered on a power of attorney in the case of certain obligations,[11] whereas under others only in the case of certain specified obligations may a judgment by confession be entered on the authority of a power of attorney.[12]

Nature of power. In its infancy such a warrant of attorney was purely a question of practice,[13] which prevailed in many, if not most, of the older states from an early day,[14] but in later times it has assumed the role of security for debt.[15]

What law governs. As a general rule the validity and effect of a power of attorney to confess judgment are governed by the law of the place where the power is given[16] although defendant is a resident of another state at the time the power is executed.[17] On the other hand, it has been held that the validity and effect of such a power are governed by the law of the place of performance[18] or the law of the jurisdiction where the judgment is

8. Del.—Rhoads v. Mitchell, Super., 47 A.2d 174.
Ill.—Lock v. Leslie, 248 Ill.App. 438, 442.
N.J.—Gotham Credit Corporation v. Powell, 38 A.2d 700, 22 N.J.Misc. 301.
Pa.—Automobile Finance Co. v. Varner, 90 Pittsb.Leg.J. 169.
34 C.J. p 104 note 85.

Instruments under seal

Power to confess judgment under warrant directed to attorney is confined to instrument under seal evidencing debt for which judgment is confessed.—General Contract Purchase Corporation v. Max Keil Real Estate Co., 170 A. 797, 5 W.W.Harr. 531.

9. Del.—General Contract Purchase Corporation v. Max Keil Real Estate Co., 170 A. 797, 5 W.W.Harr. 531.
Fla.—**Corpus Juris cited in** Carroll v. Gore, 143 So. 633, 636, 106 Fla. 582, 89 A.L.R. 1495.
Ill.—Book v. Ewbank, 35 N.E.2d 961, 311 Ill.App. 312—**Corpus Juris cited in** Lock v. Leslie, 248 Ill.App. 438, 442.
Wis.—**Corpus Juris cited in** Chippewa Valley Securities Co. v. Herbst, 278 N.W. 872, 874, 227 Wis. 422.
34 C.J. p 104 note 86.

10. Wis.—Chippewa Valley Securities Co. v. Herbst, 278 N.W. 872, 227 Wis. 422.

11. Ind.—American Furniture Mart Bldg. Corporation v. W. C. Redmon, Sons & Co., 1 N.E.2d 606, 210 Ind. 112.
34 C.J. p 104 note 88.

Ascertainment of sum due

The statutes pertaining to cognovit provisions of negotiable instruments disclose a legislative intent only to void provisions giving power of attorney with authority to confess judgment on such instruments for a sum of money to be ascertained in a manner other than by action of court on a hearing after proper service of process.—Ritchey v. Gerard 152 P.2d 894, 48 N.M. 452.

Validity of obligation

The cognovit feature of a mortgage note does not preclude recovery on mortgage, where mortgagee does not rely on note or cognovit feature thereof.—Peoples Nat. Bank & Trust Co. v. Pora, 9 N.E.2d 83, 212 Ind. 468, 111 A.L.R. 1402.

12. Wis.—Shawano Finance Corporation v. Julius, 254 N.W. 355, 214 Wis. 637.

Statute held valid

A statute authorizing a judgment on a warrant of attorney only on a bond or note did not deprive a seller, entering into conditional sale contract after enactment and construction of statute, of its property without due process of law or unreasonably deprive seller of the right to contract.—Chippewa Valley Securities Co. v. Herbst, 278 N.W. 872, 227 Wis. 422.

Conditional sale contract

(1) A judgment on warrant of attorney contained in conditional sale contract was entered without authority and was void, in view of statute authorizing a judgment on a warrant of attorney only on a bond or note.—Chippewa Valley Securities Co. v. Herbst, 278 N.W. 872, 227 Wis. 422—Wisconsin Sales Corporation v. McDougal, 271 N.W. 25, 223 Wis. 485—United Finance Corporation v. Peterson, 241 N.W. 337, 208 Wis. 104, 89 A.L.R. 1104.

(2) Whether attachment of note to conditional sales contract takes it out of the definition of a note and the statutes providing for judgment by cognovit depends on parties' intention as manifested by entire written agreement; note providing for judgment by cognovit and separated from conditional sales contract by perforated line was held subject to judgment by cognovit where parties contemplated the note's negotiation, discount, renewal, or extension independently of conditional sales contract.—Shawano Finance Corporation v. Julius, 254 N.W. 355, 214 Wis. 637.

13. Mo.—Kansas City First Nat. Bank v. White, 120 S.W. 36, 220 Mo. 717, 132 Am.S.R. 612, 16 Ann. Cas. 889.

14. Iowa.—Cuykendall v. Doe, 105 N.W. 698, 129 Iowa 453, 113 Am.S.R. 472, 3 L.R.A.,N.S., 449.

15. Pa.—Mellon v. Ritz, 2 A.2d 699, 332 Pa. 97.
34 C.J. p 104 note 92.

Future obligations

A bond or other obligation may be given and judgment entered by confession on warrant of attorney, to cover future obligations.—Rhoads v. Mitchell, Del.Super., 47 A.2d 174.

16. U.S.—**Corpus Juris cited in** Monarch Refrigerating Co. v. Farmers' Peanut Co., C.C.A.N.C., 74 F.2d 790, 793, certiorari denied Farmers Peanut Co. v. Monarch Refrigerating Co., 55 S.Ct. 643, 295 U.S. 732, 79 L.Ed. 1680.
Fla.—**Corpus Juris cited in** Carroll v. Gore, 143 So. 633, 637, 106 Fla. 582, 89 A.L.R. 1495.
Iowa.—Acme Feeds v. Berg, 4 N.W. 2d 430, 231 Iowa 1271.
34 C.J. p 107 note 87.

Renewal note

Where original note containing power of attorney to confess judgment was executed in Ohio, and makers subsequently moved to Michigan, renewal note, which contained same power and was mailed to makers in Michigan and was signed and returned by mail to payee, an Ohio bank, was an "Ohio contract", and power of attorney conferred authority to confess judgment.—State of Ohio ex rel. Squire v. Eubank, 294 N.W. 166, 295 Mich. 230.

17. Iowa.—Cuykendall v. Doe, 105 N.W. 698, 129 Iowa 453, 113 Am. S.R. 472, 3 L.R.A.,N.S., 449.
34 C.J. p 107 note 38.

18. Ind.—Egley v. T. B. Bennett & Co., 145 N.E. 830, 196 Ind. 50, 40 A. L.R. 436.

entered.[19] If the power is valid where given, generally it will be recognized in another state,[20] although it is invalid under the laws of the latter state;[21] but if it is invalid where given it is invalid in another state.[22] Where the warrant is made in one state for use in another, the law of the latter state has been held to govern as far as the use and effect of the warrant therein are concerned,[23] except that such law cannot enlarge the authority conferred by the warrant so as to bind the grantor of the power, in his own state, to terms not contained in the warrant to which he did not consent and with knowledge of which he was not charged.[24]

A warrant of attorney must be executed according to the requirements of the law in force when the judgment is taken, and not when the power was given.[25]

§ 153. Requisites and Sufficiency of Warrant or Power

A warrant or power of attorney to confess judgment should contain a clear grant of authority and should specify the amount for which judgment is to be confessed.

A warrant of attorney to confess judgment should conform to the requirements of the statute, if any, in force at the time;[26] but, in the absence of specific statutory directions, no particular form of words is necessary, if it contains the essentials of a good power and clearly states its purpose.[27] In any event it should contain a grant of the authority, in clear and intelligible terms;[28] and, unless it is accompanied by a declaration or sworn statement or other evidence of the indebtedness, it should clearly and definitely set out or describe the nature of the liability for which the judgment is to be rendered,[29] and should either clearly state the amount for which judgment is to be confessed or state facts and figures from which the amount can be definitely ascertained,[30] and it is invalid if it authorizes a judgment for an indefinite or unliqui-

19. Ind.—Paulausky v. Polish Roman Catholic Union of America, 39 N.E.2d 440, 219 Ind. 441.

20. Fla.—Carroll v. Gore, 148 So. 633, 106 Fla. 582, 89 A.L.R. 1495.
Ind.—American Furniture Mart Bldg. Corporation v. W. C. Redmon, Sons & Co., 1 N.E.2d 606, 210 Ind. 112.
34 C.J. p 107 note 39.

21. Fla.—Carroll v. Gore, 148 So. 633, 106 Fla. 582, 89 A.L.R. 1495.
Ind.—American Furniture Mart Bldg. Corporation v. W. C. Redmon, Sons & Co., 1 N.E.2d 606, 210 Ind. 112.
Iowa.—Cuykendall v. Doe, 105 N.W. 698, 129 Iowa 453, 118 Am.S.R. 472, 3 L.R.A.,N.S., 449.

Cognovit features not relied on

Recovery may be had on contract containing cognovit features, if it is valid where made and such features are not relied on in action to recover thereon.—Phrommer v. Albers, 21 N.E.2d 72, 106 Ind.App. 548.

22. Ala.—Monarch Refrigerating Co. v. Faulk, 155 So. 74, 228 Ala. 554.
34 C.J. p 107 note 41.

23. N.J.—Gotham Credit Corporation v. Powell, 38 A.2d 700, 22 N.J. Misc. 301.
34 C.J. p 107 note 42.

24. U.S.—Grover & Baker Sewing Mach. Co. v. Radcliffe, Md., 11 S.Ct. 92, 137 U.S. 287, 34 L.Ed. 670.
34 C.J. p 108 note 43.

25. Ind.—McPheeters v. Campbell, 5 Ind. 107.

26. Cal.—General Motors Acceptance Corporation v. Codiga, 216 P. 883, 62 Cal.App. 117, followed in General Motors Acceptance Corporation v. Parker, 216 P. 884, 62 Cal.App. 797.
Minn.—Keyes v. Peterson, 260 N.W. 518, 194 Minn. 361.
Ohio.—**Corpus Juris quoted in** Hill v. Buchanan, 6 Ohio Supp. 230, 233.
Pa.—Commonwealth v. Przekop, 25 A.2d 776, 148 Pa.Super. 335—Bergunder v. Cerceo, Com.Pl., 91 Pittsb.Leg.J. 576.
34 C.J. p 104 note 93.

Necessity of indebtedness

Director who executed note to bank to create reserve to make good bank's losses, which note contained a warrant for confession of judgment, was "indebted to another" within statute providing that any person being indebted to another person may confess judgment by virtue of warrant made part of note authorizing confession of judgment.—Spady v. Farmers & Merchants Trust Bank, 190 S.E. 173, 168 Va. 143.

27. Ohio.—**Corpus Juris quoted in** Hill v. Buchanan, 6 Ohio Supp. 230, 233.
34 C.J. p 104 note 94.

Authority to "enter" instead of to "confess"

Ill.—Long v. Coffman, 230 Ill.App. 527.
34 C.J. p 104 note 94 [a].

28. Ill.—Webster Grocer Co. v. Gammel, 1 N.E.2d 890, 285 Ill.App. 277—Sharpe v. Second Baptist Church of Maywood, 274 Ill.App. 374—Hughes v. First Acceptance Corporation, 260 Ill.App. 176.
Ohio.—**Corpus Juris quoted in** Hill v. Buchanan, 6 Ohio Supp. 230, 233.
Pa.—Landow v. Ballinger, 169 A. 780, 313 Pa. 385—Hogsett v. Lutrario, 13 A.2d 902, 140 Pa.Super. 419—Koruzo v. Ritenauer, 101 Pa.Super. 558—General Realty Co. v. Gold, 9 Pa.Dist. & Co. 682, affirmed 142 A. 279, 293 Pa. 260—Soklove v. Lalitas, Com.Pl., 30 Del.Co. 370—Jarzenbowski v. Dombrosky, Com.Pl., 36 Luz.Leg.Reg. 63—Graver v. Hand, Com.Pl., 58 York Leg.Rec. 180.
34 C.J. p 105 note 95.

29. Md.—**Corpus Juris cited in** C. I. T. Corporation v. Powell, 170 A. 740, 742, 166 Md. 208—Vane v. Stanley Heating Co., 152 A. 511, 160 Md. 24.
34 C.J. p 105 note 97.

Two species of judgments

"There are at least two species of judgments that can be obtained by confession upon warrants of attorney. One is the ordinary judgment, where the obligation is to pay a specific sum determinable from the instrument, and judgment is entered for the amount so determined. Another species is a judgment for a condition other than the payment of money, or where judgment is entered for a penalty."—Rhoads v. Mitchell, Del.Super., 47 A.2d 174, 179.

30. Del.—Rhoads v. Mitchell, supra.
Pa.—Dime Bank & Trust Co. of Pittston v. O'Boyle, 6 A.2d 106, 334 Pa. 500—Finance & Guaranty Co. v. Mittleman, 93 Pa.Super. 277—Wyoming Valley Trust Co. v. Tisch, 18 Pa.Dist. & Co. 581, 27 Luz.Leg.Reg. 277.
Wash.—Rubin v. Dale, 288 P. 223, 156 Wash. 676.
34 C.J. p 105 note 98.

dated amount[31] or if the amount due cannot be ascertained from the face of the instrument.[32]

Execution. A warrant or power of attorney to confess judgment should be in writing,[33] and must be signed by all the persons against whom the judgment is to be entered;[34] and, where it is annexed to the obligation to be confessed, both the obligation and the warrant of attorney must be signed by the same person.[35] Under some statutes it must also be attested by witnesses.[36] In the absence of a statute to the contrary,[37] the warrant need not be under seal.[38]

Time of execution. It is not necessary that the warrant of attorney should be given at the same time with the note, bond, or other evidence of debt.[39] At common law, a warrant of attorney to confess judgment may be executed before the bringing of the action in which the judgment is to be confessed,[40] but under some statutes a power of attorney to confess judgment, made before action brought, is void;[41] but such a statute does not invalidate a warrant of attorney given after the suit has commenced.[42]

Executing power as part of obligation. Under some statutes the warrant or power of attorney to confess judgment must be conferred by some proper instrument distinct from that containing the evidence of the debt or obligation for which the judgment is confessed.[43] In the absence of such a statutory restriction the warrant or power of attorney may be attached to, or incorporated in, the note, bond, or other obligation,[44] and for purposes of construction they are to be regarded as one instrument.[45] A power of attorney to confess judgment may be incorporated in, or attached to, a promissory note, the condition being the nonpayment of

31. Ill.—Brown v. Atwood, 224 Ill. App. 77.
34 C.J. p 105 note 99.

Where amount is fixed by law or parties' agreement, claim is liquidated.—Monarch Refrigerating Co. v. Farmers' Peanut Co., C.C.A.N.C., 74 F.2d 790, certiorari denied Farmers Peanut Co. v. Monarch Refrigerating Co., 55 S.Ct. 643, 295 U.S. 732, 79 L.Ed. 1680.

Fact that payments may be made before maturity does not avoid confession.—Monarch Refrigerating Co. v. Farmers' Peanut Co., C.C.A.N.C., 74 F.2d 790, certiorari denied Farmers Peanut Co. v. Monarch Refrigerating Co., 55 S.Ct. 643, 295 U.S. 732, 79 L.Ed. 1680.

32. Del.—Roman Auto Co. v. Miller, 95 A. 654, 28 Del. 586.
Pa.—Automobile Banking Corporation v. Duffy-Mullen Motor Co., 85 Pa.Super. 296—Longacre v. Breisch, 22 Pa.Dist. & Co. 271, 34 Sch.L.R. 149, 2 Sch.Reg. 64.

33. Cal.—Siskiyou County Bank v. Hoyt, 64 P. 118, 132 Cal. 81.
34 C.J. p 105 note 2.

34. N.Y.—Shenson v. I. Shainin & Co., 276 N.Y.S. 881, 243 App.Div. 638, affirmed 198 N.E. 407, 268 N.Y. 567.
Pa.—National F. O. B. Auction Co. v. United Produce Co., 7 Pa.Dist. & Co. 334, 73 Pittsb.Leg.J. 927, 39 York Leg.Rec. 139.
34 C.J. p 105 note 3.

35. Pa.—Liberty Grotto No. 1 S. & D. A. A. v. Meade, 11 Pa.Co. 340.

36. La.—Bass v. Barthelemy, 64 So. 126, 134 La. 819.
34 C.J. p 105 note 6.

37. Del.—Rhoads v. Mitchell, Super., 47 A.2d 174—Slaughter v. Provident Savings Bank of Preston, Md., 80 A. 243, 2 Boyce 333.

38. Va.—Bank of Chatham v. Arendall, 16 S.E.2d 352, 172 Va. 183—**Corpus Juris cited in** Johnson v. Alvis, 165 S.E. 489, 159 Va. 229.
34 C.J. p 105 note 7.

39. Mich.—Trombly v. Parsons, 10 Mich. 272.
N.J.—Burroughs v. Condit, 6 N.J. Law 300.

40. Fla.—**Corpus Juris cited in** Carroll v. Gore, 143 So. 633, 636, 106 Fla. 582, 89 A.L.R. 1495.
Va.—Virginia Ins. Co. v. Barley, 16 Gratt. 363, 57 Va. 363.

41. Fla.—Carroll v. Gore, 143 So. 633, 106 Fla. 582, 89 A.L.R. 1495.
34 C.J. p 106 note 18.

42. Ky.—Ward v. Curcier, 1 Litt. 202.

43. Ind.—Paulausky v. Polish Roman Catholic Union of America, 39 N.E.2d 440, 219 Ind. 441—Egley v. T. B. Bennett & Co., 145 N.E. 830, 196 Ind. 50, 40 A.L.R. 436.
34 C.J. p 105 note 10.

Purpose
A statute invalidating contract giving power of attorney with authority to confess judgment on instrument is intended to prevent judgment from being taken without service of process and by virtue of power of attorney executed in advance, but is not intended to enable person to escape payment of honest debt.—Peoples Nat. Bank & Trust Co. v. Pora, 9 N.E.2d 83, 212 Ind. 468, 111 A.L.R. 1402.

Statute is penal and must be construed strictly.—Simpson v. Fuller, 51 N.E.2d 870, 114 Ind.App. 583.

Statute prospective
N.M.—Hot Springs Nat. Bank v. Kenney, 48 P.2d 1029, 39 N.M. 428.

Negotiability not affected
Statute requiring instrument authorizing attorney to confess judgment to be distinct from instrument evidencing demand was not repealed by enactment of negotiable instruments law declaring that provision authorizing confession of judgment should not render instrument nonnegotiable, since such statutory provisions were not conflicting.—Keyes v. Peterson, 260 N.W. 518, 194 Minn. 361.

Confession incomplete without reference to note
Where instrument authorizing confession of judgment made note a part thereof by referring to "the foregoing note" and "said note" without which note the authorization had no meaning, because it did not state amount for which attorney was authorized to confess judgment, judgment entered by confession thereunder was void, since the authorization of confession was not "distinct instrument" as required by statute.—Keyes v. Peterson, 260 N.W. 518, 194 Minn. 361.

44. Fla.—**Corpus Juris cited in** Carroll v. Gore, 143 So. 633, 637, 106 Fla. 582, 89 A.L.R. 1495.
Ill.—Ross v. Wrightwood-Hampden Bldg. Corporation, 271 Ill.App. 22.
Mass.—Ferranti v. Lewis, 171 N.E. 232, 271 Mass. 186.
34 C.J. p 105 note 11.

45. Fla.—**Corpus Juris cited in** Carroll v. Gore, 143 So. 633, 637, 106 Fla. 582, 89 A.L.R. 1495.
Ill.—Sharp v. Barr, 234 Ill.App. 214.
34 C.J. p 105 note 12.

the note at maturity, the instrument being then commonly called a "judgment note."[46]

Omission or insertion of words; blanks. Where the meaning of the power can be ascertained from a consideration of the entire writing, the omission of words meant to be inserted, or the insertion of words evidently not intended, will not be permitted to defeat the intention of the parties.[47] In accordance with this principle, blanks in a warrant or power of attorney do not destroy its validity if enough remains to make it effective as a power, and if they do not render the instrument so ambiguous that its meaning cannot be determined.[48]

Filing. It is generally required, as essential to the jurisdiction of the court to enter the judgment, that the warrant of attorney shall be filed as a part of the record in the office of the clerk of the court in which the judgment is entered,[49] and no valid judgment can be entered until it is so filed.[50] It is not necessary that the original warrant be filed; the filing of a copy thereof is sufficient,[51] but a mere statement that the power was proved is not sufficient.[52] If the warrant is filed in the proper office before the perfecting of the judgment, the validity of the judgment is not affected by the fact that it is not properly placed on the file[53] or that the clerk neglects to indorse the filing on the warrant.[54]

§ 154. Construction and Operation of Warrant or Power

a. In general
b. For whom judgment may be entered
c. Against whom judgment may be entered
d. Place of exercising power
e. Time and conditions for exercising power
f. Who may exercise power
g. Debt or claim for which judgment may be confessed

a. In General

A warrant or power of attorney to confess judgment must be strictly construed and the authority conferred must be strictly pursued.

As a general rule a warrant or power of attorney to confess judgment is to be construed according to the rules which apply to other written contracts.[55] Such a warrant should be strictly con-

46. Ill.—Packer v. Roberts, 29 N.E. 668, 140 Ill. 9.
33 C.J. p 1041 note 82—34 C.J. p 106 note 13.

47. Ill.—Harris Trust & Savings Bank v. Neighbors, 222 Ill.App. 201.
34 C.J. p 106 note 20.

Note void if blanks filled

Promissory note containing blanks at time of delivery which, if filled, would make it cognovit note, cannot, in absence of evidence that parties when note was signed gave authority for filling blanks, be construed as cognovit note and hence invalid.—Fodor v. Popp, 178 N.E. 695, 93 Ind. App. 429.

48. Ill.—Harris Trust & Savings Bank v. Neighbors, 222 Ill.App. 201.
Pa.—William B. Rambo Building & Loan Ass'n v. Dragone, 156 A. 311, 305 Pa. 24—Park Trading Corp. v. Kline, Com.Pl., 21 Leh.L.J. 303.
34 C.J. p 106 note 21.

Authority to fill blanks

(1) Where a power of attorney to confess judgment contains a blank, the execution of the instrument and delivery thereof in such condition is authority to the holder to fill in the blank.—White v. Alward, 35 Ill.App. 195.

(2) In warrant of attorney to confess judgment, blank may be filled in by court, where it is clear what unintentionally omitted words were supposed to be.—William B. Rambo Building & Loan Ass'n v. Dragone, 156 A. 311, 305 Pa. 24.

(3) Delivery of an instrument with a space for the amount left blank is grant of authority to plaintiff to fill the blank with the amount due at the time when he desires to enter judgment.—International Advertising Syndicate v. Quaker Silk Mills, 8 Pa.Dist. & Co. 23, 18 Berks Co.L.J. 65.

49. N.M.—**Corpus Juris quoted in** Lockhart v. Rouault, 14 P.2d 268, 270, 36 N.M. 310.
Okl.—St. Louis-San Francisco Ry. Co. v. Boyne, 40 P.2d 1104, 170 Okl. 542.
34 C.J. p 106 note 23.

50. Pa.—Peerless Soda Fountain Service Co. v. Hummer, 19 Pa.Dist. & Co. 302, 46 York Leg.Rec. 201.
34 C.J. p 106 note 24.

51. N.M.—**Corpus Juris cited in** Hot Springs Nat. Bank v. Kenney, 48 P.2d 1029, 1030, 39 N.M. 428.
Pa.—Altoona Trust Co. v. Fockler, 165 A. 740, 311 Pa. 426—Harr v. Kelly, Com.Pl., 43 Lack.Jur. 221, 56 York Leg.Rec. 151—H. C. Frick Coke Co., for Use of v. Orzehowski, Com.Pl., 24 West.Co.L.J. 191.
34 C.J. p 106 note 25.

Production of original

While there might be some question as to the validity of a judgment if it were confessed on a copy of warrant of attorney, and on demand of defendant or the court the original instrument were not produced, there can be no question as to the validity of the judgment after the original has been filed with the court.—Commonwealth v. Dibble, 41 Pa.Dist. & Co. 206, 50 Dauph.Co. 310.

52. Ill.—Durham v. Brown, 24 Ill. 93.

53. N.Y.—Manufacturers' & Mechanics' Bank of the Northern Liberties in the Co. of Philadelphia v. St. John, 5 Hill 497.

54. Ark.—Thompson v. Foster, 6 Ark. 208.

55. Ill.—Farmers' Exchange Bank of Elvaston v. Sollars, 187 N.E. 289, 353 Ill. 224—People v. Cody Trust Co., 23 N.E.2d 170, 301 Ill. App. 580—Webster Grocery Co. v. Gammel, 1 N.E.2d 890, 285 Ill.App. 277.
N.J.—American Auto Finance Co. v. Miller, 7 A.2d 828, 123 N.J.Law 1.
Pa.—William B. Rambo Building & Loan Ass'n v. Dragone, 156 A. 311, 305 Pa. 24—Stucker v. Shumaker, 139 A. 114, 290 Pa. 348—Automobile Finance Co. v. Varner, Com. Pl., 90 Pittsb.Leg.J. 169.
34 C.J. p 106 note 29.

Conflict between written and printed portions

Where a printed blank is used, written portions therein will have greater weight in interpreting the instrument than the printed, if the two portions are not harmonious.—

strued[56] against the party in whose favor it is given,[57] and the authority thereby conferred must be strictly pursued, and cannot be extended by implication or inference beyond the limits expressed in the instrument.[58] A substantial departure from the authority conferred will render the confession void,[59] but this rule has its reasonable limitations, and must not be applied with such strictness as to defeat the obvious intention of the parties and make the power inoperative.[60]

As waiver or release. As a general rule a warrant or power of attorney by its own terms either includes, or operates as, a waiver of process,[61] and authorizes a judgment to be confessed in accordance with the power without notice to the grantor.[62] Where the warrant of attorney expressly waives or releases all errors which intervene in the entering of a judgment, it operates to waive or release all errors in the warrant and in the proceedings thereunder,[63] except such as go to the lack

American Express Co. v. Pinckney, 29 Ill. 392—34 C.J. p 107 note 35.

Where wording of warrant is clear, resort may not be had to any other part of note for purpose of construing the warrant; but where warrant is subject to construction the whole instrument will be looked to in order to glean its meaning.—Irwin v. Rawling, Mo.App., 141 S.W.2d 223.

Perforated document

Where conditional sales contract and bond and warrant were printed on the same sheet of paper with a line of perforations between them to facilitate physical separation, the two instruments were separate contracts and any obligation under the contract of conditional sale to resell in order to lay the foundation of a suit for deficiency thereunder was irrelevant to the definite and unconditional obligation to pay according to the terms of the bond.—Fidelity Acceptance Corporation v. Alloway, 23 A.2d 294, 127 N.J.Law 450.

Modification agreement

Original written lease and separate instrument reducing monthly rental but providing that all other terms, etc., of lease should remain in full effect must be considered together and fact that they were separate instruments did not preclude entry of judgment by confession under power of attorney contained in original lease for rent computed under modification agreement.—Davidson v. R. G. Lydy Parking Co., 57 N.E.2d 219, 324 Ill.App. 84.

56. U.S.—Nardi v. Poinsatte, D.C. Ind., 46 F.2d 347—Bower v. Casanave, D.C.N.Y., 44 F.Supp. 501—National Coal & Coke Co. v. McElvain, D.C.Tex., 21 F.Supp. 338.
Del.—Rhoads v. Mitchell, Super., 47 A.2d 174.
Ill.—Hughes v. First Acceptance Corporation, 260 Ill.App. 176.
Md.—John B. Colt Co. v. Wright, 159 A. 743, 162 Md. 387.
Mich.—Gordon v. Heller, 260 N.W. 156, 271 Mich. 240, certiorari denied 56 S.Ct. 140, 296 U.S. 619, 80 L.Ed. 440.
Mo.—Irwin v. Rawling, App., 141 S.W.2d 223—George Edw. Day Sons v. Robb, 139 S.W.2d 533, 235 Mo. App. 884, certiorari quashed State ex rel. Robb v. Shain, 149 S.W.2d 812, 347 Mo. 928.
N.M.—**Corpus Juris cited in** Lockhart v. Rouault, 14 P.2d 268, 270, 36 N.M. 310.
Ohio.—Saulpaugh v. Born, 154 N.E. 166, 22 Ohio App. 275—Kinsman Nat. Bank v. Jerko, 25 Ohio N.P., N.S., 445.
Pa.—Baldwin v. American Motor Sales Co., 163 A. 507, 309 Pa. 275—William B. Rambo Building & Loan Ass'n v. Dragone, 156 A. 311, 305 Pa. 24—Deibert v. Rhodes, 140 A. 515, 291 Pa. 550—Hogsett v. Lutrario, 13 A.2d 902, 140 Pa.Super. 419—Hooper to Use of v. Ocker, 50 Pa.Dist. & Co. 390—Maricic v. Slesser, 44 Pa.Dist. & Co. 693, 52 Dauph.Co. 185—Jasuta v. Zaremba, Com.Pl., 47 Lack.Jur. 157—Burgunder v. Cerceo, Com.Pl., 91 Pittsb.Leg.J. 576.
Va.—Bank of Chatham v. Arendall, 16 S.E.2d 852, 178 Va. 183.
34 C.J. p 107 note 30—6 C.J. p 646 note 89.

57. Colo.—Stewart v. Public Industrial Bank, 277 P. 782, 85 Colo. 546.
Ill.—Preisler v. Gulezynski, 264 Ill. App. 12.
Ohio.—Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445.
Pa.—Baldwin v. American Motor Sales Co., 163 A. 507, 309 Pa. 275—William B. Rambo Building & Loan Ass'n v. Dragone, 156 A. 311, 305 Pa. 24.
34 C.J. p 107 note 31.

58. U.S.—Nardi v. Poinsatte, D.C. Ind., 46 F.2d 347.
Ill.—Holmes v. Partridge, 31 N.E.2d 948, 375 Ill. 521—Wells v. George W. Durst Chevrolet Co., 173 N.E. 92, 341 Ill. 108—McFadden v. Lewis, 273 Ill.App. 343—Berlin v. Udell Printing Co., 271 Ill.App. 464—Hymen v. Anschicks, 270 Ill.App. 202—Doss v. Evans, 270 Ill.App. 55.
Ohio.—Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445.
Pa.—Beers v. Fallen Timber Coal Co., 161 A. 409, 307 Pa. 261—William B. Rambo Building & Loan Ass'n v. Dragone, 156 A. 311, 305 Pa. 24—Boggs v. Levin, 146 A. 533, 297 Pa. 131—Dime Bank & Trust Co. of Pittston v. Manganiello, 31 A.2d 564, 152 Pa.Super. 270—Jordan v. Kirschner, 94 Pa.Super. 252—Hooper to Use of v. Ocker, 50 Pa.Dist. & Co. 390—Jasuta v. Zaremba, Com.Pl., 47 Lack.Jur. 157—Yellow Mfg. Credit Corporation v. Rooney, Com.Pl., 9 Sch.Reg. 119—Lawton v. Garrett, Com.Pl., 22 Wash.Co. 193.
W.Va.—Perkins v. Hall, 17 S.E.2d 795, 123 W.Va. 707.
34 C.J. p 107 note 32.

Damages; rent

Lease provision authorizing lessor to confess judgment for damages for breach of covenants did not authorize confession of judgment for rent for balance of term payable in advance.—General Realty Co. v. Gold, 142 A. 279, 293 Pa. 260.

Holdover

(1) Confession of judgment in lease does not authorize judgment for rent after expiration of term where the tenant holds over.—Weiss v. Danilczik, 262 Ill.App. 551.

(2) This rule applies only where the term definitely expires.—Thompson v. Carns, 93 Pa.Super. 575—Moorehead v. King, Com.Pl., 23 Erie Co. 366—Newswander v. Fox, Com.Pl., 86 Pittsb.Leg.J. 342.

59. N.M.—**Corpus Juris cited in** Lockhart v. Rouault, 14 P.2d 268, 270, 36 N.M. 310.
Ohio.—Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445.
Pa.—Beers v. Fallen Timber Coal Co., 161 A. 409, 307 Pa. 261—Essrig v. Greenburg, 5 Pa.Dist. & Co. 183.
34 C.J. p 107 note 33.

60. Ill.—First Nat. Bank v. Galbraith, 271 Ill.App. 240.
N.J.—Gotham Credit Corporation v. Powell, 38 A.2d 700, 22 N.J.Misc. 301.
34 C.J. p 107 note 34.

61. Ala.—Baggett v. Alabama Chemical Co., 47 So. 102, 156 Ala. 637.
Fla.—Carroll v. Gore, 143 So. 633, 106 Fla. 582, 89 A.L.R. 1495.
N.J.—Gotham Credit Corporation v. Powell, 38 A.2d 700, 22 N.J.Misc. 301.
34 C.J. p 108 note 46.

62. Ala.—Hutchinson v. Palmer, 40 So. 339, 147 Ala. 517.

63. Ill.—First Nat. Bank v. Royer, 273 Ill.App. 158.

of jurisdiction in the court to enter the judgment[64] or lack of power under the warrant to confess the judgment;[65] and it has been held that such a stipulation in a power of attorney is not abrogated by the opening of the judgment for the purpose of allowing defendant to present a defense.[66]

b. For Whom Judgment May Be Entered

Judgment may be confessed only in favor of the person specified in the warrant, who may be the holder or assignee of the obligation the warrant was given to secure.

The warrant of attorney should name or describe with reasonable certainty the person in whose favor the judgment is to be entered,[67] and judgment can be confessed in favor only of the person named or who, from a construction of the whole instrument, it is evident it was the intention that judgment should be confessed.[68]

Where a warrant of attorney attached to a bond or note authorizes a confession of judgment in favor of the assignee or holder thereof, the warrant is regarded as security and authorizes a confession of judgment in favor of one to whom the bond or note has been transferred, and who is the holder thereof at the time judgment is confessed,[69] although the note is not negotiable;[70] and a judgment confessed in favor of one who at the time is not the holder of the note is void.[71] Where the warrant does not specify the person in whose favor judgment may be confessed, it has been held that it authorizes the confession of a judgment in favor of the assignee or other legal holder of the bond,

Pa.—Kait v. Rose, 41 A.2d 750, 351 Pa. 560—Peerless Soda Fountain Service Co. v. Lipschutz, 101 Pa. Super. 563.
34 C.J. p 108 note 48.

64. Ill.—Krickow v. Pennsylvania Tar Mfg. Co., 87 Ill.App. 656.
Pa.—Peerless Soda Fountain Service Co. v. Lipschutz, 101 Pa.Super. 563—Advance-Rumely Thresher Co. v. Frederick, 98 Pa.Super. 560.

65. Pa.—Boggs v. Levin, 146 A. 533, 297 Pa. 131—Advance-Rumely Thresher Co. v. Frederick, 98 Pa. Super. 560—Marquette v. McFarland, Com.Pl., 33 Del.Co. 531—Benesch & Sons Co. v. Dunlap, Com.Pl., 41 Sch.L.R. 139—Noonan v. Hoff, Com.Pl., 57 York Leg.Rec. 113, affirmed R. S. Noonan, Inc., v. Hoff, 38 A.2d 53, 350 Pa. 295.
34 C.J. p 108 note 50.

66. Ill.—Freeman v. Counsell, 208 Ill.App. 333.
Certificate of no defense in nonnegotiable judgment note given for price of furnace was held not to estop makers setting up defense against assignee that payee failed to perform contract.—Standard Furnace Co. v. Roth, 156 A. 600, 102 Pa.Super. 341.

67. Ohio.—Drake v. Simpson, 11 Ohio Dec., Reprint, 354, 30 Cinc.L. Bul. 236.
34 C.J. p 108 note 52.
Alternative payees
A warrant of attorney, authorizing confession of judgment in favor of the legal holder of a note, authorized the entry of judgment in favor of one of the joint payees of the note.—Paluszewski v. Tomczak, 278 Ill.App. 245.

68. Ill.—Barkhausen v. Naugher, App., 64 N.E.2d 561—Mutual Realty v. Gagidis, 13 N.E.2d 248, 298 Ill.App. 619.
Pa.—Ulick v. Vibration Specialty Co., 35 A.2d 332, 348 Pa. 241—Boggs v. Levin, 146 A. 533, 297 Pa. 131—Hooper to Use of v. Ocker, 50 Pa. Dist. & Co. 390—Keystone Trust Co. v. Aaronson, Com.Pl., 55 Dauph. Co. 144—Soklove v. Lalitas, Com. Pl., 30 Del.Co. 370—Merchants Nat. Bank v. Smulovitz, Com.Pl., 28 Erie Co. 293—Brown v. Mondeau, Com. Pl., 39 Luz.Leg.Reg. 3—Commercial Alliance v. Kelly, Com.Pl., 38 Luz. Leg.Reg. 174—Burgunder v. Cerceo, Com.Pl., 91 Pittsb.Leg.J. 576—Benesch & Sons Co. v. Dunlap, Com.Pl., 41 Sch.L.R. 139.
W.Va.—Perkins v. Hall, 17 S.E.2d 795, 123 W.Va. 707.
34 C.J. p 108 note 53.
Agent
(1) Lease entered into by agent as lessor authorizing confession of judgment against lessee permits judgment in name of agent to use of owner of premises.—Boggs v. Levin, 146 A. 533, 297 Pa. 131.
(2) Where lease described lessor as agent and provided further that term "lessor" should include owner, and authorized owner to proceed in its own name to confess judgment, corporation not named in lease, but averring that it was true owner, was entitled to enter confession of judgment in its name.—Metropolitan Life Ins. Co. v. Associated Auctioneers, 177 A. 483, 117 Pa.Super. 242.
Heirs
Where there was nothing in lease authorizing warrant of attorney to confess judgment for rent, except in favor of the lessor, lessor's heirs could not, in the name of the lessor's administrators, exercise the warrant of attorney to confess judgment, since a warrant to confess a money judgment is not a "covenant that runs with the land," because it does not directly concern or touch the land.—Hogsett v. Lutrario, 13 A.2d 902, 140 Pa.Super. 419.
Judgment cannot be entered in favor of a stranger to the contract.—Ulick v. Vibration Specialty Co., 35 A.2d 332, 348 Pa. 241—Boggs v. Levin, 146 A. 533, 297 Pa. 131—Hogsett v. Lutrario, 13 A.2d 902, 140 Pa.Super. 419—DeBolt v. Fullem, Com.Pl., 8 Fay.L.J. 175.
Use-plaintiff
Where proper parties to agreement were joined as parties plaintiff, it was immaterial that use-plaintiffs were added.—Wilson v. Vincent, 150 A. 642, 300 Pa. 321.

69. Pa.—Oberlin v. Parry, 134 A. 460, 287 Pa. 224—Philadelphia Saving Fund Society v. Orloff, 37 Pa.Dist. & Co. 38—Marquette v. McFarland, Com.Pl., 33 Del.Co. 531—DeBolt v. Fullem, Com.Pl., 8 Fay.L.J. 175—Freeman v. Berger, Com.Pl., 45 Lack.Jur. 269—Bell v. Lawler, Com.Pl., 45 Lack.Jur. 181—South Side Bank & Trust Co. v. Scheuer, Com.Pl., 43 Lack.Jur. 95.
34 C.J. p 108 note 54.
Assignee does not stand in better position than original obligee; his exercise of power to confess judgment is subject to same conditions as though power were still in original obligee.—E. Z. Heating Co. v. Rubin, 163 A. 335, 107 Pa.Super. 105.
Assignment for benefit of creditors
Where note authorizing confession of judgment was transferred by payee to trustee pursuant to a deed of trust for benefit of payee's creditors, trustee stood in place of payee, and legal situation of parties with regard to note was same as though payee had entered judgment by confession on note against makers.—Foland v. Hoffman, Md., 47 A.2d 62.
Guarantor of note
Ill.—Cohn v. Kraus, 255 Ill.App. 391.

70. Mass.—Richards v. Barlow, 6 N. E. 68, 140 Mass. 218.

71. Pa.—Dime Bank & Trust Co. of Pittston v. Manganiello, 31 A.2d 564, 152 Pa.Super. 270.
34 C.J. p 108 note 56.

note, or obligation, at the time of confession;[72] but it has also been held that such a power of attorney is not negotiable, and that, when the bond or note is transferred, the power becomes invalid and inoperative.[73]

A warrant of attorney to confess judgment authorizes a confession in favor of the executor or administrator of the beneficiary of the power,[74] or of his legal representative, such as his trustee.[75]

c. Against Whom Judgment May Be Entered

Judgment may be confessed under a warrant of attorney against such persons only as the terms of the warrant authorize.

Judgment may be confessed, under a warrant of attorney, against such persons only as the terms of the warrant authorize[76] and who join in the execution of the warrant.[77] A power of attorney to confess judgment is not available against one who signs it, or the obligation secured, not as maker, but only in the character of a surety[78] or guarantor,[79] unless the terms of the warrant so provide.[80]

In case of joint debtors, who jointly execute the power of attorney, a judgment may be confessed thereon only against all the makers,[81] and not

72. Ill.—Sharp v. Barr, 234 Ill.App. 214.
Pa.—Gluck v. Polakoff, 17 Pa.Dist. & Co. 640—Bautsch, to Use of Schlear v. Bubbenmoyer, Com.Pl., 32 Berks Co.L.J. 233—DeBolt v. Fullem, Com.Pl., 8 Fay.L.J. 175.
34 C.J. p 109 note 57.

73. Ohio.—Spence v. Emerine, 21 N.E. 366, 46 Ohio St. 433, 15 Am.S.R. 634.
34 C.J. p 109 note 58.

74. Ohio.—Drake v. Simpson, 11 Ohio Dec., Reprint, 854, 30 Cinc.L.Bul. 236.
34 C.J. p 109 note 59.

75. Ohio.—Martin v. Belmont Bank, 13 Ohio 250.

Proof of authority

Power to confess judgment for voluntary association or assignees did not authorize recovery of judgment by individuals describing themselves as "trustees" of voluntary association, but not establishing right to exercise power.—Wells v. George W. Durst Chevrolet Co., 173 N.E. 92, 341 Ill. 108.

76. Pa.—Dime Bank & Trust Co. of Pittston v. O'Boyle, 6 A.2d 106, 334 Pa. 500—Southern Lime & Stone Co. v. Baker, 127 A. 221, 281 Pa. 587, amended 127 A. 764, 282 Pa. 204.
34 C.J. p 109 note 61.

Lessee's successor or assignee

(1) Assignee's agreement to perform lease was held not to authorize lessor to enter judgment by confession against assignee under warrant in original lease.—Ansley v. George Coal Mining Company, 88 Pa.Super. 40.

(2) Original lessee was a proper party against whom judgment by confession should have been entered in amicable action of ejectment pursuant to warrant of attorney contained in written lease even though lessee's assignee, who was not a party to lease and had signed no warrant of attorney, was in actual physical possession of the premises, regardless of whether such assignee of lease be considered an assignee or subtenant.—Kait v. Rose, 41 A.2d 750, 351 Pa. 560.

77. Pa.—McFadden v. Gohrs, 93 Pa.Super. 134—Indiana Land and Improvement Co. v. Ferrier Run Coal Co., 6 Pa.Dist. & Co. 33, 39 York Leg.Rec. 61.
34 C.J. p 109 note 62.

Execution through agent

Under statute, the prothonotary of a court of record may look beyond the instrument in which judgment is confessed and enter judgment against the person or persons who executed the instrument, and that does not mean that he may enter judgment only against persons who signed the instrument, but partners and principals whose agents have signed for them are included.—Jamestown Banking Co. v. Conneaut Lake Dock & Dredge Co., 14 A.2d 325, 339 Pa. 26.

Execution by corporation official

(1) A warrant of attorney in a note signed by corporation and by its president in his official capacity only, which authorized confession of judgment on note "against the undersigned," did not apply to president so as to make him individually liable, although his name appeared on back of note.—Dover Motors Corporation v. North & South Motor Lines, 198 A. 592, 8 W.W.Harr., Del., 467.

(2) A judgment by confession on corporate note which was signed on face thereof by corporation's president and was indorsed by the president personally, was not void because power of attorney did not authorize a confession of judgment against president under his contract of guaranty, where note contained warrant of attorney expressly authorizing entry of judgment against "makers, endorsers and guarantors," and by special contract of indorsement president not only became "a party to" but also adopted, agreed to accept, guaranteed, and assumed all terms, conditions and waivers "contained in the note on the reverse side hereof."—National Builders Bank of Chicago v. Simons, 31 N.E. 2d 269, 307 Ill.App. 552.

78. Ill.—Doss v. Evans, 270 Ill.App. 55.
34 C.J. p 109 note 70.

Joint maker or indorser

A warrant of attorney for confession of judgment contained in nonnegotiable note was binding on person whose name was signed on the back in blank, since status of such person was that of a joint maker notwithstanding position of signature.—Iglehart v. Farmers Nat. Bank of Annapolis, Md., 197 A. 133, 117 A.L.R. 667, affirmed 200 A. 833, 117 A.L.R. 672.

79. Colo.—Sidwell v. First Nat. Bank, 233 P. 153, 76 Colo. 519, 41 A.L.R. 1255.
Ill.—Sharpe v. Second Baptist Church of Maywood, 274 Ill.App. 374.

80. Md.—Johnson v. Phillips, 122 A. 7, 143 Md. 16.

Where indorser assented to all terms and conditions of note, provision in note for confession of judgment was applicable to both maker and indorser.—Rhoads v. National Bank of Cockeysville, 190 A. 750, 172 Md. 123.

81. Ill.—Duggan v. Kupitz, 22 N.E. 2d 392, 301 Ill.App. 230—Dulsky v. Lerner, 223 Ill.App. 228.
34 C.J. p 109 note 63.

Judgment on a partnership note signed in the firm name may properly be confessed against the firm and also against the members of the firm individually.—Brumbaugh v. Brumbaugh, 16 Pa.Dist. & Co. 281.

Waiver

Parties executing note, authorizing entry of judgment thereon after default, in consideration of loan to corporation by payee, who joined in execution thereof, waived objection to being sued jointly with payee, who was also plaintiff.—Koenig v. Curran's Restaurant & Baking Co., 159 A. 553, 306 Pa. 345.

against one alone;[82] and in case of the death of one of them judgment cannot be confessed against the survivors.[83] Where the obligation and warrant of attorney are joint and several, a joint judgment may be confessed against all the makers[84] or the survivors of them,[85] or a several judgment may be confessed against each maker.[86] A joint judgment cannot be confessed or entered on separate warrants.[87]

d. Place of Exercising Power

Unless restricted by the terms of the warrant, the authority to confess judgment may be exercised in a county or state other than that in which it is executed.

The power granted in a power of attorney to confess judgment may be exercised in a county or state other than that in which it is executed, where it is not restricted in this respect,[88] especially where it authorizes judgment thereon "in any court of record;"[89] but, where it is apparent from the face of the warrant that it is to be used only in a certain state, it cannot be used in another state.[90]

e. Time and Conditions for Exercising Power

A warrant or power of attorney to confess judgment can be exercised only at the time and on the occurrence of the conditions specified.

A judgment by confession under a warrant of attorney can be taken or entered only at such time as is authorized by the terms of the warrant,[91] and on the occurrence of the conditions specified in the warrant, such as defendant's default on the obligation the warrant was given to secure.[92] Where the warrant is without limit of time it has been

82. Ill.—Holmes v. Partridge, 31 N.E.2d 948, 375 Ill. 521—First Nat. Bank of Cullom v. Chandler, 35 N.E.2d 799, 311 Ill.App. 254—Duggan v. Kupitz, 22 N.E.2d 392, 301 Ill. App. 230—Dulsky v. Lerner, 223 Ill.App. 228.
34 C.J. p 109 note 64.

83. Ill.—Genden v. Bailen, 275 Ill. App. 382.
Ohio.—Saulpaugh v. Born, 154 N.E. 166, 22 Ohio App. 275.
34 C.J. p 109 note 65.
Death as revocation of power to confess judgment see infra § 156.

84. Md.—Iglehart v. Farmers Nat. Bank of Annapolis, 197 A. 133, 117 A.L.R. 667, affirmed 200 A. 833, 117 A.L.R. 672.
Pa.—Quandel v. Orff, Com.Pl., 4 Sch. Reg. 322.
34 C.J. p 109 note 66.

85. Ill.—Farmers' Exchange Bank of Elvaston v. Sollars, 187 N.E. 289, 353 Ill. 224—Nash v. Clark, 34 N.E.2d 876, 310 Ill.App. 437—People v. Cody Trust Co., 23 N.E. 2d 170, 301 Ill.App. 580.
Mo.—Irwin v. Rawling, App., 141 S. W.2d 223.
Ohio.—Frey v. Cleveland Trust Co., 55 N.E.2d 416, 143 Ohio St. 319.
Pa.—Williams v. Smith, 38 Pa.Dist. & Co. 283, 7 Sch.Reg. 74, 10 Som. Co.Leg.J. 38—South Side Bank & Trust Co. v. Scheuer, Com.Pl., 43 Lack.Jur. 95.
34 C.J. p 109 note 67.

86. U.S.—George D. Harter Bank v. Straus, C.C.Pa., 170 F. 489.
Ill.—Holmes v. Partridge, 31 N.E.2d 948, 375 Ill. 521—Smith v. Roberts, 24 N.E.2d 720, 303 Ill.App. 89—People v. Cody Trust Co., 23 N.E. 2d 170, 301 Ill.App. 580—Reitinger v. Carlson, 272 Ill.App. 104—Richman v. Menrath, 266 Ill.App. 1.
Ohio.—Saulpaugh v. Born, 154 N.E. 166, 22 Ohio App. 275.

87. Pa.—First Nat. Bank v. Kendrew, 160 A. 227, 105 Pa.Super. 142—Pasco Rural Lighting Co. v. Roland, 88 Pa.Super. 245.
34 C.J. p 109 note 69.

88. Md.—John B. Colt Co. v. Wright, 159 A. 743, 162 Md. 387.
34 C.J. p 109 note 72.

89. Pa.—William J. Ryan, Inc., to Use v. Bodek, 10 Pa.Dist. & Co. 520.
34 C.J. p 109 note 73.

90. Ohio.—Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445.
34 C.J. p 109 note 74.

91. Ill.—Bankers Bldg. v. Bishop, 61 N.E.2d 276, 326 Ill.App. 256, certiorari denied Bishop v. Bankers Bldg., 66 S.Ct. 1352.
Pa.—Seltzer v. Novor & Israel, 12 Pa.Dist. & Co. 551—Jasuta v. Zaremba, Com.Pl., 47 Lack.Jur. 157.
34 C.J. p 109 note 76.

92. Ill.—Kaspar American State Bank v. Oul Homestead Ass'n, 22 N.E.2d 785, 301 Ill.App. 326—Sibenaller v. Smock, 283 Ill.App. 452—Berlin v. Udell Printing Co., 271 Ill.App. 464—Baering v. Epp, 247 Ill.App. 51.
Md.—Cooke v. Real Estate Trust Co., 22 A.2d 554, 180 Md. 133.
N.J.—Levin v. Wenof, 146 A. 789, 7 N.J.Misc. 603.
Pa.—Mellon v. Ritz, 2 A.2d 699, 332 Pa. 97—Wilson v. Vincent, 150 A. 642, 300 Pa. 321—Markofski v. Yanks, 146 A. 569, 297 Pa. 74—I. J. Allen Building & Loan Ass'n v. Barg, 183 A. 57, 120 Pa.Super. 487—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa. Super. 402—Commonwealth v. Eclipse Literary and Social Club, 178 A. 341, 117 Pa.Super. 339—Grant Const. Co., for Use of Home Credit Co., v. Stokes, 167 A. 643, 109 Pa.Super. 421—Arata v. Wright, 101 Pa.Super. 575—Romm v. Lobosco, 95 Pa.Super. 373—Goodis v. Stehle, 87 Pa.Super. 336—Baldwin v. American Motor Sales Co., 19 Pa.Dist. & Co. 350—Orner v. Hurwitch, 12 Pa.Dist. & Co. 403, affirmed 97 Pa.Super. 263—Ginter v. Bloser, 47 Pa.Dist. & Co. 660—Commonwealth v. Dibble, 41 Pa.Dist. & Co. 206, 50 Dauph.Co. 310—Siddall v. Burke, Com.Pl., 29 Del.Co. 530—Kuhns v. Chaffee, Com.Pl., 24 Erie Co. 6—Automobile Finance Co. v. Varner, 90 Pittsb.Leg.J. 169.
34 C.J. p 110 notes 77, 86—8 C.J. p 424 note 99.

Acceleration clause

(1) Entering judgment by confession on due date accelerated by nonpayment, according to provision therein, was proper.
Colo.—Axelson v. Dailey Co-op. Co., 298 P. 957, 88 Colo. 555.
Pa.—Baldwin v. American Motor Sales Co., 163 A. 507, 309 Pa. 275—Grant Const. Co., for Use of Home Credit Co., v. Stokes, 167 A. 643, 109 Pa.Super. 421.
34 C.J. p 110 note 86 [a].

(2) Where lease drawn by landlords contained provision for accelerating entire rent on certain contingencies, presumption exists that acceleration was not intended, with respect to provision authorizing confession of judgment on tenant's failure to pay installments of rent due and silent on acceleration.—Baldwin v. American Motor Sales Co., supra.

(3) Bailor retaking property under bailment lease authorizing confession of judgment in case of default can recover judgment only for installments of rental unpaid at time property is retaken.—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa.Super. 402.

After banking hours

Where the power is to confess judgment immediately on default, on a note payable at a certain bank on a certain day, judgment may be entered after banking hours on the

held that there is no necessity to await the maturity of the obligation before the entry of judgment,[93] although execution cannot issue until there has been a default in payment,[94] especially where the power contains a provision to that effect;[95] but it has also been held that judgment cannot be confessed under such a power before the maturity of the obligation.[96] If the warrant authorizes a confession "at any term" of court, judgment may be entered at the present term.[97] It has been held that power to confess judgment on a debt or claim not yet due must be given in clear and precise terms,[98] but there is also authority holding that judgment may be entered on a judgment note prior to maturity unless there is a restrictive provision.[99]

In many jurisdictions it has been held that a judgment cannot be confessed on a warrant of attorney executed more than a specified time before, unless an affidavit is filed showing that the maker is alive and that some portion of the debt is still due, and a rule of court, or order of a judge in vacation, is obtained granting leave to enter judgment;[1] and in some jurisdictions, after twenty years without judgment being entered, it will be presumed that the warrant of attorney has been revoked;[2] but it has been held that this rule does not apply where the power is coupled with an interest and supported by a consideration, and is necessary to effectuate the security to which it is attached.[3] Moreover, the rule referred to does not go to the question of the power but to the regularity of the execution of it;[4] it is a rule of presumption which, like other presumptions, may be rebutted.[5]

day named.—Osborn v. Rogers, 20 N. E. 365, 112 N.Y. 573.

Place for demand

A lease provision authorizing the confession of a judgment in ejectment for default in payment of rent is available, where the lease does not provide a place at which the rent is payable, only if the landlord makes demand for the precise rent due, on the very day on which it becomes due, and on the most notorious place in the land.—Shapiro v. Malarkey, 122 A. 341, 278 Pa. 78, 29 A.L.R. 1358.

Failure of purchasers of land to pay taxes was held not to authorize confession of judgment, as default in payment of principal or interest.—Hurley v. Henton, 142 A. 271, 293 Pa. 289.

Demand note

Demand note containing warrant of attorney to confess judgment, stipulating that judgment should not be entered except in default of payment, authorized entry of judgment only after demand followed by default in payment and on averment of such demand and default, but demand note which did not require that judgment be entered only after default in payment of note could be entered in judgment before default, since entry of judgment is demand.—P. Minnig Co. v. Carter, 173 A. 726, 113 Pa.Super. 231.

Default by lessee

Where lessees, under a lease providing that in case the property became subject to levy the whole rent should be payable, delivered automobile to lessor for repairs, and while in lessor's possession it was seized in replevin by third persons claiming right to possession paramount to the lessor, and assignee of the lease obtained possession of the automobile and entered judgment against defendants by confession, alleging the seizure in replevin as default under the lease, the assignee's right to enter judgment must be founded on a default by lessee, and not on acts or default by lessor, and, the lessee not being in default, assignee cannot confess judgment against him.—Ferris Motors Corporation v. Lebegern, 120 A. 894, 276 Pa. 395.

Separate contracts

Where it appeared that conditional sales contract covering automobile was assigned to obligee of bond and warrant, although the automobile was repossessed by the assignee, apparently at the instance of the buyer, and there was nothing to show that the automobile had been resold, the assignee could confess judgment on the bond and warrant in view of the fact that the two instruments were separate contracts.—Fidelity Acceptance Corporation v. Alloway, 23 A.2d 294, 127 N.J.Law 450—Ryba v. Atlas Automobile Finance Corporation, 8 A.2d 447, 121 N.J.Law 478.

93. Del.—Rhoads v. Mitchell, Super., 47 A.2d 174.
Ill.—First Nat. Bank v. Galbraith, 271 Ill.App. 240—Handley v. Moburg, 266 Ill.App. 356—Great Western Hat Works v. Pride Hat Co., 224 Ill.App. 249.
Md.—Hart v. Hart, 166 A. 414, 165 Md. 77—Johnson v. Phillips, 122 A. 7, 143 Md. 16.
Pa.—Dukas v. Cohen, Com.Pl., 33 Luz.Leg.Reg. 163.
34 C.J. p 110 note 82.
Right to confess judgments on debts which are not matured see supra § 139.

Immediately on execution

If the warrant authorizes a confession "at any time hereafter," judgment may be entered immediately on the execution of the power.—St. Clair v. Goldie, 244 Ill.App. 357—34 C.J. p 110 note 79.

94. Pa.—Integrity Title Insurance, Trust, Safe-Deposit Co. v. Rau, 26 A. 220, 153 Pa. 488—Miners Sav. Bank of Pittston v. Falzone, Com.Pl., 35 Luz.Leg.Reg. 315.
34 C.J. p 110 note 83.

95. Iowa.—Cuykendall v. Doe, 105 N.W. 698, 129 Iowa 453, 113 Am. S.R. 472, 3 L.R.A.,N.S., 449.
Pa.—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454—Shapiro v. Malarkey, 122 A. 341, 278 Pa. 78, 29 A.L.R. 1358.

96. Wis.—Reid v. Southworth, 36 N. W. 866, 71 Wis. 288—Sloane v. Anderson, 13 N.W. 684, 15 N.W. 21, 57 Wis. 123.

97. Pa.—Montelius v. Montelius, Brightly 79.

98. Ill.—Webster Grocery Co. v. Gammel, 1 N.E.2d 890, 285 Ill.App. 277—Harris v. Bernfeld, 250 Ill. App. 446.
34 C.J. p 110 note 81.

99. Pa.—Mellon v. Ritz, 2 A.2d 699, 332 Pa. 97—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454—Chubb v. Kelly, 80 Pa. Super. 487—Commonwealth v. Dibble, Pa.Com.Pl., 41 Pa.Dist. & Co. 206, 50 Dauph.Co. 310—Lillis v. Reed, Com.Pl., 21 Erie Co. 8—Com. ex rel. Argyle v. Jones, Com.Pl., 30 North.Co. 95.

1. Pa.—Grammes v. Haltzel, Com. Pl., 19 Leh.L.J. 275.
Wis.—Halfhill v. Malick, 129 N.W. 1086, 145 Wis. 200.
34 C.J. p 110 note 87.
Claim barred by limitations see infra § 156.

2. Del.—Parsons v. Cannon, 88 A. 470, 27 Del. 298.

3. Wis.—Halfhill v. Malick, 129 N. W. 1086, 145 Wis. 200.

4. Wis.—Halfhill v. Malick, supra.

5. Ill.—Mitchell v. Comstock, 27 N. E.2d 620, 305 Ill.App. 360.
Wis.—Halfhill v. Malick, 129 N.W. 1086, 145 Wis. 200.

In vacation. A warrant for the confession of judgment "as of any term," does not authorize judgment to be entered up in vacation;[6] and it has been held that a warrant to confess judgment in any court of record does not authorize a confession of judgment before a clerk in vacation,[7] but if the warrant is indefinite as to the time, or does not refer to the terms of the court, the judgment may be confessed in vacation as well as in term time.[8]

f. Who May Exercise Power

A warrant or power of attorney to confess judgment can generally be exercised only by the person authorized in the warrant.

The authority of a person confessing a judgment for another must appear on the record;[9] and a warrant of attorney to confess judgment should regularly designate, either by name or description, the person who is authorized to make the confession of judgment,[10] and only the person so designated or described can do so.[11] Under a statute so providing, however, a prothonotary may enter a judgment by confession on the instrument containing the warrant without the necessity of an attorney appearing for defendant,[12] but such a statute does not prevent a judgment being confessed in the usual way by the person empowered under the warrant.[13] The person designated as attorney in the power of attorney need not be the person to whom the claim or obligation confessed runs,[14] nor is it necessary that he should be an attorney at law,[15] nor is it necessary that a particular attorney be named or described; the warrant may run to "any attorney" of a particular court or to "any attorney of any court of record,"[16] or to any attorney selected by the creditor[17] or to any prothonotary or clerk;[18] and it has been held that in such a case defendant has no standing to be first heard before entry of judgment.[19] Where the power runs to any attorney, it may be exercised by two persons, acting jointly or as partners, both being attorneys

6. Va.—Bank of Marion v. Spence, 154 S.E. 488, 155 Va. 51.
34 C.J. p 111 note 93.

7. Ind.—Wieler v. Diver, 134 N.E. 495, 78 Ind.App. 26.
34 C.J. p 111 note 94.

8. Ill.—Long v. Coffman, 230 Ill. App. 527.
Iowa.—Cuykendall v. Doe, 105 N.W. 698, 129 Iowa 453, 113 Am.S.R. 472, 8 L.R.A.,N.S., 449.
34 C.J. p 111 note 95.

9. N.J.—Cade v. Young, 8 N.J.Law 369—Campbell v. Cooper, 6 N.J. Law 142.

10. Pa.—Vogt Farm Meat Products Co. v. Egan, 8 Pa.Dist. & Co. 550, 22 Sch.L.R. 220, 74 Pittsb.Leg.J. 504.
34 C.J. p 111 note 97.

11. Tex.—Grubbs v. Blum, 62 Tex. 426.

12. Pa.—R. S. Noonan, Inc., v. Hoff, 38 A.2d 53, 350 Pa. 295—Commonwealth v. J. & A. Moeschlin, Inc., 170 A. 119, 314 Pa. 34—Deibert v. Rhodes, 140 A. 515, 291 Pa. 550—Hefer v. Hefner, 95 Pa.Super. 551—Miller v. Desher, 12 Pa.Dist. & Co. 315, 41 Lanc.L.Rev. 635—William J. Ryan, Inc., to Use v. Bodek, 10 Pa.Dist. & Co. 520—Union Acceptance Co. v. Grant Motor Sales Co., 5 Pa.Dist. & Co. 407, 23 Luz.Leg.Reg. 69, 2 Som.Co.Leg.J. 260, 39 York Leg.Rec. 141—Steelton Finance Co. v. Kireta, Com. Pl., 46 Dauph.Co. 426—Morris v. Chevalier, Com.Pl., 20 Leh.L.J. 133—Citizens Bank of Wind Gap v. Sparrow, Com.Pl., 27 North.Co. 213—Mutual Loan Co. v. Steiger, Com. Pl., 48 Lanc.L.Rev. 60, 56 York Leg.Rec. 13.
34 C.J. p 120 note 74.

Authority of nonjudicial officers to enter judgment by confession see infra § 161 b.

Prothonotary may enter judgment but has not power to confess judgment
Pa.—Melnick v. Hamilton, 87 Pa.Super. 575.

Strict compliance with statute
(1) The mode of procedure designated in the statute for entering judgment on a note by prothonotary is mandatory.—Oberlin v. Parry, 134 A. 460, 287 Pa. 224.

(2) The statute must be strictly construed.—Dime Bank & Trust Co. of Pittston v. O'Boyle, 6 A.2d 106, 334 Pa. 500—Oberlin v. Parry, supra.

(3) The instrument, to authorize entry of judgment by the prothonotary, must expressly or by clearest implication contain provisions bringing it within the statute.—Romberger v. Romberger, 139 A. 159, 290 Pa. 454—Oberlin v. Parry, supra.

13. Pa.—R. S. Noonan, Inc., v. Hoff, 38 A.2d 53, 350 Pa. 295.

14. N.J.—Burroughs v. Condit, 6 N. J.Law 300.

15. Pa.—Melnick v. Hamilton, 87 Pa. Super. 575—Jones & Sons v. Piontkowski, 37 Pa.Dist. & Co. 504, 33 Luz.Leg.Reg. 329.
Va.—Virginia Valley Ins. Co. v. Barley, 16 Gratt. 363, 57 Va. 363.

16. Cal.—Carlton v. Miller, 299 P. 738, 114 Cal.App. 272.
Fla.—Corpus Juris cited in Carroll v. Gore, 143 So. 633, 637, 106 Fla. 582, 89 A.L.R. 1495.
Ohio.—Dayton Morris Plan Bank v. Graham, 191 N.E. 817, 47 Ohio App. 310.
Pa.—Shure v. Goodimate Co., 153 A. 757, 302 Pa. 457—Hebrew Loan Society of Wyoming Valley v. Margolis, Com.Pl., 33 Luz.Leg.Reg. 101.
34 C.J. p 111 note 2.

Attorney-client relationship
The relationship existing between one who authorizes an entry of judgment by confession by warrant of attorney and the attorney confessing judgment is not the confidential one existing between attorney and client, and it is not even necessary that the one so authorizing shall know the attorney.—Withers v. Starace, D.C. N.Y., 22 F.Supp. 773.

Person exercising the power must be an attorney or an attorney of a court of record where the warrant authorizes only such person to exercise the power.—Kirk Johnson & Co. v. Wilson, 18 Pa.Dist. & Co. 672.

17. Pa.—Shure v. Goodinate Co., 14 Pa.Dist. & Co. 209, 79 Pittsb.Leg. J. 16, affirmed Shure v. Goodimate Co., 153 A. 757, 302 Pa. 457.
Tex.—Mikeska v. Blum, 63 Tex. 44.

Plaintiff's attorney
A warrant of attorney authorizing confession of judgment by any New Jersey attorney authorized confession of judgment by a New Jersey attorney representing the plaintiff.—Withers v. Starace, D.C.N.Y., 22 F. Supp. 773.

Power of attorney to any attorney or officer of creditor corporation was not too general or indefinite.—Clay v. People's Finance & Thrift Co., 25 S.W.2d 578, 160 Tenn. 390.

18. Pa.—Auto Transit Co. v. Koch, 71 Pa.Super. 171.

19. Pa.—Mulhearn v. Roach, 24 Pa. Super. 483.

of the court,[20] or by the payee of the note, being an attorney, in favor of the holder to whom he has transferred it.[21]

g. Debt or Claim for Which Judgment May Be Confessed

Judgment may be confessed only for the debt, liability, or claim authorized by the warrant or power of attorney.

The judgment may be confessed only for the debt, liability, or claim set forth or described in the warrant or accompanying obligation;[22] and for such amount only, and not for any greater or smaller amount than that specified in the warrant or in the note or other obligation which it secures;[23] but, where a judgment entered under a power of attorney is erroneously confessed for an excessive amount, it is void only as to the excess, and not in toto,[24] unless such excess is the result of fraud.[25] A judgment entered on a bond and warrant of attorney is not void, but voidable only, where the warrant authorizes a confession of judgment for the sum mentioned in the condition of the bond and the judgment is entered for the amount of the penalty,[26] or where the warrant is general, and judgment is entered for a specified sum, without referring to the bond,[27] or where the warrant authorizes judgment for the amount of the penalty, and judgment is entered for the amount of the real debt;[28] and if in such case the record shows on its face the amount of the penalty, and the amount owing is not denied, and there is no other defense, the court will permit the record to be amended so as to conform to the proper practice.[29]

Where the warrant authorizes the confession of judgment for "such amount as may be found due" on the obligation secured, judgment may be entered for the amount actually due;[30] but the power of the attorney is not complete until the amount due has been adjusted.[31] Where the provisions of the power are severable, and judgment only for an ascertained amount is confessed, such judgment is not invalid for the reason that the power of attorney provides also for the confession of judgment for an unliquidated amount.[32]

Interest and costs. Where the warrant authorizes it, the judgment may include interest[33] and costs.[34]

Attorney's fees. It is generally held that a warrant of attorney to confess judgment may contain a stipulation for the payment of attorney's fees,[35] and a judgment entered on such warrant not only may, but should, include proper attorney's fees,[36] except where the fees have not been earned.[37] A

20. Ill.—Kuehne v. Goit, 54 Ill.App. 596.
Ind.—Patton v. Stewart, 19 Ind. 233.

21. Tex.—Parker v. Poole, 12 Tex. 86.

22. Ill.—McFadden v. Lewis, 273 Ill.App. 343—Stead v. Craine, 256 Ill.App. 445.
Ohio.—Swisher v. Orrison Cigar Co., 171 N.E. 92, 122 Ohio St. 195.
Pa.—Finance & Guaranty Co. v. Mittleman, 93 Pa.Super. 277—Seltzer v. Novor & Israel, 12 Pa.Dist. & Co. 551—International Advertising Syndicate v. Quaker Silk Mills, 8 Pa.Dist. & Co. 23, 18 Berks Co.L.J. 65—Pestcoe v. Erlick, 7 Pa.Dist. & Co. 589—Hunter v. Wertz, Com.Pl., 91 Pittsb.Leg. J. 348, 57 York Leg.Rec. 111—Noonan v. Hoff, Com.Pl., 57 York Leg.Rec. 113, affirmed R. S. Noonan, Inc., v. Hoff, 38 A.2d 53, 350 Pa. 295.
34 C.J. p 111 note 10.
Warrant to confess judgment in ejectment
Pa.—Shappell v. Himelstein, 133 A. 644, 121 Pa.Super. 418—Koruzo v. Ritenauer, 101 Pa.Super. 558—Anderson v. Dobkin, 81 Pa.Super. 416—Nash Sales & Service v. Broody, Com.Pl., 33 Luz.Leg.Reg. 158, 9 Som.Co.L.J. 326—Klein v. Lasko, Com.Pl., 86 Pittsb.Leg.J. 457—Newswander v. Fox, Com.Pl., 86 Pittsb.Leg.J. 342—Graven v. Hand, Com.Pl., 9 Sch.Reg. 154.

23. Pa.—International Advertising Syndicate v. Quaker Silk Mills, 8 Pa.Dist. & Co. 23, 18 Berks Co.L.J. 65—Empire Furniture Co. v. Masaitis, Com.Pl., 38 Luz.Leg.Reg. 409.
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
34 C.J. p 111 note 11.

24. Ill.—Larson v. Lybyer, 38 N.E. 2d 177, 312 Ill.App. 183.
Pa.—Jasuta v. Zaremba, Com.Pl., 47 Lack.Jur. 157.
34 C.J. p 111 note 12.

25. Ark.—Bryan-Brown Shoe Co. v. Block, 12 S.W. 1073, 52 Ark. 453.
34 C.J. p 112 note 13.

26. N.J.—Den v. Zellers, 7 N.J.Law 153.

27. N.J.—Den v. Zellers, supra.

28. Pa.—Keech Co. v. O'Herron, 41 Pa.Super. 103.

29. Pa.—Keech Co. v. O'Herron, supra.

30. Ill.—Scott v. Mantonya, 45 N.E. 977, 164 Ill. 473.
Pa.—Cassalia v. Dushney, 34 Pa. Dist. & Co. 503.
34 C.J. p 112 note 18.
Acceleration clause
Filing note with prothonotary evidenced holder's election under acceleration clause and authorized confession of judgment for entire amount following default in payment of installment.—Drey St. Motor Co. v. Nevling, 161 A. 880, 106 Pa.Super. 42.

31. Pa.—E. P. Wilbur Trust Co., now to Use of Federal Deposit Ins. Corporation, v. Eberts, 10 A. 2d 397, 337 Pa. 161.
Wis.—Dilley v. Van Wie, 6 Wis. 209.

32. Ill.—Fortune v. Bartolomei, 45 N.E. 274, 164 Ill. 51.
34 C.J. p 112 note 20.

33. Md.—Forwood v. Magness, 121 A. 855, 142 Md. 1.
34 C.J. p 112 note 21.

34. Ill.—Scott v. Mantonya, 45 N.E. 977, 164 Ill. 473.
34 C.J. p 112 note 22.

35. Md.—Johnson v. Phillips, 122 A. 7, 143 Md. 16.
34 C.J. p 112 note 23.

36. Pa.—First Mortgage Guarantee Co. of Philadelphia v. Powell, 98 Pa.Super. 99—First Mtg. Guarantee Co. of Philadelphia v. Powell, 12 Pa.Dist. & Co. 242, 77 Pittsb. Leg.J. 533, 43 York Leg.Rec. 147, affirmed 98 Pa.Super. 99.
34 C.J. p 112 note 24.

37. Md.—Johnsen v. Phillips, 122 A. 7, 143 Md. 16.
34 C.J. p 112 note 25.

stipulation in the warrant for such a fee rests on a valid consideration and is not fraudulent as to other creditors, and the amount specified should be allowed,[38] unless it is clearly excessive or unreasonable, in which case the judgment is voidable as against other creditors, at least to the extent of such fee.[39] If the amount is not fixed, but the stipulation is for a "reasonable attorney's fee," it is for the court to determine what is a reasonable fee under the circumstances;[40] and hence if the attorney fixes the amount of his fee and confesses judgment for the whole amount, without the intervention of the court, the judgment is void.[41] It has been held that the court will allow only a reasonable fee, even though there is a stipulation for a greater amount.[42]

§ 155. Second Confession under Same Power

A warrant or power of attorney to confess judgment is generally exhausted by its exercise, and a second judgment cannot be entered by virtue of the same power.

As a general rule a power of attorney to confess judgment is exhausted by one valid confession, and a second judgment cannot be entered by virtue of the same power.[43] Where a judgment by confession is open or vacated in order to permit defendant to defend the claim on the merits, it has been held that plaintiff cannot proceed under the warrant of attorney to confess judgment.[44] Where the first judgment is vacated or reversed for error, it has been held that the attorney may, under the same power, confess a correct judgment, his power not being exhausted by the first act;[45] but there is also authority to the contrary,[46] it being held that, for errors in the entry of the first judgment or for the correction of clerical mistakes, application should be made to the court to correct such judgment so as to make it conform to the facts, and not to enter a new judgment.[47] It has also been held that, where a judgment by confession is entered in one county, a second judgment on the same warrant in another county is not absolutely void, but the person entering the second judgment will be answerable for the consequences.[48]

§ 156. Revocation and Defeasance

A warrant of attorney to confess judgment is revocable at the will of the grantor, except where it is supported by a valuable consideration or is coupled with an interest in the subject matter. Such a warrant may be revoked by the death of the grantor, and it is generally held that it cannot be exercised after the debt is barred by limitations.

A power of attorney to confess judgment, like other powers of attorney, is revocable at the will of the grantor,[49] except where it is supported by a valuable consideration,[50] or is coupled with an interest in the subject matter,[51] or is given as a security or to render a security effectual.[52] Such a warrant, however, is terminated by the payment or extinguishment of the debt intended to be secured.[53]

38. Md.—Johnson v. Phillips, supra. 34 C.J. p 112 note 26.

39. Ill.—Hulse v. Mershon, 17 N.E. 50, 125 Ill. 52—Homewood v. Stein, 211 Ill.App. 359.

40. Md.—Johnson v. Phillips, 122 A. 7, 143 Md. 16.
Pa.—Pittston Chevrolet Sales Co. v. Felax, 9 Pa.Dist. & Co. 604, 24 Luz.Leg.Reg. 292.
34 C.J. p 113 note 28.

Where space for insertion of amount of attorney's fees was left blank and no line was drawn through the provision to indicate an intention that no attorney's fees were to be paid, the allowance by the court of attorney's fees in a reasonable amount on entry of judgment by confession was not error.—Spindler v. McKay, 13 N.E.2d 864, 294 Ill.App. 610.

41. Ill.—Campbell v. Goddard, 7 N. E. 640, 117 Ill. 251, followed in 14 N.E. 261, 123 Ill. 220.

42. Pa.—Salsburg v. Mack, 11 Pa. Co. 408.

43. Pa.—Harr v. Furman, 29 A.2d 527, 346 Pa. 138, 144 A.L.R. 828—Union Bank of Nanty-Glo v. Schnabel, 139 A. 862, 291 Pa. 228—S. Jacobs & Son v. Busedu, 95 Pa.Super. 132—Commercial Alliance v. Pickett, 50 Pa.Dist. & Co. 556, 37 Luz.Leg.Reg. 185—Maricic v. Slesser, 44 Pa.Dist. & Co. 693, 52 Dauph.Co. 185—Schwartz v. Stein, 12 Pa.Dist. & Co. 638, 43 York Leg.Rec. 155—Schwartz v. Stein, 12 Pa.Dist. & Co. 229—Keystone Trust Co. v. Aaronson, Com. Pl., 55 Dauph.Co. 144—Heller v. Bloom, Com.Pl., 52 Dauph.Co. 307—Mook v. Neuner, Com.Pl., 23 Erie Co. 340.
34 C.J. p 113 note 31.

Different powers
Subsequent judgment against guarantors of note, pursuant to warranty, was valid, where first judgment was under warrant on face of note.—Union Bank of Nanty-Glo v. Schnabel, 139 A. 862, 291 Pa. 228.

44. Ill.—Western Cold Storage Co. v. Keeshin, 252 Ill.App. 165.

45. Ill.—Vandersall v. Goldsmith, 231 Ill.App. 165.
34 C.J. p 113 note 32.

46. Pa.—Hogsett v. Lutrario, 13 A. 2d 902, 140 Pa.Super. 419—S. Jacobs & Son v. Busedu, 95 Pa.Super. 132—Maricic v. Slesser, 44 Pa. Dist. & Co. 693, 52 Dauph.Co. 185—Heller v. Bloom, Com.Pl., 52 Dauph.Co. 307—Reid v. Pechersky, Com.Pl., 87 Pittsb.Leg.J. 575.
34 C.J. p 113 note 33.

47. Pa.—Harr v. Furman, 29 A.2d 527, 346 Pa. 138, 144 A.L.R. 828—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454—Mars Nat. Bank v. Hughes, 89 A. 1130, 243 Pa. 223.

48. Pa.—Neff v. Barr, 14 Serg. & R. 166.
34 C.J. p 113 note 35.

49. Ala.—Evans v. Fearne, 16 Ala. 689, 50 Am.D. 197.
N.Y.—Gale v. Chase, 8 Johns. 147.

50. Ark.—Rapley v. Price, 11 Ark. 713.
34 C.J. p 113 note 39.

51. Ohio.—Swisher v. Orrison Cigar Co., 171 N.E. 92, 122 Ohio St. 195.
34 C.J. p 113 note 40.

52. Tenn.—Hermitage Loan Co. v. Daykin, 56 S.W.2d 164, 165 Tenn. 503—Clay v. People's Finance & Thrift Co., 25 S.W.2d 578, 160 Tenn. 390.
34 C.J. p 113 note 41.

53. Iowa.—Cohn v. Bromberg, 170 N.W. 478, 185 Iowa 293.
34 C.J. p 113 note 42.

Claim barred by limitations. Although, as discussed supra § 138, defendant himself may confess judgment on a claim which has been barred by the statute of limitations, it has generally been held that a power of attorney to confess judgment cannot be exercised after the debt or claim is thus barred;[54] but there is also authority to the contrary.[55]

Effect of alteration. Where a power of attorney is materially altered while in the hands of the payee, without any explanation thereof, the alteration will be presumed to have been made with the consent of the holder, and will render the power void;[56] but the mere filling of blanks which apparently were intended to be filled is not such an alteration as will invalidate the warrant.[57]

Death of parties. As a general rule, a judgment by confession cannot be entered on a warrant of attorney, after the death of the grantor.[58] This rule, however, does not apply where the judgment entered on such warrant can be made good by relation,[59] as where the grantor dies during a vacation; at common law a judgment may be entered against him during the same vacation as of the preceding term,[60] or, if he dies during the term, it may be entered as of the term in which he dies.[61]

Insanity or incompetency of the grantor does not revoke a warrant or power to confess judgment.[62]

§ 157. Confession under Void or Lost Warrant

A judgment entered on a void warrant or power of attorney to confess judgment is void.

A judgment by confession must be authorized by the warrant on which it is based.[63] A judgment is a nullity which is confessed under a power of attorney which is void or does not conform to mandatory statutory requirements,[64] as where the judgment is confessed on a note and warrant of attorney which have been forged[65] or fraudulently obtained.[66] However, it has also been held that the judgment is not void although the letter of attorney is void.[67]

Confession on lost warrant. A judgment may be entered on a note and warrant of attorney duly executed, but which has been lost or stolen.[68]

D. STATEMENT OF INDEBTEDNESS

§ 158. Nature and Necessity

Under statutes so providing, a person confessing judgment, without action, is required to file a written statement designating the amount for which the judgment is to be entered, and stating concisely the facts out of which the indebtedness arose, and authorizing entry of judgment therefor.

54. Mich.—Gordon v. Heller, 260 N. W. 156, 271 Mich. 240, certiorari denied 56 S.Ct. 140, 296 U.S. 619, 80 L.Ed. 440.
N.Y.—Arnold v. Bussmann, 29 N.Y. S.2d 155, affirmed 34 N.Y.S.2d 829, 264 App.Div. 713.
Ohio.—Roberts v. Davis, 35 N.E.2d 609, 66 Ohio App. 527—State ex rel. Squire v. Winch, 32 N.E.2d 569, 66 Ohio App. 221.
Tenn.—Williams v. Wilborne, 95 S. W.2d 41, 170 Tenn. 289.
34 C.J. p 113 note 44.
Effect of lapse of time on exercise of power generally see supra § 154 e.

55. Ark.—Wassell v. Reardon, 11 Ark. 705, 44 Am.D. 245.

56. Ill.—Burwell v. Orr, 34 Ill. 465.

57. Wis.—Vliet v. Camp, 18 Wis. 198.

58. Ill.—Merrion v. O'Donnell, 279 Ill.App. 435.
Ohio.—Schuck v. McDonald, 16 N.E. 2d 619, 58 Ohio App. 394.
Pa.—Stucker v. Shumaker, 139 A. 114, 290 Pa. 348—First Nat. Bank v. Crawford, 8 Pa.Dist. & Co. 423.
34 C.J. p 113 note 49, p 125 note 67.
Judgment held irregular
A judgment entered after the death of the promisor and without an action brought in the lifetime of such party is irregular and will be vacated on application of the legal representatives or heirs of the decedent.—Kummerle v. Cain, 32 Pa.Super. 528.
Wife re-signing after husband's death
Where a married woman who had signed a note as security for her husband signed it a second time after his death, judgment may be entered against her although the note under her first signature was void as to her.—First Nat. Bank v. Crawford, 8 Pa.Dist. & Co. 423.

59. N.Y.—Nichols v. Chapman, 9 Wend. 452.

60. N.Y.—Nichols v. Chapman, supra.

61. N.Y.—Nichols v. Chapman, supra.
Pa.—Felty v. Felty, 11 Pa.Dist. & Co. 186.

62. Ill.—Grimes v. Rodgers, 263 Ill. App. 429.
Md.—Acker v. Cecil Nat. Bank of Port Deposit, 157 A. 897, 162 Md. 1, followed in Acker v. National Bank of Perryville, 157 A. 899, 162 Md. 4.
Ohio.—Swisher v. Orrison Cigar Co., 171 N.E. 92, 122 Ohio St. 195.
Wis.—In re Kohl's Guardianship, 266 N.W. 800, 221 Wis. 385.

63. Ill.—Genden v. Bailen, 275 Ill. App. 382—Hughes v. First Acceptance Corporation, 260 Ill.App. 176.
N.Y.—Shenson v. I. Shainin & Co., 198 N.E. 407, 268 N.Y. 567.
Pa.—Mahoney v. Collman, 143 A. 186, 293 Pa. 478.

64. Fla.—United Mercantile Agencies v. Bissonnette, 19 So.2d 466, 155 A.L.R. 916.
34 C.J. p 114 note 53.

65. Del.—City Loan System of Delaware v. Nordquist, 165 A. 341, 5 W. W.Harr. 371.
Ill.—Bullen v. Dawson, 29 N.E. 1038, 139 Ill. 633.
Ky.—Anderson v. Reconstruction Finance Corporation, 136 S.W.2d 741, 281 Ky. 531.
Ohio.—Commercial Credit Corp. v. Wasson, 63 N.E.2d 560, 76 Ohio App. 181.

66. Tex.—Johnston v. Loop, 2 Tex. 331.

67. Mo.—Wood v. Ellis, 10 Mo. 383.

68. Pa.—Mahoney v. Collman, 143 A. 186, 293 Pa. 478.
34 C.J. p 114 note 53.

Under statutes so providing, a person confessing a judgment, without action, is required to file a written statement[69] signed and verified, as discussed infra § 159, designating the amount for which the judgment is to be entered, and stating concisely the facts out of which the indebtedness arose,[70] and authorizing the entry of judgment therefor.[71] Such statutes have been held to apply, however, only in case of a confession of judgment without action; and they are not applicable where a suit has been begun, process served or waived and a declaration filed, and defendant then confesses judgment.[72]

§ 159. Requisites and Sufficiency

a. In general
b. Degree of certainty in general
c. Allegation of amount of debt
d. Allegation that debt is "justly due"
e. Signature
f. Verification
g. Amendment of defective statement
h. Particular applications of rules

a. In General

The statement of indebtedness required to accompany a confession of judgment is sufficient if it fairly and substantially complies with the statutory requirements therefor.

Generally speaking, the statement of indebtedness required by statute in many jurisdictions to accompany a confession of judgment, as discussed supra § 158, is sufficient if it fairly and substantially complies with the statutory requirements therefor.[73] Technical accuracy in the description of the liability or cause of action is not required.[74] A statement is sufficient if it sets out the facts out of which the debt for which judgment is confessed arose;[75] and, if it is otherwise sufficiently regular and specific, it is not invalid merely because the time when the debt arose is not definitely stated,[76] or is omitted entirely.[77] A statement, however, which does not allege the fact of indebtedness, either directly or by necessary implication, will not support a judgment by confession.[78]

Referring to schedule. The statement may refer for particulars to a schedule annexed, but in that case the schedule must contain all the necessary facts.[79] A failure to annex the schedule referred to does not invalidate the judgment where the statement is sufficient without the schedule.[80]

Partial insufficiency. A statement will not be held insufficient in toto merely because a severable part of it is insufficient.[81]

b. Degree of Certainty in General

The statement of indebtedness required to support a confession of judgment should be so precise, in stating the debt or the facts out of which the debt arose, as to apprise all persons interested of the nature and consideration of the debt and enable them to inquire into the transaction, but it need not be as precise as a bill of particulars.

The statement of indebtedness required to support a confession of judgment should be so precise and particular, in stating the debt or the facts out of which the debt arose, as to apprise all persons interested of the nature and consideration of the debt,[82] and give assurance that the consideration is fair and honest,[83] the degree of particularity re-

69. N.Y.—American Cities Co. v. Stevenson, 60 N.Y.S.2d 685.
N.C.—Gibbs v. G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
34 C.J. p 114 note 64.
Consent or ratification of creditor to entry of judgment by confession see supra § 148.

70. N.Y.—Keller v. Greenstone, 2 N.Y.S.2d 977, 253 App.Div. 573—P. A. Starck Piano Co. v. O'Keefe, 208 N.Y.S. 350, 211 App.Div. 700—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.
N.C.—Gibbs v. G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
Okl.—Universal Supply & Machinery Co. v. Construction Machinery Co., 16 P.2d 865, 160 Okl. 209.
34 C.J. p 114 note 61.
Effect of failure to comply with statute see infra § 171.

71. N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.

72. Mo.—Aeolian Co. of Missouri v. Smith-Medcalf & Co., App., 7 S.W.2d 447.
34 C.J. p 114 note 63.
Requirement that confession be in writing held not to apply to confession after action.—Aeolian Co. of Missouri v. Smith-Medcalf & Co., supra—Wade v. Swope, 81 S.W. 471, 107 Mo.App. 375.

73. N.Y.—Clements v. Gerow, 1 Abb. Dec. 370, 1 Keyes 297.
34 C.J. p 114 note 65.
Captious spirit
In determining whether or not the statement is sufficient, it is not to be interpreted in a captious spirit.—Clements v. Gerow, supra—Acker v. Acker, 1 Abb.Dec.,N.Y., 1, 1 Keyes 291.

74. Ark.—Ex parte Hays, 6 Ark. 419.
34 C.J. p 114 note 67.

75. N.Y.—Kirby v. Fitzgerald, 31 N.Y. 417—Brosstedt v. Breslin, 42 Hun 656, 5 N.Y.St. 67, affirmed 13 N.E. 931, 105 N.Y. 682.
Statement held sufficient
N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 497, 201 N.C. 412.

76. N.Y.—Harrison v. Gibbons, 71 N.Y. 58.

77. N.Y.—Keller v. Greenstone, 2 N.Y.S.2d 977, 253 App.Div. 573.

78. N.Y.—Citizens' Nat. Bank v. Allison, 37 Hun 135.

79. N.Y.—Hamann v. Keinhart, 11 Abb.Pr. 132.

80. N.Y.—Clements v. Gerow, 1 Abb. Dec. 370, 1 Keyes 297—Acker v. Acker, 1 Abb.Dec. 1, 1 Keyes 291.

81. N.Y.—Frost v. Koon, 30 N.Y. 428.
34 C.J. p 115 note 70 [a].

82. Iowa.—Briggs v. Yetzer, 72 N.W. 647, 103 Iowa 342.
34 C.J. p 115 note 79.

83. N.C.—Farmers' Bank of Clayton

quired depending, to a large extent, on the circumstances of each particular case.[84] It is not required that the statement should set forth sufficient of the transaction out of which the indebtedness arose to enable other creditors to form an opinion from the facts stated as to the integrity of the debt, or in confessing the judgment;[85] but it is sufficient if it states enough of the facts to identify the transaction and enable creditors and others interested to inquire into the transaction and investigate the bona fides of the judgment.[86] It has been variously stated that the statement is sufficient if it states the transaction creating the indebtedness concisely, and in terms which will make known to the ordinary understanding the manner in which the indebtedness arose;[87] or if it indicates the facts out of which the indebtedness arose, with reasonable certainty,[88] or with certainty to a common intent;[89] or if it complies with the requirement of a statement of facts in a complaint,[90] or so fixes the consideration of the judgment as to prevent the parties from shifting it;[91] and that a statement as general as the common counts in a declaration is not sufficient;[92] but that a statement as precise as a bill of particulars is not required.[93] It has been said that the statement of facts should be so definite that affiant would be exposed to punishment for perjury in case of any misstatement.[94]

c. Allegation of Amount of Debt

The statement must set forth explicitly the amount of the debt for which judgment is confessed, indicating how much, if any, is due for interest.

The statement must set forth explicitly the amount of the debt for which the judgment is confessed,[95] indicating how much, if any, is due for interest.[96] It has been held, however, that it need not set out in precise terms that the indebtedness was for the precise sum for which the judgment is confessed, where such fact is made to appear by the statement;[97] and a mere discrepancy in an item, which is the result of a clerical error, does not render the statement invalid.[98]

d. Allegation That Debt Is "Justly Due"

Under statutes so providing, the statement must show that the sum confessed is justly due, or to become due.

Under some statutes, the statement, in addition to setting forth the facts on which the indebtedness arose, must also show that the sum confessed is justly due, or to become due.[99] It has been held, however, that this does not require the confession to state in terms that the sum for which the judgment is confessed is justly due or to become due, if such fact appears from the other facts set forth;[1] and, where the statement sets forth facts showing a just debt and the amount thereof, it need not in terms negative that it has been paid or otherwise discharged.[2] It has been held that no statement need be made that the controversy is real and the proceedings are in good faith.[3]

v. McCullers, 160 S.E. 494, 201 N.C. 440.

84. Mo.—Mechanics' Bank v. Mayer, 6 S.W. 237, 93 Mo. 417.

85. Minn.—Atwater v. Manchester Sav. Bank, 48 N.W. 187, 45 Minn. 341, 12 L.R.A. 741.
N.Y.—McDowell v. Daniels, 33 Barb. 148.

86. Minn.—Atwater v. Manchester Sav. Bank, 48 N.W. 187, 45 Minn. 341, 12 L.R.A. 741.
27 C.J. p 458 note 15—34 C.J. p 115 note 83.

87. Mo.—St. Louis Fourth Nat. Bank v. Mayer, 19 Mo.App. 517.
34 C.J. p 115 note 82.

88. N.Y.—Union Bank v. Bush, 36 N.Y. 631, 3 Transcr.A. 235—Read v. French, 28 N.Y. 285—Brown v. Marrigold, 50 How.Pr. 248.

89. N.Y.—Harrison v. Gibbons, 71 N.Y. 58.

90. N.Y.—Matter of Gray, 156 N.Y.S. 877, 172 App.Div. 884—Mather v. Mather, 55 N.Y.S. 973, 38 App. Div. 32.

91. Mo.—J. H. Teasdale Commn. Co. v. Van Hardenberg, 53 Mo.App. 326.

92. N.Y.—Lawless v. Hackett, 16 Johns. 149.
34 C.J. p 116 note 88.

93. Iowa.—Vanfleet v. Phillips, 11 Iowa 558.
27 C.J. p 458 note 14—34 C.J. p 116 note 89.

94. N.Y.—Wood v. Mitchell, 22 N.E. 1125, 117 N.Y. 439—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.

95. N.Y.—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.
N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
34 C.J. p 116 note 91.
Necessity of stating amount generally see supra § 158.

96. N.Y.—Wood v. Mitchell, 22 N.E. 1125, 117 N.Y. 439—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.
34 C.J. p 116 note 92.

97. N.Y.—Clements v. Gerow, 1 Abb.Dec. 370, 1 Keyes 297—Acker v. Acker, 1 Abb.Dec. 1, 1 Keyes 291.

98. Mo.—Hard v. Foster, 11 S.W. 760, 93 Mo. 297.

99. N.Y.—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.
N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
Okl.—Universal Supply & Machinery Co. v. Construction Machinery Co., 16 P.2d 865, 160 Okl. 209.
34 C.J. p 116 note 97.
Necessity and sufficiency of affidavit of bona fides see infra § 163.
A confession of judgment does not alone import consideration
N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.

1. N.C.—Merchants' Nat. Bank of Richmond v. Newton Cotton Mills, 20 S.E. 765, 115 N.C. 507.
34 C.J. p 116 note 98.

2. N.Y.—Lanning v. Carpenter, 20 N.Y. 447—Gandall v. Finn, 2 Abb. Dec. 232, 1 Keyes 217, 33 How.Pr. 444.

3. N.C.—Martin v. Briscoe, 55 S.E. 782, 143 N.C. 353.

e. Signature

Generally, the statement on which a judgment by confession is entered must be signed by the debtor in person.

It is generally required that the statement on which a judgment by confession is entered must be signed by the debtor or defendant in person,[4] and a signature by his attorney is not sufficient.[5] Signing the affidavit verifying the statement is, however, a sufficient signing of the statement itself, especially if they are on the same page or sheet.[6] Where the confession of judgment is against two or more persons, the statement must be signed by each of the persons against whom it authorizes the entry of judgment.[7]

f. Verification

Generally, the person making the statement of indebtedness must swear positively to the truth of the facts stated as far as they are within his own knowledge.

It is usually required by statute that the statement of indebtedness be sworn to by the party making it,[8] and such requirement has been held to be jurisdictional and mandatory.[9] He must swear, not merely that he believes the statement to be true, but positively to the truth of the facts as far as they are within his own knowledge.[10] This affidavit may be made before any duly qualified officer,[11] such as a notary public;[12] and may be made in a county other than that in which the judgment is rendered on the confession.[13] The jurat of the officer taking the affidavit should be in due form,[14] but a formal defect therein will not so far invalidate the judgment as to lay it open to collateral attack.[15] As between the parties, a confession of judgment is not avoided by the want of a seal to the notary's certificate to the affidavit.[16] Such a verification cannot be made by plaintiff's attorney under a power of attorney to confess judgment.[17]

Amendment. An unverified statement for judgment by confession or a defective verification of such statement is amendable.[18]

g. Amendment of Defective Statement

The court may, in its discretion, allow a defective statement of indebtedness to be amended on such terms as appear just.

The court may, in its discretion, allow a defective statement of indebtedness to be amended on such terms as appear just,[19] but, as a general rule, such amendment will not be allowed where it will affect the rights of subsequent judgment creditors which may have attached in the meantime,[20] especially where they have begun proceedings to avoid the judgment by confession.[21] It has been held, however, that such amendment may be allowed as against subsequent judgment creditors who have not sought to vacate the judgment.[22]

h. Particular Applications of Rules

The general rules governing the requisites and sufficiency of the statement of indebtedness required to accompany a confession of judgment have been applied to various types of indebtedness.

4. N.Y.—P. A. Starck Piano Co. v. O'Keefe, 208 N.Y.S. 350, 211 App. Div. 700.
N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
34 C.J. p 118 note 29.

5. Cal.—Reynolds v. Lincoln, 9 P. 176, 12 P. 449, 71 Cal. 183.
34 C.J. p 118 note 30.

Statement signed by creditor's attorney, acting ostensibly for debtor under authorization to confess judgment, was held not to support judgment.—P. A. Starck Piano Co. v. O'Keefe, 208 N.Y.S. 350, 211 App. Div. 700.

6. N.Y.—Mosher v. Heydrick, 45 Barb. 549, 30 How.Pr. 161, 1 Abb. Pr.,N.S., 258.
34 C.J. p 118 note 31.

7. U.S.—French v. Edwards, C.C. Cal., 9 F.Cas.No.5,098, 5 Sawy. 266.
34 C.J. p 118 note 32.

8. N.Y.—Shenson v. I. Shainin & Co., 276 N.Y.S. 881, 243 App.Div. 638, affirmed 198 N.E. 407, 268 N.Y. 567—P. A. Starck Piano Co. v. O'Keefe, 208 N.Y.S. 350, 211 App. Div. 700.
N.C.—Gibbs v. G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.

9. N.C.—Gibbs v. G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7.
34 C.J. p 118 note 35.

Before judgment may be entered, an affidavit of defendant stating concisely the facts on which the indebtedness arose must be filed.—Universal Supply & Machinery Co. v. Construction Machinery Co., 16 P.2d 865, 160 Okl. 209.

10. N.Y.—Ingram v. Robbins, 33 N. Y. 409, 88 Am.D. 393.
34 C.J. p 118 note 36.

11. N.Y.—Mosher v. Heydrick, 45 Barb. 549, 1 Abb.Pr.,N.S., 258, 30 How.Pr. 161.

12. Iowa.—Vanfleet v. Phillips, 11 Iowa 558.
34 C.J. p 118 note 38.

13. Iowa.—Frisbee v. Seaman, 49 Iowa 95.

14. Iowa.—Briggs v. Yetzer, 72 N. W. 647, 103 Iowa 342—Grattan v. Matteson, 6 N.W. 298, 54 Iowa 229.

15. Iowa.—Grattan v. Matteson, supra.
34 C.J. p 118 note 41.

16. Iowa.—Thorp v. Platt, 34 Iowa 314—Chase v. Street, 10 Iowa 593.

17. N.Y.—P. A. Starck Piano Co. v. O'Keefe, 208 N.Y.S. 350, 211 App. Div. 700—United States Fidelity & Guaranty Co. v. Shickler, 191 N.Y. S. 194, 199 App.Div. 74.

18. N.Y.—Shenson v. I. Shainin & Co., 276 N.Y.S. 881, 243 App.Div. 638, affirmed 198 N.E. 407, 268 N. Y. 567.
34 C.J. p 119 note 45.

19. N.Y.—Symson v. Selheimer, 12 N.E. 31, 105 N.Y. 660—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.
34 C.J. p 119 note 47.
Amendment of defective verification see supra § 159 f.

20. Mo.—Bryan v. Miller, 28 Mo. 32, 75 Am.D. 107.
34 C.J. p 119 note 48.

21. Minn.—Wells v. Gieseke, 8 N. W. 380, 27 Minn. 478.
34 C.J. p 119 note 50.

22. N.Y.—Bradley v. Glass, 46 N.Y. S. 790, 20 App.Div. 200.

The general rules governing the requisites and sufficiency of the statement of indebtedness required to accompany a confession of judgment, discussed supra subdivisions a–g of this section, have been applied to various types of indebtedness.[23]

For loans and advances. A statement which sets forth facts showing that the indebtedness accrued for "borrowed money," or for "money loaned" or "advanced" to the debtor, sufficiently states the facts out of which the indebtedness arose,[24] provided there is no uncertainty as to the amount due.[25] It has generally been held sufficient to allege that the money was loaned or advanced to defendant within a certain year or years, or at divers times after a specified day,[26] or from time to time,[27] or on or about a day named.[28] A statement has been held insufficient which does not state the aggregate amount of the loans, the date or how much of the amount is for interest, and how much is for principal, and does not give any data from which the amounts of the principal and interest may be ascertained.[29]

For goods sold and delivered. In some jurisdictions a statement for a confession of judgment on an account of goods sold need not contain a minute description of the articles sold, but is sufficient if it is declared to be for goods, wares, and merchandise sold and delivered.[30] In other jurisdictions, however, the statement is required to describe the kind, quantity, and price of the goods sold and delivered.[31] It is not necessary that the statement shall allege, in terms, that the goods were purchased by defendant from plaintiff; it is sufficient if the words used plainly import that fact.[32] The statement need not describe the exact time of the sale or sales; it is sufficient if it contains merely an approximate description of the period at or within which the sales took place,[33] such as during a certain month,[34] or since a certain day,[35] or during a certain year,[36] or within a certain number of years.[37]

On bills and notes. A statement in a confession of judgment which sets forth as the basis of the judgment merely the execution of a bill or note by defendant to plaintiff is not sufficient;[38] it should describe the consideration for the bill or note or should set forth the facts out of which the indebtedness arose for which it was given.[39] Thus the statement should set out the amount for which the note was given,[40] and, where it was given for "goods sold and delivered," or for "goods, wares, and merchandise," it should set out details as to the date, amount, and subject of the sale or sales.[41] It is not sufficient to state that the note was given

23. Balance of account

(1) Where there have been numerous dealings between the parties, the statement will be sufficient if it sets forth an adjustment of accounts, with exact particulars of the balance found due and defendant's agreement or liability to pay it.—Critten v. Vredenburgh, 45 N.E. 952, 151 N.Y. 536—34 C.J. p 115 note 76.

(2) It has been held, however, that the statement should allege any payments made and how such balance was ascertained.

Mo.—Bryan v. Miller, 28 Mo. 32, 75 Am.D. 107.

N.Y.—Miller v. Earle, 24 N.Y. 110.

(3) Statements held insufficient.

N.Y.—Hubbell v. Hardy, 157 N.Y.S. 497, 93 Misc. 672, modified on other grounds and affirmed 159 N.Y.S. 1102, 174 App.Div. 857.

N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.

Contingent liability

(1) Where the confession is to secure a contingent liability, the statement must set out concisely the facts constituting the liability.—Farmers' Bank of Clayton v. McCullers, supra—34 C.J. p 115 note 74.

(2) It must also show that the sum confessed does not exceed the liability.—Farmers' Bank of Clayton v. McCullers, supra—34 C.J. p 115 note 75.

24. Iowa.—Kendig v. Marble, 12 N.W. 584, 58 Iowa 529.
34 C.J. p 117 note 23.

25. N.Y.—Flour City Nat. Bank v. Doty, 41 Hun 76, 11 N.Y.Civ.Proc. 141.
34 C.J. p 118 note 24.

26. N.Y.—Lyon v. Sherman, 14 Abb. Pr. 393.
34 C.J. p 118 note 26.

27. N.Y.—Mather v. Mather, 55 N.Y.S. 973, 38 App.Div. 32.

28. N.Y.—Johnston v. McAusland, 9 Abb.Pr. 214.

29. N.Y.—Wood v. Mitchell, 22 N.E. 1125, 117 N.Y. 439.

30. Iowa.—Daniels v. Claflin, 15 Iowa 152.
S.C.—Ex parte Graham, 32 S.E. 67, 54 S.C. 163.

31. Wis.—Nichols v. Kribs, 10 Wis. 76, 78 Am.D. 294.
34 C.J. p 116 note 3.

32. N.Y.—Read v. French, 28 N.Y. 285.

33. N.Y.—Gandall v. Finn, 2 Abb. Dec. 232, 1 Keyes 217, 33 How.Pr. 444.
34 C.J. p 116 note 5.

34. N.Y.—Delaware v. Ensign, 21 Barb. 85.

35. N.Y.—Gandall v. Finn, 2 Abb. Dec. 232, 1 Keyes 217, 33 How.Pr. 444.

36. N.Y.—Read v. French, 28 N.Y. 285.

37. N.Y.—Clements v. Gerow, 1 Abb.Dec. 370, 1 Keyes 297.

38. N.Y.—Keller v. Greenstone, 2 N.Y.S.2d 977, 253 App.Div. 573.
34 C.J. p 117 note 10.

39. N.Y.—Keller v. Greenstone, supra.
34 C.J. p 117 note 11.

Statements held sufficient

(1) Generally.—Keller v. Greenstone, 2 N.Y.S.2d 977, 253 App.Div. 573.

(2) A statement is sufficient which sets forth that the judgment is confessed to secure plaintiff for a debt due or to become due on his indorsement, as the surety of defendant and for his benefit, of a certain note or notes fully described in all essential particulars.—Dow v. Platner, 16 N.Y. 562—34 C.J. p 117 note 17.

40. N.Y.—Norris v. Denton, 30 Barb. 117.
34 C.J. p 117 note 12.

41. Cal.—Cordier v. Schloss, 18 Cal. 576.
34 C.J. p 117 note 13.

for a balance due on a settlement of accounts,[42] unless the nature of the dealing out of which the account arose is described.[43] It is not necessary, however, that the statement should give all the circumstances relating to the debt or should exclude all possible circumstances which may affect the integrity of the debt.[44]

It is sufficient to state that the note was given for "money loaned" to defendant, or "money borrowed" by him, if the amount and time of the loan are given, and the sum is alleged to be justly due;[45] the terms of the loan are not required to be stated.[46] Indeed, it has been held that failure to state the time of the loan does not impair the sufficiency of the statement.[47] It is presumed that the loan was made to one person only, and it is not necessary for the statement to negative the making of the loan to more than one person.[48] It is also presumed that only one sum was loaned, and that it is due.[49]

E. PROCEDURE IN OBTAINING OR ENTERING JUDGMENT

§ 160. In General

Generally speaking, a judgment by confession may be entered only in conformity with the terms of the cognovit, and with valid statutes and rules of practice governing the manner, method, and conditions of entry.

Generally speaking, a judgment by confession may be entered only in conformity with the terms of the cognovit,[50] and with valid statutes[51] and rules of practice[52] governing the manner, method, and conditions of entry. In the absence of a statute providing otherwise, such judgment may be entered without the intervention of a jury,[53] or the direct adjudication of the court or order of a judge.[54] It may be entered without a declaration,[55] or præcipe,[56] or on the præcipe of plaintiff's attorney.[57] Indeed, it may be entered on the mere oral request of plaintiff or of anyone acting for him.[58] Under statutes so providing, judgment cannot be entered without a certificate signed by the judgment creditor, or his duly authorized attorney or agent, setting forth the precise address of the creditor;[59] or without filing in the county clerk's office a writ-

42. Iowa.—Bernard v. Douglass, 10 Iowa 370.
N.Y.—Dunham v. Waterman, 17 N.Y. 9, 72 Am.D. 406, 6 Abb.Pr. 365.

43. N.Y.—Acker v. Acker, 1 Abb. Dec. 1, 1 Keyes 291.

44. N.Y.—Acker v. Acker, supra.

45. N.Y.—Keller v. Greenstone, 2 N.Y.S.2d 977, 253 App.Div. 573.
34 C.J. p 117 note 18.

46. N.Y.—Acker v. Acker, 1 Abb. Dec. 1, 1 Keyes 291.

47. N.Y.—Keller v. Greenstone, 2 N.Y.S.2d 977, 253 App.Div. 573.

48. N.Y.—Acker v. Acker, 1 Abb. Dec. 1, 1 Keyes 291.

49. N.Y.—Acker v. Acker, supra.

50. U.S.—Nardi v. Poinsatte, D.C. Ind., 46 F.2d 347.
Del.—Money v. Hart, 159 A. 437, 5 W.W.Harr. 115.
Pa.—Pittsburgh Terminal Coal Corporation v. Potts, 92 Pa.Super. 1, followed in Hillman Gas Coal Co. v. Bozicevich, 92 Pa.Super. 39—Pittsburgh Terminal Coal Corporation v. McClements, 92 Pa.Super. 29—Medvidovich v. Sterner, 50 Pa.Dist. & Co. 690, 92 Pittsb.Leg.J. 223—Hettinger v. American Veterans of World War II, Amvets, Reading Post No. 1, Com.Pl., 38 Berks Co. 109—Donaghue v. Haupt, Com.Pl., 4 Sch.Reg. 367.
Form of judgment as following terms of cognovit see infra § 164.

Manner of confession held immaterial
Pa.—Walters v. Dooley, Com.Pl., 5 Sch.Reg. 174.

51. Ill.—Bush v. Hanson, 70 Ill. 480.
N.C.—Gibbs v. G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.

52. Pa.—Fox v. Boorse, 81 Pa.Super. 211—Hunter v. Wertz, 91 Pittsb. Leg.J. 348, 57 York Leg.Rec. 111.

53. Ga.—Estes v. Estes, 14 S.E.2d 681, 192 Ga. 94.

Where confession is unconditional and amount certain, a jury is unnecessary.—Allen v. White, Minor, Ala., 365.

Where issues arise which must be determined by jury, a rule to enter a judgment on a warrant of attorney should be discharged.—Handrick v. Billings, 24 Pa.Co. 64—34 C.J. p 119 note 58.

54. Pa.—Equipment Corporation of America v. Primos Vanadium Co., 132 A. 360, 285 Pa. 432.
34 C.J. p 119 note 53.
Authority of nonjudicial officers see infra § 161.

Rendition of judgment is distinct office of court not to be confused with the ministerial acts of filing and docketing.—Gibbs v. G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7.

55. Pa.—Union Acceptance Co. v. Grant Motor Sales Co., 5 Pa.Dist. & Co. 407, 23 Luz.Leg.Reg. 89, 2 Som.Leg.J. 260, 39 York Leg.Rec. 141—Morris v. Chevalier, Com.Pl., 20 Lehigh Co.L.J. 133.
Necessity of process and pleading generally see supra §§ 149–151.

Where confession of judgment is express and unconditional, a statement of cause of action has been held unnecessary.—International Advertising Syndicate v. Quaker Silk Mills, 3 Pa.Dist. & Co. 23, 18 Berks 65.

Duly verified petition held filed as against contention that statute barred judgment except on filing of verified petition.—Athens First Nat. Bank v. Garland, 67 N.W. 559, 109 Mich. 515, 63 Am.S.R. 597, 33 L.R.A. 83.

56. Pa.—Hefer v. Hefner, 95 Pa.Super. 551—Industrial Fibre Products Co. of Caldwell, N. J. v. Arters, 49 Pa.Dist. & Co. 304, 26 Erie Co. 202—Reinsmith v. McCready, Com.Pl., 21 Lehigh Co.L.J. 111, 58 York Leg.Rec. 187.

57. Pa.—Vietor v. Johnson, 24 A. 173, 148 Pa. 583—Racunas v. Vaughan, 29 Pa.Dist. 1058.

58. Pa.—Racunas v. Vaughan, supra.

59. Pa.—Weisbrod & Hess Brewing Co. v. Braverman, 149 A. 198, 299 Pa. 173—Weinstein v. Geller, 10 Pa.Dist. & Co. 132.

The purpose of the statute is to furnish information to the taxing authorities.—Deibert v. Rhodes, 140 A. 515, 291 Pa. 550—New Amsterdam Building & Loan Ass'n v. Moyerman,

ten notice of the proposed entry on a bond where a mortgage has been given for the same debt.[60]

The formal filing or recording of judgments by confession is discussed infra § 165.

Correction of defects in proceedings. The court may, in its discretion, allow defects in the proceedings for entry of judgment by confession to be corrected on such terms as appear just.[61]

§ 161. Jurisdiction and Authority

a. In general
b. Authority of nonjudicial officers

a. In General

It is essential to the validity of a judgment by confession that the court have jurisdiction of the subject matter and of the parties, the court which has jurisdiction in a particular case being dependent on local practice or statutes.

Although, as discussed supra § 160, judgment by confession may be entered without the direct adjudication of the court or the order of a judge, the judgment when entered is the judicial act of the court, as discussed infra § 168, and it is essential to the validity of such judgment that the court have jurisdiction of the subject matter[62] and of the parties,[63] and a judgment entered in a court which does not have jurisdiction of the subject matter,[64] or of the parties,[65] is void. A valid confession of judgment,[66] or warrant of attorney authorizing an appearance for the purpose of confessing judgment and an appearance thereunder,[67] is sufficient, however, to give the court jurisdiction of the person of defendant.

The court which has jurisdiction in a particular case depends on the local practice or statutes.[68] In the absence of a statute providing otherwise, the entry of a judgment by confession has been held to be within the jurisdiction of courts of general jurisdiction.[69] Under some statutes, a judgment by confession may be rendered only in a court which has jurisdiction in the county or district where defendant resides,[70] or where the obligation was executed,[71] and, under a statute so providing, a judgment entered by any court in any other county or district has no force or validity.[72] It has been held,

95 Pa.Super. 47—Beltonen v. Gruca & Cozel, 94 Pa.Super. 32.

Mandatory or directory

Placing on record with judgment address of creditor is mandatory, while manner of its appearance is directory.—Delbert v. Rhodes, 140 A. 515, 517, 291 Pa. 550—Silverstein v. Cohen, 12 Pa.Dist. & Co. 218, 21 North.Co. 377—C. Trevor Dunham, Inc. v. Miller, 10 Pa.Dist. & Co. 118, 23 Sch.Leg.Rec. 167.

The prothonotary or his deputy may be the agent of the judgment creditor for the purpose of certifying the latter's address, and it will be assumed that he signed the certificate as the creditor's agent.—Weisbrod & Hess Brewing Co. v. Braverman, 149 A. 198, 299 Pa. 173.

Sufficiency of address

(1) Information sufficiently definite to enable taxing authorities to locate taxable person is substantial compliance with such statute.—New Amsterdam Building & Loan Ass'n v. Moyerman, 95 Pa.Super. 47.

(2) It is not necessary to give the street address.—Weisbrod & Hess Brewing Co. v. Braverman, 149 A. 198, 299 Pa. 173—New Amsterdam Building & Loan Ass'n v. Moyerman, supra—Beltonen v. Gruca & Cozel, 94 Pa.Super. 32.

(3) The designation of ward meets requirements of statute.—Beltonen v. Gruca & Cozel, supra.

(4) Where the creditor is a nonresident of the state, it is sufficient if he names the state in which he resides.—Pennsylvania Ruggles Truck Sales v. Bocastow, 12 Pa.Dist. & Co. 328.

Lease signed by creditor, setting forth his address, was held to meet statutory requirements.—General Finance Co. v. Wasilowski, 5 Pa. Dist. & Co. 274, 20 Sch.Leg.Rec. 219.

60. N.J.—Gerstley v. Best, 151 A. 395, 8 N.J.Misc. 661, affirmed 156 A. 377, 103 N.J.Law 189.

Notice held sufficient

N.J.—Gerstley v. Best, supra.

61. Pa.—Fox v. Boorse, 81 Pa.Super. 211—Parsons v. Kuhn, Com. Pl., 45 Pa.Dist. & Co. 356.

Amendment or correction of judgment by confession see infra § 320.

62. Ill.—Stead v. Craine, 256 Ill. App. 445.

Pa.—Oberlin v. Parry, 134 A. 460, 287 Pa. 224.

Wash.—Rubin v. Dale, 288 P. 223, 156 Wash. 676.

34 C.J. p 119 note 62.

63. Ill.—Duggan v. Kupitz, 22 N.E. 2d 392, 301 Ill.App. 230—Stead v. Craine, 256 Ill.App. 445.

Without a confession by defendant or his attorney the court has no power to enter judgment by confession.—Bernstein v. Curran, 99 Ill. App. 179—34 C.J. p 121 note 92.

64. Ind.—Marsh v. Sherman, 12 Ind. 358.

34 C.J. p 119 note 63.

65. Ill.—Duggan v. Kupitz, 22 N.E. 2d 392, 301 Ill.App. 230.

66. Kan.—Ritter v. Hoffman, 10 P. 576, 35 Kan. 215.

67. U.S.—Withers v. Starace, D.C.N.Y., 22 F.Supp. 773.

Ill.—Lock v. Leslie, 248 Ill.App. 438.

Place of residence of signer of the warrant does not affect the validity of his consent to jurisdiction.—Withers v. Starace, D.C.N.Y., 22 F.Supp. 773—34 C.J. p 120 note 66.

68. N.J.—Vanderveere v. Gaston, 24 N.J.Law 818.

34 C.J. p 120 note 64.

69. Ill.—Schwartz v. Schwartz, 8 N. E.2d 668, 366 Ill. 247—Bush v. Hanson, 70 Ill. 480—Moore v. Monarch Distributing Co., 32 N.E.2d 1019, 309 Ill.App. 339—Stead v. Craine, 256 Ill.App. 445.

70. Ill.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137.

34 C.J. p 120 note 65.

The intention of defendant is not the determining factor with respect to the required residence.—Zipperman v. Wiltse, 47 N.E.2d 365, 317 Ill.App. 654.

Wife, legally separated from her husband, was held a resident of county where she resided and had her place of business.—Zipperman v. Wiltse, supra.

71. Ill.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137.

Place of preparation and delivery held place of execution, although obligation was signed in another county.—Taylorville Savings, Loan & Building Ass'n v. McBride, 22 N.E.2d 772, 301 Ill.App. 632, transferred, see, 17 N.E.2d 221, 369 Ill. 544.

72. Ill.—Rixmann v. Witwer, App.,

however, that such statutes,[73] and similar statutes not in terms limited to judgments by confession,[74] do not limit the jurisdiction of courts of general jurisdiction over the subject matter of judgments by confession, but merely provide the method by which the court may obtain jurisdiction over the person and specify the venue in which a defendant may be sued, and objections founded thereon may be waived,[75] if not raised at the earliest possible moment.[76] Where the judgment is confessed in a court of limited or inferior jurisdiction, its jurisdiction must appear on the face of the proceedings, and the record must show that there has been a compliance with all statutory requirements.[77]

The consent of parties cannot confer jurisdiction over the subject matter,[78] but, where the subject matter is within the jurisdiction of the court, a judgment entered on confession without excepting to the jurisdiction of the person has been held to be valid.[79]

b. Authority of Nonjudicial Officers

Under some statutes, the prothonotary, register, or clerk of the court may enter judgment by confession, on the filing in his office of the necessary papers, without any action by the judge, but in so doing he acts merely in a ministerial capacity and must follow closely the forms provided by law for the exercise of the power conferred on him.

Under some statutes, the prothonotary, register, or clerk of the court may enter a judgment by confession, on the filing in his office of the necessary papers, without any action by the judge,[80] and, as discussed supra § 154 f, without the agency of an attorney. The clerk's act in entering the judgment is not judicial, but merely ministerial,[81] and, when he is presented with what purport to be the necessary papers, it has been held that he cannot question their validity or sufficiency,[82] but must enter judgment thereon.[83] He must follow closely the forms provided by law for the exercise of the power conferred on him;[84] and any directions of the statute as to the conditions on which he may enter the judgment must be strictly observed.[85] His power may be exercised only where the confession is complete and unconditional.[86] In entering judgment he must follow the papers filed,[87] and cannot insert any stipulation in the judgment which is not authorized by the warrant or confession.[88]

For or against himself. Where a clerk of court is empowered to take and enter confessed judgments, he may, in the absence of fraud, enter such a judgment in his own favor[89] or against himself, as discussed supra § 143.

County clerk. The word "may" in a statute providing that a statement of confession may be filed with the county clerk of the county of which de-

63 N.E.2d 607—Houston v. Ingels, 48 N.E.2d 196, 313 Ill.App. 383.

73. Ill.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137.

74. Md.—John B. Colt Co. v. Wright, 159 A. 743, 162 Md. 387.

75. Ill.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137.
Md.—John B. Colt Co. v. Wright, 159 A. 743, 162 Md. 387.

76. Ill.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137.
General appearance under which defendant submitted to jurisdiction of court to contest plaintiff's claim on the merits, praying for leave to file a counterclaim, was held waiver of objection.—May v. Chas. O. Larson Co., supra.
Objection held not waived
Ill.—Rixmann v. Witwer, App., 63 N.E.2d 607.

77. Neb.—Howell v. Gilt Edge Mfg. Co., 49 N.W. 704, 32 Neb. 627.
34 C.J. p 120 note 67.

78. Cal.—Feillett v. Engler, 8 Cal. 76.
N.C.—Slocumb v. Cape Fear Shingle Co., 14 S.E. 622, 110 N.C. 24.

79. La.—Kelly v. Lyons, 4 So. 480, 40 La.Ann. 498.
S.C.—Martin v. Bowie, 21 S.C.Law 225.

80. Ill.—Wilson v. Josephson, 244 Ill.App. 366.
Pa.—Deibert v. Rhodes, 140 A. 515, 291 Pa. 550—Oberlin v. Parry, 134 A. 460, 287 Pa. 224—Hefer v. Hefner, 95 Pa.Super. 551—Miller v. Desher, 12 Pa.Dist. & Co. 315, 41 Lanc.L.Rev. 335—Morris v. Chevalier, Com.Pl., 20 Lehigh L.J. 183.
34 C.J. p 120 note 73.
Authority of clerk to enter in vacation see infra § 166.
Authority of clerk to liquidate amount of judgment see infra § 167.
In pending suit or action
Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.
In absence of trial judge on a rule day under a statute so providing, the register may enter a decree pro confesso.—Ex parte Anderson, 4 So. 2d 420, 242 Ala. 31.
Only a clerk of a court which has jurisdiction of the cause may enter judgment.—Kirkbride v. Durden, Pa., 1 Dall.,U.S., 238, 1 L.Ed. 141.
The court cannot make such judgment its judgment by action taken at a subsequent term, so as to alter the time when the lien of the judgment will commence.—Russell v. Geyer, 4 Mo. 384.

81. Ill.—Houston v. Ingels, 48 N.E. 2d 196, 313 Ill.App. 383—Long v. Coffman, 230 Ill.App. 527.
N.C.—G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7.
34 C.J. p 120 note 77.

82. Ill.—Houston v. Ingels, 48 N.E. 2d 196, 313 Ill.App. 383—Long v. Coffman, 230 Ill.App. 527.

83. Ill.—Houston v. Ingels, 48 N.E. 2d 196, 313 Ill.App. 383—Long v. Coffman, 230 Ill.App. 527.
Iowa.—Blott v. Blott, 290 N.W. 74, 227 Iowa 1103.

84. Cal.—Old Settlers' Inv. Co. v. White, 110 P. 922, 158 Cal. 236.
Pa.—People's Supply Co. v. Goff, 25 Pa.Co. 651.

85. Pa.—Orner v. Hurwitch, 97 Pa. Super. 263—Meyers & Joly v. Freiling, 31 Pa.Super. 116.
34 C.J. p 120 note 85.

86. Pa.—Richards v. Richards, 19 A. 1077, 135 Pa. 239—Commonwealth v. Brod, 22 Pa.Dist. 501, 41 Pa.Co. 194.

87. Ill.—Tucker v. Gill, 61 Ill. 236.
Necessity of judgment following cognovit or confession generally see infra § 164.

88. Pa.—Rohrer v. Rohrer, 14 Pa.Co. 332.

89. S.C.—Moore v. Trimmier, 11 S.E. 548, 552, 32 S.C. 511—Trimmier v. Winsmith, 23 S.C. 449.

fendant was a resident at the time of making such statement has been held to mean "must,"[90] and, as so construed, the requirement has been held to be jurisdictional.[91]

§ 162. Necessity and Sufficiency of Proof

a. In general
b. Proof of authority

a. In General

As a general rule, a confession of judgment dispenses with the necessity of proving the plaintiff's cause of action, except to the extent that by statute he is required to furnish proof of certain facts or to the extent that the right to enter judgment depends on a condition or contingency, the occurrence of which is not disclosed by the papers.

As a general rule, a confession of judgment dispenses with the necessity of proving plaintiff's cause of action,[92] except to the extent that the right to enter judgment depends on a condition or contingency, the occurrence of which is not disclosed by the papers, in which case the occurrence of such condition or contingency must be averred and shown by affidavit or other legal proof, before the judgment may be entered.[93] An affidavit, unless specially required by statute, is not necessary if other legal proof is produced.[94] Where required by statute, however, a judgment by confession must be supported by an affidavit containing all facts required by the statute to be embodied therein.[95] Thus, under a statute so providing, a judgment by confession must be supported by an affidavit stating the amount due or to become due,[96] or the true consideration of the bond or other obligation on which the judgment is confessed,[97] or a sufficient cause of action which may be the subject of a judgment by confession.[98]

b. Proof of Authority

Under some statutes and rules of practice, where a confession of judgment is made under a power of attorney, proof of due execution of the power is necessary before entry of judgment, and proof thereof by affidavit is generally sufficient.

Under some statutes and rules of practice, where the confession is made under a power of attorney, it is necessary that proof shall be made of the due execution of the warrant or power before the judgment by confession is entered,[99] at least where the judgment is entered in vacation by the clerk of the court.[1] As a general rule, an affidavit showing the execution of a warrant of attorney to confess judg-

90. N.Y.—Williams v. Mittlemann, 20 N.Y.S.2d 690, 259 App.Div. 697, appeal denied 22 N.Y.S.2d 822, 260 App.Div. 811.

91. N.Y.—Williams v. Mittleman, supra.

92. Iowa.—Edwards v. Pitzer, 12 Iowa 607.
N.J.—Baldwin v. Brown, 8 N.J.Law 533.

93. Pa.—Kolf v. Lieberman, 128 A. 122, 282 Pa. 479—Hogsett v. Lutrario, 13 A.2d 902, 140 Pa.Super. 419—Advance-Rumely Thresher Co. v. Frederick, 98 Pa.Super. 560—Soklove v. Lalitas, Com.Pl., 30 Del.Co. 370—Medvidovich v. Sterner, Com.Pl., 50 Pa.Dist. & Co. 690, 92 Pittsb.Leg.J. 223—Miller v. Miller, Com.Pl., 10 Sch.Reg. 103—Walters v. Dooley, Com.Pl., 5 Sch.Reg. 174—Home Protective Savings & Loan Ass'n v. Kefalas, 48 Pa.Dist. & Co. 346, 6 Fay.L.J. 151, 91 Pittsb. Leg.J. 326.
34 C.J. p 121 note 89.
Effect of failure to file proper affidavit of default see infra § 171.
Right to enter judgment before maturity of debt see infra § 166.
If right to enter judgment is not dependent on occurrence of a specific default, an averment of default is not necessary.—Harwood v. Bruhn, 170 A. 144, 313 Pa. 337—Commonwealth v. McLaughlin Contracting Co. of Pittsburgh, 142 A. 274, 293 Pa. 313—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454—New Amsterdam Building & Loan Ass'n v. Moyerman, 95 Pa.Super. 47—International Advertising Syndicate v. Quaker Silk Mills, 8 Pa.Dist. & Co. 23, 18 Berks Co.L.J. 65—General Finance Co. v. Wasilowski, 5 Pa.Dist. & Co. 274, 24 Sch.Leg.Rec. 219—Dukas v. Cohen, Pa.Com.Pl., 33 Luz. Leg.Reg. 163—Commonwealth ex rel. Argyle v. Jones, Pa.Com.Pl., 30 North.Co. 95—Donaghue v. Haupt, Pa.Com.Pl., 4 Sch.Reg. 367—International Finance Co. v. Barnes, Pa. Com.Pl., 86 Pittsb.Leg.J. 44.
Affidavit of default held insufficient to sustain judgment.—Commonwealth v. Przekop, 25 A.2d 776, 148 Pa.Super. 385—Home Protective Savings & Loan Ass'n v. Kefalas, 48 Pa.Dist. & Co. 346, 6 Fay.L.J. 151, 91 Pittsb.Leg.J. 326.
Affidavit of default held sufficient to sustain judgment.—Commonwealth v. J. & A. Moeschlin, Inc., 170 A. 119, 314 Pa. 34—Marshall v. Jackson, 145 A. 584, 296 Pa. 16—Grant Const. Co., for Use of Home Credit Co., v. Stokes, 167 A. 643, 109 Pa. Super. 421—Home Credit Co. v. Preston, 99 Pa.Super. 457—International Finance Co. v. Barnes, Pa.Com.Pl., 86 Pittsb.Leg.J. 44.

94. Pa.—Sweeney v. McDonnell, 25 Pa.Super. 69—Continental Mining & Smelting Corp. v. Duncan, Com. Pl., 9 Fay.L.J. 95.
34 C.J. p 121 note 91.

95. N.J.—Harrison v. Dobkin, Cir. Ct., 168 A. 837, 11 N.J.Misc. 892.

96. Wis.—Reeves v. Kroll, 113 N. W. 440, 133 Wis. 196.
34 C.J. p 121 note 93.

97. N.J.—Knoettner v. Integrity Corporation of New Jersey, 160 A. 527, 109 N.J.Law 186.
34 C.J. p 123 note 19.
Affidavits held sufficient
N.J.—Haddonfield Nat. Bank v. Hipple, 164 A. 575, 110 N.J.Law 271—Knoettner v. Integrity Corporation of New Jersey, 160 A. 527, 109 N.J.Law 186—Huck-Gerhardt Co. v. Parreca, 154 A. 870, 9 N.J.Misc. 563.
34 C.J. p 123 note 19 [a].
Incorporation of contract in affidavit held unnecessary.—Huck-Gerhardt Co. v. Parreca, supra.

98. N.J.—Brandt v. Tartar, 145 A. 225, 7 N.J.Misc. 229.

99. Okl.—St. Louis-San Francisco Ry. Co. v. Bayne, 40 P.2d 1104, 170 Okl. 542—Scanlon v. Klopfenstein, 3 P.2d 869, 152 Okl. 162.
34 C.J. p 121 note 97.
Filing of warrant or power of attorney see supra § 153.

1. Ill.—Shumway v. Shumway, 192 N.E. 578, 357 Ill. 477—Hutson v. Wood, 105 N.E. 343, 263 Ill. 376.
34 C.J. p 121 notes 98, 1.

ment, filed with the warrant, is sufficient proof of its execution.[2] It has been held that, where the record recites that the execution of the power was duly proved, this will be sufficient on error brought, although no affidavit was filed.[3]

Record. It has been held that the fact that the execution of the power was properly proved before the confession of the judgment must appear on the record,[4] at least when it is confessed in vacation before the clerk,[5] and evidence aliunde the record is inadmissible to prove a valid affidavit.[6] Other authorities, however, have held that the judgment is sufficient if it recites the power, without reciting its contents or that it was proved.[7]

§ 163. —— Affidavit as to Bona Fides of Confession

Under statutes so providing, the warrant of attorney or statement of indebtedness must be accompanied by an affidavit that the debt is "justly due and owing" or "justly due or to become due" and that the judgment is not confessed for the purpose of defrauding the debtor's creditors, but it is not necessary that the affidavit be in the precise form used in the statute, substantial compliance being sufficient.

To evidence the good faith of the transaction and prevent fraud, it is commonly required by statute that the warrant of attorney or statement of indebtedness shall be accompanied by an affidavit that the debt is "justly due and owing" or "justly due or to become due," and that the judgment is not confessed for the purpose of defrauding the debtor's creditors.[8] Under some of these statutes, plaintiff, that is, the party taking the judgment by confession,[9] or his attorney or agent,[10] must make such affidavit. Under other statutes, defendant or debtor, that is, the party confessing, must make the affidavit.[11] It has been held, however, that such an affidavit, by plaintiff, is not necessary where defendant appears under process and files an answer admitting the debt and consenting to the judgment.[12]

Sufficiency It is not essential that the required affidavit of bona fides, whether made by plaintiff or by defendant, should be in the precise form of words used in the statute; it is sufficient if it substantially complies with the statutory requirement.[13] Where a complaint is filed fully describing the cause of action, it is not necessary that the affidavit should describe it;[14] nor is it necessary to state the

2. Ill.—Hutson v. Wood, supra.
34 C.J. p 121 notes 99, 1.

3. Ill.—Iglehart v. Morris, 34 Ill. 501.

4. Ark.—Rapley v. Price, 9 Ark. 428.
34 C.J. p 121 note 5.

5. Ill.—Alton Banking & Trust Co. v. Gray, 179 N.E. 469, 347 Ill. 99.
34 C.J. p 121 note 6.

Where judgment is confessed in term time, it has been held that it will be presumed that a sufficient warrant of attorney was produced and proved to the court.—Alton Banking & Trust Co. v. Gray, supra —34 C.J. p 122 note 7.

6. Ill.—Hutson v. Wood, 105 N.E. 343, 263 Ill. 376, Ann.Cas.1915C 587.

7. Tex.—Rankin v. Filburn, 1 Tex. A.Civ.Cas. § 797.
34 C.J. p 122 note 9.

8. N.J.—Fortune Building & Loan Ass'n v. Codomo, 7 A.2d 880, 122 N.J.Law 565—Haddonfield Nat. Bank v. Hipple, 164 A. 575, 110 N. J.Law 271—Knoettner v. Integrity Corporation of New Jersey, 160 A. 527, 109 N.J.Law 186—Modern Security Co. of Philadelphia v. Fleming, 142 A. 649, 6 N.J.Misc. 730.
Allegation that debt is justly due in statement of indebtedness see supra § 159 d.
Effect of failure to file proper affidavit see infra § 171.

"Justly due and owing"
(1) It has been held that a debt is "justly due and owing" within the meaning of such statute only after the date of payment has been reached.—American Auto Finance Co. v. Miller, 7 A.2d 828, 123 N.J.Law 1—Modern Security Company v. Fleming, 142 A. 649, 7 N.J.Misc. 730.

(2) However, it has also been held that the words "due" and "justly due and owing" in such statute may be applied to an indebtedness without reference to the time of payment.—Gaskill & Sons v. Buckman, 116 A. 692, 95 N.J.Law 14—Hoyt v. Hoyt, 116 N.J.Law 138.

Filing with court
Under a statute so providing, such affidavit should be filed with the court.—McPheeters v. Campbell, 5 Ind. 107—34 C.J. p 123 note 23.

9. N.J.—Knoettner v. Integrity Corporation of New Jersey, 160 A. 527, 109 N.J.Law 186.
34 C.J. p 122 note 11.

Plaintiff in person, and not his attorney in fact or agent in the confessed judgment, must make the affidavit.
Mo.—Bryant v. Harding, 29 Mo. 347.
Tex.—Montgomery v. Barnett, 8 Tex. 143.

10. N.J.—Knoettner v. Integrity Corporation of New Jersey, 160 A. 527, 109 N.J.Law 186.

Sources of information and reason for making
It has been held that an affidavit made by an attorney must disclose the sources of the attorney's information and give a reason why it was not made by plaintiff himself. —Rogers v. Cherrier, 43 N.W. 828, 75 Wis. 54—Jewett v. Fink, 2 N.W. 1124, 47 Wis. 446.

11. Ind.—Bible v. Voris, 40 N.E. 670, 141 Ind. 569.
34 C.J. p 122 note 14.

12. Tex.—Lanier v. Blount, Civ. App., 45 S.W. 202.
34 C.J. p 122 note 15.

13. N.J.—Haddonfield Nat. Bank v. Hipple, 164 A. 575, 110 N.J.Law 271 —**Corpus Juris cited in** Harrison v. Dobkin, 168 A. 837, 838, 11 N.J. Misc. 892.
34 C.J. p 122 note 18.

Mortgage deficiency
Affidavit for judgment by confession on bond secured by mortgage need not state that mortgage was foreclosed, premises sold, and notice of intention to enter judgment for deficiency filed.—Harrison v. Dobkin, 168 A. 837, 11 N.J.Miss. 892—Levin v. Wenof, 146 A. 789, 7 N.J.Misc. 603.

Affidavit held sufficient
N.J.—Haddonfield Nat. Bank v. Hipple, 164 A. 575, 110 N.J.Law 271 —Knoettner v. Integrity Corporation of New Jersey, 160 A. 527, 109 N.J.Law 186.

Affidavit held insufficient
N.J.—Harrison v. Dobkin, Cir.Ct., 168 A. 837, 11 N.J.Misc. 892.

14. Ind.—Clouser v. March, 15 Ind. 82.

amount due, in the affidavit, where the complaint states such amount and affiant swears that the facts alleged in the complaint are true to his knowledge.[15] The affidavit need not deny in specific terms that the debt has been paid, released, barred, or discharged.[16]

§ 164. Nature, Form, and Requisites of Judgment in General

A judgment rendered on the confession of a debtor, except in so far as its form and requisites are governed by special statutory requirements, need not be in any special form, but it should follow closely the cognovit or confession.

A judgment rendered on the confession of a debtor or defendant, except in so far as its form and requisites are governed by special statutory requirements,[17] need not be in any special form, as its sufficiency must be tested by its substance rather than by its form.[18] It should, however, follow closely the cognovit or confession,[19] should express the particular debt or obligation for which it is given,[20] and should include any special conditions or stipulations contained therein,[21] except such as constitute no part of the judgment.[22] The mere filing or recording of a statement or confession of judgment in the clerk's office is not a "judgment,"[23] especially where the filing is done at a time when by law such office is not open for the transaction of business.[24]

Surplusage. The presence in the judgment of merely superfluous provisions or directions, or of matters which follow as the legal consequence of the judgment whether or not they are incorporated in it, may generally be disregarded as surplusage.[25]

Parties. A judgment by confession must designate the parties for and against whom it is rendered with reasonable certainty, or it will be void for uncertainty.[26] The judgment must follow the confession in describing the parties in favor of whom,[27] or against whom,[28] it is confessed. Where several defendants confess judgment severally, a separate judgment should be entered against each,[29] and a joint judgment may not be entered against them.[30] On the other hand, in case of joint debtors or joint defendants, it has been held that a joint judgment must be entered against them all,[31] and that, if in

15. Wis.—Rogers v. Cherrier, 43 N. W. 828, 75 Wis. 54.

16. N.Y.—Lanning v. Carpenter, 20 N.Y. 447.

17. **Judgment held to comply with statute** requiring judgment to be substantially in form set forth.—Bank of Chatham v. Arendall, 16 S. E.2d 352, 178 Va. 183.

18. Va.—Bank of Chatham v. Arendall, supra.
34 C.J. p 123 note 27.

Entry within six months of foreclosure sale was held not required by statute to be recited.—Gerstley v. Best, 151 A. 895, 8 N.J.Misc. 661, affirmed 156 A. 377, 108 N.J.Law 189.

19. Del.—Dover Motors Corporation v. North & South Motor Lines, 193 A. 592, 8 W.W.Harr. 467.
Ill.—Sharpe v. Second Baptist Church of Maywood, 274 Ill.App. 374.
Pa.—Grakelow v. Kidder, 95 Pa.Super. 250—Seltzer v. Novor & Israel, 12 Pa.Dist. & Co. 551.
34 C.J. p 123 note 28.

20. Conn.—Wight v. Mott, Kirby 152.

21. Va.—Strode v. Head, 2 Wash. 149, 2 Va. 149.

22. Pa.—Hope v. Everhart, 70 Pa. 231.
34 C.J. p 123 note 31.

23. Iowa.—Blott v. Blott, 290 N.W. 74, 227 Iowa 1108.
34 C.J. p 123 note 32.
Record entry as constituting judgment see infra § 165.

Statement, recorded on the judgment docket and cross-indexed as judgments are, is not effective as a "judgment."—Gibbs v. G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.

24. N.Y.—Hathaway v. Howell, 54 N.Y. 97.

25. Pa.—Altoona Trust Co. v. Fockler, 165 A. 740, 311 Pa. 426.
Surplusage in judgments generally see supra § 84.

What action was denominated in judgment was held immaterial.—Rubin v. Dale, 288 P. 223, 156 Wash. 676.

26. Ill.—Sproule v. Taffe, 13 N.E.2d 827, 294 Ill.App. 374.

27. Del.—Dickerson v. Kelley, 50 A. 512, 17 Del. 69.

Initials and full name
Where the payee of a note is designated merely by the use of initials, judgment may be entered thereon in favor of the payee by the use of his full name.—Money v. Hart, 159 A. 437, 5 W.W.Harr., Del., 115.

Judgment held in conformity with declaration and cognovit
Ill.—Richman v. Menrath, 266 Ill. App. 1.

28. Pa.—Freedman for Use of Rothbard v. Freedman-Smotkin, Com. Pl., 52 York Leg.Rec. 17.
34 C.J. p 123 note 35.

Judgment held in conformity with declaration and cognovit
Ill.—Richman v. Menrath, 266 Ill. App. 1.

29. Va.—Richardson v. Jones, 12 Gratt. 53, 53 Va. 53.
34 C.J. p 123 note 36.

30. Pa.—Felger v. Jersey Cereal Food Co., 141 A. 475, 292 Pa. 518—Romberger v. Romberger, 139 A. 159, 290 Pa. 454—Peoples Nat. Bank of Reynoldsville, to Use of Mottern, v. D. & M. Coal Co., 187 A. 452, 124 Pa.Super. 21—First Nat. Bank v. Kendrew, 160 A. 227, 105 Pa.Super. 142.
34 C.J. p 123 note 37.

As between makers and indorsers of judgment notes, liability was several, not joint.—First Nat. Bank v. Kendrew, supra.

Judgment made regular
Where joint judgment against maker and indorser of note was originally entered on two separate confessions, but by agreement judgment as to indorser was stricken off, judgment against maker should not be disturbed.—Farmers' & Miners' Nat. Bank of Forest City, Pa., v. Taylor, 173 A. 278, 315 Pa. 418.

31. W.Va.—Snyder v. Snyder, 9 W. Va. 415.
34 C.J. p 123 note 38.

Where wife did not authorize the signing of her name on confession, judgment may be entered only against husband, notwithstanding confession purported to be joint, and not several.—Browning v. Spurrier, 245 Ill.App. 276.

such case plaintiff accepts the confession of one of the defendants and takes judgment against him separately, the action is thereby discontinued as to the other defendants.[32]

After assignment. A statute requiring actions to be prosecuted in the name of the real party in interest has been held to require, after the underlying obligation has been assigned, that the judgment be confessed in the name of the assignee.[33]

Entry of one judgment on several powers of attorney. Where several powers of attorney are given to confess judgment on several debts in favor of and against the same parties, it is both competent and proper for the court to consolidate them and enter a single judgment.[34]

Election. Generally, where the terms of the confession authorize the entry of two distinct forms of judgment embracing different forms of relief for the redress of a given wrong or the enforcement of a given right, and these forms of judgment or relief are based on inconsistent theories, the creditor's election to enter the one form of judgment precludes entry of the other.[35]

Signature. Under a statute so providing, the judgment must be signed by a judge or court commissioner,[36] unless the statute is merely directory.[37]

Alterations. After the judgment has been entered and completed, no alterations changing its character in any way, whether by addition or otherwise, may be made without leave of the court.[38]

Nature of judgment. A judgment entered on the confession of defendant is in general final and not interlocutory,[39] and, if the right to enter the judgment or to issue execution on it depends on the happening of a contingency, the court should determine the matter by a final judgment.[40]

§ 165. Entry of Judgment

a. In general
b. Form and contents of record

a. In General

Generally, a confession of judgment does not have the effect of a judgment, at least as against other creditors, until it is entered by the clerk in the proper book or record of the court.

As a general rule, in order that a confession of judgment may have the validity and effect of a judgment, at least as against other creditors, it must be entered by the clerk in the proper book or record of the court,[41] as it is the record entry, and not the confession, that constitutes the judgment,[42] although there are decisions to the effect that the clerk's failure to enter the judgment of record as directed by statute does not invalidate the judgment.[43] The clerk may be constrained to perform his duty in this respect by a rule or motion,[44] and mere irregularities in entering or in failing to enter the judgment may be corrected by an entry made nunc pro tunc,[45] unless the defects are jurisdictional, in which case the judgment cannot be sustained, even though it should appear that the amount of the judgment was justly due.[46] Under some statutes, where judgment is confessed on a statement of indebtedness, the clerk of the court must indorse the judgment on the statement filed with him, and enter it in the judgment book.[47] It has been held,

32. Ky.—Elledge v. Bowman, 5 J.J. Marsh. 593.

33. Pa.—Market St. Trust Co. now for Use of Swails v. Grove, 46 Pa. Dist. & Co. 605, 53 Dauph.Co. 114—Reinsmith v. McCready, Com.Pl., 21 Lehigh Co.L.J. 111, 58 York Leg. Rec. 187.

34. N.J.—Levin v. Wenof, 146 A. 789, 7 N.J.Misc. 603.
34 C.J. p 123 note 41.

35. **Recovery of premises and future rent**
Where the requisite power exists, a lessor may enter judgment by confession for future rent accruing under an acceleration clause, or for recovery of the premises, but not for both.—Markeim-Chalmers-Ludington, Inc., v. Mead, 14 A.2d 152, 140 Pa.Super. 490—Matovich v. Gradich, 137 A. 65, 123 Pa.Super. 355—Grakelow v. Kidder, 95 Pa.Super. 250.

36. Wis.—Wadsworth v. Willard, 22 Wis. 238—Remington v. Cummings, 5 Wis. 138.

37. Iowa.—Dullard v. Phelan, 50 N.W. 204, 83 Iowa 471.

38. Del.—Flach v. Temple, 45 A. 539, 18 Del. 129.

39. Ill.—Johnson v. Estabrook, 84 Ill. 75.
Md.—Huston v. Ditto, 20 Md. 305.

40. Ky.—Bonta v. Clay, 1 Litt. 27.
Va.—Taylor v. Beck, 6 Rand. 316, 24 Va. 316.

41. Ga.—Whitley v. Southern Wholesale Corporation, 164 S.E. 903, 45 Ga.App. 445.
N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
34 C.J. p 124 note 46.

42. Ga.—Whitley v. Southern Wholesale Corporation, 164 S.E. 903, 45 Ga.App. 445.
34 C.J. p 124 note 47.
Filed statement or confession as not constituting judgment see supra § 164.

Certificate furnished by prothonotary to one entering judgment by confession is mere memorandum, and not evidence of a subsisting obligation.—In re Huber's Estate, 98 Pa. Super. 563.

43. Va.—American Bank & Trust Co. v. National Bank of Suffolk, 196 S.E. 693, 170 Va. 169.
34 C.J. p 124 note 48.

The failure of clerk to sign certificate, stating that judgment was confessed before him and entered of record, did not invalidate judgment, as clerk's duties in connection with entry and recordation of confessed judgment are "directory" only, not "mandatory."—Bank of Chatham v. Arendall, 16 S.E.2d 352, 178 Va. 183.

44. S.C.—Hall v. Moreman, 14 S.C. Law 477.

45. Pa.—Gutekunst v. Huber, 31 Pa. Dist. & Co. 53, 44 Dauph.Co. 300.
34 C.J. p 124 note 50.

46. Wis.—Sloane v. Anderson, 15 N. W. 21, 57 Wis. 123.

47. N.C.—Gibbs v. G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7—

however, that the clerk's failure to make such indorsement does not affect the validity of a judgment which the entry on the judgment docket shows was rendered by the court.[48]

Restoration of record. Where the record of a judgment by confession has been lost or destroyed, it may be restored on proper application stating in substance the contents of the missing record.[49]

b. Form and Contents of Record

The record of a judgment by confession should show all the facts necessary to support the judgment, but it need not include matters of evidence or other details which do not affect the jurisdiction of the court.

The record of a judgment by confession should show all the facts necessary to support the judgment.[50] The warrant or power of attorney authorizing a confession of judgment should be filed as a part of the record, as discussed supra § 153, and the record should show that the execution of the warrant or power of attorney was duly proved, as discussed supra § 162 b, but it has been held that it need not appear on the record that the bond and warrant were produced at the time of entering the judgment;[51] nor need the record include matters of evidence or other details which do not affect the jurisdiction of the court.[52] In the absence of a statute providing otherwise, it has been held that the note, bond, or other evidence of the debt need not be filed with the confession.[53] Where the judgment is entered as collateral security for an existing indebtedness, or as security for future advances, the substance of the agreement, or at least a reference thereto, should be inserted by the clerk in his memorandum.[54]

§ 166. —— Time of Entry

a. In general
b. In vacation

a. In General

Generally speaking, a judgment by confession may be entered at such time, and only such time, as is authorized by law and by the terms of the confession.

Generally speaking, a judgment by confession may be entered at such time, and only such time, as is authorized by the terms of the confession,[55] and by the statutes and local rules of practice.[56] In the absence of statute providing otherwise, the judgment need not be entered at any particular time after the confession and statement are made.[57] Where a statement is presented to the clerk with a request to enter and docket a judgment by confession thereon, it is his duty to comply promptly with the request.[58]

Cline v. Cline, 188 S.E. 904, 209 N. C. 531—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N. C. 440.

34 C.J. p 124 note 52.

48. N.C.—Cline v. Cline, 188 S.E. 904, 209 N.C. 531.

Where no judgment was rendered by the court and the clerk failed to make such indorsement, the judgment has been held to be fatally defective as against subsequent judgment creditors.—Gibbs v. G. H. Weston & Co., 13 S.E.2d 698, 221 N.C. 7.

49. Ill.—Russell v. Lillja, 90 Ill. 327.

53 C.J. p 638 note 37 [c].

50. Pa.—Dime Bank & Trust Co. of Pittston v. Manganiello, 31 A.2d 564, 152 Pa.Super. 270—Indiana Land and Improvement Co. v. Ferrier Run Coal Co., 6 Pa.Dist. & Co. 83, 39 York Leg.Rec. 61—South Union Tp. School Dist. v. Moyer, 20 Pa.Dist. 941.

Contents of record where judgment entered:

By clerk in vacation see infra § 166 b.

In court of limited jurisdiction see supra § 161 a.

51. N.J.—Burroughs v. Condit, 6 N. J.Law 300.

52. Md.—Harris v. Alcock, 10 Gill & J. 226, 32 Am.D. 158.

34 C.J. p 126 note 92.

53. N.C.—Merchants' Nat. Bank v. Newton Cotton Mills, 20 S.E. 765, 115 N.C. 507.

34 C.J. p 126 notes 93–95.

Notes held part of record

Ill.—Shumway v. Shumway, 192 N. E. 578, 357 Ill. 477.

54. Md.—First Mortgage Bond Homestead Ass'n v. Mehlhorn, 105 A. 526, 133 Md. 439, 3 A.L.R. 844.

55. Md.—Hart v. Hart, 166 A. 414, 165 Md. 77.

Time for entering judgment under warrant or power of attorney see supra § 154 e.

56. Minn.—Berg v. Burkholder Lumber Co., 204 N.W. 923, 164 Minn. 81.

N.Y.—American Cities Co. v. Stevenson, 60 N.Y.S.2d 635.

Pa.—Hunter v. Wertz, 91 Pittsb.Leg. J. 348, 57 York Leg.Rec. 111.

34 C.J. p 124 notes 54, 55.

Right to enter judgment under warrant or power of attorney on claim barred by statute of limitations see supra § 156.

Until "regularly sued out and docketed"

(1) Under a statute so providing, a judgment by confession cannot be entered up unless and until the cause has been regularly sued out and docketed as in other cases.—Thomas v. Bloodworth, 160 S.E. 709, 44 Ga. App. 44.

(2) Judgment is not "entered up" within the meaning of such statute until filed in court.—Thomas v. Bloodworth, supra.

(3) Although judgment may be made and entered on the petition before the petition is filed, and may be filed with the petition, it has been held that it is thereby entered up simultaneously with the filing of the petition and not after the case has been regularly sued out and docketed.—Thomas v. Bloodworth, supra.

Forthwith or without delay

(1) A statutory requirement that judgments by confession shall be entered on the docket forthwith has been held to mean that such entry shall be made within a reasonable time.—Burchett v. Casady, 18 Iowa 342—34 C.J. p 125 note 64.

(2) A statutory provision that the judgment be entered without delay has been held to be merely directory. —McDowell County Bank v. Wood, 55 S.E. 753, 60 W.Va. 617.

57. Pa.—Oransky v. Stepanavich, 155 A. 290, 304 Pa. 84, 77 A.L.R. 988.

34 C.J. p 125 note 62.

58. Minn.—Whelan v. Reynolds, 112 N.W. 223, 101 Minn. 290.

A judgment by confession in an action already pending cannot properly be entered before the filing of the agreement to confess judgment, where there is such an agreement,[59] or according to some authorities,[60] but not others,[61] before the return term of the writ, or before the court has disposed of the issues raised by an answer challenging plaintiff's right to recover.[62]

Death of parties. Although, as discussed supra § 156, as a general rule a judgment by confession cannot be entered on a warrant of attorney after the death of the grantor, where the judgment confessed is not to be entered until the happening of a contingency, it has been held that the death of defendant after the happening of such contingency does not prevent the mere formal entry of the judgment.[63] In the absence of statute, a confession of judgment in a pending suit, after the death of plaintiff and before substitution of his representative, has been held void, both as regards the representatives of plaintiff and any third person who may be collaterally interested in the payment of the same.[64] Under a statute so providing, however, judgment may be entered on a cognovit at any time within two terms, notwithstanding the death of plaintiff, or of one of several plaintiffs, in the meantime.[65]

Relation back. The rule, as discussed supra § 113, that judgments of a court of record relate back to the term in which they are rendered applies to judgments by confession.[66] It has been held that a judgment on a warrant received by the clerk at his residence after office hours may be docketed the next day as of the day when received.[67]

b. In Vacation

Under a number of statutes authorizing a confession of judgment, judgment may be entered either in term time or in vacation, and may be entered in vacation by the clerk of the court without an order or other direction of the judge.

Under a number of statutes authorizing a confession of judgment, the judgment confessed may be entered either in term time or in vacation,[68] and may be entered in vacation by the clerk of the court without an order or other direction from the court or judge;[69] and under some statutes, during vacation, the judgment must be entered by the clerk and cannot be entered by the judge.[70] The act of the clerk in such a case is the "entering" rather than the "rendering" of a judgment;[71] but the judgment when entered becomes the judgment of the court and not the judgment of the clerk.[72] As such an entry of judgment is a statutory proceeding in derogation of the common law, it is not valid unless there is a strict compliance with the requirements of the law authorizing it;[73] and such compliance must appear on the face of the record.[74] Where such requirements have been complied with, the clerk's authority to enter the confession is derived solely from the statute, and specific authority directed to him as clerk to make the entry is not required.[75]

What vacation includes. A vacation within the meaning of this rule includes the morning of the first day of the term of court, before the hour for the opening of court,[76] and also includes the period of an adjournment of court for several days or weeks during the term;[77] but not the period between adjournment on one day and the convening

59. Md.—Snowden v. Preston, 20 A. 910, 73 Md. 261.

60. U.S.—Haden v. Perry, D.C., 11 F.Cas.No.5,893, 1 Cranch C.C. 285—Askew v. Smith, D.C., 2 F.Cas. No. 588, 1 Cranch C.C. 159.

61. Mo.—Hoppenbrook v. Dial, 119 S.W. 496, 137 Mo.App. 75.
34 C.J. p 125 note 60.

62. **Answer benefiting all defendants**
Where it is sought to enter judgment against two or more defendants, an answer filed by one which may be or become common to all, and which goes to the right of plaintiff to recover, precludes the entry of judgment against such other defendants until the issues raised by such answer have been disposed of by the court.—Rucker v. Baker, 177 S.W.2d 878, 296 Ky. 505.

63. S.C.—Keep v. Leckie, 42 S.C.Law 164.

64. Pa.—Finney v. Ferguson, 3 Watts & S. 413—Wentz v. Bealor, 14 Pa.Co. 337.

65. N.Y.—Gilbert v. Corbin, 18 Wend. 600.
34 C.J. p 125 note 71.

66. N.C.—Farley v. Lea, 20 N.C. 307, 32 Am.D. 680.

67. Pa.—Polhemus' Appeal, 82 Pa. 328.

68. Ill.—Wilson v. Josephson, 244 Ill.App. 366—Long v. Coffman, 230 Ill.App. 1.
N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
Pa.—Wanner v. Thompson, Com.Pl., 27 Del.Co. 455.
34 C.J. p 125 note 74.
Entry in vacation under power or warrant of attorney see supra § 154.

69. N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
34 C.J. p 125 note 75.

70. Ill.—Wilson v. Josephson, 244 Ill.App. 366.
34 C.J. p 125 note 76.

71. Colo.—Abbott v. Yuma County, 30 P. 1031, 18 Colo. 6—Schuster v. Rader, 22 P. 505, 13 Colo. 329.

72. Iowa.—Kendig v. Marble, 12 N.W. 584, 58 Iowa 529.
34 C.J. p 125 note 78.

73. Ill.—Rixman v. Witwer, App., 63 N.E.2d 607.
34 C.J. p 125 note 79.

74. Ill.—Rixmann v. Witwer, supra.

75. Md.—Tyrrell v. Hilton, 48 A. 55, 92 Md. 176.
34 C.J. p 126 note 80.

76. Va.—Brown v. Hume, 16 Gratt. 456, 57 Va. 456.
34 C.J. p 126 note 81.

77. Ill.—Ottawa First Nat. Bank v. Daly, 84 Ill.App. 173—Jasper v. Schlesinger, 22 Ill.App. 637, affirmed 17 N.E. 718, 125 Ill. 230.

of court on the next,[78] or the period pending a stay of proceedings.[79]

Confirmation or approval. Where the statute requires an office confession of judgment to be confirmed by the court, its incidents as a judgment have been held not to attach until the date of such confirmation.[80] It has been held, however, that a requirement that a judgment entered by the clerk in vacation shall be approved at the next term is merely directory, and that a failure to make such approval will not avoid the judgment.[81]

Relation back. It has been held that a judgment confessed in vacation and then entered up by consent as of the preceding term is void, and cannot be validated by any subsequent act of defendant;[82] but there is also authority to the contrary.[83]

§ 167. Amount of Judgment

A judgment by confession should be entered for the amount confessed, and only for such amount, and, where the confession does not determine the extent of the recovery, and it is not ascertainable by mere calculation, it must be liquidated by the court, and not by the clerk.

A judgment by confession should be entered for the amount confessed, and only for such amount,[84] and, as discussed supra § 154, where it is entered under a warrant of attorney, it must be for such an amount only as is authorized by the warrant. It has been held, however, that on confession of judgment in a pending action, if plaintiff's demand is in the nature of a debt, the amount of which may be ascertained by calculation, it is sufficient to enter judgment generally, which, in contemplation of law, is for the amount laid in the declaration.[85] A general acknowledgment of indebtedness will not authorize the entry of judgment for a specific sum.[86] If the judgment entered is for a greater sum than that actually confessed or due, unless the excess was fraudulently included,[87] the judgment is void only as to the excess and not in toto;[88] and the irregularity may be cured by plaintiff remitting the excess.[89] It has been held, however, that a false statement as to the amount due contained in the confession of judgment renders the judgment void, even though such statement is not intentional and is made without intent to defraud.[90]

Certainty of amount. Judgment may not be entered for an indefinite or unliquidated claim or amount.[91]

Interest. The judgment may include interest on plaintiff's demand, if, and only if, that is warranted by the terms of the confession.[92] The fact that judgment is confessed for a greater rate of interest than is allowed by the debt or claim on which the confession is made will not, in the absence of fraud, vitiate the judgment,[93] but it may be corrected so as to allow the proper rate.[94]

78. Ill.—Wilson v. Josephson, 244 Ill.App. 366.

79. N.Y.—Sacket's Harbor Bank v. Martin, 2 How.Pr. 111.

80. Miss.—Bass v. Estill, 50 Miss. 300.

81. Iowa.—Vanfleet v. Phillips, 11 Iowa 558.
34 C.J. p 126 note 85.

82. N.C.—Slocumb v. Anderson, 4 N.C. 77.

83. N.Y.—King v. Shaw, 3 Johns. 142.
34 C.J. p 126 note 87.

84. Iowa.—Fenley v. Phoenix Ins. Co. of Hartford, Conn., 247 N.W. 635, 215 Iowa 1369.
Md.—Webster v. People's Loan, Savings & Deposit Bank of Cambridge, 152 A. 815, 160 Md. 57.
N.Y.—Keller v. Greenstone, 2 N.Y.S. 2d 977, 253 App.Div. 573.
Pa.—Scholnick v. Canelos, 100 Pa. Super. 6—Philadelphia Sav. Fund Soc. v. Stern, 41 Pa.Dist. & Co. 461, affirmed 23 A.2d 413, 343 Pa. 534—Commonwealth v. Joyce, 18 Pa. Co. 193, affirmed 3 Pa.Super. 609, and 3 Pa.Super. 616—Thomas v. Brady, Com.Pl., 26 Erie Co. 168—Morris v. Chevalier, Com.Pl., 20 Lehigh Co.L.J. 133—Dime Bank & Trust Co. v. O'Boyle, 33 Luz.Leg. Reg. 185, reversed on other grounds Dime Bank & Trust Co. of Pittston v. O'Boyle, 6 A.2d 106, 334 Pa. 500—Commonwealth ex rel. Argyle v. Jones, Com.Pl., 30 North. Co. 95.
34 C.J. p 126 note 98.

Where judgment is confessed for a penalty, at common law and in the absence of a statute providing otherwise, judgment should be entered for the penalty subject to the interference of a court of equity if more than the damages actually sustained is sought to be exacted.—Rhoads v. Mitchell, Del., 47 A.2d 174.

Judgment may be for a larger amount than that indorsed on the process
N.J.—Hunt v. Shivers, 4 N.J.Law 89.

85. Pa.—Commonwealth v. Baldwin, 1 Watts 54, 26 Am.D. 33.
34 C.J. p 126 note 1.

86. N.J.—Vanderveer v. Ingleton, 7 N.J.Law 140.

87. La.—McElrath v. Dupuy, 2 La. Ann. 520.
Pa.—Jasuta v. Zaremba, Com.Pl., 47 Lack.Jur. 157.

88. Ill.—Larson v. Lybyer, 38 N.E. 2d 177, 312 Ill.App. 188
N.J.—Huck-Gerhardt Co. v. Parreca, 154 A. 870, 9 N.J.Misc. 563.
N.Y.—Keller v. Greenstone, 2 N.Y.S. 2d 977, 253 App.Div. 573.
34 C.J. p 126 note 5.

89. Ga.—Raney v. McRae, 14 Ga. 589, 60 Am.D. 660.

90. N.Y.—Illinois Watch Co. v. Payne, 57 N.Y.S. 308, 39 App.Div. 521—Rutherford v. Schottman, 1 N.Y.S. 741.

91. Ill.—Hymen v. Anschicks, 270 Ill.App. 202.
34 C.J. p 126 note 8.

Unpublished award
Conn.—Curtice v. Scovel, 1 Root, 327.
34 C.J. p 127 note 9.

92. Iowa.—Fenley v. Phoenix Ins. Co. of Hartford, Conn., 247 N.W. 635, 215 Iowa 1369.
N.Y.—Keller v. Greenstone, 2 N.Y. S.2d 977, 253 App.Div. 573.
Pa.—Philadelphia Sav. Fund Soc. v. Stern, 41 Pa.Dist. & Co. 461, affirmed 23 A.2d 413, 343 Pa. 534.
34 C.J. p 127 note 10.

93. N.C.—Merchants' Nat. Bank v. Newton Cotton Mills, 20 S.E. 765, 115 N.C. 507.

94. N.C.—Merchants' Nat. Bank v. Newton Cotton Mills, supra.

Costs and attorney's fees. A judgment by confession may ordinarily include an allowance for plaintiff's costs,[95] except such as are incurred unnecessarily.[96] The judgment may also include a reasonable allowance for plaintiff's attorney's fees, if that is authorized by the terms of the warrant, as discussed supra § 154, or confession,[97] and is not contrary to statute.[98] Where defendant confesses judgment in a sum below the jurisdiction of the court, and judgment is rendered on the confession, it has been held that he is not entitled to recover costs.[99]

Liquidation by court or clerk. Where the confession of judgment does not determine the extent of the recovery, and it is not ascertainable by mere calculation, it must be liquidated by the court,[1] on a writ of inquiry,[2] and not by the clerk or prothonotary,[3] who may, it has been held, enter judgment only for the amount which appears to be due from the face of the instrument.[4] If, however, the amount of recovery is simply a matter of calculation, this may be done by the clerk;[5] and it has been held that this is a duty which he must perform without unnecessary delay.[6]

F. CONSTRUCTION AND OPERATION OF JUDGMENT

§ 168. In General

A judgment by confession is the act of the court, and until it is reversed or set aside, it has all the qualities, incidents, and attributes of a judgment on a verdict.

Although a judgment by confession may be entered without a direct adjudication of the court or order of a judge, as discussed supra § 160, such judgment whether entered on a warrant of attorney, or on a cognovit, is the act of the court, and until it is reversed or set aside, it has all the qualities, incidents, and attributes of a judgment on a verdict.[7] It is conclusive, as between the parties

95. Iowa.—Fenley v. Phœnix Ins. Co. of Hartford, Conn., 247 N.W. 635, 215 Iowa 1369.
N.C.—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
34 C.J. p 127 notes 18, 22, 23.

96. Pa.—Moore's Appeal, 1 A. 593, 110 Pa. 433.
34 C.J. p 127 note 19.

97. Md.—Legum v. Farmers Nat. Bank of Annapolis, 24 A.2d 281, 180 Md. 356—Webster v. People's Loan, Savings & Deposit Bank of Cambridge, 152 A. 815, 160 Md. 57.
Pa.—First Mortgage Guarantee Co. of Philadelphia v. Powell, 98 Pa. Super. 99—Bury & Holman v. Pezalla, Com.Pl., 27 Del.Co. 405.
34 C.J. p 127 note 21.

Where space for amount is left blank, it is implied that fee should be reasonable, but, where line is drawn through space for amount of attorney's fee, it is implied that there should be no attorney's fee.—Beard v. Baxter, 258 Ill.App. 340.

Fee is not gratuity to which attorney is entitled by plaintiff's appearance, but is payable for services rendered, and, if plaintiff pays less for services of attorney than amount allowed in entering judgment, he must remit difference, while, if he pays more, he must stand expense.—Webster v. People's Loan, Savings & Deposit Bank of Cambridge, 152 A. 815, 160 Md. 57.

Allowances held excessive

(1) Two hundred dollars on two thousand five hundred dollar debt.—Schmoldt v. Chicago Stone Setting Co., 36 N.E.2d 182, 309 Ill.App. 377.

(2) One hundred fifty dollars on nine hundred fifty dollar debt.—Security Discount Corporation v. Jackson, 51 N.E.2d 618, 320 Ill.App. 440.

(3) Fifteen per cent.—Walton v. Abbott, Pa.Com.Pl., 57 Montg.Co. 1.

98. N.J.—Huck-Gerhardt Co. v. Parreca, 154 A. 870, 9 N.J.Misc. 563.

Docket fee

Statutory provision that defendant need not pay costs or fee to plaintiff's attorney, where judgment is entered by confession by prothonotary, was held to relieve defendant from paying the so-called docket fee otherwise payable to plaintiff's attorney, but not to bar fee stipulated for in warrant.—First Mortgage Guarantee Co. of Philadelphia v. Powell, 98 Pa.Super. 99.

99. Mo.—Lee v. Stern, 22 Mo. 575.

1. Ky.—Bonta v. Clay, 1 Litt. 27.
Pa.—Church v. Given, 15 Phila. 188.

2. Va.—Dunbar v. Lindenberger, 3 Munf. 169, 17 Va. 169.

3. Pa.—R. S. Noonan, Inc. v. Hoff, 38 A.2d 53, 350 Pa. 295—Lansdowne Bank & Trust Co. v. Robinson, 154 A. 17, 303 Pa. 58—Schwartz v. Sher, 149 A. 731, 299 Pa. 423—Orner v. Hurwitch, 97 Pa.Super. 263—Meyers & Jolly v. Freiling, 81 Pa.Super. 116—Morel v. Morel, 81 Pa.Super. 84—Bell v. Lawler, Com.Pl., 45 Lack.Jur. 131—Iacovazzi v. Brauner, Com.Pl., 44 Lack.Jur. 273, 57 York Leg.Rec. 165.
34 C.J. p 127 note 15.

4. Md.—Webster v. People's Loan & Savings & Deposit Bank of Cambridge, 152 A. 815, 160 Md. 57.
Pa.—Dime Bank & Trust Co. of Pittston v. O'Boyle, 6 A.2d 106, 334 Pa. 500—Commonwealth v. J. & A. Moeschlin, 170 A. 119, 314 Pa. 34—Lansdowne Bank & Trust Co. v. Robinson, 154 A. 17, 303 Pa. 58—Schwartz v. Sher, 149 A. 731, 299 Pa. 423—Drey St. Motor Co. v. Nevling, 161 A. 880, 106 Pa.Super. 42—Orner v. Hurwitch, 97 Pa.Super. 263—Meyers & Joly v. Freiling, 81 Pa.Super. 116—Morel v. Morel, 81 Pa.Super. 84—William J. Ryan, Inc., to Use v. Bodek, 10 Pa.Dist. & Co. 520—Union Acceptance Co. v. Grant Motor Sales Co., 5 Pa.Dist. & Co. 407, 23 Luz.Leg. Reg. 89, 2 Som.Leg.J. 260, 39 York Leg.Rec. 141—Heller v. Bloom, Com.Pl., 51 Dauph. Co. 360—Iacovazzi v. Brauner, Com.Pl., 44 Lack. Jur. 273, 57 York Leg.Rec. 165—Little v. Gardner-Denver Co., Com. Pl., 41 Lack.Jur. 9—Morris v. Chevalier, Com.Pl., 20 Lehigh Co.L. J. 133—Frederick v. Smeltzer, Com.Pl., 19 Lehigh Co.L.J. 378, 56 York Leg.Rec. 30—Grammes v. Haltzel, Com.Pl., 19 Lehigh Co.L. J. 275—Nash Sales & Service v. Broody, Com.Pl., 33 Luz.Leg.Reg. 158, 9 Som.Leg.J. 326.
34 C.J. p 120 notes 79, 82.

5. Pa.—R. S. Noonan, Inc., v. Hoff, 38 A.2d 53, 350 Pa. 295—Frederick v. Smeltzer, 19 Lehigh Co.L.J. 378, 56 York Leg.Rec. 30.
34 C.J. p 127 note 16.

Credits appearing on the instrument may be deducted from the amount of the original debt.—Morel v. Morel, 81 Pa.Super. 84.

6. Del.—Cook v. Cooper, 4 Del. 189.
34 C.J. p 127 note 17.

7. U.S.—Pennsylvania Co. for Insurances on Lives and Granting An-

and their privies, of the points involved in, and determined by, it;[8] but a stranger thereto is not concluded by it.[9] Like other judgments, it supports an execution, as considered in Executions § 7 d; it is capable of being abstracted and sent to counties other than that where in it was obtained;[10] it may be renewed;[11] and it is subject to the general principles of construction, as discussed infra §§ 436–443, in determining its operation and effect.[12] If it is made in a court without jurisdiction of the case, it has been held to have the force and effect of an account stated and acknowledged.[13]

Effect on other remedies. A judgment by confession has been held not to preclude the creditor from pursuing other remedies for the collection of the same debt or claim,[14] or of such portion thereof as is not satisfied by an execution on the judgment.[15]

§ 169. As Release or Waiver of Defects

A judgment by confession operates as a release or waiver of formal errors or defects in the proceedings, but neither the judgment itself, nor an express release of errors, will operate to release errors of substance.

A judgment by confession operates as a release or waiver of formal errors or defects in the proceedings,[16] such as of defects or omissions in the declaration;[17] and the debtor may by clear and appropriate language contained in the cognovit or warrant of attorney expressly release all procedural errors,[18] and in such a case the confession of the judgment is of itself an operative release, and no formal plea of release is necessary.[19] On the oth-

nuities v. Watt, C.C.A.Fla., 151 F. 2d 697—Kieda v. Krull, C.C.A.Pa., 101 F.2d 917.
Ill.—McKenna v. Forman, 283 Ill. App. 606.
Md.—Foland v. Hoffman, 47 A.2d 62—Pioneer Oil Heat v. Brown, 16 A. 2d 880, 179 Md. 155.
N.Y.—Pierce v. Bristol, 228 N.Y.S. 678, 130 Misc. 188.
Ohio.—Risman v. Krupar, 186 N.E. 830, 45 Ohio App. 29.
Pa.—O'Hara v. Manley, 12 A.2d 820, 140 Pa.Super. 39.
Wis.—Grady v. Meyer, 236 N.W. 569, 205 Wis. 147—Wessling v. Hieb, 192 N.W. 458, 180 Wis. 160.
34 C.J. p 127 note 26.

Judgment confessed in favor of attachment plaintiffs had same effect as if court had entered judgment on evidence in the attachment proceeding.—Deeds v. Gilmer, 174 S. E. 37, 162 Va. 157.

A judgment entered by the prothonotary under a power contained in the instrument has the same force and effect as a judgment confessed by an attorney or one given in open court.—St. Bartholomew's Church v. Wood, 61 Pa. 96—Miller v. Desher, 12 Pa.Dist. & Co. 315, 41 Lanc.L.Rev. 335.

Subsequent matters

(1) Judgment for deficiency was not invalidated by anything appearing in subsequent report of receiver as to receipt of rents by plaintiff.—Levin v. Wenof, 146 A. 789, 7 N.J. Misc. 603.

(2) Issuance of execution on judgment and service thereof on defendant did not render judgment either void or valid.—Kolmar, Inc., v. Moore, 55 N.E.2d 524, 323 Ill.App. 323.

8. Pa.—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, 5 A.2d 139, 333 Pa. 344—Usnick v. Pittsburgh Terminal Coal Corporation, 157 A. 787, 305 Pa. 355—Greiner v. Brubaker, 16 A.2d 689, 142 Pa. Super. 538.
Tenn.—Marshall v. Johnson Hardware Co., 5 Tenn.App. 369.
34 C.J. p 127 note 27.
Confessed judgment as res judicata see infra § 629.
Estoppel to deny validity see infra § 172.

If valid as to debtor, it is equally so as to creditor, unless it can be impeached on some ground of fraud or collusion.—American Bank & Trust Co. v. National Bank of Suffolk, 196 S.E. 693, 170 Va. 169—Shadrack's Adm'r v. Woolfolk, 32 Gratt. 707, 73 Va. 707.

Judgment on bond and on warrant accompanying mortgage is complete and final adjudication of all matters which might have been pleaded in an action on the bond.—Kieda v. Krull, C.C.A.Pa., 101 F.2d 917.

Validity of underlying obligation held admitted by confession.—Church v. Polar Ice Cream Co., 3 P. 2d 301, 89 Colo. 390.

9. Colo.—Schuster v. Rader, 22 P. 505, 13 Colo. 329.

Judgment on bond accompanying mortgage, with respect to personal property covered by mortgage, is against defendant only, and gives plaintiff no right to levy on, seize, or attach credits of alienee of mortgaged land.—Fisher for Use of Buck v. McFarland, 167 A. 377, 110 Pa. Super. 184.

Sureties or indorsers who are not parties to it are not discharged thereby.—Washington First Nat. Bank v. Eureka Lumber Co., 31 S.E. 348, 123 N.C. 24.

10. S.C.—Ex parte Ware Furniture Co., 27 S.E. 9, 49 S.C. 20.

11. Pa.—Schreiner v. Dorwarth, Com.Pl., 19 Lehigh Co.L.J. 347.
S.C.—Ex parte Ware Furniture Co., 27 S.E. 9, 49 S.C. 20.

12. Ind.—Davenport Mills Co. v. Chambers, 44 N.E. 1109, 146 Ind. 156.
34 C.J. p 127 notes 33, 34.

It must be interpreted in light of power of attorney in pursuance of which it was made.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

13. La.—Payne v. Furlow, 29 La. Ann. 160.

14. Pa.—Clawson v. Eichbaum, 2 Grant 130—Reid v. Pechersky, Com.Pl., 87 Pittsb.Leg.J. 575.
34 C.J. p 128 note 37.

15. N.Y.—Lynch v. Welch, Seld. 15.
34 C.J. p 128 note 38.

16. Ill.—Sukowicz v. Hinko, 40 N.E. 2d 845, 314 Ill.App. 195—Long v. Coffman, 230 Ill.App. 527—Harris Trust & Savings Bank v. Neighbors, 222 Ill.App. 201.
Tenn.—Brier Hill Collieries v. Pile, 9 Tenn.App. 16.
34 C.J. p 128 note 40.

17. W.Va.—Corpus Juris cited in Harmer v. Tracey, 176 S.E. 238, 239, 115 W.Va. 349.
34 C.J. p 128 note 41.

18. Ill.—First Nat. Bank v. Royer, 273 Ill.App. 158.
Pa.—Kait v. Rose, 41 A.2d 750, 351 Pa. 560—Altoona Trust Co. v. Fockler, 165 A. 740, 311 Pa. 426—Markeim-Chalmers-Ludington Inc., v. Mead, 14 A.2d 152, 140 Pa.Super. 490—Pittsburgh Terminal Coal Corporation v. Robert Potts, 92 Pa. Super. 1—Parsons v. Kuhn, 45 Pa. Dist. & Co. 356.
34 C.J. p 128 note 42.

Failure to have summons issued is only procedural error.—Consumers' Mining Co. v. Chatak, 92 Pa.Super. 17.

19. Ill.—Hall v. Jones, 32 Ill. 38.

er hand, neither the judgment itself nor such express release operates to release or waive errors of substance,[20] such as a want of jurisdiction,[21] or lack of authority to confess the judgment.[22]

§ 170. Presumptions Supporting Judgment

A judgment on confession entered in a court having jurisdiction, is supported by the same presumptions, with respect to matters essential to its validity, as a judgment in a contested action, at least where it is entered in term time.

A judgment on confession, entered in a court having jurisdiction, is supported by the same presumptions with respect to the regularity of the proceedings, the sufficiency of the pleadings and evidence, and other matters essential to its validity, as a judgment in a contested action,[23] at least where the judgment is entered in term time.[24] It has been held, however, that such presumptions do not apply to judgments entered in vacation.[25] Where the right to enter the judgment depended on the contingency that defendant violated his contract, the law will not presume that he has done so.[26]

§ 171. Validity

According to some decisions, a judgment by confession is absolutely void if the proceedings in confessing or entering the judgment do not conform to statutory requirements, but, according to other decisions, such a judgment is merely voidable.

According to some decisions a judgment by confession is absolutely void, if the proceedings in confessing or entering the judgment do not conform to statutory requirements.[27] According to other decisions, however, the judgment is not absolutely void, but is voidable only.[28] Thus failure to file a proper affidavit of default according to some decisions renders the judgment void,[29] while, according to other authority, it is merely voidable.[30] In any case, under a statute so providing, failure on the part of the clerk to perform any of the duties imposed on him by statute does not impair the validity of the judgment or the lien thereof.[31] If the confession of judgment is void, it is not sufficient consideration to support a mortgage made to secure its payment.[32]

Defective statement. Compliance with a statute requiring a statement of the facts out of which the indebtedness arose to be filed with a confession of judgment, as discussed supra § 158, has been held to be essential to confer jurisdiction on the court and to insure validity of the judgment,[33] and failure to comply therewith has been held to render the judgment void.[34] However, according to other authority, the fact that the statement is defective or

20. Pa.—Markeim-Chalmers-Ludington, Inc., v. Mead, 14 A.2d 152, 140 Pa.Super. 490—Grakelow v. Kidder, 95 Pa.Super. 250.
34 C.J. p 128 note 44.

21. Ill.—First Nat. Bank v. Royer, 273 Ill.App. 158.
34 C.J. p 128 note 45.

22. Ill.—First Nat. Bank v. Royer, 273 Ill.App. 158.
Pa.—Pittsburgh Terminal Coal Corporation v. Robert Potts, 92 Pa. Super. 1.

23. U.S.—**Corpus Juris cited in** Monarch Refrigerating Co. v. Farmers' Peanut Co., C.C.A., Cir., 74 F.2d 790, 792.
Md.—Pioneer Oil Heat v. Brown, 16 A.2d 880, 179 Md. 155.
Pa.—Hebrew Loan Society of Wyoming Valley v. Margolis, Com.Pl., 33 Luz.Leg.Reg. 101.
34 C.J. p 128 note 47.

Judgment held valid in absence of showing of invalidity
Ill.—Chicago Title & Trust Co. v. Astrahan, 20 N.E.2d 308, 299 Ill. App. 623.

24. Ill.—Alton Banking & Trust Co. v. Gray, 179 N.E. 469, 347 Ill. 99—Book v. Ewbank, 35 N.E.2d 961, 311 Ill.App. 312—Bowman v. Powell, 127 Ill.App. 114.
22 C.J. p 128 note 83 [d].

25. Ill.—Alton Banking & Trust Co. v. Gray, 179 N.E. 469, 347 Ill. 99—Farwell v. Huston, 37 N.E. 864, 151 Ill. 239—Book v. Ewbank, 35 N.E.2d 961, 311 Ill.App. 312.
34 C.J. p 128 note 49.

26. Pa.—Patterson v. Pyle, 17 A. 6.

27. Utah.—Utah Nat. Bank v. Sears, 44 P. 832, 13 Utah 172.
34 C.J. p 128 note 51.
Judgment without jurisdiction of subject matter or parties as void see supra § 161 a.
Uncertainty in designation of parties as voiding judgment see supra § 164.
False statement as to amount due as rendering judgment void see supra § 167.

If clerk enters judgment for an amount not authorized by the confession, the judgment is void.—Illinois Valley Bank v. Harshman, 201 Ill.App. 107.

Judgment entered, without proof of execution of warrant or power of attorney held void.
Ill.—Oppenheimer v. Giershofer, 54 Ill.App. 38.
Okl.—St. Louis-San Francisco Ry. Co. v. Bayne, 40 P.2d 1104, 170 Okl. 542.
34 C.J. p 121 note 2.

28. N.Y.—Shenson v. I. Shainin & Co., 276 N.Y.S. 881, 243 App.Div. 638, affirmed 198 N.E. 407, 268 N. Y. 567.
34 C.J. p 128 note 52.

Entry of judgment before maturity of obligation authorizing entry thereof after maturity is irregularity rendering judgment voidable only.—Pasco Rural Lighting Co. v. Roland, 88 Pa.Super. 245.

29. Pa.—Hogsett v. Lutrario, 13 A. 2d 902, 140 Pa.Super. 419—Home Protective Savings & Loan Ass'n v. Kefalas, 48 Pa.Dist. & Co. 346, 6 Fay.L.J. 151, 91 Pittsb.Leg.J. 326.

30. Pa.—Valentour v. Gregory, 11 Pa.Dist. & Co. 240, 8 Wash.Co. 111.

31. **Failure to require a certificate of defendant's residence**
Pa.—Holland Furnace Co. v. Davis, 31 Pa.Dist. & Co. 469, 5 Sch.Reg. 157.

32. Mich.—Austin v. Grant, 1 Mich. 490.

33. N.C.—Gibbs v. G. H. Weston & Co., 18 S.E.2d 698, 221 N.C. 7—Cline v. Cline, 183 S.E. 904, 209 N.C. 531—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.

34. N.C.—Smith v. Smith, 23 S.E. 270, 117 N.C. 348.

Judgment entered on statement signed by only some of debtors held void as to all.—French v. Edwards, C.C.Cal., 9 F.Cas.No.5,098, 5 Sawy. 266—34 C.J. p 118 note 33.

insufficient, while not a mere irregularity,[35] will not render the judgment absolutely void.[36] It is valid as between the parties,[37] and void, or voidable, only as to interested third persons.[38] According to some authorities, as discussed infra § 433, such judgment cannot be collaterally attacked, but must be called in question in a direct proceeding for that purpose;[39] and plaintiff may sustain his judgment by proving that it is fair, and not fraudulent or collusive, and warranted by the facts actually existing, although such facts were not included in the statement.[40]

Failure to file affidavit of bona fides. A failure to file the required affidavit as to the bona fides of the confession, as discussed supra § 163, or the filing of one which is not in substantial compliance with the requirements of the statute, renders the judgment by confession, not absolutely void, but voidable only as to other creditors;[41] it is valid as between the parties thereto.[42]

Fraud. A judgment by confession entered by the creditor without the knowledge or consent of the debtor after the debt had been paid fully has been held fraudulent and void.[43] If the judgment is confessed for the purpose of defrauding creditors or other third persons, it is invalid as to them;[44] but it cannot be attacked by creditors or other interested persons merely because it is fraudulent as against the debtor, if it is not fraudulent as to them;[45] and, although it is fraudulent as against creditors, if no fraud or deception is practiced on the debtor, it is binding as between the original parties.[46]

Forgery. A judgment by confession based on a forgery has been held to be a nullity.[47]

§ 172. Estoppel to Deny Validity

A defendant confessing judgment is estopped, in the absence of fraud, to question the validity of the confession on account of irregularities to which he did not object, and if, after the entry of judgment, he ratifies or acquiesces in it, he is estopped to deny the authority on which it was confessed or otherwise to impeach its validity.

A defendant confessing judgment is estopped, in the absence of fraud, to question the validity of the confession on account of irregularities to which he did not object,[48] or to dispute any facts set forth in the confession[49] or accompanying statement,[50] or to set up any claims or defenses which might have been presented in opposition to plaintiff's action,[51] and if, after the entry of the judgment, defendant ratifies or accepts it, or acquiesces in it, he is estopped to deny the authority on which it was confessed or otherwise to impeach its validity.[52] Estoppel cannot, however, be invoked so as to preclude attack on a judgment obtained in violation of a prohibitory law.[53]

35. **Insufficiency is not imperfect pleading**, or due to negligence of party or his attorney by which adverse party has not been prejudiced, within statute providing that judgment cannot be affected by such imperfections.—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.

36. N.Y.—Shenson v. I. Shainin & Co., 276 N.Y.S. 881, 243 App.Div. 638, affirmed 198 N.E. 407, 268 N.Y. 567.
34 C.J. p 128 note 56.
Statute held to be merely directory and hence failure to comply therewith does not invalidate judgment.—Hughes v. Helms, Tenn.Ch., 52 S.W. 460.
Defect not jurisdictional
The failure of an attorney confessing judgment by warrant of attorney to set down with officer entering the judgment the real debt is not jurisdictional.—Rhoads v. Mitchell, Del., 47 A.2d 174.

37. Minn.—Whelan v. Reynolds, 112 N.W. 223, 101 Minn. 290.
34 C.J. p 128 note 57.

38. S.C.—Woods v. Bryan, 19 S.E. 218, 41 S.C. 74, 44 Am.S.R. 688.
34 C.J. p 129 note 59.

39. Cal.—Lee v. Figg, 37 Cal. 328, 99 Am.D. 271.
N.Y.—Bradley v. Glass, 46 N.Y.S. 790, 20 App.Div. 200.

40. Cal.—Cordier v. Schloss, 18 Cal. 576.
34 C.J. p 129 note 62.

41. Ind.—Bible v. Voris, 40 N.E. 670, 141 Ind. 569.
34 C.J. p 122 note 16.

42. Ind.—Irose v. Balla, 104 N.E. 851, 181 Ind. 491.
34 C.J. p 122 note 17.

43. Ill.—Rea v. Forrest, 88 Ill. 275.

44. Wash.—Compton v. Schwabacher, 46 P. 338, 15 Wash. 306.
34 C.J. p 129 note 64.
Validity of judgment by confession as to creditors generally see Fraudulent Conveyances § 44 b.

45. Pa.—Gould v. Randal, 81 A. 809, 232 Pa. 612.
34 C.J. p 129 note 65.

46. Pa.—Dillen v. Dillen, 70 A. 806, 221 Pa. 435.
34 C.J. p 129 note 66.

47. Ill.—Stoner v. Millikin, 85 Ill. 218—Kolmar, Inc., v. Moore, 55 N.E.2d 524, 323 Ill.App. 323.

48. Va.—**Corpus Juris cited in** Johnson v. Alvis, 165 S.E. 489, 490, 159 Va. 229.
34 C.J. p 129 note 67.

49. S.C.—Martin v. Bowie, 21 S.C. Law 225.
Va.—**Corpus Juris cited in** Johnson v. Alvis, 165 S.E. 489, 490, 159 Va. 229.

50. N.C.—Martin v. Briscoe, 55 S.E. 782, 143 N.C. 353.
34 C.J. p 129 note 69.

51. Iowa.—Troxel v. Clark, 9 Iowa 201.
34 C.J. p 129 note 70.

52. Ohio.—Risman v. Krupar, 186 N.E. 830, 45 Ohio App. 29.
Pa.—Fullerton's Appeal, 46 Pa.St. 144—Farmers Nat. Bank of Ephrata v. Kyper, Com.Pl., 48 Lanc.L.Rev. 211.
Va.—**Corpus Juris cited in** Johnson v. Alvis, 165 S.E. 489, 490, 159 Va. 229.
34 C.J. p 129 note 71.

53. La.—Cilluffa v. Monreale Realty Co., 24 So.2d 606.

VII. JUDGMENT ON CONSENT, OFFER, OR ADMISSION

§ 173. Consent

A judgment by consent is in substance a contract of record made by the parties and approved by the court, and is to be distinguished from a judgment by confession or on default.

A judgment by consent of the parties is a judgment the provisions and terms of which are settled and agreed to by the parties to the action in which it is entered, and which is entered of record by the consent and sanction of the court;[54] it may be more briefly defined as a contract of the parties acknowledged in open court and ordered to be recorded,[55] an agreement of the parties entered of record with the approval of a court of competent jurisdiction,[56] or a solemn contract or judgment of the parties put on file with the sanction and permission of the court.[57] A consent judgment is not a judicial determination of any litigated right,[58] and it is not the judgment of the court, except in the sense that the court allows it to go upon the record and have the force and effect of a judgment;[59] it is merely the act of the parties consented to by the court.[60]

Consent to entry of judgment implies that the terms and conditions have been agreed on and consent thereto given in open court or by stipulation,[61] and the court has no power to supply terms, provisions, or essential details not previously agreed to by the parties.[62] It has been held, however, that the fact that a judgment is entered by consent of the parties does not deprive it of its judicial character or efficacy.[63]

54. Ky.—Karnes v. Black, 215 S.W. 191, 185 Ky. 410.
Neb.—**Corpus Juris quoted in** In re Director of Insurance, 3 N.W.2d 922, 926, 141 Neb. 488.
R.I.—**Corpus Juris quoted in** Andrews v. Indemnity Ins. Co. of North America, 181 A. 403, 405, 55 R.I. 341.
Tex.—Matthews v. Looney, 123 S.W. 2d 871, 132 Tex. 313—De Garza v. Magnolia Petroleum Co., Civ.App., 83 S.W.2d 453.
34 C.J. p 130 note 73—12 C.J. p 520 note 90.

The essence of a "consent decree" is that the parties thereto have entered voluntarily into a contract setting the dispute at rest, on which contract the court has entered judgment conforming to terms of the agreement, without putting parties to necessity of proof.—Harter v. King County, 119 P.2d 919, 11 Wash. 2d 583.

55. N.C.—Keen v. Parker, 8 S.E.2d 209, 217 N.C. 378—Cason v. Shute, 189 S.E. 494, 211 N.C. 195—First Nat. Bank v. Mitchell, 131 S.E. 656, 191 N.C. 190—Coburn v. Board of Com'rs of Swain County, 131 S. E. 372, 191 N.C. 63—Southern Distributing Co. v. Carraway, 127 S.E. 427, 189 N.C. 420—Union Bank v. Commissioners of Town of Oxford, 25 S.E. 966, 119 N.C. 214, 34 L.R.A. 487.
Tex.—Prince v. Frost-Johnson Lumber Co., Civ.App., 250 S.W. 785.

In many respects a judgment by consent is treated as a contract between the parties.—Rodriguez v. Rodriguez, 29 S.E.2d 901, 224 N.C. 275.

56. U.S.—Watson v. U. S., D.C.N.C., 34 F.Supp. 777.
Neb.—**Corpus Juris quoted in** In re Director of Insurance, 3 N.W.2d 922, 926, 141 Neb. 488—McArthur v. Thompson, 299 N.W. 519, 140 Neb. 408, 139 A.L.R. 413.
N.C.—King v. King, 35 S.E.2d 393—Jones v. Griggs, 25 S.E.2d 862, 223 N.C. 279—Edmundson v. Edmundson, 22 S.E.2d 576, 222 N.C. 131—Keen v. Parker, 8 S.E.2d 209, 217 N.C. 378—Webster v. Webster, 195 S.E. 362, 213 N.C. 135—Cason v. Shute, 189 S.E. 494, 211 N.C. 195—Weaver v. Hampton, 167 S.E. 484, 204 N.C. 42—Weaver v. Hampton, 161 S.E. 430, 201 N.C. 798—Bunn v. Braswell, 51 S.E. 927, 139 N.C. 135, 138.
R.I.—**Corpus Juris quoted in** Andrews v. Indemnity Ins. Co. of North America, 181 A. 403, 405, 55 R.I. 341.
34 C.J. p 130 note 75.

57. N.C.—Town of Cary v. Templeton, 152 S.E. 797, 198 N.C. 604—Bunn v. Braswell, 51 S.E. 927, 139 N.C. 135.

58. Mass.—New York Cent. & H. R. R. Co. v. T. Stuart & Son Co., 157 N.E. 540, 260 Mass. 242.

59. Ky.—Kentucky Utilities Co. v. Steenman, 141 S.W.2d 265, 283 Ky. 317—Harrel v. Yonts, 113 S.W.2d 426, 271 Ky. 783—**Corpus Juris cited in** Myers v. Myers, 100 S.W.2d 693, 694, 266 Ky. 831—Boone v. Ohio Valley Fire & Marine Ins. Co.'s Receiver, 55 S.W.2d 374, 246 Ky. 489.
Neb.—**Corpus Juris quoted in** In re Director of Insurance, 3 N.W.2d 922, 926, 141 Neb. 488.
R.I.—**Corpus Juris quoted in** Andrews v. Indemnity Ins. Co. of North America, 181 A. 403, 405, 55 R.I. 341.
34 C.J. p 130 note 74.

60. Ill.—Heymann v. O'Connell, 13 N.E.2d 100, 293 Ill.App. 634—Consaer v. Wisniewski, 13 N.E.2d 93, 293 Ill.App. 529.
Mich.—**Corpus Juris cited in** In re Meredith's Estate, 266 N.W. 351, 354, 275 Mich. 273.
Neb.—**Corpus Juris quoted in** In re Director of Insurance, 3 N.W.2d 922, 926, 141 Neb. 488.
N.Y.—**Corpus Juris quoted in** People ex rel. Norwich Pharmacal Co. v. Porter, 239 N.Y.S. 28, 30, 31, 228 App.Div. 54.
N.C.—Ellis v. Ellis, 136 S.E. 650, 193 N.C. 216.
R.I.—**Corpus Juris quoted in** Andrews v. Indemnity Ins. Co. of North America, 181 A. 403, 405, 55 R.I. 341.
W.Va.—Stannard Supply Co. v. Delmar Coal Co., 158 S.E. 907, 110 W. Va. 560.
34 C.J. p 130 note 76.

61. N.Y.—Jacobs v. Steinbrink, 273 N.Y.S. 498, 242 App.Div. 197.

62. Okl.—Insurance Service Co. v. Finegan, 165 P.2d 620.
Tex.—Matthews v. Looney, 123 S. W.2d 871, 132 Tex. 313—Wyss v. Bookman, Com.App., 235 S.W. 567.

63. Va.—Culpeper Nat. Bank of Culpeper v. Morris, 191 S.E. 764, 168 Va. 379.

Judicial act

While a consent judgment is based on agreement of the parties rather than a finding of facts by the court, it is something more than a mere authentication or recording of the agreement; it is a judicial act involving a determination by the court that it is equitable and in the public interest.—U. S. v. Radio Corporation of America, D.C.Del., 46 F.Supp. 654, appeal dismissed 63 S.Ct. 851, 318 U.S. 796, 87 L.Ed. 1161.

Judgment of court

N.C.—Keen v. Parker, 8 S.E.2d 209, 217 N.C. 378—Weaver v. Hampton, 167 S.E. 484, 204 N.C. 42.

Distinctions. A judgment by consent is to be distinguished from one rendered on an adjudication actually made by the court after due consideration and investigation, as following verdict or findings in an adverse proceeding,[64] and such a judgment will not become a judgment by consent even though the parties may have superadded their consent to the adjudication of the court.[65] It is similar to a judgment after trial on the merits in that it is binding on the parties, but differs therefrom in that it is not appealable and can be vacated only in certain circumstances for fraud or want of consent.[66] A judgment by consent is to be distinguished from a judgment by default, its special characteristic being the settlement between the parties of the terms, amount, or conditions of the judgment to be rendered,[67] and is also to be distinguished from a judgment by confession discussed supra § 134. Termination of an action by entry of agreement for judgment for "neither party" constitutes a final disposition of the action, but no judgment may be rendered thereon by the court.[68]

§ 174. —— Right and Authority to Consent

a. In general
b. Who may and must consent

a. In General

Within limitations imposed by positive requirements of law, the parties may agree to any disposition of a pending action and the court may and should render judgment accordingly.

Within limitations imposed by positive requirements of law,[69] any disposition of a pending action, not illegal, may be fairly agreed to by the parties, and when so agreed, it is the duty of the court to permit such disposition and to enter judgment accordingly, which judgment will be given effect between the parties and their privies.[70] The court

64. Pa.—Cesare v. Caputo, 100 Pa. Super. 188.
34 C.J. p 130 note 77.

Consent judgment sufficiently shown by plaintiff's acceptance of defendant's offer in open court.—Garrett v. Davis, 112 So. 342, 216 Ala. 74.

Consent judgment not shown

(1) By recital in order that there had been an agreement on figures.—960 Park Ave. Co. v. Anderson, D.C. N.Y., 22 F.Supp. 138.

(2) Where suit to set aside oil and gas lease covering allotted acreage of full-blood restricted Creek Indian was consolidated with suit by defendants therein to quiet title to lease, and thereafter parties made written compromise agreement, and court, after examination of issues, rendered judgment approving such agreement and quieting defendant's title, the judgment was not a "consent decree" but a valid "final decree," barring subsequent action by deceased Indian's administrator to set aside the lease and for an accounting because of Indian's incompetency.—Spencer v. Gypsy Oil Co., C.C.A.Okl., 142 F.2d 935, certiorari denied 65 S.Ct. 439, 323 U.S. 798, 89 L.Ed. 636.

Decree resting on evidence

Where trial court's recitation in decree entered in quiet title action against county purported to rest decree on evidence, and not on consent of parties, the decree would not be construed as a "consent decree," especially where there was no showing of fraud or collusion between prosecuting attorney representing county and the plaintiff in procuring the decree.—Harter v. King County, 119 P.2d 919, 11 Wash.2d 533.

Failure of a party to plead further after his demurrer is overruled does not make a subsequent judgment one by consent.—State v. Glover, 5 P.2d 1014, 165 Wash. 567.

65. Pa.—Cesare v. Caputo, 100 Pa. Super. 188.
34 C.J. p 130 note 77.

Agreement to survey

Where parties to ejectment action agreed to survey, and verdict based on results of survey was returned, judgment thereon was judgment on verdict in adverse proceeding and not by consent.—Cesare v. Caputo, supra.

66. Ky.—Myers v. Myers, 100 S.W. 2d 693, 266 Ky. 831.

67. Ark.—**Corpus Juris quoted in** Vaughan v. Brown, 40 S.W.2d 996, 997, 184 Ark. 185.
34 C.J. p 130 note 78.

Judgment held by default and not by consent

Where an order form for judgment by default is prepared by counsel for plaintiff, presented to attorney for defendant, the abbreviation "O. K." indorsed on the back thereof, followed by the signatures of the attorneys for both parties and entered without any notation of consent on the face of the record, and there is no appearance of defendant noted, the judgment is a judgment by default, and not a consent judgment.—Bank of Gauley v. Osenton, 114 S. E. 435, 92 W.Va. 1.

68. Mass.—Whalen v. Worcester Electric Light Co., 29 N.E.2d 763, 307 Mass. 169—White v. Beverly Bldg. Ass'n, 108 N.E. 921, 221 Mass. 15.
Dismissal on consent of parties see Dismissal and Nonsuit § 9.

69. Ohio.—Rosebrough v. Ansley, 35 Ohio St. 107.
Tex.—Lauderdale v. R. & T. A. Ennis Stationery Co., Civ.App., 24 S.W. 834.
34 C.J. p 132 note 95.

70. U.S.—**Corpus Juris cited in** Hot Springs Coal Co. v. Miller, C. C.A.Wyo., 107 F.2d 677, 681.
Cal.—Krug v. John E. Yoakum Co., 80 P.2d 492, 27 Cal.App.2d 91.
Ga.—**Corpus Juris cited in** Estes v. Estes, 14 S.E.2d 681, 683, 192 Ga. 94.
Ill.—Bergman v. Rhodes, 165 N.E. 598, 334 Ill. 137, 65 A.L.R. 344—Consaer v. Wisniewski, 13 N.E.2d 93, 293 Ill.App. 529.
Iowa.—Cooper v. Stekelenburg, 300 N.W. 293, 230 Iowa 1066.
Kan.—**Corpus Juris cited in** Baldwin v. Baldwin, 96 P.2d 614, 617, 150 Kan. 807.
Ky.—**Corpus Juris cited in** Myers v. Myers, 100 S.W.2d 693, 694, 266 Ky. 831.
Neb.—**Corpus Juris cited in** In re Kiersyead's Estate, 259 N.W. 740, 743, 128 Neb. 654.
N.H.—Perley v. Bailey, 199 A. 570, 89 N.H. 359.
N.Y.—Gass v. Arons, 227 N.Y.S. 282, 131 Misc. 502.
N.C.—Coburn v. Board of Com'rs of Swain County, 131 S.E. 372, 191 N. C. 68.
Utah.—**Corpus Juris quoted in** Tracey v. Blood, 3 P.2d 263, 265, 78 Utah 385.
34 C.J. p 130 note 80.
Validity of consent judgment generally see infra § 178.

Implied power of court

Where court has power to render final judgment on merits, power to render judgment on compromise agreement is necessarily implied.—Union Cent. Life Ins. Co. v. Boggs, 66 S.W.2d 1077, 188 Ark. 604.

does not inquire into the merits or equities of the case; the only questions to be determined by it are whether the parties are capable of binding themselves by consent and whether they have actually done so.[71] The judgment agreed on must be one within the general jurisdiction of the court to render,[72] and such as is warranted by law,[73] for if the court is without authority the parties cannot confer it.[74]

Pleadings, proof, etc. Since consent to a judgment has been held to cure all errors not going to the jurisdiction of the court,[75] where the court has acquired jurisdiction of the subject matter and of the parties, a judgment by consent without the service or filing of a declaration or complaint has been held valid.[76] There is authority for the view that a judgment by consent may be entered and given effect as to any matters of which the court has general jurisdiction, without regard to the pleadings,[77] and even though the pleadings do not support it.[78] Thus it has been held that the rule that a judgment on matters outside the issues raised by the pleadings is a nullity does not apply to judgments entered by consent,[79] and that a consent judgment going beyond the pleadings is erroneous but not void.[80] On the other hand, it has been held that consent will not support a judgment on a declaration or complaint which fails to state a cause of action,[81] or a judgment on matters entirely without the scope of the pleadings,[82] such as a judgment on a cause of action other than that stated in the pleadings[83] or a judgment for an amount in excess of the amount alleged to be due,[84] and that a judgment rendered outside the issues made by the pleadings is void although entered by consent.[85] In any

Set-off

Stipulation, on which case was reported, that, if verdict for defendant was sustained, judgment for defendant should be entered for amount claimed in set-off, was binding on parties and became law of the case.—Adams v. Grundy & Co., 152 N.E. 379, 256 Mass. 246.

After default

It has been held that a party may in good faith sign a written consent that a money judgment be entered against him even after his default has been entered in the case.—Tracey v. Blood, 3 P.2d 263, 78 Utah 385.

71. Colo.—Garf v. Weitzman, 209 P. 309, 72 Colo. 136.
Neb.—In re Director of Insurance, 3 N.W.2d 922, 141 Neb. 488—McArthur v. Thompson, 299 N.W. 519, 140 Neb. 408, 139 A.L.R. 413.

Reasons for judgment

It has been said that the will of the parties stands as sufficient reason for the judgment so that the law will not inquire into the reasons therefor.—Board of Education of Sampson County v. Board of Com'rs of Sampson County, 134 S.E. 852, 192 N.C. 274.

72. Miss.—**Corpus Juris cited in** Roberts v. International Harvester Co., 180 So. 747, 748, 181 Miss. 440.
Neb.—**Corpus Juris cited in** In re Mattingly's Estate, 270 N.W. 487, 492, 131 Neb. 891.
Utah.—**Corpus Juris quoted in** Tracey v. Blood, 3 P.2d 263, 265, 78 Utah 385.
34 C.J. p 131 note 81.

Jurisdiction shown

Ill.—Davis v. Oliver, 25 N.E.2d 905, 304 Ill.App. 71.

73. Utah.—**Corpus Juris quoted in** Tracey v. Blood, 3 P.2d 263, 265, 78 Utah 385.
34 C.J. p 131 note 82.

74. Miss.—**Corpus Juris cited in** Roberts v. International Harvester Co., 180 So. 747, 748, 181 Miss. 440.
Utah.—**Corpus Juris quoted in** Tracey v. Blood, 3 P.2d 263, 265, 78 Utah 385.
34 C.J. p 131 note 83.

75. Ga.—**Corpus Juris quoted in** Estes v. Estes, 14 S.E.2d 681, 683, 192 Ga. 94.
Tex.—Brennan v. Greene, Civ.App., 154 S.W.2d 523, error refused—Hubbard v. Trinity State Bank, Civ.App., 48 S.W.2d 379, error dismissed.
34 C.J. p 134 note 53.
Consent judgment as waiver of errors or irregularities see infra § 178.

Scope of jurisdiction invoked by pleadings

Tex.—Williams v. Sinclair-Prairie Oil Co., Civ.App., 135 S.W.2d 211, error dismissed, judgment correct.

76. Tex.—Mullins v. Thomas, 150 S.W.2d 83, 136 Tex. 215—**Corpus Juris cited in** Pope v. Powers, Civ.App., 91 S.W.2d 873, 875.
34 C.J. p 131 note 84.

Consent or ratification

A judgment is not void because rendered without the filing of a complaint, as the parties may by consent or subsequent ratification validate such a judgment.—Stancill v. Gay, 92 N.C. 455.

77. Ind.—Fletcher v. Holmes, 25 Ind. 458.
Ky.—Kentucky Utilities Co. v. Steenman, 141 S.W.2d 265, 283 Ky. 317.
N.C.—Edmundson v. Edmundson, 22 S.E.2d 576, 222 N.C. 131.
34 C.J. p 131 note 89.

78. Mont.—Wallace v. Goldberg, 231 P. 56, 72 Mont. 234.
Tex.—Pope v. Powers, 120 S.W.2d 432, 132 Tex. 80.

Different from contested judgment

For an agreed judgment arrived at through compromise of the parties to be valid, the pleadings need not be such as would be required to support a contested judgment.—Pope v. Powers, 120 S.W.2d 432, 132 Tex. 80.

79. Ind.—Burrell v. Jean, 146 N.E. 754, 196 Ind. 137.
Ky.—Eddington's Adm'x v. Eddington, 175 S.W.2d 12, 295 Ky. 548—Boone v. Ohio Valley Fire & Marine Ins. Co.'s Receiver, 55 S.W.2d 374, 246 Ky. 489—Lincoln County Board of Education v. Board of Trustees of Stanford Graded Common School Dist., 7 S.W.2d 499, 225 Ky. 21.
N.C.—Edmundson v. Edmundson, 22 S.E.2d 576, 222 N.C. 131—Keen v. Parker, 8 S.E.2d 209, 217 N.C. 378.

Reason for rule is that parties may agree as to subject matter of litigation, and thereby waive the exception that the issue was not embraced by the pleadings.—Lodge v. Williams, 243 S.W. 1011, 195 Ky. 773.

80. Ga.—Holcombe v. Jones, 30 S.E. 2d 903, 197 Ga. 825.

81. Ohio.—Rosebrough v. Ansley, 35 Ohio St. 107.
Puerto Rico.—Questel v. Conde, 18 Puerto Rico 727.
34 C.J. p 131 note 85.

82. Ohio.—Rosebrough v. Ansley, 35 Ohio St. 107.
34 C.J. p 131 note 86.

83. Ohio.—Rosebrough v. Ansley, supra.
34 C.J. p 131 note 87.

84. Ohio.—Rosebrough v. Ansley, supra.
34 C.J. p 131 note 88.

85. Okl.—Oklahoma City v. Robinson, 65 P.2d 531, 179 Okl. 309.

event, before a judgment additional or foreign to the subject matter of the suit can be upheld as a judgment by consent, it must very plainly appear that the parties intended such an effect, and their agreement should never be enlarged beyond the clear import of the terms they have used.[86] The agreement of the parties has also been held to obviate the necessity for a hearing except for the purpose of determining the fact or validity of the agreement and ordering judgment accordingly.[87] So it has been held not required that there be proof[88] or a verdict or findings.[89]

b. Who May and Must Consent

Judgment by consent may be rendered only on consent of all parties interested and to be bound, or their duly authorized agents.

The power of the court to render a judgment by consent is dependent on the existence of the consent of the parties at the time the agreement receives the sanction of the court or is rendered and promulgated as a judgment.[90] The consent to the judgment must be given by all the parties thereto,[91] and the judgment is not binding as to a nonconsenting party,[92] as in the case of a party for whom consent was given by one lacking authority to act for him.[93] Consent may be given by the parties personally,[94] or by their legal representatives,[95] or by other duly authorized agents.[96]

§ 175. —— Sufficiency of Consent or Agreement

Consent to judgment may be made in writing, or it may be made orally if in open court, and it should be clear, specific, and complete. Withdrawal of consent prior to judgment may sometimes be permitted.

Consent to judgment must be made by or on behalf of the parties in open court or by documentary evidence of legal sufficiency.[97] If the agreement or consent is made in open court, it may be made orally;[98] otherwise it should be in writing,[99] and should be filed.[1] It has, however, been held that a judgment may be entered on an oral agreement made out of court when necessary to prevent injustice to one party.[2] The consent should be so clear and specific in terms that no mistake can arise

86. N.C.—Holloway v. Durham, 97 S.E. 486, 176 N.C. 550.

87. Ga.—Estes v. Estes, 14 S.E.2d 681, 192 Ga. 94.

88. U.S.—Swift & Co. v. U. S., App. D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

Ga.—**Corpus Juris quoted in** Estes v. Estes, 14 S.E.2d 681, 683, 192 Ga. 94.

Mich.—Fortunato v. Di Filippo, 239 N. W. 868, 256 Mich. 545.

N.J.—City of Bayonne v. Hill, 135 A. 545, 100 N.J.Eq. 479, affirmed City of Bayonne v. Doherty, 138 A. 927, 101 N.J.Eq. 737.

Tex.—Duke v. Gilbreath, Civ.App., 10 S.W.2d 412, error refused.

34 C.J. p 132 note 92.

After issues have been joined, trial court can enter judgment based on agreement of parties without hearing evidence.—Allen v. Fewel, 87 S.W.2d 142, 337 Mo. 955.

89. Ga.—**Corpus Juris quoted in** Estes v. Estes, 14 S.E.2d 681, 683, 194 Ga. 94.

34 C.J. p 132 note 93.

90. N.C.—Williamson v. Williamson, 31 S.E.2d 367, 224 N.C. 474—Rodriguez v. Rodriguez, 29 S.E.2d 901, 224 N.C. 275.

Withdrawal of consent see infra § 175.

Judgment void without consent

The power of the court to sign a consent judgment depends on the unqualified consent of the parties thereto, and judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment.—King v. King, 35 S.E.2d 893, 225 N.C. 639.

91. N.C.—Lynch v. Loftin, 69 S.E. 143, 153 N.C. 270.

Philippine.—De Tavera v. Holy Roman Catholic Apostolic Church, 10 Philippine 371.

92. Ky.—Hays v. Cyrus, 67 S.W.2d 503, 252 Ky. 435.

Mont.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.

93. Miss.—Stevens v. Barbour, 8 So. 2d 242, 193 Miss. 109.

94. Tenn.—**Corpus Juris cited in** Coley v. Family Loan Co., 80 S. W.2d 87, 88, 168 Tenn. 631.

34 C.J. p 132 note 9.

95. N.C.—Union Bank v. Oxford, 25 S.E. 966, 119 N.C. 214, 34 L.R.A. 487.

Tenn.—**Corpus Juris cited in** Coley v. Family Loan Co., 80 S.W.2d 87, 88, 168 Tenn. 631.

Ultra vires deed

Where trustee's claim for services was based on ultra vires trust deed of corporation, alleged consent decree based on deed was no more valid than the deed.—Hanrahan v. Andersen, 90 P.2d 494, 108 Mont. 218.

96. Tenn.—**Corpus Juris cited in** Coley v. Family Loan Co., 80 S.W. 2d 87, 88, 168 Tenn. 631.

34 C.J. p 132 note 12.

Consent by attorneys see Attorney and Client § 86.

A village may not legally consent to a judgment of assessment against an assessment district.—Wood v. Village of Rockwood, 18 N.W.2d 864, 311 Mich. 381.

Consent of an officer of an incorporated association has been held not binding against individual members so as to authorize entry of personal judgments against them.—People v. Brisket Buyers Ass'n of Greater New York, 8 N.Y.S.2d 511, 255 App.Div. 603.

97. U.S.—U. S. v. Sobey, D.C.Mont., 56 F.2d 664.

N.Y.—Gass v. Arons, 227 N.Y.S. 282, 131 Misc. 502.

Stipulation held sufficient

N.M.—American Nat. Bank of Tucumcari v. Tarpley, 250 P. 18, 31 N. M. 667.

98. N.H.—Perley v. Bailey, 199 A. 570, 89 N.H. 359.

N.Y.—Gass v. Arons, 227 N.Y.S. 282, 131 Misc. 502.

Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P.2d 620, 621.

Or.—Schoren v. Schoren, 222 P. 1096, 110 Or. 272.

34 C.J. p 132 note 96.

99. Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P.2d 620, 621.

34 C.J. p 132 note 97.

1. Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P.2d 620, 621.

34 C.J. p 132 note 98.

2. N.Y.—Lee v. Rudd, 198 N.Y.S. 628, 120 Misc. 407.

Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P.2d 620, 621.

respecting the concurrence of the parties,[3] and it should be complete[4] and unqualified.[5]

It is within the jurisdiction of the court to determine the fact and the sufficiency of such consent.[6] A party's consent to a judgment is shown by the fact that he causes the judgment to be entered up;[7] but consent cannot be shown by oral statements to the judge out of court[8] or by a mere statement of counsel that he has no objection to the entry of the judgment.[9] A stipulation for judgment is a consent to the entry of judgment,[10] but a stipulation which is merely a consent that the pleadings may be amended, and is not an admission of the correctness of the allegations, is not a proper basis for a judgment.[11]

Withdrawal or expiration of consent. It has been held that the consent may be withdrawn at any time prior to entry of judgment,[12] and that it is within the discretion of the court, on motion of one of the parties, to withhold the agreed judgment and grant a further trial.[13] However, a consent given prior to the adjustment of the issues in the controversy may be assumed to continue by the failure to withdraw or to protest.[14] Generally, consent to the entry of judgment expires after the creditor's remedy becomes barred by limitations.[15]

§ 176. —— Entry of Judgment

An order for entry of a consent judgment is a judicial act in the sense that it requires the court to examine the record to determine its authority, but is ministerial in the sense that it is predicated on the agreement of the parties. A consent judgment should be entered in the proper book or record and may be entered at any time stipulated by the parties and permitted by statute.

While an order for entry of a consent judgment is a judicial act in the sense that it requires the court to examine the record to determine its authority,[16] the court also acts ministerially in the sense that its power to enter judgment depends on the agreement or consent of the parties.[17] So, where the parties have lawfully agreed, the actual entry of judgment is a mere ministerial act,[18] un-

3. Mass.—Roberts v. Anheuser-Busch Brewing Ass'n, 93 N.E. 95, 211 Mass. 449.
Okl.—Corpus Juris quoted in Insurance Service Co. v. Finegan, 165 P.2d 620, 621.
34 C.J. p 132 note 1.
Consent held not shown
Cal.—Stow v. Superior Court of California in and for Alameda County, 172 P. 598, 178 Cal. 140.
Ill.—Friend v. Borrenpohl, 161 N.E. 110, 329 Ill. 528.
Iowa.—Independent School Dist. of Manning, Carroll County, v. Miller, 178 N.W. 323, 189 Iowa 123.
Md.—Baltimore High Grade Brick Co. v. Amos, 52 A. 532, 95 Md. 571, rehearing denied 53 A. 148, 95 Md. 571.

4. N.Y.—Post Institute v. Lander Co., 295 N.Y.S. 740, 251 App.Div. 23.
Tex.—Wyss v. Bookman, Com.App., 235 S.W. 567.
Omission of details
In stockholder's action for appointment of a receiver and other relief, trial court was not authorized to enter judgment by consent on stipulation providing that settlement had been reached in general terms whereby stockholder should deliver all his stock and receive six thousand dollars, but that details of settlement had not been agreed on and would be worked out later.—Insurance Service Co. v. Finegan, Okl., 165 P.2d 620.
Stipulated facts held insufficient to support judgment
S.D.—Fergen v. Lonie, 213 N.W. 720, 51 S.D. 315.

5. N.C.—Williamson v. Williamson, 31 S.E.2d 367, 224 N.C. 474.
Nonperformance of condition
Where it was undisputed that no compliance was ever made with conditions precedent to signing of consent judgment in action for foreclosure of a tax lien, superior court clerk properly refused to sign the purported consent judgment.—Williamson v. Williamson, supra.

6. Cal.—Merrill v. Bachelder, 56 P. 613, 123 Cal. 674.
R.I.—Everett v. Cutler Mills, 160 A. 924, 52 R.I. 330.
Determination from record
Whether decree was entered by consent is determined from face of record.—Shinn v. Shinn, 142 S.E. 63, 105 W.Va. 246.
Particular stipulations construed
Mo.—State ex rel. Mason v. Schmoll, App., 37 S.W.2d 972.
Vt.—St. Pierre v. Beauregard, 152 A. 914, 103 Vt. 258.

7. N.J.—Young v. Young, 17 N.J.Eq. 161.

8. Iowa.—Thorn v. Hambleton, 128 N.W. 393, 149 Iowa 214.
34 C.J. p 132 note 5.

9. Conn.—Goodrich v. Alfred, 43 A. 1041, 72 Conn. 257.
Consent shown
Wash.—Seely v. Gilbert, 134 P.2d 710, 16 Wash.2d 611.

10. Cal.—Jackson v. Brown, 23 P. 142, 82 Cal. 275—Morrow v. Learned, 245 P. 442, 76 Cal.App. 533.

11. N.Y.—Phelan v. New York Cent. & H. R. R. Co., 113 N.Y.S. 35.

12. N.Y.—Jacobs v. Steinbrink, 273 N.Y.S. 498, 242 App.Div. 197.
Withdrawal after judgment see infra § 178.
Refusal to sign judgment
Superior court clerk properly refused to sign purported consent judgment in action for foreclosure of tax lien, where defendant's consent thereto had been withdrawn at time clerk was called on to sign the purported consent judgment.—Williamson v. Williamson, 31 S.E.2d 367, 224 N.C. 474.

13. Iowa.—Garretson v. Altomari, 181 N.W. 400, 190 Iowa 1194.

14. N.Y.—Jacobs v. Steinbrink, 273 N.Y.S. 498, 242 App.Div. 197.

15. Cal.—Charles F. Harper Co. v. De Witt Mortgage & Realty Co., 75 P.2d 65, 10 Cal.2d 467.

16. R.I.—Everett v. Cutler Mills, 160 A. 924, 52 R.I. 330.
It is a judicial function and an exercise of judicial power to render a judgment on consent.—Pope v. U. S., 65 S.Ct. 16, 323 U.S. 1, 89 L.Ed. 3.
Stipulation as evidence
Stipulation of parties for judgment was merely evidence to be considered by court in making its decision whether it has authority to order entry of judgment.—Everett v. Cutler Mills, 160 A. 924, 52 R.I. 330.

17. Tex.—State v. Reagan County Purchasing Co., Civ.App., 186 S.W.2d 128, error refused.

18. Tenn.—Edwards v. Turner, Ch.A., 47 S.W. 144.
In cause pending before referee
Under statute it has been held that superior court clerk may enter consent judgment in cause pending before referee.—Weaver v. Hampton, 167 S.E. 434, 204 N.C. 42.

less the case is one in which defendant has the right to be heard as to the nature or terms of the judgment to be entered.[19] In the absence of knowledge of an assignment affecting the rights of third persons, the court has the right to journalize a settlement entry,[20] and sureties on an undertaking on appeal are not entitled to notice of entry of a judgment against them to which they have in legal contemplation consented.[21] On the other hand, sureties on a replevin bond of plaintiff, seizing certain property, have been held not bound by a judgment for debt entered in defendant's favor on stipulation of the parties without notice to the sureties.[22]

Place and time of entry. A judgment by consent must be entered in the proper book or record,[23] and within the time, if any, specified by statute,[24] but not before commencement of the term at which the cause is returnable.[25] Where the entry of judgment by agreement depends on the rendition of a final judgment in another action, it cannot be entered pending a motion for a new trial in such other action.[26] Within such limitations it may be stated generally that a judgment by consent may be entered at the time specified in the stipulation or agreement,[27] and at any stage of the proceedings, as before the expiration of defendant's time for pleading;[28] and, with defendant's consent, judgment may be entered at the term in which he enters his appearance.[29] If the agreement so provides, the judgment may be entered immediately on the happening of a contingency.[30] While a judgment by consent may in a proper case be entered nunc pro tunc,[31] it may not be so entered where no authority existed to enter it in the first instance.[32]

§ 177. —— Form and Sufficiency of Judgment

Ordinarily a judgment by consent should show the consent on its face, and should conform to the terms agreed on by the parties; but such judgment will not be regarded as void on its face unless it shows lack of jurisdiction of the court to render it.

In addition to the general features common to all judgments,[33] a consent judgment, ordinarily should recite or show on its face that it is entered by the agreement or consent of the parties;[34] but such a showing is not indispensable and the agree-

19. Mo.—Schaeffer v. Siegel, 7 Mo. App. 542.
34 C.J. p 133 note 17.

20. Ohio.—Dickinson v. Hot Mixed Bituminous Industry of Ohio, App., 58 N.E.2d 78.

21. Mont.—Waldrop v. Maser, 30 P. 2d 83, 96 Mont. 242.

22. Miss.—Horne v. Moorehead, 152 So. 495, 169 Miss. 362, suggestion of error overruled 153 So. 668, 169 Miss. 362.

23. Cal.—Old Settlers' Inv. Co. v. White, 110 P. 922, 158 Cal. 236.
34 C.J. p 132 note 14.

24. Ga.—Wright v. Broom, 158 S.E. 443, 43 Ga.App. 269.

Entry in vacation

Consent decree entered in vacation without order in term authorizing decree and without entry at time and place fixed by statute held inoperative as judgment.—Wright v. Broom, supra.

Any time

Under express statutory authorization the clerk may enter a judgment by consent at any time.—Keen v. Parker, 8 S.E.2d 209, 217 N.C. 378.

Entry on Monday not necessary

Consent judgment need not be entered on Monday, as in case of other judgments entered by clerk of superior court.—Hood ex rel. People's Bank of Burnsville v. Wilson, 179 S.E. 425, 208 N.C. 120.

25. Ga.—Bedenbaugh v. Burgin, 28 S.E.2d 652, 197 Ga. 175.

26. Cal.—Gillmore v. American Cent. Ins. Co., 2 P. 382, 65 Cal. 63.

27. N.Y.—Osborn v. Rogers, 20 N.E. 365, 112 N.Y. 573.

In vacation

(1) Parties have right to agree on and have court enter judgment in vacation.—Hurst v. Gulf States Creosoting Co., 141 So. 346, 163 Miss. 512.

(2) Where attorneys of parties appeared in vacation before judge and agreed to judgment, judgment signed by judge, approved by attorneys, and properly entered, held binding, in absence of fraud.—Hurst v. Gulf States Creosoting Co., supra.

28. N.J.—Beebe v. George H. Beebe Co., 46 A. 168, 64 N.J.Law 497—Hoguet v. Wallace, 28 N.J.Law 523.

29. Ill.—Moore v. Gilmer, 187 N.E. 466, 353 Ill. 420.

30. N.Y.—Osborn v. Rogers, 20 N.E. 365, 112 N.Y. 573.

31. Tex.—Commercial Credit Co. v. Ramsey, Civ.App., 138 S.W.2d 191, error dismissed, judgment correct.

Failure to enter on rendition

Where trial court rendered judgment, in accordance with an agreement made by counsel representing parties to litigation, but judgment was never entered, it was duty of trial court to enter judgment in accordance with agreement, nunc pro tunc.—Commercial Credit Co. v. Ramsey, supra.

32. N.C.—Williamson v. Williamson, 31 S.E.2d 367, 224 N.C. 474.

33. **Description of property**

A consent decree involving title to realty was not void for want of description or for want of any words to furnish a key to any description of land where pleadings on which consent decree was based gave a complete description of the property.—Bentley v. Still, 32 S.E.2d 814, 198 Ga. 743.

34. Ill.—Bergman v. Rhodes, 165 N. E. 598, 334 Ill. 137, 65 A.L.R. 344—Consaer v. Wisniewski, 13 N.E. 2d 93, 293 Ill.App. 529.
Tenn.—East Lake Lumber Box Co. v. Simpson, 5 Tenn.App. 51.
34 C.J. p 133 note 24.

Indorsement by attorney

(1) Indorsement by counsel for losing party of approval of proposed decree did not make decree a consent decree, but, under circumstances, was only recognition that proposed decree was legally formulated, and that it contained in substance decision as orally announced by court.
Mich.—Kirn v. Ioor, 253 N.W. 318, 266 Mich. 335.
Tex.—State v. Reagan County Purchasing Co., Civ.App., 186 S.W.2d 128, error refused.
Wash.—Harter v. King County, 119 P.2d 919, 11 Wash.2d 583.
W.Va.—Bank of Gauley v. Osenton, 114 S.E. 435, 92 W.Va. 1.

(2) Where resolution of county board of education selecting school site authorized judgment in pending litigation with county commissioners on approval of resolution by latter, such judgment, by operation of law, became consent judgment without

ment may be shown by any other evidence consistent with the record,[35] and a consent judgment has been held not void on its face unless it shows a want of jurisdiction.[36] A recital that evidence was heard is unnecessary since the consent obviates the necessity of hearing any evidence,[37] as is discussed supra § 174. The judgment entered must conform to the terms agreed on by the parties,[38] and the court has no power to add conditions or provisions on which the parties have not agreed.[39] Thus the amount of the judgment must be that fixed by the agreement of the parties;[40] if it is entered for more, it may be set aside as to the excess.[41] If there are several defendants and all consent, judgment must be entered against all of them.[42] The mere fact that a document is signed by defendant, consenting to entry of judgment against him, is not of itself a judgment.[43]

§ 178. —— Construction, Operation, and Effect

A judgment by consent ordinarily has the force and effect of a contract and is so construed, although it also partakes of the nature of a judgment and will be upheld and enforced as such. Consent to the judgment waives all nonjurisdictional defects.

Since a judgment by consent is regarded as a contract between the parties,[44] it must be construed the same as any other contract.[45] Its operation and

signatures of counsel.—Board of Education of Sampson County v. Board of Com'rs of Sampson County, 134 S.E. 852, 192 N.C. 274.

(3) Other indorsements see 34 C.J. p 133 note 24 [b].

35. Ill.—Bergman v. Rhodes, 165 N.E. 598, 334 Ill. 137, 65 A.L.R. 344—Armstrong v. Cooper, 11 Ill. 540—Sundberg v. Matteson, 29 N.E.2d 853, 307 Ill.App. 239—Consaer v. Wisniewski, 13 N.E.2d 93, 293 Ill. App. 529.

Sureties' consent

(1) By agreement in replevin suit, absolute money judgment may be rendered against defendant and sureties on bond, and sureties' consent to judgment need not affirmatively appear from the judgment.—Federal Credit Co. v. Rogers, 148 So. 353, 166 Miss. 559.

(2) Judgment in replevin rendered "by consent of plaintiff and defendants in this case," providing for recovery by plaintiff from "defendants and" named persons, "sureties upon the replevin bond," held not void on its face, as against contention that sureties' consent to judgment is not shown.—Starling v. Sorrell, 100 So. 10, 134 Miss. 782.

36. Miss.—Starling v. Sorrell, supra.

Waiver of alternative provision in replevin judgment

Miss.—Starling v. Sorrell, supra.

37. Tex.—Day v. Johnson, 72 S.W. 426, 32 Tex.Civ.App. 107.

38. Cal.—Southern Pac. Co. v. City of Santa Cruz, 145 P. 736, 26 Cal. App. 26.

Iowa.—**Corpus Juris cited in** Van Alstine v. Hartnett, 222 N.W. 363, 364, 207 Iowa 236.

Mo.—Early v. Smallwood, 256 S.W. 1053, 302 Mo. 92.

Okl.—**Corpus Juris quoted in** Posey v. Abraham, 25 P.2d 287, 289, 165 Okl. 140.

Or.—Holmboe v. Morgan, 133 P. 1084, 69 Or. 395.

Tex.—Edwards v. Gifford, 155 S.W.2d 786, 137 Tex. 559.

34 C.J. p 133 note 26.

39. Cal.—People's Ditch Co. v. Fresno Canal & Irrigation Co., 92 P. 77, 152 Cal. 87.

N.Y.—Larscy v. T. Hogan & Sons, 146 N.E. 430, 239 N.Y. 298, reargument denied 148 N.E. 713, 240 N.Y. 580.

Okl.—**Corpus Juris quoted in** Posey v. Abraham, 25 P.2d 287, 289, 165 Okl. 140.

34 C.J. p 133 note 26.

40. Ark.—Planters' Fire Ins. Co. v. Crockett, 170 S.W. 1012, 115 Ark. 606—Home Fire Ins. Co. v. Stancell, 127 S.W. 966, 94 Ark. 578.

Ky.—Continental Realty Co. v. Mowbray & Robinson Co., 218 S.W. 726, 187 Ky. 98.

N.Y.—Westcott Chuck Co. v. Oneida Nat. Chuck Co., 92 N.E. 639, 199 N.Y. 247, 139 Am.St.R. 907, 20 Ann. Cas. 858.

Or.—Riner v. Southwestern Surety Ins. Co., 166 P. 952, 85 Or. 293.

34 C.J. p 133 note 27.

Interest

In suit on contract, where parties agreed to judgment for certain amount, without mention of interest, the court properly refused to add interest to the judgment.—Vaughan v. Brown, 40 S.W.2d 996, 184 Ark. 185.

Basis of computation

A stipulation in an action on a guaranty was held to furnish the basis by mere computation of determining the amount of the judgment. —Avery v. Moore, 124 P. 173, 87 Kan. 337.

Judgment on reversal

Where, on the trial of an action for an accounting, a stipulation was entered fixing the amount of recovery to which the plaintiffs would be entitled in the event of a recovery but did not clearly confer power on the court of appeal to grant final judgment, it could not enter such judgment on a reversal.—Barney v. Hoyt, 135 N.Y.S. 126, 150 App.Div. 361, affirmed 103 N.E. 1120, 210 N.Y. 542.

41. Ark.—Wood v. Stewart, 98 S.W. 711, 81 Ark. 41.

42. Mont.—Helena Second Nat. Bank v. Kleinschmidt, 14 P. 667, 7 Mont. 146.

43. Cal.—Old Settlers' Inv. Co. v. White, 110 P. 922, 158 Cal. 236.

44. U.S.—Butler v. Denton, D.C. Okl., 57 F.Supp. 656, affirmed, C.C.A., 150 F.2d 687.

Cal.—**Corpus Juris cited in** Ex parte Ferrigno, 71 P.2d 329, 330, 22 Cal. App.2d 472.

Ill.—City of Kankakee v. Lang, 54 N.E.2d 605, 323 Ill.App. 14.

N.C.—Coburn v. Board of Com'rs of Swain County, 131 S.E. 372, 191 N.C. 68.

Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P.2d 620, 621, 622—**Corpus Juris cited in** Grayson v. Pure Oil Co., 118 P.2d 644, 648, 189 Okl. 550—**Corpus Juris quoted in** Ward v. Coleman, 39 P.2d 113, 116, 170 Okl. 201.

Tex.—**Corpus Juris cited in** Reagan County Purchasing Co. v. State, Civ.App., 65 S.W.2d 353, 356—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds, Com. App., 57 S.W.2d 75, 89 A.L.R. 571—Scaling v. Williams, Civ.App., 284 S.W. 310.

Definition and nature of consent judgment generally see supra § 173.

Same effect as contract

Tex.—Pendery v. Panhandle Refining Co., Civ.App., 169 S.W.2d 766, error refused.

Contract of highest character

Va.—Barnes v. American Fertilizer Co., 130 S.E. 902, 144 Va. 692.

45. Cal.—**Corpus Juris cited in** Ex parte Ferrigno, 71 P.2d 329, 330, 22 Cal.App.2d 472.

N.C.—Carpenter v. Carpenter, 195 S.E. 5, 213 N.C. 36—Cox v. Albemarle Drainage Dist., 141 S.E. 385, 195 N.C. 264—J. S. Schofield's Sons

effect must be gathered from the terms used in the agreement,[46] and it should not be extended beyond the clear import of such terms;[47] nor can it be supplemented by agreements which are not a part of it[48] unless attacked for fraud or mistake.[49]

As a judgment. As a consent judgment has the sanction of the court, and is entered as its determination of the controversy, it generally has the same force and effect as any other judgment,[50] although in some respects it may be given greater force than

Co. v. Bacon, 131 S.E. 659, 191 N. C. 253—First Nat. Bank v. Mitchell, 131 S.E. 656, 191 N.C. 190—Southern Distributing Co. v. Carraway, 127 S.E. 427, 189 N.C. 420.

Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P.2d 620, 622—**Corpus Juris cited** in Grayson v. Pure Oil Co., 118 P. 2d 644, 648, 189 Okl. 550—**Corpus Juris quoted in** Ward v. Coleman, 39 P.2d 113, 116, 170 Okl. 201.

Tex.—Edwards v. Gifford, 155 S.W. 2d 786, 137 Tex. 559—Turman v. Turman, 64 S.W.2d 137, 123 Tex. 1—Tyner v. City of Port Arthur, 280 S.W. 523, 115 Tex. 310—Behrens v. Behrens, Civ.App., 186 S. W.2d 697—Mauldin v. American Liberty Pipe Line Co., Civ.App., 185 S.W.2d 158, refused for want of merit.—Aaron v. Aaron, Civ. App., 173 S.W.2d 310, error refused—Pendery v. Panhandle Refining Co., Civ.App., 169 S.W.2d 766, error refused—Beam v. Southwestern Bell Tel. Co., Civ.App., 164 S. W.2d 412, error refused—Richey v. Shell Petroleum Corporation, Civ.App., 128 S.W.2d 898, error dismissed, judgment correct—Atlantic Refining Co. v. Buckley, Civ. App., 123 S.W.2d 413, error dismissed—Korn v. Johnson, Civ. App., 117 S.W.2d 344, error refused—Empire Gas & Fuel Co. v. Railroad Commission of Texas, Civ. App., 94 S.W.2d 1240, error refused—Missouri, K. & T. Ry. Co. of Texas v. State, Civ.App., 275 S.W. 673, certiorari granted 46 S.Ct. 483, 271 U.S. 653, 70 L.Ed. 1134, certiorari vacated Missouri-Kansas-Texas R. Co. v. State of Texas, 48 S.Ct. 82, 275 U.S. 494, 72 L.Ed. 391—Prince v. Frost-Johnson Lumber Co., Civ.App., 250 S.W. 785.

34 C.J. p 133 note 32.

Construction as a whole

U.S.—Swift & Co. v. U. S., App.D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

Particular judgments construed

Cal.—Cordes v. Harding, 169 P. 256, 35 Cal.App. 41.

D.C.—Bliss v. Bliss, 70 F.2d 924, 63 App.D.C. 197.

Iowa.—Van Alstine v. Hartnett, 222 N.W. 363, 207 Iowa 236.

Ky.—Banco-Kentucky Co.'s Receiver v. National Bank of Kentucky's Receiver, 137 S.W.2d 357, 281 Ky. 784—Louisville & N. R. Co. v. King, 288 S.W. 733, 216 Ky. 736.

La.—Jackson v. Jackson, App., 163 So. 175.

Mo.—Fellhauer v. Norris, 58 S.W.2d 287, 332 Mo. 322—Zeitinger v. Hargadine-McKittrick Dry Goods Co., 250 S.W. 913, 298 Mo. 461.

N.C.—Miller v. Teer, 18 S.E.2d 173 220 N.C. 605—Webster v. Webster, 195 S.E. 362, 213 N.C. 135—Horner v. Southern Ry. Co., 114 S.E. 296, 184 N.C. 270.

N.D.—Warner v. Intlehouse, 235 N. W. 633, 60 N.D. 542.

Ohio.—Whitmore v. Stern, 158 N.E. 203, 25 Ohio App. 344.

Tenn.—Barretsville Bank & Trust Co. v. Bolton, 137 S.W.2d 306, 182 Tenn. 364.

Tex.—Magnolia Petroleum Co. v. Caswell, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U. S. 640, 73 L.Ed. 555—State v. Reagan County Purchasing Co., Civ. App., 186 S.W.2d 128, error refused—Pendery v. Panhandle Refining Co., Civ.App., 169 S.W.2d 766, error refused—Korn v. Johnson, Civ. App., 141 S.W.2d 1015, error dismissed, judgment correct—Prince v. Frost-Johnson Lumber Co., Civ. App., 250 S.W. 785.

Wash.—Connor v. City of Seattle, 144 P. 52, 82 Wash. 296.

46. U.S.—Butler v. Denton, D.C.Okl., 57 F.Supp. 656, affirmed, C.C.A., 150 F.2d 687.

Ga.—**Corpus Juris cited in** Estes v. Estes, 14 S.E.2d 681, 683, 192 Ga. 94.

Mo.—Fellhauer v. Norris, 58 S.W.2d 287, 332 Mo. 322.

Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P.2d 620, 622—**Corpus Juris quoted in** Ward v. Coleman, 39 P.2d 113, 116, 170 Okl. 201.

34 C.J. p 133 note 33.

Merger of prior negotiations

Ky.—Louisville & N. R. Co. v. King, 288 S.W. 733, 216 Ky. 736.

47. U.S.—Butler v. Denton, D.C. Okl., 57 F.Supp. 656, affirmed, C.C. A., 150 F.2d 687.

Cal.—Palace Hotel Co. v. Crist, 45 P.2d 415, 6 Cal.App.2d 690.

Miss.—Farmer v. Union Ins. Co. of Indiana, 111 So. 584, 146 Miss. 600.

N.C.—First Nat. Bank v. Mitchell, 131 S.E. 656, 191 N.C. 190.

Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P. 2d 620, 622—Grayson v. Pure Oil Co., 118 P.2d 644, 189 Okl. 550.

Tex.—Edwards v. Gifford, 155 S.W.2d 786, 137 Tex. 559—Korn v. Johnson, Civ.App., 117 S.W.2d 344, error refused.

Vt.—Ex parte Thompson, 9 A.2d 107, 111 Vt. 7.

Wash.—Gregg v. Beezer, 252 P. 692, 142 Wash. 142.

34 C.J. p 133 note 34.

48. Ky.—Cord v. Hendrick, 6 Ky.L. 365.

Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P. 2d 620, 622.

Tex.—**Corpus Juris cited in** Peterman v. Peterman, Civ.App., 55 S. W.2d 1108, 1110.

49. Ky.—Cord v. Hendrick, 6 Ky.L. 365.

Okl.—**Corpus Juris quoted in** Insurance Service Co. v. Finegan, 165 P.2d 620, 622.

50. U.S.—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F.2d 304, 308, 81 A.L.R. 300—Utah Power & Light Co. v. U. S., Ct.Cl., 42 F.2d 304—Fidelity & Columbia Trust Co. v. Glenn, D.C.Ky., 39 F.Supp. 822.

Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.

Cal.—Guaranty Liquidating Corporation v. Board of Sup'rs of Los Angeles County, 71 P.2d 931, 22 Cal. App.2d 684—Rogers v. Springfield Fire & Marine Ins. Co., 268 P. 679, 92 Cal.App. 537.

Ga.—Burch v. Dodge County, 20 S.E. 2d 428, 193 Ga. 890.

Ky.—Kentucky Utilities Co. v. Steenman, 141 S.W.2d 265, 283 Ky. 317.

La.—**Corpus Juris quoted in** Sonnier v. Sonnier, App., 140 So. 49, 50.

Mont.—Thrasher v. Mannix & Wilson, 26 P.2d 370, 95 Mont. 273.

N.Y.—People ex rel. Norwich Pharmacal Co. v. Porter, 239 N.Y.S. 28, 228 App.Div. 54—Evans v. Stein, 59 N.Y.S.2d 544, second case, affirmed, 59 N.Y.S.2d 625, second case, 269 App.Div. 1052, appeal denied 60 N.Y.S.2d 283, 270 App.Div. 810.

N.C.—Edmundson v. Edmundson, 22 S.E.2d 576, 222 N.C. 181—Cason v. Shute, 189 S.E. 494, 211 N.C. 195—Walker v. Walker, 117 S.E. 167, 185 N.C. 380.

Okl.—**Corpus Juris quoted in** Ward v. Coleman, 39 P.2d 113, 116, 170 Okl. 201.

Tex.—Beam v. Southwestern Bell Tel. Co., Civ.App., 164 S.W.2d 412, error refused—**Corpus Juris quoted in** Peterman v. Peterman, Civ. App., 55 S.W.2d 1108, 1110.

34 C.J. p 133 note 37.

Decretal aspects

An agreed judgment, in so far as purely decretal aspects are con-

an ordinary judgment,[51] and in other respects it may be accorded less force.[52] Although the judgment is in the nature of a contract between the parties, the court retains power to see that its provisions are duly carried out.[53] In the absence of fraud or mistake a consent judgment is valid and binding, as such, as between the parties thereto and their privies.[54] The judgment is not invalidated by a subsequent failure to perform a condition on which the consent was based,[55] or by the fact that it obligates the parties to do that which they could not make a valid contract to do;[56] and unless it is vacated or set aside in the manner provided for by law[57] it stands as a final disposition of the rights of the parties thereto.[58]

In the absence of fraud, after the agreement has been made and a judgment entered thereon, the consent of one of the parties cannot be withdrawn,[59] and he is not entitled to a jury trial to fix the amount of damages.[60] A consent judgment may be inquired into and held void for fraud practiced on one of the parties[61] or against other creditors of defendant;[62] and is not valid unless entered in a court which might lawfully have rendered the same judgment in a contested case.[63] Where several defendants are brought into court, a judgment by

cerned, has the same effect as though rendered by court after trial of issues, "decretal" meaning granting or denying of remedy sought.—State v. Reagan County Purchasing Co., Tex. Civ.App., 186 S.W.2d 128, error refused.

51. Neb.—McArthur v. Thompson, 299 N.W. 519, 140 Neb. 408, 139 A.L.R. 413.
Pa.—Commonwealth v. Highland, Mun., 28 West.Co.L.J. 45.
Consent judgment as not appealable see Appeal and Error § 213.

52. Pa.—Platt v. Wagner, 31 A.2d 499, 347 Pa. 27.
Reciprocity not established
Reciprocity did not exist between two states on ground that entry of judgment of the supreme court in certain case constituted a decision that reciprocity had been established, where judgment in that case was merely a consent judgment.—Platt v. Wagner, 31 A.2d 499, 347 Pa. 27.

53. S.C.—Porter v. J. H. Hydrick Realty Co., 131 S.E. 768, 134 S.C. 34.
Failure to issue writ of possession
Where by a consent decree the title to the timber was severed from the estate in land, the case not being such as required an execution of writ of possession under the statutes, the failure to cause a writ of possession to be issued within one year did not render the judgment dormant, and hence not effective to convey title to the timber.—Prince v. Frost-Johnson Lumber Co., Tex.Civ. App., 250 S.W. 785.

54. U.S.—Hot Springs Coal Co. v. Miller, C.C.A.Wyo., 107 F.2d 677—Commissioner of Internal Revenue v. Blair, C.C.A., 83 F.2d 655, reversed on other grounds Blair v. Commissioner of Internal Revenue, 57 S.Ct. 33, 57 S.Ct. 330, 300 U. S. 5, 81 L.Ed. 465—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F.2d 304, 308—Utah Power & Light Co. v. U. S., Ct.Cl., 42 F.2d 304—U. S. v. Radio Corporation of America, D.C.Del., 46 F.Supp. 654, appeal dismissed 63 S.Ct. 351, 318 U.S. 796, 87 L.Ed. 1161—Steingruber v. Johnson, D.C.Tenn., 35 F. Supp. 662.
Ill.—Riggs v. Barrett, 32 N.E.2d 382, 308 Ill.App. 549—Riggs v. Barrett, 32 N.E.2d 392, 308 Ill.App. 671.
La.—**Corpus Juris quoted in** Sonnier v. Sonnier, App., 140 So. 49, 50.
Mass.—Byron v. Concord Nat. Bank, 13 N.E.2d 13, 299 Mass. 438.
Mich.—Green v. Township Board of Leoni Tp., 194 N.W. 972, 224 Mich. 498.
N.C.—Law v. Cleveland, 195 S.E. 809, 213 N.C. 289.
Okl.—**Corpus Juris quoted in** Ward v. Coleman, 39 P.2d 113, 116, 170 Okl. 201.
Tex.—Beam v. Southwestern Bell Tel. Co., Civ.App., 164 S.W.2d 412, error refused—**Corpus Juris cited in** Reagan County Purchasing Co. v. State, Civ.App., 65 S.W.2d 358, 358—**Corpus Juris quoted in** Peterman v. Peterman, Civ.App., 55 S. W.2d 1108, 1110.
Va.—**Corpus Juris cited in** Barnes v. American Fertilizer Co., 130 S.E. 902, 911, 144 Va. 692.
34 C.J. p 133 note 38.

55. U.S.—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F.2d 304, 308.
Okl.—**Corpus Juris quoted in** Ward v. Coleman, 39 P.2d 113, 116, 170 Okl. 201.
Tex.—**Corpus Juris quoted in** Peterman v. Peterman, Civ.App., 55 S. W.2d 1108, 1110.
34 C.J. p 134 note 39.

56. U.S.—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F.2d 304, 308.
Okl.—**Corpus Juris quoted in** Ward v. Coleman, 39 P.2d 113, 116, 170 Okl. 201.
34 C.J. p 134 note 40.
Invalidity of the contract on which a consent judgment is based may render the judgment erroneous, but does not make it void.
Ky.—Lodge v. Williams, 243 S.W. 1011, 195 Ky. 773.
Okl.—Ward v. Coleman, 39 P.2d 113, 170 Okl. 201.

57. U.S.—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F.2d 304, 308.
La.—**Corpus Juris quoted in** Sonnier v. Sonnier, App., 140 So. 49, 50.
Okl.—**Corpus Juris quoted in** Ward v. Coleman, 39 P.2d 113, 116, 170 Okl. 201.
Tex.—**Corpus Juris quoted in** Peterman v. Peterman, Civ.App., 55 S. W.2d 1108, 1110.

58. U.S.—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F.2d 304, 308—Utah Power & Light Co. v. U. S., Ct.Cl., 42 F.2d 304.
Cal.—Rogers v. Springfield Fire & Marine Ins. Co., 268 P. 679, 92 Cal. App. 537.
Okl.—**Corpus Juris quoted in** Ward v. Coleman, 39 P.2d 113, 116, 170 Okl. 201.
Tex.—Beam v. Southwestern Bell Tel. Co., Civ.App., 164 S.W.2d 412, error refused—**Corpus Juris quoted in** Peterman v. Peterman, Civ.App., 55 S.W.2d 1108, 1110.
34 C.J. p 134 note 42.

59. Tex.—**Corpus Juris quoted in** Peterman v. Peterman, Civ.App., 55 S.W.2d 1108, 1110.
34 C.J. p 134 note 43.
Withdrawal of consent prior to judgment see supra § 175.

60. Vt.—Manley v. Johnson, 81 A. 919, 85 Vt. 262.

61. Okl.—Cobb v. Killingsworth, 187 P. 477, 77 Okl. 186.
34 C.J. p 134 note 47.
Fraud as ground for opening or vacating see infra § 330.

62. Okl.—Cobb v. Killingsworth, supra.

63. Ind.—De Lange v. Cones, 19 N. E.2d 850, 215 Ind. 355.

agreement as to one only is a dismissal as to the others,[64] and separate judgments against defendants who are jointly and severally liable limit plaintiff's claim against one defendant to the amount of the judgment against such defendant.[65]

A second judgment cannot be entered on an agreement or consent of the parties without vacating a prior judgment which has been entered thereon.[66]

As waiver of defects or irregularities. A judgment by consent or agreement operates as a waiver of all defects or irregularities in the process, pleadings, or other proceedings previous to the rendition of the judgment,[67] except such as involve the jurisdiction of the court.[68] It is a sufficient waiver of trial by jury.[69]

§ 179. Offer

A judgment entered on offer and acceptance may be a judgment by consent, or a judgment on the pleadings if the offer is contained in a pleading.

Apart from proceedings under statutes specifically authorizing the entry of judgment on an offer of judgment made by defendant, a judgment entered pursuant to a properly manifested offer and acceptance is a judgment by consent, such as has been considered supra §§ 173–178, or, if the offer is contained in a pleading, there may be a judgment on the pleadings.[70] Such an offer must be accepted on the terms and conditions on which it is made,[71] and before the offer is properly withdrawn or the time for accepting it has expired.[72] Entry of a judgment of confession in a pending action, without consent of the adverse party, and against the refusal of the court to sanction it, is a nullity.[73]

Under statutory provisions. Offer of judgment is a method provided by statute in some states, whereby a defendant may offer to allow plaintiff to take judgment against him for a specified amount, or to a specified effect, with costs up to that time, and thus exonerate himself from liability for future costs in case plaintiff persists in his action and fails to recover a judgment more favorable to him than that offered.[74] It is a modern substitute for the common-law cognovit,[75] and is a species of judgment by confession.[76] Statutes of this class are re-

64. Mo.—Henry v. Gibson, 55 Mo. 570.

65. Conn.—Huntington v. Newport News & M. V. Co., 61 A. 59, 78 Conn. 35.

66. Wis.—Duras v. Keller, 186 N.W. 149, 176 Wis. 88.

67. U.S.—Swift & Co. v. U. S., App. D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F.2d 622—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F.2d 304, 308.
Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.
Ark.—Vaughn v. Brown, 40 S.W.2d 996, 184 Ark. 185.
Cal.—Dietrichson v. Western Loan & Building Co., 11 P.2d 64, 123 Cal. App. 358.
Ga.—Estes v. Estes, 14 S.E.2d 681, 192 Ga. 94.
Ky.—**Corpus Juris cited in** Kentucky Utilities Co. v. Steenman, 141 S. W.2d 265, 269, 283 Ky. 317.
Or.—Schmidt v. Oregon Gold Mining Co., 40 P. 406, 28 Or. 9, 52 Am.S.R. 759.
Tex.—Logan v. Mauk, Civ.App., 126 S.W.2d 513, error dismissed—Dickson v. McLaughlan, Civ.App., 51 S. W.2d 628, error refused—Posey v. Plains Pipe Line Co., Civ.App., 39 S.W.2d 1100, error dismissed—**Corpus Juris quoted in** Duke v. Gilbreath, Civ.App., 10 S.W.2d 412, 414, error refused.
34 C.J. p 134 note 52.

All errors going to the merits and remedial on appeal are waived by consent to a decree.—Walling v. Miller, C.C.A.Minn., 138 F.2d 629, certiorari denied 64 S.Ct. 781, 321 U.S. 784, 88 L.Ed. 1076.
Waiver of practice requirement
A practice requirement that affidavit or other pleading be filed by one of parties to action before entry of judgment by parties' agreement is for other party's benefit and may be waived, and judgment so entered is valid between parties.—De Lange v. Cones, 19 N.E.2d 850, 215 Ind. 355.
Form of action
N.Y.—Curran v. Hosey, 138 N.Y.S. 910, 153 App.Div. 557.

68. U.S.—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F.2d 304, 308.
Ky.—**Corpus Juris cited in** Kentucky Utilities Co. v. Steenman, 141 S. W.2d 265, 269, 283 Ky. 317.
Tex.—**Corpus Juris quoted in** Duke v. Gilbreath, Civ.App., 10 S.W.2d 412, 414.
34 C.J. p 134 note 53.

69. U.S.—Harniska v. Dolph, Alaska, 133 F. 158, 66 C.C.A. 224.
Ga.—**Corpus Juris quoted in** Estes v. Estes, 14 S.E.2d 681, 683, 192 Ga. 94.
Waiver of trial by jury generally see Juries §§ 84–113.

70. Kan.—Feight v. Thisler 114 P. 249, 84 Kan. 185.
Judgment on admissions in pleadings see infra § 186.

71. Ill.—Gaines v. Heaton, 100 Ill. App. 26, affirmed 64 N.E. 1031, 198 Ill. 479.
Pa.—Laughner v. Jennings, 1 Pa. Dist. 669.

72. Kan.—Feight v. Thisler, 114 P. 249, 84 Kan. 185.
Pa.—Cox v. Henry, 36 Pa. 445.
34 C.J. p 135 note 59.
Acceptance or rejection of offer generally see infra § 182.

73. Ga.—Barefield v. Bryan, 8 Ga. 463.
N.Y.—Connecticut Blower Co. v. Thatcher, 176 N.Y.S. 422, 106 Misc. 623.
34 C.J. p 135 note 60.

74. Ky.—Maxwell v. Dudley, 13 Bush 403.
34 C.J. p 135 note 61.
Admissions, tender, or offer of judgment as affecting costs see Costs §§ 76–93.
Proceedings to enforce mechanic's liens
Statutes relating to offers of judgment and the effect thereof are applicable to proceedings for the enforcement of mechanics' liens.—Kennedy v. McKone, 41 N.Y.S. 782, 10 App.Div. 88—40 C.J. p 500 note 4.

75. N.Y.—Beards v. Wheeler, 11 Hun 539, appeal dismissed 76 N. Y. 213.
34 C.J. p 135 note 62.

76. N.Y.—Kantrowitz v. Kulla, 13 N.Y.Civ.Proc. 74, 20 Abb.N.Cas. 321.
34 C.J. p 135 note 63.
Judgments by confession generally see supra §§ 134–172.

medial and should be liberally construed, so as to support the judgment,[77] but a judgment entered on an offer of judgment can be supported only in cases falling within, and on compliance with, the terms of the statute.[78] Such statutes do not prevent defendant from denying liability in whole or in part on instruments made the basis of a suit against him, or prevent his tendering into court the amount he owes plaintiff, or impose on him the duty of bringing plaintiff into court to accept or refuse his tender.[79] Where defendant in his answer admitted an amount due but claimed a set-off, with an offer to confess judgment for the balance, judgment for the amount confessed instead of the full amount is error in the absence of any proof of the set-off.[80]

§ 180. —— Authority to Offer

The offer on which a valid judgment is entered must have been made by the defendant or by his authority.

In order to support a judgment, the offer on which it was entered must have been made by defendant or by his authority.[81] In the absence of statutory authority one joint debtor or partner has no power to make an offer in behalf of his joint debtor or copartner.[82] Under joint debtor acts it has been broadly held that there is no statutory authority allowing one joint debtor or partner to make an offer in behalf of his joint debtor or copartner,[83] although there is also authority to the effect that one defendant, a joint debtor, served with process, may, by an offer of judgment bind his codefendant not served, as to joint property.[84]

§ 181. —— Form and Sufficiency of Offer

An offer of judgment must conform to statutory requirements and ordinarily must be formally made in open court.

In order to support a judgment, the offer must conform to statutory requirements.[85] Under some statutes an offer of judgment is required to be made in court,[86] and it has been held that the offer must be made by serving or filing a formal written offer,[87] signed by the party or his attorney.[88] The offer must be such that plaintiff may immediately enter judgment on it;[89] it must be unconditional[90] and leave no fact to be determined in order to authorize the judgment.[91] Under some statutes judgment can be entered pursuant thereto only when the offer was made after action brought and while it is pending;[92] and it has been suggested that obtaining judgment on offer should not be permitted to be used as a means of avoiding or evading compliance with the statutory safeguards thrown around judgments by confession.[93] Another view, however, is that courts cannot enforce a preference between different statutory ways of obtaining judgments, and that a judgment which is free from fraud and regular under the statute pursuant to which it was entered must be supported, although it would be irregular or unauthorized if dependent on the provisions of some other statute.[94]

The offer may be for the full amount claimed; it need not be for a smaller amount offered in compromise of the claim.[95] An offer contained in an answer has been deemed a good and sufficient statutory offer.[96] Other courts, however, hold that sub-

77. Ohio.—Adams v. Phifer, 25 Ohio St. 301.

78. N.Y.—McFarren v. St. John, 14 Hun 387.
34 C.J. p 135 note 65.
Time for filing
Nonresident defendant's offer of judgment in partition proceedings need not be filed ten days prior to grant of order of reference as they do not come within the provisions of civil practice act section so requiring.—Cahill v. Cahill, 226 N.Y.S. 199, 131 Misc. 99.

79. Ark.—Magnolia Grocer Co. v. Farrar, 115 S.W.2d 1094, 195 Ark. 1069.

80. Ark.—Barnett v. Wright, 132 S.W. 511, 129 Ark. 170.

81. N.Y.—Bush v. O'Brien, 58 N.E. 106, 164 N.Y. 205.
34 C.J. p 138 note 86.

82. N.Y.—Garrison v. Garrison, 67 How.Pr. 271.

83. N.Y.—Garrison v. Garrison, supra.

84. N.Y.—Emery v. Emery, 9 How. Pr. 130.
34 C.J. p 138 note 91.

85. Cal.—Sacramento County v. Central Pac. R. Co., 61 Cal. 250.
Me.—Hunt v. Elliott, 20 Me. 312.
34 C.J. p 135 note 68.
Consent in admission of service that judgment be entered against defendant for the relief demanded in the complaint has been held equivalent to an offer of judgment.—Cahill v. Cahill, 226 N.Y.S. 199, 131 Misc. 99.

86. Mass.—Madden v. Brown, 97 Mass. 148.
34 C.J. p 136 note 69.

87. N.Y.—Bridenbecker v. Mason, 16 How.Pr. 205.

88. N.Y.—Bridenbecker v. Mason, supra.
34 C.J. p 136 note 71.

89. N.Y.—Griffiths v. De Forest, 16 Abb.Pr. 292, 25 How.Pr. 336.
34 C.J. p 136 note 72.

90. N.Y.—Pinckney v. Childs, 20 N.Y.Super. 660.

91. N.Y.—Pinckney v. Childs, supra.

92. Cal.—Crane v. Hirshfelder, 17 Cal. 582.
34 C.J. p 136 note 75.

93. Cal.—Crane v. Hirshfelder, supra.
34 C.J. p 136 note 76.
Judgments by confession generally see supra §§ 134–172.

94. Mo.—Boyd v. J. M. Ward Furniture, Stove & Carpet Co., 38 Mo. App. 210.
34 C.J. p 136 note 77.

95. N.Y.—Ross v. Bridge, 15 Abb. Pr. 150, 24 How.Pr. 163.
34 C.J. p 137 note 78.

96. Or.—Hammond v. Northern Pacific R. Co., 31 P. 299, 23 Or. 157.
34 C.J. p 137 note 79.

stantially similar statutes contemplate a separate independent offer of judgment, and that it cannot properly be embodied in the answer or other pleading.[97] Judgments on admissions or confessions made in the answer are governed by different statutes and considerations.[98] The court can in no event direct a verdict for defendant where, in his answer, he offered to permit judgment in plaintiff's favor in an amount specified.[99] An insufficient offer, not made in conformity with the statute, will not put plaintiff to his election to accept or reject it,[1] and, if plaintiff does accept and enter judgment thereon, such judgment is unauthorized and irregular, and should be vacated.[2] In a proper case the court may allow defendant to amend his offer.[3]

§ 182. —— Acceptance or Rejection, and Withdrawal of Offer

An offer of judgment must be accepted within the period and in the manner prescribed by statute.

Defendant is not bound by an offer to allow judgment for the sum or relief specified unless the offer is accepted within the time limited by statute[4] or fixed by the court.[5] If not accepted within the time prescribed, the offer is deemed withdrawn,[6] and cannot be considered by the court or jury[7] or allowed in any way to affect the judgment,[8] except as to costs, as is discussed in Costs §§ 76–87. An offer not accepted in time will not support a judgment,[9] and after expiration of the statutory period plaintiff is not entitled to accept the offer and to have judgment entered thereon,[10] particularly not after trial.[11] A statutory offer of judgment is not a tender which must be kept good and may be accepted at any time,[12] and differs from an offer set up in the answer, which may operate as an admission or confession of judgment.[13]

The offer as made and authorized by statute must be unconditionally accepted, without reservation,[14] in the manner prescribed by the statute, as by filing or serving a written notice of acceptance,[15] or by an oral acceptance in open court in the presence of defendant.[16] Entry of judgment on an offer without a formal acceptance, however, has been held to be merely an irregularity not affecting the validity of the judgment,[17] and, where there was no written acceptance of the offer, entry of judgment has been deemed the equivalent of a due acceptance.[18]

An express rejection is unnecessary; no affirmative action on the part of plaintiff is required unless he elects to accept the offer.[19] While it has been broadly stated that a statutory offer of judgment may be withdrawn prior to acceptance,[20] and it seems that the court has power to allow a defendant to withdraw an offer made under a mistake,[21] it has been held that plaintiff is entitled to the whole of the time limited within which to accept the offer, and defendant cannot deprive him of this right by withdrawing the offer before plaintiff's right to act on it has expired.[22] Until the offer has been rejected, or the time for accepting it has expired, defendant can take no step in the action adverse to plaintiff which is inconsistent with giving effect to the offer, if plaintiff shall accept it.[23]

97. Wis.—Bourda v. Jones, 85 N.W. 671, 110 Wis. 52.
34 C.J. p 137 note 80.

98. Iowa.—City of Davenport v. Chicago, R. I. & P. R. Co., 38 Iowa 633.
Judgment on admissions in pleadings see infra § 185.

99. Or.—Easton v. Quackenbush, 168 P. 631, 86 Or. 374.

1. Ky.—Maxwell v. Dudley, 13 Bush 403.
34 C.J. p 138 note 88.

2. N.Y.—Pinckney v. Childs, 20 N. Y.Super. 660.

3. N.Y.—Stark v. Stark, 2 How.Pr. 360.
34 C.J. p 138 note 85.

4. Colo.—Hagerman v. Mutual Life Ins. Co., 103 P. 276, 45 Colo. 459.
Kan.—Johnson v. Wamego Tp., 105 P. 530, 81 Kan. 259.
34 C.J. p 138 note 95.

5. Me.—Gilman v. Pearson, 47 Me. 352.
34 C.J. p 138 note 94.

6. N.C.—Doggett Lumber Co. v. Perry, 196 S.E. 831, 213 N.C. 533.
34 C.J. p 138 note 96.

7. Wis.—Tullgren v. Karger, 181 N. W. 232, 173 Wis. 288.
34 C.J. p 139 note 97.

8. N.Y.—Marble v. Lewis, 53 Barb. 432, 36 How.Pr. 337.
34 C.J. p 139 note 98.

9. Kan.—Johnson v. Wamego Tp., 105 P. 530, 81 Kan. 259.
34 C.J. p 139 note 2.

10. Wis.—Smith v. Thewalt, 105 N. W. 662, 126 Wis. 176.
34 C.J. p 139 note 3.

11. Mo.—Maize v. Big Creek Coal Co., App., 203 S.W. 633.
34 C.J. p 139 note 4.

12. Iowa.—Benson v. Chicago & N. W. R. Co., 84 N.W. 1028, 113 Iowa 179.
Mo.—Maize v. Big Creek Coal Co., App., 203 S.W. 633.

13. Mo.—Maize v. Big Creek Coal Co., supra.
34 C.J. p 139 note 6.

14. N.Y.—Freudenheim v. Raduziner, 31 N.Y.S. 194, 10 Misc. 500.
Wis.—Sellers v. Union Lumbering Co., 36 Wis. 398.
34 C.J. p 141 note 24.

15. Ind.—Horner v. Pilkington, 11 Ind. 440.
Neb.—Becker v. Breen, 94 N.W. 614, 68 Neb. 379.

16. Ind.—Horner v. Pilkington, 11 Ind. 440.

17. N.Y.—White v. Bogart, 73 N.Y. 256.
34 C.J. p 141 note 23.

18. N.Y.—Cahill v. Cahill, 226 N. Y.S. 199, 131 Misc. 99.

19. Cal.—Scammon v. Dento, 14 P. 98, 72 Cal. 393.
34 C.J. p 140 note 8.

20. Mo.—Haffner v. Tainter, 204 S. W. 966, 200 Mo.App. 1.
34 C.J. p 140 note 10.

21. N.Y.—McVicar v. Keating, 46 N. Y.S. 298, 19 App.Div. 581.

22. N.Y.—McVicar v. Keating, supra.
34 C.J. p 140 note 9.

23. N.Y.—U. S. Mortgage & Trust

Once plaintiff has made his election either to accept or to reject the offer, his election is binding,[24] and, after expressly refusing the offer, plaintiff cannot thereafter withdraw the refusal and accept the offer, over defendant's objection, although the time limit has not expired.[25] Where the case goes to trial before expiration of the time for acceptance, and before any action on the offer by plaintiff, it has been held under different statutes that the offer becomes ineffectual for any purpose,[26] that the offer cannot be accepted,[27] and that plaintiff in effect elects not to accept;[28] but it has also been held that the offer may be accepted during the progress of the trial.[29] Where plaintiff rejects both a preaction tender of a stated amount in settlement of his claim, and also an offer of judgment in the same amount, but on the trial plaintiff introduces no evidence to show that more is due, judgment is properly rendered for only the amount tendered and offered.[30]

Where, after the making of an offer of judgment, plaintiff amends his complaint by omitting some of the causes of action and reducing the recovery sought, the offer ceases to be binding or conclusive on either party, and becomes for all purposes nugatory.[31] Where, however, an amendment to a complaint is one of form only, and the cause of action and the recovery sought remain the same, an offer of judgment theretofore made in the action remains binding on the parties, notwithstanding such amendment.[32]

§ 183. —— Entry of Judgment

Ordinarily on due acceptance of the offer and compliance with statutory requirements the plaintiff is entitled to have judgment entered without trial. The judgment must conform to the terms of the tender or offer.

On proper acceptance of an offer of judgment, and on compliance with all statutory requirements, plaintiff is entitled to have judgment entered, in accordance with the offer, without a trial.[33] Generally such entry may be made without application to the court, by the clerk acting ministerially,[34] unless the offer and acceptance are made in a case of the class where application to the court is required to be made.[35] If plaintiff neglects to enter judgment after accepting the offer, judgment may be entered on application of defendant.[36] Where for any reason an application to the court is necessary when an offer to allow judgment has been made, the party receiving the offer may go to the court and ask and obtain on the offer such final directions as are necessary to give effect to the offer and perfect a judgment thereon.[37] As the clerk acts ministerially, he must follow closely the directions of the statute or the judgment will be unauthorized and void.[38] Judgment may be entered before the return term of the writ.[39] Proof of service of the summons need not be filed.[40] The judgment as entered must conform to the offer accepted.[41]

§ 184. —— Construction, Operation, and Effect

An offer of judgment and its acceptance are to be construed as a contract, and the judgment entered thereon is to be given effect in fixing the rights of the parties as of the date on which the offer was made; entry of judgment disposes of the issues tendered by the pleadings and operates to terminate the action.

An offer of judgment and its acceptance constitute a contract,[42] and together with the judgment entered thereon are to be construed and given effect according to the state of the pleadings at the time the offer was made.[43] The rights of the parties are

Co. v. Hodgson, 58 N.Y.S. 1132, 28 Misc. 447.
34 C.J. p 140 note 12.

24. Iowa.—Benson v. Chicago & N. W. R. Co., 84 N.W. 1028, 113 Iowa 179.

25. Iowa.—Benson v. Chicago & N. W. R. Co., supra.
34 C.J. p 140 note 13.

26. Minn.—Mansfield v. Fleck, 23 Minn. 61.
34 C.J. p 141 note 14.

27. Wis.—Smith v. Thewalt, 105 N. W. 662, 126 Wis. 176.
34 C.J. p 141 note 17.

28. N.Y.—Corning v. Radley, 54 N. Y.S. 565, 25 Misc. 318.
34 C.J. p 141 note 16.

29. Mo.—Haffner v. Tainter, 204 S. W. 966, 200 Mo.App. 1.
34 C.J. p 141 note 15.

30. U.S.—Phillips Petroleum Co. v. Rau Const. Co., C.C.A.Mo., 130 F.2d 499, certiorari denied Rau Const. Co. v. Phillips Petroleum Co., 63 S.Ct. 260, 317 U.S. 685, 87 L.Ed. 549, rehearing denied 63 S.Ct. 434, 317 U.S. 713, 87 L.Ed. 567.

31. N.Y.—Woelfle v. Schmenger, 12 N.Y.Civ.Proc. 312.

32. N.Y.—Woelfle v. Schmenger, supra.

33. N.Y.—Van Allen v. Glass, 15 N. Y.S. 261, 60 Hun 546, 21 N.Y.Civ. Proc. 127.
34 C.J. p 141 note 29.

34. Cal.—Old Settlers' Inv. Co. v. White, 110 P. 922, 158 Cal. 236.
34 C.J. p 141 note 30.

35. N.Y.—Bathgate v. Haskin, 63 N. Y. 261—Pfister v. Stumm, 27 N.Y. S. 1000, 7 Misc. 526.
Application and order for judgment generally see supra § 104.

36. N.Y.—Abel v. Bischoff, 90 N.Y. S. 990, 99 App.Div. 248.

37. N.Y.—Bathgate v. Haskin, 63 N. Y. 261.

38. Cal.—Old Settlers' Inv. Co. v. White, 110 P. 922, 158 Cal. 236—Crane v. Hirshfelder, 17 Cal. 582.

39. Mo.—Boyd v. J. M. Ward Furniture, Stove & Carpet Co., 38 Mo. App. 210.

40. N.Y.—Lindsley v. Van Cortlandt, 22 N.Y.S. 222, 67 Hun 145, affirmed 37 N.E. 825, 142 N.Y. 682.

41. N.Y.—Abel v. Bischoff, 90 N.Y. S. 990, 99 App.Div. 248.
Judgment must be responsive to tender
Wis.—Emerson v. Pier, 80 N.W. 1100, 105 Wis. 161.

42. N.Y.—Stillwell v. Stillwell, 80 N.Y.S. 961, 81 Hun 392, 24 N.Y. Civ.Proc. 124, 1 N.Y.Ann.Cas. 81.
34 C.J. p 142 note 40.

43. N.Y.—Tompkins v. Ives, 86 N.Y. 75.
34 C.J. p 142 note 41.

fixed as of that date,[44] and no further inquiry as to the relation of the parties is permissible.[45] A counterclaim thereafter filed or served cannot be considered or given effect,[46] and, on the other hand, the cause of action set up in such counterclaim is not barred by the judgment, but may be recovered in a subsequent action,[47] although acceptance of the offer was made after the counterclaim was pleaded.[48]

The action is terminated by entry of the judgment[49] and the court has no power to permit plaintiff to enter judgment on the offer and to continue the action for the recovery of the balance of his claim.[50] An acceptance of an offer of judgment disposes of the issues tendered by the pleadings,[51] and a judgment on a general offer concludes plaintiff from bringing a new action for any part of the claim embraced in the complaint, and which might have been litigated in the former action.[52] Under joint debtor acts a judgment may be entered on an offer of judgment made by one of several joint debtors without affecting or barring the remedy against the other debtors.[53]

§ 185. Admission in Pleading

a. In general

b. Admission of part of demand

c. Set-off or counterclaim

a. In General

Judgment may be entered for either the plaintiff or the defendant on a clear and unequivocal admission of liability in the pleadings of the opposing party. In a proper case, under some practice, judgment may be entered by the clerk of court or prothonotary.

Where defendant in his pleadings admits liability on the cause of action set up against him, plaintiff is entitled to have judgment entered in accordance with such admission,[54] provided the admission is distinct, unequivocal, and unconditional,[55] and it is clear that no issue of fact is to be tried[56] and no serious question of law is to be argued.[57] Such judgment may be entered on motion,[58] without a trial on the merits,[59] without evidence in support of the admission,[60] and without regard to which party makes the motion;[61] and defendant cannot introduce evidence which contradicts the admissions in his answer.[62] It is the duty of the court to render judgment for plaintiff in accordance with such admission, regardless of an adverse verdict;[63] and

44. N.Y.—U.S. Mortgage & Trust Co. v. Hodgson, 58 N.Y.S. 1132, 28 Misc. 447, affirmed U. S. Trust Co. v. Hodgson, 61 N.Y.S. 868, 30 Misc. 84.
34 C.J. p 142 note 42.

45. N.Y.—Abel v. Bischoff, 90 N. Y.S. 990, 99 App.Div. 248.

46. N.Y.—U. S. Mortgage & Trust Co. v. Hodgson, 58 N.Y.S. 1132, 28 Misc. 447, affirmed U. S. Trust Co. v. Hodgson, 61 N.Y.S. 868, 30 Misc. 84.
34 C.J. p 142 note 44.

47. N.Y.—Tompkins v. Ives, 36 N. Y. 75, 3 Abb.Pr.,N.S., 267, 1 Transcr.A. 266—Kautz v. Vandenburgh, 28 N.Y.S. 1046, 77 Hun 591—Fieldings v. Mills, 15 N.Y.Super. 489.

48. N.Y.—Tompkins v. Ives, 36 N.Y. 75, 3 Abb.Pr.,N.S., 267, 1 Transcr. A. 266—Kautz v. Vandenburgh, 28 N.Y.S. 1046, 77 Hun 591.

49. N.Y.—U. S. Trust Co. v. Hodgson, 61 N.Y.S. 868, 30 Misc. 84—Freudenheim v. Raduziner, 31 N. Y.S. 194, 10 Misc. 500.

50. N.Y.—Walsh v. Empire Brick & Supply Co., 85 N.Y.S. 528, 90 App. Div. 498—Freudenheim v. Raduziner, 31 N.Y.S. 194, 10 Misc. 500.

51. N.Y.—Collins v. Harris, 5 N.Y. St. 162.
34 C.J. p 142 note 49.

52. N.Y.—Robinson v. Marks, 19 Hun 325.
34 C.J. p 142 note 50.

53. N.Y.—Kantrowitz v. Kulla, 13 N.Y.Civ.Proc. 74, 20 Abb.N.Cas. 321.
34 C.J. p 142, note 52.

54. U.S.—Wark v. Ervin Press Corporation, C.C.A.Ill., 48 F.2d 152.
Mich.—**Corpus Juris quoted in** Detroit Trust Co. v. Smith, 240 N.W. 12, 13, 256 Mich. 376.
34 C.J. p 143 note 54.

55. Idaho.—**Corpus Juris cited in** Linch v. Perrine, 4 P.2d 353, 355, 51 Idaho 152.
Mich.—**Corpus Juris quoted in** Detroit Trust Co. v. Smith, 240 N.W. 12, 13, 256 Mich. 376.
Pa.—Cain v. Redlich, 164 A. 794, 310 Pa. 68.
Utah.—**Corpus Juris cited in** Gatrell v. Salt Lake County, 149 P.2d 827, 831, 106 Utah 409.
34 C.J. p 143 note 55.

56. Mich.—**Corpus Juris quoted in** Detroit Trust Co. v. Smith, 240 N. W. 12, 13, 256 Mich. 376.
Utah.—**Corpus Juris cited in** Gatrell v. Salt Lake County, 149 P.2d 827, 831, 106 Utah 409.
34 C.J. p 143 note 56.

57. Mich.—**Corpus Juris quoted in** Detroit Trust Co. v. Smith, 240 S.W. 12, 13, 256 Mich. 376.
34 C.J. p 143 note 57.

58. La.—Frank v. Hardee, 22 La. Ann. 184.
Mich.—**Corpus Juris quoted in** Detroit Trust Co. v. Smith, 240 N.W. 12, 13, 256 Mich. 276.
Motion denied under facts.—Pfeifer v. Pfeifer, 5 Pa.Dist. & Co. 310, 20 Sch.Leg.Rec. 212.

59. Mich.—**Corpus Juris quoted in** Detroit Trust Co. v. Smith, 240 N. W. 12, 13, 256 Mich. 376.
34 C.J. p 143 note 59.

60. Ind.—New Albany & V. Plank Road Co. v. Stallcup, 62 Ind. 345.
Mich.—**Corpus Juris quoted in** Detroit Trust Co. v. Smith, 240 N.W. 12, 13, 256 Mich. 376.
Where answer was composed solely of negatives pregnant, judgment may be awarded without evidence to support it, since evidence is unnecessary unless allegations of petition are put in issue by answer.—White v. City of Williamsburg, 280 S.W. 486, 213 Ky. 90.

61. N.Y.—U. S. Trust Co. of New York v. Wenzell, 19 N.Y.S.2d 448, 173 Misc. 998, affirmed 18 N.Y.S. 2d 1001, 258 App.Div. 1046, appeal denied 19 N.Y.S.2d 770, 259 App. Div. 713, affirmed U. S. Trust Co. v. Wenzell, 30 N.E.2d 727, 284 N.Y. 693.

62. Ind.—New Albany & V. Plank Road Co. v. Stallcup, 62 Ind. 345.
Mich.—**Corpus Juris quoted in** Detroit Trust Co. v. Smith, 240 N.W. 12, 13, 256 Mich. 276.

63. Ind.—New Albany & V. Plank Road Co. v. Stallcup, 62 Ind. 345.

it is error to enter judgment for defendant.[64] Such an admission, however, admits only the traversable allegations of the declaration, and the amount of the debt or damages confessed,[65] and no greater sum can be recovered without further proof.[66]

Admission by plaintiff. Where plaintiff in his pleading admits liability to defendant, and offers to pay it, judgment may be entered thereon in favor of defendant,[67] or at least credit, to the amount of such admission, should be given defendant in entering judgment for plaintiff.[68]

Entry of judgment by clerk or prothonotary. Under statutes authorizing plaintiff to take judgment for the amount admitted to be due by the affidavit of defense, it has been held that in a proper case the judgment may be entered by the prothonotary,[69] and the prothonotary's authority may extend to entry of judgment on an admission of part of the demand.[70] Under statutory provisions authorizing the clerk of court to enter judgment on default, the clerk may not enter judgment where the defendant admits the allegations of the complaint but there is no default,[71] nor may judgment on the basis of admissions in the answer be entered before expiration of the time to amend.[72]

b. Admission of Part of Demand

Where the defendant's pleadings admit part of the plaintiff's claim to be due, the plaintiff may have judgment for the amount so admitted; at common law he may not then sue for the balance. but under some statutes he may have a judgment or order for the amount admitted and then proceed to trial for the balance.

Generally, if defendant's answer admits the justice of a portion of plaintiff's demand, the latter is entitled to judgment for at least the amount so admitted to be due, and a judgment for less, or a judgment for defendant is erroneous.[73] At common law and in the absence of statute or court rule to the contrary, plaintiff has no right to enter judgment for the part admitted, and then to proceed to trial for the balance of his claim;[74] but by statute in many jurisdictions judgment may be entered before trial for the part admitted and a trial had for the part disputed.[75] Under this class of statutes two judgments may be rendered in the same case, both for plaintiff, or one for plaintiff and one for defendant, according to the result of the trial of the controverted portion of plaintiff's claim.[76] Where defendant has admitted a part of the claim to be due, and then proceeds under different statutory provisions to offer to confess judgment on condition that the judgment be in full of the demands against him, such offer does not affect the right of plaintiff to have judgment entered for the part admitted in accordance with the first mentioned statutory provisions;[77] but the offer, if refused by plaintiff, does not defeat the defendant's right to contest the entire claim.[78]

Under other statutes an "order," as distinguished from a "judgment," may be entered requiring defendant to satisfy the part of plaintiff's claim which he has admitted,[79] or an order may be entered re-

64. N.Y.—Schenck v. Fischer, 137 N.Y.S. 857.
34 C.J. p 143 note 63.

65. N.H.—Kelley v. Dover, 18 N.H. 566.

66. N.H.—Kelley v. Dover, supra.

67. Iowa.—Farwell v. Des Moines Brick Mfg. Co., 66 N.W. 176, 97 Iowa 286, 35 L.R.A. 63.

68. Ky.—Allen v. Hodge, 106 S.W. 255, 32 Ky.L. 509.
N.Y.—Fish v. Hahn, 108 N.Y.S. 782, 124 App.Div. 173.
34 C.J. p 143 note 68.

69. Pa.—Cain v. Redlich, 164 A. 794, 310 Pa. 68.

70. Pa.—Cain v. Redlich, supra.

71. N.Y.—Valentine & Co. v. Tarabocchia, 14 N.Y.S.2d 331, 171 Misc. 1056.

72. N.Y.—Valentine & Co. v. Tarabocchia, supra.

73. Ky.—Smith v. Burchell, 181 S.W.2d 48, 297 Ky. 707—Louisville Clothing Co. v. Harned, 80 S.W.2d 549, 258 Ky. 442—Martin v. Provident Life & Accident Ins. Co., 47 S.W.2d 524, 242 Ky. 667.
La.—Villere & Co. v. Latter, 171 So. 705, 186 La. 91.
N.C.—**Corpus Juris cited in** Meadows Fertilizer Co. v. Farmers' Trading Co., 165 S.E. 694, 203 N.C. 261.
34 C.J. p 143 note 70.

74. Ala.—Henderson v. Henry, 6 Ala. 361.
Pa.—Dodds v. Blackstock, 1 Pittsb. 46.
34 C.J. p 144 note 74.

75. Ill.—Central Trust Co. of Illinois v. Hagen, 171 N.E. 531, 339 Ill. 384—U. S. Fidelity & Guaranty Co. v. Martin Auto Parts Co., 15 N.E.2d 913, 296 Ill.App. 639.
Ky.—Martin v. Provident Life & Accident Ins. Co., 47 S.W.2d 524, 242 Ky. 667.
N.C.—Meadows Fertilizer Co. v. Farmers' Trading Co., 165 S.E. 694, 203 N.C. 261.
Wash.—**Corpus Juris quoted in** Simpson v. C. P. Cox Corporation, 8 P. 2d 424, 425, 426, 167 Wash. 34.
34 C.J. p 144 note 77.

76. Pa.—City of Philadelphia v. Second & Third Sts. Pass. R. Co., 2 Pa.Dist. 705, 13 Pa.Co. 580.
Wash.—**Corpus Juris quoted in** Simpson v. C. P. Cox Corporation, 8 P. 2d 424, 426, 167 Wash. 34.

77. Ky.—Martin v. Provident Life & Accident Ins. Co., 47 S.W.2d 524, 242 Ky. 667.
The offer does not affect the state of the pleadings, and admissions there made remain an appropriate basis for rendition of judgment for plaintiff as to the part admitted under the statutes relating to judgments on admissions in the pleadings.—Martin v. Provident Life & Accident Ins. Co., supra.

78. Ky.—Martin v. Provident Life & Accident Ins. Co., supra.

79. S.C.—Malloy v. Douglass, 101 S.E. 825, 113 S.C. 384.
34 C.J. p 145 notes 79, 80.
Erroneous motion for judgment
Where the proper motion is one for an "order" directing payment of the portion of the claim admitted, the fact that plaintiff falls into a technical error by moving for "judgment" for such part will not preclude the court from granting an "order" binding on defendant to pay the portion admitted to be due.—Phenix

quiring the defendant to pay the amount into court,[80] without prejudice to a continuation of the action as to the remaining issues, which order may be enforced by the court as it enforces a judgment or provisional remedy.[81] In its discretion, under some statutes, the court may refuse to enter judgment for the part admitted in advance of the final judgment on the whole case,[82] and an order may be entered which merely declares that plaintiff's claim shall be deemed established as to the part admitted, the action allowed to proceed as to the remainder of the claim, and, on termination of such action, the judgment then entered including, in addition to any matters determined in the action, the amount of plaintiff's claim that was admitted.[83]

To entitle plaintiff to such a preliminary judgment or order under the statutes, the admission must be unconditional,[84] and amount to a plain, explicit, and unequivocal admission that a definite sum or portion of the relief sought is due to plaintiff,[85] although it is not necessary to specify the particular items of plaintiff's claim or account which are admitted;[86] and, where defendant in his answer unequivocally admits that he owes a portion of the claim, it has been held that he may not by offering to pay such portion only on condition that it be accepted as full payment of the entire claim defeat plaintiff's right to have an order directing defendant to pay the part unequivocally admitted to be due.[87] The remedy is stringent and should be applied with proper caution.[88] The judgment must be strictly confined to the amount clearly and fairly admitted to be due.[89] Failure to deny is a sufficient admission under some statutes.[90] In a case where the cause of action is on an entire demand, and the whole claim is disputed, the statute does not apply, and if, as a result of error, or for other reason, a judgment is entered for a smaller amount than plaintiff claims, this, while the judgment remains in force, is a full settlement of the whole claim of plaintiff on such cause of action.[91]

c. Set-Off or Counterclaim

The plaintiff or the defendant may be entitled to judgment as to that portion of a claim admitted by the other where the defendant has filed a counterclaim or its equivalent.

Where defendant pleads a set-off or counterclaim, but no other answer or defense, it is an admission of his liability for so much of plaintiff's demand as is in excess of the alleged set-off or counterclaim, and for that excess plaintiff may be entitled, sometimes by virtue of statutory provisions, to take judgment,[92] and the action may be continued for trial of the counterclaim.[93] However, where the counterclaim pleaded is sufficient, if sustained, to extinguish the whole of plaintiff's claim, an admission of part of it, as of one or more of several causes of action joined in the complaint, does not entitle plaintiff to judgment for the part admitted in advance of the trial and final judgment.[94] Defendant is entitled to judgment on his counterclaim to the extent of items admitted by plaintiff.[95]

§ 186. Submission on Agreed Statement of Facts

Under some statutes, the court may render judgment in a case submitted on agreed facts, but the judgment must be in accordance with the facts agreed on.

Under statutes so providing, where the parties agree as to the facts and submit the case to the court for determination on such facts, the court may enter judgment on the case so submitted.[96] So,

Furniture Co. v. Daggett, 143 S.E. 220, 145 S.C. 357.

80. N.Y.—Dusenberry v. Woodward, 1 Abb.Pr. 443.

81. Wis.—Sellers v. Union Lumbering Co., 36 Wis. 393.
34 C.J. p 145 note 82.

82. N.Y.—Cronin v. Tebo, 17 N.Y.S. 650, 63 Hun 190.

83. Cal.—Lee v. De Forest, 71 P.2d 285, 22 Cal.App.2d 351.

84. N.Y.—Foster v. Devlin, 6 N.Y.S. 505, 57 N.Y.Super. 120.

85. N.Y.—Dolan v. Petty, 6 N.Y.Super. 673.
34 C.J. p 145 note 85.

86. Pa.—Roberts v. Sharp, 28 A. 1023, 161 Pa. 185.
34 C.J. p 145 note 86.

87. S.C.—Phenix Furniture Co. v. Daggett, 143 S.E. 220, 145 S.C. 357.

88. N.Y.—Dolan v. Petty, 6 N.Y.Super. 673.
34 C.J. p 146 note 87.

89. Pa.—United Oil Cloth Co. v. Dash, 32 Pa.Super. 155.
34 C.J. p 146 note 88.

90. N.Y.—Tracy v. Humphrey, 5 How.Pr. 155, 3 Code Rep. 190.

91. Ohio.—White v. Herndon, 15 Ohio Cir.Ct. 290—Snell v. W. A. Banks Co., 16 Ohio Cir.Ct.,N.S., 32, affirmed 94 N.E. 1115, 83 Ohio St. 464.

92. Pa.—Chartiers Trust Co. v. Lincoln Gas Coal Co., 89 Pittsb.Leg. J. 77.
S.C.—Bomar v. Gantt, 166 S.E. 90, 167 S.C. 139.
34 C.J. p 146 note 92.

93. D.C.—Fidelity Mut. Life Ins. Co. v. Brown, 45 App.D.C. 579.
34 C.J. p 146 notes 94, 95.

94. N.Y.—Cronin v. Tebo, 17 N.Y.S. 650, 63 Hun 190.
34 C.J. p 146 note 96.

95. Iowa.—Hueston v. Pointer Brewing Co., 269 N.W. 754, 222 Iowa 630.

Sum deposited in court

Where, in a suit by plaintiff broker against trustees and defendant broker for commissions, the trustees deposit a certain sum in court, conceding their liability for that much and relinquishing all rights thereto, and where plaintiff's pleadings claim only a portion of such sum, on defendant broker's cross motion for partial judgment on the pleadings order should be entered awarding him the difference between the total sum deposited and the amount claimed by plaintiff.—Traub v. Weinstein, 19 N.Y.S.2d 243, 259 App.Div. 338.

96. Wis.—Luebke v. City of Watertown, 284 N.W. 519, 230 Wis. 512.

where a case is called for trial and certain matters are admitted in court so as to settle controverted questions well pleaded, it is not erroneous for the court to render judgment on such admissions.[97]

Where the case is submitted on an agreed statement of facts, the court should enter judgment in accordance with the facts agreed on,[98] and the judgment must be based on such agreed facts.[99]

VIII. JUDGMENT BY DEFAULT

A. IN GENERAL

§ 187. What Constitutes Judgment by Default

In a strict sense a default judgment is one taken against a defendant who, having been duly summoned in an action, fails to enter an appearance in time; but the term is now usually applied where default occurs after appearance as well as before, although such judgments are also designated "nil dicit."

Broadly speaking, a judgment goes by default whenever, between the commencement of the suit and its anticipated decision in court, either of the parties omits to pursue, in the regular method, the ordinary measures of prosecution or defense.[1] However, as will be seen, this doctrine is most often applied to defaults on the part of defendant; and, strictly speaking, a "judgment by default" is one taken against a defendant when, having been duly summoned or cited in an action, he fails to enter an appearance at the proper time.[2] In this strict sense the term is not properly applied to a judgment rendered where a defendant, after appearance and plea, withdraws his plea and abandons his defense,[3] unless he stipulates that a judgment by default may be entered;[4] nor is it properly applied where defendant fails to plead within the time limited after the overruling of his demurrer.[5] Nevertheless, the term "judgment by default" is now generally applied to a default made after an appearance as well as before,[6] and may be entered where defendant fails to answer or plead within the time allowed him for that purpose, as discussed infra § 199, or fails to appear on

Conclusiveness and effect of stipulated facts generally see C.J.S. title Stipulations § 18, also 60 C.J. p 83 note 66–p 84 note 77.

Judgment or decision in controversies submitted to court without action see C.J.S. title Submission of Controversies § 15, also 60 C.J. p 687 notes 77–89.

Judicial act

In giving judgment on a legal obligation which the court finds to be established by stipulated facts, the court performs a judicial act.—Pope v. U. S., Ct.Cl., 65 S.Ct. 16, 323 U.S. 1, 89 L.Ed. 3.

Facts in complaint and affidavits

Where the parties in legal effect agree to submit the case on the facts appearing from the complaint and affidavits submitted on the return to an order to show cause, the court may enter judgment as on an agreed case under the statute.—Luebke v. City of Watertown, 284 N.W. 519, 230 Wis. 512.

Defendant not party to agreement

In action to remove a cloud on the title to land, a judgment by default against defendants for failure to answer was error, where judgment was rendered on an agreed statement of facts to which defendants were not parties, and the defendants did not consent to signing judgment out of term and out of the district.—Merritt v. Inscoe, 193 S.E. 714, 212 N.C. 526.

Exceptions properly overruled

Where parties agreed as to the facts and that the decision of the superior court should be final, an exception by defendant to findings for plaintiff must be overruled.—Belknap County v. City of Laconia, 116 A. 434, 80 N.H. 251.

97. Okl.—Delco Light Frigidaire Co. v. Babb, 32 P.2d 894, 168 Okl. 207.

Particular judgment upheld

Where plaintiff, suing on replevin redelivery bond, admitted when case was called for trial that tender of property had been made shortly after rendition of judgment requiring surrender of property, and there was no contention that property, while retained, depreciated in value, judgment for plaintiff for amount of costs remaining due, but not for value of property, held proper.—Delco Light Frigidaire Co. v. Babb, supra.

98. Idaho.—Andrews v. Moore, 94 P. 579, 14 Idaho 465.

Pa.—Walters v. Dooley, Com.Pl., 5 Sch.Reg. 174.

60 C.J. p 84 note 73.

99. Pa.—Frailey v. Supreme Council of American Legion of Honor, 20 A. 634, 132 Pa. 578.

60 C.J. p 687 note 83.

1. Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.

34 C.J. p 147 note 99.

Default judgment in federal courts see Federal Courts § 144 c.

"A 'default' occurs when there is no trial of issues."—Kelm v. Kelm, 235 N.W. 787, 788, 204 Wis. 301.

2. Idaho.—In re Smith, 225 P. 495, 38 Idaho 746.

N.J.—New Jersey Cash Credit Corporation v. Zaccaria, 19 A.2d 448, 126 N.J.Law 334.

N.Y.—Redfield v. Critchely, 14 N.E. 2d 377, 277 N.Y. 336, reargument denied 15 N.E.2d 73, 278 N.Y. 483.

N.C.—Beard v. Sovereign Lodge, W. O. W., 113 S.E. 661, 184 N.C. 154.

Pa.—Simpson Motor Truck Co. v. Piccolomini, Com.Pl., 87 Pittsb. Leg.J. 87, 1 Fay.L.J. 149.

Philippine.—Garcia v. Ruiz, 1 Philippine 634, 1 Off.Gaz. 59.

Va.—Brame v. Nolen, 124 S.E. 299, 139 Va. 413.

34 C.J. p 147 note 2.

3. Idaho.—In re Smith, 225 P. 495, 38 Idaho 746.

34 C.J. p 147 note 3.

4. Ill.—Foster v. Filley, 2 Ill. 256.

5. Conn.—Falken v. Housatonic R. Co., 27 A. 1117, 63 Conn. 258.

N.Y.—Smith v. Barnum, 3 N.Y.S. 476.

6. Pa.—Simpson Motor Truck Co. v. Piccolomini, Com.Pl., 87 Pittsb. Leg.J. 87, 1 Fay.L.J. 149.

Tex.—**Corpus Juris cited in** Continental Oil & Gas Production Co. v. Austin, Civ.App., 17 S.W.2d 1114, 1115.

34 C.J. p 147 note 6.

Object of default judgment is to reach case where defendant offers no defense or frivolous defense.—Albert M. Travis Co. v. Atlantic Coast Line R. Co., 139 So. 141, 102 Fla. 1117.

the trial, as discussed infra § 198, or otherwise fails to take some step required by some rule of practice or some rule of court.[7]

Where issues of fact have been joined, a judgment thereon, although defendant does not appear at the trial, is not a judgment by default;[8] but, where there has been a proper default, the taking of ex parte proof on which to base a judgment does not make the judgment other than one by default.[9] A judgment is not by default where defendant appears, files a demurrer, is present at the final hearing, and joins in submitting the cause to the court,[10] or where, after defendant's request for an adjournment is denied, he remains in court and takes part in the trial by interposing objections to questions and cross-examining witnesses.[11]

Judgment nil dicit. Nil dicit is generally the technical form of judgment to be rendered where defendant has entered a general appearance, but has failed to plead,[12] or where, having pleaded, his plea has been stricken out[13] or is withdrawn or abandoned and no further defense is made,[14] or where he elects to stand on a plea to which a demurrer has been sustained,[15] or where a plea in the nature of a motion, such as a plea of privilege, is sustained, and on transfer defendant thereafter files no other pleadings.[16] However, although some distinctions have been noted,[17] there is no material distinction, either at common law or under the statutes, between a judgment by nil dicit and a judgment by default in effect, operation, and the principles applicable thereto; and the term "judgment by default" is now usually applied to cases which, technically speaking, are judgments by nil dicit.[18] Even though the rendition of a judgment by default after the appearance of defendant when a judgment by nil dicit should have been entered, or of a judgment by nil dicit when it should have been by default, is technically erroneous, it is regarded as a mere informality or irregularity, and not a reversible error.[19]

7. Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
N.H.—Hutchinson v. Manchester St. R. Co., 60 A. 1011, 73 N.H. 271.
Tex.—**Corpus Juris cited in** Williams v. Jameson, Civ.App., 44 S.W.2d 498, 499, error dismissed Jameson v. Williams, Com.App., 67 S.W.2d 228—**Corpus Juris cited in** Continental Oil & Gas Production Co. v. Austin, Civ.App., 17 S.W.2d 1114, 1115.

Purpose

(1) The purpose of the entry of a "default" is to speed the cause by preventing a dilatory defendant from impeding plaintiff in the establishment of his claim, but it is not intended to furnish an advantage to plaintiff so that a defense may be defeated or a judgment reached without the difficulty that arises from a contest by defendant.—Coggin v. Barfield, 8 So.2d 9, 150 Fla. 551.

(2) The purpose of law regarding judgments by default is not to coerce defendants into answering suits, but only to provide method by which plaintiffs may obtain relief to which they are actually entitled when defendants do not answer.—Russo v. Aucoin, La.App., 7 So.2d 744.

8. Ind.—Indiana State Board of Medical Registration and Examination v. Pickard, 177 N.E. 870, 93 Ind.App. 171.
Mo.—Brooks v. McCray, App., 145 S.W.2d 985—Meyerhardt v. Fredman, App., 131 S.W.2d 916—National City Bank of St. Louis v. Pattiz, App., 26 S.W.2d 815—Schopp v. Continental Underwriters' Co., App., 284 S.W. 808.
34 C.J. p 147 note 10.

9. Ind.—Debs v. Dalton, 34 N.E. 236, 7 Ind.App. 84.
Wash.—Van Buren v. Peterson, 185 P. 572, 108 Wash. 697.

10. Okl.—Chivers v. Johnston County, 161 P. 822, 62 Okl. 2, L.R.A. 1917B 1296.

11. N.Y.—Scheckter v. Reiter, 113 N.Y.S. 729.

12. Fla.—**Corpus Juris cited in** Clouts v. Spurway, 139 So. 896, 897, 104 Fla. 340.
Tex.—Spivey v. Saner-Ragley Lumber Co., Com.App., 284 S.W. 210—**Corpus Juris quoted in** Grand Lodge Brotherhood of Railroad Trainmen v. Ware, Civ.App., 73 S.W.2d 1076, 1077, error dismissed.
34 C.J. p 148 note 17.

Waiver of objections

A "judgment nihil dicit" imports waiver of all objections to service and return of process and of mere irregularities of form in stating cause of action and incidental facts, and admits cause of action stated in petition, and submission to such judgment is an abandonment of every defense known or which ordinary diligence could have disclosed.—O'Quinn v. Tate, Tex.Civ.App., 187 S.W.2d 241.

13. Ill.—Cooper v. Buckingham, 4 Ill. 546—Ferry v. National Motor Underwriters, 244 Ill.App. 241.
Tex.—Spivey v. Saner-Ragley Lumber Co., Com.App., 284 S.W. 210—**Corpus Juris quoted in** Grand Lodge Brotherhood of Railroad Trainmen v. Ware, Civ.App., 73 S.W.2d 1076, 1077, error dismissed.

14. Tex.—Spivey v. Saner-Ragley Lumber Co., Com.App., 284 S.W. 210—**Corpus Juris quoted in** Grand Lodge Brotherhood of Railroad Trainmen v. Ware, Civ.App., 73 S.W.2d 1076, 1077, error dismissed—**Corpus Juris cited in** Williams v. Jameson, Civ.App., 44 S.W.2d 498, 499, error dismissed Jameson v. Williams, Com.App., 67 S.W.2d 228—Howe v. Central State Bank of Coleman, Civ.App., 297 S.W. 692.
34 C.J. p 148 note 19.

15. Ill.—Ferry v. National Motor Underwriters, 244 Ill.App. 241—Chicago, C. C. & St. L. R. Co. v. Bozarth, 91 Ill.App. 68.

16. Tex.—O'Quinn v. Tate, Civ.App., 187 S.W.2d 241.
Failure to plead after decision on plea or demurrer generally see infra § 199 f.

17. Tex.—Spivey v. Saner-Ragley Lumber Co., Com.App., 284 S.W. 210—Grand Lodge Brotherhood of Railroad Trainmen v. Ware, Civ. App., 73 S.W.2d 1076, error dismissed.
34 C.J. p 148 note 22 [a].

Deemed confession of action

"Judgment nihil dicit" amounts to confession of cause of action and carries with it more strongly than judgment by default, admission of justice thereof.—Evans v. McNeill, Tex.Civ.App., 41 S.W.2d 268, error dismissed—Howe v. Central State Bank of Coleman, Tex.Civ.App., 297 S.W. 692.

18. Fla.—**Corpus Juris cited in** Clouts v. Spurway, 139 So. 896, 897, 104 Fla. 340.
34 C.J. p 148 note 22.

19. Ill.—Mann v. Brown, 105 N.E. 328, 263 Ill. 394.
34 C.J. p 148 note 24.

Where defendant puts in his plea and issue is joined, and he then fails to appear at the trial, nil dicit is not the proper form of judgment to be entered, for he is not in default for want of an answer.[20] At common law there is also a form called judgment by "non sum informatus," which is rendered where, instead of pleading, defendant's attorney declares that he "is not informed" of any answer or defense to be made.[21]

Non prosequitur. Where plaintiff refuses or fails, without a sufficient excuse therefor, to take in due time any of those steps in the proceedings that he is required to take, in some jurisdictions a judgment of non prosequitur or non pros. may be taken against him,[22] although, as appears in Dismissal and Nonsuit § 65, such circumstances generally warrant a judgment of dismissal for want of prosecution. The judgment of non pros. is said to be in effect a judgment by default for laches.[23]

Not favored. Since the policy of the law is to have every litigated case tried on its merits, judgments by default are not favored,[24] and, as such a judgment deprives defendant of substantial rights, it is lawful only when duly authorized.[25]

§ 188. Constitutional and Statutory Provisions

Statutes governing default judgments are to be strictly construed.

In accordance with the principle stated supra § 187, that judgments by default are not favored in law, statutes governing default judgments are to be strictly construed.[26]

§ 189. Actions in Which Authorized

The actions in which default judgments are authorized depend on the provisions of the statutes, and may include or be restricted to actions of contract for the recovery of money or damages, or to actions on instruments in writing for the payment of money.

A "judgment by default" is technically and strictly applicable only to actions arising under the common law,[27] but the term is generally applied to like judgments taken in statutory or special proceedings,[28] such as on a motion.[29] Under some statutes the right to take judgment by default, or for want of an affidavit of defense, is restricted to actions of contract, or arising ex contractu,[30] for the recovery of money or damages,[31] and does not include

20. Colo.—Taylor v. McLaughlin, 2 Colo. 375.
Absence at trial as ground of default see infra § 198.
21. Ark.—Page v. Sutton, 29 Ark. 304.
34 C.J. p 148 note 26.
22. Md.—Henderson v. Maryland Home Fire Ins. Co., 44 A. 1020, 90 Md. 47.
34 C.J. p 148 note 28.
23. Pa.—Derrickson v. Colonial Trust Co., 17 Pa.Dist. 80, 35 Pa. Co. 522—Walton v. Lefever, 17 Lanc.L.Rev. 203.
24. U.S.—Corpus Juris cited in State of Missouri v. Fidelity & Casualty Co., D.C.Mo., 107 F.2d 343, 346.
Iowa.—Jackson v. Jones, 300 N.W. 668, 231 Iowa 106.
Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804—First Nat. Corporation v. Perrine, 48 P.2d 1073, 99 Mont. 454—Kosonen v. Waara, 285 P. 668, 87 Mont. 24.
N.M.—Bourgeious v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.
Okl.—Warr v. Norton, 121 P.2d 583, 190 Okl. 114—State ex rel. Higgs v. Muskogee Iron Works, 103 P.2d 101, 187 Okl. 419—State Life Ins. Co. v. Liddell, 61 P.2d 1075, 178 Okl. 114—Lane v. O'Brien, 49 P.2d 171, 173 Okl. 475—Standard v. Fisher, 35 P.2d 878, 169 Okl. 18—Morrell v. Morrell, 299 P. 866, 149 Okl. 187.
34 C.J. p 147 note 14.
25. Fla.—Holder Turpentine Co. v. M. C. Kiser Co., 67 So. 85, 68 Fla. 312.
Pa.—Globe & Republic Ins. Co. v. Davis, 190 A. 175, 125 Pa.Super. 91.
"The default of a party to an action is always a harsh measure, and no party should ever be defaulted, unless the grounds upon which such default is authorized are clearly and authoritatively established and are in such clear and certain terms that the party to be defaulted can know, without question, that he is subject to default if he does not act in a certain manner."—State of Missouri v. Fidelity & Casualty Co., D.C.Mo., 107 F.2d 343, 345—Janoske v. Porter, C.C.A.Ill., 64 F.2d 958, 960.
26. Tex.—Middleton v. Moore, Civ. App., 4 S.W.2d 988, reversed on other grounds Moore v. Middleton, Com.App., 12 S.W.2d 995.
"Notwithstanding the value of the Statute as preventing unnecessary delay in litigation, the Courts of this State have never been inclined to unduly extend the language of the Statute and uniformly have refused judgment when a reasonable doubt existed as to, the right of the plaintiff to what has been termed a 'snap judgment.' "—Selly v. Fleming Coal Co., 180 A. 826, 827, 7 W.W.Harr., Del., 34.
Particular statutes construed
Md.—Carey v. Howard, 16 A.2d 289, 178 Md. 512.
N.C.—McNair v. Yarboro, 118 S.E. 913, 186 N.C. 111.
Pa.—Borteck v. Goldenburg, 87 Pa. Super. 602—Deemer & Co. v. Kline Tp. School Dist., 37 Pa.Dist. & Co. 698, 6 Sch.Reg. 378.
27. Va.—Davis v. Commonwealth, 16 Gratt. 134, 57 Va. 134.
28. Ind.—Gwinner v. Gary Connecting R. Co., 103 N.E. 794, 182 Ind. 553.
34 C.J. p 149 note 33.
29. Va.—Davis v. Commonwealth, 16 Gratt. 134, 57 Va. 134.
34 C.J. p 149 note 34.
30. Wash.—Garrett v. Nespelem Consol. Mines, 139 P.2d 273, 18 Wash.2d 340.
34 C.J. p 149 note 36.
31. U.S.—In re Kimbrough, D.C.N.Y., 8 F.Supp. 843.
N.C.—Baker v. Corey, 141 S.E. 892, 195 N.C. 299—Beard v. Sovereign Lodge, W. O. W., 113 S.E. 661, 184 N.C. 154.
Wash.—Garrett v. Nespelem Consol. Mines, 139 P.2d 273, 18 Wash.2d 340.
34 C.J. p 149 note 37.
Actions within rule
(1) An action in assumpsit for damages for breach of contract to deliver lumber is an action on a contract for the payment of money within the meaning of the statute authorizing entry of judgment as in case of default in certain actions.—Stevens-Jarvis Lumber Co. v. Quixley Lumber Co., 229 Ill.App. 419.

actions for damages founded on a tort;[32] but in other jurisdictions default judgments in actions for damages founded on tort have been allowed.[33] Also under some statutes the right to take a default judgment does not include an action in which the relief to be afforded on default is to be ascertained by a jury or by the judge.[34] Still other statutory provisions restrict the remedy to actions on instruments in writing for the payment of money,[35] and require that such instrument, a copy of which must be attached to the affidavit, show a definite amount due.[36] Under a statute permitting an action to be maintained for a debt or liability not yet due, as where defendant is about to depart from the state or conceal his assets, a default judgment to become effective on maturity of the debt is authorized.[37] An objection that a default judgment may not be taken in a suit in equity is of no avail where distinctions between actions at law and suits in equity have been abolished.[38] In an action for a declaratory judgment, judgment by default will not be allowed, and formal proof must be presented.[39] Where the action is commenced by capias, there cannot at common law be a judgment for default of appearance.[40]

Action on life insurance policy. It has been held that the amount claimed on a life insurance policy is a liquidated amount, which may be verified by affidavit and on which a judgment by default may be rendered,[41] and that, where the payment of the premium is alleged, and there is judgment by default, it is not necessary to prove such payment;[42] but it has also been held that a life insurance policy is not such an instrument in writing for the payment of money as will permit a judgment by default for want of an affidavit of defense to be taken thereon, since the happening or performance of the contingencies on which the policy is to become due, such as the death of the insured, furnishing proofs of death, etc., do not appear from the face of the policy.[43]

Action on fire insurance policy. It has been held, under statutes relating to judgment by default, that an action on a fire insurance policy is for the recovery of money only, although the damages demanded are unliquidated,[44] but that it is not an action founded on an instrument ascertaining plaintiff's demand.[45] Some courts have held that a fire insurance policy is an instrument for the payment of money;[46] but other courts have held the contrary where the policy contains a provision for prorating liability in case of concurrent insurance.[47]

§ 190. In Whose Favor Default May Be Taken

A judgment by default can be rendered only in favor of a party to the action.

In accordance with the general rule, stated supra § 28, that no valid judgment can be rendered for or against one who is not a party to the action, a judgment by default can be rendered only in favor of a person who is a party to the action,[48] and not in

(2) As an action for damages for a buyer's refusal to accept goods is one on a contract for the payment of money, it is within the statute providing for default judgment in suit on contract, express or implied, for the payment of money.—Orsinger v. Consolidated Flour Mills Co., C.C.A.Ill., 284 F. 224, certiorari denied 43 S.Ct. 248, 260 U.S. 746, 67 L.Ed. 493.

(3) Other actions.—Thompson v. Dillingham, 112 S.E. 321, 183 N.C. 566—34 C.J. p 149 note 37 [a].

Actions not within rule

N.Y.—Abramson v. Held, 32 N.Y.S. 2d 274, 263 App.Div. 871.
34 C.J. p 149 note 37 [b].

32. Pa.—Prentzel v. Snyder, 5 Pa. Dist. & Co. 178, 38 York Leg.Rec. 25.
34 C.J. p 149 note 38.

33. U.S.—Lanham v. Cline, D.C.Idaho, 44 F.Supp. 897.
Tex.—Metzger v. Gambill, Civ.App., 37 S.W.2d 1077, error refused.

34. S.C.—Marion v. Charleston, 52 S.E. 418, 72 S.C. 576.
34 C.J. p 149 note 40.

35. Del.—Selly v. Fleming Coal Co., 180 A. 326, 7 W.W.Harr. 34.

36. Del.—Selly v. Fleming Coal Co., supra.

37. Ky.—Cornett v. Brashear, 9 S.W.2d 802, 225 Ky. 529.

38. Neb.—Weir v. Woodruff, 186 N.W. 988, 107 Neb. 585.

Suit to set aside fraudulent transfer

Statutory provision relating to entry of judgment after proof, on failure of defendant to answer, applies in cases within exceptions to statute providing that material allegations of petition not controverted by answer shall be taken as true, and does not affect right of plaintiff to default judgment in action on foreign judgments and to set aside fraudulent transfer of stock in corporation.—Danbom v. Danbom, 273 N.W. 502, 132 Neb. 358.

39. N.Y.—Griscti v. Mortgage Commission, 291 N.Y.S. 257, 249 App. Div. 632—Wilson v. Wilson, 43 N.Y.S.2d 526, 181 Misc. 941.

40. Pa.—Barbe v. Davis, 1 Miles 118.

41. Md.—Knickerbocker Life Ins. Co. v. Hoeske, 32 Md. 317.

42. Tex.—Union Cent. Life Ins. Co. v. Lipscomb, Civ.App., 27 S.W. 307.

43. Pa.—Riley v. Mutual Ben. Assoc., 2 Chest.Co. 305—Morton v. New York Mut. Life Ins. Co., 12 Phila. 246.

44. Wis.—Schobacher v. Germantown Farmers' Mut. Ins. Co., 17 N.W. 969, 59 Wis. 86.
26 C.J. p 570 note 27.

45. Ala.—North Alabama Home Protection v. Caldwell, 5 So. 338, 85 Ala. 607—Manhattan Fire Ins. Co. v. Fowler, 76 Ala. 372.

46. Pa.—Lycoming Fire Ins. Co. v. Dickinson, 4 Wkly.N.C. 271.
26 C.J. p 570 note 30.

47. Va.—Commercial Union Assur. Co. v. Eberhart, 14 S.E. 836, 88 Va. 952.

48. Minn.—Bradley v. Sandilands, 68 N.W. 821, 66 Minn. 40, 61 Am. S.R. 386.

Plaintiff not entitled to sue

A foreign administratrix who was not entitled under Kentucky statute to maintain action for conversion in Kentucky federal district court was not entitled to a judgment by default

favor of one who is not such a party[49] unless he is made a party by an order of the court.[50]

Deceased plaintiff. A judgment rendered by default in a suit instituted in the name of a dead person is not void, but merely erroneous, where defendant is duly served but fails to appear and defend.[51]

Codefendant becoming plaintiff. One who is originally a defendant, but afterward, by leave of court, becomes a plaintiff and files a cross bill, is not entitled to a default judgment against his codefendants, if they had no notice of his cross bill or that he had changed his status in the case.[52]

§ 191. Against Whom Default May Be Taken

a. In general
b. Codefendants

a. In General

Ordinarily a default judgment may be taken only against persons who are properly named or described as parties in the complaint.

As a general rule a judgment by default may be taken against such persons only as are properly named or described as parties in the complaint[53] and who have appeared or been properly served with process,[54] and not against persons who are not so named or described[55] although they have been served with process,[56] nor against persons who are not otherwise made parties to the action.[57]

Name. A judgment by default should be taken against defendant in his real name,[58] and a judgment taken against a person sued and served by a fictitious name is irregular[59] unless the declaration or complaint is amended by the insertion of his true name.[60]

Persons in military or naval service. Under various federal and state statutes enacted during the war to extend protection to the civil rights of persons in the military and naval service, before entering a judgment by default plaintiff is required in certain cases to file an affidavit showing that defendant is not in such service,[61] or, in the absence of such affidavit, to secure an order of court directing such entry.[62] Such a judgment without such an affidavit, however, has been held not absolutely void, but voidable only.[63] Under the provision that a judgment rendered against a person in the military service, who was prejudiced in his defense by reason of such service, may be opened to permit such person to put in his defense, the judgment so rendered is not void but voidable,[64] and may be challenged only by the person against whom it was rendered.[65] The statute does not prevent the rendi-

against defendant which had failed to answer petition.—Ballard v. United Distillers Co., D.C.Ky., 28 F.Supp. 633.

49. La.—Seib v. Cooper, 127 So. 380, 170 La. 105.
Okl.—Rebold v. National Supply Co., 271 P. 852, 133 Okl. 140.
34 C.J. p 149 note 44.

Intervener

A voluntary intervener, in an action in claim and delivery for possession of an automobile, cannot complain that plaintiff, by obtaining possession under a statute and then dismissing his complaint, subjected himself to judgment without pleadings for the return of the property to defendant, since such intervener is not affected by proceedings between the original parties, both adverse to him.—Sanders v. Milford Auto Co., 218 P. 126, 62 Utah 110.

50. Miss.—Ettringham v. Handy, 60 Miss. 334.

51. W.Va.—McMillan v. Hickman, 14 S.E. 227, 35 W.Va. 705.
34 C.J. p 149 note 46.

52. Tex.—Cole v. Grigsby, Civ.App., 35 S.W. 680.

53. Cal.—Burns v. Downs, 108 P.2d 953, 42 Cal.App.2d 622.
Ga.—Federal Land Bank of Columbia v. Shingler, 157 S.E. 911, 43 Ga.App. 92, reversed on other grounds 162 S.E. 815, 174 Ga. 352, conformed to 164 S.E. 213, 45 Ga. App. 199.
Okl.—Green Const. Co. v. Oklahoma County, 50 P.2d 625, 174 Okl. 290.
Tex.—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 343, error refused.
34 C.J. p 149 note 48.

Ratification

Even though original action in replevin was filed without knowledge or consent of named plaintiff, such plaintiff would be bound by default judgment therein if it ratified the action, and ratification could be inferred if plaintiff remained silent when, according to ordinary experience, it should have spoken if it did not consent.—Hanover Fire Ins. Co. v. Isabel, C.C.A.Okl., 129 F.2d 111.

54. Kan.—Farmers' Loan & Trust Co. v. Essex, 71 P. 268, 66 Kan. 100.
34 C.J. p 149 note 49.

A party who purports to represent himself, assumes the responsibility of watching calendars and trial dates.—Latham v. Salisbury, 61 N.E. 2d 306, 326 Ill.App. 253.
Jurisdiction of person generally see infra § 192.

55. Cal.—Ford v. Doyle, 37 Cal. 346.
34 C.J. p 149 note 50.

56. Cal.—Lamping v. Hyatt, 27 Cal. 99.
Ill.—Lewis v. West Side Trust & Savings Bank, 36 N.E.2d 573, 377 Ill. 384.

57. Tex.—Buetell v. Courand, 29 S. W. 1146, 9 Tex.Civ.App. 564.
34 C.J. p 149 note 52.

58. Cal.—Curtis v. Herrick, 14 Cal. 117, 73 Am.D. 632.

59. N.Y.—Fischer v. Hetherington, 32 N.Y.S. 795, 11 Misc. 575.
34 C.J. p 150 note 54.

60. Cal.—San Francisco v. Burr, 36 P. 771, 4 Cal.Unrep.Cas. 634.
N.Y.—Upham v. Cohn, 14 N.Y.Civ. Proc. 27.

61. La.—Eureka Homestead Soc. v. Clark, 83 So. 190, 145 La. 917.
Suspension of liabilities of persons in military or naval service generally see Army and Navy § 37 f.

62. La.—Eureka Homestead Soc. v. Clark, supra.

63. La.—Eureka Homestead Soc. v. Clark, supra.

64. Tex.—J. C. Penney Co. v. Oberpriller, Civ.App., 163 S.W.2d 1067, reversed on other grounds 170 S. W.2d 607, 141 Tex. 128.

65. Tex.—J. C. Penney Co. v. Oberpriller, supra.

tion of a judgment against a person in the military service who was in default before his enlistment.[66]

Deceased defendant. Where defendant dies after default and before the execution of a writ of inquiry or other proceedings for final judgment, a final judgment cannot be entered thereon[67] unless the action is revived against his personal representative.[68]

b. Codefendants

(1) In general
(2) Where some only default
(3) Want of service on some defendants
(4) Successful defense by some defendants

(1) In General

Where all defendants jointly sued and served default, a default judgment cannot be entered against some without discontinuing as to the others.

Where all of several defendants who are jointly sued and served with process are equally in default, a judgment by default cannot be entered against some of them only[69] without discontinuing as to the others.[70]

(2) Where Some Only Default

At common law, if some defendants default, a separate final judgment cannot be entered against them alone; and while under statutes such a judgment is proper in some cases it is not permitted where the defendants are jointly liable.

As is discussed supra § 34, at common law, and in the absence of statute otherwise, where several defendants are joined in an action ex contractu, and all are brought before the court by service or appearance, plaintiff must recover against all or none. In accordance with this rule, if some defendants default, a final judgment in favor of plaintiff can be entered only against all defendants,[71] and a several judgment cannot be entered against those only who have defaulted[72] or against that defendant alone who has answered.[73] In such a case there may be entered an interlocutory judgment of default against the defaulting defendant,[74] but a final judgment cannot be entered on the default until the issue as to the other defendants is successfully disposed of.[75]

Under statutes. As discussed supra § 33, in some jurisdictions it is provided by statute that in actions regularly commenced against several joint defendants the court may, whenever a several judgment would be proper, render judgment against one or more of them, leaving the action to proceed against the others. Under these statutes, where the rights or liabilities of a portion of the codefendants who are in default is several, or joint and several, plaintiff may take a separate judgment by default against them and proceed to a determination of the issues as against defendants who appear and answer,[76] and, as appears infra subdivision b (4) of this section this rule applies although defendant who sets up a separate defense establishes it, and judgment is rendered in his favor, and although separate interlocutory judgments by default are entered against the defaulting defendants severally at different periods and on separate service of process.[77] However, even under such statute, if the claim is on a joint liability, no final judgment by de-

66. Tex.—J. C. Penney Co. v. Oberpriller, supra.

67. N.Y.—In re Laughlin's Estate, 8 N.Y.S.2d 842, 255 App.Div. 927.
34 C.J. p 76 note 67 [a] (6), p 152 note 98.

68. Pa.—Nuss v. Kemmerer, Com. Pl., 17 Leh.L.J. 379, 52 York Leg. Rec. 15.
Tenn.—Carter v. Carriger, 8 Yerg. 411, 24 Am.D. 585.

69. Ill.—Wisner v. Catherwood, 225 Ill.App. 471.
34 C.J. p 150 note 63.

70. Wis.—Stewart v. Glenn, 5 Wis. 14.

71. N.Y.—Chippewa Credit Corporation v. Strozewski, 19 N.Y.S.2d 457, 259 App.Div. 187.
34 C.J. p 150 note 66.

72. N.J.—Coles v. McKenna, 76 A. 344, 80 N.J.Law 48.
34 C.J. p 150 note 67.

73. Ill.—Wells v. Reynolds, 4 Ill. 191.
34 C.J. p 150 note 68.

74. N.J.—Corpus Juris cited in Kople v. Zalon, 2 A.2d 56, 57, 121 N.J.Law 270, appeal dismissed 5 A.2d 750, 122 N.J.Law 422.
Tex.—Sindorf v. Cen-Tex Supply Co., Civ.App., 172 S.W.2d 775.
34 C.J. p 150 note 69.

75. Ill.—Townsend v. Postal Benefit Ass'n of Illinois, 262 Ill.App. 483.
Tex.—Sindorf v. Cen-Tex Supply Co., Civ.App., 172 S.W.2d 775.
Wash.—Marinovich v. Lindh, 220 P. 807, 127 Wash. 349.
34 C.J. p 150 note 70.

76. Ind.—Moll v. Goedeke, 25 N.E. 2d 258, 107 Ind.App. 446.
La.—Campti Motor Co. v. Jolley, 120 So. 684, 10 La.App. 286.
Mich.—Kunsky-Trendle Broadcasting Corporation v. Kent Circuit Judge, 275 N.W. 175, 281 Mich. 367.
N.C.—Brooks v. White, 122 S.E. 561, 187 N.C. 656.
Tex.—Buttrill v. Occidental Life Ins. Co., Civ.App., 45 S.W.2d 636.
34 C.J. p 151 note 72.

Convenience as controlling

Where there are several defendants, the trial court may, as convenience dictates, render judgment by default against nonappearing parties before final hearing, or await the trial and render appropriate judgment as to all parties at that time. —Ex parte Mason, 104 So. 523, 213 Ala. 279.

In condemnation proceedings the highway commission's failure to enter default of one or more nonappearing defendants did not render judgment void as to defendant who appeared and contested case, since the only effect of entering the default would be to bar the defaulted parties from participating in further proceedings.—State v. Whitcomb, 22 P.2d 823, 94 Mont. 415.

77. Md.—Loney v. Bailey, 43 Md. 10.

fault can be entered until the issues raised against the other defendants are finally disposed of;[78] nor can a judgment by default be entered against a defendant who is only secondarily liable, until a successful termination of the suit against defendant primarily liable.[79] A judgment by default cannot be entered against persons who, being necessary parties by virtue of having the same interests as plaintiff, are brought into the action as defendants.[80]

Discontinuance as to some. Where one or more of several joint defendants who are jointly liable default, plaintiff cannot discontinue or dismiss his action as to one defendant and take judgment by default against the others,[81] or discontinue the action as to the ones who have defaulted and proceed to judgment against the others,[82] unless the one as to whom the discontinuance is had has pleaded a matter going to his personal discharge,[83] or unless the cause of action is joint and several.[84]

(3) Want of Service on Some Defendants

Where some of several joint defendants are not served, a default judgment cannot, in the absence of statute, be rendered against any of them; but some statutes permit judgment in such case to be entered against the defendants who were served provided the liability is several.

Since, as discussed infra § 192, a legal judgment by default cannot be rendered against a defendant who has neither appeared nor been duly served with notice of the suit, where one or more of several joint defendants has not been properly served with process or appeared, a judgment by default, in the absence of statute, cannot be rendered against any of them.[85] Under appropriate statutes, however, if the codefendants are severally liable, judgment by default may be entered against defendants who have been served with process, and have defaulted, without regard to the other defendants.[86] It has been held that a joint judgment against all, where some have been served irregularly or not at all, is not entirely void;[87] it is erroneous merely, and accordingly valid as to the person served, at least on collateral attack,[88] although it may be reversed on appeal or error[89] or, if it comes within the rules considered infra § 334, set aside on a proper application in the court below. Under some joint debtor acts, judgment by default may be taken against all joint defendants, although only some are served, and the judgment will be good as against the joint property of all, and the separate property of those served.[90] A judgment in favor of one defendant against another cannot be entered on the default of the latter, unless he had notice and opportunity to defend as against his codefendant.[91]

(4) Successful Defense by Some Defendants

A successful defense by one defendant on a ground not personal to himself inures to the benefit of his defaulting codefendant so as to bar a judgment against him; but the rule may be otherwise where the cause of action is joint and several.

Where one defendant suffers a default, while the other pleads and goes to trial and defends successfully on a ground not personal to himself, his success will inure to the benefit of the defaulting defendant, and judgment must be rendered for both,[92] and in such a case it is erroneous to render a judgment for defendants who have successfully defended the action and against those who have defaulted.[93] Under some statutes, where the cause of action is joint and several, judgment may be taken against defendant who defaults, although it

78. N.Y.—Nathan v. Zierler, 228 N.Y.S. 170, 223 App.Div. 355—Grossman Steel Stair Corp. v. Steinberg, 54 N.Y.S.2d 275.
34 C.J. p 151 note 75.

79. Cal.—**Corpus Juris cited in** Plott v. York, 91 P.2d 924, 926, 33 Cal.App.2d 460.
Colo.—Pratt v. South Canon Supply Co., 107 P. 1105, 47 Colo. 478.

80. Cal.—Watkins v. Nutting, 110 P. 2d 384, 17 Cal.2d 490.

81. Ill.—Tolman v. Spaulding, 4 Ill. 13.
34 C.J. p 151 note 78.

82. Ind.—Britton v. Wheeler, 8 Blackf. 31.
34 C.J. p 151 note 79.

83. Ill.—Tolman v. Spaulding, 4 Ill. 13.
Ind.—Britton v. Wheeler, 8 Blackf. 31.

84. U.S.—Conner v. Cockerill, C.C. D.C., 6 F.Cas.No.3,112, 4 Cranch C. C. 3.
34 C.J. p 151 note 81.

85. Miss.—Martin v. Williams, 42 Miss. 210, 97 Am.D. 456.
34 C.J. p 151 note 83.

86. Cal.—Edwards v. Hellings, 37 P. 218, 103 Cal. 204.
34 C.J. p 151 note 85.

87. Tex.—Ross v. Drouilhet, 80 S.W. 241, 34 Tex.Civ.App. 327.
34 C.J. p 152 note 86.

88. Mo.—Boyd v. Ellis, 18 S.W. 29, 107 Mo. 394.
34 C.J. p 152 note 87.

89. Minn.—Dillon v. Porter, 31 N.W. 56, 36 Minn. 341.
34 C.J. p 152 note 88.

90. N.Y.—Lahey v. Kingon, 13 Abb. Pr. 192, 22 How.Pr. 209.

91. N.Y.—New Netherland Bank of New York v. Boucheron Co., 203 N.Y.S. 766, 122 Misc. 690.

92. Ga.—Rhodes v. Southern Flour & Grain Co., 163 S.E. 237, 45 Ga. App. 13.
Ind.—**Corpus Juris quoted in** Second Nat. Bank v. Scudder, 6 N.E.2d 955, 959, 212 Ind. 283.
Mo.—**Corpus Juris quoted in** Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 1053, 328 Mo. 782.
N.J.—**Corpus Juris cited in** Kople v. Zalon, 2 A.2d 56, 58, 121 N.J.Law 270, appeal dismissed 5 A.2d 750, 122 N.J.Law 422.
34 C.J. p 152 note 92.

93. Ind.—**Corpus Juris quoted in** Second Nat. Bank v. Scudder, 6 N.E.2d 955, 959, 212 Ind. 283.
Mo.—**Corpus Juris quoted in** Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 1053, 328 Mo. 782.
34 C.J. p 152 note 93.

is given in favor of the answering defendant,[94] especially where the defense pleaded by the latter was a personal one.[95]

§ 192. Jurisdiction in General

a. In general
b. Obtaining jurisdiction of defendant

a. In General

Jurisdiction of the defendant and of the subject matter is essential to the validity of a default judgment.

As in the case of judgments generally, it is essential to the validity of a judgment by default that the court rendering the judgment have jurisdiction of defendant[96] and of the subject matter;[97] and, as is discussed infra subdivision b of this section, in order to have such jurisdiction there must have been either due service of process on defendant or a valid appearance by him or on his behalf. If the court has jurisdiction of the defendant and of the subject matter, and there are no fatal defects in the proceedings, the court has jurisdiction to enter judgment by default.[98] Jurisdiction of the court to enter a default judgment is not affected by the fact that the judgment is excessive, where the excessiveness is due to defendant's default.[99]

b. Obtaining Jurisdiction of Defendant

(1) In general
(2) Process
(3) Service
(4) Appearance

(1) In General

In order to support a default judgment, the defendant must be properly served with due process or voluntarily appear.

In order for the court to obtain the jurisdiction of the defendant essential to support a judgment by default, defendant must be properly served with due process or notice, or must voluntarily appear in person or by attorney.[1] Mere knowledge of the pendency of the suit,[2] and even the attendance on court,[3] will not support a default judgment. If the court's jurisdiction of defendant has been obtained by due process, a default judgment ordinarily is not void for failure to give defendant notice of subsequent proceedings in the cause,[4] but there is also

94. La.—Campti Motor Co. v. Jolley, 120 So. 684, 10 La.App. 287.
34 C.J. p 152 note 95.

95. Tex.—Southland Life Ins. Co. v. Stewart, Civ.App., 211 S.W. 460.

96. Del.—Yeatman v. Ward, Super., 36 A.2d 355.
Ky.—Mergenthaler Linotype Co. v. Griffin, 10 S.W.2d 633, 226 Ky. 159.
Neb.—Braun v. Quinn, 199 N.W. 828, 112 Neb. 485, 39 A.L.R. 411.
N.J.—Weiner v. Wittman, 27 A.2d 866, 129 N.J.Law 35.
N.Y.—Minnesota Laundry Service v. Mellon, 291 N.Y.S. 378, 249 App. Div. 648—6 East 97th St. Co. v. Grant, 278 N.Y.S. 884, 155 Misc. 581—Leavitt v. Matzkin, 114 N.Y.S. 687.
N.C.—Harrell v. Welstead, 175 S.E. 283, 206 N.C. 817.
Tex.—Broun v. Hayslip, Civ.App., 283 S.W. 177.
Necessity of jurisdiction for rendering of judgment generally see supra § 19.

97. Me.—Tremblay v. Ætna Life Ins. Co., 55 A. 509, 97 Me. 547, 94 Am.S.R. 521.
34 C.J. p 152 note 3.

98. U.S.—Helms v. Holmes, C.C.A. N.C., 129 F.2d 263, 141 A.L.R. 1367.
Cal.—People v. Herod, 295 P. 383, 111 Cal.App. 246.
Tex.—Bray v. First Nat. Bank, Civ. App., 10 S.W.2d 235, error dismissed.
A reference by rule of court did not effect a loss of jurisdiction of pending cause and deprive superior court of right of revoking the reference and ordering a default judgment.—Lebel v. Cyr, 34 A.2d 201, 140 Me. 98.

99. Ark.—Young v. Young, 147 S.W. 2d 736, 201 Ark. 984.

1. Cal.—Glidden v. Packard, 28 Cal. 649.
N.Y.—6 East 97th St. Co. v. Grant, 278 N.Y.S. 884, 155 Misc. 581.
N.C.—Harrell v. Welstead, 175 S.E. 283, 206 N.C. 817—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703—Moore v. Packer, 94 S.E. 449, 174 N.C. 665—Condry v. Cheshire, 88 N.C. 375—Doyle v. Brown, 72 N.C. 393.
Okl.—Street v. Dexter, 77 P.2d 707, 182 Okl. 360.
Or.—Mutzig v. Hope, 158 P.2d 110—Okanogan State Bank of Riverside, Wash., v. Thompson, 211 P. 933, 106 Or. 447.
Pa.—Modern Home Heating Co. v. Diehl, 92 Pa.Super. 571.
Tex.—Hitt v. Bell, Civ.App., 111 S.W.2d 1164—City of Corpus Christi v. Scruggs, Civ.App., 89 S.W.2d 458—Brecheen v. State, Civ.App., 89 S.W.2d 259—Christie v. Hudspeth County Conservation and Reclamation Dist. No. 1, Civ.App., 64 S.W. 2d 978—Jarrell v. U. S. Realty Co., Civ.App., 270 S.W. 1079.
33 C.J. p 1030 note 96 [a], [d].
On cross action
(1) A default judgment in favor of one defendant against his codefendants on his cross action is absolutely void, where such codefendants did not have required statutory notice.—Ruby v. Davis, Tex.Civ.App., 277 S.W. 430.
(2) A default judgment against plaintiff on defendant's cross action is void where plaintiff has not been served with citation based on the cross action.—Dilbeck v. Norwood, Tex.Civ.App., 139 S.W.2d 121—National Stock Yards Nat. Bank v. Valentine, Tex.Civ.App., 39 S.W.2d 907.
On amended petition
When plaintiff by amended petition changes cause of action and defendant has not filed answer, it is necessary, in order to support default judgment, to cite defendant on amended cause of action.—Nuckles v. J. M. Radford Grocery Co., Tex.Civ. App., 72 S.W.2d 652.
On filing a second declaration after discontinuance of first action, defendant must again be served with process to support default judgment. —Morse v. Bragg, 107 F.2d 648, 71 App.D.C. 1, certiorari denied 60 S. Ct. 1073, 310 U.S. 630, 84 L.Ed. 1400.

2. Ark.—Stewart v. California Grape Juice Corporation, 29 S.W.2d 1077, 181 Ark. 1140.
Cal.—Hunstock v. Estate Development Corporation, 138 P.2d 1, 22 Cal.2d 205, 148 A.L.R. 968.

3. Tex.—Jameson v. Farmers' State Bank of Burkburnett, Civ.App., 299 S.W. 458, affirmed Farmers' State Bank of Burkburnett v. Jameson, Com.App., 11 S.W.2d 299, rehearing denied 16 S.W.2d 526.

4. U.S.—Rosborough v. Chelan

authority to the contrary, at least as respects notice of particular proceedings.[5]

(2) Process

A default judgment is void if the process does not conform to essential statutory requirements.

A judgment by default is void where the process does not substantially conform to essential statutory requirements.[6] Thus a default judgment is void where the notice, although bearing the proper caption, is not properly addressed to defendant,[7] or where the notice, writ, or summons is not properly subscribed.[8] So too a default judgment is void where it is based on a citation which does not sufficiently conform to the statutory requirements,[9] as where it fails to name all the parties,[10] or fails properly to state the nature of plaintiff's demand[11] or the date when plaintiff's petition was filed,[12] or where it summons defendant to appear on an impossible date[13] or at a time or term not designated by law[14] or at a place other than the one designated by law,[15] or where it is erroneously or insufficiently directed to the officer for service,[16] or where it directs the officer to summon someone other than

County, Wash., C.C.A.Wash., 53 F. 2d 198.
Ark.—Hill v. Teague, 108 S.W.2d 889, 194 Ark. 552.
Va.—Fuller v. Edwards, 22 S.E.2d 26, 180 Va. 191.
Right to notice of proceedings after judgment by default see infra § 202.

5. R.I.—Sahagian v. Sahagian, 187 A. 221, 48 R.I. 267.

6. Cal.—Wilson v. Superior Court in and for Los Angeles County, 54 P.2d 539, 11 Cal.App.2d 643.
Fla.—Frostproof State Bank v. Mallett, 131 So. 322, 100 Fla. 1464.
Iowa.—Swan v. McGowan, 231 N.W. 440, 212 Iowa 631.
La.—Spillman v. Texas & P. Ry. Co., 120 So. 905, 10 La.App. 379.
Mich.—Rood v. McDonald, 7 N.W.2d 95, 303 Mich. 634.
Okl.—State v. City of Tulsa, 5 P.2d 744, 153 Okl. 262.
33 C.J. p 1081 note 1 [b], [c].

The process must contain all that the statute requires.—Duke v. Spiller, 111 S.W. 787, 51 Tex.Civ.App. 237—34 C.J. p 152 note 6.

Process held sufficient
U.S.—Jenner v. Murray, C.C.A.Fla., 32 F.2d 625.

7. Iowa.—Columbian Hog & Cattle Powder Co. v. Studer, 8 N.W.2d 592.

8. Iowa.—Swan v. McGowan, 231 N. W. 440, 212 Iowa 631.
W.Va.—Nicholas Land Co. v. Crowder, 32 S.E.2d 563.

9. La.—Robinson v. Enloe, 121 So. 320, 10 La.App. 435.
Tex.—Massie Drilling Co. v. Nees, 266 S.W. 504—Fort Worth Lloyds v. Johnson, Civ.App., 129 S.W.2d 1157—City of Corpus Christi v. Scruggs, Civ.App., 89 S.W.2d 458—Brecheen v. Wink Independent School Dist., Civ.App., 89 S.W.2d 293—Leach v. City of Orange, Civ. App., 46 S.W.2d 1047—Beck v. Nelson, Civ.App., 17 S.W.2d 144—Lipscomb v. McCart, Civ.App., 295 S.W. 245—Atkinson v. Leonard, Civ. App., 287 S.W. 525—Jenness v. First Nat. Bank, Civ.App., 256 S. W. 634.

Statute is mandatory
The courts have uniformly held that the requirements of the statute as to what shall be stated in a citation are mandatory and that, in the absence of such essential compliance, a judgment by default will not be sustained.—Nueces Hardware & Implement Co. v. Jecker, Tex.Civ. App., 56 S.W.2d 474—Wyman v. American Mortg. Corporation, Tex. Civ.App., 45 S.W.2d 629—Tyner v. Glass, Tex.Civ.App., 27 S.W.2d 916—Martinez v. Watson, Tex.Civ.App., 21 S.W.2d 54—Boydstun v. Nugent, Tex.Civ.App., 285 S.W. 695—Jarrell v. U. S. Realty Co., Tex.Civ.App., 270 S.W. 1079—Jenness v. First Nat. Bank, Tex.Civ.App., 256 S.W. 634, 635.

Citations held sufficient
(1) Citation containing palpable error in date of issuance as appearing above county clerk's signature. —Wagnon v. Elam, Tex.Civ.App., 65 S.W.2d 407.

(2) Default judgment may be taken against foreign corporation, where citation gives name of agent served, without proof of agency.—Holcomb & Hoke Mfg. Co. v. Amason, Tex.Civ. App., 2 S.W.2d 360.

10. Tex.—Fort Worth Lloyds v. Johnson, Civ.App., 129 S.W.2d 1157 —Lipscomb v. McCart, Civ.App., 295 S.W. 245—Jenness v. First Nat. Bank, Civ.App., 256 S.W. 634. 33 C.J. p 1090 note 67 [g].

"And wife"
A citation commanding an officer to summon a named defendant "and wife" was insufficient to support judgment by default against either of defendants, since it was not in compliance with statutes requiring names of all parties to be stated.—Brecheen v. Wink Independent School Dist., Tex.Civ.App., 89 S.W.2d 293—Brecheen v. State, Tex.Civ.App., 89 S.W.2d 259.

"Et ux"
Citation designating certain person "et ux," as plaintiffs, without naming plaintiff's wife, held insufficient to sustain default judgment against defendant.—Temple Lumber Co. v. McDaniel, Tex.Civ.App., 24 S. W.2d 518.

Misstatement of name
Default judgment based on citation which misstates defendant's name on face thereof is erroneous.—Nueces Hardware & Implement Co. v. Jecker, Tex.Civ.App., 56 S.W.2d 474.

11. Tex.—Woodward v. Acme Lumber Co., Civ.App., 103 S.W.2d 1054 —Jackson v. Birk, Civ.App., 84 S. W.2d 332—Bass v. Brown, Civ. App., 262 S.W. 894—Carlton v. Mayner, 103 S.W. 411, 47 Tex.Civ. App. 47.
33 C.J. p 1081 note 1 [a].

12. Tex.—Wise v. Southern Rock Island Plow Co., Civ.App., 85 S.W. 2d 257.

13. Miss.—Loving v. First Nat. Bank, 158 So. 908, 172 Miss. 15, 97 A.L.R. 745—Jenne v. Davis, 119 So. 911, 152 Miss. 4.
Tex.—Heard v. J. & C. Drilling Co., Civ.App., 124 S.W.2d 866—Tyner v. Glass, Civ.App., 27 S.W.2d 916 —Martinez v. Watson, Civ.App., 21 S.W.2d 54—Baker v. Crenshaw & Brewster, Civ.App., 270 S.W. 917.

14. Tex.—Wyman v. American Mortg. Corporation, Civ.App., 45 S. W.2d 629—Baker v. Crenshaw & Brewster, Civ.App., 270 S.W. 917.

"Special term"
Where process was void because it directed defendant to appear at unauthorized and nonexistent "special term" of county court to be held in December, fact that case was tried at following regular term of court would not avail as ground for not setting aside judgment by default.—Mosaic Templars of America v. Gaines, Tex.Civ.App., 265 S.W. 721.

15. Tex.—Boydstun v. Nugent, Civ. App., 285 S.W. 695.

16. Tex.—Green v. White, Civ.App., 32 S.W.2d 488.

Nonexistent county
Service of citation directed to sheriff or constable of nonexistent county held ineffective, rendering default judgment void for lack of jurisdiction of defendant.—Boulevard

defendant.[17] However, mere irregularities in the form of process, provided they do not violate essential requirements of the statute, have been held not to render a default judgment absolutely void.[18]

(3) Service

Proper service of process on the defendant is essential to the validity of a default judgment, and there must be a substantial compliance with statutory provisions as to return and proof of service.

To authorize a default judgment, process must be properly served on defendant in the manner prescribed by statute.[19] If defendant is not served, a default judgment taken against him is void;[20] and the same is true where service on defendant is radically defective.[21] Thus a default judgment is void where it is based on service of process by one without authority,[22] or where service is made on a third person instead of on the actual defendant[23] or on one not a proper agent to receive service of process.[24] However, mere irregularities in the manner of service, provided they do not violate the essential requirements of the statute, do not render a default judgment void.[25]

Undertaking Co. v. Breaker, Tex.Civ. App., 42 S.W.2d 451.

Alias citation

Where citations issued by county clerk of county in which plaintiffs' pleadings alleged parties to be served resided were returned with notation that president who was sued with corporation could not be found, but that he was living in county seat of another county, alias citations issued by same county clerk to sheriff or constable of other county formed sufficient basis for default judgment.—Artex Refining Co. v. Pollard & Lawrence, Tex.Civ.App., 124 S.W.2d 946.

17. Tex.—Fort Worth Lloyds v. Johnson, Civ.App., 129 S.W.2d 1157.

Officer of corporation

Citation commanding officer to summon secretary and treasurer of defendant corporation to answer and appear, instead of commanding him to summon the corporation itself, will not sustain default judgment against corporation.—Temple Lumber Co. v. McDaniel, Tex.Civ.App., 24 S.W.2d 518.

18. Minn.—Peterson v. W. Davis & Sons, 11 N.W.2d 800, 216 Minn. 60.
Ohio.—Norris v. Frowine, 19 Ohio App. 127—Gillett v. Miller, 12 Ohio Cir.Ct. 209, 5 Ohio Cir.Dec. 588.
33 C.J. p 1091 note 68 [c], [d], [h].

Irregularities held not fatal

Default judgment, entered by court having jurisdiction, was not void because caption of complaint served with summons named wrong court.—Sievert v. Selvig, 222 N.W. 281, 175 Minn. 597.

19. Ky.—Fugate v. Fugate, 81 S.W. 2d 889, 259 Ky. 18.
Minn.—Pugsley v. Magerfleisch, 201 N.W. 323, 161 Minn. 246.
Mo.—Hankins v. Smarr, 137 S.W.2d 429, 345 Mo. 973.
N.Y.—Leavitt v. Matzkin, 114 N.Y.S. 687.
Or.—Mutzig v. Hope, 158 P.2d 110.
Tex.—Flynt v. City of Kingsville, 82 S.W.2d 934, 125 Tex. 510—Whitaker Chevrolet Co. v. Blacksher, Civ.App., 132 S.W.2d 425—First Nat. Bank v. C. H. Meyers & Co., Civ.App., 283 S.W. 265—Household Furniture Co. v. Alvarado, Civ. App., 246 S.W. 1111.

Service held sufficient

(1) In general.
Fla.—Arcadia Citrus Growers Ass'n v. Hollingsworth, 135 So. 431, 135 Fla. 322.
Okl.—Hall v. Jensen, 249 P. 310, 119 Okl. 175.
Tex.—Stephens v. Austin, Civ.App., 298 S.W. 932—Grayce Oil Co. v. Varner, Civ.App., 260 S.W. 883.

(2) The court had jurisdiction to enter default on cross complaint, served by mailing of copy by defendants' attorneys to plaintiff's attorney having office in same city at place where there was mail delivery service.—Marsden v. Collins, 72 P.2d 247, 23 Cal.App.2d 148.

20. N.D.—Gallagher v. National Nonpartisan League, 205 N.W. 674, 53 N.D. 238.
Or.—Peterson v. Hutton, 284 P. 279, 132 Or. 252.
Tex.—Camden Fire Ins. Co. v. Hill, Com.App., 276 S.W. 887—Whitaker Chevrolet Co. v. Blacksher, Civ. App., 132 S.W.2d 425—Cauble v. Cauble, Civ.App., 283 S.W. 914—Carson v. Taylor, Civ.App., 261 S. W. 824.
Utah.—State Tax Commission v. Larsen, 110 P.2d 558, 100 Utah 103.

21. U.S.—Todd v. S. A. Healy Co., D.C.Ky., 49 F.Supp. 584.
Ala.—Kent v. Kent, 139 So. 240, 224 Ala. 183.
Cal.—Wilson v. Superior Court in and for Los Angeles County, 54 P.2d 539, 11 Cal.App.2d 643.
Ky.—Fugate v. Creech, 111 S.W.2d 402, 271 Ky. 3.
Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.
Mass.—Commonwealth v. Aronson, 44 N.E.2d 679, 312 Mass. 347.
Neb.—Wistrom v. Forsling, 9 N.W. 2d 294, 143 Neb. 294, rehearing denied and opinion modified on other grounds 14 N.W.2d 217, 144 Neb. 638.
N.Y.—Leavitt v. Matzkin, 114 N.Y.S. 687.
Pa.—Rogers v. Metropolitan Life Ins. Co., 99 Pa.Super. 505.

Service too late

In special proceeding for sale of land to pay debts of decedent's estate, service of summons on defendants over thirty days after its issuance was insufficient to bind them by default judgment, in absence of waiver of service within statutory period of ten days after issuance of summons or voluntary appearance.—Green v. Chrismon, 28 S.E.2d 215, 223 N.C. 724.

Writ of capias

Court had no jurisdiction to enter judgment by default against defendant, against whom writ of capias was issued, where defendant escaped from custody of sheriff immediately on his arrest, since service under writ of capias is incomplete without production of defendant in court to answer or his release on bail.—Oliver v. Kallock, 178 A. 843, 133 Me. 403, followed in 178 A. 846, 133 Me. 403.

22. Tex.—Turner v. Ephraim, Civ. App., 28 S.W.2d 608.

Sheriff of wrong county

Where a process is directed to a sheriff of one county and service is made by a sheriff of another county, a default judgment against the one so served is void.—Strauss v. Owens, 65 S.E. 161, 6 Ga.App. 415.

23. Cal.—Steuri v. Junkin, 82 P.2d 34, 27 Cal.App.2d 758.
N.Y.—Goldberg v. Fowler, 60 N.Y.S. 475, 29 Misc. 328.
Tex.—Whitaker Chevrolet Co. v. Blacksher, Civ.App., 132 S.W.2d 425.

24. Tex.—Camden Fire Ins. Co. v. Hill, Com.App., 276 S.W. 887—Sharp & Dohme v. Wayboutne, Civ. App., 74 S.W.2d 413.

Former officer of corporation

Ill.—McCoy v. HY-G Corporation, 47 N.E.2d 884, 318 Ill.App. 229.

Wrong state official

Service of process on secretary of state when statute requires service on commissioner of insurance does not support a default judgment.—Order of Calanthe v. Armstrong, 62 So. 269, 7 Ala.App. 378.

25. Ariz.—Noonan v. Montgomery.

Personal service. In the absence of any statutory provision authorizing substituted or constructive service, process must be personally served in order to support a judgment by default.[26]

Constructive or substituted service. A valid personal judgment by default cannot be predicated on substituted or constructive or extraterritorial service on a nonresident.[27] In the absence of personal service within the state or a voluntary appearance by defendant, a default judgment against a nonresident is void unless property or credits belonging to him within the state have been brought within the jurisdiction of the court by provisional process,[28] such as attachment and levy[29] or garnishment proceedings,[30] or unless the action involves title to real property within the court's territorial jurisdiction.[31] Where such property of a nonresident defendant is or has been so brought within the jurisdiction of the court, a default judgment may be taken against him on the basis of constructive or extraterritorial service;[32] but such a judgment is void if the method of attempted notice to defendant is insufficient to constitute due process[33] or does not comply substantially with the statutory requirements as to notice.[34] Even where there have been proper constructive service and attachment and levy, a default judgment cannot be enforced against a nonresident personally; the judgment is effective only against the property attached.[35] Mere irregularities in the manner of service by publication, not going to the substance of the statutory requirements concerning notice, will not render the judgment void.[36]

Return and proof. In the absence of a general appearance by defendant, the fact of due and proper service of the process must appear on the record,[37] as by the officer's return or proof of service.[38] It has been held that a valid judgment by default cannot be taken when there is no return by the officer serving the writ,[39] or when the return or other proof is radically faulty or defective,[40] as where it does not conform to essential statutory

209 P. 302, 24 Ariz. 311, 25 A.L.R. 1251.
N.Y.—Valz v. Sheepshead Bay Bungalow Corporation, 163 N.E. 124, 249 N.Y. 122, certiorari denied 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 560.
Ohio.—Norris v. Frowine, 19 Ohio App. 127.

26. Cal.—Hunstock v. Estate Development Corporation, 138 P.2d 1, 22 Cal.2d 205, 148 A.L.R. 968.

27. Miss.—Delta Insurance & Realty Agency v. Fourth Nat. Bank, 102 So. 846, 137 Miss. 855.
Nev.—Perry v. Edmonds, 84 P.2d 711, 59 Nev. 60.
Or.—Laughlin v. Hughes, 89 P.2d 568, 161 Or. 295.
S.D.—Stevens v. Jas. A. Smith Lumber Co., 222 N.W. 665, 54 S.D. 170.
Tex.—American Soda Fountain Co. v. Hairston Drug Co., Civ.App., 52 S.W.2d 764.
Wyo.—Kimbel v. Osborn, 156 P.2d 279.

28. Iowa.—Bates v. Chicago & N. W. R. Co., 19 Iowa 260.

29. N.Y.—Dimmerling v. Andrews, 139 N.E. 774, 236 N.Y. 43—Merkle v. Sable, 197 N.Y.S. 576.

30. Kan.—Herd v. Chambers, 122 P. 2d 784, 155 Kan. 55.

Status of proceeding

(1) Under some statutes where garnishment proceedings are invoked as a basis for substituted service, a default judgment may be rendered against the principal defendant when the default occurs, even though the substituted service and default must both fail if it subsequently develops that the garnishee actually holds no property of defendant.—Herd v. Chambers, supra.

(2) Under other statutes it has been held that, where defendant is served only by publication, and no property seized, it is improper to render judgment by default against him before finding that garnishee possesses property belonging to defendant, since the court will have no jurisdiction over defendant unless garnishee possesses such property.—Riley Pennsylvania Oil Co. v. Symmonds, 190 S.W. 1038, 195 Mo.App. 111.

31. Mo.—Garrison v. Schmicke, 193 S.W.2d 614.

32. Cal.—City of Salinas v. Luke Kow Lee, 18 P.2d 635, 217 Cal. 252.
Mo.—Garrison v. Schmicke, 193 S.W. 2d 614.
N.Y.—Le Baron v. Bartoli, 10 N.E.2d 519, 274 N.Y. 499—Valz v. Sheepshead Bay Bungalow Corporation, 163 N.E. 124, 249 N.Y. 122, certiorari denied 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 560.
Okl.—E. R. Thomas Motor Car Co. v. Robb, 208 P. 783, 86 Okl. 266.
Or.—Pierce v. Pierce, 56 P.2d 336, 153 Or. 248.

33. N.Y.—Standish v. Standish, 40 N.Y.S.2d 538, 179 Misc. 564.

34. Ala.—Guy v. Pridgen & Holman, 118 So. 229, 22 Ala.App. 595.
Fla.—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212.
Or.—Okanogan State Bank of Riverside, Wash., v. Thompson, 211 P. 933, 106 Or. 447.
33 C.J. p 1093 note 80.

Affidavit for service by publication must comply with statutory requirements.—Frybarger v. McMillen, 25 P. 713, 15 Colo. 349—33 C.J. p 1093 note 80 [b].

35. Del.—Yeatman v. Ward, Super., 36 A.2d 355.

36. Ariz.—Noonan v. Montgomery, 209 P. 302, 24 Ariz. 311, 25 A.L.R. 1251.

37. U.S.—Williams v. James, D.C. La., 34 F.Supp. 61.
Mich.—Dades v. Central Mut. Auto Ins. Co., 248 N.W. 616, 263 Mich. 260.
Miss.—Continental Casualty Co. v. Gilmer, 111 So. 741, 146 Miss. 22—Globe Rutgers Fire Ins. Co. v. Sayle, 65 So. 125, 107 Miss. 169.
Tex.—Head v. Texas State Bank, Civ.App., 16 S.W.2d 298—Fitzpatrick v. Dorris Bros., Civ.App., 284 S.W. 303—Broun v. Hayslip, Civ. App., 283 S.W. 177.
34 C.J. p 152 note 8.
Proof of jurisdictional facts see infra § 211.

38. Tex.—Fitzpatrick v. Dorris Bros., Civ.App., 284 S.W. 303.
34 C.J. p 152 note 9.

Filing with clerk

Since there was no statute absolutely requiring the sheriff's return to be filed with the clerk, failure of the sheriff so to file it did not prevent default judgment, in view of the presumption that the return was exhibited to the court before judgment.—Rhyne v. Missouri State Life Ins. Co., Tex.Com.App., 291 S.W. 845.

39. Mich.—Stanczuk v. Pfent, 204 N. W. 706, 231 Mich. 689.
33 C.J. p 1094 note 83.

40. La.—Robinson v. Enloe, 121 So. 320, 10 La.App. 435.
Mich.—Whirl v. Reiner, 206 N.W. 977, 229 Mich. 114.

requirements[41] or fails to show a legal service of the writ;[42] but there is authority for the view that a faulty or defective return or proof of service,[43] or even complete absence of return or proof of service,[44] does not of itself render a default judgment void if due service actually was had, since it is the fact of service, and not the return or proof thereof that gives the court jurisdiction.[45] It is generally agreed however, that minor irregularities or ambiguities in the return will not vitiate the judgment.[46]

(4) Appearance

A voluntary general appearance is a waiver of want or defect of process or service and will support a judgment by default.

If a defendant enters a voluntary general appearance in any action, it is a waiver of a want of process, or of any defects in the process or its service or return, and a default judgment in personam thereafter entered against him is valid and binding;[47] but it is otherwise where the appearance is special and is entered for the purpose of taking advantage of a failure of notice or defective service.[48]

Pa.—Rogers v. Metropolitan Life Ins. Co., 99 Pa.Super. 505.
Tex.—Home Ben. Ass'n v. Sims, Civ.App., 48 S.W.2d 708.

41. Mich.—Standard Oil Co. v. Brukwinski, 217 N.W. 922, 242 Mich. 49—Whirl v. Reiner, 200 N. W. 977, 229 Mich. 114.
Tex.—Fitzpatrick v. Dorris Bros., Civ.App., 284 S.W. 303.

42. Colo.—Gibbs v. Slevin, 212 P. 826, 72 Colo. 590.
La.—Robinson v. Enloe, 121 So. 320, 10 La.App. 435.
Tex.—Remington-Rand Business Service v. Angelo Printing Co., Civ.App., 31 S.W.2d 1098.
33 C.J. p 1094 note 84.

Recitals in judgment that defendants were legally served do not validate a default judgment based on faulty or defective return or proof of service.—Household Furniture Co. v. Alvarado, Tex.Civ.App., 246 S.W. 1111—Miller v. First State Bank & Trust Co. of Santa Anna, Tex.Civ. App., 184 S.W. 614.

Agency of person served

(1) To sustain default judgment against corporation on direct attack by appeal, officer's return must show that person served was agent on whom service was authorized.—Cain, Wolcott & Rankin v. Firemen's Fund Ins. Co., 141 So. 686, 225 Ala. 44.

(2) If the officer's return states that the person to whom process was delivered is defendant corporation's agent, such return becomes prima facie evidence sufficient to sustain a default judgment.—Green v. Nu-Grape Co., 100 So. 84, 19 Ala.App. 663.

(3) It has also been held that a default judgment against a foreign corporation will be set aside, where petition fails to show whether agent served was local or traveling agent or traveling salesman.—Holcomb & Hoke Mfg. Co. v. Amason, Tex.Civ. App., 2 S.W.2d 360.

Return held insufficient

(1) In general.—Midwest Piping & Supply Co. v. Page, Tex.Civ.App., 128 S.W.2d 459, error refused—Home Ben. Ass'n v. Sims, Tex.Civ.App., 48 S.W.2d 708.

(2) Return not stating what officer delivered to defendants held insufficient to support judgment by default.—Price v. Black Bros., Tex. Civ.App., 19 S.W.2d 847.

(3) Sheriff's return of service of citation, stating that it was executed on May 16, by delivering to D and C on May 27, "the within named defendant," true copy of writ held insufficient to support default judgment.—Fitzpatrick v. Dorris Bros., 284 S.W. 303.

Return or proof held sufficient
Ohio.—Hendershot v. Ferkel, 56 N.E. 2d 205, 144 Ohio St. 112.

43. Ariz.—Noonan v. Montgomery, 209 P. 302, 24 Ariz. 311, 25 A.L.R. 1251.
Cal.—Alpha Stores v. You Bet Mining Co., 63 P.2d 1137, 18 Cal.App. 2d 249, followed in 63 P.2d 1138, 18 Cal.App.2d 767—Wheat v. McNeill, 295 P. 102, 111 Cal.App. 72.
Idaho.—Mason v. Pelkes, 59 P.2d 1087, 57 Idaho 10, certiorari denied Pelkes v. Mason, 57 S.Ct. 319, 299 U.S. 615, 81 L.Ed. 453.
Iowa.—Mintle v. Sylvester, 197 N.W. 305, 197 Iowa 424.
Minn.—Leland v. Heiberg, 194 N.W. 93, 156 Minn. 30.
Neb.—State Furniture Co. v. Abrams, 19 N.W.2d 627.

44. Ariz.—Noonan v. Montgomery, 209 P. 302, 24 Ariz. 311, 25 A.L.R. 1251.
Minn.—Leland v. Heiberg, 194 N.W. 93, 156 Minn. 30.

45. Ariz.—Noonan v. Montgomery, 209 P. 302, 24 Ariz. 311, 25 A.L.R. 1251.
Cal.—Alpha Stores v. You Bet Mining Co., 63 P.2d 1137, 18 Cal.App.2d 249, followed in 63 P.2d 1138, 18 Cal.App.2d 767—Wheat v. McNeill, 295 P. 102, 111 Cal.App. 72.
Idaho.—Mason v. Pelkes, 59 P.2d 1087, 57 Idaho 10, certiorari denied Pelkes v. Mason, 57 S.Ct. 319, 299 U.S. 615, 81 L.Ed. 453.
Iowa.—Mintle v. Sylvester, 197 N.W. 305, 197 Iowa 424.
Minn.—Leland v. Heiberg, 194 N.W. 93, 156 Minn. 30.
Neb.—State Furniture Co. v. Abrams, 19 N.W.2d 627.

46. Cal.—Wheat v. McNeill, 295 P. 102, 111 Cal.App. 72.
Wash.—Atwood v. McGrath, 242 P. 648, 137 Wash. 400.
33 C.J. p 1095 note 85.

47. Tex.—Harvey v. Wiley, Civ. App., 88 S.W.2d 569.

As substitute for process

The effect of an entry of appearance as a substitute for service of process is identical therewith; accordingly, where no judgment by default could be taken against defendant for failure to plead at the term of service, none can be taken on appearance entered at that term.—Baldwin v. McClelland, 38 N.E. 143, 152 Ill. 42.

What constitutes sufficient appearance

(1) In general.—Flowers v. Jackson, 51 S.W. 462, 66 Ark. 458—33 C. J. p 1095 note 89 [b] (1), [c].

(2) Execution of bond, not approved by clerk, to discharge attachment, was not appearance authorizing default judgment against surety. —Brenton v. Lewiston, 216 N.W. 6, 204 Iowa 892.

(3) Notation on declaration whereby defendant's attorney waived process and entered appearance during term, without attestation by clerk of court, held not to authorize default judgment.—Industrial Inv. Co. v. Standard Life Ins. Co., 149 So. 883, 170 Miss. 138.

Unauthorized appearance

Where attorney's appearance on behalf of a party was wholly unauthorized and was entered by mistake or inadvertence, a default judgment, without proper service of process, is void.—Street v. Dexter, 77 P.2d 707, 182 Okl. 360.

48. N.Y.—6 East 97th St. Co. v. Grant, 278 N.Y.S. 884, 155 Misc. 581.

§ 193. Pleadings to Sustain Judgment

a. In general
b. Filing
c. Service
d. Verification and signature

a. In General

In order to sustain a judgment by default, the plaintiff's pleading must state a cause of action; otherwise the judgment will be void or at least voidable. According to some authorities, but not others, the pleading must be sufficient to withstand a general demurrer.

Since, as discussed infra § 201, a default admits only what is well pleaded, it follows that, in order to sustain a judgment by default, plaintiff's declaration, complaint, petition, or statement of claim, must allege with clearness and certainty sufficient facts to constitute a good cause of action or show a right to recover.[49] It should sufficiently name or describe the plaintiff,[50] and the defendant,[51] and their places of residence, where this is required by

49. U.S.—Fisher v. Jordan, D.C.Tex., 32 F.Supp. 608, reversed on other grounds, C.C.A., 116 F.2d 183, certiorari denied Jordan v. Fisher, 61 S.Ct. 734, 312 U.S. 697, 85 L.Ed. 1132.
Ala.—National Surety Co. v. First Nat. Bank, 142 So. 414, 225 Ala. 108.
Ariz.—Sturges v. Sturges, 50 P.2d 886, 46 Ariz. 331.
Ark.—Home Indemnity Co. of New York v. Bobo, 55 S.W.2d 81, 186 Ark. 636—Barnes v. Balz, 292 S. W. 391, 173 Ark. 417—Wilson v. Overturf, 248 S.W. 898, 157 Ark. 385.
Cal.—Burns v. Downs, 108 P.2d 953, 42 Cal.App.2d 322—Hammons v. Crozier, 297 P. 567, 112 Cal.App. 715—Williams v. Foss, 231 P. 766, 69 Cal.App. 705.
Del.—American University v. Todd, 1 A.2d 595, 9 W.W.Harr. 449.
Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205.
Ill.—Roe v. Cook County, 193 N.E. 472, 358 Ill. 568—Baxter v. Atchison, T. & S. F. Ry. Co., 35 N.E.2d 563, 310 Ill.App. 616—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Ky.—St. Matthews Bank & Trust Co. v. Fairleigh, 82 S.W.2d 326, 259 Ky. 209—Corbin Bldg. Supply Co. v. Martin, 39 S.W.2d 480, 239 Ky. 272—Prater v. Dingus, 18 S.W.2d 883, 230 Ky. 82—Blackburn v. Bevins, 3 S.W.2d 762, 223 Ky. 389—Allgood v. Atkinson, 248 S.W. 525, 198 Ky. 229—Bond v. Wheeler, 247 S. W. 708, 197 Ky. 437.
La.—**Corpus Juris quoted in** Perez v. Meraux, 9 So.2d 662, 676, 201 La. 498—**Corpus Juris quoted in** Simon v. Duet, 148 So. 250, 251, 177 La. 337.
Mich.—Smak v. Gwozdik, 291 N.W. 270, 293 Mich. 185.
Minn.—Roe v. Widme, 254 N.W. 274, 191 Minn. 251.
Miss.—Stevens v. Barbour, 8 So.2d 242, 193 Miss. 109—W. T. Rawleigh Co. v. Scott, 120 So. 834, 152 Miss. 704.
Mo.—McCrosky v. Burnham, App., 282 S.W. 158.
Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 89, 100 Mont. 181.
Neb.—Danbom v. Danbom, 273 N.W. 502, 132 Neb. 858.
N.Y.—**Corpus Juris cited in** Leroy Arnold, Inc., v. Mackey, 222 N.Y.S. 225, 129 Misc. 643.
N.C.—Baker v. Corey, 141 S.E. 892, 195 N.C. 299—Beard v. Sovereign Lodge, W. O. W., 113 S.E. 661, 184 N.C. 154.
Okl.—**Corpus Juris cited in** Nordman v. School Dist. No. 43 of Choctaw County, 121 P.2d 290, 291, 190 Okl. 135—Maryland Casualty Co. v. Apple, 267 P. 239, 130 Okl. 270—Western Union Telegraph Co. v. Beach, 211 P. 1034, 88 Okl. 73.
Pa.—Richey v. Gibboney, 34 A.2d 913, 154 Pa.Super. 1—Rosser v. Cusani, 97 Pa.Super. 255—Duquesne Brewing Co. v. Mazza, 30 Pa.Dist. & Co., 389, 18 Wash.Co. 5—Dintenfass v. Wirkman, 14 Pa.Dist. & Co. 798.
Tex.—Ætna Ins. Co. of Hartford, Conn., v. Long, 72 S.W.2d 588, 123 Tex. 500—Rhyne v. Missouri State Life Ins. Co., Com.App., 291 S.W. 845—Waples Platter Co. v. Miller, Civ.App., 139 S.W.2d 833—Tolivar v. Lombardo, Civ.App., 88 S.W.2d 733—State v. McKinney, Civ.App., 76 S.W.2d 556—**Corpus Juris cited in** Williamson v. City of Eastland, Civ.App., 65 S.W.2d 774, 775—Ritch v. Jarvis, Civ.App., 64 S.W. 2d 831, error dismissed—Williams v. Jameson, Civ.App., 44 S.W.2d 498, error dismissed Jameson v. Williams, Com.App., 67 S.W.2d 228—Anderson v. Dreyfuss & Son, Civ. App., 32 S.W.2d 527—Morgan v. Davis, Civ.App., 292 S.W. 610—Nichols v. Murray, Civ.App., 284 S. W. 301—Wright v. Shipman, Civ. App., 279 S.W. 296—Watson Co., Builders, v. Bleeker, Civ.App., 269 S.W. 147—Carney v. Williams, Civ. App., 266 S.W. 1115—Head v. City of Gainesville, Civ.App., 254 S.W. 323.
Wash.—Sandgren v. West, 115 P.2d 724, 9 Wash.2d 494—Roche v. McDonald, 239 P. 1015, 136 Wash. 322, 44 A.L.R. 444, reversed on other grounds 48 S.Ct. 142, 275 U. S. 449, 72 L.Ed. 365, 53 A.L.R. 1141.
34 C.J. p 153 note 13.
Pleadings to sustain judgment in general see supra §§ 39–41.

Facts not alleged, although proved, cannot form the basis of a judgment by default.—State ex rel. Com'rs of Land Office of Okl. v. Prock, 158 P.2d 719, 195 Okl. 387—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247.

Jurisdictional facts must be stated in order to sustain default judgment.
N.Y.—Contractors' Trading Co. v. Henney Contracting Corporation, 248 N.Y.S. 643, 232 App.Div. 829.
Pa.—Frankel v. Donehoo, 158 A. 570, 306 Pa. 52, followed in Marvin v. Donehoo, 158 A. 573, 306 Pa. 58.
Tex.—Shambeck v. Johnson, Civ. App., 281 S.W. 349.

Stating conclusions
A complaint which merely alleges a conclusion is insufficient to sustain a default judgment.
Ark.—Arkansas Bond Co. v. Harton, 87 S.W.2d 52, 191 Ark. 665.
Mass.—Moriarty v. King, 57 N.E.2d 633, 317 Mass. 210.
Mo.—Walrath v. Crary, App., 222 S. W. 895.
Ohio.—De Weese v. Security Sav. Ass'n of Dayton, 186 N.E. 4, 126 Ohio St. 480.

Immaterial discrepancy between wording of declaration filed and that of copy served on one defendant was held not to invalidate judgment.—Karasek v. Peoples' State Trust & Savings Bank of Pontiac, 247 N.W. 765, 262 Mich. 636.

50. Ala.—Cole v. Gay & Bruce, 104 So. 774, 20 Ala.App. 648.

51. Ala.—Crook v. Rainer Hardware Co., 97 So. 635, 210 Ala. 178.
Cal.—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257—Burn v. Downs, 108 P.2d 953, 42 Cal.App. 2d 322—Wilson v. Superior Court in and for Los Angeles County, 54 P.2d 539, 11 Cal.App.2d 643.
Tex.—Artex Refining Co. v. Pollard & Lawrence, Civ.App., 124 S.W.2d 946.
34 C.J. p 154 note 14.

statute,[52] and designate, with substantial accuracy, the court in which the action is to be tried.[53] It should also demand relief against defendant.[54] If the judgment is based on constructive service of process, plaintiff's declaration must allege the facts which justify such service, if the statute so requires.[55]

Where a cross petition alleging a sufficient cause of action has been properly filed, a judgment by default may be taken by a defendant against a co-defendant[56] or against a third person,[57] but there must be a sufficient pleading to support a default judgment on such a cross action.[58]

Determination of sufficiency. According to some decisions, the declaration or complaint must be sufficient to withstand a general demurrer,[59] but other authorities have held that, although the complaint is so defective that it would be open to general demurrer, the judgment is not void, or even necessarily voidable, if the complaint contains allegations of facts sufficient to support the judgment,[60] or sufficient to apprise defendant of the nature of plaintiff's demand,[61] and that if it is good in substance it is sufficient to uphold the judgment, although there may be formal defects.[62] Conversely, if a pleading is sufficient to withstand a general demurrer, it is sufficient to support a judgment by default,[63] even though such pleading might be subject to special demurrer.[64] Indeed, it has been held that, after judgment by default, the complaint will be most liberally construed as stating a cause of action which warrants the granting of the relief prayed for.[65] In determining the sufficiency of the allegations of a cross action to support a default judgment against a third party, evidence on the trial of the action against defendant cannot aid the pleadings in the cross action.[66] Reference is made in the notes to cases in which the petition, declaration, or complaint has been held sufficient[67] or in-

52. La.—Perez v. Meraux, 9 So.2d 662, 201 La. 498.
Tex.—Shambeck v. Johnson, Civ.App., 281 S.W. 349—Tyler v. Blanton, 78 S.W. 564, 34 Tex.Civ.App. 393.

53. Tex.—Miller v. Trice, Civ.App., 219 S.W. 229.
34 C.J. p 154 note 16.

54. Idaho.—Backman v. Douglas, 270 P. 618, 46 Idaho 671.
Miss.—W. T. Rawleigh Co. v. Scott, 120 So. 884, 152 Miss. 704.
34 C.J. p 154 note 17.

55. Miss.—Mays Food Products v. Gloster Lumber Co., 102 So. 735, 137 Miss. 691, followed in Mays Food Products v. Anderson, 108 So. 165.

56. Ohio.—Southward v. Jamison, 64 N.E. 135, 66 Ohio 290.
34 C.J. p 155 note 31.

57. Tex.—Reserve Loan Life Ins. Co. v. Benson, Civ.App., 167 S.W. 266.

58. Tex.—Celeste State Bank v. Security Nat. Bank, Civ.App., 254 S.W. 653.

59. Ark.—Barnes v. Balz, 292 S.W. 391, 173 Ark. 417.
Tex.—Ætna Ins. Co. of Hartford, Conn., v. Long, 72 S.W.2d 588, 123 Tex. 500—Cross v. Wilson, Civ. App., 33 S.W.2d 575—Missouri State Life Ins. Co. v. Rhyne, Civ. App., 276 S.W. 757, reversed in part on other grounds and affirmed in part Rhyne v. Missouri State Life Ins. Co., Com.App., 291 S.W. 845.
34 C.J. p 154 note 19.

60. Ariz.—Yuma County v. Hanneman, 28 P.2d 622, 42 Ariz. 561.
Ill.—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Pa.—Frankel v. Donehoo, 158 A. 570, 306 Pa. 52, followed in Marvin v. Donehoo, 158 A. 573, 306 Pa. 58.
34 C.J. p 154 note 20.

61. Ala.—Contorno v. Ensley Lumber Co., 100 So. 127, 211 Ala. 211.
Cal.—Moran v. Superior Court in and for Sacramento County, 96 P.2d 193, 35 Cal.App.2d 629.
Idaho.—Nielson v. Garrett, 43 P.2d 380, 55 Idaho 240.
Ill.—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Kan.—Skaer v. Capsey, 273 P. 464, 127 Kan. 883.
34 C.J. p 154 note 21.

62. Okl.—McNeal v. Moberly, 1 P. 2d 707, 150 Okl. 253.
Pa.—Frankel v. Donehoo, 158 A. 570, 306 Pa. 52, followed in Marvin v. Donehoo, 158 A. 573, 306 Pa. 58.
34 C.J. p 154 note 22.

63. Cal.—Kennard v. Binney, 217 P. 808, 62 Cal.App. 732.
Tex.—Odom v. Pinkston, Civ.App., 193 S.W.2d 888, error refused, no reversible error.

64. Tex.—Odom v. Pinkston, supra.

65. Ala.—Contorno v. Ensley Lumber Co., 100 So. 127, 211 Ala. 211.
Ariz.—Yuma County v. Hanneman, 28 P.2d 622, 42 Ariz. 561.
Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804.
Tex.—Odom v. Pinkston, 193 S.W.2d 888, error refused, no reversible error.
Wash.—Aid v. Bowerman, 232 P. 297, 132 Wash. 319.

66. Tex.—Reserve Loan Life Ins. Co. v. Benson, Civ.App., 167 S.W. 266.

67. Ala.—National Surety Co. v. First Nat. Bank, 142 So. 414, 225 Ala. 108—Ewart v. Cunningham, 122 So. 359, 219 Ala. 399.
Ark.—Home Indemnity Co. of New York v. Bobo, 55 S.W.2d 81, 186 Ark. 636.
Cal.—Kennard v. Binney, 217 P. 808, 62 Cal.App. 732.
Ga.—Royal v. Byrd, 180 S.E. 520, 51 Ga.App. 397—Brooke v. Fouts, 140 S.E. 902, 37 Ga.App. 563.
La.—Raxsdale v. Highway Commission, App., 1 So.2d 342—Guillot v. Wilhelm Moss Co., 5 La.App. 749.
Neb.—Scheumann v. Prudential Ins. Co. of America, 19 N.W.2d 48.
Tex.—Rhyne v. Missouri State Life Ins. Co., Com.App., 291 S.W. 845—Odom v. Pinkston, 193 S.W.2d 888, error refused, no reversible error—Southern S. S. Co. v. Schumacher Co., Civ.App., 154 S.W.2d 283, error refused—Artex Refining Co. v. Pollard & Lawrence, Civ.App., 124 S.W.2d 946—Cyrus W. Scott Mfg. Co. v. Haynie, Civ.App., 64 S.W.2d 1090, error dismissed—Griffin v. Burrus, Civ.App., 24 S.W. 2d 805, affirmed, Com.App., 24 S. W.2d 810—King Lumber Co. v. Blue Ridge Mill Co., Civ.App., 280 S.W. 621.

Particular actions

(1) Action to foreclose lien.—Morgan v. Stag Lumber Co., 214 P. 15, 124 Wash. 223.

(2) Slander and libel actions.
Okl.—Johnson v. Inglis, 123 P.2d 272, 190 Okl. 316, followed in 123 P. 2d 275, 190 Okl. 319.
S.C.—Rutledge v. Junior Order of United American Mechanics, 193 S.E. 434, 185 S.C. 142.

sufficient[68] to support or sustain a judgment by default.

Effect of insufficient pleading. The failure of the declaration, complaint, or petition to state a good cause of action has been held to render void a judgment by default based thereon,[69] at least where the petition wholly fails to state a cause of action[70] or where the facts alleged affirmatively show that plaintiff has no cause of action;[71] but it has generally been held that a judgment in such a case is merely erroneous and reversible on appeal[72] or subject to vacation by the trial court on motion.[73] It has also been held that, where the court has jurisdiction of the person of defendant and of the subject matter, a judgment on default is not void if the petition contains allegations sufficient to challenge the attention of the court and invoke its judicial action to determine the sufficiency thereof.[74] Where the declaration contains several counts, one of which is good, a default judgment will be sustained, although the other counts are not sufficient,[75] unless the damages

Particular allegations

(1) Petition alleging indorsement and delivery of note held sufficient to sustain default judgment against indorser.—Skaer v. Capsey, 273 P. 464, 127 Kan. 383.

(2) A petition alleging that defendant made and executed a note to payee therein sufficiently averred delivery by maker to payee so as to support a judgment by default for holder of note.—Morgan v. Baum, Tex.Civ.App., 116 S.W.2d 1180, error dismissed.

(3) Petition seeking damages because of automobile collision, alleging that car was negligently and carelessly driven, was sufficient on which to base default judgment.—Metzger v. Gambill, Tex.Civ.App., 37 S.W.2d 1077, error refused.

68. Ala.—Coffee v. Keeton, 26 So.2d 80.
Ariz.—Sturges v. Sturges, 50 P.2d 886, 46 Ariz. 331.
Ga.—Summerour v. Medlin, 172 S.E. 836, 48 Ga.App. 403.
Miss.—Stevens v. Barbour, 8 So.2d 242, 193 Miss. 109.
Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804.
Okl.—Maryland Casualty Co. v. Apple, 267 P. 239, 130 Okl. 270.
Pa.—Richey v. Gibboney, 34 A.2d 913, 154 Pa.Super. 1—Kennedy v. Upper Darby Building & Loan Ass'n, Com.Pl., 29 Del.Co. 247.
Tex.—Rhyne v. Missouri State Life Ins. Co., Com.App., 291 S.W. 845—Beard v. Smith, Civ.App., 136 S.W. 2d 886, error dismissed, judgment correct—Hicks v. Rapides Grocery Co., Civ.App., 101 S.W.2d 1042—Tolivar v. Lombardo, Civ.App. 88 S.W.2d 733—Watson Co., Builders, v. Bleeker, Civ.App., 269 S.W. 147.
Wash.—Sandgren v. West, 115 P.2d 724, 9 Wash.2d 494.
34 C.J. p 153 note 13 [a].

Particular actions

(1) Actions on notes.
Ky.—Stegemiller v. Crowe, 178 S.W.2d 937, 297 Ky. 52.
Tex.—Anderson v. Dreyfuss & Son, Civ.App., 32 S.W.2d 527—Morgan v. Davis, Civ.App., 292 S.W. 610.

(2) Action on fire insurance policy.—Ætna Ins. Co. of Hartford, Conn., v. Long, 72 S.W.2d 588, 123 Tex. 500.

(3) Action to enforce lien.—Thompson v. Hickman, 262 S.W. 20, 164 Ark. 469.

Particular allegations

(1) Complaints which fail to allege breaches of express or implied contracts for sums certain or computable do not authorize judgments by default final under the statute.—Byerly v. General Motors Acceptance Corporation, 145 S.E. 236, 196 N.C. 256—Baker v. Corey, 141 S.E. 892, 195 N.C. 299.

(2) Petition on note, not alleging notice of dishonor to indorser, or that such notice was waived, dispensed with, excused, or not required, will not support default judgment against indorser.—Levy Plumbing Co. v. Heating & Plumbing Finance Corporation, Tex.Civ.App., 66 S.W.2d 456.

(3) Mere allegation that plaintiff is temporary administrator of estate held insufficient to show authority to bring suit, precluding default judgment against defendant on petition containing such allegation.—Fenimore v. Youngs, 26 S.W.2d 195, 119 Tex. 159.

69. Ark.—Arkansas Bond Co. v. Harton, 87 S.W.2d 52, 191 Ark. 665.
Tex.—Wright v. Shipman, Civ.App., 279 S.W. 296.
34 C.J. p 154 note 23.

Excessive relief

Where court enters a judgment or awards relief clearly beyond the prayer of the complaint or the scope of its allegations, the excessive relief is, at least in default cases, void.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.

70. Okl.—Maryland Casualty Co. v. Apple, 267 P. 239, 130 Okl. 270.

71. Mont.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 89, 100 Mont. 131.
Tex.—Ritch v. Jarvis, Civ.App., 64 S.W.2d 831, error dismissed.
Wash.—Roche v. McDonald, 239 P. 1015, 136 Wash. 322, 44 A.L.R. 444, reversed on other grounds 48 S.Ct. 142, 275 U.S. 449, 72 L.Ed. 365, 56 A.L.R. 1141.

72. Ark.—Home Indemnity Co. of New York v. Bobo, 55 S.W.2d 81, 186 Ark. 636—Wilson v. Overturf, 248 S.W. 393, 157 Ark. 385.
Cal.—Williams v. Foss, 231 P. 766, 69 Cal.App. 705.
Ill.—Roe v. Cook County, 193 N.E. 472, 358 Ill. 568—Baxter v. Atchison, T. & S. F. Ry. Co., 35 N.E.2d 563, 310 Ill.App. 616.
Okl.—Western Union Telegraph Co. v. Beach, 211 P. 1034, 88 Okl. 73.
Tex.—Missouri State Life Ins. Co. v. Rhyne, Civ.App., 276 S.W. 757, reversed on other grounds in part and affirmed in part Rhyne v. Missouri State Life Ins. Co., Com.App., 291 S.W. 845.
34 C.J. p 154 note 24.

73. Ariz.—Sturges v. Sturges, 50 P. 2d 886, 46 Ariz. 331.
Del.—American University v. Todd, 1 A.2d 595, 9 W.W.Harr. 449.
Minn.—Roe v. Widme, 254 N.W. 274, 191 Minn. 251.
34 C.J. p 154 note 25.

Determination of proper remedy

Default judgment on defective statement of good cause of action is erroneous and must be appealed from in order to have it set aside, but default judgment on statement which is insufficient to make out cause of action is irregular and can be set aside in reasonable time where merit is shown and there is no laches.—Hood ex rel. Citizens Bank & Trust Co. v. Stewart, 184 S.E. 36, 209 N.C. 424.

74. Kan.—Skaer v. Capsey, 273 P. 464, 127 Kan. 383.
N.C.—Finger v. Smith, 133 S.E. 186, 191 N.C. 818.
Okl.—Ogilvie v. First Nat. Bank, 64 P.2d 875, 179 Okl. 111—McNeal v. Moberly, 1 P.2d 707, 150 Okl. 253—Great American Ins. Co. v. Keswater, 268 P. 258, 131 Okl. 196.
Tex.—Waples Platter Co. v. Miller, Civ.App., 139 S.W.2d 833—Ritch v. Jarvis, Civ.App., 64 S.W.2d 831, error dismissed.
34 C.J. p 154 note 26.

75. N.C.—J. T. Bostick & Bro. v. Laurinburg & S. R. Co., 102 S.E. 882, 179 N.C. 485.
34 C.J. p 155 note 27.

are assessed on all the counts.[76] Thus a judgment by default may be sustained on the common counts although a special count is objectionable;[77] or such judgment may be entered on the special count, without a discontinuance on the money counts.[78]

b. Filing

In most jurisdictions, before a valid default judgment can be entered the plaintiff's pleading must have been filed within the time required by law.

In most jurisdictions it is essential to the validity of the judgment that the declaration, petition, or complaint be filed at or within the time required by law[79] before judgment,[80] or within the time limited by order of court,[81] unless defendant waives the requirement as to the filing[82] or is estopped to raise the objection.[83] In the absence of waiver or estoppel, such a judgment is premature and erroneous if it is entered before the declaration or complaint has been on file the number of days required by statute or rule,[84] or before the declaration or complaint has been filed at all;[85] and it is not validated by a subsequent filing.[86] In some jurisdictions, however, the fact that the declaration or complaint is not filed within the required time does not affect a judgment by default,[87] especially where defendant might have moved for a dismissal because of the delay in filing, but failed to avail himself of that remedy.[88]

Filing instrument. Under some statutes it is also essential that a written instrument on which the action is brought, or a copy thereof, be filed with the declaration, in order to sustain a judgment by default,[89] unless such instrument constitutes a part of the records of the court,[90] but under other statutes the filing of such instruments or copies is not required.[91]

Where pleading lost. Where plaintiff's declaration, complaint, or petition has been lost, together with the writ of summons, plaintiff cannot file a new petition and take a judgment by default without first supplying the lost record by a proper proceeding taken on notice to defendant.[92]

c. Service

Where the statutes so provide, a copy of the plaintiff's pleading or a notice of rule to plead must be served on the defendant in order to sustain a default judgment.

Under some statutes it is essential that a copy of the declaration, complaint, or petition be served on defendant at or within a specified time,[93] or that he be served with notice of rule to plead,[94] unless such service is waived.[95] However, where defendant is allowed to come in and plead after a default is taken, he is bound to plead, and, if he does not do so, judgment by default may be taken against him, although he is not served with a copy of the declaration.[96]

76. Mass.—Dryden v. Dryden, 9 Pick. 546—Hemmenway v. Hickes, 4 Pick. 497.

77. Ill.—Rowell v. Chandler, 88 Ill. 288.
Wis.—Ford v. Baird, 2 Pinn., Wis., 242.

78. Miss.—Soria v. Planters' Bank, 4 Miss. 46.
34 C.J. p 155 note 30.

79. Fla.—Daniell v. Campbell, 101 So. 35, 88 Fla. 63.
Ill.—Andrews v. Lawrence, 9 N.E.2d 584, 288 Ill.App. 627.

Before return day
It has been held that merely filing the statement of claim before judgment is not sufficient; the statement must also be filed before the return day of the writ.—Witman v. Schlegel, 21 Pa.Dist. & Co. 113, 26 Berks Co.L.J. 15.

80. Pa.—Smith v. Bergdoll, 159 A. 462, 104 Pa.Super. 49—Moran v. Quirk, Com.Pl., 8 Sch.Reg. 223.
34 C.J. p 155 note 35.

81. Iowa.—Carver v. Seevers, 102 N. W. 518, 126 Iowa 669.

82. Ga.—McDonald v. Tutty, 27 S.E. 157, 99 Ga. 184.
34 C.J. p 155 note 37.

83. Ill.—Schultz v. Meiselbar, 32 N. E. 550, 144 Ill. 26.
34 C.J. p 155 note 38.

84. Cal.—Billings v. Palmer, 83 P. 1077, 2 Cal.App. 432.
34 C.J. p 155 note 39.

85. Ala.—Haygood v. Tait, 27 So. 342, 126 Ala. 264.
34 C.J. p 155 note 40.

Judgment held not void but merely irregular and subject to reversal.—Terry v. Dickinson, 75 Va. 475.

86. Ala.—Rankin v. Crowill, Minor 125.
Colo.—Gallup v. Wilder, 1 Colo. 264.

87. N.C.—Leach v. Western North Carolina R. Co., 65 N.C. 486.
34 C.J. p 155 note 42.

88. N.C.—Roberts v. Allman, 11 S.E. 424, 106 N.C. 391.

89. Pa.—McCoy v. Royal Indemnity Co., 164 A. 77, 107 Pa.Super. 486.
34 C.J. p 156 note 45.

90. Pa.—Salter v. Griffith, 89 Pa. 200.

91. U.S.—Fidelity & Deposit Co. of Maryland v. U. S., App.D.C., 23 S. Ct. 120, 187 U.S. 315, 47 L.Ed. 194.
34 C.J. p 156 note 48.

92. Mo.—Brown v. King, 39 Mo. 380.

93. Mich.—Marshall v. Calkins, 72 N.W. 992, 114 Mich. 697.
34 C.J. p 156 note 52.

Amended pleading
Where an original complaint had dropped out of existence as such when a second default was entered against a defendant, and an amended complaint had not yet been served on defendant, the second default stood as a nullity.—Sheehy v. Roman Catholic Archbishop of San Francisco, 122 P.2d 60, 49 Cal.App.2d 537.

In Pennsylvania
(1) A certified copy of plaintiff's statement of his claim must be served on defendant.—Newbold v. Pennock, 26 A. 606, 154 Pa. 591—34 C.J. p 156 note 52 [d].

(2) However, where the default is based on want of appearance, service of the statement of claim is not required, it being sufficient that the statement is on file before judgment is entered.—Smith v. Bergdoll, 159 A. 462, 104 Pa.Super. 49.

94. Mich.—Campbell v. Donovan, 69 N.W. 514, 111 Mich. 247.
34 C.J. p 156 note 53.

95. Ga.—Brown v. Tomberlin, 73 S. E. 947, 137 Ga. 596.

96. N.Y.—Hitchcock v. Barlow, 5 Wend. 628.

d. Verification and Signature

Under some statutes the complaint must be properly verified or signed in order to sustain a default judgment.

Under some statutes it is necessary, in order to sustain a judgment by default, that the complaint should be properly verified,[97] or be accompanied by plaintiff's affidavit showing the nature of his demand and the amount due,[98] but it has been held that the want of a proper verification is a mere irregularity which will not avoid the judgment.[99] Although under some statutes it is necessary that the petition or complaint be signed by plaintiff or his attorney in order to support a default judgment,[1] it has been held that the fact that it was not so signed, if not objected to on this ground, does not render a default judgment thereon either void or voidable.[2]

§ 194. —— Amendment

Where the complaint is amended in a matter of substance after default, a valid default judgment cannot be entered on the amended pleading unless the defendant is duly notified of the amendment and given opportunity to plead.

Where the declaration or complaint is amended in a matter of substance after defendant has defaulted, the amendment opens the case in default, as discussed infra § 338, and a valid default judgment cannot thereafter be entered on the amended pleading[3] unless the defaulting defendant is properly notified of or served with the amended pleading and given an opportunity to plead, and then fails to do so within the proper time.[4] Where, however, the amendment is not as to a matter of substance, but only as to an immaterial or formal matter, notice or service of the amendment is not necessary before entering judgment by default;[5] neither is such notice or service required as to an amendment which is not a voluntary one, but is made by order of court on the motion of defendant,[6] or as to parties who are brought into the case at the instance of defendant and against whom plaintiff does not seek to recover.[7] It has also been held that, in the absence of statute or rule so requiring, a defendant who has been summoned but has not yet been put in default need not be resummoned or notified of a subsequent amendment to the

97. N.C.—McNair v. Yarboro, 118 S.E. 913, 186 N.C. 111.
34 C.J. p 156 note 58.

Verification requiring verified answer
Where verification of the complaint calls for a verified answer, verification by a corporate plaintiff's attorney who resided in a county other than that of plaintiff, was held not sufficient to authorize judgment by default for failure to interpose a verified answer.—Geo. H. Storm & Co. v. G. Migliore & Sons, 224 N.Y.S. 271, 130 Misc. 654.

Verification by attorney
A statement of claim is insufficient where the affidavit thereto is taken by plaintiff's attorney without any averment that he has knowledge of the facts.—Cather v. Hess, 10 Pa. Dist. & Co. 89, 76 Pittsb.Leg.J. 102.

98. Ill.—Giles v. Grady & Neary Ink Co., 5 N.E.2d 106, 287 Ill.App. 624.
34 C.J. p 157 note 59.

An unverified statement of claim is insufficient.—Giles v. Grady & Neary Ink Co., supra.

99. N.C.—Miller v. Curl, 77 S.E. 952, 162 N.C. 1.
34 C.J. p 157 note 60.

1. Tex.—Morris v. Soble, Civ.App., 61 S.W.2d 139.

2. Tex.—Shipp v. Anderson, Civ. App., 173 S.W. 598.

3. Ariz.—Gila Valley Electric, Gas & Water Co. v. Arizona Trust & Savings Bank, 215 P. 159, 25 Ariz. 177.
Cal.—Sheehy v. Roman Catholic Archbishop of San Francisco, 122 P.2d 60, 49 Cal.App.2d 537—Gutleben v. Crossley, 56 P.2d 954, 13 Cal.App.2d 249.
Ill.—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349.
Kan.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P.2d 903, 144 Kan. 626.
34 C.J. p 157 note 65.

Duty of court
Before entering default judgment after amendment of pleadings, trial court should examine the pleadings and ascertain whether amendments were so substantial as to constitute waiver of default.—Bley v. Dessin, 87 P.2d 889, 31 Cal.App.2d 338.

Against codefendant
Failure to serve on adverse parties amended answers whereunder for first time affirmative relief, based on adverse claims, is sought against codefendant who has previously defaulted, precludes acquisition of binding additional adverse rights thereunder.—Gutleben v. Crossley, 56 P.2d 954, 13 Cal.App.2d 249.

4. Ariz.—Gila Valley Electric, Gas & Water Co. v. Arizona Trust & Savings Bank, 215 P. 159, 25 Ariz. 177.
Ark.—**Corpus Juris quoted in** Shepherd v. Grayson Motor Co., 139 S.W.2d 54, 56, 200 Ark. 199.
Cal.—Thompson v. Cook, 127 P.2d 909, 20 Cal.2d 564—Stack v. Welder, 43 P.2d 270, 3 Cal.2d 71—In re Wiechers' Estate, 250 P. 397, 199 Cal. 523, certiorari denied Wiechers v. Wiechers, 47 S.Ct. 476, 273 U.S. 762, 71 L.Ed. 879—Sheehy v. Roman Catholic Archbishop of San Francisco, 122 P.2d 60, 49 Cal.App. 2d 537—Strosnider v. Superior Court in and for El Dorado County, 62 P.2d 1394, 17 Cal.App.2d 647—Gutleben v. Crossley, 56 P.2d 954, 13 Cal.App.2d 249.
Ill.—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349—Dahlin v. Maytag Co., 238 Ill.App. 85—Gilbert v. American Trust & Savings Bank, 118 Ill.App. 678.
Tex.—Stewart v. Davenport, Civ. App., 120 S.W.2d 496, error dismissed—Phillips v. The Maccabees, Civ.App., 50 S.W.2d 478—Liquid Carbonic Co. v. Head, Civ.App., 48 S.W.2d 464, error dismissed—Jenness v. First Nat. Bank, Civ.App., 256 S.W. 634.
34 C.J. p 157 note 66.

5. Cal.—Thompson v. Cook, 127 P.2d 909, 20 Cal.2d 564—Sheehy v. Roman Catholic Archbishop of San Francisco, 122 P.2d 60, 49 Cal.App. 2d 537—Bley v. Dessin, 87 P.2d 889, 31 Cal.App.2d 338.
Okl.—Stephens v. Ellison, 63 P.2d 80, 178 Okl. 390.
Tex.—McConnell v. Foscue, Civ.App., 24 S.W. 964.
34 C.J. p 157 note 68.

6. Kan.—Cross v. Stevens, 25 P. 880, 45 Kan. 443.

7. Tex.—Perryman v. Smith, Civ. App., 32 S.W. 349.

complaint, if the amendment is such as supports the original cause of action.[8]

Bringing in new party. If, pending the action, a new party is brought in as defendant, he cannot be defaulted unless the complaint is amended, or a new complaint filed against him,[9] and he has been given an opportunity to appear and plead.[10] The summons cannot be changed after defendant's default by bringing in a new plaintiff and giving him a judgment.[11]

Judgment before amendment. Where judgment by default is entered, before an amendment is made, based on the original complaint, it is unnecessary to serve the amended complaint on defendant as to such default;[12] but, where plaintiff is required to amend his pleading, he cannot enter a default judgment before the amendment is made.[13]

Against plaintiff. The fact that a cause of action alleged in the original complaint is omitted in the amended one is no ground for entering default against plaintiff as to the omitted cause of action.[14]

§ 195. Grounds for Judgment

The defendant should not be considered in default except on some definite and sufficient ground.

Since, as stated supra § 187, judgments by default are not favored, defendant should not be considered in default except on some definite and sufficient ground;[15] he must have violated or disregarded some statute,[16] order,[17] rule of court,[18] or stipulation of the parties,[19] and even then he should not be considered in default if a good excuse for such violation is shown.[20] It is not usually ground for a judgment by default that defendant has failed to obey an order which the court has no power to make.[21] It is also erroneous to enter a judgment by default where a judgment of nonsuit appears on the record as still subsisting.[22] Where defendant pleads in abatement, and no replication is filed, his failure to move for a judgment of non pros. does not authorize the entry of a judgment against him.[23]

§ 196. —— Default of Appearance

Judgment by default may be taken against a defendant who fails to enter an appearance within the proper time after being duly served with process.

Where defendant has been duly served with process, and fails to enter his appearance within the proper time, plaintiff may take judgment by default.[24] Such a judgment, however, cannot be ren-

8. Ill.—Niehoff v. People, to Use of Degan, 49 N.E. 214, 171 Ill. 243—James W. Rice Co. v. Agnew, 147 Ill.App. 468, modified on other grounds 91 N.E. 443, 244 Ill. 264—Gilbert v. American Trust & Savings Bank, 118 Ill.App. 678.

9. Ky.—Davie v. Louisville, 166 S. W. 969, 159 Ky. 252.
N.C.—Vass v. Peoples' Building & Loan Ass'n, 91 N.C. 55.

10. Cal.—Weldon v. Lawrence, 245 P. 451, 76 Cal.App. 530.
34 C.J. p 158 note 72.
Mere entry of appearance by new defendant does not authorize default judgment against him until the expiration of the time to file answer. Aufderheide v. Aufderheide, Mo.App., 18 S.W.2d 119.

11. N.Y.—Korman v. Grand Lodge I. O. F. S. I., 90 N.Y.S. 120, 44 Misc. 564.

12. Cal.—Cole v. Roebling Constr. Co., 105 P. 255, 156 Cal. 443.
34 C.J. p 158 note 74.

13. Mich.—Rosenfeld v. Wayne Cir. Judge, 177 N.W. 946, 210 Mich. 689.

14. Cal.—Concannon v. Smith, 66 P. 40, 134 Cal. 14.

15. Wyo.—McGinnis v. Beatty, 204 P. 340, 28 Wyo. 328.
34 C.J. p 158 note 80.

16. Wyo.—McGinnis v. Beatty, supra.
34 C.J. p 158 note 81.

17. Wyo.—McGinnis v. Beatty, supra.

18. Wyo.—McGinnis v. Beatty, supra.

19. Wyo.—McGinnis v. Beatty, supra.
34 C.J. p 158 note 84.

20. Ga.—Sutherlin v. Underwriters' Agency, 53 Ga. 442.
34 C.J. p 158 note 85.

21. Md.—Baltimore & O. R. Co. v. Ritchie, 31 Md. 191.

22. Mo.—Kelley v. Hogan, 16 Mo. 215.
34 C.J. p 158 note 87.

23. Ala.—Gaston v. Parsons, 8 Port. 469.

24. U.S.—Lanham v. Cline, D.C.Idaho, 44 F.Supp. 897.
Ala.—Green v. NuGrape Co., 100 So. 84, 19 Ala.App. 663.
Conn.—Gaul v. Baker, 143 A. 51, 108 Conn. 173.
Ill.—Jones v. Harris Trust & Savings Bank, 282 Ill.App. 131.
Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.
La.—Franek v. Turner, 114 So. 148, 164 La. 532—City of Monroe v. Glasscock, Morrison, Conner Const. Co., App., 178 So. 684—Union Motor Co. v. Williams, 8 La.App. 391.
Mass.—MacEachern v. S. S. White Dental Mfg. Co., 23 N.E.2d 1020, 304 Mass. 419.
Mich.—Kunsky-Trendle Broadcasting Corporation v. Kent Circuit Judge, 275 N.W. 175, 281 Mich. 367.
Mo.—Gerber v. Kansas City, 277 S. W. 562, 311 Mo. 49.
Mont.—Taylor v. Southwick, 253 P. 889, 78 Mont. 329.
N.J.—Edelstein v. Hub Loan Co., 33 A.2d 829, 130 N.J.Law 511.
N.Y.—Redfield v. Critchley, 14 N.E.2d 377, 277 N.Y. 336, 278 N.Y. 483—Conrad v. Harbaugh, 287 N.Y.S. 1012, 248 App.Div. 655—Kinzler v. Schoeler, 47 N.Y.S.2d 508, 181 Misc. 368.
Okl.—New v. Elliott, 211 P. 1025, 88 Okl. 126.
Pa.—Deemer & Co. v. Kline Tp. School Dist., 37 Pa.Dist. & Co. 698, 6 Sch.Reg. 378—Rhoades v. Decker, 34 Pa.Dist. & Co. 409—Williams & Co. v. Orlando, 6 Pa.Dist. & Co. 153, 19 North Co. 295—Auberle v. Ciliberto, Com.Pl., 31 Del.Co. 32—Smith v. Morris, Com.Pl., 41 Lack. Jur. 18—Simpson Motor Truck Co. v. Piccolomini, Com.Pl., 87 Pittsb. Leg.J. 87, 1 Fay.L.J. 87—Moran v. Quirk, Com.Pl., 8 Sch.Reg. 223.
Philippine.—Wolfson v. Chinchilla, 8 Philippine 467, 5 Off.Gaz. 560—Behn v. Arnalot Hermanos, 7 Philippine 742, 5 Off.Gaz. 251.
S.C.—Bissonette v. Joseph, 170 S.E. 467, 170 S.C. 407.
Tex.—Panhandle Compress & Warehouse Co. v. Best, Civ.App., 58 S.W. 2d 140.
Va.—Brame v. Nolen, 124 S.E. 299, 139 Va. 413.

dered if defendant has made a formal entry of appearance[25] or its equivalent,[26] or has taken any step in the proceedings which unequivocally shows that he submits himself generally to the jurisdiction of the court.[27] Where plaintiff's failure to proceed justifies the conclusion that he has abandoned the suit, a judgment by default cannot be grounded on defendant's failure to appear.[28]

A special appearance[29] entered for the purpose of objecting to the jurisdiction of the court,[30] or to make a motion to dissolve an attachment,[31] or for a continuance,[32] is generally held not to be such an appearance as will prevent a judgment by default, but there is also authority to the contrary;[33] and it has been held that, on a special appearance for the purpose of objecting to the jurisdiction of the court, it is error to enter a default judgment without a hearing and ruling on the objection.[34]

Appearance by attorney. If defendant's appearance is entered by an attorney, in order that it may be such as will prevent a judgment by default for want of appearance, it must be made by formal notice of his retainer and appearance[35] or by the filing of a pleading.[36] If defendant has not been properly served with process, judgment by default cannot be entered against him on an unauthorized appearance by an attorney;[37] but, where defendant has been properly served with process, an unauthorized appearance for him by an attorney does not prevent such a judgment from being entered against him.[38]

§ 197. —— Withdrawal of Appearance

Where the defendant's appearance is withdrawn, judgment by default may be taken against him as on nonappearance.

As discussed in Appearances § 30, the withdrawal of defendant's appearance, after pleading, works a withdrawal of his plea or answer, and a judgment by default may thereafter be entered on his default as on nonappearance.[39] If the attorney who has entered an appearance for defendant withdraws his appearance, before further proceedings are had, judgment by default for want of an appearance may then be taken.[40] And the absence of an order permitting the withdrawal cannot be complained of by defendant, as the subsequent entry of judgment is a ratification by the court of the withdrawal.[41] However, the withdrawal of the attorney's appearance after the filing of a plea does not withdraw the plea so as to justify a judgment by default;[42] and, where an attorney abandons his client's cause without notice, the client should be given a reasonable time to secure other counsel before judgment is taken against him by default.[43] Under some statutes, where an attorney is permitted to withdraw the answer and his appearance for defendant who fails

Wash.—State v. McCoy, 209 P. 1112, 122 Wash. 94.
34 C.J. p 158 note 91.

25. Mich.—Buchanan v. Weiden, 237 N.W. 370, 255 Mich. 82.
Mont.—Taylor v. Southwick, 253 P. 889, 78 Mont. 329—Edenfield v. G. V. Seal Co., 241 P. 227, 74 Mont. 509.
34 C.J. p 159 note 92.

26. U.S.—Sheepshanks v. Boyer, C. C.Pa., 21 F.Cas.No.12,741, Baldw. 462.
34 C.J. p 159 note 93.

27. N.Y.—Jennings v. Doyle, 33 N. Y.S.2d 695, 263 App.Div. 488, motion denied in part and dismissed in part 50 N.E.2d 242, 290 N.Y. 855, affirmed 50 N.E.2d 645, 291 N.Y. 503.
34 C.J. p 159 note 94.

Representation at trial
Party brought into municipal court as third party defendant, who filed no appearance or plea of any kind, was in default, although its attorney was present during the trial and took part in the defense.—Jones v. Harris Trust & Savings Bank, 282 Ill.App. 131.

Pleading designated special appearance
Where, in a garnishment proceeding, a person ordered interpleaded as party defendant served a verified pleading denominated a special appearance, but which in fact amounted to an answer or plea in abatement, default judgment as for nonappearance could not be rendered.—Dakota Nat. Bank v. Johnson, 204 N.W. 840, 52 N.D. 845.

28. Tex.—Brooks Supply Co. v. Hardee, Civ.App., 32 S.W.2d 384, error refused.

29. N.Y.—Powell v. Home Seekers' Realty Co., 228 N.Y.S. 131, 131 Misc. 590.

30. Conn.—Gaul v. Baker, 143 A. 51, 108 Conn. 173.
34 C.J. p 159 note 96.

31. Cal.—Glidden v. Packard, 28 Cal. 649.
34 C.J. p 159 note 97.

32. Ark.—Flowers v. Jackson, 51 S. W. 462, 66 Ark. 458.
Colo.—Hoyt v. Macon, 2 Colo. 113.

33. Mont.—Taylor v. Southwick, 253 P. 889, 78 Mont. 329.

34. Wash.—Rauch v. Zander, 234 P. 1039, 134 Wash. 40.

35. N.Y.—Couch v. Mulhane, 63 How.Pr. 79.
34 C.J. p 159 note 99.

36. N.Y.—Couch v. Mulhane, supra.

37. Nev.—Stanton-Thompson Co. v. Crane, 51 P. 116, 24 Nev. 171.
34 C.J. p 159 note 3.

38. Cal.—Hunter v. Bryant, 33 P. 55, 98 Cal. 252.
34 C.J. p 159 note 4.

39. N.Y.—Kline v. Snyder, 231 N.Y. S. 275, 133 Misc. 128.
34 C.J. p 159 note 7.

Attempted withdrawal
Where defendants appeared before trial justice and made several motions, including application for trial by jury, a subsequent attempted withdrawal on their part was not sufficient to render judgment thereafter entered one taken by default.—Jay-Washington Realty Corporation v. Koondel, 49 N.Y.S.2d 306, 268 App. Div. 116.

40. Tex.—Cheshire v. Palmer, Civ. App., 44 S.W.2d 438.
34 C.J. p 159 note 8.

41. N.M.—Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 48 P. 309, 9 N.M. 12, affirmed 19 S.Ct. 761, 174 U.S. 603, 43 L.Ed. 1103.

42. Tex.—Muenster v. Tremont Nat. Bank, 49 S.W. 362, 92 Tex. 422.
34 C.J. p 159 note 10.

43. Mo.—Parks v. Coyne, 137 S.W. 335, 156 Mo.App. 379.

to appear further, and no attempt is made by plaintiff to substitute counsel, or to notify defendant to do so, judgment cannot be taken against defendant.[44]

§ 198. —— Absence from Trial or Other Proceeding

As a general rule a default judgment may be taken on defendant's failure to appear for the trial after issues have been joined, but plaintiff has been required to establish his cause of action before such default judgment is entered.

As a general rule, judgment by default may be entered on defendant's failure to appear, after issue has been joined, when the case is called for trial.[45] However, in some jurisdictions defendant's mere failure, after issue has been joined, to attend when the case is called for trial is not by itself sufficient grounds for taking judgment by default,[46] at least where defendant had not been given notice of trial[47] or has some other good excuse for his absence.[48] Before plaintiff is entitled to judgment in such a case, he must establish his cause of action,[49] unless the facts admitted by the answer[50] or other pleas[51] make out a prima facie case in his favor; and the proper course, in some jurisdictions, is to call defendant and, on his failure to appear, to proceed to trial, on which plaintiff must present evidence in support of his demands;[52] or plaintiff may be allowed to proceed to take an inquest and enter judgment thereon.[53] Conversely, if plaintiff fails to appear or proceed, under some statutes defendant may proceed with the case and judgment may be rendered on the merits;[54] but under others defendant cannot recover judgment on plaintiff's cause of action where plaintiff fails to appear at trial[55] and defendant has pleaded only defensive matters.[56] If defendant files a set-off or counterclaim and plaintiff fails to appear, defendant may proceed with the trial of the set-off or counterclaim.[57]

Pending imprisonment. Where after issue is joined one party is sentenced to prison, the other party may proceed in the action and take judgment by default.[58]

§ 199. —— Default in Pleading

a. In general
b. Answering amended pleadings
c. Answer to part of cause
d. Filing and serving plea or answer

44. Idaho.—Bogue Supply Co. v. Davis, 210 P. 577, 36 Idaho 249, followed in Lundin v. Davis, 210 P. 579, 36 Idaho 258.

45. U.S.—**Corpus Juris quoted in** U. S. v. Hoblitzell, D.C.Va., 2 F. Supp. 832, 834.
Ala.—Sovereign Camp, W. O. W., v. Gay, 104 So. 895, 20 Ala.App. 650, reversed on other grounds 104 So. 898, 213 Ala. 5.
Conn.—Barton v. Barton, 196 A. 141, 123 Conn. 487.
Ga.—Golightly v. Line, 121 S.E. 878, 31 Ga.App. 550.
Iowa.—Vaux v. Hensal, 277 N.W. 718, 224 Iowa 1055.
Ky.—Strader v. Miller, 63 S.W.2d 668, 236 Ky. 637.
Pa.—Simpson Motor Truck Co. v. Piccolomini, Com.Pl., 87 Pittsb. Leg.J. 87, 1 Fay.L.J. 149.
Philippine.—Flores v. Flores, 7 Philippine 323, 5 Off.Gaz. 165.
R.I.—Dimond v. Marwell, 190 A. 683, 57 R.I. 477—Sahagian v. Superior Court, 129 A. 813, 47 R.I. 85.
Tex.—Stevenson v. Thomas, Civ.App., 56 S.W.2d 1095, error dismissed—Continental Oil & Gas Production Co. v. Austin, Civ.App., 17 S.W.2d 1114.
34 C.J. p 160 note 14.

46. U.S.—**Corpus Juris quoted in** U. S. v. Hoblitzell, D.C.Va., 2 F. Supp. 832, 834.
Wyo.—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509.
34 C.J. p 160 note 15.

47. Miss.—International Shoe Co. v. Garfinkle, 112 So. 168, 146 Miss. 799.
34 C.J. p 160 note 16.

48. N.Y.—Concord Oil Corporation v. York Heat Service, Inc., 27 N.Y.S.2d 738, 262 App.Div. 758—Murling v. State, 1 Hilt. 116, 3 Abb.Pr. 109—Sussman v. Silverman, 199 N.Y.S. 419.

49. Ark.—Hurst v. Davies, 291 S.W. 799, 173 Ark. 36.
Ill.—Du Breuil v. Klein, 253 Ill.App. 91.
Ky.—Kraft v. Ballback, 8 S.W.2d 1068, 223 Ky. 441.
Mo.—Eubanks v. Missouri Nat. Life Ins. Co., 24 S.W.2d 715, 223 Mo. App. 1095.
N.Y.—Frucci v. Winters, 286 N.Y.S. 781, 247 App.Div. 866.
S.D.—Forman v. Hall, 212 N.W. 866, 51 S.D. 144.
Tex.—Paggi v. Rose Mfg. Co., Civ. App., 259 S.W. 962.
34 C.J. p 160 note 18.

50. Neb.—Sutton First Nat. Bank v. Sutton Mercantile Co., 110 N.W. 306, 77 Neb. 596.
S.D.—Forman v. Hall, 212 N.W. 866, 51 S.D. 144.

51. Ala.—Lokey v. Ward, 154 So. 802, 228 Ala. 559—Sovereign Camp, W. O. W., v. Gay, 104 So. 895, 20 Ala.App. 650, reversed on other grounds 104 So. 898, 213 Ala. 5.
Tex.—Dickson v. Navarro County Levee Improvement Dist. No. 3, Civ.App., 124 S.W.2d 943, followed in Dickson v. Ellis County Levee Improvement Dist. No. 10, 124 S.W.2d 946, reversed on other grounds 139 S.W.2d 260, 135 Tex. 102, set aside Dickson v. Navarro County Levee Imp. Dist. No. 3, 139 S.W.2d 257, 135 Tex. 95.

52. Cal.—Warden v. Lamb, 277 P. 867, 98 Cal.App. 738.
Iowa.—Vaux v. Hensal, 277 N.W. 718, 224 Iowa 1055.
Pa.—Anderson v. Gertler, Com.Pl., 92 Pittsb.Leg.J. 56.
34 C.J. p 160 note 20.

53. N.Y.—Rycroft v. Pierce, 185 N.Y.S. 447, 150 App.Div. 521, resettled 135 N.Y.S. 1140, 150 App.Div. 931.
34 C.J. p 160 note 21.

54. Cal.—Clune v. Quitzow, 57 P. 886, 125 Cal. 213.
34 C.J. p 160 note 23.

55. Tex.—Burger v. Young, 15 S.W. 107, 78 Tex. 656—Cornelius v. Early, Civ.App., 24 S.W.2d 757, affirmed Early v. Cornelius, 39 S.W. 2d 6, 120 Tex. 335.

56. Ga.—Beasley Motor Co. v. Cowart, 154 S.E. 458, 41 Ga.App. 684.

57. Iowa.—Stewart v. Gorham, 98 N.W. 512, 122 Iowa 669.
34 C.J. p 160 note 24.

58. Ga.—Peterson v. C. A. Martin Furniture Co., 86 S.E. 1099, 144 Ga. 316.
N.Y.—Bonnell v. Rome, W. & O. R. Co., 12 Hun 218.

e. Affidavit of defense or merits
f. After decision on motion or demurrer
g. Failure to reply or rejoin
h. Striking or withdrawal of pleading
i. Pending disposition of pleading

a. In General

(1) General rules
(2) Rule or notice to plead
(3) Time for pleading

(1) General Rules

A default judgment may be entered against a defendant who, having been duly served with process, fails to demur, plead, or answer properly.

Where process has been duly served on defendant, and plaintiff has filed a good declaration or complaint, judgment as by default may be entered against defendant if he fails to demur, plead, or answer properly[59] within the required time, as discussed infra subdivision a (3) of this section. The rule applies notwithstanding defendant has entered an appearance in the action,[60] or has demanded a trial by jury;[61] but defendant's failure to answer will not support a judgment by default where the undisputed evidence shows that he is not liable to plaintiff.[62]

Sufficiency of pleading to prevent default. To prevent a judgment by default on this ground it is generally held that defendant's plea or answer must be in writing,[63] and be properly signed[64] and verified, where verification is required by statute,[65] although, under some statutes, it has been held that, unless plaintiff takes steps to have an unverified answer removed or stricken, judgment by default is

59. U.S.—Orsinger v. Consolidated Flour Mills Co., C.C.A.Ill., 284 F. 224, certiorari denied 43 S.Ct. 248, 260 U.S. 746, 67 L.Ed. 493—Interstate Commerce Commission v. Daley, D.C.Mass., 26 F.Supp. 421.
Ala.—Ex parte Central Alabama Dry Goods Co., 189 So. 56, 238 Ala. 20.
Ariz.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373—Martin v. Sears, 44 P.2d 526, 45 Ariz. 414.
Ark.—Dunbar v. Howell, 52 S.W.2d 618, 186 Ark. 1—Alger v. Beasley, 20 S.W.2d 317, 180 Ark. 46.
Cal.—Union Oil Co. of California v. Conejo Oil Co., 267 P. 320, 91 Cal. App. 652—Butler v. Robinson, 244 P. 162, 76 Cal.App. 223.
Ill.—Gardner v. Shekleton, 253 Ill. App. 333.
La.—Fowler Commission Co. v. E. J. Deas & Co., 127 So. 456, 13 La. App. 141.
Miss.—Strain v. Gayden, 20 So.2d 697, 197 Miss. 353.
Mo.—O'Connell v. Dockery, App., 102 S.W.2d 748.
Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
N.Y.—Kinzler v. Schoeler, 47 N.Y.S. 2d 508, 181 Misc. 368.
N.C.—King v. Rudd, 37 S.E.2d 116, 226 N.C. 156—Duplin County v. Ezzell, 27 S.E.2d 448, 223 N.C. 531—Battle v. Mercer, 122 S.E. 4, 187 N.C. 437, rehearing denied 123 S.E. 258, 188 N.C. 116.
Ohio.—McCabe v. Tom, 171 N.E. 868, 35 Ohio App. 73.
Okl.—New v. Elliott, 211 P. 1025, 88 Okl. 126.
R.I.—Dimond v. Marwell, 190 A. 683, 57 R.I. 477.
Tex.—Postal Savings & Loan Ass'n v. Powell, Civ.App., 47 S.W.2d 343, error refused—Shaw v. Whitfield, Civ.App., 35 S.W.2d 1115—Fort Worth Mut. Benev. Ass'n of Texas v. Golden, Civ.App., 287 S.W. 291—Duval County Ranch Co. v. Drought, Civ.App., 260 S.W. 298—Smith v. Citizens' Nat. Bank of Lubbock, Civ.App., 246 S.W. 407—Gerlach v. North Texas & S. F. Ry. Co., Civ.App., 244 S.W. 662.
Wash.—Garrett v. Nespelem Consol. Mines, 139 P.2d 273, 18 Wash.2d 340—Riddell v. David, 23 P.2d 22, 173 Wash. 370—Lawrence v. Rawson, 217 P. 1019, 126 Wash. 158.
34 C.J. p 161 note 27.

Complaint in intervention properly served on the original parties must be answered as though it were an original complaint; otherwise a judgment by default may be taken.—State Bank of New Salem v. Schultze, 209 P. 599, 63 Mont. 410.

Consolidation of cross suit
Plaintiffs were held not entitled to judgment by reason of defendant's failure to file answer, where action had been treated by all parties as consolidated with cross suit.—Rowe v. Arnett, 45 S.W.2d 12, 241 Ky. 768.

Answer of codefendant
(1) Ordinarily, the answer of a codefendant will not prevent the taking of a default judgment against defendant who does not answer.—Kunsky-Trendle Broadcasting Corporation v. Kent Circuit Judge, 275 N. W. 175, 281 Mich. 667.

(2) However, where the answer of a codefendant was treated by defendants and the court as having been filed on behalf of both defendants, the entry of a default judgment against the nonanswering defendant was properly refused.—Thomas v. Williams, 49 P.2d 557, 173 Okl. 601.

Constructive service
Where service of process on each of defendants was constructive only, refusal of district court to quash that service imposed no duty on part of defendants personally to answer in the cause in order to avoid personal judgments by default.—Kimbel v. Osborn, Wyo., 156 P.2d 279.

60. Cal.—Judson v. Superior Court of Los Angeles County, 129 P.2d 861, 21 Cal.2d 11.
Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.
Mo.—State ex rel. Compagnie Générale Transatlantique v. Falkenhainer, 274 S.W. 758, 309 Mo. 224.
34 C.J. p 161 note 29.

Reason for rule
The entry of an appearance prevents the taking of a judgment for want of an appearance, but not a judgment for want of a plea.—Russ v. Gilbert, 19 Fla. 54.

Nil dicit
Tex.—Spivey v. Saner-Ragley Lumber Co., Com.App., 284 S.W. 210.

61. Ala.—Ex parte Central Alabama Dry Goods Co., 189 So. 56, 238 Ala. 20—Petree v. Olim, 89 So. 602, 206 Ala. 333.

62. Ark.—Wildrick v. Raney, 282 S. W. 17, 170 Ark. 1194.

63. Tex.—State v. Patterson, Civ. App., 40 S.W. 224.
34 C.J. p 161 note 32.

64. Ky.—Simon v. Webster, 211 S. W. 866, 184 Ky. 262.
34 C.J. p 161 note 33.

65. Ala.—Schwarz v. Oppenheimer, 8 So. 36, 90 Ala. 462.
N.C.—Griffin v. Asheville Light & Power Co., 16 S.E. 423, 111 N.C. 434—Alford v. McCormac, 90 N.C. 151.
Tenn.—Trabue v. Higden, 4 Coldw. 620.
34 C.J. p 161 note 34.

improper.[66] It must also be filed in the particular action,[67] and must be responsive to, and join issue on, the pleadings which defendant is bound to answer.[68]

Failure to answer interrogatories. Under some statutes a party may take a judgment by default on the opposing party's failure to answer interrogatories filed.[69] However, the fact that the answers are deemed insufficient or evasive does not authorize the court to enter a default without further proceedings;[70] it should fix a time within which further answers may be filed, in order that the time of default, if they are not filed, may be definitely known.[71] After an answer to the merits, plaintiff may not take judgment by default because defendant neglects to answer interrogatories which are taken for confessed, but may avail himself only of the confession as proved on the trial.[72]

(2) Rule or Notice to Plead

Where defendant is not required to plead until ruled to do so, he ordinarily may be put in default when, and only when, he has been duly served with rule to plead and has failed to comply.

Where defendant fails to enter an appearance, plaintiff is entitled to judgment by default without serving or posting any rule to plead on him,[73] but, where defendant has appeared and the practice or circumstances of the case are such that he is not obliged to plead unless he is ruled to do so, he cannot be put in default and judgment entered against him, unless a rule to plead is taken out and properly served on him, requiring him to plead,[74] or unless he waives his right to have plaintiff take out such a rule,[75] as where he agrees to go to trial without requiring the issues to be completed.[76] If, after the proper service or notice of such rule, defendant fails to plead or answer within the appointed time, judgment may be taken against him as for want of a plea,[77] although it has been held that a plea filed after the day fixed by the rule will not be too late, where it is filed before a default is asked for and ordered,[78] or where no delay is occasioned by his failure to plead within the prescribed time.[79] The sufficiency of the plea or answer on a rule to plead must be determined by the court,[80] and not by plaintiff.[81] Apart from the question of the propriety or necessity of a rule to plead to put defendant in default, it has been held in at least one jurisdiction that the court cannot make and enforce an order requiring defendant to plead, answer, or demur, since defendant has an absolute right to stand in default.[82]

When rule not required. A rule requiring defendant to plead, before the entry of a default, is not required where the time to plead is limited by statute or rule of court,[83] or where a rule for judgment for want of sufficient pleading has been argued and leave granted to file a supplemental pleading;[84] nor may such a rule be given and judgment entered on it for want of a plea, after a plea has been entered and the cause remanded to the rules.[85]

66. Iowa.—Mallory v. Sailing, 48 Iowa 699—Wolff v. Hagensick, 10 Iowa 590.

67. Tex.—Dowell v. Winters, 20 Tex. 793.
34 C.J. p 161 note 36.

68. Minn.—Hasse v. Victoria Co-op. Creamery Ass'n, 294 N.W. 475, 208 Minn. 457.
34 C.J. p 161 note 37.

Motion to dismiss
Defendant's motion to dismiss petition for want of security for costs was not a "pleading" preventing a default judgment for want of an answer or demurrer.—Morrison v. Baker, Ohio App., 58 N.E.2d 708.

Motion for bill of particulars
Motion to require plaintiff to set forth particulars of claim for services is not a demurrer, but is within statute as to bill of particulars, and judgment by default is proper after removal of motion from calender for want of appearance.—Butler v. Robinson, 244 P. 162, 76 Cal. App. 223—34 C.J. p 161 note 37.

69. Ohio.—Simpson v. Jackson, 163 N.E. 307, 29 Ohio App. 530.
34 C.J. p 161 note 39.

70. Mass.—Fels v. Raymond, 28 N. E. 691, 139 Mass. 98.

71. Mass.—Hooton v. Redmond, 130 N.E. 107, 237 Mass. 508.
Wash.—Lawson v. Black Diamond Coal Min. Co., 86 P. 1120, 44 Wash. 26.

72. La.—Behan v. Hite, 14 La. 67.

73. U.S.—King v. Davis, C.C.Va., 137 F. 198, affirmed 157 F. 676, 85 C. C.A. 348.
34 C.J. p 162 note 43.

74. Mich.—Griffin v. McGavin, 75 N. W. 1061, 117 Mich. 372, 72 Am.S.R. 564.
34 C.J. p 162 note 45.
Rule to plead generally see the C. J.S. title Pleading § 116, also 49 C.J. p 207 notes 91–1.

Directing tender of issues
Under a statute providing for judgment by default where defendant neglects or refuses to join issue under the direction of the court, a default judgment is unauthorized where the court did not direct the tender of issues.—Continental Oil & Gas Production Co. v. Austin, Tex. Civ.App., 17 S.W.2d 1114.

75. Ind.—Kruse v. State, 103 N.E. 663, 55 Ind.App. 203.

76. Ind.—Kruse v. State, supra.

77. Ill.—Penman v. Village of Philo, 32 N.E.2d 640, 309 Ill.App. 49.
Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.
Me.—Lebel v. Cyr, 34 A.2d 201, 140 Me. 98.
34 C.J. p 162 note 48.

78. Ill.—Castle v. Judson, 17 Ill. 381.
34 C.J. p 162 note 49.

79. Iowa.—Redfield v. Miller, 13 N. W. 334, 59 Iowa 393.

80. Pa.—Goldstein v. Fritzius, 41 Pa.Super. 219.

81. Pa.—Goldstein v. Fritzius, supra.

82. Mo.—State ex rel. Tighe v. Brown, 23 S.W.2d 1092, 224 Mo. App. 844.

83. Colo.—King v. Gardner, 55 P. 727, 25 Colo. 395.
Ill.—Michael v. Mace, 27 N.E. 694, 137 Ill. 485.

84. Pa.—Close v. Hancock, 3 Pa.Super. 207, 39 Wkly.N.C. 460.

85. Ky.—Clark v. Davis, Hard. 410.

Loss of pleading. Where, after the cause is at issue, the records and files of the court are destroyed and plaintiff files a new declaration under his affidavit that he has substantial copies of the papers which had been filed, judgment by default may not be entered against defendant because of his failure to comply with a rule of the court to plead;[86] in such a case the court can do no more than allow plaintiff to supply the plea.[87]

(3) Time for Pleading

Judgment by default cannot properly be taken until the time for pleading has expired and defendant has failed to plead within that time.

Defendant cannot be put in default for failure to plead or answer before the expiration of the time allowed to him for filing his plea or answer,[88] and, as discussed infra § 207, a judgment by default entered against him before the expiration of that time is irregular and voidable at his instance. However judgment by default may be entered, if defendant fails to plead or make up issues as the law requires, within the time limited by statute or rule of court,[89] or within the time limited by an order extending the time to plead,[90] unless such order is revoked, in which case judgment may be taken for a failure to plead within the time originally required.[91] Defendant cannot escape the consequences of his default by filing an answer or plea after the expiration of the time allowed,[92] unless it is filed by consent of plaintiff[93] or leave of court,[94] or unless, in some jurisdictions, it is filed before the entry of the default.[95]

Excuse for delay. The filing of a plea or answer after the time allowed therefor may be sufficient to prevent a judgment by default, where there is a legal and sufficient excuse for the delay,[96] as where

86. Ill.—Daniels v. Chicago Fifth Nat. Bank, 65 Ill. 409.

87. Ill.—Daniels v. Chicago Fifth Nat. Bank, supra.

88. Ala.—National Surety Co. v. First Nat. Bank, 142 So. 414, 225 Ala. 108.
Cal.—Baird v. Smith, 14 P.2d 749, 216 Cal. 408.
La.—Ponchatoula Farm Bureau Ass'n v. Tangipahoa Bank & Trust Co., 160 So. 803, 181 La. 1039—Spillman v. Texas & P. Ry. Co., 120 So. 905, 10 La.App. 379.
Mo.—Aufderheide v. Aufderheide, App., 18 S.W.2d 119.
Mont.—Griffith v. Montana Wheat Growers' Ass'n, 244 P. 277, 75 Mont. 466.
N.Y.—Barth v. Owens, 35 N.Y.S.2d 632, 178 Misc. 628—Levin v. Levin, 284 N.Y.S. 897, 157 Misc. 372.
Pa.—Deibert v. Kulp, 45 Pa.Dist. & Co. 413.
Tenn.—Fidelity-Phenix Fire Ins. Co. v. Oliver, 152 S.W.2d 254, 25 Tenn. App. 114—Marshall v. Johnson Hardware Co., 5 Tenn.App. 369.
34 C.J. p 162 note 59.

Two "last" days

Where two modes of service of process have been made under which two different periods in which to answer are provided for, one greater than the other, defendant has right of choice and no default can occur until last day of the longer period to answer has expired.—Olson v. Jordan, 43 N.Y.S.2d 348, 181 Misc. 942.

Sundays and holidays

In computing the time, intervening Sundays and holidays are counted.—Bailey v. Edmundson, 46 N.E. 1064, 168 Mass. 297.

89. Ala.—Ex parte Central Alabama Dry Goods Co., 189 So. 56, 238 Ala. 20.
Ariz.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373—Martin v. Sears, 44 P.2d 526, 45 Ariz. 414.
Ark.—Dunbar v. Howell, 52 S.W.2d 618, 186 Ark. 1—Alger v. Beasley, 20 S.W.2d 317, 180 Ark. 46.
Cal.—Union Oil Co. of California v. Conejo Oil Co., 267 P. 320, 91 Cal. App. 652.
Ill.—Penman v. Village of Philo, 32 N.E.2d 640, 309 Ill.App. 49.
Mo.—O'Connell v. Dockery, App., 102 S.W.2d 748.
Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
N.C.—King v. Rudd, 37 S.E.2d 116, 226 N.C. 156—Battle v. Mercer, 122 S.E. 4, 187 N.C. 437, rehearing denied 123 S.E. 258, 188 N.C. 116.
Tex.—Continental Oil & Gas Production Co. v. Austin, Civ.App., 17 S.W.2d 1114—Fort Worth Mut. Benev. Ass'n of Texas v. Golden, Civ.App., 287 S.W. 291—Duval County Ranch Co. v. Drought, Civ. App., 260 S.W. 298.
Wash.—Garrett v. Nespelem Consol. Mines, 139 P.2d 273, 18 Wash.2d 340.
34 C.J. p 163 note 61.

90. Cal.—Union Oil Co. of California v. Conejo Oil Co., 267 P. 320, 91 Cal.App. 652.
34 C.J. p 163 note 62.

91. N.Y.—Brown v. St. John, 19 Wend. 617.
34 C.J. p 163 note 63.

92. Ariz.—Martin v. Sears, 44 P.2d 526, 45 Ariz. 414.
Cal.—Jones v. Moers, 266 P. 821, 91 Cal.App. 65.
Idaho.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.
Ill.—Straus v. Biesen, 242 Ill.App. 370.
N.C.—Elramy v. Abeyounis, 126 S.E. 743, 189 N.C. 278.
Philippine.—Noel v. Lasala, 5 Philippine 260.
34 C.J. p 163 note 64.

93. Ind.—Rooker v. Bruce, 85 N.E. 351, 171 Ind. 86, 96.
Iowa.—Jones v. Jones, 13 Iowa 276.
Waiver of default see infra § 203.

94. Ill.—Straus v. Biesen, 242 Ill. App. 370.
34 C.J. p 163 note 66.

95. Cal.—Jones v. Moers, 266 P. 821, 91 Cal.App. 65.
Fla.—Johnson v. City of Sebring, 140 So. 672, 104 Fla. 584.
Ga.—Buttersworth v. Swint, 186 S.E. 770, 53 Ga.App. 602—Bridges v Wilmington Sav. Bank, 136 S.E. 281, 36 Ga.App. 239.
Mont.—Edenfield v. G. V. Seal Co., 241 P. 227, 74 Mont. 509.
N.M.—Animas Consol. Mines Co. v. Frazier, 69 P.2d 927, 41 N.M. 389.
Tex.—World Co. v. Dow, 287 S.W. 241, 110 Tex. 146—Aubrey v. Dunnahoo, Civ.App., 90 S.W.2d 611.
Utah.—Sanders v. Milford Auto Co., 218 P. 126, 62 Utah 110.
34 C.J. p 163 note 67.

96. D.C.—Horne v. Ostmann, Mun. App., 35 A.2d 174.
N.Y.—Lord v. Vandenburgh, 13 N.Y. Super. 703.
N.C.—Blalock v. Whisnant, 199 S.E. 292, 214 N.C. 834.
34 C.J. p 164 note 68.

Attorney's inadvertence

Even though it does not constitute a legally sufficient excuse, the court should not summarily deny defendant a hearing where he is caught unawares through attorney's inadvertence and no harm can result from trial on merits.—Tonkel v. Williams, 112 So. 368, 146 Miss. 842.

the delay is due to the action of the court,[97] or is attributable to plaintiff's own fault or irregular action in the case,[98] or the grant of further time in which to plead,[99] or a delay in the mails,[1] unless such delay is due to defendant's own fault.[2]

Whole of last day. Defendant has the whole of the last day of the time limited in which to plead, and cannot be put in default until that day has fully expired,[3] and, if the last day falls on a Sunday or holiday, he is entitled to the whole of the next succeeding day.[4]

Pleading and judgment on same day. Where defendant's pleading is filed on the same day on which judgment by default is entered, the court may consider fractions of the day for the purpose of determining whether or not the plea or answer was actually filed before the judgment was rendered.[5] In some jurisdictions it will be presumed, in the absence of evidence to the contrary, that the pleading was first in point of time, and the judgment, therefore, erroneous.[6] In other jurisdictions, however, the presumption is that the judgment was first in point of time;[7] and, if the default is taken in good faith, and without knowledge of the pleading, it will be upheld as regular,[8] although it was in fact taken after the plea or answer was served,[9] especially where the plea or answer was held back for the purpose of delay.[10]

b. Answering Amended Pleadings

Where plaintiff substantially amends his pleading, default judgment usually may be taken against defendant if he fails to file a new or amended plea within the required time, provided he is properly served with, or notified of, the amended pleading.

Where plaintiff amends his declaration or complaint so as to change the cause of action, or add a new one and thereby abandons the original issues, judgment by default may be taken against defendant if he fails to file a new or amended answer or plea within the time allowed therefor,[11] notwithstanding the original answer or plea is still on file,[12] unless defendant is not properly served with, or notified of, the amended pleading,[13] or ordered to plead thereto,[14] for after an amendment, without notice, defendant may be defaulted only as to matters alleged in the original complaint and not as to matters alleged in the amended complaint.[15] This rule, however, does not apply where the amendment is merely to formal or immaterial matters, and does not change the cause of action,[16] unless the original plea or answer has been withdrawn;[17] nor does it apply where the original plea or answer set forth a sufficient defense to the declaration or complaint as

97. N.C.—White v. Lokey, 42 S.E. 445, 131 N.C. 72.
34 C.J. p 164 note 69.

98. Mont.—**Corpus Juris quoted in** Reynolds v. Gladys Belle Oil Co., 243 P. 576, 581, 75 Mont. 332.
34 C.J. p 164 note 70.

99. D.C.—Horne v. Ostmann, Mun. App., 35 A.2d 174.
34 C.J. p 164 note 71.

Construction of extension
An indefinite agreement between parties' attorneys for extension of time to file answer should not be construed by counsel technically or strictly in taking of default judgment, so as to deprive defendant unjustly of his rights, but should be construed in spirit of professional courtesy and mutual helpfulness.—Cahaley v. Cahaley, 12 N.W.2d 182, 216 Minn. 175, 157 A.L.R. 1.

1. N.Y.—Yates v. Guthrie, 23 N.E. 741, 119 N.Y. 420.
34 C.J. p 164 note 72.

2. N.Y.—Kuh v. Goldman, 104 N.Y.S. 255, 119 App.Div. 148.
34 C.J. p 164 note 73.

3. Ill.—Mercer v. Mercer, 271 Ill. App. 307.
Pa.—Deibert v. Kulp, 45 Pa.Dist. & Co. 413.
34 C.J. p 164 note 74.

4. N.Y.—Rothchild v. Mannesovitch, 51 N.Y.S. 253, 29 App.Div. 580.
34 C.J. p 164 note 75.

5. Pa.—Bordentown Banking Co. v. Restein, 63 A. 451, 214 Pa. 30.

6. Ill.—Lyon v. Barney, 2 Ill. 387.
Pa.—Rank v. Hauer, 2 Pa.Co. 385.

7. Tex.—Wooldridge v. Brown, 1 Tex. 478.

8. N.Y.—Brainard v. Hanford, 6 Hill 368.

9. N.Y.—Brainard v. Hanford, supra.

10. N.Y.—Rogers v. Beach, 18 Wend. 533.

11. Cal.—**Corpus Juris cited in** Gray v. Hall, 265 P. 246, 250, 203 Cal. 306—**Corpus Juris cited in** Steinbauer v. Bondesen, 14 P.2d 106, 109, 125 Cal.App. 504—Jones v. Moers, 266 P. 821, 91 Cal.App. 65.
Fla.—Avon Mfg. Co. v. Herrin, 114 So. 425, 93 Fla. 1128.
Mo.—Leis v. Massachusetts Bonding & Insurance Co., App., 125 S.W.2d 906.
Mont.—Griffith v. Montana Wheat Growers' Ass'n, 244 P. 277, 75 Mont. 466.
N.C.—Brown v. Town of Hillsboro, 117 S.E. 41, 185 N.C. 368.
34 C.J. p 164 note 85.
Amendment as superseding original pleadings see the C.J.S. title Pleadings § 321, also 49 C.J. p 558 note 37–p 560 note 68.

12. Cal.—**Corpus Juris cited in** Gray v. Hall, 265 P. 246, 250, 203 Cal. 306—**Corpus Juris cited in** Steinbauer v. Bondesen, 14 P.2d 106, 109, 125 Cal.App. 419.
34 C.J. p 165 note 86.

13. Mont.—Griffith v. Montana Wheat Growers' Ass'n, 244 P. 277, 75 Mont. 466.
Okl.—Joplin Furniture Co. v. Bank of Picher, 3 P.2d 173, 151 Okl. 158.
34 C.J. p 165 note 87.

Refusal to accept
Plaintiff is entitled to judgment by default, where defendant returns the amended complaint, refuses to accept it, and fails to answer.—Walton Foundry Co. v. A. D. Granger Co., 196 N.Y.S. 719, 203 App.Div. 226.

14. Okl.—Joplin Furniture Co. v. Bank of Picher, 3 P.2d 173, 151 Okl. 158.

15. Iowa.—Bennett v. Carey, 34 N.W. 291, 72 Iowa 476.

16. Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306—Steinbauer v. Bondesen, 14 P.2d 106, 125 Cal.App. 419.
34 C.J. p 165 note 89.

Identical declaration
A second declaration identical with the original is not an "amended declaration," so that its filing requires defendant to answer over to avoid default.—Musher v. Perera, 158 A. 14, 162 Md. 44.

17. Mo.—State v. Taylor, 206 S.W. 247, 200 Mo.App. 333.

amended,[18] or where no time for filing the new answer is fixed either by statute or rule or order of court.[19]

c. Answer to Part of Cause

If the answer or plea sets up a defense to only a severable part of plaintiff's cause of action, plaintiff may ordinarily take judgment by default or nil dicit for the unanswered part.

If defendant's plea or answer sets up a denial or defense to only a part of plaintiff's cause of action, severable from the rest, plaintiff may take judgment by default, or more properly by nil dicit, for the part that is unanswered,[20] and proceed to trial for the rest,[21] or he may concede the validity of the defense, as to that portion of his demand which is answered, and have judgment by default for the remainder, without trial.[22] If in such a case plaintiff at first replies or demurs, he may thereafter take judgment nil dicit at any time before final judgment on the payment of costs.[23] If, however, the plea professes to answer the whole declaration, but in fact answers a part only, it has been held that plaintiff cannot waive the objection and take judgment for the part unanswered;[24] and this rule applies where some of the pleas do and others do not answer the whole declaration.[25]

d. Filing and Serving Plea or Answer

In order to prevent a default it is generally required that defendant's plea or answer be actually and duly filed in the clerk's office.

In order to prevent a default defendant's plea or answer must ordinarily be actually and duly filed in the clerk's office[26] within the required time,[27] notwithstanding there has been an affidavit of merits,[28] and notwithstanding it has been served on plaintiff's counsel,[29] although as to this latter rule there is authority to the contrary.[30] In some jurisdictions, in addition to filing, the plea or answer must be called to the attention of the court,[31] especially where it is filed after the time for filing has expired.[32] If a plea filed to a declaration is applicable to the declaration as amended, it need not be filed again.[33]

Service. Failure to serve a copy of defendant's pleading on plaintiff or his counsel ordinarily does not warrant a judgment by default, if it has been properly filed.[34]

18. Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306—Steinbauer v. Bondesen, 14 P.2d 106, 125 Cal.App. 419.
Minn.—Kelly v. Anderson, 194 N.W. 102, 156 Minn. 71.
34 C.J. p 165 note 91.

Demurrer

(1) Under a statute providing that, in the absence of a new plea or answer to an amended pleading, the original plea or answer shall stand and be considered as pleaded in answer to the amended pleading, a demurrer to the original declaration should be considered as made to the amended declaration.—Grand Court Order of Calanthe of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Florida, v. Johnson, 160 So. 884, 119 Fla. 440.

(2) If such demurrer is responsive to amended declaration, court should not enter default without notice for failure to demur or plead to amended declaration.—Johnson v. City of Sebring, 140 So. 672, 104 Fla. 584.

19. Iowa.—Wright v. Howell, 24 Iowa 150.
N.Y.—Elmore v. Vallette, 16 Abb.Pr. 249.

Reasonable opportunity to plead to an amended declaration must be given defendant; hence, a default judgment entered on day on which plaintiff filed an amended declaration should be reversed.—Boone v. Miller, 133 So. 121, 160 Miss. 287.

20. Fla.—**Corpus Juris cited in** Clonts v. Spurway, 139 So. 896, 897, 104 Fla. 340.
34 C.J. p 165 note 94.

Cross complaint

Where plaintiff files a cross complaint against interveners and serves such cross complaint on defendant, defendant's failure to answer such cross complaint does not entitle plaintiff to default judgment thereon, where defendant answered the original complaint which involved the same issues, and where court found for defendant on such issues.—Shuff v. Blazer, 152 P.2d 216, 66 Cal.App. 2d 348.

21. Pa.—McKinney v. Mitchell, 4 Watts & S. 25—Bradford v. Bradford, 2 Pa.L.J. 406.
Judgment on admission in pleadings see supra § 185.

22. Ill.—Henry v. Meriam & Morgan Paraffine Co., 83 Ill. 461.

23. Ill.—Safford v. Vail, 22 Ill. 326—Warren v. Nexsen, 4 Ill. 38.

24. Ark.—Jones v. Cecil, 10 Ark. 592.

25. Ala.—Tubb v. Madding, Minor 129.

26. Idaho.—Pendrey v. Brennan, 169 P. 174, 31 Idaho 54.
34 C.J. p 165 note 4.

Clerical error

Where district court clerk received answer and marked it filed, although he failed to note filing on fee book, and did not place pleading with remainder of court papers in jacket provided therefor, defendant was not in default.—Gause v. Cities Service Oil Co., Civ.App., 70 S.W.2d 224, affirmed City of Fort Worth v. Gause, 101 S.W.2d 221, 129 Tex. 25.

27. Ill.—Scammon v. McKey, 21 Ill. 554.

28. Ill.—Scammon v. McKey, supra.

29. Mont.—State v. Blaine County Twelfth Judicial Dist. Ct., 145 P. 724, 50 Mont. 119.

30. N.Y.—Smith v. Wells, 6 Johns. 286.
34 C.J. p 166 note 8.

31. Tex.—Gillaspie v. Huntsville, Civ.App., 151 S.W. 1114—Bartlett v. S. M. Jones Co., Civ.App., 103 S.W. 705.

Nil dicit

Failure of defendant to call answer to attention of court will not authorize judgment nil dicit because answer not shown to have been abandoned raises rebutting presumption against that of implied confession of judgment.—Spivey v. Saner-Ragley Lumber Co., Tex.Com.App., 284 S.W. 210—Grand Lodge Brotherhood of Railroad Trainmen v. Ware, Tex.Civ.App., 73 S.W.2d 1076, error refused.

32. Ga.—Camp v. Wallace, 61 Ga. 497.
34 C.J. p 166 note 10.

33. Miss.—Northrop v. Flaig, 57 Miss. 754.

34. N.M.—Ortega v. Vigil, 158 P. 487, 22 N.M. 18.
34 C.J. p 166 note 13.

e. Affidavit of Defense or Merits

Under various statutes, judgment by default or nil dicit may be taken unless defendant duly files an affidavit of merits or an affidavit of defense in cases where they are required.

Under some statutes or rules of court, judgment by default or nil dicit may be taken against defendant unless he duly files an affidavit of merits, showing that he has a meritorious defense to the action,[35] unless, in some jurisdictions, the answer is verified.[36] Under other statutes, a judgment by default may be entered against defendant unless he files, within the required time, an affidavit of defense setting forth the facts on which he means to rely as a defense where the action is on an instrument or contract for the payment of money,[37] including an action on a contract of guaranty or suretyship,[38] a bond or recognizance,[39] a note or draft,[40] a judgment,[41] or a book account.[42] However, this requirement has no application to claims arising out of torts,[43] or where defendant is sued in a representative capacity,[44] or where, owing to the lapse of time, a presumption of payment has arisen,[45] or where there has been an award of arbitrators finding that plaintiff has no cause of action.[46]

If the defense alleged in the affidavit is good as to a part of the claim, but insufficient as to the balance, the court may direct judgment for the part insufficiently denied, and allow plaintiff to try the case as to the remainder,[47] unless the affidavit purports to apply to the whole of plaintiff's claim.[48] Under some statutes, such judgment may also be rendered for want of an affidavit of defense in an action of scire facias on a mortgage[49] or mechanic's lien.[50]

f. After Decision on Motion or Demurrer

Judgment by default or nil dicit may be taken against defendant where his motion or demurrer is overruled and, although he is given leave and the requisite opportunity to do so, he fails to plead over.

Judgment as by default or nil dicit may be rendered against defendant where he fails or refuses to plead over within the required time after a plea or motion is overruled or denied.[51] Thus a default judgment may be entered where defendant fails to plead over after a plea to the jurisdiction[52] or a plea in abatement[53] is found against him, or after his motion to quash the summons[54] or to dismiss

35. U.S.—Orsinger v. Consolidated Flour Mills Co., C.C.A.Ill., 284 F. 224, certiorari denied 43 S.Ct. 248, 260 U.S. 746, 67 L.Ed. 493.
Ill.—James J. Brown Plastering Co. v. Gottschalk, 261 Ill.App. 147—Bannat v. Zulley, 243 Ill.App. 497—Stevens-Jarvis Lumber Co. v. Quixley Lumber Co., 229 Ill.App. 419—McWhinney v. Gill, 167 Ill. App. 582—Perry v. Krausz, 166 Ill.App. 1—Koch v. Dickinson, 152 Ill.App. 413.
34 C.J. p 166 note 17.
Effect of striking affidavit from files see infra subdivision h of this section.

Affidavit held sufficient
N.J.—Fitzsimmons v. Board of Education of Borough of Carteret, in Middlesex County, 13 A.2d 305, 125 N.J.Law 15.

36. N.Y.—Goldberg v. Wood, 98 N.Y.S. 200, 50 Misc. 618.
34 C.J. p 166 note 18.

37. Del.—Selly v. Fleming Coal Co., 180 A. 326, 7 W.W.Harr. 34.
Pa.—First Nat. Bank v. Baird, 150 A. 165, 300 Pa. 92—Coryell v. Kuser, 28 Pa.Dist. & Co. 446—Commercial Credit Co. v. Shepherd, Com.Pl., 27 Del.Co. 335, 51 York Leg.Rec. 202—Landis v. Lancaster County Nat. Bank, Com.Pl., 48 Lanc.L.Rev. 297.
34 C.J. p 166 note 21.

Not "default" judgment
Judgment for want of sufficient affidavit of defense is not "judgment by default."—Brader v. Alinikoff, 85 Pa.Super. 285.

Who must file
(1) An affidavit of defense cannot be filed by one not a party to the proceeding so as to prevent the taking of judgment against a party.—Rhoades v. Decker, 34 Pa.Dist. & Co. 409.

(2) There is no rule requiring a terre tenant to file an affidavit of defense.—Clippinger Estate, Now to Use of Ward v. Saltzgiver, 38 Pa. Dist. & Co. 27, 48 Dauph.Co. 320—Salberg v. Duffee, 31 Pa.Dist. & Co. 144.

Clerical error
Where the affidavit has been duly filed, judgment for want of affidavit of defense is improperly entered, although the prothonotary failed to note the fact of filing on the appearance docket.—Moore v. Monarch Accident Ins. Co., 17 Pa.Dist. & Co. 553, 30 Sch.Leg.Rec. 272.

38. Pa.—Jones v. Patterson, 8 A. 62, 5 Pa.Cas. 19.
34 C.J. p 167 note 22.

39. Pa.—Byrne v. Hayden, 16 A. 750, 124 Pa. 170.
34 C.J. p 167 note 23.

40. Pa.—First Nat. Bank v. Baird, 150 A. 165, 300 Pa. 92.
34 C.J. p 167 note 24.

41. Pa.—Mink v. Shaffer, 16 A. 805, 124 Pa. 280.
34 C.J. p 167 note 25.

42. Pa.—Fenn v. Early, 6 A. 58, 113 Pa. 264.
34 C.J. p 26 note 167.

43. Pa.—Osborn v. Athens First Nat. Bank, 26 A. 289, 154 Pa. 134—Auberle v. Ciliberto, Com.Pl., 31 Del.Co. 32.
34 C.J. p 167 note 27.

44. Pa.—McSorley v. Mamaux, 28 Pa.Dist. 1010—Lewis v. Quigney, 1 Lehigh Val.L.R. 188.

45. Pa.—Hitchcock v. Washburn, 9 Pa.Dist. 272.

46. Pa.—Gregg v. Meeker, 4 Binn. 428.

47. Pa.—Law v. Waldron, 79 A. 647, 230 Pa. 458, Ann.Cas.1912A 467.
34 C.J. p 167 note 31.

48. Pa.—Reilly v. Daly, 28 A. 493, 159 Pa. 605—Myers v. Cochran, 3 Pa.Dist. 135.

49. Pa.—Marsh v. Smith, 2 Pa.L.J. R. 217, 3 Pa.L.J. 489.

50. Pa.—Bradbury v. Wagenhorst, 54 Pa. 180.
34 C.J. p 167 note 36.

51. N.Y.—Bellinger v. Gallo, 224 N.Y.S. 162, 221 App.Div. 482.

52. Ga.—Jordan v. Carter, 60 Ga. 443.

53. Me.—Estabrook v. Ford Motor Co., 10 A.2d 715, 136 Me. 367, followed in 10 A.2d 719, 136 Me. 375—Jordan v. McKay, 165 A. 902, 132 Me. 55.

54. Neb.—McPherson v. Beatrice

the action[55] is overruled, or after his demurrer to plaintiff's declaration or complaint is overruled,[56] provided, in some jurisdictions, there has been a rule or order granting him leave to plead over.[57] However, until the expiration of the statutory period within which to answer, defendant cannot be put in default after the overruling of his demurrer[58] or plea[59] or denial of his motion;[60] and, where the statutes give defendant a number of days after notice of the decision in which to answer, he cannot be put in default in the absence of such notice,[61] unless he has waived it.[62]

Failure to answer an amended petition after the overruling of a demurrer thereto authorizes a judgment by default, although the answer to the original petition is on file;[63] but, where the demurrer is filed after a plea, default cannot be entered after overruling the demurrer, as the demurrer does not waive the plea.[64] Where defendant's plea of privilege is sustained and the cause is transferred and defendant files no further pleading, judgment nil dicit is authorized.[65] Where defendant's motion to strike out parts of the complaint is sustained and defendant pleads no further, plaintiff may take judgment by default if sufficient matter is left in the complaint to warrant the relief granted.[66]

Where demurrer by plaintiff sustained. Judgment by default may also be taken against defendant where plaintiff demurs to the plea or answer, and the demurrer is sustained, and defendant fails to avail himself of leave given to amend or to file a new plea or answer,[67] or fails to ask leave to amend or plead over;[68] but default judgment cannot properly be entered against defendant where plaintiff's demurrer is sustained only as to part of the answer.[69]

First Nat. Bank, 10 N.W. 707, 12 Neb. 202.

55. Iowa.—State ex rel. Adams v. Murray, 257 N.W. 553, 219 Iowa 108.

Submission of order

Failure to submit order, as required in decision denying motion to dismiss complaint, rendered subsequent default judgments against defendants irregular.—Voperian v. Industrial Rediscount Corporation, 231 N.Y.S. 676, 133 Misc. 512.

56. Cal.—Seale v. McLaughlin, 28 Cal. 668.
Ill.—Ferry v. National Motor Underwriters, 244 Ill.App. 241—Sheehan v. Reardon, 223 Ill.App. 365.
Kan.—State v. Swift & Co., 275 P. 176, 127 Kan. 817, 65 A.L.R. 696.
Mo.—Daugherty v. Lanning-Harris Coal & Grain Co., 265 S.W. 866, 218 Mo.App. 187.
Neb.—Hoesly v. Department of Roads and Irrigation, 9 N.W.2d 523, 143 Neb. 387.
34 C.J. p 167 note 40.

Erroneous decision on demurrer

Where trial court had erroneously overruled demurrer to complaint wherein four causes of action were improperly united, and defendant stood on its demurrer and did not answer complaint within time allowed or make any appearance thereafter, a default judgment could not properly be entered without affording defendant opportunity to answer complaint after correction thereof to include only causes of action properly unitable.—Hartford Min. Co. v. Home Lumber & Coal Co., 114 P.2d 1091, 61 Nev. 1.

The interposition of a defective answer to which a demurrer was sustained is a failure to plead over within the meaning of the statute providing that the judgment on overruling a demurrer shall be that the party plead over and, if he fails so to do, judgment shall be rendered against him as on a default.—McKinney v. State, 101 Ind. 355.

57. Okl.—Thwing v. Doye, 44 P. 331, 2 Okl. 608.
Utah.—Provo City v. Claudin, 63 P. 2d 570, 91 Utah 60.
34 C.J. p 168 note 41.

58. Cal.—Harris v. Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396.
N.C.—Rayburn v. Rayburn, 11 S.E.2d 463, 218 N.C. 514.
Utah.—Provo City v. Claudin, 63 P. 2d 570, 91 Utah 60.

59. R.I.—Dukehart v. Fales, 143 A. 615, 49 R.I. 407.

60. N.Y.—Levin v. Levin, 284 N.Y.S. 897, 157 Misc. 372.

61. Cal.—Chamberlin v. Del Norte County, 19 P. 271, 77 Cal. 150—Harris v. Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396.

Presence in courtroom

Default judgment for failure to amend pleading within period granted by court on sustaining demurrer thereto would not be reversed for lack of notice where counsel was in courtroom at time leave to amend was given, since court, which had power to refuse plea to amend, had lesser power to permit amendment without notice under circumstances.—Provo City v. Claudin, 63 P.2d 570, 91 Utah 60.

62. Cal.—Harris v. Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396.
34 C.J. p 168 note 43.

63. Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.
Iowa.—Brenner v. Gundershiemer, 14 Iowa 82.
Mo.—Leis v. Massachusetts Bonding & Insurance Co., App., 125 S.W.2d 906.

64. Ill.—Marshall v. Duke, 4 Ill. 67.

65. Tex.—Spivey v. Saner-Ragley Lumber Co., Com.App., 284 S.W. 210—O'Quinn v. Tate, Civ.App., 187 S.W.2d 241.

66. Utah.—Taylor v. Guaranty Mortg. Co., 220 P. 1067, 62 Utah 520.

67. Cal.—Gossman v. Gossman, App., 168 P.2d 495.
Fla.—Silva v. Robinson, 156 So. 280, 115 Fla. 830.
Ill.—Ferry v. National Motor Underwriters, 244 Ill.App. 241.
Or.—Wiggins Co. v. Fleming, 263 P. 390, 123 Or. 644.
Tex.—O'Quinn v. Tate, Civ.App., 187 S.W.2d 241.
Utah.—Provo City v. Claudin, 63 P. 2d 570, 91 Utah 60—First Sav. Bank of Ogden v. Brown, 54 P.2d 237, 88 Utah 294.
34 C.J. p 168 note 46.

Where no leave to plead over is requested or given after a demurrer to defendant's plea is sustained, final judgment on the demurrer, rather than default judgment for want of a plea, should be entered.—Hays v. Weeks, 48 So. 997, 57 Fla. 73—Porter v. Parslow, 21 So. 574, 39 Fla. 50—Pettys v. Marsh, 3 So. 577, 24 Fla. 44—L'Engle v. L'Engle, 19 Fla. 714—Wade v. Doyle, 17 Fla. 522—Garlington v. Priest, 13 Fla. 559.

68. Ohio.—Gockel v. Averment, 7 Ohio Dec., Reprint, 554, 8 Cinc.L. Bul. 894.
Tex.—Hamilton v. Black, Dall. 586.

69. Cal.—Herrmann v. Riesenberg, 34 P.2d 163, 139 Cal.App. 249.
Mont.—Taylor v. Southwick, 253 P. 889, 78 Mont. 329.

Against plaintiff. Judgment as by default may be taken against plaintiff where he fails or refuses to plead over after the overruling of his demurrer to the answer, which contains a sufficient defense,[70] or a plea of set-off or recoupment,[71] or after a demurrer to the complaint is sustained.[72]

g. Failure to Reply or Rejoin

Where defendant's answer is such as to require plaintiff to reply, his failure to do so within the required time, or to demur, will ordinarily warrant a judgment by default against him.

Judgment by default may be entered against plaintiff where, on it becoming his duty to make replication to defendant's plea or answer, he fails to do so within the time required by law,[73] or fails to demur thereto,[74] as where, in some jurisdictions, he fails to reply to an answer of set-off or counterclaim,[75] or fails to answer defendant's cross complaint.[76] However, this rule does not apply to a failure to reply to a pleading by defendant which is in effect nothing more than an affirmative traverse or denial of the allegations of the petition;[77] nor does the rule apply to a failure to reply to a cross complaint which is a repetition of the answer and presents no new issues.[78]

Default judgment cannot be taken against plaintiff for failure to reply to a counterclaim where the allegations of the complaint controvert the counterclaim,[79] or where, as under some statutes, a counterclaim is deemed controverted in the absence of a reply.[80] In any event, defendant has been held not entitled to judgment until plaintiff has had a reasonable opportunity to reply,[81] or until an issue raised by the complaint and as much of the answer as constitutes a defense thereto have been disposed of,[82] or, in some jurisdictions, until he has first asked for a rule against plaintiff.[83] Clearly, where plaintiff fails to reply to a verified answer setting forth facts sufficient to defeat the right of action, a valid default judgment cannot be rendered in favor of plaintiff.[84]

Failure to rejoin. Where defendant fails to rejoin to a replication when it is his duty to do so, a judgment by default may be taken against him.[85]

70. Ala.—Sternberg v. Bonfeld, 99 So. 659, 19 Ala.App. 594.
34 C.J. p 168 note 48.

71. Ala.—Sternberg v. Bonfeld, 99 So. 659, 19 Ala.App. 594.

72. Ind.—Glendenning v. Cowan, 109 N.E. 844, 59 Ind.App. 529.

73. Ala.—Sternberg v. Bonfeld, 99 So. 659, 19 Ala.App. 594.
Miss.—Norwood v. Gulf & S. I. R. Co., 155 So. 348, 170 Miss. 543.
Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604—Middle States Oil Corporation v. Tanner-Jones Drilling Co., 235 P. 770, 73 Mont. 180.
Okl.—Le Roi Co. v. Grimes, 144 P.2d 973, 193 Okl. 430.
Pa.—Quigley v. Western & Southern Life Ins. Co., 86 Pittsb.Leg.J. 400, affirmed 7 A.2d 70, 136 Pa.Super. 27—Nerz v. Equitable Life Assur. Soc., Com.Pl., 4 Sch.Reg. 424.
34 C.J. p 168 note 51.

On a cross petition, although no summons may be required to be served on plaintiff, he is entitled to the same time to plead to the cross petition as though defendant filing the cross petition was plaintiff and plaintiff was sole defendant, and in such case a default and judgment on the cross petition, before the time to plead has expired, are erroneous.—Farmers' Mut. Ins. Co. of Nebraska v. Gumaer, 192 N.W. 941, 109 Neb. 832.

Non pros

(1) If plaintiff fails to reply at common law, rule will issue compelling him to reply or suffer judgment non pros.—State ex rel. Shartel v. Skinker, 25 S.W.2d 472, 324 Mo. 955.

(2) It has been held that, where plaintiff fails to reply to a defense set up in the answer, final judgment by default as on the merits cannot be taken against him, defendant being entitled only to judgment non pros or judgment of nonsuit.—Ross v. C. D. Mallory Corporation, 37 A.2d 766, 132 N.J.Law 1.

74. Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604—Middle States Oil Corporation v. Tanner-Jones Drilling Co., 235 P. 770, 73 Mont. 180.
34 C.J. p 168 note 52.

75. Mo.—Dezino v. William S. Drozda Realty Co., App., 13 S.W.2d 659.
Mont.—Middle States Oil Corporation v. Tanner-Jones Drilling Co., 235 P. 770, 73 Mont. 180.
34 C.J. p 168 note 53.
"A plaintiff occupies the same relation to a plea of set-off or recoupment as a defendant does to the complaint. The plaintiff as to these pleas is the defendant and when he appears or is in court, and fails to plead, is subject to the same judgments."—Sternberg v. Bonfeld, 99 So. 659, 660, 19 Ala.App. 594.

76. Cal.—Antonsen v. San Francisco Container Co., 66 P.2d 716, 20 Cal.App.2d 214—Ratliff v. Ratliff, 2 P.2d 222, 116 Cal.App. 39.
Wash.—Graham v. Yakima Stock Brokers, 72 P.2d 1041, 192 Wash. 121.

77. Ky.—Coombs Land Co. v. Lanier, 300 S.W. 328, 222 Ky. 139—Higdon v. Wayne County, 157 S.W. 708, 154 Ky. 637.

Insufficiency of complaint

If complaint did not state cause of action, judgment for defendant for failure to reply must be affirmed, although reply was unnecessary.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.

78. Cal.—Crofton v. Young, 119 P.2d 1003, 48 Cal.App.2d 452—Brooks v. White, 136 P. 500, 22 Cal.App. 719.

79. N.C.—Simon v. Masters, 135 S.E. 861, 192 N.C. 731—Tillinghast Styles Co. v. Providence Cotton Mills, 55 S.E. 621, 143 N.C. 268.

80. U.S.—Liebling v. Barbara Building & Development Corporation, D.C.Fla., 52 F.2d 183.
Cal.—Pickwick Stages, Northern Division, v. Board of Trustees of City of El Paso de Robles, 208 P. 961, 189 Cal. 417.
34 C.J. p 168 note 56.

81. Mont.—State v. Silver Bow County Second Judicial Dist. Ct., 113 P. 472, 42 Mont. 496, Ann.Cas. 1912B 246.
34 C.J. p 168 note 57.

82. N.Y.—Crompton v. Seaich, 128 N.Y.S. 586, 143 App.Div. 284.

83. Ind.—Buchanan v. Berkshire Life Ins. Co., 96 Ind. 510.
Mo.—State ex rel. Shartel v. Skinker, 25 S.W.2d 472, 324 Mo. 955.

84. Okl.—Bankston v. Automobile Sales Co., 251 P. 33, 122 Okl. 67.

85. Mo.—Dempsey v. Harrison, 4 Mo. 267.
34 C.J. p 169 note 61.

h. Striking or Withdrawal of Pleading

Judgment by default or nil dicit ordinarily may be entered where defendant withdraws his pleading or does not offer or obtain leave to plead further after his pleading is stricken for good cause.

Judgment as by default or nil dicit may be entered where defendant withdraws his plea or answer,[86] or where he is granted permission to withdraw a plea on the express or implied condition that he will replead forthwith and he fails to do so.[87] So, too, judgment by default may be taken against defendant where he does not offer or obtain leave to plead further on his plea, answer, or affidavit being properly stricken out for good cause,[88] or where, having obtained such leave, he fails to file an amended pleading.[89] However, this rule does not apply where issue has been joined on the plea or answer,[90] especially after a trial is had and witnesses are sworn and examined;[91] or where the plea or answer is sufficient and no good reason for striking it out appears;[92] or where part of the answer is stricken out, but enough remains to constitute a substantial defense.[93] Where defendant's pleading is valid on its face and not wholly frivolous or without merit, it is error to dispose of it summarily by considering it ex parte and striking it from the files, and then to adjudge defendant in default.[94]

Waiver. Defendant's conduct may be such that he will be deemed to have waived, abandoned, or withdrawn his pleas,[95] and in such case he will be held impliedly to have authorized the entry of a judgment by default, notwithstanding the pleading on file.[96]

i. Pending Disposition of Pleading

(1) In general
(2) Pending decision on demurrer
(3) Pending decision on motion

(1) In General

A default judgment cannct be entered against defendant while there remains undisposed of an answer or other pleading raising an issue of law or fact.

86. Ill.—Sheehan v. Reardon, 223 Ill.App. 365.
Mo.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630.
Tex.—Grand Lodge Brotherhood of Railroad Trainmen v. Ware, Civ. App., 73 S.W.2d 1076—Williams v. Jameson, Civ.App., 44 S.W.2d 498, error dismissed Jameson v. Williams, Com.App., 67 S.W.2d 228.

On cross action by defendant, judgment nil dicit may be taken against plaintiff who withdraws his answer to the cross action.—Howe v. Central State Bank of Coleman, Tex. Civ.App., 297 S.W. 692.

Withdrawal of counsel does not result in the withdrawal of defendant's answer so as to put defendant in default.
Ill.—Harris v. Juenger, 11 N.E.2d 376, 367 Ill. 478.
La.—Washington v. Comeau, McGloin 234.

87. Ind.T.—Campbell v. Scott, 58 S. W. 719, 3 Ind.T. 462.
34 C.J. p 169 note 63.

Unauthorized withdrawal of answer by attorney who no longer represents defendant in the case does not warrant default judgment against defendant.—Emerson-Brantingham Implement Co. v. Olson, 227 N.W. 567, 56 S.D. 132.

88. Fla.—Grand Lodge, K. P. of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Florida v. Stroud, 144 So. 324, 107 Fla. 152.
Ga.—Hayes v. International Harvester Co. of America, 183 S.E. 197, 52 Ga.App. 328—Jones v. North American Life Ins. Co. of Chicago, 168 S.E. 923, 46 Ga.App. 647—Waters v. American Machinery Co., 163 S.E. 304, 45 Ga.App. 64—Pape v. Woolford Realty Co., 134 S.E. 174, 35 Ga.App. 284.
Minn.—Neefus v. Neefus, 296 N.W. 579, 209 Minn. 495.
Or.—Mack v. Hendricks, 270 P. 476, 126 Or. 400.
Tex.—Aviation Credit Corporation of New York v. University Aerial Service Corporation, Civ.App., 59 S.W.2d 870, error dismissed—Kentucky Oil Corporation v. David, Civ.App., 276 S.W. 351, affirmed, Com.App., 285 S.W. 290—Luse v. Curry, Civ.App., 261 S.W. 195.
34 C.J. p 169 note 64.

After striking affidavit of merits

(1) Where an affidavit of merits is stricken for insufficiency, plaintiff is entitled to judgment as by default, it being unnecessary, although not improper, to strike the plea as well.—Firestone Tire, etc., Co. v. Ginsburg, 120 N.E. 544, 285 Ill. 132—Resnick v. Varouxakis, 48 N.E.2d 555, 319 Ill.App. 51—James J. Brown Plastering Co. v. Gottschalk, 261 Ill. App. 147—Bannat v. Zulley, 243 Ill. App. 497.

(2) However, it has been held that the striking of an affidavit of merits does not carry with it the plea, and the filing thereafter of an additional affidavit under leave of court will prevent plaintiff from taking judgment by default.—Hunter v. Troup, 226 Ill.App. 343.

(3) After striking out the plea for failure to file an affidavit of merits, judgment by default may be entered without any rule on defendant to file an affidavit and without notice to him of the striking of the plea.—Stevens-Jarvis Lumber Co. v. Quixley Lumber Co., 229 Ill.App. 419.

89. Ala.—Green v. Nu Grape Co., 100 So. 84, 19 Ala.App. 663.
Minn.—Silberman v. Niles, 214 N.W. 261, 171 Minn. 405.
34 C.J. p 169 note 65.

90. Ill.—Cooper v. Buckingham, 4 Ill. 546.

91. Cal.—Abbott v. Douglass, 28 Cal. 295.

92. Or.—Klein v. Turner, 133 P. 625, 66 Or. 369.
34 C.J. p 169 note 68.

93. Mo.—Taylor v. Pearson, 1 Mo. App. 39.

94. Fla.—Suwanee River Cypress Co. v. Arbuthnot, 167 So. 412, 123 Fla. 497.

95. Ala.—Wooten v. Traders' Securities Co., 113 So. 492, second case, 216 Ala. 149.
La.—Electrical Supply Co. v. Moses, 3 La.App. 286.

96. Tex.—London Assur. Corp. v. Lee, 18 S.W. 508, 66 Tex. 247.
34 C.J. p 169 note 70.

Nil dicit

Defendant, who withdrew from case when it was regularly called for trial after its motion to withdraw its answer and appearance was overruled and remained in courtroom during trial without objecting to proceedings or to judgment rendered against it, waived issues raised by answer as though instrument had been withdrawn from record, so that judgment rendered was judgment nil dicit.—Grand Lodge Brotherhood of Railroad Trainmen v. Ware, Tex.Civ. App., 73 S.W.2d 1076, error dismissed.

A judgment by default or nil dicit cannot be entered against defendant while an answer or other pleading by him, raising an issue of law or fact, is properly on file in the case and not disposed of;[97] before a default judgment may be properly entered, the answer or other plea must be disposed of by motion, demurrer, or in some other manner.[98] This rule applies, even though defendant's pleading is filed out of time,[99] or is defective in form or in substance,[1] unless it is such that it may be treated as a mere nullity,[2] and even though defendant does not answer on being called.[3] The foregoing rule is applicable where there is on file and undisposed of a plea in abatement;[4] or where the parties have agreed to consider a plea as filed and an issue joined.[5]

Distinction between negative and affirmative pleas. A distinction has been drawn between negative and affirmative pleas, and, while the general rule is held applicable to a negative plea filed by defendant and issue joined thereon,[6] if defendant pleads affirmatively, so that he bears the burden of proof and afterward fails to appear and defend his plea, judgment by default may be rendered, although the plea has not first been disposed of,[7] except where defendant files a plea under oath denying the execution of the instrument on which the suit is based.[8]

97. Ariz.—**Corpus Juris quoted in** Turbeville v. McCarrell, 80 P.2d 496, 498, 43 Ariz. 236.
Ark.—Caine v. Lunon, 190 S.W.2d 521—North Arkansas Highway Improvement Dist. No. 2 v. Home Telephone Co., 3 S.W.2d 307, 176 Ark. 553.
Cal.—Potts v. Whitson, 125 P.2d 947, 52 Cal.App.2d 199.
Fla.—Atlanta Life Ins. Co. v. Hopps, 183 So. 15, 133 Fla. 300.
Ga.—Prudential Ins. Co. of America v. Hattaway, 174 S.E. 736, 49 Ga. App. 211.
Idaho.—In re Smith, 225 P. 495, 38 Idaho 746.
Ill.—Harris v. Juenger, 11 N.E.2d 929, 367 Ill. 478.
Ind.—Indiana State Board of Medical Registration and Examination v. Pickard, 177 N.E. 870, 93 Ind.App. 171.
Iowa.—Cutino Co. v. Weeks, 213 N. W. 413, 203 Iowa 581.
La.—Ponchatoula Farm Bureau Ass'n v. Tangipahoa Bank & Trust Co., 160 So. 803, 181 La. 1039.
Miss.—Randall v. Gunter, 179 So. 362, 181 Miss. 332—**Corpus Juris cited in** Dalton v. Rhodes Motor Co., 120 So. 821, 822, 153 Miss. 51.
Mo.—Keltner v. Threlkel, 291 S.W. 462, 316 Mo. 609—Meyerhardt v. Fredman, App., 131 S.W.2d 916.
Mont.—**Corpus Juris cited in** Aronow v. Bishop, 120 P.2d 423, 424, 112 Mont. 611.
Nev.—Price v. Brimacombe, 72 P.2d 1107, 58 Nev. 156, rehearing denied 75 P.2d 734, 58 Nev. 156.
N.M.—Animas Consol. Mines Co. v. Frazier, 69 P.2d 927, 41 N.M. 389.
Ohio.—**Corpus Juris cited in** McCabe v. Tom, 171 N.E. 868, 869, 35 Ohio App. 73.
Okl.—**Corpus Juris quoted in** Rice v. Bontjes, 250 P. 89, 121 Okl. 292.
Pa.—Moore v. Monarch Accident Ins. Co., 17 Pa.Dist. & Co. 553, 30 Sch. Leg.Rec. 272.
R.I.—Woodworth v. Baker, 135 A. 606, 48 R.I. 99.
S.C.—Nettles v. MacMillan Petroleum Corp., 37 S.E.2d 134.
Tex.—Buhrman-Pharr Hardware Co. v. Medford Bros., Civ.App., 118 S. W.2d 345, error refused—Sun Lumber Co. v. Huttig Sash & Door Co., Civ.App., 36 S.W.2d 561—Ball v. Nelms, Civ.App., 293 S.W. 336.
34 C.J. p 169 note 71.

Judgment not void, although erroneous.—McIntosh v. Munson Road Machinery Co., 145 So. 781, 167 Miss. 546.

Codefendant's answer
Defenses in answer filed by one defendant which would preclude recovery by plaintiff inured to benefit of codefendant filing no answer, and no judgment could be filed against either defendant until issues raised had been disposed of.—Beddow's Adm'r v. Barbourville Water, Ice & Light Co., 66 S.W.2d 821, 252 Ky. 267.

98. Ariz.—**Corpus Juris quoted in** Turbeville v. McCarrell, 80 P.2d 496, 498, 43 Ariz. 236.
Ill.—Harris v. Juenger, 11 N.E.2d 929, 367 Ill. 478.
Iowa.—Cutino Co. v. Weeks, 213 N. W. 413, 203 Iowa 581.
Miss.—Randall v. Gunter, 179 So. 362, 181 Miss. 332.
Ohio.—McCabe v. Tom, 171 N.E. 868, 35 Ohio App. 73.
Tex.—Sun Lumber Co. v. Huttig Sash & Door Co., Civ.App., 36 S. W.2d 561.
34 C.J. p 170 note 72.

Where defendant stands on his answer after a demurrer thereto has been erroneously sustained, it is error to enter default judgment against him.—Gossman v. Gossman, Cal.App., 168 P.2d 495.

99. Ariz.—**Corpus Juris quoted in** Turbeville v. McCarrell, 80 P.2d 496, 498, 43 Ariz. 236.
Miss.—**Corpus Juris cited in** Dalton v. Rhodes Motor Co., 120 So. 821, 822, 153 Miss. 51.
Ohio.—**Corpus Juris cited in** McCabe v. Tom, 171 N.E. 868, 869, 35 Ohio App. 73.
Okl.—**Corpus Juris quoted in** Rice v. Bontjes, 250 P. 89, 121 Okl. 292.
34 C.J. p 170 note 73.

1. Iowa.—Cutino Co. v. Weeks, 213 N.W. 413, 203 Iowa 581.
Miss.—**Corpus Juris cited in** Dalton v. Rhodes Motor Co., 120 So. 821, 822, 153 Miss. 51.
34 C.J. p 170 note 74.

Letter written by garnishee defendant to clerk of court denying indebtedness commanded notice by plaintiff at least to extent of moving that it be stricken from files before entry of default judgment.—Wiener v. Valley Steel Co., 236 N.W. 905, 254 Mich. 681.

2. Miss.—**Corpus Juris cited in** Dalton v. Rhodes Motor Co., 120 So. 821, 822, 153 Miss. 51.
Okl.—**Corpus Juris quoted in** Rice v. Bontjes, 250 P. 89, 121 Okl. 292.
34 C.J. p 170 note 75.

3. Mont.—Aronow v. Bishop, 120 P. 2d 423, 112 Mont. 611.
34 C.J. p 170 note 76.

4. Ill.—Charles H. Thompson Co. v. Burns, 199 Ill.App. 418.
34 C.J. p 170 note 79.

Plea ostensibly overruled
Plea in abatement, treated as still pending, and argued and taken under advisement after it had been ostensibly overruled, prevented default until ruled on by court.—Burbage v. Jedlicka, 234 P. 32, 27 Ariz. 426.

5. Miss.—McEwin v. State, 11 Miss. 120.

6. Ala.—Lokey v. Ward, 154 So. 802, 228 Ala. 559—Wildsmith v. Graves, 96 So. 230, 209 Ala. 294.
Ky.—Milner v. Miller, 4 Bibb 341.

7. Ala.—Lokey v. Ward, 154 So. 802, 228 Ala. 559.
34 C.J. p 170 note 82.

8. Ala.—McCoy v. Harrell, 40 Ala. 232—Crow v. Decatur Bank, 5 Ala. 249.

Where defendant properly demands oyer, default cannot be entered by plaintiff for failure of defendant to file a plea until the oyer has been furnished,[9] but defendant must have his prayer entered of record and invoke the judgment of the court as to whether or not he shall plead further until the oyer is granted; otherwise plaintiff may disregard his demand and take a judgment by default.[10] If, on a demand of oyer, the oyer given is different from that set out in the complaint, plaintiff cannot sign judgment by default without a rule or notice after service of a true oyer.[11]

(2) Pending Decision on Demurrer

Judgment by default should not ordinarily be rendered against a party whose demurrer to his adversary's pleading is still pending.

Judgment by default should not be rendered against defendant who has filed a demurrer to the declaration or complaint, where such demurrer remains undetermined and not disposed of in any way,[12] unless defendant has waived or withdrawn his demurrer,[13] or plaintiff has filed an amended or substituted complaint,[14] and the demurrer is not renewed or a new demurrer filed.[15] This rule applies, even though the demurrer was filed out of time without leave or consent,[16] or would not be sustainable,[17] unless it is merely frivolous,[18] or even though it is taken to one only of several counts of the declaration.[19] On the same principle judgment by default cannot be entered against plaintiff for failure to plead, where his demurrer to defendant's plea or answer is not disposed of,[20] or where a demurrer to his pleading is not disposed of.[21]

(3) Pending Decision on Motion

As a general rule, judgment by default cannot be entered while a motion made by defendant remains pending.

Although under some statutes a motion is not such a pleading as to prevent the taking of a default judgment during its pendency,[22] generally, and under most statutes, it has been held that a judgment by default cannot be entered while a motion made by defendant remains pending and not disposed of,[23] unless the motion appears on its face to be frivolous and without merit,[24] or such that it may be treated as a nullity,[25] or is of such a nature

9. N.Y.—Varick v. Bodine, 3 Hill 444.

10. Tenn.—Mabry v. Cowan, 6 Heisk, 295—Anderson v. Allison, 2 Head 122.

11. N.Y.—Clinton v. Porter, 2 Cai. 176, Col. & C.Cas. 388.

12. Ark.—Caine v. Lunon, 190 S.W. 2d 521.
Ill.—Greenys v. Jonalis, 244 Ill.App. 78.
Or.—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213, followed in Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 222.
Philippine.—Simon v. Castro, 6 Philippine 335.
34 C.J. p 171 note 90.

13. Cal.—Davidson v. Graham, 141 P. 834, 24 Cal.App. 692.
Ill.—Steelman v. Watson, 10 Ill. 249.
Demurrer filed through error
If the court's jurisdiction to enter a default is obtained through the service of process, such jurisdiction is not divested by the fact that through error a demurrer has been filed in the name of defendant and is afterward withdrawn by leave of court.—Deutsch Roemisch Katholischer Cent. Verein v. Lartz, 94 Ill. App. 255, affirmed 61 N.E. 487, 192 Ill. 485.

14. Iowa.—Ronayne v. Hawkeye Commercial Men's Ass'n, 144 N.W. 319, 162 Iowa 615.
34 C.J. p 171 note 92.

15. Ga.—General Accident Fire & Life Assur. Corp. v. Way, 92 S.E. 650, 20 Ga.App. 106.

16. Cal.—Cuddahy v. Gragg, 189 P. 721, 45 Cal.App. 578.
Wyo.—Bertagnolli v. Bertagnolli, 148 P. 374, 23 Wyo. 228.

17. Or.—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213, followed in Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 222.
34 C.J. p 171 note 95.

18. N.C.—Clayton v. Jones, 68 N.C. 497.

19. Ill.—Bradshaw v. McKinney, 5 Ill. 54.

20. Ala.—White v. Whatley, 30 So. 738, 128 Ala. 524.
Mo.—Louthan v. Caldwell, 52 Mo. 121.

21. Ala.—Louisville & N. R. Co. v. Walker, 30 So. 738, 128 Ala. 368.
34 C.J. p 171 note 99.

22. Nev.—Price v. Brimacombe, 72 P.2d 1107, 58 Nev. 156, rehearing denied 75 P.2d 734, 58 Nev. 156.

23. Ark.—Caine v. Lunon, 190 S.W. 2d 521.
Fla.—**Corpus Juris cited in** Johnson v. City of Sebring, 140 So. 672, 674, 104 Fla. 584.
La.—Tatum v. Toledo Scale Co., App., 187 So. 835.
Mont.—Paramount Publix Corporation v. Boucher, 19 P.2d 223, 93 Mont. 340—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
N.C.—Heffner v. Jefferson Standard Life Ins. Co., 199 S.E. 293, 214 N.C. 359.
Okl.—Massey-Harris Co. v. Booth, 57 P.2d 826, 177 Okl. 84.
Utah.—Hurd v. Ford, 276 P. 908, 74 Utah 46—Taylor v. Guaranty Mortg. Co., 220 P. 1067, 62 Utah 520—Sanders v. Milford Auto Co., 218 P. 126, 62 Utah 110.
34 C.J. p 171 note 1.
A motion not wholly frivolous and without merit cannot be treated as a nullity by the court, and judgment by default entered against the moving party.—State v. Tedder, 166 So. 590, 123 Fla. 188.
Motion challenging jurisdiction
The statute authorizing a default judgment if defendant fails to answer complaint or to make a motion challenging "jurisdiction" of court in prescribed manner uses quoted word as meaning the power to hear and determine the particular case, which power is called into activity by commencement of action to enforce a claim against defendant or to redress or prevent a wrong.—Mitchell v. McDonald, 136 P.2d 536, 114 Mont. 292.

24. Ark.—Caine v. Lunon, 190 S.W. 2d 521.
Fla.—State v. Tedder, 166 So. 590, 123 Fla. 188—**Corpus Juris cited in** Johnson v. City of Sebring, 140 So. 672, 674, 104 Fla. 584.
Kan.—**Corpus Juris cited in** Rohr v. Jeffery, 278 P. 725, 726, 128 Kan. 541.
Okl.—**Corpus Juris cited in** Rice v. Bontjes, 250 P. 89, 121 Okl. 292.
34 C.J. p 171 note 2.

25. Fla.—Eli Witt Cigar & Tobacco Co. v. Somers, 127 So. 333, 99 Fla. 592.

that a determination of it will not affect plaintiff's right to proceed with the cause.[26] However, the rule does not apply if the motion is not filed within the time to plead,[27] except in jurisdictions where defendant may prevent default by pleading at any time before default is entered;[28] and it clearly does not apply if the motion is filed after the motion for default is served and filed,[29] or if the motion has been abandoned by defendant[30] or the remedy sought by the motion waived.[31]

In applying the rule to particular cases, it has been held that a judgment by default cannot be entered while there remains undisposed of a motion to make the complaint more definite and certain,[32] or to require plaintiff to state his causes of action separately,[33] or for compulsory amendment of the declaration,[34] or for a bill of particulars,[35] or to strike out a pleading[36] or certain allegations thereof,[37] or to quash the summons or the service or return thereof,[38] or to dismiss the cause or complaint,[39] or for a change of venue,[40] for security for costs,[41] for a continuance,[42] or for the removal of the cause to a federal court.[43] On the other hand, it has been held that such a judgment is not prevented by the pendency of a motion to quash the writ,[44] to dismiss the action,[45] to set aside an amended complaint,[46] or for security for costs.[47]

Where the proceedings are stayed until the hearing and determination of a motion, plaintiff may, on decision on the motion, proceed at once to enter judgment by default, without serving notice of the order,[48] unless the order provides for notice.[49]

§ 200. Operation and Effect of Default and Judgment

A judgment by default has, in general, the same force and effect as a judgment rendered after a trial on the merits.

26. La.—Motor Finance Co. v. Lynn, App., 142 So. 310.
Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
Okl.—Rice v. Bonties, 250 P. 89, 121 Okl. 292.
34 C.J. p 171 note 3.

27. Fla.—Register v. Pringle, 50 So. 584, 58 Fla. 355.
Mass.—Dunbar v. Baker, 104 Mass. 211.

28. Fla.—Johnson v. City of Sebring, 140 So. 672, 104 Fla. 584.
Utah.—Sanders v. Milford Auto Co., 218 P. 126, 62 Utah 110.

29. Colo.—McMillen v. Hayman, 221 P. 893, 74 Colo. 300.
Wash.—General Lithographing & Printing Co. v. American Trust Co., 104 P. 608, 55 Wash. 401.

30. N.J.—Koenigsberger v. Mial, 101 A. 184, 90 N.J.Law 695.
N.Y.—Strong v. Smith, 266 N.Y.S. 745, 149 Misc. 80.

31. Okl.—Massey-Harris Co. v. Booth, 57 P.2d 826, 177 Okl. 84.

32. Okl.—St. Louis R. Co. v. Young, 130 P. 911, 35 Okl. 521.
34 C.J. p 172 note 7.

33. Utah.—Felt City Townsite Co. v. Felt Inv. Co., 167 P. 835, 50 Utah 364.

34. Fla.—Johnson v. City of Sebring, 140 So. 672, 104 Fla. 584.

35. N.Y.—Payne v. Smith, 19 Wend. 122.
34 C.J. p 172 note 8.

After bill furnished

Motion for bill of particulars on last day to plead did not prevent default judgment on failure to submit answer or request extension of time when bill was received.—Hurd v. Ford, 276 P. 908, 74 Utah 46.

36. Mont.—Paramount Publix Corporation v. Boucher, 19 P.2d 223, 93 Mont. 340.
34 C.J. p 172 note 10.

37. N.C.—Heffner v. Jefferson Standard Life Ins. Co., 199 S.E. 293, 214 N.C. 359.
Utah.—Sanders v. Milford Auto Co., 218 P. 126, 62 Utah 110.

38. U.S.—Phillips v. Manufacturers Trust Co., C.C.A.Idaho, 101 F.2d 723.
Kan.—Corpus Juris cited in Rohr v. Jeffery, 278 P. 725, 726, 128 Kan. 541.
34 C.J. p 172 note 12.

39. Fla.—Brauer v. Paddock, 139 So. 146, 103 Fla. 1175—Eli Witt Cigar & Tobacco Co. v. Somers, 127 So. 333, 99 Fla. 592.

Error in filing

Judgment by default should not be entered against defendant who within apt time filed motion to dismiss complaint and served notice of its filing on plaintiff, notwithstanding motion to dismiss complaint was filed in office of clerk of court instead of being presented to court.—People, for Use of Heidinger, v. U. S. Fidelity & Guaranty Co., 7 N.E.2d 472, 289 Ill.App. 498.

40. Mo.—Cannon v. Nikles, 151 S. W.2d 472, 235 Mo.App. 1094—Carpenter v. Alton R. Co., App., 148 S.W.2d 68.
34 C.J. p 172 note 11.

41. Mo.—Anspach v. Jansen, 78 S. W.2d 137, 229 Mo.App. 321.
34 C.J. p 172 note 13.

After security deposited

Where nonresident plaintiff deposited security for costs in response to defendant's motion, but did not give defendant notice as required by statute that costs had been furnished, entering default judgment against defendant for failure to serve affidavit of merits was error.—Automobile Banking Corporation v. Birkhead, 36 A.2d 608, 22 N.J.Misc. 135.

Motion in nature of plea

Where defendant filed motion for costs and for injunction against plaintiff's prosecuting suits without paying costs in original matter, the motion was in the nature of a plea in abatement, and the court properly refused to enter default judgment.—Griffin v. Arney, Mo.App., 12 S.W.2d 95.

42. Mass.—Hosmer v. Hoitt, 36 N.E. 835, 161 Mass. 173.
34 C.J. p 172 note 14.

43. Ill.—Mattoon v. Hinkley, 33 Ill. 208.
Kan.—Cooper v. Condon, 15 Kan. 572.

44. N.M.—Elida First Nat. Bank v. George, 189 P. 240, 26 N.M. 46.

45. Cal.—McDonald v. Swett, 18 P. 324, 76 Cal. 257.
Fla.—Dudley v. White, 81 So. 830, 44 Fla. 264.

46. Utah.—Greenfield v. Wallace, 1 Utah 133.

47. Ohio.—Morrison v. Baker, App., 58 N.E.2d 708.
34 C.J. p 172 note 13.

Signing of order

A default judgment for plaintiff was not erroneous because of motion pending at time of its entry to require plaintiff to furnish bond for costs, where defendant failed to have judge sign order fixing amount of bond.—Wilson v. Lagasse, 179 So. 472, 14 La.App. 463.

48. N.Y.—Tuska v. Jarvis, 113 N.Y. S. 767, 61 Misc. 224.

49. N.Y.—Tuska v. Jarvis, supra.

The mere entry of a default is not the equivalent of a judgment,[50] nor is it a final disposition;[51] in legal effect it has been said to be the equivalent of a demurrer.[52] A default does not affect the status, rights, or liability of a codefendant[53] or intervening claimant,[54] or of defendant himself except as to the matters necessarily admitted by the default.[55]

A judgment by default has the same force and effect as a judgment rendered after a trial on the merits,[56] except in so far as it is governed by statutory provisions,[57] and it is not to be discredited because of the manner in which it is taken.[58] It determines plaintiff's right to recover, and defendant's liability,[59] although the amount of recovery remains in some cases to be ascertained.[60] A final judgment cannot be rendered in defendant's favor without first setting aside a default judgment that has been entered against him.[61]

As waiving or curing defects. A judgment by default or nil dicit operates as a waiver or release of any mere formal errors or irregularities in the previous proceedings,[62] such as in plaintiff's pleading;[63] but it does not cure a totally defective declaration or complaint[64] or the entire absence of an allegation of a material fact,[65] nor does it cure or waive radical defects or errors which go to the authority of the court to enter the judgment[66] or to the foundation of plaintiff's cause of action.[67]

50. Ala.—**Corpus Juris cited in** Ex parte Anderson, 4 So.2d 420, 421, 242 Ala. 31.
Cal.—Paduveris v. Paris, 1 P.2d 986, 213 Cal. 169.
Vt.—Sheldon v. Sheldon, 87 Vt. 152.
34 C.J. p 172 note 22.
Preliminary entry of default generally see infra § 206.

Intermediate step
An entry of default is a judgment only in the sense that it adjudges the case in default, and is only an intermediate step authorizing plaintiff to enter verdict and judgment subject to statutory exceptions. —Ryles v. Moore, 18 S.E.2d 672, 191 Ga. 661.

Status as "party"
A defendant who has been merely defaulted is still a "party" to the suit.—Webb v. Willett Co., 33 N.E.2d 636, 309 Ill.App. 504.

Effect of laches
Where default had been entered several months prior to defendant's application to intervene, or to plead to court's jurisdiction, or to traverse allegations of complaint, denial of application was held proper exercise of court's discretion.—Sauve v. Hamilton, 271 P. 630, 84 Colo. 498.

Tacit joinder of issue
Effect of entry of preliminary default is to form tacit joinder of issue on basis of general denial, and it merely serves to put plaintiff on proof of relevant facts alleged.—Whalen v. Davis, 9 So.2d 424, 200 La. 1066—Russo v. Aucoin, La.App., 7 So.2d 744.

51. Conn.—Felton v. Felton, 196 A. 791, 123 Conn. 564.
Mass.—Doodlesack v. Superfine Coal & Ice Corporation, 193 N.E. 773, 292 Mass. 424, 101 A.L.R. 1247—Hooton v. Redmond, 130 N.E. 107, 237 Mass. 508.

52. N.Y.—Redfield v. Critchley, 14 N.E.2d 377, 277 N.Y. 336, reargument denied 15 N.E.2d 73, 278 N.Y. 483.

53. U.S.—Kuhn v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 118 F.2d 400.
Fla.—Merchants' & Mechanics' Bank v. Sample, 125 So. 1, 98 Fla. 759.
Ill.—Chamblin v. Chamblin, 1 N.E. 2d 73, 362 Ill. 588, 104 A.L.R. 1183, certiorari denied 57 S.Ct. 24, 299 U.S. 541, 81 L.Ed. 398.
Mo.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630.
S.C.—J. R. Watkins Co. v. Jaillette, 25 S.E.2d 478, 202 S.C. 429.
Tenn.—Brown v. Wilson, 13 Tenn. App. 255.
Tex.—Buttrill v. Occidental Life Ins. Co., Civ.App., 45 S.W.2d 636.
34 C.J. p 173 note 35.

54. Utah.—Cunnington v. Scott, 11 P. 578, 4 Utah 446.

55. U.S.—Kuhn v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 118 F.2d 400.
S.C.—Gadsden v. Home Fertilizer & Chemical Co., 72 S.E. 15, 89 S.C. 483.

56. Del.—Yeatman v. Ward, Super., 36 A.2d 355.
Kan.—Concordia Building & Loan Ass'n v. Dundas, 42 P.2d 563, 141 Kan. 598.
N.C.—Strickland v. Shearon, 137 S. E. 803, 193 N.C. 599.
Tex.—Ritch v. Jarvis, Civ.App., 64 S.W.2d 831, error dismissed.
Wash.—Puett v. Bernhard, 71 P.2d 406, 191 Wash. 557.
34 C.J. p 172 notes 23, 24.

Bond validation proceeding
Judgment by default permitted by taxpayers in bond validation proceeding has same effect as any other judgment by default rendered by court of competent jurisdiction.—Love v. Yazoo City, 138 So. 600, 162 Miss. 65.

Effect as nonsuit or dismissal
Where court, on failure of plaintiff to appear at time set for trial, heard evidence and submitted issues, judgment for defendant was essentially a judgment of nonsuit or dismissal, and the irregular proceeding did not affect its essential nature as such.—Craver v. Spaugh, 38 S.E.2d 525, 226 N.C. 450.

57. Iowa.—Stanbrough v. Cook, 49 N.W. 1010, 83 Iowa 705.
34 C.J. p 172 note 26.

58. Ind.—Hitt v. Carr, 130 N.E. 1, 77 Ind.App. 488.

59. Or.—Winters v. Falls Lumber Co., 31 P.2d 177, 146 Or. 592.
Tex.—Simmons Co. v. Spruill, Civ. App., 131 S.W.2d 1026.
34 C.J. p 172 note 29.

60. Tex.—Simmons Co. v. Spruill, supra.
34 C.J. p 173 note 31.

61. Tex.—Bateman v. Pool, 19 S.W. 552, 84 Tex. 405.

62. Ala.—Eaton v. Harris, 42 Ala. 491.
34 C.J. p 173 note 38.

63. Ala.—Crawford v. Camfield, 6 Ala. 153—Swope v. Sherman, 60 So. 474, 7 Ala.App. 210.
Tex.—Busby v. Busby, Civ.App., 64 S.W.2d 392.
34 C.J. p 173 note 39.

Intention shown by record
A party permitting judgment nihil dicit impliedly confesses judgment and waives all errors in pleading or proof not fundamental or jurisdictional in character, except those which record shows were not intended to be waived.—O'Quinn v. Tate, Tex.Civ.App., 137 S.W.2d 241—Grand Lodge Brotherhood of Railroad Trainmen v. Ware, Tex.Civ.App., 73 S.W.2d 1076, error dismissed.

64. Mass.—Hemmenway v. Hickes, 4 Pick. 497.
34 C.J. p 173 note 40.

65. Tenn.—Tumley v. Clarksville & M. R. Co., 2 Coldw. 327—Harlan v. Dew, 3 Head 505.
34 C.J. p 173 note 41.

66. Md.—McDonald v. King, 93 A. 979, 125 Md. 589.
34 C.J. p 173 note 42.

67. Ky.—International Harvester Co. of America v. Commonwealth, 185 S.W. 102, 170 Ky. 41, L.R.A. 1918D 1004.
34 C.J. p 173 note 43.

As confession of judgment. A judgment by default has been held to operate as a judgment by confession,[68] especially where it is rendered on the withdrawal of a plea or answer,[69] which, in its effect, is not precisely coextensive with a judgment by express confession.[70]

§ 201. —— Default as Admission

a. In general
b. Allegations in pleadings
c. Amount of claim or damages
d. Other matters

a. In General

A default operates as an admission by the defendant of the truth of the cause of action as set forth in the plaintiff's pleading, but not as an admission that the facts alleged are in law sufficient to constitute a cause of action.

A default or nil dicit operates as an admission by defendant of the truth of the cause of action as set up in the declaration or complaint,[71] or admits liability on the part of defendant,[72] or amounts to an admission of plaintiff's right to recover.[73] However, it has also been held that a default does not admit that the facts alleged are in law sufficient to constitute a good cause of action or to entitle plaintiff to the relief prayed.[74]

Constructive service; nonresidents. Where the service of process on defendant is constructive only, as by publication, his default is not a sufficient admission of the allegations of the complaint to authorize a judgment in accordance therewith;[75] and, as shown infra §§ 211, 213, in order for plaintiff to obtain judgment it is necessary for him to show the proper issuance and service of process on defendant, as well as the facts which entitle him to recover. A default in pleading has been held not an admission of the court's jurisdiction over a nonresident of the county.[76]

b. Allegations in Pleadings

A defendant's default has been held to admit all matters properly pleaded and material to the issues.

It has been broadly held that default by defendant operates as an admission of all matters alleged in plaintiff's pleading;[77] more particularly, a de-

68. Puerto Rico.—Cajigas v. Prats, 5 Puerto Rico 142.
34 C.J. p 173 note 45.
Judgment by confession distinguished from default judgment see supra § 134.

69. Tex.—O'Quinn v. Tate, Civ.App., 187 S.W.2d 241.
34 C.J. p 173 note 46.
Judgment nil dicit generally see supra § 187.

70. Tex.—Grand Lodge Brotherhood of Railroad Trainmen v. Ware, Civ.App., 73 S.W.2d 1076—Spivey v. Saner-Ragley Lumber Co., Civ. App., 284 S.W. 210.
34 C.J. p 173 note 47.

71. Cal.—Heintzsch v. LaFrance, 44 P.2d 358, 3 Cal.2d 180.
Ill.—Wisner v. Catherwood, 225 Ill. App. 471.
Mo.—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930.
Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804.
N.C.—**Corpus Juris cited in** De Hoff v. Black, 175 S.E. 179, 180, 206 N.C. 687—Strickland v. Shearon, 137 S.E. 803, 193 N.C. 599—Mitchell v. Town of Ahoskie, 129 S.E. 626, 190 N.C. 235—Hill v. Huffines Hotel Co., 125 S.E. 266, 188 N.C. 586—Parker v. House, 66 N.C. 374.
Tenn.—Grace v. Curley, 3 Tenn.App. 1.
Tex.—Saner-Ragley Lumber Co. v. Spivey, Civ.App., 255 S.W. 193, modified on other grounds Spivey v. Saner-Ragley Lumber Co., Com. App., 284 S.W. 210.
34 C.J. p 173 note 49.

Breach of penal bond
Under some statutes, where judgment on a penal bond is obtained by default, the court must make an order that the truth of the breaches shall be inquired into at the same or next succeeding term.—Taylor v. Auditor, 4 Ark. 574.

Failure to attach itemized statement
Defendant after default could not complain that petition for enforcement of mechanic's lien had no itemized statement attached.—Dierks & Sons Lumber Co. v. Taylor, Mo. App., 296 S.W. 176.

72. Md.—Smith v. Dolan, 185 A. 453, 170 Md. 654.
Mo.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630.
R.I.—Fudim v. Kane, 136 A. 306, 48 R.I. 155.
Tex.—Spivey v. Saner-Ragley Lumber Co., Com.App., 284 S.W. 210.
34 C.J. p 173 note 49, p 174 note 50.

73. Ark.—Shelton v. Landers, 270 S.W. 522, 167 Ark. 638.
Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.
Mich.—Hanover Fire Ins. Co. of New York v. Furkas, 255 N.W. 381, 267 Mich. 14.
Mo.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630.
34 C.J. p 173 note 49.

74. Conn.—**Corpus Juris cited in** Felton v. Felton, 196 A. 791, 793, 123 Conn. 564.
Ill.—Templeman v. People for Use of Usher, 11 N.E.2d 974, 292 Ill. App. 647—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Pa.—**Corpus Juris cited in** Frankel v. Donehoo, 158 A. 570, 572, 306 Pa. 52, followed in Marvin v. Donehoo, 158 A. 573, 306 Pa. 58.
Tex.—Gamel v. City Nat. Bank of Colorado, Tex., Com.App., 258 S.W. 1043.
34 C.J. p 174 note 53.

75. Ind.—Rochester Security Trust Co. v. Myhan, 114 N.E. 410, 186 Ind. 391, 394.
34 C.J. p 175 note 75.

76. Ga.—Davis-Washington Co. v. Vickers, 155 S.E. 92, 41 Ga.App. 818.

77. U.S.—In re Kimmel, D.C.N.Y., 28 F.Supp. 942.
Ala.—**Corpus Juris cited in** Corpren v. Tallapoosa County, 3 So.2d 53, 241 Ala. 492.
Cal.—Davis v. Davis, 224 P. 478, 65 Cal.App. 499.
Conn.—Felton v. Felton, 196 A. 791, 123 Conn. 564.
Ill.—People v. Rust, 292 Ill. 412—Templeman v. People for Use of Usher, 11 N.E.2d 974, 292 Ill.App. 647—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Ind.—Second Nat. Bank v. Scudder, 6 N.E.2d 955, 212 Ind. 283.
Mich.—Smak v. Gwozdik, 291 N.W. 270, 293 Mich. 185.
Mo.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630—Electrolytic Chlorine Co. v. Wal-

fault has been held to constitute an admission of traversable[78] allegations that are well and properly pleaded and are material to the issues[79] or only such allegations as are necessary to obtain the particular relief sought.[80]

The rules as to admissions resulting from default have been said to obtain even though the allegations are untrue.[81]

c. Amount of Claim or Damages

A default in an action for an unliquidated claim admits the plaintiff's right to recover something, but not the amount; where the amount to which the plaintiff is entitled is fixed or liquidated, or ascertainable by mere calculation, a default admits his right to the sum demanded.

Where the action is in tort or for an unliquidated claim or amount, a default admits plaintiff's right to recover something,[82] at least nominal damages,[83] but does not admit the amount to which he is enti-

lace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930.
Neb.—Danborn v. Danborn, 273 N.W. 502, 132 Neb. 858.
N.D.—Corn Exchange Sav. Bank, Sioux Falls, S. D., v. Northwest Const. Co., 260 N.W. 580, 65 N.D. 577.
Ohio.—Carter Wood Specialty Co. v. Drug & Store Fixtures, App., 50 N.E.2d 188.
Pa.—Irwin Building & Loan Ass'n v. Krizanowski, Com.Pl., 22 West.Co. L.J. 99.
Tenn.—Grace v. Curley, 8 Tenn.App. 1.
Tex.—Gamel v. City Nat. Bank of Colorado, Tex.Com.App., 258 S.W. 1043—Milford v. Culpepper, Civ. App., 40 S.W.2d 163, error refused —Citizens' Bank v. Brandau, Civ. App., 1 S.W.2d 466, error refused.
34 C.J. p 173 note 49.

Allegations not controverted by answer are deemed true, although plaintiff proceeded with evidence as though issue were joined where defendant was in default and not present.—Stein v. Rainey, 286 S.W. 53, 315 Mo. 535.

Default in prior cause carries with it the admission of all facts alleged in that action and that admission may be applied against defendant in a new suit.—Thorne v. McKinley Bros., 56 P.2d 204, 5 Cal.2d 704.

Admissions of codefendant

(1) The default of one defendant, although an admission by him of allegations of petition, does not operate as an admission of such allegations as against contesting codefendant.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630.

(2) Where one defendant is liable for the negligence of his codefendant, default by the latter has been held an admission of the negligence charged and is imputable over to, and binding on, the other.—Holland v. Kodimer, 77 P.2d 843, 11 Cal.2d 40.

78. Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804.
N.Y.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, remittitur amended 171 N.E. 770, 253 N.Y. 533, reargument denied 171 N.E. 781, 253 N.Y. 558—Tremblay v. Lyon, 29 N.Y.S.2d 336, 176 Misc. 906.
Okl.—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247.
34 C.J. p 173 note 49.

79. Ariz.—**Corpus Juris cited in** Postal Ben. Ins. Co. v. Johnson, 165 P.2d 173, 178—Collister v. Inter-State Fidelity Building & Loan Ass'n of Utah, 38 P.2d 626, 44 Ariz. 427, 98 A.L.R. 1020.
Ark.—Shelton v. Landers, 270 S.W. 522, 167 Ark. 638.
Cal.—Strong v. Shatto, 258 P. 71, 201 Cal. 555—In re Wiechers' Estate, 250 P. 397, 199 Cal. 523, certiorari denied Wiechers v. Wiechers, 47 S. Ct. 476, 273 U.S. 762, 71 L.Ed. 879 —Milstein v. Sartain, 133 P.2d 836, 56 Cal.App.2d 924.
Conn.—Went v. Schmidt, 167 A. 721, 117 Conn. 257.
Ga.—**Corpus Juris quoted in** Summerour v. Medlin, 172 S.E. 836, 838, 48 Ga.App. 403.
Ind.—Carson v. Perkins, 29 N.E.2d 543, 217 Ind. 543—Morris v. Pierson & Bro., 168 N.E. 873, 91 Ind. App. 288.
La.—**Corpus Juris cited in** Simon v. Duet, 148 So. 250, 251, 177 La. 337.
Mich.—Smak v. Gwozdik, 291 N.W. 270, 293 Mich. 185.
Mo.—**Corpus Juris quoted in** Dierks & Sons Lumber Co. v. Taylor, App., 296 S.W. 176, 180.
Neb.—Scheumann v. Prudential Ins. Co. of America, 19 N.W.2d 48.
N.M.—Ealy v. McGahen, 21 P.2d 84, 37 N.M. 246.
Or.—Kerschner v. Smith, 256 P. 195, 121 Or. 469.
Pa.—New York Life Ins. Co. v. Sekula, Com.Pl., 9 Sch.Reg. 156.
S.C.—Gadsden v. Home Fertilizer & Chemical Co., 72 S.E. 15, 89 S.C. 483.
Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed—Williamson v. City of Eastland, Civ. App., 65 S.W.2d 774—Aviation Credit Corporation of New York v. University Aerial Service Corporation, Civ.App., 59 S.W.2d 870, error dismissed—Buttrill v. Occidental Life Ins. Co., Civ.App., 45 S.W.2d 636—Missouri State Life Ins. Co. v. Rhyne, Civ.App., 276 S.W. 757, reversed on other grounds in part and affirmed in part, Rhyne v. Missouri State Life Ins. Co., Com.App., 291 S.W. 845.
34 C.J. p 173 note 49, p 175 note 73.
All matters except amount of damages
Tex.—Security Ben. Ass'n v. Tucker, Civ.App., 111 S.W.2d 333, error dismissed.

80. Ky.—Wilson's Adm'r v. Wilson, 156 S.W.2d 832, 288 Ky. 522—Pinson v. Murphy, 295 S.W. 442, 226 Ky. 464.

81. U.S.—Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, D.C. S.C., 278 F. 816, modified on other grounds 282 F. 811, certiorari denied 43 S.Ct. 248, 260 U.S. 749, 67 L.Ed. 494.
Mo.—Evans v. Dockins, App., 40 S.W.2d 508—**Corpus Juris quoted in** Dierks & Sons Lumber Co. v. Taylor, App., 296 S.W. 176, 180.

82. U.S.—Thorpe v. National City Bank of Tampa, C.C.A.Fla., 274 F. 200.
Conn.—New York, N. H. & H. R. Co. v. Hungerford, 52 A. 487, 75 Conn. 76.
Md.—Betz v. P. Welty & Co., 81 A. 382, 116 Md. 190.
Utah.—**Corpus Juris quoted in** Hurd v. Ford, 276 P. 908, 911, 74 Utah 46.
Wash.—**Corpus Juris cited in** Skidmore v. Pacific Creditors, 138 P.2d 664, 667, 18 Wash.2d 157.
34 C.J. p 174 note 53 [a], p 176 note 80—17 C.J. p 1048 notes 55, 56.
In a negligence suit defendant, by default, is deemed to admit some injury to plaintiff; but the amount or extent of damage must be established by evidence.—Smith v. Dolan, 185 A. 453, 170 Md. 654.

83. Conn.—Went v. Schmidt, 167 A. 721, 117 Conn. 257.
N.C.—De Hoff v. Black, 175 S.E. 179, 206 N.C. 687, followed in Akins v. Black, 175 S.E. 181, 206 N.C. 691 —Mitchell v. Town of Ahoskie, 129 S.E. 626, 190 N.C. 235—Acme Mfg. Co. v. McQueen, 127 S.E. 246, 189 N.C. 311—Hill v. Huffines Hotel Co., 125 S.E. 266, 188 N.C. 536.
17 C.J. p 1048 note 56.

tled,[84] and there is no final judgment until the amount is ascertained, as discussed infra § 216.

Fixed or liquidated amount. Where the cause of action is such that plaintiff, if entitled to recover at all, is entitled to recover a fixed or liquidated amount,[85] or where the amount of his damages is ascertainable by mere calculation,[86] defendant's default admits plaintiff's right to recover the sum demanded in the declaration or complaint, and judgment may be entered therefor, without further proof, and without an assessment of damages.

d. Other Matters

The defendant, by defaulting, admits the capacity in which the plaintiff sues, the status or relationship of the defendant as alleged, and the jurisdiction of the court, in addition to other matters.

A default has been held to admit the capacity in which plaintiff sues,[87] that defendant is the person named in the writ and intended to be sued,[88] that he occupies the position or status or fills the relation to others which is alleged in the declaration,[89] and that the court has acquired jurisdiction of his person and of the cause of action.[90] It also admits the due execution and validity of the instrument sued on,[91] that plaintiff's claim or demand is just[92] and legal,[93] and that defendant has no defense to the action.[94]

A default constitutes an admission of the fair inferences and conclusions of fact to be drawn from plaintiff's allegations;[95] but it does not admit

84. U.S.—Thorpe v. National City Bank of Tampa, C.C.A.Fla., 274 F. 200.
Conn.—New York, N. H. & H. R. Co. v. Hungerford, 52 A. 487, 75 Conn. 76.
Ind.—Second Nat. Bank v. Scudder, 6 N.E.2d 955, 212 Ind. 283.
Mich.—Hanover Fire Ins. Co. of New York v. Furkas, 255 N.W. 381, 267 Mich. 14.
Mo.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630.
Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804.
N.Y.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347.
N.C.—Earle v. Earle, 151 S.E. 884, 198 N.C. 411—Mitchell v. Town of Ahoskie, 129 S.E. 626, 190 N.C. 235.
R.I.—Fudim v. Kane, 136 A. 306, 48 R.I. 155.
Tex.—Spivey v. Saner-Ragley Lumber Co., Com.App., 284 S.W. 210—Security Ben. Ass'n v. Tucker, Civ. App., 111 S.W.2d 333, error dismissed.
Utah.—**Corpus Juris quoted in** Hurd v. Ford, 276 P. 908, 911, 74 Utah 46.
Wash.—**Corpus Juris cited in** Skidmore v. Pacific Creditors, 138 P.2d 664, 667, 18 Wash.2d 157.
34 C.J. p 176 note 81—17 C.J. p 1048 notes 55, 56.

Proof required by statute
A default does not admit the amount of damages to which plaintiff is entitled, if the case is one in which the statutes require proof as to damage.—Odom v. Pinkston, Tex. Civ.App., 193 S.W.2d 888, error refused, no reversible error.

Punitive damages alleged in declaration are not considered as admitted upon default.—Florida East Coast Ry. Co. v. McRoberts, 149 So. 631, 111 Fla. 278, 94 A.L.R. 376.

85. Conn.—New York, N. H. & H. R. Co. v. Hungerford, 52 A. 487, 75 Conn. 76.
Utah.—**Corpus Juris quoted in** Hurd v. Ford, 276 P. 908, 911, 74 Utah 46.
Wash.—**Corpus Juris cited in** Skidmore v. Pacific Creditors, 138 P. 2d 664, 667, 18 Wash.2d 157.
34 C.J. p 176 note 85.

Amount of life insurance policy
Action to recover amount of life insurance policy held action for liquidated sum.—Metropolitan Life Ins. Co. v. Scarboro, 156 S.E. 726, 42 Ga.App. 423.

86. Utah.—**Corpus Juris quoted in** Hurd v. Ford, 276 P. 908, 911, 74 Utah 46.
Wash.—**Corpus Juris cited in** Skidmore v. Pacific Creditors, 138 P. 2d 664, 667, 18 Wash.2d 157.
34 C.J. p 176 note 86.

87. Conn.—Fresenius v. Levy, 108 A. 540, 94 Conn. 244.
34 C.J. p 175 note 61.

88. Utah.—Utah Credit Men's Assoc. v. Bowman, 113 P. 63, 38 Utah 326, Ann.Cas.1913B 334.
34 C.J. p 175 note 62.

89. Minn.—Ueland v. Johnson, 80 N. W. 700, 77 Minn. 543, 77 Am.S.R. 698.
34 C.J. p 175 note 63.

Partners
The existence of a partnership between two or more defendants sued as such is admitted by a default.—Colorado River Syndicate Subscribers v. Alexander, Tex.Civ.App., 288 S.W. 586—34 C.J. p 175 note 63 [c].

90. Md.—Betz v. Welty, 81 A. 382, 116 Md. 190.
34 C.J. p 175 note 64.

91. Conn.—Fresenius v. Levy, 108 A. 540, 94 Conn. 244.
34 C.J. p 175 note 65.

Assumption of mortgage debt and agreement to pay the amount thereof is admitted on entry of default, where the allegations clearly set forth those facts.—Citizens' Nat. Trust & Savings Bank of Los Angeles v. Holton, 290 P. 447, 210 Cal. 44.

92. Ill.—Roe v. Cook County, 193 N. E. 472, 358 Ill. 568—Buck v. Citizens' Coal Min. Co., 98 N.E. 228, 254 Ill. 198.
La.—Segal v. Helis, App., 168 So. 864, amended on other grounds 170 So. 276, modified on other grounds Siegel v. Helis, 172 So. 768, 186 La. 506—Victory Oil Co. v. Von Schlemmer, 7 La.App. 289.

93. U.S.—Cromwell v. Sac County, Iowa, 94 U.S. 351, 24 L.Ed. 195—In re Van Buren, D.C.N.Y., 2 F. 643.

Ownership of title
In action in nature of ejectment, wherein default judgment was entered for plaintiff, plaintiff was not required to exhibit chain of title from some grantor in possession or the United States government, since under statute the default judgment was an admission of title in plaintiff, and proof thereof was unnecessary.—Coffee v. Keeton, Ala., 26 So. 2d 80.

94. Ill.—Roe v. Cook County, 193 N. E. 472, 358 Ill. 568.
34 C.J. p 175 note 68.

Breach of contract on the part of plaintiff cannot be shown by a defendant who has defaulted, as the default forecloses his rights in this respect.—Gary v. Central of Georgia Ry. Co., 160 S.E. 716, 44 Ga.App. 120.

95. Cal.—Davis v. Davis, 224 P. 478, 65 Cal.App. 499.
Mo.—**Corpus Juris quoted in** Dierks & Sons Lumber Co. v. Taylor, App., 296 S.W. 176, 180.
Tenn.—Gace v. Curley, 3 Tenn.App. 1.
34 C.J. p 174 note 52.

In foreclosure or kindred proceeding, default by defendant who is called on to disclose supposed but unknown interest in the subject of action admits that such interest is

forced inferences[96] or matters or conclusions of law,[97] nor does it admit allegations of facts extrinsic to plaintiff's cause of action[98] or unnecessary to its establishment,[99] facts alleged by a codefendant,[1] or statements in portions of the record not constituting part of plaintiff's pleadings.[2]

Amendment. A default admits the facts of an amendable statement of facts as far as it can be amended,[3] but not of an amendment setting up new facts.[4]

Value. It has been held that a default operates as an admission of value as alleged by plaintiff;[5] but there is also authority to the contrary.[6]

Plaintiff's failure to reply to a plea covering only part of the issues does not preclude him from trying issues not met by the plea.[7]

§ 202. —— Right to Notice of, and Participation in, Further Proceedings

Except as otherwise provided by statute or rules of practice, the defendant, after entry of default, ordinarily is not entitled to notice of, or to participate in, further proceedings in the case.

A defendant against whom a default is entered is out of court,[8] and except as otherwise provided by statute or rule of practice,[9] or in the absence of a request for, or an order requiring, notice[10] is not entitled to notice of further proceedings in the case,[11] including notice of an application for entry of the default judgment, as discussed infra § 208, or of assessment of damages against him, as discussed in Damages § 170.

Unless there is a statutory provision or a rule of court permitting him to do so, or unless the default

subordinate to plaintiff's.—Scheumann v. Prudential Ins. Co. of America, Neb., 19 N.W.2d 48—Lincoln Nat. Bank v. Virgin, 55 N.W. 218, 36 Neb. 735, 38 Am.S.R. 747—34 C.J. p 174 note 52 [a].

98. Ga.—Summerour v. Medlin, 172 S.E. 336, 48 Ga.App. 403.
34 C.J. p 174 note 59.

97. Ala.—Corprew v. Tallapoosa County, 3 So.2d 53, 241 Ala. 492.
Ga.—Summerour v. Medlin, 172 S.E. 336, 48 Ga.App. 403.
Mich.—Bonnici v. Kindsvater, 266 N. W. 360, 275 Mich. 304.
34 C.J. p 175 note 58.

Allegation of wanton and willful recklessness
Mich.—Cogswell v. Kells, 292 N.W. 483, 293 Mich. 541.

98. Mich.—**Corpus Juris cited in** Bonnici v. Kindsvater, 266 N.W. 360, 361, 275 Mich. 304.
34 C.J. p 174 note 55.

99. Me.—Dunlap v. Glidden, 34 Me. 517.
Mich.—**Corpus Juris cited in** Bonnici v. Kindsvater, 266 N.W. 360, 361, 275 Mich. 304.

1. Or.—Dempsey v. Ball, 167 P. 508, 85 Or. 560.
34 C.J. p 174 note 57.

2. Tex.—Whisenant v. Thompson Bros. Hardware Co., Civ.App., 120 S.W.2d 316.

Statements in caption of judgment
Tex.—Whisenant v. Thompson Bros. Hardware Co., supra.

3. Puerto Rico.—Fuentes v. Maldonado, 7 Puerto Rico Fed. 52.

4. Ga.—Gary v. Central of Georgia Ry. Co., 160 S.E. 716, 44 Ga.App. 120.
34 C.J. p 175 note 70.

5. Tex.—Martin v. Lee County State Bank, Civ.App., 265 S.W. 1057.

6. Ind.—Second Nat. Bank v. Scudder, 6 N.E.2d 955, 212 Ind. 283.
34 C.J. p 176 note 81 [a].

7. Mich.—Snyder v. Quarton, 10 N. W. 204, 47 Mich. 211.

8. Cal.—Jones v. Moers, 266 P. 821, 91 Cal.App. 65.
Idaho.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.
Ill.—People ex rel. Wilmette State Bank v. Village of Wilmette, 13 N. E.2d 990, 294 Ill.App. 362.
Minn.—**Corpus Juris cited in** Anderson v. Graue, 236 N.W. 483, 484, 183 Minn. 336, followed in Lima v. Graue, 236 N.W. 484, 183 Minn. 338.
34 C.J. p 176 note 90.

9. **Where rights not affected**
The statute providing that, where defendant has not appeared, service of notice of papers need not be made on him means that notice of papers need not be served on a defaulting party if his rights are not thereby affected.—Thompson v. Cook, 127 P. 2d 909, 20 Cal.2d 564—Strong v. Shatto, 258 P. 71, 201 Cal. 555.

10. Fla.—Grand Lodge, K. P. of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Florida, v. Stroud, 144 So. 324, 107 Fla. 152.

11. Ariz.—Faltis v. Colachis, 274 P. 776, 35 Ariz. 78.
Cal.—Citizens' Nat. Trust & Savings Bank of Los Angeles v. Holton, 290 P. 447, 210 Cal. 44.
Fla.—Grand Lodge, K. P. of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Florida, v. Stroud, 144 So. 324, 107 Fla. 152.
Ill.—People v. Village of Wilmette, 13 N.E.2d 990, 294 Ill.App. 362—Strauss v. Zuker, 7 N.E.2d 504, 289 Ill.App. 619—Bird-Sykes Co. v. McNamara, 252 Ill.App. 262—Hickman v. Ritchey Coal Co., 252 Ill. App. 560—Precision Products Co. v. Cady, 233 Ill.App. 72.
Minn.—**Corpus Juris cited in** Anderson v. Graue, 236 N.W. 483, 484, 183 Minn. 336, followed in Lima v. Graue, 236 N.W. 484, 183 Minn. 338.
Miss.—Strain v. Gayden, 20 So.2d 697.
N.Y.—Kirschenbaum v. Rubin, 218 N.Y.S. 373, 128 Misc. 149.
Wash.—Skidmore v. Pacific Creditors, 138 P.2d 664, 18 Wash.2d 157.
Wis.—Velte v. Zeh, 206 N.W. 197, 188 Wis. 401.
34 C.J. p 176 note 91.
Effect of amended pleading without notice to defendant see supra § 194.
Notice of:
Application for judgment see infra § 208.
Further proceedings in equity see Equity § 671.

Charged with notice
Defendant, who has been summoned, is charged with notice that plaintiff may make amendment.—Bird-Sykes Co. v. McNamara, 252 Ill.App. 262.

Cross petition
(1) A defaulting defendant has been held not entitled to notice of the filing of a cross petition by a codefendant, where both had been served with the original summons.—Rice v. Bontjes, 250 P. 89, 121 Okl. 292—Littlefield v. Brown, 172 P. 643, 68 Okl. 144.

(2) A cross petition by defendant seeking additional affirmative relief against a codefendant on whom service of summons had been had at plaintiff's request, but who was in default and whose time for answering had expired before filing of cross petition, could not be prosecuted to judgment without further notice to defaulting defendant.—Roberts v. Paschall, 138 P.2d 834, 192 Okl. 673—Wood v. Speakman, 5 P.2d 121, 153 Okl. 180.

has been properly set aside,[12] defendant cannot, after the entry of default, file pleadings contesting plaintiff's allegations,[13] move for a new trial,[14] or take, or participate in, any further proceedings in the cause affecting plaintiff's right of action,[15] except to make an application to open or set aside the default[16] or to dismiss the case for noncompliance with some statutory provision[17] or for failure of plaintiff's pleading to set forth a cause of action,[18] or to appear and contest the taxation of costs,[19] interpose proper objections to judgment,[20] or to show facts in mitigation of unliquidated damages,[21] although in contesting the amount of damages claimed he cannot deny or dispute any of the material facts adjudicated against him by the default.[22]

§ 203. Waiver of Default

The entry of default is a privilege which is waived by proceeding with the cause without taking advantage of the default.

The entry of a default against defendant is merely a privilege which may or may not be exercised by plaintiff,[23] and which is waived by his proceeding with the cause without taking advantage of the default in the proper time and manner,[24] un-

12. Minn.—Anderson v. Graue, 236 N.W. 483, 183 Minn. 336, followed in Lima v. Graue, 236 N.W. 484, 183 Minn. 338.
Proceedings after opening default see infra §§ 339, 340.

13. Cal.—Jones v. Moers, 266 P. 821, 91 Cal.App. 65.
Colo.—Myers v. Myers, 135 P.2d 235, 110 Colo. 412.
Idaho.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.
La.—Segal v. Helis, App., 168 So. 364, amended on other grounds 170 So. 276, modified on other grounds Siegel v. Helis, 172 So. 768, 186 La. 506.
Minn.—Anderson v. Graue, 236 N.W. 483, 183 Minn. 336, followed in Lima v. Graue, 236 N.W. 484, 183 Minn. 338.
Okl.—Roskoten v. Odom, 87 P.2d 338, 184 Okl. 368.
Or.—J. W. Copeland Yards v. Sheridan, 296 P. 833, 136 Or. 37, rehearing denied 297 P. 837, 136 Or. 37.
Tex.—Buttrill v. Occidental Life Ins. Co., Civ.App., 45 S.W.2d 636.
34 C.J. p 177 note 96.
Time for pleading generally see supra § 199.

14. Cal.—Title Ins. & Trust Co. v. King Land & Improvement Co., 120 P. 1066, 162 Cal. 44.
34 C.J. p 177 note 97.
However, it has been stated that one who has defaulted may move for a new trial.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.

Defendant not in default
Where district court clerk received answer and marked it filed, although he failed to note filing on fee book, and did not place pleading with remainder of court papers in jacket provided therefor, defendant was held not in default, entitling him to new trial where default judgment was entered without notice.—Gause v. Cities Service Oil Co., Civ.App., 70 S.W.2d 224, affirmed City of Fort Worth v. Gause, 101 S.W.2d 221, 129 Tex. 25.

15. Ariz.—Martin v. Sears, 44 P.2d 526, 45 Ariz. 414.
Ill.—People ex rel. Wilmette State Bank v. Village of Wilmette, 13 N.E.2d 990, 294 Ill.App. 362—Gardner v. Shekleton, 253 Ill.App. 333.
La.—Harrisonburg-Catahoula State Bank v. Meyers, App., 185 So. 96.
Mont.—State v. Whitcomb, 22 P.2d 823, 94 Mont. 415.
34 C.J. p 177 note 98.
Right to appeal see Appeal and Error § 155.

Injecting issue
In jactitation action wherein default judgment was entered against defendants, merits or validity of title or lack of such was not in issue, and issue with respect thereto could not be created by enlargement of pleadings by introduction of evidence not primarily admissible under allegations of petition.—Segal v. Helis, App., 168 So. 364, amended 170 So. 276, modified on other grounds Siegel v. Helis, 172 So. 768, 186 La. 506.

Introduction of evidence
Ga.—Metropolitan Life Ins. Co. v. Scarboro, 156 S.E. 726, 42 Ga.App. 423.
Idaho.—Silk v. Kelly, 214 P. 524, 37 Idaho 11.

Argument of case to jury
Ga.—Metropolitan Life Ins. Co. v. Scarboro, 156 S.E. 726, 42 Ga.App. 423.

Interlocutory judgment by default
only prevents defendant from coming in and making a defense after expiration of time given him to plead.—Stein v. Rainey, 286 S.W. 53, 315 Mo. 535.

16. Ariz.—Martin v. Sears, 44 P.2d 526, 45 Ariz. 414.
Cal.—Jones v. Moer, 266 P. 821, 91 Cal.App. 65.
Minn.—Anderson v. Graue, 236 N.W. 483, 183 Minn. 336, followed in Lima v. Graue, 236 N.W. 484, 183 Minn. 338.
34 C.J. p 177 note 99.

17. Puerto Rico.—Chavier v. Giraldez, 15 Puerto Rico 145.

18. Ga.—O'Connor v. Brucker, 43 S.E. 731, 117 Ga. 451—Kelly v. Strouse & Bros., 43 S.E. 280, 116 Ga. 372—R. E. Jarman & Sons v. Drew, 21 S.E.2d 444, 67 Ga.App. 350—Thigpen v. Bituminous Casualty Corporation, 20 S.E.2d 213, 67 Ga.App. 367—Hobbs v. Citizen's Bank of Wrens, 124 S.E. 72, 32 Ga. App. 522.

19. Mo.—Laclede Land & Improvement Co. v. Creason, 175 S.W. 55, 264 Mo. 452.
N.Y.—Fenton v. Garlick, 6 Johns. 237.

20. Wis.—Graham v. Zellers, 233 N.W. 387, 205 Wis. 547.

21. Fla.—Grand Lodge, K. P. of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Florida, v. Stroud, 144 So. 324, 107 Fla. 152.
Ga.—Metropolitan Life Ins. Co. v. Scarboro, 156 S.E. 726, 42 Ga.App. 423.
Ill.—Tierney v. Szumny, 257 Ill.App. 457—Gardner v. Shekleton, 253 Ill. App. 333.
Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.
Mo.—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930.
Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804.
Tex.—Brill v. Guaranty State Bank of Goose Creek, Com.App., 280 S.W. 537.
34 C.J. p 177 note 3.

22. Ga.—Whittier Mills Co. v. Jenkins, 98 S.E. 236, 23 Ga.App. 328.

Recovery of liquidated sum
In action on life policy against insurer in default, court properly refused to allow insurer to introduce evidence to show recovery was not for liquidated sum.—Metropolitan Life Ins. Co. v. Scarboro, 156 S.E. 726, 42 Ga.App. 423.

23. U.S.—Upton-Lang Co. v. Metropolitan Casualty Ins. Co. of New York, C.C.A.Pa., 57 F.2d 133.
Idaho.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.
34 C.J. p 177 note 5.

24. Cal.—Oil Tool Exchange v. Schuh, 153 P.2d 976, 67 Cal.App.2d 288.
34 C.J. p 177 note 6.

less he was ignorant of the default at the time.[25] Plaintiff will be held to have waived defendant's default where he voluntarily extends the time for defendant to plead[26] or appear,[27] accepts a pleading filed out of time,[28] files a replication to a pleading so filed,[29] or goes to trial without objection.[30]

A default on the part of plaintiff may likewise be waived by defendant's failure to take advantage of it,[31] as where, after the default, he abandons his defense and does not appear at the trial.[32]

B. PROCEDURE IN TAKING DEFAULT AND ENTERING JUDGMENT

§ 204. Power of Court in General

A preliminary default may be entered, and a final judgment by default may be rendered only by a court of competent jurisdiction, unless such power is vested in the clerk of court or in a court commissioner.

Since the giving of judgment on a legal obligation, when defendant is in default, is a judicial act,[33] judgment may be rendered by a court possessing jurisdiction;[34] and the fact that the clerk has power to enter such a judgment does not affect the court's power to render the judgment.[35] Except in so far as power to enter a judgment by de-

What constitutes waiver

(1) Some act disclosing an implied or express intent to waive the default is required to constitute a waiver thereof.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.

(2) A mere appearance generally after entry of default does not constitute a waiver of the default.—Kingsbury v. Brown, supra.

(3) Plaintiff's motion to strike an unauthorized and void answer does not affect the conclusiveness of the default or judgment.—Kingsbury v. Brown, supra.

(4) Particular acts see 34 C.J. p 177 note 6 [a].

General appearance, made before default is actually entered, is in time.—Edenfield v. G. V. Seal Co., 241 P. 227, 74 Mont. 509.

Waiver not shown

(1) Plaintiff's right to judgment for want of affidavit of defense held not waived by voluntarily placing case at issue in reliance on agreement of defendant's attorney to file pleading.—Upton-Lang Co. v. Metropolitan Casualty Ins. Co. of New York, C.C.A.Pa., 57 F.2d 133.

(2) Other facts not constituting waiver see 34 C.J. p 177 note 6 [b].

In Texas

(1) It has been held that participation in the trial by a codefendant who defaulted did not waive the filing of a formal denial of the allegations of plaintiff's petition and that such codefendant could not complain because no proof of admitted facts was made by plaintiff.—Brill v. Guaranty State Bank of Goose Creek, Com.App., 280 S.W. 537.

(2) And it has been held that plaintiff was entitled to judgment against defendants who did not appear and answer, notwithstanding he did not insist on judgment by default.—Foust v. Jones, Civ.App., 90 S.W.2d 665.

(3) However, the rule in the text has been followed.—**Corpus Juris cited in** Shaw v. Whitfield, Civ.App., 35 S.W.2d 1115.—**Corpus Juris cited in** Brasher v. Carnation Co. of Texas, Civ.App., 92 S.W.2d 573, 574.

25. N.Y.—Giles v. Gaines, 3 Cai. Cas. 107, Col. & C.Cas. 463.
34 C.J. p 177 note 7.

26. Idaho.—**Corpus Juris quoted in** Kingsbury v. Brown, 92 P.2d 1053, 1055, 60 Idaho 464, 124 A.L.R. 149.
34 C.J. p 177 note 8.

Acquiescence in delay

Iowa.—City of Des Moines v. Barnes, 20 N.W.2d 895.

Effect of extension on time of trial

A waiver of default and grant of right to answer, with the understanding that answer will be filed within a few days and that defendant will be ready to try the case during the following term implies that no steps will be taken by him to delay the trial, and so he waives his right to move for a stay previous to the trial, even though he alleges facts which are claimed to render the arbitration law a bar to judgment by plaintiff without first resorting to arbitration.—Clyde Renco Mill Co. v. Globe Elevator Co., 215 N.Y.S. 829, 216 App.Div. 780.

27. Cal.—Baird v. Smith, 14 P.2d 749, 216 Cal. 408.
Mont.—Mitchell v. Banking Corporation of Montana, 264 P. 127, 81 Mont. 459.

28. Cal.—Oil Tool Exchange v. Schuh, 153 P.2d 976, 67 Cal.App.2d 288.
Idaho.—**Corpus Juris quoted in** Kingsbury v. Brown, 92 P.2d 1053, 1055, 60 Idaho 464, 124 A.L.R. 149.
S.D.—Tristate Fair Ass'n v. Lasell, 215 N.W. 692, 51 S.D. 527.
34 C.J. p 177 note 9.

29. Idaho.—**Corpus Juris quoted in** Kingsbury v. Brown, 92 P.2d 1053, 1055, 60 Idaho 464, 124 A.L.R. 149.
34 C.J. p 177 note 10.

30. Idaho.—**Corpus Juris quoted in** Kingsbury v. Brown, 92 P.2d 1053, 1055, 60 Idaho 464, 124 A.L.R. 149.
Pa.—Dunn v. Calpin, Com.Pl., 51 Dauph.Co. 192.
34 C.J. p 177 note 11.

31. Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
34 C.J. p 177 note 12.

32. Ind.—Aston v. Wallace, 43 Ind. 468.

33. U.S.—Pope v. U. S., Ct.Cl., 65 S. Ct. 16, 323 U.S. 1, 89 L.Ed. 3.

34. Cal.—Phillips v. Trusheim, 156 P.2d 25, 25 Cal.2d 913—Merver Lumber Co. v. Silvey, 84 P.2d 1062, 29 Cal.App.2d 426.
Jurisdiction in respect of default judgments generally see supra § 192.

Judge of another court

County judge is without jurisdiction to grant default judgment in action pending in supreme court.—Kline v. Snyder, 231 N.Y.S. 275, 133 Misc. 128.

Place of action by judge

(1) Judge is authorized to give default judgment outside court in which suit was brought.—Gray v. Bank of Moundville, 107 So. 804, 214 Ala. 260.

(2) Under statutes and rules of court, when a party is entitled to a judgment by default and has complied with the rules adopted by the court for the purpose of obtaining it, and the court is open, the judge of the court may, anywhere in the county, circuit, or state, sign an order in writing to the clerk to enter in the minutes a judgment by default for the amount named therein, or write, sign, and forward to the clerk, a judgment by default to be filed in the cause.—Carothers v. Callahan, 93 So. 569, 207 Ala. 611.

35. Colo.—Griffing v. Smith, 142 P. 202, 26 Colo.App. 220.
N.C.—Hill v. Huffines Hotel Co., 125 S.E. 266, 188 N.C. 586.

fault is vested in the clerk of the court, as discussed infra § 205, or a court commissioner,[36] a judgment by default may be rendered only by a court.[37] So, too, in cases where the clerk of court is not authorized to make it, a preliminary entry of default should be made only by the court;[38] or the judge[39] authorized to preside over the tribunal and empowered to hear and determine the issues between the parties.[40] In the absence of an appearance, strict compliance with the proceedings necessary to the rendition of judgment will be exacted.[41]

§ 205. Authority and Duty of Clerk

The authority of a clerk of court to make a preliminary entry of default, or to enter a final judgment by default without authority from the court, is purely statutory.

In making a preliminary entry of default, or entering a judgment of default, a clerk of court exercises a purely ministerial, and not a judicial, function.[42] Where a preliminary entry or interlocutory judgment of default is necessary or proper, as discussed infra § 206, the clerk of the court is authorized, under some statutes, to make such entry on defendant's failure to appear or answer.[43] The statutory provisions giving him such authority must be strictly construed,[44] and, such power or authority, being purely statutory,[45] may be exercised by him only in cases which clearly come within the terms of the statute[46] and only to the extent authorized;[47] but the entry when authorized may be made by him notwithstanding the court is in session,[48] and notwithstanding the judge is disqualified to try the case.[49]

Entry of judgment. As in the case of judgments generally, as discussed supra § 108, where a default judgment is rendered by the court, it should be reg-

36. Wash.—Peterson v. Dillon, 67 P. 397, 27 Wash. 78.
34 C.J. p 178 note 15 [a].

37. Pa.—School Dist. of Haverford Tp., to Use of Tedesco v. Herzog, 171 A. 455, 314 Pa. 161—Gallagher v. Dwyer, Com.Pl., 34 Luz.Leg. Reg. 366—Kaikaman v. Greek Catholic Church, Com.Pl., 20 Wash. Co. 88.
34 C.J. p 178 note 17.

38. Cal.—Crofton v. Young, 119 P.2d 1003, 48 Cal.App.2d 452.

39. Fla.—Albert M. Travis Co. v. Atlantic Coast Line R. Co., 139 So. 141, 102 Fla. 1117.
Ga.—Burson v. Lunsford, 186 S.E. 213, 53 Ga.App. 411.
34 C.J. p 179 note 66.

40. La.—Jones v. Cunningham, 102 So. 309, 157 La. 208.

Judge who had recused himself because of personal interest could not grant preliminary default.—Jones v. Cunningham, 102 So. 309, 157 La. 208.

41. U.S.—Exchange Nat. Bank of Shreveport, La. v. Joseph Reid Gas Engine Co., C.C.A.La., 287 F. 870.

42. Cal.—Baird v. Smith, 14 P.2d 749, 216 Cal. 408.
Fla.—Coslick v. Finney, 140 So. 216, 104 Fla. 394—Daniell v. Campbell, 101 So. 35, 88 Fla. 63.
Mont.—**Corpus Juris cited in** Commercial Bank & Trust Co. v. Jordan, 278 P. 832, 834, 85 Mont. 375, 65 A.L.R. 968.
Nev.—Price v. Brimacombe, 72 P.2d 1107, 58 Nev. 156, rehearing denied 75 P.2d 734, 58 Nev. 156.
Wyo.—Winnicke v. Lieth, 157 P.2d 274—Kimbel v. Osborn, 156 P.2d 279—James v. Lederer-Strauss & Co., 233 P. 137, 32 Wyo. 377.
34 C.J. p 178 notes 41, 43.

Act of clerk regarded as judgment of court
Iowa.—Fred Miller Brewing Co. v. Capital Ins. Co., 82 N.W. 1023, 111 Iowa 590, 82 Am.S.R. 529.
34 C.J. p 178 note 44.

43. Ala.—Ex parte Anderson, 4 So.2d 420, 242 Ala. 31.
Cal.—Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., 209 P. 357, 189 Cal. 509—Hinds v. Superior Court of Los Angeles County, 223 P. 422, 65 Cal.App. 223.
Fla.—Albert M. Travis Co. v. Atlantic Coast Line R. Co., 139 So. 141, 102 Fla. 1117.
Mont.—Commercial Bank & Trust Co. v. Jordan, 278 P. 832, 85 Mont. 375, 65 A.L.R. 968.
34 C.J. p 178 note 23.
Entry by clerk of office judgment see infra § 218.
Entry by clerk under Federal Rules of Civil Procedure see Federal Courts § 144 c.

Duty of clerk
(1) There should be strict compliance with statutes expressly requiring the clerk to enter defaults.—Security Finance Co. v. Gentry, 109 So. 220, 91 Fla. 1015, followed in 109 So. 222, 91 Fla. 1024.

(2) Under a statutory provision contemplating, in certain cases, both entry of default and entry of judgment by the clerk, it is the duty of the clerk, in a case within such provision, and on application by plaintiff, to enter the default.—Commercial Bank & Trust Co. v. Jordan, 278 P. 832, 85 Mont. 375, 65 A.L.R. 968—34 C.J. p 178 note 23 [a].

(3) However, another statutory provision that, in other cases, if no answer, demurrer, or motion has been filed with clerk of court within time specified in summons, clerk must enter default, and thereafter plaintiff may apply for relief demanded in complaint, is directory rather than mandatory.—Mitchell v. Banking Corporation of Montana, 264 P. 127, 81 Mont. 459—Edenfield v. G. V. Seal Co., 241 P. 227, 74 Mont. 509.

44. Fla.—Arcadia Citrus Growers Ass'n v. Hollingsworth, 185 So. 431, 135 Fla. 322—Cosmopolitan Fire Ins. Co. v. Boatwright, 51 So. 540, 59 Fla. 232.

45. Ariz.—Turbeville v. McCarrell, 30 P.2d 496, 43 Ariz. 236.
Fla.—Arcadia Citrus Growers Ass'n v. Hollingsworth, 185 So. 431, 135 Fla. 322.

46. Ariz.—Turbeville v. McCarrell, 30 P.2d 496, 43 Ariz. 236.
Cal.—Crofton v. Young, 119 P.2d 1003, 48 Cal.App.2d 452.
Mont.—Edenfield v. G. V. Seal Co., 241 P. 227, 74 Mont. 509.
34 C.J. p 178 note 25.

47. W.Va.—Bradley v. Long, 50 S.E. 746, 57 W.Va. 599.
34 C.J. p 178 note 26.

Amount
Where summons and complaint are served personally, clerk entering default must enter it for amount demanded, unless plaintiff elects smaller sum.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, 226 App.Div. 664, 739, remittitur amended 171 N.E. 770, 253 N.Y. 533, reargument denied 171 N.E. 781, 253 N.Y. 553.

48. Ariz.—Agua Fria Copper Co. v. Bashford-Burmister Co., 35 P. 933, 4 Ariz. 203.

49. Cal.—People v. De Carrillo, 35 Cal. 37.
Fla.—Dudley v. White, 31 So. 830, 44 Fla. 264.

ularly entered by the clerk in his minutes,[50] but the clerk may not enter a final judgment by default without authority from the court,[51] except where he is authorized by statute to do so,[52] and then only in cases authorized by the statute,[53] and in strict[54] conformity with the provisions of the statute.[55] The clerk must determine from the allegations of the complaint alone whether the action is one in which he is authorized to enter judgment;[56] but otherwise he may exercise no discretion;[57] and he is not authorized to enter judgment where the taking of extrinsic evidence is necessary to ascertain and determine the amount of the recovery.[58] He may be disqualified from entering default judgment in a particular case,[59] as by reason of his pecuniary interest in the subject matter.[60]

Authority of the clerk of court to compute and

50. N.Y.—Tyler v. Jahn, 178 N.Y.S. 689, 109 Misc. 425.
Tenn.—Memphis & Ohio R. R. Co. v. Dowd, 9 Heisk. 179.

51. Ala.—Ex parte Anderson, 4 So. 2d 420, 242 Ala. 31.
34 C.J. p 178 note 29.

52. Fla.—Coslick v. Finney, 140 So. 216, 104 Fla. 394—Green v. Procter & Gamble Distributing Co., 109 So. 471, 92 Fla. 396.
Minn.—Marthaler Machine & Engineering Co. v. Meyers, 218 N.W. 127, 173 Minn. 606—Thomas-Halvorson Lumber Co. v. McRell, 206 N.W. 951, 165 Minn. 460.
Mont.—Commercial Bank & Trust Co. v. Jordan, 278 P. 832, 85 Mont. 375, 65 A.L.R. 968.
N.C.—Clegg v. Canady, 195 S.E. 770, 213 N.C. 258—Crye v. Stoltz, 138 S.E. 167, 193 N.C. 802.
Wyo.—Lederer-Strauss & Co., 233 P. 137, 32 Wyo. 377.
34 C.J. p 178 note 31, p 185 notes 67, 68.
Statutes authorizing entry by clerk without prior application to court see infra § 208 a.

53. Cal.—Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., 209 P. 357, 189 Cal. 509—McOmie v. Board of Directors of Veterans' Home of California, 263 P. 253, 88 Cal.App. 16.
Idaho.—Gustin v. Byam, 240 P. 600, 41 Idaho 538.
Minn.—High v. Supreme Lodge of the World, Loyal Order of Moose, 290 N.W. 425, 207 Minn. 228.
Pa.—School Dist. of Haverford Tp., to Use of Tedesco, v. Herzog, 171 A. 455, 314 Pa. 161.
34 C.J. p 179 note 47.

Strict construction of statute

Statutory authority of clerks of circuit courts as to entering default judgments in certain cases must be strictly construed.—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.

Default judgment for reasonable attorney's fees is beyond the authority of the clerk to enter.
Idaho.—Tripp v. Dotson, 4 P.2d 349, 51 Idaho 200.
Wyo.—Wunnicke v. Leith, 157 P.2d 274.

54. Cal.—Baird v. Smith, 14 P.2d 749, 216 Cal. 408.
Wyo.—Wunnicke v. Leith, 157 P.2d 274.
34 C.J. p 179 note 48.

55. La.—Stetson v. Webber, 187 So. 83, 192 La. 148.
N.Y.—In re Laughlin's Estate, 8 N.Y.S.2d 842, 255 App.Div. 927.
34 C.J. p 179 note 48.

56. Mont.—Soliri v. Fasso, 185 P. 322, 56 Mont. 400.

Necessity of complaint and timely filing thereof

(1) Default judgment cannot be entered by clerk without application to court, unless there is complaint.—Leroy Arnold, Inc., v. Mackey, 222 N.Y.S. 225, 129 Misc. 643.

(2) Complaint must be filed as part of judgment roll to authorize clerk of court to enter judgment on default.—Juskowitz v. Stern, 283 N.Y.S. 955, 158 Misc. 28.

(3) Where plaintiff in law action does not file declaration on or before rule day to which process is made returnable or on or before next succeeding rule day, entry by clerk, not in term time, of final judgment for plaintiff on rule day thereafter on filing his declaration, unless further time has been duly allowed by the court, is unauthorized.—Daniell v. Campbell, 101 So. 35, 88 Fla. 63.

Cause of action within statute

Question whether clerk was authorized to enter a default judgment against one of defendants was not dependent on whether complaint stated a cause of action, but on whether the complaint stated a cause of action within statute authorizing the clerk to enter default judgment in an action arising on contract for the recovery of money or damages only.—Lynch v. Bencini, 110 P.2d 662, 7 Cal.2d 521.

Ascertainment of amount from complaint

(1) Clerk has right to enter default judgment only where the proper amount appears from terms of contract as alleged in complaint or follows therefrom by mere mathematical computation.—Lynch v. Bencini, supra.

(2) The word "amount," in statute authorizing clerk of district court to enter judgment after default, indicates that clerk is empowered to enter judgment only in instances on an account or written instrument or other contract, express or implied, for payment of money only where plaintiff's verified original petition is such that mere inspection thereof or computation from data supplied by pleading enables clerk to enter a judgment for a fixed sum with costs.—Kimbel v. Osborn, Wyo., 156 P.2d 279.

(3) In determining whether an action is one arising on contract for the recovery of money or damages only so as to authorize the clerk to enter default judgment, allegations of complaint and the terms of the contract are to be considered notwithstanding the prayer is for the certain amount.—Lynch v. Bencini, 110 P.2d 662, 17 Cal.2d 521.

57. Fla.—Coslick v. Finney, 140 So. 216, 104 Fla. 394.
34 C.J. p 179 note 46.

Where exercise of discretion and taking of evidence are necessary to determine amount of damages, clerk has no power to enter default judgment.—Lynch v. Bencini, 110 P.2d 662, 17 Cal.2d 521.

Sufficiency of defendant's pleading

(1) The clerk is without authority to decide that a plea is not good and then enter default judgment for want of any plea.—Albert M. Travis Co. v. Atlantic Coast Line R. Co., 139 So. 141, 102 Fla. 1117.

(2) It has been held, however, that default judgment entered by clerk for failure to reply to answer in nature of counterclaim is not irregular, even if it is erroneous as to the nature and sufficiency of defendant's pleading as a counterclaim.—Finger v. Smith, 133 S.E. 186, 191 N.C. 818.

58. Cal.—Lynch v. Bencini, 110 P.2d 662, 7 Cal.2d 521.
Fla.—Douglass v. Oemler, 124 So. 19, 98 Fla. 497—Security Finance Co. v. Gentry, 109 So. 220, 91 Fla. 1015, followed in 109 So. 222, 91 Fla. 1024.
N.C.—Johnston County v. Ellis, 38 S.E.2d 81, 226 N.C. 268.

59. N.C.—Thompson v. Dillingham, 112 S.E. 321, 183 N.C. 566.

60. N.C.—Thompson v. Dillingham, supra.

allow interest in entering default judgment is discussed infra § 214 c.

A judgment entered by the clerk without authority to do so is void.[61] If, however, a mistake or irregularity, not going to the jurisdiction, is committed by the clerk in entering the judgment, the judgment is not void, but erroneous.[62] Even where the clerk is disqualified to enter default judgment in a particular case, the judgment entered by him is not void, but only voidable,[63] unless it is in violation of some statute.[64] If plaintiff has done all that is required to entitle him to a default judgment, he cannot be prejudiced by the clerk's failure to enter it[65] properly.[66] Where a default judgment rendered by the court is noted on the docket of the trial judge, the clerk's failure to enter it does not affect its validity,[67] and the omission may, in a proper case, be supplied nunc pro tunc.[68]

§ 206. Preliminary Entry of Default

A preliminary entry of default is proper; but there is a divergence in the rules obtaining under different statutes in respect of its necessity as a condition precedent to final judgment by default.

An entry of default is a proper procedural step.[69] Under some statutes, a final judgment on default may not be rendered until there has been a preliminary entry of the default, or of an interlocutory judgment of default,[70] unless the requirement is waived.[71] Under other statutes, such an entry is not necessary.[72] Under still other statutes, while it is the practice to call defendant and make an entry of the default, an omission to do so is at most a mere irregularity which does not render the judgment void,[73] although it may constitute grounds for reversing it;[74] the default may be entered in the trial court at any time while the proceedings are in fieri.[75] Under the practice in some jurisdictions, entry of default should not be made until after service of notice.[76]

An entry of the words "in default," or their equivalent, on the appearance docket is necessary[77] and sufficient[78] to comply with a statute so providing. A statute requiring all defaults to be entered in full in a default docket is not complied with by entry of a default in a book designated as a rules judgment docket.[79] An examination of the files is required before entering a default.[80]

61. Idaho.—Tripp v. Dotson, 4 P.2d 349, 51 Idaho 200—Gustin v. Byam, 240 P. 600, 41 Idaho 538.
Pa.—Kaikaman v. Greek Catholic Church, Com.Pl., 20 Wash.Co. 88.
Wyo.—Wunnicke v. Leith, 157 P.2d 274.
34 C.J. p 178 note 29 [a], p 179 note 53.

62. Fla.—Weaver v. Hale, 89 So. 363, 82 Fla. 88.
34 C.J. p 179 note 49.

63. N.C.—Thompson v. Dillingham, 112 S.E. 321, 183 N.C. 566.
34 C.J. p 178 note 38.
Disqualification may be waived
N.C.—Thompson v. Dillingham, supra.

64. N.C.—Thompson v. Dillingham, supra.

65. Cal.—W. H. Marston Co. v. Kochritz, 251 P. 959, 80 Cal.App. 352.

66. Va.—Southern Express Co. v. Jacobs, 63 S.E. 17, 109 Va. 27.

67. Tenn.—Memphis & Ohio R. R. Co. v. Dowd, 9 Heisk. 179.

68. Ill.—Paulin v. American Surety Co., 204 Ill.App. 218.
34 C.J. p 178 note 35.
Nunc pro tunc entries generally see supra §§ 117–121.

69. Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
34 C.J. p 179 note 61.

70. La.—Jones v. Cunningham, 102 So. 309, 157 La. 208—Milliken & Farwell v. Taft Mercantile Co., 7 La.App. 150—Jackson v. Young, 6 La.App. 854.
34 C.J. p 179 note 56.
Mandatory statute
(1) The making of an entry of default on the docket is mandatory under some statutes.—Burson v. Lunsford, 186 S.E. 213, 53 Ga.App. 411.

(2) However, it has been held that case not marked in default or containing no plea to merits before judgment is considered in default entitling plaintiff to judgment.—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568.

(3) A statute relating to an interlocutory judgment by default is mandatory in the sense that plaintiff has a right to, and the court may, not deny him, an interlocutory judgment at or after the time of the default; but the failure of plaintiff to take an interlocutory judgment does not render it improper or irregular for him to await the coming on of the case for trial and then prove his damages and take a final judgment by default where defendant remains in default.—Cornoyer v. Oppermann Drug Co., Mo.App., 56 S.W.2d 612.

71. Mo.—Cornoyer v. Oppermann Drug Co., supra.
34 C.J. p 179 note 57.

72. Cal.—Crouch v. Miller, 146 P. 880, 169 Cal. 341.
34 C.J. p 179 note 59.

73. Tenn.—State v. Thompson, 102 S.W. 349, 118 Tenn. 571, 20 L.R.A.,N.S., 1.
34 C.J. p 179 note 61.

74. Wis.—Fisher v. Chase, 2 Chandl. 3.

75. Ind.—Torr v. Torr, 20 Ind. 118.
34 C.J. p 179 note 63.
Time of taking default generally see infra § 207.

76. Ill.—Swiercz v. Nalepka, 259 Ill. App. 262.
Wash.—Hofto v. National Casualty Co., 237 P. 726, 135 Wash. 313.

77. Ga.—Gregg v. Fitzpatrick, 187 S.E. 730, 54 Ga.App. 303.

78. Ga.—Fraser v. Neese, 137 S.E. 550, 163 Ga. 843.
34 C.J. p 179 note 66 [a].
Erasure and reëntry
The original default entry made by the judge is not affected by an unauthorized erasure by the clerk, and an ex parte order of judge to reenter default, and reëntry by clerk pursuant thereto.—Fraser v. Neese, supra.

79. Fla.—Security Finance Co. v. Gentry, 109 So. 220, 91 Fla. 1015, followed in 109 So. 222, 91 Fla. 1024.

80. Mich.—Wiener v. Valley Steel Co., 286 N.W. 905, 284 Mich. 681.

§ 207. Time for Taking Default and Entering Judgment

a. In general
b. Expiration of time allowed for appearance or pleading
c. After entry of default
d. Term of court
e. Day and hour
f. In vacation or at chambers

a. In General

There is a conflict of authority on the question whether a premature default judgment is void or only voidable, as well as on the question whether a delay of several years precludes the taking of a default judgment.

A statutory provision for entry of judgment in defaulted cases at any time after default has been construed to be restricted to unanswered defaulted cases and not to apply where the default consists of failure to appear for trial.[81] A judgment by default, of course, may not be entered against defendant until he is in default, and, therefore, neither a simple default nor a judgment by default may regularly be taken and entered against defendant until the expiration of the period prescribed by statute or rule of practice for taking the step or proceeding, on the failure to take which the default is based,[82] or until the expiration of the time stipulated or agreed on by the parties.[83]

According to some authorities, a premature judgment by default is not void, but is merely irregular and voidable.[84] Under this view a default judgment rendered or entered prematurely will be upheld unless it is attacked at the time and in the manner provided by law;[85] and it is effective until reversed[86] or set aside.[87] Defendant may waive the irregularity and so ratify the judgment,[88] and, if he takes no steps to vacate or reverse the judgment, or otherwise to correct the error, he may be held to have waived it.[89] According to a number of other authorities, a premature judgment by default is void;[90] and under this view a default judgment prematurely entered is not validated by its subsequent confirmation[91] or by the fact that it is not made final until the expiration of the usual time,[92] or by the fact that defendant has suffered no injury.[93]

81. R.I.—Gregson v. Superior Court, 128 A. 221, 46 R.I. 362.

82. Ark.—Murrell v. Rawlings, 279 S.W. 382, 170 Ark. 212.
Colo.—Netland v. Baughman, 162 P. 2d 601.
34 C.J. p 180 note 71.

In quo warranto proceeding, the cause was held not ripe for judgment in view of the statutes relating to judgments by default against corporations in personal actions being inapplicable to quo warranto proceedings to oust a corporation from the exercise of its franchise.—Atty.-Gen. v. Delaware & Bound Brook R. Co., 38 N.J.Law 282.

83. N.Y.—Osborn v. Rogers, 20 N.E. 365, 112 N.Y. 573.
34 C.J. p 180 note 72.

84. Ohio.—Hughes v. Cramer, 34 N.E.2d 772, 138 Ohio St. 267.
Okl.—Orr v. Johnson, 149 P.2d 993, 194 Okl. 287.
Or.—Pedro v. Vey, 46 P.2d 582, 150 Or. 415.
Pa.—McTee & Co. v. Clark, Com.Pl., 13 Northumb.Leg.J. 297.
34 C.J. p 180 note 82, p 181 note 98 [b].

Signature of judge

(1) The text rule obtains where the premature judgment is recorded and signed by the judge.—Hoey v. Aspell, 40 A. 776, 62 N.J.Law 200.

(2) On the other hand, a premature judgment is void where it is entered by plaintiff's attorney without the signature of the judge.—Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 115 N.J.Law 86, affirmed 183 A. 165, 116 N.J.Law 190.

In Montana

(1) The rule stated in the text has been followed.—Paramount Publix Corporation v. Boucher, 19 P.2d 223, 93 Mont. 340—Batchoff v. Butte Pac. Copper Co., 198 P. 132, 60 Mont. 179.

(2) In some cases, however, it has been declared that a default judgment prematurely entered is a nullity.—Taylor v. Southwick, 253 P. 839, 78 Mont. 329—Palmer v. McMaster, 19 P. 585, 8 Mont. 186.

85. Okl.—Orr v. Johnson, 149 P.2d 993, 194 Okl. 287.

86. N.J.—Hoey v. Aspell, 40 A. 776, 62 N.J.Law 200.
34 C.J. p 180 notes 82, 83.

87. N.J.—Hoey v. Aspell, supra.
34 C.J. p 180 note 84.

88. N.Y.—Rothchild v. Mannesovitch, 51 N.Y.S. 253, 29 App.Div. 580—Havemeyer v. Brooklyn Sugar Refining Co., 12 N.Y.S. 873, 26 Abb. N.Cas. 157, affirmed 15 N.Y.S. 157, 59 Hun 619.

89. Kan.—Mitchell v. Aten, 14 P. 497, 37 Kan. 33, 1 Am.S.R. 231.
34 C.J. p 180 note 86.

90. Cal.—Pinon v. Pollard, 158 P.2d 254, 69 Cal.App.2d 129.
Fla.—Brauer v. Paddock, 189 So. 146, 103 Fla. 1175.
La.—Evans v. Hamner, 24 So.2d 814—Cottonport Bank v. Thomas, App., 12 So.2d 618.
Mich.—Smak v. Gwozdik, 291 N.W. 270, 293 Mich. 185.
Miss.—Copiah Hardware Co. v. Meteor Motor Car Co., 101 So. 375, 136 Miss. 274, suggestion of error overruled Copiah Hardware Co. v. Meteor Motor Car, 101 So. 579, 136 Miss. 274—J. B. Colt Co. v. Ward, 99 So. 676, 135 Miss. 202.
Nev.—Price v. Brimacombe, 72 P.2d 1107, 58 Nev. 156, rehearing denied 75 P.2d 734, 58 Nev. 156.
Tex.—Sneed v. Box, Civ.App., 166 S.W.2d 951.
34 C.J. p 180 note 87.

Preliminary judgment by default

La.—Kelly v. Kelleher, 171 So. 569, 186 La. 51.

Judgment entered before expiration of time allowed to answer after service by publication.

Colo.—Brown v. Tucker, 1 P. 221, 7 Colo. 80.

Lack of vacation

Court did not err in basing its judgment on a subsequent default, notwithstanding prior default had not been vacated when the second default was entered, where the prior default was a nullity because prematurely entered.—Price v. Brimacombe, 72 P.2d 1107, 58 Nev. 156, rehearing denied 75 P.2d 734, 58 Nev. 156.

91. La.—Hart v. Nixon, 25 La.Ann. 136—Washington v. Comeau, McG. 234.

92. La.—Hart v. Nixon, 25 La.Ann. 136.

93. La.—Hart v. Nixon, supra.

Delay. It has been held that, in the absence of statutory limitation, the lapse of several years after the bringing of suit does not prevent the entry of a default judgment,[94] and that, even where a statute provides that an action must be dismissed where no answer has been filed and plaintiff has failed to have judgment entered within a stated number of years after service of summons, a default judgment entered after the expiration of the statutory period is not void,[95] as the court has jurisdiction to render it,[96] even though it is erroneous and subject to direct attack on appeal.[97] However, it has also been held that plaintiff's inaction in the case, including his omission to have a default judgment entered for several years, constitutes a waiver of his right[98] or constitutes an abandonment of the suit, so that a default judgment taken after such long delay is null and void,[99] and defendant is not charged with notice of the taking of the default judgment.[1]

b. Expiration of Time Allowed for Appearance or Pleading

A judgment by default is premature where it is entered before the expiration of the time allowed for appearance, if it is taken for want of appearance, or where it is entered before the expiration of the time allowed for filing a plea or answer, if it is taken for want of a plea or answer.

A judgment by default is premature if it is entered before the expiration of the time allowed by law for defendant to enter his appearance, if taken for want of appearance,[2] or if it is entered before the expiration of the time allowed for the filing of a plea or answer, if taken for want of a plea or answer.[3] Thus a judgment by default is premature where the required length of time has not elapsed between the service of the summons or writ and the return day;[4] or where it is entered before the expiration of the time allowed in the summons or writ,[5] although it is in excess of the time allowed by law;[6] or where it is entered before the expiration of the time allowed to appear, plead, or answer, after constructive service by publication,[7] or before the expiration of the time limited in an order extending the time to plead,[8] unless such extension was fraudulently obtained or collusively granted.[9] Where both substituted and personal service is made, judgment by default may be entered on the expiration of the time to answer limited by personal service, although that limited by substituted service is not exhausted.[10]

In case of joint defendants all must have the full time allowed for answering; and a judgment by default may not be entered before the expiration of such time.[11]

94. Md.—Carey v. Howard, 16 A.2d 289, 178 Md. 512.

95. Cal.—Merner Lumber Co. v. Silvey, 84 P.2d 1062, 29 Cal.App.2d 426.

96. Cal.—Phillips v. Trusheim, 156 P.2d 25, 25 Cal.2d 913—Merner Lumber Co. v. Silvey, 84 P.2d 1062, 29 Cal.App.2d 426.

97. Cal.—Phillips v. Trusheim, 156 P.2d 25, 25 Cal.2d 913.

98. N.J.—Kaplan v. Tomka, 37 A.3d 665, 131 N.J.Law 572.
Waiver of default by taking other proceedings in cause see supra § 203.

99. La.—Evans v. Hamner, App., 24 So.2d 164, affirmed 24 So.2d 814, 209 La. 442.

1. Tex.—Sloan v. Bartlett, Civ.App., 139 S.W.2d 216.

2. Tex.—Sneed v. Box, Civ.App., 166 S.W.2d 951.
34 C.J. p 180 note 93.

Entry held not premature
La.—City of Monroe v. Glasscock, Morriston, Conner Const. Co., App., 178 So. 684.

3. Ala.—Crook v. Rainer Hardware Co., 97 So. 635, 210 Ala. 178.
Nev.—Price v. Brimacombe, 72 P.2d 1107, 58 Nev. 156, rehearing denied 75 P.2d 734, 58 Nev. 156.
N.J.—Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 115 N.J.Law 86, affirmed 183 A. 165, 116 N.J.Law 191.
Okl.—Orr v. Johnson, 149 P.2d 993, 194 Okl. 287.
Or.—Pedro v. Vey, 46 P.2d 582, 150 Or. 415.
34 C.J. p 181 note 94.

Entry held not premature
Ark.—Fidelity Mortg. Co. v. Evans, 270 S.W. 624, 168 Ark. 459.
Ind.—Julien v. Lane, 157 N.E. 114, second case, 95 Ind.App. 139.
Pa.—First Nat. Bank v. Baird, 150 A. 165, 300 Pa. 92.
Tex.—Cook v. Waco Auto Loan Co., Civ.App., 299 S.W. 514.
34 C.J. p 181 note 94 [b].

4. Tex.—Andrus v. Andrus, Civ. App., 168 S.W.2d 891.
34 C.J. p 181 note 95.

5. Colo.—Yentzer v. Thayer, 14 P. 53, 10 Colo. 63, 3 Am.S.R. 563.
34 C.J. p 181 note 96.

6. N.Y.—Hatfield v. Atwood, 15 N.Y. Civ.Proc. 330.
34 C.J. p 181 note 97.

7. Cal.—Pinon v. Pollard, 158 P.2d 254, 69 Cal.App.2d 129.
Colo.—Netland v. Baughman, 162 P. 2d 601.
34 C.J. p 181 note 98.
In attachment suit see attachment § 497 d.

8. N.Y.—Littauer v. Stern, 69 N.E. 538, 177 N.Y. 233.
34 C.J. p 181 note 99.

After overruling of motion to dismiss
(1) Default judgment on amended complaint was erroneously entered against defendant who appeared and moved for dismissal, which motion was argued and overruled and defendant allowed ten days after notice in which to answer, where no notice was served on defendant.—Bolognese v. Anderson, 44 P.2d 706, 87 Utah 450, modified on other grounds and rehearing denied 49 P.2d 1034, 87 Utah 455.

(2) Likewise, where a motion to dismiss the complaint was overruled and the court entered a rule against defendant to plead to the complaint within thirty days, a default entered before rule to plead had expired was improper.—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349.

9. N.Y.—Havemeyer v. Brooklyn Sugar Refining Co., 15 N.Y.S. 157, 59 Hun 619.

10. N.Y.—United Verde Copper Co. v. Tritle, 20 Abb.N.Cas. 57.

11. N.J.—Stehr v. Ollbermann, 10 A. 547, 49 N.J.Law 633.
34 C.J. p 181 note 4.

c. After Entry of Default

Where there are no controlling statutory provisions and no compelling reason for delay, final judgment may be rendered immediately after preliminary entry of default or at any time thereafter.

Where a preliminary entry of default has been made, the final judgment is usually deferred, as discussed infra § 216, until the assessment of damages, where these are uncertain or unliquidated; but, where there is no such reason for delay and in the absence of statutory limitations, final judgment may be rendered as of the day of the default,[12] or at any time thereafter,[13] and may be taken as of the term when the default was entered.[14] A statutory provision requiring the judgment to be entered immediately after the entry of default is merely directory,[15] and for the benefit of the party obtaining the judgment,[16] and hence the adverse party may not complain of a delay in entering the judgment.[17] Under some statutes, a default may not be made final until a succeeding day[18] or until the elapse of a certain number of days, after the entry of default.[19]

d. Term of Court

In the absence of a statute providing otherwise, a default judgment ordinarily may be rendered during any term of court after the default.

In the absence of a statute providing otherwise, a default judgment may be rendered at any time during any term of court after the default,[20] except that, as indicated infra subdivision e of this section, when the case is placed on the trial docket, judgment should be rendered on or after the day on which the case is set for trial. In some jurisdictions this matter is governed by statute and the terms of the statute, together with the circumstances in regard to service of process, appearance, and pleading, which control in determining the term of court at which such a judgment may or should be entered in a particular case;[21] and such a statutory regulation may not be rendered nugatory or materially modified by a conflicting rule of court.[22] Under some statutes and conditions, a default judgment may be entered at the first or return term of the court,[23] as where a given number of days have elapsed since service of process.[24] Under other statutes and conditions, it may not properly be entered as final at the return term or appearance term,[25] unless defendant consents,[26] but only at the next term thereafter,[27] as where defendant was out of the state at the time of service of process.[28]

A default judgment may be rendered or entered at a special,[29] but not at an illegal,[30] term of court.

12. Mo.—Reed v. Nicholson, 59 S.W. 977, 158 Mo. 624.
34 C.J. p 182 note 8.

13. Iowa.—Ronayne v. Hawkeye Commercial Men's Ass'n, 144 N.W. 319, 162 Iowa 615.
34 C.J. p 182 note 9.

14. Tex.—Miller v. Trice, Civ.App., 219 S.W. 229.
34 C.J. p 182 note 10.

15. Cal.—Ritter v. Braash, 104 P. 592, 11 Cal.App. 258.
34 C.J. p 182 note 9 [a].

16. Cal.—Ritter v. Braash, supra.

Lack of prejudice
On entry of default in action on contract for recovery of money or damages only, it becomes duty of clerk to enter judgment forthwith; but the failure of the clerk to perform his ministerial duty in this respect may not prejudice plaintiff.—Jones v. Moers, 266 P. 821, 91 Cal. App. 65.

17. Cal.—Ritter v. Braash, 104 P. 592, 11 Cal.App. 258.

18. Neb.—Oakdale Heat & Light Co. v. Seymour, 110 N.W. 541, 78 Neb. 47.

19. La.—Evans v. Hamner, 24 So.2d 814.
34 C.J. p 182 note 13.

Confirmation of default held timely
La.—Elchinger v. Lacroix, 189 So. 572, 192 La. 908—Many Iron Works v. Kay, App., 151 So. 253—Union Motor Co. v. Williams, 8 La.App. 391.

After preliminary entry of decision
Under a particular statute, judgment may not be rendered in a defaulted answered case until the seventh day after the preliminary entry of a decision, which may be properly entered after default in neglecting to appear at the time fixed for trial.—Sahagian v. Superior Court, 129 A. 813, 47 R.I. 85—Gregson v. Superior Court, 128 A. 221, 46 R.I. 362.

20. Okl.—Boles v. MacLaren, 4 P.2d 106, 152 Okl. 265—Western Coal & Mining Co. v. Green, 166 P. 154, 64 Okl. 53.
Wyo.—James v. Lederer-Strauss & Co., 233 P. 137, 32 Wyo. 377.
34 C.J. p 182 note 15.

21. Ga.—Mutual Ben. Health & Accident Ass'n v. White, 172 S.E. 92, 48 Ga.App. 146.
N.J.—Rogers-Ebert Co. v. Century Const. Co., 18 A.2d 8, 126 N.J.Law 68.
Ohio.—Strain v. Isaacs, 18 N.E.2d 816, 59 Ohio App. 495.
34 C.J. p 182 note 18.

22. Ohio.—Van Ingen v. Berger, 92 N.E. 433, 82 Ohio St. 255, 19 Ann. Cas. 799.
34 C.J. p 182 note 19 [a].

23. Tenn.—Ross v. Meek, 28 S.W. 20, 93 Tenn. 666.
34 C.J. p 182 note 21.

24. Mo.—Montz v. Moran, 172 S.W. 613, 263 Mo. 252.
34 C.J. p 182 note 22.

25. Del.—Southern Maryland Trust Co. v. Henry, 155 A. 599, 4 W.W. Harr. 496.
Miss.—Copiah Hardware Co. v. Meteor Motor Car Co., 101 So. 375, 136 Miss. 274, suggestion of error overruled Copiah Hardware Co. v. Meteor Motor Car, 101 So. 579, 136 Miss. 274—J. B. Colt Co. v. Ward, 99 So. 676, 135 Miss. 202.
34 C.J. p 182 note 24.

Cross action
Court was without authority to enter judgment against codefendant on cross action, filed during term at which main case was tried, where such codefendant filed no answer thereto and entered no appearance thereon.—Kirk v. City of Gorman, Tex.Civ.App., 283 S.W. 188.

26. Ala.—O'Neal v. Garrett, 8 Ala. 276.

27. Iowa.—Walters v. Blake, 69 N. W. 879, 100 Iowa 521.
34 C.J. p 182 note 26.

28. Mass.—Thayer v. Tyler, 10 Gray 164.
34 C.J. p 183 note 27.

29. Tex.—Ruby v. Martin, Civ.App., 44 S.W.2d 824, error refused.

30. Ga.—Martin v. Scott, 44 S.E. 974, 118 Ga. 149.
34 C.J. p 183 note 28.

Where the summons and declaration are filed at a term which is not held by reason of the absence of the judge, a judgment by default may nevertheless be entered at the next succeeding term.[31] It has been held that the entry of a default judgment during a term at which the court has ordered the trial of criminal cases only is unauthorized;[32] but it has also been held that a statute providing for division of a term between civil and criminal business is for convenience in administration of the business of the court, and does not limit the jurisdiction of the court to enter a default judgment during the portion of the term allotted by statute to criminal business.[33] It is improper to enter a default judgment, under notice of trial for a certain term, when the case is reached under a note of issue for a prior term.[34]

e. Day and Hour

The terms of the statutes control in determining the day of the term on which a default judgment may regularly be rendered.

The terms of the statutes control in determining the day of the term on which a judgment by default may be regularly rendered.[35] As a general rule judgment may not be entered against defendant until a day after his default;[36] if he is summoned to appear and plead on the first day of the term, he may not be held in default and judgment entered against him until the next or a subsequent day;[37] but if the summons, although served the required number of days prior to the first day of the term, is made returnable at a subsequent day, judgment may be entered on the return day.[38] Where it is the custom to enter judgments as of the last day of the term, a judgment by default may be so entered, although the record shows that the default occurred on a previous day.[39]

Day of trial. In some jurisdictions where defendant is actually in default, judgment may be entered before the day on which the cause is set for trial,[40] or before the time at which the cause may regularly stand for trial,[41] or judgment may be entered notwithstanding the case has not been set for trial or placed on the trial docket.[42] In other jurisdictions judgment by default may not be entered before the day set for trial,[43] or before the case stands[44] or is set[45] for trial, but plaintiff is not deprived of his right to claim a default because he does not demand it until the time of trial.[46]

Hour of day. Where a party is cited to appear at a certain hour on a day named, judgment may not be taken against him at an earlier hour on the same day,[47] or at a later hour, if defendant appears at the hour set and the judge is not present;[48] and it is not mandatory on the court, on a party's failure to arrive at the exact hour set for trial, to proceed and render judgment by default;[49] but, under express statutory provision, judgment by default may

31. Tenn.—Brient v. Waterfield, 5 Sneed 537.

32. Ky.—Thacker v. Thacker, 75 S. W.2d 3, 255 Ky. 523.

33. Miss.—Strain v. Gayden, 20 So. 2d 697, 197 Miss. 353.

34. N.Y.—Mills v. Nedza, 227 N.Y.S. 156, 222 App.Div. 615.

35. Pa.—Cadwallader v. Firestone, Com.Pl., 7 Fay.L.J. 259.
Tex.—Metzger v. Gambill, Civ.App., 37 S.W.2d 1077, error refused—Bradford Supply Co. v. D. F. Connelly Agency, Civ.App., 272 S.W. 519.
34 C.J. p 183 note 31.

Case going to judgment automatically on certain day
Default judgments are within statutes and court rules under which cases which are ripe for judgment generally go to judgment automatically on a certain day, even though the clerk of court may fail to record the judgments.—Mann v. Rudnick, 2 N.E.2d 189, 294 Mass. 353.

Monday
Under a statute so providing, the clerk of court lacks jurisdiction to enter a default judgment except on a Monday.—Clegg v. Canady, 195 S. E. 770, 213 N.C. 258.

Day when waiver of citation filed
A contention that entry of default judgment on day when waiver of citation was filed was void because of fundamental error was overruled without discussion.—Harvey v. Wiley, Tex.Civ.App., 88 S.W.2d 569.

36. Pa.—Cadwallader v. Firestone, Com.Pl., 9 Fay.L.J. 62—McTee & Co. v. Clark, Com.Pl., 13 Northumb. Leg.J. 297.
34 C.J. p 183 note 32.

37. Ala.—Hollis v. Herzberg, 29 So. 582, 128 Ala. 474.
34 C.J. p 183 note 33.

38. Ind.—Citizens Loan & Trust Co. v. Boyles, 1 N.E.2d 292, 102 Ind. App. 157.
34 C.J. p 183 note 34.

39. Mass.—Herring v. Polley, 8 Mass. 113.
34 C.J. p 183 note 35.

40. Ind.—Martin v. Berry, 37 S.W. 835, 1 Ind.T. 399.
Iowa.—Brenner v. Gundershiemer, 14 Iowa 82.

Failure to comply with rule or order
(1) If defendant fails to plead under order of the court, judgment may be entered by default before the day on which the case is docketed for trial.—Blair v. Manson, 9 Ind. 357.
(2) Where the cause is at issue, a party may not be defaulted until the day for trial except for failure to discharge some rule or order entered in the meantime.—Norris v. Dodge, 28 Ind. 190.

41. Ohio.—State ex rel. Hughes v. Cramer, 34 N.E.2d 772, 138 Ohio St. 267.

42. Ind.—Indianapolis Power & Light Co. v. Waltz, 12 N.E.2d 404, 104 Ind.App. 526.
Okl.—Boles v. MacLaren, 4 P.2d 106, 152 Okl. 265.
34 C.J. p 183 note 37.

43. Kan.—Race v. Malony, 21 Kan. 31.
34 C.J. p 183 note 38.

44. Ky.—Bishop v. Bishop, 281 S.W. 824, 213 Ky. 703.

45. Ariz.—Burbage v. Jedlicka, 234 P. 32, 27 Ariz. 426.

46. Colo.—Manville v. Parks, 2 P. 212, 7 Colo. 128.

47. Cal.—Parker v. Shephard, 1 Cal. 131.

48. Pa.—Smith v. Fetherston, 10 Phila. 306.

49. Okl.—St. Louis I. M. & S. R. Co. v. Hardwick, 115 P. 471, 28 Okl. 577.

be rendered at the hour specified in the citation for appearance and answer where defendant does not appear and answer at or before such time.[50]

f. In Vacation or at Chambers

A default judgment may be rendered or entered in vacation in pursuance of statutory authority, but not otherwise except in the case of an entry evidencing judicial action taken in term time.

Where the rendition of a judgment by default is to be performed as a judicial act by the court, or involves an application to the court, the judgment ordinarily must be rendered in term time and not in vacation;[51] and, where the time for defendant to plead expires in vacation, plaintiff must await the convening of the court at term.[52] However, when authorized to do so by statute, a judge may render a default judgment in vacation.[53] Also, a judgment by default may be entered after term time[54] by the judge where he has acted judicially and ordered the entry before adjournment.[55] Under some statutes, a judgment by default, under prescribed circumstances, may be entered by the clerk in vacation,[56] but as such a proceeding is in derogation of the common law, the statutory requirements must be strictly pursued.[57]

At chambers. In some jurisdictions a judgment by default may be rendered by the judge at chambers,[58] during a regular term;[59] but in other jurisdictions this practice is not allowed.[60]

§ 208. Application for Judgment

a. In general
b. Time and place of application
c. Notice of application

a. In General

An application to the court or clerk for a preliminary entry of default, or to the court for a final default judgment, is necessary when required by statute or rule of court or, in the case of final judgment, when judicial determination of a matter dependent on extrinsic proof, such as the amount of unliquidated damages, is necessary before rendition of judgment.

As a general rule, where extrinsic proof of any fact is required involving judicial determination to enable the court to assess the damages or take an account, or generally to render the judgment by default, or to carry it into effect, an application must first be made to the trial court, and such facts judicially ascertained before the judgment by default may be entered,[61] as where the claim or demand is for unliquidated damages,[62] or, generally, where the action is in tort,[63] unless the damages are liquidated;[64] and, although the action is in form ex contractu, if facts are alleged which constitute a tort, application must generally be made to the court before judgment by default may be entered.[65]

If in such a case judgment is entered by the clerk without a prior application to the court, the judgment, although irregular,[66] is sometimes held not void, but voidable merely,[67] although there is authority to the effect that it is absolutely void.[68] It is irregular for the court to render a judgment on a default, in the absence of both parties, and without application by plaintiff, at a time when it is regularly reached for trial,[69] notwithstanding plaintiff would be entitled to such a judgment, on application therefor.[70]

In many jurisdictions there are statutory provisions to the effect that a judgment by default may be entered by the clerk without a prior application to the court where, in an action on a contract ex-

50. Tex.—Metzger v. Gambill, Civ. App., 37 S.W.2d 1077, error refused.

51. N.C.—Branch v. Walker, 92 N.C. 87.
34 C.J. p 183 note 46.

52. Ill.—Cook v. Forest, 18 Ill. 581.

53. Fla.—Malone v. Meres, 107 So. 625, 91 Fla. 490.

54. Pa.—Wanner v. Thompson, Com. Pl., 27 Del.Co. 455.

55. Tex.—Griffin v. Burrus, Civ. App., 24 S.W.2d 805, affirmed, Com. App., 24 S.W.2d 810.

56. Cal.—In re Cook's Estate, 17 P. 923, 19 P. 431, 77 Cal. 220, 11 Am. S.R. 267, 1 L.R.A. 567.
34 C.J. p 183 note 49.

57. Ark.—Files v. Robinson, 30 Ark. 487.

58. Idaho.—Neustel v. Spokane International R. Co., 149 P. 462, 27 Idaho 367.
34 C.J. p 184 note 52.

59. Ga.—Fouché v. Cherokee Nat. Bank, 90 S.E. 102, 18 Ga.App. 569.

60. Colo.—Hotchkiss v. Denver First Nat. Bank, 85 P. 1007, 37 Colo. 228.
34 C.J. p 184 note 54.

61. N.Y.—Hotel Syracuse v. Brainard, 10 N.Y.S.2d 892, 256 App.Div. 1055.
34 C.J. p 184 note 56.

Where clerk may not enter default for amount demanded, plaintiff must apply to court or judge for judgment.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, remittitur amended 171 N.E. 770, 253 N.Y. 583, reargument denied 171 N.E. 781, 253 N.Y. 558.

62. Okl.—Guthrie v. T. W. Harvey Lumber Co., 50 P. 84, 5 Okl. 774.
34 C.J. p 184 note 57.

63. Fla.—Saucer v. Vincent, 89 So. 802, 82 Fla. 296.
34 C.J. p 184 note 58.

64. N.Y.—Reeder v. Lockwood, 62 N.Y.S. 713, 30 Misc. 531.
34 C.J. p 184 note 59.

65. N.Y.—Field v. Morse, 7 How. Pr. 12—Flynn v. Hudson River R. Co., 6 How.Pr. 308, 10 N.Y.Leg. Obs. 158.

66. N.Y.—Bissell v. New York Cent., Hudson River R. Co., 67 Barb. 385.

67. N.Y.—Roeber v. Dawson, 3 N.Y.S. 122, 22 Abb.N.Cas. 73, 15 N.Y. Civ.Proc. 417.
34 C.J. p 184 note 62.

68. Cal.—Bond v. Pacheco, 30 Cal. 530.
34 C.J. p 184 note 63.

69. Neb.—Pitman v. Heumeier, 115 N.W. 1083, 81 Neb. 338.

70. Neb.—Pitman v. Heumeier, supra.

press or implied, the nature of the action and of plaintiff's demand is such that there is no necessity for judicial action in determining the relief to be granted or the amount of the recovery, a common provision being that the clerk may enter such judgment in an action ex contractu for the recovery of money or of a certain or liquidated amount. Whether, under such a statute, the clerk may or may not enter a default judgment without a prior application to the court depends, of course, on whether the statute is or is not applicable to the particular case.[71] Under some statutes, it is the duty of the clerk, in one class of actions, to enter defendant's default on application by plaintiff and, in other actions, to enter such default without præcipe or application therefor.[72] A rule of court providing that, in all causes in which adverse counsel have appeared of record, no default judgment shall be rendered except on motion does not apply to a judgment which is not a default judgment.[73]

Judgment against self or codefendant. It has been held that defendant may not make a motion for a default judgment against himself[74] and that one defendant may not pray it against codefendants.[75]

Oral or written motion. Under a statute so providing, it is necessary for plaintiff or his counsel to appear in open court and ask for a preliminary default;[76] but the motion may be made either orally or in writing,[77] and it is sufficient if a written request for entry of default is filed with the clerk of court and read by him in open court.[78]

b. Time and Place of Application

An application for judgment by default, when one is necessary should be made at the proper time therefor.

The application should be made in the court where the action is pending at the time of default.

Where, as indicated supra subdivision a of this section, an application for judgment by default is required, the local statute or practice govern as to the time when the application should be made.[79] A motion based on the claim that affidavits to the pleas do not comply with a statute is too late where plaintiff has waived any and all rights he may have had at any time to judgment by default.[80] However, where the complaint is duly verified, but the answer is not, as required by statute, delay in moving for default judgment on the complaint for want of an answer is not, as a matter of law, a waiver of plaintiff's rights.[81] Also, failure of plaintiff to move promptly for judgment because of defendant's default in filing an answer in time does not work a discontinuance of the action.[82]

The application should be made in the court where the action is pending at the time of default;[83] if there has been a change of venue, before default, it should be made, not in the court where the action was commenced, but in the court to which the venue has been changed,[84] unless the change of venue was merely granted but never perfected,[85] or was made by stipulation between plaintiff and interveners only, and was not effective as to defendant.[86]

c. Notice of Application

Notice of an application for a default judgment is necessary only when required by statute or rule of court.

Under some statutory or practice rules, notice of the application for, or entry of, a judgment by default must be given to defendant;[87] but, unless so

71. N.Y.—Hotel Syracuse v. Brainard, 10 N.Y.S.2d 892, 256 App.Div. 1055—Sobel v. Sobel, 4 N.Y.S.2d 194, 254 App.Div. 203, reargument denied 6 N.Y.S. 328, 254 App.Div. 836—Bump v. Carnavale, 244 N.Y.S. 206, 137 Misc. 707.
34 C.J. p 185 notes 67, 68.
Authority of clerk to enter preliminary default or default judgment generally see supra § 205.

72. Idaho.—Savage v. Stokes, 28 P. 2d 900, 54 Idaho 109.

73. Kan.—Hamilton v. Bernstein, 299 P. 581, 133 Kan. 229.

74. Iowa.—Greenough v. Shelden, 9 Iowa 503.
34 C.J. p 185 note 70.

75. Mass.—Vinal v. Burrill, 18 Pick. 29.

76. La.—Aycock v. Miller, App., 18 So.2d 335.

77. La.—Aycock v. Miller, supra.

78. La.—Aycock v. Miller, supra.

79. Tex.—Merrill v. Dunn, Civ.App., 140 S.W.2d 320, error dismissed, judgment correct.
34 C.J. p 185 note 75.

80. Md.—Buehner v. Sehlhorst, 132 A. 70, 149 Md. 474.
Waiver of default generally see supra § 203.

81. N.C.—Horney v. Mills, 128 S.E. 324, 189 N.C. 724.

82. N.C.—King v. Rudd, 37 S.E.2d 116, 226 N.C. 156.

83. Iowa.—Wormley v. Carroll Dist. Tp., 45 Iowa 666.

84. Iowa.—Wormley v. Carroll Dist. Tp., supra.
34 C.J. p 185 note 77.

85. Ind.—Snyder v. Bunnell, 64 Ind. 403.
34 C.J. p 185 note 78.

86. Colo.—Talpey v. Doane, 3 Colo. 22.

87. Ill.—Marland Refining Co. v. Lewis, 264 Ill.App. 163.
La.—Strange v. Albrecht, App., 176 So. 700.
Pa.—Welzel v. Link-Belt Co., 35 A.2d 596, 154 Pa.Super. 66.
Wis.—Federal Land Bank of St. Paul v. Olson, 1 N.W.2d 752, 239 Wis. 448.
34 C.J. p 185 note 82.

Defendant who has appeared
Ill.—Swiercz v. Nalepka, 259 Ill.App. 262—Risedorf v. Fyfe, 250 Ill.App. 122.
N.D.—Dakota Nat. Bank v. Johnson, 204 N.W. 840, 52 N.D. 845.
S.D.—Heitman v. Gross, 19 N.W.2d 508—Peterson v. McMillan, 14 N.W.2d 97.
34 C.J. p 185 note 82 [d] (1).

Purpose of court rule providing that any attorney intending to make a motion for a default order shall first serve on adverse party, if one

required, a defendant who is once in court whether by legal process or by appearance is not entitled to such notice,[88] especially where the judgment is one which will be entered as a matter of course, as in an action for the payment of money only.[89] Such notice may be waived by defendant;[90] and the want of it, even when required, does not render the judgment void, but merely irregular.[91] A judgment by default without notice against a plaintiff at a term after the term at which he was dismissed from the case is void.[92]

Service of a motion for judgment on a clerk of an attorney for defendant is sufficient notice to defendant.[93] Certain procedure permitted by a local court rule has been held to be constructive notice to a defendant before the court that a motion for judgment by default will be entertained on failure of defendant to plead;[94] and, irrespective of such rule, plaintiff may give actual notice that on a day specified he will move for judgment unless an answer is filed on or before that time.[95]

§ 209. Bond or Recognizance on Taking Judgment

The execution of a bond, conditioned to save defendant harmless if he procures a vacation or modification of the judgment, is necessary, under a few statutes, before rendition of a judgment against a defendant who was constructively summoned and has not appeared.

Under some statutes, before the rendering of a judgment against an absent defendant who was constructively summoned, and did not appear, a bond or recognizance should be executed conditioned to save him harmless if he procures a vacation or modification of the judgment;[96] and a judgment rendered without such security is erroneous,[97] but not invalid.[98] Such a bond is not required, where an absent defendant was personally served with process,[99] or a defendant has appeared and no judgment is rendered against him,[1] or the interest of a defendant is identical with that of another defendant who appeared and asserted defenses.[2]

§ 210. Evidence

In order to justify the rendition of a default judgment for plaintiff, it is sometimes necessary to show that plaintiff appeared.

One of the matters to be shown, in order to justify the court in rendering judgment by default for plaintiff, under statutes relating to the proceeding

has appeared or is known in the case, a copy of form of order he proposes to ask for, is to prevent entering of default orders through inadvertence, mistake, surprise, or excusable neglect of a party who has appeared in the case either personally or by an attorney, or of an attorney, who is known to represent litigants but who has not appeared, and rule should not be construed as making it a condition precedent to the entry of a default order that plaintiffs serve defendants with a copy of order when attorneys representing defendants have withdrawn and defendants have had ample time in which to substitute other attorneys, but have failed to do so, and have failed to inform plaintiffs of defendants' address.—Merryman v. Colonial Realty Co., 120 P.2d 230, 168 Or. 12.

Requirement not applicable

(1) A rule of court that, in all causes in which adverse counsel have appeared of record, no default judgment shall be rendered except on the giving of at least three days' notice to such adverse party of the hearing of the motion for the judgment does not apply to a judgment which is not a default judgment.—Hamilton v. Bernstein, 299 P. 581, 133 Kan. 229.

(2) Where plaintiffs waived defendant's failure to answer by proceeding to introduce their evidence as though defendant were present in court and had announced ready for trial, statute requiring a three-day notice prior to hearing of application for default judgment was inapplicable.—Yeast v. Fleck, 121 P.2d 426, 58 Ariz. 469.

88. La.—Barbetta v. Blythe Co., 129 So. 167, 14 La.App. 288.
N.D.—Corn Exchange Sav. Bank, Sioux Falls, S. D., v. Northwest Const. Co., 260 N.W. 580, 65 N.D. 577.
Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W. 2d 435, error dismissed.
Wis.—Velte v. Zeh, 206 N.W. 197, 188 Wis. 401.
34 C.J. p 186 note 88.

Later appearance

After granting of motion for default for defendant's failure to appear and answer in time, defendant is not entitled, by reason of later appearance, to notice of application for judgment under statute entitling him to five days' notice of subsequent proceedings if he gives notice of appearance before time for answering expires.—Skidmore v. Pacific Creditors, 138 P.2d 664, 18 Wash.2d 157.

89. Minn.—Heinrich v. Englund, 26 N.W. 122, 34 Minn. 395.
34 C.J. p 186 note 85.

Former code provision requiring notice was inapplicable in such case.—Heitman v. Gross, S.D., 19 N.W.2d 508—Henderson v. Egan, 179 N.W. 31, 43 S.D. 366—Searles v. Lawrence, 65 N.W. 34, 8 S.D. 11.

90. N.Y.—Selinger v. G. C. Inc., 142 N.Y.S. 194, 81 Misc. 343.

91. Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.
Wis.—Federal Land Bank of St. Paul v. Olson, 1 N.W.2d 752, 239 Wis. 448.
34 C.J. p 186 note 87.

92. Ark.—Liddell v. Landau, 112 S. W. 1085, 87 Ark. 438.

93. Alaska.—Rubenstein v. Imlach, 9 Alaska 62.

94. U.S.—Marking v. New St. Louis & Calhoun Packet Co., D.C.Ky., 48 F.Supp. 680.

95. U.S.—Marking v. New St. Louis & Calhoun Packet Co., supra.

96. Ark.—Hoofman v. Manor, 176 S. W.2d 911, 206 Ark. 615.
Ky.—Carter v. Capshaw, 60 S.W.2d 959, 249 Ky. 483.
34 C.J. p 186 note 90.

97. Ky.—Morrison v. Beckham, 27 S. W. 868, 96 Ky. 72, 16 Ky.L. 294.
34 C.J. p 186 note 91.

98. Ky.—Ballman v. Ballman, 67 S. W.2d 39, 252 Ky. 332.
34 C.J. p 186 note 92.

99. Ky.—Hall v. Bradley, 160 S.W. 2d 641, 290 Ky. 120.
34 C.J. p 186 note 93.

1. Ky.—Miller v. Title Insurance & Trust Co., 129 S.W.2d 163, 278 Ky. 598.

2. Ky.—Akers v. Kentucky Title Trust Co., 132 S.W.2d 83, 279 Ky. 727.

for the trial of right of property, is that plaintiff appeared.[3]

Proof of jurisdictional facts is discussed infra § 211, proof of default, infra § 212, and proof of the cause of action and amount recoverable, infra § 213.

§ 211. —— Proof of Jurisdictional Facts

Acquisition of jurisdiction over the person of defendant by service of process or voluntary appearance must be shown before the rendition or entry of judgment by default.

In order to sustain a judgment by default plaintiff must show that the court acquired jurisdiction over the person of defendant.[4] Except where there has been a voluntary appearance by defendant,[5] there must be proof of a proper service of process on defendant.[6] Ordinarily this proof is furnished by the officer's return[7] or by an affidavit of the person serving the writ, which must be made in due form in order to support the judgment.[8] An admission of service of the summons and complaint is not sufficient,[9] unless it states the manner in which the service was made;[10] and a written acknowledgment of service of process, indorsed on the writ, and purporting to be signed by defendant, will not be sufficient to support a judgment by default, without proof of the authenticity of the indorsement and signature.[11]

In case of service by publication on an absent or nonresident defendant, plaintiff must show a full compliance with all the requirements of the statute with regard to the mode of issuing and serving the process,[12] and also prove the facts which give the court jurisdiction over the property attached, or the res on which alone its judgment may operate,[13] unless the necessity for such proof is obviated by filing a statutory affidavit.[14]

A judgment rendered without sufficient proof of service of process has been held erroneous[15] and, according to some decisions, void.[16]

§ 212. —— Proof of Default

In many jurisdictions an affidavit or other extrinsic proof of a failure to plead within the time allowed by law is essential to a judgment by default.

In some jurisdictions, under the rule that the court will take judicial notice from its records as to whether an appearance has been entered or a plea filed,[17] an affidavit or other extrinsic proof of the default is not necessary before entering a default judgment for failure to appear and plead,[18] as

3. Tex.—Merrill v. Dunn, Civ.App., 140 S.W.2d 320, error dismissed, judgment correct.

4. Mich.—Denison v. Smith, 33 Mich. 155.
Puerto Rico.—Aparicio v. Christianson, 28 Puerto Rico 457.

5. N.Y.—Christal v. Kelly, 88 N.Y. 285.

6. Ill.—Hunsaker v. Watts, 257 Ill. App. 351.
S.D.—Illinois Trust & Savings Bank v. Town of Roscoe, 194 N.W. 649, 46 S.D. 477.
34 C.J. p 186 note 97.
Necessity and sufficiency of service of process or notice see supra § 192.

7. Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed.
34 C.J. p 187 note 98.

Examination by court of return
Court, on request for default judgment, is under duty to examine process and returns thereon, and determine whether process and manner of service was such as to give defendant notice required by law.—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604.

Formal offer in evidence
There is no law requiring that, in confirming a default, the citation and return of the sheriff thereon be formally offered in evidence.—Stout v. Henderson, 102 So. 193, 157 La. 169—Electrical Supply Co. v. Moses, 3 La.App. 286—Dupuy v. Knickerbocker Leather & Novelty Co., 11 La.App., Orleans, 272.

Return filed after adjournment of term
Filing summons in clerk's office with return showing service after adjournment of term at which default judgment was rendered is not proof of service or part of proceedings of court for rendition of judgment.—Hunsaker v. Watts, 257 Ill. App. 351.

Necessity of other evidence
(1) Where amended return of sheriff showed legal service on foreign corporation through local agent, default judgment was warranted without further showing or proof of agency, and burden of disproving agency was on defendant seeking to overthrow service.—Employer's Reinsurance Corporation v. Brock, Tex. Civ.App., 74 S.W.2d 435, error dismissed.

(2) However, where return of service of process, together with other parts of record, leaves any question of doubt or is not sufficiently explicit, court, before entering default judgment, has duty to hear, and to require to be produced, evidence showing that defendant was given notice required by law.—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604.

8. Mich.—People's Mut. Ben. Soc. v. Wayne Cir. Judge, 56 N.W. 944, 97 Mich. 627.
34 C.J. p 187 note 99.

9. N.Y.—Read v. French, 28 N.Y. 285.

10. N.Y.—Andrews v. Townshend, 1 N.Y.S. 421, 56 N.Y.Super. 140.
34 C.J. p 187 note 5.

11. Mich.—Johnson v. Delbridge, 35 Mich. 436.
34 C.J. p 187 note 6

12. Ind.—Rochester Security Trust Co. v. Myhan, 114 N.E. 410, 186 Ind. 391.
34 C.J. p 187 note 1.

13. Ky.—Jackson v. McElroy, 2 Bush 132—Harris v. Adams, 2 Duv. 141.

14. Ky.—Harris v. Adams, supra.

15. Iowa.—McCraney v. Childs, 11 Iowa 54.
Pa.—Camp v. Welles, 11 Pa. 206.

16. Wis.—McConkey v. McCraney, 37 N.W. 822, 71 Wis. 576.
34 C.J. p 187 note 8.

17. Mich.—Edson v. La Londe, 50 N. W. 112, 88 Mich. 162.
34 C.J. p 187 note 9.

18. Mich.—Edson v. La Londe, supra.
34 C.J. p 187 note 10.

Record only necessary proof
Where plaintiff made motion for preliminary default, the only proof necessary to show that defendant had made no appearance was record

where the default consists of the failure to obey a rule to plead,[19] although, where judgment is taken for want of a plea, the record must show that there was no plea filed,[20] and proof of service of the declaration may be necessary in order to ascertain whether the time within which defendant might plead has expired at the time of the entry of the default.[21]

In other jurisdictions in the ordinary case of defendant's omission to plead or answer within the time limited by law, plaintiff is required to make and file an affidavit[22] or submit other sufficient proof[23] that no plea or answer has been received or filed within the time allowed; and the sufficiency of such affidavit or proof,[24] and of the filing or service thereof,[25] depends on the requirements of the particular statute.

In order to justify the court in rendering judgment by default for plaintiff, under the statutes relating to the trial of right of property, it must be made to appear that defendant failed to appear or neglected or refused to join issue when directed.[26]

§ 213. —— Proof of Cause of Action

a. Necessity
b. Admissibility, weight, and sufficiency

a. Necessity

It is a general rule that, in order to be entitled to a judgment by default, plaintiff need not prove his cause of action or the allegations of his petition, declaration, or complaint, except as to damages where they are unliquidated.

In a few jurisdictions plaintiff is required to prove his cause of action in every case of default.[27] However, in most jurisdictions, since defendant's default in failing to plead or answer admits the material and traversable allegations of the declaration or complaint, as discussed supra § 201, if such declaration or complaint alleges a good cause of action and, when so required by statute, is duly verified, plaintiff, as a general rule, is not required, in order to be entitled to a judgment by default, to establish his cause of action by further proof,[28] except as to the amount of damages where they are unliquidated, as discussed in Damages § 163; but the nature of the action, or the circumstances of the particular case may, under some statutes, take it out of the general rule and require plaintiff to prove the facts essential to his recovery,[29] as where defendant was only constructively served with proc-

of court which was before court.—Aycock v. Miller, La.App., 18 So.2d 335.

19. Mich.—Edson v. La Londe, 50 N. W. 112, 88 Mich. 162—Elliott v. Farwell, 6 N.W. 234, 44 Mich. 186.

20. Miss.—Irving v. Montgomery, 4 Miss. 191.

21. Mich.—Rosen v. Brennan, 221 N. W. 276, 244 Mich. 397.

22. S.D.—Burton v. Cooley, 118 N. W. 1028, 22 S.D. 515.
34 C.J. p 187 note 14.

23. Fla.—Gamble v. Jacksonville, Pensacola & Mobile R. R. Co., 14 Fla. 226.
34 C.J. p 187 note 15.

Requirement inapplicable
An affidavit or other proof of failure to answer is not necessary where plaintiff is entitled to judgment, not because of a failure to answer, but on an issue of law found in his favor, such as the frivolousness of a demurrer.—Cahoon v. Wisconsin Cent. R. Co., 10 Wis. 290.

24. Wis.—Reed v. Catlin, 6 N.W. 326, 49 Wis. 686.
34 C.J. p 187 note 17.

25. S.D.—Whitcher v. Cooley, 123 N. W. 1135, 24 S.D. 190.
34 C.J. p 188 note 18.

26. Tex.—Merrill v. Dunn, Civ.App., 140 S.W.2d 320, error dismissed, judgment correct.

27. U.S.—Bradshaw v. General Motors Acceptance Corporation, D.C. Pa., 19 F.Supp. 993.
La.—Dreher v. Guaranty Bond & Finance Co., 165 So. 711, 184 La. 197—Saenger Amusement Co. v. Masur, 104 So. 701, 158 La. 745.
Pa.—Leglar v. Pittsburgh, C., C. & St. L. R. Co., 131 A. 363, 284 Pa. 521—Johnston v. American Casualty Co., Com.Pl., 23 West.Co.L.J. 178.
Philippine.—Camps v. Paterno, 9 Philippine 229.
34 C.J. p 188 notes 21, 25 [d].

Judgment must be on proof
N.J.—Gimbel Bros. v. Corcoran, 192 A. 715, 15 N.J.Misc. 538.

28. Ariz.—**Corpus Juris quoted in** Postal Ben. Ins. Co. v. Johnson, 165 P.2d 173, 178.
Ga.—Waters v. American Machinery Co., 163 S.E. 304, 45 Ga.App. 64.
Mo.—Shannon v. Del-Home Light Co., App., 43 S.W.2d 872.
Neb.—Danbom v. Danbom, 273 N.W. 502, 132 Neb. 858.
N.C.—De Hoff v. Black, 175 S.E. 179, 206 N.C. 687, followed in Akins v. Black, 175 S.E. 181, 206 N.C. 691—Gillam v. Cherry, 134 S.E. 423, 192 N.C. 195.
Tex.—Southern S. S. Co. v. Schumacker Co., Civ.App., 154 S.W.2d 283, error refused—Simmons Co. v. Spruill, Civ.App., 131 S.W.2d 1026—Aviation Credit Corporation of New York v. University Aerial Service Corporation, Civ.App., 59 S.W.2d 870, error dismissed—Martin v. Bell-Woods, Civ.App., 57 S. W. 271—Milford v. Culpepper, Civ. App., 40 S.W.2d 163, error refused—Citizens' Bank v. Brandan, Civ. App., 1 S.W.2d 466, error refused.
Va.—**Corpus Juris cited in** Bova v. Roanoke Oil Co., 23 S.E.2d 347, 351, 180 Va. 332.
34 C.J. p 188 note 25.

Taking verdict
In a case within a statute so providing, plaintiff is entitled, on defendant's default, to take a verdict as though each allegation had been proved.—Hayes v. International Harvester Co. of America, 183 S.E. 197, 52 Ga.App. 328—Pape v. Woolford Realty Co., 134 S.E. 174, 35 Ga.App. 284—Cochran v. Carter, 132 S.E. 921, 35 Ga.App. 286—34 C.J. p 188 note 25 [c] (1).

Court may require, or not require, proof
Ill.—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
On assessment of damages see Damages § 172 b.

29. Idaho.—Portland Cattle Loan Co. v. Gemmell, 242 P. 798, 41 Idaho 756.
Ill.—Downers Grove Sanitary Dist.

ess,[30] as by publication,[31] or where the complaint was not served with the summons.[32] A failure to produce such proof, where required, does not render the judgment void, but merely erroneous.[33] An attempt to prove the allegations of the complaint unnecessarily does not affect plaintiff's right to the judgment,[34] or compel him to make a complete case;[35] nor does it affect statutory provisions regarding the effect of defendant's default.[36]

Quo warranto proceeding. In some jurisdictions, the state is entitled, without making proof of the facts set out in the petition or information, to a judgment of ouster against defendant in a quo warranto proceeding where he defaults by failing to appear or answer;[37] but in other jurisdictions proof must be made to sustain a judgment in case of default.[38]

Joint defendants. Where one of two joint defendants answers, controverting the material allegations of the declaration, the fact that the other defendant suffers default does not dispense with the necessity of proof as to the answering defendant;[39] and proof against those in default may be taken at the same time and on the trial of the issues against those defending and a judgment may be rendered on the whole case.[40]

Where there are several adverse claimants to the demand and one of them appears and prosecutes his claim, and the other fails to do so, and defendant interposes no defense, the party prosecuting may not take judgment by default, unless he shows by legal proof a right of recovery prima facie in himself.[41]

b. Admissibility, Weight, and Sufficiency

In so far as they are not varied by statute, general rules as to the admissibility and weight, and the sufficiency, of evidence are applicable where, on an application for a default judgment, proof of plaintiff's cause of action is required.

Where proof of the cause of action or of the amount of plaintiff's claim or demand is necessary, the general rules of evidence, in so far as they are not varied by statute, apply in a proceeding on an application for a default judgment with regard to the admissibility[42] and the weight and sufficiency[43] of the evidence. Plaintiff's proof must conform to

v. Downers Grove Inv. Co., 178 N.E. 42, 345 Ill. 359.
Mo.—Jones v. Cook, 193 S.W.2d 494.
Okl.—Henshaw v. Pringle, 300 P. 666, 150 Okl. 64.
Tex.—First Nat. Bank v. Robert, Civ. App., 10 S.W.2d 1010—Love v. Allard, Civ.App., 286 S.W. 581.
34 C.J. p 188 notes 28, 32.

Under speedy judgment act
Md.—Carey v. Howard, 16 A.2d 289, 178 Md. 512.
Necessity of proof in action to quiet title see the C.J.S. title Quieting Title § 104, also 51 C.J. p 282 notes 38-41.
Whether proof necessary when defendant absent from trial see supra § 198.

30. Ga.—Jones v. Adams, 46 Ga. 605.

31. Tex.—Pellum v. Fleming, Civ. App., 283 S.W. 531, error refused Fleming v. Pellum, 287 S.W. 492, 116 Tex. 130—Lopez v. Mexico-Texas Petroline & Asphalt Co., Civ. App., 281 S.W. 326.
34 C.J. p 188 note 30.

32. N.Y.—Whitman & Barnes Mfg. Co. v. Hamilton, 57 N.Y.S. 760, 27 Misc. 198.
34 C.J. p 188 note 31.

33. Kan.—Garner v. State, 28 Kan. 790.
34 C.J. p 189 note 33.

Waiver
In suit by heir against other heirs for sale of land because of indivisibility, any error in rendering judgment against nonresident defendants without supporting evidence was waived where, after judgment, the nonresident defendants filed an answer in which they admitted the allegations of the petition and asked that the sale be confirmed.—Adams v. Gardner, 277 S.W. 284, 211 Ky. 246.

34. Wis.—Phillips v. Portage Transit Co., 118 N.W. 539, 137 Wis. 189.
34 C.J. p 189 note 34.

35. Wis.—Phillips v. Portage Transit Co., supra.

36. Tex.—Southern S. S. Co. v. Schumacher Co., Civ.App., 154 S.W.2d 283, error refused—Simmons Co. v. Spruill, Civ.App., 131 S.W.2d 1026.

37. R.I.—State v. Kearn, 22 A. 322, 17 R.I. 391.
51 C.J. p 360 note 63.

38. Cal.—Searcy v. Grow, 15 Cal. 117.
51 C.J. p 360 note 64.

39. Ill.—Chamblin v. Chamblin, 1 N.E.2d 73, 362 Ill. 588, 104 A.L.R. 1183, certiorari denied 57 S.Ct. 24, 299 U.S. 541, 81 L.Ed. 398.
34 C.J. p 189 note 37.

Default at direction of another defendant
A defendant's default at direction or for benefit of codefendant by whom defendant was employed did not relieve plaintiff from proving her case against codefendant, as any defendant at any time may withdraw his defense.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630.

40. N.Y.—Lyon v. Yates, 61 N.Y. 661—Erie Basin Impr. Co. v. Smith, 120 N.Y.S. 323, 135 App.Div. 365.

41. U.S.—Bright v. U. S., 8 Ct.Cl. 326.

42. Va.—Frazier v. Frazier, 2 Leigh 642, 29 Va. 642.
34 C.J. p 190 note 54.
Admissibility of evidence of damages see Damages § 172 b.

43. Tex.—Engineers' Petroleum Co. v. Gourley, Civ.App., 243 S.W. 595.
34 C.J. p 190 note 55.

Prima facie case sufficient
La.—Strange v. Albrecht, 183 So. 209, 190 La. 897.
Tex.—Olsan Bros. v. Miller, Civ. App., 108 S.W.2d 856.

Incompetent evidence admitted without objection
Whether the judgment is by default or otherwise, it is not supported by evidence which is wholly incompetent and therefore without probative force, even though it was admitted without objection.—Paggi v. Rose Mfg. Co., Tex.Civ.App., 259 S.W. 962.

Statement of account, indorsed by defendant as true and correct, is a liquidated demand and sufficient proof to support default.—Colorado River Syndicate Subscribers v. Alexander, Tex.Civ.App., 288 S.W. 586.

Evidence held sufficient to sustain default judgment.
Ariz.—Yuma County v. Hanneman, 28 P.2d 622, 42 Ariz. 561.

his allegations,[44] and must be sufficient to make out his case with legal certainty.[45] In the absence of statute prescribing the nature of the evidence, the judgment may be founded on any legal evidence which is sufficient to satisfy the court.[46] Under some statutes an affidavit in respect of plaintiff's claim or demand, if regularly and properly made, may be sufficient by itself to support the judgment;[47] but it is within the discretion of the court to require other or further proof.[48]

Evidence for defendant. As defendant by his default has admitted all the traversable facts which were properly pleaded in the declaration or complaint, as discussed supra § 201, he usually is not permitted on the hearing of an application for a default judgment to introduce any evidence controverting plaintiff's cause of action and his liability thereon;[49] but, as indicated in Damages § 172 b, he may, in a proceeding for the assessment of damages, offer evidence in mitigation or reduction of the damages claimed by plaintiff.

§ 214. Hearing, Determination, and Relief

a. In general

b. Conformity to pleadings and proof

c. Amount

d. Attorney's fees

a. In General

The court may render judgment by default or deny the application therefor, continue the cause, and grant further time to plead. Where it renders judgment for plaintiff by default, the court may award such recovery or relief as is permissible and appropriate under the law and the facts.

A default judgment may properly be rendered without the aid of a jury[50] where a writ of inquiry is unnecessary;[51] and, under some statutes relating to particular classes of actions, a hearing is not a prerequisite to a default judgment;[52] but where the cause of action must be proved, as considered supra § 213, and the preliminary default must be confirmed, as discussed infra § 216, a confirmation of, or attempt to confirm, a preliminary default involves a trial of the case on the merits and on the issue joined by the preliminary default.[53] The sufficiency of the cause of action stated in the declaration or complaint is open for consideration;[54] and, where no cause of action is stated, it is proper for the court to dismiss the complaint.[55] The court

Kan.—Royse v. Grage, 28 P.2d 732, 138 Kan. 779.

Evidence held insufficient to support default judgment

(1) Generally.—Dreher v. Guaranty Bond & Finance Co., 165 So. 711, 184 La. 197—W. T. Rawleigh Co. v. Copeland, La.App., 169 So. 251—Pfeifer v. Bacharach, 121 So. 196, 10 La. App. 30—34 C.J. p 190 note 55 [a].

(2) As to amount.—San Antonio Paper Co. v. Morgan, Tex.Civ.App., 53 S.W.2d 651, error dismissed.

44. La.—Wilson & Gandy v. Cummings, App., 150 So. 436.
Tex.—Pellum v. Fleming, Civ.App., 283 S.W. 531, writ of error refused Fleming v. Pellum, 287 S.W. 492, 116 Tex. 130.
34 C.J. p 190 note 56.

45. La.—Noullet v. Schulz, 2 La. App., Orleans, 416.

46. S.D.—Gordon v. Gordon, 105 N. W. 244, 20 S.D. 275.
34 C.J. p 190 note 58.

47. La.—Victory Oil Co. v. Von Schlemmer, 7 La.App. 289.
N.J.—Becker v. Welliver, 34 A.2d 893, 131 N.J.Law 64.
N.D.—Corn Exchange Sav. Bank, Sioux Falls, S. D., v. Northwest Const. Co., 260 N.W. 580, 65 N.D. 577.
34 C.J. p 190 note 60.

Action by executor

An executor who brought action on note was not an agent within meaning of statutory provision that, if all plaintiffs are absent from the state at time of bringing of suit, or if plaintiff is a corporation, affidavit or affirmation may be made by an agent of plaintiffs who will make further oath or affirmation that he has personal knowledge of the matters therein stated, and hence executor was not required to make oath or affirmation that he had personal knowledge of matters stated in affidavit.—Carey v. Howard, 16 A.2d 289, 178 Md. 512.

Basis of affidavit

Under a particular statute, affidavit of demand for judgment must be based on unconditional promise to pay an ascertained sum of money only.—Selly v. Fleming Coal Co., 180 A. 326, 7 W.W.Harr., Del., 34.

Doubt as to sufficiency of affidavit is resolved in favor of defendant.—Holland v. Universal Life Co., 180 A. 328, 7 W.W.Harr., Del., 39.

Affidavit held insufficient to support judgment.
Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205.
Tex.—Gause v. Roden, Civ.App., 66 S.W.2d 400.
34 C.J. p 190 note 60 [a].

48. U.S.—Orsinger v. Consolidated Flour Mills Co., C.C.A.Ill., 284 F. 224.
N.Y.—Didier v. Warner, 1 Code Rep. 42, 2 Edm.Sel.Cas. 41.

49. Ala.—Werten v. Koosa, 53 So. 98, 169 Ala. 258.
34 C.J. p 189 note 42.

50. Ala.—King v. Holtam, 122 So. 405, 219 Ala. 410.

Direction of verdict

Where there has been a default on a trial, parties may have a direction of a verdict with the same force and effect as though a jury were physically present.—Davis v. Ross, 20 N.Y.S.2d 375, 259 App.Div. 577, reargument denied 21 N.Y.S.2d 391, 259 App.Div. 1029.

51. Ala.—Lokey v. Ward, 154 So. 802, 228 Ala. 559.

52. Ohio.—State ex rel. Hughes v. Cramer, 34 N.E.2d 772, 138 Ohio St. 267.

53. La.—Russo v. Aucoin, App., 7 So.2d 744.

54. Ill.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147.
Pleading stating cause of action as necessary to sustain judgment see supra § 193.

Correctness of conclusion from facts

Whether pleader stated correct or incorrect conclusion from facts alleged was question for court's determination when judgment was entered.—Wright v. Shipman, Tex.Civ. App., 279 S.W. 296.

Unless clearly bad, complaint should be held sufficient.—Mihelich v., Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.

55. Mont.—Lindsey v. Drs. Keenan, Andrews & Allred, 165 P.2d 804.

may disregard objections which are not jurisdictional, but amount to no more than mere irregularities.[56]

According to the facts, the court may either render a judgment by default, or confirm the entry thereof, and assess plaintiff's damages,[57] or it may set aside a preliminary entry of the default, as discussed infra § 333, or deny the application, and grant defendant further time to answer or otherwise plead.[58] Whether a default judgment shall be rendered in a proper case or some other permissible action taken rests largely in the court's discretion,[59] which is to be exercised in conformity with the spirit of the law, and in a manner to subserve the ends of substantial justice.[60] However, where by statute plaintiff is entitled to a default, the court may refuse it and continue the cause.[61] The refusal of the court to enter a default at one time does not estop it from granting a default at a subsequent time.[62]

Relief generally. In rendering judgment for plaintiff by default, the court may award any recovery or relief which is appropriate[63] and to which plaintiff is entitled under the facts alleged and relief demanded in his declaration or complaint,[64] but not relief which is not authorized by law.[65]

Judgment for defendant. If plaintiff's pleading states a good cause of action, and defendant fails to answer, it is error to give judgment for defendant;[66] at least affirmative relief may not be given in his favor as long as the default stands.[67] Even where plaintiff fails to appear, where defendant has pleaded only matter going to defeat plaintiff's cause of action, the remedy of defendant is to move for dismissal for want of prosecution,[68] and not to prove his defense and take a verdict and judgment in his favor.[69] A judgment in favor of defendant has, however, been sustained where required proof of the cause of action was not introduced and consequently a judgment against him would have been improper.[70]

Where defendant served by publication. Where a nonresident defendant is served by publication only, the proper judgment against him on his default is, not one in personam, but a judgment quasi in rem.[71] A judgment in personam in such a case is void.[72] If plaintiff fails to prove his cause of action, the only proper judgment is one dismissing the complaint.[73] It is not error not to appoint an attorney to represent one of two defendants who

56. W.Va.—Anderson v. Doolittle, 18 S.E. 724, 38 W.Va. 629.
34 C.J. p 191 note 72.

57. Wis.—Wausau First Nat. Bank v. Kromer, 105 N.W. 823, 126 Wis. 436.
34 C.J. p 190 note 64.
Assessment of damages on default or interlocutory judgment see Damages §§ 163-172.

58. Mass.—Hooton v. Redmond, 130 N.E. 107, 237 Mass. 508.
34 C.J. p 190 note 66.

Restriction of time
If the court grants defendant leave to plead, it may restrict the time within which he may do so.—Lichtenberger v. Worm, 60 N.W. 93, 41 Neb. 856.

59. Ala.—Ex parte Central Alabama Dry Goods Co., 189 So. 56, 238 Ala. 20.
La.—Levee Const. Co. v. Equitable Casualty & Surety Co. of New York, 138 So. 431, 173 La. 648.
N.C.—Brown v. Town of Hillsboro, 117 S.E. 41, 185 N.C. 368.
Wash.—Garrett v. Nespelem Consol. Mines, 139 P.2d 273, 18 Wash.2d 340—Graham v. Yakima Stock Brokers, 72 P.2d 1041, 192 Wash. 121.
In federal court see Federal Courts § 144 c.

60. Wash.—Graham v. Yakima Stock Brokers, 72 P.2d 1041, 192 Wash. 121.

Discretion held abused
Ala.—Ex parte Central Alabama Dry Goods Co., 189 So. 56, 238 Ala. 20.

61. La.—State v. Posey, 17 La.Ann. 252, 87 Am.D. 525.

62. Iowa.—Schofield v. Peterson, 33 Iowa 597.

63. Ky.—McIntosh v. Clark, Thurmund & Richardson, 177 S.W.2d 155, 296 Ky. 358.
N.Y.—Karp v. Karp, 283 N.Y.S. 656, 246 App.Div. 730.

64. Cal.—Faucett v. Riveroll, 264 P. 1098, 203 Cal. 438—Kennard v. Binney, 217 P. 808, 62 Cal.App. 732.
Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205.
Minn.—Union Central Life Ins. Co. v. Page, 251 N.W. 911, 190 Minn. 360.
Okl.—Hewitt Oil & Gas Co. v. Ramsey, 261 P. 206, 128 Okl. 87.
34 C.J. p 191 note 68.

Where relief prayed for is not definite and certain, and the case is not one in which plaintiff may, without application to the court, enter judgment on default, on such application for judgment it is the duty of the court to determine the precise relief to which plaintiff is entitled.—Smith v. Rathbun, 88 N.Y. 660.

65. N.Y.—Bank of America Nat. Ass'n v. Dames, 239 N.Y.S. 558, 135 Misc. 391.

66. Neb.—Bouscaren v. Brown, 59 N.W. 385, 40 Neb. 722.
33 C.J. p 1143 note 64—34 C.J. p 191 note 73.

67. Mo.—Leclede Land & Improvement Co. v. Creason, 175 S.W. 55, 264 Mo. 452.

Dismissal of counterclaim
When defendant did not appear on the trial day, the court when rendering judgment for plaintiff on its cause of action should have dismissed the counterclaim for failure to prosecute.—Springfield Gas & Electric Co. v. Fraternity Bldg. Co., Mo.App., 264 S.W. 429.

68. Ga.—Woodall v. Exposition Cotton Mills, 120 S.E. 423, 31 Ga.App. 269.

69. Ga.—Woodall v. Exposition Cotton Mills, supra.

70. Tex.—First Nat. Bank v. Robert, Civ.App., 10 S.W.2d 1010.

71. Vt.—French v. White, 62 A. 85, 78 Vt. 89, 2 L.R.A.,N.S., 804, 6 Ann.Cas. 479.
34 C.J. p 191 note 78.

72. Iowa.—Smith v. Griffin, 13 N.W. 423, 59 Iowa 409.
34 C.J. p 191 note 79.

73. N.Y.—Berger v. Horsfield, 176 N.Y.S. 854, 188 App.Div. 649.
Necessity of proof of cause of action where defendant served by publication see supra § 213.

was served by publication and who filed no answer and made no appearance, where he testifies as a witness at the trial.[74]

b. Conformity to Pleadings and Proof

(1) In general
(2) As to relief

(1) In General

A default judgment must strictly conform to, and be supported by, the allegations of the petition or complaint.

A judgment for plaintiff by default must strictly[75] conform to, and be supported by, the allegations of the petition or complaint,[76] a closer correspondence between pleading and judgment being necessary than after a contested trial.[77] Defendant's default does not enlarge or broaden plaintiff's claim and rights under the allegations of the petition;[78] nor may the allegations of the petition be enlarged by any evidence offered or introduced on confirmation of the default judgment.[79] Where plaintiff proceeds under a statute requiring proof, and his own evidence shows that he has no cause of action, it is proper to render judgment in favor of defendant.[80]

(2) As to Relief

The relief granted plaintiff in a judgment by default must conform to, and be supported by, the allegations in the complaint, as well as by the proof in support of the allegations where such proof is required.

The relief granted plaintiff on a judgment by default must conform to, and be supported by, the allegations of the declaration or complaint,[81] and the proofs in support thereof,[82] where such proof is required, as discussed supra § 213; and it may not be any different from, or greater than, that which plaintiff has demanded in his complaint.[83] Plaintiff's relief in a judgment by default is strictly limited in nature and degree to that specifically demanded in the complaint,[84] even though the allega-

74. Tex.—Sharpe v. National Bank of Commerce, Civ.App., 272 S.W. 321.

75. N.C.—Federal Land Bank of Columbia v. Davis, 1 S.E.2d 350, 215 N.C. 100.

76. Cal.—Flores v. Smith, 117 P.2d 712, 47 Cal.App.2d 253—Gregg v. Stark, 17 P.2d 766, 128 Cal.App. 434.
Idaho.—Angel v. Mellen, 285 P. 461, 48 Idaho 750.
Tex.—Bass v. Brown, Civ.App., 262 S.W. 894.
Wash.—Bates v. Glaser, 227 P. 15, 130 Wash. 328.

77. U.S.—Armand Co. v. Federal Trade Commission, C.C.A., 84 F.2d 973, certiorari denied 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 463, certiorari denied 57 S.Ct. 189, 299 U.S. 597, 81 L.Ed. 440, rehearing denied 57 S.Ct. 234, 299 U.S. 623, 81 L.Ed. 459.

78. Iowa.—Rayburn v. Maher, 288 N. W. 136, 227 Iowa 274.
Judgment foreign to pleadings
Defendant's failure to appear and defend an action on a note did not entitle plaintiffs to findings or judgment foreign to the pleadings in the case.—Petersen v. Dethlefs, 298 N.W. 155, 139 Neb. 572.

79. La.—Atkins v. Smith, App., 21 So.2d 85, reversed in part on other grounds 15 So.2d 855, 204 La. 468.
Testimony not admissible under pleading
La.—W. T. Rawleigh Co. v. Copeland, App., 169 So. 251.

80. Hawaii.—Hirokawa v. Abe, 29 Hawaii 228.

81. Ark.—**Corpus Juris cited in** Johnson v. Swanson, 189 S.W.2d 803, 805.
Ind.—Christ v. Jovanoff, 151 N.E. 26, 84 Ind.App. 676, rehearing denied 152 N.E. 2, 84 Ind.App. 676.
Iowa.—Manassa v. Garland, 206 N. W. 33, 200 Iowa 1129.
Mont.—Steinbrenner v. Love, 129 P. 2d 101, 113 Mont. 466—Stillwater County v. Kenyon, 297 P. 453, 89 Mont. 354—State v. District Court of Eighth Judicial Dist., 284 P. 128, 86 Mont. 387.
N.C.—Lane v. Becton, 35 S.E.2d 334, 225 N.C. 457.
34 C.J. p 191 note 82.

82. Iowa.—Oviatt v. Oviatt, 156 N. W. 687, 174 Iowa 512.
34 C.J. p 191 note 83.

83. Cal.—Balaam v. Perazzo, 295 P. 330, 221 Cal. 375—Peck v. Peck, 127 P.2d 94, 52 Cal.App.2d 792—Barton v. Maal, 55 P.2d 529, 12 Cal. App.2d 353—In re Thurnell's Estate, App., 19 P.2d 14—McOmie v. Board of Directors of Veterans' Home of California, 263 P. 253, 88 Cal.App. 16.
Colo.—Barslund v. Anderson, 103 P. 2d 23, 106 Colo. 238.
Idaho.—Nielson v. Garrett, 43 P.2d 380, 55 Idaho 240—Angel v. Mellen, 285 P. 461, 48 Idaho 750.
Ill.—Kryl v. Zelezny, 8 N.E.2d 223, 290 Ill.App. 599.
Ind.—Christ v. Jovanoff, 151 N.E. 26, 84 Ind.App. 676, rehearing denied 152 N.E. 2, 84 Ind.App. 676.
Minn.—Union Central Life Ins. Co. v. Page, 251 N.W. 911, 190 Minn. 360.
Miss.—Grissom v. General Contract Purchase Corporation, 4 So.2d 303, 191 Miss. 742.
Mont.—Steinbrenner v. Love, 129 P. 2d 101, 113 Mont. 466—Stillwater County v. Kenyon, 297 P. 453, 89 Mont. 354—State v. District Court of Eighth Judicial Dist., 284 P. 128, 86 Mont. 387—State v. District Court of Nineteenth Judicial Dist. in and for Toole County, 245 P. 529, 76 Mont. 143.
Nev.—Keyes v. Nevada Gas Co., 38 P.2d 661, 55 Nev. 431.
N.Y.—Slote v. Cascade Holding Corporation, 11 N.E.2d 894, 276 N.Y. 239—Schickler v. Gordon, 219 N.Y. S. 909, 219 App.Div. 747.
N.C.—**Corpus Juris cited in** Simms v. Sampson, 20 S.E.2d 554, 559, 221 N.C. 379.
Wash.—**Corpus Juris cited in** Ermey v. Ermey, 139 P.2d 1016—Aid v. Bowerman, 232 P. 297, 132 Wash. 319.
Wis.—Parish v. Awschu Properties, 10 N.W.2d 166, 243 Wis. 269—Good v. Schiltz, 218 N.W. 727, 195 Wis. 481.
33 C.J. p 1146 note 89 [a], [c], [d], p 1147 note 93—34 C.J. p 154 note 18, p 191 note 85, p 192 note 88.

84. Cal.—Estrin v. Superior Court in and for Sacramento County, 96 P.2d 340, 14 Cal.2d 670—American Securities Co. v. Van Loben Sels, 56 P.2d 1247, 13 Cal.App.2d 265.
Minn.—Pilney v. Funk, 3 N.W.2d 792, 212 Minn. 398—Keys v. Schultz, 2 N.W.2d 549, 212 Minn. 109.
33 C.J. p 1147 note 93 [f].
Filing of demurrer is not the making of a "defense" within the meaning of the statute providing that, if no "defense" is made, plaintiff may not have judgment for any relief not specifically demanded.—Union Light, Heat & Power Co. v. City of Bellevue, 144 S.W.2d 1046, 284 Ky. 405.

tions[85] or the proofs,[86] or both,[87] would justify other, additional, or greater relief, as under a prayer for general relief.[88]

According to some authorities a default judgment for relief different from, or greater than, that demanded is void;[89] but according to others it is merely erroneous or voidable.[90] If the complaint states a cause of action sufficient to sustain the relief actually given, the judgment will not be held invalid because the complaint also states facts authorizing other relief;[91] and it has been held, on the theory, that the allegations and not the prayer in a petition should control such a judgment,[92] that the judgment is not void because the relief afforded was not specifically prayed for.[93]

Where the complaint is amended, and defendant does not answer either the original or the amended complaint, he may not object that the relief granted under the amended complaint is greater than that demanded in the original complaint,[94] unless the amendment is made without notice to him.[95]

Award of damages to defendant. It is error to award damages to defendant where, although plaintiff defaults by failing to appear at the time set for trial, no issue as to damages to defendant has been raised in the pleadings.[96]

c. Amount

A default judgment may be rendered for the amount claimed in the complaint, but not for a greater amount. It should not include interest unless interest is demanded in the complaint.

A judgment by default may be rendered for the amount claimed in the complaint,[97] less amounts received in payment in the meantime,[98] unless the case has been compromised for a smaller sum,[99] or unless evidence is required and a prima facie case made for the full amount claimed is destroyed in whole or in part by other evidence.[1] Judgment should not be rendered for an amount greater than that prayed for in the declaration or complaint,[2] or justified by the facts alleged,[3] although the evidence shows a larger amount.[4] The fact that a part of the claim is barred by the statute of limitations does not render a default judgment for the whole illegal.[5]

Interest. Except to the extent that interest is demanded in the complaint,[6] interest should not be included in the judgment;[7] and, even where interest is allowed, it should not be allowed for more than the legal rate.[8] Under some statutes, the clerk of the court, in entering a default judgment, is authorized to compute and allow interest if the complaint asks for a certain sum with interest;[9] but this does not invalidate a judgment, the interest on which is computed by the court.[10]

d. Attorney's Fees

A statutory or contractual provision therefor is es-

85. Cal.—American Securities Co. v. Van Loben Sels, 56 P.2d 1247, 13 Cal.App.2d 265.

86. Minn.—Pilney v. Funk, 3 N.W.2d 792, 212 Minn. 398.

Facts not alleged, although proved, may not form the basis of the judgment.—International Harvester Co. v. Cameron, 105 P. 189, 25 Okl. 256.

87. Minn.—Keys v. Schultz, 2 N.W. 2d 549, 212 Minn. 109.

88. Cal.—Metropolitan Life Ins. Co. v. Welch, 260 P. 545, 202 Cal. 312—American Securities Co. v. Van Loben Sels, 56 P.2d 1247, 13 Cal. App.2d 265.
Idaho.—Angel v. Mellen, 285 P. 461, 48 Idaho 750.
33 C.J. p 1147 note 93 [g].

89. Cal.—Balaam v. Perazzo, 295 P. 330, 221 Cal. 375.
Mont.—State v. District Court of Eighth Judicial Dist., 284 P. 128, 86 Mont. 387.
N.M.—**Corpus Juris cited in** Walls v. Erupcion Min. Co., 6 P.2d 1021, 1025, 36 N.M. 15.
33 C.J. p 1148 note 95—34 C.J. p 192 note 91, p 564 note 35 [a].

90. Ind.—Christ v. Jovanoff, 151 N. E. 26, 84 Ind.App. 676, rehearing denied 152 N.E. 2, 84 Ind.App. 676.
N.C.—**Corpus Juris cited in** Simms v. Sampson, 20 S.E.2d 554, 559, 221 N.C. 379.
33 C.J. p 1147 note 94—34 C.J. p 192 note 92.

91. Cal.—Zucco v. Farullo, 174 P. 929, 37 Cal.App. 562.

92. Ky.—Mansfield v. Mansfield, 2 Ky.Op. 182.

93. Ky.—Burton v. Louisville, 85 S. W. 727, 27 Ky.L. 514.

94. N.Y.—Carr v. Sterling, 22 N.E. 87, 114 N.Y. 558.
Wash.—Robbins v. Wyman, 135 P. 656, 75 Wash. 617.

95. Iowa.—Chandler Mill. & Mfg. Co. v. Sinaiko, 208 N.W. 323, 201 Iowa 791.
33 C.J. p 1147 note 93 [d]—34 C.J. p 192 note 98.

96. Cal.—Evans v. Baxter, 260 P. 832, 86 Cal.App. 412.

97. Ill.—Kryl v. Zelezny, 8 N.E.2d 223, 290 Ill.App. 599.
34 C.J. p 192 note 1.

98. Ill.—Beckers v. Kankakee, 213 Ill.App. 538.
Va.—Rees v. Conococheague Bank, 5 Rand. 326, 26 Va. 326, 16 Am.D. 755.

99. Ark.—Ozark Ins. Co. v. Leatherwood, 96 S.W. 374, 79 Ark. 252.

1. La.—Russo v. Aucoin, App., 7 So. 2d 744.

2. Cal.—Flores v. Smith, 117 P.2d 712, 47 Cal.App.2d 253.
Ill.—Kryl v. Zelezny, 8 N.E.2d 223, 290 Ill.App. 599.
S.D.—Jones v. Johnson, 222 N.W. 688, 54 S.D. 149.
33 C.J. p 1166 note 11—34 C.J. p 192 note 4.

3. Miss.—Board of Sup'rs of Neshoba County v. City of Philadelphia, 160 So. 730, 172 Miss. 326.
34 C.J. p 192 note 5.

4. La.—Craver v. Gillespie, 86 So. 730, 148 La. 182.

5. Pa.—Wilson v. Hayes, 18 Pa. 354.

6. Cal.—Flores v. Smith, 117 P.2d 712, 47 Cal.App.2d 253.
Ill.—Kryl v. Zelezny, 8 N.E.2d 223, 290 Ill.App. 599.
34 C.J. p 193 note 12.

7. Cal.—Flores v. Smith, 117 P.2d 712, 47 Cal.App.2d 253.
34 C.J. p 193 note 13.

8. Ky.—Dysart v. Logan, 2 J.J. Marsh. 428.

9. Ala.—Radcliff v. Erwin, Minor 88.
N.Y.—Bullard v. Sherwood, 85 N.Y. 253.

10. Ala.—Radcliff v. Erwin, Minor 88.

sential to the allowance of attorney's fees to plaintiff on the rendition of a default judgment in his favor.

A default judgment for plaintiff may include attorney's fees where the petition brings the case within a statute imposing liability for such fees on defendant;[11] but, as a general rule, plaintiff will not, in the absence of statute, be entitled to an allowance for attorney's fees,[12] except where the suit is on a written instrument containing a stipulation for the payment of an attorney's fee, in which case the judgment rendered on defendant's default may include the amount of such fee as well as the principal sum of plaintiff's demand,[13] and even in such case the allowance of the fee is subject to the discretion of the court,[14] and the fee may be disallowed in a proper case.[15]

Costs generally where judgment is by default are discussed in Costs § 70.

§ 215. Form and Requisites of Judgment

A default judgment must comply with general requirements as to the form and contents of judgments, except in so far as the statutes and rules of practice govern the rendition and entry of such judgments.

The essentials to the existence, validity, and regularity of judgments generally, as discussed supra §§ 13–61, and the general requirements as to the form and contents of judgments, as considered supra §§ 62–86, apply to judgments by default,[16] except in so far as special statutes and rules of practice govern the rendition and entry of such judgments,[17] and, even in such a case, although it is preferable that the entry be made in the language of the statute,[18] it is not essential that any set form be followed, a substantial compliance with the statutory requirements being sufficient.[19] The judgment rendered must pronounce the true sentence of the law,[20] and must be definite and certain as to its terms,[21] and as to the amount of the recovery;[22] and must be more than a mere order that judgment be entered.[23] Where the judgment is given against a defendant absent from the state, it should direct plaintiff to comply with the statutory provisions which in such a case are necessary to entitle him to execution.[24] The judgment should be properly docketed or filed;[25] but, if it is duly rendered, the fact that it is not entered on the record does not affect its validity as against defendant, if it is so entered before any action is taken by him.[26]

Designation of parties. The judgment must designate the parties for and against whom it is rendered;[27] and the names of the parties appearing in the judgment must correspond with those in the

11. Tex.—Rhyne v. Missouri State Life Ins. Co., Com.App., 291 S.W. 845.

12. Fla.—Florida Dev. Co. v. Polk County Nat. Bank, 80 So. 560, 76 Fla. 629.
Ga.—Farmers' & Merchants' Bank v. Alford, 94 S.E. 818, 21 Ga.App. 546.

Contract conditional as to fees
Where note providing for principal, interest, and attorney's fees is conditional as to attorney's fees and not unconditional contract, judgment, although by default, cannot be rendered thereon by the court without jury.—Fowler v. Bank of Commerce, 143 S.E. 512, 38 Ga.App. 226.

13. Fla.—Streety v. John Deere Plow Co., 109 So. 632.
34 C.J. p 193 note 20.

14. Pa.—Philadelphia Trust & Safe Deposit Co. v. McDaniel, 2 Pa.Co. 102.

15. Pa.—Philadelphia Trust & Safe Deposit Co. v. McDaniel, supra.
34 C.J. p 193 note 22.

16. Colo.—Hoehne v. Trugillo, 1 Colo. 161, 91 Am.D. 703.
34 C.J. p 193 note 25.

Judgment held one by default
Ala.—Coffee v. Keeton, 26 So.2d 80.

Default judgments held sufficient
Ark.—Shelton v. Landers, 270 S.W. 522, 167 Ark. 638.
34 C.J. p 193 note 25 [a].

Default judgments held regular or not void on face thereof
Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.
Tex.—Arenstein v. Jencks, Civ.App., 179 S.W.2d 831, error dismissed—Citizens Mut. Life & Accident Ass'n of Texas v. Gillespie, Civ. App., 93 S.W.2d 200.

17. Mont.—Palmer v. McMaster, 19 P. 585, 8 Mont. 186.
34 C.J. p 193 note 27.

18. Ga.—Jenkins v. Whittier Mills Co., 93 S.E. 530, 20 Ga.App. 828.

19. Ga.—American Cent. Ins. Co. v. Albright, 89 S.E. 487, 145 Ga. 515.
34 C.J. p 193 note 29.

Strict compliance
It has been declared that there must be strict compliance with the statutory provisions relative to the entry of default judgments.—Smak v. Gwozdik, 291 N.W. 270, 293 Mich. 185.

20. Conn.—New York N. H. & H. R. R. Co. v. Hungerford, 52 A. 487, 75 Conn. 76.

21. N.Y.—U. S. Life Ins. Co. v. Jordan, 46 Hun 202, 21 Abb.N.Cas. 330.

22. Miss.—Claughton v. Black, 24 Miss. 185.
34 C.J. p 193 note 32.

Proportion of debt for which one of several defendants liable
Where a creditor sued two named defendants and heirs of another person jointly, judgment by default against defendants and heirs was invalid as to defendant who appealed, where it failed to comply with a statute by fixing proportion of debt for which he was liable and proportion could not be ascertained by reference to pleadings.—Hagerdorn v. Klotz, La.App., 185 So. 658.

23. Ill.—Loughlin v. G. Heileman Brewing Co., 189 Ill.App. 176.
34 C.J. p 194 note 33.

Entry evidently intended as guide to clerk in making up his record at some subsequent time is not a judgment.—Townsend v. Postal Benefit Ass'n of Illinois, 262 Ill.App. 483.

24. Conn.—Strong v. Meacham, 1 Root 391.

25. Wash.—Warner v. Miner, 82 P. 1033, 41 Wash. 98.
34 C.J. p 194 note 35.

26. Iowa.—Romayne v. Hawkeye Commercial Men's Ass'n, 135 N.W. 735.

27. Fla.—Stringfellow v. Ajax-Grieb

pleadings and process,[28] the ordinary rules as to variance in this respect being applicable.[29]

Separate judgments or findings. Where distinct suits are brought, separate judgments by default must be rendered therein, although the suits arise out of the same subject matter and the parties are identical in all,[30] unless they are consolidated.[31] The rule which requires the court sitting as a jury to find separately facts and conclusions of law, as discussed in the C.J.S. title Trial § 624, also 64 C.J. p 1244 note 72, does not apply in rendering a judgment by default against one of several defendants.[32] It has been held that there was only one judgment and one final determination of the rights and liabilities of all the parties, although that part of the final determination relating to defaulting defendants was reached on a certain day and another part relating to the remaining defendant was reached on a later day.[33]

§ 216. —— Final or Interlocutory

Subject to statutory variation, a default judgment against the defendant in an action against him ordinarily may be, and is, interlocutory or final according-ly as some act does or does not remain to be done.

A judgment by default is either interlocutory or final;[34] and where it is not shown that it was intended to be final the tendency is to hold it to be interlocutory.[35] Under the statutes of some jurisdictions, as considered supra § 206, a final judgment cannot be entered immediately on a default; there must first be a preliminary entry of the default. The judgment is final where the record is such that no such inquiry or act is necessary,[36] but a judgment by default against one of several defendants ordinarily is interlocutory[37] and not final[38] until the conclusion of the case against the other defendants,[39] although it may be final where defendants are sued jointly and severally, and, prior to the judgment, the action was discontinued as to the other defendants.[40]

The judgment is interlocutory where a writ of inquiry must be issued thereon, or some other act done involving a future inquiry to determine the amount of recovery.[41] Generally a final judgment need not and cannot be entered where the damages are unliquidated or the amount of plaintiff's claim is uncertain or indeterminate;[42] there may or must first

Rubber Co., 64 So. 947, 67 Fla. 317.
34 C.J. p 194 note 38.

28. Pa.—Noetling v. Wallace, 46 Pa. Dist. & Co. 169, 16 Northumb.Leg. J. 123.
Tex.—Nueces Hardware & Implement Co. v. Jecker, Civ.App., 56 S.W.2d 474—Fairbanks v. Hayes-Sammons Hardware Co., Civ.App., 55 S.W.2d 591.
34 C.J. p 194 note 39.

29. Tex.—Nelson v. Detroit & Security Trust Co., Com.App., 56 S.W.2d 860.
34 C.J. p 194 note 39.

Variance not fatal

Fact that petition and citation designated plaintiff as administrator with will annexed did not invalidate default judgment for plaintiff as executor; and, where probate court's order probating foreign will showed that foreign corporation, suing on note, was legal representative, default judgment is not void because in favor of corporation under new name.—Nelson v. Detroit & Security Trust Co., Tex.Com.App., 56 S.W. 2d 860.

30. Miss.—Louisville N. R. R. Co. v. McCollister, 5 So. 695, 66 Miss. 106.

31. Miss.—Louisville N. R. R. Co. v. McCollister, supra.

32. Cal.—Brown v. Brown, 8 Cal. 111.

33. Kan.—Korber v. Willis, 274 P. 239, 127 Kan. 587.

34. Conn.—Falken v. Housatonic R. Co., 27 A. 1117, 63 Conn. 258.
S.C.—Smith v. Vanderhorst, 12 S.C. L. 328, 10 Am.D. 674.
Final and interlocutory judgments generally see supra § 11.

Terminology

(1) The interlocutory judgment referred to in practice act provision relating to assessment of damages on entry of interlocutory judgment by default is the equivalent of a judgment by default under the ancient practice, and is ordinarily considered a judgment notwithstanding it may fall short of an actual judgment in the strictly technical sense.—Edelstein v. Hub Loan Co., 33 A.2d 829, 130 N.J.Law 511.

(2) A simple or naked default is not a substantial right, nor a final determination of cause of action, but simply a finding by the court that plaintiff is entitled to default on record.—Weinhart v. Meyer, 247 N.W. 811, 215 Iowa 1317.

(3) Under some statutes the preliminary entry made by an answering defendant who defaults by failing to appear at the trial is, and should be, termed a decision rather than a judgment.—Hathaway v. Wilson, 161 A. 234, 52 R.I. 447—Gregson v. Superior Court, 128 A. 221, 46 R.I. 362.

Distinction

"Judgment by default final" is distinguished from "judgment by default and inquiry," in that former establishes allegations of complaint and concludes by way of estoppel, while latter establishes right of action in plaintiff of kind stated in complaint, precise character and extent of which remain to be determined by hearing in damages and final judgment thereon.—De Hoff v. Black, 175 S.E. 179, 206 N.C. 687, followed in Akins v. Black, 175 S.E. 181, 206 N.C. 691.

35. Pa.—Commonwealth v. McCleary, 92 Pa. 188.
34 C.J. p 194 note 45.

Marking case "no appearance" impresses it with an interlocutory judgment.—Becker v. Welliver, 34 A.2d 893, 131 N.J.Law 64—Edelstein v Hub Loan Co., 33 A.2d 829, 130 N.J. Law 511.

36. Ind.—Carson v. Perkins, 29 N.E. 2d 772, 217 Ind. 543.
34 C.J. p 194 note 48.

37. Ala.—Ex parte Mason, 104 So. 523, 213 Ala. 279.

38. Mo.—Fleming v. McCall, App., 35 S.W.2d 60—Conrath v. Houchin, 34 S.W.2d 190, 226 Mo.App. 261.

39. Tex.—Buttrill v. Occidental Life Ins. Co., Civ.App., 45 S.W.2d 636.

40. Tex.—Ridley v. McCallum, 168 S.W.2d 833, 139 Tex. 540.

41. Ala.—Ex parte Haisten, 149 So. 213, 227 Ala. 183—Ewart v. Cunningham, 122 So. 359, 219 Ala. 399.
Ind.—Carson v. Perkins, 29 N.E.2d 772, 217 Ind. 543.
34 C.J. p 194 note 47.

42. Colo.—Melville v. Weybrew, 120 P.2d 189, 108 Colo. 520, certiorari

be an interlocutory judgment by default,[43] and the final judgment is entered after the damages have been assessed on a writ of inquiry or otherwise determined according to law.[44] On the other hand, where plaintiff's claim is liquidated or certain in amount, so that he is entitled to recover that amount, if anything at all, final judgment may be at once entered on default.[45] If a part of the declaration or complaint is unanswered, plaintiff may have an interlocutory judgment as to such part, but final judgment cannot be entered until the issues are tried and determined.[46]

Confirmation. In some jurisdictions a preliminary or interlocutory judgment entered on a default must be confirmed by the court, before it can have the effect of a final judgment;[47] but in other jurisdictions, when a judgment by default is properly entered by the clerk or a commissioner, in final form, it is regarded as the judgment of the court, as discussed supra § 205, and confirmation by the court is not necessary.[48]

Directing judgment. In some jurisdictions it is proper for the court, on entering an interlocutory judgment, to direct what final judgment shall be entered,[49] or to direct that the final judgment shall be settled by the court or a referee,[50] or that the damages be assessed by a jury.[51]

Lapse of time as making final. Under some statutes, a default judgment becomes final after the expiration of a prescribed period of time,[52] unless defendant pleads[53] or a motion for a new trial is filed[54] in the meantime, or unless the case is continued at plaintiff's instance.[55]

§ 217. —— Recitals and Record

Where there is a judgment by default, the judgment should contain appropriate recitals of the facts on which it is based, and the judgment roll or record should contain whatever is required by statute to be included therein.

A judgment by default should contain appropriate recitals of the facts on which the judgment is based;[56] and in states wherein the statutes pro-

denied 62 S.Ct. 795, 315 U.S. 811, 86 L.Ed. 1210, rehearing denied 62 S. Ct. 913, 315 U.S. 830, 86 L.Ed. 1224.
N.C.—Chozen Confections v. Johnson, 11 S.E.2d 472, 218 N.C. 500—Baker v. Corey, 141 S.E. 892, 195 N.C. 299—Brooks v. White, 122 S. E. 561, 187 N.C. 656—Pyles v. Pyles, 122 S.E. 12, 187 N.C. 486.
Or.—McAuliffe v. McAuliffe, 298 P. 239, 136 Or. 168.
Tex.—Morgan v. Davis, Civ.App., 292 S.W. 610.
34 C.J. p 194 note 50.

43. N.C.—Chozen Confections v. Johnson, 11 S.E.2d 472, 218 N.C. 500—Standard Supply Co. v. Vance Plumbing & Electric Co., 143 S.E. 248, 195 N.C. 629—Brooks v. White, 122 S.E. 561, 187 N.C. 656—Pyles v. Pyles, 122 S.E. 12, 187 N.C. 486.
Tex.—Ridley v. McCallum, 163 S.W. 2d 833, 139 Tex. 540—Southern S. S. Co. v. Schumacher Co., Civ. App., 154 S.W.2d 283, error refused.
34 C.J. p 194 note 51.

Interlocutory judgment is not necessary in some states.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630—Cornoyer v. Oppermann Drug Co., Mo.App., 56 S.W.2d 612.

44. Colo.—Melville v. Weybrew, 120 P.2d 189, 108 Colo. 520, certiorari denied 62 S.Ct. 795, 315 U.S. 811, 86 L.Ed. 1210, rehearing denied 62 S.Ct. 913, 315 U.S. 830, 86 L.Ed. 1224.
Tex.—Ridley v. McCallum, 163 S.W. 2d 833, 139 Tex. 540—Southern S. S. Co. v. Schumacher Co., Civ.App., 154 S.W.2d 283, error refused.
34 C.J. p 194 note 51.

45. N.C.—Standard Supply Co. v. Vance Plumbing & Electric Co., 143 S.E. 248, 195 N.C. 629—Baker v. Corey, 141 S.E. 892, 195 N.C. 299—Gillam v. Cherry, 134 S.E. 423, 192 N.C. 195.
34 C.J. p 195 note 53.

46. Ill.—Lucas v. Farrington, 21 Ill. 31.
34 C.J. p 195 note 54.

Better course
Although judgment nil dicit may be proper, better course is to reserve entry of final judgment on uncontested issues until contested issues are adjudicated.—Clonts v. Spurway, 139 So. 896, 104 Fla. 340.

47. La.—Ballard v. Lee, 14 La. 211.
34 C.J. p 195 note 55.

After disposition of motion to set aside preliminary default, way was open under court's rules for confirmation of default.—Motor Finance Co. v. Lynn, La.App., 142 So. 310.

Confirmation held sufficient
La.—W. T. Raleigh Co. v. Freeland, App., 16 So.2d 489.

Confirmation after filing of answer is void.—McClelland v. District Household of Ruth, La.App., 151 So. 246—34 C.J. p 195 note 55 [b].

48. U.S.—Patons v. Lee, D.C., 18 F. Cas.No.10,800, 2 Cranch C.C. 646.
Wash.—Peterson v. Dillon, 67 P. 397, 27 Wash. 78.

49. N.Y.—U. S. Life Ins. Co. v. Jordan, 46 Hun 201, 21 Abb.N.Cas. 330.

50. N.Y.—Kerr v. Dildine, 14 N.Y. Civ.Proc. 176.

51. N.Y.—Shiffner v. Beck, 145 N. Y.S. 27, 159 App.Div. 821.
Assessment of damages by jury after interlocutory judgment see Damages § 168.

52. Idaho.—Brainard v. Cœur d'Alene Antimony Min. Co., 208 P. 855, 35 Idaho 742.
34 C.J. p 195 note 62.

Time prescribed for appeal where no appeal taken
Cal.—People v. Barnes City, 288 P. 442, 105 Cal.App. 618.

In Maryland
A default judgment becomes enrolled on the expiration of the term of court at which it is entered or, where the action is in one of the courts of Baltimore, at the end of thirty days after the entry of the judgment.—Harvey v. Slacum, 29 A. 2d 276, 181 Md. 206—Dixon v. Baltimore American Ins. Co. of New York, 188 A. 215, 171 Md. 695—Wagner v. Scurlock, 170 A. 539, 166 Md. 284—Murray v. Hurst, 163 A. 183, 163 Md. 481, 85 A.L.R. 442.

53. Va.—Gring v. Lake Drummond Canal & Water Co., 67 S.E. 360, 110 Va. 754.

54. Tex.—Ridley v. McCallum, 163 S.W.2d 833, 139 Tex. 540.

55. W.Va.—Pennsboro First Nat. Bank v. Barker, 83 S.E. 898, 75 W. Va. 244.

56. Colo.—Hille v. Evans, 187 P. 315, 68 Colo. 98.
34 C.J. p 195 note 67.

Defendant's liability for debt or claim
It has been held that the judgment should recite facts which show defendant's liability for the debt or claim sought to be recovered.—Graham v. Reynolds, 45 Ala. 578—Smith v. Mobile Branch Bank, 5 Ala. 26.

vide what the judgment roll or record in case of judgments by default shall contain there should be a compliance therewith.[57] The record of the judgment imports verity of the facts recited;[58] but a recital in the judgment of a fact is not proof thereof, where the contrary appears from the records of the court.[59]

Jurisdictional facts. The judgment or record must disclose facts which show that the court had jurisdiction in the case,[60] such as that process or notice had been duly and properly issued and served on defendant,[61] and that all facts necessary to give the court jurisdiction had been proved,[62] or that defendant had acknowledged or waived service and voluntarily appeared.[63] However, a failure to recite such facts in the judgment does not invalidate it, if they sufficiently appear in the record;[64] and a mere showing that proof of service of summons is absent from the judgment roll several years after the entry of judgment is insufficient to defeat the judgment,[65] especially where filing of due proof of service is recited in the judgment itself and in the records of the court, and is stated in an affidavit of the attorney at whose instance the judgment was entered.[66] The judgment need not recite that defendant had been called.[67] Where the service of process was constructive only, as by publication, the judgment itself or the record should affirmatively show a full compliance with the statute authorizing such service,[68] and if the record shows service of an insufficient notice it will not be presumed that another sufficient notice was served.[69]

Default. The judgment should recite facts sufficient to show affirmatively that defendant was in default, and for what reason, whether for want of an appearance, for want of a plea, or otherwise,[70] and not merely that plaintiff claimed the default or moved for the entry;[71] and if the record shows a judgment without a lawful default the judgment is void on the face of the record.[72]

Proof of cause of action. Where plaintiff is required to produce or file proof of his cause of action before the judgment can be entered, discussed supra § 213, the record or the recitals of the judgment should show a compliance with this requirement;[73] and under some statutes, where service is

Sufficient recital of trial of issues

Where a statute provides that parties to an issue of fact shall be deemed to have waived a jury trial by failing to appear at the trial, judgment reciting that defendant, although filing answer, failed to appear when case was called for trial, and that thereupon plaintiff waived jury and submitted his case to court on pleadings and proof adduced, is not void on its face as not showing a trial of the issues raised by the pleadings.—Goffstein v. Coleman, Mo. App., 52 S.W.2d 1043.

57. Idaho.—Bissing v. Bissing, 115 P. 827, 19 Idaho 777.
34 C.J. p 196 note 72 [a], [b].

58. Mass.—Gardner v. Butler, 78 N. E. 885, 193 Mass. 96.

59. La.—Deblanc v. Leblanc, 15 La. Ann. 224.
Miss.—Globe Rutgers Life Ins. Co. v. Sayle, 65 So. 125, 107 Miss. 169.

60. Tex.—Head v. Texas State Bank, Civ.App., 16 S.W.2d 298—Brown v. Hayslip, Civ.App., 283 S.W. 177.
34 C.J. p 196 note 86.

61. Ala.—Spurlin Mercantile Co. v. Lauchheimer, 48 So. 812, 159 Ala. 512.
34 C.J. p 196 note 87.

62. Cal.—Doyle v. Hampton, 116 P. 39, 159 Cal. 729.
34 C.J. p 197 note 88.

Minute entry showing that petition, citation, and sheriff's return, with record, were introduced is sufficient.—Cohn Flour & Feed Co. v. Mitchell, 136 So. 782, 18 La.App. 534.

A mere recital of service is not sufficient; the process and return or proof thereof must be set out.—Head v. Texas State Bank, Tex.Civ.App., 16 S.W.2d 298—Broun v. Hayslip, Tex.Civ.App., 283 S.W. 177—Daugherty v. Powell, Tex.Civ.App., 139 S. W. 625—Glasscock v. Barnard, 125 S.W. 615, 58 Tex.Civ.App. 369—34 C. J. p 197 note 88 [a].

63. Ala.—De Jarnette v. Dreyfus, 51 So. 932, 166 Ala. 138.
34 C.J. p 197 note 89.

64. Tex.—Pipkin v. Kaufman, 62 Tex. 545.

65. N.Y.—Egan v. Giragosian, 245 N. Y.S. 69, 137 Misc. 830.

66. N.Y.—Egan v. Giragosian, supra.

67. N.M.—Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 48 P. 309, 9 N.M. 12, affirmed 19 S.Ct. 761, 174 U.S. 603, 43 L.Ed. 1103.

68. Iowa.—Schaller v. Marker, 114 N.W. 43, 136 Iowa 575.
34 C.J. p 197 note 92.

69. Iowa.—Schaller v. Marker, 114 N.W. 43, 136 Iowa 575.

70. Ark.—Papan v. Nahay, 152 S.W. 107, 106 Ark. 230.
34 C.J. p 195 note 69.

Judgment reciting appearance of parties and trial does not show default.—St. Francis Levee Dist. v. Dorroh, 289 S.W. 925, 316 Mo. 398.

Irregularity

Fact that default judgment recited that it was entered for want of appearance instead of for failure to file pleading is a mere irregularity.—Precision Products Co. v. Cady, 233 Ill.App. 72.

Fact of default sufficient

It has been held sufficient to state the fact of default generally without stating in what respect defendant is in default.—Lyons Planning Mills v. Guillot, La.App., 146 So. 700—34 C.J. p 195 note 69 [b].

71. Ala.—Goodwater Warehouse Co. v. Street, 34 So. 903, 137 Ala. 621—Woosley v. Memphis & C. R. Co., 28 Ala. 536.

72. Mich.—Goodspeed v. Smith, 126 N.W. 975, 161 Mich. 688.
N.J.—**Corpus Juris cited in** Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 549, 115 N.J.Law 86, affirmed 183 A. 165, 116 N.J.Law 191.

73. Pa.—Johnston v. American Casualty Co., Com.Pl., 23 West.Co. 178.
34 C.J. p 196 note 77.

Recitals or notations held sufficient

Ark.—Shelton v. Landers, 270 S.W. 522, 167 Ark. 638.
La.—W. T. Rawleigh Co. v. Freeland, App., 16 So.2d 489—Brown v. Brown, App., 196 So. 661—Wilson v. Lagasse, 179 So. 472, 14 La.App. 463—Martin v. District Grand Lodge No. 21, G. U. O. O. F. of Louisiana, App., 146 So. 793—Cohn Flour & Feed Co. v. Mitchell, 136 So. 782, 18 La.App. 534.
34 C.J. p 196 note 77 [a] (1).

Presumption from recital

Where recitals in judgment are that plaintiff has made due proof of

by publication, and no answer is filed, a statement of the evidence must be filed as a part of the record;[74] but in the absence of statute the evidence need not be reduced to writing and preserved with the record.[75]

Assessment of damages. If an assessment of damages is necessary, the judgment should recite the fact that the assessment had been made,[76] but it need not state explicitly that the assessment was made by the court;[77] and the record need not show that the interest was computed by the clerk.[78] The judgment will be held erroneous where the record shows that the judge acted on a certificate of the clerk in lieu of a writ of inquiry and does not show a compliance with statutory conditions to a default judgment without a writ of inquiry.[79]

Findings. Unnecessary findings form no part of the judgment roll in case of a default judgment,[80] and their incompleteness does not vitiate the judgment.[81]

§ 218. Office Judgments

Under the statutes of a few states, the clerk of court, on defendant's default, enters a conditional judgment, known as an office judgment, which is confirmed at a subsequent date and becomes final at a still later date.

Under some statutes, if defendant defaults at the rules, to which a writ or summons issued against him is returnable,[82] and plaintiff has duly filed his declaration,[83] a conditional judgment, known as an office judgment, may be entered against him by the clerk of the court, by what is known as a common order,[84] which may be confirmed at the next succeeding rules.[85] If the "common order" and "common order confirmed" were regularly taken, the cause is properly on the office judgment docket at the next term of the court,[86] and if the case is one in which an order for an inquiry of damages is not necessary or made, unless defendant appears in the meantime and demurs, pleads, or otherwise makes defense to the action,[87] the office judgment becomes final, so as to bar a defense, on such day of the next succeeding term of court as is fixed by statute,[88] except where the statutory number of days has not elapsed after the service of process,[89] in which case it becomes final at the term next succeeding the expiration of such time.[90] However, where the case is one in which an inquiry of damages is proper, an order therefor should be made and the office judgment does not become final so as to bar a defense thereafter, without the intervention of the court or a jury,[91] and defendant may

his claim, presumption exists that legal and sufficient evidence was before court.—Aycock v. Miller, La. App., 18 So.2d 335—Goldman v. Thomson, 8 La.App. 469.

74. Tex.—McLane v. Kirby, 116 S. W. 118, 54 Tex.Civ.App. 113.
34 C.J. p 196 note 79.

75. Ariz.—Postal Ben. Ins. Co. v. Johnson, 165 P.2d 173.
S.C.—Duncan v. Duncan, 76 S.E. 1099, 93 S.C. 487.

Defendant personally served
Ariz.—Postal Ben. Ins. Co. v. Johnson, 165 P.2d 173.
Tex.—Dalton v. Davis, Civ.App., 294 S.W. 1115, reversed on other grounds, Com.App., 1 S.W.2d 571.

Defendant voluntarily appearing and filing answer
Ariz.—Kinealy v. O'Reilly, 236 P. 716, 28 Ariz. 246.

76. Ky.—Daniel v. Judy, 14 B.Mon. 393.

77. Mass.—Jarvis v. Blanchard, 6 Mass. 4.
Mich.—Howard v. Tomlinson, 27 Mich. 168.

Recital of waiver of jury
The recital in default judgment, in action based on fraud, that a jury and a decision were waived and that a verdict was directed established prima facie what occurred on the inquest as to whether there should be a jury trial or a decision.—Davis v. Ross, 20 N.Y.S.2d 375, 259 App. Div. 577, reargument denied 21 N.Y. S.2d 391, 259 App.Div. 1029.

78. Ala.—Radcliff v. Erwin, Minor 88.

79. Ala.—Frazier v. Dismuke, 118 So. 227, 22 Ala.App. 594.

80. Cal.—In re Cook's Estate, 19 P. 431, 77 Cal. 220, 11 Am.S.R. 267, 1 L.R.A. 567.
N.Y.—Tyler v. Jahn, 178 N.Y.S. 689, 109 Misc. 425.
Lack of necessity for findings where judgment rendered by default see the C.J.S. title Trial § 612, also 34 C.J. p 196 note 73 and 64 C.J. p 1229 note 39.

81. N.D.—O'Sullivan v. Vadnais, 234 N.W. 522, 60 N.D. 359.

82. Va.—Crews v. Garland, 2 Munf. 491, 16 Va. 491.
34 C.J. p 197 note 95.

83. Va.—Waugh v. Carter, 2 Munf. 333, 16 Va. 333.
34 C.J. p 197 note 96.

84. Va.—Dillard v. Thornton, 25 Gratt. 392, 70 Va. 392.
34 C.J. p 197 note 97.

"Common order" is defined as the usual order; or the "conditional judgment," so called because it threatens defendant with a judgment unless he appear and plead according to its terms.—Mahoney v. New South Building & Loan Ass'n, C.C. Va., 70 F. 513—12 C.J. p 205 note 96.

85. Va.—Dillard v. Thornton, 29 Gratt. 392, 70 Va. 392.

86. Va.—Wall v. Atwell, 21 Gratt. 401, 62 Va. 401—Powell v. Watson, 3 Leigh. 4, 30 Va. 4.
34 C.J. p 197 note 99.

87. W.Va.—Snider v. Cochran, 92 S. E. 347, 80 W.Va. 252.
34 C.J. p 197 note 1.

88. Va.—Carney v. Poindexter, 196 S.E. 639, 170 Va. 233.
34 C.J. p 182 note 26 [c], p 183 note 35 [a], p 195 note 62 [a] (2), p 197 note 4 [a]–[d].

Proceedings after judgment becomes final
All proceedings in action at law after office judgment becomes final are nullity or should be set aside, so as to give plaintiff benefit of judgment, if proceedings are regular and plaintiff's rights have not been waived.—Carney v. Poindexter, supra—Gring v. Lake Drummond Canal & Water Co., 67 S.E. 360, 110 Va. 754.

89. Va.—Dillard v. Thornton, 29 Gratt. 392, 70 Va. 392—Turnbull v. Thompson, 27 Gratt. 306, 68 Va. 306.
34 C.J. p 198 note 5.

90. Va.—Dillard v. Thornton, 29 Gratt. 392, 70 Va. 392.

91. U.S.—Ciccarello v. Jos. Schlitz

plead to issue at any time before the order for inquiry of damages is executed.[92]

Waiver. Plaintiff may waive the benefit of such statute so as to prevent the office judgment from becoming final by operation of the statute,[93] and it cannot thereafter become final until it is entered up as the judgment of the court.[94]

Affidavits or proof. Under some statutes final judgment cannot be entered up for plaintiff, in an action for the recovery of money arising out of contract until he, his agent, or his attorney has filed an affidavit stating the amount he believes to be due him, or proved his case in open court.[95] Such affidavit may be filed at any time before judgment is entered,[96] except that if plaintiff desires to prevent defendant from filing a plea without affidavit he must file his affidavit before the plea is filed.[97] If plaintiff has filed such an affidavit, no plea can be filed by defendant unless he files therewith, as required by statute, an affidavit denying that any sum is due from him to plaintiff, or stating that the amount due is less than that stated by plaintiff,[98] or unless plaintiff waives the benefit of such requirement.[99]

IX. JUDGMENT ON MOTION OR SUMMARY PROCEEDINGS

§ 219. In General

Judgment on motion or in a summary proceeding is permissible in some instances at common law and in cases covered by statutes providing therefor.

The common law admits of a judgment on motion or a summary proceeding for judgment in a few instances,[1] such as in case of contempt of court, as is discussed in Contempt § 62, or in a case to compel an attorney to pay money over to his client, as is discussed in Attorney and Client § 159; and, where funds in the custody of a court are lent out by order of the court, the borrower's obedience to an order requiring the return of the money may be enforced by a judgment entered against him on a mere motion.[2] In most instances, however, such a remedy is regarded as being in derogation of the common law, and exists only under the authority of statutory enactments,[3] which in some jurisdictions provide in certain cases for a special summary proceeding for judgment on notice and motion,[4] and in other jurisdictions provide that, after issue is joined by the pleadings in certain kinds of actions, summary judgment for either party may be had on motion where the moving party substantiates his claim or defense by affidavit and the other party fails to show the existence of triable issues of fact warranting a trial.[5]

Brewing Co., D.C.W.Va., 1 F.R.D. 491.
34 C.J. p 198 note 7.

92. U.S.—Ciccarello v. Jos. Schlitz Brewing Co., supra.
34 C.J. p 195 note 62 [a] (1), p 198 note 8.

93. Va.—Pollard v. American Stone Co., 68 S.E. 266, 111 Va. 147.
34 C.J. p 198 note 9.

94. W.Va.—James v. Gott, 47 S.E. 649, 55 W.Va. 223.

95. W.Va.—Bell v. Tormey, 67 S.E. 1088, 67 W.Va. 1.
34 C.J. p 198 note 13.

Specific items

An affidavit is not defective as a whole because in addition to stating a sum certain it contains specific divisible items not recoverable as a matter of law.—Pineville First Nat. Bank v. Sanders, 88 S.E. 137, 77 W. Va. 716.

Record

It is not necessary to make the facts proved, or the evidence, a part of the record, in case of a judgment by default; and if any part of the evidence is referred to in the judgment, this of itself is insufficient to preclude the fact that other evidence might have been heard by the court, unless it affirmatively appears from the record that this was all the evidence heard by the court.—Anderson v. Doolittle, 18 S.E. 724, 88 W.Va. 629.

96. W.Va.—Marstiller v. Ward, 43 S. E. 178, 52 W.Va. 74—Quesenberry v. People's Building, Loan & Savings Ass'n, 30 S.E. 73, 44 W.Va. 512.

97. W.Va.—Phoenix Assur. Co. v. Fristoe, 44 S.E. 253, 53 W.Va. 361.
34 C.J. p 198 note 15.

98. Va.—Price v. Marks, 48 S.E. 499, 103 Va. 18.
34 C.J. p 198 note 16.

99. W.Va.—Williamson v. Nigh, 58 S.E. 124, 58 W.Va. 629.
34 C.J. p 198 note 17.

1. Tenn.—Ex parte Craighead, 12 Heisk. 640.

2. Tenn.—Vaughn v. Tealey, Ch.A., 39 S.W. 868.
34 C.J. p 198 note 23.

3. Ark.—Cook v. Cramer Cotton Co., 244 S.W. 730, 155 Ark. 549.
34 C.J. p 198 note 24.

4. Va.—Shearin v. Virginia Electric & Power Co., 29 S.E.2d 841, 182 Va. 573.
33 C.J. p 1065 note 70—34 C.J. p 198 note 26.
Procedure generally see infra § 222.

5. Cal.—Cowan Oil & Refining Co. v. Miley Petroleum Corporation, 295 P. 504, 112 Cal.App.Supp. 773.
N.Y.—Aronstam v. Scientific Utilities Co., 196 N.Y.S. 306, affirmed 199 N.Y.S. 908, 206 App.Div. 657.
R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.
Wis.—Witzko v. Koenig, 272 N.W. 864, 224 Wis. 674.

History

"In a general way, our summary judgment statute traces its origin to the English Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67, passed in 1855. . . . In the United States provisions similar to the English rules have been adopted in a number of states, either by statute or by rule of court. Whenever variations are found, they are traceable to local conditions or judicial structure. An examination of the so-called summary judgment laws both in England and in this country shows that the purpose of such laws was to regulate procedure, and not to create a new right in fa-

Statutes providing for judgment on motion in certain cases have generally been held valid,[6] and it has been held that, although they should not be extended by construction,[7] they should be liberally construed to effectuate their purpose.[8] The power given to grant a summary judgment must be exercised with care, and not be extended beyond its just limits,[9] and before a party is entitled to the benefit of such a statutory remedy he should bring himself squarely within the spirit and letter of the statute,[10] and everything pertaining to the entry of such a judgment must be done strictly according to the provision which authorizes it.[11] The remedy is to be administered in the furtherance of justice.[12]

vor of a party plaintiff. They were adopted to grant relief against procedural tactics interposed for delay and not to substitute a new method of trial where an issue of fact exists."—Fisher v. Sun Underwriters Ins. Co. of New York, 179 A. 702, 704, 705, 55 R.I. 175, 103 A.L.R. 1097.

"At common law, although false and sham pleas could be stricken out, the general issue could not be inquired into and eliminated. A defendant had the right to plead the general issue and thereby put the plaintiff to his proof, irrespective of whether or not he actually had a defense to the claim made against him."—Fisher v. Sun Underwriters Ins. Co. of New York, supra.

Actions commenced prior to enactment

Such a statutory provision, being remedial, applies to actions commenced prior to the date of its enactment.—General Inv. Co. v. Interborough Rapid Transit Co., 193 N.Y.S. 903, 200 App.Div. 794, affirmed 139 N.E. 216, 235 N.Y. 133—Peninsular Transp. Co. v. Greater Britain Ins. Co., Ltd., 193 N.Y.S. 885, reversed on other grounds 193 N.Y.S. 886, 200 App.Div. 695.

6. Cal.—Cowan Oil & Refining Co. v. Miley Petroleum Corporation, 295 P. 504, 112 Cal.App.Supp. 773.
N.J.—Nolte v. Nannino, 154 A. 831, 107 N.J.Law 462.
N.Y.—Diamond v. Davis, 38 N.Y.S.2d 103, affirmed 39 N.Y.S.2d 412, first case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, first case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, first case, 292 N.Y. 552.

Alleged defects in summary judgment law preventing subpœnaing of adverse parties by defendant and not requiring plaintiff's and defendant's affidavits to be of same particularity could not be urged by party not injured thereby.—People's Wayne County Bank v. Wolverine Box Co., 230 N.W. 170, 250 Mich. 273, 69 A.L.R. 1024.

Claims under veterans' legislation

However, it has been held that a state statute providing for summary judgment based on complaint and affidavits in support of motion for judgment without examination of facts is repugnant to Tucker Act, which manifests congressional intent that claims under World War veterans' legislation should not be treated in a summary manner.—U. S. v. Lindholm, C.C.A.Cal., 79 F.2d 784, 103 A.L.R. 213, followed in U. S. v. Stevenson, 79 F.2d 788.

Consistency with other provisions

Rules of Civil Practice, rule 113, providing that an answer in certain actions may be struck out, and judgment entered thereon, on motion, and the affidavit of plaintiff, or any other person having knowledge of the facts, justifying the cause of action, and stating the amount claimed, and his belief that there is no defense to the action, unless defendant shall show facts sufficient to entitle him to defend, is not inconsistent with Civ.Prac. Act § 422, providing that an issue of fact arises on an allegation, contained in an answer, that defendant has no sufficient knowledge or information to form a belief with respect to a material allegation of the complaint, § 423, providing that an "issue of fact must be tried as prescribed in this article" (§§ 421–471), and § 425, providing that, in an action in which a complaint demands a judgment for a sum of money only, an issue of fact must be tried by a jury, unless a jury trial is waived.—Hanna v. Mitchell, 196 N.Y.S. 43, 202 App.Div. 504, affirmed 139 N.E. 724, 235 N.Y. 534.

7. Ala.—Lewis v. Head, 189 So. 886, 238 Ala. 151—Union Indemnity Co. v. Freeman, 133 So. 48, 222 Ala. 479.

Strict construction required

Ala.—Harris v. Barber, 186 So. 160, 237 Ala. 138.
Ga.—Breen v. Phillips, 149 S.E. 565, 169 Ga. 13.

8. N.Y.—Reddy v. Zurich General Accident & Liability Ins. Co., 11 N.Y.S.2d 88, 171 Misc. 69.
Va.—Pereira v. Davis Financial Agency, 135 S.E. 823, 146 Va. 215.

Dismissal of complaint

Rule of civil practice authorizing dismissal of complaint on motion where answer sets forth a defense which is sufficient as a matter of law and is founded on facts established prima facie by documentary evidence or official record, should be liberally construed to promote the beneficial results intended.—Levine v. Behn, 8 N.Y.S.2d 58, 169 Misc. 601, affirmed 12 N.Y.S.2d 190, 257 App.Div. 156, reversed on other grounds 25 N.E.2d 871, 282 N.Y. 120—Diamond v. Davis, 38 N.Y.S.2d 103, affirmed 39 N.Y.S.2d 412, first case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, first case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, first case, 292 N.Y. 552.

9. Cal.—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609.
Colo.—Hatfield v. Barnes, 168 P.2d 552.
N.Y.—General Inv. Co. v. Interborough Rapid Transit Co., 139 N.E. 216, 235 N.Y. 133—Norwich Pharmacal Co. v. Barrett, 200 N.Y.S. 298, 205 App.Div. 749—Stone v. Ætna Life Ins. Co., 31 N.Y.S.2d 615, 178 Misc. 23—Rodger v. Bliss, 223 N.Y.S. 401, 130 Misc. 168—First Trust Co. of Albany v. Dumary, 23 N.Y.S.2d 532—Nester v. Nester, 19 N.Y.S.2d 426, reversed on other grounds 22 N.Y.S.2d 119, 259 App.Div. 1065.
34 C.J. p 199 note 27.
"The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact."—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 265, 19 Cal.2d 553.

10. Ala.—Union Indemnity Co. v. Freeman, 133 So. 48, 222 Ala. 479.
Ill.—Great Atlantic & Pacific Tea Co. v. Town of Bremen, 64 N.E.2d 220, 327 Ill.App. 393.
Md.—Katski v. Triplett, 30 A.2d 764, 181 Md. 545—Power v. Allied Asphalt Products Corporation, 159 A. 251, 162 Md. 175.
N.Y.—Conyne v. McGibbon, 37 N.Y.S.2d 590, 179 Misc. 54, transferred, see 39 N.Y.S.2d 609, 265 App.Div. 976, and affirmed 41 N.Y.S.2d 189, 266 App.Div. 711—Macomber v. Wilkinson, 6 N.Y.S.2d 608.
Pa.—Lassiter v. Style Shop, Com. Pl., 28 Del.Co. 418.
R.I.—Fisher v. Sun Underwriters Ins. Co. of New York, 179 A. 702, 55 R.I. 175, 103 A.L.R. 1097.
34 C.J. p 199 note 28.

11. N.Y.—Universal Credit Co. v. Uggla, 290 N.Y.S. 365, 248 App.Div. 848, motion denied 290 N.Y.S. 997, 248 App.Div. 529, amended on other grounds 298 N.Y.S. 158, 251 App.Div. 786.
34 C.J. p 199 note 29.

12. N.Y.—Curry v. Mackenzie, 146 N.E. 375, 239 N.Y. 267.

Nature and purpose of statutes. Statutes in some jurisdictions permitting the filing of a notice of motion for judgment in lieu of filing a declaration in an action at law are intended to give plaintiff a simpler, cheaper, and more expeditious mode of procedure than is provided by a regular common-law action.[13] Other statutes providing for summary judgment in actions instituted in the normal manner where no triable issue of fact is disclosed after consideration of affidavits of the parties are intended to further the prompt administration of justice,[14] and expedite litigation[15] by avoiding needless trials;[16] and they enable a party speedily to obtain a judgment by preventing the interposition of unmeritorious defenses for purposes of delay.[17] The object of the proceedings provided by such statutes is to determine whether a defense genuinely exists[18] and whether there is an issue of fact warranting submission of the case to the jury.[19] On the other hand, such statutes were not intended to furnish an easy medium to plaintiff by which he might avoid the inconvenience and uncertainty of a trial; they do not provide a new method for the consideration and determination by the court of questions of law in advance of a trial on the facts contrary to established practice[20] or provide a substitute for existing methods in the determination of issues of fact.[21] Moreover, the statutory procedure for judgment on motion was not intended as a test for the sufficiency of pleadings[22] or to supplant a demurrer or motion to make pleadings more definite and certain.[23]

13. Va.—Shearin v. Virginia Electric & Power Co., 29 S.E.2d 841, 182 Va. 573—Pereira v. Davis Financial Agency, 135 S.E. 823, 146 Va. 215.

34 C.J. p 199 note 30.

14. N.Y.—First Trust Co. of Albany v. Dumary, 23 N.Y.S.2d 532.

R.I.—Fisher v. Sun Underwriters Ins. Co. of New York, 179 A. 702, 705, 55 R.I. 175, 103 A.L.R. 1097.

Other statements of purpose

(1) The purpose is to simplify court practice and eliminate technicalities and formalism serving no useful purpose.—Simson v. Bugman, 45 N.Y.S.2d 140.

(2) The object of statute is to regulate procedure and to aid the court in promoting justice by eliminating so far as possible fictitious defenses.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201.

(3) The object is to provide for speedy collection of debts by requiring from plaintiff and defendant a definite sworn statement of the claim and the defense, if any, so that parties may know exactly wherein they differ and shape their action accordingly.—Katski v. Triplett, 30 A.2d 764, 181 Md. 545.

15. U.S.—Prudential Ins. Co. of America v. Goldstein, D.C.N.Y., 43 F.Supp. 767.

N.Y.—Glove City Amusement Co. v. Smalley Chain Theatres, 4 N.Y.S.2d 397, 167 Misc. 603—Halpern v. Lavine, 60 N.Y.S.2d 121.

Wis.—Binsfeld v. Home Mut. Ins. Co., 19 N.W.2d 240, 247 Wis. 273.

16. Ill.—Puckett v. American Life of Illinois, 13 N.E.2d 828, 294 Ill. App. 605.

N.Y.—Chance v. Guaranty Trust Co. of New York, 20 N.Y.S.2d 635, 173 Misc. 754, affirmed 13 N.Y.S.2d 785, 257 App.Div. 1006, affirmed 26 N.E.2d 802, 282 N.Y. 656—Dr. A. Posner Shoes v. Vogel, 198 N.Y.S. 283.

Wis.—Potts v. Farmers' Mut. Automobile Ins. Co., 289 N.W. 606, 233 Wis. 313.

17. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Oil Well Supply Co. of California, 55 P.2d 885, 12 Cal.App.2d 265.

Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.

N.Y.—McAnsh v. Blauner, 226 N.Y.S. 379, 222 App.Div. 381, affirmed, 162 N.E. 515, 248 N.Y. 537—Hurwitz v. Corn Exchange Bank Trust Co., 253 N.Y.S. 851, 142 Misc. 398—Western Felt Works v. Modern Carpet Cleaning & Storage Corporation, 252 N.Y.S. 696, 141 Misc. 495.

Wis.—Costello v. Polenska, 7 N.W.2d 593, 242 Wis. 204, modified on other grounds 8 N.W.2d 307, 242 Wis. 204—Atlas Inv. Co. v. Christ, 2 N.W.2d 714, 240 Wis. 114—Prime Mfg. Co. v. A. F. Gallun & Sons Corporation, 281 N.W. 697, 229 Wis. 348.

34 C.J. p 199 note 31.

Separation of matter in denial

Object of motion for summary judgment is to separate what is formal or pretended in denial from what is genuine and substantial.—Richard v. Credit Suisse, 152 N.E. 110, 242 N.Y. 346, 45 A.L.R. 1041.

18. Ill.—Security Discount Corporation v. Jackson, 51 N.E.2d 618, 320 Ill.App. 440—Harris v. Oxford Metal Spinning Co., 43 N.E.2d 186, 315 Ill.App. 490—Shirley v. Ellis Drier Co., 39 N.E.2d 329, 379 Ill. 105—Diversey Liquidating Corporation v. Neunkirchen, 19 N.E.2d 863, 370 Ill. 523.

19. Ill.—Macks v. Macks, 67 N.E.2d 505, 329 Ill.App. 144—Barkhausen v. Naugher, 64 N.E.2d 561, 327 Ill. App. 555—Ublasi v. Western & Southern Life Ins. Co., 64 N.E.2d 233, 327 Ill.App. 412—Great Atlantic & Pacific Tea Co. v. Town of Bremen, 64 N.E.2d 220, 327 Ill. App. 393—Fellheimer v. Wess, 45 N.E.2d 89, 316 Ill.App. 449—Soelke v. Chicago Business Men's Racing Ass'n, 41 N.E.2d 232, 314 Ill.App. 336—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465—Mee v. Marks, 26 N.E.2d 516, 304 Ill.App. 370.

Mich.—People's Wayne County Bank v. Wolverine Box Co., 230 N.W. 170, 250 Mich. 273, 69 A.L.R. 1024.

N.Y.—Ecker v. Muzysh, 19 N.Y.S.2d 250, 259 App.Div. 206—First Nat. Bank of Dolgeville, N. Y., v. Mang, 41 N.Y.S.2d 92—Macomber v. Wilkinson, 6 N.Y.S.2d 608.

20. R.I.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201—Fisher v. Sun Underwriters Ins. Co. of New York, 179 A. 702, 55 R.I. 175, 103 A.L.R. 1097.

Trial by affidavit

It is not purpose of summary judgment statute to substitute a trial by affidavit for a trial according to law.

R.I.—Goucher v. Herr, 14 A.2d 651, 65 R.I. 246.

Wis.—McLaughlin v. Malnar, 297 N.W. 370, 237 Wis. 492.

21. Cal.—Walsh v. Walsh, 116 P.2d 62, 13 Cal.2d 439—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609.

Ill.—Soelke v. Chicago Business Men's Racing Ass'n, 41 N.E.2d 232, 314 Ill.App. 336.

R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.

22. Cal.—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal.2d 553.

23. Wis.—McLoughlin v. Malnar, 297 N.W. 370, 237 Wis. 492.

§ 220. Cases in Which Allowed

a. In general
b. Particular actions
c. As determined by issues

a. In General

As a general rule, summary judgment on motion will be granted only in cases or under circumstances clearly covered by the statute or court rule, and, where it is so provided, the remedy is available to both the plaintiff and the defendant, on original causes of action or counterclaims, and judgment may be obtained for part of a claim.

Except in so far as such remedy is permitted by the common law, a summary judgment on motion will be granted only in cases, or under circumstances, covered by the terms of the statute or court rule.[24] The statutes generally limit summary procedure to simple cases,[25] where the moving party's right to judgment is clear and free from doubt.[26]

24. Ala.—Lewis v. Head, 189 So. 886, 238 Ala. 151—Union Indemnity Co. v. Freeman, 133 So. 48, 222 Ala. 479.
Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
Idaho.—Union Central Life Ins. Co. v. Albrethsen, 294 P. 842, 50 Idaho 196.
Ill.—Ward v. Sampson, 63 N.E.2d 751, 391 Ill. 585.
N.Y.—Newark Fire Ins. Co. v. Brill, 296 N.Y.S. 707, 251 App.Div. 399—Bethlehem Knitting Mills v. S. Karpen & Bros., 292 N.Y.S. 754, 249 App.Div. 855—Fiscella v. Fridman, 7 N.Y.S.2d 544, 169 Misc. 327—Ben Bimberg & Co. v. Unity Coat & Apron Co., 270 N.Y.S. 579, 151 Misc. 442—Rodger v. Bliss, 223 N.Y.S. 401, 130 Misc. 168—Lawrence Textile Corporation v. American Ry. Express Co., 211 N.Y.S. 699, 125 Misc. 858—George F. Hinrichs, Inc., v. City of New York, 201 N.Y.S. 377, 121 Misc. 592, affirmed 207 N.Y.S. 852, 212 App.Div. 816 and affirmed 209 N.Y.S. 836, 213 App.Div. 863—Tenny v. Tenny, 36 N.Y.S.2d 704—Borenstein v. Buffalo Hat Co., 33 N.Y.S.2d 60.
Pa.—Bellevue Park Ass'n v. Lippman, Com.Pl., 54 Dauph.Co. 163—McVeigh v. Scranton-Spring Brook Water Service Co., Com.Pl., 44 Lack.Jur. 205.
S.C.—Anderson v. Gage, 23 S.C.L. 319.
Tex.—Grubstake Inv. Ass'n v. Worley, Civ.App., 116 S.W.2d 472, error dismissed.
Wis.—Prey v. Allard, 300 N.W. 13, 239 Wis. 151—McLoughlin v. Malnar, 297 N.W. 870, 237 Wis. 492.
34 C.J. p 199 notes 34-36.

In action to vacate an order on ground that it is unlawful or unreasonable, as on appeal from revocation of architect's license, no motion for summary judgment is necessary, and there is no occasion to supplement the record by affidavits filed by both parties to support motions for summary judgment.—Kuehnel v. Wisconsin Registration Board of Architects and Professional Engineers, 9 N.W.2d 630, 243 Wis. 188.

Costs

The provision of municipal court code that, within limits of jurisdiction defined in the code, the court shall have power to render any judgment that is consistent with a case made by the pleadings and embraced within the issues, does not authorize the granting of summary judgment against a party who has failed to pay costs assessed against him in a prior action.—Ebel v. Ast, 21 N.Y.S.2d 768, appeal granted 23 N.Y.S.2d 476, 260 App.Div. 870.

Validity of cause of action

The validity or invalidity of the cause of action on which the motion for summary judgment was made depends on the facts existing at the time the action was commenced, or, at least, at the time the motion was made.—Poritzky v. Wachtel, 27 N.Y.S.2d 316, 176 Misc. 633.

25. Ill.—Ward v. Sampson, 63 N.E.2d 751, 391 Ill. 585—Soelke v. Chicago Business Men's Racing Ass'n, 41 N.E.2d 232, 314 Ill.App. 336—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.
Pa.—Malter v. Whitehall, Com.Pl., 32 Del.Co. 442.

Actions in special assumpsit

Generally, remedy by summary judgment is applicable to commercial cases and to simple actions in assumpsit, but actions in special assumpsit involving complicated facts difficult to establish by means of affidavits are outside scope of statute.—Fisher v. Sun Underwriters Ins. Co. of New York, 179 A. 702, 55 R.I. 175, 103 A.L.R. 1097.

26. Ariz.—Cress v. Switzer, 150 P.2d 86, 61 Ariz. 405.
Ill.—Scharf v. Waters, 66 N.E.2d 499, 328 Ill.App. 525—Bertlee Co. v. Illinois Publishing & Printing Co., 52 N.E.2d 47, 320 Ill.App. 490—Security Discount Corporation v. Jackson, 51 N.E.2d 618, 320 Ill. App. 440—Fellheimer v. Wess, 45 N.E.2d 89, 316 Ill.App. 449—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.
N.Y.—Sorensen v. East River Sav. Inst., 196 N.Y.S. 361, 119 Misc. 297.
Pa.—Ockman v. Jones Mach. Tool Works, 45 A.2d 47—Ockman v. Jones Mach. Tool Works, 37 A.2d 538, 349 Pa. 527—Bacher v. City Nat. Bank of Philadelphia, 31 A.2d 725, 347 Pa. 80—Koehring Co. v. Ventresca, 6 A.2d 297, 334 Pa. 566—Miller v. Adonizio, 6 A.2d 77, 334 Pa. 286—Aultman v. City of Pittsburgh, 192 A. 112, 326 Pa. 213—Drummond v. Parrish, 182 A. 383, 320 Pa. 307—Moran v. Bair, 156 A. 81, 304 Pa. 471—Vierling v. Baxter, 141 A. 728, 293 Pa. 52—Smith v. Miller, 137 A. 254, 289 Pa. 184—Holladay v. Fidler, 43 A.2d 919, 158 Pa.Super. 100—Jordan v. Prudential Ins. Co. of America, 19 A.2d 485, 144 Pa.Super. 3—Blieden v. Toll, 12 A.2d 487, 139 Pa.Super. 436—Societe Anonyme Des Etablissements J. Peraro v. Loewe, 157 A. 509, 103 Pa.Super. 526—Gregory v. Russo, 87 Pa.Super. 537—Mehrkam v. Schlegel & Williamson, Inc., 5 Pa.Dist. & Co. 668, 10 Lehigh Co. L.R. 368, 39 York Leg.Rec. 28—Farmers-Kissinger Market House Co. v. Garman, Com.Pl., 36 Berks Co. 149—Hess v. McMahon, Com. Pl., 32 Del.Co. 528—Allen v. Bergdoll, Com.Pl., 32 Del.Co. 343, 12 Som.Leg.J. 38—Kennedy v. Upper Darby Building & Loan Ass'n, Com.Pl., 29 Del.Co. 247—Lindholm v. Wiley Const. Co., Com.Pl., 49 Lanc.L.Rev. 126—Macheska v. Pasternak, Com.Pl., 46 Lack.Jur. 30—Kies v. Town Hall Co., Com.Pl., 44 Lack.Jur. 241—Regan v. City of Scranton, Com.Pl., 44 Lack.Jur. 210, 35 Mun.L.R. 59—New York Credit Men's Ass'n v. Boyan, 37 Luz.Leg.Reg. 214—Warlong Glove Mfg. Co. v. Samtil Co., Com.Pl., 35 Luz.Leg.Reg. 240—First Nat. Bank in Greensburg, v. Serro, Com.Pl., 26 West.Co. 69—Gisburne v. Petroleum Transport Co., Com.Pl., 55 York Leg.Rec. 165.
Wis.—Marco v. Whiting, 12 N.W.2d 926, 244 Wis. 631—Prime Mfg. Co. v. A. F. Gallun & Sons Corporation, 281 N.W. 697, 229 Wis. 348.

Doubt should be resolved against right to summary judgment.
Cal.—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609.
Colo.—Hatfield v. Barnes, 168 P.2d 552.
Pa.—Ottman v. Nixon-Nirdlinger, 151 A. 879, 301 Pa. 234—Armstrong v. Connelly, 149 A. 87, 299 Pa. 51—Davis v. Investment Land Co., 146 A. 119, 296 Pa. 449.
R.I.—Goucher v. Herr, 14 A.2d 651, 65 R.I. 246.

Whether a case is of such a nature as to permit application of the statutory procedure rests largely in the trial judge's discretion.[27] The statutory remedy of summary judgment where no triable issue is shown to exist is available to defendant as well as to plaintiff,[28] but defendant's remedy is generally limited to the kinds of actions in which plaintiff could have secured such judgment,[29] except to the extent that the statute permits defendant to move for summary judgment in other actions.[30]

Counterclaims. As a general rule, summary judgment procedure is applicable to defendant's counterclaims as well as to original actions, so that either party may move with respect to the same as though the counterclaim were an independent action.[31] Where the statute authorizes summary judgment only in certain kinds of actions, as is discussed infra subdivision b of this section, the counterclaim must be based on a cause of the kind specified,[32] but, if it is of such a kind, summary judgment may be obtained even though the main action is not of the kind in which summary judgment could be granted.[33]

Partial judgment. Under some statutes or court rules, if it appears that defendant's defense applies only to a part of plaintiff's claim, or admits a part of it, plaintiff may have judgment on motion for so much of his claim as such defense does not apply to[34] or as is admitted without qualification;[35] and such recovery may be had where the amount is ad-

27. Ill.—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.
N.Y.—New York Cent. R. Co. v. Gillespie, 16 N.Y.S.2d 618, 172 Misc. 112.

28. U.S.—MacNamara & Wadbrook Trading Co. v. Royal Ins. Co., D.C.N.Y., 288 F. 985.
N.Y.—Chester v. Chester, 13 N.Y.S.2d 502, 171 Misc. 608—Rainville v. Keil, 266 N.Y.S. 867, 148 Misc. 795.
Wis.—Binsfeld v. Home Mut. Ins. Co., 19 N.W.2d 240, 247 Wis. 273.
Defendant's right to judgment as determined by issues see infra subdivision c (2) of this section.

Judgment against interpleaded parties

Defendant may contest plaintiff's motion for summary judgment against it and at the same time move for summary judgment against interpleaded parties in the event that summary judgment is awarded against it.—William J. Conners Car Co. v. Manufacturers' & Traders' Nat. Bank of Buffalo, 209 N.Y.S. 406, 124 Misc. 584, affirmed 210 N.Y.S. 939, 214 App.Div. 811.

29. N.Y.—Dumont v. Raymond, 49 N.Y.S.2d 865, affirmed 56 N.Y.S. 592, 269 App.Div. 592.

30. N.Y.—Levine v. Behn, 25 N.E.2d 871, 282 N.Y. 120—Simson v. Bugman, 45 N.Y.S.2d 140.

Defense founded on documentary evidence

Where case does not fall within any of the eight classes specifically enumerated in first paragraph of rule of civil practice governing summary judgment, defendants' authority to move for summary judgment may be found in the paragraph governing summary judgment where defense founded on facts established prima facie by documentary evidence or official record.—Levine v. Behn, 25 N.E.2d 871, 282 N.Y. 120—Lederer v. Wise Shoe Co., 12 N.E.2d 544, 276 N.Y. 459, 852, disapproving Felberose Holding Corporation v. New York Rapid Transit Corporation, 279 N.Y.S. 645, 244 App.Div. 427—Watters v. Watters, 19 N.Y.S.2d 995, 259 App.Div. 611—White v. Merchants Despatch Transp. Co., 10 N.Y.S.2d 962, 25 App.Div. 1044—Pross v. Foundation Properties, 285 N.Y.S. 796, 158 Misc. 304.

31. N.Y.—Stein v. W. T. Grant Co., 56 N.Y.S.2d 582, 269 App.Div. 909—Dell'Osso v. Everett, 197 N.Y.S. 423, 119 Misc. 502, modified on other grounds 200 N.Y.S. 840, 206 App.Div. 718, appeal dismissed 144 N.E. 887, 238 N.Y. 551—Zaveloff v. Zaveloff, 37 N.Y.S.2d 46.
Effect of counterclaim on plaintiff's motion for summary judgment on his cause of action see infra subdivision c (1) of this section.

Conditions under which judgment granted

Court rule fixing conditions under which summary judgment may be granted applies to counterclaims as well as to defenses.—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 259 N.Y.S. 24, 144 Misc. 547, reversed on other grounds 263 N.Y.S. 55, 238 App.Div. 150.

32. N.Y.—Macomber v. Wilkinson, 6 N.Y.S.2d 608.

33. N.Y.—Macomber v. Wilkinson, supra.

In summary proceeding by landlord wherein tenant filed counterclaim for injuries caused by deleterious gas escaping from an electrical refrigerator on the premises, fact that a summary judgment awarding the premises to landlord could not be granted did not preclude testing the sufficiency of the counterclaim under rule of civil practice providing for summary judgment in specified cases.—Macomber v. Wilkinson, supra.

34. U.S.—Tractor & Equipment Corporation v. Chain Belt Co., D.C.N.Y., 50 F.Supp. 1001.
N.Y.—Mayfair Detectives v. Karp Metal Products Co., 35 N.Y.S.2d 544, 264 App.Div. 410—Amalgamated Bank of New York v. Lancto, 28 N.Y.S.2d 944, 176 Misc. 754—Coudenhove-Kalergi v. Dieterle, 36 N.Y.S.2d 313.
34 C.J. p 200 note 52.

Actions to which applicable

Provisions of rule limiting summary judgment to certain actions apply to partial judgment.—Berson Sydeman Co. v. Waumbeck Mfg. Co., 208 N.Y.S. 716, 212 App.Div. 422—Hilbring v. Mooney, 223 N.Y.S. 303, 130 Misc. 273—34 C.J. p 200 note 50 [a].

Severing cause of action

The severing of first cause of action and granting summary judgment on second cause of action was improper, where amount of damages under second cause of action might affect defendant's liability under first cause of action, and the whole claim should be considered at one time.—Cavagnaro v. Bowman, 34 N.Y.S.2d 637, 264 App.Div. 118, appeal denied 36 N.Y.S.2d 187, 264 App.Div. 853.

35. N.Y.—Fleder v. Itkin, 60 N.E.2d 753, 294 N.Y. 77—Mayfair Detectives v. Karp Metal Products Co., 35 N.Y.S.2d 544, 264 App.Div. 410—Sheehan v. Andrew Cone General Advertising Agency, 29 N.Y.S.2d 317, 176 Misc. 882—Friedman v. Equitable Life Assur. Soc. of U. S., 274 N.Y.S. 851, 153 Misc. 349—Barber v. Warland, 247 N.Y.S. 455, 139 Misc. 398—Finkel v. Affom Holding Corporation, 46 N.Y.S.2d 378—Kaminsky v. Rich, 10 N.Y.S.2d 503.
Pa.—Mesharrer v. Lewis, Com.Pl., 33 Luz.Leg.Reg. 330.
34 C.J. p 200 note 51.
Judgment on admission in pleadings generally see supra § 185.

Defense enabling delay in recovery

A plaintiff may recover judgment forthwith where defendant admits that he has no defense on merits to

mitted to be due on the same transaction which forms the basis of plaintiff's claim, notwithstanding the admission of liability is predicated on a cause of action different from that alleged in the complaint, or on different terms concerning the same type of action.[36] However, a motion for partial judgment must be denied where the amount due is disputed[37] or where the amount tendered by defendant was not accepted.[38] If defendant's motion for summary judgment applies only to one or more of several causes of action or to one or more of several parties plaintiff, and his contentions are sufficient to dispose of the claims of the complaint in such part, defendant may have final judgment forthwith dismissing the complaint to the extent warranted, and the action may be severed;[39] but defendant is not entitled to partial summary judgment for certain alleged items of damage set forth in the complaint where only a single cause of action is alleged and other items of damage remain for determination.[40]

b. Particular Actions

(1) In general
(2) Liquidated or unliquidated claims

(1) In General

The remedy of summary judgment is available only in the kinds of actions provided for by the statute or court rule, and, within limitations, such provisions usually extend to actions at law or equity, and to causes based on contract.

Generally the remedy of summary judgment is available only in such actions as are within the terms of the statute or court rule.[41] If the statute so provides, summary judgment may be granted in actions at law[42] or in equity,[43] but the action must be otherwise one permitted by the statute, as where the remedy is further restricted to liquidated demands, as is discussed infra subdivision b (2) of this section, and under some statutes the remedy is not available in equitable actions other than those particularly specified.[44] The statutes usually apply

part of plaintiff's claim, although he may have a defense which might enable him to defeat recovery on the cause of action stated and to delay recovery even for the part of the claim which defendant is admittedly bound to pay immediately.—Fieder v. Itkin, 60 N.E.2d 753, 294 N.Y. 77.

36. N.Y.—Sheehan v. Andrew Cone General Advertising Agency, 29 N.Y.S.2d 317, 176 Misc. 882.

37. N.Y.—Hilbring v. Mooney, 223 N.Y.S. 303, 130 Misc. 273.

Accord and satisfaction

One suing for purchase price of goods sold and delivered was not entitled to a partial summary judgment on ground that buyer had admitted liability for a specific amount for which it had sent its check before commencement of action, where allegations of defense of buyer, if proven upon trial, would establish accord and satisfaction.—Capitol Coal Corporation v. Juneglory Realty Corporation, 281 N.Y.S. 947, 156 Misc. 631.

38. N.Y.—Hilbring v. Mooney, 223 N.Y.S. 303, 130 Misc. 273.

39. N.Y.—Boyan v. General Time Instruments Corporation, 47 N.Y.S.2d 29, 267 App.Div. 908—Goldman v. Nu-Boro Park Cleaners, 41 N.Y.S.2d 592, 266 App.Div. 780, appeal denied 43 N.Y.S.2d 635, two cases, 266 App.Div. 856—Winkler v. Compania Sud Americana De Vapores, 41 N.Y.S.2d 67, 180 Misc. 181—Druckerman v. Harbord, 29 N.Y.S.2d 370.

40. N.Y.—Luotto v. Field, 63 N.E.2d 58, 294 N.Y. 460—Dumont v. Raymond, 49 N.Y.S.2d 365, affirmed 56 N.Y.S.2d 592, 269 App.Div. 592.

41. Ark.—Craig v. Collier, 244 S.W. 717, 155 Ark. 538.
Ill.—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.
Mich.—Detroit Trust Co. v. City of Detroit, 227 N.W. 715, 248 Mich. 612.
N.Y.—Tracy v. Danzinger, 291 N.Y.S. 113, 249 App.Div. 46—103 Park Ave. Co. v. Exchange Buffet Corporation, 197 N.Y.S. 422, 203 App. Div. 739—Resource Holding Corporation v. Nitke, 239 N.Y.S. 26, 136 Misc. 139.
W.Va.—Mountain State Water Co. v. Town of Kingwood, 1 S.E.2d 395, 121 W.Va. 66.
Wis.—Winter v. Trepte, 290 N.W. 599, 234 Wis. 193.
34 C.J. p 200 note 54.
Particular actions in which summary judgment allowed:
Against:
Collectors of taxes and revenues see the C.J.S. title Taxation §§ 670, 682, also 61 C.J. p 1026 notes 13–18, p 1036 notes 25–43.
Defaulting:
Attorney charged with collection of money for his client see Attorney and Client § 159.
Officers and their sureties see the C.J.S. title Officers §§ 123, 167, also 46 C.J. p 1042 notes 75–85, p 1075 note 20–p 1076 note 33.
Sheriffs and constables see the C.J.S. title Sheriffs and Constables §§ 168–172, 192, also 57 C.J. p 980 note 3–p 997 note 56, p 1046 note 8–p 1057 note 35.
Stipulators see Admiralty § 285.

Particular actions in which summary judgment allowed—Cont'd
Against—Cont'd
Sureties see the C.J.S. title Principal and Surety § 277, also 50 C.J. p 224 notes 80–32.
For costs see Costs § 181.
In favor of surety against his principal whose debts surety has had to pay see the C.J.S. title Principal and Surety § 337, also 50 C.J. p 263 note 82–p 264 note 8.
On appeal bond see Appeal and Error §§ 2087–2094.
To recover on bill or note see Bills and Notes § 527.

Collection of excise tax

While ordinarily as between private litigants a notice of motion can be employed only to recover money due on contract, under statute relating to collection of claims due the state, state could proceed by notice of motion for collection of gasoline excise tax and penalties.—State v. Penn Oak Oil & Gas, W.Va., 36 S.E.2d 595.

42. Mich.—Robertson v. New York Life Ins. Co., 19 N.E.2d 498, 312 Mich. 92, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. —, rehearing denied 66 S.Ct. 896.
Va.—Pickeral v. Federal Land Bank of Baltimore, 15 S.E.2d 82, 177 Va. 743.

43. Ill.—Fisher v. Hargrave, 48 N.E.2d 966, 318 Ill.App. 510.

44. N.Y.—Tracy v. Danzinger, 291 N.Y.S. 113, 249 App.Div. 46—103 Park Ave. Co. v. Exchange Buffet Corporation, 197 N.Y.S. 422, 203 App.Div. 739—People v. Allender

to actions on contracts express or implied in fact or in law,[45] and are sometimes restricted in application to actions of such a nature.[46] In some states,[47] but not in others,[48] summary procedure may be used in tort actions.

The remedy of summary judgment has been held available in various particular actions such as for an accounting[49] arising on a written contract,[50] for ejectment,[51] to recover possession of a specific chattel,[52] for forcible entry and detainer,[53] for specific performance of a contract for the sale and purchase of specific property,[54] to enforce or foreclose a lien or mortgage,[55] and in an action on a statute

Co., 43 N.Y.S.2d 685, 181 Misc. 307—Fiscella v. Fridman, 7 N.Y.S.2d 544, 169 Misc. 827.
34 C.J. p 200 note 54 [b] (1).

Reformation of instrument is function of court of equity and not of court of law on motion for summary judgment.—Comas Holding Corporation v. Handel, 265 N.Y.S. 873, 148 Misc. 439.

45. Ill.—Eagle Indemnity Co. v. Haaker, 33 N.E.2d 154, 309 Ill.App. 406.
N.Y.—Pribyl v. Van Loan & Co., 26 N.Y.S.2d 1, 261 App.Div. 503, reargument denied 27 N.Y.S.2d 992, 262 App.Div. 711, affirmed 40 N.E. 2d 36, 287 N.Y. 749—Title Guarantee & Trust Co. v. Smith, 213 N.Y. S. 730, 215 App.Div. 448—Hughes v. Frank M. Murphy, Inc., 6 N.Y. S.2d 833, 169 Misc. 239.
W.Va.—Mountain State Water Co. v. Town of Kingwood, 1 S.E.2d 395, 121 W.Va. 66—Lambert v. Morton, 160 S.E. 223, 111 W.Va. 25.
Wis.—Jefferson Gardens v. Terzan, 257 N.W. 154, 216 Wis. 230.

Actions held within statute or rule
(1) Action to recover tax paid under protest.—National Bond & Share Corporation v. Hoey, D.C.N.Y., 14 F. Supp. 787.

(2) Action to recover amount due because of bank stockholder's double liability.—Schafer v. Bellin Memorial Hospital of Wisconsin Conference of Methodist Episcopal Church, 264 N. W. 177, 219 Wis. 495.

(3) A suit for accounting on theory that by agreement defendants or their predecessors in interest assumed liabilities of dissolved brokerage firm with which plaintiff had dealt.—Fisher v. Hargrave, 48 N.E.2d 966, 318 Ill.App. 510.

Waiver of tort
Rule authorizing summary judgment is applicable to proceeding arising out of wrongful taking, where plaintiff waived tort and proceeded on implied contract.—Bishop v. Spector, 269 N.Y.S. 76, 150 Misc. 860.

Third-party beneficiary
Plaintiff seeking to enforce a contract as third-party beneficiary is asserting a contract right within statute authorizing summary judgments.—Rifkin v. Safenovitz, 40 A. 2d 188, 131 Conn. 411.

All cases not within statute
Under some statutes proceedings for summary judgment are not applicable in all cases founded on contract.—Goucher v. Herr, 14 A.2d 651, 65 R.I. 246.

46. W.Va.—City of Beckley v. Craighead, 24 S.E.2d 908, 125 W.Va. 484.

A municipal special assessment for the cost of street paving did not create a "contractual obligation" as against the owners of abutting lots.—City of Moundsville v. Brown, 25 S.E.2d 900, 125 W.Va. 779.

Damages
Notice of motion for judgment on justice's official bond is not proper procedure to enforce claim sounding in damages.—White v. Conley, 152 S. E. 527, 108 W.Va. 658.

47. Mich.—Robertson v. New York Life Ins. Co., 19 N.W.2d 498, 312 Mich. 92, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. ——, rehearing denied 66 S.Ct. 896.

48. N.Y.—Allegro for Children v. Weisbrod, 18 N.Y.S.2d 369.

Summary judgment held unavailable
(1) In action for conversion.—Formel v. National City Bank of New York, 273 N.Y.S. 817, 152 Misc. 275—Rothman v. Charles D. Strang, Inc., 273 N.Y.S. 816, 152 Misc. 606—Allegro for Children v. Weisbrod, 18 N.Y.S.2d 369.

(2) In action for negligence resulting in damage to personal property.—Ottone v. American London Shrinkers Corp., 55 N.Y.S.2d 243.

49. Ill.—Fisher v. Hargrave, 48 N.E. 2d 966, 318 Ill.App. 510.

50. N.Y.—City Bank Farmers' Trust Co. v. Charity Organization Soc. of City of New York, 265 N.Y.S. 267, 238 App.Div. 720, affirmed 191 N.E. 504, 264 N.Y. 441.

Accounting not under contract
Summary judgment cannot be granted plaintiffs in action for accounting, where they do not rely on written contract.—Ben Bimberg & Co. v. Unity Coat & Apron Co., 270 N.Y.S. 579, 151 Misc. 442.

51. N.J.—Milberg v. Keuthe, 121 A. 713, 98 N.J.Law 779.

Alternative procedural remedy
The code section, extending right to proceed by motion for judgment in all cases where action at law of any kind would lie, includes alternative procedural remedy to common-law action of ejectment, that is, petition to establish boundary lines, which partakes of legal nature of such action and is governed much by like legal principles and rules.—Pickeral v. Federal Land Bank of Baltimore, 15 S.E.2d 82, 177 Va. 743.

52. N.Y.—Le Fevre v. Reliable Paint Supply Co., 273 N.Y.S. 903, 152 Misc. 594.

Action in conversion for damages for unlawful repossession of automobile is not one to recover possession of specific chattel so as to warrant granting of motion for summary judgment.—Gilbert v. Gotham Credit Corporation, 273 N.Y.S. 815, 152 Misc. 598.

Prior to change in statute, summary judgment could not be obtained in a replevin action.—New York Yellow Cab Co. Sales Agency v. Weinberg, 222 N.Y.S. 862, 220 App.Div. 761.

53. Ill.—Killian v. Welfare Engineering Co., 66 N.E.2d 305, 328 Ill. App. 375—Wainscott v. Penikoff, 4 N.E.2d 511, 287 Ill.App. 78.

54. N.Y.—Bennett v. Ritchie, 55 N. Y.S.2d 820, 269 App.Div. 851.

A contrary rule prevailed prior to amendment of rule of civil practice specifically permitting summary judgment in such actions.—Morris v. Dorfmann, 233 N.Y.S. 460, 226 App. Div. 695.

Action not within rule
(1) An action for specific performance of a contract, under which defendant allegedly agreed that on plaintiff's return from the armed forces defendant would return to plaintiff the taxi business which had been transferred to defendant, was not an action for specific performance of a contract for the sale and purchase of specific property or to recover possession of a specific chattel which could be disposed of on motion for summary judgment.—Bennett v. Ritchie, 55 N.Y.S.2d 820, 269 App.Div. 851.

(2) The statutes do not comprehend actions to compel specific performance of an alleged agreement of an insurer to reinstate a policy terminated by failure of plaintiff to pay premiums.—Liss v. Continental Casualty Co., 284 N.Y.S. 304, 245 App. Div. 670.

55. N.Y.—City of New Rochelle v. Echo Bay Waterfront Corp., 49 N. Y.S.2d 673, 268 App.Div. 182, certiorari denied Echo Bay Waterfront Corp. v. City of New Rochelle, 66 S.Ct. 24, 326 U.S. 720, 90

where the sum sought to be recovered is a sum of money other than a penalty.[56]

On the other hand, summary judgment procedure has been held inapplicable to special proceedings,[57] such as mandamus,[58] an action against a state in the court of claims,[59] or summary proceedings by a landlord to recover possession of premises,[60] or in actions or proceedings for a declaratory judgment,[61] to partition realty,[62] to quiet title,[63] to establish a claim against a decedent's estate,[64] to have a trustee's compensation determined,[65] to recover attorney's fees,[66] or to levy on the earnings or income of a judgment debtor.[67] Summary judgment under a state statute is not authorized in suits in the federal courts on claims under veterans' legislation.[68]

(2) Liquidated or Unliquidated Claims

The statutes or court rules authorizing summary judgment usually apply to actions to recover a debt or liquidated demand arising on a contract or judgment and are sometimes restricted to such actions, but some provisions also authorize the remedy in suits to recover on an unliquidated claim.

The statutes or court rules authorizing the entry of judgment on motion where no triable issue is raised in response to the affidavits of the moving party usually apply to actions to recover a debt or liquidated demand arising on a contract express or implied in fact or in law,[69] or arising on a judg-

L.Ed. —. Affirmed 60 N.E.2d 838, 294 N.Y. 678—Reddy v. Zurich General Accident & Liability Ins. Co., 11 N.Y.S.2d 88, 171 Misc. 69.

Summary judgment is not available in such an action under statutes in some jurisdictions.—Slama v. Dehmel, 257 N.W. 163, 216 Wis. 224.

Prior to change in rule, summary judgment could not be obtained in such an action.—Toner v. Ehrgott, 235 N.Y.S. 17, 226 App.Div. 244—Reed v. Neu-Pro Const. Corporation, 234 N.Y.S. 400, 226 App.Div. 70—Securities Acceptance Corporation v. E. M. Kane Co., 196 N.Y.S. 519, 119 Misc. 354, affirmed 201 N.Y.S. 945, 207 App.Div. 840—Savad v. Schwartz, 241 N.Y.S. 729—34 C.J. p 200 note 54 [b] (2).

Suits under mechanic's lien act are within court rule authorizing summary judgment.—Nolte v. Nannino, 154 A. 831, 107 N.J.Law 462.

56. N.Y.—Ehlers v. Blood, 22 N.Y.S. 2d 999.

Failure to honor execution

Action against judgment debtor's employer for failure to honor execution against employee's earnings is one founded on statute within text rule.—Rosenberg v. Parlay Hats, 258 N.Y.S. 949, 144 Misc. 519.

Action not within rule

Rule did not apply to an action brought under the general corporation law to compel individual to account to corporation for management and disposition of assets of corporation.—Fiscella v. Fridman, 7 N.Y.S. 2d 544, 169 Misc. 827.

Action held one to recover penalty

N.Y.—Wachtel v. Schelberg, 59 N.Y. S.2d 846, 186 Misc. 406.

57. Cal.—Loveland v. City of Oakland, 159 P.2d 70, 69 Cal.App.2d 399.

58. Cal.—Loveland v. City of Oakland, supra.

59. N.Y.—Muccino v. State, 300 N. Y.S. 247, 164 Misc. 918.

60. N.Y.—In re Wendel's Estate, 266 N.Y.S. 694, 148 Misc. 912—905 West End Ave. Corp. v. Peers, 195 N.Y.S. 86, 118 Misc. 754—Gardella v. Hagopian, 28 N.Y.S.2d 250, reversed on other grounds 31 N.Y.S. 2d 450, 263 App.Div. 816—Macomber v. Wilkinson, 6 N.Y.S.2d 608—Alexander v. O'Brien, 6 N.Y.S.2d 614.

61. N.Y.—Tiernan Realty Co. v. Title Guarantee & Trust Co., 28 N. Y.S.2d 920, 176 Misc. 1071—Spaulding v. Hotchkiss, 62 N.Y.S.2d 151.

62. N.Y.—Lowe v. Plainfield Trust Co. of Plainfield, N. J., 215 N.Y.S. 50, 216 App.Div. 72—Zaveloff v. Zaveloff, 37 N.Y.S.2d 46.

63. Ill.—Ward v. Sampson, 63 N.E. 2d 751, 391 Ill. 585.
Wis.—Loehr v. Stenz, 263 N.W. 373, 219 Wis. 361.

64. Mich.—Caswell v. Stearns, 241 N.W. 165, 257 Mich. 461.

65. Mich.—In re Stott's Estate, 239 N.W. 336, 256 Mich. 281.

66. Mich.—Bisbee v. Wetmore, 241 N.W. 162, 257 Mich. 178.

67. N.Y.—Royco Realty Corporation v. Farber, 225 N.Y.S. 688, 131 Misc. 46.

68. U.S.—U. S. v. Lindholm, C.C.A. Cal., 79 F.2d 784, 103 A.L.R. 213, followed in U. S. v. Stevenson, 79 F.2d 788.

69. Cal.—Haupt v. Charlie's Kosher Market, 112 P.2d 627, 17 Cal.2d 843.
N.Y.—United Products Corporation of America v. Standard Textile Products Co., 231 N.Y.S. 115, 224 App.Div. 371—Hurwitz v. Corn Exchange Bank Trust Co., 253 N.Y.S. 851, 142 Misc. 398—Haiss v. Schmukler, 201 N.Y.S. 332, 121 Misc. 574—Garlick v. Garlick, 53 N.Y.S.2d 821—David S. Stern Corporation v. Richard Nathan Corporation, 42 N.Y.S.2d 249—Zaveloff v. Zaveloff, 37 N.Y.S.2d 46.
34 C.J. p 199 note 48.

Particular claims within statute or court rule

(1) Action for rent due.—American Nat. Bank & Trust Co. of Chicago v. National Mineral Co., 63 N.E.2d 142, 326 Ill.App. 597.

(2) Action to recover initial payment on realty.—Perloff v. Island Development Co., 133 A. 178, 4 N.J. Misc. 473.

(3) Action to recover deposit and fees for searching title.—Grossman v. Brick, 139 A. 490, 5 N.J.Misc. 1016.

(4) Action for services on quantum meruit.—Jacobs v. Korpus, 218 N.Y.S. 314, 128 Misc. 445.

(5) Action on provision in obligation for payment of reasonable attorney's fees.
N.Y.—Waxman v. Williamson, 175 N.E. 534, 256 N.Y. 117, amendment of remittitur denied 177 N.E. 151, 256 N.Y. 587.
R.I.—Morris Plan Co. of Rhode Island v. Whitman, 150 A. 610, 51 R.I. 24.

(6) Other actions.
Conn.—Rifkin v. Safenovitz, 40 A. 2d 188, 131 Conn. 411.
N.Y.—Weisberg v. Art Work Shop, 235 N.Y.S. 8, 226 App.Div. 532, affirmed 170 N.E. 147, 252 N.Y. 572.
Wis.—Unmack v. McGovern, 296 N. W. 66, 236 Wis. 639.

Actions held not within statute or court rule

(1) An action by a tenant of stalls in a public market to recover increased rent paid under protest, under threat to revoke license.—George F. Hinrichs, Inc., v. City of New York, 201 N.Y.S. 377, 121 Misc. 592, affirmed 207 N.Y.S. 852, 212 App. Div. 816 and affirmed 209 N.Y.S. 836, 213 App.Div. 863, affirmed 152 N.E. 413, 242 N.Y. 527.

(2) Action for damages against landlord for breach of covenant of quiet enjoyment.—Paul v. Mantell, 247 N.Y.S. 452, 139 Misc. 395.

(3) Other actions.—Joseph Mogul, Inc., v. C. Lewis Lavine, Inc., 159 N. E. 708, 247 N.Y. 20, 57 A.L.R. 934—Nagle v. Rubin, 247 N.Y.S. 786, 231 App.Div. 462—Schwed v. E. N. Kennedy, Inc., 221 N.Y.S. 179, 220 App.

ment for a stated sum.[70] The words "debt" or "liquidated demand" as used in the statutes are not to be given a constricted interpretation, although they should not be stretched to include a cause of action outside the main purpose of the enactment.[71] The suit ordinarily must be one founded on express or implied contract to pay a sum which is certain or readily reducible to certainty,[72] and, while it has been held that proceedings for summary judgment are applicable in any action in which recovery is sought under the indebitatus counts,[73] they are not applicable in every action in assumpsit.[74] Some statutes do not extend the summary judgment procedure to an action for unliquidated damages,[75] even though no defense is disclosed by the answer;[76] but other statutes or court rules make the remedy available in an action to recover an unliquidated debt or demand for a sum of money arising on express or implied contract.[77]

c. As Determined by Issues

(1) In general
(2) On motion by defendant
(3) Particular causes and issues

(1) In General

Under statutes and court rules authorizing summary judgment where affidavits are tendered in support of the claim and the opposing party fails to present facts establishing a triable issue, the court will grant the motion if no such issue is disclosed, even though the answer presents a counterclaim; but it will deny the motion if a triable issue of fact is raised as to a valid defense even though such defense is not properly pleaded.

Under various statutes and court rules authorizing summary judgment where the moving party files an affidavit in support of his claim or defense and the opposing party fails to present any facts giving rise to any triable issue or defense, the right to judgment depends on the nonexistence of a genuine issue warranting a trial,[78] and not merely on

Div. 189—Buffalo Gaiety Theatre Co. v. Indemnity Ins. Co. of North America, 219 N.Y.S. 212, 218 App.Div. 669—Apfel v. Auditore, 216 N.Y.S. 795, 217 App.Div. 724, appeal dismissed 155 N.E. 875, 244 N.Y. 507—Norwich Pharmacal Co. v. Barrett, 200 N.Y.S. 298, 205 App.Div. 749—Lawrence Textile Corporation v. American Ry. Express Co., 211 N.Y.S. 699, 125 Misc. 858—State Realty Co. v. Post, 206 N.Y.S. 713, 123 Misc. 925—Haiss v. Schmukler, 201 N.Y.S. 332, 121 Misc. 574.

Demand for sum of money

(1) Motions for judgment will be entertained only for the recovery of money based on contract.—Mountain State Water Co. v. Town of Kingwood, 1 S.E.2d 395, 121 W.Va. 66.

(2) A mandate proceeding to compel payment of pension to fireman's widow, when pension trustees had refused to recognize widow's right, was not a "demand for a sum of money only" within statute governing summary judgment.—Loveland v. City of Oakland, 159 P.2d 70, 69 Cal.App.2d 399.

70. N.Y.—Tenny v. Tenny, 36 N.Y.S.2d 704.

An action for arrears of alimony under a foreign decree is not covered by statute authorizing summary judgment in "actions to recover a debt or liquidated demand arising on a judgment for a stated sum."—Southard v. Southard, 232 N.Y.S. 391, 138 Misc. 259—Tenny v. Tenny, 36 N.Y.S.2d 704.

71. Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.

Debt

(1) Notes containing unconditional promise to pay sum certain in money with unconditional promise to pay plaintiff reasonable attorney's fee was a "debt."—Norwood Morris Plan Co. v. McCarthy, supra.

(2) Action held not one on debt.—Schaffer Stores Co. v. Sweet, 228 N.Y.S. 599, 132 Misc. 38.

72. N.Y.—Paul v. Mantell, 247 N.Y.S. 452, 139 Misc. 395.

Mathematical calculations

Amount claimed to be due is a "liquidated demand" within statute authorizing summary judgments if it is susceptible of being made certain in amount by mathematical calculations from factors which are or ought to be in possession or knowledge of party to be charged.—Rifkin v. Safenovitz, 40 A.2d 188, 131 Conn. 411.

73. N.Y.—Waxman v. Williamson, 175 N.E. 534, 256 N.Y. 117, amendment of remittitur denied 177 N.E. 151, 256 N.Y. 587.
R.I.—Fisher v. Sun Underwriters Ins. Co. of New York, 179 A. 702, 55 R.I. 175, 103 A.L.R. 1097—Henry W. Cooke Co. v. Sheldon, 164 A. 327, 53 R.I. 101.
34 C.J. p 201 note 55.

74. R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193—Fisher v. Sun Underwriters Ins. Co. of New York, 179 A. 702, 55 R.I. 175, 103 A.L.R. 1097.

Basis of recovery

Generally the basis for "assumpsit" is not recovery under a contract, but recovery of damages for a contract's breach, while a "notice of motion for judgment" is for recovery of money due under and by virtue of a contract.—City of Moundsville v. Brown, 25 S.E.2d 900, 125 W.Va. 779.

75. Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.
Mich.—Hecker Products Corporation v. Transamerican Freight Lines, 296 N.W. 297, 296 Mich. 381.
R.I.—Goucher v. Herr, 14 A.2d 651, 65 R.I. 246—Fisher v. Sun Underwriters Ins. Co. of New York, 179 A. 702, 55 R.I. 175, 103 A.L.R. 1097.
34 C.J. p 201 note 56.

76. Idaho.—Welch v. Bigger, 133 P. 381, 24 Idaho 169.

77. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Oil Well Supply Co. of California, 55 P.2d 885, 12 Cal.App.2d 265.

In New York

(1) The text rule now prevails.—Aiken Mills v. Boss Mfg. Co., 265 N.Y.S. 555, 238 App.Div. 605.

(2) Prior to the amendment of the court rules in 1932, summary judgment could not be obtained in an action to recover unliquidated damages.—Interstate Pulp & Paper Co. v. New York Tribune, 202 N.Y.S. 232, 207 App.Div. 453—Norwich Pharmacal Co. v. Barrett, 200 N.Y.S. 298, 205 App.Div. 749—Golden State Fruit Distributors v. Shambro, 232 N.Y.S. 338, 133 Misc. 561.

78. Cal.—Walsh v. Walsh, 116 P.2d 62, 18 Cal.2d 439.
N.Y.—Piedmont Hotel Co. v. A. E. Nettleton Co., 183 N.E. 145, 263 N.Y. 25—Curry v. Mackenzie, 146 N.E. 375, 239 N.Y. 267—Miorin v. Miorin, 13 N.Y.S.2d 705, 257 App. Div. 556, reargument denied 14 N.Y.S.2d 1003, 257 App.Div. 1084—Moir v. Johnson, 207 N.Y.S. 380, 211 App.Div. 427—Ritz Carlton

whether the pleadings join issue.[79] In passing on such a motion, the court is not authorized to try an issue of fact between the parties,[80] but is to determine whether or not there is an issue to be tried;[81] and whether under the facts defendant is entitled to defend.[82] If it is apparent from the opposing affidavits or other pleadings and proof that there is a substantial issue between the parties, a

Restaurant & Hotel Co. v. Ditmars, 197 N.Y.S. 405, 203 App.Div. 748—American Surety Co. of New York v. Empire Trust Co., 217 N.Y.S. 673, 128 Misc. 116—Peabody v. Interborough Rapid Transit Co., 209 N.Y.S. 376, 124 Misc. 801, affirmed 209 N.Y.S. 893, 213 App.Div. 857, affirmed 148 N.E. 768, 240 N.Y. 708—First Trust Co. of Albany v. Dumary, 23 N.Y.S.2d 532.

79. Ill.—Roberts v. Sauerman Bros., 20 N.E.2d 849, 300 Ill.App. 213.

Joinder presupposed

Ordinarily a motion for summary judgment presupposes that the pleadings properly join issue.—Roberts v. Sauerman Bros., supra.

The mere service of an amended answer after plaintiff moves for summary judgment will not of itself defeat the motion, but the case may be considered on the amended pleadings and the affidavits in support thereof.—Standard Factors Corp. v. Kreisler, 53 N.Y.S.2d 871. Affirmed 56 N.Y.S.2d 414, 269 App. Div. 830.

80. U.S.—Schram v. Clair, D.C.N.Y., 28 F.Supp. 422.

Cal.—Arnold v. Hibernia Savings & Loan Soc., 146 P.2d 684, 23 Cal.2d 741—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal.2d 553—Walsh v. Walsh, 116 P.2d 62, 18 Cal.2d 439—Slocum v. Nelson, App., 163 P.2d 888.

Ill.—Molner v. Schaefle, 58 N.E.2d 744, 324 Ill.App. 589.

N.Y.—Irving Trust Co. v. Anahma Realty Corporation, 35 N.E.2d 21, 285 N.Y. 416—Brooklyn Fire Brick Works v. Brooklyn Contractors Machinery Exchange, 47 N.Y.S.2d 229, 181 Misc. 662—Yokohama Specie Bank, Limited, New York Agency, v. Milbert Importing Co., 44 N.Y.S.2d 71, 182 Misc. 281—Havens v. Rochester Ropes, Inc., 39 N.Y.S.2d 444, 179 Misc. 839, affirmed 41 N.Y.S.2d 180, 266 App.Div. 672, appeal denied 41 N.Y.S.2d 907, 266 App.Div. 692—Neptune Meter Co. v. Long Island Water Meter Repair Co., 39 N.Y.S.2d 325, 179 Misc. 445—Community Volunteer Fire Co. of Nimmonsburg v. City Nat. Bank of Binghamton, 14 N.Y.S.2d 306, 171 Misc. 1027—Falk v. Empire State Degree of Honor of Stockton, 246 N.Y.S. 649, 138 Misc. 697—New York Post Corp. v. Kelley, 61 N.Y.S.2d 264, affirmed Hearst Consolidated Publications v. Kelley, 61 N.Y.S.2d 762, 270 App.Div. 916, appeal granted 63 N.Y.S.2d 614, 270 App.Div. 923, New York Sun v. Kelley, 62 N.Y.S.2d 614, 270 App.Div. 924, New York World Telegram Corp. v. Kelley, 62 N.Y.S.2d 614, 270 App. Div. 924, and New York Post Corp. v. Kelley, 62 N.Y.S.2d 615, 270 App.Div. 923—Robinov v. Homler Progressive Soc., 52 N.Y.S.2d 39, affirmed 56 N.Y.S.2d 413, 269 App. Div. 832—Gardella v. Hagopian, 28 N.Y.S.2d 250, reversed on other grounds 31 N.Y.S.2d 450, 268 App. Div. 816—Spiegel v. U. S. Lines Co., 27 N.Y.S.2d 631—Biloz v. Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, affirmed 23 N.Y.S. 2d 460, 260 App.Div. 976—Dr. A. Posner, Shoes, v. Vogel, 198 N.Y.S. 233.

R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.

Wis.—Parish v. Awschu Properties, 19 N.W.2d 276, 247 Wis. 166.

34 C.J. p 201 note 60.

81. U.S.—U. S. v. Stephanidis, D.C. N.Y., 41 F.2d 958.

Cal.—Arnold v. Hibernia Savings & Loan Soc., 146 P.2d 684, 23 Cal.2d 741—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal.2d 553—Walsh v. Walsh, 116 P.2d 62, 18 Cal.2d 439—Slocum v. Nelson, App., 163 P.2d 888—Loveland v. City of Oakland, 159 P.2d 70, 69 Cal.App.2d 399—Security-First Nat. Bank of Los Angeles v. Cryer, 104 P.2d 66, 39 Cal.App.2d 757—Kelly v. Liddicoat, 96 P.2d 186, 35 Cal. App.2d 599—Shea v. Leonis, 84 P. 2d 277, 29 Cal.App.2d 184.

Ill.—Scharf v. Waters, 66 N.E.2d 499, 328 Ill.App. 525—Bertlee Co. v. Illinois Publishing & Printing Co., 52 N.E.2d 47, 320 Ill.App. 490.

Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.

Mich.—Bed v. Fallon, 12 N.W.2d 396, 307 Mich. 466—People's Wayne County Bank of Dearborn v. Harvey, 255 N.W. 436, 268 Mich. 47—Baxter v. Szucs, 227 N.W. 666, 248 Mich. 672.

N.Y.—Miorin v. Miorin, 13 N.Y.S.2d 705, 257 App.Div. 556, reargument denied 14 N.Y.S.2d 1003, 257 App. Div. 1084—Camp-Of-The-Pines v. New York Times Co., 53 N.Y.S.2d 475, 184 Misc. 389—First Trust Co. of Albany v. Arnold, 39 N.Y.S.2d 175, 179 Misc. 349—Edward F. Dibble Seedgrower v. Jones, 223 N. Y.S. 785, 130 Misc. 359—Rodger v. Bliss, 223 N.Y.S. 401, 130 Misc. 168—Tchlenoff v. Jacobs, 44 N.Y. S.2d 38, affirmed 46 N.Y.S.2d 875, 267 App.Div. 908, appeal denied 48 N.Y.S.2d 451, 267 App.Div. 987, affirmed 60 N.E.2d 32, 293 N.Y. 904—First Nat. Bank of Dolgeville, N. Y., v. Mang, 41 N.Y.S.2d 92—Biloz v. Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, affirmed 23 N.Y.S.2d 460, 260 App. Div. 976—Krauss v. Central Ins. Co. of Baltimore, 40 N.Y.S.2d 736—Erie County Sav. Bank v. Garson, 33 N.Y.S.2d 142—Nester v. Nester, 19 N.Y.S.2d 426, reversed on other grounds 22 N.Y.S.2d 119, 259 App. Div. 1065—Ludmerer v. New York Life Ins. Co., 19 N.Y.S.2d 272.

R.I.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201—Berick v. Curran, 179 A. 708, 55 R. I. 193—Fisher v. Sun Underwriters Ins. Co. of New York, 179 A. 702, 55 R.I. 175, 103 A.L.R. 1097.

Wis.—Potts v. Farmers' Mut. Automobile Ins. Co., 289 N.W. 606, 233 Wis. 313—Prime Mfg. Co. v. A. F. Gallun & Sons Corporation, 281 N.W. 697, 229 Wis. 348.

34 C.J. p 201 note 61.

Court determines whether there is real defense

N.Y.—Connor v. Commercial Travelers Mut. Accident Ass'n of America, 287 N.Y.S. 416, 247 App.Div. 352—Cleghorn v. Ocean Accident & Guarantee Corporation, Limited, of London, 215 N.Y.S. 127, 216 App. Div. 342, modified on other grounds 155 N.E. 87, 244 N.Y. 166—Security Finance Co. v. Stuart, 224 N. Y.S. 257, 130 Misc. 538.

82. N.Y.—Hamilton Fire Ins. Co. v. Greger, 218 N.Y.S. 534, 218 App. Div. 536, reversed on other grounds 158 N.E. 60, 246 N.Y. 162, 55 A.L.R. 921—Rogan v. Consolidated Coppermines Co., 193 N.Y.S. 163, 117 Misc. 718.

The test of a motion for summary judgment is whether the pleadings, affidavits, and exhibits in support of the motion are sufficient to overcome the opposing papers and to justify a finding as a matter of law that there is no defense to the action.—Nester v. Nester, 19 N.Y.S.2d 426, reversed on other grounds 22 N.Y.S. 2d 119, 259 App.Div. 1065.

Protection of defendant

In proceedings for summary judgment, defendant's right to present his defense at a trial should be carefully protected.—Berick v. Curran, 179 A. 708, 55 R.I. 193.

Disclosure of defense

On plaintiff's motion for summary judgment, defendant is not required to disclose his entire defense, but only so much as to show that there is an issue to be decided by the jury. —La Pointe v. Wilson, 61 N.Y.S.2d 64.

judgment can be entered only after the trial of the issue in regular course.[83] In such a case defendant should be given leave to defend[84] and a motion for a summary judgment should not be granted,[85] especially where it would not dispose of an

83. U.S.—Prudential Ins. Co. of America v. Zorger, C.C.A.Ill., 86 F.2d 446, 108 A.L.R. 498—Maryland Casualty Co. v. Sparks, C.C.A.Mich., 76 F.2d 929—Chase Nat. Bank of City of New York v. Burg, D.C.Minn., 32 F.Supp. 230—Schenley Distributors v. Wisconsin Wine & Spirit Import Corporation, D.C.Wis., 28 F.Supp. 635.

Ariz.—Cress v. Switzer, 150 P.2d 86, 61 Ariz. 405—Hughes v. Union Oil Co. of Arizona, 132 P.2d 640, 60 Ariz. 130.

Cal.—Walsh v. Walsh, 116 P.2d 62, 18 Cal.2d 439—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609—Grady v. Easley, 114 P.2d 635, 45 Cal.App.2d 632.

Ill.—Bertlee Co. v. Illinois Publishing & Printing Co., 52 N.E.2d 47, 320 Ill.App. 490.

N.Y.—Gravenhorst v. Zimmerman, 139 N.E. 766, 236 N.Y. 22, 27 A.L.R. 1465—Greca v. De Luxe Dainties, 61 N.Y.S.2d 413, 270 App.Div. 907, appeal denied 62 N.Y.S.2d 847, 270 App.Div. 944—Sound Realty Co. v. Nicholson, 27 N.Y.S.2d 929, 262 App.Div. 81, reargument denied 29 N.Y.S.2d 712, two cases, 262 App.Div. 848—Mills v. City of New York, 27 N.Y.S.2d 929, 262 App.Div. 81, reargument denied 29 N.Y.S.2d 712, 262 App.Div. 848—Farber v. De Bruin, 2 N.Y.S.2d 244, 253 App.Div. 909—Childs Co. v. Stone, 240 N.Y.S. 582, 228 App.Div. 546—Weinberg v. Goldstein, 235 N.Y.S. 529, 226 App.Div. 479—Leidy v. Procter, 235 N.Y.S. 101, 226 App.Div. 322—H. C. King Motor Sales Corporation v. Allen, 204 N.Y.S. 555, 209 App.Div. 281—Moers v. American Exch. Nat. Bank, 203 N.Y.S. 727, 208 App.Div. 473—Brooklyn Clothing Corporation v. Fidelity-Phenix Fire Ins. Co., 200 N.Y.S. 208, 205 App.Div. 743—Ritz Carlton Restaurant & Hotel Co. v. Ditmars, 197 N.Y.S. 405, 203 App.Div. 748—New York Cent. R. Co. v. Gillespie, 16 N.Y.S.2d 618, 172 Misc. 112—National City Bank of New York v. Bon Ray Dance Frocks, 275 N.Y.S. 510, 153 Misc. 549—Wm. H. Frear & Co. v. Bailey, 214 N.Y.S. 675, 127 Misc. 79—Macomber v. Wilkinson, 6 N.Y.S.2d 608.

Wis.—Parish v. Awschu Properties, 19 N.W.2d 276, 247 Wis. 166—Atlas Inv. Co. v. Christ, 2 N.W.2d 714, 240 Wis. 114.

34 C.J. p 201 note 63.

Adjudication as to issue of fact

Where appellate court had held issue of fact raised by reply, issue remained an issue of fact after filing of rejoinder traversing reply and precluded entry of summary judgment.—Harvester Building & Loan Ass'n v. Hana & Simon Elbaum, 3 A.2d 450, 121 N.J.Law 515.

84. N.J.—Louis S. Kaplan, Architect v. Catlett, 1 A.2d 884, 121 N.J.Law 201.

34 C.J. p 201 note 64.

Matter of right

Where defendant files an answer presenting a good defense, and reasonably supports the essential factual assertions of his answer by affidavit or other proofs, he is entitled as a matter of right, and not of discretion or on terms, to have his answer sustained as against a motion for summary judgment.—Louis S. Kaplan, Architect v. Catlett, supra.

85. U.S.—Schenley Distributors v. Wisconsin Wine & Spirit Import Corporation, D.C.Wis., 28 F.Supp. 635—Mutual Life Ins. Co. of New York v. Patterson, D.C.N.Y., 17 F.Supp. 416—Aufderheide v. Mine Safety Appliance Co., D.C.Pa., 9 F.Supp. 918—U. S. v. Turner Milk Co., D.C.Ill., 1 F.R.D. 643.

Ariz.—Cress v. Switzer, 150 P.2d 86, 61 Ariz. 405.

Cal.—Walsh v. Walsh, 116 P.2d 62, 18 Cal.2d 439—Ross v. McDougal, 87 P.2d 709, 31 Cal.App.2d 114.

Ill.—Shirley v. Ellis Drier Co., 39 N.E.2d 329, 379 Ill. 105—Diversey Liquidating Corporation v. Neunkirchen, 19 N.E.2d 363, 370 Ill. 523, 120 A.L.R. 1395—C. I. T. Corporation v. Smith, 48 N.E.2d 785, 318 Ill.App. 642—Shaw v. National Life Co., 42 N.E.2d 885, 315 Ill. App. 210.

Mich.—Bullard Gage Co. v. Saffady, 11 N.W.2d 895, 307 Mich. 296—Terre Haute Brewing Co. v. Goldberg, 289 N.W. 192, 291 Mich. 401—McDonald v. Staples, 261 N.W. 86, 271 Mich. 590.

N.Y.—Werfel v. Zivnostenska Banka, 38 N.E.2d 382, 287 N.Y. 91—McCarthy v. Pieret, 24 N.E.2d 102, 281 N.Y. 407, reargument denied 27 N.E.2d 207, 282 N.Y. 800—Owen v. Blumenthal, 19 N.E.2d 977, 280 N.Y. 96—Muth v. Telenga, 191 N.E. 523, 264 N.Y. 477—Vandeweghe v. City of New York, 189 N.E. 751, 263 N.Y. 672—Brawer v. Mendelson Bros. Factors, 186 N.E. 200, 262 N.Y. 53, amended 188 N.E. 65, 262 N.Y. 562—People's Nat. Bank & Trust Co. of White Plains v. Westchester County, 185 N.E. 405, 261 N.Y. 342, followed in Gramatan Nat. Bank & Trust Co. of Bronxville v. Westchester County, 185 N.E. 773, 261 N.Y. 640—Dam v. Dam, 51 N.Y.S.2d 902, 268 App.Div. 501—Gutterson v. Gutterson, 38 N.Y.S.2d 9, 265 App.Div. 902—Goodman v. W. W. Const. Co., 32 N.Y.S.2d 198, 263 App.Div. 879—Oleck v. Blustein Wine & Liquor Store, 28 N.Y.S.2d 325, 262 App.Div. 870—Jos. Riedel Glass Works v. Indemnity Ins. Co. of North America, 25 N.Y.S.2d 46, 261 App.Div. 886, motion denied 27 N.Y.S.2d 189, 261 App.Div. 956, motion denied 27 N.Y.S.2d 189, 261 App.Div. 956, appeal denied 27 N.Y.S.2d 1013, 261 App.Div. 956—Weinstein v. Berg, 18 N.Y.S.2d 496, 259 App.Div. 741—Zabelle v. Gladstone, 8 N.Y.S.2d 238, 255 App.Div. 953—Lawrence, Blake & Jewell v. Rockhurst Realty Corporation, 8 N.Y.S.2d 202, 255 App.Div. 491—Elsman v. Elsman, 284 N.Y.S. 406, 245 App.Div. 699—Chase Nat. Bank of City of New York v. Wessell, 281 N.Y.S. 146, 245 App.Div. 815—Brooklyn Nat. Bank of New York v. City of Long Beach, 274 N.Y.S. 799, 242 App.Div. 790—Gellens v. Continental Bank & Trust Co. of New York, 272 N.Y.S. 900, 241 App.Div. 591, followed in Wiand v. Continental Bank & Trust Co. of New York, 272 N.Y.S. 903, 241 App.Div. 593, and Twomey v. Continental Bank & Trust Co. of New York, 272 N.Y.S. 904, 241 App.Div. 594—Gold v. Smith, 272 N.Y.S. 139, 242 App.Div. 648, amended on other grounds 275 N.Y.S. 342, 242 App.Div. 777—Nusbaum v. Rialto Sec. Corporation, 264 N.Y.S. 518, 238 App.Div. 257—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 263 N.Y.S. 55, 238 App.Div. 150—Friedman v. Universal Mercerizing Co., 262 N.Y.S. 674, 238 App.Div. 805—Krausman v. John Hancock Mut. Life Ins. Co., 260 N.Y.S. 319, 236 App.Div. 582, reargument denied 260 N.Y.S. 981, 237 App.Div. 810—Standard Oil Co. of New York v. Boyle, 246 N.Y.S. 142, 231 App.Div. 101—Exhibitors' Supply Corporation v. North Vernon Lumber Mills, 241 N.Y.S. 192, 229 App.Div. 702—Leidy v. Procter, 235 N.Y.S. 101, 226 App.Div. 322—Hemingray Glass Co. v. Wilkenfeld Bros., 234 N.Y.S. 329, 226 App.Div. 771—Rawlin v. New Jersey Fidelity & Plate Glass Ins. Co., 223 N.Y.S. 85, 221 App.Div. 399—Domestic Electric Co. v. Meliski, 212 N.Y.S. 799, 215 App.Div. 669—Ritz Carlton Restaurant & Hotel Co. v. Ditmars, 197 N.Y.S. 405, 203 App.Div. 748—New York Consol. R. Co. v. City of New York, 197 N.Y.S. 387, 204 App.Div. 171—Nemours-Stevens, Limited, v. Nemours Trading Corporation, 197 N.Y.S. 241, 204 App.Div. 38—Sachs Quality Furniture v. Nadborne, 51 N.Y.S.2d 503, 183 Misc. 778, affirmed 54 N.Y.S.2d 535,

essential part of the case.[86]

The rule that a motion for summary judgment should not be granted where a triable issue is presented has been held to apply where there is any doubt as to the defense,[87] or where defendant alleges facts which, if proved, will constitute a good defense to the action,[88] or where an authorized form of general denial has been interposed by a

183 Misc. 781—Jones v. Moffatt, 50 N.Y.S.2d 233, 183 Misc. 129, affirmed 51 N.Y.S.2d 767, 268 App.Div. 967—Havens v. Rochester Ropes, Inc., 39 N.Y.S.2d 444, 179 Misc. 889, affirmed 41 N.Y.S.2d 180, 266 App. Div. 672, appeal denied 41 N.Y.S. 2d 907, 266 App.Div. 692—White v. Nemecek, 9 N.Y.S.2d 882, 170 Misc. 569—Sternlieb v. Normandie Nat. Securities Corporation, 273 N.Y.S. 229, 152 Misc. 303—Gantz v. Investors' Syndicate, 265 N.Y.S. 749, 148 Misc. 274—Pyrke v. Standard Accident Ins. Co., 252 N.Y.S. 635, 141 Misc. 186, reversed in part on other grounds and affirmed in part 254 N.Y.S. 529, 234 App.Div. 133 —Bauer v. Phelps, 235 N.Y.S. 47, 134 Misc. 447—Hilbring v. Mooney, 223 N.Y.S. 303, 130 Misc. 273 —Wm. H. Frear & Co. v. Bailey, 214 N.Y.S. 675, 127 Misc. 79—Kellog v. Berkshire Bldg. Corporation, 211 N.Y.S. 623, 125 Misc. 318—Iserman v. J. E. Long Coal Co., 204 N.Y.S. 98, 122 Misc. 822, affirmed 205 N.Y.S. 929, 209 App.Div. 882 —Chappell v. Chappell, 60 N.Y.S. 2d 447—Franz v. 48 West Forty-Eighth Realization Corp., 60 N.Y.S. 2d 160—Zipser v. Hardy, 57 N.Y.S. 2d 482—Ottone v. American London Shrinkers Corp., 55 N.Y.S.2d 243 —National Sur. Corp. v. Laurentz, 53 N.Y.S.2d 339—Coudenhove-Kalergi v. Dieterle, 36 N.Y.S.2d 313— Reisfeld v. Casino & Co., 198 N. Y.S. 778—Christo v. Bayukas, 196 N.Y.S. 500.

Pa.—Ockman v. Jones Mach. Tool Works, 45 A.2d 47, 353 Pa. 308— Roberts v. Washington Trust Co., 170 A. 291, 313 Pa. 584, certiorari denied 54 S.Ct. 778, 292 U.S. 608, 78 L.Ed. 1469, rehearing denied 54 S.Ct. 857, 292 U.S. 613, 78 L.Ed. 1472—Berman v. Hartford Accident & Indemnity Co., Com.Pl., 34 Del.Co. 35—Commonwealth v. Ivannucci, Com.Pl., 33 Del.Co. 574 —In re Chester County Trust Co., Com.Pl., 29 Del.Co. 178—Bellevue Park Ass'n v. Lippman, Com.Pl., 54 Dauph.Co. 163—Department of Public Assistance v. Jones, Com. Pl., 44 Lack.Jur. 148—Pieklo v. Pieklo, Com.Pl., 38 Luz.Leg.Reg. 369—North River Ins. Co. v. Yocum, Com.Pl., 16* Northumb.L.J. 1 —Porter v. Nido, Com.Pl., 86 Pittsb.Leg.J. 25.

Wis.—City of Milwaukee v. Heyer, 4 N.W.2d 126, 241 Wis. 56—McLoughlin v. Malnar, 297 N.W. 370, 237 Wis. 492—Prime Mfg. Co. v. A. F. Gallun & Sons Corporation, 281 N.W. 697, 229 Wis. 348—Sullivan v. State, 251 N.W. 251, 213 Wis. 185, 91 A.L.R. 877.

34 C.J. p 201 note 65.

Other statements of rule

(1) Summary judgment should not be entered where the trial judge would have to decide controverted questions of fact.—Security Discount Corporation v. Jackson, 51 N.E.2d 618, 320 Ill.App. 440.

(2) Summary judgment may not be granted where the conclusion depends on varying inferences to be drawn from the facts.—Krauss v. Central Ins. Co. of Baltimore, 40 N. Y.S.2d 736.

(3) To warrant a summary judgment, there must be a failure on the part of defendant to satisfy the court that there is any basis for his denial or any truth in his defense, and unless the defendant fails so to do, the case should proceed to trial. —Grady v. Easley, 114 P.2d 635, 45 Cal.App.2d 632.

(4) Judgment may be rendered against defendant only as result of conclusion of law from facts found or not disputed.—Persky v. Bank of America Nat. Ass'n, 185 N.E. 77, 261 N.Y. 212.

Several defenses

Where defendant shows that under any one of several defenses genuine and substantial issue is created, he is entitled to trial, and summary judgment is improper.—American Surety Co. of New York v. Empire Trust Co., 217 N.Y.S. 673, 128 Misc. 116.

Denial of damages

Denial in answer of plaintiff's allegation of damages raised no issue requiring trial.—Gise v. Brooklyn Soc. for Prevention of Cruelty to Children, 260 N.Y.S. 787, 236 App. Div. 852, appeal dismissed 186 N.E. 412, 262 N.Y. 114, reargument denied 188 N.E. 111, 262 N.Y. 664.

86. Ind.—New Hampshire Fire Ins. Co. v. Wall, 75 N.E. 668, 36 Ind. App. 238.

Absent party

In action by one of depositors having joint savings account to recover amount thereof as sole owner without bank book in absence of other depositor, plaintiff was not entitled to summary judgment, since depositor could serve other depositor by publication and obtain judgment cutting off her rights, if his contentions were true.—Caruso v. Dry Dock Sav. Inst., 11 N.Y.S.2d 411, 170 Misc. 867.

87. Del.—Lamson v. Habbart, 43 A. 2d 249.

Ill.—Bertlee Co. v. Illinois Publishing & Printing Co., 52 N.E.2d 47, 320 Ill.App. 490.

34 C.J. p 201 note 67.

If a defense is arguable, apparent, or made in good faith, it should be submitted to a jury, and plaintiff's motion for summary judgment should not be granted.

Ill.—C. I. T. Corporation v. Smith, 48 N.E.2d 735, 318 Ill.App. 642— Fellheimer v. Wess, 45 N.E.2d 89, 316 Ill.App. 449—Shaw v. National Life Co., 42 N.E.2d 885, 315 Ill. App. 210—Soelke v. Chicago Business Men's Racing Ass'n, 41 N.E. 2d 232, 314 Ill.App. 336—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill. App. 465.

N.Y.—Neivel Realty Corporation v. Prudence Bonds Corporation, 271 N.Y.S. 209, 151 Misc. 737—Federal Deposit Ins. Corporation v. Appelbaum, 39 N.Y.S.2d 300.

Defense held not sham

U.S.—Goess v. A. D. H. Holding Corporation, C.C.A.N.Y., 85 F.2d 72.

Finding as matter of law

To warrant summary judgment, pleadings, affidavits, and exhibits supporting motion therefor must overcome opposing papers and justify finding as matter of law that there is no defense.—People's Wayne County Bank v. Power City Trust Co., 263 N.Y.S. 477, 147 Misc. 168.

88. Ill.—Fellheimer v. Wess, 45 N. E.2d 89, 316 Ill.App. 449—Barrett v. Shanks, 20 N.E.2d 799, 300 Ill. App. 119, followed in Barrett v. Heichman, 20 N.E.2d 802, 300 Ill. App. 605—Barrett v. Volkman, 20 N.E.2d 802, 300 Ill.App. 605—Barrett v. Gardner, 20 N.E. 803, 300 Ill.App. 605—Barrett v. Wallace, 20 N.E.2d 804, 300 Ill.App. 606— Puckett v. American Life of Illinois, 13 N.E.2d 828, 294 Ill.App. 605.

N.Y.—General Inv. Co. v. Interborough Rapid Transit Co., 139 N.E. 216, 235 N.Y. 133—Progressive Finance & Realty Co. v. Miller & Sherry Enterprises, 283 N.Y.S. 478, 246 App.Div. 639—Rawlin v. New Jersey Fidelity & Plate Glass Ins. Co., 223 N.Y.S. 85, 221 App.Div. 399—Abrams v. Abrams, 270 N.Y. S. 841, 150 Misc. 660—Wm. H. Frear & Co. v. Bailey, 214 N.Y.S. 675, 127 Misc. 79—Iserman v. J. E. Long Coal Co., 204 N.Y.S. 98, 122 Misc. 822, affirmed 205 N.Y.S. 929, 209 App.Div. 882—Sellingsloh v. Sellingsloh, 59 N.Y.S.2d 38.

34 C.J. p 202 note 68.

defendant having no interest other than that of self-protection,[89] or where the allegations and proof adduced by plaintiff are insufficient as a matter of law to warrant recovery.[90] Likewise plaintiff's motion for summary judgment will be denied where the interests of justice require that the controversy be disposed of on a trial rather than on the motion,[91] as where there is a real question as to a matter of law which could not be determined without a full and authoritative determination of the facts by a trial.[92] If the facts on which the application for summary judgment is based are exclusively within the knowledge of the moving party, or clearly not within the knowledge of the opponent, the relief requested will be denied;[93] but it must appear that the lack of knowledge is genuine, and if the facts are matters of public record or are otherwise fully available to the opposing party, his plea of lack of knowledge will be without force.[94]

On the other hand, a motion for a summary judgment may be allowed where plaintiff has sufficiently shown or verified his claim or demand and it satisfactorily appears that there is no real issue of fact to be determined between the parties,[95] or that there

89. N.Y.—Sorenson v. East River Sav. Inst., 196 N.Y.S. 361, 119 Misc. 297.
34 C.J. p 202 note 69.

90. N.Y.—Town of Putnam Valley v. Slutzky, 28 N.E.2d 860, 283 N.Y. 334, reargument denied 29 N.E.2d 665, 284 N.Y. 590—St. Joseph's Maternity Hospital v. Hawthorne, 34 N.Y.S.2d 427, 264 App.Div. 749—Swift & Co. v. Cohen, 10 N.Y.S.2d 484, 256 App.Div. 996, reargument denied 12 N.Y.S.2d 353, 256 App.Div. 1082—Charitis v. Savransky, 225 N.Y.S. 803, 222 App.Div. 697—Bercholz v. Guaranty Trust Co. of New York, 44 N.Y.S.2d 143, 180 Misc. 1043—Wecht v. Kornblum, 264 N.Y.S. 333, 147 Misc. 653—Romine v. Barnaby Agency, 227 N.Y.S. 235, 131 Misc. 696—Clark v. Herkimer County, 8 N.Y.S.2d 675.

91. N.Y.—Scalia v. Goldfarb, 53 N.Y.S.2d 950.

92. R.I.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201.
34 C.J. p 202 note 70.

Complicated case

An answered case that presents actually disputed and complicated facts subject to different interpretation, or abstruse questions of law, should proceed to an orderly and authoritative determination of the facts by trial and should not be summarily determined on motion for summary judgment, even though what appears to be question of fact may ultimately resolve itself into a question of law.—Minuto v. Metropolitan Life Ins. Co., supra.

93. N.Y.—Suslensky v. Metropolitan Life Ins. Co., 43 N.Y.S.2d 144, 180 Misc. 624, affirmed 46 N.Y.S.2d 888, 267 App.Div. 812, appeal denied 60 N.Y.S.2d 294, 270 App.Div. 819.

Indorser's denial of knowledge or information sufficient to form a belief as to holder's allegations of due presentment, protest, and notice, coupled with denial of receipt of notice, was sufficient to warrant denial of motion for summary judgment and to require holder to prove its cause of action, where indorser was not shown and could not be expected to have any actual knowledge of protest.—Asbury Park & Ocean Grove Bank v. Simensky, 290 N.Y.S. 992, 160 Misc. 921.

94. N.Y.—Suslensky v. Metropolitan Life Ins. Co., 43 N.Y.S.2d 144, 180 Misc. 624, affirmed 46 N.Y.S.2d 888, 267 App.Div. 812, appeal denied 60 N.Y.S.2d 294, 270 App.Div. 819.

95. Ariz.—Suburban Pump & Water Co. v. Linville, 135 P.2d 210, 60 Ariz. 274.
D.C.—Sedgwick v. National Savings & Trust Co., 130 F.2d 440, 76 U.S.App.D.C. 177.
Ill.—People ex rel. Barclay v. West Chicago Park Com'rs, 32 N.E.2d 323, 308 Ill.App. 622.
N.Y.—Sannasardo v. Hartford Accident & Indemnity Co., 8 N.Y.S.2d 974, 256 App.Div. 825—Evans v. Rome Trust Co., 282 N.Y.S. 785, 246 App.Div. 569—City Bank Farmers' Trust Co. v. Charity Organization Soc. of City of New York, 265 N.Y.S. 267, 238 App.Div. 720, affirmed 191 N.E. 504, 264 N.Y. 441—Nathan H. Gordon Corporation v. Cosman, 249 N.Y.S. 544, 232 App.Div. 280—Lion Brewery of New York City v. Loughran, 229 N.Y.S. 216, 223 App.Div. 623—O'Neil v. McKinley Music Co., 212 N.Y.S. 7, 214 App.Div. 181—Appleton v. National Park Bank of New York, 208 N.Y.S. 228, 211 App.Div. 708, affirmed 150 N.E. 555, 241 N.Y. 561—Hongkong & Shanghai Banking Corporation v. Lazard-Godchaux Co. of America, 201 N.Y.S. 771, 207 App.Div. 174, affirmed 147 N.E. 216, 239 N.Y. 610—Lee v. Graubard, 199 N.Y.S. 563, 205 App.Div. 344—Second Nat. Bank v. Breitung, 197 N.Y.S. 375, 203 App.Div. 636—Osborne v. Banco Aleman-Antioqueno, 29 N.Y.S.2d 236, 176 Misc. 664—Glove City Amusement Co. v. Smalley Chain Theatres, 4 N.Y.S.2d 397, 167 Misc. 603—Sedwitz v. Arnold, 299 N.Y.S. 343, 164 Misc. 892—Haight v. Brown, 288 N.Y.S. 65, 159 Misc. 652—Kaufman v. Investors' Syndicate, 266 N.Y.S. 386, 148 Misc. 624, affirmed 271 N.Y.S. 1058, 242 App.Div. 609—Garfunkel v. Pennsylvania R. Co., 266 N.Y.S. 35, 147 Misc. 810—Lewis Historical Pub. Co. v. Bowe, 255 N.Y.S. 59, 142 Misc. 862—Western Felt Works v. Modern Carpet Cleaning & Storage Corporation, 252 N.Y.S. 696, 141 Misc. 495—Cogswell v. Cogswell, 224 N.Y.S. 59, 130 Misc. 541—Guardino v. Guardino, 62 N.Y.S.2d 531—MacKenzie v. Muncie, 54 N.Y.S.2d 52—Green v. Foreman, 53 N.Y.S.2d 863—Marte v. Marte, 45 N.Y.S.2d 174—Glazman v. City of New York, 29 N.Y.S.2d 804.
Pa.—John J. Strassel & Son v. Rossman-Weaver Co., Com.Pl., 48 Dauph.Co. 172—Holt Lumber Co. v. Lauzar, Com.Pl., 42 Lack.Jur. 147—Nathan B. Salsbery v. Fanning Motor Co., Com.Pl., 41 Lack. Jur. 199—Tierney v. Lifland, Com. Pl., 30 North.Co. 149.
R.I.—Mackenzie v. Desautels, 3 A.2d 660, 62 R.I. 135—Bond & Goodwin v. Weiner, 172 A. 395, 54 R.I. 244—Henry W. Cooke Co. v. Sheldon, 164 A. 327, 53 R.I. 101.
Wis.—H. Hohensee Const. Co. v. City of Oshkosh, 291 N.W. 309, 234 Wis. 274—Schlesinger v. Schroeder, 245 N.W. 666, 210 Wis. 403.
34 C.J. p 202 note 72.

The test of whether triable issues of fact appear from the pleadings, within rule that summary judgment is not permitted where triable issues of fact appear from the pleadings, is in the facts alleged in defendant's affidavit of merits and plaintiff's sworn reply.—Smith v. Karasek, 40 N.E.2d 594, 313 Ill.App. 654.

Statement of conclusion of law or fact is insufficient to raise issue of fact on application for summary judgment.—Galusha Stove Co. v. Pivnick Const. Co., 230 N.Y.S. 720, 132 Misc. 875.

Cause on jury calendar

Judgment may be entered when no issue of fact is raised, although the cause is on a jury calendar.—Resnick

clearly is no substantial defense to the action,[96] or that the defense alleged is clearly a sham or frivolous,[97] even though it is necessary to decide an important question of law.[98] So it has been held that, where the question raised is wholly one of law, the determination of such question on a motion for summary judgment is proper.[99]

Effect of counterclaim. It has been held that the remedy of summary judgment may be available to plaintiff on his cause of action even where the answer sets up a counterclaim,[1] and that, if the counterclaim is plausible, judgment may be granted for plaintiff with a stay of execution until trial of the counterclaim;[2] but it has been held improper to grant summary judgment where valid counterclaims are pleaded for sums exceeding the damages de-

v. Varouxakis, 43 N.E.2d 555, 319 Ill.App. 51.

Facts, if insufficient to sustain verdict under practice act, are not sufficient to entitle party to defend in motion for summary judgment.—Edward F. Dibble Seedgrower v. Jones, 223 N.Y.S. 785, 130 Misc. 359.

Right to plead anew

If affidavit of party whose pleading is attacked by motion for summary judgment does not show facts sufficient to constitute defense, no leave to plead anew should be granted.—Perlman v. Perlman, 257 N.Y.S. 48, 235 App.Div. 313.

96. Ariz.—Suburban Pump & Water Co. v. Linville, 135 P.2d 210, 60 Ariz. 274.
Mich.—Jackson Reinforced Concrete Pipe Co. v. Central Contracting & Engineering Co., 234 N.W. 111, 253 Mich. 157.
N.Y.—Ford v. Hahn, 55 N.Y.S.2d 854, 269 App.Div. 436—Gellens v. 11 West 42nd Street, 19 N.Y.S.2d 525, 259 App.Div. 435, appeal denied 20 N.Y.S.2d 935, 259 App.Div. 1002—Guaranty Trust Co. of New York v. Compton Mines Corporation, 5 N.Y.S.2d 46, 254 App.Div. 876—Consolidated Film Industries v. Talking Picture Epics, 260 N.Y.S. 1, 236 App.Div. 422—Lion Brewery of New York City v. Loughran, 229 N.Y.S. 216, 223 App.Div. 623—Isaacs v. Schmuck, 218 N.Y.S. 568, 218 App.Div. 516, reversed 156 N.E. 621, 245 N.Y. 77, 51 A.L.R. 1454—Pinney v. Geraghty, 205 N.Y.S. 645, 209 App.Div. 630—Wilbur-Dolson Silk Co. v. William Wallach Co., 201 N.Y.S. 465, 206 App.Div. 470—Iago Realty Corp. v. Marmin Garage Corp., 59 N.Y.S.2d 740, 186 Misc. 478—Utilities Engineering Institute v. Kofod, 58 N.Y.S.2d 743, 185 Misc. 1035—Hyman v. Fischer, 52 N.Y.S.2d 553, 184 Misc. 90—Ellis v. City of New York, 46 N.Y.S.2d 363, 180 Misc. 968, affirmed 47 N.Y.S.2d 96, 267 App.Div. 810—Sackman v. Iosue, 36 N.Y.S.2d 625, 178 Misc. 759—Osborne v. Banco Aleman-Antioqueno, 29 N.Y.S.2d 236, 176 Misc. 664—Lann v. United Steel Works Corporation, 1 N.Y.S.2d 951, 166 Misc. 465—Haight v. Brown, 288 N.Y.S. 65, 159 Misc. 652—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106—Paul v. Mantell, 247 N.Y.S. 452, 139 Misc. 395—Security Finance Co. v. Stuart, 224 N.Y.S. 257, 130 Misc. 538—Cogswell v. Cogswell, 224 N.Y.S. 59, 130 Misc. 541—Edward F. Dibble Seedgrower v. Jones, 223 N.Y.S. 785, 130 Misc. 359—Conoley v. Distileria Serralles, Inc., 43 N.Y.S.2d 11—Bankers Trust Co. v. Fuller, 37 N.Y.S.2d 536—Henderson v. Hildreth Varnish Co., 276 N.Y.S. 414.
Pa.—Commonwealth to Use of Unemployment Compensation Fund, v. Lentz, 44 A.2d 291, 353 Pa. 98.
Wis.—Donovan v. Theo. Otjen Co., 298 N.W. 168, 238 Wis. 47—First Wisconsin Nat. Bank of Milwaukee v. Pierce, 278 N.W. 451, 227 Wis. 581.
34 C.J. p 202 note 73.

Additional facts

Where defendant filed answer alleging state of facts substantially as those alleged in complaint, but showing additional facts claimed to constitute defense, summary judgment could be entered if affirmative matters alleged as defense did not as matter of law constitute a defense, although if additional facts alleged did constitute defense summary judgment could not be entered.—People ex rel. Ames v. Marx, 18 N.E.2d 915, 370 Ill. 264.

Alimony

Motion for summary judgment for arrears of alimony under foreign decree will not be denied because of court's power to modify decree as to alimony.—Curran v. Curran, 240 N.Y.S. 364, 136 Misc. 598.

97. U.S.—Irving Trust Co. v. American Silk Mills, Inc., C.C.A.N.Y., 72 F.2d 288, certiorari denied American Silk Mills, Inc., v. Irving Trust Co., 55 S.Ct. 239, 293 U.S. 624, 79 L.Ed. 711.
Cal.—Bank of America Nat. Trust & Savings Ass'n v. Oil Well Supply Co. of California, 55 P.2d 835, 12 Cal.App.2d 265.
N.Y.—Alexander Hamilton Institute v. Huston, 4 N.Y.S.2d 776, 254 App.Div. 729—Heer v. Forward, 3 N.Y.S.2d 3, 254 App.Div. 628—Nathan H. Gordon Corporation v. Cosman, 249 N.Y.S. 544, 232 App.Div. 280—Cleghorn v. Ocean Accident & Guarantee Corporation, Limited, of London, 215 N.Y.S. 127, 216 App.Div. 342, modified on other grounds 155 N.E. 87, 244 N.Y. 166—First Trust Co. of Albany v. Arnold, 30 N.Y.S.2d 175, 179 Misc. 349—Manhattan Paper Co. v. Bayer, 263 N.Y.S. 720, 147 Misc. 227—Rodger v. Bliss, 223 N.Y.S. 401, 130 Misc. 163—Donlin v. Carlow, 200 N.Y.S. 339, 120 Misc. 698—First Trust Co. of Albany v. Dumary, 23 N.Y.S.2d 532.
34 C.J. p 202 note 74.

98. N.Y.—Kennilwood Owners' Ass'n v. Wall, 264 N.Y.S. 135, 148 Misc. 67.
34 C.J. p 202 note 75.

99. U.S.—Maryland Casualty Co. v. Sparks, C.C.A.Mich., 76 F.2d 929.
D.C.—Maghan v. Board of Com'rs of District of Columbia, 141 F.2d 274, 78 U.S.App.D.C. 370.
Ill.—Reconstruction Finance Corporation v. Lucius, 49 N.E.2d 852, 320 Ill.App. 57.
N.Y.—Fisher v. Lohse, 42 N.Y.S.2d 121, 181 Misc. 149.

Conflicting motions

Where plaintiff made a motion for summary judgment on ground that there was no defense to the action, and defendant in opposition did not indicate existence of triable issues of fact and made a motion that summary judgment should be granted dismissing complaint, sole issue to be determined by the court was one of law.—Schifter v. Commercial Travelers Mut. Accident Ass'n of America, 50 N.Y.S.2d 376, 183 Misc. 74, affirmed 54 N.Y.S.2d 408, 269 App. Div. 706.

1. N.Y.—Smith v. Cranleigh, Inc., 231 N.Y.S. 201, 224 App.Div. 376—Hinman v. Hinman, 263 N.Y.S. 800, 146 Misc. 786—Little Falls Dairy Co. v. Berghorn, 224 N.Y.S. 34, 130 Misc. 454—Evalenko v. Catts, 210 N.Y.S. 35, 125 Misc. 726, affirmed 213 N.Y.S. 796, 215 App.Div. 805, and 216 N.Y.S. 827, 217 App.Div. 723, affirmed 154 N.E. 627, 243 N.Y. 613, reargument denied 155 N.E. 873, 244 N.Y. 504.
34 C.J. p 201 note 58.

However, it has been held that a counterclaim predicating good and substantial cause justifying trial constitutes insuperable objection to summary judgment for plaintiff.—Bank of U. S. v. Slifka, 264 N.Y.S. 204, 148 Misc. 60—Wilkinson v. Halliwell Electric Co., 204 N.Y.S. 854, 123 Misc. 250.

2. N.Y.—Dell'Osso v. Everett, 197 N.Y.S. 423, 119 Misc. 502.

manded by plaintiff.[3] Plaintiff may be entitled to summary judgment with respect to the counterclaim itself if no triable issue is raised in response to his defense thereto,[4] but his motion will be denied if issues are raised requiring determination at a trial.[5]

Sufficiency of pleadings. On a motion for summary judgment on a claim or defense on the ground that no triable issue of fact is raised, the decisive issue is not the sufficiency of the opposing party's pleadings,[6] for, if defective pleadings disclose a triable issue, they may be amended at or before the trial, and the motion for summary judgment should be denied;[7] but an amended pleading merely restating in different form sham allegations set forth in an earlier pleading will not defeat the motion.[8]

(2) On Motion by Defendant

Where the defendant's affidavits show that his denials or defenses are sufficient to defeat the plaintiff, or that his cause of action on a counterclaim warrants recovery, summary judgment for the defendant may be entered with respect to the plaintiff's cause of action or the defendant's counterclaim, if the plaintiff by affidavit fails to establish triable issues of fact.

As is discussed supra subdivision a of this section, the statutes and court rules permit defendant to move for summary judgment with respect to plaintiff's cause of action or with respect to his own counterclaims. Accordingly, where defendant's affidavits establish his contentions and show that his denials or defenses are sufficient to defeat plaintiff, and plaintiff by affidavit fails to establish triable issues of fact, the complaint may be dismissed and judgment entered for defendant.[9] However, the

3. N.Y.—Nussbaum v. Sobel, 54 N.Y.S.2d 228, 269 App.Div. 105, reargument denied 55 N.Y.S.2d 117, 269 App.Div. 767—Plaut v. Plaut, 7 N.Y.S.2d 583, 255 App.Div. 375—Dietz v. Glynne, 223 N.Y.S. 221, 221 App.Div. 329—Gregor v. Bird Aircraft Corporation, 260 N.Y.S. 164, 145 Misc. 755.

Effect of proviso

Defendant's counterclaim for amount greater than that sued for by plaintiff prevented entry of summary judgment for plaintiff, notwithstanding proviso that amount collected thereunder should be held subject to judgment obtained by defendant on counterclaim.—Ætna Life Ins. Co. of Hartford, Conn., v. National Dry Dock & Repair Co., 245 N.Y.S. 365, 230 App.Div. 486.

4. Cal.—Cowan Oil & Refining Co. v. Miley Petroleum Corporation, 295 P. 504, 112 Cal.App.Supp. 773.

N.Y.—Zaveloff v. Zaveloff, 37 N.Y.S.2d 46—Macomber v. Wilkinson, 6 N.Y.S.2d 608.

Right generally see supra subdivision a of this section.

Defendant's right to summary judgment as determined by issues see infra subdivision c (2) of this section.

5. N.Y.—Wise v. Powell, 215 N.Y.S. 693, 216 App.Div. 618—Miller v. Easton, 213 N.Y.S. 413, 126 Misc. 330—Macomber v. Wilkinson, 6 N.Y.S.2d 608.

Pa.—Barnett v. Dickerman, Com.Pl., 25 Erie Co. 321.

6. N.Y.—Werfel v. Zivnostenska Banka, 38 N.E.2d 382, 287 N.Y. 91—Miorin v. Miorin, 13 N.Y.S.2d 705, 257 App.Div. 556, reargument denied 14 N.Y.S.2d 1003, 257 App.Div. 1084—Woodmere Academy v. Moskowitz, 208 N.Y.S. 578, 212 App.Div. 457—Marks v. Follo, 29 N.Y.S.2d 1019, 177 Misc. 108—Lyon v. Holton, 14 N.Y.S.2d 436, 172 Misc. 31, affirmed 20 N.Y.S.2d 1015, 259 App.Div. 877, appeal denied 21 N.Y.S.2d 612, 259 App.Div. 1073, modified on other grounds 36 N.E.2d 201, 286 N.Y. 270—Nix v. Low, 1 N.Y.S.2d 21, 165 Misc. 484.

Technical defects in answer are not available on application for summary judgment.—Curry v. Mackenzie, 146 N.E. 375, 239 N.Y. 267—Donnelly v. Bauder, 216 N.Y.S. 437, 217 App.Div. 59—Le Fevre v. Reliable Paint Supply Co., 273 N.Y.S. 903, 152 Misc. 594—Hilbring v. Mooney, 223 N.Y.S. 303, 130 Misc. 273—Ford v. Reilley, 216 N.Y.S. 273, 127 Misc. 373.

Superfluous matter

Fact that statement of claim does not state facts in concise and summary form, and contains superfluous matter, does not warrant entering summary judgment for defendant.—Davis v. Investment Land Co., 146 A. 119, 296 Pa. 449.

Denial of motion to dismiss

Affirmance of an order denying motion to dismiss cause of action for insufficiency did not entitle plaintiff to summary judgment, since such order merely determined that the cause of action was sufficient from standpoint of pleading to state a good prima facie case.—Brandt v. Davidson, 48 N.Y.S.2d 917.

Which of two causes of action plaintiff intended to state is immaterial on motion for summary judgment, if allegations of complaint show any cause of action.—Sullivan v. State, 251 N.W. 251, 213 Wis. 185, 91 A.L.R. 877.

7. N.Y.—Curry v. Mackenzie, 146 N.E. 375, 239 N.Y. 267—East River Sav. Bank v. Lash Realty Co., 53 N.Y.S.2d 229, 269 App.Div. 658—Perlman v. Perlman, 257 N.Y.S. 48, 235 App.Div. 313—Marks v. Follo, 29 N.Y.S.2d 1019, 177 Misc. 108—Tompkins Haulage Corporation v. Roberts, 249 N.Y.S. 22, 140 Misc. 80—Krauss v. Central Ins. Co. of Baltimore, 40 N.Y.S.2d 736—Biloz v. Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, affirmed 23 N.Y.S.2d 460, 260 App.Div. 976.

If the facts develop a defense, summary judgment is not justified even though the pleadings require amendment to allow the defense.—Erie Commercial Corporation v. Then, 18 N.Y.S.2d 569, 259 App.Div. 786—Nix v. Low, 1 N.Y.S.2d 21, 165 Misc. 484—Royal Diamond Co. v. Ostrin, 232 N.Y.S. 223, 133 Misc. 555—Agress Const. Co. of Brooklyn v. Jurgens, 217 N.Y.S. 204, 128 Misc. 12.

Request for amendment

If either party on hearing of motion for summary judgment finds that his pleading is inadequate, either by way of allegation or denial, court may and should permit party to amend, but in absence of request for amendment, there is no occasion to inquire about possible issues not raised by pleadings.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.

8. N.Y.—Nathan H. Gordon Corporation v. Cosman, 249 N.Y.S. 544, 232 App.Div. 280.

9. U.S.—Banco de Espana v. Federal Reserve Bank of New York, D.C.N.Y., 28 F.Supp. 958, affirmed, C.C.A., 114 F.2d 438—Larson v. Todd Shipyards Corporation, D.C.N.Y., 16 F.Supp. 967.

Colo.—Klancher v. Anderson, 158 P.2d 923, 113 Colo. 478.

N.Y.—Independent Electric Lighting Corp. v. Armin Development Corp., 61 N.Y.S.2d 69, 270 App.Div. 878—Melioris v. Morgenstein, 58 N.Y.S.2d 885, 269 App.Div. 1028—Myers v. 139 East 79th Street, Inc., 53 N.Y.S.2d 650, 269 App.Div. 68—Noll v. Ruprecht, 9 N.Y.S.2d 651, 256 App.Div. 926, affirmed 25 N.E.2d 386, 282 N.Y. 598—Feeney v. Woods, 300 N.Y.S. 1044, 253 App.

complaint will not be dismissed if proof at the trial is necessary to the determination of the legal question raised, or if substantial justice requires a trial and a full disclosure of the facts,[10] or if defendant's denials or defenses are insufficient to defeat plaintiff's claim,[11] or where although the cause must go against plaintiff, the question of the right of defendants as among themselves remains to be settled.[12] While a plaintiff should not be permitted to defeat defendant's motion for judgment by the mere device of serving an amended complaint,[13] such motion will not be granted if a cause of action added by amendment possesses merit.[14] Defendant may be entitled to summary judgment on his counter-

Div. 751—Bauersfeld v. Valentine, 43 N.Y.S.2d 56, 180 Misc. 705—Stone v. Ætna Life Ins. Co., 31 N.Y.S.2d 615, 178 Misc. 23—Chester v. Chester, 13 N.Y.S.2d 502, 171 Misc. 608—Helmick v. Probst, 9 N.Y.S.2d 975, 170 Misc. 284—Goebbel v. Gross, 275 N.Y.S. 308, 153 Misc. 637—Justry v. Northern Ins. Co. of New York, 273 N.Y.S. 64, 151 Misc. 757—Shlivek v. Castle & Overton, 39 N.Y.S.2d 685.

Pa.—Shockley v. Travelers Ins. Co., Com.Pl., 33 Del.Co. 526—Stahl v. Wildwood Development Co., Com. Pl., 89 Pittsb.L.J. 284, 50 York Leg.Rec. 60.

Wis.—Binsfeld v. Home Mut. Ins. Co., 19 N.W.2d 240, 247 Wis. 273—Marco v. Whiting, 12 N.W.2d 926, 244 Wis. 621.

Direction of verdict

When it appears from thorough consideration of uncontroverted facts that they would impel direction of verdict by court, no issue exists and summary judgment is properly entered.—Marco v. Whiting, supra.

Inadmissible parol testimony

In action for breach of an alleged contract to convey property, where proof of existence of such contract would have depended on inadmissible parol testimony, summary judgment for defendants was proper.—Ajax Holding Co. v. Heinsbergen, 149 P.2d 189, 64 Cal.App.2d 665.

Retention as nominal party

Where, in stockholders' action to obtain relief against both the directors and the corporation itself, stockholders were not entitled to relief against the corporation or certain defendants who moved for summary judgment dismissing complaint, but the action continued as to the nonmoving defendants, stockholders were entitled to have the corporation retained as a nominal party defendant, in so far as relief was sought against nonmoving individual defendants in favor of the corporation.—Lyon v. Holton, 36 N.E.2d 201, 286 N.Y. 270.

10. Cal.—Hardy v. Hardy, 143 P.2d 701, 23 Cal.2d 244—Loveland v. City of Oakland, 159 P.2d 70, 69 Cal.App.2d 399—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609.

N.Y.—Stulsaft v. Mercer Tube & Mfg. Co., 43 N.E.2d 81, 288 N.Y. 255—Werfel v. Zivnostenska Banka, 38 N.E.2d 332, 287 N.Y. 91—Woods v. Bard, 32 N.E.2d 772, 285 N.Y. 11—Hogan v. Williams, 59 N.Y.S.2d 331, 270 App.Div. 789—Schottke v. Jeacock, 55 N.Y.S.2d 186, 269 App.Div. 242, affirmed, Schottke v. Jeacock, 66 N.E.2d 586, 295 N.Y. 812—Solotoff v. Solotoff, 53 N.Y.S.2d 510, 269 App.Div. 677, reargument denied 55 N.Y.S.2d 567, 269 App.Div. 777—Giorno v. Banco Di Napoli Trust Co. of N. Y., 52 N.Y.S.2d 659, 268 App.Div. 1035—Drapkin v. Ryan Contracting Corporation, 42 N.Y.S.2d 307, 266 App. Div. 857, appeal and reargument denied 44 N.Y.S.2d 343, 266 App. Div. 922—Citizen's Bank of White Plains v. Oglesby, 39 N.Y.S.2d 500, 265 App.Div. 1062, appeal denied 41 N.Y.S.2d 219, 266 App.Div. 682—Schelberger v. Schelberg, 35 N.Y.S. 2d 516, 264 App.Div. 870—Berkeley v. Epstein, 22 N.Y.S.2d 921, 260 App.Div. 877—Miorin v. Miorin, 13 N.Y.S.2d 705, 257 App.Div. 556, reargument denied 14 N.Y.S.2d 1003, 257 App.Div. 1084—431 Fifth Ave. Corp. v. City of New York, 55 N. Y.S.2d 203, 184 Misc. 1001, modified on other grounds 59 N.Y.S.2d 25, 270 App.Div. 241, appeal granted 60 N.Y.S.2d 272, 270 App.Div. 804—Jones v. Moffatt, 50 N.Y.S.2d 233, 183 Misc. 129, affirmed 51 N. Y.S.2d 767, 268 App.Div. 967—Daniel J. Rice, Inc., v. City of New York, 42 N.Y.S.2d 532, 180 Misc. 860—Havens v. Rochester Ropes, Inc., 39 N.Y.S.2d 444, 179 Misc. 889, affirmed 41 N.Y.S.2d 180, 266 App.Div. 672, appeal denied 41 N. Y.S.2d 907, 266 App.Div. 692—Freund v. Zephyr Laundry Machinery Co., 39 N.Y.S.2d 250, 180 Misc. 249, affirmed 41 N.Y.S.2d 909, 266 App.Div. 734, appeal discontinued 43 N.Y.S.2d 857, 266 App. Div. 853—Walfrice v. Buffalo Pottery Co., 27 N.Y.S.2d 487, 176 Misc. 472, affirmed 32 N.Y.S.2d 121, 263 App.Div. 787, reargument denied 33 N.Y.S.2d 541, 263 App.Div. 935—Cohen v. Lieberman, 289 N.Y.S. 797, 160 Misc. 310—Regan v. Bank of Athens Trust Co., 286 N.Y.S. 726, 159 Misc. 361—Franz v. 48 West Forty-Eighth Realization Corp., 60 N.Y.S.2d 160—Loomis v. Loomis, 51 N.Y.S.2d 417, affirmed 51 N.Y.S.2d 94, 268 App.Div. 883—Mortenson v. New York Telephone Co., 32 N.Y.S.2d 488, modified 38 N.Y.S.2d 949, 179 Misc. 289—Schostal v. Compagnie Generale Transatlantique, 27 N.Y.S.2d 638—Personal Finance Corporation of Waterbury v. Robinson, 27 N.Y.S.2d 6—O'Brien v. O'Brien, 16 N.Y.S.2d 799.

Pa.—Miller v. Adonizio, 6 A.2d 77, 334 Pa. 286—Ottman v. Nixon-Nirdlinger, 151 A. 879, 301 Pa. 234—Leedy v. Cimino, Com.Pl., 49 Dauph.Co. 54—Kies v. Town Hall Co., Com.Pl., 44 Lack.Jur. 241—Regan v. City of Scranton, Com. Pl., 44 Lack.Jur. 210, 35 Mun.L.R. 59—McVeigh v. Scranton-Spring Brook Water Service Co., Com.Pl., 44 Lack.Jur. 205—Kern v. Union Mut. Life Ins. Co., Com.Pl., 44 Lack.Jur. 143—Geo. T. Sellers' Sons v. Eshleman, Com.Pl., 48 Lanc.Rev. 79.

Wis.—Parish v. Awschu Properties, 19 N.W.2d 276, 247 Wis. 166—Holzschuh v. Webster, 17 N.W.2d 553, 246 Wis. 423—First Wisconsin Nat. Bank of Milwaukee v. Brynwood Land Co., 15 N.W.2d 840, 245 Wis. 610—Employers Mut. Liability Ins. Co. v. Starkweather, 12 N. W.2d 904, 244 Wis. 531.

Question for determination

In determining whether summary judgment should be entered for defendant, question is whether statement of claim shows that law will not permit recovery by plaintiff.—Davis v. Investment Land Co., 146 A. 119, 296 Pa. 449.

Technical defects in pleading are not available to defendant on a motion to dismiss a complaint under the rule relating to summary judgment.—Benjamin v. Arundel Corp., 59 N.Y.S.2d 487, 270 App.Div. 766.

Moot action

Fact that an action has become moot is not a defense, and dismissal on that ground does not entitle defendant to summary judgment.—Duel v. State Farm Mut. Automobile Co., 9 N.W.2d 593, 243 Wis. 172.

11. U.S.—Warner v. Marsh & McLennan, D.C.N.Y., 26 F.Supp. 814.
N.Y.—Gans v. Hearst, 50 N.Y.S.2d 475—McDonald v. Cluff & Pickering, 35 N.Y.S.2d 380.

12. U.S.—Mutual Life Ins. Co. of New York v. Patterson, D.C.N.Y., 17 F.Supp. 416.

13. N.Y.—Chester v. Chester, 13 N. Y.S.2d 502, 171 Misc. 608.

14. N.Y.—Chester v. Chester, supra.

claim if no triable issue is raised in response to his affidavits,[15] but his motion will be denied if such an issue appears.[16]

Facts established by documentary evidence or official record. Under some statutes or court rules, where an answer states a defense sufficient as a matter of law and if founded on facts established prima facie by documentary evidence or official record, defendant may obtain judgment dismissing the complaint unless plaintiff shows facts sufficient to raise an issue respecting the verity and conclusiveness of such evidence or record;[17] "defense" is used in such provisions in its broadest sense and includes everything which would defeat plaintiff's claim, including a general denial.[18] However, the complaint will not be dismissed if the defense is insufficient in law,[19] or if facts are shown sufficient to raise an issue with respect to the verity and conclusiveness of the documentary evidence.[20]

(3) Particular Causes and Issues

Summary judgment has been granted or has been denied in numerous particular actions, and with respect to numerous particular issues, depending on whether triable issues of fact were raised in opposition to the affidavits of the moving party.

The rule that summary judgment will be granted only where the moving party substantiates his claim or defense by affidavit and no triable issue of fact is raised in response thereto, discussed supra subdivisions c (1) and c (2) of this section, has been applied in numerous cases which have adjudicated the existence or nonexistence of triable issues in causes of action on express or implied contracts generally,[21] to recover the price of goods or mer-

15. N.Y.—Stein v. W. T. Grant Co., 56 N.Y.S.2d 582, 269 App.Div. 909—Bissell v. Finley Realty Co., 293 N.Y.S. 47, 249 App.Div. 855—Lipscomb v. Lipscomb, 40 N.Y.S.2d 720, 179 Misc. 1025—Conoley v. Distilleria Serralles, Inc., 48 N.Y.S.2d 11—Ringler v. Metropolitan Life Ins. Co., 29 N.Y.S.2d 281.

16. N.Y.—Commercial Credit Corporation v. Podhorzer, 224 N.Y.S. 505, 221 App.Div. 644—National Electrotype Co. v. Pennie, 282 N.Y.S. 737, 157 Misc. 26, affirmed 278 N.Y.S. 529, 243 App.Div. 764.

17. N.Y.—Watters v. Watters, 19 N.Y.S.2d 995, 259 App.Div. 611—Hub Oil Co. v. Jodomar, Inc., 27 N.Y.S.2d 370, 176 Misc. 320—Chance v. Guaranty Trust Co. of New York, 20 N.Y.S.2d 635, 173 Misc. 754, affirmed 13 N.Y.S.2d 785, 257 App.Div. 1006, affirmed 26 N.E.2d 802, 282 N.Y. 656—Diamond v. Davis, 38 N.Y.S.2d 93, affirmed 39 N.Y.S.2d 412, second case, 265 App.Div. 919, affirmed 54 N.E.2d 683, second case, 292 N.Y. 554.

Remedy as available in actions other than those in which plaintiff may move for judgment see supra subdivision a of this section.

Statute of frauds

Where agreement on which action was brought was unenforceable under statute of frauds, plaintiff could not defeat defendant's motion for summary judgment because plaintiff might have had a cause of action different from one set forth in complaint.—Elsfelder v. Cournand, 59 N.Y.S.2d 34, 270 App.Div. 162, followed in 59 N.Y.S.2d 377, 269 App.Div. 1034.

Books of corporate defendant are "documentary evidence" within meaning of text rule.—White v. Merchants Despatch Transp. Co., 10 N.Y.S.2d 962, 256 App.Div. 1044.

Admissions as documentary proof

In action for carrier's failure to deliver merchandise, plaintiff's admissions or concessions that there was no conversion were to be given weight of documentary proof on which defendants might move for a summary judgment.—Winkler v. Compania Sud Americana De Vapores, 41 N.Y.S.2d 67, 180 Misc. 181.

18. N.Y.—Levine v. Behn, 25 N.E.2d 871, 282 N.Y. 120—Dumont v. Raymond, 49 N.Y.S.2d 865, affirmed 56 N.Y.S.2d 592, 269 App.Div. 592—Simson v. Bugman, 45 N.Y.S.2d 140.

19. N.Y.—Maxwell v. Maxwell, 7 N.Y.S.2d 991, 169 Misc. 431, affirmed 9 N.Y.S.2d 572, 256 App.Div. 809.

Uncertainty of damages

The complaint will not be dismissed if a cause of action exists and only the amount of damage arising from a breach of contract is uncertain.—Bogardus v. U. S. Fidelity & Guaranty Co., 58 N.Y.S.2d 217, 269 App.Div. 615, appeal denied 60 N.Y.S.2d 270, 270 App.Div. 801.

20. N.Y.—Levine v. Behn, 25 N.E.2d 871, 282 N.Y. 120—Dumont v. Raymond, 56 N.Y.S.2d 592, 269 App.Div. 592—Goldstein v. Massachusetts Accident Co., 284 N.Y.S. 704, 246 App.Div. 823—Lyon v. Holton, 14 N.Y.S.2d 436, 172 Misc. 31, affirmed 20 N.Y.S.2d 1015, 259 App.Div. 877, modified on other grounds 36 N.E.2d 201, 286 N.Y. 270—New York Post Corp. v. Kelley, 61 N.Y.S.2d 264, affirmed Hearst Consolidated Publications v. Kelley, 61 N.Y.S.2d 762, 270 App.Div. 916, appeal granted 62 N.Y.S.2d 614, 270 App.Div. 923, New York Sun v. Kelley, 62 N.Y.S.2d 614, 270 App.Div. 924 and New York World Telegram Corp. v. Kelley, 62 N.Y.S.2d 614, 270 App.Div. 924, and New York Post Corp. v. Kelley, 62 N.Y.S.2d 615, 270 App.Div. 923—Steinbugler v. Steinbugler, 9 N.Y.S.2d 939.

21. U.S.—U. S. v. Stephanidis, D.C.N.Y., 41 F.2d 958.
Cal.—Walsh v. Walsh, 108 P.2d 760, 42 Cal.App.2d 282.
Mich.—Barsky v. Katz, 216 N.W. 382, 241 Mich. 63.
N.J.—Perloff v. Island Development Co., 133 A. 178, 4 N.J.Misc. 473.
N.Y.—National Brokerage Corp. v. Travelers Ins. Co., 65 N.E.2d 183, 295 N.Y. 97—Rotberg v. M. S. & J. A. Workman, 200 N.E. 314, 270 N.Y. 553—Keystone Hardware Corporation v. Tague, 158 N.E. 27, 246 N.Y. 79, 53 A.L.R. 610—McCabe v. Interstate Iron & Steel Co., 27 N.Y.S.2d 862, 262 App.Div. 777—Birch v. Cameron Mach. Co., 1 N.Y.S.2d 550, 253 App.Div. 830, modified on other grounds 2 N.Y.S.2d 66, 253 App.Div. 900—Wald v. Manufacturers Trust Co., 290 N.Y.S. 632, 248 App.Div. 911, affirmed 6 N.Y.S.2d 142, 254 App.Div. 769, reargument denied 6 N.Y.S.2d 350, 254 App.Div. 885—Sanborn v. Amron, 234 N.Y.S. 129, 225 App.Div. 616—Lion Brewery of New York City v. Loughran, 229 N.Y.S. 216, 223 App.Div. 623—Rawlin v. New Jersey Fidelity & Plate Glass Ins. Co., 223 N.Y.S. 85, 221 App.Div. 399—Schulman v. Cornman, 223 N.Y.S. 19, 221 App.Div. 170—Aviation Training Corp. v. Gargiulo, 53 N.Y.S.2d 141, 184 Misc. 198—Kahn v. Rosenstiel, 212 N.Y.S. 441, 125 Misc. 559—Bein v. Slater, 51 N.Y.S.2d 896, affirmed 55 N.Y.S.2d 118, 269 App.Div. 764, appeal denied 56 N.Y.S.2d 203, 269 App.Div. 813—Borrelli v. J. H. Taylor Const. Co., 37 N.Y.S.2d 150—Federal Schools v. Goldstein, 29 N.Y.S.2d 256.
Pa.—Simpson v. Stabler, Com.Pl., 53 Dauph.Co. 350—Kosko v. Wenner, 35 Luz.Leg.Reg. 151.
Wis.—Prime Mfg. Co. v. A. F. Gallun

chandise sold[22] or for services rendered,[23] causes of action on bills, notes, and bonds,[24] on insur-

& Sons Corporation, 281 N.W. 697, 229 Wis. 348.

Employment contracts

N.Y.—Montefalcone v. Banco Di Napoli Trust Co. of N. Y., 52 N.Y.S.2d 655, 268 App.Div. 636, reargument denied 53 N.Y.S.2d 955, 269 App. Div. 685—Catherwood v. Ithaca College, 33 N.Y.S.2d 537, 263 App. Div. 1027—Sundland v. Korfund Co., 20 N.Y.S.2d 819, 260 App.Div. 80.

Summary judgment granted

Ill.—Gateway Securities Co. v. Schultz, 52 N.E.2d 825, 321 Ill.App. 312.

N.Y.—Jamaica Water Supply Co. v. City of New York, 18 N.E.2d 523, 279 N.Y. 342—Lueders v. Lueders, 55 N.Y.S.2d 717, 269 App.Div. 869—Sargant v. Monroe, 49 N.Y.S.2d 546, 268 App.Div. 123—Long Island Daily Press Pub. Co. v. Uneeda Credit Clothing Stores, 38 N.Y.S.2d 712, 265 App.Div. 958—Staniloff v. Ferguson, 283 N.Y.S. 244, 246 App. Div. 630—United Products Corporation of America v. Standard Textile Products Co., 231 N.Y.S. 115, 224 App.Div. 371—O'Neil v. McKinley Music Co., 212 N.Y.S. 7, 214 App.Div. 181—Kennedy v. Herter, 38 N.Y.S.2d 863.

22. N.Y.—Ellison v. Republic Mfg. Corporation, 296 N.Y.S. 38, 251 App.Div. 746—Bank of Taiwan v. Schild, 258 N.Y.S. 331, 236 App.Div. 128—Klein v. Halbreich, 227 N.Y.S. 834, 223 App.Div. 732—J. R. Melcher, Inc., v. Graziano, 209 N. Y.S. 425, 212 App.Div. 589.

Summary judgment granted

N.Y.—Edward F. Dibble Seedgrower v. Jones, 228 N.Y.S. 785, 130 Misc. 359.

23. N.Y.—Geweye v. Haffen, 10 N. Y.S.2d 743, 256 App.Div. 1035—McCulloch v. Morton Lodge, No. 63, F. & A. M., 267 N.Y.S. 5, 240 App. Div. 848—Strom v. Prince, 279 N. Y.S. 589, 154 Misc. 888—Bergman v. Royal Typewriter Co., 29 N.Y. S.2d 827, modified on other grounds 32 N.Y.S.2d 132, 263 App.Div. 812.

Wis.—Sullivan v. State, 251 N.W. 251, 213 Wis. 185, 91 A.L.R. 877.

Actions for commissions

N.Y.—North Sea Developments v. Burnett, 173 N.E. 228, 254 N.Y. 374—Kenny v. New York Life Ins. Co., 46 N.Y.S.2d 4, 267 App.Div. 837, appeal denied 47 N.Y.S.2d 315, 267 App.Div. 879—Axelrath v. Spencer Kellogg & Sons, 38 N.Y.S. 2d 39, 265 App.Div. 874, affirmed 50 N.E.2d 103, 290 N.Y. 767, certiorari denied 64 S.Ct. 71, two cases, 320 U.S. 761, 88 L.Ed. 454—Tuohey v. Carvin Bottle Cap Corporation, 12 N.Y.S.2d 516, 257 App.Div. 856—Romine v. Barnaby Agency, 227 N. Y.S. 235, 131 Misc. 696—Windsor Investing Corporation v. T. J. McLaughlin's Sons, 225 N.Y.S. 7, 130 Misc. 730, affirmed 229 N.Y.S. 926, 224 App.Div. 715—Murray v. Plymouth Oil Co., 46 N.Y.S.2d 113—Handel v. Dumbra, 29 N.Y.S.2d 347.

Attorneys' fees

Ill.—Soelke v. Chicago Business Men's Racing Ass'n, 41 N.E.2d 232, 314 Ill.App. 336—Woods v. Village of La Grange Park, 19 N.E.2d 396, 298 Ill.App. 595.

N.Y.—Breitbart v. Weill, 7 N.Y.S.2d 266, 255 App.Div. 801—Zipser v. Hardy, 57 N.Y.S.2d 482—Goldwater v. Hal-Ro Textile Corp., 53 N.Y.S. 2d 73.

Summary judgment granted

N.Y.—McDonald v. Amsterdam Bldg. Co., 251 N.Y.S. 494, 232 App.Div. 382, affirmed 182 N.E. 169, 259 N. Y. 533—Geraci v. Fabbozi, 291 N. Y.S. 86, 161 Misc. 450—Goldsmith v. T. & G. Assets Realization Corporation, 37 N.Y.S.2d 37, affirmed 39 N.Y.S.2d 413, 265 App.Div. 917, affirmed 50 N.E.2d 107, 290 N.Y. 784.

Value of services

The value of professional services rendered and the amount thereof remaining unpaid should be determined by assessment before a jury, and the granting of a summary judgment for a certain amount was improper, where allegation in complaint that services were reasonably worth the sum of one hundred dollars was denied in defendant's answer and denial found support in the affidavits.—Averbach v. Stone, 12 N.Y.S.2d 114, 257 App.Div. 922.

24. U.S.—Federal Reserve Bank of New York v. Palm, 79 F.2d 539.

Cal.—Slocum v. Nelson, App., 163 P. 2d 888.

Colo.—Hatfield v. Barnes, 168 P.2d 552.

Mich.—Hart & Crouse Co. v. Palavin, 241 N.W. 806, 257 Mich. 637—Tomlinson v. Imperial Hotel Corporation, 222 N.W. 104, 245 Mich. 52.

N.J.—Maurer v. Hahn, 140 A. 273, 104 N.J.Law 254, affirmed 145 A. 316, 105 N.J.Law 494.

N.Y.—Niles v. Seeler, 148 N.E. 743, 240 N.Y. 650—Segal v. National City Bank of N. Y., 58 N.Y.S.2d 261, 269 App.Div. 986—Empire Trust Co. v. Bartley & Co., 16 N.Y.S.2d 248, 258 App.Div. 249—C. I. T. Corporation v. Revoir Motors, 13 N.Y.S.2d 221, 257 App. Div. 385—Sweeney v. National City Bank of Troy, 10 N.Y.S.2d 796, 256 App.Div. 1022—Sherry v. Marsh, 9 N.Y.S.2d 494, 256 App.Div. 219—Lawrence, Blake & Jewell v. Rockhurst Realty Corporation, 8 N.Y. S.2d 202, 255 App.Div. 491—C. I. T. Corporation v. McKinney, 3 N.Y.S. 2d 92, 254 App.Div. 629—National City Bank of New York v. Piluso, 290 N.Y.S. 968, 249 App.Div. 626—Totoris v. Welikes, 286 N.Y.S. 924, 247 App.Div. 923—Danneman v. White, 283 N.Y.S. 868, 246 App.Div. 727—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 263 N.Y.S. 55, 238 App.Div. 150—First Trust & Deposit Co. v. Le Messurier, 257 N.Y.S. 394, 235 App.Div. 347, motion granted and question certified 258 N.Y.S. 1075, 236 App.Div. 775—Ulster Finance Corporation v. Schroeder, 243 N.Y.S. 682, 230 App. Div. 146—Weinberg v. Goldstein, 235 N.Y.S. 529, 226 App.Div. 479—Bernstein v. Kritzer, 231 N.Y.S. 97, 224 App.Div. 387—Karpas v. Bandler, 218 N.Y.S. 500, 218 App.Div. 418—Hauswald v. Katz, 214 N.Y. S. 705, 216 App.Div. 92—Berson Sydeman Co. v. Waumbeck Mfg. Co., 208 N.Y.S. 716, 212 App.Div. 422—Hongkong & Shanghai Banking Corporation v. Lazard-Godchaux Co. of America, 201 N.Y.S. 771, 207 App.Div. 174, affirmed 147 N.E. 216, 239 N.Y. 610—Ritz Carlton Restaurant & Hotel Co. v. Ditmars, 197 N.Y.S. 405, 203 App.Div. 748—Allick v. Columbian Protective Ass'n, 53 N.Y.S.2d 507, 184 Misc. 525, reversed on other grounds 55 N.Y.S.2d 438, 269 App. Div. 281, affirmed 64 N.E. 350, 295 N.Y. 603—Duval v. Skouras, 44 N.Y.S.2d 107, 181 Misc. 651, affirmed 46 N.Y.S.2d 888, 267 App. Div. 811, and affirmed, 61 N.Y.S.2d 379, 270 App.Div. 841—Yokohama Specie Bank, Limited, New York Agency, v. Milbert Importing Co., 44 N.Y.S.2d 71, 182 Misc. 281—Neptune Meter Co. v. Long Island Water Meter Repair Co., 39 N.Y. S.2d 325, 179 Misc. 445—Oesterreichisches Credit-Institut v. Gross, 9 N.Y.S.2d 84, 169 Misc. 951—Zurich General Accident & Liability Ins. Co. v. Lackawanna Steel Co., 299 N.Y.S. 862, 164 Misc. 498—Anglo-Continentale Treuhand, A. G., v. Southern Pac. Co., 299 N. Y.S. 859, 165 Misc. 562, affirmed 298 N.Y.S. 181, 251 App.Div. 803—Asbury Park & Ocean Grove Bank v. Simensky, 290 N.Y.S. 992, 160 Misc. 921—Bank of U. S. v. Slifka, 264 N.Y.S. 204, 148 Misc. 60—Hurwitz v. Corn Exchange Bank Trust Co., 253 N.Y.S. 851, 142 Misc. 398—American Surety Co. of New York v. Empire Trust Co., 217 N.Y.S. 673, 128 Misc. 116—Gramercy Finance Corporation v. Greenberg, 217 N.Y.S. 224, 127 Misc. 897—Ford v. Reilley, 216 N.Y.S. 273, 127 Misc. 373—Cohen v. Public Nat. Bank of New York, 204 N.Y. S. 332, 123 Misc. 163—Asbestos Trading & Finance Co. v. Hazen, 203 N.Y.S. 565, 122 Misc. 269—Euler v. Sutherland, 55 N.Y.S.2d

ance policies,[25] causes of action pertaining to, involving or based on contracts of guaranty or sure-

758—First Nat. Bank of Dolgeville, N. Y., v. Mang, 41 N.Y.S.2d 92—Haskell v. Lason, 31 N.Y.S.2d 729—Goldstein v. Korff, 203 N.Y.S. 119—Christo v. Bayukas, 196 N. Y.S. 500.

Wis.—Atlas Inv. Co. v. Christ, 2 N. W.2d 714, 240 Wis. 114.

Summary judgment granted

(1) To plaintiff.

U.S.—Maryland Casualty Co. v. Sparks, C.C.A.Mich., 76 F.2d 929.

Ill.—Smith v. Karasek, 40 N.E.2d 594, 313 Ill.App. 654.

Mich.—McDonald v. Staples, 261 N. W. 86, 271 Mich. 590.

N.Y.—Waxman v. Williamson, 175 N. E. 534, 256 N.Y. 117, amendment of remittitur denied 177 N.E. 151, 256 N.Y. 587—Nester v. Nester, 22 N.Y. S.2d 119, 259 App.Div. 1065—Kennah v. Hurley, 14 N.Y.S.2d 799, 258 App.Div. 771—Modernization Contracts Corporation v. Sadonis, 9 N. Y.S.2d 247, 256 App.Div. 877—International & Industrial Securities Corporation v. Jamaica Jewish Center, 263 N.Y.S. 840, 237 App.Div. 738—National City Bank of New Rochelle v. Holzworth, 248 N.Y.S. 584, 231 App.Div. 688—Smith v. Cranleigh, Inc., 231 N.Y.S. 201, 224 App.Div. 376—New York Trust Co. v. American Realty Co., 210 N.Y.S. 64, 213 App.Div. 272—Caledonian Ins. Co. of Edinburgh, Scotland v. National City Bank of New York, 203 N.Y.S. 32, 208 App.Div. 83—Second Nat. Bank v. Breitung, 197 N.Y.S. 375, 203 App.Div. 636—First Trust Co. of Albany v. Arnold, 39 N.Y.S.2d 175, 179 Misc. 349—Lann v. United Steel Works Corporation, 1 N.Y.S.2d 951, 166 Misc. 465—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106—Union Trust Co. of Rochester v. Lauman, 248 N.Y.S. 233, 139 Misc. 308—Ralph Klonick Corporation v. Haas, 240 N.Y.S. 643, 136 Misc. 286—Palmer Lumber Co. v. Whitney, 240 N.Y.S. 640, 136 Misc. 284—Security Finance Co. v. Stuart, 224 N.Y.S. 257, 130 Misc. 538—Rodger v. Bliss, 223 N.Y.S. 401, 130 Misc. 168—Sarachan & Rosenthal v. J. R. Bull & Co., 217 N.Y.S. 588, 127 Misc. 760—Mark Spiegel Realty Corporation v. Gotham Nat. Bank of New York, 201 N.Y.S. 599, 121 Misc. 547, affirmed 204 N.Y.S. 927, 208 App.Div. 843—Brown v. C. Rosenstein Co., 200 N.Y.S. 491, 120 Misc. 787, affirmed 203 N.Y.S. 922, 208 App.Div. 799—Blanchard Press v. Aerosphere, Inc., 51 N.Y.S.2d 715, affirmed 56 N.Y.S.2d 415, 269 App.Div. 826—Ullman v. Edgebert, 43 N.Y.S.2d 666—Lalor v. Bour, 36 N.Y.S.2d 850—Douglass v. John Aquino Sons, 16 N.Y.S.2d 196—Integrity Trust Co. v. Posch, 13 N.Y.S.2d 973.

(2) To defendant.—Swift & Co. v. Bankers Trust Co., 3 N.Y.S.2d 923, 254 App.Div. 666, affirmed 19 N.E.2d 992, 280 N.Y. 135.

Judgment for defendant denied

Wis.—Schultz v. Rayome, 19 N.W. 2d 280, 247 Wis. 178.

Defense sufficient in law

To justify denial of plaintiffs' motion for summary judgment in action on note, it is not enough that there be a factual dispute, but it must appear that the maker has a defense which is sufficient in point of law.—President and Directors of Manhattan Co. v. Cocheo, 10 N.Y.S.2d 770, 256 App.Div. 560.

Acquisition from holder in due course

Whether plaintiff acquired note from holder in due course was question of fact and hence motion for a summary judgment was properly denied.—Zabelle v. Gladstone, 8 N.Y.S. 2d 233, 255 App.Div. 953—Korn v. Garfinkel, 9 N.Y.S.2d 20.

25. U.S.—Hoff v. St. Paul-Mercury Indemnity Co. of St. Paul, C.C.A., 74 F.2d 689—Consolidated Indemnity & Insurance Co. v. Alliance Casualty Co., C.C.A.N.Y., 68 F.2d 21—General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v. Morgan, D.C.N.Y., 30 F.Supp. 753—Maslin v. Columbian Nat. Life Ins. Co., D.C.N.Y., 8 F. Supp. 368.

Ill.—Ublasi v. Western & Southern Life Ins. Co., 64 N.E.2d 233, 327 Ill.App. 412.

N.Y.—Butler v. New York Life Ins. Co., 38 N.Y.S.2d 451, 265 App.Div. 289, appeal denied 39 N.Y.S.2d 988, 265 App.Div. 991—Udisky v. Metropolitan Life Ins. Co., 35 N.Y.S. 2d 1021, 264 App.Div. 890—Winokur v. Commercial Casualty Ins. Co., 30 N.Y.S.2d 225, 262 App.Div. 972—Eifert v. U. S. Fidelity & Guaranty Co., 16 N.Y.S.2d 783, 258 App.Div. 921—Imperial Auction Galleries v. Massachusetts Fire & Marine Ins. Co., Boston, Mass., 9 N.Y.S.2d 424, 256 App.Div. 242—Duke v. Metropolitan Life Ins. Co., 8 N.Y.S.2d 723, 255 App.Div. 923—Kaufman v. Metropolitan Life Ins. Co., 287 N.Y.S. 1014, 248 App.Div. 613, motion denied 4 N.E.2d 421, 272 N.Y. 508—Klein v. Metropolitan Life Ins. Co., 282 N.Y.S. 794, 246 App.Div. 564—Lo Galbo v. Columbia Casualty Co., 255 N.Y.S. 502, 234 App.Div. 510—Tully v. New York Life Ins. Co., 240 N.Y. S. 118, 228 App.Div. 449—Brooklyn Clothing Corporation v. Fidelity-Phenix Fire Ins. Co., 200 N.Y.S. 208, 205 App.Div. 743—Fertig v. General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 13 N.Y.S.2d 872, 171 Misc. 921—Hoffman v. Fireman's Fund Indemnity Co., 290 N.Y.S. 876, 160 Misc. 823, affirmed in part 290 N. Y.S. 873, 248 App.Div. 866—Pollack v. Equitable Life Assur. Soc. of U. S., 277 N.Y.S. 328, 154 Misc. 443—Garrow v. Lincoln Fire Ins. Co. of New York, 273 N.Y.S. 492, 152 Misc. 423—Falk v. Empire State Degree of Honor of Stockton, 246 N.Y.S. 649, 138 Misc. 697—Carr v. Prudential Life Ins. Co. of America, 27 N.Y.S.2d 349—Palermo v. Northwestern Nat. Ins. Co. of Milwaukee, 201 N.Y.S. 106.

"Summary judgment is rarely granted in actions on policies of insurance. Almost always in such cases the facts are not within the knowledge of the defendant, who is therefore entitled to have the plaintiff's claim submitted to the test of cross-examination. The better practice, even in such cases, is for the defendant to submit in proper form what knowledge he has on the subject or to set forth his lack of knowledge. But the nature of the case may be such that the very facts set forth in the moving affidavit itself demonstrate that a trial rather than a summary judgment is appropriate."—Suslensky v. Metropolitan Life Ins. Co., 43 N.Y.S.2d 144, 146, 180 Misc. 624, affirmed 46 N.Y.S.2d 888, 267 App.Div. 812, appeal denied 60 N.Y.S.2d 294, 270 App.Div. 819.

Summary judgment granted

(1) To plaintiff.

U.S.—Empire Carting Co. v. Employers' Reinsurance Corporation, C.C. A.N.Y., 64 F.2d 36—Goldberger v. McPeak, D.C.Pa., 60 F.Supp. 498.

Ill.—Kovae v. Modern Mut. Ins. Co., 30 N.E.2d 109, 307 Ill.App. 247.

N.Y.—Cleghorn v. Ocean Accident & Guarantee Corporation, Limited, of London, 215 N.Y.S. 127, 216 App. Div. 342, modified on other grounds 155 N.E. 87, 244 N.Y. 166—Balsam v. National Retailers Mut. Ins. Co., 48 N.Y.S.2d 828, 182 Misc. 16—Youknot v. U. S. Fidelity & Guaranty Co., 283 N.Y.S. 902, 158 Misc. 83, affirmed 281 N.Y.S. 968, 245 App.Div. 705—Killeen v. General Acc., Fire & Life Assur. Corporation, 227 N.Y.S. 220, 131 Misc. 691, affirmed 229 N.Y.S. 875, 224 App.Div. 719—Independence Indemnity Co. v. Albert A. Volk Co., 226 N.Y.S. 457, 131 Misc. 61—Krasilovsky Bros. Trucking Corp. v. Maryland Cas. Co., 54 N.Y.S.2d 60.

(2) To defendant.

N.Y.—Feldstein v. New York Life Ins. Co., 23 N.Y.S.2d 108, 260 App. Div. 476, affirmed 35 N.E.2d 924, 286 N.Y. 572—Kalna v. Newark Fire Ins. Co., 22 N.Y.S.2d 407, 260 App.Div. 829, appeal dismissed 40 N.E.2d 42, 287 N.Y. 756—Rifkin v. Manhattan Life Ins. Co. of New

tyship,[26] on judgments,[27] and causes of action in- | volving foreclosure of liens or mortgages,[28] specific

York, 288 N.Y.S. 665, 248 App.Div. 732—Webster v. Mutual Life Ins. Co. of New York, 20 N.Y.S.2d 608, 174 Misc. 262, appeal denied 22 N.Y.S.2d 824, 260 App.Div. 811—Barenblatt v. Massachusetts Accident Co., 280 N.Y.S. 414, 155 Misc. 591, affirmed 288 N.Y.S. 889, 247 App.Div. 832—Mizrahi v. National Ben Franklin Fire Ins. Co., 37 N.Y.S.2d 698—Cullinane v. Travelers Ins. Co., 26 N.Y.S.2d 933—Arroyo v. John Hancock Mut. Life Ins. Co., 24 N.Y.S.2d 188—Moore v. Metropolitan Life Ins. Co., 16 N.Y.S.2d 195.

Wis.—Fehr v. General Accident Fire & Life Assur. Corp., 16 N.W.2d 787, 246 Wis. 228—Binsfeld v. Home Mut. Ins. Co., 15 N.W.2d 828, 245 Wis. 552—Potts v. Farmers' Mut. Automobile Ins. Co., 289 N.W. 606, 233 Wis. 313—Witzko v. Koenig, 272 N.W. 864, 224 Wis. 674.

(3) Where plaintiff fails to comply with the necessary requirements before he can enforce his cause of action, such as making proper proof of loss prior to an action against an insurer, no issue for trial exists, and a summary judgment is proper.—Binsfeld v. Home Mut. Ins. Co., 19 N.W.2d 240, 247 Wis. 273.

Defendant's motion for judgment denied

Mich.—R. E. Townsend Corporation v. Gleaner Life Ins. Soc., 298 N.W. 385, 298 Mich. 10.

N.Y.—Duke v. Metropolitan Life Ins. Co., 298 N.Y.S. 608, 163 Misc. 629, affirmed 8 N.Y.S.2d 723, 255 App.Div. 923—Halpern v. Lavine, 60 N.Y.S.2d 121—O'Neal v. Travelers Fire Ins. Co., 48 N.Y.S.2d 99—Esquilin v. Prudential Ins. Co. of America, 38 N.Y.S.2d 6—Biloz v. Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, affirmed 23 N.Y.S.2d 460, 260 App.Div. 976.

26. U.S.—Real Estate-Land Title & Trust Co. v. Commonwealth Bond Corporation, C.C.A.N.Y., 63 F.2d 237—U. S. v. Stephanidis, D.C.N.Y., 41 F.2d 958—Massee & Felton Lumber Co. v. Benenson, D.C.N.Y., 23 F.2d 107—Chase Nat. Bank of City of New York v. Burg, D.C. Minn., 32 F.Supp. 230.

N.Y.—Read v. Lehigh Valley R. Co., 31 N.E.2d 891, 284 N.Y. 435—Anderson v. Title Guarantee & Trust Co., 10 N.E.2d 544, 274 N.Y. 546—Morris v. Albany Hotel Corporation, 276 N.Y.S. 635, 243 App.Div. 645, affirmed 198 N.E. 535, 268 N.Y. 641—Seglin Const. Co. v. Columbia Casualty Co., 264 N.Y.S. 144, 239 App.Div. 803—Moran v. Van Dyk, 260 N.Y.S. 12, 236 App.Div. 463—Souhami v. Prudence-Bonds Corporation, 270 N.Y.S. 359, 150 Misc. 602—Biel v. Crosse & Blackwell, 264 N.Y.S. 318, 147 Misc. 718—People's Wayne County Bank v. Power City Trust Co., 263 N.Y.S. 477, 147 Misc. 168—Pyrke v. Standard Accident Ins. Co., 252 N.Y.S. 635, 141 Misc. 186, reversed in part on other grounds and affirmed in part 254 N.Y.S. 520, 234 App.Div. 133—Standard Factors Corp. v. Kreisler, 53 N.Y.S.2d 871, affirmed 56 N.Y.S.2d 414, 269 App.Div. 830, motion denied 62 N.E. 247, 294 N.Y. 1.

Wis.—Frank v. Schroeder, 300 N.W. 254, 239 Wis. 159.

Summary judgment granted

N.J.—Electric Service Supplies Co. v. Consolidated Indemnity & Insurance Co., 168 A. 412, 111 N.J. Law 288.

Summary judgment denied

(1) To plaintiff.—Morris v. Albany Hotel Corporation, 198 N.E. 535, 268 N.Y. 641—Kramer v. Relgov Realty Co., 198 N.E. 420, 268 N.Y. 592—Brawer v. Mendelson Bros. Factors, 186 N.E. 200, 262 N.Y. 53, amended on other grounds 188 N.E. 65, 262 N.Y. 562—Moran v. Van Dyk, 279 N.Y.S. 638, 244 App.Div. 810.

(2) To defendant.

Mich.—American Employers' Ins. Co. v. H. G. Christman & Bros. Co., 278 N.W. 750, 284 Mich. 36.

N.Y.—Read v. Lehigh Valley R. Co., 31 N.E.2d 891, 284 N.Y. 435.

27. N.Y.—Sargant v. Monroe, 49 N.Y.S.2d 546, 268 App.Div. 123—Barber v. Warland, 247 N.Y.S. 455, 139 Misc. 398—Bissell v. Engle, 3 N.Y.S.2d 747.

Wis.—Ehrlich v. Frank Holton & Co., 280 N.W. 297, 228 Wis. 676, rehearing denied and mandate vacated 281 N.W. 696, 228 Wis. 676.

Summary judgment granted

N.Y.—Preston v. Preston, 33 N.Y.S.2d 24, 178 Misc. 81—Curran v. Curran, 240 N.Y.S. 364, 136 Misc. 598.

Wis.—Ehrlich v. Frank Holton & Co., 281 N.W. 696, 228 Wis. 676.

28. N.Y.—Spruce Hill Homes v. Brieant, 43 N.E.2d 56, 288 N.Y. 309, motion denied 47 N.E.2d 445, 289 N.Y. 849—East River Sav. Bank v. 671 Prospect Ave. Holding Corporation, 20 N.E.2d 780, 280 N.Y. 342, reargument denied 21 N.E.2d 699, 280 N.Y. 814, motion denied 22 N.E.2d 871, 281 N.Y. 676—City of New Rochelle v. Echo Bay Waterfront Corporation, 49 N.Y.S.2d 673, 268 App.Div. 182, certiorari denied 66 S.Ct. 24, 326 U.S. 720, 90 L.Ed. ——. Affirmed 60 N.E.2d 838, 294 N.Y. 678—Town of Harrison v. Valentine, 34 N.Y.S.2d 54, 264 App. Div. 729—Box v. Linnemann, 12 N.Y.S.2d 527, 257 App.Div. 849—Clinton Trust Co. v. Church Extension Committee of Presbytery of New York, 5 N.Y.S.2d 290, 255 App.Div. 157—Farber v. De Bruin, 2 N.Y.S.2d 244, 253 App.Div. 909—Bowery Sav. Bank v. Sonona Holding Corporation, 296 N.Y.S. 79, 251 App.Div. 746—Flushing Nat. Bank in New York v. Thorpe, 295 N.Y.S. 172, 251 App.Div. 721—Floral Park Lawns v. O'Connell, 294 N.Y.S. 991, 250 App.Div. 464—Phœnix Mut. Life Ins. Co. v. Tuddington Holding Corporation, 291 N.Y.S. 1012, 249 App.Div. 766—Prudential Ins. Co. of America v. K. L. F. Realty Co., 287 N.Y.S. 124, 247 App.Div. 898—Exchange Bank v. Ludlum, 285 N.Y.S. 862, 246 App. Div. 892—Safety Building-Loan & Savings Ass'n of City of Albany v. Felts, 279 N.Y.S. 846, 244 App.Div. 867—Brescia Const. Co. v. Walart Const. Co., 264 N.Y.S. 862, 238 App. Div. 360—Reed v. Neu-Pro Const. Corporation, 234 N.Y.S. 400, 226 App.Div. 70—Sudarsky v. Woodmar Realty Co., 229 N.Y.S. 576, 224 App. Div. 38—Levy v. Cohen, 267 N.Y.S. 46, 148 Misc. 908—Kaufman v. Hitesman, 61 N.Y.S.2d 734.

Wis.—Seymour Holding Corp. v. Wendt, 21 N.W.2d 267, 248 Wis. 130.

Summary judgment granted

Ill.—Shepard v. Wheaton, 60 N.E.2d 47, 325 Ill.App. 269.

N.Y.—Astor v. Hotel St. Regis, 195 N.E. 227, 266 N.Y. 617—Mills Land Corporation v. Rapoport, 51 N.Y.S.2d 17, 268 App.Div. 911—Franklin Soc. for Home-Building & Savings v. Flavin, 40 N.Y.S.2d 582, 265 App.Div. 720, affirmed 50 N.E.2d 653, 291 N.Y. 530, certiorari denied Flavin v. Franklin Soc. for Home Building & Savings, 64 S.Ct. 158, 320 U.S. 786, 88 L.Ed. 472—Smyth v. McDonogh, 22 N.Y.S.2d 631, 260 App.Div. 889, reargument denied 23 N.Y.S.2d 833, 260 App.Div. 897, appeal denied 30 N.E.2d 731, 248 N.Y. 822—New York State Teachers' Retirement System v. Coyne, 13 N.Y.S.2d 660, 257 App.Div. 1010, certified questions answered and affirmed 28 N.E.2d 28, 283 N.Y. 615, motion granted 29 N.E.2d 669, 284 N.Y. 594—New York Life Ins. Co. v. West Eighteenth & Nineteenth Streets Realty Corporation, 2 N.Y.S.2d 806, 253 App.Div. 523—Malcolm Realty Co. v. 21 East 21st St. Corporation, 280 N.Y.S. 146, 245 App.Div. 731—Pellino v. 3232 Hull Ave. Realty Corporation, 264 N.Y.S. 214, 237 App.Div. 759—Hyman v. Fischer, 52 N.Y.S.2d 553, 184 Misc. 90—Home Owners' Loan Corporation v. Wood, 9 N.Y.S.2d 834, 170 Misc. 74—Clark v. Seligman, 296 N.Y.S. 98, 163 Misc. 533—Kennilwood Owners' Ass'n v. Wall, 264 N.Y.S. 135, 148 Misc. 67—Village of Fleischmanns v. Silberman, 15 N.Y.S.2d 904.

performance,[29] to recover chattels,[30] or to recover a deposit of money,[31] and causes or proceedings involving the rights and liabilities of corporations, corporate officers, or stockholders,[32] and landlord and tenant.[33]

So also summary judgment has been granted or has been denied depending on whether issues of fact were raised with respect to such matters as the existence, validity, and conditions of a contract,[34] the right of set-off or recoupment against plaintiff's claim,[35] negligence,[36] statute of frauds,[37] limitations,[38] and whether issues of fact were raised

Defendant's motion denied

N.Y.—Katz v. Weinschelblatt, 205 N.Y.S. 76, 209 App.Div. 606.

29. Cal.—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609.

N.Y.—Bartels v. Bennett, 8 N.Y.S.2d 335, 255 App.Div. 1001—Mondrus v. Salt Haven Corp., 62 N.Y.S.2d 477, modified on other grounds 63 N.Y.S.2d 205—MacLaeon v. Lipchitz, 56 N.Y.S.2d 609, affirmed 58 N.Y.S.2d 337, 269 App.Div. 953.

Defendant's motion denied

N.Y.—Singer v. First Nat. Bank, 287 N.Y.S. 634, 248 App.Div. 609—New York Produce Exch. Safe Deposit & Storage Co. v. New York Produce Exch., 203 N.Y.S. 648, 208 App.Div. 421, affirmed 144 N.E. 901, 238 N.Y. 582—MacLaeon v. Lipchitz, 56 N.Y.S.2d 609, affirmed 58 N.Y.S.2d 337, 269 App.Div. 953.

30. N.Y.—Sullivan County Oil Co. v. Sommers, 45 N.Y.S.2d 547, 267 App.Div. 799—Hampton Bottlers v. Distributors Consol. Corporation, 38 N.Y.S.2d 236.

Pa.—Koehring Co. v. Ventresca, 6 A.2d 297, 334 Pa. 566—Household Outfitting Co. v. Goldman, Com.Pl., 43 Lack.Jur. 106—Pieklo v. Pieklo, Com.Pl., 38 Luz.Leg.Reg. 369—Automobile Banking Corporation v. Drahus, 33 Luz.Leg.Reg. 481, appeal quashed 13 A.2d 874, 140 Pa. Super. 469.

31. N.Y.—Ditkoff v. Prudential Sav. Bank, 280 N.Y.S. 437, 245 App.Div. 748—Larkin v. Greenwich Sav. Bank, 271 N.Y.S. 288, 241 App.Div. 874—Allison v. Brooklyn Trust Co., 260 N.Y.S. 31, 145 Misc. 658—Chillvers v. Baldwin's Bank of Penn Yan, 233 N.Y.S. 520, 133 Misc. 787—Sperling v. Sperling, 56 N.Y.S.2d 88—Lourie v. Chase Nat. Bank, 42 N.Y.S.2d 205—Hampton Bottlers v. Distributors Consol. Corporation, 38 N.Y.S.2d 236—Stoever v. Small, 35 N.Y.S.2d 375—Kirshenblatt v. Public Nat. Bank & Trust Co. of New York, 9 N.Y.S.2d 262.

Summary judgment granted

(1) To plaintiff.—Van Der Veen v. Amsterdamsche Bank, 35 N.Y.S.2d 945, 178 Misc. 668—Community Volunteer Fire Co. of Nimmonsburg v. City Nat. Bank of Binghamton, 14 N.Y.S.2d 306, 171 Misc. 1027.

(2) To defendant.—Bromberg v. Bank of America Nat. Trust & Savings Ass'n, 135 P.2d 689, 58 Cal.App.2d 1.

32. N.Y.—Binder v. Doelid, 285 N.Y.S. 56, 246 App.Div. 800—Schnitzler v. Tartell, 224 N.Y.S. 339, 130 Misc. 565—Federal Deposit Ins. Corporation v. Appelbaum, 39 N.Y.S.2d 300—Kirby v. Schenck, 25 N.Y.S.2d 431.

33. N.Y.—Piedmont Hotel Co. v. A. E. Nettleton Co., 188 N.E. 145, 263 N.Y. 25—Land Associates Corporation v. Grand Union Stores, 299 N.Y.S. 882, 252 App.Div. 908—Berry v. Stuyvesant, 283 N.Y.S. 191, 245 App.Div. 516—Maxrice Realty Corporation v. B/G Sandwich Shops, 267 N.Y.S. 863, 239 App.Div. 472—60 West 53rd St. Corporation v. Haskell, 246 N.Y.S. 360, 231 App.Div. 62—Canrock Realty Corporation v. Vim Electric Co., 37 N.Y.S.2d 139, 179 Misc. 391—Comas Holding Corporation v. Handel, 265 N.Y.S. 373, 148 Misc. 439—Stein v. Feinberg, 245 N.Y.S. 551, 138 Misc. 295—Printerion Realty Corp. v. Mancini, 61 N.Y.S.2d 200—Direct Realty Co. v. Birnbaum, 46 N.Y.S.2d 435—Jefferson Estates v. Wilson, 39 N.Y.S.2d 502—Sheridan Ave. Corporation v. Siff, 29 N.Y.S.2d 333.

Summary judgment granted

(1) To plaintiff.

U.S.—Irving Trust Co. v. American Silk Mills, Inc., C.C.A.N.Y., 72 F.2d 288, certiorari denied American Silk Mills, Inc., v. Irving Trust Co., 55 S.Ct. 239, 293 U.S. 624, 79 L.Ed. 711.

N.Y.—Robitzek Investing Co. v. Colonial Beacon Oil Co., 40 N.Y.S.2d 819, 265 App.Div. 749, appeal denied 42 N.Y.S.2d 922, 266 App.Div. 775—Silleck v. McDonald, 260 N.Y.S. 802, 237 App.Div. 121—Iago Realty Corp. v. Marmin Garage Corp., 59 N.Y.S.2d 740, 186 Misc. 473.

(2) To defendant.—Abrams v. Allen, 42 N.Y.S.2d 641, 266 App.Div. 835, reargument and appeal denied 44 N.Y.S.2d 337, 266 App.Div. 948.

Motion by defendant denied

U.S.—Weisser v. Mursam Shoe Corporation, C.C.A., 127 F.2d 344, 145 A.L.R. 467.

N.Y.—Schulte Real Estate Co. v. Pedemode, Inc., 195 N.E. 195, 266 N.Y. 550.

34. N.Y.—Liebman v. Rosenthal, 59 N.Y.S.2d 148, 269 App.Div. 1062—Sherry v. Marsh, 9 N.Y.S.2d 494, 256 App.Div. 219—Hano Paper Corporation v. F. W. Woolworth Co., 293 N.Y.S. 804, 250 App.Div. 49—Lowe v. Plainfield Trust Co. of Plainsfield, N. J., 215 N.Y.S. 50, 216 App.Div. 72—Perera v. Longone, 213 N.Y.S. 418, 215 App.Div. 796—Gantz v. Investors' Syndicate, 265 N.Y.S. 749, 148 Misc. 274.

35. N.Y.—Gaimari v. Horch, 293 N.Y.S. 479, 249 App.Div. 537—Union Trust Co. of Rochester v. Vetromile, 268 N.Y.S. 26, 239 App.Div. 562—A. B. Aldus Realty Co. v. Breslof, 231 N.Y.S. 640, 133 Misc. 149.

36. Ariz.—Manor v. Barry, 154 P.2d 374.

N.Y.—Troy v. New York Trust Co., 16 N.Y.S.2d 589, 258 App.Div. 959, reargument denied In re Wolff's Will, 18 N.Y.S.2d 742, 258 App.Div. 1055—Nusbaum v. Rialto Sec. Corporation, 264 N.Y.S. 513, 238 App.Div. 257—Pyramid Musical Corporation v. Floral Park Bank, 42 N.Y.S.2d 24, 179 Misc. 733—Siegal v. Public Nat. Bank & Trust Co. of New York, 7 N.Y.S.2d 771.

37. N.Y.—Gold v. Smith, 272 N.Y.S. 139, 242 App.Div. 643, amended on other grounds 275 N.Y.S. 842, 242 App.Div. 777—Pohlers v. Exeter Mfg. Co., 52 N.Y.S.2d 316—De Jahn v. Crichton, 16 N.Y.S.2d 888.

On defendant's motion

Whether oral contract in suit is void and unenforceable under statute of frauds should be determined on trial of issues, rather than on defendant's motion for summary judgment.—Jacobson v. Jacobson, 49 N.Y.S.2d 166, 268 App.Div. 770.

38. U.S.—Aachen & Munich Fire Ins. Co. v. Guaranty Trust Co. of New York, D.C.N.Y., 24 F.2d 463.

N.Y.—Di Nufrio v. Ajello, 207 N.Y.S. 229, 211 App.Div. 487—Fogarty v. Ross, 41 N.Y.S.2d 109, 180 Misc. 506—Monhof v. Happy, 258 N.Y.S. 498, 144 Misc. 208—Arnold v. Bussmann, 29 N.Y.S.2d 155, affirmed 34 N.Y.S.2d 829, 264 App.Div. 713.

Motion for defendant granted on defense of limitations.

U.S.—Downey v. Palmer, D.C.N.Y., 32 F.Supp. 344, reversed on other grounds, C.C.A., 114 F.2d 116.

Ill.—Richey v. Northwestern University, 55 N.E.2d 406, 323 Ill.App. 293.

N.Y.—Hamill v. Title Guarantee & Trust Co., 28 N.Y.S.2d 244, 260 App.Div. 873, appeal denied 24 N.Y.S.2d 127, 260 App.Div. 932, appeal denied 31 N.E.2d 517, 285 N.Y. 856—Chance v. Guaranty Trust

with respect to false representations or fraud,[39] waiver,[40] duress,[41] and usury.[42]

Issue as to foreign law. A question raised as to foreign law ordinarily presents a triable issue so as to preclude the granting of summary judgment,[43] but that is not the case where no interpretive decisions of foreign courts are referred to by either side, and statutes alone are presented for construction.[44]

Damages. Where the statute or court rule permits recovery of summary judgment on an unliquidated claim where no triable issue exists, and provides for an assessment of damages to determine the amount of the judgment, an issue of fact with respect to damages will not bar judgment.[45]

Claims against decedents' estates. In actions prosecuting claims against a decedent's estate based on a transaction with the decedent, plaintiff's motion for summary judgment ordinarily will be denied notwithstanding insufficiency of opposing affidavits since the facts on which the claim is based usually are within plaintiff's exclusive knowledge and the claim should be properly proved on a trial.[46]

§ 221. Against Whom Judgment May Be Rendered

In a proper case summary judgment may be rendered against all persons permitted by statute to be joined in the action and who are parties thereto.

In a proceeding for summary judgment by motion, plaintiff may proceed against all persons permitted by statute to be joined in the action.[47] However, a summary judgment may be entered only against a party to the action,[48] and not against a third person who is not such a party.[49] Where the

Co. of New York, 13 N.Y.S.2d 785, 257 App.Div. 1006, affirmed 26 N.E.2d 802, 282 N.Y. 656—Lyon v. Holton, 14 N.Y.S.2d 436, 172 Misc. 31, affirmed 20 N.Y.S.2d 1015, 259 App.Div. 877, modified on other grounds 36 N.E.2d 201, 286 N.Y. 270.

Motion for defendant denied

U.S.—Hadlock v. Erie, D.C.N.Y., 23 F.Supp. 692.

N.Y.—Schmoll Fils Associated v. Export S. S. Corporation, 21 N.Y.S.2d 194.

39. N.Y.—Bank of Lucedale v. United Naval Stores Co., 211 N.Y.S. 32, 214 App.Div. 81—Tidewater Oil Sales Corporation v. Pierce, 210 N.Y.S. 759, 213 App.Div. 796—Capone v. Simantob Realty Corporation, 260 N.Y.S. 486, 146 Misc. 2—Asbestos Trading & Finance Co. v. Hazen, 203 N.Y.S. 565, 122 Misc. 269—Utilities Engineering Institute v. Hagerty, 56 N.Y.S.2d 377—First Nat. Bank of Dolgeville, N. Y., v. Mang, 41 N.Y.S.2d 92—Utilities Engineering Institute v. Yanick, 29 N.Y.S.2d 258.

Summary judgment granted to defendant

N.Y.—Marshall v. U. S. Review Corporation, 15 N.Y.S.2d 21, 258 App. Div. 722, appeal dismissed 25 N.E. 2d 147, 282 N.Y. 594.

Summary judgment for defendant denied

N.Y.—Goldsmith v. National Container Corporation, 40 N.E.2d 242, 287 N.Y. 438.

40. N.Y.—Federal Terra Cotta Co. v. Margolies, 211 N.Y.S. 876, 215 App.Div. 651—Hurwitz v. Slater, 53 N.Y.S.2d 905.

Pa.—Klupot v. Prudential Ins. Co. of America, Com.Pl., 36 Luz.Leg. Reg. 165.

41. N.Y.—Ritz Carlton Restaurant & Hotel Co. v. Ditmars, 197 N.Y.S. 405, 203 App.Div. 748—Merchants' Ladies Garment Ass'n v. Coat House of William M. Schwartz, Inc., 273 N.Y.S. 317, 152 Misc. 130.

42. Mich.—Straus v. Elless Co., 222 N.W. 752, 245 Mich. 558.

N.Y.—Baker v. Smythe, 59 N.Y.S.2d 709, 270 App.Div. 811, reargument denied 61 N.Y.S.2d 388, two cases, 270 App.Div. 842—S. C. Beckwith Special Agency v. Orange County Herald Pub. Co., 212 N.Y.S. 108, 214 App.Div. 212—Royal Diamond Co. v. Ostrin, 232 N.Y.S. 223, 133 Misc. 555—Hinman v. Brundage, 13 N.Y.S.2d 363.

43. N.Y.—Bercholz v. Guaranty Trust Co. of New York, 40 N.Y.S. 2d 41, 179 Misc. 778—Paterno v. Eagar, 51 N.Y.S.2d 938—Old World Art v. Quistgaard, 41 N.Y.S.2d 536, affirmed 44 N.Y.S.2d 341, 266 App. Div. 951, appeal denied 44 N.Y.S. 2d 687, 266 App.Div. 964—Dumbadze v. Agency of Canadian Car & Foundry Co., 38 N.Y.S.2d 991, affirmed Gurge v. Agency of Canadian Car & Foundry Co., 45 N.Y.S. 2d 955, 267 App.Div. 782, appeal denied In re Dumbadze's Estate, 47 N.Y.S.2d 315, 267 App.Div. 878.

44. N.Y.—Dumbadze v. Agency of Canadian Car & Foundry Co., 38 N.Y.S.2d 991, affirmed Gurge v. Agency of Canadian Car & Foundry Co., 45 N.Y.S.2d 955, 267 App. Div. 782, appeal denied In re Dumbadze's Estate, 47 N.Y.S.2d 315, 267 App.Div. 878.

45. N.Y.—C. J. G. Corporation v. Knickerbocker Ins. Co. of New York, 278 N.Y.S. 42, 242 App.Div. 685—Fuller v. American Surety Co., 275 N.Y.S. 113, 153 Misc. 432.

46. N.Y.—Browne v. Browne, 40 N.Y.S.2d 253, 266 App.Div. 664—Robinsohn v. Herman, 234 N.Y.S. 693, 134 Misc. 246—Sorensen v. East River Sav. Inst., 196 N.Y.S. 361, 119 Misc. 297—Quigley v. Fitts, 57 N.Y.S.2d 16.

In action on unpaid checks against maker's administrator, wherein administrator denied knowledge of transaction in which checks were given, plaintiff was not entitled to summary judgment, since formal proof would be required even though plaintiff was likely to succeed at trial.—Friedman v. Friedman, 296 N.Y. S. 714, 251 App.Div. 835.

47. W.Va.—State ex rel. Connellsville By-Product Coal Co. v. Continental Coal Co., 186 S.E. 119, 117 W.Va. 447, 106 A.L.R. 83.

Persons liable on instrument.

Statute providing that holder of instrument in any proceeding by notice for judgment on motion thereon may join all or any intermediate number of persons liable although promise of makers or obligations of persons otherwise liable may be joint or several or joint and several, being remedial, should not be given a technical or unlimited construction. —State ex rel. Connellsville By-Product Coal Co. v. Continental Coal Co., supra.

Sureties on different bonds

Where two supersedeas bonds were filed in the same suit and conditioned the same, although made at different times, in different penalties and signed by different sureties, the sureties could not be joined as parties defendant in a notice of motion for judgment for recovery on the bonds.—State ex rel. Shenandoah Valley Nat. Bank v. Hiett, 17 S.E.2d 878, 123 W.Va. 739, 137 A.L.R. 1041.

48. N.Y.—Field v. Maghee, 5 Paige 539.

49. N.Y.—Field v. Maghee, supra. Tenn.—Ex parte Craighead, 12 Heisk. 640.

34 C.J. p 202 note 77.

action is against two or more defendants, it has been held that a summary judgment may not be entered against one of them alone,[50] unless it appears that he has no defense to the action and that the others have good defenses and should be permitted to defend.[51] A motion and judgment against heirs only, where they are liable only jointly with the personal representative, has been held to be erroneous but not void, where the court had jurisdiction of the subject matter.[52] Where the motion is under a special statute which is applicable only to certain persons, judgment may be had against those only against whom the remedy is given.[53]

§ 222. Procedure in General

The procedure prescribed by statute or court rule for obtaining summary judgment on motion or in special proceedings generally must be followed, and a failure to comply therewith will preclude the granting of the motion.

A party moving for summary judgment must generally comply with the statute or court rule relating thereto, and a failure to follow the procedure prescribed will preclude the granting of a motion for summary judgment or the substantiation of a claim of defense.[54] Under statutes providing for summary judgment on motion in actions instituted in the ordinary way where no triable issue of fact is disclosed in answer to affidavits of the moving party, such a motion is the procedural equivalent of a trial,[55] and all necessary parties must be before the court, or their status must be submitted by proper proof.[56] The motion searches the record,[57] and, where made by plaintiff, it admits every material averment in the answer or affidavit of defense[58] and reopens the question of the sufficiency of the complaint;[59] but defendant's motion for judgment

50. N.Y.—Alwais v. Employers' Liability Assur. Corporation, Limited, of London, Eng., 208 N.Y.S. 137, 211 App.Div. 734.
34 C.J. p 202 note 79.

51. N.Y.—Meeker v. Saskill, 298 N.Y.S. 754, 164 Misc. 718.
34 C.J. p 202 note 78.

52. Ky.—Bustard v. Gates, 4 Dana 429.

53. Cal.—Hansen v. Martin, 63 Cal. 282.
34 C.J. p 202 note 82.

54. Md.—Katski v. Triplett, 30 A.2d 764, 181 Md. 545—Mueller v. Michaels, 60 A. 485, 101 Md. 138.
Mich.—Terre Haute Brewing Co. v. Goldberg, 289 N.W. 192, 291 Mich. 401—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106.
N.Y.—Silvestro v. City of New York, 49 N.Y.S.2d 217, affirmed 55 N.Y.S.2d 583, 269 App.Div. 783.

Verification and statement of amount
To entitle plaintiff to a summary judgment, under Rules of Civil Practice, rule 113, the cause of action must be verified by plaintiff, or by a person having knowledge of the facts, and the amount claimed must be stated.—State Bank v. Mackstein, 205 N.Y.S. 290, 123 Misc. 416.

Unprecedented motion
Fact that defendant's motion to require plaintiff to accept as a sufficient response to plaintiff's motion to strike out the answer and for summary judgment an annexed affidavit and on the strength of such affidavit to have motion for judgment denied was unprecedented was no reason of itself for denying the motion.—Stone v. Ætna Life Ins. Co., 31 N.Y.S.2d 615, 178 Misc. 23.

55. N.Y.—Irvin Agency v. Hess, 26 N.Y.S.2d 819, 176 Misc. 56, affirmed 26 N.Y.S.2d 858, 261 App.Div. 935.

Admission of defense
The rule that a defense in defendant's answer stands admitted where plaintiff does not file a reply applies as well on a motion for summary judgment as on a trial.—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.

56. N.Y.—Grossman Steel Stair Corp. v. Steinberg, 54 N.Y.S.2d 275.

Partners
In action against two partners, where only one of them files answer and papers submitted on plaintiff's motion for summary judgment do not show whether codefendant was served with process and appeared or answered motion will be held in abeyance and plaintiff will be permitted to submit proof by affidavit as to whether such codefendant was served with process, appeared and answered, and also whether he is entitled to benefits of Soldiers' and Sailors' Civil Relief Act.—Grossman Steel Stair Corp. v. Steinberg, supra.

Defendant held within jurisdiction of court
Ill.—National Builders Bank of Chicago v. Simons, 31 N.E.2d 269, 307 Ill.App. 552.

57. Wis.—Unmack v. McGovern, 296 N.W. 66, 236 Wis. 639—Fuller v. General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 272 N.W. 839, 224 Wis. 603.

First defective pleading
Record on motion for summary judgment will be searched to ascertain first fault in pleading and condemnation visited on first pleading found defective.
N.Y.—City Trust Co. v. Anthony Ricci Realty Co., 241 N.Y.S. 481, 137 Misc. 128.
Wis.—Sullivan v. State, 251 N.W. 251, 213 Wis. 185, 91 A.L.R. 877.

Demurrer to motion for judgment admitted truth of matters alleged in motion.—Arkansas State Highway Commission v. Partain, 103 S.W.2d 53, 193 Ark. 803.

58. U.S.—Mara v. U. S., D.C.N.Y., 54 F.2d 397.
Cal.—Grady v. Easley, 114 P.2d 635, 45 Cal.App.2d 632.

59. Ill.—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.

Affidavits
Search of record on plaintiff's motion for summary judgment should include affidavits supporting complaint, which should be dismissed, where such affidavits disclose no cause of action, although demurrer would otherwise have to be overruled.—Sullivan v. State, 251 N.W. 251, 213 Wis. 185, 91 A.L.R. 877.

Typographical error
On motion for summary judgment, a typographical error in complaint may be corrected, and complaint will be deemed corrected for purpose of motion.—Schroeder v. Columbia Casualty Co., 213 N.Y.S. 649, 126 Misc. 205.

Unlike judgment on pleadings
While a motion for summary judgment, when properly supported by required affidavits, searches the record and permits the court to examine the complaint to determine whether it states a cause of action, such motion is not the same as a motion for judgment on the pleadings.—Fuller v. General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 272 N.W. 839, 224 Wis. 603.

dismissing the complaint on the ground that there was an existing final judgment determining the same cause of action does not challenge the sufficiency of the facts alleged in the complaint to constitute a cause of action or the truth of such allegations.[60]

The filing of a motion for summary judgment does not constitute the filing of a motion for default which would preclude defendant from filing answer thereafter,[61] but a cross motion to amend the answer will not lie on a motion for summary judgment.[62] The refusal to permit interrogatories to obtain certain evidence in defense of a motion for summary judgment is not error where such evidence would not constitute a defense to the action.[63] Plaintiff's motion for partial summary judgment is not an acceptance of defendant's tender of part of the amount claimed but is subject to the implied reservation of the right to proceed with the prosecution of the cause of action for the remainder of his claim.[64]

Proceedings by notice of motion. Under some statutes, in lieu of an ordinary action at law, one may proceed in certain cases by way of notice of motion for judgment,[65] and under such procedure the notice constitutes the writ and declaration in the case informing defendant of the demand on which summary judgment will be sought on a future day, as is discussed infra § 223 b.

The proceedings for a summary judgment by motion on notice are of an informal nature,[66] not in all respects governed by the common-law rules of practice and procedure,[67] and are to be construed with liberality.[68] Formal pleadings usually are not required;[69] but there must be both allegation and proof to entitle plaintiff to judgment,[70] and the allegation must precede the proof,[71] and what is lacking in the allegations cannot be supplied by evidence.[72] An answer or other pleading to the motion is not required,[73] except in cases where pleadings are required by statute.[74] Defendant may either demur to the sufficiency of the notice,[75] in which case the demurrer admits the truth of all the facts properly pleaded in the notice,[76] or he

60. N.Y.—Pagano v. Arnstein, 55 N.E.2d 181, 292 N.Y. 326.

61. Iowa.—City of Des Moines v. Barnes, 20 N.W.2d 895.

62. N.Y.—Erie Commercial Corporation v. Then, 18 N.Y.S.2d 569, 259 App.Div. 786.

63. Mich.—Dart Nat. Bank v. Burton, 241 N.W. 853, 258 Mich. 283.

64. N.Y.—Fleder v. Itkin, 60 N.E.2d 753, 294 N.Y. 77.

65. Va.—Schreck v. Virginia Hot Springs Co., 125 S.E. 316, 140 Va. 429.

W.Va.—George A. Kelley Co. v. Phillips, 134 S.E. 469, 102 W.Va. 85.

66. Va.—Schreck v. Virginia Hot Springs Co., 125 S.E. 316, 140 Va. 429—Bardach Iron & Steel Co. v. Tenenbaum, 118 S.E. 502, 136 Va. 163.

W.Va.—Elkhorn Sand & Supply Co. v. Algonquin Coal Co., 136 S.E. 783, 103 W.Va. 110—George A. Kelley Co. v. Phillips, 134 S.E. 469, 102 W.Va. 85.

34 C.J. p 202 note 83.

67. W.Va.—Lawhead v. Nelson, 168 S.E. 659, 113 W.Va. 453—Elkhorn Sand & Supply Co. v. Algonquin Coal Co., 136 S.E. 783, 103 W.Va. 110.

68. Va.—Warren v. Shackelford, 169 S.E. 737, 160 Va. 671.

34 C.J. p 202 note 84.

69. W.Va.—Citizens' Nat. Bank v. Dixon, 117 S.E. 685, 94 W.Va. 21.

34 C.J. p 202 note 85.

Complaint

A motion for summary judgment serves office of complaint.—Harris v. Barber, 186 So. 160, 237 Ala. 138.

70. Va.—Kennedy v. Mullins, 154 S.E. 568, 155 Va. 166—Mankin v. Aldridge, 105 S.E. 459, 127 Va. 761.

Common counts

The bare allegation of the common counts in assumpsit in a notice of motion for judgment was not sufficient to warrant recovery on the basis of fraud, since fraud must be clearly alleged and proved.—Inter-Ocean Casualty Co. v. Leccony Smokeless Fuel Co., 17 S.E.2d 51, 123 W.Va. 541, 137 A.L.R. 488.

Note not due

Where, on trial of motion for judgment, one of two notes sued on was not due when notice was filed in clerk's office and suit thereby begun, reception in evidence, over objection, of such immature demand constitutes error.—Charlton v. Pancake, 127 S.E. 70, 98 W.Va. 363.

Writ of inquiry

In notice of motion for judgment on bond with collateral conditions, writ of inquiry is necessary in case of default by defendant.—State v. Picklesimer, 138 S.E. 313, 103 W.Va. 561.

71. Va.—Mankin v. Aldridge, 105 S.E. 459, 127 Va. 761.

72. Va.—Mankin v. Aldridge, supra.

W.Va.—Anderson v. Prince, 55 S.E. 656, 60 W.Va. 557.

73. Kan.—Berry v. Dewey, 170 P. 1000, 102 Kan. 392.

74. Va.—Saunders v. Mecklenburg Bank, 71 S.E. 714, 112 Va. 443, Ann. Cas.1913B 982—Liskey v. Paul, 42 S.E. 875, 100 Va. 764.

34 C.J. 203 note 90.

Counter-affidavit

(1) Where plaintiff has served and filed a proper affidavit, defendant must first file a counter-affidavit and plead before he is entitled to cross-examine witnesses and offer evidence.—Bluefield Supply Co. v. Waugh, 145 S.E. 584, 106 W.Va. 67.

(2) Statute providing for notice of motion for judgment changed common-law rule permitting evidence on writ of inquiry to reduce plaintiff's claim.—Bluefield Supply Co. v. Waugh, supra.

75. Va.—Crosswhite v. Shelby Operating Corporation, 30 S.E.2d 673, 182 Va. 713, 153 A.L.R. 573.

34 C.J. p 203 note 91.

Demurrer rather than a motion to strike is proper to attack sufficiency of motion.—Harris v. Barber, 186 So. 160, 237 Ala. 138.

Motion to quash notice of motion is equivalent of demurrer with respect to attacking defects in notice.—Kitson v. Messenger, 27 S.E.2d 265, 126 W.Va. 60.

Matters considered

On demurrer to notice of motion for judgment, bill of particulars and exhibits filed therewith and subsequent stipulation and exhibits are not to be considered.—City of Beckley v. Craighead, 24 S.E.2d 908, 125 W.Va. 484.

76. U.S.—Artinano v. W. R. Grace & Co., D.C.Va., 286 F. 702.

may tender an issue by plea;[77] or, in the absence of a statute providing otherwise, he may file an informal statement in writing of his grounds of defense.[78] Where the grounds of defense are set up in writing without a formal pleading, the parties are generally deemed to be at issue on the grounds so stated without the necessity for a replication or other pleading.[79]

Under the doctrine that defendant may plead as many several matters of law or fact as he thinks necessary and is not required to file all his pleas in bar at the same time, the filing of a special plea is not a waiver of other grounds of defense.[80] Where defendant has appeared, he cannot demur to the notice on the ground that it does not appear therefrom at what time the court is to be held, but his objection, if available, must be taken by plea in abatement.[81] There is, strictly speaking, no such pleading as a general issue to a notice,[82] but the court may accept it as a general denial of plaintiff's claim set up in the notice, and, like other general issues, it may be pleaded orally.[83]

Supreme court commissioners. Under some statutes supreme court commissioners designated to hear and determine motions preliminary to trial have no power to make an order for summary judgment.[84]

§ 223. Notice

a. In general
b. Nature and sufficiency of notice as a pleading

a. In General

A party against whom summary judgment is sought must be served with timely, proper, and sufficient notice of the motion, and there must be a compliance with statutory requirements as to the service, return, and docketing of the notice.

As a general rule, it is essential to the validity of a judgment on motion that defendant be served with proper and sufficient notice of the motion, as required by the statute or court rule,[85] within the time specified therein,[86] and, even where the statute authorizing such a proceeding is silent as to notice, defendant is entitled to a reasonable notice;[87] but the requirement of notice may be waived by the party against whom judgment or order is sought.[88] The giving of notice will not be inferred from a

77. Ala.—Griffin v. State Bank, 6 Ala. 908.
Va.—Whitley v. Booker Brick Co., 74 S.E. 160, 113 Va. 434.

78. W.Va.—Collins v. White Oak Fuel Co., 71 S.E. 277, 69 W.Va. 292. 34 C.J. p 203 note 94.

Affidavit of defense

Trial court erred in rendering a judgment for plaintiff in a proceeding on a notice of motion for judgment on a note after hearing on the merits but without passing on affidavit of defense, filed by defendants. —Bacon v. Dettor, 33 S.E.2d 648, 183 Va. 835.

79. Va.—Duncan v. Carson, 103 S. E. 665, 127 Va. 306, rehearing denied 105 S.E. 62, 127 Va. 306.

80. Va.—Duncan v. Carson, supra. 34 C.J. p 203 note 97.

81. Ala.—Griffin v. State Bank, 6 Ala. 908.

82. Va.—Duncan v. Carson, 103 S. E. 665, 127 Va. 306, rehearing denied 105 S.E. 62, 127 Va. 306.

83. Va.—Duncan v. Carson, supra.

84. N.J.—Milberg v. Keuthe, 121 A. 713, 98 N.J.Law 779—Okin v. Railway Exp. Agency, Sup., 44 A.2d 396—Rollenhagen v. Stevenson, 43 A.2d 173, 23 N.J.Misc. 219—State v. Owen, 41 A.2d 309, 23 N.J.Misc. 123—Township of Neptune v. Sweet, 160 A. 209, 10 N.J.Misc. 615 —Egan v. Hemingway, 159 A. 703, 10 N.J.Misc. 466.

85. N.Y.—Aronstam v. Scientific Utilities Co., 196 N.Y.S. 306, affirmed 199 N.Y.S. 908, 206 App.Div. 657.
34 C.J. p 203 note 3.

Notice held sufficient

Notice of motion, requesting judgment on pleadings, and for such other relief as court may deem just, brought plaintiff within statute providing for partial summary judgment on motion.—Little Falls Dairy Co., v. Berghorn, 224 N.Y.S. 34, 130 Misc. 454.

Who issues notice

Notice in motion proceedings for judgment emanates from plaintiff and does not come within control of court until return to clerk of court. —Pereira v. Davis Financial Agency, 135 S.E. 823, 146 Va. 215.

86. N.Y.—Wise v. Powell, 215 N.Y. S. 693, 216 App.Div. 618.

After time for reply

Notice of motion to strike answer and for summary judgment was not ineffective because given after expiration of time for reply.—Charles S. Schultz & Son v. Klipper, 145 A. 634, 7 N.J.Misc. 391, followed in Newell v. Klipper, 145 A. 635, 7 N. J.Misc. 398.

Defect held nonprejudicial

Motion for summary judgment would not be denied for failure to give notice within prescribed time where motion was argued on merits and defendants were not prejudiced, having submitted complete set of affidavits in objection to motion.—Le Fevre v. Reliable Paint Supply Co., 278 N.Y.S. 903, 152 Misc. 594.

Particular requirements

Any person entitled to recover money by action on contract may obtain judgment by motion in a court having jurisdiction, after having given his debtor notice in writing of such motion for at least twenty days of the time and court in which the motion will be made, which notice shall be returned to the clerk's office of such court at least fifteen days before the time such motion is heard.—Citizens' Nat. Bank v. Dixon, 117 S.E. 685, 94 W.Va. 21.

87. Ala.—Brown v. Wheeler, 3 Ala. 287.
Tenn.—Williamson v. Burge, 7 Heisk. 117.

88. Ark.—Brickell v. Guaranty Loan & Trust Co., 93 S.W.2d 656, 192 Ark. 652.

No prejudice

The entering of plaintiff's motion for summary judgment was not error, notwithstanding notice of plaintiff's motion did not cover a motion for summary judgment, where defendants were in court in response to the notice and had been permitted to and did file an original and amended affidavit of defense, and there was no prejudice to defendants, and the trial court had before it the several sworn pleadings of the parties and the parties themselves.—Smith v. Karasek, 40 N.E.2d 594, 313 Ill.App. 654.

statement on the record that the parties came by their attorneys.[89]

As to place and time of motion. The notice must allege the place where,[90] and the time when,[91] the motion will be made. It has been held to be sufficient if it states that a judgment will be moved for at a specified term of the court;[92] and it need not designate the day on which the motion will be made[93] unless the statute requires that it must summon the party on whom it is served to a fixed and certain day.[94] The notice need not be dated,[95] unless the date is made material by a reference to it as indicating the time when the motion will be made, or unless it is material for the purpose of showing the time when the court is to be held, such time not otherwise appearing.[96]

Service, return, and docketing. There must be a compliance with statutory requirements as to the service,[97] return,[98] and docketing[99] of the notice. It must be served on defendant the prescribed period before the day on which the motion is to be made,[1] although an error in this respect may be waived by defendant's appearing and consenting to the trial without objection.[2] If the notice is served prematurely, it is subject to a plea in abatement.[3]

b. Nature and Sufficiency of Notice as a Pleading

In special proceedings for judgment instituted by notice of motion, the notice serves the purpose of a writ and declaration and must state with reasonable certainty sufficient facts to show a good cause of action against the defendant, and if the notice is uncertain the plaintiff may be required to file a bill of particulars.

The statutes of some states, as discussed supra § 222, authorize special proceedings for judgment instituted by notice of the proposed motion. In such proceedings, notice of the motion serves the purpose both of a writ and a declaration.[4] It therefore must allege facts which are necessary to show jurisdiction;[5] and, although it need not set out, in

89. Ala.—Brown v. Wheeler, 3 Ala. 287.

90. Tenn.—Curry v. Munford, 5 Heisk. 61.

91. Tenn.—Curry v. Munford, supra.

Special term

Notice of motion for judgment may be made returnable to, and heard at, special term, if properly matured.—Monongahela Bank of Fairmont v. Watson, 150 S.E. 731, 108 W.Va. 250.

92. Tenn.—State v. Allison, 8 Heisk. 1.

34 C.J. p 204 note 26.

93. Tenn.—State v. Allison, supra.

94. Va.—Tench v. Gray, 46 S.E. 287 102 Va. 215.

95. Ala.—Griffin v. State Bank, 6 Ala. 908.

96. Ala.—Griffin v. State Bank, supra.

97. Ark.—Milor v. Farrelly, 25 Ark. 353.

Va.—Kain v. Ashworth, 89 S.E. 857, 119 Va. 605.

Amended notice

Service of an amended notice of motion for judgment, not involving new parties, is not required, when the amendment is made in term, and by leave of court.—Morrison v. Judy, 13 S.E.2d 751, 123 W.Va. 200.

Service by marshal

On notice of motion for judgment, under practice in some jurisdictions, it is not necessary that writ or other process be served by marshal to bring defendants into court.—Chisholm v. Gilmer, C.C.A.Va., 81 F.2d 120, affirmed 57 S.Ct. 65, 299 U.S. 99, 81 L.Ed. 63, rehearing denied 57 S. Ct. 229, 299 U.S. 623, 81 L.Ed. 458.

98. Va.—Brame v. Nolen, 124 S.E. 299, 139 Va. 413.

34 C.J. p 204 note 34.

Clerk's certificate, indorsed on notice of motion for judgment as to when notice was returned and filed, is an official record which imports verity.—Brame v. Nolen, supra.

In computing time in which notice of motion for judgment must be returned to clerk's office, the day of service but not the date of return is to be counted.—Brame v. Nolen, supra.

Notice returnable after adjournment

Under statute, fact that notice of motion for judgment was made returnable after final adjournment of term did not justify dismissal and refusal to reinstate cause of action. —Warren v. Shackelford, 169 S.E. 737, 160 Va. 671.

99. Va.—Brame v. Nolen, 124 S.E. 299, 139 Va. 413.

W.Va.—Citizens' Nat. Bank v. Dixon, 117 S.E. 685, 94 W.Va. 21.

34 C.J. p 204 note 35.

Time of filing

The notice of motion for judgment, with the return of service thereon, necessary in a procedure to recover money due on contract by motion, may be filed in the clerk's office at any time before the commencement of the term at which the motion is to be heard, sufficient to enable the clerk to docket for trial.—Citizens' Nat. Bank v. Dixon, supra.

1. Va.—Tench v. Gray, 46 S.E. 287, 102 Va. 215.

34 C.J. p 204 note 36.

2. Ky.—Millett v. Millett, 3 Ky.Op. 431.

3. U.S.—Schofield v. Palmer, C.C.Va., 134 F. 753.

34 C.J. p 204 note 38.

4. W.Va.—Myers v. Myers, 35 S.E. 2d 847—Kitson v. Messenger, 27 S. E.2d 265, 126 W.Va. 60—Citizens' Nat. Bank v. Dixon, 117 S.E. 685, 94 W.Va. 21.

34 C.J. p 203 note 6.

Notice performs functions of a summons

Ark.—Brickell v. Guaranty Loan & Trust Co., 93 S.W.2d 656, 192 Ark. 652.

Liberal construction

Notices of motions for judgment must be viewed as pleadings with great liberality, and the same strictness as in formal pleadings is not required.

Va.—Bardach Iron & Steel Co. v. Charleston Port Terminals, 129 S. E. 687, 143 Va. 656—Shreck v. Virginia Hot Springs Co., 125 S.E. 316, 140 Va. 429.

W.Va.—Mountain State Water Co. v. Town of Kingwood, 1 S.E.2d 395, 121 W.Va. 66.

5. U.S.—West Fork Glass Co. v. Innes-Weld Glass Co., W.Va., 178 F. 205, 101 C.C.A. 525.

Va.—City of Richmond v. Best, 23 S.E.2d 224, 180 Va. 429.

Cause based on contract

Recovery on notice of motion for judgment is confined to recovery based on contract, and it is necessary that essential elements showing money due on contract as distinguished from damages for breach be alleged notwithstanding no formality of pleading is exacted.—City of Beckley v. Craighead, 24 S.E.2d 908, 125 W.Va. 484.

hæc verba, the contract or instrument relied on,[6] it must state with reasonable certainty[7] sufficient facts to show a good cause of action against defendant,[8] and fairly apprise him of the nature of the demand made on him,[9] and to enable the court to say that, if the facts stated are proved, plaintiff is entitled to recover;[10] and it must indicate with reasonable certainty that the obligation which it is proposed to reduce to judgment is that of defendant.[11] It is not necessary to have separate counts in the notice,[12] and the case may be stated in a composite form;[13] and, while the notice is insufficient if it states too little,[14] any excess therein may as a general rule be treated as surplusage.[15]

Bill of particulars. Under some statutes, if the notice is uncertain as to the facts constituting the cause of action, the court, on demand of defendant, should require plaintiff to file a bill of particulars.[16] If the bill of particulars is insufficient, defendant may move to reject any evidence offered by plaintiff touching any matters not described in the notice or other pleading so plainly as to give notice of its character.[17] Bills of particulars filed by plaintiff following his original notices are no part of the original or amended notices and are not to be considered in determining their sufficiency.[18]

Amendment. The court may permit the notice to be amended during the proceedings, where defendant is not thereby taken by surprise.[19]

6. Va.—Foltz v. Conrad Realty Co., 109 S.E. 463, 131 Va. 496.

Filing of policy sued on

Where plaintiff in action on fire policy proceeded by notice of motion, it was proper to file with notice the original policy sued on.—Skidmore v. Star Ins. Co. of America, 27 S.E.2d 845, 126 W.Va. 307.

7. W.Va.—Tuggle v. Belcher, 139 S. E. 653, 104 W.Va. 178—Hall v. Harrisville Southern R. Co., 137 S.E. 226, 103 W.Va. 287—Pelley v. Hibner, 118 S.E. 923, 93 W.Va. 169—Citizens' Nat. Bank v. Dixon, 117 S.E. 685, 94 W.Va. 21.

34 C.J. p 203 note 9.

8. W.Va.—Mountain State Water Co. v. Town of Kingwood, 1 S.E.2d 395, 121 W.Va. 66—Citizens' Nat. Bank v. Dixon, 117 S.E. 685, 94 W. Va. 21.

34 C.J. p 203 note 10.

Notices held sufficient

(1) Notice is sufficient if it is such that defendant cannot reasonably mistake the cause of action stated therein.—Walton v. Light, 26 S.E.2d 29, 181 Va. 609.

(2) Notice is sufficient if it clearly informs defendant of nature and object of plaintiff's claim.—Lawhead v. Nelson, 168 S.E. 659, 113 W.Va. 453—Elkhorn Sand & Supply Co. v. Algonquin Coal Co., 136 S.E. 783, 103 W.Va. 110—George A. Kelley Co. v. Phillips, 134 S.E. 469, 102 W. Va. 85.

(3) Notice indicating obligation, demand, or account on which it is based with reasonable certainty, and that it is owing plaintiff by defendant, is sufficient.—Tuggle v. Belcher, 139 S.E. 653, 104 W.Va. 178.

(4) Where notice of motion for judgment is accompanied by statement of account made part thereof, items designated "To Mdse." are sufficient, without naming each particular article making up items listed.—George A. Kelley Co. v. Phillips, 134 S.E. 469, 102 W.Va. 85.

(5) Notice setting out note in full, accompanied by account and affidavit showing exact amount due at time thereof, satisfies statute, although exact amount for which judgment will be asked is not specified.—Fink v. Scott, 143 S.E. 305, 105 W.Va. 523.

(6) If nonpayment of note is averred in affidavit, failure to allege nonpayment in notice of motion for judgment is not material.—People's State Bank of Crown Point, Ind., v. Jeffries, 129 S.E. 462, 99 W.Va. 399.

(7) Allegations in notice that plaintiff was the duly appointed receiver of a named bank which had acquired note sued on in due course and that the note was an asset of the said bank were sufficient allegations as to ownership of the note.—Odland v. Hamrick, W.Va., 32 S.E. 2d 629.

(8) Other cases.

Va.—Walton v. Light, 26 S.E.2d 29, 181 Va. 609—Aistrop v. Blue Diamond Coal Co., 24 S.E.2d 546, 181 Va. 287—Kaylor v. Quality Bread & Cake Co., 154 S.E. 572, 155 Va. 156—Kennedy v. Mullins, 154 S.E. 568, 155 Va. 166—Bardach Iron & Steel Co. v. Charleston Port Terminals, 129 S.E. 687, 143 Va. 656—Shreck v. Virginia Hot Springs Co., 125 S.E. 316, 140 Va. 429—Wessel v. Bargamin, 120 S.E. 287, 137 Va. 701.

W.Va.—Lawhead v. Garlow, 171 S.E. 250, 114 W.Va. 175—Hall v. Harrisville Southern R. Co., 137 S.E. 226, 103 W.Va. 287—Elkhorn Sand & Supply Co. v. Algonquin Coal Co., 136 S.E. 783, 103 W.Va. 110—Charleston v. Pancake, 127 S.E. 70, 98 W.Va. 363.

34 C.J. p 203 note 10 [a].

Notices held insufficient

Va.—Alpaugh v. Wolverton, 36 S.E. 2d 906, 184 Va. 943—Costello v. Larsen, 29 S.E.2d 856, 182 Va. 557.

W.Va.—City of Beckley v. Craighead, 24 S.E.2d 908, 125 W.Va. 484—Mountain State Water Co. v. Town of Kingwood, 1 S.E.2d 395, 121 W.Va. 66—Bringardner v. Rollins, 135 S.E. 665, 102 W.Va. 584.

34 C.J. p 203 note 10 [b].

9. Va.—Kennedy v. Mullins, 154 S. E. 568, 155 Va. 166—Wessel v. Bargamin, 120 S.E. 287, 137 Va. 701—Bardach Iron & Steel Co. v. Tenenbaum, 118 S.E. 502, 136 Va. 163.

W.Va.—Pelley v. Hibner, 118 S.E. 923, 93 W.Va. 169—Citizens' Nat. Bank v. Dixon, 117 S.E. 685, 94 W. Va. 21.

34 C.J. p 203 note 11.

10. Va.—Mankin v. Aldridge, 105 S. E. 459, 127 Va. 761.

11. W.Va.—Citizens' Nat. Bank v. Dixon, 117 S.E. 685, 94 W.Va. 21—Anderson v. Prince, 55 S.E. 656, 60 W.Va. 557.

Parties to note

In notice of motion for judgment on note, it is not necessary to allege affirmatively parties thereto, when these facts appear with reasonable certainty from entire notice.—People's State Bank of Crown Point, Ind., v. Jeffries, 129 S.E. 462, 99 W. Va. 399.

12. Va.—Hines v. Beard, 107 S.E. 717, 130 Va. 286.

13. Va.—Hines v. Beard, supra.

14. Va.—Hines v. Beard, supra.

15. W.Va.—Anderson v. Prince, 55 S.E. 656, 60 W.Va. 557.

34 C.J. p 204 note 17.

16. Va.—Piccolo v. Woodford, 35 S. E.2d 393, 184 Va. 432—Schreck v. Virginia Hot Springs Co., 125 S. E. 316, 140 Va. 429—Wessel v. Bargamin, 120 S.E. 287, 137 Va. 701.

34 C.J. p 204 note 20.

17. Va.—Lehigh Portland Cement Co. v. Virginia SS. Co., 111 S.E. 104, 132 Va. 257.

18. Va.—Rinehart v. Pirkey, 101 S. E. 353, 126 Va. 346.

19. Va.—Ropp v. Stevens, 154 S.E 553, 155 Va. 304.

W.Va.—Elkhorn Sand & Supply Co.

§ 224. Motion

A motion for summary judgment must be made by proper application to the court and should be proceeded with within the proper time.

Under the practice prevailing in some states, a motion for summary judgment generally must be made by application to the court for such relief,[20] but formal requirements have been dispensed with in some cases,[21] and motions not expressly seeking summary judgment or referring to the court rule providing therefor have sometimes been treated as motions for summary judgment where it otherwise appeared that such was the intent of the moving party.[22] Under some statutes or court rules, on a motion for summary judgment by one party, the court may award judgment to the other party if he is entitled thereto notwithstanding such other party has not made a cross motion therefor.[23] A motion to strike the motion for summary judgment has been held proper procedure to test its sufficiency.[24]

As a general rule, a motion for judgment must be made and proceeded with within the proper time,[25] and under some statutes or court rules such a motion may be entertained only after answer is filed[26] and issue is joined,[27] although it may be pursued at any subsequent stage of the litigation.[28] In proceedings instituted by notice of motion for judgment, if the motion is not proceeded with at the term to which the notice is returnable,[29] or on the day specified in the notice,[30] it operates as a discontinuance, and the case cannot be taken up subsequently, and judgment entered, on the same motion, unless defendant waives the objection by appearing personally and failing to object at the proper time,[31] or by himself calling up the motion.[32] However, discontinuance of the proceeding by reason of fail-

v. Algonquin Coal Co., 136 S.E. 783, 103 W.Va. 110.
34 C.J. p 204 note 23.

20. N.Y.—Sheepshead Bay Bungalow Corporation v. Mandel & Co., 279 N.Y.S. 556, 244 App.Div. 811—Glove City Amusement Co. v. Smalley Chain Theatres, 4 N.Y.S.2d 397, 167 Misc. 603.

A motion to dismiss case as moot could not be treated as a motion for summary judgment as the latter involves a determination of existence of a cause of action and virtue of claimed defenses, and practice of dismissing actions when questions have become moot does not arise out of statute relating to summary judgment.—Duel v. State Farm Mut. Automobile Ins. Co., 9 N.W.2d 593, 243 Wis. 172.

Use of affidavits is not permitted under rules providing for judgment on the pleadings, for striking out of a pleading as sham, or for dismissal of counterclaim or striking out of defense consisting of new matter in certain cases and a motion based thereon and on other rules concerning summary judgments permitting affidavits will be treated as motion under such other rules.—Henderson v. Hildreth Varnish Co., 276 N.Y.S. 414.

21. N.Y.—Simson v. Bugman, 45 N.Y.S.2d 140.

Oral application was sufficient as "motion for judgment," filing of formal motion being unnecessary.—Baldwin v. Anderson, 13 P.2d 650, 52 Idaho 243.

22. U.S.—Larson v. Todd Shipyards Corporation, D.C.N.Y., 16 F.Supp. 967.

Motion for judgment on pleadings
(1) Motion ostensibly for judgment on pleadings would be treated as motion for summary judgment where letter was annexed to motion papers and additional agreed facts were stated in argument.—Mara v. U. S., D.C.N.Y., 54 F.2d 397.

(2) Fact that affidavits were used on motion for judgment was held to show that it was for summary judgment, and not for judgment on pleadings.—Donelly v. Bauder, 216 N.Y.S. 437, 217 App.Div. 59.

Motion for dismissal
Where plaintiff moved for summary judgment, defendant's moving affidavit asking for dismissal of complaint was properly treated as cross motion for summary judgment.—Goldarbeiter v. Cunard White Star Limited, 27 N.Y.S.2d 920.

23. N.Y.—Board of Education of Union Free School Dist. No. 3, Town of Huntington, Suffolk County, to Use and Benefit of Stickley Mfg. Co. v. American Bonding Co. of Baltimore, 30 N.Y.S.2d 428, 177 Misc. 341, affirmed 29 N.Y.S.2d 492, 177 Misc. 343.

24. Ill.—Wainscott v. Penikoff, 4 N.E.2d 511, 287 Ill.App. 78.

Forcible detainer action
Affidavit for summary judgment in forcible detainer action to which was attached plaintiff's lease to premises would not be struck for failure to state that attached lease was sworn or certified copy of lease on which plaintiff relied; motion to strike admitted that plaintiff was lessee of premises for term covering time when plaintiff demanded possession of premises.—Wainscott v. Penikoff, supra.

25. N.Y.—Sheepshead Bay Bungalow Corporation v. Mandel & Co., 279 N.Y.S. 556, 244 App.Div. 811.
34 C.J. p 204 notes 40, 41.

Intervention
A motion for summary judgment by one prior to granting of his petition of intervention in the case is premature, but the court will consider the motion where it intends to permit the intervention.—Stern v. Newton, 39 N.Y.S.2d 593, 180 Misc. 241.

26. Cal.—Loveland v. City of Oakland, 159 P.2d 70, 69 Cal.App.2d 399.
N.Y.—Bobrose Developments v. Jacobson, 296 N.Y.S. 520, 251 App. Div. 825.

27. N.Y.—Sheepshead Bay Bungalow Corporation v. Mandel & Co., 279 N.Y.S. 556, 244 App.Div. 811.

Papers not yet in case
Defendant's motion for summary judgment on papers including plea not yet in case was premature.—Apperson Realty Corporation v. Wolosky, 279 N.Y.S. 688, 156 Misc. 29.

28. N.Y.—Ecker v. Muzysh, 19 N.Y.S.2d 250, 259 App.Div. 206.

Fact that plaintiff proceeded to trial did not preclude him from thereafter moving for summary judgment.—Ecker v. Muzysh, supra.

29. Ark.—Webb v. Brown, 3 Ark. 488.
34 C.J. p 204 note 42.

30. Ala.—Barclay v. Barclay, 42 Ala. 345.
34 C.J. p 204 note 43.

31. Ala.—Evans v. State Bank, 13 Ala. 787.
Miss.—Phillips v. Chaney, 8 Miss. 250.

32. Ala.—Gary v. State Bank, 11 Ala. 771.

ure to obtain an order of continuance may be prevented by the provisions of statute.[33]

§ 225. Affidavits and Other Evidence

a. In general
b. In support of motion
c. In opposition to motion
d. Applications of rules

a. In General

The function of affidavits on a motion for summary judgment is to show whether the issues are genuine and require a trial. They should contain evidentiary facts, not conclusions or mere general averments; and they must be made by affiants having personal knowledge of the facts and competent to testify thereto.

The affidavits on a motion for summary judgment do not constitute a second set of pleadings in the action,[34] the purpose of the affidavits being only to show whether or not the issues apparently made by the formal pleadings are genuine and require a trial, and whether or not each party has competent evidence to offer which tends to support his side of the issue.[35] Summary judgment statutes are not intended to authorize the trial of contested issues on affidavits,[36] and hence summary judgment cannot be granted, on motion of either plaintiff or defendant, where the affidavits or other proofs submitted set forth facts showing that there is a triable issue of fact.[37] Where court rules relating to the affidavits in support of, or in opposition to, a motion

33. W.Va.—Odland v. Hamrick, 32 S.E.2d 629.

34. Cal.—Loveland v. City of Oakland, 159 P.2d 70, 69 Cal.App.2d 399—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.

35. Cal.—Loveland v. City of Oakland, 159 P.2d 70, 69 Cal.App.2d 399—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.

Ill.—Otis Elevator Co. v. American Surety Co. of New York, 41 N.E.2d 987, 314 Ill.App. 479.

"The function of affidavits upon a motion for summary judgment is to show quickly and summarily what the parties can prove at a long trial."—Rosenblum v. Dingfelder, C.C.A.N.Y., 111 F.2d 406, 408.

36. Colo.—Hatfield v. Barnes, 168 P. 2d 552.

D.C.—Morse v. U. S., to Use of Hine, 29 App.D.C. 433.

Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.

N.Y.—Berson Sydeman Co. v. Waumbeck Mfg. Co., 208 N.Y.S. 716, 212 App.Div. 422.

Wis.—Parish v. Awschu Properties, 19 N.W.2d 276, 247 Wis. 166—Atlas Inv. Co. v. Christ, 2 N.W.2d 714, 240 Wis. 114—Prime Mfg. Co. v. A. F. Gallun & Sons Corporation, 281 N.W. 697, 229 Wis. 348.

"Conflicts of testimony which are not patently a sham cannot be disposed of summarily."—Hoff v. St. Paul-Mercury Indemnity Co. of St. Paul, C.C.A.N.Y., 74 F.2d 689, 690.

The credibility of affiants will not be determined on a motion for summary judgment.

Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.

N.Y.—Roxy Athletic Club v. Simmons, 44 N.Y.S.2d 47—First Nat. Bank of Dolgeville, N. Y., v. Mang, 41 N.Y.S.2d 92.

Analogy to questions for jury

(1) A summary judgment may not be entered where, if evidence contained in affidavits was orally submitted to the court, there would be something left to go to the jury; but summary judgment should be entered if what is contained in the affidavits would have constituted all evidence before the court, and, on such evidence, there would be nothing left to go to the jury.—Shirley v. Ellis Drier Co., 39 N.E.2d 329, 379 Ill. 105.

(2) "If the pleadings taking them as they stand make a case for trial by a jury, a summary judgment will be denied unless it appears from the affidavits that different conclusions of essential ultimate fact can not reasonably be drawn."—Hanson v. Halvorson, 19 N.W.2d 882, 883, 247 Wis. 434.

37. Cal.—Hardy v. Hardy, 143 P.2d 701, 23 Cal.2d 244—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal.2d 553—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609—Grady v. Easley, 114 P.2d 635, 45 Cal.App.2d 632.

Ill.—Roberts v. Sauerman Bros., 20 N.E.2d 849, 300 Ill.App. 213.

Mich.—Maser v. Gibbons, 274 N.W. 352, 280 Mich. 621—Lippman v. Hunt, 227 N.W. 668, 249 Mich. 86.

N.Y.—Ross Industries Corporation v. Bentley, 51 N.Y.S.2d 183, 268 App.Div. 897—Grunder v. Schwab, 46 N.Y.S.2d 715, 267 App.Div. 887, appeal denied 48 N.Y.S.2d 330, 267 App.Div. 946—Kelly v. Rathburn, 38 N.Y.S.2d 391, 265 App.Div. 883—Malone v. Kahnert, 37 N.Y.S.2d 505, 265 App.Div. 832—Merlau v. Dermetics Co., 35 N.Y.S.2d 76, 264 App.Div. 829—Strauss v. G. H. Mumm Champagne & Associates, 30 N.Y.S.2d 117, 262 App.Div. 971—Gross v. Continental Caoutchouc-Export Aktien-Gesellschaft, Continental Rubber Export Corporation, 28 N.Y.S.2d 434, 262 App.Div. 866—Biloz v. Tioga County Patrons' Fire Relief Ass'n, 23 N.Y.S. 2d 460, 260 App.Div. 976—Lloyd v. Sloan, 19 N.Y.S.2d 842, 259 App. Div. 615—Airflow Taxi Corporation v. C. I. T. Corporation, 15 N.Y.S.2d 965, 258 App.Div. 857, reargument denied 17 N.Y.S.2d 1002, 258 App. Div. 1030—Newman v. Newman, 11 N.Y.S.2d 153, 256 App.Div. 605, reargument denied 12 N.Y.S.2d 352, 256 App.Div. 1067—Adams v. Judson, 277 N.Y.S. 304, 243 App.Div. 404—Silberman v. Feinstein, 214 N.Y.S. 920, 216 App.Div. 727—Katz v. Film Metal Box Corporation, 47 N.Y.S.2d 454, 181 Misc. 812—Lamere v. Franklin, 267 N.Y.S. 310, 149 Misc. 371—Sark Co. v. Display Finishing Co., 61 N.Y.S.2d 786—La Pointe v. Wilson, 61 N.Y.S.2d 64—Gorman v. Baltimore Drive It Yourself Co., 46 N.Y.S.2d 530—La Salle Extension University v. Glickman, 29 N.Y.S.2d 32.

Pa.—Drummond v. Parrish, 182 A. 383, 320 Pa. 307—Britex Waste Co. v. Nathan Schwab & Sons, 12 A.2d 473, 139 Pa.Super. 474—Brown v. Brown, Com.Pl., 41 Lack.Jur. 155.

R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.

Wis.—Dubin v. Mohr, 19 N.W.2d 880, 247 Wis. 520—Potts v. Farmers' Mut. Automobile Ins. Co., 289 N.W. 606, 233 Wis. 313.

Possibility of amending pleadings

Facts in affidavits and record control and if pleadings can be amended to include such facts or defenses they must be considered.—Benjamin v. Arundel Corp., 59 N.Y.S.2d 437.

On issues of good faith, intent, and purpose, the bald declaration of a party by affidavit is insufficient in the face of a pleaded denial to resolve the issue.—Hatfield v. Barnes, Colo., 168 P.2d 552.

Special meaning of words

Whether the term "existing violations" had by custom or usage acquired a special meaning presented a question of fact which could not

for summary judgment are mandatory, failure of either party to comply therewith will preclude the granting of the motion or the substantiation of a claim of defense.[38]

The statements made, whether adduced in support of, or in opposition to, the motion for summary judgment, must be statements of fact,[39] and not mere conclusions, opinions, or beliefs.[40] The affidavits must be made by affiants who have personal knowledge of the facts stated,[41] and must state only facts to which affiant could testify, if called as a witness on the trial.[42] The affidavits should set

be disposed of on affidavits on motion for summary judgment.—Horby Realty Corp. v. Yarmouth Land Corp., 62 N.Y.S.2d 173.

38. Mich.—Gloeser v. Moore, 278 N. W. 781, 284 Mich. 106.

39. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Oil Well Supply Co. of California, 55 P.2d 885, 12 Cal.App.2d 265.
Ill.—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.
N.Y.—Maurice O'Meara Co. v. National Park Bank of New York, 146 N.E. 636, 239 N.Y. 386, 39 A. L.R. 747, reargument denied 148 N.E. 725, 240 N.Y. 607—Smith v. McCullaugh, 255 N.Y.S. 497, 234 App.Div. 490—Stone v. Ætna Life Ins. Co., 31 N.Y.S.2d 615, 178 Misc. 23.
R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.

Frivolous proof; innuendo

Frivolous, sham, and transparently insufficient proof, or mere denials or statements of innuendo or suspicion, will not suffice.—Diamond v. Davis, 38 N.Y.S.2d 103, affirmed 39 N.Y.S.2d 412, first case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, first case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, first case, 292 N.Y. 552.

40. Cal.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745—Cowan Oil & Refining Co. v. Miley Petroleum Corporation, 295 P. 504, 112 Cal.App.Supp. 773.
Ill.—Willadsen v. City of East Peoria, 47 N.E.2d 136, 317 Ill.App. 541—Soelke v. Chicago Business Men's Racing Ass'n, 41 N.E.2d 232, 314 Ill.App. 336—Roberts v. Sauerman Bros., 20 N.E.2d 849, 300 Ill. App. 213.
Mich.—Terre Haute Brewing Co. v. Goldberg, 289 N.W. 192, 291 Mich. 401—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106—Gloeser v. Moore, 278 N.W. 72, 283 Mich. 425—People's Wayne County Bank v. Wolverine Box Co., 230 N.W. 170, 250 Mich. 273, 69 A.L.R. 1024—Warren Webster & Co. v. Pelavin, 216 N.W. 430, 241 Mich. 19.
N.Y.—Irving Trust Co. v. Orvis, 248 N.Y.S. 771, 139 Misc. 670—Ralph Klonick Corporation v. Haas, 240 N.Y.S. 643, 136 Misc. 286.

Failure of consideration

A mere statement in affidavit that there was a "failure of consideration" is not sufficient to create a triable issue of fact.—Bentley, Settle & Co. v. Brinkman, 42 N.Y.S.2d 194.

Hospital as charitable institution

Statement in affidavit of attorney that hospital was not a charitable institution was a conclusion of law, and was insufficient under statute requiring statement of evidentiary facts.—Schau v. Morgan, 6 N.W.2d 212, 241 Wis. 334.

Indebtedness

In action on common counts for amount owing plaintiff by defendant, statement in affidavit supporting plaintiff's motion for summary judgment that indebtedness was on account of purchase of merchandise and products mentioned in affidavit and agreements attached as exhibits was statement of fact, not conclusion.—Terre Haute Brewing Co. v. Goldberg, 289 N.W. 192, 291 Mich. 401.

41. U.S.—U. S. v. Stephanidis, D.C. N.Y., 41 F.2d 958.
Cal.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.
N.Y.—Curry v. Mackenzie, 146 N.E. 375, 239 N.Y. 267—Gnozzo v. Marine Trust Co. of Buffalo, 17 N.Y.S. 2d 168, 258 App.Div. 298, reargument denied Gnozzo v. Marine Trust Co., 18 N.Y.S.2d 752, 259 App.Div. 788, affirmed Gnozzo v. Marine Trust Co. of Buffalo, 29 N.E.2d 933, 284 N.Y. 617—City Sav. Bank of Brooklyn v. Torro, 300 N. Y.S. 1009, 253 App.Div. 748—Lonsky v. Bank of U. S., 221 N.Y.S. 177, 220 App.Div. 194—Krause v. Lehigh Valley Coal Co., 14 N.Y.S.2d 206, 172 Mich. 2—Hurwitz v. Corn Exchange Bank Trust Co., 253 N.Y. S. 851, 142 Misc. 398—Abercrombie & Fitch Co. v. Colford, 204 N.Y. S. 209, 123 Misc. 138—Hodson v. Metropolitan Life Ins. Co., 34 N.Y. S.2d 922.
R.I.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201.

Information derived from others

Affidavits by attorney and a bookkeeper, based solely on information and belief derived from discussions with agent and employee of plaintiff, were not made by persons having knowledge of the facts.—Miller v. Wightman, 43 N.Y.S.2d 681.

Affiants held to have personal knowledge

Ill.—National Builders Bank of Chicago v. Simons, 31 N.E.2d 274, 307 Ill.App. 562.
N.Y.—Royal Indemnity Co. v. Ginsberg, 284 N.Y.S. 551, 157 Misc. 507.

Admission of elements of cause of action

Motion for summary judgment would be granted where defendant admitted all elements of plaintiff's cause of action, notwithstanding moving affidavit was made by attorney and not by plaintiff or some person having knowledge of facts.—Johnson v. Briggs, Inc., 12 N.Y.S.2d 60.

42. Cal.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.
Ill.—Soelke v. Chicago Business Men's Racing Ass'n, 41 N.E.2d 232, 314 Ill.App. 336—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.
Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106—Gloeser v. Moore, 278 N.W. 72, 283 Mich. 425—Birgbauer v. Ætna Casualty & Surety Co. of Hartford, Conn., 232 N.W. 403, 251 Mich. 614—La Prise v. Smith, 208 N.W. 449, 234 Mich. 371.
R.I.—Henry W. Cooke Co. v. Sheldon, 164 A. 327, 53 R.I. 101—Rosenthal v. Halsband, 152 A. 320, 51 R.I. 119.
Wis.—Juergens v. Ritter, 279 N.W. 51, 227 Wis. 480.

Affidavit of felon

In a jurisdiction in which a felon is a competent witness on a trial, a motion for summary judgment may be predicated on the affidavit of a felon, and the test to be applied to such affidavit is the test to be applied to the affidavit of any witness.—William J. Conners Car Co. v. Manufacturers' & Traders' Nat. Bank of Buffalo, 209 N.Y.S. 406, 124 Misc. 584, affirmed 210 N.Y.S. 939, 214 App. Div. 811.

Conjectural allegations

Ill.—Fisher v. Hargrave, 48 N.E.2d 966, 318 Ill.App. 510.

Hearsay

Cal.—Shea v. Leonis, 84 P.2d 277, 29 Cal.App.2d 184—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.
R.I.—Rosenthal v. Halsband, 152 A. 320, 51 R.I. 119.

forth evidentiary[43] and not ultimate[44] facts, and should set forth the facts with particularity,[45] mere general averments being insufficient.[46] However, the affidavit need not be composed wholly of strictly evidentiary facts,[47] and an affiant is not required to aver as a fact that which is not a fact, but an opinion.[48]

Burden of proof. Provisions authorizing summary judgment do not shift the burden of proof.[49] Where the motion for summary judgment is made by plaintiff, he is required to sustain the burden of submitting convincing proof, by affidavit or otherwise, that the answer is sham, and that there is no real defense or real issue to be determined.[50] On a motion by defendant for summary judgment the burden is on defendant to establish his defense by proof of the facts pleaded.[51]

Documentary evidence; attachment of papers. Under some court rules, where a sufficient defense is founded on facts established prima facie by documentary or official record, defendant may have summary judgment in his favor unless plaintiff shows facts sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record;[52] and the defense

Violation of parol evidence rule

(1) Defendant's affidavit raising defense obnoxious to parol evidence rule was insufficient.—Power v. Allied Asphalt Products Corporation, 159 A. 251, 162 Md. 175.

(2) An affidavit stating the contents of certain writings by giving their purport but not their words is not sufficient, since as a witness the affiant could not competently give such testimony, over proper objection, there being no showing of loss of the writings or other circumstances which would excuse production of the originals.—Gardenswartz v. Equitable Life Assur. Soc. of the U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.

(3) Introduction contained in affidavits in support of motion for summary judgment, which stated facts leading up to preparation of original order, did not render affidavits inadmissible as an attempt to vary terms of written contract between parties, but introduction could be treated as mere surplusage.—Lowenstern Bros. v. Marks Credit Clothing, 48 N.E.2d 729, 319 Ill.App. 71.

43. Cal.—Kelly v. Liddicoat, 96 P. 2d 186, 35 Cal.App.2d 559—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal. App.2d Supp. 745.
Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.
N.Y.—Hopfan v. Knauth, 282 N.Y.S. 219, 156 Misc. 545—Diamond v. Davis, 38 N.Y.S.2d 103, affirmed 39 N.Y.S.2d 412, first case, 265 App.Div. 919, appeal denied 41 N.Y. S.2d 191, first case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, first case, 292 N.Y. 552.
Wis.—Schau v. Morgan, 6 N.W.2d 212, 241 Wis. 334.

Naked assertions, unsupported by evidentiary facts, and unaccompanied by available documentary proof, are insufficient.—Hopfan v. Knauth, 282 N.Y.S. 219, 156 Misc. 545.

44. Cal.—Kelly v. Liddicoat, 96 P. 2d 186, 35 Cal.App.2d 559—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal. App.2d Supp. 745.

45. Cal.—Shea v. Leonis, 84 P.2d 277, 29 Cal.App.2d 184—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal. App.2d Supp. 745—Cowan Oil & Refining Co. v. Miley Petroleum Corporation, 295 P. 504, 112 Cal. App.Supp. 773.

46. Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 925 Mass. 597, 107 A.L.R. 1215.
N.Y.—Dodwell & Co. v. Silverman, 254 N.Y.S. 746, 234 App.Div. 362—Blanchard Press v. Aerosphere, Inc., 51 N.Y.S.2d 715, affirmed 56 N.Y.S.2d 415, 269 App.Div. 826.

47. Cal.—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal. 2d 553—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App. 2d 609.

Conclusions

Where affiant was competent to testify to all the contents of his affidavit, conclusions contained in affidavit would not vitiate the particularities or nullify their force.—McComsey v. Leaf, 97 P.2d 242, 36 Cal.App.2d 132.

48. Mich.—Baxter v. Szucs, 237 N. W. 666, 248 Mich. 672.

Value of services

Attorney was held not entitled to summary judgment for services, where defendant filed affidavit denying that services were worth more than amount paid.—Baxter v. Szucs, 227 N.W. 666, 248 Mich. 672.

49. N.Y.—Lonsky v. Bank of U. S., 221 N.Y.S. 177, 220 App.Div. 194—Hurwitz v. Corn Exchange Bank Trust Co., 253 N.Y.S. 851, 142 Misc. 398.

50. N.Y.—Stuyvesant Credit Union v. Manufacturers' Trust Co., 267 N.Y.S. 302, 239 App.Div. 187—Tidewater Oil Sales Corporation v. Pierce, 210 N.Y.S. 759, 213 App. Div. 796—Wm. H. Frear & Co. v. Bailey, 214 N.Y.S. 675, 127 Misc. 79—Nester v. Nester, 19 N.Y.S.2d 426, reversed on other grounds 22 N.Y.S.2d 119, 259 App.Div. 1065.
"The burden of proof is upon the plaintiff to prove the cause of action, and to show that the defense is interposed solely for the purpose of delay."—State Bank v. Mackstein, 205 N.Y.S. 290, 291, 123 Misc. 416.

51. N.Y.—Dumbadze v. Agency of Canadian Car & Foundry Co., 38 N.Y.S.2d 991, affirmed Gurge v. Agency of Canadian Car & Foundry Co., 45 N.Y.S.2d 955, 267 App. Div. 782, appeal denied In re Dumbadze's Estate, 47 N.Y.S.2d 815, 267 App.Div. 878.

52. N.Y.—Gnozzo v. Marine Trust Co. of Buffalo, 17 N.Y.S.2d 168, 258 App.Div. 298, reargument denied Gnozzo v. Marine Trust Co., 18 N.Y.S.2d 752, 259 App.Div. 788, affirmed Gnozzo v. Marine Trust Co. of Buffalo, 29 N.E.2d 933, 284 N.Y. 617—White v. Merchants Despatch Transp. Co., 10 N.Y.S.2d 962, 256 App.Div. 1044—Wels v. Rubin, 5 N.Y.S.2d 350, 254 App.Div. 484, reversed on other grounds 20 N.E. 2d 737, 280 N.Y. 233—Algiere v. Cosmopolitan Shipping Co., 56 N. Y.S.2d 361, 185 Misc. 271—Hyde v. Clark, 39 N.Y.S.2d 229, 179 Misc. 414—Beisheim v. People, 39 N.Y. S.2d 333—Diamond v. Davis, 38 N. Y.S.2d 103, affirmed 39 N.Y.S.2d 412, first case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, first case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, first case, 292 N. Y. 552—Diamond v. Davis, 38 N. Y.S.2d 93, affirmed 39 N.Y.S.2d 412, second case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, second case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, second case, 292 N.Y. 554.

When documentary evidence required

Under some rules, where case is one of those enumerated in specified subdivisions, affidavits may be used on motion for summary judgment, but otherwise the defense must be established by documentary evidence.—Dumont v. Raymond, 49 N.Y.

relied on need not be an affirmative defense.[53] Under some rules of this nature there is nothing which specifies or limits the form or character of the documentary evidence or official record on which the motion for summary judgment by a defendant is to be based;[54] the documentary proof required under these provisions is not limited to that which prima facie, completely, and conclusively establishes the defense, without resort to extrinsic or fragmentary connecting links of proof supplied by affidavit or scattered entries or memoranda.[55] Defendant need not present all the official record, and if he submits merely part of the record it is within the province of plaintiff to submit the remainder if in his judgment he can thereby show facts sufficient to raise an issue as to the official record.[56] Under provisions of this nature the defense must be established prima facie by documentary evidence or official record,[57] and summary judgment will be denied where plaintiff's showing of the facts is sufficient to raise an issue with respect to the verity and conclusiveness of the documentary evidence or official records adduced by defendant.[58]

Some court rules require the attachment of copies of all papers on which a party relies on a motion for summary judgment,[59] but the failure to attach all such papers has been held not to be fatal to a granting of the motion where copies of the exhibits were either attached to the complaint, or were contained in the files in the clerk's office, or were available to defendant at any time.[60]

Production of witnesses for oral examination. Under some statutes and rules the court may, in its

S.2d 865, affirmed 56 N.Y.S.2d 592, 269 App.Div. 592.

53. N.Y.—Diamond v. Davis, 38 N.Y.S.2d 93, affirmed 39 N.Y.S.2d 412, second case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, second case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, second case, 292 N.Y. 554.

54. N.Y.—Levine v. Behn, 8 N.Y.S.2d 58, 169 Misc. 601, affirmed 12 N.Y.S.2d 190, 257 App.Div. 156, reversed on other grounds 25 N.E.2d 871, 282 N.Y. 120—Diamond v. Davis, 38 N.Y.S.2d 103, affirmed 39 N.Y.S.2d 412, first case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, first case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, first case, 292 N.Y. 552.

What constitutes documentary evidence or official records

(1) In stockholders' derivative action against corporate officers and directors invoices and petty cash slips, and excerpts from, and photostatic copies of, corporate books and records constituted "documentary evidence" which could be considered on defendants' motion for summary judgment.—Dumont v. Raymond, 49 N.Y.S.2d 865, affirmed 56 N.Y.S.2d 592, 269 App.Div. 592.

(2) In such an action, however, affidavits vouching for purity of defendants' motives and seeking to justify acts criticized by plaintiffs, do not constitute "documentary evidence" within the rule.—Dumont v. Raymond, supra.

(3) In action for injuries sustained as result of defendant's alleged negligent construction of machine, affidavits of defendant's vice president and of defendant's buyer and copy of purchasing agreement indicating that machine was purchased from a third person and not manufactured by defendant were not "documentary evidence" or "official records" as contemplated by rule.—Dewar v. Sears Roebuck & Co., 49 N.Y.S.2d 404.

Competency or admissibility

Where affidavits and certificates were supplied to plaintiff by defendant at plaintiff's request, plaintiff could not object to them on ground of competency or admissibility.—Diamond v. Davis, 38 N.Y.S.2d 93, affirmed 39 N.Y.S.2d 412, second case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, second case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, second case, 292 N.Y. 554.

55. N.Y.—Chance v. Guaranty Trust Co. of New York, 20 N.Y.S.2d 635, 173 Misc. 754, affirmed 13 N.Y.S.2d 785, 257 App.Div. 1006, affirmed 26 N.E.2d 802, 282 N.Y. 656.

56. N.Y.—Wels v. Rubin, 5 N.Y.S.2d 350, 254 App.Div. 484, reversed on other grounds 20 N.E.2d 737, 280 N.Y. 233.

57. N.Y.—Diamond v. Davis, 38 N.Y.S.2d 93, affirmed 39 N.Y.S.2d 412, second case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, second case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, second case, 292 N.Y. 554.

58. N.Y.—Davignon v. Raquette River Paper Co., 56 N.Y.S.2d 249, 269 App.Div. 889, appeal denied 57 N.Y.S.2d 653, 269 App.Div. 913, appeal dismissed 64 N.E.2d 279, 295 N.Y. 569—Grunder v. Schwab, 43 N.Y.S.2d 931, 181 Misc. 488, modified on other grounds 46 N.Y.S.2d 715, 267 App.Div. 887, appeal denied 48 N.Y.S.2d 330, 267 App.Div. 946—Hyde v. Clark, 39 N.Y.S.2d 229, 179 Misc. 414—Conyne v. McGibbon, 37 N.Y.S.2d 590, 179 Misc. 54, transferred, see 39 N.Y.S.2d 609, 265 App.Div. 976, affirmed 41 N.Y.S.2d 189, 266 App.Div. 711—Dewar v. Sears Roebuck & Co., 49 N.Y.S.2d 404—Dumbadze v. Agency of Canadian Car & Foundry Co., 38 N.Y.S.2d 991, affirmed Gurge v. Agency of Canadian Car & Foundry Co., 45 N.Y.S.2d 955, 267 App.Div. 782, appeal denied In re Dumbadze's Estate, 47 N.Y.S.2d 315, 267 App.Div. 878.

59. Ill.—Otis Elevator Co. v. American Surety Co. of New York, 41 N.E.2d 987, 314 Ill.App. 479.

Original or copy

In the absence of circumstances showing loss of a writing or other circumstances which would excuse production of the original, an affidavit, to be sufficient as to a writing, must have attached to it the original of such writing or, possibly, a verified or certified copy.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.

Settlement agreement

If settlement agreement, alleged as defense to action on note, was in writing, such writing should have been produced in evidence to defeat motion for summary judgment.—Di Roma v. Chambers Drug Store, 28 N.Y.S.2d 170, 262 App.Div. 856.

60. Ill.—Otis Elevator Co. v. American Surety Co. of New York, 41 N.E.2d 987, 314 Ill.App. 479.

Vouchers

In action under Speedy Judgment Act, it is necessary that plaintiff file any vouchers of his claim at time he institutes his suit, and vouchers must show on their face a prima facie case of defendant's indebtedness to plaintiff for certain amount or an amount which they furnish the means of making certain.—Katski v. Triplett, 30 A.2d 764, 181 Md. 545.

discretion, require production of witnesses for oral examination in open court.[61]

b. In Support of Motion

In order to justify the granting of a motion for summary judgment in favor of the plaintiff, the affidavits or other proof adduced in support of the motion must verify the cause of action and negative the existence of a defense, or, where the motion is made by the defendant, must establish the sufficiency of his defense. They must, in addition, contain any formal statements required by statute, such as a statement of an affiant's belief that there is no defense to the action, or, where the motion is by the defendant, that there is no merit to the action.

The affidavits of the moving party must contain facts sufficient to entitle him to judgment in his favor,[62] and are to be strictly construed.[63] They must comply with the statutory requirements and the rules of court[64] as to the matters required to be stated[65] and as to service on the adverse party.[66]

Ordinarily, in order that plaintiff may be entitled to summary judgment on motion, he must file, in support thereof, an affidavit or other proof which fully and clearly verifies or states the facts which constitute his cause of action against defendant, and negatives the existence of a defense;[67] and, if plaintiff's affidavits are insufficient to support his cause of action, the motion should be denied.[68] It

61. Mich.—Schempf v. New Era Life Ass'n, 234 N.W. 177, 253 Mich. 152.

Refusal to take testimony

Under particular circumstances it was held that the court abused its discretion in refusing to take the testimony of witnesses offered for the purpose of supplying the insufficiencies of affidavits.—Schempf v. New Era Life Ass'n, supra.

62. Cal.—Hardy v. Hardy, 143 P.2d 701, 23 Cal.2d 244—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609.

Proof rather than mere presumption is necessary to warrant the granting of summary judgment.—Romine v. Barnaby Agency, 227 N.Y. S. 235, 131 Misc. 696.

Method of testing sufficiency

Under some statutes a motion to strike an affidavit for summary judgment from the files is a proper method of testing the sufficiency of the affidavit.—People, for Use of Dyer, v. Sawyer, 2 N.E.2d 343, 284 Ill.App. 463.

63. Cal.—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal. 2d 553—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609—Grady v. Easley, 114 P.2d 635, 45 Cal.App.2d 632.

D.C.—Wyatt v. Madden, 32 F.2d 838, 59 App.D.C. 38—Gleason v. Hoeke, 5 App.D.C. 1.

Ill.—Molner v. Schaefle, 58 N.E.2d 744, 324 Ill.App. 589—Security Discount Corporation v. Jackson, 51 N.E.2d 618, 320 Ill.App. 440—C. I. T. Corporation v. Smith, 48 N.E.2d 735, 318 Ill.App. 642—Fellheimer v. Wess, 45 N.E.2d 89, 316 Ill.App. 449—Shaw v. National Life Co., 42 N.E.2d 885, 315 Ill.App. 210—Soelke v. Chicago Business Men's Racing Ass'n, 41 N.E.2d 232, 314 Ill. App. 336—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.

64. Md.—Mueller v. Michaels, 60 A. 485, 101 Md. 188.

N.Y.—William J. Conners Car Co. v. Manufacturers' & Traders' Nat. Bank of Buffalo, 209 N.Y.S. 406, 124 Misc. 584, affirmed 210 N.Y.S. 939, 214 App.Div. 811.

65. N.Y.—Macomber v. Wilkinson, 6 N.Y.S.2d 608.

34 C.J. p 205 note 53.

Knowledge of affiant

Plaintiff's affidavit that he could swear to the facts of his own knowledge, but without doing so, is insufficient to support his motion for summary judgment.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201.

Statement as constituting "account"

Where plaintiffs intending to bring suit under the Speedy Judgment Act filed with their declaration a statement under affidavit claiming that defendants were indebted to them in a specified sum, but statement did not mention any items of merchandise alleged to have been sold to the defendants, or a copy of agreements subsequently relied on wherein defendants promised to be liable for merchandise purchased, the statement did not constitute an "account" within meaning of the statute.—Katski v. Triplett, 30 A.2d 764, 181 Md. 545.

Capacity to institute action

In action under Speedy Judgment Act, affidavit of merit need not contain positive allegation of plaintiff's capacity to institute action.—Power v. Allied Asphalt Products Corporation, 159 A. 251, 162 Md. 175.

66. N.Y.—Neff v. Palmer, 227 N.Y. S. 612, 131 Misc. 671.

34 C.J. p 205 note 55.

67. Ill.—People, for Use of Dyer, v. Sawyer, 2 N.E.2d 343, 284 Ill.App. 463.

Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106.

N.Y.—Barrett v. Jacobs, 175 N.E. 275, 255 N.Y. 520—Curry v. Mackenzie, 146 N.E. 375, 239 N.Y. 267—Maxrice Realty Corporation v. B/G Sandwich Shops, 267 N.Y.S. 863, 239 App.Div. 472—Hallgarten v. Wolkenstein, 198 N.Y.S. 485, 204 App.Div. 487—Union Trust Co. of Rochester v. Mayer, 270 N.Y.S. 355, 150 Misc. 375, affirmed in part and reversed in part on other grounds 273 N.Y.S. 438, 242 App. Div. 671, affirmed 285 N.Y.S. 1046, 246 App.Div. 685—First Trust Co. of Albany v. Dumary, 23 N.Y.S.2d 532.

Pa.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Stern, 14 Pa.Dist. & Co. 188.

R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.

34 C.J. p 205 note 49.

Execution of contract

Plaintiff seeking summary judgment for amounts due under assigned land contract must first prove that such contract was entered into by defendants.—MacClure v. Noble, 244 N.W. 174, 259 Mich. 601.

Effect of tender

Plaintiff's application for partial judgment must be supported by proof that part of plaintiff's claim is admitted, and defendant's tender and payment into court of part of amount claimed does not itself furnish such proof.—Fleder v. Itkin, 60 N.E.2d 753, 294 N.Y. 77.

Computation of amount claimed

Where declaration is based on common counts, plaintiff's affidavit, alleging defendant's indebtedness to plaintiff in certain amount, need not state manner in which such amount was computed.—Terre Haute Brewing Co. v. Goldberg, 289 N.W. 192, 291 Mich. 401.

68. Del.—Lamson v. Habbart, 43 A. 2d 249.

34 C.J. p 205 note 57.

Bad count

Under statutes whereby the description of plaintiff's cause of action in his affidavit becomes a part of each count in his declaration, the fact that one of the counts is bad in law does not vitiate the statement of the cause of action contained in the affidavit which is documented, clear, distinct, and precise; and a defendant who has failed to demur or object to a count cannot reach the defect through an objection to the affidavit.—Power v. Allied As-

has been held, however, that summary judgment will not be denied because of the insufficiency of plaintiff's affidavit where the complaint is sufficient and its essential facts are admitted.[69] Plaintiff's affidavits must do more than merely set forth those allegations which would be required by a pleading to constitute a cause of action;[70] they should set forth the evidentiary facts, from the existence of which the conclusion of law must follow that plaintiff's claim is valid and enforceable.[71] Although plaintiff cannot convert his affidavit into a pleading,[72] and, by anticipating therein a defense, require defendant to negative or defend against such new matter,[73] it has been held that if his complaint is merely defective it may be deemed amended for the purpose of the motion where the affidavits filed in support of the motion contain facts which cure the defects.[74]

On a motion by defendant for summary judgment dismissing the complaint, his affidavits must set forth evidentiary facts showing the sufficiency of his defense.[75] He must make out a clear case on undisputed material facts presented on the record.[76] However, where the affidavits or other proofs do establish that the action has no merit and that there is no triable issue, a motion by defendant for summary judgment in his favor is properly granted.[77]

Belief as to merit of action or defense. It is frequently required by the statutes or rules of court that, on a motion by plaintiff for summary judgment, the affidavits submitted in support of the motion state the belief of one having knowledge of the facts that there is no defense to the action.[78] The fact, however, that none of the affidavits presented by plaintiff contains the averment that there is no defense to the action is not fatal to the legal efficacy of the affidavits, where affiants have used language which is equivalent in sense and meaning to the words employed by the statute.[79]

Affidavits of a defendant submitted in support of a motion for summary judgment dismissing the complaint are required by some provisions to state his belief that the action has no merit.[80]

phalt Products Corporation, 159 A. 251, 162 Md. 175.

69. Ill.—People ex rel. Ames v. Marx, 18 N.E.2d 915, 370 Ill. 264.

70. N.Y.—Sher v. Rodkin, 198 N.Y.S. 597.

Verification of cause of action

The statutory requirement of an affidavit "verifying the cause of action" means an affidavit which will enable the judge to determine whether plaintiff has in fact a cause of action which cannot be controverted on a trial.—Sher v. Rodkin, supra.

71. Ill.—Wainscott v. Penikoff, 4 N.E.2d 511, 287 Ill.App. 78.
N.Y.—Schaffer Stores Co. v. Sweet, 228 N.Y.S. 599, 132 Misc. 38.

Foundation of proceeding

Plaintiff's affidavit in aid of motion for summary judgment is the foundation and not a mere incident of such proceedings, and facts within personal knowledge of affiant must be set out sufficiently to apprise the court with reasonable certainty of the truth of plaintiff's claim.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201.

Originals or copies of instruments involved

(1) Papers on which plaintiff's motion for summary judgment was granted were held defective where they did not contain a copy of alleged contract and note sued on.—La Salle Extension University v. Mandel, 27 N.Y.S.2d 625.

(2) Insured's affidavit in support of motion for summary judgment in action on disability policies, which affidavit stated provisions of policies by their legal effect only without any showing to excuse production of originals, was insufficient, if any showing of provisions of policies was required; but in the particular case insured's affidavit was held not insufficient where affidavits set forth provisions of policies by their legal effect and insurer's answer set forth exact language of policies and denied execution thereof in any other terms, and there was no issue in pleading as to issuance of policies or their terms.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.

72. D.C.—Booth v. Arnold, 27 App. D.C. 287.

73. D.C.—Booth v. Arnold, supra.

74. U.S.—Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey, C.C.A.N.Y., 104 F.2d 659.
N.Y.—McAnsh v. Blauner, 226 N.Y.S. 379, 222 App.Div. 381, affirmed 162 N.E. 515, 248 N.Y. 537—Florida Land Holding Corporation v. Burke, 238 N.Y.S. 1, 135 Misc. 341, affirmed 243 N.Y.S. 799, 229 App. Div. 853.

75. N.Y.—Krause v. Lehigh Valley Coal Co., 14 N.Y.S.2d 206, 172 Misc. 2.
Wis.—Fuller v. General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 272 N.W. 839, 224 Wis. 603.

76. N.Y.—Gorman v. Baltimore Drive It Yourself Co., 46 N.Y.S.2d 530.

77. N.Y.—Luotto v. Field, 50 N.Y.S. 2d 849, 268 App.Div. 227, reversed on other grounds 63 N.E.2d 58, 294 N.Y. 460—Pribyl v. Van Loan & Co., 26 N.Y.S.2d 1, 261 App.Div. 503, reargument denied 27 N.Y.S. 2d 992, 262 App.Div. 711, affirmed 40 N.E.2d 36, 287 N.Y. 749—Colwell v. Adelphi College, 25 N.Y.S.2d 429, 261 App.Div. 933, affirmed 42 N.E. 2d 599, 288 N.Y. 585—Camp-Of-The-Pines v. New York Times Co., 53 N.Y.S.2d 475, 184 Misc. 389—Eichler v. Furness, Withy & Co., 6 N.Y.S.2d 893, 169 Misc. 22.
Wis.—Binsfeld v. Home Mut. Ins. Co., 15 N.W.2d 828, 245 Wis. 552—Potts v. Farmers' Mut. Automobile Ins. Co., 289 N.W. 606, 233 Wis. 313.

78. N.J.—Katz v. Inglis, 160 A. 314, 109 N.J.Law 54.
N.Y.—Freund v. James McCullagh, Inc., 50 N.Y.S.2d 740, 268 App.Div. 875—Universal Credit Co. v. Uggla, 290 N.Y.S. 365, 248 App.Div. 848, motion denied 290 N.Y.S. 997, 248 App.Div. 529, amended on other grounds 298 N.Y.S. 158, 251 App. Div. 786—Krause v. Lehigh Valley Coal Co., 14 N.Y.S.2d 206, 172 Misc. 2—Baronberg v. Humphreys, 1 N.Y.S.2d 415, 166 Misc. 100—Bevelyn Realty Corporation v. Brooklyn Const. Co., 249 N.Y.S. 41, 140 Misc. 74—Tompkins Haulage Corporation v. Roberts, 249 N.Y.S. 22, 140 Misc. 80—La Pointe v. Wilson, 61 N.Y.S. 2d 64.
R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.

79. N.J.—Fidelity Union Trust Co. v. Decker Bldg. Material Co., 148 A. 717, 106 N.J.Law 132.

80. N.Y.—Krause v. Lehigh Valley

By whom made. Plaintiff's affidavit may be made either by plaintiff himself[81] or by his agent;[82] and if it is made by an agent it is not necessary that it should show why plaintiff did not execute it[83] nor need it expressly appear whether the agent's knowledge is personal or is merely based on information and belief.[84]

Amendment of affidavit. Whether or not plaintiff should be permitted to amend his affidavit of merit is a matter within the sound discretion of the court.[85]

Special proceedings for judgment by notice of motion. Under statutes providing for special proceedings for judgment by notice of motion, discussed generally supra § 222, an affidavit may be used to supplement the notice of motion.[86] Such affidavit should refer to the notice and the demand or demands therein stated,[87] and must comply with statutory requirements as to the time of making[88] and as to its service on defendant.[89] The use of exhibits in a notice of motion for judgment proceeding has been held improper.[90]

c. In Opposition to Motion

After the plaintiff makes out a prima facie case for summary judgment by his proofs, the defendant by affidavits or other proof must show a bona fide defense, although in this he is aided by a liberal construction of his affidavits, and the acceptance as true of the statements therein.

Defendant is entitled to an opportunity to interpose an affidavit in response to plaintiff's proof, and to have the affidavit weighed as against such proof.[91] Indeed, where plaintiff has shown sufficient facts to make out his case, if defendant contests the granting of the motion and wishes to be entitled to defend, he must establish by affidavit or other proof such facts as show that he has a bona fide defense to the action,[92] and the mere filing of an answer containing denials or raising an issue of fact is not sufficient.[93] Where defendant does not deny the allegations of the affidavit presented by

Coal Co., 14 N.Y.S.2d 206, 172 Misc. 2.
Wis.—Fuller v. General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 272 N.W. 839, 224 Wis. 603.

Basis of belief
A provision in summary judgment statute requiring party moving for summary judgment to make a verified statement that he believes that the action has no merit does not require the moving party to state the basis for his belief, or that he had been so advised by an attorney, and does not require an affidavit by an attorney to that effect.—Tregloan v. Hayden, 282 N.W. 698, 229 Wis. 500.

81. D.C.—Newman v. Goddard, 12 App.D.C. 404.
34 C.J. p 205 note 63.

82. D.C.—Newman v. Goddard, supra.
34 C.J. p 205 note 64.

Failure to allege agency
Affidavit of merit was not defective for affiant's failure to allege his agency for plaintiff.—Power v. Allied Asphalt Products Corporation, 159 A. 251, 162 Md. 175.

Where plaintiff was corporation, the affidavit on which its motion for summary judgment was based was not improperly received because made by plaintiff's attorneys instead of by plaintiff.—Monroe County Finance Co. v. Thomas, 11 N.W.2d 190, 243 Wis. 568.

83. D.C.—Newman v. Goddard, 12 App.D.C. 404.

84. D.C.—Newman v. Goddard, supra.

85. D.C.—McReynolds v. Mortgage & Acceptance Corporation, 18 F.2d 313, 56 App.D.C. 342.

86. W.Va.—Mountain State Water Co. v. Town of Kingwood, 1 S.E.2d 395, 121 W.Va. 66—People's State Bank of Crown Point, Ind., v. Jeffries, 129 S.E. 462, 99 W.Va. 399.

Cause of action
Under some statutes, the affidavit filed with a notice of motion for judgment need not set out a cause of action stated in the notice, but is sufficient if it states that there is, as affiant verily believes, due and unpaid, from defendant to plaintiff, on demand or demands stated in the notice, including principal and interest, after deducting all payments, credits, and set-offs made by defendant, or of which, he is entitled, a sum certain, named.—Citizens' Nat. Bank v. Dixon, 117 S.E. 685, 94 W. Va. 21.

87. W.Va.—Rogers v. Wolf, 139 S.E. 702, 104 W.Va. 206.
34 C.J. p 205 note 51.

88. W.Va. — Landsman-Hirscheimer Co. v. Radwan, 111 S.E. 507, 90 W. Va. 590.

89. W.Va. — Landsman-Hirscheimer Co. v. Radwan, supra.
34 C.J. p 205 note 55 [a].

90. W.Va.—City of Beckley v. Craighead, 24 S.E.2d 908, 125 W. Va. 484, overruling Mountain State Water Co. v. Town of Kingwood, 1 S.E.2d 395, 121 W.Va. 66.

91. U.S.—Massee & Felton Lumber Co. v. Benenson, D.C.N.Y., 23 F.2d 107.
N.Y.—Federal Deposit Ins. Corporation v. Fisher, 16 N.Y.S.2d 221, 258 App.Div. 900.

Claim of surprise
Plaintiff has been held not entitled to claim surprise because of a statement made in the answering affidavit where a similar statement was contained in the opposing affidavit submitted on a prior motion for summary judgment.—Doniger v. Lasoff, 211 N.Y.S. 486, 125 Misc. 838.

92. Cal.—Kelly v. Liddicoat, 96 P.2d 136, 35 Cal.App.2d 559—Shea v. Leonis, 84 P.2d 277, 29 Cal.App. 2d 184.
Ill.—Killian v. Welfare Engineering Co., 66 N.E.2d 305, 328 Ill.App. 375—Great Atlantic & Pacific Tea Co. v. Town of Bremen, 64 N.E.2d 220, 327 Ill.App. 393.
Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106—Gloeser v. Moore, 278 N.W. 72, 283 Mich. 425.
N.J.—Pusatere v. New Amsterdam Casualty Co., 184 A. 513, 116 N.J. Law 359.
N.Y.—Security Finance Co. v. Stuart, 224 N.Y.S. 257, 130 Misc. 538—Henderson v. Hildreth Varnish Co., 276 N.Y.S. 414.
34 C.J. p 206 note 75.

Statements by defendants' attorney on information and belief, without stating basis of belief, are insufficient to defeat motion for summary judgment.—Seventh Nat. Bank of New York v. Cromwell, 226 N.Y.S. 721, 131 Misc. 276.

93. Ark.—Holland v. Wait, 86 S.W. 2d 415, 191 Ark. 405.
Ill.—Killian v. Welfare Engineering Co., 66 N.E.2d 305, 328 Ill.App. 375.
N.Y.—Saunders v. Delario, 238 N.Y.S. 337, 135 Misc. 455—Rodger v. Bliss, 223 N.Y.S. 401, 130 Misc. 168—William J. Conners Car Co. v.

plaintiff in support of his motion, the allegations of that affidavit are taken as true.[94]

Defendant, however, is under no duty to challenge the claim of plaintiff or to submit affidavits or proof showing a meritorious defense, unless the affidavits or other proof in support of the motion show in the first instance a good cause of action in plaintiff and that the defense is without merit.[95] If plaintiff's complaint[96] or affidavits or proof[97] are insufficient to justify summary judgment the motion must be denied although defendant fails to file an opposing affidavit or to show any facts sufficient to entitle him to defend. Defendant is under no burden to show that affirmative allegations in the defense are not sham when the attack on such allegations is made solely on the ground that they are insufficient in law.[98]

Where the motion for summary judgment is made by defendant, the allegations of the complaint do not constitute proof on behalf of plaintiff of the facts therein alleged so as to defeat the motion.[99]

The general requirements of an affidavit filed in opposition to a motion for summary judgment are no different from those necessary in support of a summary judgment.[1] The averment of facts which create only an issue of law, rather than an issue of fact, will not defeat the motion.[2] To avert summary judgment in favor of plaintiff, the affidavits or other proof adduced by defendant must disclose a good defense or set out facts and circumstances sufficient to raise a triable issue of fact and to entitle defendant to defend.[3] Affidavits of defendant opposing a motion for summary judgment which

Manufacturers' & Traders' Nat. Bank of Buffalo, 209 N.Y.S. 406, 124 Misc. 584, affirmed 210 N.Y.S. 939, 214 App.Div. 811—Devlin v. New York Mut. Casualty Taxicab Ins. Co., 206 N.Y.S. 365, 123 Misc. 784, modified on other grounds 210 N.Y.S. 57, 213 App.Div. 152—Bentley, Settle & Co. v. Brinkman, 42 N.Y.S.2d 194—Allen Commercial Corporation v. Loucks, 41 N.Y.S.2d 106.

34 C.J. p 206 note 77.

The pleadings are not controlling, and if it appears from facts stated in affidavits or documents that the answer pleaded is sham, false, or frivolous, the answer will be disregarded.—Fellheimer v. Wess, 45 N.E. 2d 89, 316 Ill.App. 449—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.

94. Ill.—Killian v. Welfare Engineering Co., 66 N.E.2d 305, 328 Ill. App. 375.
N.Y.—Title Guarantee & Trust Co. v. Smith, 213 N.Y.S. 730, 215 App.Div. 448.
Wis.—Jefferson Gardens v. Terzan, 257 N.W. 154, 216 Wis. 230.

Presumption of inability to sustain defense

Absence of affidavit supporting answer raises presumption that defense cannot be sustained.—U. S. v. Fiedler, D.C.N.Y., 37 F.2d 578.

95. N.Y.—Cohen v. Metropolitan Casualty Ins. Co. of New York, 252 N.Y.S. 841, 233 App.Div. 840—Jacobs v. Korpus, 218 N.Y.S. 314, 128 Misc. 445—State Bank v. Mackstein, 205 N.Y.S. 290, 123 Misc. 416.

Admission of triable issue

Defendant's failure to submit affidavit showing facts entitling him to trial did not require court to grant plaintiff's motion for summary judgment where the moving affidavit admitted that the answer raised a triable issue.—Bergman v. Santamaria, 279 N.Y.S. 876, 244 App.Div. 819.

96. N.Y.—Gubin v. City of New York, 276 N.Y.S. 515, 154 Misc. 547.

97. Cal.—Gardenswartz, v. Equitable Life Assur. Soc. of U. S., 68 P. 2d 322, 23 Cal.App.2d Supp. 745.
Ill.—Fellheimer v. Wess, 45 N.E.2d 89, 316 Ill.App. 449—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill. App. 465.
N.Y.—Hurwitz v. Corn Exchange Bank Trust Co., 253 N.Y.S. 851, 142 Misc. 398—Romine v. Barnaby Agency, 227 N.Y.S. 235, 131 Misc. 696.

34 C.J. p 205 notes 58, 59.

Disclosure of issues in plaintiff's showing

Insufficiencies in affidavit of merits, filed by defendants in proceeding for summary judgment, are unimportant, where plaintiff's own showing discloses fact issues.—Caswell v. Stearns, 241 N.W. 165, 257 Mich. 461.

Duty to deny statement of ultimate fact

Defendant need not submit an opposing affidavit to an allegation which is at best a statement of an ultimate fact, rather than a statement of evidentiary facts which proves plaintiff's cause of action.—Kellog v. Berkshire Bldg. Corporation, 211 N.Y.S. 623, 125 Misc. 818.

Effect of admissions and documentary evidence

Summary judgment has been held proper, notwithstanding the insufficiency of plaintiff's affidavits standing alone, where such affidavits together with defendant's admissions in his pleadings and with other documentary evidence presented a case to which no valid defense was offered.—Pratt v. Miedema, 18 N.W.2d 279, 311 Mich. 64, certiorari denied 66 S.Ct. 49.

98. N.Y.—Hessian Hills Country Club v. Home Ins. Co., 186 N.E. 439, 262 N.Y. 189—Hessian Hills Country Club v. Hartford Fire Ins. Co., 186 N.E. 439, 262 N.Y. 189.

99. N.Y.—Pribyl v. Van Loan & Co., 26 N.Y.S.2d 1, 261 App.Div. 503, reargument denied 27 N.Y.S.2d 992, 262 App.Div. 711, affirmed 40 N.E. 2d 36, 287 N.Y. 749—Gnozzo v. Marine Trust Co. of Buffalo, 17 N.Y.S. 2d 168, 258 App.Div. 298, reargument denied Gnozzo v. Marine Trust Co., 18 N.Y.S.2d 752, 259 App.Div. 788, affirmed Gnozzo v. Marine Trust Co. of Buffalo, 29 N. E.2d 933, 284 N.Y. 617—Camp-Of-The-Pines v. New York Times Co., 53 N.Y.S.2d 475, 184 Misc. 389—Midland Union Groupe v. McMullen, 5 N.Y.S.2d 975, 167 Misc. 806.

1. Ill.—Fisher v. Hargrave, 48 N.E. 2d 966, 318 Ill.App. 510.

2. Cal.—Grady v. Easley, 114 P.2d 635, 45 Cal.App.2d 632—Bank of America Nat. Trust & Savings Ass'n v. Casady, 59 P.2d 444, 15 Cal.App.2d 163.
Pa.—Allen v. York Buffalo Motor Express, Com.Pl., 56 York Leg.Rec. 145.

Construction of contract

Court may enter summary judgment, where only issue involved is true construction of written contract, and opposing affidavits suggest no facts which might be proved to aid in interpretation.
U.S.—Sterling Homes Co. v. Stamford Water Co., C.C.A.N.Y., 79 F.2d 607.
Ill.—Spry v. Chicago Ry. Equipment Co., 19 N.E.2d 122, 298 Ill.App. 471.
R.I.—Sutter v. Harrington, 154 A. 657, 51 R.I. 325.

3. U.S.—U. S. Gypsum Co. v. Insur-

merely repeat the various denials contained in the answer,[4] or which merely deny in general terms plaintiff's right of action,[5] are insufficient. His affidavits must set forth evidentiary facts sufficient to show that he has a defense to plaintiff's claim or to some part thereof.[6] The facts must be set forth with such particularity that the court can determine whether there is a good and substantial defense,[7] general denials or expressions of defendant's belief, or conclusions and inferences of law, and the like, being insufficient.[8]

The affidavits of the party opposing the motion are to be liberally construed[9] and must be accepted as true for the purposes of the motion.[10] Plaintiff's motion for summary judgment will not be

ance Co. of North America, D.C. N.Y., 19 F.Supp. 767.

Ill.—Killian v. Welfare Engineering Co., 66 N.E.2d 305, 328 Ill.App. 375—Clark v. Lithuanian Roman Catholic Alliance of America, 64 N.E.2d 209, 327 Ill.App. 336—Employers' Liability Assur. Corporation v. A. A. Electric Co., 27 N.E.2d 321, 305 Ill.App. 209—Spry v. Chicago Ry. Equipment Co., 19 N.E.2d 122, 298 Ill.App. 471.

Mich.—Schneider v. Levy, 239 N.W. 326, 256 Mich. 184.

N.J.—National Sur. Corp. v. Clement, 42 A.2d 387—Birkenfeld v. Ginsburg, 146 A. 176, 106 N.J.Law 377.

N.Y.—Di Roma v. Chambers Drug Store, 28 N.Y.S.2d 170, 262 App. Div. 856—Butler v. Mercantile Arcade Realty Corporation, 276 N.Y. S. 190, 243 App.Div. 60—Strasburger v. Rosenheim, 255 N.Y.S. 316, 234 App.Div. 544—Dodwell & Co. v. Silverman, 254 N.Y.S. 746, 234 App.Div. 362—Lapkin v. Equitable Life Assur. Soc. of U. S., 42 N.Y. S.2d 642, 181 Misc. 856, modified on other grounds 48 N.Y.S.2d 463, 267 App.Div. 950—First Nat. Bank & Trust Co. of Elmira v. Conzo, 7 N.Y.S.2d 334, 169 Misc. 268—Hanfeld v. A. Broido, Inc., 3 N.Y.S.2d 463, 167 Misc. 85—Union Trust Co. of Rochester v. Mayer, 270 N.Y.S. 355, 150 Misc. 375, affirmed in part and reversed in part on other grounds 273 N.Y.S. 438, 242 App. Div. 671, affirmed 285 N.Y.S. 1046, 246 App.Div. 685—Sobel-Mirken Holding Corporation v. Rubman, 259 N.Y.S. 476, 144 Misc. 731—Goodman & Suss v. Rosenthal, 244 N.Y.S. 242, 137 Misc. 704—Hanrog Distributing Corp. v. Hanioti, 54 N.Y.S.2d 500—Blanchard Press v. Aerosphere, Inc., 51 N.Y.S.2d 715, affirmed 56 N.Y.S.2d 415, 269 App. Div. 826—First Nat. Bank of Dolgeville, N. Y., v. Mang, 41 N.Y. S.2d 92—Air Conditioning Training Corporation v. Strassberg, 18 N.Y.S.2d 310—Samuel Goldberg & Son v. Siegel, 8 N.Y.S.2d 897—Hoof v. John Hunter Corp., 193 N.Y.S. 91.

R.I.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201—Merchants' & Manufacturers' Finance Co. v. Jeschke, 165 A. 441.

34 C.J. p 206 note 80.

4. U.S.—Frick Co. v. Rubel Corporation, C.C.A.N.Y., 62 F.2d 768.

N.Y.—Maurice O'Meara Co. v. National Park Bank of New York, 146 N.E. 636, 239 N.Y. 386, 39 A.L.R. 747, reargument denied 148 N.E. 725, 240 N.Y. 607—Dodwell & Co. v. Silverman, 254 N.Y.S. 746, 234 App.Div. 362—Cleghorn v. Ocean Accident & Guarantee Corporation, Limited, of London, 215 N.Y.S. 127, 216 App.Div. 342, modified on other grounds 155 N.E. 87, 244 N.Y. 166—Phillips v. Investors' Syndicate, 259 N.Y.S. 462, 145 Misc. 361—La Pointe v. Wilson, 61 N.Y.S.2d 64—Krauss v. Central Ins. Co. of Baltimore, 40 N.Y.S.2d 736.

Denial of infancy

In an action by an infant to disaffirm a contract, defendant's denial of knowledge or information sufficient to form a belief as to plaintiff's infancy is insufficient to defeat plaintiff's motion for summary judgment, in the absence of a showing contrary to the proof advanced by plaintiff by affidavit and his birth certificate.—Bower v. M. Samuels & Co., 234 N.Y.S. 379, 226 App.Div. 769, affirmed 170 N.E. 138, 252 N.Y. 549.

Mere refusal to concede statements

A statement in an affidavit that defendant does not concede certain statements made in plaintiff's affidavit is unavailing as counter proof on a motion for a summary judgment.—Honkkong & Shanghai Banking Corporation v. Lazard-Godchaux Co. of America, 201 N.Y.S. 771, 207 App.Div. 174, appeal denied 143 N.E. 761, 237 N.Y. 604, and affirmed 147 N.E. 216, 239 N.Y. 610.

5. Ill.—Wainscott v. Penikoff, 4 N.E.2d 511, 287 Ill.App. 78.

R.I.—Sutter v. Harrington, 154 A. 657, 51 R.I. 325—Rosenthal v. Halsband, 152 A. 320, 51 R.I. 119.

6. Cal.—Security-First Nat. Bank of Los Angeles v. Cryer, 104 P.2d 66, 39 Cal.App.2d 757—Shea v. Leonis, 84 P.2d 277, 29 Cal.App.2d 184.

Ill.—Killian v. Welfare Engineering Co., 66 N.E.2d 305, 328 Ill.App. 375.

N.Y.—Anderson v. City of New York, 17 N.Y.S.2d 326, 258 App.Div. 588.

R.I.—Merchants' & Manufacturers' Finance Co. v. Jeschke, 165 A. 441.

7. Mich.—Andrews v. Pfent, 273 N.W. 585, 280 Mich. 324.

8. Ill.—Killian v. Welfare Engineering Co., 66 N.E.2d 305, 328 Ill.App. 375.

R.I.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201.

Discretion of court

Trial court was vested with sound judicial discretion to deny motion for summary judgment against defendant on ground that defendant's answers to interrogatories were modified expressions and not positive declarations.—Aycock v. Bottoms, 144 S.W.2d 43, 201 Ark. 104.

9. Cal.—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal.2d 553—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609—Grady v. Easley, 114 P.2d 635, 45 Cal.App.2d 632—McComsey v. Leaf, 97 P.2d 242, 36 Cal.App.2d 132.

D.C.—Wyatt v. Madden, 32 F.2d 838, 59 App.D.C. 38—Gleason v. Hoeke, 5 App.D.C. 1.

Ill.—Fellheimer v. Wess, 45 N.E.2d 89, 316 Ill.App. 449—Soelke v. Chicago Business Men's Racing Ass'n, 41 N.E.2d 232, 314 Ill.App. 336—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.

N.Y.—Diamond v. Davis, 38 N.Y.S. 2d 103, affirmed 39 N.Y.S.2d 412, first case, 265 App.Div. 919; appeal denied 41 N.Y.S.2d 191, first case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, first case, 292 N.Y. 552.

Presumption of exercise of ordinary care

In action for death of motorist at crossing, in determining whether defendant was entitled to summary judgment, presumption that motorist exercised ordinary care was to be considered.—Holzschuh v. Webster, 17 N.W.2d 553, 246 Wis. 423.

10. Cal.—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal. 2d 553—Slocum v. Nelson, App., 163 P.2d 888—Gibson v. De La Salle Institute, 152 P.2d 774, 66 Cal.App.2d 609—Grady v. Easley, 114 P.2d 635, 45 Cal.App.2d 632—Anchors v. Anchors, App., 107 P. 2d 973—Kelly v. Liddicoat, 96 P. 2d 186, 35 Cal.App.2d 559—Shea v. Leonis, 84 P.2d 277, 29 Cal.App.2d 184—Bank of America Nat. Trust & Savings Ass'n v. Casady. 59 P. 2d 444, 15 Cal.App.2d 163—Krieger v. Dennie, 10 P.2d 830, 123 Cal. App.Supp. 777—Cowan Oil & Refining Co. v. Miley Petroleum Corpo-

granted where the affidavits submitted in opposition state facts which, if true, would constitute a defense,[11] or, as the rule is sometimes expressed, in order to warrant summary judgment against defendant, there must be a failure on the part of defendant to satisfy the court by affidavit or other proof that there is any basis for his denial or any truth in his defense.[12] The fact that the statements made in the opposing affidavit are made on information and belief does not of itself render the affidavit insufficient to defeat the motion.[13] In the exercise of its sound discretion, the court may grant defendant the right to amend an affidavit of defense which, although suggesting a triable issue, may be incomplete or technically deficient.[14]

Difficulty of making proper showing. Failure of defendant to dispute the facts presented in plaintiff's affidavit is not excused on the ground that the necessary proof would be difficult to obtain.[15] Under some circumstances, however, the court in the exercise of its discretion may deny a motion for summary judgment even though defendant is unable to make a showing such as the statute requires, as where the facts of the defense are not within defendant's knowledge and other persons who know or claim to know them refuse to make affidavits to be used in opposition to the motion;[16] but before defendant may have the benefit of this rule he should at least present an affidavit by some one who states of his own knowledge that such other persons do know or claim to know the facts and have refused to make affidavits,[17] and such affidavit ought to name the other persons and set forth what each one knows or claims to know, in a manner similar to an affidavit for continuance on the ground of absence of witnesses.[18]

Preponderance of proof unnecessary. Where the motion for summary judgment is made by plaintiff, the affidavits of defendant are not required to establish his defense by a preponderance of proof.[19] Similarly, on a motion by defendant for summary judgment, plaintiff is not required to establish his defense to the motion by a preponderance of the proof.[20]

Executors and administrators. Since the representative of a deceased person may be in ignorance

ration, 295 P. 504, 112 Cal.App. Supp. 773.

D.C.—Wyatt v. Madden, 32 F.2d 838, 59 App.D.C. 38.

Ill.—Fellheimer v. Wess, 45 N.E.2d 89, 316 Ill.App. 449—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill. App. 465.

Mich.—Dempsey v. Langton, 253 N. W. 210, 266 Mich. 47.

N.Y.—Chance v. Guaranty Trust Co. of New York, 21 N.Y.S.2d 356, 260 App.Div. 216—German v. Snedeker, 13 N.Y.S.2d 237, 257 App.Div. 596, reargument denied 14 N.Y.S.2d 1012, 258 App.Div. 708, affirmed 24 N.E.2d 492, 281 N.Y. 832—Tully v. New York Life Ins. Co., 240 N.Y.S. 118, 228 App.Div. 449—Marcus v. Knitzer, 4 N.Y.S.2d 308, 168 Misc. 9—Voros v. Barna, 285 N.Y.S. 926, 158 Misc. 500—Greenberg v. Rudnick, 258 N.Y.S. 679, 143 Misc. 793—Magner v. Mills, 242 N.Y.S. 705, 137 Misc. 535—Harris v. Equitable Surety Co., 226 N.Y.S. 263, 131 Misc. 85—De Mott v. Palmer, 59 N.Y.S.2d 163—Biloz v. Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, affirmed 23 N.Y.S.2d 460, 260 App.Div. 976.

R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.

Conclusiveness of testimony before trial

Testimony of a witness before trial is not conclusive and does not on motion for summary judgment preclude consideration of his supplemental statement contained in affidavit.—Strauss v. G. H. Mumm Champagne & Associates, 30 N.Y.S.2d 117, 262 App.Div. 971.

Incredibility

Claims of defendant's witnesses relative to issue of fact raised by answer should not be disposed of on affidavits, on plaintiff's motion for summary judgment, on ground that testimony is incredible as matter of law.—Danneman v. White, 283 N.Y.S. 868, 246 App.Div. 727.

Only the facts well pleaded must be taken as admitted, and not a party's conclusions therefrom.—Shepard v. Wheaton, 60 N.E.2d 47, 325 Ill.App. 269.

11. N.Y.—Cook v. Bauman, 217 N.Y. S. 187, 128 Misc. 23.

Consideration of entire affidavit

Fact that a certain part of defendant's affidavit opposing plaintiff's motion for summary judgment does not in itself constitute a defense is not a valid ground for disregarding entire affidavit.—Scharf v. Waters, Ill.App., 66 N.E.2d 499.

12. Cal.—McComsey v. Leaf, 97 P. 2d 242, 36 Cal.App.2d 132.
N.Y.—Curry v. Mackenzie, 146 N.E. 375, 239 N.Y. 267—Salt Springs Nat. Bank of Syracuse v. Hitchcock, 259 N.Y.S. 24, 144 Misc. 547, reversed on other grounds 263 N.Y.S. 55, 238 App.Div. 150—Robinsohn v. Herman, 234 N.Y.S. 693, 134 Misc. 246.

Weight and credibility of defense

Where affidavit in opposition to plaintiff's motion for summary judgment indicates that there may be a defense to the action, the weight and credibility of such defense is for the jury, and court cannot discount it entirely.—La Pointe v. Wilson, 61 N.Y.S.2d 64.

13. N.Y.—Dolge v. Commercial Casualty Ins. Co., 207 N.Y.S. 42, 211 App.Div. 112, affirmed 148 N.E. 746, 240 N.Y. 656.
34 C.J. p 206 note 75 [a].

Effect of failure to deny

An allegation made in an answering affidavit on information was held the equivalent of a statement of fact where it was not denied.—Doniger v. Lasoff, 211 N.Y.S. 486, 125 Misc. 838.

14. Pa.—Yezek v. Pennsylvania Turnpike Commission, Com.Pl., 22 West.Co.L.J. 262.
R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.

15. N.Y.—William J. Conners Car Co. v. Manufacturers' & Traders' Nat. Bank of Buffalo, 209 N.Y.S. 406, 124 Misc. 584, affirmed 210 N.Y.S. 939, 214 App.Div. 811.

16. Cal.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.

17. Cal.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., supra.

18. Cal.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., supra.

19. N.Y.—Connor v. Commercial Travelers Mut. Accident Ass'n of America, 287 N.Y.S. 416, 247 App. Div. 352.

20. N.Y.—First Trust & Deposit Co. v. Dent, 34 N.Y.S.2d 282, 263 App. Div. 1058.

of the facts, a denial by such representative of knowledge or information sufficient to form a belief is sometimes sufficient to defeat plaintiff's motion for summary judgment where it does not appear that the representative has such factual knowledge of the circumstances as to make his denial worthless.[21] A mere statement in the representative's affidavit of want of knowledge of the facts does not, however, prevent summary judgment,[22] such a want of knowledge being sufficient to prevent summary judgment only when it appears that a thorough investigation has been made and that ignorance persists after genuine efforts to ascertain the facts.[23]

Objections to affidavits; motion to strike. The better practice is for defendant to include in his affidavit all his objections to plaintiff's affidavit.[24] It has also been held, however, that the failure of defendant to object to plaintiff's affidavit is not a waiver of errors therein, since unless plaintiff does those things which the statutes prescribe as essential to jurisdiction he can claim none of its benefits.[25]

Under the practice in some jurisdictions, a plaintiff who contends that the affidavit or affidavits submitted by defendant do not present a defense, or are otherwise objectionable, should move to strike all of the affidavit or the objectionable parts;[26] and a defendant who desires to test the sufficiency of plaintiff's motion and affidavit for summary judgment should file a written motion to strike, specifying his objections.[27] On a motion to strike an affidavit or portions thereof, the material facts well pleaded or stated in the affidavit are deemed admitted.[28]

Service of affidavits. The court may permit answering affidavits in a proper case, although they are not served within the time limited by the moving party.[29] Under the practice in some jurisdictions, a party moving for summary judgment who gives sufficient notice of his motion may require that the adverse party serve his affidavits in opposition a specified time before the hearing; and where without good cause the opposing party has failed to comply with such a demand the court may refuse to receive his affidavits.[30]

Counterclaims or set-offs. Summary judgment in favor of defendant on a counterclaim asserted by him is proper where there is no substantial evidence in the affidavits to sustain any of the defenses alleged in plaintiff's reply;[31] but the submission of affidavits by plaintiff which raise a triable issue as to the counterclaim precludes summary judgment thereon.[32]

It has been held that, under a plea of non assumpsit to a motion on an open account, defendant may prove set-offs.[33]

d. Applications of Rules

The principles governing the necessity and sufficiency of affidavits or other proofs in support of, or in opposition to, a motion for summary judgment have been applied in a great variety of cases, and summary judgments have been granted or denied, on motion of either the plaintiff or the defendant, according to the circumstances of particular cases.

In accordance with the principles discussed in the foregoing subdivisions of this section, the affidavits or other proofs submitted by plaintiff on a motion for summary judgment in his favor, coupled with the failure of defendant sufficiently to contro-

21. N.Y.—Emley v. Gray, 32 N.Y.S. 2d 537, 263 App.Div. 894—Woodmere Academy v. Moskowitz, 208 N.Y.S. 578, 212 App.Div. 457.

22. Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.

23. Mass.—Norwood Morris Plan Co. v. McCarthy, supra.

24. Mich.—Hecker Products Corporation v. Transamerican Freight Lines, 296 N.W. 297, 296 Mich. 381.

25. Md.—Power v. Allied Asphalt Products Corporation, 159 A. 251, 162 Md. 175.

Failure of defendants' attorney to contest motion for summary judgment is not waiver of plaintiff's compliance with statute and court rule. —MacClure v. Noble, 244 N.W. 174, 259 Mich. 601.

Defective affidavit

Defendant in action under Speedy Judgment Act can be put in no worse position by filing defective affidavit of defense than if he filed none.—Power v. Allied Asphalt Products Corporation, 159 A. 251, 162 Md. 175.

26. Ill.—Scharf v. Waters, App., 66 N.E.2d 499.

27. Ill.—Scharf v. Waters, supra.

28. Ill.—Ublasi v. Western & Southern Life Ins. Co., 64 N.E.2d 233, 327 Ill.App. 412—Lowenstern Bros. v. Marks Credit Clothing, 48 N.E.2d 729, 319 Ill.App. 71—National Builders Bank of Chicago v. Simons, 31 N.E.2d 274, 307 Ill.App. 562.

29. N.Y.—McMasters v. Allcut, 136 N.Y.S. 144, 151 App.Div. 559.

Refusal to consider filed affidavits

Where affidavits opposing a motion for summary judgment were filed, the court's refusal to consider them, on the ground that copies had not been served on plaintiff's attorney as directed, and that plaintiff had not had an opportunity to reply thereto, was held error.—Cook v. Bauman, 217 N.Y.S. 187, 128 Misc. 23.

30. N.Y.—Gnozzo v. Marine Trust Co. of Buffalo, 17 N.Y.S.2d 168, 258 App.Div. 298, reargument denied Gnozzo v. Marine Trust Co., 18 N.Y.S.2d 752, 259 App.Div. 788, affirmed Gnozzo v. Marine Trust Co. of Buffalo, 29 N.E.2d 933, 284 N. Y. 617.

31. N.Y.—Brooks v. Slawson, 10 N. Y.S.2d 878, 256 App.Div. 1052, affirmed 24 N.E.2d 21, 281 N.Y. 762.

32. N.Y.—Gottesman v. Goldberg, 266 N.Y.S. 676, 149 Misc. 50.
Wis.—Prime Mfg. Co. v. A. F. Gallun & Sons Corporation, 281 N.W. 697, 229 Wis. 348.

33. Va.—Whitley v. Booker Brick Co., 74 S.E. 160, 113 Va. 434.

vert such proof, have been held to justify summary judgment, as to either all or a part of the claim asserted, in a great variety of actions,[34] including actions for or involving accounts stated,[35] alimony,[36] assessments against stockholders[37] or policyholders,[38] bonds,[39] building or construction contracts,[40] checks,[41] drafts,[42] extension agreements,[43] fees and charges,[44] forcible detainer,[45] foreclosure of mortgages, deeds of trust, or liens,[46] guaranties,[47] insurance,[48] loans,[49] notes,[50] rents,[51] including ac-

34. Ill.—Great Atlantic & Pacific Tea Co. v. Town of Bremen, 64 N.E.2d 220, 327 Ill.App. 393—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill. App. 465.
N.Y.—Isaacs v. Schmuck, 156 N.E. 621, 245 N.Y. 77, 51 A.L.R. 1454—Buffalo Sav. Bank v. O'Gorman, 25 N.Y.S.2d 8, 260 App.Div. 993—Yonkers Nat. Bank & Trust Co. v. Roth, 285 N.Y.S. 264, 247 App.Div. 730—Schlesinger v. Kofsky-Moos, Inc., 276 N.Y.S. 980, 154 Misc. 242.
Wis.—Barneveld State Bank of Barneveld v. Rongve, 280 N.W. 295, 228 Wis. 293.

35. N.Y.—Tobey v. Nelson, 270 N.Y.S. 201, 150 Misc. 346—Manhattan Paper Co. v. Bayer, 263 N.Y.S. 720, 147 Misc. 227.

36. N.Y.—Sutin v. Sutin, 38 N.Y.S.2d 162, 180 Misc. 197.

37. N.Y.—Broderick v. Alexander, 275 N.Y.S. 278, 153 Misc. 825.

38. Wis.—Duel v. Ramar Baking Co., 18 N.W.2d 345, 246 Wis. 604.

39. Ill.—People ex rel. Ames v. Marx, 18 N.E.2d 915, 370 Ill. 264.
N.J.—Electric Service Supplies Co. v. Consolidated Indemnity & Insurance Co., 168 A. 412, 111 N.J. Law 288.
N.Y.—Perry v. Norddeutscher Lloyd, 268 N.Y.S. 525, 150 Misc. 73—Union Trust Co. of Rochester v. Toal, 28 N.Y.S.2d 956.

40. Ill.—Willadsen v. City of East Peoria, 47 N.E.2d 136, 317 Ill.App. 541.
Md.—Power v. Allied Asphalt Products Corporation, 159 A. 251, 162 Md. 175.
N.J.—Nolte v. Nannino, 154 A. 831, 107 N.J.Law 462.
N.Y.—J. R. Const. Corporation v. Berkeley Apartments, 26 N.Y.S.2d 958, 261 App.Div. 1085, appeal denied 28 N.Y.S.2d 715, 262 App.Div. 757, appeal denied 35 N.E.2d 941, 286 N.Y. 604, reargument denied 30 N.Y.S.2d 494, 268 App.Div. 965.

41. N.Y.—Frankfurter v. Silverman, 208 N.Y.S. 405, 124 Misc. 751—William J. Conners Car Co. v. Manufacturers' & Traders' Nat. Bank of Buffalo, 209 N.Y.S. 406, 124 Misc. 584, affirmed 210 N.Y.S. 939, 214 App.Div. 811.

42. N.Y.—Buffalo Porcelain Enameling Corporation v. Paramount Service Corporation, 202 N.Y.S. 301.

43. N.Y.—East River Sav. Bank v. Realty Ventures, 60 N.Y.S.2d 581.

44. N.Y.—Title Guarantee & Trust Co. v. Smith, 213 N.Y.S. 730, 215 App.Div. 448.

45. Ill.—Wainscott v. Penikoff, 4 N.E.2d 511, 287 Ill.App. 78.

46. Cal.—Ware v. Heller, 148 P.2d 410, 63 Cal.App.2d 817—Security-First Nat. Bank of Los Angeles v. Cryer, 104 P.2d 66, 39 Cal.App.2d 757.
N.Y.—City of New Rochelle v. Echo Bay Waterfront Corporation, 49 N.Y.S.2d 673, 268 App.Div. 182, certiorari denied Echo Bay Waterfront Corp. v. City of New Rochelle, 66 S.Ct. 24. Affirmed 60 N.E.2d 838, 294 N.Y. 678—Federation Bank & Trust Co. v. Andrew Jackson Apartments, 7 N.Y.S.2d 983, 255 App.Div. 878, reargument denied 8 N.Y.S.2d 1005, 255 App.Div. 986—Proudman v. Shaw Service Stations, 7 N.Y.S.2d 526, 255 App. Div. 857—Federation Bank & Trust Co. v. Andrew Jackson Apartments, 5 N.Y.S.2d 928, 168 Misc. 328, affirmed 7 N.Y.S.2d 983, 255 App.Div. 878, reargument denied 8 N.Y.S.2d 1005, 255 App.Div. 986—Meurer v. Keimel, 267 N.Y.S. 799, 150 Misc. 113.

47. N.Y.—Doehler Die Casting Co. v. Holmes, 52 N.Y.S.2d 321—Kirsten v. Chrystmos, 14 N.Y.S.2d 442.

48. Ill.—Clark v. Lithuanian Roman Catholic Alliance of America, 64 N.E.2d 209, 327 Ill.App. 336—Bilton v. Pure Protection Ins. Ass'n, 49 N.E.2d 834, 319 Ill.App. 644—Employers' Liability Assur. Corporation v. A. A. Electric Co., 27 N.E. 2d 321, 305 Ill.App. 209.
N.Y.—Killian v. Metropolitan Life Ins. Co., 232 N.Y.S. 280, 225 App. Div. 781, affirmed 166 N.E. 798, 251 N.Y. 44, 64 A.L.R. 956—Killeen v. General Acc., Fire & Life Assur. Corporation, 227 N.Y.S. 220, 131 Misc. 691, affirmed 229 N.Y.S. 875, 224 App.Div. 719—Krauss v. Central Ins. Co. of Baltimore, 40 N.Y. S.2d 736.

49. N.Y.—Perlman v. Perlman, 257 N.Y.S. 48, 235 App.Div. 313—Rodger v. Bliss, 223 N.Y.S. 401, 130 Misc. 168.

50. Cal.—Kelly v. Liddicoat, 96 P. 2d 186, 35 Cal.App.2d 559—Himes v. Club Rustico De La Playa, S. A., 44 P.2d 395, 6 Cal.App.2d 356.
Ill.—National Builders Bank of Chicago v. Simons, 31 N.E.2d 274, 307 Ill.App. 562.
Mass.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.
Mich.—Dart Nat. Bank v. Burton, 241 N.W. 858, 258 Mich. 283—Warren Webster & Co. v. Pelavin, 216 N.W. 430, 241 Mich. 19—Slebodnick v. La Buda, 213 N.W. 698, 238 Mich. 550.
N.J.—Irvington Trust Co. v. Maurer, 151 A. 72, 8 N.J.Misc. 565, affirmed 156 A. 428, 108 N.J.Law 404.
N.Y.—General Inv. Co. v. Interborough Rapid Transit Co., 139 N.E. 216, 235 N.Y. 133—Italiano v. Rosenbaum, 284 N.Y.S. 177, 246 App. Div. 687, affirmed 3 N.E.2d 196, 271 N.Y. 583—Walmor Inc., v. Globe Industrial Corporation, 276 N.Y.S. 1000, 243 App.Div. 619—Hayes Nat. Bank v. Chynoweth, 257 N.Y.S. 561, 235 App.Div. 890—McAnsh v. Blauner, 226 N.Y.S. 379, 222 App.Div. 381, affirmed 162 N.E. 515, 248 N.Y. 537—Commonwealth Fuel Co. v. Powpit Co., 209 N.Y.S. 603, 212 App.Div. 553—Hanna v. Mitchell, 196 N.Y.S. 43, 202 App.Div. 504, affirmed 139 N.E. 724, 235 N.Y. 534—First Nat. Bank & Trust Co. of Elmira v. Conzo, 7 N.Y.S.2d 334, 169 Misc. 268—Irving Trust Co. v. Orvis, 248 N.Y.S. 771, 139 Misc. 670—Garcin v. Granville Iron Corporation, 244 N.Y.S. 145, 137 Misc. 648—Palmer Lumber Co. v. Whitney, 240 N.Y.S. 640, 136 Misc. 284—Ullman v. Edgebert, 43 N.Y.S.2d 666—Bentley, Settle & Co. v. Brinkman, 42 N.Y.S.2d 194.
R.I.—Bond & Goodwin v. Weiner, 167 A. 189, 53 R.I. 407—Rosenthal v. Halsband, 152 A. 320, 51 R.I. 119.

Genuineness of testator's signature

In action against executor on note wherein plaintiff filed motion for summary judgment, counter-affidavit of defendant denying signature of testator on note and demanding proof of genuineness of signature was held ineffectual as showing of facts entitling executor to defend.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.

Agreement respecting payment of different note

In action on demand note, written agreement respecting payment of earlier note not held by plaintiff was held inapplicable to note in suit and could not prevent summary judgment for plaintiff, where execution and delivery of note in suit were admitted.—White v. Douglas, 270 N.Y.S. 661, 240 App.Div. 530.

51. Ill.—Board of Education of City of Chicago v. Crilly, 37 N.E.2d 873, 312 Ill.App. 177.
N.Y.—Louis K. Liggett Co. v. Broadway-John Street Corporation, 221

tions for replevin,[52] repurchase agreements,[53] sales of personal property,[54] services rendered,[55] specific performance,[56] sureties,[57] wages or salaries,[58] and wrongful discharge.[59]

In other cases the affidavits or proofs submitted by plaintiff, when considered with the opposing affidavits or proofs submitted by defendant, have been held insufficient to justify summary judgment, at least for the full amount claimed,[60] as, for example, in actions for or involving accounts,[61] assessment of stockholders,[62] bonds,[63] building or construction contracts,[64] checks,[65] commissions,[66]

N.Y.S. 189, 220 App.Div. 195—Hanfeld v. A. Broido, Inc., 3 N.Y.S.2d 463, 167 Misc. 85—City & State Supervision Co. v. Hogan, 246 N.Y.S. 557, 140 Misc. 404.

Abandonment

In action for rent wherein main defense was abandonment of lease, an affidavit resisting the motion which failed to show that lessors knew of lessee's intention to abandon or the abandonment by the lessee was insufficient to resist the motion for summary judgment.—Shea v. Leonis, 84 P.2d 277, 29 Cal.App.2d 184.

52. N.Y.—Roxy Athletic Club v. Simmons, 44 N.Y.S.2d 47.

53. N.Y.—Strasburger v. Rosenheim, 255 N.Y.S. 316, 234 App.Div. 544.

54. Ill.—Lowenstern Bros. v. Marks Credit Clothing, 48 N.E.2d 729, 319 Ill.App. 71—Mee v. Marks, 26 N.E.2d 516, 304 Ill.App. 370.
Mich.—Terre Haute Brewing Co. v. Goldberg, 289 N.W. 192, 291 Mich. 401.
N.Y.—Edward F. Dibble Seedgrower v. Jones, 228 N.Y.S. 785, 130 Misc. 359—Methuen Heel Co. v. Tupper, 41 N.Y.S.2d 357—Stern v. S. S. Steiner, Inc., 12 N.Y.S.2d 44.
Pa.—Gray Co. v. D. G. Nicholas Co., Com.Pl., 41 Lack.Jur. 157.

55. N.Y.—Geraci v. Fabbozi, 291 N.Y.S. 86, 161 Misc. 450.
Wis.—Juergens v. Ritter, 279 N.W. 51, 227 Wis. 480.

Hospital services

N.Y.—Buffalo General Hospital v. Suppa, 13 N.Y.S.2d 680, 257 App.Div. 1030.

56. N.Y.—Friedman v. Platzik, 57 N.Y.S.2d 215.

57. N.J.—Electric Service Supplies Co. v. Consolidated Indemnity & Insurance Co., 168 A. 412, 111 N.J.Law 288.

58. Ill.—Case v. Green Oil Soap Co., 13 N.E.2d 866, 294 Ill.App. 610.
N.Y.—Bergman v. Royal Typewriter Co., 29 N.Y.S.2d 827, modified on other grounds 32 N.Y.S.2d 132, 263 App.Div. 812—Henderson v. Hildreth Varnish Co., 276 N.Y.S. 414.

59. N.Y.—Wilkinson v. Halliwell Electric Co., 204 N.Y.S. 854, 123 Misc. 250.

60. Cal.—McComsey v. Leaf, 97 P.2d 242, 36 Cal.App.2d 132.
Ill.—Scharf v. Waters, App., 66 N.E.2d 499.
Mich.—Caswell v. Stearns, 241 N.W. 165, 257 Mich. 461.
N.Y.—Diamond D. Bus Lines v. Hudson Transit Corporation, 14 N.Y.S.2d 811, 258 App.Div. 770—County Trust Co. v. Moore, 300 N.Y.S. 128, 252 App.Div. 351—Braus v. Blondel's Shops, 286 N.Y.S. 777, 247 App.Div. 209—Klein v. Horowitz, 270 N.Y.S. 834, 240 App.Div. 495—Consolidated Indemnity & Insurance Co. v. Epstein, 255 N.Y.S. 408, 235 App.Div. 661—Standard Oil Co. of New York v. Boyle, 246 N.Y.S. 142, 231 App.Div. 101—Miner v. Reinhardt, 233 N.Y.S. 592, 225 App.Div. 530—Erzinger v. Lieberman, 219 N.Y.S. 28, 218 App.Div. 847—Idoni v. Down, 8 N.Y.S.2d 719, 170 Misc. 303—Broderick v. Cox, 297 N.Y.S. 875, 163 Misc. 283—Schaffer Stores Co. v. Sweet, 228 N.Y.S. 599, 132 Misc. 38—McKinney v. Donahue, 59 N.Y.S.2d 726—Bloom v. Hershowitz, 202 N.Y.S. 298.
Pa.—Armstrong v. Connelly, 149 A. 87, 299 Pa. 51—Forest City Foundry v. Lamb, Com.Pl., 24 Erie Co. 118.

Recovery of property from police department property clerk

N.Y.—Costello v. Simmons, 55 N.Y.S.2d 735, 269 App.Div. 823, affirmed 66 N.E.2d 581, 295 N.Y. 801—Kleiger v. Simmons, 47 N.Y.S.2d 269, 181 Misc. 175, appeal granted 55 N.Y.S.2d 665, 269 App.Div. 784.

61. Cal.—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal.2d 553.
Mich.—Grand Dress v. Detroit Dress Co., 227 N.W. 723, 248 Mich. 447.
N.Y.—Curry v. Mackenzie, 146 N.E. 375, 239 N.Y. 267—Roberts v. McDonald, 280 N.Y.S. 817, 245 App.Div. 80—Marvin v. Goldhurst, 234 N.Y.S. 80, 226 App.Div. 758.

62. U.S.—Goess v. A. D. H. Holding Corporation, C.C.A.N.Y., 85 F.2d 72.

63. N.Y.—Read v. Lehigh Valley R. Co., 31 N.E.2d 891, 284 N.Y. 435—Gellens v. Continental Bank & Trust Co. of New York, 272 N.Y.S. 900, 241 App.Div. 591, followed in Wiand v. Continental Bank & Trust Co. of New York, 272 N.Y.S. 903, 241 App.Div. 593, and Twomey v. Continental Bank & Trust Co. of New York, 272 N.Y.S. 904, 241 App.Div. 594—Marks v. Follo, 29 N.Y.S.2d 1019, 177 Misc. 108—Milanese v. Azzarone, 294 N.Y.S. 479, 162 Misc. 329.

Usury

Where right of individual obligors on bond to raise defense of usury depended on whether or not they were principals or merely sureties or guarantors of corporation's debts, and contradictory affidavits had been submitted on that issue, rendition of summary judgment against individual defendants was improper.—Pink v. L. Kaplan, Inc., 300 N.Y.S. 45, 252 App.Div. 490.

64. Mich.—Douglas v. Milbrand, 4 N.W.2d 528, 302 Mich. 227.
N.Y.—Charles C. Kellogg & Sons Co. v. De Lia, 28 N.Y.S.2d 4, 262 App.Div. 803.

65. N.Y.—Stuyvesant Credit Union v. Manufacturers' Trust Co., 267 N.Y.S. 302, 239 App.Div. 187—Moe v. Bank of U. S., 207 N.Y.S. 347, 211 App.Div. 519—Cardo Drug Co. v. Chatham & Phenix Nat. Bank, 204 N.Y.S. 13, 209 App.Div. 167—Hurwitz v. Corn Exchange Bank Trust Co., 253 N.Y.S. 851, 142 Misc. 398.

Check for gambling debt

In action on check against maker and payee, plaintiff was not entitled to summary judgment under affidavits which showed that check was indorsed to plaintiff in payment of unenforceable gambling debt and which raised triable issue of fact.—Singer v. Union Table & Spring Co., 271 N.Y.S. 349, 151 Misc. 909.

66. N.Y.—Barrett v. Jacobs, 175 N.E. 275, 255 N.Y. 520—Windsor Investing Corporation v. T. J. McLaughlin's Sons, 225 N.Y.S. 7, 130 Misc. 730, affirmed 229 N.Y.S. 926, 224 App.Div. 715—La Pointe v. Wilson, 61 N.Y.S.2d 64.

Authority to promise payment

Where plaintiff made affidavit that corporate officers had authority to sign written promise to pay real estate commissions to plaintiff, and authority was denied by defendants, fact issue was raised for trial.—Archbold v. Industrial Land Co., 249 N.W. 858, 264 Mich. 289.

Employment by competitor

Where defendant's affidavit in opposition to plaintiffs' motion for summary judgment in action for commissions alleged that plaintiffs had an associate who was repre-

drafts,[67] escrow agreements,[68] foreclosure of mortgages or liens,[69] foreign judgments,[70] guaranties,[71] insurance,[72] labor and materials,[73] money had and received,[74] necessaries,[75] notes,[76] partnerships,[77] property settlement agreements between spouses,[78] rents or leases,[79] replevin,[80] sales of personal[81] or

senting a competitor of defendant, and it was admitted in plaintiffs' affidavit and in letters that such individual did do certain work for plaintiffs, and also work on his own account connected with competitors of defendant, trial court erred in granting summary judgment.—Shirley v. Ellis Drier Co., 39 N.E.2d 329, 379 Ill. 105.

67. N.Y.—Siegal v. Public Nat. Bank & Trust Co. of New York, 7 N.Y.S.2d 771.

68. Conn.—Rifkin v. Safenovitz, 40 A.2d 188, 131 Conn. 411.

69. N.Y.—Weber v. Richter, 58 N.Y.S.2d 147, 269 App.Div. 961, motion denied 59 N.Y.S.2d 276, 269 App.Div. 1037—Title Guarantee & Trust Co. v. Queens Freeholds, 45 N.Y.S.2d 575, 267 App.Div. 787—Dime Sav. Bank of Brooklyn v. Feeney, 284 N.Y.S. 94, 246 App.Div. 769—Citizens Nat. Bank of Freeport v. Mintz, 280 N.Y.S. 902, 245 App.Div. 759—Brescia Const. Co. v. Walart Const. Co., 264 N.Y.S. 862, 238 App.Div. 360—Harry Kresner, Inc., v. Fuchs, 262 N.Y.S. 669, 238 App.Div. 844.

Unconscionable conduct

In foreclosure action, where facts set forth in affidavit opposing plaintiff's motion for summary judgment show oppressive or unconscionable conduct on part of mortgagee in declaring entire principal due because of mortgagor's short delay in paying interest installment, plaintiff's motion for summary judgment was denied.—Domus Realty Corporation v. 3440 Realty Co., 40 N.Y.S.2d 69, 179 Misc. 749, affirmed 41 N.Y.S.2d 940, 266 App.Div. 725.

70. N.Y.—Croker v. Croker, 168 N.E. 450, 252 N.Y. 24, remittitur amended 169 N.E. 408, 252 N.Y. 345—Scanlon v. Kuehn, 232 N.Y.S. 592, 225 App.Div. 256.

71. U.S.—Real Estate-Land Title & Trust Co. v. Commonwealth Bond Corporation, C.C.A.N.Y., 63 F.2d 237.

72. Cal.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745.
Ill.—Shaw v. National Life Co., 42 N.E.2d 885, 315 Ill.App. 210.
N.Y.—Panettieri v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 42 N.Y.S.2d 317, 266 App.Div. 872, appeal denied 44 N.Y.S.2d 471, 266 App.Div. 924—Svensen v. Zurich General Accident & Liability Ins. Co., Limited, of Zurich, Switzerland, 16 N.Y.S.2d 751, 258 App.Div. 964—Kaplan v. Girard Fire & Marine Ins. Co., 266 N.Y.S. 226, 238 App.Div. 577—Krausman v. John Hancock Mut. Life Ins. Co., 260 N.Y.S. 319, 236 App.Div. 582, reargument denied 260 N.Y.S. 981, 237 App.Div. 810—Suslensky v. Metropolitan Life Ins. Co., 43 N.Y.S.2d 144, 180 Misc. 624, affirmed 46 N.Y.S.2d 888, 267 App.Div. 812, appeal denied 60 N.Y.S.2d 294, 270 App.Div. 819—Wecht v. Kornblum, 264 N.Y.S. 333, 147 Misc. 653.
R.I.—Minuto v. Metropolitan Life Ins. Co., 179 A. 713, 55 R.I. 201.

Identity of vehicle; failure to cooperate

N.Y.—Cohen v. Metropolitan Casualty Ins. Co. of New York, 252 N.Y.S. 841, 233 App.Div. 340.

Intoxication of insured

N.Y.—Connor v. Commercial Travelers Mut. Accident Ass'n of America, 287 N.Y.S. 416, 247 App.Div. 352.

73. N.Y.—Curry v. Mackenzie, 146 N.E. 375, 239 N.Y. 267.

74. Mich.—Dempsey v. Langton, 253 N.W. 210, 266 Mich. 47.

75. N.Y.—Moll v. Greer, 269 N.Y.S. 660, 150 Misc. 10.

76. Cal.—Slocum v. Nelson, App., 163 P.2d 888.
Del.—Lamson v. Habbart, 43 A.2d 249.
Ill.—Security Discount Corporation v. Jackson, 51 N.E.2d 618, 320 Ill. App. 440—C. I. T. Corporation v. Smith, 48 N.E.2d 735, 318 Ill.App. 642.
Mich.—Scripsema v. De Korne, 268 N.W. 762, 276 Mich. 634—Lammie v. Klug, 249 N.W. 866, 264 Mich. 323—Cass v. Washington Finance Co., 248 N.W. 863, 263 Mich. 440.
N.J.—Berger v. Rospond, 158 A. 472, 108 N.J.Law 268.
N.Y.—C. I. T. Corporation v. Revoir Motors, 13 N.Y.S.2d 221, 257 App.Div. 885—Greenblatt v. Miller, 5 N.Y.S.2d 388, 255 App.Div. 18—Union Trust Co. of Rochester v. Mayer, 273 N.Y.S. 438, 242 App.Div. 671, affirmed 285 N.Y.S. 1046, 246 App.Div. 685—Brulatour, Inc., v. Garsson, 242 N.Y.S. 583, 229 App.Div. 466—Scanlon v. Kuehn, 232 N.Y.S. 592, 225 App.Div. 256—Moir v. Johnson, 207 N.Y.S. 380, 211 App.Div. 427—Sherwin v. Jonas, 269 N.Y.S. 121, 150 Misc. 342—Berman-Steinberg v. Standard Cotton Stores, 262 N.Y.S. 495, 146 Misc. 586—Franco v. Swartz, 225 N.Y.S. 739, 131 Misc. 74—C. I. T. Corporation v. Spence, 224 N.Y.S. 297, 130 Misc. 659—Security Finance Co. v. Stuart, 224 N.Y.S. 257, 130 Misc. 538—Weartex Rubber Co. v. Goldman, 204 N.Y.S. 205, 123 Misc. 228—Sher v. Rodkin, 198 N.Y.S. 597.
R.I.—Beauvais v. Kishfy, 175 A. 826, 54 R.I. 494.
Wis.—Atlas Inv. Co. v. Christ, 2 N.W.2d 714, 240 Wis. 114.

Material misrepresentations

Affidavit of defense alleging that defendant was induced to execute notes by material misrepresentations was held sufficient to withstand motion for summary judgment.—Wyatt v. Madden, 32 F.2d 838, 59 App.D.C. 38.

Lack of consideration

In payee's action on note, which had allegedly been given in payment of account originally owed by defendant to payee's husband and assigned to payee, defendant's affidavit disputing items of account and pleading lack of consideration for note was held proper defense as between original parties and sufficient to defeat payee's motion for summary judgment.—Feinberg v. Mullin, 291 N.Y.S. 302, 249 App.Div. 670.

77. N.Y.—Scanlon v. Kuehn, 232 N.Y.S. 592, 225 App.Div. 256—Schulman v. Cornman, 223 N.Y.S. 19, 221 App.Div. 170.

78. N.Y.—Jaeckel v. Jaeckel, 40 N.Y.S.2d 491, 179 Misc. 994.

79. Cal.—Krieger v. Dennie, 10 P.2d 820, 123 Cal.App., Supp., 777.
N.Y.—Foster v. Barbeau, 5 N.Y.S.2d 168, 254 App.Div. 823—Walgreen Co. v. Diamond, 292 N.Y.S. 513, 249 App.Div. 387—Port Chester Central Corporation v. Leibert, 39 N.Y.S.2d 41, 179 Misc. 839.

80. N.Y.—Hofferman v. Simmons, 49 N.E.2d 523, 290 N.Y. 449—Rader v. Simmons, 49 N.E.2d 523, 290 N.Y. 449, appeal denied 37 N.Y.S.2d 621, 265 App.Div. 1003, motion denied 49 N.E.2d 624, 290 N.Y. 668—Rivera v. Simmons, 49 N.E.2d 523, 290 N.Y. 449—Smith v. Simmons, 49 N.E.2d 523, 290 N.Y. 449—Le Fevre v. Reliable Paint Supply Co., 273 N.Y.S. 903, 152 Misc. 594.

81. Ill.—Kanik v. Johnson Bros. Heating Co., 54 N.E.2d 751, 323 Ill.App. 282.
Mich.—Bed v. Fallon, 12 N.W.2d 396, 307 Mich. 466.
N.Y.—Enterprise Frame & Novelty Corporation v. Schieman, 49 N.Y.S.2d 860, 183 Misc. 3—Mill Factors Corporation v. Bridal Veil & Accessories Co., 51 N.Y.S.2d 356.
Wis.—Prime Mfg. Co. v. A. F. Gallun & Sons Corporation, 281 N.W. 697, 229 Wis. 348.

real[82] property, services rendered,[83] specific performance,[84] subscriptions for stocks[85] or bonds,[86] trade acceptances,[87] and wrongful discharge.[88]

On defendant's motion. On the basis of the affidavits or other proof submitted, following the principles discussed in the foregoing subdivisions of this section, defendant has been held entitled to summary judgment dismissing the complaint, either entirely or in part, in various actions,[89] including actions for or involving accounts stated,[90] bank deposits,[91] bonds,[92] breach of marriage promise,[93] commissions,[94] conspiracy and slander,[95] ejectment,[96] employment agreements,[97] fraudulent transfers,[98] insurance,[99] liens on realty,[1] malicious prosecution and false arrest,[2] property settlements be-

82. Mich.—Maser v. Gibbons, 274 N.W. 352, 280 Mich. 621—MacClure v. Noble, 244 N.W. 174, 259 Mich. 601—Sloman v. Allen, 233 N.W. 421, 252 Mich. 578.

Assignment of land contract

In vendor's action on land contract wherein defendant filed answer asserting that another had been substituted as vendee, defendant's affidavit of merits, stating that contract was assigned with plaintiff's consent and that by agreement defendant was released, was held sufficient.—Lauppe v. Silverstein, 260 N. W. 105, 271 Mich. 19.

83. Colo.—Inter-Mountain Iron & Metal Co. v. Cortinez, 162 P.2d 237.
Ill.—Fein v. Taylor Washing Mach. Co., 28 N.E.2d 344, 306 Ill.App. 273.
Mich.—Laughery v. Wayne County, 11 N.W.2d 902, 307 Mich. 316.
N.Y.—Knapp v. Friedman, 238 N.Y. S. 22, 227 App.Div. 261—Gruss v. City of New York, 40 N.Y.S.2d 816, 179 Misc. 1053—Brandt v. Davidson, 48 N.Y.S.2d 917—Miller v. Wightman, 43 N.Y.S.2d 681.
R.I.—Berick v. Curran, 179 A. 708, 55 R.I. 193.
Wis.—Sullivan v. State, 251 N.W. 251, 213 Wis. 185, 91 A.L.R. 877.

Liability of stockholders for services performed for corporation.

Plaintiff, suing under statute making stockholders personally liable to laborers, servants, and employees for services performed for corporation, was held not entitled to summary judgment where answering affidavits presented triable issues whether plaintiff was laborer, servant, or employee, and whether action was commenced within period of limitation.—Warsen v. Granger, 284 N. Y.S. 308, 246 App.Div. 778.

84. N.Y.—Herrick Park Development Corporation v. Sholom Realty Co., 298 N.Y.S. 656, 164 Misc. 603.

85. N.Y.—Armleder Motor Truck Co. of New York v. Barnes, 202 N.Y.S. 472, 207 App.Div. 764.

86. N.Y.—Woodmere Academy v. Moskowitz, 208 N.Y.S. 578, 212 App.Div. 457.

87. N.Y.—Berson Sydeman Co. v. Waumbeck Mfg. Co., 208 N.Y.S. 716, 212 App.Div. 422.

88. N.Y.—Stevens v. Elizabeth Arden, Inc., 2 N.Y.S.2d 187, 253 App. Div. 358.

89. Ill.—Fisher v. Hargrave, 48 N. E.2d 966, 318 Ill.App. 510.
N.Y.—Graves v. Northern N. Y. Pub. Co., 22 N.Y.S.2d 537, 260 App.Div. 900, motion granted 32 N.E.2d 832, 285 N.Y. 547—Gnozzo v. Marine Trust Co. of Buffalo, 17 N.Y.S.2d 168, 258 App.Div. 298, reargument denied Gnozzo v. Marine Trust Co., 18 N.Y.S.2d 752, 259 App.Div. 788, affirmed Gnozzo v. Marine Trust Co. of Buffalo, 29 N.E.2d 933, 284 N.Y. 617—Marmor v. Bernstein, 11 N.Y.S.2d 818, 256 App.Div. 1106, affirmed 23 N.E.2d 557, 281 N.Y. 754—Hyde v. Clark, 39 N.Y.S.2d 229, 179 Misc. 414—Beisheim v. People, 39 N.Y.S.2d 333.

Hospital as charitable institution

In action for injuries to patient at hospital, the mere assertion of patient's counsel in affidavit that defendant hospital was not a charitable institution did not create an issue as opposed to affidavit of hospital's superintendent which contained copies of material documents, the articles of incorporation, constitution, and by-laws, which showed the actual charitable, benevolent, and educational practices of defendant; and hence defendant's motion for summary judgment should have been granted.—Schau v. Morgan, 6 N.W. 2d 212, 241 Wis. 334.

90. N.Y.—Ziegfeld Theatre Corp. v. Sixth Ave. Amusement Corp., 57 N.Y.S.2d 195.

91. U.S.—U. S. v. Guaranty Trust Co. of New York, C.C.A.N.Y., 100 F.2d 369.

92. N.Y.—Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Co.) v. Allgemeine Elektricitaets-Gesellschaft (General Electric Co., Germany), 13 N.Y. S.2d 397, 171 Misc. 714.

93. N.Y.—Sweinhart v. Bamberger, 2 N.Y.S.2d 130, 166 Misc. 256.

94. N.Y.—Dumbadze v. Agency of Canadian Car & Foundry Co., 38 N.Y.S.2d 991, affirmed Gurge v. Agency of Canadian Car & Foundry Co., 45 N.Y.S.2d 955, 267 App. Div. 782, appeal denied In re Dumbadze's Estate, 47 N.Y.S.2d 815, 267 App.Div. 878.

95. Mich.—Robertson v. New York Life Ins. Co., 19 N.W.2d 498, 312 Mich. 92, certiorari denied 66 S.Ct. 470, rehearing denied 66 S.Ct. 896.

96. Wis.—Tregloan v. Hayden, 282 N.W. 698, 229 Wis. 500.

97. U.S.—Larson v. Todd Shipyards Corporation, D.C.N.Y., 16 F.Supp. 967.
Ill.—Owen v. Mathias Klein & Sons, 54 N.E.2d 88, 322 Ill.App. 689.
N.Y.—Kirschbaum v. Dauman, 26 N. Y.S.2d 646, 261 App.Div. 998, reargument denied 28 N.Y.S.2d 156, 262 App.Div. 747.

98. N.Y.—Lederer v. Wise Shoe Co., 12 N.E.2d 544, 276 N.Y. 459, motion denied 296 N.Y.S. 324, 250 App. Div. 852.

99. N.Y.—Starker v. Prudential Ins. Co. of America, 282 N.Y.S. 845, 246 App.Div. 567—Ludmerer v. New York Life Ins. Co., 19 N.Y.S.2d 272.
Wis.—Fehr v. General Accident Fire & Life Assur. Corp., 16 N.W.2d 787, 246 Wis. 228.

Lapse for nonpayment of premiums

Where insurer's affidavit showed that on date of insured's death life policy sued on had lapsed for nonpayment of premiums, and insurer's claim was not controverted, insurer's motion for summary judgment should have been granted.—Mecca v. Metropolitan Life Ins. Co., 42 N.Y.S. 2d 452, 266 App.Div. 910.

Vessel unattended

Affidavits disclosing that marine policy contained warranty by insured that barge when moored should be in charge of competent watchman, and that loss occurred while moored barge was unattended, entitled insurer to summary judgment dismissing complaint for lack of merits. —U. S. Gypsum Co. v. Insurance Co. of North America, D.C.N.Y., 19 F. Supp. 767.

1. N.Y.—Tymon v. Tyrose Homes, 1 N.Y.S.2d 974, 253 App.Div. 900, resettled 3 N.Y.S.2d 74, 254 App. Div. 582, appeal dismissed 18 N.E. 2d 869, 279 N.Y. 787.

2. N.Y.—Goldman v. Nu-Boro Park Cleaners, 41 N.Y.S.2d 592, 266 App. Div. 780, appeal denied 43 N.Y.S.2d 635, two cases, 266 App.Div. 856.

tween spouses,[3] releases,[4] rents or leases,[5] res judicata,[6] specific performance,[7] stockbrokers,[8] and stocks or stockholders.[9]

In other cases, summary judgment in favor of defendant dismissing the complaint, at least as to all causes of action involved, has been held not justified on the basis of the affidavits or other proof submitted,[10] as, for example, in actions for or involving alimony,[11] bonds,[12] condemnation of land,[13] detinue,[14] employment contracts or services rendered,[15] foreclosure of mortgages,[16] guaranties,[17] insurance,[18] liability of corporate directors for alleged dereliction of duty,[19] libel,[20] notes,[21] personal injuries,[22] releases,[23] rents or leases,[24] replevin,[25] roy-

3. Cal.—Hardy v. Hardy, 143 P.2d 701, 23 Cal.2d 244.

4. N.Y.—Murphy v. Bissell, 5 N.Y.S.2d 225, 254 App.Div. 891, followed in 5 N.Y.S.2d 226, 254 App.Div. 891.

Insufficient proof of infirmity in release

Where documentary evidence supported defense of release and plaintiff, to meet that defense, interposed only an affidavit of an attorney having no personal knowledge and reciting hearsay, although it affirmatively appeared that several individuals, including plaintiff, were in position to make affidavits if true situation revealed any infirmity in release, defendants' motion for summary judgment should have been granted.—Favole v. Gallo, 30 N.Y.S.2d 878, 263 App.Div. 729, reargument denied 32 N.Y.S.2d 139, 263 App.Div. 826, affirmed 45 N.E.2d 456, 289 N.Y. 696.

5. N.Y.—Ziegfeld Theatre Corp. v. Sixth Ave. Amusement Corp., 57 N.Y.S.2d 195.

6. N.Y.—Ritter v. Broff, 43 N.Y.S.2d 867.

7. N.Y.—Brookwood Parks v. Jackson, 26 N.Y.S.2d 127, 261 App.Div. 410.
Wis.—Strelow v. Bohr, 290 N.W. 603, 234 Wis. 170.

8. N.Y.—Mackenzie v. Rothschild, 47 N.Y.S.2d 928, 267 App.Div. 989, reargument denied 50 N.Y.S.2d 174, 268 App.Div. 780, affirmed 62 N.E.2d 237, 294 N.Y. 800.

9. U.S.—Toebelman v. Missouri-Kansas Pipe Line Co., C.C.A.Del., 130 F.2d 1016.
N.Y.—O'Brien v. American Beverage Corporation, 45 N.Y.S.2d 760, 267 App.Div. 813—Vendrink Corporation of New York v. MacBride, 23 N.Y.S.2d 705, 261 App.Div. 19—Diamond v. Davis, 38 N.Y.S.2d 103, affirmed 39 N.Y.S.2d 412, first case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, first case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, first case, 292 N.Y. 552—Diamond v. Davis, 38 N.Y.S.2d 93, affirmed 39 N.Y.S.2d 412, second case, 265 App.Div. 919, appeal denied 41 N.Y.S.2d 191, second case, 265 App.Div. 1052, and affirmed 54 N.E.2d 683, second case, 292 N.Y. 554—Druckerman v. Harbord, 29 N.Y.S.2d 370.

10. N.Y.—Idoni v. Down, 8 N.Y.S.2d 719, 170 Misc. 303—Dale Radio Co. v. Fairbrother, 32 N.Y.S.2d 344—Michigan Millers Mut. Ins. Co. v. Regan, 21 N.Y.S.2d 36.
Wis.—Holzschuh v. Webster, 17 N.W.2d 553, 246 Wis. 423.

11. N.Y.—Bogert v. Watts, 38 N.Y.S.2d 426, 265 App.Div. 931, reversing 33 N.Y.S.2d 658, appeal denied 39 N.Y.S.2d 988, 265 App.Div. 992.

12. N.Y.—Aronow Bros. v. U. S. Casualty Co., 35 N.Y.S.2d 75, affirmed 39 N.Y.S.2d 993, 265 App.Div. 992, appeal denied 41 N.Y.S.2d 192, 265 App.Div. 1052.

13. Wis.—City of Milwaukee v. Heyer, 4 N.W.2d 126, 241 Wis. 56.

14. Ill.—Macks v. Macks, App., 67 N.E.2d 505.

15. N.Y.—Rechtschaffer v. Rechtschaffer, 59 N.Y.S.2d 735, 270 App.Div. 812, appeal denied 61 N.Y.S.2d 386, 270 App.Div. 843—King v. Lafayette Nat. Bank of Brooklyn in New York, 31 N.Y.S.2d 602, 263 App.Div. 830, reargument denied 33 N.Y.S.2d 256, 263 App.Div. 892—King v. Lafayette Nat. Bank of Brooklyn in New York, 31 N.Y.S.2d 601, 263 App.Div. 830—Schwartz v. Frieder, 291 N.Y.S. 836, 249 App.Div. 199—Gruss v. City of New York, 40 N.Y.S.2d 816, 179 Misc. 1053—Semprevivo v. Winn, 62 N.Y.S.2d 350—New York Post Corp. v. Kelley, 61 N.Y.S.2d 264, affirmed Hearst Consolidated Publication v. Kelley, 61 N.Y.S.2d 762, 270 App.Div. 916, appeal granted 62 N.Y.S 2d 614, 270 App.Div. 923, New York Sun v. Kelley, 62 N.Y.S.2d 614, 270 App.Div. 924, New York World Telegram Corp. v. Kelley, 62 N.Y.S.2d 614, 270 App.Div. 924, and New York Post Corp. v. Kelley, 62 N.Y.S.2d 615, 270 App.Div. 923—Pohlers v. Exeter Mfg. Co., 52 N.Y.S.2d 316—Russell v. Lopez, 16 N.Y.S.2d 595, affirmed 20 N.Y.S. 2d 1016, 259 App.Div. 885.

16. N.Y.—Riordan v. Crabtree, 56 N.Y.S.2d 425, 269 App.Div. 907, appeal dismissed 68 N.E.2d 455, 296 N.Y. 515.

17. N.Y.—Gervis v. Knapp, 43 N.Y.S. 2d 849, 182 Misc. 311.

18. N.Y.—Gold v. Travelers Ins. Co., 31 N.Y.S.2d 580, 263 App.Div. 817—Daly v. National Civil Service Endowment Ass'n, 43 N.Y.S.2d 339, 181 Misc. 163—Roth v. Equitable Life Assur. Soc. of U. S., 50 N.Y.S.2d 119, affirmed 55 N.Y.S.2d 117, 269 App.Div. 746, appeal denied 56 N.Y.S.2d 202, 269 App.Div. 818—Biloz v. Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, affirmed 23 N.Y.S.2d 460, 260 App.Div. 976.

Notice of accident

In action for injuries sustained in an automobile accident, where defendant's liability insurer moved for summary judgment dismissing complaint on ground that insurance coverage was lost because of insured's failure to give insurer notice of the accident as soon as practicable, motion was properly denied in view of affidavits raising an issue of fact whether insurer was notified as soon as practicable.—Vande Leest v. Basten, 6 N.W.2d 667, 241 Wis. 509.

19. U.S.—Toebelman v. Missouri-Kansas Pipe Line Co., C.C.A.Del., 130 F.2d 1016.
N.Y.—Levine v. Behn, 25 N.E.2d 871, 282 N.Y. 120.

20. N.Y.—Wels v. Rubin, 20 N.E.2d 737, 280 N.Y. 233.

21. N.Y.—First Trust & Deposit Co. v. Dent, 34 N.Y.S.2d 282, 263 App.Div. 1058—Farley v. Overbury, 3 N.Y.S.2d 990, 254 App.Div. 739—Strong v. Dahm, 39 N.Y.S.2d 266—O'Brien v. O'Brien, 16 N.Y.S.2d 799.

22. Wis.—Hanson v. Halvorson, 19 N.W.2d 882, 247 Wis. 434—Ettelldorf v. Yellow Cab & Transfer Co., 18 N.W.2d 330, 246 Wis. 602.

23. N.Y.—Adams v. Judson, 277 N.Y.S. 304, 243 App.Div. 404.

24. U.S.—Weisser v. Mursam Shoe Corporation, C.C.A.N.Y., 127 F.2d 344, 145 A.L.R. 467.
N.Y.—Port Chester Central Corporation v. Leibert, 39 N.Y.S.2d 41, 179 Misc. 839.

25. N.Y.—Kennedy v. Schroeder, 40 N.Y.S.2d 611, 265 App.Div. 725.

alties,[26] sales of personalty,[27] and stock subscriptions.[28]

§ 226. Hearing and Determination; Relief Awarded

A motion for summary judgment is to be determined on the facts shown by the record, and relief awarded in accordance with the rules of law and equity.

In passing on a motion for summary judgment the court should consider all the facts shown by the record,[29] and, if the circumstances require, may hold its decision on the motion in abeyance pending submission to it of facts necessary for a determination.[30] The pleadings should be considered in order that the court may know what the issues are,[31] although it has been held that, on a motion for summary judgment by plaintiff, the court will not decide whether particular defenses have been properly denominated or pleaded.[32] The questions to be decided are whether the facts set forth sufficiently show all that the case will involve on a trial, and whether the evidence, including the pleadings and exhibits, clearly demonstrates that the movants are entitled to judgment in their favor.[33]

Relief is to be awarded in accordance with the rules of law and equity,[34] and, where the circum-

26. U.S.—Sartor v. Arkansas Natural Gas Corporation, La., 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967, rehearing denied 64 S.Ct. 941, 322 U.S. 767, 88 L.Ed. 1593.

27. N.Y.—Price v. Spielman Motor Sales Co., 26 N.Y.S.2d 886, 261 App.Div. 626—S. Reubens & Bros. v. Samdperil, 47 N.Y.S.2d 407, 181 Misc. 713—Jenks v. Ladue, 59 N.Y.S.2d 353.

28. Pa.—Bell v. Brady, 31 A.2d 547, 346 Pa. 666.

29. Ariz.—Suburban Pump & Water Co. v. Linville, 135 P.2d 210, 60 Ariz. 274.

Ill.—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465.

Matters subsequent to formation of original issues

The court has jurisdiction to render summary judgment on issues raised by stipulations and facts occurring after the formation of issues by the original pleadings, since such stipulations and facts could be set up by supplemental pleadings.—Costello v. Polenska, 7 N.W.2d 593, 242 Wis. 204, modified on other grounds 8 N.W.2d 307, 242 Wis. 204.

Correction of name

A difference in pleadings and notice of motion for summary judgment as to defendant's name will be disregarded on filing of affidavit as to his correct name.—Grossman Steel Stair Corp. v. Steinberg, 54 N.Y.S.2d 275.

30. N.Y.—Forma Corp. v. A. & L. Constructors Corp., 59 N.Y.S.2d 878—Grossman Steel Stair Corp. v. Steinberg, 54 N.Y.S.2d 275—Mill Factors Corporation v. Bridal Veil & Accessories Co., 51 N.Y.S.2d 256.

Request for additional information

It was held not improper for the court, after argument on motion for summary judgment, to ask for additional information which was supplied, and which completed the showing that entitled plaintiff to summary judgment, where defendants were accorded full opportunity to supply any facts which they deemed material and motion papers contained all that was necessary to advise defendants of claim of plaintiff.—Winter v. Trepte, 290 N.W. 599, 234 Wis. 193.

31. Ill.—Roberts v. Sauerman Bros., 20 N.E.2d 849, 300 Ill.App. 213.

All pleadings considered

N.Y.—Fertig v. General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 13 N.Y.S.2d 872, 171 Misc. 921.

A liberal construction must be given to the pleadings of the party against whom the motion is made.—Eagle Oil & Refining Co. v. Prentice, 122 P.2d 264, 19 Cal.2d 553.

Inclusion of separate defense in answer

Plaintiff's motion that amended answer be stricken and summary judgment entered for him constituted an attack on answer as it then stood, and propriety of granting of motion must be tested on understanding that answer included separate defense to which general demurrer was pending.—Ware v. Heller, 148 P.2d 410, 63 Cal.App.2d 817.

Cross complaint treated as counterclaim

It has been held that a cross complaint could be treated as counterclaim, notwithstanding statute relating to summary judgments does not specifically mention cross complaints.—Loehr v. Stenz, 263 N.W. 373, 219 Wis. 361.

32. N.Y.—Standard Factors Corp. v. Kreisler, 53 N.Y.S.2d 871, affirmed 56 N.Y.S.2d 414, 269 App.Div. 830.

33. U.S.—Sun Oil Co. v. Blevins, D.C.La., 29 F.Supp. 901, affirmed, C.C.A., Blevins v. Sun Oil Co., 110 F.2d 566.

"The test of a motion for summary judgment is whether the pleadings, affidavits, and exhibits in support of the motion are sufficient to overcome the opposing papers, and to justify a finding as a matter of law that there is no defense to the action."—Stuyvesant Credit Union v. Manufacturers' Trust Co., 267 N.Y.S. 302, 305, 239 App.Div. 187—Tidewater Oil Sales Corporation v. Pierce, 210 N.Y.S. 759, 760, 213 App.Div. 796—Wm. H. Frear & Co. v. Bailey, 214 N.Y.S. 675, 677, 127 Misc. 79.

Showing as to good faith and merits

Under some statutes, the test in determining right to relief in summary judgment proceedings is good faith and merits as disclosed by showing made.—Jackson Reinforced Concrete Pipe Co. v. Central Contracting & Engineering Co., 234 N.W. 111, 253 Mich. 157.

34. N.Y.—Federal Reserve Bank of Philadelphia v. Weekes, 11 N.Y.S.2d 952, 171 Misc. 404—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106—Balio v. Utica General Truck Co., 38 N.Y.S.2d 85.

Resulting burdens

The rules cannot be changed merely because grave burdens will thereby be placed on individuals or institutions.—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

Failure to ask proper relief

As the duty of judges is to administer justice according to law, if counsel should inadvertently omit to ask what his client is entitled to demand in a summary proceeding, the court is nevertheless bound to award it to him, notwithstanding the omission.—Roth v. Steffe, 9 Lanc.Bar., Pa., 77.

Possibility of double liability

Summary judgment will not be denied on the ground that defendant may be subjected to a double liability where defendant can fully protect himself by an application for a stay of execution.—Jackson Reinforced Concrete Pipe Co. v. Central Contracting & Engineering Co., 234 N.W. 111, 253 Mich. 157.

Striking out of answer

An answer containing defenses or denials may be stricken out as sham or frivolous when the motion papers on a motion for summary judgment

stances require, the court will look through the form of a transaction to determine its true nature,[35] although it cannot inquire into the circumstances of the case except as they are revealed in the papers submitted.[36] The number of affidavits submitted on behalf of the respective parties is not controlling any more than the weight of the testimony on the trial of an action is governed by the number of witnesses.[37] The amount awarded by way of summary judgment should be consistent with that demanded and shown to be due,[38] and the various provisions of the judgment must be consistent with each other.[39] Where a motion by defendant for judgment on the pleadings has been granted, his motion for summary judgment is properly denied as academic.[40]

Determination of the issues should not be made piecemeal,[41] and the granting of a motion for summary judgment with respect to some of the issues has been held improper where there was no disposition of other issues.[42] However, where the proofs adduced on the motion show no issue as to the existence of some liability on the part of defendant, although they do present an issue as to the amount of liability, summary judgment may be granted on the issue of liability, with directions for the assessment of the amount of liability by trial or hearing;[43] but where a complaint demanding a liquidated amount is supported by the moving affida-

make it appear that the answer falls within either category.—Commonwealth Fuel Co. v. Powpit Co., 209 N.Y.S. 603, 212 App.Div. 553.

Amendment of statement of claim

Where statement of claim was not in form required by statute, the court instead of entering summary judgment against plaintiff, should have permitted him to amend so as to make his cause of action clear.—Seaman v. Tamaqua Nat. Bank, 124 A. 323, 280 Pa. 124.

Default

Defendant was properly defaulted when absent from hearing on plaintiff's motion for judgment, and hence was not entitled to file demand for trial within seven days from order for judgment, and thus secure advance of case for speedy trial.—Norwood Morris Plan Co. v. McCarthy, 4 N.E.2d 450, 295 Mass. 597, 107 A.L.R. 1215.

35. N.Y.—Lamula v. Morris Plan Industrial Bank of New York, 19 N.Y.S.2d 357, 173 Misc. 347.

36. N.Y.—First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847, 155 Misc. 106.

Insertions in written contract

In action for breach of an alleged contract to convey property, on defendants' motion for summary judgment for nonexistence of a contract in writing, trial judge was not bound to insert in the agreement what was omitted but merely to ascertain and declare legal effect of contents of writings purporting to evidence contract.—Ajax Holding Co. v. Heinsbergen, 149 P.2d 139, 64 Cal.App.2d 665.

Matters not before the court

(1) A notice of intention to apply for leave to amend a pleading is not properly before the court on an application for summary judgment.—Dale Radio Co. v. Fairbrother, 32 N.Y.S.2d 344.

(2) An order which strikes out ar answer, and from which no appeal has been taken, cannot be revised on a motion for summary judgment.—2018 Seventh Ave., Inc., v. Nach-Haus Leasing Corporation, 46 N.E.2d 900, 289 N.Y. 490, motion denied 47 N.E.2d 443, 289 N.Y. 848, motion denied 50 N.E.2d 308, 290 N.Y. 925.

37. N.Y.—La Pointe v. Wilson, 61 N.Y.S.2d 64.

38. Ill.—Drake v. Wood, 4 N.E.2d 50, 286 Ill.App. 623.
Mich.—Baxter v. Szucs, 227 N.W. 666, 248 Mich. 672.
Va.—Morrow v. Vaughan-Bassett Furniture Co., 4 S.E.2d 399, 173 Va. 417.

Erroneous item

Where computation in notice of motion for judgment on note showed on its face that plaintiff's claim included a certain item which was no part of note, court was without authority to enter office judgment for plaintiffs without deduction of such item irrespective of defendant's appearance.—Bacon v. Dettor, 33 S.E. 2d 648, 183 Va. 835.

Allowance previously credited

Defendant was not entitled to an allowance provided in contract, on plaintiff's recovering summary judgment for breach of contract, where it appeared that allowance had already been credited to defendant.—Lowenstern Bros. v. Marks Credit Clothing, 48 N.E.2d 729, 319 Ill.App. 71.

39. N.Y.—Closson v. Seaboard Sand & Gravel Corporation, 265 N.Y.S. 160, 238 App.Div. 584, motion denied 189 N.E. 701, 263 N.Y. 568.

Assessment of damages on denial of motion

An order which denies plaintiff's motion for summary judgment, and at the same time sets the case down for trial for the purpose of assessing damages, is inconsistent.—R. K. L. Dresses v. Nationwide Packing & Shipping Service, 11 N.Y.S.2d 729, 171 Misc. 1.

Direction for trial after striking of answer

It is error for the court to direct that the answer be stricken out on a motion for summary judgment, leaving no issues whatever to be tried, and then to send the matter to another part of the court for trial.—Closson v. Seaboard Sand & Gravel Corporation, 265 N.Y.S. 160, 238 App. Div. 584, motion denied 189 N.E. 701, 263 N.Y. 568.

40. N.Y.—Dry Dock Sav. Inst. v. Grant, 60 N.Y.S.2d 238.

41. Ill.—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N. E.2d 736, 310 Ill.App. 465.

42. N.Y.—Warner v. P. F. Collier & Son Distributing Corporation, 218 N.Y.S. 262, 218 App.Div. 354.

Undetermined plea in abatement

A decision granting a plaintiff's motion for summary judgment, made while a plea in abatement, for nonjoinder of necessary parties, remained open for judicial determination, was premature and judgment was a nullity.—Goucher v. Herr, 14 A.2d 651, 65 R.I. 246.

43. N.Y.—Reid v. Reid, 10 N.Y.S.2d 916, 170 Misc. 719—Kollsman v. Detzel, 55 N.Y.S.2d 491—President and Directors of Manhattan Co. v. Spier, 43 N.Y.S.2d 954.

Questions determinable at assessment

In action against liability insurer for failure to defend action against insured, amount of expenses incurred by insured in defending action, and whether settlement made was reasonably necessary, were questions which could properly be determined at an assessment ordered in connection with granting of insured's motion for summary judgment against insurer.—Krasilovsky Bros. Trucking Corp. v. Maryland Cas. Co., 54 N.Y.S.2d 60.

vit, and no issue with respect thereto has been raised by the answering affidavit, it is error to direct an assessment of damages.[44] The court may grant partial summary judgment for the amount established to be due, and may direct that the action be severed, and the case proceed in its usual course as to the balance of the claim.[45] It has been held that where defendant admits plaintiff's claim, but asserts a counterclaim, plaintiff is entitled to summary judgment only for the difference between his claim and the amount of defendant's counterclaim;[46] but it has also been held proper in such a case to award plaintiff judgment for the amount of his claim and allow the counterclaim to stand, to be disposed of in the usual course of practice.[47]

In some jurisdictions, on a motion by either party for summary judgment, the other party may have a judgment to which he shows himself to be entitled.[48] Thus summary judgment may be granted to plaintiff, notwithstanding the motion for summary judgment was made by defendant and plaintiff did not move therefor, where it appears that plaintiff is entitled to judgment.[49] Similarly summary judgment may be granted in favor of defendant dismissing the complaint, notwithstanding the motion for summary judgment was made by plaintiff.[50] Under the practice in other jurisdictions, however, the court is not authorized to dismiss the suit on striking plaintiff's affidavit for summary judgment from the files, in the absence of a motion by defendant for dismissal.[51]

Terms or conditions. It is within the discretion of the court, where justified by the circumstances, to deny or grant a motion for summary judgment on such terms as the justice of the case may require;[52] but, in the absence of circumstances warranting the imposition of terms or conditions, a motion for summary judgment must be granted or denied without condition.[53]

Decision as without prejudice or on the merits. In a proper case the court may deny the motion for summary judgment without prejudice to a new motion[54] or without prejudice to the right of the moving party to seek other appropriate relief.[55] It has been held that dismissal of a cause of action on defendant's motion for summary judgment may be made without prejudice to plaintiff's right to move for permission to serve an amended complaint;[56] but it has also been held that dismissal of the complaint without prejudice, on defendant's motion for summary judgment, is improper.[57] Where an action has been submitted to the court on a motion for summary judgment only, and has not been assigned for hearing on the merits, it is error for the court to dispose of the case on the merits after it appears that a decision necessarily involves the determination of a controverted issue of fact.[58]

44. N.Y.—Mayer v. Sulzberger, 41 N.Y.S.2d 822.

45. N.Y.—Direct Realty Co. v. Birnbaum, 46 N.Y.S.2d 435—Tenny v. Tenny, 36 N.Y.S.2d 704.

Claim of excessive amount held not fatal

The fact that plaintiff claims an excessive amount does not necessitate denial of his motion for summary judgment, since he is entitled to partial summary judgment for the amount established to be due.—Uptown Transp. Corporation v. Fisk Discount Corporation, 271 N.Y.S. 723, 151 Misc. 469.

46. N.Y.—Dairymen's League Co-Op. Ass'n v. Egli, 239 N.Y.S. 152, 228 App.Div. 164.

Effect of counterclaim generally see supra § 220 c (1).

47. N.Y.—Little Falls Dairy Co. v. Berghorn, 224 N.Y.S. 34, 130 Misc. 454.

Restraint against disposition of judgment or recovery

It was held proper to sever the action on the counterclaim and to permit plaintiff to proceed to collect the amount of his judgment, except that plaintiff was restrained, pending disposition of the counterclaim, from assigning or otherwise disposing of the judgment, or of the moneys payable thereunder to an amount equal to defendant's counterclaim.—Little Falls Dairy Co. v. Berghorn, supra.

48. N.Y.—Cuchal v. Walsh, 59 N.Y.S.2d 435, 185 Misc. 1008, modified on other grounds 60 N.Y.S.2d 776.

49. N.Y.—Bradley v. Roe, 13 N.Y.S.2d 693, 257 App.Div. 1005, certified questions answered 27 N.E.2d 35, 282 N.Y. 525, 129 A.L.R. 633, reversed on other grounds 27 N.E.2d 35, 282 N.Y. 525, 129 A.L.R. 633.

50. N.Y.—Porcella v. Kramrisch, 59 N.Y.S.2d 349.

Where lack of jurisdiction appears, the court on a motion for summary judgment should dispose of the case finally on the jurisdictional point without requiring an additional motion for a dismissal.—Mara v. U. S., D.C.N.Y., 54 F.2d 397.

51. Ill.—People, for Use of Dyer, v. Sawyer, 2 N.E.2d 343, 284 Ill.App. 463.

52. N.Y.—Souhami v. Prudence-Bonds Corporation, 270 N.Y.S. 359, 150 Misc. 602—Free v. Fisher, 41 N.Y.S.2d 111—Lalor v. Bour, 36 N.Y.S.2d 850.

34 C.J. p 206 note 92.

53. N.Y.—National City Bank of Cleveland v. Cold Mix, 1 N.Y.S.2d 459.

Furnishing of bond

An order granting a motion for summary judgment unless defendant gives bond to pay any judgment ultimately recovered has been held unauthorized.—Gibson v. Standard Automobile Mut. Casualty Co. of New York, 203 N.Y.S. 53, 208 App.Div. 91.

54. N.Y.—A. Sidney Davison Coal Co., Inc. v. Interstate Coal & Dock Co., 193 N.Y.S. 883.

34 C.J. p 207 note 96.

55. N.Y.—Ottone v. American London Shrinkers Corp., 55 N.Y.S.2d 243.

56. N.Y.—Boscarino v. Spear Box Co., 52 N.Y.S.2d 252, 268 App.Div. 1041.

57. Wis.—Potts v. Farmers' Mut. Automobile Ins. Co., 289 N.W. 606, 233 Wis. 313.

58. Mich.—Elston v. Robert Brown, Limited, 282 N.W. 895, 287 Mich. 44.

Reconsideration or renewal of motion. The court may, before final judgment, reconsider its ruling on a motion for judgment.[59] It may grant reargument of the motion[60] and, in the interests of justice, may on reargument consider a new affidavit presented by a party as though it had been timely presented.[61] On denial of a motion for summary judgment for insufficiency of the affidavit submitted, leave may be granted to renew the motion on affidavits which comply with the statutes.[62] It has been held that where plaintiff's motion for summary judgment was denied and the case tried, he waived his right to move again for summary judgment.[63]

Costs. Notwithstanding denial of a motion for summary judgment on the ground that plaintiff's affidavit is insufficient to support his cause of action, if defendant has failed to show sufficient facts to entitle him to defend, the motion should be denied without costs.[64]

Disposition of exhibits. Where exhibits are produced in court in support of a motion for summary judgment, the court on granting the motion may make suitable provision for their disposition.[65]

Construction and operation. It has been held that the validity of a summary judgment is to be determined by the sufficiency of the affidavits considered on the hearing of the motion.[66] Where the facts are undisputed, the decision on a motion for summary judgment is on the law.[67] An order which terminates plaintiff's motion for summary judgment and defendant's cross motion to dismiss the complaint, by grant of defendant's motion, by necessary inference denies the motion for summary judgment.[68] A dismissal as to one of the parties to a motion for judgment is not a discontinuance of the entire motion,[69] although the party dismissed was notified and has appeared and pleaded.[70]

§ 227. Form, Requisites, and Entry of Judgment

A summary judgment should show compliance with statutory requirements as to its form and entry, and should set forth those facts necessary to give the court jurisdiction and to support the judgment.

A summary judgment on motion must show on its face the existence or proof of all facts which were necessary to give the court jurisdiction and support the judgment.[71] It must show that there was compliance with all the statutory requirements,[72] such as that notice was given for the time and in the manner required[73] and that the motion was made at the proper time and place.[74] The court should not make findings of fact and conclusions of law on granting a motion for summary judgment.[75]

On the granting of a motion for summary judgment for plaintiff, it is better practice to enter an order striking out the answer and directing judgment,[76] with the result that there is an entry of

59. Ill.—Roach v. Village of Winnetka, 10 N.E.2d 356, 366 Ill. 578.

60. N.Y.—Newman v. Special, 13 N.Y.S.2d 634, 257 App.Div. 1030.

Filing of bond as condition for new hearing

The court may grant a new hearing to defendant on facts not presented in opposition to a motion for summary judgment on his filing a bond to protect plaintiff against any judgment that may be procured.—Greenberg v. Rudnick, 258 N.Y.S. 679, 143 Misc. 793.

Motion held one for rehearing

A motion for reargument on which new facts were adduced was held in effect a motion for a rehearing on additional papers.—Gold v. Travelers Ins. Co., 31 N.Y.S.2d 580, 263 App.Div. 817.

61. N.Y.—Musler v. Brooks, Inc., 1 N.Y.S.2d 537, 165 Misc. 797, affirmed 1 N.Y.S.2d 528, 253 App.Div. 793.

62. Wis.—Fuller v. General Accident Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 272 N.W. 839, 224 Wis. 603.

63. N.Y.—Corr v. Boggiano, 278 N.Y.S. 455, 244 App.Div. 724.

64. N.Y.—A. Sidney Davison Coal Co., Inc. v. Interstate Coal & Dock Co., 193 N.Y.S. 883.

65. **Safeguarding of notes**

In an action on notes, where notes are produced in court in support of motion for summary judgment, the court on granting the judgment should require the notes to be marked as exhibits, or should seal the notes, or require them to be placed in a safe depositary to be retained under the order of the court and redelivered under like order to a person designated therein after final termination of a litigation.—General Inv. Co. v. Interborough Rapid Transit Co., 139 N.E. 216, 235 N.Y. 133.

66. Cal.—McComsey v. Leaf, 97 P.2d 242, 36 Cal.App.2d 132.

67. Mich.—Michigan Lafayette Bldg. Co. v. Continental Bank, 246 N.W. 53, 261 Mich. 256.

68. N.Y.—New York Cent. R. Co. v. Beacon Milling Co., 53 N.Y.S.2d 405, 184 Misc. 187.

69. Ala.—Beard v. Mobile Branch Bank, 8 Ala. 344.

70. Ala.—Beard v. Mobile Branch Bank, supra.

71. N.Y.—Brown v. Randazzo, 15 N.Y.S.2d 425, 258 App.Div. 748.
Tenn.—Phillips v. Landess, 280 S.W. 694, 152 Tenn. 682.
34 C.J. p 206 note 83.

Production of note

In rendering summary judgment in an action on a note, where the note is produced in court, the court should recite in its order that the note was produced.—General Inv. Co. v. Interborough Rapid Transit Co., 139 N.E. 216, 235 N.Y. 133.

72. Ala.—Arthur v. State, 22 Ala. 61.
Pa.—Freihofer v. Diggins, Com.Pl., 27 Del. 275.

73. Tenn.—Lane v. Keith, 2 Baxt. 189.
34 C.J. p 206 note 85.

Notice held sufficient

Ill.—Mecartney v. Hale, 48 N.E.2d 570, 318 Ill.App. 502.

74. Tenn.—Curry v. Munford, 5 Heisk. 61.

75. N.Y.—Brescia Const. Co. v. Walart Const. Co., 264 N.Y.S. 862, 238 App.Div. 360.

76. N.Y.—Donnelly v. Bauder, 216 N.Y.S. 437, 217 App.Div. 59.

both an order and a judgment;[77] but such an order is not strictly necessary.[78]

Entry. Summary judgment must be entered by a person authorized so to do.[79] The entry of a decree by the clerk on the minutes of the court in a summary proceeding is the judgment;[80] and where, after such entry, defendant dies, the fact that it is signed during the term thereafter does not make it irregular.[81] If judgment is entered on the motion before the time as to which defendant was notified it is erroneous, but not void.[82]

X. AMENDING, CORRECTING, REVIEWING, OPENING, AND VACATING JUDGMENT

A. JURISDICTION AND POWER GENERALLY

§ 228. In General

Courts have inherent power to control, amend, open, and vacate their judgments under proper circumstances, although in some jurisdictions statutes regulate the courts' control of their judgments.

In the absence of a statute to the contrary, courts, under proper circumstances, may control, amend, open, and vacate their own judgments.[83] This power is inherent and independent of statutes.[84] In

77. N.Y.—Weinberg v. Goldstein, 235 N.Y.S. 529, 226 App.Div. 479.

78. N.Y.—Donnelly v. Bauder, 216 N.Y.S. 437, 217 App.Div. 59.

79. **Court or judge at chambers** may enter summary judgment after supreme court commissioner has struck out answer.—National Surety Co. v. Mulligan, 146 A. 372, 105 N.J.Law 336.

80. S.C.—Dibble v. Taylor, 29 S.C. L. 308, 42 Am.D. 368.
34 C.J. p 206 note 87.

81. S.C.—Dibble v. Taylor, supra.

82. Ky.—Bustard v. Gates, 4 Dana. 429.

83. U.S.—Petway v. Dobson, D.C. Tenn., 46 F.Supp. 114—Illinois Printing Co. v. Electric Shovel Coal Corporation, D.C.Ill., 20 F. Supp. 181.
Ala.—Du Pree v. Hart, 8 So.2d 183, 242 Ala. 690.
Ark.—State v. West, 254 S.W. 828, 160 Ark. 413.
Cal.—In re Estrem's Estate, 107 P. 2d 36, 16 Cal.2d 563—Kohlstedt v. Hauseur, 74 P.2d 314, 24 Cal.App.2d 60.
Conn.—Persky v. Puglisi, 127 A. 351, 101 Conn. 658.
Ga.—Coker v. Elson, 151 S.E. 682, 40 Ga.App. 835.
Ill.—Western Smelting & Refining Co. v. Benj. Harris & Co., 24 N.E. 2d 255, 302 Ill.App. 535.
Kan.—State v. Riverside Drainage Dist. of Sedgwick County, 255 P. 37, 123 Kan. 393.
Ky.—Dotson v. Burchett, 190 S.W.2d 697, 301 Ky. 28.
La.—Termini v. McCormick, 23 So.2d 52, 208 La. 221—Frank v. Currie, App., 172 So. 843.
Mass.—Russell v. Foley, 179 N.E. 619, 278 Mass. 145.
Mich.—Home Life Ins. Co. v. Cohen, 270 N.W. 256, 278 Mich. 169.
Miss.—Moore v. Montgomery Ward & Co., 156 So. 875, 171 Miss. 420.
N.J.—Pink v. Deering, 4 A.2d 790, 122 N.J.Law 277, motion denied 17 A.2d 603, 125 N.J.Law 569—Assets Development Co. v. Wall, 119 A. 10, 97 N.J.Law 468—Davis v. City of Newark, 17 A.2d 305, 19 N.J.Misc. 85.
N.Y.—Youngs v. Goodman, 148 N.E. 639, 240 N.Y. 470, reargument denied 150 N.E. 533, 241 N.Y. 509—White v. White, 231 N.Y.S. 146, 224 App.Div. 355—La Salle Extension University v. Parella, 294 N. Y.S. 146, 162 Misc. 220—Siegel v. State, 246 N.Y.S. 652, 138 Misc. 474—Tousey v. Barber, 231 N.Y.S. 133, 132 Misc. 861.
N.C.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
Pa.—In re Sale of Real Estate on Compromise of Taxes, Com.Pl., 46 Lack.Jur. 31.
S.C.—Foster v. Pruitt, 167 S.E. 410, 168 S.C. 262.
Tex.—Spence v. National Life & Accident Ins. Co., Civ.App., 59 S.W. 2d 212—Texas Co. v. Beall, Civ. App., 3 S.W.2d 524, error refused.
Authority of court over its records generally see Courts §§ 229–236.
Power of:
Amendment and correction of judgments see infra § 236.
Opening and vacating judgments see infra § 265.

Memorandum of court, designated "memorandum on final hearing," which contained court's conclusions of law entitling plaintiff to recover, and concluded, "Judgment accordingly," was at most a memorandum having weight of general verdict of jury, and neither special finding of facts nor final judgment, which precluded court from reopening case at succeeding term.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855.

Unsigned judgment may be modified.—Koontz v. Butler, 38 S.W.2d 204, 238 Ky. 406.

Until order book is signed by judge judgment is under court's control and may be amended, modified, or set aside.—Hazelip v. Doyel, 85 S.W.2d 685, 260 Ky. 313.

Void judgment
When the court's attention is directed to a void judgment, it should purge its records of the nullity by canceling the entry.—Stretch v. Murphy, 113 P.2d 1018, 166 Or. 439.

In declaratory judgment action after there had been a trial of the issues, the trial judge had no power to vacate the judgment.—Jay-Washington Realty Corporation v. Koondel, 49 N.Y.S.2d 306, 268 App.Div. 116.

84. U.S.—Illinois Printing Co. v. Electric Shovel Coal Corporation, D.C.Ill., 20 F.Supp. 181—Peters v. Mutual Life Ins. Co. of New York, D.C.Pa., 17 F.Supp. 246, reversed on other grounds, C.C.A., 92 F.2d 301.
Ala.—Louisville & N. R. Co. v. Bridgeforth, 101 So. 807, 20 Ala. App. 326.
Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.
Ind.—Cory v. Howard, 164 N.E. 639, 88 Ind.App. 503.
N.Y.—Application of Bond, 36 N.Y.S. 2d 147, 264 App.Div. 484, motion denied In re Bond 49 N.E.2d 1006, 290 N.Y. 739, and affirmed 50 N. E.2d 299, 290 N.Y. 901—Albright v. New York Life Ins. Co., 26 N. Y.S.2d 210, 261 App.Div. 419—Williams v. Williams, 25 N.Y.S.2d 940, 261 App.Div. 470, affirmed 40 N.E. 2d 1017, 287 N.Y. 799—Monahan v. Kenny, 288 N.Y.S. 323, 248 App. Div. 159—Jacobowitz v. Herson, 276 N.Y.S. 816, 243 App.Div. 274, reversed on other grounds Jacobowitz v. Metselaar, 197 N.E. 169, 268 N.Y. 130, 99 A.L.R. 1198, reargument denied Jacobowitz v. Herson, 198 N.E. 528, 268 N.Y. 630—Klein v. Fairberg, 276 N.Y.S. 347, 243 App.Div. 609—In re Wing, 295 N. Y.S. 336, 162 Misc. 551—Greenberg v. Rudnick, 258 N.Y.S. 679, 143 Misc. 793—American Cities Co. v. Stevenson, 60 N.Y.S.2d 685—Los Angeles Inv. Securities Corpora-

some states it has been held that jurisdiction, at least with respect to certain courts, ceases with the rendition of the final judgment, and that thereafter the court has no power to amend or vacate the judgment except pursuant to statutory authority.[85]

Where the court is not justified in modifying or vacating a judgment, it may not accomplish the same result by indirection by refusing to enforce the judgment.[86]

Statutory provisions generally. In various jurisdictions statutes have been enacted which regulate the amendment, correction, opening, and vacation of judgments.[87] Some such statutes do not affect the inherent power and control of the court over its judgments,[88] while other statutes do.[89] In cases not within the statute, the common-law rules prevail.[90] Such statutes are remedial and should be

tion v. Joslyn, 12 N.Y.S.2d 370, reversed on other grounds 14 N.Y.S.2d 798, 258 App.Div. 762, motion denied 15 N.Y.S.2d 175, 258 App.Div. 821, motion granted 16 N.Y.S.2d 875, 258 App.Div. 1018, motion granted 25 N.E.2d 146, 285 N.Y. 592, appeal dismissed 26 N.E.2d 968, 282 N.Y. 438.

Pa.—Davis v. Commonwealth Trust Co., 7 A.2d 3, 335 Pa. 387—In re Stetson's Estate, 155 A. 856, 305 Pa. 62.

S.D.—Janssen v. Tusha, 5 N.W.2d 684, 68 S.D. 639—Boshart v. National Ben. Ass'n of Mitchell, 273 N.W. 7, 65 S.D. 260.

Tex.—Nevitt v. Wilson, 285 S.W. 1079, 116 Tex. 29, 48 A.L.R. 355—Garrett v. Katz, Civ.App., 27 S.W.2d 373.

Wis.—Libby v. Central Wisconsin Trust Co., 197 N.W. 206, 182 Wis. 599.

Court of claims has same inherent discretionary powers to set aside own judgments for error of law as supreme court.—Siegel v. State, 246 N.Y.S. 652, 138 Misc. 474.

Power to vacate judgment on ground it is prejudicially irregular, therefore voidable, is not dependent on statute.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.

In California

(1) Independently of statute courts have power to correct, amend, and annul judgments.—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209—Treat v. Superior Court in and for City and County of San Francisco, 62 P.2d 147, 7 Cal.2d 636—Carson v. Emmons Draying & Safe Moving Co., 64 P.2d 176, 18 Cal.App.2d 326, followed in 64 P.2d 178, 18 Cal.App.2d 768—Dutton Dredge Co. v. Goss, 247 P. 594, 77 Cal.App. 727.

(2) However, it has been stated that in the absence of statutory authority courts have no jurisdiction to alter their final judgments.—Gillespie v. Andrews, 248 P. 715, 78 Cal.App. 595.

(3) Once a decree has become final it may not be amended, modified, or supplemented except where otherwise authorized by statute or where there has been a clerical error or misprision due to inadvertence.—Hales v. Snowden, 105 P.2d 1015, 40 Cal.App.2d 301.

85. La.—Succession of Harrison, 123 So. 120, 168 La. 675—Albritton v. Nauls, App., 15 So.2d 126—Lacaze v. Hardee, App., 7 So.2d 719—Jefferson v. Laure N. Truck Line, App., 181 So. 821, affirmed Jefferson v. Lauri N. Truck Lines, 187 So. 44, 192 La. 29—American Multigraph Sales Co. v. Globe Indemnity Co., 123 So. 358, 11 La.App. 353.

Mass.—Amory v. Kelley, 34 N.E.2d 507, 309 Mass. 162.

34 C.J. p 210 note 8.

Money judgment is not subject to change

La.—Wright v. Wright, 179 So. 866, 189 La. 539.

86. N.Y.—In re Kananack's Estate, 278 N.Y.S. 898, 155 Misc. 35.

87. Ariz.—Swisshelm Gold Silver Co. v. Farwell, 124 P.2d 544, 59 Ariz. 162.

Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328—In re Smead's Estate, 82 P.2d 182, 12 Cal.2d 20—Stanton v. Superior Court within and for Los Angeles County, 261 P. 1001, 202 Cal. 478—In re Wiechers' Estate, 250 P. 397, 199 Cal. 523, certiorari denied Wiechers v. Wiechers, 47 S.Ct. 476, 273 U.S. 762, 71 L.Ed. 879—Watterson v. Owens River Canal Co., 210 P. 625, 190 Cal. 88—Wetzel v. Wetzel, App., 162 P.2d 299—Jones v. Clover, 74 P.2d 517, 24 Cal.App.2d 210.

Ill.—Trupp v. First Englewood State Bank of Chicago, 30 N.E.2d 198, 307 Ill.App. 258.

Iowa.—Workman v. District Court, Delaware County, 269 N.W. 27, 222 Iowa 364.

Minn.—Cacka v. Gaulke, 3 N.W.2d 791, 212 Minn. 404.

N.Y.—Keim v. Orel, 31 N.Y.S.2d 321, 263 App.Div. 779, reargument denied 32 N.Y.S.2d 1010, 263 App.Div. 908, motion dismissed Lefkowitz v. Keim, 41 N.E.2d 165, 287 N.Y. 837—Germann v. Jones, 221 N.Y.S. 32, 220 App.Div. 5—Goishen v. Samor Realty Co., 4 N.Y.S.2d 107, 167 Misc. 477—In re Kennedy's Estate, 266 N.Y.S. 883, 149 Misc. 188.

N.D.—Bellingham State Bank of Bellingham v. McCormick, 215 N.W. 152, 55 N.D. 700.

Ohio.—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.

Pa.—Davis v. Commonwealth Trust Co., Com.Pl., 46 Dauph.Co. 419.

34 C.J. p 221 note 54.

Correction and vacation of decrees in equity see Equity §§ 622–667, 674–677, 682.

Repeal of statute

Statute providing that judgment shall not be set aside for irregularity on motion unless made within three years after term at which such judgment was rendered is not inconsistent, and therefore is not repealed by implication by civil code for practice and procedure in all courts enacted in 1943, or by harmonizing rules of supreme court.—Poindexter v. Marshall, Mo.App., 193 S.W.2d 622.

88. Ga.—East Side Lumber & Coal Co. v. Barfield, 18 S.E.2d 492, 193 Ga. 273.

Ohio.—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.

Tex.—Nevitt v. Wilson, 285 S.W. 1079, 116 Tex. 29, 48 A.L.R. 355.

34 C.J. p 223 note 56, p 332 note 57 [a].

Rules of Civil Procedure, rule 21, does not deprive court of inherent power to set aside judgment during the term.—Arenstein v. Jencks, Tex. Civ.App., 179 S.W.2d 831, error dismissed.

Court rule relating to time for perfecting appeal to supreme court did not limit power of trial court to vacate judgment for defendant, which was entered without payment of judgment fee required by statute and another court rule.—Detroit Edison Co. v. Hartrick, 278 N.W. 664, 283 Mich. 502.

89. Colo.—Empire Constr. Co. v. Crawford, 141 P. 474, 57 Colo. 281.

Ohio.—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.

34 C.J. p 224 note 57.

90. N.M.—De Baca v. Sais, 99 P.2d 106, 44 N.M. 105.

Ohio.—**Corpus Juris quoted in** Kins-

liberally construed,[91] although they cannot be extended beyond their legitimate purport.[92] Thus if they speak only of "defaults" they cannot be applied to final judgments otherwise rendered.[93] Statutes of this character should not be construed retrospectively.[94]

Under some of these statutes a court retains control of its judgments for a fixed period of time,[95] and a judgment may be amended, corrected, opened, or vacated only within the time so limited,[96] such as thirty days,[97] sixty days,[98] or six months[99] after the making or entry of the judgment or notice of the judgment, during the term, as considered infra § 229, or within a reasonable time, but not exceeding six months after judgment is taken.[1] The court may amend a judgment after the expiration of the statutory period as to matters of form[2] or where the judgment is interlocutory.[3] Where the judgment is void the court may vacate it after the expiration of the time fixed by statute.[4]

After expiration of time for appeal. Unless otherwise provided by statute,[5] a court ordinarily does not lose the power to vacate a judgment merely on

man Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.
34 C.J. p 224 note 58.

91. Cal.—Bonfilio v. Ganger, 140 P. 2d 861, 60 Cal.App.2d 405.
Ohio.—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.
34 C.J. p 224 note 59.

92. Ohio.—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.
34 C.J. p 224 note 61.

93. Ga.—O'Connell v. Friedman, 45 S.E. 668, 118 Ga. 831.
34 C.J. p 224 note 61.

94. Miss.—Pendleton v. Prestridge, 20 Miss. 302.
34 C.J. p 224 note 62.

95. Ala.—Reese & Reese v. Burton & Watson Undertaking Co., 184 So. 320, 28 Ala.App. 384.
Control of judgments where terms abolished see infra § 231.

96. Ala.—Gabbert v. Gabbert, 117 So. 214, 217 Ala. 599—Reese & Reese v. Burton & Watson Undertaking Co., 184 So. 320, 28 Ala. App. 384.
Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328—Cikuth v. Loero, 57 P.2d 1009, 14 Cal.App.2d 32—Delmuto v. Superior Court in and for San Joaquin County, 6 P.2d 1007, 119 Cal.App. 590.
Iowa.—Albright v. Moeckley, 237 N. W. 309.
Minn.—Elsen v. State Farmers Mut. Ins. Co., 17 N.W.2d 652, 219 Minn. 315—Smude v. Amidon, 7 N.W.2d 776, 214 Minn. 266.
N.D.—Kilby v. Movius Land & Loan Co., 219 N.W. 948, 57 N.D. 14—Bellingham State Bank of Bellingham v. McCormick, 215 N.W. 152, 55 N.D. 700.
Wis.—Amalgamated Meat Cutters & Butcher Workmen of N. A., A. F. of L., Local Union No. 73 v. Smith, 10 N.W.2d 114, 243 Wis. 390—Kickapoo Development Corporation v. Kickapoo Orchard Co., 285 N.W. 354, 231 Wis. 458.
34 C.J. p 221 note 54.

97. Ala.—Pate v. State, 14 So.2d 251, 244 Ala. 396—Brand v. State, 6 So.2d 446, 242 Ala. 15, certiorari denied 6 So.2d 450, 242 Ala. 349—Ex parte Howard, 142 So. 403, 225 Ala. 106—Ex parte Fidelity & Deposit Co. of Maryland, 134 So. 861, 223 Ala. 98—Ex parte Green, 129 So. 72, 221 Ala. 298—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91.
Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—Illinois Nat. Bank of Springfield v. Gwinn, 61 N.E.2d 249, 390 Ill. 345—In re Reemts' Estate, 50 N.E.2d 514, 383 Ill. 447—People ex rel. Meier v. Lewe, 44 N.E.2d 551, 380 Ill. 531—Department of Public Works and Buildings v. Legg, 29 N.E.2d 515, 374 Ill. 306—Scribner v. Village of Downers Grove, 25 N.E.2d 54, 372 Ill. 614—Simon v. Horan, 56 N.E. 2d 147, 323 Ill.App. 527—Thorne v. Thorne, 45 N.E.2d 85, 316 Ill.App. 451—Schmahl v. Aurora Nat. Bank, 35 N.E.2d 689, 311 Ill.App. 228—Trupp v. First Englewood State Bank of Chicago, 30 N.E.2d 198, 307 Ill.App. 258—Becker v. Loebs Ins. Agency Co., 26 N.E.2d 653, 304 Ill.App. 575—Rasmussen v. National Tea Co., 26 N.E.2d 523, 304 Ill.App. 353—Parish Bank & Trust Co. v. Uptown Sales & Service Co., 20 N.E.2d 634, 300 Ill.App. 73—McKenna v. Forman, 283 Ill. App. 606.
Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.
N.J.—Zicarelli v. General Finance Co., 186 A. 726, 14 N.J.Misc. 711.
N.M.—De Baca v. Sais, 99 P.2d 106, 44 N.M. 105—Arias v. Springer, 78 P.2d 153, 42 N.M. 350—Pugh v. Phelps, 19 P.2d 315, 37 N.M. 126.
Tenn.—Broadway Motor Co. v. Public Fire Ins. Co., 12 Tenn.App. 278—Durham Coal & Iron Co. v. Bischel, 4 Tenn.App. 233.
Tex.—Joy v. Young, Civ.App., 194 S. W.2d 159.
34 C.J. p 210 note 8 [a], p 221 note 54 [d].

Common rule allowing correction or vacation during term was changed by statute limiting time to thirty days.—Reese & Reese v. Burton & Watson Undertaking Co., 184 So. 320, 28 Ala.App. 384.

98. Ky.—Hutchinson v. Hutchinson, 168 S.W.2d 738, 293 Ky. 270—Straton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632.

99. Ariz.—Hartford Accident & Indemnity Co. v. Sorrells, 69 P.2d 240, 50 Ariz. 90—In re Ralph's Estate, 67 P.2d 230, 49 Ariz. 391—Intermountain Building & Loan Ass'n v. Allison Steel Mfg. Co., 22 P.2d 413, 42 Ariz. 51.
Cal.—Goatman v. Fuller, 216 P. 35, 191 Cal. 245.
Mont.—Edgar State Bank v. Long, 278 P. 108, 85 Mont. 225.
Nev.—Lauer v. Eighth Judicial District Court in and for Clark County, 140 P.2d 953, 62 Nev. 78.

1. Cal.—People v. Greene, 16 P. 197, 74 Cal. 400, 5 Am.S.R. 448—Wetzel v. Wetzel, App., 162 P.2d 299.

2. Ill.—Thorne v. Thorne, 45 N.E. 2d 85, 316 Ill.App. 451.

3. Ala.—Blankenship v. Hail, 106 So. 594, 214 Ala. 95.

4. Ill.—Barnard v. Michael, 63 N.E. 2d 858, 392 Ill. 130—Pedersen v. Logan Square State & Savings Bank, 32 N.E.2d 644, 309 Ill.App. 54, reversed on other grounds 36 N.E.2d 732, 377 Ill. 408.
34 C.J. p 210 note 8 [a].
Fraud on court and counsel
N.J.—Zicarelli v. General Finance Co., 186 A. 726, 14 N.J.Misc. 711.

5. Minn.—Smude v. Amidon, 7 N.W. 2d 776, 214 Minn. 266.
Interlocutory judgment
After expiration of time to appeal from or to modify interlocutory judgment, trial court had no jurisdiction to determine whether interlocutory judgment was supported by the finding.—Kickapoo Development Corporation v. Kickapoo Orchard Co., 285 N.W. 354, 231 Wis. 458.

the lapse of the statutory period during which an appeal may be taken.[6]

§ 229. During Term

At common law a court has full control over its orders or judgments during the term at which they are made, and may, on sufficient cause shown amend, correct, open, or vacate such judgments.

In the absence of a statute to the contrary, a court has full control over its orders or judgments during the term at which they are made, and may, on sufficient cause shown, in the exercise of its sound discretion, amend, correct, revise, supplement, open, or vacate such judgments, at least where the court is a court of general jurisdiction.[7]

6. U.S.—Denholm & McKay Co. v. Commissioner of Internal Revenue, C.C.A., 132 F.2d 243.

7. U.S.—Zimmern v. U. S., Ala., 56 S.Ct. 706, 298 U.S. 167, 80 L.Ed. 1118—U. S. v. Benz, 51 S.Ct. 113, 282 U.S. 304, 75 L.Ed. 354—Sun Oil Co. v. Burford, C.C.A.Tex., 130 F. 2d 10, reversed on other grounds 63 S.Ct. 1098, 319 U.S. 315, 87 L.Ed. 1424, rehearing denied 63 S.Ct. 1442, 320 U.S. 214, 87 L.Ed. 1851, and 63 S.Ct. 1442, 320 U.S. 214, 87 L.Ed. 1851—Suggs v. Mutual Ben. Health & Accident Ass'n, C.C.A. Okl., 115 F.2d 30—Arcoil Mfg. Co. v. American Equitable Assur. Co. of New York, C.C.A.N.J., 87 F.2d 206—American Guaranty Co. v. Caldwell, C.C.A.Cal., 72 F.2d 209—Associated Mfrs. Corporation of America v. De Jong, C.C.A.Iowa, 64 F.2d 64—Obear-Nester Glass Co. v. Hartford-Empire Co., C.C.A.Mo., 61 F.2d 31—Massachusetts Fire & Marine Ins. Co. v. Schmick, C.C.A.S. D., 58 F.2d 130—Gentry v. State of Missouri, ex rel. and to Use of Butler, C.C.A.Mo., 32 F.2d 159—McCandless v. Haskins, C.C.A.S.D., 28 F.2d 693—Cudahy Packing Co. v. City of Omaha, C.C.A.Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530—Chicago, M. & St. P. Ry. Co. v. Leverentz, C.C.A.Minn., 19 F.2d 915, certiorari denied 48 S.Ct. 38, 275 U.S. 543, 72 L.Ed. 416—Maison Dorin Société Anonyme v. Arnold, C.C.A. N.Y., 16 F.2d 977, certiorari denied 47 S.Ct. 571, 273 U.S. 766, 71 L.Ed. 881—Pennsylvania R. R. v. Montgomery, C.C.A.N.Y., 6 F.2d 386—In re Vardaman Shoe Co., D.C.Mo., 52 F.Supp. 562—Leslie v. Floyd Gas Co., D.C.Ky., 11 F.Supp. 401—Greyerbiehl v. Hughes Electric Co., C.C.A.N.D., 294 F. 802, certiorari denied Hughes Electric Co. v. Greyerbiehl, 44 S.Ct. 402, 264 U.S. 589, 68 L.Ed. 864.

Ala.—Schaeffer v. Walker, 3 So.2d 405, 241 Ala. 530—Sovereign Camp, W. O. W., v. Gay, 104 So. 895, 20 Ala.App. 650, reversed on other grounds 104 So. 898, 213 Ala. 5—State v. Heflin, 96 So. 459, 19 Ala. App. 222.

Alaska.—Mitchell v. Beaver Dredging Co., 8 Alaska 566.

Ariz.—In re Ralph's Estate, 67 P. 2d 230, 49 Ariz. 391—**Corpus Juris cited in** Intermountain Building & Loan Ass'n v. Allison Steel Mfg. Co., 22 P.2d 413, 415, 42 Ariz. 51.

Ark.—Stinson v. Stinson, 159 S.W.2d 446, 203 Ark. 888—Security Bank of Branson, Mo., v. Speer, 157 S.W. 2d 775, 203 Ark. 562—Browning v. Berg, 118 S.W.2d 1017, 196 Ark. 595—McDonald v. Olla State Bank, 93 S.W.2d 325, 192 Ark. 603—Union Sawmill Co. v. Langley, 66 S.W.2d 300, 188 Ark. 316—American Building & Loan Ass'n v. Memphis Furniture Mfg. Co., 49 S.W.2d 377, 185 Ark. 762—Union & Planters' Bank & Trust Co. v. Pope, 5 S. W.2d 330, 176 Ark. 1023—T. J. Moss Tie Co. v. Miller, 276 S.W. 586, 169 Ark. 657—Dawson v. Mays, 252 S.W. 33, 159 Ark. 331, 30 A.L.R. 1463.

Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328.

Conn.—Ideal Financing Ass'n v. LaBonte, 180 A. 300, 120 Conn. 190—Ferguson v. Sabo, 162 A. 844, 115 Conn. 619, certiorari denied 53 S. Ct. 595, 289 U.S. 734, 77 L.Ed. 1482—McCulloch v. Pittsburgh Plate Glass Co., 140 A. 114, 107 Conn. 164.

Del.—Tweed v. Lockton, 167 A. 703, 5 W.W.Harr. 474.

D.C.—Meloy v. Finbers Realty Co., 66 F.2d 208, 62 App.D.C. 228.

Fla.—State v. City of Sarasota, 17 So.2d 109, 154 Fla. 250—Revell v. Dishong, 175 So. 905, 129 Fla. 9—State v. Wright, 145 So. 598, 107 Fla. 178—Hazen v. Smith, 135 So. 813, 101 Fla. 767—Whitaker v. Wright, 129 So. 889, 100 Fla. 282—Robinson v. Farmers' & Merchants' Bank of Tullahoma, Tenn., 117 So. 393, 95 Fla. 940—Alabama Hotel Co. v. J. L. Mott Iron Works, 98 So. 825, 86 Fla. 608.

Ga.—East Side Lumber & Coal Co. v. Barfield, 18 S.E.2d 492, 193 Ga. 273—Deen v. Baxley State Bank, 15 S.E.2d 194, 192 Ga. 300—**Corpus Juris cited in** Kerr v. Kerr, 189 S. E. 20, 183 Ga. 573—Gaines v. Gaines, 150 S.E. 645, 169 Ga. 432—Loughridge v. City of Dalton, 143 S.E. 393, 166 Ga. 323—Berrien County Bank v. Alexander, 115 S.E. 643, 154 Ga. 775, answers to certified questions conformed to 116 S.E. 231, 29 Ga.App. 658—Milton v. Mitchell County Electric Membership Ass'n, 12 S.E.2d 367, 64 Ga.App. 63—Methodist Episcopal Church South v. Decell, 5 S.E.2d 66, 60 Ga.App. 843—Frazier v. Beasley, 1 S.E.2d 458, 59 Ga.App. 500—International Agr. Corporation v. Law, 151 S.E. 557, 40 Ga. App. 756—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga. App. 568—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287—Dabney v. Benteen, 132 S.E. 916, 35 Ga. App. 203—Terrell v. Clarke, 122 S. E. 715, 32 Ga.App. 39—Hardwick v. Hatfield, 119 S.E. 430, 30 Ga.App. 760.

Hawaii.—A-One Building Co. v. Yee, 32 Hawaii 15.

Ill.—Corwin v. Rheims, 61 N.E.2d 40, 390 Ill. 205—People v. Lyle, 160 N.E. 742, 329 Ill. 418—Brelsford v. Community High School Dist. No. 36 of Pulaski County, 159 N.E. 237, 328 Ill. 27—Unbehahn v. Fader, 149 N.E. 773, 319 Ill. 250—Simon v. Horan, 56 N.E.2d 147, 323 Ill.App. 527—Schmahl v. Aurora Nat. Bank, 35 N.E.2d 689, 311 Ill.App. 228—People ex rel. Nelson v. Farmers & Merchants State Bank of Mendota, 281 Ill.App. 354—Wilson v. Hilligoss, 278 Ill.App. 564.

Ind.—Tri-City Electric Service Co. v. Jarvis, 185 N.E. 136, 206 Ind. 5—State v. Superior Court of Marion County, 174 N.E. 732, 202 Ind. 456—Hoffman v. Hoffman, 57 N.E.2d 591, 115 Ind.App. 277, rehearing denied 58 N.E.2d 201, 115 Ind.App. 277—Papuschak v. Burich, 185 N. E. 876, 97 Ind.App. 100—Butcher v. Olmstead, 182 N.E. 265, 99 Ind. App. 92.

Iowa.—**Corpus Juris cited in** Concannon v. Blackman, 6 N.W.2d 116, 119, 232 Iowa 722—Hallam v. Finch, 195 N.W. 352, 197 Iowa 224.

Kan.—Rasing v. Healzer, 142 P.2d 832, 157 Kan. 516—Hoffman v. Hoffman, 135 P.2d 887, 156 Kan. 647—**Corpus Juris cited in** Herd v. Chambers, 122 P.2d 784, 787, 155 Kan. 55—Mayall v. American Well Works Co., 89 P.2d 846, 149 Kan. 781—Epperson v. Kansas State Department of Inspections and Registration, 78 P.2d 850, 147 Kan. 762—Standard Life Ass'n v. Merrill, 75 P.2d 825, 147 Kan. 121—Gaston v. Collins, 72 P.2d 84, 146 Kan. 449—Board of Com'rs of Montgomery County v. Allen, 25 P.2d 374, 138 Kan. 265—**Corpus Juris quoted in** Isenhart v. Powers, 9 P.2d 988, 989, 135 Kan. 111—J. B. Colt Co. v. Clark, 266 P. 41, 125 Kan. 722—Wichita Motors Co. v. United Warehouse Co., 255 P. 30, 123 Kan. 235—Golden v. Southwestern Utilities Corporation of Delaware, 250 P. 286, 121 Kan. 793—Schubach v.

Hammer, 232 P. 1041, 117 Kan. 615.

Ky.—Furst v. Meek, 180 S.W.2d 410, 297 Ky. 509—Welch v. Mann's Ex'r, 88 S.W.2d 1, 261 Ky. 470—Equitable Life Assur. Soc. of U. S. v. Goble, 72 S.W.2d 35, 254 Ky. 614—Clements v. Kell, 39 S.W.2d 663, 239 Ky. 396—Fields v. Combs, 18 S.W.2d 965, 230 Ky. 97—Morris v. Morris, 10 S.W.2d 277, 225 Ky. 823.

Md.—Eddy v. Summers, 39 A.2d 812, 183 Md. 683—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.

Miss.—Mutual Health & Benefit Ass'n v. Cranford, 156 So. 876, 173 Miss. 152.

Mo.—**Corpus Juris cited in** In re Zartman's Adoption, 65 S.W.2d 951, 955, 334 Mo. 237—**Corpus Juris cited in** State v. Lonon, 56 S.W.2d 378, 380, 331 Mo. 591—Bruegge v. State Bank of Wellston, 74 S.W.2d 835—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091—Boegemann v. Bracey, 285 S.W. 992, 315 Mo. 437—Spickard v. McNabb, App., 180 S.W.2d 611—McCormick v. St. John, 149 S.W.2d 894, 236 Mo.App. 72—Savings Trust Co. of St. Louis v. Skain, 131 S.W.2d 566, 345 Mo. 46—Wilson v. Teale, App., 88 S.W.2d 422—In re Henry County Mut. Burial Ass'n, 77 S.W.2d 124, 229 Mo.App. 300—Niedringhaus v. Wm. F. Niedringhaus Inv. Co., App., 54 S.W.2d 79, certiorari quashed State ex rel. Williams v. Daues, 66 S.W.2d 137, 334 Mo. 91—Herbert v. Hawley, App., 32 S.W.2d 1095—Dietrich v. Dietrich, 28 S.W.2d 418—National City Bank of St. Louis v. Pattiz, App., 26 S.W.2d 815—State ex rel. Ramsey v. Green, App., 17 S.W.2d 629—Ekonomou v. Greek Orthodox Church St. Nicholas, App., 280 S.W. 57—State ex rel. Pargeon v. McPike, App., 243 S.W. 278.

Neb.—Barney v. Platte Valley Public Power & Irr. Dist., 23 N.W.2d 335—First Nat. Bank of Fairbury v. First Trust Co. of Lincoln, 15 N.W.2d 386, 145 Neb. 147—**Corpus Juris cited in** Sedlak v. Duda, 13 N.W.2d 892, 899, 144 Neb. 567, 154 A.L.R. 490—Gate City Co. v. Douglas County, 282 N.W. 532, 135 Neb. 531—Britt v. Byrkit, 268 N.W. 83, 131 Neb. 350—Lyman v. Dunn, 252 N.W. 197, 125 Neb. 770—Lacey v. Citizens' Lumber & Supply Co., 248 N.W. 378, 124 Neb. 813—Citizens' State Bank of Cedar Rapids v. Young, 244 N.W. 294, 123 Neb. 786—Shafer v. Wilsonville Elevator Co., 237 N.W. 155, 121 Neb. 280—Netusil v. Novak, 235 N.W. 335, 120 Neb. 751.

N.J.—**Corpus Juris quoted in** Dorman v. Usbe Building & Loan Ass'n, 180 A. 413, 415, 115 N.J.Law 337—Shaheen v. New Jersey Fidelity & Plate Glass Ins. Co., 160 A. 553, 109 N.J.Law 201.

N.M.—**Corpus Juris quoted in** Gilbert v. New Mexico Const. Co., 295 P. 291, 292, 35 N.M. 262.

Ohio.—In re Kleinhen's Estate, 63 N.E.2d 315, 76 Ohio App. 122—Thompson v. Stonom, App., 57 N.E.2d 788—Rauth v. Rauth, 57 N.E.2d 266, 73 Ohio App. 564—Davis v. Teachnor, App., 53 N.E.2d 208—Ames Co. v. Busick, App., 47 N.E.2d 647—Central Nat. Bank of Cleveland v. Ely, App., 44 N.E.2d 822—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871—Schnitzler v. Lake Shore Coach Co., 41 N.E.2d 436, 69 Ohio App.2d 265—Maryland Casualty Co. v. John F. Rees Co., App., 40 N.E.2d 200—Coble v. Coble, App., 38 N.E.2d 928—State ex rel. Hussey v. Hemmert, App., 37 N.E.2d 668—Leatherman v. Maytham, 33 N.E.2d 1022, 66 Ohio App. 344—National Guaranty & Finance Co. v. Lindimore, App., 31 N.E.2d 155—Pfeiffer v. Sheffield, 37 N.E.2d 494, 64 Ohio App. 1—Sullivan v. Cloud, 24 N.E.2d 625, 62 Ohio App. 462—Barger-Mitchell Motor Co. v. Levy, 170 N.E. 443, 34 Ohio App. 84—Smith v. Smith, 157 N.E. 768, 25 Ohio App. 239.

Okl.—Harder v. Woodside, 165 P.2d 841—Phillips Petroleum Co. v. Davis, 147 P.2d 135, 194 Okl. 84—Long v. Hill, 145 P.2d 434, 193 Okl. 463—Riddle v. Cornell, 135 P.2d 41, 192 Okl. 232—Roland Union Graded School Dist. No. 1 of Sequoyah County v. Thompson, 124 P.2d 400, 190 Okl. 416—Haskell v. Cutler, 108 P.2d 146, 188 Okl. 239—Pitts v. Walker, 105 P.2d 760, 188 Okl. 17—Western Union Telegraph Co. v. Martin, 95 P.2d 849, 186 Okl. 24—**Corpus Juris quoted in** Montague v. State ex rel. Commissioners of Land Office of Oklahoma, 89 P.2d 283, 285, 184 Okl. 574—Hart v. Howell, 85 P.2d 401, 184 Okl. 146—Atchison, T. & S. F. Ry. Co. v. Washington, 56 P.2d 1190, 176 Okl. 521—Firemen's Fund Ins. Co. v. Griffin, 54 P.2d 1032, 176 Okl. 94—Lane v. O'Brien, 49 P.2d 171, 173 Okl. 475—Nichols v. Bonaparte, 42 P.2d 866, 171 Okl. 234—Johnson v. Bearden Plumbing & Heating Co., 38 P.2d 500, 170 Okl. 63—McNac v. Kinch, 238 P. 424, 113 Okl. 59—McNac v. Chapman, 223 P. 350, 101 Okl. 121—Ross v. Irving, 220 P. 642, 96 Okl. 124—Wall v. Snider, 219 P. 671, 93 Okl. 99—Missouri Quarries Co. v. Brady, 219 P. 868, 95 Okl. 279.

Or.—Seufert v. Stadelman, 167 P.2d 936—In re Mannix' Estate, 29 P.2d 364, 146 Or. 187—Jackson v. United Rys. Co., 28 P.2d 836, 145 Or. 546—Rosumny v. Marks, 246 P. 723, 118 Or. 248—In re Gerhardus' Estate, 239 P. 829, 116 Or. 113—Finch v. Pacific Reduction & Chemical Mfg. Co., 234 P. 296, 113 Or. 670—Hudelson v. Sanders-Swafford Co., 227 P. 310, 111 Or. 600.

Pa.—Bergen v. Lit Bros., 47 A.2d 671—Bekelja v. James E. Strates Shows, 37 A.2d 502, 349 Pa. 442—H. H. Robertson Co. v. Pfotzer, 28 A.2d 721, 150 Pa.Super. 457—Commonwealth ex rel. Howard v. Howard, 10 A.2d 779, 138 Pa.Super. 505—Hoffer v. Carlisle Community Hotel Co., 198 A. 478, 130 Pa.Super. 457—Keefer v. Lancaster Intelligencer and News-Journal, 6 Pa. Dist. & Co. 476, 39 Lanc.L.Rev. 225, 38 York Leg.Rec. 167—Collins v. Media-69th St. Trust Co., Com.Pl., 30 Del.Co. 332—Allied Store Utilities Co. v. Azat, Com.Pl. 34 Luz. Leg.Reg. 41.

S.D.—Brown v. Brown, 206 N.W. 688, 49 S.D. 167.

Tenn.—Citizens' Bank & Trust Co. v. Bayles, 281 S.W. 932, 153 Tenn. 40—Broadway Motor Co. v. Public Fire Ins. Co., 12 Tenn.App. 278.

Tex.—Callahan v. Staples, 161 S.W.2d 489, 139 Tex. 8—Turman v. Turman, 64 S.W.2d 137, 123 Tex. 1—Wear v. McCallum, 33 S.W.2d 723, 119 Tex. 473—Dittman v. Model Baking Co., Com.App., 271 S.W. 75—Collins v. Davenport, Civ.App., 192 S.W.2d 291—Henderson v. Soash, Civ.App., 157 S.W.2d 161—Glasscock v. Bryant, Civ.App., 185 S.W.2d 595, refused for want of merit—Arenstein v. Jencks, Civ.App., 179 S.W.2d 831, error dismissed—Witty v. Rose, Civ.App., 148 S.W.2d 962, error dismissed—St. John v. Archer, Civ.App., 147 S.W.2d 519, error dismissed—Rhodius v. Miller, Civ.App., 139 S.W.2d 316, error dismissed, judgment correct—Johnson v. Henderson, Civ.App., 132 S.W.2d 458—Zachary v. Home Owners Loan Corporation, Civ.App., 117 S.W.2d 153, error dismissed—F. C. Crane Co. v. Gosdin, Civ.App., 94 S.W.2d 221, followed in F. C. Crane Co. v. Bozarth, 94 S.W.2d 223 and F. C. Crane Co. v. Williams, 94 S.W.2d 224—Gaffney v. Kent, Civ.App., 74 S.W.2d 176—**Corpus Juris cited in** Turman v. Turman, Civ.App., 71 S.W.2d 898, 901, error dismissed—Guaranty Bond State Bank of Timpson v. Redding, Civ.App., 24 S.W.2d 457—Perkins v. Lightfoot, Civ.App., 10 S.W.2d 1030, error dismissed—Texas Employers' Ins. Ass'n v. Knouff, Civ.App., 297 S.W. 799, reversed on other grounds, Com.App., 7 S.W.2d 68—Adamson v. Collins, Civ.App., 286 S.W. 598—Ex parte Reis, 33 S.W.2d 435, 117 Tex.Cr. 123—Reeves v. State, 4 S.W.2d 49, 109 Tex.Cr. 289, followed in 4 S.W.2d 1115, 1116, 109 Tex.Cr. 462.

Va.—Massanutten Bank of Strasburg v. Glaize, 14 S.E.2d 285, 177 Va. 519—Ætna Casualty & Surety Co. of Hartford, Conn., v. Board of

This power is inherent and exists independently of any statute.[8] Unless previously adjourned sine die, every term continues until the beginning of the next for the purpose of this rule.[9] The power of the court extends, at least in cases tried without the intervention of a jury, to the hearing of additional testimony with respect to any part of the proceedings as to which the judge may entertain doubt.[10] The perfection of an appeal during the term does not deprive the court of this power.[11]

Statutory provisions. In some jurisdictions the statutes expressly provide that the judgment may be amended or vacated during the term at which it was entered.[12]

§ 230. After Expiration of Term

a. In general
b. Void judgments
c. Reservation of power in judgment
d. Consent and waiver

a. In General

In the absence of statutory authority, a court ordinarily has no power to correct, amend, open, or vacate a judgment after the expiration of the term.

In the absence of a statute providing otherwise, jurisdiction over the cause ceases with the expiration of the term at which final judgment is rendered[13] and thereafter the court has no power to correct or amend the judgment,[14] and a fortiori the

Sup'rs of Warren County, 168 S.E. 617, 160 Va. 11.
W.Va.—Baker v. Gaskins, 36 S.E.2d 893—Chaney v. State Compensation Com'r, 33 S.E.2d 284.
Wis.—Feiges v. Racine Dry Goods Co., 285 N.W. 805, 231 Wis. 284.
Wyo.—Book v. Book, 141 P.2d 546, 59 Wyo. 423—**Corpus Juris quoted in** In re Shaul, 39 P.2d 478, 480, 46 Wyo. 549—Sioux City Seed Co. v. Montgomery, 291 P. 918, 42 Wyo. 170—State v. Scott, 247 P. 699, 35 Wyo. 108.
34 C.J. p 207 note 5.
Amendment and correction see infra §§ 236–264.
Jurisdiction of courts of limited jurisdiction see infra § 235.
Opening and vacating see infra §§ 265–310.
Setting aside dismissal and reinstatement of cause see Dismissal and Nonsuit §§ 41, 79.

Resorting to motion for judgment non obstante veredicto in trial without jury does not deprive court of control of judgment during term.—Fitzpatrick v. Bates, 92 Pa.Super. 114.

8. Ariz.—Intermountain Building & Loan Ass'n v. Allison Steel Mfg. Co., 22 P.2d 413, 415, 42 Ariz. 51.
Fla.—Whitaker v. Wright, 129 So. 889, 100 Fla. 282.
Ill.—Department of Public Works and Buildings v. Legg, 29 N.E.2d 515, 374 Ill. 306.
Iowa.—Concannon v. Blackman, 6 N.W.2d 116, 119, 232 Iowa 722.
Ohio.—Moherman v. Nickels, 45 N.E. 2d 405, 140 Ohio St. 450, 143 A.L.R. 1174—Ames Co. v. Busick, App., 47 N.E.2d 647.
Okl.—Montague v. State, 89 P.2d 283, 184 Okl. 574.
34 C.J. p 207 note 5.

Not dependent on statute regulating new trials
Ky.—City of Hazard v. Duff, 175 S.W. 2d 357, 295 Ky. 701—First State Bank v. Asher, 117 S.W.2d 581, 273 Ky. 574—South Mountain Coal Co. v. Rowland, 265 S.W. 320, 204 Ky. 820.
Mo.—Ritchie v. Ritchie, App., 173 S.W.2d 101.
Okl.—Firemen's Fund Ins. Co. v. Griffin, 54 P.2d 1032, 176 Okl. 94.
Tex.—Townes v. Lattimore, 272 S.W. 435, 114 Tex. 511.

Statute relating to entry of judgment did not affect power of district court to modify at term in which it was rendered a judgment which was entered after direction of verdict.—Zachary v. Home Owners Loan Corporation, Tex.Civ.App., 117 S.W.2d 153, error dismissed.

9. Wyo.—**Corpus Juris quoted in** In re Shaul, 30 P.2d 478, 480, 46 Wyo. 549.
34 C.J. p 209 note 6.
Terms and sessions see Courts §§ 147–169.

10. Tex.—F. C. Crane Co. v. Gosdin, Civ.App., 94 S.W.2d 221, followed in F. C. Crane Co. v. Bozarth, 94 S.W.2d 223 and F. C. Crane Co. v. Williams, 94 S.W.2d 224.

11. Pa.—Kingsley Clothing Mfg. Co. v. Jacobs, 26 A.2d 315, 344 Pa. 551.
Tex.—Glasscock v. Bryant, Civ.App., 185 S.W.2d 595, refused for want of merit.

12. Iowa.—Concannon v. Blackman, 6 N.W.2d 116, 232 Iowa 722—Johnston v. Calvin, 5 N.W.2d 840, 232 Iowa 531.
34 C.J. p 221 note 54 [e] (1).

13. U.S.—New England Furniture & Carpet Co. v. Willcuts, D.C. Minn., 55 F.2d 983.
Ala.—Pate v. State, 14 So.2d 251, 244 Ala. 396.
Ark.—Coulter v. Martin, 139 S.W.2d 688, 200 Ark. 1139, 201 Ark. 21.
Conn.—**Corpus Juris quoted in** Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.
Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.
Fla.—State v. Wright, 145 So. 598, 107 Fla. 178—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.
Hawaii.—Goo v. Hee Fat, 34 Hawaii 123.
Ill.—Wallace Grain & Supply Co. v. Cary, 24 N.E.2d 907, 303 Ill.App. 221, reversed on other grounds 28 N.E.2d 107, 374 Ill. 57.
Ind.—In re Perry, 148 N.E. 163, 83 Ind.App. 456.
Kan.—Thornton v. Van Horn, 37 P.2d 1015, 140 Kan. 568.
Ky.—Reed v. Hatcher, 1 Bibb. 346.
Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.
Mo.—Ætna Ins. Co. v. O'Malley, 118 S.W.2d 3, 342 Mo. 800—Burton v. Chicago & A. R. Co., 204 S.W. 501, 275 Mo. 185.
Ohio.—Davis v. Teachnor, App., 53 N.E.2d 208—Ryan v. Buckeye State Building & Loan Co., 163 N.E. 719, 29 Ohio App. 476.
Okl.—U. S. Smelting Co. v. McGuire, 253 P. 79, 123 Okl. 272.
Pa.—Cesare v. Caputo, 100 Pa.Super. 188.
S.C.—Burns v. Babb, 3 S.E.2d 247, 190 S.C. 508—Eagerton v. Atlantic Coast Line R. Co., 178 S.E. 844, 175 S.C. 209.
Tenn.—Citizens' Bank & Trust Co. v. Bayles, 281 S.W. 932, 153 Tenn. 40—Shaw v. Shaw, 277 S.W. 898, 152 Tenn. 360, rehearing denied 280 S.W. 23, 152 Tenn. 552.
Tex.—Reeves v. State, 4 S.W.2d 49, 109 Tex.Cr. 289, followed in 4 S.W.2d 1115, 1116, 109 Tex.Cr. 462.
Wyo.—Midwest Refining Co. v. George, 7 P.2d 213, 44 Wyo. 25.
34 C.J. p 210 note 11, p 212 note 12—15 C.J. p 825 note 85.
Amendment and correction see infra §§ 236–264.
Terms and sessions see Courts §§ 147–169.

14. U.S.—Stewart Die Casting Corporation v. National Labor Relations Board, C.C.A., 129 F.2d 481—Beyer v. McGeorge, C.C.A.N.J., 90 F.2d 998—U. S. v. Wilson, C.C.A. Wash., 85 F.2d 444—Hiawassee Lumber Co. v. U. S., C.C.A.N.C.,

court has no power after expiration of the term to | open or vacate the judgment,[15] except in either

64 F.2d 417—Board of Com'rs of Muskogee County v. Morely, C.C.A. Okl., 6 F.2d 553—Canning v. Hackett, D.C.Mass., 3 F.Supp. 460.

Ala.—**Corpus Juris cited in** Sisson v. Leonard, 11 So.2d 144, 146, 243 Ala. 546—Ex parte Bergeron, 193 So. 113, 238 Ala. 665—Ex parte Howard, 142 So. 403, 225 Ala. 106—Gabbert v. Gabbert, 117 So. 214, 217 Ala. 599.

Ariz.—In re Ralph's Estate, 67 P.2d 230, 49 Ariz. 391.

Ark.—Bright v. Johnson, 152 S.W.2d 540, 202 Ark. 751—Bank of Russellville v. Walthall, 96 S.W.2d 952, 192 Ark. 1111—Evans v. U. S. Anthracite Coal Co., 21 S.W.2d 952, 180 Ark. 578—Browning v. Waldrip, 273 S.W. 1032, 169 Ark. 261.

Colo.—Osborne v. MacDonald, 8 P.2d 707, 90 Colo. 292.

Conn.—Foley v. George A. Douglas & Bro., 185 A. 70, 121 Conn. 377—**Corpus Juris cited in** Ferguson v. Sabo, 162 A. 844, 845, 115 Conn. 619, certiorari denied 53 S.Ct. 595, 289 U.S. 734, 77 L.Ed. 1482.

Del.—Smulski v. H. Feinberg Furniture Co., 193 A. 585, 8 W.W.Harr. 451.

Fla.—State ex rel. Coleman v. Williams, 3 So.2d 152, 147 Fla. 514—Alabama Hotel Co. v. J. L. Mott Iron Works, 98 So. 825, 86 Fla. 608.

Ga.—Crowell v. Crowell, 11 S.E.2d 190, 191 Ga. 36—Frazier v. Beasley, 1 S.E.2d 458, 59 Ga.App. 500—Rogers v. Rigell, 188 S.E. 704, 183 Ga. 455—Farmers Mut. Fire Ins. Co. of Georgia v. Pollock, 184 S.E. 383, 52 Ga.App. 603—Jill Bros. v. Holmes, 150 S.E. 921, 40 Ga.App. 625.

Hawaii.—Goo v. Hee Fat, 34 Hawaii 123.

Ill.—People ex rel. McDonough v. Klein, 186 N.E. 533, 353 Ill. 80—People v. Lyle, 160 N.E. 742, 329 Ill. 418—Village of Downer's Grove v. Glos, 147 N.E. 390, 316 Ill. 563—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147—Chicago Title & Trust Co. v. Gottschalk, 45 N.E.2d 194, 316 Ill.App. 455—Schmahl v. Aurora Nat. Bank, 35 N.E.2d 689, 311 Ill.App. 228—Chicago Faucet Co. v. 839 Lake St. Bldg. Corporation, 1 N.E.2d 865, 285 Ill.App. 151—Quigley v. Quigley, 268 Ill.App. 130—Walentarski v. Racine, 264 Ill.App. 369—Nelson v. Arcola State Bank, 261 Ill.App. 421.

Ind.—Wagner v. McFadden, 31 N.E. 2d 628, 218 Ind. 400—Scheiring v. Baker, 177 N.E. 866, 202 Ind. 678—Rooker v. Fidelity Trust Co., 177 N.E. 454, 202 Ind. 641.

Iowa.—**Corpus Juris cited in** Concannon v. Blackman, 6 N.W.2d 116, 119, 232 Iowa 722.

Kan.—Elliott v. Elliott, 114 P.2d 823, 154 Kan. 145—State v. Frame, 95 P.2d 278, 150 Kan. 646—Shope v. Shope, 89 P.2d 859, 149 Kan. 754—Bigler v. Goltl, 64 P.2d 39, 145 Kan. 191—Riley v. Riederer, 61 P. 2d 106, 144 Kan. 422—Drury v. Drury, 41 P.2d 1032, 141 Kan. 511—J. B. Colt Co. v. Clark, 266 P. 41, 125 Kan. 722—Heston v. Finley, 236 P. 841, 118 Kan. 717.

Ky.—Schlenker v. Clark, 11 S.W.2d 725, 226 Ky. 665—People's Bank & Trust Co. v. Sleet, 4 S.W.2d 689, 223 Ky. 749—Nelson v. Cartmel, 6 Dana 7.

Mo.—City of St. Louis v. Franklin Bank, 173 S.W.2d 837, 351 Mo. 688—Smith v. Smith, 164 S.W.2d 921, 350 Mo. 104—Seigle v. First Nat. Co., 90 S.W.2d 776, 338 Mo. 417, 105 A.L.R. 181—**Corpus Juris cited in** Ætna Ins. Co. v. Hyde, 34 S.W. 2d 85, 87, 327 Mo. 115—Johnson v. Underwood, 24 S.W.2d 133, 324 Mo. 578—State ex rel. Maple v. Mulloy, 15 S.W.2d 809, 322 Mo. 281—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282—Madden v. Fitzsimmons, 150 S. W.2d 761, 235 Mo.App. 1074.

N.J.—Somers v. Holmes, 177 A. 434, 114 N.J.Law 497.

N.Y.—Walzer v. Manufacturers Trust Co., 290 N.Y.S. 879, 160 Misc. 803, affirmed 290 N.Y.S. 880, 248 App. Div. 865, affirmed 12 N.E.2d 452, 276 N.Y. 507.

Ohio.—Davis v. Teachnor, App., 53 N.E.2d 208—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 456.

Okl.—Harder v. Woodside, 165 P.2d 841—Great American Ins. Co. v. Keswater, 268 P. 258, 131 Okl. 196—McNac v. Kinch, 238 P. 424, 113 Okl. 59—Pennsylvania Co. v. Potter, 233 P. 700, 108 Okl. 49—McNac v. Chapman, 223 P. 350, 101 Okl. 121.

Or.—Hicks v. Hill Aeronautical School, 286 P. 553, 132 Or. 545—Smith v. Rose, 265 P. 800, 125 Or. 56—Western Land & Irrigation Co. v. Humfeld, 247 P. 143, 118 Or. 416—Finch v. Pacific Reduction & Chemical Mfg. Co., 234 P. 296, 113 Or. 670.

Pa.—Commonwealth v. Wright, Oyer & T., 33 Del.Co. 254.

Tenn.—Sullivan v. Eason, 8 Tenn. App. 429—Everett v. Everett, 1 Tenn.App. 85.

Tex.—Arrington v. McDaniel, 25 S. W.2d 295, 119 Tex. 148—Federal Surety Co. v. Cook, 24 S.W.2d 394, 119 Tex. 89—O'Neil v. Norton, Com. App., 33 S.W.2d 733—Collins v. Davenport, Civ.App., 192 S.W.2d 291—Railroad Commission v. Dyer, Civ.App., 144 S.W.2d 375—Henderson v. Stone, Civ.App., 95 S.W.2d 772, error dismissed.

Utah.—Frost v. District Court of First Judicial District in and for Box Elder County, 83 P.2d 737, 96 Utah 106, rehearing denied 85 P. 2d 601, 96 Utah 115.

W.Va.—Baker v. Gaskins, 36 S.E.2d 893—Chaney v. State Compensation Com'r, 33 S.E.2d 284—Stannard Supply Co. v. Delmar Coal Co., 158 S.E. 907, 110 W.Va. 560.

Wyo.—Bales v. Brome, 105 P.2d 568, 56 Wyo. 111—Midwest Refining Co. v. George, 7 P.2d 213, 44 Wyo. 25—Boulter v. Cook, 234 P. 1101, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.

34 C.J. p 210 notes 10, 11.

In determining whether federal court lost jurisdiction to modify judgment by expiration of term, case should be deemed as belonging to division in which county was situated from which removal was made.—Upton-Lang Co. v. Metropolitan Casualty Ins. Co. of New York, C.C.A.Pa., 57 F.2d 133.

Judgment on petition for new trial is "final judgment" and cannot be modified by the court rendering it at a subsequent term on a motion for a new trial.—Wilhoit v. Nicely, 134 S. W.2d 615, 280 Ky. 793.

15. U.S.—Aderhold v. Murphy, C.C. A.Kan., 103 F.2d 492—Sun Indemnity Co. of New York v. U. S., C.C. A.N.J., 91 F.2d 120—Beyer v. McGeorge, C.C.A.N.J., 90 F.2d 998—Mallinger v. U. S., C.C.A.Pa., 82 F.2d 705—Upton-Lang Co. v. Metropolitan Casualty Ins. Co. of New York, C.C.A.Pa., 57 F.2d 133—Woods Bros. Const. Co. v. Yankton County, S. D., C.C.A.S.D., 54 F. 2d 304, 81 A.L.R. 300—Ayer v. Kemper, C.C.A.N.Y., 48 F.2d 11, certiorari denied Union Trust Co. of Rochester v. Ayer, 52 S.Ct. 20, 284 U.S. 639, 76 L.Ed. 543—Henry v. U. S., C.C.A.Pa., 46 F.2d 640—Kulesza v. Blair, C.C.A.Ill., 41 F.2d 439, certiorari denied 51 S.Ct. 86, 282 U.S. 883, 75 L.Ed. 779—Bache v. Moe, D.C.Ohio, 33 F.2d 976—Roman v. Alvarez, C.C.A.Puerto Rico, 30 F.2d 813—U. S. v. Ali, D. C.Mich., 20 F.2d 998—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855—Ex parte Robinson, D.C.Tex., 44 F.Supp. 795—Heffern v. The De Witt Clinton, D.C.N.Y., 44 F.Supp. 550—U. S. v. Clatterbuck, D.C.Md., 26 F.Supp. 297—Borough of Hasbrouck Heights, N. J., v. Agrios, D.C.N.J., 10 F.Supp. 371—U. S. v. Manger, D. C.N.J., 7 F.Supp. 720—Canning v. Hackett, D.C.Mass., 3 F.Supp. 460.

Ala.—Pate v. State, 14 So.2d 251, 244 Ala. 396—Ex parte Bergeron, 193 So. 113, 238 Ala. 665—Ex parte Howard, 142 So. 403, 225 Ala. 106—Ex parte Fidelity & Deposit Co.

case pursuant to proceedings begun within the proper time and continued to the subsequent term;

of Maryland, 134 So. 861, 223 Ala. 98—Monroe County Growers' Exch. v. Harper, 103 So. 600, 20 Ala.App. 532.

Ariz.—In re Ralph's Estate, 67 P.2d 230, 49 Ariz. 391—Mosher v. Dye, 39 P.2d 639, 44 Ariz. 555.

Ark.—Feild v. Waters, 1 S.W.2d 807, 175 Ark. 1169—McConnell v. Bourland, 299 S.W. 44, 175 Ark. 253—Browning v. Waldrep, 273 S.W. 1032, 169 Ark. 261.

Cal.—Casner v. San Diego Trust & Savings Bank, 94 P.2d 65, 34 Cal. App.2d 524.

Colo.—Osborne v. MacDonald, 8 P.2d 707, 90 Colo. 292—Monte Vista Potato Growers' Co-op. Ass'n v. Bond, 252 P. 813, 80 Colo. 516.

Conn.—Foley v. George A. Douglas & Bro., 185 A. 70, 121 Conn. 377—Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.

Del.—Smulski v. H. Feinberg Furniture Co., 193 A. 585, 8 W.W.Harr. 451—Hazzard v. Alexander, 178 A. 873, 6 W.W.Harr. 512—Tweed v. Lockton, 167 A. 703, 5 W.W.Harr. 474.

D.C.—Verkouteren v. Edwards, 128 F.2d 33, 76 U.S.App.D.C. 18—Fidelity & Deposit Co. of Maryland v. Hurley, 72 F.2d 927, 63 App.D.C. 377—Taliaferro v. Carter, 72 F.2d 172, 63 App.D.C. 304.

Fla.—Cassels v. Ideal Farms Drainage Dist., 23 So.2d 247—State ex rel. Coleman v. Williams, 3 So.2d 152, 147 Fla. 514—Zemurray v. Kilgore, 177 So. 714, 130 Fla. 317—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.

Ga.—Peoples Loan Co. v. Allen, 34 S.E.2d 811, 199 Ga. 537—Smith v. Cone, 156 S.E. 612, 171 Ga. 697—Loughridge v. City of Dalton, 143 S.E. 393, 166 Ga. 323—Gulf Life Ins. Co. v. Gaines, 179 S.E. 199, 50 Ga.App. 504—Jill Bros. v. Holmes, 150 S.E. 921, 40 Ga.App. 625.

Ill.—Wilson v. Fisher, 17 N.E.2d 216, 369 Ill. 538—Checker Taxi Co. v. Industrial Commission, 174 N.E. 849, 343 Ill. 139—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158—Shoup v. Cummins, 166 N.E. 118, 334 Ill. 539, 65 A.L.R. 887—Loew v. Krauspe, 150 N.E. 683, 320 Ill. 244—People v. Omega Chapter of Psi Upsilon Fraternity, 150 N.E. 677, 320 Ill. 326—Noonan v. Thompson, 83 N.E. 426, 231 Ill. 588—Continental Ill. Nat. Bank & Trust Co. of Chicago v. University of Notre Dame Du Lac, 63 N.E.2d 127, 326 Ill.App. 567—Chicago Faucet Co. v. 839 Lake St. Bldg. Corporation, 1 N.E.2d 865, 285 Ill. App. 151—People ex rel. Nelson v. Farmers & Merchants State Bank of Mendota, 281 Ill.App. 654—Travelers Ins. Co. v. Wagner, 279 Ill.App. 13—Hamilton Glass Co. v. Borin Mfg. Co., 248 Ill.App. 301.

Ind.—Irwin v. State, 41 N.E.2d 809, 220 Ind. 228.

Kan.—Hoffman v. Hoffman, 135 P.2d 887, 156 Kan. 647—Keys v. Smallwood, 102 P.2d 1001, 152 Kan. 115—Gaston v. Collins, 72 P.2d 84, 146 Kan. 449—Bigler v. Goltl, 64 P.2d 39, 145 Kan. 191—Thornton v. Van Horn, 37 P.2d 1015, 140 Kan. 568.

Ky.—First State Bank v. Asher, 117 S.W.2d 581, 273 Ky. 574—Faulkner v. Faulkner, 110 S.W.2d 465, 270 Ky. 693—Warfield Natural Gas Co. v. Endicott, 99 S.W.2d 822, 266 Ky. 735—Fidelity & Columbia Trust Co. v. Huffman, 82 S.W.2d 482, 259 Ky. 477—Robbins v. Hopkins, 65 S.W.2d 54, 251 Ky. 413—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632—Sandy Hook Bank's Trustee v. Elliott County Fiscal Court, 58 S.W.2d 637, 248 Ky. 498—Center's Guardian v. Center, 51 S.W.2d 460, 244 Ky. 502—Crawford v. Riddle, 45 S.W.2d 463, 241 Ky. 839—Brown's Adm'r v. Gabhart, 23 S.W.2d 551, 232 Ky. 336—Malnowski v. Stacy, 20 S.W.2d 1008, 231 Ky. 23—Commonwealth v. Partin, 3 S.W.2d 779, 223 Ky. 405—Barnes v. Montjoy's Adm'r, 290 S.W. 349, 217 Ky. 465—Watts v. Noble, 262 S.W. 1114, 203 Ky. 699—Cooper v. Williamson, 248 S.W. 245, 198 Ky. 62.

Md.—Armour Fertilizer Works, Division of Armour & Co. of Del. v. Brown, 44 A.2d 753.

Mich.—Moebius v. McCracken, 246 N.W. 163, 261 Mich. 409.

Miss.—Strain v. Gayden, 20 So.2d 697, 197 Miss. 353—Evans v. King-Peoples Auto Co., 99 So. 758, 135 Miss. 194.

Mo.—City of St. Louis v. Franklin Bank, 173 S.W.2d 837, 351 Mo. 688—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386—Harrison v. Slaton, 49 S.W.2d 31—People's Bank of Glasgow v. Yager, 46 S.W.2d 585, 329 Mo. 767—Sutton v. Anderson, 31 S.W.2d 1026, 326 Mo. 304—Johnson v. Underwood, 24 S.W.2d 133, 324 Mo. 578—Johnson v. Baumhoff, 18 S.W.2d 13, 322 Mo. 1017—State ex rel. Maple v. Mulloy, 15 S.W.2d 809, 322 Mo. 281—Bess v. Bothwell, App., 163 S.W.2d 125—State ex rel. Caplow v. Kirkwood, App., 117 S.W.2d 652—Haight v. Stuart, App., 31 S.W.2d 241.

Neb.—Hamaker v. Patrick, 244 N.W. 420, 123 Neb. 809.

N.J.—Somers v. Holmes, 177 A. 434, 114 N.J.Law 497.

N.Y.—Kalwite v. National Liberty Ins. Co. of America, 233 N.Y.S. 183, 225 App.Div. 898, appeal dismissed 170 N.E. 136, 252 N.Y. 542.

N.C.—Clark v. Cagle, 37 S.E.2d 672, 226 N.C. 230—Crow v. McCullen, 17 S.E.2d 107, 220 N.C. 306—State v. Hollingsworth, 175 S.E. 99, 206 N.C. 739—Hinnant v. American Fire & Marine Ins. Co., 168 S.E. 199 (first case), 204 N.C. 307—Bisanar v. Suttlemyre, 138 S.E. 1, 193 N.C. 711—Dunn v. Taylor, 121 S.E. 659, 187 N.C. 385.

Ohio.—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871—Rabinovitz v. Novak, App., 31 N.E.2d 151—Pfeiffer v. Sheffield, 27 N.E.2d 494, 64 Ohio App. 1—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 456.

Okl.—Savery v. Mosely, 76 P.2d 902, 182 Okl. 133—Fowler v. Humphrey Inv. Co., 286 P. 867, 142 Okl. 221—Okmulgee Northern Ry. Co. v. Oklahoma Salvage & Supply Co., 271 P. 167, 133 Okl. 64—McNac v. Kinch, 238 P. 424, 113 Okl. 59—McNac v. Chapman, 223 P. 350, 101 Okl. 121.

Or.—Hicks v. Hill Aeronautical School, 286 P. 553, 132 Or. 545—Western Land & Irrigation Co. v. Humfeld, 247 P. 143, 118 Or. 416.

Pa.—York v. George, 39 A.2d 625, 350 Pa. 439—Frantz v. City of Philadelphia, 3 A.2d 917, 333 Pa. 220—Dellacasse v. Floyd, 2 A.2d 860, 332 Pa. 218—Dormont Motors v. Hoerr, 1 A.2d 493, 132 Pa.Super. 567—Kappel v. Meth, 189 A. 795, 125 Pa.Super. 443—Citizens' Bank v. Gwinner, 170 A. 471, 112 Pa.Super. 12—Schlosberg v. City of New Castle, 100 Pa.Super. 139—Abramson v. Getz, 89 Pa.Super. 403—Brader v. Alinikoff, 85 Pa.Super. 285—Petition of Lissi, 16 Pa.Dist. & Co. 787, 23 Berks Co. 255—Knipper v. B. & L. E. Traction Co., 9 Pa.Dist. & Co. 235, 8 Erie Co. 112, 74 Pittsb.Leg.J. 564—McKenzie Co. v. Fidelity & Deposit Co. of Maryland, Com.Pl., 54 Dauph.Co. 294—Levitt v. Wayne Title & Trust Co., Com.Pl., 29 Del.Co. 558—Wanner v. Thompson, Com.Pl., 27 Del.Co. 455—Allied Store Utilities Co. v. Azat, Com.Pl., 34 Luz.Leg.Reg. 41—Pittston Building & Loan Ass'n v. Coggins, Com.Pl., 31 Luz.Leg.Reg. 345.

Tenn.—Battle v. National Life & Accident Ins. Co., 157 S.W.2d 817, 178 Tenn. 283.

Tex.—Lanier v. Parnell, Civ.App., 190 S.W.2d 421—Aldridge v. General Mills, Civ.App., 188 S.W.2d 407—Smith v. Pegram, Civ.App., 80 S.W.2d 354, error refused—Pfeifer v. Johnson, Civ.App., 70 S.W.2d 203—Bell v. Rogers, Civ.App., 58 S.W.2d 878—Pass v. Ray, Civ.App., 44 S.W.2d 470—Keller v. Keller, Civ. App., 3 S.W.2d 590, error dismissed

in such cases the proceedings remain in fieri, and the court may open, amend or vacate the judgment at the subsequent term.[16] The court may not, after the expiration of the term, set aside a judgment and reënter it as of a later date for the purpose of extending, or reviving, the time for appeal therefrom.[17] The only remedy after the term for irregular and erroneous, as distinguished from void,

—Texas & N. O. R. Co. v. Owens, Civ.App., 299 S.W. 516—Kahl v. Porter, Civ.App., 296 S.W. 324—Phœnix Oil Co. v. Illinois Torpedo Co., Civ.App., 261 S.W. 487—Lepp v. Ward County Water Improvement Dist., No. 2, Civ.App., 257 S.W. 916—Wier v. Yates, Civ.App., 256 S.W. 636—Silver v. State, 9 S.W.2d 358, 110 Tex.Cr. 512, 60 A.L.R. 290.

W.Va.—Baker v. Gaskins, 36 S.E.2d 893—Chaney v. State Compensation Com'r, 33 S.E.2d 284—County Court of Mason County v. Roush, 142 S.E. 520, 105 W.Va. 355.

Wis.—Osmundson v. Lang, 290 N.W. 125, 233 Wis. 591—State ex rel. Wingenter v. Circuit Court for Walworth County, 248 N.W. 413, 211 Wis. 561.

Wyo.—Boulter v. Cook, 234 P. 1101, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.

34 C.J. p 210 note 10, p 212 note 12.

Opening and vacating see infra §§ 265-310.

Setting aside dismissal and reinstatement of cause after close of term see Dismissal and Nonsuit §§ 41, 79.

Reason for rule

(1) Basis of rule that court is without power to modify or vacate judgment in other than clerical matters after expiration of term in which it was rendered is that in interest of public as well as parties time must be fixed after expiration of which controversy is regarded as settled.—Foley v. George A. Douglas & Bro., 185 A. 70, 121 Conn. 377.

(2) Other cases see 34 C.J. p 212 note 12 [a].

Judgment should not be lightly set aside after expiration of term at which rendered.—Dunlap v. Villareal, Tex.Civ.App., 91 S.W.2d 1124.

Rule ordinarily refers to judgments recovered after trial or by default, where defendant has, or is treated as having, knowledge of judgment.—Denton Nat. Bank of Maryland v. Lynch, 142 A. 103, 155 Md. 333.

Time limit is not when right of exception expires, but rather is the end of the term.—Deen v. Baxley State Bank, 15 S.E.2d 194, 192 Ga. 300.

Where court did not enter judgment and prothonotary's entries were insufficient, rule that judgment cannot be disturbed after term of entry, except on appeal, does not control.—Trestrail v. Johnson, 146 A. 150, 297 Pa. 49.

Judgment vacating previous judgment

Ga.—East Side Lumber & Coal Co. v. Barfield, 18 S.E.2d 492, 193 Ga. 273.

Judgment rendered in vacation

Ky.—Hurd v. Laurel County Board of Education, 103 S.W.2d 277, 267 Ky. 730—Clark County Nat. Bank v. Rowan County Board of Education, 89 S.W.2d 638, 262 Ky. 153, overruling Center's Guardian v. Center, 51 S.W.2d 460, 244 Ky. 502—Estes v. Woodford, 55 S.W.2d 396, 246 Ky. 485.

Miss.—Ex parte Stanfield, 53 So. 538, 98 Miss. 214.

Portion of judgment vacated during term may not be reinstated after expiration of term.—Furst v. Meek, 130 S.W.2d 410, 297 Ky. 509.

16. U.S.—Windholz v. Everett, C.C.A.N.C., 74 F.2d 834, followed in Blackley v. Powell, 74 F.2d 1009—Montgomery v. Realty Acceptance Corporation, C.C.A.Del., 51 F.2d 642, affirmed Realty Acceptance Corporation v. Montgomery, 52 S.Ct. 215, 284 U.S. 547, 76 L.Ed. 476—Ex parte Robinson, D.C.Tex., 44 F.Supp. 795—Canning v. Hackett, D.C.Mass., 3 F.Supp. 460.

Ala.—Pate v. State, 14 So.2d 251, 244 Ala. 396.

Conn.—Ferguson v. Sabo, 162 A. 844, 115 Conn. 619, certiorari denied 53 S.Ct. 595, 289 U.S. 734, 77 L.Ed. 1482—Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.

Del.—Hazard v. Alexander, 178 A. 873, 6 W.W.Harr. 512.

Fla.—E. B. Elliott Co. v. Turrentine, 151 So. 414, 113 Fla. 210—State v. Wright, 145 So. 598, 107 Fla. 178.

Ga.—Frazier v. Beasley, 1 S.E.2d 458, 59 Ga.App. 500—Hardwick v. Shahan, 118 S.E. 575, 30 Ga.App. 526.

Ky.—Riggs v. Ketner, 187 S.W.2d 287, 299 Ky. 754—Welch v. Mann's Ex'r, 88 S.W.2d 1, 261 Ky. 470—Lilly v. Marcum, 283 S.W. 1059, 214 Ky. 514.

Mo.—Ætna Ins. Co. v. Hyde, 34 S.W.2d 85, 327 Mo. 115—Herrmann v. Kaiser, App., 85 S.W.2d 928.

Ohio.—Pfeiffer v. Sheffield, 27 N.E.2d 494, 64 Ohio App. 1—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 456.

Okl.—Phillips Petroleum Co. v. Davis, 147 P.2d 135, 194 Okl. 84—Riddle v. Cornell, 135 P.2d 41, 192 Okl. 232—Canada v. Canada, 121 P.2d 989, 190 Okl. 203—Nichols v. Bonaparte, 42 P.2d 866, 171 Okl. 234—Martin v. Jones, 238 P. 458, 111 Okl. 101.

Or.—Hicks v. Hill Aeronautical School, 286 P. 553, 132 Or. 545—Finch v. Pacific Reduction & Chemical Mfg. Co., 234 P. 296, 113 Or. 670.

Pa.—Stein v. Kessler, 92 Pa.Super. 359—Commonwealth v. Wright, Oyer & T., 33 Del.Co. 254.

Tex.—Duclos v. Applin, Civ.App., 66 S.W.2d 1105.

W.Va.—Womeldorff & Thomas Co. v. Moore, 152 S.E. 783, 108 W.Va. 721—Bank of Gauley v. Osenton, 114 S.E. 435, 92 W.Va. 1.

Wyo.—Ramsay v. Gottsche, 69 P.2d 535, 51 Wyo. 516.

34 C.J. p 214 note 13.

Sufficiency of proceedings

(1) In absence of motion for new trial, district court's attempted modification of judgment, more than thirty days after rendition but in same term, could not form predicate for modification of judgment at subsequent term.—Hardy v. McCulloch, Tex.Civ.App., 286 S.W. 629.

(2) Motions to modify or to vacate a judgment, when not acted on during the term, have been held not to confer jurisdiction to modify or vacate at a subsequent term.—Hoffman v. Hoffman, 135 P.2d 887, 156 Kan. 647.

(3) Other cases.—Ayer v. Kemper, C.C.A.N.Y., 48 F.2d 11, certiorari denied Union Trust Co. of Rochester v. Ayer, 52 S.Ct. 20, 284 U.S. 639, 76 L.Ed. 543—34 C.J. p 214 note 13 [b]-[h].

Motion for new trial

(1) Where a motion for a new trial is made and continued over the term, it suspends the finality of the judgment so that the court may modify or set it aside at a subsequent term.—Luther Lumber Co. v. Sheldahl Sav. Bank, 139 P. 433, 22 Wyo. 302.

(2) Pendency of motion for new trial does not authorize court to reopen cause at subsequent term for taking further evidence and entering another decree.—Irwin v. Burgan, 28 S.W.2d 1017, 325 Mo. 309.

Order within term suspending all proceedings to keep way open for further action was within court's discretion.—Stein v. Kessler, 92 Pa. Super. 359.

17. U.S.—Board of Com'rs of Muskogee County v. Morely, C.C.A.Okl., 6 F.2d 553.

judgments is usually by new trial, review, writ of error, or appeal, as may be appropriate and allowable by law, or by some other mode specially provided by statute.[18]

Exceptions to rule. There are various exceptions to the rule that jurisdiction of a court over its judgments terminates with the close of the term.[19] Clerical or formal corrections or amendments of the judgment record, necessary to make it speak the truth, and not involving any change in the judicial action already taken, may be made at any time, before or after expiration of the term.[20] Judg-

18. U.S.—Arcoil Mfg. Co. v. American Equitable Assur. Co. of New York, C.C.A.N.J., 87 F.2d 206—U. S. v. Manger, D.C.N.Y., 7 F. Supp. 720.
Ark.—Hagen v. Hagen, 183 S.W.2d 785, 207 Ark. 1007—Robertson v. Cunningham, 178 S.W.2d 1014, 207 Ark. 76—Merriott v. Kilgore, 139 S.W.2d 387, 200 Ark. 394—Bank of Russellville v. Walthall, 96 S.W.2d 952, 192 Ark. 1111—Fawcett v. Rhyne, 63 S.W.2d 349, 187 Ark. 940—Merchants' & Planters' Bank & Trust Co. v. Ussery, 38 S.W.2d 1087, 183 Ark. 838.
Fla.—Alabama Hotel Co. v. J. L. Mott Iron Works, 98 So. 825, 86 Fla. 608.
Ga.—Donalson v. Bank of Jakin, 127 S.E. 229, 33 Ga.App. 428.
Ill.—Wilson v. Fisher, 17 N.E.2d 216, 369 Ill. 538—Katauski v. Eldridge Coal & Coke Co., 255 Ill.App. 41—Hickman v. Ritchey Coal Co., 252 Ill.App. 560—Toth v. Samuel Phillipson & Co., 250 Ill.App. 247.
Iowa.—Concannon v. Blackman, 6 N. W.2d 116, 232 Iowa 722.
Kan.—Sparks v. Maguire, 169 P.2d 826—Hoffman v. Hoffman, 135 P. 2d 887, 156 Kan. 647—Keys v. Smallwood, 102 P.2d 1001, 152 Kan. 115—Riley v. Riederer, 61 P.2d 106, 144 Kan. 422.
Ky.—House v. Rawlings, 177 S.W.2d 562, 296 Ky. 578—Swartz v. Caudill, 130 S.W.2d 80, 279 Ky. 206—First State Bank v. Asher, 117 S.W.2d 581, 273 Ky. 574—Faulkner v. Faulkner, 110 S.W.2d 465, 270 Ky. 693—Sauerman Bros. v. Roberts, 100 S.W.2d 225, 266 Ky. 815—Schlenker v. Clark, 11 S.W.2d 725, 226 Ky. 665—Newman v. Ohio Valley Fire & Marine Ins. Co., 299 S. W. 559, 221 Ky. 616—Duff v. Duff, 265 S.W. 305, 205 Ky. 10.
Md.—Armour Fertilizer Works Division of Armour & Co. of Del. v. Brown, 44 A.2d 753.
Mo.—Johnson v. Underwood, 24 S. W.2d 133, 324 Mo. 578—Robinson v. Martin Wunderlich Const. Co., App., 72 S.W.2d 127—Goodman v. Meyer, App., 38 S.W.2d 268.
Neb.—Stanton v. Stanton, 18 N.W. 2d 654—State ex rel. Spillman v. Commercial State Bank of Omaha, 10 N.W.2d 268, 143 Neb. 490—Feldt v. Wanek, 278 N.W. 557, 134 Neb. 334—Elvidge v. Brant, 267 N. W. 169, 131 Neb. 1—Cronkleton v. Lane, 263 N.W. 338, 130 Neb. 17—Hoeppner v. Bruckman, 261 N.W. 572, 129 Neb. 390—Howard Stove & Furnace Co. v. Rudolf, 260 N.W. 189, 128 Neb. 665—Lyman v. Dunn, 252 N.W. 197, 125 Neb. 770—State ex rel. Sorensen v. Security State Bank of Plainview, 251 N.W. 97, 125 Neb. 516.
N.C.—Phillips v. Ray, 129 S.E. 177, 190 N.C. 152.
Ohio.—State ex rel. Bell v. Edmondson, App., 43 N.E.2d 108—Maryland Casualty Co. v. John F. Rees Co., App., 40 N.E.2d 200—State ex rel. Hussey v. Hemmert, App., 37 N.E. 2d 668—Dusha v. Binz, 155 N.E. 256, 23 Ohio App. 285—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 456.
Okl.—Harder v. Woodside, 165 P.2d 841—Savery v. Mosely, 76 P.2d 902, 182 Okl. 133—Purcell Wholesale Grocery Co. v. Cantrell, 255 P. 704, 124 Okl. 273—Taliaferro v. Batis, 252 P. 845, 123 Okl. 59—American Inv. Co. v. Wadlington, 244 P. 435, 114 Okl. 124—First Nat. Bank v. Smith, 241 P. 761, 115 Okl. 119—Pennsylvania Co. v. Potter, 233 P. 700, 108 Okl. 49.
Or.—Rosumny v. Marks, 246 P. 723, 118 Or. 248.
Tex.—Smith v. Ferrell, Com.App., 44 S.W.2d 962—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed.
Utah.—Salt Lake City v. Industrial Commission, 22 P.2d 1046, 82 Utah 179.
W.Va.—Aide v. Amburgey, 148 S.E. 326, 107 W.Va. 370—County Court of Mason County v. Roush, 142 S. E. 520, 105 W.Va. 355.
Wis.—Amalgamated Meat Cutters & Butcher Workmen of N. A., A. F. of L. Local Union No. 73 v. Smith, 10 N.W.2d 114, 243 Wis. 390—Kellogg-Citizens Nat. Bank of Green Bay v. Francois, 3 N.W.2d 686, 240 Wis. 432—State ex rel. Gaudynski v. Pruss, 290 N.W. 289, 233 Wis. 600—In re Meek's Estate, 227 N. W. 270, 199 Wis. 602.
Wyo.—**Corpus Juris cited in** Ramsey v. Gottsche, 69 P.2d 535, 539, 51 Wyo. 516.
34 C.J. p 215 note 15.

19. Del.—Webb Packing Co. v. Harmon, 193 A. 596, 8 W.W.Harr. 476.
Ohio.—Maryland Casualty Co. v. John F. Rees Co., App., 40 N.E.2d 200.
Pa.—Kappel v. Meth, 189 A. 795, 125 Pa.Super. 443.
Tex.—Halbrook v. Quinn, Civ.App., 286 S.W. 954, certified questions dismissed Quinn v. Halbrook, 285 S.W. 1079, 115 Tex. 1079.

"These exceptions may be summarized as follows: (1) where the subject is governed by statute, (2) the correction of a clerical error, (3) where the judgment has been entered by misprision of a clerk, (4) errors of law disclosed by the record or where it appears that there are errors in matters of fact which have not been put in issue and passed upon and were material to the validity and regularity of the proceedings, and (5) where from the record it is apparent that the judgment is void in law."—Goo v. Hee Fat, 34 Hawaii 123, 127.

Tendency in modern judicial procedure is to minimize or abandon the significance of the mere expiration of the term of court as no longer having the importance attached to it under other conditions prevailing at common law.—U. S. v. Clatterbuck, D.C.Md., 26 F.Supp. 297.

Where record shows that defendants have been deprived of rights given by law, judgments have been vacated.—Webb Packing Co. v. Harmon, 193 A. 596, 8 W.W.Harr., Del., 476.

20. U.S.—Gilmore v. U. S., C.C.A. Ark., 131 F.2d 873—In re Pottasch Bros. Co., D.C.N.Y., 11 F.Supp. 275, affirmed, C.C.A., 79 F.2d 613—Ex parte Robinson, D.C.Tex., 44 F. Supp. 795.
Ala.—Ex parte French, 147 So. 631, 226 Ala. 297.
Ark.—Richardson v. Sallee, 183 S.W. 2d 508, 207 Ark. 915—Bright v. Johnson, 152 S.W.2d 540, 202 Ark. 751—Kory v. Less, 87 S.W.2d 92, 183 Ark. 553—Evans v. U. S. Anthracite Coal Co., 21 S.W.2d 952, 180 Ark. 578.
Conn.—Gruber v. Friedman, 132 A. 395, 104 Conn. 107.
D.C.—Verkouteren v. Edwards, 128 F.2d 33, 76 U.S.App.D.C. 18—Fidelity & Deposit Co. of Maryland v. Hurley, 72 F.2d 927, 63 App.D.C. 377.
Ill.—Quigley v. Quigley, 268 Ill.App. 130.
Iowa.—Murnan v. Schuldt, 265 N.W. 369, 221 Iowa 242.
Kan.—Bush v. Bush, 150 P.2d 168, 158 Kan. 760—Elliott v. Elliott, 114 P.2d 823, 154 Kan. 145—North American Life Ins. Co. of Chicago, Ill., v. Dyatt, 250 P. 341, 121 Kan. 873.

ments entered as the result of clerical mistake or inadvertence,[21] or which are void on their face,[22] may be vacated after expiration of the term.

Where a judgment is irregular by reason of error or mistake of fact, such as was ground for a writ of error coram nobis, the practice in some jurisdictions permits it to be opened or vacated on motion after the term;[23] but this exception does not reach to facts submitted to a jury, or found by a referee or by the court sitting to try the issues.[24] In some cases equitable relief against the judgment has been granted in a summary way on motion after the term to avoid the expense and delay of a formal suit in equity.[25]

Statutes in some states confer on the court which rendered the judgment a prescribed and limited control over it after expiration of the term at which it was rendered.[26] Statutory judgments entered by the clerk, and which may be entered in vacation, are not within the general rule;[27] and it has been held that in statutory proceedings the judgment may be opened at a subsequent term where there is due diligence.[28]

Interlocutory judgments. The rule against amending or vacating a judgment after expiration of the term at which it was rendered has no application to interlocutory judgments, and such judgments may be opened, amended, or vacated at any time while the proceedings remain in fieri, and before the final judgment,[29] and a statute making such

Me.—Davis v. Cass, 142 A. 377, 127 Me. 167.
Mo.—Campbell v. Spotts, 55 S.W.2d 986, 331 Mo. 974—Vaughn v. Kansas City Gas Co., 159 S.W.2d 690, 236 Mo.App. 669—Ex parte Messina, 128 S.W.2d 1082, 233 Mo.App. 1234.
Mont.—Morse v. Morse, 154 P.2d 982—State ex rel. Kruletz v. District Court of Fifth Judicial Dist. in and for Beaverhead County, 98 P. 2d 883, 110 Mont. 36.
Neb.—Petersen v. Dethlefs, 298 N.W. 155, 139 Neb. 572.
N.H.—Hubley v. Goodwin, 4 A.2d 665, 90 N.H. 54.
N.M.—De Baca v. Sais, 99 P.2d 106, 44 N.M. 105.
Tex.—Jones v. Bass, Com.App., 49 S.W.2d 723—Collins v. Davenport, Civ.App., 192 S.W.2d 291—De Leon v. Texas Employers Ins. Ass'n, Civ. App., 159 S.W.2d 574, error refused—Kveton v. Farmers Royalty Holding Co., Civ.App., 149 S.W.2d 998—Duncan v. Marlin Motor Co., Civ.App., 41 S.W.2d 740, error refused—Bray v. Clark, Civ.App., 9 S.W.2d 203, error dismissed.
Vt.—St. Pierre v. Beauregard, 152 A. 914, 103 Vt. 258.
Wash.—Pappas v. Taylor, 244 P. 393, 138 Wash. 31.
W.Va.—Chaney v. State Compensation Com'r, 33 S.E.2d 284.
Wis.—Ætna Life Ins. Co. v. McCormick, 20 Wis. 265.
Wyo.—Bales v. Brome, 105 P.2d 568, 56 Wyo. 111.
Correction of clerical and formal errors generally see infra §§ 237, 239–249.

Power of court exists by virtue of continuing power over its records and right of parties to have a correct record without instituting an independent suit to obtain it.—Weaver v. Humphrey, Tex.Civ.App., 114 S.W.2d 609, error dismissed.

Interlocutory order
Wyo.—Bales v. Brome, 105 P.2d 568, 56 Wyo. 111.

21. Ill.—Chapman v. North American Life Ins. Co., 126 N.E. 732, 292 Ill. 179.
Wis.—Ætna Life Ins. Co. v. McCormick, 20 Wis. 265.
Grounds for opening and vacating generally see infra §§ 266–281.

22. Del.—Hendrix v. Kelley, 143 A. 460, 4 W.W.Harr. 120.
Miss.—Horne v. Moorehead, 153 So. 668, 169 Miss. 362.
Mo.—Case v. Smith, 257 S.W. 148, 215 Mo.App. 621.
Okl.—Skipper v. Baer, 277 P. 930, 136 Okl. 286.
34 C.J. p 215 note 18.

Judgment is "void on its face," when it requires only inspection of the judgment roll to show its invalidity.—Anderson v. Lynch, 221 P. 415, 94 Okl. 137.

23. U.S.—Gilmore v. U. S., C.C.A. Ark., 131 F.2d 873—Hiawassee Lumber Co. v. U. S., C.C.A.N.C., 64 F.2d 417.
Ill.—Gunn v. Britt, 39 N.E.2d 76, 313 Ill.App. 13.
34 C.J. p 215 note 20.
Writ of error coram nobis see infra §§ 311–313.

24. U.S.—Bronson v. Schulten, N. Y., 104 U.S. 410, 26 L.Ed. 997.
34 C.J. p 216 note 21.

25. U.S.—Bronson v. Schulten, supra.
34 C.J. p 216 note 22.
Equitable relief against judgments see infra §§ 341–400.

26. Iowa.—Albright v. Moeckley, 237 N.W. 309.
Minn.—Elsen v. State Farmers Mut. Ins. Co., 17 N.W.2d 652, 219 Minn. 315.
Okl.—Carter v. Grimmett, 213 P. 732, 89 Okl. 37.
Wis.—Osmundson v. Lang, 290 N.W. 125, 233 Wis. 591.
Wyo.—Midwest Refining Co. v. George, 7 P.2d 213, 44 Wyo. 25—Boulter v. Cook, 236 P. 245, 32 Wyo. 461.
34 C.J. p 216 note 23, p 221 note 54.

27. Cal.—People v. Greene, 16 P. 197, 74 Cal. 400, 5 Am.S.R. 448.
34 C.J. p 216 note 24.

28. Pa.—M. A. Long Co. v. Keystone Portland Cement Co., 153 A. 429, 302 Pa. 308—Kantor v. Herd, 120 A. 450, 276 Pa. 519.

29. Ala.—Scott v. Leigeber, 18 So. 2d 275, 245 Ala. 583—**Corpus Juris cited in** Ex parte Green, 129 So. 72, 73, 221 Ala. 298.
Conn.—Stolman v. Boston Furniture Co., 180 A. 507, 120 Conn. 235.
Fla.—State v. City of Sarasota, 17 So.2d 109, 154 Fla. 250—Whitaker v. Wright, 129 So. 839, 100 Fla. 282—Alabama Hotel Co. v. J. L. Mott Iron Works, 98 So. 825, 86 Fla. 608.
Ill.—Parsons v. Parsons Lumber Co., 27 N.E.2d 477, 305 Ill.App. 486.
Ind.—State ex rel. Unemployment Compensation Board of Unemployment Compensation Division v. Burton, 44 N.E.2d 506, 112 Ind. App. 268.
Iowa.—Riley v. Board of Trustees of Policemen's Pension Fund, 222 N. W. 403, 207 Iowa 177.
Ky.—Corbin v. Corbin, 176 S.W.2d 691, 296 Ky. 276—Wilcoxen v. Farmers' Nat. Bank of Scottsville, 10 S.W.2d 298, 225 Ky. 764.
Mo.—**Corpus Juris cited in** Barlow v. Scott, 85 S.W.2d 504, 519.
N.Y.—Bannon v. Bannon, 1 N.E.2d 975, 270 N.Y. 484, 105 A.L.R. 1401.
Pa.—Markofski v. Yanks, 146 A. 569, 297 Pa. 74.
Tex.—Manley v. Razien, Civ.App., 172 S.W.2d 798—Standard Oil Co. v. State, Civ.App., 132 S.W.2d 612, error dismissed, judgment correct—Blain v. Broussard, Civ.App., 99 S.W.2d 993—Ellis v. Jefferson Standard Life Ins. Co., Civ.App., 78 S.W.2d 645—Brannon v. Wilson, Civ.App., 260 S.W. 201.
Utah.—Richards v. District Court of Weber County, 267 P. 779, 71 Utah 473.
Va.—Freezer v. Miller, 176 S.E. 159, 163 Va. 180.
Wyo.—**Corpus Juris cited in** Bales v.

a judgment appealable does not change the rule.[30]

Removal of cause. When a cause is remanded to the state court after removal to a federal court, the state court again has the same jurisdiction it had at the time of removal, and may open, amend, or vacate a judgment notwithstanding the lapse of a term if it could have done so at the time of removal.[31]

Effect of improper amendment or vacation after term. According to some decisions any change or modification or attempted vacation of the judgment itself at a subsequent term is beyond the jurisdiction of the court and is void for that reason.[32] According to other decisions, however, where an improper amendment in a matter of substance has been made, the order making such amendment, while erroneous, is not void, and may not be assailed collaterally; the party aggrieved must seek his remedy by appeal from the order.[33]

b. Void Judgments

A judgment which is void for want of jurisdiction may be vacated at a subsequent term.

Where a judgment is entirely void for want of jurisdiction, the power to vacate it or set it aside is not limited to the term at which it was rendered, but may be exercised at a succeeding term,[34] subject to any existing statutory provisions.[35] A judgment of a court of last resort may not be set aside after the term on the ground that the court had no jurisdiction.[36]

c. Reservation of Power in Judgment

A reservation in the judgment of power to amend or vacate it at a subsequent term does not enlarge or extend the authority of the court.

An attempted reservation in the judgment itself of power to amend or vacate it at a subsequent term does not enlarge or extend the authority which the court otherwise has in that behalf.[37] A new or amended judgment rendered at a subsequent term pursuant to such reservation is without jurisdiction and void, and the prior judgment continues in force.[38]

Brome, 105 P.2d 568, 574, 56 Wyo. 111.
34 C.J. p 216 note 30—47 C.J. p 435 note 10, p 436 note 24.
Final or interlocutory judgment see supra § 11.
Interlocutory decrees in equity see Equity § 624.

Ruling on pleading
Trial court, when it becomes satisfied that erroneous ruling has been made concerning a pleading, should set aside such ruling.—Shaw v. Dorris, 124 N.E. 796, 290 Ill. 196—Mater v. Silver Cross Hospital, 2 N.E.2d 138, 285 Ill.App. 437.

In Georgia
The court cannot revoke interlocutory rulings made at preceding term, notwithstanding cause is still pending and no final judgment on merits has been rendered.—Gulf Life Ins. Co. v. Gaines, 179 S.E. 199, 50 Ga. App. 504.

30. Mo.—Aull v. Day, 34 S.W. 578, 133 Mo. 337.

31. Ill.—Jansen v. Grimshaw, 17 N. E. 850, 125 Ill. 468.

32. U.S.—In re Metropolitan Trust Co. of City of New York, N. Y., 31 S.Ct. 18, 218 U.S. 312, 54 L.Ed. 1051.
34 C.J. p 216 note 27.

Validity of second judgment
Second judgment, entered after expiration of term, expunging judgment timely entered from record, was void.—Hubbard v. Trinity State Bank, Tex.Civ.App., 48 S.W.2d 379, error dismissed.

33. N.Y.—Stannard v. Hubbell, 25 N. E. 1084, 123 N.Y. 520.

Trial court's opening judgment, after end of term during which it was rendered, is erroneous but not void.—Simpson v. Young Men's Christian Ass'n of Bridgeport, 172 A. 855, 118 Conn. 414.

34. U.S.—U. S. v. Sotis, C.C.A.Ill., 131 F.2d 783—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, S. D., C.C.A.S.D., 54 F.2d 304, 310—**Corpus Juris cited in** U. S. v. Turner, C.C.A.N.D., 47 F.2d 86, 88.
Ala.—**Corpus Juris cited in** Ex parte R. H. Byrd Contracting Co., 156 So. 579, 581, 26 Ala.App. 171.
Del.—Hazzard v. Alexander, 178 A. 873, 6 W.W.Harr. 512.
Fla.—State ex rel. Coleman v. Williams, 3 So.2d 152, 147 Fla. 514.
Ga.—Hamilton v. Hardwick, 170 S.E. 826, 47 Ga.App. 513.
Ill.—In re Johnson's Estate, 277 Ill. App. 319—Heckman v. Ritchey Coal Co., 252 Ill.App. 560.
Kan.—Sparks v. Maguire, 169 P.2d 826.
Mo.—**Corpus Juris cited in** In re Main's Estate, App., 152 S.W.2d 696, 701—**Corpus Juris cited in** Dickey v. Dickey, App., 132 S.W.2d 1026, 1032.
N.J.—Pink v. Deering, 4 A.2d 790, 122 N.J.Law 277, motion denied 17 A.2d 603, 125 N.J.Law 569.
N.Y.—**Corpus Juris cited in** People v. Ashworth, 56 N.Y.S.2d 791, 793, 185 Misc. 391.
Ohio.—Synder v. Clough, 50 N.E.2d 384, 71 Ohio App. 440—McAllister v. Schlemmer & Graber Co., 177 N.E. 841, 39 Ohio App. 434—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.
Or.—Finch v. Pacific Reduction & Chemical Mfg. Co., 234 P. 296, 113 Or. 670.
Pa.—Stickel v. Barron, Com.Pl., 7 Fay.L.J. 35.
Tex.—**Corpus Juris cited in** Harrison v. Whiteley, Com.App., 6 S.W. 2d 89, 90—Nymon v. Eggert, Civ. App., 154 S.W.2d 157.
34 C.J. p 217 note 32.

Especially where defect appears on record, authority of court to set aside void judgment continues beyond expiration of term.—Harrison v. Whiteley, Tex.Com.App., 6 S.W.2d 89.

Filing answer did not deprive court of jurisdiction to pass on motion to set aside void judgment rendered before service of summons.—Kastner v. Tobias, 282 P. 585, 129 Kan. 321.

35. Ohio.—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.
34 C.J. p 219 note 33.

36. Ohio.—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.
Wis.—State v. Waupaca County Bank, 20 Wis. 640.
34 C.J. p 219 note 34.

37. U.S.—**Corpus Juris quoted in** Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F.2d 304, 310, 81 A.L.R. 300
Okl.—**Corpus Juris cited in** Consolidated School Dist. No. 1b v. Green, 71 P.2d 712, 714, 180 Okl. 567.
34 C.J. p 219 note 35.

38. Mo.—Hill v. St. Louis, 20 Mo. 584.

d. Consent and Waiver

The authorities are in disagreement on the question whether or not a judgment rendered at one term of court can be set aside at a subsequent term by consent of both parties.

On the ground that consent cannot confer jurisdiction, it has been held that a judgment rendered at one term of court cannot be set aside at a subsequent term even by consent of both parties,[39] except where the judgment was entered by reason of a clerical mistake or inadvertence.[40] Other courts have held that, although a court may not amend or vacate its own final judgments after expiration of the term at which they were rendered without the consent of both parties, it may do so with such consent, and the second judgment in such cases is not void for want of jurisdiction.[41] Parties who consent to the amendment of a judgment have been held to be estopped from afterward objecting to it.[42] Appearance on application to amend judgment after term, however, has been held to confer no jurisdiction to make it.[43]

§ 231. Where Terms Abolished

Where terms of court have been abolished, relief against a final judgment may be had in the manner and within the time provided by statute.

Where terms of court are abolished, and the court is deemed to be continuously in session, as considered in Courts § 148, the general rule of control during the term, as discussed supra § 229, has no application,[44] and relief against a final judgment may be had only in the manner and within the time provided by statute,[45] except that judgments inadvertently or improvidently made, or prematurely entered, may be vacated under the inherent power of the court,[46] and judgments void on their face may be vacated at any time.[47]

§ 232. At Chambers or in Vacation

In the absence of statutory authority, a judgment ordinarily may not be amended, opened, or vacated at chambers or in vacation.

Except as to purely clerical amendments of the record,[48] the exercise of the power to amend, open, or vacate a judgment is a judicial act which, unless otherwise authorized by statute, must be performed in open court, in term time, and which cannot be done at chambers or in vacation.[49]

39. Tenn.—Everett v. Everett, 1 Tenn.App. 85.
34 C.J. p 219 note 37.

40. Tenn.—Anderson v. Thompson, 7 Lea 259.

41. Ill.—Steinhagen v. Trull, 151 N. E. 250, 320 Ill. 382—Reisman v. Central Mfg. Dist. Bank, 45 N.E. 2d 90, 316 Ill.App. 371—Hickman v. Ritchey Coal Co., 252 Ill.App. 560.
Tex.—Slattery v. Uvalde Rock Asphalt Co., Civ.App., 140 S.W.2d 987, error refused.
34 C.J. p 220 note 39.

Consent not shown
N.C.—Clark v. Cagle, 37 S.E.2d 672, 226 N.C. 230.

Persons not parties to stipulation are not bound.—Western Land & Irrigation Co. v. Humfeld, 247 P. 143, 118 Or. 416.

In Arkansas
(1) A valid agreement between the parties that a foreclosure decree be vacated is enforceable, although the term at which the decree was rendered has expired.—Franzen v. Juhl, 32 S.W.2d 627, 182 Ark. 663.

(2) It has also been held, however, that consent of parties will not authorize vacation of judgment after the expiration of the term.—Brady v. Hamlett, 33 Ark. 105—Little Rock v. Bullock, 6 Ark. 282.

42. Wis.—Steckmesser v. Graham, 10 Wis. 37.

43. Mo.—Ross v. Ross, 83 Mo. 100.
34 C.J. p 220 note 41.

44. U.S.—U. S. v. Maier, 18 C.C.P. A.,Customs, 409.
N.D.—Bank of Inkster v. Christenson, 194 N.W. 702, 49 N.D. 1047.
34 C.J. p 220 note 43.

45. U.S.—U. S. v. Maier, 18 C.C.P.A., Customs, 409.
Ala.—Pate v. State, 14 So.2d 251, 244 Ala. 396.
Ariz.—In re Ralph's Estate, 67 P.2d 230, 49 Ariz. 391—Intermountain Building & Loan Ass'n v. Allison Steel Mfg. Co., 22 P.2d 413, 42 Ariz. 51.
Ill.—McKenna v. Forman, 283 Ill. App. 606.
Ky.—Hutchinson v. Hutchinson, 168 S.W.2d 738, 293 Ky. 270—Straton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632.
Mont.—In re Jennings' Estate, 254 P. 1069, 79 Mont. 80—In re Jennings' Estate, 254 P. 1067, 79 Mont. 73—Stabler v. Adamson, 237 P. 433, 73 Mont. 490.
S.D.—Janssen v. Tusha, 5 N.W.2d 684, 68 S.D. 639.
Tex.—Joy v. Young, Civ.App., 194 S. W.2d 159.
34 C.J. p 220 note 44, p 221 note 54.

Independent suits
Rule fixing time applies only to motions in original cause and not to independent suits to set aside judgment.—Lauer v. Eighth Judicial District Court in and for Clark County, 140 P.2d 953, 62 Nev. 78.

46. N.D.—Martinson v. Marzolf, 103 N.W. 937, 14 N.D. 301.
34 C.J. p 220 note 45.

47. Cal.—Luckenbach v. Krempel. 204 P. 591, 188 Cal. 175.
Nev.—Lauer v. Eighth Judicial District Court in and for Clark County, 140 P.2d 953, 62 Nev. 78.
34 C.J. p 220 note 46.

48. Tex.—Ft. Worth & D. C. R. Co. v. Roberts, 81 S.W. 25, 98 Tex. 42—Baum v. Corsicana Nat. Bank, 75 S.W. 863, 32 Tex.Civ.App. 531, error refused.
34 C.J. p 220 note 48.
Amendment and correction of clerical errors generally see infra §§ 237, 239–249.

49. Ga.—O'Neal v. Neal Veneering Co., 143 S.E. 381, 166 Ga. 376—Davis v. Bennett, 125 S.E. 714, 159 Ga. 332—Davis v. Bennett, 123 S.E. 11, 158 Ga. 368—Revels v. Kilgo, 121 S.E. 209, 157 Ga. 39—Atlantic Coast Line R. Co. v. Devero, 173 S.E. 865, 48 Ga.App. 800.
Okl.—Appeal of Barnett, 252 P. 418, 122 Okl. 169—Appeal of Barnett, 252 P. 410, 122 Okl. 160.
34 C.J. p 220 note 50, p 221 note 51.

Consent of parties
(1) It has been held that a motion to vacate may be made and heard in vacation by consent of parties.—Skinner v. Terry, 12 S.E. 118, 107 N. C. 103.

(2) Under some statutes a judge at chambers, except by consent of parties to be affected, has no jurisdiction to modify or correct decree of district court.—Nicholson v. Getchell, 202 N.W. 618, 113 Neb. 248.

§ 233. Authority of Clerk

Unless authorized by statute, the clerk of court is without power to amend, correct, or vacate a judgment.

Except to the extent that permission may be given by statute,[50] the clerk of the court has no authority on his own responsibility and without an order or direction of the court to amend, change, or correct a judgment record.[51] A court may not delegate its judicial functions to its clerk so that he may set aside a judgment on the performance of a condition.[52]

§ 234. Judgments Subject to Amendment or Vacation

Various classes and kinds of judgments may be amended or vacated, but a void judgment, or a judgment which has been vacated, may not be amended.

In proper cases and for sufficient cause shown, various classes and kinds of judgments may be amended or vacated,[53] including, as considered infra §§ 321, 328–330, 333, judgments by confession, consent, or default.

Where the court does not render a formal or proper judgment, there is no judgment to vacate.[54] An unauthorized and void judgment may not be amended;[55] nor may a vacated judgment be amended.[56]

A judgment on demurrer, where proper grounds exist, may be vacated with leave to amend or plead over.[57]

Executed or satisfied judgments. In some jurisdictions a judgment may be opened, amended, or vacated for good cause, even after the amount of it has been collected by payment or by levy and sale on execution.[58] In other jurisdictions a judgment which has been paid or otherwise satisfied

(3) It has also been held that jurisdiction to vacate judgment at chambers cannot be conferred by agreement.—Moody v. Freeman, 104 P. 30, 24 Okl. 701.

Proceeding begun in vacation

A judgment passed in term time in a proceeding begun in vacation, which judgment sets aside a judgment previously entered, was not void for lack of jurisdiction.—Revels v. Kilgo, 121 S.E. 209, 157 Ga. 39—Kalil v. Spivey, 27 S.E.2d 475, 70 Ga. App. 84.

50. N.C.—Caldwell v. Caldwell, 128 S.E. 329, 189 N.C. 805.

Motion to vacate may be made before judge or clerk for irregularity of judgment entered by clerk of superior court.—Caldwell v. Caldwell, supra.

Decision of clerk is reviewable by judge

N.C.—Caldwell v. Caldwell, supra.

51. U.S.—Barnes v. Lee, D.C., 2 F. Cas.No.1,017, 1 Cranch C.C. 430.
34 C.J. p 221 note 52.
Exercise of judicial functions by clerk generally see Clerks of Courts §§ 34–37.

52. N.C.—Hopkins v. Bowers, 16 S. E. 1, 111 N.C. 175.
34 C.J. p 221 note 53.

53. Ala.—Louisville & N. R. Co. v. Bridgeforth, 101 So. 807, 20 Ala. App. 326.
Ariz.—Hartford Accident & Indemnity Co. v. Sorrells, 69 P.2d 240, 50 Ariz. 90.
N.Y.—McCormick v. Walker, 142 N. Y.S. 759, 158 App.Div. 54.
34 C.J. p 224 note 63.
Amendment, modification, and vacation of orders see the C.J.S. title Motions and Orders § 62, also 42 C. J. p 541 note 17 et seq.
Amendment, opening, and vacation of interlocutory judgments after term see supra § 230 a.
Correction and vacation of decrees in equity see Equity §§ 622–667.
Effect of filing transcript in other court on power to amend or vacate see supra § 129.
Setting aside dismissal or nonsuit and reinstatement of cause see Dismissal and Nonsuit §§ 40–44, 78–85.

Statute authorizing court to modify or set aside its judgment for good cause shown applies to all judgments and not simply to default judgments or judgments that are erroneous.—Holmes v. Conter, 295 N. W. 649, 209 Minn. 144.

Judgment on directed verdict

Tex.—Zachary v. Home Owners Loan Corporation, Civ.App., 117 S.W.2d 153, error dismissed.

Judgment entered on failure to present exceptions

Mass.—Russell v. Foley, 179 N.E. 619, 278 Mass. 145.

Judgment for partition

Kan.—Daleschal v. Geiser, 13 P. 595, 36 Kan. 374.
47 C.J. p 436 notes 15, 17, 23.

Judgments based on jury verdict do not come within court's discretionary power to revise or vacate during term of entry.—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287.

54. Ill.—Robinson v. Stewart, 252 Ill.App. 203.

Stipulation

The filing, prior to trial, of stipulation which stated "settled no costs," and which had the effect of terminating the action, was not a "judgment" within statute authorizing person, against whom judgment has been rendered in action wherein no trial has been had, to petition supreme court for a trial, since no act or determination of trial court was involved in bringing about such termination.—Girard v. Sawyer, 9 A.2d 854, 64 R.I. 48.

55. N.Y.—Ainsworth v. Ainsworth, 267 N.Y.S. 587, 239 App.Div. 258—American Cities Co. v. Stevenson, 60 N.Y.S.2d 685.
Tex.—Ashton v. Farrell & Co., Civ. App., 121 S.W.2d 611, error dismissed.
34 C.J. p 225 note 67.

Judgment declared void by appellate court

Ala.—Ex parte S. & R. McLeod, 104 So. 688, 20 Ala.App. 641.

Void judgment cannot be made valid by amendment.—Wunnicke v. Leith, Wyo., 157 P.2d 274.

56. N.C.—Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 88 S.E. 349, 171 N.C. 248.

57. N.D.—Taylor State Bank v. Baumgartner, 147 N.W. 385, 27 N. D. 606.
34 C.J. p 224 note 63 [b]—49 C.J. p 465 note 31.

58. Cal.—Patterson v. Keeney, 132 P. 1043, 165 Cal. 465, Ann.Cas. 1914D 232.
Ky.—Williams v. Isaacs, 256 S.W. 19, 201 Ky. 158.
34 C.J. p 225 note 68.

Irrespective of tender of amount of judgment by defendant in open court, court of common pleas, during term on its own motion and in interests of justice, has inherent power to strike off judgment entered against defendant.—Bergen v. Lit Bros., 45 A.2d 373, 158 Pa.Super. 469, affirmed, Sup., 47 A.2d 671.

and discharged may not be amended,[59] modified,[60] or vacated.[61]

§ 235. Jurisdiction of Particular Courts and Judges

A judgment ordinarily may be amended, opened, or vacated only by the court by which it was rendered.

A judgment may not be amended or vacated by a court unless the court has jurisdiction.[62] As a general rule a judgment may be amended, opened, vacated, or set aside only by the court by which it was rendered.[63] A judge of that court, other than the one who presided at the trial and rendered the judgment, may order its amendment or vacation,[64] although, as a matter of practice, what amounts to an appeal from one judge to another coördinate judge will not be permitted in the absence of special circumstances.[65]

The jurisdiction of the proper court to amend the judgment is not affected by defendant's absence from the state, jurisdiction of his person having attached in the action,[66] or by the fact that similar relief has already been granted to a joint party.[67]

Courts of special or limited jurisdiction. Unless authority is conferred by statute, courts of special or limited jurisdiction have no power to review, retry, annul, or set aside their judgments.[68]

B. AMENDMENT AND CORRECTION

§ 236. In General

The general rule is that a court may amend its judgment as truth requires and the rules of law permit, so as to make it express what was actually decided or intended.

As a general rule, all courts whose judgments are preserved in any species of record or memorial have the power and authority to make such amendments and corrections therein as truth and justice require and the rules of law permit,[69] to the end that the

59. Miss.—Spring v. Tidwell, 31 Miss. 63.
Neb.—Durland Trust Co. v. Uttley, 172 N.W. 251, 103 Neb. 461.
34 C.J. p 225 note 69.

60. La.—Sweeney v. Black River Lumber Co., 4 La.App. 244.

61. N.C.—Pardue v. Absher, 94 S.E. 414, 174 N.C. 676.
34 C.J. p 225 note 70.

62. Iowa.—Albright v. Moeckley, 237 N.W. 309.
Power of probate court see Courts § 309 c.
Superior court has general jurisdiction over subject matter of setting aside judgments rendered therein.—State v. Superior Court for Thurston County, 271 P. 87, 149 Wash. 443.

63. Ga.—Jackson v. Jackson, 35 S.E.2d 258, 199 Ga. 716—Barber v. Barber, 121 S.E. 317, 157 Ga. 188—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55.
Iowa.—Hansen v. McCoy & McCoy, 266 N.W. 1, 221 Iowa 523.
Ky.—Kaze v. Wheat's Guardian, 4 S.W.2d 723, 223 Ky. 719.
Mich.—Jackson City Bank & Trust Co. v. Fredrick, 260 N.W. 908, 271 Mich. 538.
N.Y.—Harvey v. Harvey, 48 N.Y.S.2d 238, 183 Misc. 475—Feinberg v. Feinberg, 41 N.Y.S.2d 869, 180 Misc. 305.
N.C.—Gaster v. Thomas, 124 S.E. 609, 188 N.C. 346.
Ohio.—Buckeye State Building & Loan Co. v. Ryan, 157 N.E. 811, 24 Ohio App. 481.
Pa.—Frew v. Heinbach, Com.Pl., 9 Sch.Reg. 91.
Tex.—Texas-Carolina Oil Co. v. Fires, 48 S.W.2d 600, 121 Tex. 396.
34 C.J. p 225 note 75.
Collateral attack see infra §§ 401–435.
Effect of filing transcript in other court on power to amend or vacate see supra § 139.
Jurisdiction to grant equitable relief see infra § 342.
Vacating, modifying, or annulling decisions of other courts see Courts §§ 501, 552.
Appellate court is without jurisdiction to vacate judgment of trial court.
Cal.—Bank of Italy v. E. N. Cadenasso, 274 P. 534, 206 Cal. 436.
Wis.—Milwaukee County v. H. Neidner & Co., 265 N.W. 226, 220 Wis. 185, motion denied 266 N.W. 238, 220 Wis. 185.
34 C.J. p 225 note 75 [b].

64. Conn.—Gruber v. Friedman, 132 A. 395, 104 Conn. 107.
Mass.—Commonwealth v. Gedzium, 159 N.E. 51, 261 Mass. 299.
Neb.—State Life Ins. Co. of Indianapolis, Ind., v. Heffner, 269 N.W. 629, 131 Neb. 700.
S.C.—Ex parte Hart, 2 S.E.2d 52, 190 S.C. 473, certiorari denied Bowen v. Hart, 60 S.Ct. 82, 308 U.S. 569, 84 L.Ed. 477.
34 C.J. p 227 note 76.
Powers of:
Substitute or special judge see Judges § 105.
Successor judge see Judges § 56.

65. N.Y.—Levy v. Kurak, 52 N.Y.S.2d 304, 184 Misc. 29.
N.C.—Price v. Life & Casualty Ins. Co. of Tennessee, 160 S.E. 367, 201 N.C. 376.
34 C.J. p 227 note 77.

66. La.—Smith v. Railroad Lands Co., 45 So. 441, 120 La. 564.
Me.—Hall v. Williams, 10 Me. 278.
Jurisdiction once acquired over the parties to a suit continues as long as action by the court for the purpose of making a true record may be necessary.—Hubley v. Goodwin, 4 A.2d 665, 90 N.H. 54.

67. Miss.—Healy v. Just, 53 Miss. 547.

68. Ind.—Pass v. State, 147 N.E. 287, 83 Ind.App. 598.
Amendment and vacation by justice of peace see the C.J.S. title Justices of the Peace §§ 112, 113, also 35 C.J. p 677 note 47 et seq.
Courts of limited jurisdiction see Courts §§ 244–248.
Circuit court commissioner, after judgment in summary proceedings by vendors to repossess premises had been entered on his docket and signed by him, was without authority to make any alterations in docket entry either by addition, deletion, or change of name or figures.—Springett v. Circuit Court Com'r for Jackson County, 283 N.W. 857, 287 Mich. 271.

69. U.S.—Illinois Printing Co. v. Electric Shovel Coal Corporation, D.C.Ill., 20 F.Supp. 181.
Ark.—Kory v. Less, 37 S.W.2d 92, 183 Ark. 553—United Drug Co. v. Bedell, 262 S.W. 316, 164 Ark. 527.
Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328—Leftridge v. City of Sacramento,

judgment may express what was actually decided or intended.[70] This power is inherent and independent of statutes;[71] but the power to amend and correct judgments is very largely regulated by statute in the different jurisdictions.[72]

119 P.2d 390, 48 Cal.App.2d 589—Carter v. Shinsako, 108 P.2d 27, 42 Cal.App.2d 9—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

Colo.—Wilson v. Carroll, 250 P. 555, 80 Colo. 234.

Ind.—**Corpus Juris cited in** Miller v. Muir, 56 N.E.2d 496, 504, 115 Ind. App. 335.

Mont.—In re Jennings' Estate, 254 P. 1067, 79 Mont. 73.

N.H.—Hubley v. Goodwin, 4 A.2d 665, 90 N.H. 54.

N.Y.—American Cities Co. v. Stevenson, 60 N.Y.S.2d 685.

Tex.—Jones v. Bass, Com.App., 49 S.W.2d 723—Weaver v. Humphrey, Civ.App., 114 S.W.2d 609, error dismissed—Corbett v. Rankin Independent School Dist., Civ.App., 100 S.W.2d 113.

Wyo.—**Corpus Juris cited in** Bales v. Brome, 105 P.2d 568, 572, 56 Wyo. 111.

34 C.J. p 228 note 80, p 229 note 82—47 C.J. p 435 note 2.

After decision and mandate on appeal see Appeal and Error § 1967.

Amendment and correction of judicial records generally see Courts §§ 231–236.

Jurisdiction and power of court to deal with judgments generally see supra §§ 228–235.

Jurisdiction of probate courts to amend or correct judgments or orders see Courts § 309 c.

"If in fact the judgment fails to set forth the court's determination of the prior suit in accordance with the record, it is the privilege of the plaintiff to move for amendment of the judgment to procure such relief as the law affords."—O'Brien v. New York Edison Co., D.C.N.Y., 26 F.Supp. 290, 292.

Amendment or modification held not shown

(1) It is not a modification of a judgment of partition, which directs the commissioners to proceed generally according to law, to give, in a subsequent order appointing new commissioners, specific instructions following the statute, as every judgment of partition contains the statutory directions by implication, if they are not expressed.—Houston v. Blythe, 10 S.W. 520, 71 Tex. 719.

(2) Other circumstances.

N.J.—Terminal Cab Co. v. Mikolasy, 25 A.2d 253, 128 N.J.Law 275.

N.Y.—Siegel v. State, 246 N.Y.S. 652, 138 Misc. 474.

Motion for modification not required

Where both plaintiff and defendant sought ejectment against the other and court entered judgment denying plaintiff relief but failed to pass on issues raised by defendant's pleading, plaintiff properly moved court to enter a final judgment and was not required to move for modification of judgment entered and thus invite error as moving court to find against him on issues tendered by his opponent.—State ex rel. Clark v. Rice, 47 N.E.2d 849, 113 Ind.App. 238.

Revision by lay judges

The court may change its decision on the day on which it is rendered, so that, treating the prior decree of president judge of court of common pleas of county as that of the court, it was still subject to revision as to facts by a majority of lay judges on the same day.—Petition of Murray, 105 A. 61, 262 Pa. 188.

70. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371—In re Easton's Estate, 28 P.2d 376, 136 Cal. App. 213.

Ill.—Rogers v. Trudzinski, 67 N.E. 2d 427, 329 Ill.App. 179.

Kan.—Bush v. Bush, 150 P.2d 168, 158 Kan. 760.

Mont.—Morse v. Morse, 154 P.2d 982—State ex rel. Vaughn v. District Court of Fifth Judicial Dist. in and for Madison County, 111 P.2d 810, 111 Mont. 552—State ex rel. Kruletz v. District Court of Fifth Judicial Dist. in and for Beaverhead County, 98 P.2d 883, 110 Mont. 36—Kline v. Murray, 257 P. 465, 79 Mont. 530—State v. Silver Bow County Second Judicial Dist. Ct., 176 P. 608, 55 Mont. 324.

N.J.—Terminal Cab Co. v. Mikolasy, 25 A.2d 253, 128 N.J.Law 275.

N.Y.—American Cities Co. v. Stevenson, 60 N.Y.S.2d 685.

Pa.—Davis v. Commonwealth Trust Co., 7 A.2d 3, 335 Pa. 387.

Tex.—Weaver v. Humphrey, Civ. App., 114 S.W.2d 609, error dismissed.

As long as trial court has jurisdiction of the cause, it has the inherent power to modify its judgment to make it conform to the judgment actually entered.—Penchos v. Ranta, 155 P.2d 277, 22 Wash.2d 198.

At any time

(1) A court may at any time correct a judgment so as to make it conform to the decision actually made.—Benway v. Benway, 159 P.2d 682, 69 Cal.App.2d 574.

(2) This is true at least as between the parties.—Klinefelter v. Anderson, 230 N.W. 288, 59 N.D. 417.

"No lapse of time, however long, will preclude the correction of the judgment roll so as to make it speak precisely what the court intended."—Cazzell v. Cazzell, 3 P.2d 479, 480, 133 Kan. 766.

71. U.S.—Illinois Printing Co. v. Electric Shovel Coal Corporation, D.C.Ill., 20 F.Supp. 181.

Cal.—In re Goldberg's Estate, 76 P. 2d 508, 10 Cal.2d 709—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209.

Mont.—Edgar State Bank v. Long, 278 P. 103, 85 Mont. 225—In re Jennings' Estate, 254 P. 1067, 79 Mont. 73.

Nev.—Lindsay v. Lindsay, 280 P. 95, 52 Nev. 26, 67 A.L.R. 824.

N.D.—Klinefelter v. Anderson, 230 N.W. 288, 59 N.D. 417.

Okl.—Montague v. State ex rel. Commissioners of Land Office of Oklahoma, 89 P.2d 233, 184 Okl. 574.

Pa.—Davis v. Commonwealth Trust Co., 7 A.2d 3, 335 Pa. 387.

Tex.—Collins v. Davenport, Civ.App., 192 S.W.2d 291—Weaver v. Humphrey, Civ.App., 114 S.W.2d 609, error dismissed.

Utah.—Garrison v. Davis, 54 P.2d 439, 88 Utah 358.

Wyo.—**Corpus Juris cited in** Bales v. Brome, 105 P.2d 568, 572, 56 Wyo. 111.

34 C.J. p 228 note 81.

In Iowa

(1) The power of the court to modify a judgment, when once entered, is purely statutory.—Hammon v. Gilson, 291 N.W. 448, 227 Iowa 1366—Workman v. District Court, Delaware County, 269 N.W. 27, 222 Iowa 364.

(2) "When a clear mistake of fact, due to misunderstanding honestly made, is presented to the court at the same term at which the entry is made, both statutory authority (section 10801, Code of 1935) and inherent power is [are] vested in the court to change, modify or even expunge the record."—Watters v. Knutsen, 272 N.W. 420, 422, 223 Iowa 225.

(2) "The power and authority of the court to correct an evident mistake is [are] not restricted either by section 11550 or sections 12787, 12790, and 12791, but . . . such power is inherent in the court, and [correction] may be made under such inherent power as well as under section 10803."—Murnan v. Schuldt, 265 N.W. 369, 373, 221 Iowa 242.

72. Cal.—Brown v. Jones, 52 P.2d 962, 11 Cal.App.2d 30.

Kan.—Leach v. Roberson, 52 P.2d 629, 142 Kan. 687.

Mass.—Amory v. Kelley, 34 N.E.2d 507, 309 Mass. 162.

It has been held that in the case of fraud, misrepresentation, or mistake relief must be granted by a court by the correction of its decrees, in the interests of justice;[73] and, under some authorities, a judgment procured through fraud, collusion, deceit, or mistake may be modified at any time, on a proper showing by the party injured.[74] However, the right of a court to modify its judgment is not limited to a showing that it was procured by fraud, collusion, or misrepresentation,[75] but it is sufficient if there is a showing that the rights of interested parties are prejudicially affected by the judgment, and if there was a withholding of matters which should have been before the court, but for which withholding the judgment would not have been rendered.[76]

Where amendments affecting the enforcement of a judgment or its application to the subject matter adjudicated may be made without relitigating former issues, no attack on the judgment is made.[77]

§ 237. Clerical and Formal Changes

The general rule is that clerical and formal errors in a judgment may be corrected, either during or after the term at which it was rendered.

The general rule is that the court, at any time either before or after the expiration of the term at which a judgment was rendered, may and should correct or amend clerical or formal errors and misprisions of its officers so as to make the record entry speak the truth and show the judgment which was actually rendered by the court;[78] and the

Wash.—Schmelling v. Hoffman, 213 P. 478, 124 Wash. 1.
34 C.J. p 229 note 82.

"Irregular;" "irregularity"

(1) Under some statutes courts may modify their judgments or orders for irregularity in proceedings. —Vann v. Board of Education of Town of Lenapah, 229 P. 433, 102 Okl. 286.

(2) Under such statute, errors in permitting amendment of petition after judgment, in fixing amount of attorney's fees, and in rendering judgment on verdict, were held not grounds for modifying judgment on motion filed after expiration of term at which judgment was rendered.—Duncan v. Wilkins, 229 P. 801, 103 Okl. 221.

(3) An "irregular judgment" within meaning of statute providing that, for irregularity in obtaining a judgment, a district court has power to modify the judgment after expiration of the term at which the judgment was rendered is a judgment which is rendered contrary to the course of law and the practice of the courts.—Petersen v. Dethlefs, 298 N. W. 155, 139 Neb. 572.

(4) "Irregularity," within statute permitting modification of judgment by proceeding begun within three years for mistake, neglect, or omission of clerk, or irregularity in obtaining judgment or order, does not apply merely to acts of clerk or other ministerial officers, but includes case where court has acted on erroneous understanding of facts.—Phœnix Mut. Life Ins. Co. v. Aby, 61 P.2d 915, 144 Kan. 544, rehearing denied 64 P.2d 21, 145 Kan. 18.

Unavoidable casualty

Illness of litigant represented by counsel was not "unavoidable casualty or misfortune" within statute authorizing modification of judgment against litigant after expiration of term at which it was rendered for unavoidable casualty or misfortune preventing litigant from appearing or defending, where nothing could have been done to protect litigant's rights while she was ill which could not have been done theretofore, and no continuance of hearings before commissioner because of her inability to be present was requested.—Washle v. Security Bank, 97 S.W.2d 823, 265 Ky. 808.

Negligence

Some statutes are not intended to relieve a party from the consequences of his own negligence.—Hickman v. Ritchey Coal Co., 252 Ill.App. 560.

73. U.S.—Illinois Printing Co. v. Electric Shovel Coal Corporation, D.C.Ill., 20 F.Supp. 181.
Iowa.—Watters v. Knutsen, 272 N. W. 420, 223 Iowa 225.

74. Fla.—Zemurray v. Kilgore, 177 So. 714, 130 Fla. 317—State v. Wright, 145 So. 598, 107 Fla. 178—Eli Witt Cigar & Tobacco Co. v. Somers, 127 So. 333, 99 Fla. 592—Alabama Hotel Co. v. J. L. Mott Iron Works, 98 So. 825, 86 Fla. 608.

Correctness of final judgment cannot be questioned on application for modification, in absence of error, fraud, or misrepresentation.—Bailey v. Gifford Sand & Gravel Co., La. App., 145 So. 712.

Errors correctible by writ of error coram nobis

(1) Under statutes providing that all errors of fact committed in proceedings of any court of record, which by common law could have been corrected by writ of error coram nobis, may be corrected by court in which error was committed on motion in writing made at any time within five years after the rendition of final judgment, "errors of fact" include duress, fraud, and excusable mistake, and fraud of opposing party or his counsel which prevents one from making his defense is such an error of fact.—Gunn v. Britt, 39 N.E.2d 76, 313 Ill.App. 13.

(2) Errors of fact which may be assigned under motion authorized by such statute must be as to facts, unknown to court, which would have precluded entry of judgment order.—Tylke v. Norwegian American Hospital, 54 N.E.2d 75, 322 Ill.App. 283.

(3) Writ of error coram nobis generally see infra §§ 311–313.

75. Ohio.—Pengelly v. Thomas, App., 65 N.E.2d 897, appeal dismissed 67 N.E.2d 714, 146 Ohio St. 693.

76. Ohio.—Pengelly v. Thomas, supra.

77. Ky.—Ballew v. Denny, 177 S.W. 2d 152, 296 Ky. 368, 150 A.L.R. 770.

78. U.S.—Simonds v. Norwich Union Indemnity Co., C.C.A.Minn., 73 F. 2d 412, certiorari denied Norwich Union Indemnity Co. v. Simonds, 55 S.Ct. 507, 294 U.S. 711, 79 L.Ed. 1246—Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F. 2d 304, 81 A.L.R. 300—Fultz v. Laird, C.C.A.Mich., 24 F.2d 172—Ex parte Robinson, D.C.Tex., 44 F. Supp. 795—New River Collieries Co. v. U. S., D.C.N.J., 300 F. 333—Ewert v. Thompson, C.C.A.Okl., 281 F. 449.
Ala.—Parker v. Duke, 157 So. 436, 239 Ala. 361—Ex parte R. H. Byrd Contracting Co., 156 So. 579, 26 Ala. App. 171, certiorari denied 156 So. 582, 229 Ala. 248.
Ark.—Kory v. Less, 87 S.W.2d 92, 183 Ark. 553—Reynolds v. Winship, 299 S.W. 16, 175 Ark. 352—United Drug Co. v. Bedell, 262 S.W. 316, 164 Ark. 527.
Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328—In re Goldberg's Estate, 76 P.2d 508, 10 Cal.2d 709—Security-First Nat. Bank of Los Angeles v. Ruddle Properties, 295 P. 343, 211 Cal. 346—Barkelew v. Barkelew, App., 166 P.2d 57—Benway v. Benway,

correction of such error may be authorized by statute.[79] The term "clerical error" as here used must not be taken in too narrow a sense; it includes not only errors made by the clerk in entering the judgment, but also those mistakes apparent on the record, whether made by the court or by counsel during

159 P.2d 682, 69 Cal.App.2d 574—Hercules Glue Co. v. Littooy, 113 P.2d 490, 45 Cal.App.2d 42—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal. App.2d 371—Kohlstedt v. Hauseur, 74 P.2d 314, 24 Cal.App.2d 60—Bradbury Estate Co. v. Carroll, 276 P. 394, 98 Cal.App. 145—McKannay v. McKannay, 230 P. 213, 68 Cal.App. 709.

Conn.—Varanelli v. Luddy, 32 A.2d 61, 130 Conn. 74—Sachs v. Feinn, 183 A. 384, 121 Conn. 77—Connecticut Mortgage & Title Guaranty Co. v. Di Francesco, 151 A. 491, 112 Conn. 673—Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.

Fla.—Kroier v. Kroier, 116 So. 753, 95 Fla. 865—R. R. Ricou & Sons Co. v. Merwin, 113 So. 745, 94 Fla. 86.

Ga.—Robinson v. Vickers, 127 S.E. 849, 160 Ga. 362.

Hawaii.—City and County of Honolulu v. Caetano, 30 Hawaii 1.

Ill.—People ex rel. Sweitzer v. City of Chicago, 2 N.E.2d 330, 363 Ill. 409, 104 A.L.R. 1335—People v. Lyle, 160 N.E. 742, 329 Ill. 418—McIntosh v. Glos, 136 N.E. 781, 304 Ill. 620—Rogers v. Trudzinski, App., 67 N.E.2d 427—Chicago Wood Piling Co. v. Anderson, 39 N.E.2d 702, 313 Ill.App. 242—Hickman v. Ritchey Coal Co., 252 Ill. App. 560—Nokol Co. of Illinois v. Cunningham, 231 Ill.App. 154.

Iowa.—Equitable Life Ins. Co. of Iowa v. Carpenter, 212 N.W. 145, 202 Iowa 1334.

Kan.—Elliott v. Elliott, 114 P.2d 823, 154 Kan. 145—State v. Frame, 95 P.2d 278, 150 Kan. 646—Perkins v. Ashmore, 61 P.2d 888, 144 Kan. 540.

Ky.—Wides v. Wides, 188 S.W.2d 471, 300 Ky. 344—Weil v. B. E. Buffaloe & Co., 65 S.W.2d 704, 251 Ky. 673—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632—Keyser v. Hopkins, 34 S.W.2d 968, 227 Ky. 105—Lindholm v. Kice, 281 S.W. 795, 213 Ky. 544—Jones v. Dalton, 273 S.W. 449, 209 Ky. 593.

Mass.—In re Keenan, 47 N.E.2d 12, 313 Mass. 186—Amory v. Kelley, 34 N.E.2d 507, 309 Mass. 162.

Minn.—Plankerton v. Continental Casualty Co., 230 N.W. 464, 180 Minn. 168.

Mo.—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282—Haycraft v. Haycraft, App., 141 S.W.2d 170—**Corpus Juris cited** in Thomas v. Brotherhood of Railway & Steamship Clerks, App., 72 S.W.2d 502, 503—Everett v. Glenn, 35 S.W.2d 652, 225 Mo.App. 921—Greggers v. Gleason, 29 S.W.2d 183, 224 Mo.App. 1108.

Mont.—State ex rel. Kruletz v. District Court of Fifth Judicial Dist. in and for Beaverhead County, 93 P.2d 883, 110 Mont. 36—Edgar State Bank v. Long, 278 P. 108, 85 Mont. 225—Oregon Mortg. Co. v. Kunneke, 245 P. 539, 76 Mont. 117.

Nev.—**Corpus Juris cited in** Silva v. Second Judicial Dist. Court in and for Washoe County, 66 P.2d 422, 424, 57 Nev. 468—Lindsay v. Lindsay, 280 P. 95, 52 Nev. 26, 67 A.L.R. 824.

N.J.—Terminal Cab Co. v. Mikolasy, 25 A.2d 253, 128 N.J.Law 275.

N.Y.—Hiser v. Davis, 137 N.E. 596, 234 N.Y. 300—West 158th Street Garage Corporation v. State, 10 N.Y.S.2d 990, 256 App.Div. 401, reargument denied 12 N.Y.S.2d 759, 257 App.Div. 875—In re Gould, 8 N.Y.S.2d 714, 255 App.Div. 433—In re Brady's Estate, 264 N.Y.S. 449, 147 Misc. 613—Siegel v. State, 246 N.Y.S. 652, 138 Misc. 474—Board of Hudson River Regulating Dist. v. De Long, 236 N.Y.S. 245, 134 Misc. 775—Santasino v. Karnuth, 41 N.Y.S.2d 459.

N.C.—Federal Land Bank of Columbia v. Davis, 1 S.E.2d 350, 215 N. C. 100.

N.D.—Klinefelter v. Anderson, 230 N. W. 288, 59 N.D. 417.

Ohio.—Webb v. Western Reserve Bond & Share Co., 153 N.E. 289, 115 Ohio St. 247, 48 A.L.R. 1176.

Okl.—McAdams v. C. D. Shamburger Lumber Co., 240 P. 124, 112 Okl. 173—Mason v. Slonecker, 219 P. 357, 92 Okl. 227.

Or.—Farmers' Loan & Mortgage Co. v. Hansen, 260 P. 999, 123 Or. 72.

Pa.—Fitzpatrick v. Bates, 92 Pa.Super. 114—Casey Heat Service Co. v. Klein, Com.Pl., 46 Lack.Jur. 257.

S.C.—Varser v. Smith, 197 S.E. 394, 187 S.C. 328.

S.D.—Janssen v. Tusha, 5 N.W.2d 684, 68 S.D. 639.

Tenn.—College Coal & Mining Co. v. Smith, 21 S.W.2d 1038, 160 Tenn. 93.

Tex.—Panhandle Const. Co. v. Lindsey, 72 S.W.2d 1068, 123 Tex. 613—O'Neil v. Norton, Com.App., 33 S. W.2d 733—Collins v. Davenport, Civ.App., 192 S.W.2d 291—Weaver v. Humphrey, Civ.App., 114 S.W.2d 609, error dismissed—Acosta v. Realty Trust Co., Civ.App., 111 S. W.2d 777—Flannery v. Eblen, Civ. App., 106 S.W.2d 837, error dismissed—Florence v. Swails, Civ. App., 85 S.W.2d 257—Goodyear Tire & Rubber Co. v. Pearcy, Civ. App., 80 S.W.2d 1096—Veal v. Jaggers, Civ.App., 13 S.W.2d 745, error dismissed.

Utah.—Garrison v. Davis, 54 P.2d 439, 88 Utah 358.

W.Va.—Haller v. Digman, 167 S.E. 593, 113 W.Va. 240.

Wyo.—Riverton Valley Drainage Dist. v. Board of Com'rs of Fremont County, 74 P.2d 871, 52 Wyo. 336, 114 A.L.R. 1093—**Corpus Juris quoted in** In re Pringle's Estate, 67 P.2d 204, 209, 51 Wyo. 352.

34 C.J. p 229 note 83.

"It is the generally accepted rule that courts have the inherent power to correct or amend their judgments so that they shall truly express that which was actually decided, where it appears from the face of the record that a clerical mistake has been made in setting forth correctly that which was in fact determined by the court."—In re Jennings' Estate, 254 P. 1067, 1068, 79 Mont. 73.

Correction without vacation

Such an error may and should be corrected by amendment without vacating the judgment.—Chadwick v. Superior Court of California in and for Los Angeles County, 270 P. 192, 205 Cal. 163.

Correction within reasonable time

Mont.—State Bank of New Salem v. Schultze, 209 P. 599, 63 Mont. 410.

Judgment in ejectment

Idaho.—Wilcox v. Wells, 51 P. 985, 5 Idaho 786.

19 C.J. p 1212 note 60.

79. La.—Glen Falls Indemnity Co. v. Manning, App., 168 So. 787.

Neb.—Crete Mills v. Stevens, 235 N. W. 453, 120 Neb. 794.

Okl.—Hurley v. Childers, 243 P. 218, 116 Okl. 84.

Tex.—Arrington v. McDaniel, 25 S. W.2d 295, 119 Tex. 148—Miller v. Texas Life Ins. Co., Civ.App., 123 S.W.2d 756, error refused—Hays v. Hughes, Civ.App., 106 S.W.2d 724, error refused—Bell v. Rogers, Civ. App., 58 S.W.2d 878—State Bank & Trust Co. of San Antonio v. Love, Civ.App., 57 S.W.2d 924, affirmed Love v. State Bank & Trust Co. of San Antonio, 90 S.W.2d 819, 126 Tex. 591—Pring v. Pratt, Civ. App., 1 S.W.2d 441, error dismissed —Bray v. City of Corsicana, Civ. App., 280 S.W. 609.

W.Va.—Yost v. O'Brien, 130 S.E. 442, 100 W.Va. 408.

Wis.—In re Cudahy's Estate, 219 N. W. 203, 196 Wis. 260.

the progress of the case, which cannot reasonably be attributed to the exercise of judicial consideration or discretion.[80] Errors into which the court itself falls, however, have been said to be judicial errors,[81] and it has been said that an error in arriving at a conclusion cannot possibly be a clerical error, but must be a judicial one.[82] A mere arithmetical error, as in computation, may be corrected as a clerical error.[83]

The amendment of clerical errors after the term has been limited to situations in which the error has not misled, and does not prejudice, the party opposing the amendment.[84]

§ 238. Judicial and Substantial Changes

Subject to some exceptions, the general rule is that, after the term at which it renders a judgment, a court cannot amend it in a matter of substance or in a manner involving the exercise of judicial discretion on the merits.

After expiration of the term at which it was rendered, or of the statutory period of limitation, in cases governed by statute, a judgment is no longer open to any amendment, revision, modification, or correction which involves the exercise of the judgment or discretion of the court on the merits or on matters of substance.[85] The only amendment then permissible is one which is intended to make the

80. Cal.—Benway v. Benway, 159 P.2d 682, 69 Cal.App.2d 574—Carter v. Shinsako, 108 P.2d 27, 42 Cal.App.2d 9—McKannay v. McKannay, 230 P. 218, 68 Cal.App. 709.
Tex.—Hays v. Hughes, Civ.App., 106 S.W.2d 724, error refused.
Wyo.—**Corpus Juris quoted in** In re Pringle's Estate, 67 P.2d 204, 209, 51 Wyo. 352.
34 C.J. p 231 note 84.
"Ordinarily, although originally and in its literal significance, a 'clerical error' is one that has been made by a clerk or some subordinate agent, latterly the meaning has been broadened and extended so that it now may include an error that may have been made by the judge or by the court."—In re Goldberg's Estate, 76 P.2d 508, 511, 10 Cal.2d 709.

Nature of clerical error

(1) "Such a mistake ordinarily is apparent upon the face of the record and capable of being corrected by reference to the record only. It is usually a mistake in the clerical work of transcribing the particular record. It is usually one of form. It may be made by a clerk, by counsel, or by the court. A clerical error in reference to an order for judgment or judgment, as regards correction, includes one made by the court which cannot reasonably be attributed to the exercise of judicial consideration or discretion."—Wilson v. City of Fergus Falls, 232 N.W. 322, 323, 181 Minn. 329.

(2) "Clerical error" defined generally see Clerical 14 C.J.S. p 1202 note 33–p 1203 note 52.

(3) "Clerical misprision" defined generally see Clerical 14 C.J.S. p 1203 notes 53–60.

Expression of judicial desire or intention

Where judgment assigned by trial judge does not express the actual judicial desire or intention of the trial court, but is contrary thereto, the signing of such purported judgment is a clerical error rather than a judicial one.—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209.

Types of errors correctible

Mistakes in the names of the parties, dates, descriptions of lands, amounts, and others of similar character may be corrected on the court's own motion at any time, when it is clear from the whole record what the entry should be.
Kan.—Cubitt v. Cubitt, 86 P. 475, 74 Kan. 353.
Okl.—Mason v. Slonecker, 219 P. 357, 92 Okl. 227.

Use of "and" for "or"

Mo.—Fulton Loan Service No. 2 v. Colvin, App., 81 S.W.2d 373.

Personal judgment, entered in suit to enforce paving lien, not praying for such judgment, was not clerical misprision, correctible by motion in lower court.—Dotson v. People's Bank, 27 S.W.2d 673, 234 Ky. 133—Chesapeake & O. Ry. Co. v. City of Olive Hill, 21 S.W.2d 127, 231 Ky. 65.

81. Conn.—Connecticut Mortgage & Title Guaranty Co. v. Di Francesco, 151 A. 491, 112 Conn. 673.
34 C.J. p 232 note 85.
Judicial and substantial changes see infra § 238.

82. Cal.—Howland v. Superior Court of Los Angeles County, 16 P.2d 318, 127 Cal.App. 695.

83. Cal.—Chadwick v. Superior Court of California in and for Los Angeles County, 270 P. 192, 205 Cal. 168.
Ky.—Weil v. B. E. Buffaloe & Co., 65 S.W.2d 704, 251 Ky. 673—Jones v. Dalton, 273 S.W. 449, 209 Ky. 593.
Mass.—Amory v. Kelley, 34 N.E.2d 507, 309 Mass. 162.
Minn.—Barnard-Curtiss Co. v. Minneapolis Dredging Co., 274 N.W. 229, 200 Minn. 327.
Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190.
Wis.—Olson v. Elliott, 15 N.W.2d 37, 245 Wis. 279.
34 C.J. p 231 note 84 [h].
Amount of recovery and allowance of interest see infra § 247.
Costs and allowances see infra § 248.

Computation of commissions and fees

Wyo.—In re Pringle's Estate, 67 P. 2d 204, 51 Wyo. 352.

84. Ga.—Rogers v. Rigell, 188 S.E. 704, 183 Ga. 455.

Reliance on date of judgment

Defendants in action were not entitled nine months after rendition of judgment of nonsuit to have judgment revised so as to show true date on which it was rendered, where such revision would have required dismissal of plaintiff's second action which had been commenced within six months from date appearing on original judgment, on which plaintiff had relied.—Rogers v. Rigell, supra.

85. U.S.—Ex parte Robinson, D.C. Tex., 44 F.Supp. 795.
Fla.—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.
Ga.—Rogers v. Rigell, 188 S.E. 704, 183 Ga. 455.
Ill.—People ex rel. Sweitzer v. City of Chicago, 2 N.E.2d 330, 363 Ill. 409, 104 A.L.R. 1335—McIntosh v. Glos, 136 N.E. 781, 304 Ill. 620—Dillenburg v. Hellgren, 25 N.E.2d 890, 304 Ill.App. 51, transferred, see, 21 N.E.2d 393, 371 Ill. 452—Parish Bank & Trust Co. v. Uptown Sales & Service Co., 20 N.E. 2d 634, 300 Ill.App. 73.
Ind.—Rooker v. Fidelity Trust Co., 177 N.E. 454, 202 Ind. 641—Farmers' & Merchants Nat. Bank of Rensselaer v. Elliott, 141 N.E. 652, 80 Ind.App. 596.
Minn.—Wilson v. City of Fergus Falls, 232 N.W. 322, 181 Minn. 329.
Mo.—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386.
Mont.—Oregon Mortg. Co. v. Kunneke, 245 P. 539, 76 Mont. 117.
N.Y.—In re Gould, 8 N.Y.S.2d 714, 255 App.Div. 433.
Tenn.—College Coal & Mining Co. v. Smith, 21 S.W.2d 1038, 160 Tenn. 93.
Tex.—O'Neil v. Norton, Com.App., 33 S.W.2d 733—Bell v. Rogers, Civ. App., 58 S.W.2d 378.
Utah.—Frost v. District Court of First Judicial District in and for Box Elder County, 83 P.2d 737, 96

judgment speak the truth by showing what the judicial action really was, and not one which corrects judicial errors or remedies the effects of judicial nonaction; the court has no power at such time to revise and amend a judgment by correcting judicial errors, and making it express something which the court did not pronounce, and did not intend to pronounce, in the first instance.[86] Judicial errors in judgments are to be corrected by appeal or writ of error, or by certiorari, or by awarding a new trial, or by any means specially provided by statute, and not by amendment,[87] unless the statute permits such

Utah 106, rehearing denied 85 P. 2d 601, 96 Utah 115.
34 C.J. p 232 note 90.
Expiration of term generally see supra § 230.
Statutory provisions generally see supra § 228.

Rule limited to operative portion

The rule limiting the power of the court over its own judgments and decrees to the term is applicable only to the operative portion of the decree or judgment sought to be affected.—Santasino v. Karnuth, 41 N.Y.S.2d 459.

Failure of clerk to extend judgment on minutes

(1) If a judge makes a docket memorandum of his judgment, and the clerk fails during term to extend it in form on the minutes, it is a "mistake of the clerk" which is not merely "clerical" but it may be corrected at a subsequent term by a judgment nunc pro tunc under statute.—Sisson v. Leonard, 11 So.2d 144, 243 Ala. 546.

(2) Allowing amendment nunc pro tunc generally see infra § 258.

86. Cal.—In re Goldberg's Estate, 76 P.2d 508, 10 Cal.2d 709—Hercules Glue Co. v. Littooy, 113 P.2d 490, 45 Cal.App.2d 42—Los Angeles County v. Rindge County, 230 P. 468, 69 Cal.App. 72, error dismissed Marblehead Land Co. v. Los Angeles County, 47 S.Ct. 247, 273 U. S. 646, 71 L.Ed. 820.
Conn.—Varanelli v. Luddy, 32 A.2d 61, 130 Conn. 74—Connecticut Mortgage & Title Guaranty Co. v. Di Francesco, 151 A. 491, 112 Conn. 673.
Ga.—Rogers v. Rigell, 188 S.E. 704, 183 Ga. 455.
Hawaii.—City and County of Honolulu v. Caetano, 30 Hawaii 1.
Ill.—Chicago Wood Piling Co. v. Anderson, 39 N.E.2d 702, 313 Ill.App. 242.
Ind.—State ex rel. Clark v. Rice, 47 N.E.2d 849, 113 Ind.App. 238.
Kan.—State v. Frame, 95 P.2d 273, 150 Kan. 646.
Mo.—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282—Haycraft v. Haycraft, App., 141 S.W.2d 170.
N.C.—Federal Land Bank of Columbia v. Davis, 1 S.E.2d 350, 215 N. C. 100.
Tenn.—College Coal & Mining Co. v. Smith, 21 S.W.2d 1038, 160 Tenn. 93.
Tex.—Panhandle Const. Co. v. Lindsey, 72 S.W.2d 1068, 123 Tex. 613—Arrington v. McDaniel, 25 S.W. 2d 295. 119 Tex. 148—Jones v. Bass, Com.App., 49 S.W.2d 723—Collins v. Davenport, Civ.App., 192 S.W.2d 291—Kveton v. Farmers Royalty Holding Co., Civ.App., 149 S.W.2d 998—Miller v. Texas Life Ins. Co., Civ.App., 123 S.W.2d 756, error refused—Acosta v. Realty Trust Co., Civ.App., 111 S.W.2d 777—Flannery v. Eblen, Civ.App., 106 S.W.2d 837, error dismissed—Hays v. Hughes, Civ.App., 106 S. W.2d 724, error refused—Florence v. Swails, Civ.App., 85 S.W.2d 257—Bell v. Rogers, Civ.App., 58 S. W.2d 878—State Bank & Trust Co. of San Antonio v. Love, Civ.App., 57 S.W.2d 924, affirmed Love v. State Bank & Trust Co. of San Antonio, 90 S.W.2d 819, 126 Tex. 591—Montgomery v. Huff, Civ. App., 11 S.W.2d 237, error refused—Pring v. Pratt, Civ.App., 1 S.W. 2d 441, error dismissed.
W.Va.—**Corpus Juris cited in** First Nat. Bank of Williamson v. Webb, 158 S.E. 378, 379, 110 W.Va. 387.
34 C.J. p 234 note 91.
"Under the guise of an amendment, there is no authority to correct a judicial mistake. . . . The authority of the court is to amend its record so as to make it speak the truth, but not to make it speak what it did not speak but ought to have spoken."—Kory v. Less, 37 S.W.2d 92, 93, 183 Ark. 553.

87. U.S.—Parker Bros. v. Fagan, C. C.A.Fla., 68 F.2d 616, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490.
Cal.—Reichert v. Rabun, 265 P. 260, 89 Cal.App. 375—McConville v. Superior Court within and for Los Angeles County, 248 P. 553, 78 Cal. App. 203—Los Angeles County v. Rindge County, 230 P. 468, 69 Cal. App. 72, error dismissed Marblehead Land Co. v. Los Angeles County, 47 S.Ct. 247, 273 U.S. 646, 71 L.Ed. 820—McKannay v. McKannay, 230 P. 218, 68 Cal.App. 709.
Colo.—Schattinger v. Schattinger, 250 P. 851, 80 Colo. 261.
Fla.—Malone v. Meres, 109 So. 677, 91 Fla. 709.
Hawaii.—City and County of Honolulu v. Caetano, 30 Hawaii 1.
Idaho.—Baldwin v. Anderson, 299 P. 341, 50 Idaho 606, certiorari dismissed American Surety Co. v. Baldwin, 53 S.Ct. 98, 287 U.S. 156, 77 L.Ed. 231, 86 A.L.R. 298.
Ky.—**Corpus Juris cited in** Broderick v. Bourbon-Agricultural Bank & Trust Co., 53 S.W.2d 397, 398, 248 Ky. 191—Dotson v. People's Bank, 27 S.W.2d 673, 234 Ky. 138.
La.—Jefferson v. Laure N. Truck Line, App., 181 So. 821, affirmed Jefferson v. Lauri N. Truck Lines, 187 So. 44, 192 La. 29.
Mont.—Hawker v. Hawker, 118 P.2d 759, 112 Mont. 546—**Corpus Juris cited in** Midland Development Co. v. Cove Irr. Dist., 58 P.2d 1001, 1003, 102 Mont. 479—Oregon Mortgage Co. v. Kunneke, 245 P. 539, 76 Mont. 117.
N.Y.—Application of Bond, 36 N.Y. S.2d 147, 264 App.Div. 484, motion denied In re Bond, 49 N.E.2d 1006, 290 N.Y. 739, affirmed 50 N.E.2d 299, 290 N.Y. 901—J. H. & S. Theatres v. Fay, 257 N.Y.S. 64, 235 App. Div. 820, followed in 257 N.Y.S. 65, 235 App.Div. 820—Kittinger v. Churchill Evangelistic Ass'n, 276 N.Y.S. 465, 153 Misc. 880, affirmed 281 N.Y.S. 680, 244 App.Div. 876, reargument denied 281 N.Y.S. 409, 245 App.Div. 895, affirmed 281 N. Y.S. 681, 244 App.Div. 877—In re Brady's Estate, 264 N.Y.S. 449, 147 Misc. 613.
N.C.—Nall v. McConnell, 190 S.E. 210, 211 N.C. 258—State v. Hollingsworth, 175 S.E. 99, 206 N.C. 739—Thomas v. Watkins, 137 S.E. 818, 193 N.C. 630.
Tex.—Love v. State Bank & Trust Co. of San Antonio, 90 S.W.2d 819, 126 Tex. 591—Jones v. Bass, Com. App., 49 S.W.2d 723—Acosta v. Realty Trust Co., Civ.App., 111 S. W.2d 777—Pring v. Pratt, Civ. App., 1 S.W.2d 441, error dismissed.
Wash.—Spalsbury v. Wycoff, 213 P. 476, 123 Wash. 691.
34 C.J. p 232 note 90 [c], p 234 note 92.

The reason for the rule is that if, on the application of one party, the court could change its judgment to the prejudice of the other, it could thereafter, on application of the latter, again change the judgment and continue this practice indefinitely.—Kline v. Murray, 257 P. 465, 79 Mont. 530.

Judgment rendered as intended becomes final and may be reviewed or corrected only on appeal or motion for new trial.—St. Onge v. Blakely, 245 P. 532, 76 Mont. 1.

Correction by trial court

Judicial error cannot be corrected by trial court except through new trial or on timely motion, where erroneous conclusions of law not consistent with findings have been

amendment.[88]

At common law, and in the absence of statute changing the rule, all proceedings of the court remain in the breast of the judge until the expiration of the term at which they were had, and, accordingly, it has been held or stated that a judgment may be amended and changed in matter of substance by the judicial action of the court, taken during the term at which such judgment was rendered;[89] but some authorities, without express reference to the term or time, deny the power of the court to correct a judicial error or omission, or to make a change in substance,[90] even where such

drawn, or where judgment is inconsistent with special verdict.—Howland v. Superior Court of Los Angeles County, 16 P.2d 318, 127 Cal. App. 695.

Conformity to evidence, findings, or order

(1) Where a decree fails to conform to evidence, findings, or order, error may be corrected only on some seasonable and legally recognized proceeding for review.—Hill v. Taylor, Mass., 65 N.E.2d 97.

(2) If judgment conforms to finding, only remedy is by motion for new trial asking that finding and judgment be set aside.—S. J. Peabody Lumber Co. v. Northam, 184 N. E. 794, 96 Ind.App. 197—Tri Lake Const. Co. v. Northam, 184 N.E. 792, 96 Ind.App. 183.

Giving judgment over against another defendant

N.Y.—Terry & Gibson v. Bank of New York & Trust Co., 273 N.Y.S. 32, 242 App.Div. 699.

Inclusion of matters outside issues

Where judgment allegedly includes matters outside of issues, only remedy is by motion to modify judgment, designating changes desired, ruling on motion being assignable as error.—Rooker v. Fidelity Trust Co., 177 N.E. 454, 202 Ind. 641.

On opposition to administrator's final account, judge could not reverse or amend judgment to prejudice of administrator without giving him opportunity to be heard again by new trial.—Succession of Coreil, 148 So. 711, 177 La. 568.

Lapse of time for appeal or motion for new trial

A court has no jurisdiction to modify its judgment after time for appeal or motion for new trial has lapsed, except to correct clerical mistakes.—Johnson v. Superior Court in and for Yuba County, 87 P.2d 384, 31 Cal.App.2d 111.

88. Cal.—Bastajian v. Brown, 120 P. 2d 9, 19 Cal.2d 209—McMahan v. Baringer, 122 P.2d 63, 49 Cal.App. 2d 431.

89. U.S.—Suggs v. Mutual Ben. Health & Accident Ass'n, C.C.A. Okl., 115 F.2d 80.
Conn.—Varanelli v. Luddy, 32 A.2d 61, 130 Conn. 74.
Ind.—Rooker v. Fidelity Trust Co., 177 N.E. 454, 202 Ind. 641.
Mo.—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282.
34 C.J. p 232 note 87.
Jurisdiction and power during term generally see supra § 229.
Statutory provisions as to court's dealing with judgments generally see supra § 228.

90. Cal.—In re Burnett's Estate, 79 P.2d 89, 11 Cal.2d 259—Liuzza v. Brinkerhoff, 83 P.2d 976, 29 Cal. App.2d 1—McConville v. Superior Court within and for Los Angeles County, 248 P. 553, 78 Cal.App. 203—McKannay v. McKannay, 230 P. 218, 68 Cal.App. 709.
Ill.—Dillenburg v. Hellgren, 25 N.E. 2d 890, 304 Ill.App. 51, transferred, see, 21 N.E.2d 393, 371 Ill. 452.
Ind.—First State Bank of Frankfort v. Spradling, 11 N.E.2d 76, 104 Ind.App. 342.
Mont.—Hawker v. Hawker, 118 P.2d 759, 112 Mont. 546—State ex rel. Vaughn v. District Court of Fifth Judicial Dist. in and for Madison County, 111 P.2d 810, 111 Mont. 552.
N.Y.—Hiser v. Davis, 137 N.E. 596, 234 N.Y. 300—Application of Bond, 36 N.Y.S.2d 147, 264 App.Div. 484, motion denied In re Bond, 49 N.E. 2d 1006, 290 N.Y. 739, affirmed 50 N.E.2d 299, 290 N.Y. 901—Fred Medart Mfg. Co. v. Rafferty, 276 N.Y.S. 678, 243 App.Div. 632—Feinberg v. Feinberg, 41 N.Y.S.2d 869, 180 Misc. 305—Kittinger v. Churchill Evangelistic Ass'n, 276 N.Y.S. 465, 153 Misc. 380, affirmed 281 N.Y.S. 680, 244 App.Div. 876, reargument denied 281 N.Y.S. 409, 245 App.Div. 805, affirmed 281 N. Y.S. 681, 244 App.Div. 877—Siegel v. State, 246 N.Y.S. 652, 138 Misc. 474—Gellens v. Saso, 44 N.Y.S.2d 84—Seward v. Jackson, 8 Cow. 406.
S.C.—Varser v. Smith, 197 S.E. 394, 187 S.C. 328.
Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.

"Judicial error" defined

A judicial error is one which is not merely clerical, but affects the substance and justice of the judgment.—Connecticut Mortgage & Title Guaranty Co. v. Di Francesco, 151 A. 491, 492, 112 Conn. 673.

Judgment following findings or conclusions

(1) Where judgment accords with findings, any omission, if error, cannot be remedied by an amendment made after judgment is entered.—Van Tiger v. Superior Court in and for Los Angeles County, 60 P.2d 851, 7 Cal.2d 377.

(2) Motion to modify judgment will not lie where judgment followed court's finding.
Colo.—Schattinger v. Schattinger, 250 P. 851, 80 Colo. 261.
Ind.—S. J. Peabody Lumber Co. v. Northam, 184 N.E. 794, 96 Ind.App. 197—Tri Lake Const. Co. v. Northam, 184 N.E. 792, 96 Ind.App. 183—Heppe v. Heppe, 152 N.E. 293, 85 Ind.App. 39, transferred, see, 149 N.E. 890, 199 Ind. 566—Southern Colonization Co. v. Sanford, 149 N.E. 655, 83 Ind.App. 626—Hall v. Bledsoe, 149 N.E. 448, 83 Ind.App. 622.

(3) The same is true where the judgment is in accordance with the court's conclusions of law.—Pittsburgh, C., C. & St. L. Ry. Co. v. Muncie & Portland Traction Co., 91 N.E. 600, 174 Ind. 167—Old First Nat. Bank & Trust Co. of Fort Wayne v. Snouffer, 192 N.E. 369, 99 Ind.App. 325.

(4) Trial court properly refused to modify judgment which followed finding of facts and conclusions of law laid down by court sitting without jury.—Griffith State Bank v. Clark, 199 N.E. 447, 101 Ind.App. 458.

(5) Where error in computation appeared in judgment, findings of fact, and conclusions of law, amended judgment correcting error was not supported by findings or conclusions.—Proctor v. Smith, 4 P.2d 773, 214 Cal. 227.

An error of law in judgment as originally entered cannot be corrected by amending judgment where entry made was the one intended to be made and was free from mistake other than error of law.—Amory v. Kelley, 34 N.E.2d 507, 309 Mass. 162.

Resettlement

(1) Resettlement is a procedure of correction or clarification and not a procedure to change or amplify the direction of the court, and is unavailable in a situation where object sought is an alteration of the decision actually made.—In re Chisholm's Estate, 30 N.Y.S.2d 870, 177 Misc. 423, affirmed 35 N.Y.S.2d 212, 264 App.Div. 793, appeal denied 37 N.Y.S. 2d 442, 264 App.Div. 956, affirmed 50 N.E.2d 239, 290 N.Y. 842—In re Bart-

change is for the purpose of meeting some supposed equity subsequently called to the court's attention or subsequently arising,[91] or newly ascertained provisions of law.[92] A new adjudication on an issue not previously disposed of cannot be made in the guise of an amendment of a judgment.[93]

A court cannot correct a judicial error under the guise of correcting or rectifying a clerical one;[94] but it has full power to determine whether an alleged error is clerical or judicial in character.[95] It has been said to be difficult, often, to draw the distinction between the two types of error,[96] but that the distinction is not dependent on the source of the error.[97] The court has been held not precluded from determining whether an error is judicial or clerical by the fact that the judgment follows the findings of fact and conclusions of law;[98] but it has also been held that, where the judgment accords with the findings, any omission, if error, is a judicial, rather than a clerical, error.[99]

Exceptions to rule. The rule against rectification of judicial error after the term has been said to obtain except in exceptional circumstances.[1] Thus, according to some decisions, when it clearly appears what judgment should have been rendered as of course on the facts in the record, the court will assume to treat the failure to render such judgment as a mere clerical misprision, and will amend the judgment so as to make it conform to that which should have been rendered on the facts.[2] Likewise, directions for carrying a judgment into effect, which do not change or modify the judgment with respect to matters put in issue and determined by the judgment, may be inserted or modified by amendment.[3]

lett's Will, 299 N.Y.S. 316, 164 Misc. 524.

(2) When properly performed, the act of resettlement of a decree is merely the exercise of the court's inherent authority to alter its formal pronouncements in cases in which the initial instrument of adjudication is shown to have been the result of mistake or inadvertence.—In re Bartlett's Will, supra.

(3) Where decree as originally entered correctly reflected the decision of the court, there was no authority for its resettlement.—In re Putnam's Will, 17 N.Y.S.2d 238, 173 Misc. 151.

(4) In order to obtain an alteration of a decision actually made, there must be an actual vacatur of the order or decree in question, and not merely a resettlement of such order or decree.—In re Chisholm's Estate, supra.

91. N.Y.—Application of Bond, 36 N.Y.S.2d 147, 264 App.Div. 484, motion denied In re Bond, 49 N.E.2d 1006, 290 N.Y. 739, affirmed 50 N.E.2d 299, 290 N.Y. 901—West 158th Street Garage Corporation v. State, 10 N.Y.S.2d 990, 256 App.Div. 401, reargument denied 12 N.Y.S.2d 759, 257 App.Div. 875—Feinberg v. Feinberg, 41 N.Y.S.2d 869, 180 Misc. 305.

34 C.J. p 232 note 90 [c].

92. N.Y.—West 158th Street Garage Corporation v. State, 10 N.Y.S.2d 990, 256 App.Div. 401, reargument denied 12 N.Y.S.2d 759, 257 App.Div. 875.

93. Cal.—Leftridge v. City of Sacramento, 119 P.2d 390, 48 Cal.App.2d 589.

Mont.—State ex rel. Vaughn v. District Court of Fifth Judicial Dist. in and for Madison County, 111 P.2d 810, 111 Mont. 552.

Adjudication as to land not in issue Wash.—Engstrom v. Edendale Land Co., 157 P. 683, 91 Wash. 241.

19 C.J. p 1212 note 61 [a].

Resettlement of a decree is wholly unavailable for purpose of including a ruling on a matter not initially adjudicated.—In re Bartlett's Will, 299 N.Y.S. 316, 164 Misc. 524.

94. Cal.—Carpenter v. Pacific Mut. Life Ins. Co. of California, 96 P.2d 796, 14 Cal.2d 704.

Idaho.—Fall River Irr. Co. v. Swendsen, 241 P. 1021, 41 Idaho 686.

95. Cal.—In re Goldberg's Estate, 76 P.2d 508, 10 Cal.2d 709—Harman v. Cabaniss, 276 P. 569, 207 Cal. 60.

Final determination by trial court

A trial judge who has made a decision in which error appears in record has full power in the first instance to determine whether error is clerical or judicial, and his conclusion, in the absence of a clear showing to the contrary, is final.—Carpenter v. Pacific Mut. Life Ins. Co. of California, 96 P.2d 796, 14 Cal.2d 704.

96. Ky.—Wides v. Wides, 188 S.W.2d 471, 300 Ky. 344.

97. Ky.—Wides v. Wides, supra.

98. Cal.—Harman v. Cabaniss, 276 P. 569, 207 Cal. 60—Kohlstedt v. Hauseur, 74 P.2d 314, 24 Cal.App.2d 60.

The signing of the findings does not necessarily establish that an error in a judgment is a judicial error.—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209.

99. Cal.—Van Tiger v. Superior Court in and for Los Angeles County, 60 P.2d 851, 7 Cal.2d 377.

1. Conn.—Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.

2. Ill.—Dillenburg v. Hellgren, 25 N.E.2d 890, 304 Ill.App. 51, transferred, see 21 N.E.2d 393, 371 Ill. 452.

N.Y.—West 158th Street Garage Corporation v. State, 10 N.Y.S.2d 990, 256 App.Div. 401, reargument denied 12 N.Y.S.2d 759, 257 App.Div. 875—Board of Hudson River Regulating Dist. v. De Long, 236 N.Y.S. 245, 134 Misc. 775.

34 C.J. p 235 note 94.

3. Cal.—**Corpus Juris quoted in** Gibson v. River Farms Co. of California, 121 P.2d 504, 508, 49 Cal.App.2d 278.

Ill.—Dillenburg v. Hellgren, 10 N.E.2d 44, 291 Ill.App. 448, cause remanded 21 N.E.2d 393, 371 Ill. 452, transferred, see, 25 N.E.2d 890, 304 Ill.App. 51.

Kan.—Cazzell v. Cazzell, 3 P.2d 479, 133 Kan. 766.

Tex.—Chambers v. Hodges, 3 Tex. 517—Collins v. Davenport, Civ. App., 192 S.W.2d 291—Flannery v. Eblen, Civ.App., 106 S.W.2d 837, error dismissed.

34 C.J. p 235 note 95.

Extension of time

(1) The court has power to make an order extending the time within which, by the terms of a judgment for specific performance, a defendant is required to pay purchase money and accept title to land.

Cal.—**Corpus Juris quoted in** Gibson v. River Farms Co. of California, 121 P.2d 504, 508, 49 Cal.App.2d 278.

N.Y.—Adams v. Ash, 46 Hun 105.

(2) Where a time is prescribed within which money must be paid to entitle a party to the benefit of a judgment, the court may, even after such time has expired, extend it by a modification of the judgment in furtherance of justice.

Cal.—**Corpus Juris quoted in** Gibson v. River Farms Co. of California,

§ 239. Particular Amendments and Corrections

The application of the general rules governing the amendment or correction of judgments, considered supra §§ 236–238, to particular types of amendment or correction is treated infra §§ 240–249.

Examine Pocket Parts for later cases.

§ 240. —— Supplying Omissions Generally

Matter which is properly part of a judgment, and was so intended, but was negligently or inadvertently omitted, may be supplied by amendment, even after the term.

If anything has been omitted from the judgment which is necessarily or properly a part of it, and which was intended and understood to be a part of it, but failed to be incorporated in it through the negligence or inadvertence of the court or counsel, or the clerk, the omission may be supplied by an amendment, even after the term.[4] If the proposed addition is a mere afterthought, and formed no part of the judgment as originally intended and pronounced, it may not be brought in by way of amendment.[5]

§ 241. —— Striking Out Improper or Erroneous Entries

Matter improperly included in a judgment may be stricken out by amendment.

The power of amendment may be employed to strike out surplusage or other matter improperly included in a judgment.[6]

§ 242. —— Recitals in General

Incorrect recitals in a judgment may be corrected, omitted recitals supplied, and improper recitals stricken out, by amendment.

121 P.2d 504, 508, 49 Cal.App.2d 278.

N.D.—Tyler v. Shea, 61 N.W. 468, 4 N.D. 377, 50 Am.S.R. 660.

4. Ala.—Nabson v. McGowen, 54 Ala. 167.

Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328.

Fla.—**Corpus Juris quoted in** Walling v. Carlton, 147 So. 236, 239, 109 Fla. 97.

Kan.—**Corpus Juris cited in** Cazzell v. Cazzell, 3 P.2d 479, 480, 133 Kan. 766—Cubitt v. Cubitt, 86 P. 475, 74 Kan. 353.

Miss.—Huckaby v. Huckaby, 122 So. 427, 154 Miss. 378.

Neb.—Crete Mills v. Stevens, 235 N. W. 453, 120 Neb. 794.

Okl.—Mason v. Slonecker, 219 P. 357, 92 Okl. 227.

S.D.—Gerhart v. Quirk, 209 N.W. 544, 50 S.D. 269.

Tex.—Luck v. Riggs Optical Co., Civ. App., 149 S.W.2d 204—**Corpus Juris quoted in** Veal v. Jaggers, Civ.App., 13 S.W.2d 745, error dismissed—O'Quinn v. Harrison, Civ.App., 271 S.W. 137.

Wis.—**Corpus Juris cited in** Olson v. Elliott, 15 N.W.2d 37, 40, 245 Wis. 279.

34 C.J. p 235 note 1.

Amendments as to carrying judgment into effect see supra § 238.

Particular omissions see infra §§ 242–249.

Matter supplied by amendment

(1) Inadvertent omission of claim from computation.—Olson v. Elliott, 15 N.W.2d 37, 245 Wis. 279.

(2) Failure to state, in judgment for plaintiff in full amount claimed, that defendants' counterclaims were dismissed.—S. J. E. Building Corporation v. Matt O. M. Construction Co., 192 N.E. 413, 265 N.Y. 282.

(3) Other matter see 34 C.J. p 235 note 1 [a].

Resettlement is permissible for inclusion in judicial pronouncement of some provision which was initially omitted through inadvertence.—In re Chisholm's Estate, 30 N.Y.S.2d 870, 177 Misc. 423, affirmed 35 N.Y.S.2d 212, 264 App.Div. 793, appeal denied 37 N.Y.S.2d 442, 264 App.Div. 956, affirmed 50 N.E.2d 289, 290 N.Y. 842.

5. Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.

W.Va.—**Corpus Juris quoted in** First Nat. Bank of Williamson v. Webb, 158 S.E. 378, 379, 110 W.Va. 387.

34 C.J. p 236 note 2.

Nunc pro tunc amendments see infra § 258.

Bounds of encumbrance

In judgment record establishing prescriptive right to pile materials on easement of way, omission of finding giving definite bounds of encumbrance cannot be cured by amendment of record.—Noyes v. Levine, 159 A. 117, 131 Me. 88.

6. Ill.—Nokol Co. of Illinois v. Cunningham, 231 Ill.App. 154.

S.D.—**Corpus Juris cited in** Cannon v. Merchen, 223 N.W. 824, 825, 54 S.D. 592.

34 C.J. p 236 note 3, p 243 note 59 [b]—19 C.J. p 1212 note 64 [b].

Striking out improper recitals see infra § 242.

Matters properly stricken out by amendment

(1) A finding or other part of a judgment foreign to any pleading and not necessary to the relief grantable to any litigant.—Petersen v. Dethlefs, 298 N.W. 155, 139 Neb. 572.

(2) Improper directions to probate court.—Anderson v. Anderson, 266 N. W. 841, 197 Minn. 252.

(3) Improper personal judgment.—Perkins v. Ashmore, 61 P.2d 888, 144 Kan. 540.

(4) Statement of theory on which damages were awarded.—Brown v. Shyne, 206 N.Y.S. 310, 123 Misc. 851.

(5) Void portion of judgment which court was unauthorized to decide.—Maloney v. Zipf, 237 P. 632, 41 Idaho 30.

(6) Other matters.—Goldstein v. Schick, 261 N.Y.S. 839, 237 App.Div. 905, motion denied 185 N.E. 804, 261 N.Y. 713, affirmed 188 N.E. 126, 262 N.Y. 696—34 C.J. p 231 note 84 [c] (3), p 236 note 3 [a].

Matters not properly stricken out by amendment

(1) Words "with prejudice" in divorce decree are improperly stricken out, ten months after entry, where change in judgment was not made because of any changed findings, but because court had reached a different conclusion on a point of law.—Hawker v. Hawker, 118 P.2d 759, 112 Mont. 546.

(2) Trial court's order, amending judgment for defendant in action on fire insurance policy by striking out words, "solely upon the ground that an appraisement of the loss was not had prior to the commencement of the above entitled action," was improper.—Jacobs v. Norwich Union Fire Ins. Soc., 40 P.2d 899, 4 Cal.App. 2d 1.

(3) Other matters.

Cal.—Liuzza v. Brinkerhoff, 83 P.2d 976, 29 Cal.App.2d 1.

Ind.—First State Bank of Frankfort v. Spradling, 11 N.E.2d 76, 104 Ind. App. 342.

Kan.—Leach v. Roberson, 52 P.2d 629, 142 Kan. 687.

19 C.J. p 1212 note 60 [c], [f].

Incorrect and erroneous recitals in a judgment may be corrected,[7] omitted recitals supplied,[8] and improper recitals stricken out,[9] by amendment; but a judgment will not be amended in order to show facts.[10]

§ 243. —— Conforming Judgment to Verdict or Findings

A judgment may be amended so as to make it conform to the verdict or findings.

A judgment may properly be amended so as to make it conform to the verdict, findings, or decision where by mistake or inadvertence it has been entered in terms differing therefrom,[11] but the court is limited to the substitution of the judgment that should have been given on the findings, and cannot substitute new findings and judgment.[12] Correction of a judgment will not be granted where the findings are not inconsistent therewith.[13]

It has been held that a motion for an order correcting a judgment so as to conform to the verdict, being in effect a request to construe the verdict, must be made before the jury are discharged.[14]

7. Cal.—McKannay v. McKannay, 230 P. 218, 68 Cal.App. 709.
Tex.—**Corpus Juris quoted in** Flannery v. Eblen, Civ.App., 106 S.W.2d 837, error dismissed.
34 C.J. p 236 note 5.
Recital as to issuance and service of process see infra § 245.

8. Cal.—McKannay v. McKannay, 230 P. 218, 68 Cal.App. 709.
Tex.—**Corpus Juris quoted in** Flannery v. Eblen, Civ.App., 106 S.W.2d 837, error dismissed.
34 C.J. p 237 note 6.
Supplying omissions generally see supra § 240.

Resettlement is permissible for inclusion in judicial pronouncement of some recital which was initially omitted through inadvertence.—In re Chisholm's Estate, 30 N.Y.S.2d 370, 177 Misc. 423, affirmed 35 N.Y.S.2d 212, 264 App.Div. 793, appeal denied 37 N.Y.S.2d 442, 264 App.Div. 956, affirmed 50 N.E.2d 239, 290 N.Y. 842—In re Bartlett's Will, 299 N.Y.S. 316, 164 Misc. 524.

9. Tex.—**Corpus Juris quoted in** Flannery v. Eblen, Civ.App., 106 S.W.2d 837, error dismissed.
34 C.J. p 237 note 7.
Striking out improper or erroneous entries see supra § 241.

Erroneous recital of dismissal "on the merits"

An erroneous recital in the judgment that it was dismissed "on the merits" may be stricken out on motion.—Mink v. Keim, 41 N.Y.S.2d 769, 266 App.Div. 184, affirmed 52 N.E.2d 444, 291 N.Y. 300—33 C.J. p 1215 note 88—34 C.J. p 236 note 5 [b].

10. Ind.—Carr v. Besse, 143 N.E. 639, 82 Ind.App. 124.

Facts as to mortgage

It is not function of judgment to show facts, and hence motion to modify judgment adjudging deed sought to be set aside a mortgage, to show what amount of money mortgage secured, and what debt was secured, was properly overruled. —Carr v. Besse, supra.

11. U.S.—Kenyon v. Chain O'Mines, C.C.A.Colo., 107 F.2d 160.
Cal.—Benway v. Benway, 159 P.2d 682, 69 Cal.App.2d 574—Dutton Dredge Co. v. Goss, 247 P. 594, 77 Cal.App. 727.
Ga.—Brown v. Cole, 28 S.E.2d 76, 196 Ga. 843—Jones v. Whitehead, 146 S.E. 768, 167 Ga. 848.
Hawaii.—City and County of Honolulu v. Caetano, 30 Hawaii 1.
Minn.—Berthiaume v. Erickson, 16 N.W.2d 288, 218 Minn. 403—Plankerton v. Continental Casualty Co., 230 N.W. 464, 180 Minn. 168.
Mont.—Morse v. Morse, 154 P.2d 982—Hawker v. Hawker, 118 P.2d 759, 112 Mont. 546.
N.Y.—Smith v. Moles, 223 N.Y.S. 637, 130 Misc. 399.
Ohio.—State ex rel. Fulton v. Ach, 24 N.E.2d 462, 62 Ohio App. 439.
Wash.—In re Christianson's Estate, 132 P.2d 368, 16 Wash.2d 48—City of Tacoma v. Nyman, 281 P. 484, 154 Wash. 154—Pappas v. Taylor, 244 P. 393, 138 Wash. 31.
Wyo.—Marcante v. Hein, 67 P.2d 196, 51 Wyo. 339.
34 C.J. p 237 note 8.
Conformity to verdict or findings see supra §§ 55–61.

Amendment at following term

Ky.—Koontz v. Butler, 38 S.W.2d 204, 238 Ky. 406.
Tex.—Batson v. Bentley, Civ.App., 297 S.W. 769.

Amendment at subsequent term

(1) Generally.

Ga.—Jones v. Whitehead, 146 S.E. 768, 167 Ga. 848—Merchants' Grocery Co. v. Albany Hardware & Mill Supply Co., 160 S.E. 658, 44 Ga.App. 112.
Tex.—Rush v. Klapproth, Civ.App., 81 S.W.2d 257.

(2) However, a judgment for double rent in dispossessory proceeding despite verdict against double rent was not an error appearing on face of record or an error to which exception could be taken in a motion for new trial, and hence trial court could not modify judgment at a subsequent term in absence of a motion made at term at which judgment was rendered.—Frazier v. Beasley, 1 S.E.2d 458, 59 Ga.App. 500, transferred, see, 199 S.E. 194, 186 Ga. 861.

Amendment after issuance of execution

Judgment may be amended to conform to verdict even after issuance of execution.—Frank E. Wood Co. v. Colson, 158 S.E. 533, 43 Ga.App. 265.

Amount

Where by clerical misprision judgment was entered for greater sum than that named in verdict, it could be corrected by motion below.—Jones v. Dalton, 273 S.W. 449, 209 Ky. 593.

The intention of the jury should govern and control recitals in a judgment; thus, where the statements therein do not conform to what the panel intended, it may be amended.
Ark.—Reader R. R. v. Sanders, 90 S.W.2d 762, 192 Ark. 28.
Ky.—Wolff v. Niagara Fire Ins. Co., 32 S.W.2d 548, 236 Ky. 1.
Okl.—Marker v. Gillam, 196 P. 126, 80 Okl. 259.

Showing of error by court's notes.

Where the notes required to be kept by court of its proceedings show that a duly recorded judgment does not reflect the true procedure and finding of the court, the judgment may be corrected on motion of an aggrieved party.—Ex parte Messina, 128 S.W.2d 1082, 233 Mo.App. 1234.

Judgment reciting "dismissed on the merits" will be corrected to a judgment "by dismissal" in order to conserve possible equity right of plaintiff where the court intimated that plaintiff, although not entitled to recover at law, might have possible equitable rights.—Hertenberger v. Smith, 280 N.Y.S. 926, 245 App. Div. 785.

12. Cal.—Jones v. Clover, 74 P.2d 517, 24 Cal.App.2d 210.

13. Ind.—Wise v. Layman, 150 N. E. 868, 197 Ind. 393—Brier v. Childers, 148 N.E. 474, 196 Ind. 520.
Utah.—Frost v. District Court of First Judicial Dist. in and for Box Elder County, 85 P.2d 601, 96 Utah 115.

14. Cal.—Murray v. Babb, 86 P.2d 146, 30 Cal.App.2d 301.

§ 244. —— Parties

Errors of omission, inclusion, or description of parties in a judgment may generally be corrected by amendment, provided new parties, not previously before the court, are not brought in, and the judgment is not changed in substance.

Where a judgment entry fails to correspond with the record in consequence of a clerical error or inadvertence, which makes it include more or fewer parties than it should, it may be amended by striking out the names of those erroneously added,[15] or inserting the names of those improperly omitted.[16] A judgment may be corrected, with respect to the parties, so as to conform to the verdict.[17] It may even be permissible, where necessary to carry out the purpose of the judgment, to substitute one party for another as plaintiff or defendant,[18] or to correct the entry of judgment, through inadvertence, for the wrong party.[19] The power of amendment, however, cannot be employed to bring within the judgment new parties, who were not previously before the court,[20] or for the purpose, or with the effect, of changing the substance and effect of the judgment as to the parties who were before the court.[21]

A misnomer or misdescription of a party or wrong spelling of his name in the judgment may

Reason for rule

Any objections to form of verdict must be made before jury are discharged, and change, if any, in verdict must be made, not by the court, but by the jury acting under proper instructions.—Murray v. Babb, 86 P. 2d 146, 30 Cal.App.2d 301.

15. Fla.—Robinson v. Farmers' & Merchants' Bank of Tullahoma, Tenn., 117 So. 393, 95 Fla. 940.
Ga.—Miller v. Jackson, 175 S.E. 409, 49 Ga.App. 309—Merchants' Grocery Co. v. Albany Hardware & Mill Supply Co., 160 S.E. 658, 44 Ga.App. 112.
La.—Fradella v. Pumilia, 174 So. 350, 187 La. 263.
Pa.—Merchants Banking Trust Co. v. Klimosky, 9 Pa.Dist. & Co. 143, 23 Sch.Leg.Rec. 78.
Tex.—Rush v. Klapproth, Civ.App., 81 S.W.2d 257—Batson v. Bentley, Civ.App., 297 S.W. 769.
34 C.J. p 238 note 14.
Parties to judgment:
Generally see supra §§ 27–38.
Designation of see supra § 75.

Nominal party

A wife, who is made a nominal party in a suit against her husband, has a right to have the judgment issued in the action amended by deleting her name.—Rawlings v. Lewert, 9 Pa.Dist. & Co. 701, 28 Lack. Jur. 15, 75 Pittsb.Leg.J. 111.

16. S.C.—Boykin v. Capehart, 31 S.E.2d 506, 205 S.C. 276.
Tex.—Brite v. Atascosa County, Civ. App., 247 S.W. 378.
34 C.J. p 238 note 15.

Agent's name may be inserted in judgment by amendment where the verdict was against both him and his principal.—Power v. Crown Stage Co., 256 P. 457, 82 Cal.App. 660.

Judgment against defendant "et al."

(1) Trial court was authorized to amend original judgment against one of three defendants "et als." by rendering second judgment naming all defendants in action, so that execution issued thereon would be valid.—Glen Falls Indemnity Co. v. Manning, La.App., 168 So. 787.

(2) However, judgment against a named defendant "et al.," based on a decision directing judgment against "defendant," without specifying which defendant was intended, cannot be amended so as to name specifically each of defendants.—Marc v. Pinkard, 230 N.Y.S. 765, 133 Miss. 83.

Defendant not cast in original judgment

Under the general law, a definitive judgment cannot be amended by rule to condemn a party defendant who by inadvertence was not cast in the original judgment.—Jefferson v. Laure N. Truck Line, La.App., 181 So. 821, affirmed Jefferson v. Lauri N. Truck Lines, 187 So. 44, 192 La. 29—State ex rel. Sehrt v. Registrar of Conveyances, 129 So. 197, 14 La. App. 30.

17. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P. 2d 698, 32 Cal.App.2d 371.
Ohio.—State ex rel. Fulton v. Ach, 24 N.E.2d 462, 62 Ohio App. 439.
Conforming judgment to verdict or findings generally see supra § 243.

18. Mich.—Kees v. Maxim, 58 N.W. 473, 99 Mich. 493.
34 C.J. p 238 note 16.

Partnership or members thereof

(1) Where a partnership was substituted for corporate plaintiff, judgment was required to be amended to run in favor of the partnership and individual members thereof.—Williams Lumber Co. v. Stewart Gast & Bro., La.App., 21 So.2d 773.

(2) Judgment in favor of partnership was properly amended by substituting individual names of plaintiffs as recovering judgment, where original amended petition showed dissolution of partnership and that plaintiffs seeking to recover were surviving partner and widow of deceased partner, individually and as independent executrix of his estate.—Bridges v. Wilder, Tex.Civ.App., 72 S.W.2d 644.

Administrator substituted for payee of note

Pa.—Aiken, to Use of Mayberry, v. Mayberry, 193 A. 374, 128 Pa.Super. 15.

19. Pa.—Fitzpatrick v. Bates, 92 Pa. Super. 114.

Correction before or after term

Pa.—Fitzpatrick v. Bates, supra.

20. Okl.—Hurley v. Childers, 243 P. 218, 116 Okl. 84.
Tex.—Florence v. Swails, Civ.App., 85 S.W.2d 257—Turman v. Turman, Civ.App., 71 S.W.2d 898, error dismissed.
34 C.J. p 238 note 17.

21. D.C.—U. S. ex rel. Rauch v. Davis, 8 F.2d 907, 56 App.D.C. 46, certiorari denied 46 S.Ct. 352, 270 U.S. 653, 70 L.Ed. 782.
N.Y.—Piratensky v. Wallach, 295 N. Y.S. 581, 162 Misc. 749.
34 C.J. p 238 note 18.
Judicial and substantial changes generally see supra § 238.

Joint or several right

(1) The erroneous entry of a joint judgment does not preclude plaintiff from applying for and having a several judgment against defendants.—Leese v. Clark, 28 Cal. 26.

(2) Where auditor's findings and judgment thereon were for plaintiffs severally, and execution was in favor of plaintiffs jointly and severally, amendment of judgment in favor of plaintiffs jointly and severally was unauthorized.—Kicklighter v. Burkhalter, 170 S.E. 75, 177 Ga. 187.

(3) Where clerk inadvertently entered a several judgment against each defendant when in fact verdict correctly construed was a joint and several judgment and should have been entered against both defendants, nunc pro tunc order correcting entry of judgment was not an order vacating a previous judgment, but was merely an order for correction of clerical mistake in original entry, so that court had jurisdiction to make order, although judgment had become final.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

be cured by amendment,[22] as may an error in the description of the attorney.[23]

Personal or representative capacity. A judgment entered against a party in a representative capacity, when it should have been against him individually, or vice versa, or a personal judgment against an executor or administrator which should have been against the goods of the estate, may be cured by amendment when the mistake was clerical, but not where the error was judicial.[24]

Remission against one or more defendants. By consent, the court, after judgment in an action of trespass to try title, may reform the judgment and permit plaintiff to dismiss or remit the judgment against one or more of several defendants.[25]

§ 245. —— Process and Appearance

A recital in a judgment as to the issuance or service of process, or as to appearance, may be amended to make it conform to the facts or to make it more explicit.

An erroneous recital in a judgment with respect to the issuance or service of process may be amended to make it conform to the actual facts, or to make it more explicit;[26] and recitals as to appearance likewise may be amended.[27] A fault, however, which is not in the statements or recitals of the record, but in the writ or process itself, cannot be amended, being a jurisdictional defect.[28]

§ 246. —— Relief Awarded in General

A judgment may be amended with respect to the relief granted so as to carry out the court's intention, as by correcting clerical or formal mistakes; but correcting judicial errors after the term, or granting relief other than that originally intended, may not be accomplished by amendment.

With respect to the extent and character of the relief granted, if the judgment entered does not correspond with that actually intended and pronounced by the court, it may be amended to carry out the court's intention,[29] by correcting any clerical mistake,[30] by supplying matters inadvertently omitted,[31] by striking out clauses erroneously inserted,[32] or by making merely formal or insubstantial changes,[33] such as are necessary to make the judgment conform to the pleadings,[34] verdict,[35]

22. N.M.—Zintgraff v. Sisney, 249 P. 108, 31 N.M. 564.
N.Y.—Emmons v. Hirschberger, 55 N.Y.S.2d 257, 269 App.Div. 789, appeal denied 63 N.E.2d 712, 294 N.Y. 978, affirmed 65 N.E.2d 328, 295 N.Y. 680.
S.C.—Tunstall v. Lerner Shops, 159 S.E. 386, 160 S.C. 557.
34 C.J. p 239 note 20.

23. U.S.—Odell v. Reynolds, Ohio, 70 F. 656, 17 C.C.A. 317.

24. Ark.—Crane v. Crane, 11 S.W. 1, 51 Ark. 287.
34 C.J. p 238 note 22.

25. Tex.—Jones v. Andrews, 9 S.W. 170, 72 Tex. 5.

26. Tex.—Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co., Civ. App., 189 S.W. 784.
34 C.J. p 239 note 24.
Amendment as to recitals in general see supra § 242.
Validity and regularity of judgment as dependent on process or appearance see supra §§ 23–26.

27. Mass.—Tilden v. Johnson, 6 Cush. 354.
34 C.J. p 239 note 25.

28. Tex.—Florence v. Swails, Civ. App., 85 S.W.2d 257.
34 C.J. p 240 note 26.
Amendment of process or return see the C.J.S. title Process §§ 114–118, also 50 C.J. p 599 note 12–p 612 note 2.
Effect on judgment generally of defective process or service see supra § 24.

29. Ark.—Morgan v. Scott-Mayer Commission Co., 48 S.W.2d 838, 185 Ark. 637.
Cal.—Dutton Dredge Co. v. Goss, 247 P. 594, 77 Cal.App. 727.
Mont.—St. Onge v. Blakley, 245 P. 532, 76 Mont. 1.
34 C.J. p 240 note 27.
Judgment's failure to speak the truth is ground for modification.—City of Tacoma v. Nyman, 281 P. 484, 154 Wash. 154.
Release of lien on realty
Where court never intended recovery to be preferred claim against company in process of liquidation, judgment could be amended so that it would not be a lien on realty.—Davis v. Commonwealth Trust Co., 7 A.2d 3, 335 Pa. 387.
Source of payment
Judgment ordered paid out of funds in hands of highway commission may be amended to require payment out of funds in hands of its transferee.—Pigeon-Thomas Iron Co. v. Drew Bros., 111 So. 182, 162 La. 836.

30. Ill.—Berghoff v. Cummings, 225 Ill.App. 1.
34 C.J. p 240 note 27.
Clerical and formal changes generally see supra § 237.

31. N.Y.—New York Ice Co. v. Northwestern Ins. Co., 23 N.Y. 357.
34 C.J. p 240 note 27.
Supplying omissions generally see supra § 240.

32. Pa.—Altoona Trust Co. v. Fockler, 165 A. 740, 311 Pa. 426.
34 C.J. p 240 note 27.

33. Ind.—Scheiring v. Baker, 177 N.E. 866, 202 Ind. 678—Hinton v. Bryant, 190 N.E. 554, 99 Ind.App. 38—Haas v. Wishmier's Estate, 190 N.E. 548, 99 Ind.App. 31.
Judicial and substantial changes generally see supra § 238.
Itemizing property
Where court, in decree interpreting original judgment, merely sets out particular items of property referred to generally in original judgment, there was no material alteration or amendment substantially changing such original judgment.—Baptiste v. Southall, 102 So. 420, 157 La. 333.
Dismissing without prejudice
Where judgment of dismissal was predicated on pendency of suit before railroad commission, amendment, making dismissal without prejudice to bringing of another suit, was not erroneous, as it added nothing to original judgment.—Marine Production Co. v. Shell Oil Co., Tex.Civ.App., 146 S.W.2d 1024.

34. Ga.—Robinson v. Vickers, 127 S.E. 849, 160 Ga. 362.
N.C.—Federal Land Bank of Columbia v. Davis, 1 S.E.2d 350, 215 N.C. 100.
34 C.J. p 240 note 28.
Conformity to pleadings see supra §§ 47–54.

35. Ga.—Jones v. Whitehead, 146 S.E. 768, 167 Ga. 848—Robinson v. Vickers, 127 S.E. 849, 160 Ga. 362.
Ind.—Scheiring v. Baker, 177 N.E. 866, 202 Ind. 678—Tom v. Tom, 26 N.E.2d 410, 107 Ind.App. 599—Moore v. Moore, 129 N.E. 480, 74 Ind.App. 626.
34 C.J. p 240 note 29.

findings,[36] conclusions of law,[37] and agreements of the parties.[38]

Although there is some authority to the contrary,[39] it has generally been held that there is no power to amend by correcting a judicial mistake or error of law, at least after the term at which the judgment is rendered.[40] Also a court may not grant relief in addition to,[41] or in lieu of,[42] that originally contemplated and intended to be given, or change the rights of the parties as fixed by the original decision,[43] or adjudicate a matter which might have been, but was not, considered and determined on the trial.[44]

Medium of payment. An amendment in the provision of a judgment designating the medium of payment may be allowed in a proper case.[45]

§ 247. —— Amount of Recovery and Allowance of Interest

A judgment may be amended in order to correct clerical mistakes as to the amount or interest recoverable so as to make it conform to the record and the court's intention; but judicial errors with respect to such matters may not be corrected by amendment, at least after the term.

An amendment of a judgment is proper where the clerk in entering the judgment has omitted to insert the sum recovered.[46] If, in consequence of a clerical error[47] or miscalculation on the part of the clerk or the court,[48] the amount of the recovery in a judgment is stated at a wrong sum, the judgment may be amended to conform to the truth. Where, however, the amount of a judgment is wrong because of a judicial error in fixing the amount, it cannot be amended after the term,[49] although, dur-

Conforming judgment to verdict and findings generally see supra § 243.

Verdict by implication

Jury's failure to mention employee in verdict against employer was in law equivalent of a verdict for employee, and trial court should have granted motion to amend judgment to provide that complaint be dismissed as against employee.—Thibodeau v. Gerosa Haulage & Warehouse Corporation, 300 N.Y.S. 686, 252 App. Div. 615, affirmed 16 N.E.2d 98, 278 N.Y. 551.

36. Ind.—Scheiring v. Baker, 177 N. E. 866, 202 Ind. 678—Tom v. Tom, 26 N.E.2d 410, 107 Ind.App. 599—Moore v. Moore, 129 N.E. 480, 74 Ind.App. 626.
34 C.J. p 240 note 29.

37. Mont.—Monteath v. Monteath, 44 P.2d 517, 99 Mont. 444.

38. Pa.—Altoona Trust Co. v. Fockler, 165 A. 740, 311 Pa. 426.

39. N.Y.—Caruso v. Metropolitan 5 to 50 Cent Store, 212 N.Y.S. 199, 214 App.Div. 328.
Wash.—Bulkley v. Dunkin, 280 P. 429, 131 Wash. 422, affirmed on rehearing 286 P. 301.

40. Tex.—Acosta v. Realty Trust Co., Civ.App., 111 S.W.2d 777.
34 C.J. p 240 note 31.

Amendment removing materialman's lien on a building was held improper as being a correction of judicial error.—Johnson v. Foreman, 56 N.E. 254, 24 Ind.App. 93.

41. N.Y.—Winter v. New York Life Ins. Co., 23 N.Y.S.2d 759, 260 App. Div. 676, appeal denied 25 N.Y.S. 2d 781, 261 App.Div. 816.
34 C.J. p 240 note 32.

Adjudicating new issue

Judgment deciding issue of title to land against municipality could not be amended so as to adjudicate validity of taxes imposed by the city after the entry of the judgment.—Harway Improvement Co. v. Partridge, 222 N.Y.S. 176, 220 App.Div. 595.

42. Ind.—Scheiring v. Baker, 177 N. E. 866, 202 Ind. 678—Haas v. Wishmier's Estate, 190 N.E. 548, 99 Ind. App. 31.
N.Y.—Winter v. New York Life Ins. Co., 23 N.Y.S.2d 759, 260 App.Div. 676, appeal denied 25 N.Y.S.2d 781, 261 App.Div. 816.
34 C.J. p 240 note 32.

"Amendments to judgments can only be made for the purpose of making the record conform to the truth, and not for the purpose of revising and changing the judgment."—Barkelew v. Barkelew, Cal. App., 166 P.2d 57, 59—Felton Chemical Co. v. Superior Court in and for Los Angeles County, 92 P.2d 684, 687, 33 Cal.App.2d 622.

43. Cal.—Jacobs v. Norwich Union Fire Ins. Soc., 40 P.2d 899, 4 Cal. App.2d 1.
34 C.J. p 240 note 34.

Reason for rule

Public policy requires end to litigation and that judgment securing valuable rights should not lightly be disturbed.—Palm Beach Estates v. Croker, 152 So. 416, 111 Fla. 671.

Award of possession

Where defendants were awarded certain items of decedent's personalty and plaintiff other items, refusal to amend judgment, by expunging portion purporting to award defendants any property described in complaint, was upheld.—Hinton v. Bryant, 190 N.E. 554, 99 Ind.App. 38.

Award to one not party

Where vendor was not party to suit in which court awarded proportionate share of rents to him and during pendency of which purchaser bought vendor's interest, mistake in making award to vendor instead of purchaser was held not to authorize correction of judgment.—Bell v. Rogers, Tex.Civ.App., 58 S.W.2d 878.

44. Wash.—Engstrom v. Edendale Land Co., 157 P. 683, 91 Wash. 241.
34 C.J. p 240 note 35.

45. N.Y.—Miller v. Tyler, 58 N.Y. 477.
34 C.J. p 240 note 30.
Specifying medium of payment in judgment see supra § 79.

46. Ga.—Bank of Tupelo v. Collier, 15 S.E.2d 499, 192 Ga. 409.
34 C.J. p 240 note 36.

47. Iowa.—Murnan v. Schuldt, 265 N.W. 369, 221 Iowa 242.
Ky.—Weil v. B. E. Buffaloe & Co., 65 S.W.2d 704, 251 Ky. 673.
Tex.—Wedgeworth v. Pope, Civ.App., 12 S.W.2d 1045, error refused.
Wyo.—Riverton Valley Drainage Dist. v. Board of Com'rs of Fremont County, 74 P.2d 871, 52 Wyo. 336, 114 A.L.R. 1093.
34 C.J. p 241 note 37.

48. Tex.—Birdsong v. Allen, Civ. App., 166 S.W. 1177.
34 C.J. p 241 note 37.

Fact that evidence fails to support full amount of judgment is a basis for new trial and does not warrant modification of judgment.—Boos v. State, 39 N.E. 197, 11 Ind.App. 257.

49. Ind.—Pursley v. Wickle, 30 N.E. 1115, 4 Ind.App. 382.
Kan.—Barker v. Mecartney, 62 P. 439, 10 Kan.App. 130.
N.Y.—Minnesota Laundry Service v. Mellon, 32 N.Y.S.2d 455, 263 App. Div. 889, reargument denied 33 N.Y. S.2d 826, 263 App.Div. 968, reargument denied 33 N.Y.S.2d 826, 263 App.Div. 968, affirmed 46 N.E.2d 354, 289 N.Y. 749.
Tex.—Arrington v. McDaniel, 25 S. W.2d 295, 119 Tex. 148.
34 C.J. p 241 note 45.

ing the term such errors have been held correctible.[50]

In accordance with the foregoing rules, an amendment may be made, particularly where plaintiff remits the excess,[51] in a case in which the amount of the judgment is in excess of that claimed by plaintiff in his pleadings,[52] or is in excess of the sum found by the verdict,[53] or findings,[54] or ordered by the court,[55] or is larger than the total which limits the jurisdiction of the court,[56] or is excessive in consequence of the failure to allow proper credits.[57]

A rule similar to that followed in the case of excessive judgments, applies where through inadvertence or mistake the judgment is entered for too small an amount,[58] as where it is for less than appears on the face of the obligation in suit,[59] or less than the amount admitted to be due by defendant's pleadings.[60]

In some jurisdictions the statutes contain express provisions governing the correction of the amount awarded in a judgment.[61]

Allowance of interest. A clerical error in the calculation of interest[62] or in fixing the date from or to which interest shall run,[63] or the inadvertent

Amendments after term generally see supra § 230.

Amount of recovery for slander held not amendable.—Crowder v. Stiers, 1 S.E.2d 353, 215 N.C. 123.

After a proceeding in partition, a valuation of the estate by a jury, confirmation of the inquisition, and awarding the estate to one of the heirs, it is not in the power of the orphans' court to make any subsequent decree or order by which the amount of the liability of the heir to whom the estate was awarded is either increased or diminished.—Galbraith v. Galbraith, 6 Watts, Pa., 112.

50. Iowa.—Flickinger v. Omaha Bridge Terminal R. Co., 67 N.W. 372, 98 Iowa 358.
Amendments during term generally see supra § 229.

51. N.J.—Bozza v. Leonardis, 131 A. 87, 3 N.J.Misc. 1186.
34 C.J. p 242 note 48.

52. N.J.—Bozza v. Leonardis, 131 A. 87, 3 N.J.Misc. 1186.
S.D.—Sinclair Refining Co. v. Larson, 214 N.W. 842, 51 S.D. 443.
34 C.J. p 241 note 38.

53. Cal.—Alpers v. Schammel, 17 P. 708, 75 Cal. 590.
34 C.J. p 241 note 39.

54. Mont.—Quigley v. Birdseye, 28 P. 741, 11 Mont. 439.
34 C.J. p 241 note 39.

55. Colo.—Kindel v. Beck & Pauli Lithographing Co., 35 P. 538, 19 Colo. 310.
34 C.J. p 241 note 39.

Liability of codefendants

(1) Judgment ordering full recovery against each of a number of defendants requires reformation to provide that any sum paid by any defendant shall to that extent satisfy judgment against other defendants. —First Nat. Bank v. Slaton Independent School Dist., Tex.Civ.App., 58 S.W.2d 870, error dismissed.

(2) Where judgment was entered against both owner and operator of motor vehicle for five thousand dollars and twelve thousand five hundred dollars, respectively, and costs, it should be modified so as to prevent collection of more than twelve thousand five hundred dollars and costs, and to show that owner's statutory liability depended on nonpayment by operator.—O'Neill v. Williams, 15 P.2d 879, 127 Cal.App. 385.

56. N.Y.—Stinerville & B. Stone Co. v. White, 54 N.Y.S. 577, 25 Misc. 314, reversed on other grounds 65 N.Y.S. 609, 32 Misc. 135.
34 C.J. p 241 note 40.

57. U.S.—Sabine Hardwood Co. v. West Lumber Co., D.C.Tex., 238 F. 611.
34 C.J. p 241 note 41.

Where court's instructions confused jury and resulting verdict was too large because of jury's failure to understand charges and credits, judgment rendered on verdict was properly modified, especially where the change received plaintiff's approval.—Mosher v. Sanford-Evans Co., 216 P. 811, 68 Mont. 64.

Necessity of pleading credit item

Fact that judgment includes allowances for work done by plaintiff for defendant on Sunday is not ground for modifying it, issue of right to pay for Sunday work not having been raised by the pleadings.—Mosing v. Bankers' Oil Co., 212 P. 115, 112 Kan. 575.

Allowance for prior recovery

Where bonds, secured by trust deed, had already been basis of personam judgment obtained by bondholder, subsequent deficiency judgment, obtained by trustee in foreclosure suit, for entire debt, less proceeds of foreclosure sale, was excessive to extent of first recovery and could have been corrected.—Doerr v. Schmitt, 31 N.E.2d 971, 375 Ill. 470.

Effect of code provision

Amendment of judgment, holding defendants liable for rent for balance of term, after abandonment of premises by them, is not necessary to give them credit, to which they are entitled for rent collected by plaintiff for such period from new tenants, as under the code such credit may be urged as a set-off against the judgment itself, in reduction and partial compensation thereof.—Meriwether v. Dorrity, 104 So. 187, 158 La. 405.

58. Iowa.—Murnan v. Schuldt, 265 N.W. 369, 221 Iowa 242.
Ky.—Weil v. B. E. Buffaloe & Co., 65 S.W.2d 704, 251 Ky. 673.
34 C.J. p 241 note 42.

59. La.—Brumfield v. Mortee, 15 La. 116.
34 C.J. p 241 note 43.

60. Minn.—Brown v. Lawler, 21 Minn. 327.
34 C.J. p 241 note 44.

61. Iowa.—McConkey v. Lamb, 33 N.W. 146, 71 Iowa 636.

Court has both inherent and statutory power to correct evident mistakes in awarding amounts in judgments, and such power is not restricted by provisions of statutes providing for vacation or modification of judgments to correct errors in amount or mistakes, neglect, or omissions of clerk and limiting time within which motion therefor may be made to one year.—Murnan v. Schuldt, 265 N.W. 369, 221 Iowa 242.

62. Ga.—Haygood v. E. B. Clark Co., 118 S.E. 461, 30 Ga.App. 392.
34 C.J. p 242 note 50.
Interest in judgments generally see supra § 77.

Where plaintiff's attorney incorrectly computed interest to which plaintiff was entitled, plaintiff was entitled to order amending and correcting judgment by inserting therein proper amount of interest.—Spatz v. Pulensky, 43 N.Y.S.2d 314, 267 App.Div. 1031.

63. Idaho.—Donahoe v. Herrick, 260 P. 150, 44 Idaho 560.
Ky.—Keyser v. Hopkins, 34 S.W.2d 968, 237 Ky. 105.
La.—Gurney Refrigerator Co. v. McDonald, 131 So. 853, 15 La.App. 319.
N.Y.—Board of Hudson River Regu-

omission of a provision for interest,[64] may be corrected by an amendment; and the court may correct its judgment so as to show the rate of interest[65] and the date from which interest is to run.[66] However, judicial error in passing on the right to interest,[67] or in fixing the amount of interest to be recovered,[68] or in failing to make any provision for interest in the judgment,[69] cannot be corrected by amendment, at least after the term.

In determining whether an amendment of the award of interest is proper, courts will consider whether the correction will conform the judgment to the verdict,[70] and to the findings.[71]

§ 248. —— Costs and Allowances

A clerical error or omission as to the costs in a judgment may be corrected by amendment; but errors of substance in the allowance of costs or attorneys' fees may not be amended after the term.

A clerical error[72] or omission[73] with respect to the costs to be included in the judgment may be corrected by amendment. It is not permissible, however, by an amendment after the term, to add to the judgment costs which were not originally allowed or within the purview of the original judgment,[74] or to reconsider or review the allowance

lating Dist. v. De Long, 236 N.Y.S. 245, 134 Misc. 775.
34 C.J. p 242 note 50.

64. U.S.—Hartmann-Schneider Co. v. Farish Co., C.C.A.Pa., 7 F.2d 561.
Cal.—Pacific Coast Adjustment Bureau v. Indemnity Ins. Co. of North America, 2 P.2d 218, 115 Cal.App. 583.
Mich.—Porter v. Michigan Elevator Exchange, 271 N.W. 757, 279 Mich. 276.
N.Y.—Tedesco v. Genova, 235 N.Y.S. 739, 134 Misc. 222.

Interest as matter of course
Where judgment as entered bears interest as a matter of course, addition of a provision expressly providing for interest was held a change in form, and not in substance.—New River Collieries Co. v. U. S., D.C. N.J., 300 F. 333.

Amendment after term
(1) Where judgment has been rendered for principal, interest, and costs, without specifying any amounts, but they are determinable by inspection of record, including pleadings and verdict, without resort to extraneous proof, judgment may be amended at a subsequent term by inserting the several amounts thus shown to be due.—Bank of Tupelo v. Collier, 15 S.E.2d 499, 192 Ga. 409.

(2) Where jury's answers showed that verdict did not include interest, court at subsequent term may increase judgment by including interest.—Beeler v. Continental Casualty Co., 265 P. 57, 125 Kan. 441.

(3) Judgment may be corrected before execution to provide for interest on contract demand, regardless of expiration of trial term.—McLaughlin v. Brinckerhoff, 226 N.Y.S. 623, 222 App.Div. 458, followed in Joannes Bros. Co. v. Lamborn, 234 N.Y.S. 817, 226 App.Div. 777.

65. Tex.—Luck v. Riggs Optical Co., Civ.App., 149 S.W.2d 204.

66. Tex.—Luck v. Riggs Optical Co., supra.

67. N.Y.—Rambusch v. Burke, 223 N.Y.S. 464, 221 App.Div. 777—In re Brady's Estate, 264 N.Y.S. 449, 147 Misc. 613.

68. N.C.—Garrett v. Love, 90 N.C. 368.
34 C.J. p 242 note 51.

Allowance for insufficient period
If court erred in failing to provide for interest on amount recoverable from collector of internal revenue from date of judgment to date of payment, error was judicial and not subject to correction after expiration of term at which judgment was rendered.—Reed v. Howbert, C.C.A.Colo., 77 F.2d 227.

69. Conn.—Goldreyer v. Cronan, 55 A. 594, 76 Conn. 113.
34 C.J. p 242 note 51.

Right to interest debatable
Denial of interest from date of order for possession in condemnation proceeding was held judicial error, if any, and not subject to correction as clerical error, where matter of defendants' right to such interest was debatable.—Howland v. Superior Court of Los Angeles County, 16 P. 2d 318, 127 Cal.App. 695.

70. **Objection to verdict necessary**
(1) Where no objection was made to verdict which did not allow interest on notes sued on, court was powerless to fix amount of interest to be recovered or to amend judgment accordingly.—Meffert v. Lawson, 287 S.W. 610, 315 Mo. 1091.

(2) Conformity of interest award to verdict and findings see supra § 58.

71. **Interest not recoverable eo nomine but as damages** is a question for jury, and, in absence of finding awarding such interest, judgment including such interest should be reformed so as to exclude it.—Atkinson v. Jackson Bros., Tex.Civ.App., 259 S.W. 280, modified on other grounds, Com.App., 270 S.W. 848.

72. Conn.—Albright v. MacDonald, 183 A. 389, 121 Conn. 88.
Kan.—**Corpus Juris quoted in** Galloway v. Wesley, 73 P.2d 1073, 1079, 146 Kan. 937.
Tex.—Weaver v. Humphrey, 114 S.W.2d 609, error dismissed.
34 C.J. p 242 note 52.
Costs, allowances, and attorney's fees in judgments generally see supra § 78.

Taxation against wrong party
Clerical error of clerk in entering judgment taxing costs against plaintiff in error instead of defendant in error could be corrected.—O'Neil v. Norton, Tex.Com.App., 33 S.W.2d 733.

Stipulation binding on parties
Where attorneys for plaintiff and defendant drew and signed stipulation that judgment should be entered for plaintiff for one hundred dollars "without costs" and judgment was entered by clerk for one hundred two dollars, including two dollars clerk fees, trial court on defendant's motion properly reduced the judgment to one hundred dollars.—Berthiaume v. Erickson, 16 N.W.2d 238, 218 Minn. 403.

73. Ga.—Bank of Tupelo v. Collier, 15 S.E.2d 499, 192 Ga. 409.
Kan.—**Corpus Juris quoted in** Galloway v. Wesley, 73 P.2d 1073, 1079, 146 Kan. 937.
N.Y.—Empire Produce Co. v. Ring, 232 N.Y.S. 82, 225 App.Div. 6.
34 C.J. p 242 note 52, p 243 note 55 [c].

After satisfaction of judgment
Judgment may be amended to allow costs to defendant notwithstanding the judgment has been satisfied.—Coffee v. Johnson, 24 N.Y.S.2d 588.

Costs to which party is entitled as of course may be added by amendment.—Coffee v. Johnson, supra—34 C.J. p 242 note 52 [b].

74. Kan.—**Corpus Juris quoted in** Galloway v. Wesley, 73 P.2d 1073, 1079, 146 Kan. 937.
34 C.J. p 242 note 53.

Remedy for omitting costs from judgment is by appeal or motion to vacate, if omission is substantial.—Empire Produce Co. v Ring, 232 N.Y.S. 82, 225 App.Div. 6.

of costs,[75] or to shift them from one party to the other.[76]

Allowances for attorneys' fees. Error with respect to the allowance of attorneys' fees may be presented by motion to modify the judgment.[77] Such allowances are also subject to the rule that the correction of other than clerical or formal errors, by amendment, is limited to the term at which the judgment is rendered.[78]

§ 249. —— Other Errors or Defects

The general rules governing the amendment of judgments have been applied to various particular types of amendments or corrections, such as those relating to the cure of ambiguity, date of judgment, signature, and description of property.

In addition to the amendments and corrections discussed supra §§ 240–248, under the general rules governing the amendment and correction of judgments particular amendments have been permitted or have been held proper,[79] or have been not permitted or have been held improper.[80]

Amendment of substance

A provision withholding or awarding costs is a substantive part of a judgment in an action in equity and cannot be amended.—Schenectady Trust Co. v. Emmons, 48 N.E.2d 497, 290 N.Y. 225—34 C.J. p 242 note 53 [b] (1).

75. Kan.—**Corpus Juris quoted in** Galloway v. Wesley, 73 P.2d 1073, 1079, 146 Kan. 937.
Tex.—Wiggins v. Hensley, Civ.App., 114 S.W.2d 914, error dismissed.
34 C.J. p 243 note 54.

Remedy

Effect of judgment for costs incurred by successful appellant was not avoidable by motion to modify judgment, but only by motion for new trial and appeal from order denying it.—Reno Electrical Works v. Ward, 290 P. 1024, 53 Nev. 1, rehearing denied 296 P. 1112, 53 Nev. 1.

76. Kan.—**Corpus Juris quoted in** Galloway v. Wesley, 73 P.2d 1073, 1079, 146 Kan. 937.
34 C.J. p 243 note 54.

77. Ind.—Tom v. Tom, 26 N.E.2d 410, 107 Ind.App. 599.

Separability of fee from award

Fact that judgment has been rendered for an amount including attorney's fees, which were not recoverable, is cause for striking that part of judgment covering attorney's fees, and this portion can be stricken only where the amount thereof is separable from the balance of the judgment.—Love v. National Liberty Ins. Co., 121 S.E. 648, 157 Ga. 259.

78. Kan.—**Corpus Juris quoted in** Galloway v. Wesley, 73 P.2d 1073, 1079, 146 Kan. 937.
34 C.J. p 243 note 55.

Scrivener's error in decree in foreclosure suit was properly amended nearly two years after entry to show correct amount of attorney's fee.—Wilson v. Carroll, 250 P. 555, 80 Colo. 234.

79. **Defects held amendable or correctible**

(1) Failure to enter judgment as directed by court.—Ewert v. Thompson, C.C.A.Okl., 281 F. 449.

(2) Failure of judgment against guardian to direct that levy should be made on goods of ward in guardian's hands.—Haller v. Digman, 167 S.E. 593, 113 W.Va. 240.

(3) Clerk's mistake in recording decree providing for sale of oil and gas leases instead of land.—Reynolds v. Winship, 299 S.W. 16, 175 Ark. 352.

(4) Dismissal on merits in absence of plaintiff's counsel, resulting from a misunderstanding between plaintiff and his counsel as to disposal of case.—Massachusetts Fire & Marine Ins. Co. v. Schmick, C.C.A.S.D., 58 F.2d 130.

(5) Failure to provide for return of property or its value in a judgment of nonsuit in claim and delivery action.—Skaggs v. Taylor, 247 P. 218, 77 Cal.App. 519.

(6) Failure to include an order for sale of attached debt.—Hudelson v. Sanders-Swafford Co., 227 P. 310, 111 Or. 600.

(7) Other amendments.
Cal.—Carter v. Shinsako, 108 P.2d 27, 42 Cal.App.2d 9.
Iowa.—Watters v. Knutsen, 272 N.W. 420, 223 Iowa 225.
Ky.—Williams v. Isaacs, 256 S.W. 19, 201 Ky. 165.
N.Y.—Vogel v. Harriman Nat. Bank & Trust Co. of City of New York, 5 N.Y.S.2d 306, 254 App.Div. 479.
Tex.—Kittrell v. Conanico, Civ.App., 56 S.W.2d 272.
34 C.J. p 231 note 84 [c], p 235 note 99 [a].

80. **Amendments held improper or not permitted**

(1) Order striking words "on the merits" from judgment dismissing action on merits.—McElroy v. Board of Education of City of Minneapolis, 238 N.W. 681, 184 Minn. 357.

(2) Order directing receiver, instead of sheriff, to sell property and pay costs and expenses from proceeds, instead of rent money.—State ex rel. Maple v. Mulloy, 15 S.W.2d 809, 322 Mo. 281.

(3) Refusal of judgment against attachment claimant and bondsmen for value of property.—Pring v. Pratt, Tex.Civ.App., 1 S.W.2d 441, error dismissed.

(4) To correct error in conclusions of law and judgment, in failing to state that property was not benefited by improvement, so as to constitute res judicata.—Wilson v. City of Fergus Falls, 232 N.W. 322, 181 Minn. 329.

(5) To correct error in judgment vesting title, where ownership of land was adjudicated in trespass to try title in partition suit.—Montgomery v. Huff, Tex.Civ.App., 11 S.W. 2d 237, error refused.

(6) Other amendments.
Cal.—Liuzza v. Brinkerhoff, 83 P.2d 976, 29 Cal.App.2d 1—McConville v. Superior Court within and for Los Angeles County, 248 P. 553, 78 Cal.App. 203—McKannay v. McKannay, 230 P. 218, 68 Cal.App. 709.
Colo.—Berkley v. Consolidated Lower Boulder Reservoir & Ditch Co., 216 P. 548, 73 Colo. 483.
Ga.—City of Cornelia v. Wells, 183 S.E. 66, 181 Ga. 554.
Ill.—Noel State Bank v. Blakely Real Estate Imp. Corporation, 53 N.E.2d 621, 321 Ill.App. 594.
Kan.—Leach v. Roberson, 52 P.2d 629, 142 Kan. 687.
Ky.—Broderick v. Bourbon-Agricultural Bank & Trust Co., 58 S.W.2d 397, 248 Ky. 191.
N.Y.—Brocia v. F. Romeo & Co., 150 N.E. 530, 241 N.Y. 505—Hiser v. Davis, 137 N.E. 596, 234 N.Y. 300—Kittinger v. Churchill Evangelistic Ass'n, 276 N.Y.S. 465, 153 Misc. 880, affirmed 281 N.Y.S. 680, 244 App.Div. 876, reargument denied 281 N.Y.S. 409, 245 App.Div. 805, affirmed 281 N.Y.S. 681, 244 App. Div. 877.
Or.—Hicks v. Hill Aeronautical School, 286 P. 553, 132 Or. 545.
Tex.—Arrington v. McDaniel, 25 S. W.2d 295, 119 Tex. 148—Miller v. Texas Life Ins. Co., Civ.App., 128 S.W.2d 756, error refused.
Utah.—Frost v. District Court of First Judicial District in and for Box Elder County, 83 P.2d 737, 96 Utah 106, rehearing denied 85 P.2d 601, 96 Utah 115.
34 C.J. p 235 note 99 [b].

Dismissal without prejudice

(1) Under some statutes trial court was without power to amend judgment of dismissal by inserting

Curing ambiguity. Independently of statute,[81] a judgment may be amended so as to cure it of ambiguity or remove the possibility of confusion.[82]

Date of judgment. An error in the date of rendition of a judgment is amendable,[83] even at a subsequent term,[84] so as to make it express the true date. It has been held, however, that the date on which the judgment is entered is not a part of the judgment, and that it is a fact which the court cannot correct.[85]

Signature. The required signature of the judge or clerk may be supplied by amendment;[86] and the defect of an intervening space between the end of the judgment and the judge's signature may be corrected at any time.[87]

Description of property. Where a description of the land or other property involved is omitted from a judgment, or where such description is erroneous or uncertain, it may be inserted or corrected by amendment.[88]

Conforming judgment to pleadings. A judgment may be reformed or amended so as to conform to the pleadings.[89]

words "without prejudice," without showing that its original intention was to dismiss without prejudice.—Testa v. Armour & Co., 8 N.Y.S.2d 302, 255 App.Div. 998—Cabang v. U. S. Shipping Board Merchant Fleet Corporation, 237 N.Y.S. 105, 227 App. Div. 751.

(2) Refusal to amend judgment of dismissal by making dismissal without prejudice, as for failure of proof, was justified, under some statutes.—Ziegler v. International Ry. Co., 248 N.Y.S. 375, 232 App.Div. 43—Commercial Motors Mortg. Corporation v. Mack International Motor Truck Corporation, 209 N.Y.S. 661, 213 App.Div. 25.

81. Nev.—Lindsay v. Lindsay, 280 P. 95, 52 Nev. 26, 67 A.L.R. 824.

82. Cal.—Dahlberg v. Dahlberg, 268 P. 695, 92 Cal.App. 639.
La.—Glen Falls Indemnity Co. v. Manning, App., 168 So. 787.
Tex.—Weaver v. Humphrey, 114 S.W. 2d 609, Civ.App., error dismissed—**Corpus Juris quoted in** Flannery v. Eblen, Civ.App., 106 S.W.2d 837, error dismissed—Shipman v. Wright, Civ.App., 3 S.W.2d 519, error refused.
34 C.J. p 236 note 4.

Specifying parties
(1) Where it appeared that, although judgment was entered in favor of one defendant, judgment was erroneously entered against "defendants" without specifying them, judgment file could be corrected.—Sachs v. Feinn, 183 A. 384, 121 Conn. 77.

(2) Parties generally see supra § 244.

Double recovery
Judgment for plaintiffs which was ambiguous and could be construed as permitting double recovery was required to be amended to remove ambiguity.—Coluccio v. State, 64 P.2d 786, 189 Wash. 236.

Ownership of property
In suit for damages resulting from conversion of furniture, where defendants were shown to be the owners of items of furniture described in their answer and in the judgment, defendants were entitled to have the judgment amended so as to leave no doubt of defendants' ownership of such items.—Turner v. Charlton, La. App., 197 So. 187.

83. Or.—Fuller v. Blanc, 77 P.2d 440, 160 Or. 50.

Date of rendition shown in judgment
Where judgment was actually rendered, as recited in the judgment itself, on a certain date, motion for leave to amend to show that it was actually rendered on a later date, so as to render effective appeal bond filed within thirty days of entry of judgment but more than thirty days from date of rendition, was overruled.—Sloan v. Richey, Tex.Civ.App., 143 S.W.2d 119, error dismissed, judgment correct.

84. Iowa.—Greazel v. Price, 112 N. W. 827, 135 Iowa 364.
34 C.J. p 237 note 9.

85. Ohio.—Friedman v. Brown, 172 N.E. 565, 35 Ohio App. 450.

Delay in spreading entry on journal
Under a statute authorizing the court to modify its judgment after the term for mistake, neglect, or omission of the clerk, the record will not be corrected to show the entry of judgment to have been made on the date the journal clerk spread the entry on the journal, rather than the earlier date on which it was filed with the clerk, as there was no mistake, neglect, or omission by the clerk in not spreading the entry on the journal on the date of filing.—Morewood Realty Holding Co. v. Amazon Rubber Co., 18 Ohio App. 201, affirmed Amazon Rubber Co. v. Morewood Realty Holding Co., 142 N. E. 363, 109 Ohio St. 291.

86. Ga.—Pollard v. King, 62 Ga. 103.
N.Y.—Seaman v. Drake, 1 Cai. 9.
Signing by judge or clerk generally see supra § 85.

87. Ky.—Leming v. Farmers' Nat. Bank, 25 S.W.2d 1020, 233 Ky. 438.

88. Ala.—Parker v. Duke, 157 So. 436, 229 Ala. 361.
Cal.—Bradbury Estate Co. v. Carroll, 276 P. 394, 98 Cal.App. 145—Hogan v. Horsfall, 266 P. 1002, 91 Cal. App. 87, followed in 266 P. 1005, 91 Cal.App. 797.
Mont.—State Bank of New Salem v. Schultze, 209 P. 599, 63 Mont. 410.
Or.—Winslow v. Burge, 237 P. 979, 115 Or. 375.
S.D.—**Corpus Juris cited in** Gerhart v. Quirk, 209 N.W. 544, 545, 50 S.D. 269.
34 C.J. p 237 note 10.

Conformity to description in pleading
Court has authority at any time to correct misdescription of lands contained in judgment, where pleadings and proof correctly describe land in question; but erroneous description of land which was in accordance with description referred to in complaint cannot be corrected as clerical error, since the judgment correctly expresses the decision of the court.—Oregon Mortg. Co. v. Kunneke, 245 P. 539, 76 Mont. 117—34 C.J. p 237 note 10 [b].

89. Cal.—McFarland v. Cordiero, 278 P. 889, 99 Cal.App. 352.
Tex.—Davis v. Standard Rice Co., Civ.App., 293 S.W. 593.
Changes with respect to relief awarded see supra § 246.
Conformity to pleadings generally see supra §§ 47–54.

Judgment in ejectment was subject to amendment to conform to the declaration.—Renwick v. Noggle, 225 N.W. 535, 247 Mich. 150.

After judgment in foreclosure suit and sale of land thereunder and confirmation of sale, judgment thereafter should be modified on motion to conform to pleadings and proof, if at all, in such respect as not to prejudice uncontroverted rights of parties.—First State Bank of Larned v. Arnold, 234 P. 1003, 118 Kan. 389.

§ 250. Procedure and Relief

A judgment once entered must be corrected, if irregular or erroneous, by some proper proceeding for that purpose.

A judgment once entered must be corrected, if irregular or erroneous, by some proper proceeding for that purpose; it cannot be merely disregarded and the proper judgment entered anew.[90] A judgment once regularly signed or entered may be modified or altered by the court which entered it only in the manner, if any, prescribed by statute.[91]

Substantial or judicial errors, as discussed supra § 238, are generally to be corrected by a motion for a new trial or by appeal or writ of error, or they may be amended under appropriate statutory procedure,[92] or, after the term, by independent action;[93] and it has been held that the correction cannot be made on the court's own motion.[94]

Merely formal or clerical errors in the judgment as entered are to be corrected by amendment in the trial court, and not by writ of error or appeal from the judgment;[95] and they may be corrected on motion or at the instance of the parties.[96] During the term at which the judgment was rendered, the

90. Wis.—Hottelet v. Von Cotzhausen, 154 N.W. 701, 162 Wis. 12.
34 C.J. p 243 note 57.
Action to review judgment see infra §§ 314–319.
Writ of error coram nobis see infra §§ 311–313.

Amount

(1) A judgment stands in amount as it is entered, and the only way in which it may be modified is by a direct proceeding for that purpose.—Blakeslee's Storage Warehouse v. City of Chicago, 17 N.E.2d 1, 369 Ill. 480, 120 A.L.R. 715.

(2) Amendment as to amount of recovery generally see supra § 247.

Final judgment

To modify an original judgment that has become final, proceedings must be had directed to that end under statute or in some direct proceeding to correct the judgment.—Jackson v. Redding, 139 So. 317, 162 Miss. 323.

91. Cal.—Eisenberg v. Superior Court in and for City and County of San Francisco, 226 P. 617, 193 Cal. 575.
Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521.
Ky.—Gardner v. Breedlove, 76 S.W.2d 240, 256 Ky. 413.
La.—Castelluccio v. Cloverland Dairy Products Co., 115 So. 796, 165 La. 606, conformed to 8 La.App. 723.
Ohio.—Barman v. Feid, 27 Ohio N.P., N.S., 409.
Wash.—Betz v. Tower Sav. Bank, 55 P.2d 338, 185 Wash. 314.

92. Cal.—Bastajian v. Brown, 120 P. 2d 9, 19 Cal.2d 209—McMahan v. Baringer, 122 P.2d 63, 49 Cal.App. 2d 431.

Time for correction or motion

(1) Judicial errors cannot be corrected at any time, but must be corrected seasonably, in accordance with statutory or code provisions for the correction of erroneous judgments.—Wides v. Wides, 188 S.W.2d 471, 300 Ky. 344.

(2) A motion calling, not for correction of a mere clerical error, but for modification of an essential judicatory part of a judgment must be made during the term at which the judgment was rendered.—Farmers' & Merchants' Nat. Bank of Rensselaer v. Elliott, 141 N.E. 652, 80 Ind.App. 596.

93. Tex.—Love v. State Bank & Trust Co. of San Antonio, 90 S.W. 2d 819, 126 Tex. 591—Coleman v. Zapp, 151 S.W. 1040, 105 Tex. 491—Miller v. Texas Life Ins. Co., Civ.App., 123 S.W.2d 756, error refused.

94. Minn.—Wilson v. City of Fergus Falls, 232 N.W. 322, 181 Minn. 329.
N.Y.—In re Starbuck, 225 N.Y.S. 113, 221 App.Div. 702, affirmed In re Starbuck's Ex'x, 162 N.E. 522, 248 N.Y. 555.

95. N.Y.—Goldstein v. Schick, 261 N.Y.S. 839, 237 App.Div. 905, motion denied 185 N.E. 804, 261 N. Y. 713, affirmed 188 N.E. 126, 262 N.Y. 696.
34 C.J. p 243 note 59.

96. Ariz.—Fay v. Harris, 164 P.2d 860.
Cal.—Benway v. Benway, 159 P.2d 682, 69 Cal.App.2d 574.
Ky.—Weil v. B. E. Buffaloe & Co., 65 S.W.2d 704, 251 Ky. 673—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632—Keyser v. Hopkins, 34 S.W.2d 968, 227 Ky. 105—Williams v. Isaacs, 256 S.W. 19, 201 Ky. 165.
N.Y.—Goldstein v. Shick, 261 N.Y.S. 839, 237 App.Div. 905, motion denied 185 N.E. 804, 261 N.Y. 713, affirmed 188 N.E. 126, 262 N.Y. 696—Brown v. Shyne, 206 N.Y.S. 310, 123 Misc. 851.
N.C.—Federal Land Bank of Columbia v. Davis, 1 S.E.2d 350, 215 N.C. 100.
Okl.—Hurley v. Childers, 243 P. 218, 116 Okl. 84—McAdams v. C. D. Shamburger Lumber Co., 240 P. 124, 112 Okl. 173.
Tex.—Love v. State Bank & Trust Co. of San Antonio, 90 S.W.2d 819, 126 Tex. 591—Coleman v. Zapp, 151 S.W. 1040, 105 Tex. 491—Weaver v. Humphrey, Civ.App., 114 S.W. 2d 609, error dismissed—Acosta v. Realty Trust Co., Civ.App., 111 S. W.2d 777.
34 C.J. p 244 note 64.

Defects amounting only to irregularities should be corrected by a motion for that purpose.—Brantley v. Greer, 71 Ga. 11—City of Albany v. Parks, 5 S.E.2d 680, 61 Ga.App. 55.

"Errors" may be corrected on the application of a party in interest.—In re Cornine's Guardianship, N.J. Orph., 199 A. 733.

Improper recital of dismissal on merits

A judgment improperly reciting that the dismissal is on the merits may be corrected by motion.—Mink v. Keim, 41 N.Y.S.2d 769, 266 App. Div. 184, affirmed 52 N.E.2d 444, 291 N.Y. 300.

Motion as not suggestion of error

In order to include material elements left out through error or oversight, judgment may be corrected on motion; and such motion is not a suggestion of error.—Huckaby v. Jenkins, 122 So. 487, 154 Miss. 378.

Securing costs

Where defendant in law action was entitled to recover statutory costs as matter of course, and judgment was entered for plaintiff and was satisfied, proper procedure to secure costs for defendant was by motion to amend judgment and not by the entry of second judgment for costs.—Coffee v. Johnson, 24 N.Y.S.2d 588.

In Indiana

(1) The office of a motion to modify judgment is to make the judgment conform to the verdict or finding.—Wise v. Layman, 150 N.E. 868, 197 Ind. 393—Blagetz v. Blagetz, 37 N.E.2d 318, 109 Ind.App. 662—First State Bank of Frankfort v. Spradling, 11 N.E.2d 76, 104 Ind.App. 342—Hinton v. Bryant, 190 N.E. 554, 99 Ind.App. 38—Moore v. Moore, 135 N.E. 362, 81 Ind.App. 169.

(2) Such a motion cannot be used for any other purpose than to raise questions affecting the form of the judgment.—First State Bank of Frankfort v. Spradling, supra.

correction may be made by an order of the court on a mere suggestion of the error.[97] Under a number of authorities, the court may act of its own motion, without application by a party,[98] although some authorities restrict this power to the term[99] and hold that after the term the amendment can be made only on the presentation of a formal petition or motion,[1] entitled and filed in the action or proceeding in which the judgment was rendered.[2]

A motion in the cause, as distinguished from an independent action, is generally the proper remedy to obtain an amendment of a judgment,[3] and such

(3) Such a motion may be used to correct some matter of form in judgment, but not to secure the substitution of a different one.—Blagetz v. Blagetz, supra—Hinton v. Bryant, supra.

(4) Such a motion cannot be made to perform the office of a motion for a new trial.—Blagetz v. Blagetz, supra—Hinton v. Bryant, supra—Hatfield v. Ralston, 155 N.E. 221, 85 Ind.App. 621.

(5) Remedy against an erroneous or improper judgment is a motion to modify the judgment, not a motion for a new trial.—Smith v. Hill, 165 N.E. 911, 200 Ind. 616—Edwards v. Wiedenhaupt, 32 N.E.2d 106, 109 Ind.App. 450.

(6) Remedy against judgment not within issues, and which did not follow findings, was held to be a motion to modify the judgment and not a motion for a new trial.—Fisher v. Rosander, 151 N.E. 12, 84 Ind.App. 694—34 C.J. p 243 note 59 [e].

97. Mo.—Marsala v. Marsala, 232 S.W. 1048, 288 Mo. 501.
34 C.J. p 243 note 60.

98. Ariz.—Fay v. Harris, 164 P.2d 860—Swisshelm Gold Silver Co. v. Farwell, 124 P.2d 544, 59 Ariz. 162.
Cal.—In re Soboslay's Estate, 47 P. 2d 714, 4 Cal.2d 177—Benway v. Benway, 159 P.2d 682, 69 Cal.App. 2d 574—Kohlstedt v. Hauseur, 74 P.2d 314, 24 Cal.App.2d 60—Hogan v. Horsfall, 266 P. 1002, 91 Cal. App. 37, followed in 266 P. 1005, 91 Cal.App. 797—McConville v. Superior Court within and for Los Angeles County, 248 P. 553, 78 Cal. App. 203.
Kan.—Cubitt v. Cubitt, 86 P. 475, 74 Kan. 353.
Minn.—Wilson v. City of Fergus Falls, 232 N.W. 322, 181 Minn. 329—Plankerton v. Continental Casualty Co., 230 N.W. 464, 180 Minn. 168.
Mont.—Morse v. Morse, 154 P.2d 982.
Okl.—Mason v. Slonecker, 219 P. 357, 92 Okl. 227.
Tex.—Love v. State Bank & Trust Co. of San Antonio, 90 S.W.2d 819, 126 Tex. 591—**Corpus Juris cited in** Townes v. Lattimore, 272 S.W. 435, 437, 114 Tex. 511—Coleman v. Zapp, 151 S.W. 1040, 105 Tex. 491—Weaver v. Humphrey, Civ.App., 114 S.W.2d 609, error dismissed—Acosta v. Realty Trust Co., Civ. App., 111 S.W.2d 777.
34 C.J. p 244 note 61.
Notice see infra § 254.

Correction within period for signing
District judge was entitled to correct clerical errors in judgment ex proprio motu within period provided by statute for signing judgment.—State ex rel. Porterie v. Walmsley, 162 So. 826, 183 La. 139, appeal dismissed Board of Liquidation v. Board of Com'rs of Port of New Orleans, 56 S.Ct. 141, 296 U.S. 540, 80 L.Ed. 384, rehearing denied Board of Liquidation, City Debt of New Orleans v. Board of Com'rs of Port of New Orleans, 56 S.Ct. 246, 296 U.S. 663, 80 L.Ed. 473.

Duty of court
If a court is made aware that through mistake or omission its records do not recite its judgment as actually rendered, it is not only the right but the duty of the court, of its own motion, to order the proper entry.—Coleman v. Zapp, 151 S.W. 1040, 105 Tex. 491—Magnolia Petroleum Co. v. Wheeler, Tex.Civ.App., 132 S.W.2d 456, error dismissed, judgment correct.

"Errors" may be corrected by court on its own motion.—In re Cornine's Guardianship, N.J.Orph., 199 A. 733.

99. Ark.—Stinson v. Stinson, 159 S. W.2d 446, 203 Ark. 888—American Building & Loan Association v. Memphis Furniture Manufacturing Co., 49 S.W.2d 377, 185 Ark. 762.
Mo.—Marsala v. Marsala, 232 S.W. 1048, 288 Mo. 501.
34 C.J. p 244 note 61.

1. Mo.—Marsala v. Marsala, supra.
34 C.J. p 244 note 62.

2. Md.—Clark v. Digges, 5 Gill 109.
34 C.J. p 244 note 63.

3. Ky.—Gardner v. Breedlove, 76 S. W.2d 240, 256 Ky. 413—Campbell v. First Nat. Bank, 50 S.W.2d 17, 244 Ky. 110.
N.C.—Federal Land Bank of Columbia v. Davis, 1 S.E.2d 350, 215 N. C. 100—Murray v. Southerland, 34 S.E. 270, 125 N.C. 175.
34 C.J. p 244 note 64.
Action to review judgment see infra §§ 314–319.

If a judgment is irregular, remedy is by motion in the case made within a reasonable time.—Nall v. McConnell, 190 S.E. 210, 211 N.C. 258.

Remedy after statutory period
Where invalidity of a judgment is apparent from the record so that the court rendering it, in the absence of an application within six months after its rendition for relief from mistake, is powerless to modify the judgment, the sole remedy of the aggrieved party is by a new action.—People ex rel. Pollock v. Bogart, 138 P.2d 360, 58 Cal.App.2d 831.

Motion to bring forward suit
Usual form of procedure where a correction of record of judgment is sought is a motion to bring forward the suit and to correct the judgment entry therein; suit by plaintiff to amend record of judgment against nonresident motorist and another for damages growing out of accident or collision could be treated as a motion to bring forward the law action for the correction of the judgment entry therein.—Hubley v. Goodwin, 4 A.2d 665, 90 N.H. 54.

Suit constituting collateral attack
(1) Under some statutes an error of form of a judgment in replevin is not rectifiable in suit constituting collateral attack on such judgment.—Fore v. Chenault, 271 S.W. 704, 108 Ark. 747.

(2) Collateral attack generally see infra §§ 401–435.

Separate suit as not abridging rights
Fact that party seeking to have alleged error in judgment corrected brought separate suit instead of proceeding by motion in original suit as apparently contemplated by statute, was held not to abridge his rights.—Bell v. Rogers, Tex.Civ.App., 58 S. W.2d 878.

Trial of issue on claim of property
Where original judgment on the merits had become final by reason of the fact that no appeal had been taken therefrom, such judgment was not amendable on the trial of claimant's issue pursuant to statutory affidavit claiming property before sale under levy.—Spencer v. Marmon, 126 So. 824, 156 Miss. 729.

In Illinois
(1) The practice and procedure under Pract.Act § 89, stating the manner in which all errors in fact committed in the proceeding of any court of record may be corrected, are similar in most respects to the practice under the writ of error coram nobis; the motion under § 89 is treated substantially as the petition or motion for the common-law writ, and is the beginning of a new suit, and the sufficiency of the motion

notion is to be disposed of in a summary manner without formal pleadings,[4] although formal pleadings and process, if resorted to, may and should be regarded as constituting merely a written motion and notice.[5] However, in some jurisdictions, the amendment may be obtained by action, the same as on motion in the original cause,[6] although, of course, an action cannot take the place of an appeal as a means for the correction of erroneous judgments.[7]

Where a judgment is incomplete, in not going as far as the pleadings demand, the remedy has been held to be by motion to modify.[8]

Error in entering judgment after trial for more than the amount demanded has been held correctible on motion or by appeal.[9]

§ 251. —— Jurisdiction

Jurisdiction over the amendment of judgments is discussed generally supra §§ 228–235, and the jurisdiction of particular courts and judges supra § 235.

Examine Pocket Parts for later cases.

§ 252. —— Time for Application

An application to amend a judgment must be made within the time prescribed by statute unless it invokes the inherent power of the court to amend its judgments. Laches may defeat the application.

Any statutory limitation of the time within which an application to amend or correct a judgment may be made must be observed in all applications made under, and within the operation of, the statute.[10] It has been held that, where a judgment becomes final at the end of a specified period, an application to amend or correct errors must be filed before the lapse of that time.[11]

Where an application for the amendment of a judgment is not made under statute, or on statutory grounds, but invokes the inherent power of the court to amend its judgments, the statutory limitation is generally deemed not applicable,[12] and the power of the court to correct or amend in proper cases is not lost by mere lapse of time, the expiration of the term, or the time for appeal.[13] However, judicial errors, unlike clerical mistakes, may not be corrected at any time and the appli-

may be raised by demurrer, or an issue of fact may be raised by plea denying the truth of the error in fact alleged.—Smyth v. Fargo, 138 N.E. 610, 307 Ill. 300.

(2) Writ of error coram nobis see infra §§ 311–313.

4. Ind.—Morrow v. Greeting, 55 N. E. 787, 23 Ind.App. 494.
34 C.J. p 244 note 65.

Alleging valid cause of action or defense

Where motion to modify judgment is filed during term at which it is rendered, movant need not allege or prove a valid cause of action or defense.—Long v. Hill, Okl., 145 P.2d 434—Montague v. State ex rel. Commissioners of Land Office of Oklahoma, 89 P.2d 283, 184 Okl. 574.

5. Ind.—Jenkins v. Long, 23 Ind. 460.
34 C.J. p 244 note 65.

6. Okl.—Grayson v. Stith, 72 P.2d 820, 181 Okl. 131, 114 A.L.R. 276.
34 C.J. p 244 note 67.

7. N.Y.—Libby v. Rosekrans, 55 Barb. 202.
Equitable relief against judgments see infra §§ 341–400.

8. Ind.—Walters v. Cantner, 60 N. E.2d 138.

9. Minn.—Becker v. Brecht, 231 N. W. 220, 180 Minn. 482.

10. Cal.—Goatman v. Fuller, 216 P. 35, 191 Cal. 245—People ex rel. Pollock v. Bogart, 138 P.2d 360, 58 Cal.App.2d 831.
Ky.—Wides v. Wides, 188 S.W.2d 471, 300 Ky. 344.
La.—Nichols v. Bell & Rachal, 2 La. App. 16.
Pa.—Balch v. Shick, 24 A.2d 548, 147 Pa.Super. 273—Commonwealth v. Wright, O. & T., 33 Del.Co. 254.
34 C.J. p 244 note 76, p 245 note 77.

Particular requirements as to time

(1) Within time for taking appeal. —In re Simon's Estate, 246 N.W. 31, 187 Minn. 399.

(2) Within thirty days.—Pugh v. Phelps, 19 P.2d 315, 37 N.M. 126.

(3) Within one year.
N.Y.—Petition of Holman, 51 N.Y.S. 2d 246, 268 App.Div. 330.
Wash.—Nevers v. Cochrane, 229 P. 738, 131 Wash. 225.
34 C.J. p 244 note 76 [a], [b].

(4) Within two years.—Application of Beaver Dam Ditch Co., 93 P. 2d 934, 54 Wyo. 459.

(5) Within three years.—Washburn v. Culbertson, 75 P.2d 190, 181 Okl. 476—Ritchie v. Keeney, 73 P.2d 397, 181 Okl. 207.

(6) Within four years.—Huggins v. Johnston, Civ.App., 3 S.W.2d 937, affirmed 35 S.W.2d 688, 120 Tex. 21.

Time for suggestion of error

(1) Motion to correct judgment, involving change in court's decision, must be filed within time for filing suggestion of error.—Huckaby v. Jenkins, 122 So. 487, 154 Miss. 378.

(2) Motion to correct judgment to include statutory damages, however, need not be filed within time for filing suggestions of error.—Huckaby v. Jenkins, supra.

11. Tenn.—Harris v. Penn. Nat. Hardware Mutual, 7 Tenn.App. 330.

12. Colo.—Pleyte v. Pleyte, 24 P. 579, 15 Colo. 44.
34 C.J. p 245 note 79.

Statute held applicable

(1) Where it did not appear satisfactorily that a clerical error was made and all-important witnesses, including the judge, were dead, it was held that failure to take steps within the statutory period to amend a judgment was a bar, and the court had no inherent power to amend.—Application of Beaver Dam Ditch Co., 93 P.2d 934, 54 Wyo. 459.

(2) Where the error was in no way disclosed in the record, and there was no clerical error and no difference between the judgment and the record, it was held that the statutory limitation applied and the court did not have inherent power to correct or amend the judgment.—Goatman v. Fuller, 216 P. 35, 191 Cal. 245.

13. Ga.—Brown v. Cole, 28 S.E.2d 76, 196 Ga. 843.
Kan.—**Corpus Juris cited in** Cazzell v. Cazzell, 3 P.2d 479, 480, 133 Kan. 766.
Mich.—Partch v. Baird, 199 N.W. 692, 227 Mich. 660.
34 C.J. p 245 note 79.
Jurisdiction and power after term generally see supra § 230.

cation must be made seasonably, in accordance with statutory or code provisions.[14]

Laches or undue delay in making application for the amendment of a judgment is ground for denial of the application,[15] particularly where rights have vested under the judgment as entered which would be disturbed by its alteration.[16] Mere delay explained and excused is not fatal to the application;[17] but a prima facie case of laches and delay must be excused to warrant relief.[18]

Although an application to amend or correct a judgment has been held timely if filed while the execution is in the hands of the sheriff,[19] generally an application to amend a judgment is too late after the amount of it has been paid, especially if the amendment would make a party liable to pay it a second time.[20]

§ 253. —— Parties

An application for the amendment of a judgment must be made by one entitled to such relief; and all parties whose rights or interests may be affected by the amendment should be made parties to the application.

An application for the amendment of a judgment must be made by one entitled to such relief.[21] It has variously been held that the application may be made by either litigant,[22] by the party for or against whom judgment has been given,[23] by anyone injuriously affected,[24] by a defendant, to determine rights as between him and a codefendant,[25] and by persons not parties whose vested rights would be affected;[26] but it has also been held that only the parties to a judgment may apply,[27] except that, where the rights of one not a party are directly and necessarily affected, he may intervene after judgment and have his rights protected.[28] A person who suffers no loss by a judgment has been held to have no right to a modification thereof.[29]

All the parties to the judgment whose rights or interests may be affected by the proposed amendment should be made parties to the application therefor;[30] but persons whose rights are not affected need not be joined.[31]

§ 254. —— Notice

It is a general rule that a judgment cannot be materially amended, especially after the term, unless due and proper notice of the application for amendment has been given to the opposite party; but notice is not required for clerical amendments based on matters appearing in the record.

14. Ky.—Wides v. Wides, 188 S.W. 2d 471, 300 Ky. 344.
Judicial errors generally see supra § 238.

15. U.S.—Albion-Idaho Land Co. v. Adams, D.C.Idaho, 58 F.Supp. 579.
Iowa.—**Corpus Juris cited in** Floyd County v. Ramsey, 239 N.W. 237, 238, 213 Iowa 556.
Wyo.—Application of Beaver Dam Ditch Co., 93 P.2d 934, 54 Wyo. 459.
34 C.J. p 245 note 81.
Laches generally see Equity §§ 112–132.

Laches not shown
Where a judgment was defective for failure of the trial court to certify the evidence and direct that judgment be entered for plaintiffs, plaintiffs, in waiting four and a half years before attempting to perfect the judgment, were not guilty of laches so as to preclude relief, since the oversight was the fault of the trial court.—Balch v. Shick, 24 A.2d 548, 147 Pa.Super. 273.

16. U.S.—Albion-Idaho Land Co. v. Adams, D.C.Idaho, 58 F.Supp. 579.
Wyo.—Application of Beaver Dam Ditch Co., 93 P.2d 934, 54 Wyo. 459.
34 C.J. p 245 note 82.

17. Pa.—Balch v. Shick, 24 A.2d 548, 147 Pa.Super. 273.
34 C.J. p 245 note 83.

18. Wis.—In re Brandstedter's Estate, 224 N.W. 735, 198 Wis. 457.
Wyo.—Application of Beaver Dam Ditch Co., 93 P.2d 934, 54 Wyo. 459.

19. N.C.—Brown v. Norfolk Southern R. Co., 181 S.E. 279, 208 N.C. 423.

20. Pa.—Appeal of Hassler, 5 Watts 176.
34 C.J. p 245 note 85.
Executed or satisfied judgments see supra § 234.

21. Ind.—Pritchard v. Mines, 106 N. E. 411, 56 Ind.App. 671.
34 C.J. p 245 note 86.

Judgment in rem
Where a judgment operates only in rem against property, a party who is the holder of a claim adverse to that of the judgment creditor is entitled to a correction of the judgment so as to reduce the latter's claim.—Globe Automatic Sprinkler Co. v. Bell, 165 So. 150, 183 La. 937.

22. Tex.—Batson v. Bentley, Civ. App., 297 S.W. 769.

23. N.Y.—Montgomery v. Ellis, 6 How.Pr. 326.
34 C.J. p 245 note 86 [b].

Who may invoke statute
Statute providing that judgment becomes vested property of person in whose favor it is rendered, which cannot be altered except in mode provided by law, can be invoked only by person in whose favor judgment is rendered.—Glen Falls Indemnity Co. v. Manning, La.App., 168 So. 787.

24. Wash.—In re Christianson's Estate, 132 P.2d 368, 16 Wash.2d 48.

25. N.Y.—Cohen v. Dugan Bros., 235 N.Y.S. 116, 134 Misc. 500.

26. Colo.—In re German Ditch & Reservoir Co., 139 P. 2, 56 Colo. 252.

Village trustees ousted by unauthorized part of judgment in an action in which they were not made parties are entitled to apply for relief by motion to strike out unauthorized part.—Abell v. Hunter, 207 N.Y.S. 203, 211 App.Div. 467, affirmed 148 N.E. 765, 240 N.Y. 702.

27. Tex.—Standard Oil Co. v. State, Civ.App., 132 S.W.2d 612, error dismissed, judgment correct.

28. Tex.—Standard Oil Co. v. State, supra.

29. Mo.—Heidbreder v. Superior Ice & Cold Storage Co., 83 S.W. 469, 184 Mo. 456.

30. Ind.—Bradford v. McBride, 96 N.E. 503, 50 Ind.App. 624.
34 C.J. p 246 note 87.

Binding parties before court
Where all parties whose rights or interests may be affected by the proposed amendment are not made parties to the application, an amendment of the judgment is binding only on those parties properly before the court.—Pritchard v. Mines, 106 N.E. 411, 56 Ind.App. 671.

31. Mo.—Turner v. Christy, 50 Mo. 145.
34 C.J. p 246 note 88.

As a general rule a judgment cannot be amended in a material particular unless due and proper notice of the application for amendment has been given to the adverse, interested, or affected parties, so that they may have an opportunity to appear and show cause against the proposed correction;[32] but it has been held that, in order to make a judgment as entered conform to the judicial decision actually made, the court may correct the judgment with or without notice,[33] although in this situation notice has also been required.[34] It has been held that an amendment may be made without notice during the same term at which the judgment was rendered,[35] but that notice[36] or voluntary appearance[37] is necessary to an amendment at a subsequent term. It has also been held that formal or clerical amendments, based entirely on matters appearing in the record,[38] or resting in the recollection of the judge,[39] may be made without notice, but that amendments based on evidence aliunde may be

32. Ariz.—Fay v. Harris, 164 P.2d 860.
Ill.—Thorne v. Thorne, 45 N.E.2d 85, 316 Ill.App. 451—Schmahl v. Aurora Nat. Bank, 35 N.E.2d 689, 311 Ill.App. 228.
Iowa.—**Corpus Juris cited in** Charlton & Lucas County Nat. Bank v. Taylor, 232 N.W. 487, 496, 210 Iowa 1153.
Mich.—McHenry v. Merriam, 204 N. W. 99, 231 Mich. 479—Partch v. Baird, 199 N.W. 692, 227 Mich. 660.
Miss.—**Corpus Juris cited in** Countiss v. Lee, 131 So. 643, 644, 159 Miss. 11.
N.J.—Surety Building & Loan Ass'n of Newark v. Risack, 179 A. 680, 118 N.J.Eq. 425.
N.Y.—Metropolitan Commercial Corporation v. Scheffler, 256 N.Y.S. 473, 143 Misc. 359.
Okl.—Lewis v. Ward, 223 P. 839, 101 Okl. 146—Co-Wok-Ochee v. Chapman, 183 P. 610, 76 Okl. 1.
Tex.—Kveton v. Farmers Royalty Holding Co., Civ.App., 149 S.W.2d 998—Miller v. Texas Life Ins. Co., Civ.App., 123 S.W.2d 756, error refused—Turman v. Turman, Civ. App., 71 S.W.2d 898, error dismissed—Presidio Cotton Gin & Oil Co. v. Dupuy, Civ.App., 2 S.W.2d 341—Bray v. City of Corsicana, Civ. App., 280 S.W. 609.
34 C.J. p 246 note 91.
Parties to application see supra § 253.

After final decree, entry of supplemental order without notice to, and in absence of, parties in interest, and proceedings thereunder, were void.—First Nat. Bank v. Webb, 158 S.E. 378, 110 W.Va. 387.

Entry of remittitur

Court did not err in permitting plaintiff to enter remittitur of part of judgment for him without notice to defendant.—Gulf, C. & S. F. Ry. Co. v. Morrow, Tex.Civ.App., 66 S. W.2d 481, error dismissed.

Person without adverse interest

The statute requiring reasonable notice to be given to adverse party of proceedings to correct irregularity in obtaining judgment is for purpose of protecting one's adverse interest and notice is not required to be given to one whose interest cannot possibly be adverse to the result to be accomplished.—Franklin v. Hunt Dry Goods Co., 123 P.2d 253, 190 Okl. 396.

Sureties on redelivery bond are not entitled to notice of application for modification of judgment in replevin suit, not being parties thereto.—White Automobile Co. v. Hamilton, 226 P. 687, 3 Wyo. 390.

33. Cal.—Benway v. Benway, 159 P. 2d 682, 69 Cal.App.2d 574.
Iowa.—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 232 Iowa 1226.

Obvious mistake

Generally notice is not necessary to make a nunc pro tunc entry to correct an obvious mistake in judgment in order to make record speak truth.—Miller v. Bates, 292 N.W. 818, 228 Iowa 775.

34. Tex.—Coleman v. Zapp, 151 S. W. 1040, 105 Tex. 491—Magnolia Petroleum Co. v. Wheeler, Civ. App., 132 S.W.2d 456, error dismissed, judgment correct.

35. U.S.—**Corpus Juris cited in** U. S. ex rel. Campbell v. Bishop, C.C.A. Fla., 47 F.2d 95, 97.
Ark.—Stinson v. Stinson, 159 S.W.2d 446, 203 Ark. 888.
Wyo.—White Automobile Co. v. Hamilton, 226 P. 687, 31 Wyo. 390.
34 C.J. p 246 note 92.

36. Ga.—Crowell v. Crowell, 11 S.E. 2d 190, 191 Ga. 36.
Ill.—People ex rel. Sweitzer v. City of Chicago, 2 N.E.2d 330, 363 Ill. 409, 104 A.L.R. 1335—Chicago Wood Piling Co. v. Anderson, 39 N.E.2d 702, 313 Ill.App. 242—Hickman v. Ritchey Coal Co., 252 Ill. App. 560.
Ind.—Penn v. Ducomb, 12 N.E.2d 116, 213 Ind. 133.
Mich.—Emery v. Whitehill, 6 Mich. 474.
Miss.—Countiss v. Lee, 131 So. 643, 159 Miss. 11.
Mo.—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282.
N.C.—Pendergraph v. Davis, 169 S.E. 815, 205 N.C. 29.
34 C.J. p 247 note 93.

37. Ind.—Penn v. Ducomb, 12 N.E. 2d 116, 213 Ind. 133.

38. U.S.—U. S. ex rel. Campbell v. Bishop, C.C.A.Fla., 47 F.2d 95.
Ala.—Sisson v. Leonard, 11 So.2d 144, 243 Ala. 546.
Cal.—Carpenter v. Pacific Mut. Life Ins. Co. of California, 96 P.2d 796, 14 Cal.2d 704—Benway v. Benway, 159 P.2d 682, 69 Cal.App.2d 574—Hogan v. Horsfall, 266 P. 1002, 91 Cal.App. 37, followed in 266 P. 1005, 91 Cal.App. 797.
Mo.—Conrath v. Houchin, 84 S.W.2d 190, 226 Mo.App. 261.
34 C.J. p 247 note 94.
"Having had jurisdiction of the parties and subject matter when the decision was made, the power of the court to control the record and its ministerial officers does not depend upon the continued presence of the parties."—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 900, 232 Iowa 1226.

Ex parte amendment held proper

(1) In an action in which the court in rendering judgment erroneously described defendant, there was no error in directing the clerk to strike out the name improperly used and insert defendant's name, without citing defendant to show cause why the correction should not be made, as the error was of little or no importance.—Town of Mandeville v. Paquette, 95 So. 391, 153 La. 33.

(2) An order amending judgment on plaintiff's ex parte application so as to render liable a defendant who had appeared and filed answer and had been held not liable to plaintiff, although he had not taken part in trial, was valid.—Kohlstedt v. Hauseur, 74 P.2d 314, 24 Cal.App.2d 60.

Under statute

(1) Under some statutes the proper method of correcting clerical misprision is by motion on reasonable notice to adverse party or his attorney.—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632.

(2) Also under some statutes a mistake or omission of the clerk in entering judgment on the journal may be corrected by motion on reasonable notice during or after term at which judgment was rendered.—Hurley v. Childers, 243 P. 218, 116 Okl. 84.

39. Cal.—Carpenter v. Pacific Mut.

made only after notice, and that, in the absence of notice, the proceedings for amendment or correction are void.[40]

Other authorities have held that during the same term and before the judgment has been entered of record, the court may change its rulings of its own motion and without notice, and direct a different judgment,[41] but that after the judgment has been entered the court may not change the record without notice even at the same term.[42]

The notice, if required, must be sufficient in form and substance to inform the party of the time and purpose of the proceeding.[43] Written notice is not always required;[44] and actual notice may supply the place of formal notice.[45] Appearance at the hearing waives the absence of, or defects in, the notice of the application.[46] Service of notice must be on the party or his attorney of record.[47]

Where the time of notice is prescribed by statute or rule of court, failure to give the required notice may be fatal to the order amending the judgment.[48]

§ 255. —— Contents and Sufficiency of Application

An application for amendment of a judgment should specify the errors or omissions complained of and the correction desired, and should state a sufficient ground for the modification asked.

A petition or motion for the amendment or correction of a judgment should set forth clearly and specifically the nature of the errors or omissions complained of, and the terms of the correction desired;[49] an application which states no ground or reason for the modification asked, or an insufficient one, is properly overruled.[50]

Life Ins. Co. of California, 96 P.2d 796, 14 Cal.2d 704.
34 C.J. p 247 note 95.
Recollection of judge as basis for amendment see infra § 256.

40. U.S.—Odell v. Reynolds, Ohio, 70 F. 656, 17 C.C.A. 317.
34 C.J. p 247 note 96.
Evidence as basis of amendment see infra § 256.

41. Tex.—Daniel v. Sharpe, Civ.App., 69 S.W.2d 508.
34 C.J. p 247 note 97.

42. Iowa.—Willson v. Polk County Dist. Ct., 147 N.W. 766, 166 Iowa 352—Kwentsky v. Sirovy, 121 N. W. 27, 142 Iowa 385.

43. Cal.—Citizens' Nat. Trust & Savings Bank of Los Angeles v. Holton, 290 P. 447, 210 Cal. 44.
Tex.—Luck v. Riggs Optical Co., Civ. App., 149 S.W.2d 204.
34 C.J. p 247 note 99.

Personal service not required
On motion to correct a judgment entry, personal service on the opposing party such as would give jurisdiction in a new proceeding is not required, but notice of the motion to the opposing party is sufficient.—Hubley v. Goodwin, 4 A.2d 665, 90 N.H. 54.

44. Va.—Dillard v. Thornton, 29 Gratt. 392, 70 Va. 392.

45. Okl.—Jones v. Gallagher, 166 P. 204, 64 Okl. 41.
Tex.—Varn v. Varn, 125 S.W. 639, 58 Tex.Civ.App. 595.

46. Ind.—Penn v. Ducomb, 12 N.E. 2d 116, 213 Ind. 133.
Tex.—Luck v. Riggs Optical Co., Civ.App., 149 S.W.2d 204.
34 C.J. p 247 note 3.

47. Ky.—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632.
N.Y.—Metropolitan Commercial Corporation v. Scheffler, 256 N.Y.S. 473, 143 Misc. 359.
Okl.—Hurley v. Childers, 243 P. 218, 116 Okl. 84.
34 C.J. p 247 note 4.

Service on attorney after final judgment
The notice of application to correct a final judgment may be given to the attorney who appeared for adverse party in the original action or proceeding, notwithstanding the final termination thereof, since the authority of an attorney does not necessarily terminate on the entry of judgment but he is regarded as still representing the party for the purpose of receiving notices of motion or other appropriate process.—Langrick v. Rowe, 32 N.Y.S.2d 328, affirmed 41 N.Y.S.2d 82, 265 App.Div. 793, affirmed 52 N.E.2d 964, 291 N. Y. 756.

Service on transferee of interest
Notice was properly given to one to whom original adverse party had transferred interest.—Burris v. Reinhardt, 242 P. 143, 120 Kan. 32.

48. U.S.—Bernard v. Abel, Wash., 156 F. 649, 84 C.C.A. 361.

Statute requiring reasonable notice
Notice of hearing of motion to amend judgment given by registered mail and received a reasonable time before hearing, which was attended by defendant who made due objection and formal protest, constituted "reasonable notice" within statute authorizing correction of judgments.—Luck v. Riggs Optical Co., Tex.Civ. App., 149 S.W.2d 204.

49. Ind.—Mazac v. Michigan City, 189 N.E. 400, 98 Ind.App. 366.
Tex.—Wier v. Yates, Civ.App., 256 S.W. 636.
34 C.J. p 247 note 7.

Conforming to verdict
Motion to reform judgment to conform to verdict is in essence motion to amend judgment.—Jones v. White head, 146 S.E. 768, 167 Ga. 848.

Motion to correct journal entry of judgment by clerk was not insufficient in failing to allege that error was due to clerk's mistake or omission.—Hurley v. Childers, 243 P. 218, 116 Okl. 84.

Where rule seeks modification of postea, reasons for such modification must be set forth in statement of case.—Fantauzzo v. Phœnix Assur. Co. of London, 155 A. 749, 9 N.J.Misc. 713.

Verification
Failure of plaintiff to swear to motion to correct record of judgment erroneously entered was immaterial. —Greggers v. Gleason, 29 S.W.2d 183, 224 Mo.App. 1108.

Agreement of parties as to referee's findings
Correction of judgment entered on report of referee, settling controversy on count on note, to show that parties had agreed that referee's findings should not pertain to count on note, could be made at term at which judgment was rendered, on motion to correct entry and judgment, as against contention that matter could only be presented by motion for new trial, or under statutes relating to vacation or modification of judgments, since such statutes had reference to proceedings instituted after term at which judgment was entered.—Watters v. Knutsen, 272 N.W. 420, 223 Iowa 225.

50. Ind.—Briles v. Prudential Ins. Co., 25 N.E.2d 240, 216 Ind. 627—Brier v. Childers, 148 N.E. 474, 196 Ind. 520—Elliott v. Gardner, 46 N.E.2d 702, 113 Ind.App. 47.
Mo.—State ex rel. Woolman v. Gui-

§ 256. —— Evidence; Source of Amendment or Correction

While some authorities hold that a judgment may be amended on any satisfactory extrinsic evidence, other authorities hold that an amendment after the term must be based on evidence in the record, or matter in the nature of record. During the term, an amendment may be based on any satisfactory evidence, or on the court's recollection.

There is considerable authority for the rule that an amendment or correction of a judgment cannot be made, especially after the term, on extrinsic evidence but must be based on evidence contained in the record, or quasi of record,[51] including the verdict and the pleadings,[52] at least where the error or mistake complained of is such that, if it exists,

notte, 282 S.W. 68, 221 Mo.App. 466.

34 C.J. p 247 note 8.

Allegations held sufficient

Motion to amend judgment referring to pleadings in original suit, and containing copies of verdict and of judgment sought to be amended, set forth sufficient facts to authorize relief.—Brown v. Cole, 28 S.E.2d 76, 196 Ga. 843.

Expression of opinion or belief is insufficient.—Wier v. Yates, Tex.Civ. App., 256 S.W. 636—34 C.J. p 247 note 8 [a].

51. Ala.—**Corpus Juris cited in** Palatine Ins. Co. v. Hill, 121 So. 412, 415, 219 Ala. 123—Jackson v. Board of Revenue of Choctaw County, 110 So. 799, 215 Ala. 418.

Ga.—Brown v. Cole, 28 S.E.2d 76, 196 Ga. 843—Jones v. Whitehead, 146 S.E. 768, 167 Ga. 848—Miller v. Jackson, 175 S.E. 409, 49 Ga.App. 309—Frank E. Wood Co. v. Colson, 158 S.E. 533, 43 Ga.App. 265.

Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158.

Ky.—Bowling v. Evans, 98 S.W.2d 916, 266 Ky. 242—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302—Combs v. Deaton, 251 S.W. 638, 199 Ky. 477.

Mo.—Schulte v. Schulte, 140 S.W.2d 51—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282—Vaughn v. Kansas City Gas Co., 159 S.W.2d 690, 236 Mo. App. 669—**Corpus Juris cited in** State v. Guinotte, 282 S.W. 68, 70, 221 Mo.App. 466—Fulton Loan Service No. 2 v. Colvin, App., 81 S.W.2d 373.

Tenn.—Clardy v. Clardy, 186 S.W. 2d 526. 23 Tenn.App. 608.

Wyo.—Application of Beaver Dam Ditch Co., 93 P.2d 934, 54 Wyo. 459.

34 C.J. p 248 note 13, p 249 note 16.

Evidence as basis for amending decrees see Equity § 682 b.

Amendment nunc pro tunc

(1) A judgment may be amended nunc pro tunc only on record or quasi-record evidence.—Palatine Ins. Co. v. Hill, 121 So. 412, 219 Ala. 123—Jackson v. Board of Revenue of Choctaw County, 110 So. 799, 215 Ala. 418.

(2) Where formal judgment contained entry taxing costs against contestant, and there was no evidence of any other judgment respecting costs, nunc pro tunc order at subsequent term amending judgment by taking costs against estate was erroneous.—Calnane v. Calnane, 17 S.W.2d 566, 223 Mo.App. 381.

(3) Evidence was held insufficient to justify amendment nunc pro tunc. —Wiggins v. Union Trust Co. of East St. Louis, 266 Ill.App. 560.

Power or authority to allow amendment nunc pro tunc see infra § 258.

Nunc pro tunc entry of judgment see supra § 120.

Nunc pro tunc entry to correct or amend court records generally see Courts § 227 d.

Deficiency in judgment cannot be supplied by parol.—Jackson v. Board of Revenue of Choctaw County, 110 So. 799, 215 Ala. 418.

Presumptions and burden of proof

(1) In proceedings to correct a judgment nunc pro tunc, a presumption exists that judgment entered of record is judgment actually rendered.—In re Tompkin's Estate, Mo.App., 50 S.W.2d 659.

(2) Rule that, where judgment is shown to be rendered for one of the parties, and statute directs what that judgment shall be, it will be presumed that the judgment rendered was only such as could have been rendered, applies in proceedings to correct and amend judgment nunc pro tunc.—Saunders v. Scott, 111 S.W. 874, 132 Mo.App. 209—State v. Juden, Mo.App., 50 S.W.2d 702.

(3) Burden is on party seeking to correct judgment record to overcome presumption of truthfulness of court's recitals of fact in record.—Sullivan v. Coakley, 217 N.W. 820, 205 Iowa 225.

(4) Under statute providing that a judgment shall not be vacated at plaintiff's request until it is adjudged that there is a valid cause of action, where defendants demurred on grounds of misjoinder of causes of action, and that petition did not state a cause of action, and court informed defendants that demurrer would be sustained on ground of misjoinder of parties, and thereafter sustained demurrer generally, and ordered action dismissed, plaintiff, at subsequent term, seeking to correct order sustaining demurrer to correspond to the facts, was not required to show that petition stated cause of action, since trial court, in refusing to sustain demurrers on ground that it failed to state a cause of action, impliedly held that it stated such cause.—Bales v. Brome, 105 P. 2d 568, 56 Wyo. 111.

Recital held insufficient

Where amended judgment recited that, through inadvertence, there was inserted in the record of the judgment a direction and order that a receiver be appointed, such recital cannot justify review by the court of its own judicial act without showing to justify it.—Schroeder v. Superior Court of California in and for Alameda County, 239 P. 65, 73 Cal.App. 687.

Rule not dependent on statute

Necessity of record evidence as condition to amendment of judgment is not dependent on statute.—Palatine Ins. Co. v. Hill, 121 So. 412, 219 Ala. 123.

Uncertainty in judgment may not be supplied by parol proof, since the rule is that judgments may not be amended in any such manner, but the entire record may be inspected to cure the uncertainty.—Decker v Tyree, 264 S.W. 726, 204 Ky. 302.

52. Ga.—Brown v. Cole, 28 S.E.2d 76, 196 Ga. 843—Jones v. Whitehead, 146 S.E. 768, 167 Ga. 848—Miller v. Jackson, 175 S.E. 409, 49 Ga.App. 309.

Mo.—Fulton Loan Service No. 2 v. Colvin, App., 81 S.W.2d 373.

Evidence held sufficient

(1) Contract and pleadings held to authorize court to enter judgment nunc pro tunc, adding name of defendant omitted from original judgment.—Batson v. Bentley, Tex.Civ. App., 4 S.W.2d 577.

(2) Evidence authorized trial judge's finding that recital in judgment denying recovery on pleas of intervention was clerical error, which court could correct at term subsequent to rendition of judgment.—Duncan v. Marlin Motor Co., Tex. Civ.App., 41 S.W.2d 740, error refused.

Findings and pleadings

(1) In deciding a motion to modify the judgment, the court cannot look beyond the findings and pleadings. —Briles v. Prudential Ins. Co., 25 N.E.2d 240, 216 Ind. 627—Brier v. Childers, 148 N.E. 474, 196 Ind. 520—Elliott v. Gardner, 46 N.E.2d 702, 113 Ind.App. 47—Heaton v. Grant Lodge No. 335 I. O. O. F., 103 N. E. 488, 55 Ind.App. 100.

it should be apparent from the papers and records in the case.[53] For the purpose of this rule, the matters relied on need not be part of the record proper, or strict judgment roll; it is generally deemed sufficient if the amendment is not based on parol evidence alone, but is supported by the record, or some note or minute made by the judge or clerk, or notes taken by the stenographer, or some memorial paper or document in the nature of a record made in connection with the case or on the trial or hearing.[54]

Some authorities, however, adhere to the rule, characterized as the more liberal rule,[55] that an amendment may be based on any satisfactory or competent extrinsic evidence,[56] parol as well as written.[57] This rule is subject to the limitation that, where there is no record or quasi-record evidence, the court should act with great caution,[58] and only on evidence which is clear and convincing.[59]

(2) While, on motion to modify judgment, the court cannot look beyond the pleadings to determine theory of the case, this rule refers to the pleadings as construed by the parties.—Montgomery v. Montgomery, 140 N.E. 917, 81 Ind.App. 1.

53. Cal.—Citizens' Nat. Trust & Savings Bank of Los Angeles v. Holton, 290 P. 447, 210 Cal. 44.
Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158.
Ky.—Bowling v. Evans, 98 S.W.2d 916, 266 Ky. 242—Combs v. Deaton, 251 S.W. 638, 199 Ky. 477.
Tenn.—Clardy v. Clardy, 136 S.W.2d 526, 23 Tenn.App. 608.
34 C.J. p 248 note 13.

54. Ill.—People v. City of Chicago, 2 N.E.2d 330, 363 Ill. 409, 104 A.L.R. 1335—People v. Weinstein, 131 N.E. 631, 298 Ill. 264—People v. Leinecke, 125 N.E. 513, 290 Ill. 560.
Mo.—Vaughn v. Kansas City Gas Co., 159 S.W.2d 690, 236 Mo.App. 669—**Corpus Juris cited in** State ex rel. Woolman v. Guinotte, 282 S. W. 68, 70, 221 Mo.App. 466.
34 C.J. p 248 notes 13, 15.
Judgment roll or record see supra §§ 122–125.

Affidavit of plaintiff's attorney that defendant's name had been omitted from judgment by mistake, record disclosing such omission was held sufficient for amendment.—Citizens' Nat. Trust & Savings Bank of Los Angeles v. Holton, 290 P. 447, 210 Cal. 44.

Appearance or judgment docket entries

(1) Appearance and docket entries of amount of judgment were held admissible in proceeding to correct judgment.—Brooks v. Owen, 202 N. W. 505, 200 Iowa 1151, modified on other grounds and rehearing denied 206 N.W. 149.

(2) Where action and cross action were identified on court's docket by same number and style, court's docket entry stating that such numbered and styled case was "dismissed for want of prosecution" sufficiently evidenced the fact that the court rendered judgment dismissing the whole case so that, if judgment as entered was not sufficient to effect a dismissal of the cross action, it was a sufficient notation to support a nunc pro tunc order to correct the judgment so as to make it include the cross action in dismissal.—Johnson v. Campbell, Tex.Civ.App., 154 S.W.2d 878.

Evidence outside of the judgment sought to be amended may be admitted.—Willard v. Loucks, 175 N.E. 256, 97 Ind.App. 131.

Memoranda of judge

Judgment may be amended after term, where memoranda of judge form basis therefor.—McCord v. Briggs & Turivas, 249 Ill.App. 516, affirmed 170 N.E. 320, 338 Ill. 158—34 C.J. p 248 note 15 [f].

55. Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.
Wis.—Milwaukee Electric Crane & Mfg. Corporation v. Feil Mfg. Co., 230 N.W. 607, 201 Wis. 494—Packard v. Kinzie Avenue Co., 81 N.W. 488, 105 Wis. 323.

56. Ark.—Kory v. Less, 87 S.W.2d 92, 183 Ark. 553—Bowman v. State, 129 S.W. 80, 93 Ark. 168—Liddell v. Bodenheimer, 95 S.W. 475, 78 Ark. 364, 115 Am.S.R. 42—Goddard v. State, 95 S.W. 476, 78 Ark. 226—Ward v. Magness, 86 S. W. 822, 75 Ark. 12.
Kan.—Bush v. Bush, 150 P.2d 168, 158 Kan. 760—United Zinc & Chemical Co. v. Morrison, 92 P. 1114, 76 Kan. 799—Christisen v. Bartlett, 84 P. 530, 73 Kan. 401, rehearing denied 85 P. 594, 73 Kan. 401—Martindale v. Battey, 84 P. 527, 73 Kan. 92.
N.H.—Hubley v. Goodwin, 4 A.2d 665, 90 N.H. 54.
Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.
Wis.—Packard v. Kinzie Avenue Co., 81 N.W. 488, 105 Wis. 323.
34 C.J. p 247 note 12.

Nature and amount of evidence required

Court in which judgment is entered may correct it on evidence satisfactory to itself, whether oral or documentary, record or otherwise, and the kind and amount of evidence requisite to show that amendments should be made are for court.—McAdams v. C. D. Shamburger Lumber Co., 240 P. 124, 112 Okl. 173.

Motion within two months after entry

Where motion to amend judgment was made within two months after entry, court could order correction based on facts outside record.—Milwaukee Electric Crane & Mfg. Corporation v. Feil Mfg. Co., 230 N. W. 607, 201 Wis. 494.

57. Ark.—Kory v. Less, 87 S.W.2d 92, 183 Ark. 553.
Kan.—Bush v. Bush, 150 P.2d 168, 158 Kan. 760—United Zinc & Chemical Co. v. Morrison, 92 P. 1114, 76 Kan. 799—Christisen v. Bartlett, 84 P. 530, 703 Kan. 401, rehearing denied 85 P. 594, 73 Kan. 401—Martindale v. Battey, 84 P. 527, 73 Kan. 92.
Okl.—McAdams v. C. D. Shamburger Lumber Co., 240 P. 124, 112 Okl. 173.

58. Okl.—McAdams v. C. D. Shamburger Lumber Co., supra.
Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.
34 C.J. p 247 note 12 [b].

59. Ark.—Tracy v. Tracy, 43 S.W. 2d 539, 184 Ark. 832—Kory v. Less, 87 S.W.2d 92, 183 Ark. 553.
Okl.—Co-Wok-Ochee v. Chapman, 183 P. 610, 76 Okl. 1—Jones v. Gallagher, 166 P. 204, 64 Okl. 41, 10 A.L.R. 518.
Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.

Absence of witness at opening of probate court when certain person was adjudged incompetent and guardian was appointed, and absence of sheriff and clerk from hearing were insufficient to overturn recitals of judgment.—Randolph v. Porter, 67 S.W.2d 574, 188 Ark. 729.

Overcoming recitals

In order to justify nunc pro tunc judgment after term, evidence, supplemented by judge's personal recollection, must be so clear as to overcome recitals of written judgment sought to be corrected.—Morgan v. Scott-Mayer Commission Co., 48 S.W. 2d 838, 185 Ark. 637.

Parol evidence was sufficient where the judge who rendered the original judgments was the same judge who made the correction therein as to

Parol and extrinsic evidence may be competent for various purposes in connection with record evidence,[60] as to show whether the record shows what was really done,[61] or to support or rebut evidence not technically a matter of record.[62]

Although there is authority to the contrary,[63] it has been held that an amendment at a subsequent term cannot be based on the judge's knowledge or recollection of the facts,[64] and that such an amendment cannot rest on the recollection of other persons.[65]

After the lapse of a long period, such as fifty years, clear, cogent, and convincing proof should be required for amendment,[66] nothing being left to speculation or conjecture.[67]

During the term, and before the court has lost jurisdiction of the cause, it has been held that an amendment of the judgment may be made on any evidence satisfactory to the court, whether oral or documentary, and whether of record or otherwise,[68] or the court may act solely on its own knowledge and recollection.[69]

§ 257. —— Hearing and Determination in General

On an application to amend a judgment, the adverse party is entitled to a hearing. Only matters involved in determining the necessity or propriety of the amendment will be examined.

On an application to amend a judgment, the adverse party is entitled to be heard in opposition.[70] The questions presented, whether of law or fact, are for the determination of the court to which the motion is addressed.[71] No questions will be examined other than those necessary to determine the necessity or propriety of the amendment.[72] Matters already determined will not be reviewed and

the date on which judgments were rendered, and the time between the rendition of the judgments and the correction thereof was not long.—St. Louis-San Francisco Ry. Co. v. Hovley, 120 S.W.2d 14, 196 Ark. 775.

To correct clerical mistake in judgment, evidence must be clear and convincing that mistake is clerical, and not judicial.—Fall River Irr. Co. v. Swendsen, 241 P. 1021, 41 Idaho 686.

60. Miss.—Wilson v. Handsboro, 54 So. 845, 99 Miss. 252, Ann.Cas. 1913E 345.
34 C.J. p 249 note 17.

61. Colo.—West Pueblo Ditch & Reservoir Co. v. Bessemer Ditch Co., 210 P. 601, 72 Colo. 224.

62. Tex.—Getzendaner v. Trinity & B. V. R. Co., 102 S.W. 161, 43 Tex. Civ.App. 66.
34 C.J. p 249 note 18.

63. Ark.—Randolph v. Porter, 67 S. W.2d 574, 188 Ark. 729—Morgan v. Scott-Mayer Commission Co., 48 S. W.2d 838, 185 Ark. 637—Bertig Bros. v. Grooms Bros., 262 S.W. 672, 164 Ark. 628.
Cal.—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209.
Kan.—Elliott v. Elliott, 114 P.2d 823, 154 Kan. 145—Christisen v. Bartlett, 84 P. 530, 73 Kan. 401, rehearing denied 85 P. 594, 73 Kan. 401.
Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.
Wis.—Wyman v. Buckstaff, 24 Wis. 477.
34 C.J. p 249 note 20.
Amendment of court records generally on court's recollection see Courts § 235.

Force of evidence
Judge's recollection of circumstances of rendering judgment and of court's intention has force of evidence on question of propriety of nunc pro tunc order.—Cazzell v. Cazzell, 3 P.2d 479, 133 Kan. 766.

Rule should be confined to cases in which the application is made within so short a time after the judgment is entered that the terms of the judgment pronounced will be fresh in the minds of both counsel and court.—Milwaukee Electric Crane & Mfg. Corporation v. Feil Mfg. Co., 230 N.W. 607, 201 Wis. 494—Packard v. Kinzie Avenue Co., 81 N.W. 488, 105 Wis. 323.

Vagueness or inaccuracy in terms of entry of judgment on docket could be corrected or omissions therefrom supplied through testimony and trial judge's own recollection of transaction.—Kluck v. Spitzer, Tex.Civ. App., 54 S.W.2d 1063.

64. Ill.—People ex rel. Sweitzer v. City of Chicago, 2 N.E.2d 330, 363 Ill. 409, 104 A.L.R. 1335—People v. Weinstein, 131 N.E. 631, 298 Ill. 264—People v. Leinecke, 125 N.E. 513, 290 Ill. 560.
Ky.—Combs v. Deaton, 251 S.W. 638, 199 Ky. 477.
34 C.J. p 249 note 19.

65. Ill.—People v. City of Chicago, 2 N.E.2d 330, 363 Ill. 409, 104 A. L.R. 1335—People v. Weinstein, 131 N.E. 631, 298 Ill. 264—People v. Leinecke, 125 N.E. 513, 290 Ill. 560.

Counsel
Tenn.—Clardy v. Clardy, 136 S.W.2d 526, 23 Tenn.App. 608.

66. Wyo.—Application of Beaver Dam Ditch Co., 93 P.2d 934, 54 Wyo. 459.

67. Wyo.—Application of Beaver Dam Ditch Co., supra.

68. Mo.—In re Henry County Mut. Burial Ass'n, 77 S.W.2d 124, 229 Mo.App. 300.
34 C.J. p 249 note 21.

69. Mo.—Kirkman v. Stevenson, 238 S.W. 543, 210 Mo.App. 380.
34 C.J. p 249 note 22.

70. Ill.—Village of Downer's Grove v. Glos, 147 N.E. 390, 316 Ill. 563.
Mo.—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282.
N.Y.—Cohen v. Dugan Bros., 235 N. Y.S. 118, 134 Misc. 155.
Tex.—Presidio Cotton Gin & Oil Co. v. Dupuy, Civ.App., 2 S.W.2d 341.
34 C.J. p 249 note 23.
Notice of application see supra § 254.

Right to cross-examine clerk
Before entry of nunc pro tunc order in subsequent term correcting judgment, plaintiff has right to be present and cross-examine clerk.—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282.

Correction of parties' names
Proofs or admissions and findings should precede order correcting names of parties, where corrections may involve questions of jurisdiction over parties.—E. B. Elliott Co. v. Turrentine, 151 So. 414, 113 Fla. 210.

71. N.H.—Hubley v. Goodwin, 4 A. 2d 665, 90 N.H. 54—Frink v. Frink, 43 N.H. 508, 80 Am.D. 189, 82 Am. D. 172.
Okl.—McAdams v. C. D. Shamburger Lumber Co., 240 P. 124, 112 Okl. 173.
34 C.J. p 249 note 24.
Discretion of court see infra § 259.

72. Ga.—Pryor v. Leonard, 57 Ga. 136.

Nature of questions raised
(1) Motion to modify judgment merely raises the question whether judgment follows the conclusions of

re-examined; the motion is not a new trial or rehearing of the original case.[73]

The opening of the judgment for the purpose of amending it should not be made the occasion for granting relief other than that asked in the motion,[74] although it is proper to impose reasonable and just conditions on granting the amendment, as discussed infra § 260. A judgment may be amended as to one only of several joint parties where the rights of the others will not be affected.[75]

Where an alteration of the record would be futile, an application therefor will not be granted.[76] An equitable estoppel is ground for denial of the application.[77] Where the motion is too broad, it may be denied in toto.[78]

An inquiry into facts dehors the record may be had by reference or otherwise.[79]

§ 258. —— Allowing Amendment Nunc pro Tunc

Subject to the rules governing amendments and corrections of judgments generally, a court may amend or correct its own judgments nunc pro tunc, for clerical errors or omissions, so as to make them speak the truth, but not to correct judicial errors or omissions, or to change a judgment.

Subject to the rules governing amendments and corrections of judgments generally, discussed supra § 228 et seq, the power to amend or correct a judgment nunc pro tunc so as to make it speak the truth is inherent in courts of record.[80] Thus, if a judgment has been irregularly entered, or fails to contain all that is essential to it, or to express the true decision of the court, in consequence of clerical errors or omissions, it may be completed by an order nunc pro tunc, or may be set aside and the true and correct judgment entered nunc pro tunc.[81]

law.—Kostanzer v. State ex rel. Ramsey, 187 N.E. 337, 205 Ind. 536.

(2) A motion to modify a judgment does not present any question as to what finding ought to be, but only whether judgment conforms to findings actually made.—Briles v. Prudential Ins. Co., 25 N.E.2d 240, 216 Ind. 627—Brier v. Childers, 148 N.E. 474, 196 Ind. 520—Elliott v. Gardner, 46 N.E.2d 702, 113 Ind.App. 47.

(3) A judge who has made a decision should not direct amendment, unless he is satisfied that original entry does not clearly express order which was made.—Kohlstedt v. Hauseur, 74 P.2d 314, 24 Cal.App.2d 60.

Existence of cause of action or defense

Modification of judgment was held substantially to comply with statute requiring existence of cause of action or defense to be adjudged.—Burris v. Reinhardt, 242 P. 143, 120 Kan. 32.

73. Wyo.—Application of Beaver Dam Ditch Co., 93 P.2d 934, 54 Wyo. 459.
34 C.J. p 249 note 26.

74. N.Y.—Siegrist v. Holloway, 7 N.Y.Civ.Proc. 58.

75. Ark.—Kory v. Less, 37 S.W.2d 92, 183 Ark. 553.
Mo.—Neenan v. St. Joseph, 28 S.W. 963, 126 Mo. 89.
Entirety of judgments see supra § 33.
Rights of third persons see infra § 264.

76. Me.—Hurley v. Robinson, 27 A. 270, 85 Me. 400.

77. Kan.—Cornell University v. Parkinson, 53 P. 138, 59 Kan. 365.

78. Ind.—Overbay v. Fisher, 115 N.E. 366, 64 Ind.App. 44.
34 C.J. p 250 note 32.

Motion good in part and bad in part

Although a judgment for costs includes costs not properly recoverable, it is not error to overrule a motion to modify such judgment, the motion including both costs properly, and those improperly, awarded.—Spence v. Owen County, 18 N.E. 513, 117 Ind. 573.

79. N.Y.—Pitt v. Davison, 12 Abb. Pr. 385, affirmed 37 N.Y. 235.
Extrinsic evidence as source of amendment see supra § 256.

80. Cal.—Mather v. Mather, 134 P.2d 795, reheard 140 P.2d 808, 22 Cal.2d 713—E. Clemens Horst Co. v. Federal Mut. Liability Ins. Co., 71 P.2d 599, 22 Cal.App.2d 548.
Iowa.—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 232 Iowa 1226.
Mo.—Schulte v. Schulte, 140 S.W.2d 51—In re Tompkins' Estate, App., 50 S.W.2d 659.
Okl.—Hawks v. McCormack, 71 P.2d 724, 180 Okl. 569.
Tex.—Collins v. Davenport, Civ.App., 192 S.W.2d 291—White v. Haynes, Civ.App., 60 S.W.2d 275, error dismissed.
34 C.J. p 76 note 69.
Amending and correcting record generally see Courts §§ 231–236.
Entering judgment nunc pro tunc see supra §§ 117–121.

81. U.S.—Irving Trust Co. v. American Silk Mills, Inc., C.C.A.N.Y., 72 F.2d 288, certiorari denied American Silk Mills, Inc., v. Irving Trust Co., 55 S.Ct. 239, 293 U.S. 624, 79 L.Ed. 711—Fultz v. Laird, C.C.A.Mich., 24 F.2d 172.
Ala.—Sisson v. Leonard, 11 So.2d 144, 243 Ala. 546—Gaston v. Reconstruction Finance Corporation, 185 So. 893, 237 Ala. 111—Parker v. Duke, 157 So. 436, 229 Ala. 361—Ex parte R. H. Byrd Contracting Co., 156 So. 579, 26 Ala.App. 171, certiorari denied 156 So. 582, 229 Ala. 248.
Ark.—**Corpus Juris quoted in** Wright v. Curry, 187 S.W.2d 880, 881, 208 Ark. 816—Bright v. Johnson, 152 S.W.2d 540, 202 Ark. 751.
Cal.—Mather v. Mather, 134 P.2d 795, reheard 140 P.2d 808, 22 Cal.2d 713—Hughes v. Hughes, App., 168 P.2d 429—Benway v. Benway, 159 P.2d 682, 69 Cal.App.2d 574—Stewart v. Abernathy, 144 P.2d 844, 62 Cal.App.2d 429—Felton Chemical Co. v. Superior Court in and for Los Angeles County, 92 P.2d 634, 33 Cal.App.2d 622—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371—E. Clemens Horst Co. v. Federal Mut. Liability Ins. Co., 71 P.2d 599, 22 Cal.App.2d 548—Albori v. Sykes, 65 P.2d 84, 18 Cal.App.2d 619—Haug v. Superior Court in and for Los Angeles County, 37 P.2d 1048, 2 Cal.App.2d 547—Schroeder v. Superior Court of California in and for Alameda County, 239 P. 65, 73 Cal.App. 687.
Fla.—**Corpus Juris cited in** Taylor v. Chapman, 173 So. 143, 144, 127 Fla. 401—R. R. Ricou & Sons Co. v. Merwin, 113 So. 745, 94 Fla. 86.
Ga.—Rogers v. Rigell, 188 S.E. 704, 183 Ga. 455.
Ill.—Village of Downer's Grove v. Glos, 147 N.E. 390, 316 Ill. 563—Chicago Wood Piling Co. v. Anderson, 39 N.E.2d 702, 313 Ill.App. 242.
Ind.—Citizens' Trust Co. v. Wheeling Can Co., 157 N.E. 441, 199 Ind. 311.
Iowa.—Hobson v. Dempsey Const. Co., 7 N.W.2d 896, 232 Iowa 1226—Murnan v. Schuldt, 265 N.W. 369, 221 Iowa 242.
Kan.—State v. Frame, 95 P.2d 278, 150 Kan. 646.
Mich.—Donohue v. Merriam, 213 N.W. 150, 238 Mich. 253.

The power to order the entry of judgments nunc pro tunc, however, cannot be used for the purpose of correcting judicial errors or omissions of the court.[82] This procedure cannot be employed to give life to, or validate, a void judgment,[83] or to change or revise a judgment,[84] or to set aside a judgment actually rendered,[85] or to change the judgment actually rendered to one which the court neither rendered nor intended to render,[86] or to render a judgment different from the one actually

Minn.—Plankerton v. Continental Casualty Co., 230 N.W. 464, 180 Minn. 163.

Mo.—Wiggins v. Perry, 119 S.W.2d 539, 343 Mo. 40, 126 A.L.R. 949—Curry v. Crull, 116 S.W.2d 125, 342 Mo. 553—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 356—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282—Vaughn v. Kansas City Gas Co., 159 S.W.2d 690, 236 Mo.App. 669—State ex rel. Arthur v. Hammett, 151 S.W.2d 695, 235 Mo.App. 927—Haycraft v. Haycraft, App., 141 S.W.2d 170—Thompson v. Baer, App., 139 S.W.2d 1080—Ex parte Messina, 128 S.W.2d 1052, 233 Mo.App. 1234—Fulton Loan Service No. 2 v. Colvin, App., 81 S.W.2d 373—State ex rel. and to Use of Grant v. Juden, App., 50 S.W.2d 702—In re Tompkins' Estate, App., 50 S.W.2d 659—Everett v. Glenn, 35 S.W.2d 652, 225 Mo.App. 921—Cordes v. Femmer, App., 289 S.W. 13—Pulitzer Pub. Co. v. Allen, 113 S.W. 1159, 134 Mo.App. 229.

Mont.—State Bank of New Salem v. Schultze, 209 P. 599, 63 Mont. 410.

Ohio.—Webb v. Western Reserve Bond & Share Co., 153 N.E. 289, 115 Ohio St. 247, 48 A.L.R. 1176—State ex rel. Stephens v. Wiseman, App., 42 N.E.2d 240—State ex rel. Fulton v. Ach, 24 N.E.2d 462, 62 Ohio App. 439.

Okl.—Hawks v. McCormack, 71 P.2d 724, 180 Okl. 569.

Tex.—Collins v. Davenport, Civ.App., 192 S.W.2d 291—Johnson v. Campbell, Civ.App., 154 S.W.2d 878—Kveton v. Farmers Royalty Holding Co., Civ.App., 149 S.W.2d 998—Hays v. Hughes, Civ.App., 106 S.W.2d 724, error refused—Rogers v. Allen, Civ.App., 80 S.W.2d 1085—Veal v. Jaggers, Civ.App., 13 S.W.2d 745, error dismissed.

34 C.J. p 76 note 70.

What constitutes clerical error generally see supra § 237.

The test of whether a judgment may be amended nunc pro tunc is whether the change will make the record speak the truth as to what was actually determined or done or intended to be determined or done by the court, or whether it will alter such action or intended action.—State ex rel. Kruletz v. District Court of Fifth Judicial Dist. in and for Beaverhead County, 98 P.2d 883, 110 Mont. 36.

Purpose

(1) The purpose of a nunc pro tunc order correcting a clerical error in a judgment appearing on the face of the record is to make the judgment as entered conform to the judicial decision actually made.—Barkelew v. Barkelew, Cal.App., 166 P.2d 57.

(2) The purpose of a nunc pro tunc judgment is to record a judgment theretofore pronounced by the court but which has been imperfectly or erroneously entered.—Goodman v. Mayer, 128 S.W.2d 1156, 133 Tex. 319.

(3) The purpose of a nunc pro tunc order is to have judgment reflect its true finding, and, whenever original judgment entry does not do so, trial court has very broad power to correct the entry by nunc pro tunc order.—Tresemer v. Gugle, 42 N.E.2d 712, 70 Ohio App. 409.

(4) The sole purpose for which a judgment may be amended nunc pro tunc is to correct an error which has crept into the judgment by reason of misprision on part of the clerk, judge, or counsel, when the error is apparent on face of the records, so that the judgment will truly express what was actually decided or intended to be decided and will grant the relief originally intended to be granted together with the relief following therefrom by reason of law.—State ex rel. Kruletz v. District Court of Fifth Judicial Dist. in and for Beaverhead County, 98 P.2d 883, 110 Mont. 36.

Judgment in excess of statutory limit was not a clerical error which could be corrected by a nunc pro tunc order.—Garrison v. Williams, 17 P.2d 1072, 128 Cal.App. 598.

Lapse of long period

A judgment may be amended at a subsequent term, nunc pro tunc, even a long time after rendition, and thus perfect verdict, where rights of intermediate parties will not be prejudiced.—Tanner v. Wilson, 192 S.E. 425, 184 Ga. 628.

82. Ark.—Wright v. Curry, 187 S.W. 2d 880, 208 Ark. 816.

Cal.—Reider v. Aqueduct Const. Co., 89 P.2d 169, 32 Cal.App.2d 90—E. Clemens Horst Co. v. Federal Mut. Liability Ins. Co., 71 P.2d 599, 22 Cal.App.2d 548—Albori v. Sykes, 65 P.2d 84, 18 Cal.App.2d 619—Garrison v. Williams, 17 P.2d 1072, 128 Cal.App. 598—Schroeder v. Superior Court of California in and for Alameda County, 239 P. 65, 73 Cal.App. 687.

Ky.—Bowling v. Evans, 98 S.W.2d 916, 266 Ky. 242.

Mo.—Wiggins v. Perry, 119 S.W.2d 539, 343 Mo. 40, 126 A.L.R. 949—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 356—Haycraft v. Haycraft, App., 141 S.W.2d 170—Thompson v. Baer, App., 139 S.W.2d 1080—Cordes v. Femmer, App., 289 S.W. 13.

Tex.—Hays v. Hughes, Civ.App., 106 S.W.2d 724, error refused.

34 C.J. p 77 note 72.

Judicial errors generally see supra § 238.

83. Ga.—Wright v. Broom, 158 S.E. 443, 43 Ga.App. 269.

Mo.—State v. Pemberton, 151 S.W.2d 111, 235 Mo.App. 1128.

84. Ark.—Evans v. U. S. Anthracite Coal Co., 21 S.W.2d 952, 180 Ark. 578.

Cal.—Albori v. Sykes, 65 P.2d 84, 18 Cal.App.2d 619—Schroeder v. Superior Court of California in and for Alameda County, 239 P. 65, 73 Cal.App. 687.

Ga.—Rogers v. Rigell, 188 S.E. 704, 183 Ga. 455.

Change of date to save appeal from being premature is a nullity.—Hampshire Arms Hotel Co. v. Wells, 298 N.W. 452, 210 Minn. 286.

Description of lands

The purpose of such amendment is not to change the description of lands in the decree otherwise than to conform to pleadings and proof.—State ex rel. Kruletz v. District Court of Fifth Judicial Dist. in and for Beaverhead County, 98 P.2d 883, 110 Mont. 36.

Matters not in court's decision

The amendment of a judgment by order nunc pro tunc may not make the judgment express anything not embraced in the court's decision, although proposed amendment contains matters which ought to have been so pronounced.—Felton Chemical Co. v. Superior Court in and for Los Angeles County, 92 P.2d 684, 33 Cal.App.2d 622.

85. Mont.—State ex rel. Kruletz v. District Court of Fifth Judicial Dist. in and for Beaverhead County, 98 P.2d 883, 110 Mont. 36.

86. Ark.—**Corpus Juris quoted in** Wright v. Curry, 187 S.W.2d 880, 881, 208 Ark. 816.

Cal.—Albori v. Sykes, 65 P.2d 84, 18 Cal.App.2d 619—Schroeder v. Superior Court of California in and for Alameda County, 239 P. 65, 73 Cal.App. 687.

rendered, even though the judgment actually rendered was not the judgment the judge intended to render.[87] It cannot be used to enlarge the judgment as originally rendered[88] or to change the rights fixed by it as it was originally intended or made,[89] nor can it be employed where the fault in the original judgment is that it is wrong as a matter of law[90] or to allow the court to review and reverse its action with respect to what it formerly refused to do or assent to.[91]

Where the clerk has made no entry of the judgment, a motion to amend by entering judgment nunc pro tunc cannot be granted because there is no judgment to amend.[92]

§ 259. —— Discretion of Court

Whether or not a court will amend, modify, or correct a judgment generally rests within its sound discretion.

Although in some circumstances the allowance of an amendment or correction of a judgment is a matter of duty,[93] an application to amend, modify, or correct a judgment is generally addressed to the sound discretion of the court,[94] and, as stated in Appeal & Error § 1630, the exercise of such discretion will not be interfered with by an appellate court unless an abuse of discretion is manifest, nor, as discussed in the C.J.S. title Mandamus § 97, also 38 C.J. p 636 notes 71–78, will it usually be controlled by mandamus. This discretion, however, must not be exercised in an arbitrary manner,[95] and the court will not favorably exercise its discretion and allow an amendment where injustice will thereby be done to anyone.[96] Relief is granted on equitable principles and only on a showing of merits in the application.[97]

After the term, the power of amendment should be exercised discretely and with caution.[98]

§ 260. —— Imposition of Terms

In granting an application to amend a judgment, the court may impose reasonable and just terms.

In the exercise of its discretion to grant or refuse an application to amend a judgment, the court, in granting such application, may impose such terms as are reasonable and just.[99]

Ohio.—Herman v. Ohio Finance Co., 32 N.E.2d 28, 66 Ohio App. 164.
34 C.J. p 77 note 75.

87. Mo.—Wiggins v. Perry, 119 S.W. 2d 839, 343 Mo. 40, 126 A.L.R. 949—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386—Clancy v. Herman C. G. Luyties Realty Co., 10 S.W.2d 914, 321 Mo. 282—Burnside v. Wand, 71 S.W. 337, 170 Mo. 531, 62 L.R.A. 427—Haycraft v. Haycraft, App., 141 S.W.2d 170—Thompson v. Baer, App., 139 S.W.2d 1080—Cordes v. Femmer, App., 289 S.W. 13.

88. Cal.—Felton Chemical Co. v. Superior Court in and for Los Angeles County, 92 P.2d 684, 33 Cal. App.2d 622.

Varying rights of parties

A nunc pro tunc order enlarging a judgment so as to vary the rights of the parties as fixed by the original decision is void, although the court informed counsel of its intention to enter such order and read its contents to counsel who did not object thereto, and although the court committed a judicial error through inadvertence and oversight.—Felton Chemical Co. v. Superior Court in and for Los Angeles County, supra.

89. Mont.—State ex rel. Kruletz v. District Court of Fifth Judicial Dist. in and for Beaverhead County, 98 P.2d 883, 110 Mont. 36.

90. Ark.—**Corpus Juris quoted in** Wright v. Curry, 187 S.W.2d 880, 881, 208 Ark. 816.
34 C.J. p 77 note 76.

91. Ark.—**Corpus Juris quoted in** Wright v. Curry, 187 S.W.2d 880, 881, 208 Ark. 816.
34 C.J. p 77 note 77.

92. S.C.—Brown v. Coward, 21 S.C. L. 4.
34 C.J. p 244 note 69.

93. Minn.—National Council, K. & L. S. v. Silver, 164 N.W. 1015, 138 Minn. 330, 10 A.L.R. 523.
Wash.—O'Bryan v. American Inv. & Imp. Co., 97 P. 241, 50 Wash. 371.

Amendment as matter of right

(1) In a case where the mistake is conceded, where it is material, where the judgment is unexecuted, and the parties are still in statu quo, and the rights of no third parties have intervened, the parties are entitled as a matter of right to the judgment the court has ordered, and it is the duty of the court to correct the mistake.—National Council K. & L. S. v. Silver, 164 N.W. 1015, 138 Minn. 330, 10 A.L.R. 523.

(2) Where an entry of a judgment concededly does not speak the truth, no discretion is involved and it is the imperative duty of the court to correct such an entry when no innocent third person will suffer thereby.—O'Bryan v. American Inv. & Imp. Co., 97 P. 241, 50 Wash. 371.

94. Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.
Kan.—Hoffman v. Hoffman, 135 P.2d 887, 156 Kan. 647—Schubach v. Hammer, 232 P. 1041, 117 Kan. 615.
Nev.—Gottwals v. Rencher, 98 P.2d 481, 60 Nev. 35, 126 A.L.R. 1262.
Ohio.—Central Nat. Bank of Cleveland v. Ely, App., 44 N.E.2d 822.
Okl.—Long v. Hill, 145 P.2d 434, 193 Okl. 463—Pitts v. Walker, 105 P.2d 760, 188 Okl. 17—Parker v. Board of County Com'rs of Okmulgee County, 102 P.2d 880, 187 Okl. 308, followed in Parker v. Board of Com'rs of Okmulgee County, 102 P.2d 883, 187 Okl. 311—Montague v. State ex rel. Commissioners of Land Office of Oklahoma, 89 P.2d 283, 184 Okl. 574—Wilson v. Porter, 221 P. 713, 94 Okl. 259.
34 C.J. p 250 note 34.
Discretion of court during term see supra § 229.

95. Ga.—Grogan v. Deraney, 148 S. E. 912, 38 Ga.App. 287.
W.Va.—Baker v. Gaskins, 36 S.E.2d 893.

96. Ohio.—Central Nat. Bank of Cleveland v. Ely, App., 44 N.E.2d 822.
34 C.J. p 250 note 38.
Rights of third persons see infra § 264.

97. Wis.—Reichenbach v. Fisher, 32 Wis. 133.

98. U.S.—Odell v. Reynolds, Ohio, 70 F. 656, 17 C.C.A. 317.

99. Mich.—Salter v. Sutherland, 85 N.W. 112, 125 Mich. 662.
34 C.J. p 250 note 42.

Payment of specified sum

The court may amend a judgment subject to the payment of a specified sum by the party who caused the irregularities necessitating such amendment.—Whitney v. Lyric-Ro-

§ 261. —— Order

An order granting or refusing an amendment to a judgment is a final order. Where it allows such amendment, it should recite all necessary jurisdictional facts and should not be too broad.

The order granting or overruling a motion to amend a judgment is a final order which cannot be set aside at a subsequent term,[1] and which precludes a renewal of the motion[2] or a retrial of the question in a subsequent action.[3]

An order allowing an amendment of a judgment should recite all necessary jurisdictional facts.[4] It should not be too broad;[5] only as much of the judgment as needs correction should be corrected.[6]

§ 262. —— Mode of Making Amendments

Although good practice requires that the amendment of a judgment be actually made as directed, other methods are permitted or tolerated, such as the entry of the order for amendment, or erasure and interlineation.

Although good practice requires not only that the amendment of a judgment should be ordered, but that the clerk should actually make it as directed,[7] such amendment may practically be accomplished by entering the order therefor, or the making and entry of an order which effects the same result,[8] in which case the amendment may actually be made at any time thereafter,[9] or by the entry of a release or remittitur, where that will make the necessary correction.[10] The courts tolerate, but do not favor, the making of such corrections by erasure and interlineation on the original record,[11] the better method being to annul or vacate the defective entry and replace it by a new entry,[12] which, as stated supra § 258, in proper cases may be ordered to be made nunc pro tunc. There must be a compliance with a statute requiring amendment in open court.[13] The judgment of a court cannot be changed or modified by the agreement of parties or the testimony of witnesses.[14]

Where a judgment already made in a cause is tacitly revoked during the same term, and a second judgment is made on the same subject matter, it is more orderly and convenient, in making the second judgment, to refer to the first one and state in what particular it is intended to modify, supplement, or supersede it; but this is not essential where a comparison of the two judgments discloses the changes or modifications made.[15] An order authorizing execution on a judgment does not constitute an amendment of the judgment.[16] The filing of amended findings and the entry of a modified judgment, without first vacating the judgment previously entered, has been held proper.[17]

§ 263. —— Operation and Effect in General

Generally an amendment or correction of a judgment makes the judgment of the same effect as though the defects necessitating the amendment had never existed; it does not confer any new or additional rights.

Since the amendment of a judgment is merely perfected evidence of what, in contemplation of law, existed from the time judgment was pronounced,[18] as between the parties the amendment or correction of a judgment relates back to the original judgment

chester Corporation, 287 N.Y.S. 126, 247 App.Div. 925.

1. Ky.—Bonar v. Gosney, 30 S.W. 602, 17 Ky.L. 92.

2. Ky.—Bonar v. Gosney, supra.
34 C.J. p 250 note 45.

3. Kan.—Emery v. Farmers' State Bank, 155 P. 34, 97 Kan. 231.

4. Tenn.—Carney v. McDonald, 10 Heisk. 232.

5. N.Y.—Frankland v. Schoenfeld, 106 N.Y.S. 1101, 56 Misc. 547.
34 C.J. p 250 note 48.

6. Ky.—Snowden v. Darnaby, 15 Ky. L. 332.

7. Mo.—State v. Broaddus, 111 S. W. 508, 212 Mo. 685.
34 C.J. p 251 note 55.

8. Tex.—Swanson v. Holt, Civ.App., 56 S.W.2d 266, reversed on other grounds 87 S.W.2d 1090, 126 Tex. 383, remanding cause for further consideration, Civ.App., 97 S.W.2d 285.
34 C.J. p 251 note 52.

9. N.C.—Marshall v. Fisher, 46 N.C. 111.

10. U.S.—Ambler v. McMechen, D. C., 1 F.Cas.No.273, 1 Cranch C.C. 320.
34 C.J. p 251 note 54.

Waiver of new entry after remittitur

Parties after reduction of judgment by writing of remittitur on combination docket could waive new entry on district court record; parties on filing of motion after remittitur actuating continued existence of judgment in effect waived cancellation of existing judgment and new entry.—Fox v. McCurnin, 228 N.W. 582, 210 Iowa 429.

11. Tex.—Goodyear Tire & Rubber Co. v. Pearcy, Civ.App., 80 S.W.2d 1096.
34 C.J. p 251 note 56.

Party's initials

Although the better practice in correcting a clerical mistake in entering a judgment, such as where a party's initials are erroneously given, is to reënter the corrected judgment nunc pro tunc, a correction by erasure or by interlineation does not destroy the judgment.—Rogers v. Allen, Tex.Civ.App., 80 S.W.2d 1085—Goodyear Tire & Rubber Co. v. Pearcy, Tex.Civ.App., 80 S.W.2d 1096.

12. Tex.—Swanson v. Holt, Civ.App., 56 S.W.2d 266, reversed on other grounds 87 S.W.2d 1090, 126 Tex. 383, remanding cause for further consideration, Civ.App., 97 S.W.2d 285.
34 C.J. p 251 note 57.

13. Tex.—Presidio Cotton Gin & Oil Co. v. Dupuy, Civ.App., 2 S.W.2d 341.

14. Ill.—People v. Traeger, 171 N.E. 548, 339 Ill. 356.

15. Mo.—Eddie v. Eddie, 39 S.W. 451, 138 Mo. 599.
34 C.J. p 251 note 59.

16. Colo.—Scott v. Woodhams, 246 P. 1027, 79 Colo. 528, followed in 246 P. 1029, 79 Colo. 532.

17. Cal.—Robinson v. Fidelity & Deposit Co. of Maryland, 42 P.2d 653, 5 Cal.App.2d 241.

18. Okl.—Gaines v. Gaines, 151 P.2d 393, 194 Okl. 343.

and becomes a part of it, and makes the judgment of the same effect as though the defects or mistakes because of which it was amended or corrected had never existed.[19] However, it usually does not make a new judgment or confer any new or additional rights,[20] although a change materially affecting a judgment and the rights of the parties against whom it is rendered and involving the exercise of judicial discretion does amount to a new judgment.[21]

Generally an amendment leaves the original judgment effective and unimpaired;[22] and where the court strikes out part of a judgment the remaining portion stands[23] so that the court need not enter a new judgment with the stricken part omitted.[24]

An order amending a clerical error in a judgment does not supersede the judgment or incorporate it into the order,[25] and the act of the clerk in correcting the judgment pursuant to such order is ministerial and does not affect the materiality or finality of the judgment or order.[26]

Where a party applies for and obtains an amendment of the judgment, he thereby waives all erroneous rulings of the court preceding the judgment.[27] An amendment or correction of a judgment is binding on those parties who were afforded an opportunity to be heard;[28] but an amendment or modification changing the rights of the parties as fixed by a former judgment is not binding on a party in interest who was not afforded such opportunity.[29]

§ 264. —— Rights of Third Persons

An amendment of a judgment, unless made at the same term at which the judgment was rendered, will not be allowed to prejudice the rights of third persons who have acquired interests for value and without notice.

While a few cases hold that it is the duty of the court to amend and correct its records so as to make them speak the truth regardless of the effect of so doing on the interests of either parties or third persons,[30] the general rule is that an amendment of a judgment will not be allowed to prejudice the rights of third persons who have acquired interests for value,[31] except where they have taken with notice[32] or where the amendment is made at the same term at which the judgment is rendered.[33] The order allowing an amendment should contain a saving of the intervening rights of third persons[34] but the law makes such reservation whether or not it is expressly reserved.[35]

19. Ark.—T. J. Moss Tie Co. v. Miller, 276 S.W. 586, 169 Ark. 657.
Okl.—Gaines v. Gaines, 151 P.2d 393, 194 Okl. 343—Mason v. Slonecker, 219 P. 357, 92 Okl. 227.
34 C.J. p 251 note 60.

Waiver of irregularity
Recitation in amendment to final judgment that all parties consented to amendment was waiver of alleged irregularity of circuit judge in having arrived at his conclusions and placed them in form of order and judgment in chambers in city which was not county seat and afterwards filing them in office of clerk of court in county seat to be recorded in court's minutes as judgment of court.—State ex rel. Landis v. City of Auburndale, 163 So. 698, 121 Fla. 336.

20. Cal.—McConville v. Superior Court within and for Los Angeles County, 248 P. 553, 78 Cal.App. 203.
Okl.—Mason v. Slonecker, 219 P. 357, 92 Okl. 227.
34 C.J. p 251 note 61.

21. Cal.—McConville v. Superior Court within and for Los Angeles County, 248 P. 553, 78 Cal.App. 203.

22. Cal.—McConville v. Superior Court within and for Los Angeles County, supra.

23. Ind.—Elliott v. Gardner, 46 N. E.2d 702, 113 Ind.App. 47.

Where the name of a defendant is stricken from a judgment, the judgment is valid as against the remaining defendants.—Henderson v. Ellarbee, 131 S.E. 524, 35 Ga.App. 5.

24. Ind.—Elliott v. Gardner, 46 N.E. 2d 702, 113 Ind.App. 47.

25. Cal.—McConville v. Superior Court within and for Los Angeles County, 248 P. 553, 78 Cal.App. 203.

26. Cal.—McConville v. Superior Court within and for Los Angeles County, supra.

27. U.S.—Sabine Hardwood Co. v. West Lumber Co., D.C.Tex., 238 F. 611, affirmed 248 F. 123, 160 C.C. A. 263.
Ind.—Pittsburg, C. C. & St. L. R. Co. v. Beck, 52 N.E. 399, superseded, 53 N.E. 439, 152 Ind. 421.

28. Iowa.—Samek v. Taylor, 213 N. W. 801, 203 Iowa 1064.
Pa.—Altoona Trust Co. v. Fockler, 165 A. 740, 311 Pa. 426.

29. N.Y.—Emmet v. Runyon, 123 N. Y.S. 1026, 139 App.Div. 310.

30. N.C.—Walton v. Pearson, 85 N. C. 34.
34 C.J. p 252 note 69.

Estoppel
Parties to the record by their dealings with third persons may subject themselves to estoppels or other equities which will prevent them from taking any advantage from the amendment.—Foster v. Woodfin, 65 N.C. 29.

31. U.S.—Sabine Hardwood Co. v. West Lumber Co., D.C.Tex., 238 F. 611, affirmed 248 F. 123, 160 C.C. A. 263.
34 C.J. p 252 note 64—47 C.J. p 435 note 6.

Land descriptions
Clerical error in judgments concerning land descriptions may be corrected nunc pro tunc, if the rights of strangers are not affected.—State Bank of New Salem v. Schultze, 209 P. 599, 63 Mont. 410.

Third persons held not prejudiced by correction.—Plankerton v. Continental Casualty Co., 230 N.W. 464, 180 Minn. 168.

32. U.S.—Sabine Hardwood Co. v. West Lumber Co., D.C.Tex., 238 F. 611, affirmed 248 F. 123, 160 C.C.A. 263.
Ind.—Colman v. Watson, 54 Ind. 65.

33. U.S.—Henderson v. Carbondale Coal & Coke Co., Ill., 11 S.Ct. 691, 140 U.S. 25, 35 L.Ed. 332.
34 C.J. p 252 note 66.

34. Or.—Senkler v. Berry, 96 P. 1070, 52 Or. 212.
34 C.J. p 252 note 67.

35. U.S.—Sabine Hardwood Co. v. West Lumber Co., D.C.Tex., 238 F. 611, affirmed 248 F. 123, 160 C. C.A. 263.
34 C.J. p 252 notes 64–67.

C. OPENING AND VACATING

1. In General

§ 265. In General

Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgments.

In accordance with the rules governing the power and control of a court over its judgments generally, considered supra §§ 228–235, the authority to vacate or set aside its own judgments is inherently incident to all courts of record or of general jurisdiction,[36] and may be exercised without the grant of any special statutory authority,[37] although courts of special or limited jurisdiction have no such powers in the absence of statutes expressly granting them.[38] However, in jurisdictions having statutes regulating the power, the statutes are controlling.[39] The rules governing the vacation of decrees in equity and of judgments at law are the same.[40]

Opening and vacating distinguished. Opening a judgment is not setting it aside, striking it, annulling, or reversing it, but is a mode of allowing defendant a hearing on the merits, the judgment meanwhile remaining in force and standing as security; if the defense is successful the judgment is vacated, otherwise when it is closed by the action of the court it operates as though it had never been disturbed.[41] Another distinction is that a petition to vacate or set aside or strike a judgment is based on fatal defects apparent on the face of the record, while petitions to open concern other matters associated with the judgment, or those on which the judgment is based, in other words, the merits of the controversy.[42] An application to open a judgment admits its validity.[43]

Judgments against personal representative. The rule stated above has been held to apply to judgments against a personal representative, and such judgments may be opened or vacated when proper grounds for such relief exist.[44]

Judgments in ejectment. Within and under the general rules, a judgment in ejectment may be set aside for a sufficient cause,[45] whether the judgment is against the casual ejector[46] or against the tenant.[47]

Motion for new trial distinguished. The motion to vacate is to be distinguished from a motion for a new trial which is granted on different principles and grounds;[48] and statutes regulating or limiting motions for a new trial have no application to motions to open or vacate the judgment.[49]

"Impeach." The word "impeach," as applied to

36. Ala.—Alabama By-Products Corporation v. Rutherford, 195 So. 210, 239 Ala. 413.
Fla.—Skipper v. Schumacher, 160 So. 357, 118 Fla. 867, followed in Collier v. King, 160 So. 926, 118 Fla. 866, and certiorari denied 56 S.Ct. 88, 296 U.S. 578, 80 L.Ed. 408.
Tex.—Pavelka v. Overton, Civ.App., 47 S.W.2d 369, error refused.
34 C.J. p 252 note 72.
Opening or vacating:
Divorce decrees see Divorce §§ 166, 168–172.
Judgments against married women see Husband and Wife § 454.
Power of:
Appellate court to vacate its judgments see Appeal and Error § 1957 a.
Probate court to open or vacate its judgments or orders see Courts § 309 c.
Trial court to open or vacate judgment after perfection of appeal see Appeal and Error § 616.
Review of referee's decision
A court cannot, on a motion to vacate a judgment, review the decision of the referee on which the judgment was entered, as such remedy is only by appeal.—Jones v. Jones, 24 N.Y.S. 1031, 71 Hun 519.

37. Ark.—Wells v. W. B. Baker Lumber Co., 155 S.W. 122, 107 Ark. 415.
34 C.J. p 253 note 76.

38. Ind.—Pass v. State, 147 N.E. 287, 83 Ind.App. 598.
N.Y.—Holmes v. Evans, 13 N.Y.S. 610, 59 N.Y.S. 121, affirmed 29 N.E. 233, 129 N.Y. 140.
Wis.—In re Cudahy's Estate, 219 N.W. 203, 196 Wis. 260.
34 C.J. p 253 note 76 [a].

39. Iowa.—Hammon v. Gilson, 291 N.W. 448, 227 Iowa 1366—Workman v. District Court, Delaware County, 269 N.W. 27, 222 Iowa 364.
34 C.J. p 254 note 77.

40. Mont.—Meyer v. Lemley, 282 P. 268, 86 Mont. 83.
Vacation of decrees in equity see Equity §§ 622–667.

41. Neb.—Farmers' Loan & Trust Co. v. Killinger, 65 N.W. 790, 46 Neb. 677, 41 L.R.A. 222.
Pa.—Kahn v. Kahn, Com.Pl., 47 Lack.Jur. 101—Schantz v. Clemmer, Com.Pl., 21 Leh.L.J. 394.
34 C.J. p 255 note 81.

42. Pa.—Nixon v. Nixon, 198 A. 154, 329 Pa. 256.
Judgment must be null and void
Generally a judgment cannot be stricken off unless it is entirely null and void; and if it is merely irregular it will be opened and defendant let in to a defense.—Dikeman v. Butterfield, 19 A. 938, 135 Pa. 236—34 C.J. p 376 note 14.

43. Pa.—Noonan v. Hoff, Com.Pl., 57 York Leg.Rec. 113, affirmed R. S. Noonan, Inc., v. Hoff, 38 A.2d 53, 350 Pa. 295.
34 C.J. p 255 note 82.

44. Pa.—Fischer v. Woodruff, 98 A. 878, 254 Pa. 140—24 C.J. p 887 note 79, p 888 note 80.

45. Ga.—Bryan v. Averett, 21 Ga. 401, 68 Am.D. 464.
19 C.J. p 1212 note 65.

46. Ala.—Howard v. Kennedy, 4 Ala. 592, 39 Am.D. 307.
19 C.J. p 1212 note 67.

47. Ill.—Williams v. Brunton, 8 Ill. 600.
19 C.J. p 1212 note 68.

48. Ill.—Grubb v. Milan, 157 Ill. App. 228, reversed on other grounds 94 N.E. 927, 249 Ill. 456.
34 C.J. p 254 note 79.

49. Ky.—Union Gas & Oil Co. v. Kelly, 238 S.W. 334, 194 Ky. 153.
34 C.J. p 255 note 80.

a judgment, means to show that it was erroneous,[50] not to deny its existence.[51]

§ 266. Right to and Grounds for Relief

The grounds on which courts may open or vacate their judgments, particularly after the term, are generally matters which render the judgment void or which are specified in statutes authorizing such action.

In accordance with the rules governing the power and control of courts over their judgments generally, considered supra §§ 228–235, it has been held, without reference to the term or time at which the judgment was rendered, that the inherent power of a court to open or vacate its judgment may be exercised when the judgment is void,[52] or when there has been a procedural or jurisdictional defect or where a question of fraud or other collateral issue is raised,[53] and that courts have no power to set aside judgments on other grounds unless specific power is granted to them.[54] However, under some statutes the courts may open or vacate their judgments on various other grounds;[55] but the statute will not prevent the courts from acting on other grounds or causes which would be good and sufficient at common law, and an application based on such a ground is not governed by the statute.[56] In general a judgment or decree once solemnly entered should not be easily or lightly opened or vacated except for cogent reasons.[57] A judgment can be set aside for various reasons even though it is not reversible.[58]

Time. During the term the power of the court is absolute, and the court may even change its decision on the merits; accordingly any consideration sufficient to move the equitable discretion of the court is ground for opening or vacating the judgment during the term.[59] While the statutory grounds have been held merely cumulative,[60] it has been held that after the term the judgment can be opened only on statutory grounds,[61] except where

50. La.—Pratt v. McCoy, 52 So. 151, 125 La. 1040.

51. N.J.—Den v. Downam, 13 N.J. Law 135.

52. Fla.—Skipper v. Schumacher, 160 So. 357, 118 Fla. 867, followed in Collier v. King, 160 So. 926, 118 Fla. 866, and certiorari denied 56 S.Ct. 88, 296 U.S. 578, 80 L.Ed. 403.

53. N.Y.—Quirk v. Quirk, 24 N.Y.S. 2d 937, 175 Misc. 703.

Grounds for equitable relief against judgment see infra §§ 350–376.

Right to, and grounds for, opening or vacating default judgments see infra § 334.

54. N.Y.—Quirk v. Quirk, supra.

N.C.—Polson v. Strickland, 136 S.E. 873, 193 N.C. 299.

Pa.—Frantz v. City of Philadelphia, 3 A.2d 917, 333 Pa. 220—Schwartz v. Stewart, 55 Pa.Dist. & Co. 633, 5 Lawrence L.J. 1—Dickel v. Tyson, Com.Pl., 50 Lanc.Rev. 163.

55. Cal.—McMahan v. Baringer, 122 P.2d 63, 49 Cal.App.2d 431—Fisch & Co. v. Superior Court in and for Los Angeles County, 43 P.2d 855, 6 Cal.App.2d 21.

N.D.—Bellingham State Bank of Bellingham v. McCormick, 215 N.W. 152, 55 N.D. 700.

34 C.J. p 268 note 45.

Same grounds as for writ of error coram nobis

Reasons for correcting judgment under statute are same as those required by writ of error coram nobis.—Coultry v. Yellow Cab Co., 252 Ill.App. 443.

56. N.Y.—Ladd v. Stevenson, 19 N. E. 842, 112 N.Y. 325, 8 Am.S.R. 748.

34 C.J. p 268 note 47.

57. Ark.—Dent v. Adkisson, 157 S. W.2d 16, 203 Ark. 176.

Cal.—Spahn v. Spahn, App., 162 P. 2d 53.

N.M.—Board of Com'rs of Quay County v. Wasson, 24 P.2d 1093, 37 N.M. 503, followed in Board of Com'rs of Quay County v. Gardner, 24 P.2d 1104, 37 N.M. 514—Ealy v. McGahen, 21 P.2d 84, 37 N.M. 246.

N.Y.—In re Madden's Estate, 279 N. Y.S. 218, 155 Misc. 308—In re Minard's Will, 35 N.Y.S.2d 457.

Pa.—Ferguson v. O'Hara, 132 A. 801, 286 Pa. 37—McKenzie Co. v. Fidelity & Deposit Co. of Maryland, Com.Pl., 54 Dauph.Co. 294—Wanner v. Thompson, Com.Pl., 27 Del. Co. 455—Charles B. Scott Co. v. Oliver, Com.Pl., 1 Monroe L.R. 143.

S.C.—Anderson v. Toledo Scale Co., 6 S.E.2d 465, 192 S.C. 300—Jefferson Standard Life Ins. Co. v. Hydrick, 141 S.E. 278, 143 S.C. 127.

Wash.—In re Upton's Estate, 92 P. 2d 210, 199 Wash. 447, 123 A.L.R. 1220.

Wyo.—Application of Beaver Dam Ditch Co., 93 P.2d 934, 54 Wyo. 459.

58. N.Y.—Lasser v. Stuyvesant Ins. Co., 16 N.Y.S.2d 401, 258 App.Div. 340, affirmed 17 N.Y.S.2d 221, 258 App.Div. 340.

Conviction of crime

Where insured's conviction for destroying apartment by fire with intent to defraud insurer was upheld by supreme court, sound public policy required that insurer's motion for arrest and vacation of judgment for insured in action on fire policy, begun before trial on criminal charge, be granted on that ground. —North River Ins. Co. of City of New York v. Militello, 67 P.2d 625, 100 Colo. 343.

59. U.S.—**Corpus Juris cited in** Suggs v. Mutual Ben. Health & Accident Ass'n, C.C.A.Okl., 115 F.2d 80, 82.

Ala.—Louisville & N. R. Co. v. Bridgeforth, 101 So. 807, 20 Ala. App. 326.

Idaho.—**Corpus Juris cited in** Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 1102, 55 Idaho 521.

Ky.—Kentucky Home Mut. Life Ins. Co. v. Hardin, 126 S.W.2d 427, 277 Ky. 565.

Neb.—First Nat. Bank of Fairbury v. First Trust Co. of Lincoln, 15 N. W.2d 386, 145 Neb. 147.

Ohio.—Harbine v. Davis, App., 57 N.E.2d 421—Ames Co. v. Busick, App., 47 N.E.2d 647—Canal Winchester Bank v. Exline, 22 N.E.2d 528, 61 Ohio App. 253.

34 C.J. p 268 note 48.

Additional evidence

A district court has discretionary power, in furtherance of justice, to vacate a decree at the same term, in order to allow additional evidence to be introduced.—Bartels v. Meyer, 285 N.W. 698, 136 Neb. 274.

60. Ohio.—Snyder v. Clough, 50 N. E.2d 384, 71 Ohio App. 440—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871.

61. Ark.—Old American Ins. Co. v. Perry, 266 S.W. 943, 167 Ark. 198.

Cal.—Hotel Park Central v. Security First Nat. Bank of Los Angeles, 59 P.2d 606, 15 Cal.App.2d 293—Cikuth v. Loero, 57 P.2d 1009, 14 Cal. App.2d 32.

Iowa.—Montagne v. Cherokee County, 205 N.W. 228, 200 Iowa 534.

Okl.—Burton v. Graves, 273 P. 898, 135 Okl. 35—McAleer v. Waddell-

the grounds are sufficient to invoke the inherent power of the court, generally limited to matters which render the judgment void, or which affect the correctness or authoritative character of the record.[62]

§ 267. —— Invalidity of Judgment in General

Invalidity of the judgment of such nature as to render it void is a valid ground for vacating it, at least if the invalidity is apparent on the face of the record.

Under or apart from statutory provisions, invalidity of the judgment as for want of jurisdiction either of the person or of the subject matter, or of the question determined and to give the particular relief granted, rendering the judgment void, as distinguished from merely voidable or erroneous, is ground for vacating it,[63] even after the expiration

O'Brien Motor Co., 231 P. 480, 105 Okl. 35.

34 C.J. p 268 note 49.

62. Cal.—Cikuth v. Loero, 57 P.2d 1009, 14 Cal.App.2d 32—F. E. Young Co. v. Fernstrom, 79 P.2d 1117, 31 Cal.App.2d Supp. 763.

Fla.—Malone v. Meres, 107 So. 625, 91 Fla. 490.

Idaho.—Baldwin v. Anderson, 8 P.2d 461, 51 Idaho 614.

Ky.—McIntosh v. Clark, Thurmund & Richardson, 177 S.W.2d 155, 296 Ky. 358.

Mo.—Irwin v. Burgan, 28 S.W.2d 1017, 325 Mo. 309.

N.J.—Gimbel Bros. v. Corcoran, 192 A. 715, 15 N.J.Misc. 538.

Ohio.—Snyder v. Clough, 50 N.E.2d 384, 71 Ohio App. 440—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871.

Pa.—Corby v. Swing, 22 Pa.Dist. & Co. 717—James B. Sheehan Building & Loan Ass'n v. Scanlon, 16 Pa.Dist. & Co. 646, affirmed 164 A. 722, 310 Pa. 6.

Judgment held not void on face

Where appearance bond did not purport to have been executed by surety as a feme covert, and to establish the fact of coverture and its consequent disabilities would require evidence aliunde the record, and term of court at which judgment was rendered against surety had expired, federal district court was without jurisdiction in a summary proceeding to declare judgment, which was not void on its face, void ab initio on ground that judgment of Florida court declaring the surety to be a feme sole was without effect.—U. S. v. Peacock, D.C.Fla., 34 F.Supp. 557.

63. U.S.—Simonds v. Norwich Union Indemnity Co., C.C.A.Minn., 73 F.2d 412, certiorari denied Norwich Union Indemnity Co. v. Simonds, 55 S.Ct. 507, 294 U.S. 711, 29 L.Ed. 1246—U. S. v. Turner, C.C.A.N.D., 47 F.2d 86.

Ala.—Hanover Fire Ins. Co. v. Street, 176 So. 350, 234 Ala. 537.

Alaska.—Smith v. Coucher, 9 Alaska 730—In re Young's Estate, 9 Alaska 158—**Corpus Juris cited in** U. S. v. Hoxie, 8 Alaska 201, 209.

Ark.—Taylor v. O'Kane, 49 S.W.2d 400, 185 Ark. 782.

Cal.—Casner v. San Diego Trust & Savings Bank, 94 P.2d 65, 34 Cal. App.2d 524—Richert v. Benson Lumber Co., 34 P.2d 840, 139 Cal. App. 671—Harvey v. Griffiths, 23 P.2d 532, 133 Cal.App. 17—Jellen v. O'Brien, 264 P. 1115, 89 Cal.App. 505—Petition of Furness, 218 P. 61, 62 Cal.App. 753.

Colo.—Sidwell v. First Nat. Bank, 233 P. 153, 76 Colo. 547.

Fla.—Watkins v. Johnson, 191 So. 2, 139 Fla. 712—Skipper v. Schumacher, 160 So. 357, 118 Fla. 867, followed in Collier v. King, 160 So. 926, 118 Fla. 866, and certiorari denied 56 S.Ct. 88, 296 U.S. 578, 80 L.Ed. 408—Frostproof State Bank v. Mallett, 131 So. 322, 100 Fla. 1464—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.

Ga.—Ward v. Master Loan Service, 33 S.E.2d 313, 199 Ga. 108—Anderson v. Turner, 133 S.E. 306, 35 Ga. App. 428—Smoyer v. Jarman, 114 S.E. 924, 29 Ga.App. 305.

Idaho.—McHan v. McHan, 84 P.2d 984, 59 Idaho 496—Jensen v. Gooch, 211 P. 551, 36 Idaho 457.

Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—City of Des Plaines v. Boeckenhauer, 50 N.E.2d 483, 383 Ill. 475—Thayer v. Village of Downers Grove, 16 N.E.2d 717, 369 Ill. 334—Industrial Nat. Bank of Chicago v. Altenberg, 64 N.E.2d 219, 327 Ill.App. 337—Personal Loan & Savings Bank v. Schuett, 20 N.E.2d 329, 299 Ill.App. 421—Webster Grocer Co. v. Gammel, 1 N.E.2d 890, 285 Ill.App. 277—Cummer v. Cummer, 283 Ill.App. 220—Calbreath v. Beckwith, 260 Ill. App. 7—Sherman & Ellis v. Journal of Commerce and Commercial Bulletin, 259 Ill.App. 453—Conway v. Gill, 257 Ill. 606—Hickman v. Ritchey Coal Co., 252 Ill.App. 560.

Kan.—Sparks v. Maguire, 169 P.2d 826—Penn Mut. Life Ins. Co. v. Tittel, 111 P.2d 1116, 153 Kan. 530, rehearing denied 114 P.2d 312, 153 Kan. 747—Wible v. Wible, 110 P.2d 761, 153 Kan. 428—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P.2d 903, 144 Kan. 626—Poorman v. Carlton, 253 P. 424, 122 Kan. 762.

Ky.—Morris v. Morris, 185 S.W.2d 244, 299 Ky. 235—Dees' Adm'r v. Dees' Ex'rs, 13 S.W.2d 1025, 227 Ky. 670—Harding v. Board of Drainage Com'rs of McCracken County, 13 S.W.2d 1011, 227 Ky. 661.

Md.—Spencer v. Franks, 195 A. 306, 173 Md. 73, 114 A.L.R. 263.

Minn.—In re Belt Line, Phalen, and Hazel Park Sewer Assessment, 222 N.W. 520, 176 Minn. 59.

Mo.—Haight v. Stuart, App., 31 S.W. 2d 241.

Mont.—Oregon Mortg. Co. v. Kunneke, 245 P. 539, 76 Mont. 117.

Neb.—Rasmussen v. Rasmussen, 269 N.W. 818, 131 Neb. 724—Shafer v. Wilsonville Elevator Co., 237 N.W. 155, 121 Neb. 280—Foster v. Foster, 196 N.W. 702, 111 Neb. 414.

N.J.—New Jersey Cash Credit Corporation v. Zaccaria, 19 A.2d 448, 126 N.J.Law 334—Gloucester City Trust Co. v. Goodfellow, 3 A.2d 561, 121 N.J.Law 546—Gimbel Bros. v. Corcoran, 192 A. 715, 15 N.J. Misc. 538.

N.Y.—Conkling Rug Co. v. Hinman, 29 N.Y.S.2d 244, 176 Misc. 842.

N.C.—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465—Ellis v. Ellis, 136 S. E. 350, 193 N.C. 216—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536—Ellis v. Ellis, 130 S.E. 7, 190 N.C. 418.

Ohio.—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.

Okl.—Petty v. Roberts, 98 P.2d 602, 186 Okl. 269—Hinkle v. Jones, 66 P.2d 1073, 180 Okl. 17—Blake v. Metz, 276 P. 762, 136 Okl. 146, followed in Blake v. Metz, 276 P. 765, 136 Okl. 150—Nero v. Brooks, 244 P. 588, 116 Okl. 279.

Or.—Lothstein v. Fitzpatrick, 138 P. 2d 919, 171 Or. 648—**Corpus Juris cited in** Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 911, 150 Or. 395—McLean v. Porter, 35 P.2d 664, 148 Or. 262—Finch v. Pacific Reduction & Chemical Mfg. Co., 234 P. 296, 113 Or. 670.

Pa.—In re Galli's Estate, 17 A.2d 899, 340 Pa. 561—Commonwealth ex rel. Howard v. Howard, 10 A.2d 779, 138 Pa.Super. 505—Baker v. Carter, 157 A. 211, 103 Pa.Super. 344—Department of Public Assistance v. Scalzo, 45 Pa.Dist. & Co. 89, 44 Lack.Jur. 19—Webber v. Dolan, 17 Pa.Dist. & Co. 93—Sterling Finance Ass'n v. Frankel, 11 Pa.Dist. & Co. 456—Yoder v. Universal Credit Co., Com.Pl., 8 Sch.Reg. 76.

of the term, as discussed supra § 230, and without limitation of time other than such as may be expressly prescribed by statute, discussed infra § 288, at least if such invalidity is apparent on the face of the record.[64] In fact it is the duty of the court

S.D.—Janssen v. Tusha, 5 N.W.2d 684, 68 S.D. 639—In re Shafer's Estate, 209 N.W. 355, 50 S.D. 232, opinion adhered to In re Schafer's Estate, 216 N.W. 948, 52 S.D. 182—Wayne v. Caldwell, 47 N.W. 547, 1 S.D. 483.

Tex.—Crouch v. McGaw, 138 S.W. 2d 94, 134 Tex. 633—Wichita Falls, R. & Fort Worth Ry. Co. v. Combs, 283 S.W. 135, 115 Tex. 405—**Corpus Juris quoted in** Ferguson v. Ferguson, Civ.App., 98 S.W.2d 847, 850—Mendlovitz v. Samuels Shoe Co., Civ.App., 5 S.W.2d 559—Barton v. Montex Corporation, Civ.App., 295 S.W. 950.

Utah.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.

Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.

Wis.—State ex rel. Wall v. Sovinski, 291 N.W. 344, 234 Wis. 336—State ex rel. Lang v. Civil Court of Milwaukee County, 280 N.W. 347, 228 Wis. 411.

Wyo.—Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.

34 C.J. p 269 note 57.

Existence of valid or meritorious defense to action as condition of relief see infra § 290.

The reason for enacting statute authorizing courts to set aside void judgments or orders was the probability that the legislature feared that courts not of record might be held not to possess such power after repeal of statutes authorizing justice courts to set aside void judgments and to relieve against judgments on ground of inadvertence, surprise or excusable neglect.—F. E. Young Co. v. Fernstrom, 79 P.2d 1117, 31 Cal. App.2d Supp. 763.

Judgment beyond issues

(1) A judgment outside the issues in the case and on a matter not submitted to the court for its determination is a nullity, and may be vacated at any time on motion of the judgment debtor or other persen affected thereby.

Kan.—Hawkins v. Smith, 111 P.2d 1108, 153 Kan. 542.

Okl.—Electrical Research Products v. Haniotis Bros., 39 P.2d 42, 170 Okl. 150.

34 C.J. p 269 note 57 [d].

(2) In action to declare a resulting trust of real property in favor of plaintiffs where judgment for plaintiffs undertook to adjudicate rights to described personal property, plaintiffs' statement that no personalty was demanded was a concession of error subject to attack by defendant's motion after judgment term to set the judgment aside on ground of irregularity.—Weatherford v. Spiritual Christian Union Church, Mo., 163 S.W.2d 916.

Judgment for less than jurisdictional amount

Under statute providing for dismissal of cause where amount sued for is less than jurisdiction of court, and for taxation of entire cost against plaintiff where suit is brought for amount of which court has jurisdiction and a smaller sum is recovered, the overruling of defendants' motion to set aside judgment for plaintiff for one cent and costs on ground that judgment was for an amount less than jurisdiction of court was not error.—Watson v. Spinks, 199 So. 1, 240 Ala. 291.

Question of venue

(1) Whether trial should be in county court from which summons issued or in county in which served was question, not of jurisdiction, but of venue, which should be raised by motion for removal to latter county, not by motion to set aside judgment.—Virginia-Carolina Chemical Co. v. Turner, 130 S.E. 154, 190 N.C. 471.

(2) Where an action to recover damages to land caused by drainage water from defendants' adjoining land was brought in county where plaintiff's land was situated, against defendants residing in other counties and in which counties each was served with summons, a motion filed after term to vacate judgment was improperly overruled, even though a defense to the action was not tendered, since action, being "transitory," was maintainable only in county in which one of the defendants resided or service could be had and judgment was "void" ab initio.—Snyder v. Clough, 50 N.E.2d 384, 71 Ohio App. 440.

Judgment based on void judgment

On motion to set aside judgment based on filing transcript of another judgment, it is proper to grant relief asked on showing that the other judgment was void.—Lowry v. Himmler, 239 N.Y.S. 347, 136 Misc. 215.

Judgment based on void verdict

In joint action for injuries sustained in automobile collision against owner of automobile and her son who was driving automobile at time of collision, a verdict exonerating son but finding owner liable was void and the judgment based thereon could be attacked on a motion to set aside.—Kalil v. Spivey, 27 S.E.2d 475, 70 Ga.App. 34.

Facts held not to show want of jurisdiction

Where surviving partners suing the alien property custodian and the United States treasurer to recover a debt claimed to be owing to firm by an enemy corporation set forth in their complaint their claim, their nonenemy status, transactions out of which claim arose, and that they had given statutory notice of claim, denials of answer concerning partners' status and transactions, and affirmative defenses alleging that there were prior claims, that partners did not have title to cause of action, that partnership had been dissolved through outbreak of war, that claim had passed to another partner and on his death to his German executors who had entered into an arbitration agreement, and that arbitrators had found no liability on part of enemy corporation, presented issues which the district court was competent to try, and hence unappealed from judgment on such issues could not be set aside for want of jurisdiction on ground that beneficial owner of claim was an enemy as defined by the act.—Jackson v. Irving Trust Co., 61 S. Ct. 326, 311 U.S. 494, 85 L.Ed. 297.

Facts held not to warrant relief

(1) Conduct of condemnation proceeding by special assistant to attorney general is not ground for vacation of final condemnation order and judgment.—U. S. v. Certain Land at Great Neck in Nassau County, N.Y., D.C.N.Y., 57 F.Supp. 157.

(2) A definitive judgment, in petitory action by plaintiffs who had possession of land under recorded tax deed, could not be set aside for alleged invalidity of tax sale because taxes for collection of which sale was made had been made on part of property by third person.—Adkins' Heirs v. Crawford, Jenkins & Booth, La., 24 So.2d 246.

(3) Where the court has jurisdiction of the parties and the subject matter, a judgment cannot be vacated on the ground that there was no case or controversy before the court, since that question should properly be raised by appeal or bill of review.—Swift & Co. v. U. S., App.D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

(4) Other facts.

Ariz.—In re Hannerkam's Estate, 77 P.2d 814, 51 Ariz. 447.

Ga.—Manry v. Stephens, 9 S.E.2d 58, 190 Ga. 365.

64. Ala.—Gibson v. Edwards, 16 So. 2d 865, 245 Ala. 334—Griffin v. Proctor, 14 So.2d 116, 244 Ala. 537.

to annul an invalid judgment.[65] However, it has also been held that a void judgment need not be set aside since it is an absolute nullity and ineffective without being set aside.[66] Any applicable statutes are, of course, controlling.[67]

Process, service, or notice lacking or defective. Since the validity and regularity of a judgment depend on the existence and sufficiency of the process or notice on which it is based, as discussed supra §§ 23–25, it is good ground for vacating or opening a judgment that defendant had no notice of the action, either because of a failure to serve him with process or because the process or service was fatally irregular or defective.[68] Thus a false return

Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328—City of Salinas v. Luke Kow Lee, 18 P.2d 335, 217 Cal. 252—Michel v. Williams, 56 P.2d 546, 13 Cal. App.2d 198—Shelley v. Casa De Oro, Limited, 24 P.2d 900, 133 Cal. App. 720—People v. Barnes City, 288 P. 442, 105 Cal.App. 618.

Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521—Baldwin v. Anderson, 8 P.2d 461, 51 Idaho 614.

Mo.—Harrison v. Slaton, 49 S.W.2d 31—McFadden v. Mullins, 136 S. W.2d 74, 234 Mo.App. 1056.

N.C.—Dunn v. Wilson, 187 S.E. 502, 210 N.C. 493.

Okl.—Morgan v. City of Ardmore ex rel. Love & Thurmond, 78 P.2d 765, 182 Okl. 542—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572—American Exchange Corporation v. Lowry, 63 P.2d 71, 178 Okl. 433—Green v. James, 296 P. 743, 147 Okl. 273—Bledsoe v. Green, 280 P. 301, 138 Okl. 15—Skipper v. Baer, 277 P. 930, 136 Okl. 286.

Pa.—Commonwealth ex rel. Howard v. Howard, 10 A.2d 779, 138 Pa. Super. 505—Gedrich v. Yaroscz, 156 A. 575, 102 Pa.Super. 127.

Determination from record

(1) Whether the judgment is void on its face must be determined from an inspection of the judgment roll alone, and unless the record affirmatively shows that the court was without jurisdiction, the judgment is not subject to such summary action.—Spahn v. Spahn, Cal.App., 162 P.2d 53.

(2) A judgment is void on its face when the judgment roll affirmatively shows that trial court lacks either jurisdiction over the person, jurisdiction over the subject matter, or judicial power to render the particular judgment.—Town of Watonga v. Crane Co., 114 P.2d 941, 189 Okl. 184—Caraway v. Overholser, 77 P. 2d 688, 182 Okl. 357.

Judgment held not void on face

(1) In general.

Cal.—In re Robinson's Estate, 121 P. 2d 734, 19 Cal.2d 534—In re Estrem's Estate, 107 P.2d 36, 16 Cal. 2d 563.

Okl.—Caraway v. Overholser, 77 P.2d 688, 182 Okl. 357.

(2) Absence from judgment roll of original summons against subcontractors as to whom cause was continued was held not to make judgment declaring materialman's lien void, and subject to attack after term.—Harris v. Spurrier Lumber Co., 265 P. 637, 130 Okl. 99.

(3) Judgment failing to show defendant's presence at trial, but showing that she was represented, was held not void on face, so as to justify setting it aside on motion after term at which rendered.—Steiner v. Smith, 242 P. 207, 115 Okl. 205.

(4) A judgment would not be vacated where it would be presumed that facts required to be proved to confer jurisdiction were duly proved, even though record was silent on the matter.—Town of Watonga v. Crane Co., 114 P.2d 941, 189 Okl. 184.

65. N.J.—Gimbel Bros. v. Corcoran, 192 A. 715, 15 N.J.Misc. 538.

Tex.—Bridgman v. Moore, 183 S.W. 2d 705, 143 Tex. 250.

63. Miss.—Walton v. Gregory Funeral Home, 154 So. 717, 170 Miss. 129.

67. Ohio.—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.

34 C.J. p 270 note 60.

68. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S. Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Alaska.—**Corpus Juris cited in** U. S. v. Hoxie, 8 Alaska, 201, 208.

Fla.—Rhea v. Hackney, 157 So. 190, 117 Fla. 62.

Ga.—Cone v. Eubanks, 145 S.E. 652, 167 Ga. 384—Wilby v. McRae, 191 S.E. 662, 56 Ga.App. 140.

Ill.—Howard v. Howard, 26 N.E.2d 421, 304 Ill.App. 637—Sweet v. Sweet, 277 Ill.App. 545.

Ky.—Center's Guardian v. Center, 51 S.W.2d 460, 244 Ky. 502—Farmers' Bank of Salvisa v. Riley, 272 S.W. 9, 209 Ky. 54.

Mich.—Huebner v. Winskowski, 224 N.W. 340, 246 Mich. 77.

N.Y.—Pacek v. Ferrar, 14 N.Y.S.2d 814, 258 App.Div. 772—Universal Credit Co. v. Blinderman, 288 N. Y.S. 77, 159 Misc. 802—Doctor's Hospital v. Kahal, 277 N.Y.S. 736, 155 Misc. 126, affirmed 277 N.Y.S. 738, 155 Misc. 127—Potenza v. Canto, 18 N.Y.S.2d 849.

Okl.—American Exchange Corporation v. Lowry, 63 P.2d 71, 178 Okl. 433—Locke v. Gilbert, 271 P. 247, 133 Okl. 93—Hatfield v. Lewis, 235 P. 611, 110 Okl. 95—Good v. First Nat. Bank, 211 P. 1051, 88 Okl. 110.

Pa.—In re Stolzenbach's Estate, 29 A.2d 6, 346 Pa. 74—Schlegel v. Brobst, Com.Pl., 18 Leh.L.J. 365—Rought v. Billings, Com.Pl., 38 Luz.Leg.Reg. 405.

Tex.—Empire Gas & Fuel Co. v. Albright, 87 S.W.2d 1092, 126 Tex. 485—Mandlovitz v. Samuels Shoe Co., Civ.App., 5 S.W.2d 559.

Va.—Mann v. Osborne, 149 S.E. 537, 153 Va. 190—Lockard v. Whitenack, 144 S.E. 606, 151 Va. 143.

Wash.—City of Tacoma v. Nyman, 281 P. 484, 154 Wash. 154.

34 C.J. p 270 note 63.

Judgment against several defendants

Judgment, valid as to one defendant, will not be set aside as to such defendant for the reason that no service, or insufficient service, has been had on codefendant.—Burns v. Pittsburg Mortg. Inv. Co., 231 P. 887, 105 Okl. 150—34 C.J. p 270 note 63 [a].

Notice to unauthorized attorney

Judgment rendered pursuant to notice to attorney acting without authority may be vacated even after term.—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141.

Decree on cross complaint

Ark.—Taylor v. Harris, 54 S.W.2d 701, 186 Ark. 580.

Service by publication

(1) Where service of summons by publication on defendants was based on an affidavit which was defective because of failure to allege that defendants could not after due diligence be found in the state, the denying of motion of defendants to vacate the judgment because of defective service was error.—Groce v. Groce, 199 S.E. 388, 214 N.C. 398.

(2) However where court appointed guardian ad litem for certain defendants who were cited by publication in suit on notes and to foreclose vendor's and trust deed liens, and judgment made specific provision protecting interests of defendants so summoned, judgment would not be set aside on ground that by exercise of reasonable diligence defendants' residences could have been ascertained; moreover without showing that defendants' residence could have been ascertained by reasonable diligence or that he had meritorious

of service of process has been held ground for vacating the judgment.[69] However, in some cases it has been held that the failure or defect must be apparent on the face of the record,[70] so that a judgment will not be vacated on the claim of a false return of service, since the return is conclusive,[71] unless there is an irreconcilable conflict in the judgment roll.[72]

In any event, a judgment will not be set aside for mere clerical errors, omissions, or irregularities in the process not affecting the jurisdiction,[73] especially where defendant had actual notice of the commencement of the action[74] and refrained from appearing and defending in the expectation that he could overturn the judgment in consequence of such error or defect,[75] or where his objections to the process or service are waived by his appearance.[76] Moreover, when a party has once been properly served with proper process, he is in court for every purpose connected with the action, and cannot have the judgment vacated for the failure to notify him of some intermediate step in the case.[77]

Unauthorized appearance. Where a judgment is entered without service of process on the judgment defendant, based solely on an unauthorized appearance of an attorney, some cases have held that the remedy of the judgment defendant is against the attorney, and that the judgment cannot be opened or vacated on the ground that such appearance was unauthorized unless the attorney is insolvent and not able to respond in damages for his wrong,[78] or unless plaintiff or his attorney was guilty of fraud or collusion, or was otherwise a party to the wrong,[79] or where there is some other good reason for not confining the party to his remedy against the attorney, in which cases the judgment may be opened or vacated.[80] However, the generally prevailing rule is that a judgment entered without the service of process on the unauthorized appearance of an attorney may be set aside without regard to whether or not the attorney is financially responsible for his wrong,[81] provided defendant did not accept or ratify the unauthorized act of the attorney, as by acquiescing in it or failing to object, with full knowledge.[82]

Where process has been served, and plaintiff is innocent of any fraud or collusion, and the attorney is solvent, the party for whom the attorney appeared is confined to his remedy against the latter, plaintiff in such case being regarded as blameless and defendant negligent in not appearing and making defense by his own attorney, if he had any defense.[83]

defense to the action, judgment would not be set aside on ground that defendant was improperly cited. —Patridge v. Peschke, Tex.Civ.App., 111 S.W.2d 1147.

Summons held sufficient
Okl.—Thomas v. Tucker, 86 P.2d 1011, 184 Okl. 304.

Loss of papers
Right to attack judgment on ground of nonservice would not be denied because papers in suit except judgment had been lost.—Downing v. White, 188 S.E. 815, 211 N.C. 40.

Defendant held to have been served
N.Y.—Peppe v. Black, 7 N.Y.S.2d 748.
N.C.—Jackson v. Turnage, 22 S.E. 2d 434, 222 N.C. 752.

69. N.D.—**Corpus Juris cited in** Baird v. Ellison, 293 N.W. 794, 800, 70 N.D. 261.
34 C.J. p 271 note 64.

Impeachment of return
Ky.—Gardner v. Lincoln Bank & Trust Co., 64 S.W.2d 497, 251 Ky. 109.

70. Ky.—Horton v. Horton, 92 S. W.2d 373, 263 Ky. 413.
Okl.—Good v. First Nat. Bank, 211 P. 1051, 88 Okl. 110.

Judgment rendered on proper service by publication is not void on its face within law providing for vacation of void judgment.—Moore v. Hawkins, 271 P. 244, 133 Okl. 227.

Special provision where invalidity not apparent
Okl.—Morrissey v. Hurst, 229 P. 431, 107 Okl. 1—Woodley v. McKee, 223 P. 346, 101 Okl. 120.

71. Pa.—Liberal Credit Clothing Co. v. Tropp, 4 A.2d 565, 135 Pa.Super. 53.

72. Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273.

73. Fla.—Walker v. Carver, 112 So. 45, 93 Fla. 337.
34 C.J. p 271 note 66.

Amendable defect
Ga.—Hayes v. American Bankers' Ins. Co., 167 S.E. 731, 46 Ga.App. 552.

74. Fla.—Selton v. Miami Roofing & Sheet Metal, 10 So.2d 428, 151 Fla. 631.
34 C.J. p 272 note 67.

Cross complaint
Ark.—Taylor v. Harris, 54 S.W.2d 701, 186 Ark. 580.

75. Cal.—McGinn v. Rees, 165 P. 52, 33 Cal.App. 291.
34 C.J. p 272 note 68.

76. Kan.—Home Owners' Loan Corporation v. Clogston, 118 P.2d 568, 154 Kan. 257.
34 C.J. p 272 note 69.

77. N.Y.—Eyring v. Hercules Land Co., 41 N.Y.S. 191, 9 App.Div. 306.
34 C.J. p 272 note 70.

Amendment of petition
U.S.—U. S. v. 165.1978 Acres of Land, More or Less, in East Hampton Tp., Suffolk County, D. C., N.Y., 61 F.Supp. 362.

Intervention by third parties
Ark.—Progressive Life Ins. Co. v. Riley, 88 S.W.2d 66, 191 Ark. 850.

78. N.Y.—Vilas v. Plattsburgh & M. R. Co., 25 N.E. 941, 123 N.Y. 440, 20 Am.S.R. 771, 9 L.R.A. 844.
34 C.J. p 272 note 72.
Validity of judgment based on unauthorized appearance see supra § 26.

79. N.Y.—Yates v. Horanson, 30 N. Y.Super. 12.
34 C.J. p 273 note 73.

80. N.Y.—Hamilton v. Wright, 37 N.Y. 502, 504, 5 Transcr.A. 1.
34 C.J. p 273 note 75.

81. Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205.
Okl.—Myers v. Chamness, 228 P. 985, 102 Okl. 131.
34 C.J. p 274 note 76.

82. Ga.—Jackson v. Jackson, 35 S.E. 2d 258, 199 Ga. 716.
34 C.J. p 274 note 77.

83. N.C.—Hatcher v. Faison, 55 S.E. 284, 142 N.C. 364.
34 C.J. p 274 note 78.

§ 268. —— Irregularity of Judgment in General

A material and substantial irregularity which has not been cured or waived is a ground for opening or vacating judgment if the complaining party is adversely affected thereby.

A judgment ordinarily will not be vacated for merely technical, formal, and unimportant irregularities which may be disregarded on the principle of harmless error,[84] or which are curable by amendment,[85] or which may be deemed cured or waived as by failure to object in due season;[86] and the only remedy for such irregularity is by proceedings for review by an appellate court.[87] However, irregularity in the proceedings leading to the entry of a judgment, as distinguished from mere error which is considered infra § 274, has been held a ground for vacating the judgment,[88] provided it is preju-

84. U.S.—Borough v. Hasbrouck Heights, N. J., v. Agrios, D.C.N.J., 10 F.Supp. 371.
Ga.—Manry v. Stephens, 9 S.E.2d 58, 190 Ga. 305.
Ky.—Barker v. Roe, 109 S.W.2d 395, 270 Ky. 158.
N.J.—Cook v. American Smelting & Refining Co., 122 A. 743, 99 N.J. Law 81.
N.M.—American Nat. Bank of Tucumcari v. Tarpley, 250 P. 18, 31 N.M. 667.
N.Y.—Harwitz v. Cohen, 245 N.Y.S. 350, 138 Misc. 300—Brockman v. Pape, 116 N.Y.S. 752.
N.C.—Mitchell v. Mitchell, 190 S.E. 487, 211 N.C. 308.
Pa.—Holland Furnace Co. v. Davis, 31 Pa.Dist. & Co. 469, 5 Sch.Reg. 157.
Tex.—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.
Wis.—Luebke v. City of Watertown, 284 N.W. 519, 230 Wis. 512.
34 C.J. p 276 note 84.

Particular irregularities held insufficient

(1) Failure to give notice of entry of judgment, at least where the other party was not harmed thereby.
Ky.—McAllister v. Dravenstott, 115 S.W.2d 1041, 273 Ky. 239.
Okl.—Mayer v. Keener, 163 P.2d 991, 195 Okl. 658.
Wash.—Larson v. Department of Labor and Industries, 25 P.2d 1040, 174 Wash. 618.

(2) Fact that court in rendering final judgment inadvertently overlooked previous minute entry setting case for hearing at subsequent date was held not to justify nunc pro tunc order at subsequent term annulling final judgment.—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386.

(3) Failure of commissioners, appraising land condemned, to include description thereof, date of view, and other details, was not irregularity authorizing vacation of final judgment awarding owner amount of damages assessed by them.—Board of Com'rs of Quay County v. Wasson, 24 P.2d 1098, 37 N.M. 503, followed in Board of Com'rs of Quay County v. Gardner, 24 P.2d 1104, 37 N.M. 514.

(4) On bill to review judgment rendered on notice by publication, where the issues were made and tried on the bill and answers filed thereto, the judgment will not be set aside merely because there was technical failure to set aside the original judgment and make up the same issues on the old petition and answers.—Witcher v. Hanley, 253 S.W. 1002, 299 Mo. 696.

(5) A valid judgment is not rendered void merely by an unauthorized, immaterial, and nonprejudicial interlineation, and addition to judgment by attorney for plaintiff after judge had signed judgment and immediately over judge's signature did not change nature, force or effect of judgment, and hence such interpolation did not invalidate otherwise valid judgment as constituting a fraud upon defendants' rights.—Parrish v. Ferriell, 186 S.W.2d 625, 299 Ky. 676.

(6) Judgment creditor's laches in not having judgment entered of record until more than six years after rendition thereof, where there was no showing that judgment debtor had been harmed in any way by belated filing, since belated entry of judgment did not extend lien thereof.—Harvey v. Gibson, 2 S.E.2d 385, 190 S.C. 98.

(7) Other irregularities.
U.S.—Coggeshall v. U. S., C.C.A.S.C., 95 F.2d 986.
Ala.—Du Pree v. Hart, 8 So.2d 183, 242 Ala. 690.
N.Y.—Peters v. Berkeley, 219 N.Y.S. 709, 219 App.Div. 261.
Pa.—Liberal Credit Clothing Co. v. Tropp, 4 A.2d 565, 135 Pa.Super. 53.
34 C.J. p 276 note 84 [a].

85. Ga.—Nottingham v. Nicholson, 157 S.E. 113, 42 Ga.App. 628.
34 C.J. p 277 note 85.

An inquest to make partition will not be set aside for an irregularity which may be corrected by amendment.—In re Schweitzer, 3 Del.Co., Pa., 385, 4 Lanc.L.Rev. 369, 1 North. Co. 65.

Statute as to automatic amendment

Where record was insufficient to sustain decree in failing to require county in whom title to realty was adjudged to pay county's bid on tax sales to sheriff and in failing to show payment thereof, and deficiency could have been supplied by amendment, plaintiff was not entitled to have decree set aside, in view of statute providing that an amendable decree under such circumstances is, in legal effect, amended.—Burch v. Dodge County, 20 S.E.2d 428, 193 Ga. 890.

86. Mo.—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386.
N.Y.—Cohn v. Warschauer Sick Support Soc. Bnei Israel, 19 N.Y.S. 2d 742, appeal denied 20 N.Y.S.2d 669, 259 App.Div. 914.
Wyo.—Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.
34 C.J. p 278 note 86.

Motion to open judgment

One moving to open judgment will be held to have waived mere irregularity in entry thereof.—Pasco Rural Lighting Co. v. Roland, 88 Pa.Super. 245.

Filing of amended answer

Defendants in partition action who took no further steps until nearly two years after filing of answer when they filed an amended answer after cause had been submitted without objection was held not entitled to assert that judgment entered on same day that amended answer was filed was irregular or premature, where filing of amended answer was permitted on condition that it should not delay trial.—Horton v. Horton, 92 S.W.2d 373, 263 Ky. 413.

87. U.S.—Parker Bros. v. Fagan, C.C.A.Fla., 68 F.2d 616, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490.
Ill.—Hamilton Glass Co. v. Borin Mfg. Co., 248 Ill.App. 301.

88. Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.
Conn.—**Corpus Juris quoted in** Stolman v. Boston Furniture Co., 180 A. 507, 509, 120 Conn. 235.
Ind.—Isaacs v. Fletcher American Nat. Bank, 185 N.E. 154, 98 Ind. App. 111.
Mont.—Stenner v. Colorado-Montana Mines Ass'n, 149 P.2d 546.
N.C.—Nall v. McConnell, 190 S.E. 210, 211 N.C. 258—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
Okl.—Vann v. Board of Education of Town of Lenapah, 229 P. 433, 102

dicial or dangerous to the substantial rights and interest of the party affected,[89] at least during the term.[90]

Irregularity apparent on face of record. In some states it has been held that a judgment cannot be vacated for irregularity unless the irregularity appears on the face of the record,[91] at least where

Okl. 286—Boaz v. Martin, 225 P. 516, 101 Okl. 243.
S.D.—Janssen v. Tusha, 5 N.W.2d 684, 68 S.D. 639.
Tex.—British General Ins. Co. v. Ripy, 106 S.W.2d 1047, 130 Tex. 101.
Wis.—**Corpus Juris quoted in** Federal Land Bank of St. Paul v. Olson, 1 N.W.2d 752, 754, 239 Wis. 448.
Wyo.—Ramsay v. Gottsche, 69 P.2d 535, 51 Wyo. 516—Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.
34 C.J. p 274 note 81.

89. Conn.—**Corpus Juris quoted in** Stolman v. Boston Furniture Co., 180 A. 507, 509, 120 Conn. 235.
Ga.—Byers v. Byers, 154 S.E. 456, 41 Ga.App. 671.
Ill.—City of Des Plaines v. Boeckenhauer, 50 N.E.2d 483, 383 Ill. 475.
Kan.—Swalwell v. Wyatt, 257 P. 742, 124 Kan. 152.
La.—Coltraro v. Chotin, 1 La.App. 628.
Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.
N.J.—Kohn v. Lazarus, 155 A. 260, 9 N.J.Misc. 644.
N.C.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536—Snow Hill Live Stock Co. v. Atkinson, 126 S.E. 610, 189 N.C. 248.
Okl.—Le Roi Co. v. Grimes, 144 P.2d 973, 93 Okl. 430—Stull v. Hoehn, 126 P.2d 1007, 191 Okl. 190.
Pa.—Moyer v. Meray, 25 A.2d 612, 143 Pa.Super. 284—Kerstetter v. Kerstetter, Com.Pl., 49 Dauph.Co. 102—Harr v. Kulp Roofing & Painting Co., Com.Pl., 34 Luz.Leg.Reg. 14.
Wis.—**Corpus Juris quoted in** Federal Land Bank of St. Paul v. Olson, 1 N.W.2d 752, 754, 239 Wis. 448.
34 C.J. p 275 note 83.

Irregularity within rule

(1) The irregularity must be a want of adherence to some prescribed rule or mode of proceeding, either in omitting to do something that is necessary for the orderly conduct of a suit, or doing it at an unreasonable time, or in an improper manner.
Mo.—State ex rel. Caplow v. Kirkwood, App., 117 S.W.2d 652—Platies v. Theodorow Bakery Co., App., 79 S.W.2d 504—Robinson v. Martin Wunderlich Const. Co., App., 72 S.W.2d 127—Mefford v. Mefford, App., 26 S.W.2d 804.
N.M.—Sheppard v. Sandfer, 102 P.2d 668, 44 N.M. 357.
Wash.—In re Ellern, 160 P.2d 639, 28 Wash.2d 219.
34 C.J. p 275 note 83 [a].

(2) Judgment is "irregular" whenever it is not entered in accordance with practice and course of proceeding where it was rendered.
Conn.—Stolman v. Boston Furniture Co., 180 A. 507, 120 Conn. 235.
N.C.—Everett v. Johnson, 14 S.E.2d 520, 219 N.C. 540—Fowler v. Fowler 130 S.E. 315, 190 N.C. 536.

Particular irregularities held sufficient

(1) Entry of judgment without notice to parties concerned.
Ky.—Middleton v. Lewis, 95 S.W. 2d 1114, 265 Ky. 9.
Minn.—Kemerer v. State Farm Mut. Auto. Ins. Co. of Bloomington, Ill., 288 N.W. 719, 206 Minn. 325.
N.M.—Moore v. Brannin, 274 P. 50, 33 N.M. 624.
Ohio.—Baldwin v. Lint, 5 N.E.2d 413, 53 Ohio App. 349, appeal dismissed 4 N.E.2d 399, 132 Ohio St. 140.
Okl.—Sizemore v. Dill, 220 P. 352, 93 Okl. 176.
Or.—Lawson v. Hughes, 270 P. 922, 127 Or. 16.
Wash.—Larson v. Department of Labor and Industries, 25 P.2d 1040, 174 Wash. 618.

(2) Entry of judgment without notice, after transfer, where attorneys before transfer agreed notice would be given.—Home State Bank of Arcadia v. Haynes, 290 P. 338, 144 Okl. 190.

(3) Failure to give prior notice of entry of judgment in case taken under advisement as required by statute.—McKinley County Abstract & Investment Co. v. Shaw, 239 P. 865, 30 N.M. 517.

(4) Where court took case under advisement and, before rendition of judgment, plaintiff's attorney mailed notice, addressed to residence of defendant's attorney, that a form of judgment would be presented to court, but defendant's attorney did not receive notice, trial court properly vacated judgment for plaintiff, since under the statute actual notice from court was required.—R. V. Smith Supply Co. v. Black, 88 P.2d 269, 43 N.M. 177.

(5) Entry of judgment without disposition having been made of counterclaim.—Springfield Gas & Electric Co. v. Fraternity Bldg. Co., Mo.App., 264 S.W. 429.

(6) Judgment not in conformity with verdict.—Mielcarek v. Riske, N. D., 21 N.W.2d 218.

(7) Clerical misprision.
Ill.—Simon v. Balasic, 39 N.E.2d 685, 313 Ill.App. 266.
Ky.—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632.

(8) Other irregularities.
Ohio.—Morrison v. Baker, App., 58 N.E.2d 708—Ramsey v. Holland, 172 N.E. 411, 35 Ohio App. 199.
Wash.—State v. Superior Court of Okanogan County, 290 P. 430, 158 Wash. 46.
34 C.J. p 275 note 83 [c].

Particular matters held not irregularities

(1) The statute authorizing the court to vacate a judgment because of "irregularity" in obtaining it does not authorize the vacation of a judgment because of perjured testimony of prevailing party.—Cherry v. Gamble, 224 P. 960, 101 Okl. 234.

(2) The statute providing that no judge of the county court shall be retained as attorney in any action which may depend on or relate to any judgment passed by him did not require vacating judgment rendered in proceedings wherein claimant was represented by attorney who was public administrator of county under an appointment by the judge who presided over the proceedings.—In re Evans' Estate, 22 N.W.2d 497, 248 Wis. 456

90. Conn.—Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.
Okl.—Curtis v. Bank of Dover, 241 P. 173, 113 Okl. 224.

91. Ga.—Jackson v. Jackson, 35 S.E.2d 258, 199 Ga. 716—Fields v. Arnall, 34 S.E.2d 692, 199 Ga. 491.
Mo.—Badger Lumber Co. v. Goodrich, 184 S.W.2d 435, 353 Mo. 769—Weatherford v. Spiritual Christian Union Church, 163 S.W.2d 916—Harrison v. Slaton, 49 S.W.2d 31—State ex rel. Caplow v. Kirkwood, App., 117 S.W.2d 652—Mefford v. Mefford, App., 26 S.W.2d 804.
Pa.—McConnell v. Bowden, 41 A.2d 849, 352 Pa. 48—Nixon v. Nixon, 198 A. 154, 329 Pa. 256—Harr v. Bernheimer, 185 A. 857, 322 Pa. 412—Giles v. Ryan, 176 A. 1, 317 Pa. 65—Liberal Credit Clothing Co. v. Tropp, 4 A.2d 565, 135 Pa.Super. 53—Eastman Kodak Co. v. Osenider, 193 A. 284, 127 Pa.Super. 332—Lyman Felheim Co. v. Walker, 193 A. 69, 128 Pa.Super. 1—C. Trevor Dunham, Inc. v. Maloney, 7 Pa.Dist. & Co. 419—Picone v. Barbano, Com.Pl., 32 Del.Co. 88—Siddall v. Burke, Com.Pl., 30 Del. Co. 47—Kahn v. Kahn, Com.Pl., 47

the application is made after the end of the term at which judgment was rendered.[92]

The taxation of costs without notice has been held not of itself a sufficient ground to set aside a judgment,[93] especially where the judgment is just and equitable[94] or where no error is claimed.[95]

§ 269. —— Fraud or Collusion

Fraud or collusion in obtaining judgment is a sufficient ground for opening or vacating it, even after the term at which it was rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action.

The fact that a judgment was obtained through fraud or collusion is universally held to constitute a sufficient reason for opening or vacating such judgment either during or after the term at which it was rendered.[96] In some jurisdictions statutes confer power on the courts to vacate judgments on the ground of fraud and to regulate its exercise,[97] although generally courts of record possess

Lack.Jur. 101—Aponikas v. Skrypkun, Com.Pl., 5 Sch.Reg. 1.
34 C.J. p 357 note 97.

92. Mo.—In re Tompkins' Estate, App., 50 S.W.2d 659.
34 C.J. p 358 note 98.

93. Vt.—Nicholas v. Nicholas, 67 A. 531, 80 Vt. 242.
15 C.J. p 177 note 45—34 C.J. p 276 note 84 [a] (31), (32), p 290 note 53 [a].
Irregularity in taxation of costs as error of law see infra § 274.

94. Wis.—Rollins v. Kahn, 29 N.W. 640, 66 Wis. 658.

95. Vt.—Nicholas v. Nicholas, 67 A. 531, 80 Vt. 242.

96. U.S.—Griffin v. Griffin, App.D.C., 66 S.Ct. 556, rehearing denied 66 S.Ct. 975—In re Cox, D.C.Ky., 33 F.Supp. 796—Illinois Printing Co. v. Electric Shovel Coal Corporation, D.C.Ill., 20 F.Supp. 181.
Ala.—Bean v. Harrison, 104 So. 244, 213 Ala. 33—Louisville & N. R. Co. v. Bridgeforth, 101 So. 807, 20 Ala.App. 326.
Ariz.—Gordon v. Gordon, 278 P. 375, 35 Ariz. 357, motion denied 281 P. 215, 35 Ariz. 532—Kendall v. Silver King of Arizona Mining Co., 226 P. 540, 26 Ariz. 456.
Ark.—Chronister v. Robertson, 185 S.W.2d 104.
Cal.—In re Estrem's Estate, 107 P.2d 36, 16 Cal.2d 563—Hirsch v. Hirsch, App., 168 P.2d 770—Cowan v. Cowan, App., 166 P.2d 21—Rhea v. Millsap, 156 P.2d 941, 68 Cal.App.2d 449—King v. Superior Court in and for San Diego County, 56 P.2d 268, 12 Cal.App.2d 501—Kronman v. Kronman, 18 P.2d 712, 129 Cal.App. 10—Vale v. Maryland Casualty Co., 281 P. 1058, 101 Cal.App. 599.
Fla.—Zemurray v. Kilgore, 177 So. 714, 130 Fla. 317—State v. Wright, 145 So. 598, 107 Fla. 178—Alabama Hotel Co. v. J. L. Mott Iron Works, 98 So. 825, 86 Fla. 608.
Ga.—Young v. Young, 2 S.E.2d 622, 188 Ga. 29—Lester v. Graham, 123 S.E. 37, 32 Ga.App. 379.
Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—Nash v. Park Castles Apartment Bldg. Corporation, 50 N.E.2d 725, 384 Ill. 68—Thorne v. Thorne, 45 N.E.2d 85, 316 Ill.App. 451—In re Togneri's Estate, 15 N.E.2d 908, 296 Ill.App. 33.
Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.
Miss.—Rockett v. Finley, 184 So. 78, 183 Miss. 308.
Neb.—Lincoln County v. Provident Loan & Inv. Co. of Lincoln, 22 N.W.2d 609—State Life Ins. Co. of Indianapolis, Ind. v. Heffner, 269 N.W. 629, 131 Neb. 700.
Nev.—Lauer v. Eighth Judicial Dist. Court in and for Clark County, 140 P.2d 953, 62 Nev. 78.
N.J.—Simon v. Calabrese, 46 A.2d 58, 137 N.J.Eq. 581—Kaffitz v. Clawson, 36 A.2d 215, 134 N.J.Eq. 494.
N.M.—**Corpus Juris cited in** Kerr v. Southwest Fluorite Co., 294 P. 324, 326, 35 N.M. 232.
N.Y.—Lyons v. Goldstein, 47 N.E.2d 425, 290 N.Y. 19, 146 A.L.R. 1422—In re Holden, 2 N.E.2d 631, 271 N.Y. 212—Scopano v. U. S. Gypsum Co., 3 N.Y.S.2d 300, 166 Misc. 805.
N.D.—Jacobson v. Brey, 6 N.W.2d 269, 72 N.D. 269—Smith v. Smith, 299 N.W. 693, 71 N.D. 110—Lamb v. King, 296 N.W. 185, 70 N.D. 469.
Okl.—Pruner v. McKee, 258 P. 749, 126 Okl. 121.
Pa.—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, 5 A.2d 139, 333 Pa. 344—Salus v. Fogel, 153 A. 547, 302 Pa. 268—Sallada v. Mock, 121 A. 54, 277 Pa. 285—Dormont Motors v. Hoerr, 1 A.2d 493, 132 Pa.Super. 567—Willetts v. Willetts, 96 Pa.Super. 198—Stoll v. Kunkel, 5 Pa.Dist. & Co. 161, 38 York Leg.Rec. 1—Zardus v. Zardus, Com.Pl., 28 Del.Co. 332—Davis v. Tate, Com.Pl., 26 Erie Co. 141—Kahn v. Kahn, Com.Pl., 47 Lack.Jur. 101.
Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—**Corpus Juris quoted in** Ferguson v. Ferguson, Civ.App., 98 S.W.2d 847, 850—Brammer & Wilder v. Limestone County, Civ.App., 24 S.W.2d 99, error dismissed—Saunders v. Saunders, Civ.App., 293 S.W. 899.
W.Va.—Baker v. Gaskins, 36 S.E.2d 893.
34 C.J. p 278 note 89.
Collateral attack on ground of fraud see infra § 434.
Equitable relief on ground of fraud see infra § 372.
Fraud as within statute authorizing opening or vacating of judgment for surprise, mistake, or excusable neglect see infra § 280.

Facts held not to constitute fraud
Where case on oral agreement is continued to permit defendant's counsel to take depositions, action of plaintiff's counsel in taking judgment at subsequent term, in absence of defendant's counsel, is not fraud, or ground for setting judgment aside.—National Union Fire Ins. Co. v. Ethridge, 124 S.E. 546, 32 Ga.App. 725.

Fraud of party attacking judgment
A declaratory judgment establishing that plaintiff had never been validly married to defendant would not be vacated on plaintiff's motion on ground that plaintiff had facilitated granting of judgment, in that she had accepted a settlement and thereafter acquiesced in the result without trial justice's knowledge.—Greenman v. Greenman, 53 N.Y.S.2d 551, affirmed 59 N.Y.S.2d 153, 269 App.Div. 988.

Party attacking judgment not deceived
Fraudulent misrepresentations are not ground for vacating decree, if complainant knew of misrepresentations or was not deceived.—Grant Inventions Co. v. Grant Oil Burner Corporation, 157 A. 108, 109 N.J.Eq. 281.

Fraud of executor or administrator
A judgment procured through the fraud or collusion of an executor or administrator will not be allowed to stand against the objection of a party in interest.—Patterson v. Carter, 41 So. 133, 147 Ala. 522—24 C.J. p 888 note 81.

97. Ky.—Buttermore v. Hensley, 103 S.W.2d 68, 267 Ky. 669.
Wash.—Pacific Telephone & Telegraph Co. v. Henneford, 92 P.2d 214, 199 Wash. 462, certiorari denied Henneford v. Pacific Telephone & Telegraph Co., 59 S.Ct. 483, 306 U.S. 637, 83 L.Ed. 1038.
34 C.J. p 280 note 93.

"Fraud practiced in obtaining judgment"
Where defendant was allegedly in-

an inherent common-law power in this behalf, which is not dependent on legislation.[98] However, inferior courts not of record do not possess this power,[99] unless it is conferred by statute.[1]

Nature of fraud required. While a few cases have held or assumed for the purpose of the decision that a judgment should be vacated for fraud or deceit practiced by one party on the other in regard to the cause of action,[2] the authority to set aside judgments for fraud after the term usually is limited to cases where the fraud complained of was practiced in the very act of obtaining the judgment, and all cases of fraud which might have been used as a defense to defeat the action are excluded; the fraud must be extrinsic and collateral to the matter tried, and not a matter which was actually or potentially in issue in the action,[3] unless the interpo-

duced to sign note by misrepresentation and misrepresentation was allegedly repeated shortly before suit, such fraud, if inducing defendant to believe that he had no defense, was "fraud practiced in obtaining judgment" within statute permitting vacation of judgment and granting new trial after term.—Rock Island Plow Co. v. Brunkan, 248 N.W. 32, 215 Iowa 1264.

Fraud of "successful party"

A creditor who, in order to establish his claim, intervened in action for dissolution of partnership, could thereby become a "successful party" as to judgment approving receiver's sale of personal property, within statute authorizing district court to vacate its judgment, after the term, for fraud practiced by the "successful party."—Mayer v. Harrison, 166 P.2d 674, 161 Kan. 80.

98. Cal.—Rhea v. Millsap, 156 P.2d 941, 68 Cal.App.2d 449.
Mont.—Gillen v. Gillen, 159 P.2d 511.
N.Y.—**Corpus Juris cited in** People v. Ashworth, 56 N.Y.S.2d 791, 793, 185 Misc. 391.
N.D.—Lamb v. King, 296 N.W. 185, 70 N.D. 469.
Wis.—In re Cudahy's Estate, 219 N. W. 203, 196 Wis. 260.
Wyo.—Midwest Refining Co. v. George, 7 P.2d 213, 44 Wyo. 25.
34 C.J. p 279 note 92.

Motion made under statute

Fact that notice of motion to vacate decree stated that it was made under statute and for fraud did not deprive court of inherent jurisdiction to vacate decree obtained by fraud.—Kronman v. Kronman, 18 P. 2d 712, 129 Cal.App. 10.

99. N.Y.—**Corpus Juris quoted in** People v. Ashworth, 56 N.Y.S.2d 791, 793, 185 Misc. 391.
34 C.J. p 280 note 94.

1. N.Y.—**Corpus Juris quoted in** People v. Ashworth, 56 N.Y.S.2d 791, 793, 185 Misc. 391.
34 C.J. p 280 note 95.

2. Ill.—Chicago v. Newberry Library, 79 N.E. 666, 224 Ill. 330.
34 C.J. p 283 note 8.

Fraud held immaterial

Refusal to strike out judgment for manager of department who sued owner of millinery establishment for percentage of net profits of department, because manager falsely represented that she was unmarried and was working in similar business at inception of contract, which could be severed after six months, was held not error, where manager voluntarily left after three years' service.—Morris v. Phillips, 168 A. 400, 165 Md. 392.

3. U.S.—Fiske v. Buder, C.C.A.Mo., 125 F.2d 841—In re Burton Coal Co., D.C.Ill., 57 F.Supp. 361.
Ariz.—**Corpus Juris cited in** Schuster v. Schuster, 73 P.2d 1345, 1348, 51 Ariz. 1.
Ark.—Manning v. Manning, 175 S.W. 2d 982, 206 Ark. 425—Karnes v. Gentry, 172 S.W.2d 424, 205 Ark. 1112—Kersh Lake Drainage Dist. v. Johnson, 157 S.W.2d 39, 203 Ark. 315, certiorari denied Johnson v. Kersh Lake Drainage Dist., 62 S. Ct. 1044, 316 U.S. 673, 86 L.Ed. 1748—Baker v. State, for Use and Benefit of Independence County, 147 S.W.2d 17, 201 Ark. 652—Holland v. Wait, 86 S.W.2d 415, 191 Ark. 405—Feild v. Waters, 1 S.W. 2d 807, 175 Ark. 1169.
Cal.—Metzger v. Vestal, 42 P.2d 67, 2 Cal.2d 517—Hirsch v. Hirsch, App., 168 P.2d 770.
Ga.—**Corpus Juris cited in** Abercrombie v. Hair, 196 S.E. 447, 450, 185 Ga. 728.
Ind.—State v. Martin, 154 N.E. 284, 198 Ind. 516.
Iowa.—Girdey v. Girdey, 238 N.W. 432, 213 Iowa 1.
Kan.—Suter v. Schultz, 7 P.2d 55, 134 Kan. 538—Putnam v. Putnam, 268 P. 797, 126 Kan. 479.
Ky.—Clifton v. McMakin, 157 S.W. 2d 81, 288 Ky. 813.
Minn.—Swan v. Rivoli Theater Co., 219 N.W. 85, 174 Minn. 197.
Miss.—**Corpus Juris quoted in** Carraway v. State, 148 So. 340, 344, 167 Miss. 390.
Mo.—State ex inf. McKittrick ex rel. Oehler v. Church, App., 158 S.W.2d 215.
Nev.—Calvert v. Calvert, 122 P.2d 426, 61 Nev. 168.
N.M.—**Corpus Juris cited in** Kerr v. Southwest Fluorite Co., 294 P. 324, 326, 35 N.M. 232.
N.Y.—In re Holden, 2 N.E.2d 631, 271 N.Y. 212—Klein v. Fairberg, 276 N.Y.S. 347, 243 App.Div. 609.
N.D.—Jacobson v. Brey, 6 N.W.2d 269, 72 N.D. 269.
Ohio.—May v. May, 50 N.E.2d 790, 72 Ohio App. 82—Haynes v. United Ins. Co., 194 N.E. 381, 48 Ohio App. 475.
Okl.—**Corpus Juris cited in** Metzger v. Turner, 158 P.2d 701, 704, 195 Okl. 406—Davison v. Mutual Savings & Loan Ass'n, 73 P.2d 455, 181 Okl. 295—Render v. Capitol Hill Undertaking Co., 56 P.2d 829, 176 Okl. 520—Wright v. Saltmarsh, 50 P.2d 694, 174 Okl. 226—Lee v. Terrell, 40 P.2d 10, 170 Okl. 310—Brown v. Exchange Trust Co., 36 P.2d 495, 169 Okl. 175—Riley v. Jones, 4 P.2d 1070, 153 Okl. 64—Bird v. Palmer, 3 P.2d 890, 152 Okl. 3, followed in Bird v. Palmer, 3 P.2d 894, 152 Okl. 7—Vacuum Oil Co. v. Brett, 300 P. 632, 150 Okl. 153—Cherry v. Gamble, 224 P. 960, 101 Okl. 234.
Pa.—Greiner v. Brubaker, 30 A.2d 621, 151 Pa.Super. 515, certiorari denied Royer v. Greiner, 64 S.Ct. 42, 320 U.S. 742, 88 L.Ed. 440, rehearing denied 64 S.Ct. 194, 320 U. S. 813, 88 L.Ed. 491, rehearing denied 64 S.Ct. 434, 320 U.S. 816, 88 L.Ed. 493—Estok v. Estok, 157 A. 356, 102 Pa.Super. 604—Kahn v. Kahn, Com.Pl., 47 Lack.Jur. 101.
Tex.—O'Meara v. O'Meara, Civ.App., 181 S.W.2d 891, error refused—Price v. Smith, Civ.App., 109 S. W.2d 1144, error dismissed—**Corpus Juris cited in** Traders & General Ins. Co. v. Rhodabarger, Civ. App., 109 S.W.2d 1119, 1123—**Corpus Juris quoted in** Ferguson v. Ferguson, Civ.App., 98 S.W.2d 847, 850—**Corpus Juris cited in** Yount-Lee Oil Co. v. Federal Crude Oil Co., Civ.App., 92 S.W.2d 493, 495—**Corpus Juris cited in** State v. Wright, Civ.App., 56 S.W.2d 950, 952—Saunders v. Saunders, Civ. App., 293 S.W. 899—Warne v. Jackson, Civ.App., 273 S.W. 315.
34 C.J. p 280 note 96, p 287 note 25.

What constitutes "extrinsic or collateral fraud"

(1) "Fraud, which is extrinsic or collateral to the matter tried by the court," within the rule, is fraud, the effect of which is to prevent the unsuccessful party from having a trial or from presenting his case fully, as keeping him away from court, or purposely keeping him in ignorance of the action, or where an attorney fraudulently pretends to represent a

sition of such defense was prevented by fraud, accident, or the act of the opposite party without fault or blame on his own part.[4] The principle that a final judgment concludes all matters litigated, or which might have been litigated in the case, affords the fundamental reason for this rule[5] which applies equally whether the judgment is attacked by motion in the cause or by separate suit.[6] The instances in which the judgment may be vacated are those in which the party is prevented from having a fair trial of the real issue by reason of the fraudulent contrivance of his adversary.[7]

Fraud practiced on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair.[8] So a

party and connives at his defeat, or, being regularly employed, sells out his client's interest, or where a party, residing without the jurisdiction of the court, is induced by false pretenses or representations to come within the jurisdiction for the sole purpose of getting personal service of process on him, or where, through the instrumentality of the successful party, the witnesses of his adversary are forcibly or illegally detained from court or bribed to disobey the subpœna served on them, or where a judgment is obtained in violation of an agreement between the parties.
U.S.—U. S. v. Kusche, D.C.Cal., 56 F.Supp. 201.
Mont.—Clark v. Clark, 210 P. 93, 64 Mont. 386.
Okl.—Beatty v. Beatty, 242 P. 766, 114 Okl. 5.
Tex.—Price v. Smith, Civ.App., 109 S.W.2d 1144.
34 C.J. p 280 note 96 [b].

(2) "Extrinsic fraud" is act or conduct preventing fair submission of controversy.
Kan.—Putnam v. Putnam, 268 P. 797, 126 Kan. 479.
Pa.—Willetts v. Willetts, 96 Pa.Super. 198.

Hearsay evidence

Proof that only evidence given by plaintiff, in quiet title action against county, was hearsay evidence, would not establish that decree in favor of plaintiff was fraudulently entered, so as to provide ground for vacating the decree.—Harter v. King County, 119 P.2d 919, 11 Wash.2d 583.

False allegations in pleadings are not such fraud as will justify or require vacation of the judgment.—Steele v. The Maccabees, 53 P.2d 232, 175 Okl. 471—34 C.J. p 280 note 96 [c].

Defendant's fraud as to garnishee

Where insurer under automobile liability policy was summoned as garnishee in attachment execution on a judgment obtained in action by injured party against insured, in which insurer was not a party, petition to open judgment on ground of collusion and fraud imposed on garnishee by insured and injured party was properly denied, since such defenses could be interposed in the attachment proceeding; and the procedure formerly adhered to of permitting a party to open judgment to interpose a defense of fraud or collusion to defraud garnishee should not be resorted to unless there is some compelling reason therefor and the third party should be compelled to litigate his right in a collateral issue.—Renschler v. Pizano, 198 A. 33, 329 Pa. 249.

4. U.S.—Hartford-Empire Co. v. Hazel-Atlas Glass Co., C.C.A.Pa., 137 F.2d 764, reversed on other grounds Hazel-Atlas Glass Co. v. Hartford-Empire Co., 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250, rehearing denied 64 S.Ct. 1281, 322 U.S. 772, 88 L.Ed. 1596. Motion denied, C.C.A., Hartford-Empire Co. v. Shawkee Mfg. Co., 147 F.2d 532—Hartford - Empire Co. v. Shawkee Mfg. Co., C.C.A.Pa., 137 F.2d 764, reversed on other grounds Shawkee Mfg. Co. v. Hartford-Empire Co., 64 S.Ct. 1014, 322 U.S. 271, 88 L.Ed. 1269, rehearing denied 64 S.Ct. 1281, 322 U.S. 772, 88 L.Ed. 1596. Motion denied C. C.A., Hartford-Empire Co. v. Shawkee Mfg. Co., 147 F.2d 532—Abbott v. Ætna Casualty & Surety Co., D.C.Md., 42 F.Supp. 793, affirmed C.C.A., Ætna Casualty & Surety Co. v. Abbott, 130 F.2d 40.
Ariz.—**Corpus Juris cited in** Schuster v. Schuster, 73 P.2d 1345, 1348, 51 Ariz. 1.
Okl.—**Corpus Juris cited in** Metzger v. Turner, 158 P.2d 701, 704, 195 Okl. 406—Bird v. Palmer, 3 P.2d 890, 152 Okl. 3, followed in Bird v. Palmer, 3 P.2d 894, 152 Okl. 7.
Pa.—Fleming v. Fleming, 33 Pa.Super. 554.
Tex.—**Corpus Juris cited in** Traders & General Ins. Co. v. Rhodabarger, Civ.App., 109 S.W.2d 1119, 1123—**Corpus Juris quoted in** Ferguson v. Ferguson, Civ.App., 98 S.W.2d 847, 850.
34 C.J. p 281 note 97.
Failure to interpose defenses generally as ground for opening or vacating judgment see infra § 272.

5. U.S.—U. S. v. Throckmorton, Cal., 98 U.S. 61, 25 L.Ed. 93.
34 C.J. p 282 note 99.

6. Mont.—Clark v. Clark, 210 P. 93, 64 Mont. 386.

7. Kan.—Putnam v. Putnam, 268 P. 797, 126 Kan. 479.
Okl.—**Corpus Juris quoted in** Stout v. Derr, 42 P.2d 136, 138, 139, 171 Okl. 132.
34 C.J. p 282 note 2.

8. U.S.—American Ins. Co. v. Lucas, D.C.Mo., 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466 and affirmed C.C. A., American Ins. Co. v. Scheufler, 129 F.2d 143, certiorari denied 63 S.Ct. 257, 317 U.S. 687, 87 L.Ed. 551, rehearing denied 63 S.Ct. 433, 317 U.S. 712, 87 L.Ed. 567.
Ark.—Holland v. Wait, 86 S.W.2d 415, 191 Ark. 405.
Cal.—Kasparian v. Kasparian, 23 P. 2d 802, 132 Cal.App. 773.
N.Y.—**Corpus Juris cited in** In re Holden, 2 N.E.2d 631, 633, 271 N. Y. 212—In re Gellis' Estate, 252 N. Y.S. 725, 141 Misc. 432.
Okl.—**Corpus Juris quoted in** Stout v. Derr, 42 P.2d 136, 138, 139, 171 Okl. 132.
Pa.—Willetts v. Willetts, 96 Pa.Super. 198.
34 C.J. p 282 note 3.

Concealment of material facts

(1) The concealment of facts which, if revealed to a trial court, may result in a postponement of an adjudication until absent party can be heard, constitutes "extrinsic fraud" which will warrant setting aside of the judgment.—Landon v. Landon, Cal.App., 159 P.2d 980.

(2) An order of partition procured by a party who concealed such material facts as would have defeated the action is properly vacated on the application of the real parties in interest.—Daleschal v. Geiser, 13 P. 595, 36 Kan. 374.

(3) Judgment obtained against corporation by default in action wherein four of five directors had adverse interest constituted "extrinsic fraud or collusion," warranting vacation of judgment at instance of stockholder, where directors' interest had not been disclosed.—Kerr v. Southwest Fluorite Co., 294 P. 324, 35 N.M. 232.

Fraud in service of process

(1) A judgment obtained against one induced by fraud to come within the jurisdiction where he is served with process may be set aside as fraudulent.—Wyman v. Newhouse, C. C.A.N.Y., 93 F.2d 313, 115 A.L.R. 460,

judgment may be vacated for misrepresentations or tricks practiced on defendant to keep him away from the trial, or to prevent him from claiming his rights in the premises, or from setting up an available defense,[9] or for fraudulent collusion between some of the parties to the action, or between the counsel in the case, working injury to the just rights of the others.[10] However, mere failure to disclose to the adversary, or to the court, matters which would defeat one's own claim or defense is not such extrinsic fraud as will justify or require vacation of the judgment.[11]

While there is some authority to the contrary,[12] actual fraud as distinguished from constructive fraud has been held essential,[13] except in the case of judgments against municipalities.[14]

§ 270. —— Perjury

In general perjury at the trial is not regarded as a ground for vacating the judgment.

Perjury at the trial generally is held to be no ground for vacating the judgment[15] as being one

certiorari denied 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.

(2) A willful misstatement of defendant's address in an affidavit for publication of summons is "extrinsic fraud" which justifies setting aside judgment resulting from proceedings of which defendant did not have notice.—Rivieccio v. Bothan, Cal., 165 P.2d 677.

9. Okl.—Covington v. Anthony, 128 P.2d 1012, 191 Okl. 266—**Corpus Juris quoted in** Stout v. Derr, 42 P.2d 136, 138, 139, 171 Okl. 132.
Pa.—Kahn v. Kahn, Com.Pl., 47 Lack. Jur. 101—Schantz v. Clemmer, Com.Pl., 21 Leh.L.J. 394.
34 C.J. p 282 note 4.

10. Ga.—Hargroves' Ex'rs v. Nix, 14 Ga. 316.
Okl.—**Corpus Juris quoted in** Stout v. Derr, 42 P.2d 136, 138, 139, 171 Okl. 132—In re Gypsy Oil Co., 285 P. 67, 141 Okl. 291.
Tex.—Ferguson v. Ferguson, Civ. App., 93 S.W.2d 847.
34 C.J. p 283 note 5.

Bribery

Where suits by fire insurance companies to enjoin superintendent of insurance from interfering with collection of proposed increased rates were settled by bribery of the superintendent, the bribery constituted extrinsic fraud which would permit reopening of decrees of dismissal after term for purpose of ordering redistribution of amount of rate increase which had been impounded and collected pending the litigation. —American Ins. Co. v. Lucas, D.C. Mo., 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466, and affirmed, C.C.A., American Ins. Co. v. Scheufler, 129 F.2d 143, certiorari denied 63 S.Ct. 257, 317 U.S. 687, 87 L.Ed. 551, rehearing denied 63 S.Ct. 433, 317 U.S. 712, 87 L.Ed. 567.

No injury resulting

Collusion between third persons and municipal employees or official not shown to have resulted in injury to the municipality is not cause for setting aside a judgment regularly obtained.—City of New York v. Brady, 22 N.E. 237, 115 N.Y. 599.

11. Ga.—Young v. Young, 2 S.E.2d 622, 188 Ga. 29—Coker v. Elson 151 S.E. 632, 40 Ga.App. 835.
Mo.—**Corpus Juris quoted in** First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W.2d 842, 852, 322 Mo. 654.
Okl.—**Corpus Juris quoted in** Stout v. Derr, 42 P.2d 136, 138, 139, 171 Okl. 132.
Tex.—**Corpus Juris cited in** Price v. Smith, Civ.App., 109 S.W.2d 1144, 1149.
34 C.J. p 283 note 6.

Nondisclosure of agreement with co-defendant

In action against several defendants jointly to recover for an injury, plaintiff was under no duty to inform one defendant of agreement with co-defendants under which plaintiff received sum of money in satisfaction of her claim against them, and plaintiff's nondisclosure thereof was not "fraudulent" so as to require vacation of judgment against such defendant for fraud.—Gillespie v. Brewer, Miss., 10 So.2d 197.

12. **Inadvertent withholding of facts**

The right of a court to vacate or modify judgment is not limited to showing that it was procured by actual fraud, collusion, and misrepresentation, but it is sufficient if there is a showing that the rights of interested parties are prejudicially affected by the judgment and if there was inadvertently a withholding from the court of matters which should have been properly before it, but for which withholding the judgment would not have been rendered. —Pengelly v. Thomas, App., 65 N.E. 2d 897, appeal dismissed 67 N.E.2d 714, 146 Ohio St. 693.

13. Mo.—**Corpus Juris quoted in** First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W.2d 842, 852, 322 Mo. 654.
Okl.—Abernathy v. Huston, 26 P.2d 939, 166 Okl. 184.
34 C.J. p 283 note 7.

14. **Constructive or legal fraud as sufficient**

Where illegal claim against municipal or quasi-municipal corporation is reduced to judgment under agreement between claimant and officers representing municipality without judicial determination of merits of claim and where circumstances surrounding entry of judgment justify finding of collusion, court may vacate judgment on grounds of legal fraud; and where, after taxpayer had established, in test cases, right to recover protested tax because not properly notified of increase in property valuation, attorneys of claimants in consolidated case and county official prepared journal entry reciting rendition of judgment in consolidated case as of date of trial of test cases and obtained judge's signature without consulting city and school district, not parties to case but interested in funds involved and whose attorneys had indicated disposition to participate in trial, facts established that judgment in consolidated case should be vacated because based on legal fraud.—Abernathy v. Huston, supra.

15. U.S.—Delaware, L. & W. R. Co. v. Rellstab, N.J., 48 S.Ct. 203, 276 U.S. 1, 72 L.Ed. 439.
Ark.—Turley v. Owen, 69 S.W.2d 882, 188 Ark. 1067.
Cal.—Stiebel v. Roberts, 109 P.2d 22, 42 Cal.App.2d 434.
Conn.—Boushay v. Boushay, 27 A.2d 800, 129 Conn. 347.
Ill.—Thorne v. Thorne, 45 N.E.2d 85, 316 Ill.App. 451.
Iowa.—Genco v. Northwestern Mfg. Co., 214 N.W. 545, 203 Iowa 1390.
Mass.—Stephens v. Lampron, 30 N. E.2d 838, 308 Mass. 50, 131 A.L.R. 1516—Chagnon v. Chagnon, 15 N. E.2d 231, 300 Mass. 309.
Mo.—Wright v. Wright, 165 S.W.2d 870, 350 Mo. 325.
Mont.—**Corpus Juris cited in** Khan v. Khan, 105 P.2d 665, 666, 110 Mont. 591.
Okl.—Davison v. Mutual Savings & Loan Ass'n, 73 P.2d 455, 181 Okl. 295—Render v. Capitol Hill Undertaking Co., 56 P.2d 829, 176 Okl. 520—Small v. White, 46 P.2d 517, 173 Okl. 83—State ex rel. Oklahoma Tax Commission v. Sinclair Prairie Oil Co., 41 P.2d 876, 171 Okl. 493—National Aid Life Ass'n

obtained by fraud,[16] within the rule stated supra § 269, unless specially made so by statute,[17] or unless the perjury is connected with extrinsic or collateral fraud and the complaining party is without fault.[18] This rule rests on grounds of public policy which requires that there shall be an end to litigation.[19] Some courts hold, however, that a judgment may be vacated for perjury under certain conditions,[20] as where a party obtains a judgment by his own willful perjury, or by the use of false testimony, which he knows at the time to be false.[21] In any event perjury is not ground for vacating the judgment where the judgment does not rest on the perjured testimony, as where it relates to an immaterial matter,[22] or where it does not appear that the perjury was in any way instrumental in the court's assuming jurisdiction of the case.[23]

§ 271. —— Violation of Agreement

A judgment secured in violation of an agreement not to enter judgment may be vacated on that ground.

Where there was an agreement between the parties that the case should be continued, or that defendant's time to answer should be extended, or that the action should be dismissed as the result of a compromise or settlement, or a promise of plaintiff that he would not press the case to judgment, in violation of which plaintiff, without notice to defendant, secures a judgment against the latter in his absence, it is good ground for vacating the judg-

v. Morgan, 32 P.2d 290, 168 Okl. 224—National Aid Life Ass'n v. Morgan, 32 P.2d 288, 168 Okl. 226—Oklahoma Union Ins. Co. v. Morgan, 32 P.2d 287, 168 Okl. 225—Oklahoma Union Ins. Co. v. Morgan, 32 P.2d 287, 168 Okl. 225—Riley v. Jones, 4 P.2d 1070, 153 Okl. 64—Bird v. Palmer, 3 P.2d 890, 152 Okl. 2, followed in 3 P.2d 894, 152 Okl. 7—Vacuum Oil Co. v. Brett, 300 P. 632, 150 Okl. 153—Bell v. Knoble, 225 P. 897, 99 Okl. 110—Cherry v. Gamble, 224 P. 960, 101 Okl. 234.

Pa.—**Corpus Juris cited in** Crouse v. Volas, 178 A. 414, 416, 117 Pa.Super. 532—Kahn v. Kahn, Com.Pl., 47 Lack.Jur. 101.

Tex.—**Corpus Juris cited in** Crouch v. McGaw, 138 S.W.2d 94, 96, 134 Tex. 633—Yount-Lee Oil Co. v. Federal Crude Oil Co., Civ.App., 92 S.W.2d 493, certiorari denied Federal Crude Oil Co. v. Yount-Lee Oil Co., 57 S.Ct. 16, 299 U.S. 554, 81 L.Ed. 408.

Wis.—Gray v. Gray, 287 N.W. 708, 232 Wis. 400.

34 C.J. p 284 note 10.

Equitable relief on ground of perjury see infra § 374.

Opportunity to refute

The alleged perjury of witness on trial of contested issue, to which opposing party had the opportunity to refute, will not furnish basis for setting aside judgment on bill of review.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633.

A forged instrument introduced in evidence is the equivalent of perjured testimony, for which a judgment cannot be set aside.—Bradford v. Trapp, 193 P. 584, 49 Cal.App. 493—34 C.J. p 280 note 96 [o].

16. Ill.—Conway v. Gill, 257 Ill.App. 606.

Iowa.—Girdey v. Girdey, 288 N.W. 432, 213 Iowa 1.

N.Y.—Cowens v. Ticonderoga Pulp & Paper Co., 217 N.Y.S. 647, 127 Misc. 898, affirmed in part 219 N.Y.S. 774, 219 App.Div. 749, and reversed in part on other grounds Cowans v. Ticonderoga Pulp & Paper Co., 219 N.Y.S. 284, 219 App.Div. 120, appeal dismissed in part 157 N.E. 862, 245 N.Y. 573, affirmed 159 N.E. 669, 246 N.Y. 603.

Okl.—Small v. White, 46 P.2d 517, 173 Okl. 83.

Pa.—Sallada v. Mock, 121 A. 54, 277 Pa. 285.

Perjury is "intrinsic fraud" for which a judgment will not ordinarily be vacated.

Cal.—Adams v. Martin, 44 P.2d 572, 3 Cal.2d 246.

Kan.—Suter v. Schultz, 7 P.2d 55, 134 Kan. 538.

Pa.—Greiner v. Brubaker, 30 A.2d 621, 151 Pa.Super. 515, certiorari denied Royer v. Greiner, 64 S.Ct. 42, 320 U.S. 742, 88 L.Ed. 640, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491, rehearing denied 64 S.Ct. 434, 320 U.S. 816, 88 L.Ed. 493—Willetts v. Willetts, 96 Pa.Super. 198.

17. Ark.—Fawcett v. Rhyne, 63 S.W.2d 349, 187 Ark. 940.

Ga.—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287.

34 C.J. p 284 note 12.

Statute authorizing new trial

Perjured testimony in obtaining judgment constitutes "fraud" within statute authorizing new trial.—Reynolds v. Evans, 50 S.W.2d 549, 244 Ky. 267.

18. Wash.—E. R. Thomas & Co. v. Penland, 268 P. 867, 148 Wash. 279.

19. Ill.—Cohen v. Sparberg, 44 N.E. 2d 335, 316 Ill.App. 140.

34 C.J. p 285 note 13.

20. **Against good conscience**

Only when a judgment is clearly shown to have been obtained by fraud or false testimony and when it would be against good conscience to enforce judgment and proper showing of due diligence is made will a judgment be vacated after term in which it was rendered.—Lincoln County v. Provident Loan & Inv. Co. of Lincoln, Neb., 22 N.W.2d 609—Kielian v. Kent & Burke Co., 268 N.W. 79, 131 Neb. 308.

Complaining party without fault

An action will lie to set aside a judgment procured by the false and perjured testimony of the party in whose favor the judgment was rendered, where the party against whom such judgment was rendered was not personally served, was not wanting in diligence in presenting his defenses in the original action, was prevented from so doing by the wrongful conduct of the adverse party, and moved with due diligence to set aside the judgment after its rendition.—Lunt v. Lunt, Tex.Civ.App., 121 S.W.2d 445, error dismissed.

After conviction of witness

Ground for vacation of judgment that judgment was secured by perjured testimony is not available until after conviction of witness against whom charge of perjury is made.—Haynes v. United Ins. Co., 194 N.E. 381, 48 Ohio App. 475.

21. Ky.—Webb v. Niceley, 151 S.W. 2d 768, 286 Ky. 632.

La.—**Corpus Juris cited in** Christie v. Patorno, 8 La.App. 603.

Ohio.—Cincinnati Traction Co. v. Schlasinger, 26 Ohio N.P.,N.S., 9.

34 C.J. p 285 note 14.

Mere suspicion of truth of defendant's testimony founded on improbability or conflicting statements will not be sufficient to support finding of perjury.—Christie v. Patorno, 8 La.App. 603.

22. Pa.—Sallada v. Mock, 121 A. 54, 277 Pa. 285.

Tex.—Yount-Lee Oil Co. v. Federal Crude Oil Co., Civ.App., 92 S.W.2d 493, certiorari denied Federal Crude Oil Co. v. Yount-Lee Oil Co., 57 S.Ct. 16, 299 U.S. 554, 81 L.Ed. 408.

34 C.J. p 285 note 15.

23. Ariz.—In re Hannerkam's Estate, 77 P.2d 814, 51 Ariz. 447.

ment.[24] However, the agreement or promise must have been explicit, and of such a character that defendant could rely on it and remain inactive without being thereby chargeable with negligence or lack of due diligence in guarding his own interests.[25] Where a statute or rule of court requires agreements to extend the time for pleading, or for the trial, to be reduced to writing and filed, or communicated to the court, a mere oral agreement of the parties, not brought to the notice of the court, will not be sufficient to authorize the vacation of a judgment taken in violation of its terms.[26] It has nevertheless been held that, although oral stipulations are not regarded with favor,[27] relief may be granted on the basis of an oral agreement satisfactorily established.[28]

§ 272. —— Defenses to Action

In general, a judgment will not be opened or vacated on grounds which could have been pleaded in the original action.

Except where the motion to vacate is filed within the term at which the judgment was rendered,[29] a proceeding to open or vacate a judgment cannot be sustained on any grounds which might have been pleaded in defense to the action, and could have been so pleaded with proper care and diligence.[30] Within this rule are included various defenses,[31]

24. Ky.—American Ry. Express Co. v. Hulentoops & Co., 261 S.W. 889, 203 Ky. 107.
Pa.—First Nat. Bank of Irwin, for Use of, v. Shields, Com.Pl., 22 West.Co. 50.
34 C.J. p 285 note 16.
Violation of agreement as surprise see infra § 280.

Party having notice; appearing at trial
An alleged agreement by defendant with one of the attorneys for plaintiff before judgment, that suit would be dismissed, is not ground for setting aside the judgment or arresting execution, where it appears that defendant appeared at the trial and defended against the action.—Felker v. Johnson, 7 S.E.2d 668, 189 Ga. 797.

25. Ill.—Hartford Life & Annuity Ins. Co. v. Rossiter, 63 N.E. 680, 196 Ill. 277.
34 C.J. p 286 note 17.

Unenforceable agreement
Fact that testator's widow orally agreed with certain of husband's heirs that, if they would offer no defense to her suit for construction of the will, she would execute a will whereby at her death the heirs would be devised all of the real property of the husband of which she should die possessed, was not valid ground for setting aside the decree in the will construction suit, since such oral promise was not fraud in the legal sense and was unenforceable under statute of frauds.—Sample v. Ward, Fla., 23 So.2d 81.

26. Pa.—Bauman Iron Works v. Buono, 22 Pa.Dist. & Co. 362.
34 C.J. p 286 note 18.

27. Iowa.—Dixon v. Brophey, 29 Iowa 460.

28. Cal.—Johnson v. Sweeney, 30 P. 540, 95 Cal. 304.
34 C.J. p 286 note 20.

29. Ohio.—Ames Co. v. Busick, App., 47 N.E.2d 647.

Additional defense necessary
A final judgment for plaintiff, if correct, will not be vacated for the purpose of granting leave to amend the answer, unless the proposed amended answer discloses additional facts or defenses material to the action and not pleaded in the original answer.—State v. Coleman, 127 P. 568, 71 Wash. 15.

30. Ga.—Alexander v. Slear, 169 S.E. 304, 177 Ga. 101—Wilder v. Hardwick, 122 S.E. 624, 32 Ga.App. 105—Hardwick v. Hatfield, 119 S.E. 430, 30 Ga.App. 760.
Ill.—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465—Mitchell v. Hareckson, 250 Ill.App. 508.
Ky.—Childers v. Potter, 165 S.W.2d 3, 291 Ky. 478.
Mass.—Lynch v. City of Boston, 48 N.E.2d 26, 313 Mass. 478—Beserosky v. Mason, 168 N.E. 726, 269 Mass. 325.
Mich.—Kirn v. Ioor, 253 N.W. 318, 266 Mich. 335.
Minn.—In re Jordan's Estate, 271 N.W. 104, 109 Minn. 53.
Mo.—Bodine v. Farr, 182 S.W.2d 173, 353 Mo. 206—State ex rel. Gary Realty Co. v. Hall, 17 S.W.2d 935 322 Mo. 1118.
N.Y.—Winter v. New York Life Ins. Co., 23 N.Y.S.2d 759, 260 App.Div. 676, appeal denied 25 N.Y.S.2d 781, 261 App.Div. 816, appeal denied 33 N.E.2d 568, 285 N.Y. 863—**Corpus Juris quoted in** Di Donato v. Rosenberg, 245 N.Y.S. 675, 679, 230 App.Div. 538.
Okl.—Staples v. Jenkins, 62 P.2d 504, 178 Okl. 186—**Corpus Juris cited in** Dial v. Kirkpatrick, 31 P.2d 591, 592, 168 Okl. 21, 95 A.L.R. 1263.
Pa.—Berkowitz v. Kass, 40 A.2d 691, 351 Pa. 263—Keystone Bank of Spangler, Pa., v. Booth, 6 A.2d 417, 334 Pa. 545—McCloskey v. Sykes, 14 Pa.Dist. & Co. 437—New York Joint Stock Land Bank v. Kegerise, Com.Pl., 29 Berks.Co. 296—Picone v. Barbano, Com.Pl., 32 Del.Co. 88—Gapes v. Lawrenitis, Com.Pl., 4 Sch.Reg. 403.
Utah.—Logan City v. Utah Power & Light Co., 16 P.2d 1097, 86 Utah 340, opinion adhered to 44 P.2d 698, 86 Utah 354.
34 C.J. p 286 note 21.

Good defense is insufficient ground for setting aside judgment, unless judgment debtor brings himself within particular class to whom relief may be given.—Collins' Ex'rs v. Bonner, 294 S.W. 1027, 220 Ky. 212.

Disqualification of attorney
Attack on judgment for disqualification of other party's attorney was held too late, where no objection was made before judgment, although facts were known.—Dewey v. Frawley, 236 N.Y.S. 484, 227 App.Div. 757.

Matter available on motion for new trial
Where, on an equitable petition and an answer by defendant in the nature of a cross bill, the jury returned a verdict in favor of defendant on the special issues of fact submitted by the judge, and plaintiff's motion for new trial on general and special grounds was denied, and his writ of error from such judgment was dismissed by the supreme court, plaintiff could not in a subsequent petition or motion to set aside the verdict and judgment attack them on any grounds which either were included in previous motion for new trial or could in the exercise of reasonable diligence have been so included, if the grounds presented such questions as could be raised by motion for new trial.—Manry v. Stephens, 9 S.E.2d 58, 190 Ga. 305.

Individual or partnership liability
Where defendant defended as in action for individual liability, he might not have judgment vacated on ground based on partnership liability.—Pace v. Continental Supply Co., 251 P. 743, 120 Okl. 302.

31. **Statute of limitations**
Refusing to open judgment on pleadings to afford defendant opportunity to plead statute of limitations was held not abuse of discre-

such as payment;[32] set-off and counterclaim;[33] want or failure of consideration;[34] fraud as discussed supra § 269; forgery;[35] and illegality of the contract or transaction out of which the alleged cause of action arose,[36] except in so far as statutes have changed the rule,[37] or public policy requires the opening of the judgment to permit the introduction of such defense.[38] Moreover, if the parties were equally guilty in participating in an immoral or unlawful contract, the courts will give no relief after the recovery of a judgment thereon, but will leave them where they stand.[39]

Notwithstanding the general rule, where the pleading and trial of a defense is prevented by fraud, accident, or other cause for which the moving party is not to blame, the judgment may be opened or vacated to let in the defense;[40] and, as appears infra § 334, default judgments ordinarily will be opened to let in substantial defenses where the default is sufficiently excused. Also, while some authorities have held that a judgment will not be opened to let in a defense which has arisen since the entry of the judgment,[41] others have held that matter arising after judgment, or before judgment but too late to be presented as a defense, which would have been an effectual bar to the action if it had occurred in time to be presented as a defense, is ground for vacating the judgment.[42] In any event, the court will usually decline to open a judgment to let in a merely technical defense as distinguished from a meritorious defense.[43]

Subsequent changes in law. A judgment will not be opened or vacated on the ground that a statute becoming effective after the judgment would have warranted a different decision, where such statute does not purport to be curative.[44] Similarly, a judicial decree will not be set aside by reason of a change in the law, resulting from a subsequent decision by a higher court reaching a contrary conclusion.[45] The reason for the rule is that there

tion.—Bedell v. Oliver H. Bair Co., 158 A. 651, 104 Pa.Super. 146.

32. N.C.—Council v. Willis, 66 N.C. 359.
34 C.J. p 287 note 22.

33. Pa.—Bennett v. Bechtel, 7 Pa. Dist. & Co. 283.
34 C.J. p 287 note 23.

During term

The rule that a counterclaim cannot be made available as a basis to vacate judgment is inapplicable to a motion to vacate judgment filed within term at which judgment was rendered.—Ames Co. v. Busick, Ohio App., 47 N.E.2d 647.

34. Ill.—Blake v. State Bank, 52 N. E. 957, 178 Ill. 182.
34 C.J. p 287 note 24.

35. Philippine.—Cruz v. Lopez, 19 Philippine 555.

36. Okl.—Corpus Juris cited in Dial v. Kirkpatrick, 31 P.2d 591, 592, 168 Okl. 21, 95 A.L.R. 1263.
34 C.J. p 287 note 27.

Champerty

Where defendants in quiet title action proceeded to trial on theory of validity of resale tax deed to county and commissioners' deed under which they claimed and appealed on same theory without attempting to inject defense of champerty, they could not assert such defense as grounds for vacating adverse judgment in quiet title action.—Dierks v. Walsh, Okl., 165 P.2d 354.

Usury

Judgments will not be opened to let in a defense of usury which could and should have been raised at the trial.

S.D.—James Valley Bank v. Nicholas, 210 N.W. 191, 50 S.D. 366.

Wash.—Arnot v. Fischer, 295 P. 1117, 161 Wash. 67.
34 C.J. p 287 note 27 [a].

37. Ill.—West v. Carter, 21 N.E. 782, 129 Ill. 249.
34 C.J. p 287 note 28.

38. Okl.—Dial v. Kirkpatrick, 31 P. 2d 591, 168 Okl. 21, 95 A.L.R. 1263.
Pa.—Nescopeck Nat. Bank v. Smith, 165 A. 526, 108 Pa.Super. 553—Gordon v. Miller, 21 Pa.Dist. & Co. 272, 39 Dauph.Co. 126—Smith v. Press, Com.Pl., 54 Montg.Co. 169.
34 C.J. p 287 note 27 [b].

No trial on merits

The rule that the lack of consideration is an affirmative defense that cannot be raised after judgment does not apply in a direct proceeding to vacate a judgment procured on an affidavit of demand without trial on the merits and for defects apparent on the face of the record.—American University v. Todd, 1 A.2d 595, 9 W. W.Harr. Del., 449.

Usury

Pa.—Personal Finance Co. v. Kettering, 20 Pa.Dist. & Co. 654.

39. Pa.—Woelfel v. Hammer, 28 A. 146, 159 Pa. 446.
34 C.J. p 287 note 29.

40. Ohio.—Buckeye State Building & Loan Co. v. Ryan, 157 N.E. 611, 24 Ohio App. 481.
Pa.—Zuch v. Gorman, 7 Pa.Dist. & Co. 564, 39 Lanc.L.Rev. 557.
34 C.J. p 287 note 30.
Pleading defense of fraud prevented by fraud or accident see supra § 299.

Defense held not prevented

Defendants in quiet title action were not prevented from asserting defense of champerty by inadvertent institution of action in name of former record owner of the land without disclosing the fact of his prior death, where his grantee by unrecorded deed was substituted as plaintiff before trial and introduced in evidence his deed, showing date when he acquired title.—Dierks v. Walsh, Okl., 165 P.2d 354.

41. Pa.—Ward & Wiener v. Casterline, Com.Pl., 33 Luz.Leg.Reg. 54.
34 C.J. p 286 note 21 [c].

42. Cal.—Gordon v. Hillman, 191 P. 62, 47 Cal.App. 571.
34 C.J. p 288 note 32.

43. Kan.—Mulvaney v. Lovejoy, 15 P. 181, 37 Kan. 305.

44. Pa.—In re Kulp's Estate, Orph., 56 Montg.Co. 347.
Wash.—Pacific Telephone & Telegraph Co. v. Henneford, 92 P.2d 214, 199 Wash. 462, certiorari denied Henneford v. Pacific Telephone & Telegraph Co., 59 S.Ct. 483, 306 U.S. 637, 83 L.Ed. 1038.

45. Cal.—Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, 113 P.2d 689, 18 Cal.2d 92—Union Oil Co. of California v. Reconstruction Oil Co., 135 P.2d 621, 58 Cal.App.2d 30.
N.Y.—Williams v. Madison Personal Loan, 42 N.Y.S.2d 144, 180 Misc. 497.

Change in law as to estate by curtesy

Finality of judgment that title by curtesy consummate existed in favor of husband to all lands of which Chickasaw wife became seized during coverture was held not subject to subsequent attack by motion to vacate as void after rule of law had been established by subsequent decision of a higher court that estate by curtesy did not attach.—Latimer

must be an end to litigation, and it is the policy of the law to prohibit, as far as possible, the further contest of an issue once judicially decided and to accord finality to judgments.[46] However, a motion to open a judgment has been allowed where the higher court subsequently made a contrary decision on the identical facts.[47]

§ 273. —— Newly Discovered Evidence

Newly discovered evidence is ground for vacating a judgment, provided it could not have been discovered at the time of the trial, and it is material and such as to affect the decision.

Newly discovered evidence, as distinguished from matter newly arising which would have constituted a defense if it had occurred in time to be presented as a defense in the action, as considered supra § 272, is ground for vacating a judgment,[48] provided the party was ignorant of such evidence and could not have discovered it in time to adduce it at the trial, by the exercise of due diligence,[49] and provided the evidence is material and such as to affect the decision of the issue,[50] and not merely cumulative or additional to that which was introduced at the trial.[51] It has been held that the power to open or vacate a judgment for newly discovered evidence applies only during the term in which the judgment was rendered, and not after the expiration of the term.[52]

§ 274. —— Errors of Law

While a judgment may be opened or vacated during the term for errors of law, such relief ordinarily will not be granted after the expiration of the term.

During the term, a judgment may be opened or vacated for errors of law,[53] even though the error

v. Vanderslice, 62 P.2d 1197, 178 Okl. 501.

46. Cal.—Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, 113 P.2d 689, 18 Cal. 2d 92—Union Oil Co. of California v. Reconstruction Oil Co., 135 P.2d 621, 58 Cal.App.2d 30.

47. La.—Townley v. Pomes, 194 So. 763, 194 La. 730.

48. Ark.—Papa v. Jackson, 67 S.W. 2d 187, 188 Ark. 1167.
Minn.—Holmes v. Conter, 295 N.W. 649, 209 Minn. 144.
N.J.—Strong v. Strong, 47 A.2d 427.
Wis.—Welhouse v. Industrial Commission of Wisconsin, 252 N.W. 717, 214 Wis. 163.
34 C.J. p 288 note 36.

Grounds for opening, not vacating
Where new evidence relating to the cause of action must be introduced in order to sustain an attack on a judgment, the judgment should not be vacated or set aside, but should be opened for the purpose of admitting the new evidence.—Nixon v. Nixon, 198 A. 154, 329 Pa. 256.

Failure to comply with statute
In suit on fire policy, defendant's motion to vacate judgment for plaintiff, which alleged that fact had been discovered since trial that plaintiff was not owner of building was properly overruled, where motion was not verified, no testimony was offered to support it, and no attempt was made to comply with statute relating to granting of new trial on ground of newly discovered evidence.—Farmers Union Mut. Ins. Co. v. Jordan, 140 S.W.2d 430, 200 Ark. 711.

49. Ark.—Papa v. Jackson, 67 S.W. 2d 187, 188 Ark. 1167.
Ill.—Hodge v. Globe Mut. Life Ins. Co., 274 Ill.App. 31.
Minn.—Holmes v. Conter, 295 N.W. 649, 209 Minn. 144.
N.J.—Strong v. Strong, 47 A.2d 427.
N.Y.—Albright v. New York Life Ins. Co., 26 N.Y.S.2d 210, 261 App.Div. 419—**Corpus Juris cited in** Di Donato v. Rosenberg, 245 N.Y.S. 675, 679, 230 App.Div. 538—In re Lynn's Estate, 23 N.Y.S.2d 995, 175 Misc. 441, modified on other grounds and affirmed 26 N.Y.S.2d 96, 261 App. Div. 513, affirmed In re Lynn's Will, 39 N.E.2d 266, 287 N.Y. 627.
Tex.—**Corpus Juris cited in** Walker v. State, Civ.App., 103 S.W.2d 404, 405.
34 C.J. p 288 note 38.

Inability to locate property in issue
Where party seeks to set aside judgment for newly discovered evidence which could not have been produced before because the location of property in issue was not known, owing to the loss of the deeds, the party must show that the deeds were not recorded, or, if recorded, were improperly indexed, since otherwise slight effort would have disclosed a true description of the property.—Trustees of Cumberland Presbyterian Church of Central City v. Central City, 11 S.W.2d 694, 226 Ky. 699.

Evidence held previously ascertainable
N.J.—Pamrapau Corporation v. City of Bayonne, 19 A.2d 877, 129 N. J.Eq. 586.
N.Y.—Joannes Bros. Co. v. Federal Sugar Refining Co., 218 N.Y.S. 504, 218 App.Div. 396.

50. Conn.—Comcowich v. Zaparyniuk, 37 A.2d 612, 131 Conn. 40.
Minn.—Holmes v. Conter, 295 N.W. 649, 209 Minn. 144.
N.J.—Strong v. Strong, 47 A.2d 427.
N.Y.—In re Madden's Estate, 279 N. Y.S. 218, 155 Misc. 308.
Tex.—**Corpus Juris cited in** Kelley v. Wright, Civ.App., 134 S.W.2d 649, 654.
34 C.J. p 288 note 39.

Evidence held to warrant opening judgment
Judgment holding defendant liable on agreement in bill of sale will be set aside on production of copy of bill of sale showing no liability.—Eddingston v. Acom, Tex.Civ.App., 287 S.W. 96.

Evidence held not to warrant opening judgment
(1) Petition, alleging newly discovered evidence that judgment had been secured by perjury, was held insufficient to reopen case.—King v. King, Tex.Civ.App., 279 S.W. 899.

(2) Defendant could not attack judgment on ground of newly discovered evidence that it awarded damages based on retail rather than wholesale values.—White Transp. Co. v. Michelin Tire Co., 161 A. 163, 163 Md. 142.

(3) Other evidence.
Ind.—Lowther v. Union Trust Co. of Indianapolis, 50 N.E.2d 872, 221 Ind. 635.
N.Y.—In re Lynn's Estate, 23 N.Y. S.2d 995, 175 Misc. 441, modified on other grounds and affirmed 26 N. Y.S.2d 96, 261 App.Div. 513, affirmed In re Lynn's Will, 39 N.E. 2d 266, 287 N.Y. 627.

51. Ill.—Hodge v. Globe Mut. Life Ins. Co., 274 Ill.App. 31.
34 C.J. p 289 note 40.

52. N.C.—Crow v. McCullen, 17 S. E.2d 107, 220 N.C. 306.

53. U.S.—Suggs v. Mutual Ben. Health & Accident Ass'n, C.C.A. Okl., 115 F.2d 80.
Ky.—Kentucky Home Mut. Life Ins. Co. v. Hardin, 126 S.W.2d 427, 277 Ky. 565.
Mich.—Strausser v. Sovereign Camp, W. O. W., 278 N.W. 101, 283 Mich. 370.
N.C.—Price v. Life & Casualty Ins. Co. of Tennessee, 157 S.E. 132, 200 N.C. 427.

was invited by the party against whom the judgment was entered.[54] However, after the term at which a judgment was rendered, it cannot be vacated or set aside on the sole ground that it is erroneous in matter of law,[55] except in so far as such

Okl.—**Corpus Juris cited in** Pitts v. Walker, 105 P.2d 760, 761, 188 Okl. 17.

34 C.J. p 289 note 41.

Duty

It is duty of judge of court to set aside a judgment which he concludes was erroneously entered by him.—Dorman v. Usbe Building & Loan Ass'n, 180 A. 413, 115 N.J.Law 337.

Refusal held error

Where court improperly rendered judgment, discharging garnishee without requiring it to answer, it was error to refuse motion made during term to vacate judgment.—American Agricultural Chemical Co. v. Bank of Madison, 123 S.E. 921, 32 Ga.App. 473.

To make additional findings

In death action, trial court had authority to reopen judgment against defendant for purpose of making additional findings which it had omitted to make where court acted within term at which judgment was rendered and all parties were before court and no advantage was taken of either.—Western Union Telegraph Co. v. Martin, 95 P.2d 849, 186 Okl. 24.

54. Okl.—Pitts v. Walker, 105 P.2d 760, 188 Okl. 17.

55. Ariz.—Hawkins v. Leake, 22 P. 2d 833, 42 Ariz. 121.

Ark.—Magnolia Grocer Co. v. Farrar, 115 S.W.2d 1094, 195 Ark. 1069—Feild v. Waters, 1 S.W.2d 807, 175 Ark. 1169.

Cal.—Phillips v. Trusheim, 156 P.2d 25, 25 Cal.2d 913—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209—Stevens v. Superior Court in and for San Joaquin County, 59 P.2d 988, 7 Cal.2d 110—In re Lingg's Estate, App., 162 P.2d 707—Reichert v. Rabun, 265 P. 260, 89 Cal. App. 375.

Conn.—**Corpus Juris quoted in** Kalinick v. Collins Co., 163 A. 460, 462, 116 Conn. 1.

Ga.—Lester v. Rogers, 121 S.E. 582, 31 Ga.App. 590.

Ill.—Jerome v. 5019–21 Quincy Street Bldg. Corporation, 53 N.E.2d 444, 385 Ill. 524—McNulty v. White, 248 Ill.App. 572.

Kan.—McLeod v. Hartman, 253 P. 1094, 123 Kan. 110.

Ky.—McKim v. Smith, 172 S.W.2d 634, 294 Ky. 835—Crawford v. Riddle, 45 S.W.2d 463, 241 Ky. 839.

La.—Wunderlich v. Palmisano, App., 177 So. 843.

Mass.—Peterson v. Hopson, 29 N.E. 2d 140, 306 Mass. 597, 132 A.L.R. 1—Powdrell v. Du Bois, 174 N.E. 220, 274 Mass. 106.

Minn.—In re Holum's Estate, 229 N. W. 133, 179 Minn. 315.

Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.

Mo.—Weatherford v. Spiritual Christian Union Church, 163 S.W.2d 916—Harrison v. Slaton, 49 S.W.2d 31—McFadden v. Mullins, 136 S.W. 2d 74, 234 Mo.App. 1056.

Neb.—Penn Mut. Life Ins. Co. v. Sweeney, 273 N.W. 46, 132 Neb. 624.

Nev.—Scheeline Banking & Trust Co. v. Stockgrowers' & Ranchers' Bank of Reno, 16 P.2d 368, 54 Nev. 346.

N.M.—**Corpus Juris cited in** In re Field's Estate, 60 P.2d 945, 951, 40 N.M. 423—Mozley v. Potteiger, 18 P.2d 1021, 37 N.M. 91.

N.Y.—Dana v. Howe, 18 N.Y. 306—West 158th Street Garage Corporation v. State, 10 N.Y.S.2d 990, 256 App.Div. 401, reargument denied 12 N.Y.S.2d 759, 257 App.Div. 875—Klein v. Fairberg, 276 N.Y.S. 847, 243 App.Div. 609—In re Beach 9th St. (Jarvis Lane) in City of New York, 54 N.Y.S.2d 187, 183 Misc. 446—Feinberg v. Feinberg, 41 N.Y. S.2d 868, 180 Misc. 305—In re Minard's Will, 35 N.Y.S.2d 457.

N.C.—Herbert B. Newton & Co. v. Wilson Furniture Mfg. Co., 174 S.E. 449, 206 N.C. 533.

N.D.—Kranz v. Tavis, 192 N.W. 176, 49 N.D. 553.

Ohio.—State ex rel. Ehmann v. Schneider, App., 67 N.E.2d 117.

Okl.—Tolliver v. First Nat. Bank, 64 P.2d 1215, 179 Okl. 191—Hill v. Capitol State Bank, 63 P.2d 957, 178 Okl. 610.

Pa.—Levitt v. Wayne Title & Trust Co., Com.Pl., 29 Del.Co. 553—In re Kulp's Estate, Orph., 56 Montg.Co. 347.

S.D.—Payton v. Rogers, 285 N.W. 873, 66 S.D. 486—Boshart v. National Ben. Ass'n of Mitchell, 273 N.W. 7, 65 S.D. 260.

Wash.—Pacific Telephone & Telegraph Co. v. Henneford, 92 P.2d 214, 199 Wash. 462, certiorari denied Henneford v. Pacific Telephone & Telegraph Co., 59 S.Ct. 483, 306 U.S. 637, 83 L.Ed. 1038—Goodwin v. American Surety Co. of New York, 68 P.2d 619, 190 Wash. 457.

Wyo.—Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.

34 C.J. p 289 note 42.

An "error of law" is committed when court, either on motion of one of the parties or on its own motion, makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make.—In re Ellern, 160 P.2d 639, 23 Wash.2d 219.

Even gross error in decree does not render it void and subject to motion to vacate.—Swift & Co. v. U. S., App.D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

Error held not "judicial"

Where trial judge intended to pronounce judgment for defendants but signed a judgment for plaintiff, whose counsel had prepared findings of fact, conclusions of law, and judgment, the error in signing judgment was a "clerical error" and not a "judicial error."—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209.

Appeal held proper remedy

Miss.—Bates v. Strickland, 103 So. 432, 139 Miss. 636.

Mo.—Platies v. Theodorow Bakery Co., App., 79 S.W.2d 504.

N.Y.—Whitney v. Chesbro, 280 N. Y.S. 133, 244 App.Div. 594—Schwert v. Crawford, 271 N.Y.S. 654, 241 App.Div. 909—In re White's Estate, 10 N.Y.S.2d 983, 170 Misc. 657.

N.C.—Crissman v. Palmer, 35 S.E.2d 423, 225 N.C. 472—Dail v. Hawkins, 189 S.E. 774, 211 N.C. 283.

S.D.—Janssen v. Tusha, 5 N.W.2d 684, 68 S.D. 639.

Estoppel

One making judicial declaration on which judgment is rendered cannot ordinarily attack judgment for error of law.—Succession of Williams, 121 So. 171, 168 La. 1.

Particular matters within rule

(1) A motion to vacate a judgment cannot be based on the reception of incompetent evidence or the alleged insufficiency of the evidence to support the judgment.

Kan.—Sparks v. Maguire, 169 P.2d 826—American Oil & Refining Co. v. Liberty-Texas Oil Co., 211 P. 137, 112 Kan. 309.

Mo.—Weatherford v. Spiritual Christian Union Church, 163 S.W.2d 916—Robinson v. Martin Wunderlich Const. Co., App., 72 S.W.2d 127.

N.C.—Crissman v. Palmer, 35 S.E.2d 422, 225 N.C. 472.

34 C.J. p 289 note 42 [a].

(2) Where court had jurisdiction of parties and to administer legal and equitable relief, mistake, if any, in holding complaint sufficient to warrant both was judicial error, not irregularity.—Porter v. Alamocitos Land & Live Stock Co., 256 P. 179, 32 N.M. 344.

(3) Errors in permitting amendment of petition after judgment, and in fixing amount of attorney's fees, and in rendering judgment on verdict, were held not grounds for vacating judgment on motion filed after expiration of term at which judg-

procedure may be authorized by statute,[56] or unless the error is one going to the jurisdiction;[57] and, while there is some authority to the contrary,[58] it has been held to be immaterial that the time for a review of the judgment has expired.[59]

Amount of judgment. A judgment may be vacated when rendered for an amount in excess of that claimed in the writ or declaration,[60] or where it includes an unauthorized allowance of damages in addition to the amount fixed by the jury,[61] unless the fault can be cured by reducing or remitting the excess,[62] or unless the excess is very trifling.[63] However, this cannot generally be done on account of an erroneous computation of the amount of damages or interest,[64] or on an allegation that the amount of the judgment is greater than the facts of the case will warrant.[65] It has been held that a judgment may be set aside on the ground of clear inadequacy of the amount awarded,[66] at least during the term.[67]

Taxation of costs. A judgment should not be set aside for irregularity in the taxing of costs, or error in the amount as taxed, the remedy being by motion to correct the judgment by reducing or otherwise changing the taxed costs.[68] The taxation of costs without notice as ground for setting aside a judgment is considered supra § 268.

§ 275. —— Errors of Fact

Errors of fact going to the validity or regularity of a judgment constitute grounds for opening or vacating the judgment.

Error or mistake of fact going to the validity or regularity of the judgment, such as furnished ground for the writ of error coram nobis at common law, discussed infra §§ 311, 312, has been held a ground, sometimes by virtue of statutory provisions, for opening or vacating the judgment.[69] Er-

ment was rendered.—Duncan v. Wilkins, 229 P. 801, 103 Okl. 221.

(4) Other matters.

Ga.—Hood v. Bibb Brokerage Corporation, 173 S.E. 236, 48 Ga.App. 606.

Ill.—Linehan v. Travelers Ins. Co., 18 N.E.2d 178, 370 Ill. 157.

56. Cal.—Phillips v. Trusheim, 156 P.2d 25, 25 Cal.2d 913—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209—In re Lingg's Estate, App., 162 P.2d 707.

34 C.J. p 290 note 44.

Error of law as "irregularity"

An "irregularity," within statute authorizing setting aside of a judgment for irregularity, does not embrace judicial error in rendition of judgment, and, where proceedings have been regular, court's power to correct judgment ceases with end of judgment term, regardless of how erroneous proceedings may have been.—State ex rel. Caplow v. Kirkwood, Mo.App., 117 S.W.2d 652—34 C. J. p 290 note 44 [a].

Unsupported judgment or conclusions of law

(1) Under statute so providing, a judgment may be vacated "and another and different judgment entered for either of the following causes materially affecting the substantial rights of such party and entitling him to a different judgment: 1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be amended and corrected. 2. A judgment not consistent with or not supported by the special verdict."—Irer v. Gawn, 277 P. 1053, 99 Cal.App. 17—Gale v. Dixon, 267 P. 342, 91 Cal.App. 529—34 C.J. p 290 note 44 [c].

(2) In particular cases the facts were held not to furnish grounds for setting aside the judgment under such a statute.—Stanton v. Superior Court within and for Los Angeles County, 261 P. 1001, 202 Cal. 478.

(3) Order vacating judgment, findings of fact, and conclusions of law on ground that they were signed and filed by inadvertence, and granting certain defendants leave to substitute modified judgment, findings of fact, and conclusions of law, was held invalid as not within the statute.—Warden v. Barnes, 295 P. 569, 111 Cal.App. 287.

57. N.Y.—Schaettler v. Gardiner, 47 N.Y. 404.

58. N.Y.—Siegel v. State, 246 N.Y.S. 652, 138 Misc. 474.

59. Minn.—State ex rel. Wendland v. Probate Court of St. Louis County, 22 N.W.2d 448.

Wash.—In re Jones, 199 P. 734, 116 Wash. 424.

60. Pa.—Great American Tea Co. v. McCabe, 94 Pa.Super. 573.

34 C.J. p 290 note 46.

61. N.Y.—Chicago Corn Exch. Bank v. Blye, 23 N.E. 805, 119 N.Y. 414.

62. Ga.—Love v. National Liberty Ins. Co., 121 S.E. 648, 157 Ga. 259.

N.J.—A. Poth Brewing Co. v. Bernd, Sup., 36 A. 664.

63. Cal.—Ziel v. Dukes, 12 Cal. 479.

Wis.—Lathrop v. Snyder, 17 Wis. 110.

34 C.J. p 290 note 49.

64. Mo.—Robinson v. Martin Wunderlich Const. Co., App., 72 S.W.2d 127.

Wash.—E. R. Thomas & Co. v. Penland, 268 P. 867, 148 Wash. 279.

34 C.J. p 290 note 50.

After term

Rendition of judgment changing interest date at term subsequent to rendition of judgment reopened was held error.—Potter v. Prudential Ins. Co., 142 A. 891, 108 Conn. 271.

65. Ga.—Lester v. Rogers, 121 S.E. 582, 31 Ga.App. 590.

Okl.—Welden v. Home Owners & Loan Corporation, 141 P.2d 1010, 193 Okl. 167.

34 C.J. p 290 note 51.

66. Cal.—Collier v. Landram, 155 P. 2d 652, 67 Cal.App.2d 752.

Conn.—Santoro v. Kleinberger, 163 A. 107, 115 Conn. 631.

67. Ohio.—Licht v. Woertz, 167 N. E. 614, 32 Ohio App. 111.

Pa.—Bekelja v. James E. Strates Shows, 37 A.2d 502, 349 Pa. 442.

68. Or.—**Corpus Juris quoted in** Linn County v. Rozelle, 162 P.2d 150, 165.

15 C.J. p 186 note 10—34 C.J. p 290 note 53.

69. Ill.—Loew v. Krauspe, 150 N.E. 683, 320 Ill. 244—Harris v. Chicago House-Wrecking Co., 145 N.E. 666, 314 Ill. 500—O'Connell v. Jacobs, 30 N.E.2d 136, 307 Ill.App. 245—Reid v. Dolan, 19 N.E.2d 764, 299 Ill.App. 612—Chicago Securities Corporation v. Olsen, 14 N.E. 2d 893, 295 Ill.App. 615—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392.

Miss.—Lott v. Illinois Cent. R. Co., 10 So.2d 96, 193 Miss. 443.

Tex.—John E. Quarles Co. v. Lee, Com.App., 58 S.W.2d 77, costs retaxed 67 S.W.2d 607—**Corpus Juris**

rors of fact within this rule are errors in material matters, prejudicial to the judgment debtor, and which, if known, would have prevented rendition of the judgment.[70] Erroneous or mistaken findings as to facts in issue afford no ground for vacating the judgment.[71]

§ 276. —— Defects and Objections as to Parties

A judgment may be opened or vacated for serious defects or objections as to parties, and generally for the disability or death of a party.

A judgment may be vacated for nonjoinder of a necessary party,[72] or where it was rendered on a

cited in Walker v. State, Civ.App., 103 S.W.2d 404, 405.

W.Va.—Yost v. O'Brien, 130 S.E. 442, 100 W.Va. 408.

34 C.J. p 290 note 55, p 291 note 57.

Mistake of fact generally see infra § 280.

Opening or vacating judgment after expiration of term generally see supra § 230.

Errors not appearing on face of record

(1) Statutory motion in nature of writ of error coram nobis is not available to review questions of fact arising on pleadings, being limited to matters not appearing of record.—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141.

(2) Under statute substituting motion for writ of error coram nobis and providing that motion may be made in writing within five years after rendition of final judgment on reasonable notice, certain errors of fact not appearing on face of record can be corrected on proper showing.—Grice v. Grice, 26 N.E.2d 747, 304 Ill.App. 584.

Effect of negligence

(1) Under statute substituting motion for writ of error coram nobis and providing that motion may be made in writing within five years after rendition of final judgment on reasonable notice, motion will not lie where party seeking relief is guilty of negligence.—Grice v. Grice, 26 N.E.2d 747, 304 Ill.App. 584.

(2) Failure of attorneys for plaintiff to attend call of calendar of certain judge which resulted in dismissal of cause for want of prosecution is not such negligence as bars vacation of judgment for error of fact on motion under the statute, where it appears that cause was improperly on calendar of such judge and was on calendar of another judge, to whom cause had been originally assigned, for call on same day, and that attorneys were present before such latter judge, and that attorneys for both parties were absent at call of first judge's calendar.—Reid v. Chicago Rys. Co., 231 Ill.App. 58.

70. Conn.—Stolman v. Boston Furniture Co., 180 A. 507, 120 Conn. 235.

Ill.—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141—Loew v. Krauspe, 150 N.E. 683, 320 Ill. 244—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349—Reid v. Dolan, 19 N.E.2d 764, 299 Ill.App. 612—Mitchell v. Eareckson, 250 Ill.App. 508—McNulty v. White, 248 Ill.App. 572.

Miss.—Lott v. Illinois Cent. R. Co., 10 So.2d 96, 193 Miss. 443.

34 C.J. p 291 note 58.

Effect of statute on court's power

The statute authorizing a court in its discretion and on just terms, at any time within one year after notice, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect is not a limitation on court's power to set aside a judgment based on stipulated facts where it appears that there was a mutual mistake concerning certain material facts.—Payton v. Rogers, 285 N.W. 873, 66 S.D. 486.

Errors held within rule

(1) Error in fact, to justify vacation of judgment, is not necessarily one which would have precluded rendition of judgment for lack of jurisdiction.—Baird & Warner, Inc., v. Roble, 250 Ill.App. 255.

(2) Where trial judge intended to pronounce judgment for defendants but signed a judgment for plaintiff, whose counsel had prepared findings of fact, conclusions of law, and judgment, the error in signing judgment was a "clerical error" and not a "judicial error," and hence trial court, on defendants' motion, had power to vacate findings and judgment on ground that they were signed as result of mistake.—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209.

(3) Mistakes of fact, justifying vacation of judgment, are not confined to omissions or misprisions of clerk of court.—Toth v. Samuel Phillipson & Co., 250 Ill.App. 247.

(4) Other errors.—Chicago Securities corporation v. Olsen, 14 N.E.2d 893, 295 Ill.App. 613—Hooper v. Wabash Automotive Corporation, 10 N.E.2d 892, 291 Ill.App. 618—Swiercz v. Nalepka, 259 Ill.App. 262—Reid v. Chicago Rys. Co., 231 Ill.App. 58.

Errors held not within rule

(1) Facts that cause was stricken off calendar through mistake, and inadvertence in office of plaintiff's attorney, and that, latter being ignorant of fact that case was within order striking certain cases from docket, it was again stricken from calendar, were held not errors of fact authorizing recall of judgment of dismissal.—Harris v. Chicago House-Wrecking Co., 145 N.E. 666, 314 Ill. 500.

(2) A trial court's entry of judgment, without observing court rules of record, such as rule requiring that testimony be taken down by court reporter, does not constitute "error of fact" entitling defendant to vacation of judgment on motion, as courts take judicial notice of their own records, which are always constructively before them.—Viedenschek v. Johnny Perkins Playdium, 49 N.E.2d 339, 319 Ill.App. 523.

(3) "Errors of fact" not arising on the trial of an action, which authorize the vacating of a judgment, do not include a failure to present a defense based on facts known to the party at the time of the original action.—Boslov v. Boslov, 31 N.Y.S.2d 970, 177 Misc. 817, affirmed 36 N.Y.S.2d 744, 264 App.Div. 943.

(4) Other errors.—McNulty v. White, 248 Ill.App. 572.

71. Mass.—Chagnon v. Chagnon, 15 N.E.2d 231, 300 Mass. 309—Parsekian v. Oynoian, 13 N.E.2d 409, 299 Mass. 543, 115 A.L.R. 470.

N.M.—Porter v. Alamocitos Land & Live Stock Co., 256 P. 179, 32 N.M. 344.

34 C.J. p 291 note 59.

Effect of statute

Statute authorizing setting aside of judgment where conclusions are inconsistent with findings has been held not to authorize attack on findings of fact.—Stanton v. Superior Court within and for Los Angeles County, 261 P. 1001, 202 Cal. 473.

72. Ky.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 228 Ky. 554.

34 C.J. p 291 note 61.

Demurrer held proper remedy

Judgment cannot be attacked by motion to set aside as beyond jurisdiction of court, where defect is of parties, demurrer being the proper remedy.—Royal Indemnity Co. v. Peebles Ceramic Products Co., 169 N.E. 39, 33 Ohio App. 247.

Vacation not warranted

Where action against county to quiet title was duly commenced by proper service on county auditor and defended by assistant prosecuting attorney, lack of knowledge by board of county commissioners of such action and board's failure to participate therein afforded no grounds for vacation of decree en-

joint contract against only some of the defendants,[73] or where it affects persons who were never made parties to the suit,[74] or where it appears that the real party in interest has not been joined,[75] although on the last point there is some authority to the contrary.[76] However, it has been held that a judgment good as to at least some of the defendants will not be stricken, although it may be opened;[77] and, except during the term in which the judgment was rendered,[78] a judgment will not be set aside because of the misnomer of a party, at least where it did not mislead, and is not calculated to work substantial injury;[79] nor will a judgment be set aside because of a technical objection, not appearing on the face of the record, to plaintiff's capacity to sue.[80]

Legal disability. Except in so far as there may be a waiver of the right to raise the objection,[81] legal disability, such as coverture, infancy, or insanity, of a party against whom a judgment is improvidently rendered without regard to such disability is ground for opening or vacating such judgment,[82] in some instances under statutes to that effect.[83] Such a case is one of mistake of fact,[84] as distinguished from irregularity.[85]

Death of party. It is competent and proper for the court to set aside a judgment which was rendered for or against a party after his death,[86] particularly where statutes so provide.[87] However, a party's death after judgment has been rendered does not warrant vacation of the judgment, even though the cause of action would not have survived.[88]

Bankruptcy of party. The bankruptcy of defendant has been held to be no ground for opening a judgment against him.[89]

§ 277. —— Defects and Objections as to Pleadings

While ordinarily a judgment will not be set aside for mere defects in the pleadings, it may be set aside where there is a fatal error.

A judgment will not be set aside because of de-

tered therein.—Harter v. King County, 119 P.2d 919, 11 Wash.2d 583.

73. Tex.—Uher v. Cameron State Bank, 125 S.W. 321, 59 Tex.Civ. App. 134.
34 C.J. p 292 note 62.

74. Mich.—Rosenfield v. Wayne Circuit Judge, 177 N.W. 946, 210 Mich. 689.
34 C.J. p 292 note 63.

Judgment quieting title to land is void, except as to land of plaintiff and subject to be set aside on defendants' motion, in so far as they were affected thereby, where action was brought by plaintiff for himself and other landowners not parties to case, whose lands were not described.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P.2d 903, 144 Kan. 626.

75. N.M.—Miller v. Klasner, 140 P. 1107, 19 N.M. 21.
Tex.—Ebel v. Bursinger, 8 S.W. 77, 70 Tex. 120.

Substitution of parties
Court, in vacating judgment for defendant and allowing substituted party for plaintiff to put in complaint, did not abuse discretion.—Demarrias v. Burke, 210 N.W. 198, 50 S.D. 353.

76. N.Y.—Grinnell v. Schmidt, 4 N. Y.Super. 706, 3 Code Rep. 19.
Pa.—McKenzie Co. v. Fidelity & Deposit Co. of Maryland, Com.Pl., 54 Dauph.Co. 294.

77. Pa.—Merchants Banking Trust Co. v. Klimosky, 9 Pa.Dist. & Co. 143, 23 Sch.L.R. 78.

78. Kan.—Standard Life Ass'n v. Merrill, 75 P.2d 825, 147 Kan. 121.

79. N.Y.—Meurer v. Berlin, 80 N.Y. S. 240, 80 App.Div. 294.
34 C.J. p 292 note 65.

80. Tex.—Sayles v. Abilene First State Bank & Trust Co., Civ.App., 199 S.W. 823.
34 C.J. p 292 note 66.

81. **Previous claim of legal ability**
Where a married woman claiming disability and seeking to open a judgment on that ground previously swore that she was unmarried she is precluded from asserting the contrary.—Cole v. Hunter, 20 Pa.Dist. & Co. 477, 35 Lack.Jur. 23.

82. Ill.—Mitchell v. Eareckson, 250 Ill.App. 508.
Mass.—Herlihy v. Kane, 38 N.E.2d 620, 310 Mass. 457.
34 C.J. p 292 note 67, p 316 note 44 [b].
Availability of writ of error coram nobis see infra § 312.

Abnormal mental condition
The trial court has discretion to vacate a judgment which has been brought about as the result of an abnormal mental condition of a party against whom it was rendered, and who was not represented by a guardian or a guardian ad litem.—Herlihy v. Kane, 38 N.E.2d 620, 310 Mass. 457.

83. Ark.—Hare v. Ft. Smith & W. Co., 148 S.W. 1038, 104 Ark. 187.
34 C.J. p 292 note 71.

84. Ill.—St. Louis Cons. Coal Co. v. Oeltjen, 59 N.E. 600, 189 Ill. 85.
Mo.—Powell v. Gott, 13 Mo. 458, 53 Am.D. 153.

Knowledge prior to entry of judgment
Where the disability is known to the court before the entry of judgment, the judgment will not be vacated since the error then is one of law, to be remedied by appeal.—Mitchell v. Eareckson, 250 Ill.App. 508.

85. Mo.—Powell v. Gott, 13 Mo. 458, 53 Am.D. 153.
34 C.J. p 292 note 69.

86. Ala.—Griffin v. Proctor, 14 So. 2d 116, 244 Ala. 537.
Ill.—State Bank of Prairie du Rocher v. Brown, 263 Ill.App. 312.
34 C.J. p 269 note 57 [e], p 293 note 72, p 317 note 50.

Death of executor
Judgment against estate of decedent was properly set aside, where executor was dead at time of trial and his death was unknown to counsel for plaintiff and for estate, and administrator cum testamento annexo was not made party to action and did not appear therein, notwithstanding cause was properly and fairly tried and fully presented to jury and that administrator cum testamento annexo on order of court, paid two hundred and fifty dollars to attorneys who tried case and who prepared and served statement of case on appeal.—Taylor v. Caudle, 180 S.E. 699, 208 N.C. 298.

87. Okl.—Jefferson v. Hicks, 126 P. 739, 33 Okl. 407.
34 C.J. p 293 note 73.

88. Colo.—Ahearn v. Goble, 7 P.2d 409, 90 Colo. 173.

89. Pa.—Felin v. Conway, 32 Pa.Super. 171.
34 C.J. p 293 note 75.

fects or insufficiency in the pleadings,[90] especially where the alleged fault is amendable,[91] or has been waived, as by joining issue and going to trial,[92] or has been cured by the verdict,[93] or otherwise will not result in a miscarriage of justice.[94] However, a judgment without a declaration to support it may be set aside as irregular;[95] and it has been held that a judgment will be set aside where there is a fatal error as to the pleadings.[96] A judgment for defendant on the pleadings for want of a reply may be vacated and plaintiff granted leave to reply.[97]

Failure to state cause of action. It has been held that since, where the declaration or complaint states no cause of action, or contains no averments showing liability on the part of defendant, the judgment based thereon is erroneous and reversible, but not void, as is discussed supra § 40, it is not subject to vacation on the ground of such insufficiency of the declaration or complaint,[98] in accordance with the

90. Ariz.—Hawkins v. Leake, 22 P. 2d 833, 42 Ariz. 121.
Mo.—Harrison v. Slaton, 49 S.W.2d 31.
Pa.—Lauderbaugh v. Lumley, 38 Luz.Leg.Reg. 441.
Tex.—**Corpus Juris quoted in** Empire Gas & Fuel Co. v. Noble, Com. App., 36 S.W.2d 451, 454.
34 C.J. p 293 note 76.

Petition held not insufficient
In suit to declare a resulting trust, petition alleging that plaintiffs' ancestor purchased the real estate involved and paid the consideration therefor and that defendant contributed no part of such consideration, containing no allegation that the ancestor had acted contrary to the law, was not insufficient as against motion filed after judgment term to set judgment for plaintiffs aside on ground of irregularity because of alleged fraudulent appropriation by ancestor.—Weatherford v. Spiritual Christian Union Church, Mo., 163 S.W.2d 916.

91. Ga.—Auld v. Schmelz, 34 S.E.2d 860, 199 Ga. 633—Burch v. Dodge County, 20 S.E.2d 428, 193 Ga. 890—Georgia Securities Co. v. Ward, 17 S.E.2d 605, 66 Ga.App. 182.
Okl.—Simmons v. Howard, 276 P. 718, 136 Okl. 118—Ashinger v. White, 232 P. 850, 106 Okl. 19—Latimer v. Haste, 223 P. 879, 101 Okl. 109.
Tex.—**Corpus Juris quoted in** Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451, 454.
34 C.J. p 293 note 77.

Pendency of demurrers undisposed of did not constitute defect on record authorizing setting aside judgment where petition was amendable.—Oliver v. Fireman's Ins. Co., 155 S.E. 227, 42 Ga.App. 99.

Particular defects
(1) Omission of prayer for process from petition held "amendable defect" within statute providing that judgment may not be set aside for any defects in pleadings or record that is aided by verdict or amendable as matter of form.—Guthrie v. Spence, 191 S.E. 188, 55 Ga.App. 669.

(2) Where plaintiff filed amended petition alleging that, by mistake and oversight, case was styled by name of another instead of plaintiff, court entered order directing that plaintiff's name be substituted, and subsequent proceedings were conducted in the name and for plaintiff's benefit under original title, plaintiff was party in interest and proceedings would not be set aside because of mistake in title.—Spence v. Yell, 71 P.2d 701, 180 Okl. 475.

92. Ark.—Manhattan Const. Co. v. Atkisson, 88 S.W.2d 819, 191 Ark. 920.
Mo.—McFadden v. Mullins, 136 S.W. 2d 74, 234 Mo.App. 1056.
Tex.—**Corpus Juris quoted in** Empire Gas & Fuel Co. v. Noble, Com. App., 36 S.W.2d 451, 454.
34 C.J. p 293 note 78.

Under statute so providing, where complaint states substantial cause of action, judgment for plaintiff cannot be set aside for insufficiency of averment in complaint, in absence of previous objection thereto.—Chandler v. Price, 15 So.2d 462, 244 Ala. 667—34 C.J. p 293 note 78 [a].

93. Ga.—Auld v. Schmelz, 34 S.E.2d 860, 199 Ga. 633—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636.
Tex.—**Corpus Juris quoted in** Empire Gas & Fuel Co. v. Noble, Com. App., 36 S.W.2d 451, 454.
34 C.J. p 293 note 79.

Particular defects
(1) Where petition by holder of note against maker alleged that note was delivered by payee to another and through a number of successive assignees was delivered to plaintiff, but it did not appear that the note was ever transferred by indorsement by payee or any of the assignees or that any of the assignees or holder had paid anything of value for the note, such defects in the petition were subject to amendment and were cured by verdict and judgment rendered thereon could not be set aside on ground that petition failed to state a cause of action.—Georgia Securities Co. v. Ward, 17 S.E.2d 605, 66 Ga.App. 182.

(2) In suit to recover alleged balance due of money advanced by plaintiff against his salesman's commission, where judgment was rendered against salesman when he failed to prosecute case after filing demurrer and answer, salesman was held not entitled to set aside judgment because of failure of petition to allege agreement that salesman was to return any excess of sums advanced over commissions earned, since such defect was cured by verdict and judgment.—Smith v. Franklin Printing Co., 187 S.E. 904, 54 Ga. App. 385.

94. Cal.—Myers v. Metropolitan Trust Co. of California, 70 P.2d 992, 22 Cal.App.2d 284.

Particular defects or objections
(1) Where defendants did not show that substantial justice required a new trial or that any real injustice was done by refusal of trial court to receive a special plea three years after entry of action by plaintiff, motion to vacate judgment was properly denied.—Lehigh Nav. Coal Co. v. Keene Coal Co., 197 A. 410, 89 N.H. 274.

(2) In claim and delivery, the fact that the complaint merely consisted of a statement of the facts constituting the cause of action in ordinary and concise language, together with a demand for relief, and did not formally set up the cause of action in claim and delivery, did not mislead defendant to his prejudice, within constitutional provision providing that no judgment shall be set aside for errors in pleadings unless resulting in a miscarriage of justice.—Faure v. Drollinger, 213 P. 724, 60 Cal.App. 594.

95. U.S.—Ringgold v. Elliot, 20 F. Cas.No.11,844, 2 Cranch C.C. 462.

96. W.Va.—Collins v. Dravo Contracting Co., 171 S.E. 757, 114 W. Va. 229.

Certification by clerk
Judgment for amount of liquidated damages was properly set aside where it did not appear that copy of affidavit claim served on defendant was certified by clerk of court as required by statute.—Virginia-Lincoln Furniture Corporation v. Southern Factories & Stores Corporation, 174 S.E. 848, 162 Va. 767.

97. Minn.—McLaughlin v. City of Breckenridge, 142 N.W. 134, 122 Minn. 154.

98. Ariz.—Hawkins v. Leake, 22 P. 2d 833, 42 Ariz. 121.
34 C.J. p 293 note 81.

rule, considered supra § 274, that mere error in law is not ground for vacating a judgment after the term. Other courts, however, have held that failure of the declaration or complaint to state a cause of action is ground for vacating the judgment.[99]

§ 278. —— Unauthorized, Inadvertent, Improvident, or Premature Entry

A judgment may be set aside where its entry was unauthorized, inadvertent, improvident, or premature.

A judgment may be set aside where it was entered by the clerk without any authority therefor, whether his entry thereof was the result of mistake, inadvertence, or wrongful intent, and whether there was a total lack of authority to enter any judgment, or only a lack of authority to enter the particular judgment;[1] and the same is true where the entry was ordered by the court inadvertently, improvidently, or under a mistake.[2] A judgment may be stricken off where it is entered without the authority of the party in whose favor the judgment is entered and he disavows such entry.[3]

Premature entry. While there is some authority to the contrary,[4] it has been held that a judgment may be set aside where it was prematurely entered,[5] either because made before the return day, or the day fixed by law for entering judgments,[6] or before the time for answering or otherwise pleading had expired,[7] or while there was an answer or demurrer on file and not disposed of,[8] or before pleadings had been completed,[9] or because, for any other reason, it was made before the case was ripe for trial or regularity came on for hearing.[10]

§ 279. —— Disobedience of Order of Court or Other Misconduct of Party or Counsel

Where a judgment is entered in violation of a court order or direction it may be set aside, as may also a judgment obtained through the misconduct of a party's attorney.

A judgment may be set aside where it is entered in violation of a court order or direction,[11] as where it is entered in disobedience to an injunction or stay forbidding the further prosecution of the action, or in disregard of a pending order for a new trial.[12]

Misconduct of counsel. A judgment may be set aside where it was obtained through the fraudulent or dishonest conduct of a party's attorney, as where

99. Ala.—Chandler v. Price, 15 So. 2d 462, 244 Ala. 667.
Ga.—Auld v. Schmelz, 34 S.E.2d 860, 199 Ga. 633—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636—Burch v. Dodge County, 20 S.E.2d 428, 193 Ga. 890—Smith v. Franklin Printing Co., 187 S.E. 904, 54 Ga.App. 385—Tolbert v. Tolbert, 154 S.E. 655, 41 Ga.App. 737.
34 C.J. p 293 note 63.

1. Ala.—Du Pree v. Hart, 8 So.2d 183, 242 Ala. 690—Ex parte Anderson, 4 So.2d 420, 242 Ala. 31.
Ga.—Athens Apartment Corporation v. Hill, 119 S.E. 631, 156 Ga. 437.
N.C.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
Okl.—Abernathy v. Huston, 26 P.2d 939, 166 Okl. 184.
S.D.—Janssen v. Tusha, 5 N.W.2d 684, 68 S.D. 639.
Tex.—O'Neil v. Norton, Com.App., 33 S.W.2d 733.
34 C.J. p 294 note 86.

2. Cal.—Carter v. Shinsako, 108 P. 2d 27, 42 Cal.App.2d 9.
Pa.—Moore v. Monarch Accident Ins. Co., 17 Pa.Dist. & Co. 553, 30 Sch.L.R. 272.
34 C.J. p 294 note 87.

Entry of judgment not intended, and without proof required, justified setting aside judgment.—Morsbach v. Thurston County, 268 P. 135, 148 Wash. 87.

Lack of hearing

In suit to enjoin a nuisance where cause was by consent passed for a hearing in vacation and no hearing was held, refusal to grant defendant's motion to vacate inadvertent and invalid decree was error.—Hester v. Bishop, 10 So.2d 350, 193 Miss. 449.

Misapprehension of agreement

Judgment entered out of county, confirming sale under deed of trust, where entered under misapprehension of agreement of parties, was properly vacated on motion.—Brown v. Mitchell, 176 S.E. 258, 207 N.C. 132.

3. Pa.—Commonwealth v. Kerr, 25 Pa.Co. 645.

4. Ark.—Magnolia Grocer Co. v. Farrar, 115 S.W.2d 1094, 195 Ark. 1069.

5. N.J.—**Corpus Juris cited in** West Jersey Trust Co. v. Bigham, 187 A. 561, 563, 14 N.J.Misc. 752.
R.I.—Baus v. Coffey, 165 A. 593, 53 R.I. 227.
34 C.J. p 294 note 88.

Entry before decision

A judgment entered before a decision is made is premature and will be set aside on motion.—Hager v. Arland, 143 N.Y.S. 388, 81 Misc. 421.

6. Mass.—Everett-Morgan Co. v. Boyajian Pharmacy, 139 N.E. 170, 244 Mass. 460.
34 C.J. p 294 note 88.

7. Mo.—Poindexter v. Marshall, App., 193 S.W.2d 632.
N.J.—**Corpus Juris cited in** Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 549, 115 N.J. 86.
34 C.J. p 294 note 89.

8. Idaho.—Vincent v. Black, 166 P. 923, 30 Idaho 636.
34 C.J. p 295 note 90.

9. Ky.—Robbins v. Hopkins, 65 S. W.2d 54, 251 Ky. 413.

10. Ill.—Simon v. Balasic, 45 N.E. 2d 98, 316 Ill.App. 442.
Or.—Herrick v. Wallace, 236 P. 471, 114 Or. 520.
Wyo.—Ramsay v. Gottsche, 69 P.2d 535, 51 Wyo. 516.
34 C.J. p 295 note 91.

Time of service

In suit against four grantees to cancel deed, where only one grantee was served in time to make following term return term as to such grantee, verdict against all and judgment against two grantees taken at next term were properly set aside.—Hooper v. Weathers, 165 S.E. 52, 175 Ga. 133.

Continuance to subsequent term

Entry of judgment before term to which cause was continued was premature.—Nordquist v. Armourdale State Bank, 19 S.W.2d 553, 225 Mo. App. 186.

11. N.Y.—Kerr v. Dildine, 15 N.Y. St. 616, 14 N.Y.Civ.Proc. 176.
34 C.J. p 295 note 93 [a].

12. N.Y.—Lobdell v. Livingston, 8 N.Y.Super. 661.
34 C.J. p 295 note 93.

he deceives and misleads his client,[13] enters into a collusive arrangement with the opposing party or counsel,[14] or corruptly sells out his client's interests.[15] A judgment may also be set aside for such constructive fraud as is implied in the attorney's attempt to act for both parties,[16] or, out of hostility to his client, his secret withdrawal from the case and leaving it undefended.[17] It has even been held that the unauthorized withdrawal of an attorney without any circumstances of fraud or dishonesty is a sufficient ground for vacating the resulting judgment provided the client did not know of or consent to such withdrawal.[18]

However, where a party is actually represented by counsel in court, fully prepared to try the cause, and such counsel refuses to proceed for the sole reason that he thinks the justice presiding may decide against him, the judgment thus rendered cannot be vacated as though taken by default.[19]

§ 280. —— Mistake, Inadvertence, Surprise, Excusable Neglect, Casualty, or Misfortune

a. In general

b. Mistake

c. Surprise

d. Excusable neglect

e. Act or fault of counsel

f. Casualty or misfortune

a. In General

In general the trial court may grant relief against judgments suffered by reason of mistake, inadvertence, surprise, excusable neglect, casualty, or misfortune.

It is the general rule, in many jurisdictions by virtue of statutes so providing, that the trial court may, in its discretion, grant relief against judgments suffered by reason of mistake, inadvertence, surprise, excusable neglect, casualty, or misfortune.[20] The most usual application of provisions of this nature is found in the case of judgments entered by default, as appears infra § 334; and some such statutes apply only where the party, by reason of some mistake, inadvertence, etc., failed to be present or represented at the trial.[21] Such statutes are entitled to a liberal interpretation so as to advance the

13. N.J.—Barton v. Harker, 55 A. 105, 69 N.J.Law 603.
34 C.J. p 312 note 10.

Attorney lacking authority
Where plaintiff's former attorney was without authority to settle and discontinue action, court should have granted motion to vacate judgment entered pursuant to settlement and should have restored case to calendar.—Kropiewnicki v. National Transp. Co., 29 N.Y.S.2d 257, 262 App.Div. 112.

14. Tenn.—Smith v. Miller, Ch.A., 42 S.W. 182.
Wyo.—Chadron Bank v. Anderson, 48 P. 197, 6 Wyo. 518.

15. Neb.—Anthony v. Karbach, 90 N.W. 243, 64 Neb. 509, 97 Am.S.R. 662.
34 C.J. p 313 note 12.

16. N.C.—Patrick v. Bryan, 162 S.E. 207, 202 N.C. 62.
34 C.J. p 313 note 13.

17. N.D.—Nichells v. Nichells, 64 N.W. 73, 5 N.D. 125, 57 Am.S.R. 540, 33 L.R.A. 515.
34 C.J. p 313 note 14.

18. S.C.—Ex parte Roundtree, 29 S.E. 66, 51 S.C. 405.
34 C.J. p 313 note 15.

19. N.Y.—Sutter v. New York, 94 N.Y.S. 515, 106 App.Div. 129.
34 C.J. p 313 note 16.

20. Alaska.—Rubenstein v. Imlach, 9 Alaska 62.
Ariz.—Postal Ben. Ins. Co. v. Johnson, 165 P.2d 173.
Cal.—Pease v. City of San Diego, App., 169 P.2d 973—In re Rabinowitz' Estate, 155 P.2d 915, 67 Cal.App.2d 840—Hewins v. Walbeck, 141 P.2d 241, 60 Cal.App.2d 603—Clark v. Clark, 132 P.2d 527, 56 Cal.App.2d 324—In re Moreland's Estate, 121 P.2d 867, 49 Cal.App.2d 434—Burbank v. Continental Life Ins. Co., 33 P.2d 451, 2 Cal.App.2d 664—Startzman v. Los Banos Cotton Gins, 256 P. 220, 82 Cal.App. 624, followed in Erreca v. Los Banos Cotton Gins, 274 P. 1041, 96 Cal.App. 783.
Conn.—Kurzaji v. Warner & Bowman, 137 A. 19, 106 Conn. 90.
Iowa.—Dimick v. Munsinger, 211 N.W. 404, 202 Iowa 784.
Minn.—Stebbins v. Friend, Crosby & Co., 228 N.W. 150, 178 Minn. 549.
N.J.—Simon v. Calabrese, 46 A.2d 58, 137 N.J.Eq. 581—Kaffitz v. Clawson, 36 A.2d 215, 134 N.J.Eq. 494.
Or.—Hartley v. Rice, 261 P. 689, 123 Or. 237.
S.C.—Savage v. Cannon, 30 S.E.2d 70, 204 S.C. 473.
S.D.—Payton v. Rogers, 285 N.W. 873, 66 S.D. 486.
Tex.—Saunders v. Saunders, Civ. App., 293 S.W. 899.
W.Va.—Baker v. Gaskins, 36 S.E.2d 893.
Wyo.—Midwest Refining Co. v. George, 7 P.2d 213, 44 Wyo. 25.
34 C.J. p 296 note 4.
Surprise, accident, mistake, and inadvertence as grounds for new trial see the C.J.S. title New Trial §§ 78–100, also 46 C.J. p 214 note 74–p 243 note 87.

Relief from act of court only
The statute authorizing persons against whom judgment has been rendered in action wherein no trial has been had, to petition supreme court for a trial, was not intended to furnish relief against voluntary acts of such person, but only against act of court in rendering judgment under the conditions definitely set out in the statute.—Girard v. Sawyer, 9 A.2d 854, 64 R.I. 43.

During term only
It has been held under some statutes that the power to set aside a judgment for mistake, inadvertence, or neglect is confined to the term in which the judgment is rendered and does not apply after the term.—State ex rel. Spillman v. Commercial State Bank of Omaha, 10 N.W.2d 268, 143 Neb. 490—State Life Ins. Co. of Indianapolis, Ind. v. Heffner, 269 N.W. 629, 131 Neb. 700.

Legal reasons
To authorize vacation of judgment, facts shown by applicant must constitute mistake, inadvertence, surprise, or excusable neglect as matter of law, and erroneous reliance on reasons which would merely constitute everyday excuse for suffering judgment to be rendered will not suffice.—Salazar v. Steelman, 71 P.2d 79, 22 Cal.App.2d 402.

21. S.C.—Kaminitsky v. Northeastern R. Co., 25 S.C. 53.
34 C.J. p 296 note 6.

remedy.[22] However, relief should not be granted where to do so would be to grant a new trial at the capricious demand of a party who was either grossly negligent or had simply changed his mind after the judgment;[23] and relief should be granted only when it is sought in good faith and when no injustice will result therefrom.[24] It has been held that under such statutes a judgment may be set aside for fraud[25] and that in such case it is immaterial whether the fraud was extrinsic or intrinsic.[26]

Judgment on verdict, findings, or conclusions. It has been held that a statute authorizing the setting aside of a judgment for "mistake, inadvertence, surprise, or excusable neglect," does not apply to such judgments as necessarily follow a verdict, the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, as the verdict would stand even if the judgment were vacated, and such verdict could not be set aside after the term;[27] and the same rule has been held to apply to judgments which follow findings of fact or conclusions of law.[28]

b. Mistake

In general a judgment taken against a person by mistake may be opened or vacated provided the mistake is one of fact.

Under numerous statutes a judgment taken against a person by mistake may be opened or vacated;[29] but this applies only to mistakes of fact, not to mistakes of law,[30] unless otherwise provided by the statute.[31] If the statute gives the right to open or vacate a judgment taken against a party through "his" mistake, no mistake made by any other person will justify this action;[32] but in the ab-

22. Ariz.—Brown v. Beck, 169 P.2d 855.
Cal.—Elms v. Elms, App., 164 P.2d 936—Marston v. Rood, 144 P.2d 863, 62 Cal.App.2d 435—Hewins v. Walbeck, 141 P.2d 241, 60 Cal.App. 2d 603—Miller v. Lee, 125 P.2d 627, 52 Cal.App.2d 10—Kent v. County Fire Ins. Co. of Philadelphia, 80 P.2d 1019, 27 Cal.App.2d 340—Starkweather v. Minarets Mining Co., 43 P.2d 321, 5 Cal.App.2d 501.
S.C.—Jenkins v. Jones, 38 S.E.2d 255.
34 C.J. p 296 note 7.

23. Cal.—Elms v. Elms, App., 164 P.2d 936.

"Inadvertence" as excusable

As used in such statutes, "inadvertence" does not mean mere inadvertence in the abstract; and if it is wholly inexcusable it does not justify relief.—Elms v. Elms, supra.

24. Cal.—Hewins v. Walbeck, 141 P.2d 241, 60 Cal.App. 603.

25. Or.—Nichols v. Nichols, 143 P. 2d 663, 174 Or. 390.
Fraud as ground for opening or vacating judgment generally see supra § 269.

Concealment of facts

The concealment from court by vendor of agricultural land of fact of its actual forfeiture of vendee's rights under conditional sales agreement constituted a "fraud" justifying an order setting aside a summary judgment granting vendor the proceeds derived from sales of crops growing upon the land, which proceeds had been assigned by vendee as security for payment of portion of purchase price.—Security-First Nat. Bank of Los Angeles v. Hauer, 117 P.2d 952, 47 Cal.App.2d 302.

26. Cal.—Security-First Nat. Bank of Los Angeles v. Hauer, supra.

27. N.C.—Brown v. Rhinehart, 16 S. E. 840, 112 N.C. 772.
34 C.J. p 296 note 8.

28. Or.—Haas v. Scott, 239 P. 202, 115 Or. 580.

29. Cal.—Salazar v. Steelman, 71 P. 2d 79, 22 Cal.App.2d 402—Vale v. Maryland Casualty Co., 281 P. 1058, 101 Cal.App. 599.
Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.
Minn.—Fagerstrom v. Cotton, 246 N. W. 884, 188 Minn. 245.
Neb.—Crete Mills v. Stevens, 235 N. W. 453, 120 Neb. 794.
N.H.—Lancaster Nat. Bank v. Whitefield Sav. Bank & Trust Co., 30 A.2d 473, 92 N.H. 337.
R.I.—Dimond v. Marwell, 190 A. 683, 57 R.I. 477—Baus v. Coffey, 165 A. 593, 53 R.I. 227.
S.C.—Ex parte Clark, 118 S.E. 27, 125 S.C. 34.
W.Va.—Baker v. Gaskins, 36 S.E.2d 893.
Wis.—Welhouse v. Industrial Commission of Wisconsin, 252 N.W. 717, 214 Wis. 163.
34 C.J. p 296 note 9.

Consent to waive findings

Motion to vacate judgment and require filing of findings of fact was held properly granted, where consent to waive findings was inadvertently given.—Baucus v. Riveroll, 272 P. 760, 95 Cal.App. 224.

Mistake must be shown by facts

Original judgment cannot be vacated for mistake, where not shown by facts, and subsequent consent judgment is not predicated upon such mistake.—Sheehan v. Connor, 136 A. 355, 83 N.H. 529.

30. Cal.—Salazar v. Steelman, 71 P. 2d 79, 22 Cal.App.2d 402.
Ind.—Carty v. Toro, 57 N.E.2d 434.
Mont.—Rieckhoff v. Woodhull, 75 P. 2d 56, 106 Mont. 22.
N.C.—Crissman v. Palmer, 35 S.E.2d 422, 225 N.C. 472.
S.C.—Savage v. Cannon, 30 S.E.2d 70, 204 S.C. 473—Corpus Juris cited in Lucas v. North Carolina Mut. Life Ins. Co., 191 S.E. 711, 712, 184 S.C. 119.
34 C.J. p 297 note 10.
Errors of fact or law generally see supra §§ 274, 275.

Relief denied

(1) A defendant who did not appear, demur, answer, or otherwise plead to petition in belief that his property could not be reached by execution, was held not entitled to have the judgment vacated.—Bell v. Knoble, 225 P. 897, 99 Okl. 110.

(2) Refusal to vacate judgment for party's failure properly to interpret plain and unambiguous language of trial court was proper.—Howe v. Farmers' & Merchants' Bank, 263 P. 673, 129 Okl. 140.

(3) Failure to object to bill of costs was held not "mistake" within statute, authorizing court to set aside judgment for mistake, hence court exceeded jurisdiction in vacating judgment to revise costs, sole effect being to extend time for appeal.—Bottum & Torrance Co. v. Consolidated Yarns, 163 A. 544, 53 R.I. 50.

31. Cal.—Miller v. Lee, 125 P.2d 627, 52 Cal.App.2d 10.
34 C.J. p 298 note 11.

32. N.Y.—Barron v. Feist, 101 N.Y. S. 72, 51 Misc. 539.
34 C.J. p 298 note 12.

Mistake of court

(1) Error in the decision of the issue directly before the court is not, in the legal sense, a "mistake" for which the judgment may be impeached.—Bradford v. Trapp, 198 P. 584, 49 Cal.App. 493.

(2) Statutes authorizing the vacating of an order made as result of mistake, omission, inadvertence, or defect or through mistake, inadvertence, surprise, or excusable neglect refers to the parties or their attorneys and not to mistake, omission,

sence of such a restriction the mistake may be one made by plaintiff, whereby he fails to secure all he is entitled to,[33] a mutual mistake or misunderstanding of the parties,[34] or a mistake of the court arising from misinformation or misunderstanding as to matters of fact,[35] or even the mistake of an entire stranger, which affects the action of the parties, or the progress of the cause, and the entry of judgment.[36] The mistake must have been one which was excusable under the circumstances; an inexcusable mistake is no ground for opening the judgment.[37] A motion for relief on the ground that defendant was prevented by a mistake from being present at the trial and making his defense will not be granted where the defense set up in the moving papers is entirely new, and not disclosed by the original pleadings.[38]

As to cause of action. A judgment will not generally be set aside on account of a mistake as to the identity of the suit or the cause of action, as where the party erroneously supposes the action is brought on one claim or obligation, although it is really on another,[39] unless there are strong circumstances to show that the mistake was natural and excusable and productive of decided injustice.[40] However, a mistake as to the capacity in which the party is sued, as where he supposes the action to be against him in an official capacity, when he is really sued as an individual or vice versa, may be ground for vacating the judgment,[41] except where it is inexcusable;[42] and this is true of a mistake as to plaintiff's capacity or title to sue.[43] Where by mistake a party splits his cause of action, the judgment rendered in the action first brought may be vacated as it bars another action for the balance of the party's claim.[44]

As to time for pleading or trial. A party who makes an honest and excusable mistake as to the time when he is required to plead or answer, or as to the time of the trial, whereby he is prevented from making his defense in due season, may have judgment opened or set aside;[45] but not where the mistake was the result of his own heedlessness or lack of due attention and care.[46] A party ordinarily is bound to take notice of the time and place where the court sits and of the condition of the calendar.[47] However, a judgment rendered in the absence of defendant and of his counsel should be set aside where such absence was caused by their reliance on a statement made officially by the judge of the court that the case could not be reached, or would not be tried, before a certain date, or that nothing further would be done without notifying counsel,[48] or where they were similarly misinformed and misled by the clerk of the court,[49] or by the calendar or official list of cases set for trial,[50] or by counsel for the adversary party;[51] but some cases hold that even such official assurances will not

irregularity, defect, inadvertence, surprise, or excusable neglect of court, the correction of which lies in the discretion of the court.—Hammond v. Barone, 33 N.Y.S.2d 119.

33. U.S.—Newton v. Weaver, C.C.D. C., 18 F.Cas.No.10,193, 2 Cranch C. C. 685.

34. S.D.—Payton v. Rogers, 285 N. W. 873, 66 S.D. 486.
34 C.J. p 298 note 14.

35. Ky.—Rudy v. Ramey, 170 S.W. 179, 160 Ky. 842.
34 C.J. p 298 note 15.

36. Idaho.—Thum v. Pyke, 55 P. 864, 6 Idaho 359.
34 C.J. p 298 note 16.

37. S.C.—Martin v. Fowler, 28 S.E 312, 51 S.C. 164.
34 C.J. p 298 note 17.

38. U.S.—Kehler v. New Orleans Ins. Co., C.C.Mo., 23 F. 709.

39. Kan.—Vail v. School Dist. No. 1, 122 P. 885, 86 Kan. 808.
34 C.J. p 298 note 19.

40. Minn.—Martin v. Curley, 73 N. W. 405, 70 Minn. 489.
34 C.J. p 299 note 20.

41 Iowa.—Capital Sav. Bank & Trust Co. v. Swan, 69 N.W. 1065, 100 Iowa 718.

42. N.C.—Williamson v. Cocke, 32 S. E. 963, 124 N.C. 585.

43. N.J.—Western Nat. Bank v. Paul, Sup., 49 A. 830.

44. N.Y.—Rockefeller v. St. Regis Paper Co., 80 N.Y.S. 975, 39 Misc. 746, appeal dismissed 83 N.Y.S. 138, 85 App.Div. 267.

45. Iowa.—Newlove v. Stern, 196 N. W. 51, 196 Iowa 1111.
34 C.J. p 299 note 25.

Mistake as to time for appeal
Judgment could not be vacated after time for appealing had expired on ground of mistake as to time to appeal.—Johnson v. Union Sav. Bank & Trust Co., 266 N.W. 169, 196 Minn. 588.

46. Okl.—Ross v. Irving, 220 P. 642, 96 Okl. 124.
Pa.—Spadaro v. Chase Const. Co., 17 Pa.Dist. & Co. 65, 23 North Co. 143.
34 C.J. p 299 note 26.

47. Iowa.—Dollister v. Pilkington, 171 N.W. 127, 185 Iowa 815.
34 C.J. p 299 note 27.

48. Del.—**Corpus Juris** cited in Yerkes v. Dangle, Super., 33 A.2d 406, 408.
Ga.—International Agr. Corporation v. Law, 151 S.E. 557, 40 Ga.App. 756.
Okl.—Sharum v. Dean, 239 P. 666, 113 Okl. 95.
34 C.J. p 299 note 28.

49. Del.—**Corpus Juris** cited in Yerkes v. Dangle, Super., 33 A.2d 406, 408.
Okl.—Sharum v. Dean, 239 P. 666, 113 Okl. 95.
34 C.J. p 300 note 29.

Clerk's failure to notify
(1) In absence of statute or rule of court, it is not duty of court clerk to notify party or his attorney of setting of cause for trial, and failure to do so is not ground to vacate judgment rendered in absence of such party or his attorney.—McCandless v. Childs, 239 P. 254, 113 Okl. 97.

(2) It is not sufficient grounds on which to vacate judgment that neither plaintiffs nor their attorneys of record were notified by the clerk of the court at the time that the case was set for trial.—Ross v. Irving, 220 P. 642, 96 Okl. 124.

50. N.Y.—Carpenter v. Tuffs, 2 How.Pr. 166.
34 C.J. p 300 note 31.

51. Ga.—Rodgers v. Furse, 9 S.E. 669, 83 Ga. 115.
N.Y.—Rabinowitz v. Haimowitz, 91 N.Y.S. 11.

relieve litigants or their counsel from the duty of exercising the utmost vigilance in watching the progress of their cases.[52]

As to process. A person served with a summons must make sure that he understands what it is, by reading it or having it read to him, since he cannot have a judgment set aside on the ground that he mistook it for a subpœna or for a notice in another suit,[53] or a suit against him in a representative instead of an individual capacity or vice versa,[54] unless he failed to receive a copy of the writ and was misled by the officer as to its purport,[55] or where the copy was so illegible that the command of the writ could not be ascertained and obeyed,[56] or where there was some other sufficient excuse.[57]

As to retainer of counsel. A defendant ordinarily cannot procure the setting aside of a judgment against him on the ground of his mistaken belief that he had retained an attorney to protect his interests for he must see to it that the attorney understands and accepts the retainer, and his failure to pay personal attention to the case is inexcusable negligence.[58] However, there are cases of this kind where the court, in the exercise of its discretion, has granted relief.[59] Where the mistake was as to the employment of counsel by a person whom defendant justifiably relied on to attend to that matter as a codefendant, or a business agent, it may furnish cause for vacating the judgment.[60]

As to validity and regularity of proceedings. A mistake as to the validity or regularity of the proceedings is one of law, not of fact, and therefore a defendant cannot have a judgment set aside because he erroneously believed that the service of process on him was illegal[61] or that the proceedings were otherwise irregular or invalid.[62]

Ignorance as excuse. The illiteracy of a defendant, or ignorance of the English language, of the course of judicial procedure, or of his rights and duties, will furnish no excuse for failing to defend the action, or justify the vacation of the judgment, where he at least knew that he had been sued, and neglected to ask information or advice from others,[63] although it may be otherwise where such ignorance prevented him from discovering that legal proceedings had been taken against him until after the rendition of the judgment,[64] or where plaintiff has taken a fraudulent or deceitful advantage of his ignorance,[65] or where defendant was not negligent and asked information or advice from others but was given no notice of the case being set for trial.[66]

c. Surprise

Judgments usually may be opened or vacated on the ground that they were obtained through surprise of the party injuriously affected.

Under the statutes in many jurisdictions judgments may be opened or vacated on the ground that they were obtained through some surprise of the party injuriously affected,[67] provided such surprise could not have been avoided by the exercise of due diligence.[68]

What constitutes "surprise" within rule. The surprise contemplated by the statute is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against.[69] However, this

52. Minn.—Stewart v. Cannon, 68 N. W. 604, 66 Minn. 64.
34 C.J. p 300 note 33.

53. Ky.—Dean v. Noel, 70 S.W. 406, 24 Ky.L. 969.
34 C.J. p 300 note 34.

54. N.C.—Williamson v. Cocke, 32 S. E. 963, 124 N.C. 585.
34 C.J. p 300 note 35.

55. Ind.—Hite v. Fisher, 76 Ind. 231.

56. N.D.—Wheeler v. Castor, 92 N. W. 381, 11 N.D. 347, 61 L.R.A. 746.

57. Mont.—Delaney v. Cook, 195 P. 833, 59 Mont. 92.
34 C.J. p 300 note 38.

58. Tex.—**Corpus Juris quoted in** Dempsey v. Gibbon, Civ.App., 100 S.W.2d 430, 432.
34 C.J. p 300 note 39, p 306 note 72.

59. Wash.—Kain v. Sylvester, 113 P. 573, 62 Wash. 151.
34 C.J. p 300 note 40.

60. Iowa.—Barto v. Sioux City Electric Co., 93 N.W. 268, 119 Iowa 179.
34 C.J. p 300 note 41.

61. Ky.—Sergeant of the Court of Appeals v. George, 5 Litt. 198.
S.D.—Plano Mfg. Co. v. Murphy, 92 N.W. 1072, 16 S.D. 380, 102 Am. S.R. 692.

62. Conn.—Jartman v. Pacific Fire Ins. Co., 37 A. 970, 69 Conn. 355.
34 C.J. p 301 note 43.

63. Fla.—Gainesville v. Johnson, 51 So. 852, 59 Fla. 459.
34 C.J. p 301 note 44.

64. Mont.—State v. Second Judicial Dist. Ct., 100 P. 207, 38 Mont. 415.
34 C.J. p 301 note 45.

65. Wash.—Paltro v. Gavenas, 166 P. 1156, 97 Wash. 327.
34 C.J. p 301 note 46.

66. Okl.—McNac v. Kinch, 238 P. 424, 113 Okl. 59—McNac v. Chapman, 223 P. 350, 101 Okl. 121.

67. Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.
34 C.J. p 301 note 47.

Change in law by subsequent decision

Where supreme court decision, rendered after trial court granted defendants' motion for judgment on pleadings in action for malicious prosecution, established that amended complaint stated cause of action because it sufficiently alleged that particular criminal proceeding against plaintiff for embezzlement was terminated by final judgment of dismissal after trial, trial court did not abuse its discretion in granting plaintiff's motion to vacate judgment on ground of "surprise."—Miller v. Lee, 125 P.2d 627, 52 Cal.App.2d 10.

68. W.Va.—Baker v. Gaskins, 36 S. E.2d 893.
34 C.J. p 302 note 48.

69. Cal.—Miller v. Lee, 125 P.2d 627, 52 Cal.App.2d 10.
34 C.J. p 302 note 49.

does not include surprise occasioned by a ruling or decision of the court,[70] the unexpected introduction or rejection of evidence at the trial,[71] or the calling of the case for trial before defendant thought it could possibly be reached.[72]

The unanticipated transfer of the case to another court may constitute legal surprise,[73] and so may the taking of judgment contrary to an agreement to postpone the time for answering or for the trial,[74] or a mistake as to the employment of counsel,[75] or a misunderstanding among several counsel for the defense as to who was charged with the duty of filing the answer.[76] There is no legal "surprise" where the judgment was given by consent of the party's attorney, and the contention is merely that he exceeded his authority.[77]

d. Excusable Neglect

A party may be relieved against a judgment taken against him through his excusable neglect.

Under the statutes in many states a party may be relieved against a judgment taken against him through his "excusable neglect," which means a lack of attention to the progress of his cause, or failure to attend the trial, which is excused or justified by the peculiar circumstances of the case.[78] However, the term "excusable neglect" has no fixed legal meaning,[79] the question being one of fact dependent on the circumstances of each case;[80] but whether the facts found or admitted constitute excusable neglect is a conclusion of law,[81] unless different inferences as to the ultimate fact might reasonably be drawn by different minds, in which case it is a question of fact.[82]

Negligence may be excusable where it is caused by failure to receive notice of the action or the trial,[83] by an accident or chain of accidents which could not have been avoided or controlled,[84] by a genuine and excusable mistake or miscalculation,[85]

Implication of active misconduct

"Surprise, in the legal sense of the term, that would defeat a judgment, always involves the idea that there has been active misconduct on part of the plaintiff amounting to much the same thing as fraud."—Turley v. Taylor, 6 Baxt., Tenn., 376, 390.

Facts held not to constitute "surprise"

(1) Where mineral deed, bearing notary's certificate that his commission expired on date before that of deed, was in grantee's possession approximately twenty years, parties suing to remove cloud thereof from their title to land containing minerals conveyed specifically denied in reply, filed some time before trial, that deed was validly registered, and record of notaries' commissions in governor's office was available at all times to grantee, he could not claim surprise or inadvertence entitling him to vacation of judgment for plaintiffs because such record showed that notary's commission expired after execution of deed.—Crissman v. Palmer, 35 S.E.2d 422, 225 N. C. 472.

(2) Judgment in partition proceedings would not be set aside because plaintiff did not receive as much land as he expected, where judge had indicated by his opinion previously filed just how property was to be partitioned and had authorized a surveyor to prepare a map showing courses and distances in accordance with directions contained in opinion, and immediately preceding drawing of decree, all of parties with their respective attorneys had met with judge and agreed to waive findings, it not appearing that decree as signed by judge departed in any degree from conclusions announced.—Chavez v. Scully, 232 P. 165, 69 Cal. App. 633.

70. N.C.—Crissman v. Palmer, 35 S. E.2d 422, 225 N.C. 472.
34 C.J. p 302 note 50.

71. Ark.—Robinson v. Davis, 51 S. W. 66, 66 Ark. 429.
34 C.J. p 302 note 51.

72. Okl.—Tracy v. Fancher, 159 P. 496, 60 Okl. 109.
34 C.J. p 302 note 52.

73. W.Va.—Bennett v. Jackson, 11 S.E. 734, 34 W.Va. 62.
Wis.—Dunlop v. Schubert, 72 N.W. 350, 97 Wis. 135.

74. Or.—Durham v. Commercial Nat. Bank, 77 P. 902, 45 Or. 385.
34 C.J. p 302 note 54.

75. S.C.—Ex parte Rountree, 29 S. E. 66, 51 S.C. 405.
34 C.J. p 302 note 55.

76. N.J.—Bradley v. McPherson, Ch., 56 A. 303.

77. N.C.—Hairston v. Garwood, 31 S.E. 653, 123 N.C. 345.

78. N.C.—Hooks v. Neighbors, 190 S.E. 236, 211 N.C. 332.
34 C.J. p 302 note 58.

Act of prudent person as test

"Excusable neglect" must be such neglect as might have been the act of a reasonably prudent person under the same circumstances.—Elms v. Elms, Cal.App., 164 P.2d 936.

Inexcusable negligence

(1) Inexcusable negligence may defeat an application to open or vacate a judgment.—National Fertilizer Co. v. Hinson, 15 So. 844, 103 Ala. 532.

(2) Statute providing for correction of errors of fact by motion in nature of application for writ of error coram nobis was not intended to relieve a party from consequences of his own negligence.—Trust Co. of Chicago v. Public Service Co. of Northern Illinois, 57 N.E.2d 900, 324 Ill.App. 228—Blaha v. Turk, 12 N.E. 2d 338, 293 Ill.App. 626.

(3) In action for personal injuries sustained in automobile collision wherein defendant was informed by his insurer that it would look after case for him and it appeared that the insurer instructed a firm of attorneys to appear, but they later withdrew their appearance without notice to defendant and damages were assessed and judgment taken against him without notice, it was held that defendant was not so negligent as to preclude him from obtaining relief by motion in the nature of a writ of error coram nobis, there being nothing to show that the case was on the regular trial call when heard.—Heinsius v. Poehlmann, 282 Ill.App. 472.

79. N.C.—Beaufort Lumber Co. v. Cottingham, 92 S.E. 9, 173 N.C. 323.
34 C.J. p 303 note 59.

80. Ind.—Masten v. Indiana Car & Foundry Co., 57 N.E. 148, 25 Ind. App. 175.
34 C.J. p 303 note 60.

81. N.C.—Gaylord v. Berry, 86 S.E. 623, 169 N.C. 733—Morris v. Liverpool, L. & G. Ins. Co., 42 S.E. 577, 131 N.C. 212.

82. Ind.—Masten v. Indiana Car & Foundry Co., 57 N.E. 148, 25 Ind. App. 175.

83. Ind.—Knowlton v. Smith, 71 N. E. 895, 163 Ind. 294.
34 C.J. p 304 note 63.

84. Or.—Capalija v. Kulish, 201 P. 545, 101 Or. 666.
34 C.J. p 304 note 64.

85. Minn.—Barta v. Nestaval, 157 N.W. 1076, 133 Minn. 116.
34 C.J. p 304 note 65.

by reliance on assurances given by those on whom the party had a right to depend, as the adverse party or counsel retained in the case, or a competent business adviser, that it would not be necessary for him to take an active part in the case or that the suit would not be prosecuted,[86] by relying on another person to attend to the case for him, when such other person promised to do so or was chargeable with that duty,[87] by a well-founded belief that the case would not be reached for trial as quickly as it was in fact reached,[88] or by other circumstances not involving fault of the moving party.[89]

Diligence required of suitors. A party seeking relief against a judgment on the ground of excusable negligence must clear himself of the imputation of want of due diligence, and he cannot have relief if the taking of the judgment appears to have been due to his own carelessness, slothfulness, or indifference to his own rights.[90] Thus, in order to put himself in a position where he can claim relief against an adverse judgment, suffered by reason of excusable neglect, he must, unless he means to try his own case, retain an attorney practicing in the particular court,[91] and, as appears supra subdivision b of this section, see that his attorney understands and accepts the retainer. In case his counsel dies, or withdraws or is discharged from the case,[92] or is otherwise unable to handle the case properly,[93] he must promptly engage another, unless he is excused therefrom by ignorance of the facts requiring it, in which case he must act promptly on discovery of the facts.[94]

It is the duty of a party to inform his counsel fully of the facts constituting his cause of action or defense,[95] and to be personally active in procuring witnesses, collecting evidence, and otherwise preparing for trial, the mere employment of counsel not being sufficient to excuse the party from giving the case his personal attention.[96] A party must keep himself informed of the progress of the case, not relying on such news as he can obtain from persons not bound to keep him advised,[97] and, particu-

86. Tex.—Jordan v. Brown, Civ. App., 94 S.W. 398.
34 C.J. p 304 note 66.

87. Iowa.—Acheson v. Inglis, 135 N. W. 632, 155 Iowa 239.
34 C.J. p 304 note 67.

88. Ill.—Rapp v. Goerlitz, 40 N.E. 2d 767, 314 Ill.App. 191.
34 C.J. p 305 note 68.

89. Cal.—Rehfuss v. Rehfuss, 145 P. 1020, 169 Cal. 86.
34 C.J. p 305 note 69.

90. Ark.—Hill v. Teague, 108 S.W. 2d 889, 194 Ark. 552—Merchants' & Planters' Bank & Trust Co. v. Ussery, 38 S.W.2d 1087, 183 Ark. 838.
Cal.—Elms v. Elms, App., 164 P.2d 936.
Ga.—Gray v. Georgia Loan & Trust Co., 143 S.E. 501, 166 Ga. 445—Hoke v. Walraven, 194 S.E. 610, 57 Ga.App. 106.
Ky.—Workingmen's Perpetual Bldg. & Loan Ass'n v. Stephens, 184 S. W.2d 575, 299 Ky. 177—Vanover v. Ashley, 183 S.W.2d 944, 298 Ky. 722—Gorin v. Gorin, 167 S.W.2d 52, 292 Ky. 562.
Mich.—**Corpus Juris cited in** First Nat. Bank of Boyne City v. Pine Shores Realty Co., 241 N.W. 190, 191, 257 Mich. 289.
Minn.—Johnson v. Union Sav. Bank & Trust Co., 266 N.W. 169, 196 Minn. 588.
Mo.—**Corpus Juris quoted in** Allen v. Fewel, 87 S.W.2d 142, 146, 337 Mo. 955.
N.Y.—Winter v. New York Life Ins. Co., 23 N.Y.S.2d 759, 260 App.Div. 676, appeal denied 25 N.Y.S.2d 781, 261 App.Div. 816. Appeal denied.
N.C.—Hyde County Land & Lumber Co. v. Thomasville Chair Co., 130 S.E. 12, 190 N.C. 437.
Tex.—Fowler v. Roden, 105 S.W.2d 187, 129 Tex. 599—Hubbard v. Tallal, Civ.App., 57 S.W.2d 226, reversed on other grounds and appeal dismissed 92 S.W.2d 1022, 127 Tex. 242.
Wash.—Morsbach v. Thurston County, 268 P. 135, 148 Wash. 87.
34 C.J. p 305 note 70.

Irregular judgment for defendant, rendered in plaintiff's absence, should have been vacated and case restored to docket for trial on merits, where motion was made with proper diligence after notice of judgment, and meritorious defense was shown, negligence before judgment only defeating right to vacate judgment regularly entered.—Snow Hill Live Stock Co. v. Atkinson, 126 S.E. 610, 189 N.C. 248.

91. N.C.—Gray v. King, 104 S.E. 646, 180 N.C. 667.
34 C.J. p 306 note 71.

92. Ky.—Horton v. Horton, 92 S.W. 2d 373, 263 Ky. 413.
34 C.J. p 306 note 73.

93. **Attorney on military service**
Prolonged absence of an attorney who formerly represented a defendant, due to his military service which continued until after trial at which a final judgment was rendered against absent defendants who had been duly served, and failure of such defendants to obtain services of another attorney, and their lack of information that case would be, or was, tried and judgment entered, until after its rendition, did not constitute good cause for setting aside such judgment during the term of court at which it was rendered.—Baker v. Gaskins, W.Va., 36 S.E.2d 893.

94. Iowa.—Ennis v. Fourth St. Bldg. Assoc., 71 N.W. 426, 102 Iowa 520.
34 C.J. p 307 note 74.

95. Ky.—**Corpus Juris quoted in** Douthitt v. Guardian Life Ins. Co. of America, 31 S.W.2d 377, 380, 235 Ky. 328.
34 C.J. p 307 note 75.

96. Ky.—**Corpus Juris cited in** Carter v. Miller, 95 S.W.2d 29, 30, 264 Ky. 532—**Corpus Juris quoted in** Douthitt v. Guardian Life Ins. Co. of America, 31 S.W.2d 377, 380, 235 Ky. 328.
Tex.—Fowler v. Roden, 105 S.W.2d 187, 129 Tex. 599.
34 C.J. p 307 note 76.

Delay in obtaining deposition
Where court appointed commissioner to take deposition of plaintiff, a deafmute; and plaintiff delayed almost five months without seeking to have deposition taken, and made no objection when cause was submitted for judgment, refusal to set aside judgment so as to permit plaintiff to have proof taken was held not error.—Smith v. First Nat. Bank, 56 S.W.2d 953, 247 Ky. 171.

97. Ky.—**Corpus Juris quoted in** Douthitt v. Guardian Life Ins. Co. of America, 31 S.W.2d 377, 380, 235 Ky. 328.
34 C.J. p 307 note 77.

Surety's reliance on principal
In personal injury action by bridge contractors' employee against contractor and surety, it was surety's duty to defend its rights from time service was made on it and not depend on contractor, as regards right

larly, he must find out when his case is set down for trial or when it is likely to be reached in its order on the calendar,[98] and must be in attendance while the court is in session and there is a prospect of his case being called.[99]

e. Act or Fault of Counsel

(1) In general
(2) Mistake

(1) In General

A trial court may, in its discretion, open or vacate a judgment rendered against a party as a result of accident, negligence, or surprise of such party's attorney.

In a proper case, a trial court may, in its discretion, open or vacate a judgment rendered against a party as a result of the accident, mistake, negligence, or surprise of such party's attorney.[1] It is a general rule that the negligence of an attorney is imputable to his client, and that the latter cannot be relieved from a judgment taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of the former,[2] unless such neglect was excusable under the circumstances.[3] This rule applies not only where the negligence of the attorney consisted in his failure to enter an appearance, or to file a plea, or answer in due season,[4] but also where it consisted in a failure to pursue and follow up the case with due care and watchfulness,[5] in accordance with the diligence required of suitors, considered supra subdivision d of this section.

There are, however, a considerable number of cases in which it has been held, sometimes by virtue of statutory provisions, that, where the party himself has not been guilty of negligence, a judgment against him may be set aside because obtained through the negligence of his counsel.[6] While such relief has been granted on a showing that the at-

to set judgment aside for allegedly excusable neglect.—Detroit Fidelity & Surety Co. v. Foster, 169 S.E. 871, 170 S.C. 121.

Parent's reliance on codefendant child

Fact that defendant's child, who was codefendant, told defendant he would see counsel and advise as to proper defense, but failed to do so, was held insufficient to justify vacating chancery decree after term.—Merchants' & Planters' Bank & Trust Co. v. Ussery, 88 S.W.2d 1087, 183 Ark. 838.

98. Ala.—McCord v. Harrison, 93 So. 428, 207 Ala. 480.
34 C.J. p 307 note 78.

99. Iowa.—Hagar v. Galles, 244 N. W. 700.
Neb.—Holman v. Stull, 267 N.W. 149, 130 Neb. 876.
34 C.J. p 307 note 79.

Conflict in dates of two trials

Defendant's motion to vacate judgment entered against him in action on open book account, on ground that on date set for trial his attendance was required in another court, was properly denied, where defendant made no effort to have the dates of either proceeding changed, and it was not shown that he would have been unsuccessful had he done so.—Palomar Refining Co. v. Prentice, 136 P.2d 83, 57 Cal.App.2d 954.

1. Mass.—Lovell v. Lovell, 176 N. E. 210, 276 Mass. 10.
34 C.J. p 307 note 80.
Absence or sickness of counsel see infra subdivision f of this section.
Misconduct of counsel see supra § 279.
Liability of client for acts of attorney generally see Attorney and Client § 68.

2. Ark.—**Corpus Juris cited in** Dengler v. Dengler, 120 S.W.2d 340, 345, 196 Ark. 913.
Ga.—Robinson v. Yarbrough, 162 S. E. 629, 44 Ga.App. 648—Williams v. Swift & Co., 114 S.E. 646, 29 Ga.App. 239.
Ind.—Sharp v. Grip Nut Co., App., 62 N.E.2d 774.
Ky.—Gorin v. Gorin, 167 S.W.2d 52, 292 Ky. 562—Childers v. Potter, 165 S.W.2d 3, 291 Ky. 478—Cooper v. Douglas, 77 S.W.2d 49, 256 Ky. 787—**Corpus Juris quoted in** Douthitt v. Guardian Life Ins. Co. of America, 31 S.W.2d 377, 379, 235 Ky. 328.
Mass.—Silverstein v. Daniel Russell Boiler Works, 167 N.E. 676, 268 Mass. 424.
Mont.—Rieckhoff v. Woodhull, 75 P. 2d 56, 106 Mont. 22—First State Bank of Thompson Falls v. Larsen, 233 P. 960, 72 Mont. 400.
Okl.—Grayson v. Stith, 72 P.2d 820, 181 Okl. 131, 114 A.L.R. 276—Schneider v. Decker, 291 P. 80, 144 Okl. 213.
Or.—Western Land & Irrigation Co. v. Humfeld, 247 P. 143, 118 Or. 416.
S.D.—**Corpus Juris cited in** Smith v. Wordeman, 240 N.W. 325, 326, 59 S.D. 368.
Tex.—Traders & General Ins. Co. v. Keith, Civ.App., 107 S.W.2d 710, error dismissed.
Vt.—Haskins v. Haskins' Estate, 35 A.2d 662, 113 Vt. 466.
34 C.J. p 307 note 81.

Corpus Juris has been cited as containing an analysis of cases relevant to the issue of whether a judgment may be set aside because of the negligence of counsel.—Ledwith v. Storkan, D.C.Neb., 2 F.R.D. 539, 544.

3. Ky.—**Corpus Juris quoted in** Douthitt v. Guardian Life Ins. Co. of America, 31 S.W.2d 377, 379, 235 Ky. 328.
Mont.—First State Bank of Thompson Falls v. Larsen, 233 P. 960, 72 Mont. 400.
S.C.—Martin v. Fowler, 28 S.E. 312, 51 S.C. 164.
S.D.—**Corpus Juris cited in** Smith v. Wordeman, 240 N.W. 325, 326, 59 S.D. 368.

4. Ky.—Childers v. Potter, 165 S.W. 2d 3, 291 Ky. 478—Cooper v. Douglas, 77 S.W.2d 49, 256 Ky. 787.
Tex.—Collins v. National Bank of Commerce of San Antonio, Civ. App., 154 S.W.2d 296, error refused.
34 C.J. p 308 note 83.

5. Minn.—Slatoski v. Jendro, 159 N. W. 752, 134 Minn. 328.
34 C.J. p 309 note 84.

6. Mass.—Borst v. Young, 18 N.E.2d 544, 302 Mass. 124.
S.C.—Detroit Fidelity & Surety Co. v. Foster, 169 S.E. 871, 170 S.C. 121.
34 C.J. p 309 note 86.

Party having abnormal mental condition

Mass.—Herlihy v. Kane, 38 N.E.2d 620, 310 Mass. 457.

Foreign attorney

The code provision relating to the setting aside of a judgment entered against a party through neglect of an "attorney" of such party to file or serve any paper within time limited therefor refers to neglect of an attorney having authority and owing duty to represent the litigant in the courts of the state, and does not include acts of a foreign attorney who is forbidden by law to practice in the state.—Cleek v. Virginia Gold

torney is insolvent and therefore unable to make good his fault by paying damages,[7] according to some decisions relief should be granted without regard to the financial responsibility of the attorney.[8] The negligence of an attorney may be excusable, when attributable to an honest mistake, an accident, or any cause which is not incompatible with proper diligence on his part, and in these circumstances it will be proper to set aside or open the judgment taken in consequence thereof.[9] However, in any case the client himself must be free from fault, and negligence of his counsel is not excusable negligence, for which a judgment will be set aside, if the client wholly neglected the case and took no interest in its issue.[10] He must show that he employed counsel practicing habitually in the particular court, or who specially agreed to attend to the case.[11]

When an attorney is employed simply to retain counsel to appear at another place, he is a mere agent, and his negligence is imputable to his client;[12] and likewise the negligence of any person who is delegated or employed by the attorney to attend to the case is imputable to the attorney himself, and will not be excusable in the one unless it would have been in the other.[13]

Misunderstanding. While it has been held that the mere fact of a misunderstanding between a party and his attorney is insufficient to deprive the other party of his judgment,[14] it usually has been held that where a defense is not interposed, and judgment is consequently suffered, through a genuine and accidental misunderstanding between the party and his counsel, the judgment may be set aside,[15] except where either is chargeable with inexcusable negligence or carelessness, without which the misunderstanding would not have arisen.[16] The rule is similar where the misunderstanding was between different counsel retained on the same side, or between the attorneys for the opposing parties, or opposing counsel and a party, the courts holding this sufficient ground for vacating the judgment.[17] In all such cases, however, in order that the judgment may be set aside, it is necessary that the facts shall be fully explained and that the mistake shall be shown to be excusable.[18]

(2) Mistake

A genuine and reasonable mistake of fact made by a party's attorney may be a ground for opening or vacating a judgment against the party resulting from such mistake.

A mistake of the party's counsel, as well as a mistake of his own, may be pleaded as a reason for opening or vacating a judgment, provided it was genuine and reasonable, and a mistake of fact rather than of law,[19] such as counsel's mistaking the case in which he was retained or becoming confused between several similar cases,[20] or his misunderstanding of the real facts of the case or the circumstances of the transaction out of which the suit arose,[21] or his erroneous impression that the action

Mining & Milling Co., 122 P.2d 232, 63 Idaho 445.

7. Minn.—Hildebrandt v. Robbecke, 20 Minn. 100.
34 C.J. p 309 note 87.

8. N.Y.—Sharp v. New York, 31 Barb. 578, 19 How.Pr. 193.
34 C.J. p 309 note 88.

9. Ark.—**Corpus Juris cited in** Metropolitan Life Ins. Co. v. Duty, 126 S.W.2d 921, 925, 197 Ark. 1118.
34 C.J. p 309 note 89.

10. N.C.—Allen v. McPherson, 84 S.E. 766, 168 N.C. 435.
34 C.J. p 310 note 90.

11. N.C.—Ham v. Person, 91 S.E. 605, 173 N.C. 72.
34 C.J. p 310 note 91.

12. N.C.—Chatham Lumber Co. v. Parsons Lumber Co., 90 S.E. 241, 172 N.C. 320.
34 C.J. p 310 note 92.

13. Ky.—Kohlman v. Moore, 194 S. W. 933, 175 Ky. 710.
34 C.J. p 310 note 93.

14. Ga.—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga. App. 568.
34 C.J. p 313 note 19.

15. Ind.—Beatty v. O'Connor, 5 N.E. 880, 106 Ind. 81.
34 C.J. p 313 note 17.

16. Del.—Home Loan Assoc. v. Foard, 50 A. 537, 19 Del. 165.
34 C.J. p 313 note 18.

17. S.C.—Ex parte Charleston Republic Truck Co., 115 S.E. 820, 123 S.C. 13.
W.Va.—**Corpus Juris cited in** Black v. Foley, 185 S.E. 902, 903, 117 W. Va. 490.
34 C.J. p 313 note 20.

18. Iowa.—Tschohl v. Machinery Mut. Ins. Assoc., 101 N.W. 740, 126 Iowa 211.
34 C.J. p 313 note 21.

19. Cal.—Starkweather v. Minarets Mining Co., 43 P.2d 321, 5 Cal.App. 2d 501—Callaway v. Wolcott, 266 P. 574, 90 Cal.App. 753.
Iowa.—Rounds v. Butler, 227 N.W. 417, 208 Iowa 1391, followed in 227 N.W. 419—Dimick v. Munsinger, 211 N.W. 404, 202 Iowa 784.
Ky.—Dow v. Pearce, 289 S.W. 245, 217 Ky. 202.
34 C.J. p 310 note 94.
Mistake generally see supra subdivision b of this section.

Unauthorized compromise

A judgment based on unauthorized compromise of claim by attorney may be vacated on seasonable application.—Harris v. Diamond Const. Co., Va., 36 S.E.2d 573.

Relief denied

(1) The trial court did not abuse its discretion in refusing to set aside judgment and stay proceedings thereon until disposition of garnishment and execution proceedings against judgment debtor by creditors of judgment creditor's assignor on ground of reasonable and justifiable mistake of law by judgment debtor's counsel in believing that proper remedy was interpleader action against execution and garnishee creditors.—Kent v. County Fire Ins. Co. of Philadelphia, 80 P.2d 1019, 27 Cal.App. 2d 340.

(2) Other instances see 34 C.J. p 310 note 94 [b].

20. Mont.—Mantle v. Largey, 43 P. 633, 17 Mont. 479.
34 C.J. p 311 note 95.

21. Cal.—Underwood v. Underwood, 25 P. 1065, 87 Cal. 523.
N.Y.—McCredy v. Woodcock, 58 N.

had been discontinued[22] or settled.[23]

Time for appearance or pleading or trial. A judgment may be vacated or opened when the failure to defend was due to a mistake or miscalculation of the party's attorney as to the time allowed him for appearing, pleading, or taking some other step in the action,[24] as to the term of court at which the case would be tried,[25] or the day of the term or hour of the day,[26] or as to its being on the calendar for trial,[27] or as to the time when it would probably be reached for trial in its order,[28] provided, always, there was sufficient excuse for the mistake.[29]

Ignorance or mistake of law. It is a general rule that a party cannot be relieved from a judgment taken against him in consequence of the ignorance or mistake of his counsel with respect to the law, whether it concerns the rights or duties of the client, the legal effect of the facts in the case, or the rules of procedure.[30] However, there are cases where relief has been granted largely, if not entirely, on the ground of ignorance or mistake of law.[31]

Erroneous advice. It has generally been held not to be good ground for setting aside a judgment that it was suffered by the party in consequence of receiving erroneous advice from his attorney as to the necessity of making a defense or as to the validity of his defense;[32] but some courts have granted relief on this ground.[33]

f. Casualty or Misfortune

A party may have an adverse judgment opened or vacated on the ground that he was prevented by unavoidable casualty or misfortune from properly prosecuting or defending the action.

Under the statutes of many states, a party may have a judgment adverse to him opened or vacated on the ground that he was prevented by unavoidable casualty or misfortune from properly prosecuting or defending the action in which it was rendered.[34] The "unavoidable casualty or misfortune," for which a judgment may be opened or vacated is an accident or mishap arising from causes beyond the party's control, and against which he could not have guarded in the exercise of due foresight and diligence.[35]

Absence of party. The mere fact that a party was absent from the trial is not cause for setting the judgment aside, where his absence is not excused or shown to have been unavoidable.[36] How-

Y.S. 656, 41 App.Div. 526, appeal dismissed 55 N.E. 1097, 160 N.Y. 676.

22. Ky.—Rosen v. Galizio, 212 S.W. 104, 184 Ky. 367.
34 C.J. p 311 note 97.

23. R.I.—Fox v. Artesian Well & Supply Co., 83 A. 115, 34 R.I. 260.
34 C.J. p 311 note 98.

24. Iowa.—Banks v. C. C. Taft Co., 174 N.W. 576, 188 Iowa 559.
34 C.J. p 311 note 99.

25. S.D.—Western Surety Co. v. Boettcher, 156 N.W. 68, 36 S.D. 583.
34 C.J. p 311 note 1.

26. N.C.—Smith v. Holmes, 61 S.E. 631, 148 N.C. 210.
34 C.J. p 311 note 2.

27. Mont.—Collier v. Fitzpatrick, 57 P. 181, 22 Mont. 553.
34 C.J. p 311 note 3.

28. N.C.—Grandy v. Carolina Metal Products Co., 95 S.E. 914, 175 N.C. 511.
34 C.J. p 311 note 4.

29. Ark.—Progressive Life Ins. Co. v. Riley, 88 S.W.2d 66, 191 Ark. 850.
Pa.—Silent Auto Corporation of Northern New Jersey v. Folk, 97 Pa.Super. 588.
34 C.J. p 311 note 5.

30. Cal.—Bonestell v. Western Automotive Finance Corporation, 232 P. 734, 69 Cal.App. 719.
Okl.—Schneider v. Decker, 291 P. 80, 144 Okl. 213.
34 C.J. p 312 note 6.
Errors of law generally see supra § 274.

31. Ariz.—Central Bank v. Willcox-Pima Overland Co., 188 P. 133, 21 Ariz. 314.
34 C.J. p 312 note 7.

32. Cal.—Adams v. Alexander, App., 162 P.2d 647.
34 C.J. p 312 note 8.

33. Okl.—Hatfield v. Lewis, 236 P. 611, 110 Okl. 98.
34 C.J. p 312 note 9.

34. U.S.—In re Cox, D.C.Ky., 33 F. Supp. 796.
Ark.—Kersh Lake Drainage Dist. v. Johnson, 157 S.W.2d 39, 203 Ark. 315, certiorari denied Johnson v. Kersh Lake Drainage Dist., 62 S. Ct. 1044, 316 U.S. 673, 86 L.Ed. 1748—Merchants' & Planters' Bank & Trust Co. v. Ussery, 38 S.W.2d 1037, 183 Ark. 838.
Okl.—Boaz v. Martin, 225 P. 516, 101 Okl. 243.

35. Ark.—Wilder v. Harris, 168 S.W. 2d 804, 205 Ark. 841.
Okl.—Walker v. Gulf Pipe Line Co., 226 P. 1046, 102 Okl. 7.
34 C.J. p 314 note 23.

Facts constituting unavoidable casualty

(1) Where trial court granted a continuance to defendant, judgment rendered against him, through oversight of judge and without setting aside continuance and without notifying defendant or his counsel of such action was, as to defendant, an unavoidable casualty, and was properly vacated.—K. & S. Sales Co. v. Lee, 261 S.W. 903, 164 Ark. 449.

(2) Other facts see 34 C.J. p 314 note 23 [a].

Loss of papers

(1) The accidental misplacement and loss of papers essential to inform the party of his rights or enable him to prepare his defense is a "casualty or misfortune."—Northern Dispensary Trustees v. Merriam, 59 How.Pr., N.Y., 226—34 C.J. p 314 note 23 [c].

(2) However, fact that church records had been negligently lost, and that church's former name had been forgotten, was held not "unavoidable casualty or misfortune" such as to warrant setting aside order in probate proceedings decreeing that devise to church having different name from applicant had failed.—In re Jones' Estate, 27 P.2d 237, 138 Kan. 531, rehearing denied First Colored Baptist Church v. Caldwell, 30 P. 2d 144, 139 Kan. 45.

36. Iowa.—Hagar v. Galles, 244 N. W. 700.
Pa.—Wanner v. Thompson, Com.Pl., 27 Del.Co. 455.
Tex.—Kurtz v. Carr, Civ.App., 261 S.W. 479.
34 C.J. p 315 note 26.

ever, it is a good excuse if he shows that he was compelled to absent himself from the trial by a constraint which he was bound to obey, or a cause which he could not control,[37] provided reasonable diligence and foresight was exercised to anticipate and avoid, or to overcome, the obstacles.[38] Similarly the absence of defendant from the state or beyond the seas at the time of the trial will be cause for setting aside the judgment if he could not have been present, and his absence operated to his prejudice,[39] provided he is not chargeable with negligence or lack of proper attention to his case.[40]

Absence of counsel. The mere absence of one's attorney at the time of the trial is no cause for setting aside a judgment[41] unless it is shown that, had he been present, he could have gone to trial, or that he could have presented good grounds for a continuance[42] and that injustice and injury have resulted to the client in consequence thereof[43] or that the attorney's absence was excusable or unavoidable under the circumstances.[44] It has been considered a sufficient excuse that the attorney was engaged at the time in trying a case in another court,[45] or was in attendance on another court as a witness[46] unless such attendance was voluntary and without subpœna,[47] or, being out of town, was unexpectedly detained[48] or was delayed by obstruction to travel,[49] or even that the mere multiplicity and pressure of his professional engagements prevented him from giving attention to the case.[50]

Some cases, however, take a stricter view of the attorney's obligations, and hold that if he has cases coming on in different courts he must obtain leave of absence from one court or the other, and arrange that neither case shall be proceeded with in his absence,[51] that if he is likely to be detained elsewhere he must apply for a continuance or extension of time,[52] that if he is detained on his way to the place of trial he should telegraph to the judges and ask to have the case held,[53] and that it is no excuse for his voluntary absence that he believed the case would not be reached before his return.[54] Many cases have refused to accept the excuse that the attorney was detained elsewhere by important business, even when it was of a public character, such as his attendance on the legislature, of which he was a member.[55]

Illness of party or relative. If a party is prevented by sickness from preparing his case or attending the trial, and the circumstances are such that his personal attention and presence are necessary to the due protection of his rights, a judgment against him may be set aside on the ground of "casualty or misfortune," or of "excusable neglect."[56] It is otherwise, however, where the party's interests were, or could have been, adequately protected by attorney or agent without the personal presence or attention of the party,[57] or where the character and duration of the illness were not such as in fact to obstruct the due prosecution or defense of the action,[58] or where the exercise of due diligence would have prevented or obviated the alleged con-

37. Or.—Capalija v. Kulish, 201 P. 545, 101 Or. 666.
34 C.J. p 315 note 27.

38. Tex.—Miller v. First State Bank & Trust Co. of Santa Anna Co., Civ.App., 184 S.W. 614.
34 C.J. p 315 note 28.

39. Mo.—McElvain v. Maloney, App., 186 S.W. 745.
34 C.J. p 315 note 24.

40. Ark.—Trumbull v. Harris, 170 S. W. 222, 114 Ark. 493.
34 C.J. p 315 note 25.

41. Cal.—Startzman v. Los Banos Cotton Gins, 256 P. 220, 82 Cal. App. 624, followed in Erreca v. Los Banos Cotton Gins, 274 P. 1041, 96 Cal.App. 783.
Okl.—Brockman v. Penn Mut. Life Ins. Co., 64 P.2d 1208, 179 Okl. 98.
S.C.—Hartford Fire Ins. Co. v. Sightler, 127 S.E. 13, 131 S.C. 241.
34 C.J. p 315 note 29.

42. Mo.—Hurck v. St. Louis Exposition & Music Hall Assoc., 28 Mo. App. 629.

43. Cal.—Bixby v. Hotchkis, App., 164 P.2d 808.
34 C.J. p 315 note 31.

44. Wash.—O'Toole v. Phoenix Ins. Co., 82 P. 175, 39 Wash. 688.
34 C.J. p 315 note 32.

Excuses held sufficient

(1) Judgment against party whose sole counsel is absent by express leave is properly vacated, when fact is properly called to court's attention by timely motion in writing.—Donalson v. Bank of Jakin, 127 S.E. 229, 33 Ga.App. 428—McNeill v. Morgan, 68 S.E. 1020, 8 Ga.App. 323.

(2) Other excuses see 34 C.J. p 315 note 32 [a].

45. Wis.—Koch v. Wisconsin Pea Canners Co., 131 N.W. 404, 146 Wis. 267.
34 C.J. p 316 note 33.

46. N.Y.—Hopkins v. Meyer, 78 N.Y. S. 459, 76 App.Div. 365.
N.C.—Wynne v. Prairie, 86 N.C. 73.

47. Cal.—Gray v. Sabin, 25 P. 422, 87 Cal. 211.

48. Iowa.—Ellis v. Butler, 43 N.W. 459, 78 Iowa 632.
34 C.J. p 316 note 36.

49. N.Y.—Hirschfeld v. Monahan, 141 N.Y.S. 520.
34 C.J. p 316 note 37.

50. Iowa.—McMillan v. Osterson, 133 N.W. 487, 191 Iowa 983.
34 C.J. p 316 note 38.

51. Ga.—Western & A. R. Co. v. Pitts, 4 S.E. 921, 79 Ga. 532.

52. Wyo.—Luman v. Hill, 252 P. 1019, 36 Wyo. 48, rehearing denied 256 P. 339, 36 Wyo. 427.
34 C.J. p 316 note 40.

53. Minn.—Caughey v. Northern Pac. El. Co., 53 N.W. 545, 51 Minn. 324.

54. Cal.—Gray v. Sabin, 25 P. 422, 87 Cal. 211.
34 C.J. p 316 note 42.

55. Ga.—Bentley v. Finch, 13 S.E. 155, 86 Ga. 309.
34 C.J. p 316 note 43.

56. Ky.—Baker v. Owensboro Sav. Bank & Trust Co.'s Receiver Co., 130 S.W. 969, 140 Ky. 121.
34 C.J. p 316 note 44.
Insanity of party see supra § 276.

57. Tex.—Woytek v. King, Civ.App., 218 S.W. 1081.
34 C.J. p 317 note 45.

58. Iowa.—Reiher v. Webb, 35 N.W. 631, 73 Iowa 559.
34 C.J. p 317 note 46.

sequence of such sickness.[59] The illness of a member of a party's family, or of any other relative, while it may be ground for a continuance, is generally held to be no cause for setting aside the judgment;[60] but in many cases judgments have been opened or vacated largely, if not altogether, on the ground of serious sickness of a close relative actually preventing attendance of the party.[61]

Illness or death of counsel or relative. The illness of a party's counsel, so severe as to prevent him from appearing and trying the case, is good ground for vacating the judgment, provided such party did not know of it in time to retain other counsel or was prevented in some other way from doing so.[62] The same rule applies in case of the illness or death of a member of the attorney's family, or a near relative, withdrawing his attention from professional business, and leaving the client without legal aid and without the opportunity to retain other counsel.[63] The death of one's attorney has been held to be an "unavoidable casualty" and, as such, ground for vacating a judgment.[64]

§ 281. —— Other Grounds

The sufficiency of various other grounds for opening or vacating judgment has been adjudicated, including the consent of the parties and the disability, disqualification, or misconduct of the judge.

In addition to the matters considered supra §§ 266–280, the courts have determined the sufficiency of other matters as ground for opening or vacating a judgment.[65] The generality of the court's judgment or decree,[66] the lack of authority of the attorneys who instituted the suit,[67] and the fact that the judgment was obtained by duress[68] have been held not ground for opening or vacating a judgment.

Agreement or consent. Where a court has jurisdiction to set aside a judgment for specified reasons, it may do so on consent of parties without specifying any grounds;[69] and where the parties enter into an otherwise valid agreement for the vacation of a judgment such agreement is binding and enforceable.[70] However, it is error to vacate a judgment on an agreement not supported by a consideration.[71] Where, after the court has ordered commissioners to partition land, defendants file exceptions and present a valid written agreement for partition made by the parties, the court will vacate its order, and direct a partition according to the agreement, the partition by the parties being paramount to one made by the officers of the court.[72]

59. Iowa.—Iowa Savings & Loan Assoc. v. Kent, 109 N.W. 773, 134 Iowa 444.
34 C.J. p 317 note 47.

60. Kan.—Gooden v. Lewis, 167 P. 1133, 101 Kan. 482.
34 C.J. p 317 note 48.
Death of party see supra § 276.

61. Tex.—Clewis v. Snell, Civ.App., 59 S.W. 910.
34 C.J. p 317 note 49.

62. Neb.—Scott v. Wright, 70 N.W. 396, 50 Neb. 849.
34 C.J. p 317 note 52.

Mental incapacity of attorney was held to authorize vacation of judgment at subsequent term.—Baird & Warner, Inc., v. Roble, 250 Ill.App. 255.

Ability to notify court of condition

Motion to reinstate case for illness of counsel, not alleging that counsel was unable to notify court of condition at time of dismissal, held fatally defective.—Brannen v. Riggs, 140 S.E. 515, 37 Ga.App. 356, affirmed 146 S.E. 169, 167 Ga. 493.

Relief denied

(1) Where defendant had several attorneys, one of whom was ill.—Mays & Mays v. Flattery, Tex.Civ.App., 252 S.W. 860.

(2) Other circumstances see 34 C.J. p 317 note 52 [a].

63. Iowa.—Norman v. Iowa Cent. R. Co., 128 N.W. 349, 149 Iowa 246.
34 C.J. p 318 note 53.

64. Ark.—Columbia County v. England, 236 S.W. 625, 151 Ark. 465.
Ky.—Snelling v. Lewis, 78 S.W. 1124, 25 Ky.L. 1856.

65. **Extension of time for appeal**

Vacating judgment after expiration of appeal period for purpose of giving defendant opportunity to appeal was held not vacation due to "clerical" or "judicial error" and was improper.—Connecticut Mortgage & Title Guaranty Co. v. Di Francesco, 151 A. 491, 112 Conn. 673.

Juror's false answers on voir dire

In statutory proceeding to vacate judgment because of misstatements of juror on voir dire examination, relief would not be granted on mere showing that juror did not answer truthfully and fully, but only on showing of prejudice, and in action against railroad for injuries, where juror's voir dire examination indicated that he was more favorable to railroad, juror's misstatements to the effect that no member of his family had been involved in personal injuries case, whereas he had been involved in accidents resulting in personal injuries, and his son had been sued for personal injuries, were held not to require vacation of judgment against railroad in statutory proceeding, especially where judgment had been affirmed by appellate court, and leave to appeal to supreme court had been denied.—Maher v. New York, C. & St. L. R. Co., 8 N.E.2d 512, 290 Ill.App. 267.

66. U.S.—Swift & Co. v. U. S., App. D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

67. Mo.—Cooper v. Armour & Co., 15 S.W.2d 946, 222 Mo.App. 1176.

68. Or.—Chaney v. Chaney, 156 P. 2d 559.

69. Ohio.—National Home for Disabled Volunteer Soldiers v. Overholser, 60 N.E. 628, 64 Ohio St. 517.
34 C.J. p 295 note 94.

70. Ark.—Franzen v. Juhl, 32 S.W. 2d 627, 182 Ark. 663.

71. Mo.—State v. Broaddus, 111 S. W. 508, 212 Mo. 685.
N.Y.—Schlesser v. Pearl, 185 N.Y.S. 116.

Oral agreement

A naked oral agreement for the setting aside of a judgment entered into after the rendition of the judgment is insufficient to require that the judgment be set aside.—Smith v. Cone, 156 S.E. 612, 171 Ga. 697.

Inability to comply with agreement

Equity will not enforce agreement to vacate judgment, where judgment debtors seeking enforcement have not complied therewith, although given ample opportunity.—Chambers v. Investors' Syndicate, 10 P.2d 339, 154 Okl. 142.

72. Tex.—High v. Tarver, Civ.App., 25 S.W. 1098.

The effect of the consent of the parties on the power of the court to vacate a judgment after the expiration of the term in which the judgment was rendered is considered supra § 230.

Disability, disqualification, or misconduct of judge. Insanity of the judge or referee who tried the case is not necessarily ground for vacating the judgment,[73] but where the mental capacity to render a proper judgment was lacking the judgment should be set aside.[74] It has been held that disqualification of the judge rendering a judgment is ground for vacating it,[75] particularly where such disqualification renders the judgment void.[76] However, it has also been held that disqualification of the judge renders the judgment merely voidable so that the remedy is by appeal and not by motion to vacate.[77]

Misconduct of judge has been held ground for vacating the judgment.[78]

§ 282. Defenses to Relief

The sufficiency of particular matters as defenses to a motion to open or vacate a judgment has been considered.

The sufficiency of particular matters as defenses to a motion to open or vacate a judgment has been considered with respect to such matters as the lapse of the term, supra § 230, the expiration of the statutory limitation of time or laches, infra § 288, and other matters.[79]

§ 283. —— Other Remedies Available

Subject to some exceptions, a motion to vacate will not be entertained when the proper remedy is by some other proceeding, such as by appeal.

Except where such remedies are cumulative under the governing statutes,[80] a motion to vacate or set aside a judgment will not be entertained when the proper remedy of the party aggrieved is by appeal, error, or certiorari,[81] but it has been held that the availability of the remedy of appeal will not bar the remedy of vacation of the judgment where the judgment is absolutely void.[82] The same rule has been held to apply where the proper remedy was

73. N.Y.—Schoenberg v. Ulman, 99 N.Y.S. 650, 51 Misc. 83, 18 N.Y. Ann.Cas. 353, reversed on other grounds 101 N.Y.S. 798, 52 Misc. 104.
34 C.J. p 295 note 1.

74. N.Y.—R. A. Schoenberg & Co. v. City Trust, Safe Deposit & Surety Co., 101 N.Y.S. 798, 52 Misc. 104.

75. Ga.—State Mut. Life Ins. Co. v. Walton, 83 S.E. 656, 142 Ga. 765.
34 C.J. p 295 note 97.

Judge held not disqualified
Trial judge, who had been law partner of attorney for litigant, was not disqualified, so as to warrant setting aside judgment, where evidence showed that partnership had been dissolved as to new business before litigation in question was intrusted to counsel.—Walker County Lumber Co. v. Sweet, Tex.Civ.App., 63 S.W.2d 1061, error dismissed.

76. Ga.—James v. Douglasville Banking Co., 106 S.E. 595, 26 Ga. App. 509.
34 C.J. p 295 note 98.

77. Ky.—Duff v. Hodges' Guardian, 14 S.W.2d 1058, 228 Ky. 294.

78. U.S.—Newton v. Joslin, C.C. Colo., 30 F. 891.
34 C.J. p 295 note 99.

79. **Inequitable conduct, or unclean hands,** on the part of the applicant is sufficient reason for denying relief.—Blystone v. Blystone, 51 Pa. 373—34 C.J. p 363 note 47.

Res judicata
Judgment overruling contention that fact findings were procured by fraud practiced by successful party which was affirmed on appeal was held res judicata of issue whether judgment was procured by extrinsic fraud in proceeding on petition to vacate judgment on that ground.—Hazen v. Dudley, 61 P.2d 898, 144 Kan. 467.

80. Cal.—Miller v. Lee, 125 P.2d 627, 52 Cal.App.2d 10.
Idaho.—Baldwin v. Anderson, 8 P. 2d 461, 51 Idaho 614.
34 C.J. p 362 note 22.

81. U.S.—Woods Bros. Const. Co. v. Yankton County, S. D., C.C.A.S. D., 54 F.2d 304, 81 A.L.R. 300.
Ark.—Magnolia Grocer Co. v. Farrar, 115 S.W.2d 1094, 195 Ark. 1069—Dent v. Farmers' & Merchants' Bank, 258 S.W. 322, 162 Ark. 325.
Cal.—Kupfer v. Brawner, 122 P.2d 268, 19 Cal.2d 562.
Ill.—Wilson v. Fisher, 17 N.E.2d 216, 369 Ill. 538.
Kan.—McLeod v. Hartman, 253 P. 1094, 123 Kan. 110.
Ky.—Hargis Commercial Bank & Trust Co.'s Liquidating Agent v. Eversole, 74 S.W.2d 193, 255 Ky. 377—Center's Guardian v. Center, 51 S.W.2d 460, 244 Ky. 502—Smith v. Patterson, 280 S.W. 930, 213 Ky. 142—Combs v. Allen, 271 S.W. 598, 208 Ky. 519.
Minn.—Johnson v. Union Sav. Bank & Trust Co., 266 N.W. 169, 196 Minn. 588—Matchan v. Phœnix Land Inv. Co., 205 N.W. 637, 165 Minn. 479.
Mo.—Weatherford v. Spiritual Christian Union Church, 163 S.W.2d 916.
N.Y.—Sternkopf v. Hillers, 285 N.Y. S. 471, 247 App.Div. 738—In re Evans' Estate, 1 N.Y.S.2d 99, 165 Misc. 752, affirmed In re Evans' Will, 17 N.Y.S.2d 1006, 258 App. Div. 1037, affirmed 29 N.E.2d 392, 284 N.Y. 576.
N.C.—Snow Hill Live Stock Co. v. Atkinson, 126 S.E. 610, 189 N.C. 243—In re Ricks' Will, 126 S.E. 422, 189 N.C. 187.
Okl.—Welden v. Home Owners & Loan Corporation, 141 P.2d 1010, 193 Okl. 167.
Pa.—Griffith v. Hamer, 173 A. 874, 113 Pa.Super. 239.
34 C.J. p 361 note 21.

Joint or several judgment
A solidary judgment against comakers of note who were personally cited would not give rise to an action of nullity on ground that judgment was erroneous in that it should have been a joint one against comakers each only for virile share instead of against each for the whole, since error, if any, could have been corrected on appeal.—Wunderlich v. Palmisano, La.App., 177 So. 843.

Finding of jurisdictional facts
When all parties affected by judgment are actually or constructively before the court with an opportunity to assert their contentions and to appeal from an adverse ruling, the finding of jurisdictional facts by the court may be reviewed only by an appeal or other timely and available direct attack.—In re Robinson's Estate, 121 P.2d 734, 19 Cal.2d 534—In re Estrem's Estate, 107 P.2d 86, 16 Cal.2d 563.

82. La.—Collins v. McCook, 136 So. 204, 17 La.App. 415.
S.D.—In re Shafer's Estate, 209 N.W.

by a motion for a new trial in the court rendering the judgment,[83] by motion to correct the judgment,[84] by mandamus requiring the court to take some action which would give the party what he seeks,[85] by an independent action for damages,[86] by a bill in equity for injunction or other relief,[87] or by other proceedings.[88]

§ 284. —— Waiver and Estoppel

The right to vacation of a judgment may be lost by waiver or estoppel.

While it has been held that estoppel may not be invoked in support of an invalid proceeding or a void judgment,[89] in general a person who would ordinarily be entitled to apply for the vacation of a judgment may waive the right to such relief, or be estopped by his conduct to ask for it.[90] The right to have a judgment opened on the ground of fraud may be waived by the party injured, or he may be estopped by his subsequent conduct to apply for such relief.[91]

Conduct constituting waiver or estoppel. Waiver or estoppel generally results where the party injured acquiesces in the rendition of the judgment,[92] or in the effect of the judgment as rendered,[93] or acknowledges its binding force,[94] or receives and retains benefits accruing to him under it,[95] or voluntarily pays the amount of it,[96] or suffers his property to be sold on execution without objection,[97] or where the party against whom an interlocutory

355, adhered to on rehearing In re Schafer's Estate, 216 N.W. 948, 52 S.D. 182.
Tex.—Dempsey v. Gibson, Civ.App., 105 S.W.2d 423, error dismissed.
Va.—Mann v. Osborne, 149 S.E. 537, 153 Va. 190.

83. Md.—Brawner v. Hooper, 135 A. 420, 151 Md. 579.
Ohio.—Horwitz v. Franklin, 172 N.E. 303, 35 Ohio App. 95.
34 C.J. p 362 note 23.

Remedies held cumulative
Cal.—Miller v. Lee, 125 P.2d 627, 52 Cal.App.2d 10.

In Georgia
(1) The rule stated in the text has been followed.—Mize v. Americus Mfg. & Imp. Co., 34 S.E. 563, 109 Ga. 359—Clark's Cove Guano Co. v. Steed, 17 S.E. 967, 92 Ga. 440.

(2) However, it has also been held to be permissible to prosecute both a motion for a new trial and a motion to set judgment aside at the same time.—Kalil v. Spivey, 27 S.E. 2d 475, 70 Ga.App. 84.

(3) Certainly defendant was not precluded from prosecuting his motion to set aside judgment because defendant had previously filed a skeleton motion for new trial which was dismissed by trial court on ground that defendant had abandoned it.—Kalil v. Spivey, supra.

After time for motion for new trial
Under statute so providing, where the time for filing a motion for new trial has elapsed, and the grounds for a new trial could not have been discovered within such time by the application of reasonable diligence, the remedy of a motion to set aside the judgment may be available.—Valley Iron Works v. Independent Bakery, 17 P.2d 898, 171 Wash. 349.

84. S.D.—McDonald v. Egan, 178 N. W. 296, 43 S.D. 147.
34 C.J. p 362 note 24.

85. Md.—Chappell v. Real-Estate Pooling Co., 46 A. 982, 91 Md. 754.

86. N.C.—Bradburn v. Roberts, 61 S.E. 617, 148 N.C. 214.
34 C.J. p 362 note 26.

87. Ill.—Pedersen v. Logan Square State & Savings Bank, 36 N.E.2d 732, 377 Ill. 408.
34 C.J. p 362 note 27.

88. N.Y.—Railroad Federal Savings & Loan Ass'n v. Rosemont Holding Corporation, 290 N.Y.S. 609, 248 App.Div. 909—Railroad Co-op. Building & Loan Ass'n v. Cocks, 290 N.Y.S. 611, 248 App.Div. 905.
Pa.—Anderson v. Polaszewski, 52 Pa. Dist. & Co. 659, 27 Erie Co. 19.

89. N.J.—Gimbel Bros. v. Corcoran, 192 A. 715, 15 N.J.Misc. 538.

90. Ky.—Kirk v. Springton Coal Co., 124 S.W.2d 760, 276 Ky. 501.
N.Y.—Whitney v. Chesbro, 280 N.Y.S. 138, 244 App.Div. 594.
Pa.—Rapp v. Schlichtman, Com.Pl., 54 Montg.Co. 13.
34 C.J. p 362 note 28.
Waiver of mere irregularities see supra § 268.

91. Fla.—Stehli v. Thompson, 10 So.2d 123, 151 Fla. 566.
34 C.J. p 362 note 29.

92. N.C.—Crissman v. Palmer, 35 S.E.2d 422, 225 N.C. 472.
34 C.J. p 362 note 30.

Facts held not to show waiver or estoppel
(1) Filing answer did not waive defendant's right to be heard on motion to set aside void judgment rendered before service of summons.—Kastner v. Tobias, 282 P. 585, 129 Kan. 321.

(2) Where defendants, when judgments were first called to their attention, asserted without any equivocation that they had never been served with any papers in the case, and they at no time receded from that position, defendants were not precluded by "estoppel" from moving to vacate the judgments, although they may have known for about eight years or more that the judgments had been entered.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261.

93. Pa.—In re Mervine's Estate, 19 Pa.Dist. & Co. 528—Kuhns v. Chaffee, Com.Pl., 24 Erie Co. 6.
34 C.J. p 362 note 31.

Consent to continuance of lien
Where court had jurisdiction of subject matter but not person of defendant before judgment, defendant waived such objection on motion to strike out judgment by consenting to let lien of judgment stand pending trial on merits.—C. I. T. Corporation v. Powell, 170 A. 740, 166 Md. 208.

94. Ohio.—Mannix v. Elder, 1 Ohio Cir.Ct. 59—Roberts v. Price, 2 Ohio Dec., Reprint, 681, 4 West.L.Month. 581.

Compromise of liability and giving of security therefor
Ark.—Brierton v. Guaranty Building & Loan Ass'n, 120 S.W.2d 570, 196 Ark. 1177.

Move to quash garnishment proceedings
Refusal to vacate judgment irregularly obtained was not error, where defendant allowed judgment to stand and moved to quash garnishment proceedings thereon.—Williams v. State, 3 P.2d 443, 151 Okl. 223.

95. Fla.—Stehli v. Thompson, 10 So.2d 123, 151 Fla. 566.
Miss.—**Corpus Juris cited in** Cratin v. Cratin, 174 So. 255, 256, 178 Miss. 881.
N.Y.—Whitney v. Chesbro, 280 N.Y.S. 138, 244 App.Div. 594.
W.Va.—National Bank of Summers of Hinton v. Barton, 155 S.E. 907, 109 W.Va. 648.
34 C.J. p 362 note 33.

96. Ohio.—Lynch v. Board of Education of City School Dist. of City of Lakewood, 156 N.E. 133, 116 Ohio St. 361.
34 C.J. p 362 note 34.

97. Kan.—Coffey v. Carter, 27 P. 128, 47 Kan. 22.
34 C.J. p 363 note 35.

judgment is taken submits to and ratifies it by participating in the further proceedings in the action,[98] or generally by proceeding in the cause without objection to errors or defects which may be waived, and which could have been cured on timely objection.[99] Where two entries of a judgment for the same debt are made by mistake, and the debtor contrives to procure an entry of satisfaction of the first, he is estopped to have the second vacated for irregularity.[1]

Pursuit of other remedies. It has generally been held that a party waives his right to apply for the vacation of a judgment by pursuing other remedies,[2] as by taking an appeal from it,[3] or by instituting an independent action for substantially the same relief,[4] although there is also some authority to the contrary.[5] Where a ground for the vacation of a judgment is asserted as a ground for a new trial but is withdrawn before the motion for new trial is ruled on, it has been held that there is no estoppel to assert such ground in a petition to vacate the judgment.[6]

§ 285. —— Assignment of Judgment or Rights Thereunder

Subject to statutory qualifications, the assignee or purchaser of a judgment or rights thereunder cannot set up his rights to prevent its being opened or vacated.

Except as the rule may be affected by statute, the assignee of a judgment, or a subsequent purchaser of rights affected thereby, cannot set up his rights to prevent its being opened or vacated, as he stands in no better position than his assignor, or vendor.[7]

The effect of the assignment of judgments on the rights and liabilities of the parties generally is considered infra §§ 521–528.

2. Proceedings and Relief

§ 286. Nature and Form of Remedy

a. In general
b. Motion or petition in cause
c. Action
d. Statutory petition or complaint and summons
e. Waiver of objections to form of remedy
f. Indirect or implied vacation

a. In General

Unless clearly so intended, a statutory mode of proceeding for the vacation of a judgment is not the exclusive remedy for the purpose.

In order to open or vacate a judgment there must be a direct proceeding for that purpose, not a mere incident to the progress of the cause or to the execution of the judgment, and one which is appropriate to the relief sought;[8] and a judgment cannot be

98. N.Y.—Koehler v. Brady, 81 N.Y. S. 695, 82 App.Div. 279, appeal dismissed 73 N.E. 1135, 181 N.Y. 503.
34 C.J. p 363 note 36.

Moving for final judgment
Plaintiff's motion to set aside judgment, dismissing complaint on merits for want of jurisdiction to enter it because of failure to join issue by answer or demurrer to complaint and on order to show cause, was properly denied, where plaintiff moved for final judgment, and so acted as to consent to decision on agreed statement of facts.—Luebke v. City of Watertown, 284 N.W. 519, 230 Wis. 512.

99. N.C.—Ollis v. Proffitt, 94 S.E. 401, 174 N.C. 675.
34 C.J. p 363 note 37.

Judge's disqualification
Judgment will not be set aside on attack by party with knowledge of judge's disqualification before trial on ground of such disqualification, when record shows consent, and it is not necessary for record to use word "consent" or its equivalent.—Gulf States Steel Co. v. Christison, 154 So. 565, 228 Ala. 622.

Capacity in which party appears
If a person submits himself to the jurisdiction of court and litigates throughout in any particular capacity, he will not be permitted after an adverse result to impeach the decree as to himself on the ground that his capacity was in fact different.—Hubbard v. Massie, 4 So.2d 494, 192 Miss. 95.

Facts held not to constitute waiver
Fact that defendants, discovering trial judge's disqualification, promptly but erroneously moved in supreme court rather than trial court to vacate judgment, did not show waiver.—Cadenasso v. Bank of Italy, 6 P.2d 944, 214 Cal. 562.

1. N.Y.—Weed v. Pendleton, 1 Abb. Pr. 51.

2. **Rule held inapplicable**
(1) Defects in service of statement of claim or entry of judgment were not waived, where rule to open judgment was entered at time when rule to strike off judgment was pending.—Skrynski v. Zeroka, 98 Pa. Super. 469.

(2) Fact that by virtue of appeal judgment had become final as against one of the parties would not preclude another party from moving to set aside judgment in a proper case.—Nuckolls v. Bank of California Nat. Ass'n, 74 P.2d 264, 10 Cal.2d 266, 114 A.L.R. 708.

3. La.—Sladovich v. Eureka Homestead Society, 108 So. 478, 161 La. 270.
34 C.J. p 363 note 38.

4. Pa.—Mellerio v. Freeman, 60 A. 735, 211 Pa. 202.
34 C.J. p 363 note 39.

5. Ark.—Clark v. Bowen, 56 S.W.2d 1032, 186 Ark. 931.

Pending certiorari proceeding
Since one may pursue more than one remedy simultaneously, it is no ground for setting judgment aside that there is pending in another court a proceeding, such as certiorari, by defendant assigning error on judgment.—Whitley v. Jackson, 129 S.E. 662, 34 Ga.App. 286.

6. Okl.—Fellows v. Owens, 62 P.2d 1215, 178 Okl. 224.

7. S.D.—Weber v. Tschetter, 46 N. W. 201, 1 S.D. 205, 215.
34 C.J. p 363 notes 41, 42.

8. Mass.—Davis v. National Life

nullified by agreement of the parties.[9] In a number of jurisdictions provision is made by statute for the opening and vacating of judgments, but, unless the statutory procedure is exclusive,[10] a statutory mode of proceeding for this purpose is not the exclusive remedy, but is cumulative to the common-law right to proceed in proper time and form for the setting aside of the judgment.[11] Where the statutory procedure is followed, strict compliance with the statute may be necessary.[12]

Proceedings to open a judgment have been said to be equitable in nature[13] and in substance;[14] but at least one court has declined to entertain applications to vacate judgments except in simple cases, the remedy in chancery being deemed a better mode of investigation.[15]

It has been said that the power to vacate judgments may be exercised by the court on suggestion by a party or interested person,[16] that a judgment procured by fraud on the court may be vacated or set aside at any time on the suggestion of any interested party,[17] that, during the term at which the judgment was rendered, the judgment may be vacated on mere suggestion[18] of a party in interest,[19]

Ins. Co., 73 N.E. 658, 187 Mass. 468.
34 C.J. p 318 note 63.

9. Pa.—Ferriday v. Reinbold, 8 Pa. Dist. 637.

10. Ariz.—Paul v. Paul, 238 P. 399, 28 Ariz. 598.
Cal.—Eisenberg v. Superior Court in and for City and County of San Francisco, 226 P. 617, 193 Cal. 575—McMahan v. Baringer, 122 P.2d 63, 49 Cal.App.2d 431.
Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521.
La.—Cohn Flour & Feed Co. v. Mitchell, 136 So. 782, 18 La.App. 534.
N.D.—Bellingham State Bank of Bellingham v. McCormick, 215 N.W. 152, 55 N.D. 700.
Wash.—Pacific Telephone & Telegraph Co. v. Henneford, 92 P.2d 214, 199 Wash. 462, certiorari denied Henneford v. Pacific Telephone & Telegraph Co., 59 S.Ct. 483, 306 U.S. 637, 83 L.Ed. 1038—Betz v. Tower Sav. Bank, 55 P.2d 338, 185 Wash. 314.
34 C.J. p 319 note 64—47 C.J. p 437 note 36.

Specific and general statutes

General statute giving court control of its own records, with right to amend or expunge them, must be read in light of other provisions of statute, and does not alone control method of vacating judgments, since vacation of judgment is specifically treated by statute.—Workman v. District Court, Delaware County, 269 N.W. 27, 222 Iowa 364.

11. Cal.—In re Sankey's Estate, 249 P. 517, 199 Cal. 391.
Ga.—Donalson v. Bank of Jakin, 127 S.E. 229, 33 Ga.App. 428.
Iowa.—Cedar Rapids Finance & Thrift Co. v. Bowen, 233 N.W. 495, 211 Iowa 1207.
34 C.J. p 319 note 64.

During or after term

(1) In some jurisdictions the procedure for vacating judgments during term is not controlled by statute.—Mosher v. Mutual Home & Savings Ass'n, Ohio App., 41 N.E.2d 871.

(2) In such a jurisdiction, a statute relating to the vacation of judgments after term provides a cumulative and not an exclusive remedy.—Vida v. Parsley, Ohio App., 47 N.E.2d 663.

(3) Courts may vacate a judgment during term without following all provisions of statutes applicable to vacation of judgments after term.—National Guaranty & Finance Co. v. Lindimore, Ohio App., 31 N.E.2d 155.

Judgment without jurisdiction

(1) Judgment void for want of jurisdiction may be vacated at any time on motion of party affected thereby without compliance with statutes otherwise applying to vacating judgments.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P.2d 903, 144 Kan. 626.

(2) The statute relating to procedure to vacate or modify judgment does not apply to proceedings to vacate a judgment entered without jurisdiction.—Martin Bros. Box Co. v. Fritz, 292 N.W. 143, 228 Iowa 482.

Statute limiting time for proceedings

Statute providing that judgments in any court of record shall not be set aside for irregularity, on motion, unless such motion be made within three years after term at which judgment was rendered, does not make remedy there available exclusive or condition precedent to review proceedings; where more than one method of procedure is available for correction of irregularities patent on record and errors of fact calling for introduction of evidence dehors record, and for prevention of miscarriage of justice, litigant should be permitted to exercise his choice of methods.—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173.

12. Ariz.—Paul v. Paul, 238 P. 399, 28 Ariz. 598.
S.C.—Anderson v. Toledo Scale Co., 6 S.E.2d 465, 192 S.C. 300.
"The proceedings prescribed by such statutory provisions [for vacation of judgments] were unknown to the common law, and, being novel in character, strict compliance with such provisions is essential."—Terry v. Claypool, 65 N.E.2d 883, 888, 77 Ohio App. 77.

Judgment that is not void on its face can be attacked only under some statutory provision and in manner therein provided.—Latimer v. Vanderslice, 62 P.2d 1197, 178 Okl. 501—Walker v. Gulf Pipe Line Co., 226 P. 1046, 102 Okl. 7.

13. Pa.—U. S. Savings & Trust Co. of Conemaugh to Use of Hindes v. Helsel, 188 A. 167, 325 Pa. 1—Harr v. Bernheimer, 185 A. 857, 322 Pa. 412—Richey v. Gibboney, 34 A.2d 913, 154 Pa.Super. 1—Page v. Wilson, 28 A.2d 706, 150 Pa.Super. 427—Liberal Credit Clothing Co. v. Tropp, 4 A.2d 565, 135 Pa.Super. 53—Kaufman v. Feldman, 180 A. 101, 118 Pa.Super. 435—Hamborsky v. Magyar Presbyterian Church, 78 Pa.Super. 519—Packet v. Packet, Com.Pl., 47 Lack.Jur. 149—Sheaffer v. Sheaffer, Com.Pl., 45 Lanc.L. Rev. 613—Stetsko v. Lea, Com.Pl., 26 West.Co.L.J. 97—Freedman for the Use of Rothbard v. Freedman-Smotkin, Com.Pl., 52 York Leg.Rec. 17.

Rule as substitute for bill in equity

A rule to show cause why judgment should not be opened and defendant let into a defense is a substitute for a bill in equity.—Albert M. Greenfield & Co. v. Roberts, 5 A.2d 642, 135 Pa.Super. 328.

14. Pa.—Richey v. Gibboney, 34 A.2d 913, 154 Pa.Super. 1.

15. Del.—Industrial Trust Co. v. Miller, 170 A. 923, 5 W.W.Harr. 554.

16. N.C.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
Persons by whom proceedings may be brought see infra § 293.

17. Ariz.—Kendall v. Silver King of Arizona Mining Co., 226 P. 540, 26 Ariz. 456.

18. Mo.—Savings Trust Co. of St. Louis v. Skain, 131 S.W.2d 566, 345 Mo. 46.

19. Okl.—Wall v. Snider, 219 P. 671, 93 Okl. 97.
34 C.J. p 318 note 61.

and that the exercise of the broad power to set aside a judgment during the term is not hampered by the ordinary rules of procedure.[20] The power of the court to act on its own motion is considered infra § 287.

The employment, at common law, of a writ of error coram nobis as a remedy to obtain the vacation of a judgment, and its supercession, in most jurisdictions, by a summary motion to vacate the judgment, are discussed infra §§ 311–313. The former and the present status of the writ of audita querela as a remedy for this purpose are treated in Audita Querela. Equitable relief against judgments is considered infra §§ 341–400, and the vacation of decrees in equity, in Equity §§ 622–667. Procedure and relief in connection with the opening or vacating of default judgments are considered infra § 337.

Proceeding for new trial distinguished. A proceeding for opening a judgment is not a proceeding for a new trial,[21] and is not governed by the same rules of court.[22] A statute authorizing a proceeding to obtain a new trial on the ground of newly discovered evidence and a statute providing for other relief, such as vacation, after judgment, ordinarily afford an alternative remedy.[23]

Plea or answer. Where a plaintiff relies on a judgment which is void or voidable, relief against it may be had by plea or answer.[24] Fraud in obtaining a judgment is available as an equitable defense.[25]

b. Motion or Petition in Cause

Subject to some exceptions, judgments may be opened or vacated, in most jurisdictions, on simple motion or petition in the cause.

In most jurisdictions, judgments may be opened or vacated on simple motion, or petition in the cause,[26] with exceptions, considered infra subdivisions c and d of this section, obtaining in some ju-

20. Ky.—South Mountain Coal Co. v. Rowland, 265 S.W. 320, 204 Ky. 820.

21. N.J.—Wardell v. Warshofsky, 159 A. 694, 10 N.J.Misc. 519—Kohn v. Lazarus, 155 A. 260, 9 N.J.Misc. 644.

34 C.J. p 319 note 64 [c].

In Iowa

A statutory proceeding to vacate judgment and grant new trial is at law, not in equity, and must be distinguished from application for new trial in original suit.—Shaw v. Addison, Iowa, 18 N.W.2d 796.

22. N.J.—Wardell v. Warshofsky, 159 A. 694, 10 N.J.Misc. 519—Kohn v. Lazarus, 155 A. 260, 9 N.J.Misc. 644.

23. Ohio.—Townley v. A. C. Miller Co., 45 N.E.2d 786, 70 Ohio App. 219.

24. Kan.—Simpson v. Kimberlin, 12 Kan. 579.

34 C.J. p 324 note 8.

25. Ind.—Hogg v. Link, 90 Ind. 346.

26. U.S.—American Ins. Co. v. Lucas, D.C.Mo., 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466, affirmed American Ins. Co. v. Scheufler, 129 F.2d 143, certiorari denied 63 S.Ct. 257, 317 U.S. 687, 87 L.Ed. 551, rehearing denied 63 S.Ct. 433, 317 U.S. 712, 87 L.Ed. 567—U. S. v. Certain Land in Falls Tp., Bucks County, D.C., Pa., 38 F.2d 109.

Cal.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221—King v. Superior Court in and for San Diego County, 56 P.2d 268, 12 Cal.App.2d 501—Fisch & Co. v. Superior Court in and for Los Angeles County, 43 P.2d 855, 6 Cal.App.2d 21—Application of Behymer, 19 P.2d 829, 130 Cal.App. 200—Jellen v. O'Brien, 264 P. 1115, 89 Cal.App. 505—Fletcher v. Superior Court of Sacramento County, 250 P. 195, 79 Cal.App. 468—In re Dahnke's Estate and Guardianship, 222 P. 381, 64 Cal. App. 555.

Fla.—McGee v. McGee, 22 So.2d 788—In re Begg's Estate, 12 So.2d 115, 152 Fla. 277.

Ga.—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287.

Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521—Savage v. Stokes, 28 P.2d 900, 54 Idaho 109—Baldwin v. Anderson, 8 P.2d 461, 51 Idaho 614—Jensen v. Gooch, 211 P. 551, 36 Idaho 457—Miller v. Prout, 197 P. 1023, 33 Idaho 709.

Ill.—City of Des Plaines v. Boeckenhauer, 50 N.E.2d 483, 383 Ill. 475—Industrial Nat. Bank of Chicago v. Altenberg, 64 N.E.2d 219, 327 Ill.App. 337—Anderson v. Anderson, 11 N.E.2d 216, 292 Ill.App. 421.

Kan.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P. 2d 903, 144 Kan. 626.

Mass.—Powdrel v. Du Bois, 174 N. E. 220, 274 Mass. 106.

Minn.—In re Jordan's Estate, 271 N. W. 104, 199 Minn. 53.

Mo.—Spichard v. McNabb, App., 180 S.W.2d 611—National City Bank of St. Louis v. Pattiz, App., 26 S. W.2d 815—Moutier v. Sherman, App., 25 S.W.2d 490.

Neb.—Netusil v. Novak, 235 N.W. 335, 120 Neb. 751—Foster v. Foster, 196 N.W. 702, 111 Neb. 414.

N.J.—Collyer v. McDonald, 10 A.2d 284, 123 N.J.Law 547.

N.D.—Taylor v. Oulie, 212 N.W. 931, 55 N.D. 253.

Okl.—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273—Ritchie v. Keeney, 73 P.2d 397, 181 Okl. 207—Winters v. Birch, 36 P.2d 907, 169 Okl. 237—Maryland Casualty Co. v. Apple, 267 P. 239, 130 Okl. 270—Central Nat. Oil Co. v. Continental Supply Co., 249 P. 347, 119 Okl. 190—Grubb v. Fay State Bank of Fay, 249 P. 341, 119 Okl. 199—Wall v. Snider, 219 P. 671, 93 Okl. 97—Mason v. Slonecker, 219 P. 357, 92 Okl. 227.

S.C.—Ex parte Hart, 2 S.E.2d 52, 190 S.C. 473, certiorari denied Bowen v. Hart, 60 S.Ct. 82, 308 U. S. 569, 84 L.Ed. 477—Baker v. Brewer, 123 S.E. 771, 129 S.C. 74.

Wash.—Nevers v. Cochrane, 229 P. 738, 131 Wash. 225.

Wis.—Ellis v. Gordon, 231 N.W. 585, 202 Wis. 134—In re Meek's Estate, 227 N.W. 270, 199 Wis. 602.

Wyo.—Ramsay v. Gottsche, 69 P.2d 535, 51 Wyo. 516.

34 C.J. p 319 note 65.

Aid in equity; equity cases

(1) Ordinarily, equitable interposition cannot be invoked in aid of motion to vacate judgment, and a petition in equity is necessary therefor.—Longmire v. Diagraph-Bradley Stencil Mach. Corporation, 173 S.W. 2d 641, 237 Mo.App. 553.

(2) "This remedy by motion is available in equity cases as well as those at law."—Freeman v. Wood, 88 N.W. 721, 11 N.D. 1, 7.

(3) A proceeding to set aside a final decree by a court of chancery, regular on its face and alleged to have been obtained by fraud, deceit, artifice or trickery, or other unlawful means, should be instituted by bill of complaint rather than a motion to set aside final decree and open up the case.—Sauer v. Sauer,

risdictions when certain grounds are relied on. Thus judgments may, it has been held, be opened or vacated on motion based on any of the following grounds: Irregularity;[27] invalidity or voidness;[28]

19 So.2d 247, 154 Fla. 827—State ex rel. Lorenz v. Lorenz, 6 So.2d 620, 149 Fla. 625.

(4) Equitable relief against judgments see infra §§ 341–400.

Motion for resettlement of judgment to provide for striking out of certain provision may be deemed motion to vacate judgment.—Gray v. Gray, 278 N.Y.S. 9, 243 App.Div. 793—Harlem Sav. Bank v. Salvador Realty Corporation, 24 N.Y.S.2d 55, 175 Misc. 504.

Motion or petition in nature of bill of review

Tex.—Galbraith v. Bishop, Com.App., 287 S.W. 1087—Jackson v. Wallace, Civ.App., 239 S.W. 698, affirmed Com.App., 252 S.W. 745.

Motion to reverse

W.Va.—Williams v. Stratton, 174 S. E. 417, 114 W.Va. 337.

Proceeding for new trial

(1) A motion to set aside and vacate order overruling defendant's plea of privilege and the judgment on the merits against defendant was in effect a motion for a new trial on both features of the case.—Joske Bros. Co. v. Eddingston, Tex.Civ. App., 123 S.W.2d 405.

(2) Petition for relief against judgment irregularly or improperly obtained, although defect does not appear on record, is not technically statutory petition to set aside judgment, but is, in effect, motion for new trial.—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 237.

(3) Application for new trial may be regarded as motion to set aside judgment as void.—Lamereaux v. Dixie Motor Co., 91 S.W.2d 993, 263 Ky. 67.

(4) Action intended as action for new trial would be treated as motion to set aside, as void, judgment in original action which was entered without consent or agreement of appellant and without statutory notice after expiration of statutory term of court.—Green v. Blankenship, 91 S. W.2d 996, 263 Ky. 29.

Remedy by motion at same term

Ala.—Ex parte Fidelity & Deposit Co. of Maryland, 134 So. 861, 223 Ala. 98.

Conn.—Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.

Ohio.—In re Kleinhen's Estate, App., 63 N.E.2d 315.

Statutory rules were held not intended as statement of common-law rule.—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 237.

Where ground is not based on fraud, motion is the proper remedy. —Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369.

In Pennsylvania

(1) Remedy of parties aggrieved by judgment regular on its face is by motion or petition to open judgment and not to strike it off.—Harr v. Bernheimer, 185 A. 857, 322 Pa. 412—Wilson v. Vincent, 150 A. 642, 300 Pa. 321—Lincoln Bank of Erie v. Gem City Wholesale Grocery Co., 133 A. 554, 286 Pa. 421—Hotel Redington v. Guffey, 25 A.2d 773, 148 Pa.Super. 502—Lyman Felheim Co. v. Walker, 193 A. 69, 128 Pa.Super. 1 —Broadway Nat. Bank of Scottdale v. Diskin, 161 A. 470, 105 Pa.Super. 279—Vogt Farm Meat Products Co. v. Sherman, 5 Pa.Dist. & Co. 609—Bell v. Fitzgerald, Com.Pl., 31 Del. Co. 3—Jenkins v. Keystone Mut. Casualty Co., Com.Pl., 45 Lack.Jur. 88—Keyser v. Cardon, Com.Pl., 55 Montg.Co. 366—Faust v. Gluck, Com. Pl., 6 Sch.Reg. 1—Walters v. Dooley, Com.Pl., 5 Sch.Reg. 174.

(2) A motion or petition to strike off a judgment may be regarded as a petition to open, if it is such in substance.—Curran v. James Regulator Co., 36 A.2d 187, 154 Pa.Super. 261—Scalatis & Calogeros v. Cargas, 10 Pa.Dist. & Co. 704, 40 Lanc.L.Rev. 623—Vogt Farm Meat Products Co. v. Sherman, 5 Pa.Dist. & Co. 609.

(3) Where a judgment is irregular on its face, the remedy is to strike it off the record and not a motion to open.—Sayers v. Redbank Tel. Co., 25 Pa.Dist. 655—Keyser v. Cardon, Com.Pl., 55 Montg.Co. 366—Jenkins v. Keystone Mut. Casualty Co., Com. Pl., 45 Lack.Jur. 88—Faust v. Gluck, Com.Pl., 6 Sch.Reg. 1.

(4) A rule to "strike off judgment" is essentially a common-law proceeding, a short and summary substitute for an audita querela, a writ of error coram vobis, or a certiorari or writ of error from a superior court by which the same relief was formerly administered, and, being for an irregularity on the face of the proceedings, it is in the nature of a demurrer to the record.—Hotel Redington v. Guffey, 25 A.2d 773, 148 Pa.Super. 502—Albert M. Greenfield & Co. v. Roberts, 5 A.2d 642, 135 Pa.Super. 328—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa.Super. 402.

(5) Petitions to vacate and set aside are based on fatal defects apparent on the face of the record, while petitions to open concern other matters associated with the decree or judgment, or those on which the decree or judgment is based; where a judgment is being attacked for a matter of record, the proper motion is to strike off or vacate, which operates as a demurrer to the record. —Nixon v. Nixon, 198 A. 154, 329 Pa. 256—Strauch v. Miller, Com.Pl., 27 West.Co.L.J. 109.

(6) A rule to strike off a judgment is a common-law proceeding, raising questions of irregularity or insufficiency apparent on the face of the record; a rule to open judgment is an equitable proceeding; the two are not interchangeable, and, where the parties do not consent thereto, one cannot be substituted for the other by the court.—Hamborsky v. Magyar Presbyterian Church, 78 Pa. Super. 519—Faust v. Gluck, Com.Pl., 6 Sch.Reg. 1.

(7) A rule to strike off judgment is not a substitute for a rule for more specific statement of claim or a rule to strike off a pleading.—Hotel Redington v. Guffey, 25 A.2d 773, 148 Pa.Super. 502.

(8) Where defenses arise after the rendition of a judgment, the better practice now is to proceed by way of motion, or the parties may agree to the relief.—German Trust Co. of Davenport, Iowa, v. Plotke, 118 A. 508, 274 Pa. 483.

(9) Petition to open is the proper method to test validity of judgment entered on former scire facias.— Brusko v. Olshefski, 13 A.2d 916, 140 Pa.Super. 485—Miller Bros. v. Keenan, 90 Pa.Super. 470.

27. Mo.—Moutier v. Sherman, App., 25 S.W.2d 490.
N.C.—Cox v. Cox, 18 S.E.2d 713, 221 N.C. 19—Dail v. Hawkins, 189 S.E. 774, 211 N.C. 283—Duffer v. Brunson, 125 S.E. 619, 188 N.C. 789.
34 C.J. p 319 note 65 [h], p 320 note 68.

Elimination of defendant

Trial court's action in modifying judgment by eliminating therefrom one of the defendants on the ground that, at the time of signing the journal entry, court did not know that entry recited a judgment against such defendant constituted the vacation of a judgment irregularly obtained and proceeding therefor was properly by motion.—Goodkin v. Hough, 130 P.2d 93, 191 Okl. 372.

28. Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521—Baldwin v. Anderson, 8 P.2d 461, 51 Idaho 614—Jensen v. Gooch, 211 P. 551, 36 Idaho 457—Miller v. Prout, 197 P. 1023, 33 Idaho 709.
Kan.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P. 2d 903, 144 Kan. 626.

error or mistake of fact,[29] such as was ground for relief at common law by writ of error coram nobis, as discussed infra §§ 311–313; fraud in obtaining judgment;[30] perjury;[31] accident, mistake, inadvertence, surprise, excusable neglect, casualty, or misfortune;[32] and likewise judgments may be vacated

Neb.—Foster v. Foster, 196 N.W. 702, 111 Neb. 414.
Okl.—Maryland Casualty Co. v. Apple, 267 P. 239, 130 Okl. 270—Grubb v. Fay State Bank of Fay, 249 P. 341, 119 Okl. 199—Mason v. Slonecker, 219 P. 357, 92 Okl. 227.
S.D.—Lessert v. Lessert, 263 N.W. 559, 64 S.D. 3.
34 C.J. p 320 note 69.

Want of jurisdiction of person

U.S.—U. S. v. Sotis, C.C.A.Ill., 131 F. 2d 783.
Fla.—McGee v. McGee, 22 So.2d 788.
Ill.—Anderson v. Anderson, 11 N.E. 2d 216, 292 Ill.App. 421.

29. Miss.—Lott v. Illinois Cent. R. Co., 10 So.2d 96, 193 Miss. 443.
34 C.J. p 320 note 70.

In Illinois

(1) Under the statute abolishing the writ of error coram nobis and providing that errors of fact which could have been corrected by such writ may be corrected on motion by the court in which the error was committed, petition to vacate judgment under statute takes place of writ of error coram nobis at common law.—Josten Mfg. Co. v. Keeler, 2 N.E.2d 586, 284 Ill.App. 646.

(2) The courts of Illinois, although they refused to recognize the writ of error coram nobis, have encouraged the development of its statutory equivalent and have permitted its use in new situations wherever such was consonant with the history of its common-law antecedent, due to the tendency of the courts of law to apply equitable principles wherever necessary to prevent injustice; the Civil Practice Act has expanded the scope of the statute providing for motion in nature of writ of error coram nobis.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 583, 303 Ill.App. 516.

(3) The motion under the statute is independent of the suit or proceeding in which the judgment sought to be corrected or vacated was rendered.—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 732, 323 Ill. 90—Sherman & Ellis v. Journal of Commerce and Commercial Bulletin, 259 Ill.App. 453—Mitchell v. Eareckson, 250 Ill.App. 508—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 224 Ill.App. 367, reversed on other grounds 140 N.E. 836, 309 Ill. 147—34 C.J. p 319 note 65 [g].

(4) Such a motion stands as a declaration in a new suit, in which new issues are presented and on which there must be a finding and a judgment.—Christian v. Smirinotis, 57 N.E.2d 457, 388 Ill. 73—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 732, 323 Ill. 90—Reid v. Dolan, 19 N.E.2d 764, 299 Ill.App. 612—Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 290 Ill.App. 558—Adams v. Butman, 264 Ill.App. 378—Sherman & Ellis v. Journal of Commerce and Commercial Bulletin, 259 Ill.App. 453—Mitchell v. Eareckson, 250 Ill.App. 508—Ness v. Bell, 246 Ill.App. 79—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 224 Ill.App. 367, reversed on other grounds 140 N.E. 836, 309 Ill. 147—34 C.J. p 320 note 70 [c].

(5) The proceeding on the petition has nothing to do with the merits of the original controversy between the parties.—Christian v. Smirinotis, 57 N.E.2d 457, 388 Ill. 73.

(6) In a proceeding under the statute to correct errors of fact in the record by motion after the term, the scope of inquiry is limited to errors in fact not appearing on the face of the record, and which could have been inquired into by the common-law writ of error coram nobis.—Jerome v. 5019–21 Quincy Street Bldg. Corporation, 53 N.E.2d 444, 385 Ill. 524.

(7) The purpose of such motion is to bring before court matters of fact not appearing of record which, if known at time of rendition of judgment, would have prevented its rendition.—Linehan v. Travelers Ins. Co., 18 N.E.2d 178, 370 Ill. 157—Viedenschek v. Johnny Perkins Playdium, 49 N.E.2d 339, 319 Ill.App. 523—Reid v. Dolan, 19 N.E.2d 764, 299 Ill.App. 612—Swiercz v. Nalepka, 259 Ill.App. 262.

(8) The motion is not available to review questions of fact arising on the pleadings in original proceeding or to correct errors of court on questions of law therein.—Linehan v. Travelers Ins. Co., supra—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147.

(9) The proceeding under the statute refers only to a judgment sought to be set aside at a term subsequent to that at which the judgment was rendered.—Cooper v. Handelsman, 247 Ill.App. 454.

(10) The statute and the procedure thereunder apply to law actions and not to equity actions.—Pedersen v. Logan Square State Bank, 36 N.E. 2d 732, 377 Ill. 408—Frank v. Salomon, 34 N.E.2d 424, 376 Ill. 439—Lamons & Co. v. American Cast Iron Pipe Co., 38 N.E.2d 779, 312 Ill.App. 573—Solomon v. Bayles, 36 N.E.2d 274, 311 Ill.App. 368.

(11) The motion is not appropriate in statutory proceedings, but only in proceedings at common law.—Reid v. Chicago Rys. Co., 231 Ill.App. 58—Bishop v. Illinois Western Electric Co., 221 Ill.App. 141.

(12) The motion does not lie in insanity proceedings.—People v. Janssen, 263 Ill.App. 101.

(13) Motion filed forty-five days after judgment for clarification of new trial order could not be considered as a motion brought under the statute.—Rome Soap Mfg. Co. v. John T. La Forge & Sons, 54 N.E. 2d 252, 322 Ill.App. 281.

(14) Relief under statute was held not unavailable because of intervening appeal and affirmance of judgment.—Maher v. New York, C. & St. L. R. Co., 8 N.E.2d 512, 290 Ill.App. 267.

In Missouri

The scope of the remedy administered on the motion now employed as a substitute for the writ of error coram nobis reaches far beyond the ordinary writ of error as known to the common law.—Moutier v. Sherman, App., 25 S.W.2d 490.

30. Ill.—Clausen v. Varrin, 11 N.E. 2d 820, 292 Ill.App. 641.
Minn.—In re Jordan's Estate, 271 N. W. 104, 199 Minn. 53.
N.D.—Smith v. Smith, 299 N.W. 693, 71 N.D. 110.
34 C.J. p 320 note 72.

Motion in nature of writ of error coram nobis

Where wife, because of husband's representation that his divorce suit had been dismissed, did not appear at the trial, and husband continued to live with her until the divorce decree was granted, it was held that, even though the judgment was procured by fraud, a motion in the nature of a writ of error coram nobis to set aside the decree on the ground of fraud on the wife and on the court was not the proper remedy; such motion cannot be considered as a suit in equity; a motion in the nature of writ of error coram nobis to set aside judgment for fraud in its procurement does not reach anything occurring after final judgment.—Ragland v. Ragland, Mo.App., 258 S.W. 728.

31. Minn.—In re Jordan's Estate, 271 N.W. 104, 199 Minn. 53.
34 C.J. p 320 note 74 [a].

32. Colo.—Wharton v. De Vinna, 246 P. 279, 79 Colo. 450.

or opened on various other specific grounds.[33] On the other hand, it has been held that the insufficiency of the evidence to support the verdict cannot be attacked by a motion to vacate and set aside the judgment,[34] and that a final decree of partition cannot be opened by mere motion after the term.[35]

In some jurisdictions a judgment may be vacated on motion only when it is void or irregular on its face,[36] except pursuant to statutory provisions granting power to act on motion;[37] but in other jurisdictions this limitation does not prevail.[38] It has been held that an erroneous, as distinguished from an irregular, judgment cannot be set aside on motion.[39] A petition addressed to the court wherein the judgment was rendered, with rule nisi or process served on the necessary parties, has been deemed a proper form of procedure to vacate a judgment for defects not appearing on the face of the record.[40] A motion to set aside a judgment may not be made to perform the office of an appeal.[41]

While an action is pending to set aside a judgment, the same relief will not be granted on motion;[42] and, where an appeal is perfected before a motion is made to vacate, it has been held that the court has no power to vacate the judgment except on the ground of jurisdiction.[43]

During the term at which it was rendered, the court has inherent power to vacate the judgment on motion, on any ground appealing to the judicial discretion.[44]

A motion to set aside a verdict and judgment has been said to be distinguishable from,[45] and not to be subject to the same rules of practice as,[46] a motion to set aside a judgment only; and that it should also be distinguished from an independent suit in equity to set aside a verdict and judgment.[47] A petition to vacate a verdict and judgment for matters not appearing on the record has been held, in effect, a motion for a new trial.[48]

Petition as independent proceeding. A petition to vacate a judgment has been regarded, in at least one jurisdiction, as a new proceeding, separate from, and independent of, the action in which the judgment was entered,[49] and not as a supplemental step

Ill.—Clausen v. Varrin, 11 N.E.2d 820, 292 Ill.App. 641.
34 C.J. p 320 note 73.

Ground held not shown, so that motion was not available.—Chavez v. Scully, 232 P. 165, 69 Cal.App. 633.

33. **Particular grounds**
(1) Failure of complaint to state cause of action.—Alabama Power Co. v. Curry, 153 So. 634, 228 Ala. 444.
(2) Failure to serve process.—Davis v. Brigman, 169 S.E. 431, 204 N.C. 630—34 C.J. p 320 note 74 [e].
(3) Other grounds see 34 C.J. p 320 note 74 [b]–[d], [f].

34. S.D.—First Nat. Bank v. Thompson, 227 N.W. 81, 55 S.D. 629.

35. Wis.—Kane v. Parker, 4 Wis. 123.

36. Cal.—Jacks v. Baldez, 31 P. 899, 97 Cal. 91.
Ga.—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636—Wofford v. Vandiver, 34 S.E.2d 579, 92 Ga.App. 623.
Okl.—Petty v. Roberts, 98 P.2d 602, 186 Okl. 269—Ritchie v. Keeney, 73 P.2d 397, 181 Okl. 207—Simmons v. Howard, 276 P. 718, 136 Okl. 118—Central Nat. Oil Co. v. Continental Supply Co., 249 P. 347, 119 Okl. 190—Grubb v. Fay State Bank of Fay, 249 P. 341, 119 Okl. 199—Steiner v. Smith, 242 P. 207, 115 Okl. 205—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247—Miller v. Madigan, 215 P. 742, 90 Okl. 17.
34 C.J. p 320 note 75.

Coram nobis
A motion to vacate a judgment on an irregularity not appearing on the face of record, but to be shown outside of record, if available, is in the nature of a writ of error coram nobis.—Audsley v. Hale, 261 S.W. 117, 303 Mo. 451—34 C.J. p 320 note 75 [b].

Where rights of third persons have not intervened, however, it has been held that a judgment may be vacated on motion, even though the nullity of the judgment is not apparent from an inspection of the judgment roll.—Sharp v. Eagle Lake Lumber Co., 212 P. 933, 60 Cal.App. 386.

37. Cal.—Jacks v. Baldez, 31 P. 899, 97 Cal. 91.

38. S.C.—Tolbert v. Roark, 119 S.E. 571, 126 S.C. 207.
34 C.J. p 321 note 77.

39. N.C.—Dail v. Hawkins, 189 S.E. 774, 211 N.C. 283—State v. Hollingsworth, 175 S.E. 99, 206 N.C. 739.
S.D.—Janssen v. Tusha, 5 N.W.2d 684, 68 S.D. 639—Jennings v. Des Moines Mutual Hail & Cyclone Ins. Ass'n, 146 N.W. 564, 33 S.D. 385.

40. Ga.—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287—Longshore v. Collier, 140 S.E. 636, 37 Ga.App. 450, followed in Reddy-Waldhauer-Maffett Co. v. Cranman, 153 S.E. 616, 41 Ga.App. 563.
34 C.J. p 321 note 78.

41. S.D.—Janssen v. Tusha, 5 N.W. 2d 684, 68 S.D. 639—Jennings v. Des Moines Mutual Hail & Cyclone Ins. Ass'n, 146 N.W. 564, 33 S.D. 385.

42. Wash.—Stolze v. Stolze, 191 P. 641, 111 Wash. 398.
34 C.J. p 321 note 79.

43. Or.—Blanchard v. Makinster, 290 P. 1093, 137 Or. 58.

Mistake of fact resulting in judgment cannot be remedied by motion to vacate judgment after perfecting appeal.—Blanchard v. Makinster, 290 P. 1093, 137 Or. 58.

44. Mo.—Reid v. Moulton, 210 S.W. 34.
34 C.J. p 321 note 80.
Discretion of court generally see infra § 300.

45. Ga.—Wrenn v. Allen, 180 S.E. 104, 180 Ga. 613—Lucas v. Lucas, 177 S.E. 684, 179 Ga. 821—Firemen's Ins. Co. v. Oliver, 167 S.E. 99, 176 Ga. 80.

46. Ga.—Louis K. Liggett Co. v. Foster, 136 S.E. 93, 36 Ga.App. 185.

47. Ga.—Wrenn v. Allen, 180 S.E. 104, 180 Ga. 613—Lucas v. Lucas, 177 S.E. 684, 179 Ga. 821.
Equitable relief against judgments see infra §§ 341–400.

48. Ga.—Firemen's Ins. Co. v. Oliver, 162 S.E. 636, 44 Ga.App. 639, reversed on other grounds 167 S.E. 99, 176 Ga. 80—Oliver v. Fireman's Ins. Co., 155 S.E. 227, 42 Ga.App. 99—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568—Donalson v. Bank of Jakin, 127 S.E. 229, 33 Ga.App. 428.

49. Mass.—Noyes v. Bankers Indemnity Ins. Co., 30 N.E.2d 867, 307 Mass. 567—Lynch v. Springfield Safe Deposit & Trust Co., 13 N.E.2d 611, 300 Mass. 14—Town of

in the original cause.[50]

Interlocutory judgments or orders may always be vacated on motion in the cause made before the action is determined by final judgment.[51]

c. Action

It is variously held, with respect to particular grounds or circumstances, that an action, rather than a motion, is or is not the proper mode for seeking vacation of a judgment; some authorities permit the use of either.

In some jurisdictions the vacation of a judgment on certain grounds, or in certain circumstances, must be obtained by a direct action with appropriate pleadings, brought for the purpose of annulling such judgment, and cannot be obtained by mere motion.[52] Thus it has been held that the remedy is by plenary action, and not by motion, where vacation of the judgment is sought on any of the following grounds: Invalidity not apparent on the face of the record;[53] want of service of process, and of jurisdiction of the person;[54] fraud;[55] and accident or mistake.[56]

On the other hand, it has been held that the remedy by motion or petition in the cause is exclusive, and that an independent action will not lie,[57] at least not where based on certain grounds,[58] including irregularity,[59] failure to serve process,[60] the unauthorized appearance of an attorney,[61] the premature entry of judgment,[62] or the death of defendant before judgment.[63] The principle is that an independent action will not be allowed where the relief or remedy demanded may be had in an existing action.[64]

In some jurisdictions, the rule is that an independent action to vacate a judgment will lie where, without plaintiff's fault, the remedy by motion is not available, or adequate, but not otherwise.[65]

In some cases, it has been held that the remedy either by motion or by action is available.[66]

Hopkinton v. B. F. Sturtevant Co., 189 N.E. 107, 285 Mass. 272—Powdrell v. Du Bois, 174 N.E. 220, 274 Mass. 106—French v. Kemp, 170 N.E. 815, 271 Mass. 79—Mellet v. Swan, 168 N.E. 732, 269 Mass. 173—Beserosky v. Mason, 168 N.E. 726, 269 Mass. 325—Wrinn v. Sellers, 147 N.E. 899, 252 Mass. 423—Maker v. Bouthier, 136 N.E. 255, 242 Mass. 20.

When judgment was entered prematurely, cutting off plaintiff's right to present exceptions, he could file petition as separate proceeding to vacate the judgment.—Everett-Morgan Co. v. Boyajian Pharmacy, 139 N.E. 170, 244 Mass. 460.

50. Mass.—Lynch v. Springfield Safe Deposit & Trust Co., 13 N.E. 2d 611, 300 Mass. 14—Beserosky v. Mason, 168 N.E. 726, 269 Mass. 325.

51. N.C.—Vaughan v. Gooch, 92 N. C. 524.
34 C.J. p 321 note 81.

Equity doctrines inapplicable
Doctrines limiting the functions of an action in equity to set aside a decree are not applicable to a motion made in the action itself and within the time prescribed by statute to set aside an interlocutory decree of divorce on ground of fraud and coercion.—Wetzel v. Wetzel, Cal.App., 162 P.2d 299.

52. N.C.—Cox v. Cox, 18 S.E.2d 713, 221 N.C. 19.
34 C.J. p 321 note 83.

Judgment not void
Relief against judgment which is not void may be granted only in independent suit brought for such relief.—Halbrook v. Quinn, Civ.App., 286 S.W. 954, certified questions dismissed Quinn v. Halbrook, 285 S.W. 1079, 115 Tex. 513.

Lapse of time; rights of third persons
Where one of the parties to a partition has been evicted by title paramount, the decree cannot be set aside on motion, where a considerable time has elapsed, the rights of third persons have intervened, and other complicated circumstances are involved, but remedy is to be sought by a new action.—Marvin v. Marvin, 1 Abb.N.Cas.,N.Y., 372, 52 How.Pr. 97.

53. Cal.—People ex rel. Pollock v. Bogart, 138 P.2d 360, 58 Cal.App.2d 831—Moran v. Superior Court in and for Sacramento County, 96 P. 2d 193, 35 Cal.App.2d 629.
Okl.—Simmons v. Howard, 276 P. 718, 136 Okl. 118.
34 C.J. p 321 note 84.

54. Okl.—Simmons v. Howard, supra.
34 C.J. p 321 note 85.

55. Ga.—Simpson v. Bradley, 5 S.E. 2d 893, 189 Ga. 316, mandate conformed to 6 S.E.2d 424, 61 Ga.App. 495, certiorari denied 60 S.Ct. 1105, 310 U.S. 643, 84 L.Ed. 1410, rehearing denied 61 S.Ct. 56, 311 U.S. 725, 85 L.Ed. 472.
N.C.—Cox v. Cox, 18 S.E.2d 713, 221 N.C. 19—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 340, 213 N.C. 369—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
34 C.J. p 321 note 86.

56. Mo.—Curtiss v. Bell, 111 S.W. 131, 131 Mo.App. 245.
34 C.J. p 322 note 87.

57. N.D.—Lamb v. King, 296 N.W. 185, 70 N.D. 469.
S.C.—Baker v. Brewer, 123 S.E. 771, 129 S.C. 74.
34 C.J. p 322 note 89.

58. Ky.—Thompson v. Porter, 210 S.W. 948, 183 Ky. 848.
34 C.J. p 322 note 90.

Grounds other than fraud
N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S. E. 340, 213 N.C. 369.

59. N.C.—Scott v. Mutual Reserve Fund Life Ass'n, 50 S.E. 221, 137 N.C. 515—Knott v. Taylor, 6 S.E. 788, 99 N.C. 511, 6 Am.S.R. 547.

60. N.C.—Davis v. Brigman, 169 S. E. 421, 204 N.C. 680—Grant v. Harrell, 13 S.E. 718, 109 N.C. 78.

61. N.Y.—Vilas v. Plattsburgh & M. R. Co., 25 N.E. 941, 123 N.Y. 440, 20 Am.S.R. 771, 9 L.R.A. 844.
34 C.J. p 322 note 92.

62. Minn.—Calhoun Beach Holding Co. v. Minneapolis Builders' Supply Co., 252 N.W. 442, 190 Minn. 576.

63. N.C.—Knott v. Taylor, 6 S.E. 788, 99 N.C. 511, 6 Am.S.R. 547.

64. N.C.—Knott v. Taylor, supra.

Where order of consolidation of societies was obtained by fraudulent proof of compliance with statutory requirements, redress is by motion in consolidation proceeding and not by separate action.—Carnemolla v. Society of Citizens of Pozzallo, 270 N. Y.S. 517, 241 App.Div. 765.

65. N.D.—Freeman v. Wood, 88 N. W. 721, 11 N.D. 1, following Kitzman v. Minnesota Thresher Mfg. Co., 84 N.W. 585, 10 N.D. 26.
34 C.J. p 322 note 95.

66. Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.
Minn.—In re Melgaard's Will, 274 N. W. 641, 200 Minn. 493.

It has been held that after the term[67] or after long delay[68] relief should be sought by action and not by motion.

Without regard to whether or not relief may be had by motion or petition, a number of cases have held that relief may be had by action.[69]

d. Statutory Petition or Complaint and Summons

The statutory proceedings for vacating a judgment after the term, on specified grounds, by verified complaint or petition and summons are exclusive in some jurisdictions, but cumulative in others.

Under some statutes the proceedings to vacate or set aside a judgment in the court in which it was rendered, after the expiration of the term, on certain grounds therein enumerated, are by verified complaint or petition, and not by motion, and on such complaint or petition a summons or notice issues and is served, and other proceedings are had, substantially as in an action.[70] Such statutory proceeding, while incidental to the original action, has been declared, in effect, a new action,[71] equitable in character,[72] or an independent proceeding[73] or action,[74] or in the nature of an independent ac-

N.C.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
34 C.J. p 322 note 97.

Fraud; perjury

Remedy afforded by statute authorizing setting aside of judgment obtained by means of perjury or fraud may be put into effect either by motion or by an original action.—In re Jordan's Estate, 271 N.W. 104, 199 Minn. 53—34 C.J. p 322 note 97 [c], [e].

67. Conn.—Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.

68. Mich.—Jennison v. Haire, 29 Mich. 207.
34 C.J. p 322 note 98.

69. Ind.—Scudder v. Jones, 32 N.E. 221, 134 Ind. 547.
34 C.J. p 323 note 99.
Action for review of drainage assessment see Drains § 70.

Fraud

A party may attack a judgment for fraud by an independent action.—Oates v. Texas Co., 166 S.E. 317, 203 N.C. 474.

Action and motion for new trial

Litigant may enter motion for new trial, and prosecute appeal, and simultaneously therewith, or after appeal is decided, sue to vacate judgment and for new trial provided ground on which he relies in his petition is one of which he did not avail himself on motion for new trial; but he is not entitled to both remedies on same ground.—Ison v. Buskirk-Rutledge Lumber Co., 266 S.W. 243, 205 Ky. 583.

In Louisiana

(1) The action of nullity under Code Pract. art. 607 is independent of the remedy of appeal and is not a substitute for an appeal, its purpose being to furnish relief against fraud which has operated in the obtention of a judgment which makes no appearance in the record, and for which an appeal would afford no remedy.—Miller v. Miller, 100 So. 45, 156 La. 46—State ex rel. Pelletier v. Sommerville, 36 So. 864, 112 La. 1091—Vinson v. Picolo, La.App., 15 So.2d 778.

(2) A petition to annul a definitive judgment rendered in a prior proceeding, on ground that court in prior proceeding was without jurisdiction ratione personae to adjudge the cause in so far as present plaintiffs were concerned because they were not cited, constituted a direct and independent action attacking a judgment that had become final, and was not an attempt to appear in the prior proceedings, notwithstanding plaintiffs did not found their action solely on lack of citation, but also sought to establish nullity of the judgment on two other wholly unrelated grounds.—Adkins' Heirs v. Crawford, Jenkins & Booth, 3 So.2d 539, 200 La. 561.

70. Ky.—Miller v. National Bank of London, 116 S.W.2d 320, 273 Ky. 243.
Okl.—Grayson v. Stith, 72 P.2d 320, 181 Okl. 131, 114 A.L.R. 276—Steiner v. Smith, 242 P. 207, 115 Okl. 205—Cherry v. Gamble, 224 P. 960, 101 Okl. 234.
Wyo.—Boulter v. Cook, 236 P. 245, 32 Wyo. 461.
34 C.J. p 323 note 1.

Proceeding entitled in original action

Iowa.—Bates v. Farmers Loan & Trust Co. of Iowa City, 291 N.W. 184, 227 Iowa 1347—McKee v. National Travelers Casualty Ass'n, 282 N.W. 291, 225 Iowa 1200.

"Application" sustained as petition

Iowa.—Newlove v. Stern, 196 N.W. 51, 196 Iowa 1111.

Contentions available on petition, but not on motion

Contentions that a personal judgment could not be had on the averments of an amended petition, that lack of notice of proceedings under amended petition constituted casualty, and that there was accident and surprise on the part of defendant, could be relied on in a petition to set aside the judgment, but could not be presented on motion to set it aside.—Williams v. Isaacs, 256 S.W. 19, 201 Ky. 158.

Rehearing under Alabama statute

The character of judgment within purview of statute authorizing application for rehearing within four months from rendition of judgment when a party has been prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his part, is a judgment valid ex facia which on principles of equity and justice should not be allowed to stand.—Marshall County v. Critcher, 17 So.2d 540, 245 Ala. 357.

71. Kan.—State v. Soffietti, 136 P. 260, 90 Kan. 742.
34 C.J. p 323 note 2.

In Alabama

Rehearing under four-month statute is new proceeding, cumulative to remedy in equity, and sustainable on like grounds as to diligence required in presenting defense in original suit.—Craft v. Hirsh, 149 So. 683, 227 Ala. 257, appeal dismissed 54 S.Ct. 455, 291 U.S. 644, 78 L.Ed. 1041.

72. Wash.—**Corpus Juris cited in** Roth v. Nash, 144 P.2d 271, 275, 19 Wash.2d 731.
34 C.J. p 323 note 3.
Equitable relief see infra §§ 341–400.

73. Ark.—United Order of Good Samaritans v. Bryant, 57 S.W.2d 399, 186 Ark. 960, certiorari denied 54 S.Ct. 59, 290 U.S. 641, 78 L.Ed. 557.

Filing application under title of original cause

If application to be relieved from judgment on ground of mistake, inadvertence, surprise, or excusable neglect is filed under title of cause in which original judgment was entered, application will be treated as an independent proceeding.—Vail v. Department of Financial Institutions of Indiana, 17 N.E.2d 854, 106 Ind. App. 39.

74. Okl.—Thompson v. General Outdoor Advertising Co., 151 P.2d 379, 194 Okl. 300.

Docketing

(1) Such proceeding may be docketed as a separate action or as part of, and in connection with, original case in which the judgment sought

tion;[75] but it has also been said not to be in the nature of a new or independent action, but supplementary,[76] and not to be a civil action, but a special proceeding.[77]

Under some statutes, the statutory proceeding is an exclusive remedy, in cases where it is available, and a judgment cannot be vacated after the term in any other form of proceeding,[78] except by bill of review under equity practice.[79] Under other statutes, the statutory remedy is cumulative and not exclusive; it does not impair the remedies by motion or suit in equity which continue to be available in proper cases;[80] but an adverse decision in one form of proceeding will bar a subsequent resort to the other form of remedy.[81]

e. Waiver of Objections to Form of Remedy

Failure to object to the manner in which an application to vacate a judgment is made may be treated as a waiver of such objection.

Where the manner in which an application to vacate a judgment is made is not objected to at the time, it has been held that such objection will be considered waived and that it comes too late on appeal.[82] Thus, where no objection is made to the proceedings being by motion instead of by petition, the appellate court will consider the application as regular;[83] and the action of the court in setting aside a judgment on a petition instead of a motion will be considered a mere irregularity, and the irregular order will not be void for want of jurisdiction.[84] The irregularity of a motion instead of a formal complaint may likewise be waived.[85]

It has been held to be error for the court of its own motion, and without the consent of the parties, to treat a motion as an independent action;[86] but where, by mistake, a remedy is sought by independent action instead of motion in the original cause, the court may, in its discretion, treat the summons and complaint as a motion, to the end that the issues may be determined and the rights of the parties adjudicated.[87]

f. Indirect or Implied Vacation

A judgment may be in effect vacated by the taking of subsequent proceedings in the action which are inconsistent with its continuing in force. Authorities differ as to whether the entry of a second and different judgment in the case has this effect.

A judgment may be practically, or in effect, vacated, although not in terms set aside, by the taking of subsequent proceedings in the same action which are inconsistent with the judgment's continuing in force,[88] as by the entry of a second judgment in the case, different from the first,[89] although as to the last point there is authority to the contrary,[90] or, as appears in the C.J.S. title New Trial § 210, also 34 C.J. p 326 note 21, 46 C.J. p 436 notes 77–81, 84–85, by an order granting a new trial. The general rule, however, is that a judgment stands as such until it is expressly vacated in the manner prescribed by law.[91]

§ 287. —— Vacation on Court's Own Motion

A court may, on its own motion, vacate a judgment during the term at which it was rendered; and, if it is void, may do so at any time, even after the term.

Courts have been broadly said to be authorized to set aside or vacate their judgments on their own

to be vacated was rendered.—Thompson v. General Outdoor Advertising Co., supra.

(2) Docketing generally see supra §§ 126–128.

75. Okl.—Grayson v. Stith, 72 P.2d 820, 181 Okl. 131, 114 A.L.R. 276.

76. Iowa.—Gilman v. Donovan, 12 N.W. 779, 59 Iowa 76.
34 C.J. p 323 note 2 [a] (2).

77. Kan.—Blair v. Blair, 153 P. 544, 96 Kan. 757.
Ohio.—Vida v. Parsley, App., 47 N.E. 2d 663.
Wyo.—Luman v. Hill, 256 P. 339, 36 Wyo. 427.

78. Okl.—Cherry v. Gamble, 224 P. 960, 101 Okl. 234.
34 C.J. p 324 note 4.
Exclusiveness of statutory proceedings generally see supra subdivision a of this section.

79. Wash.—Ball v. Clothier, 75 P. 1099, 34 Wash. 299.
34 C.J. p 324 note 5.

80. Ky.—Southern Nat. Life Ins. Co. v. Ford, 152 S.W. 243, 151 Ky. 476.
34 C.J. p 324 note 6.

81. Wash.—Stolze v. Stolze, 191 P. 641, 111 Wash. 398—Boylan v. Bock, 111 P. 454, 60 Wash. 423.

82. Mass.—Maker v. Bouthier, 136 N.E. 255, 242 Mass. 20.
34 C.J. p 324 note 10.

83. Ind.—Indiana Travelers' Accident Ass'n v. Doherty, 123 N.E. 242, 70 Ind.App. 214.
Iowa.—Callanan v. Ætna Nat. Bank, 50 N.W. 69, 84 Iowa 8.

84. Neb.—Pollock v. Boyd, 54 N.W. 560, 36 Neb. 369.

85. Ind.—Beatty v. O'Connor, 5 N.E. 880, 106 Ind. 81.
Wash.—State v. Washington Dredging & Improvement Co., 86 P. 936, 43 Wash. 508.

86. N.C.—Smith v. Fort, 10 S.E. 914, 105 N.C. 446, 453, 454.
34 C.J. p 324 note 14.

87. N.C.—Abernethy Land & Finance Co. v. First Security Trust Co., 196 S.E. 840, 213 N.C. 369.

88. Mo.—Corpus Juris quoted in Marsden v. Nipp, 30 S.W.2d 77, 81, 325 Mo. 822.
34 C.J. p 325 note 18.

89. Mo.—Corpus Juris quoted in Marsden v. Nipp, 30 S.W.2d 77, 81, 325 Mo. 822.
Contra Mitchell v. Dabney, Mo.App., 71 S.W.2d 165, transferred, see, 58 S.W.2d 731, 332 Mo. 410.
34 C.J. p 325 note 19.
One or more judgments in same case generally see supra § 65.

90. Tex.—Mullins v. Thomas, 150 S.W.2d 83, 136 Tex. 215—Bridgman v. Moore, Civ.App., 180 S.W.2d 211, affirmed, Sup., 183 S.W.2d 705.
Contra Luck v. Hopkins, 49 S.W. 360, 92 Tex. 426—Watson v. Harris, 65 Tex. 61.
34 C.J. p 325 note 20.

91. Mo.—Marsden v. Nipp, 30 S.W. 2d 77, 325 Mo. 822.
34 C.J. p 326 note 22.

motion,[92] and, independently of statutory provisions, to annul on their own motion, and within a reasonable time, judgments inadvertently made.[93] More particularly, during the term at which a judgment was rendered, the court has power on its own motion to vacate it or set it aside.[94] It may quash, vacate, or set aside a void judgment on its own motion,[95] at any time,[96] and, according to the deci-

92. N.M.—Arias v. Springer, 78 P. 2d 153, 42 N.M. 350.
N.C.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.

Setting aside to allow new trial

Trial court's order of its own motion setting aside judgment and order allowing appeal, for purpose of allowing motion for new trial, was held unauthorized and void.—Dougherty v. Manhattan Rubber Mfg. Co., 29 S.W.2d 126, 325 Mo. 656.

Nonpayment of fee

Under statute requiring collection of fee prior to entry of final judgment and court rule requiring deposit of judgment fee prior to taking of proofs, court could vacate judgment for defendant, which was entered without payment of fee, even if plaintiff had no right to move for vacation of judgment because of plaintiff's noncompliance with court rule.—Detroit Edison Co. v. Hartrick, 278 N.W. 664, 283 Mich. 502.

In Texas

(1) "The trial court has control of its judgments for a period of 30 days after the rendition thereof, and may set aside any judgment . . . on its own motion."—Christner v. Mayer, Civ.App., 123 S.W.2d 715, 718, error dismissed, judgment correct.

(2) Where plaintiff's motion for new trial was overruled by operation of law for failure to present motion to trial court within thirty days after it was filed, judgment for defendant became final at the end of thirty-day period and trial court was without authority to set aside judgment either on strength of motion or on court's own motion, where term of court at which judgment was rendered had ended.—Aldridge v. General Mills, Civ.App., 188 S.W.2d 407.

(3) Where trial judge had jurisdiction to render judgment in first instance and judgment had been spread on minutes of court under judge's written instructions in form of an approved decree and had stood for five years without challenge, trial judge had no power to vacate the judgment on his own motion, merely because he had no recollection of having pronounced judgment from the bench; statutes empowering court to correct certain clerical errors and misrecitals in judgment after judgment has become final do not give court authority to vacate and set aside an entire judgment on court's own motion, where judge had directed clerk to enter such judgment.—Eskridge & Williams v. Merchants State Bank & Trust Co., Civ. App., 173 S.W.2d 518, error refused.

(4) Under Acts 38th Leg., 1923, c 105 § 1 subds 14–16, inclusive, requiring motions or amended motions for new trial to be determined within forty-five days after motion is filed, after filing of original motion, trial court had jurisdiction of case for at least forty-five days thereafter, during which time he could set aside his judgment without any motion and of his own accord.—Townes v. Lattimore, 272 S.W. 435, 114 Tex. 511.

93. Cal.—Burbank v. Continental Life Ins. Co., 38 P.2d 451, 2 Cal. App.2d 664—Harris v. Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396.

94. Ark.—Stinson v. Stinson, 159 S. W.2d 446, 203 Ark. 888.
Ga.—Athens Apartment Corporation v. Hill, 119 S.E. 631, 156 Ga. 437.
Mo.—Savings Trust Co. of St. Louis v. Skain, 131 S.W.2d 566, 345 Mo. 46—Taylor v. Cleveland, C., C. & St. L. Ry. Co., 63 S.W.2d 69, 333 Mo. 650, certiorari denied Cleveland, C. C. & St. L. Ry. Co. v. Taylor, 54 S.Ct. 121, 290 U.S. 635, 78 L.Ed. 590—Marsden v. Nipp, 30 S. W.2d 77, 325 Mo. 822—In re Henry County Mut. Burial Ass'n, 77 S.W. 2d 124, 229 Mo.App. 300—National City Bank of St. Louis v. Pattiz, App., 26 S.W.2d 315.
Neb.—Netusil v. Novak, 235 N.W. 335, 120 Neb. 751.
Okl.—Roland Union Graded School Dist. No. 1 of Sequoyah County v. Thompson, 124 P.2d 400, 190 Okl. 416—Wall v. Snider, 219 P. 671, 93 Okl. 97.
Tex.—Brannon v. Wilson, Civ.App., 260 S.W. 201.
34 C.J. p 325 note 15.
Power of court over judgment during term generally see supra § 229.

"During the term of the court at which a judgment is rendered, the judgment is in the breast of the court and, in the exercise of its common law right, it may, in the interest of justice, set aside the judgment upon its own motion."—Cherry v. Cherry, 35 S.W.2d 659, 660, 225 Mo. App. 998.

Reason for rule

"The entire proceeding remains in the breast of the court throughout the term in which the judgment is rendered."—Spickard v. McNabb, Mo. App., 180 S.W.2d 611, 613.

Dismissal

(1) Where a proceeding was dismissed by inadvertence or mistake, the court had a right on its own motion to set aside a judgment of dismissal, during the term at which it was rendered.—Hallam v. Finch, 195 N.W. 352, 197 Iowa 224.

(2) Vacation of entry of dismissal of judgment nunc pro tunc made without motion or petition, however, was held to be void.—Baylor v. Killinger, 186 N.E. 512, 44 Ohio App. 523.

Prompt action required

However, a statute permitting a trial court to set aside a verdict on its own motion, in certain circumstances, was held to contemplate prompt action by the court on the coming in of the verdict, so that the court could not, on its own motion, vacate a judgment eighty-three days after the verdict was returned.—Mountain States Implement Co. v. Arave, 291 P. 1074, 49 Idaho 710.

95. Ind.—Isaacs v. Fletcher American Nat. Bank, 185 N.E. 154, 98 Ind.App. 111.
N.C.—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.
Pa.—Stickel v. Barron, Com.Pl., 7 Fay.L.J. 35.
Wash.—Ballard Savings & Loan Ass'n v. Linden, 62 P.2d 1364, 188 Wash. 490.

It is the duty of the court to strike off a void judgment of its own motion whenever its attention is called to it.—Romberger v. Romberger, 139 A. 159, 290 Pa. 454.

96. Nev.—Scheeline Banking & Trust Co. v. Stockgrowers' & Ranchers' Bank of Reno, 16 P.2d 368, 54 Nev. 346.
Pa.—Stickel v. Barron, Com.Pl., 7 Fay.L.J. 35.

Judgment void on its face

Cal.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221—Application of Behymer, 19 P.2d 829, 130 Cal.App. 200.
Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521—Savage v. Stokes, 28 P.2d 900, 54 Idaho 109—Baldwin v. Anderson, 8 P.2d 461, 51 Idaho 614—Jensen v. Gooch, 211 P. 551, 36 Idaho 457—Miller v. Prout, 197 P. 1023, 33 Idaho 709.

Judgment without jurisdiction

Cal.—Jellen v. O'Brien, 264 P. 1115, 89 Cal.App. 505.
Or.—May v. Roberts, 286 P. 546, 133 Or. 643—Ladd & Tilton v. Mason, 10 Or. 308.

It is the duty of the court on its own motion to strike off a void judgment whenever its attention is called to it.
N.J.—Collyer v. McDonald, 10 A.2d 284, 123 N.J.Law 547—Westfield

sions on the question, even after the term;[97] and it may set aside, on its own motion, a constructively fraudulent entry,[98] and may vacate a clearly fraudulent judgment on its own motion after the term.[99]

The act of a court in setting aside a judgment on its own motion may be instigated by an application or paper filed in the case by a stranger to the record.[1]

§ 288. Time for Application

a. In general
b. Statutory provisions
c. Laches and delay
d. Irregular judgments
e. Fraudulent or collusive judgments

a. In General

An application for vacation of a judgment, invoking the court's inherent power and not made under statute, is generally not subject to statutory limitations of time; and under some authorities a void judgment, at least if void on its face, may be vacated at any time.

As appears infra subdivision b of this section, any statutory limitation of the time within which an application to open or vacate a judgment may be made must be observed in all applications to open or vacate made under, or within the operation of, the statute. Where, however, the application is not made under the statute, or on statutory grounds, but invokes the inherent power of the court, as discussed supra § 265, the statutory limitation is generally deemed not applicable[2] and the power to vacate in proper cases is not lost by mere lapse of time or expiration of the term.[3] Further, a void judgment may, under some authorities, be set aside or vacated at any time,[4] time not barring a motion

Trust Co. v. Court of Common Pleas, 178 A. 546, 115 N.J.Law 86.
Pa.—Cadwallader v. Firestone, Com. Pl., 7 Fay.L.J. 259.

97. Or.—White v. Ladd, 68 P. 739, 41 Or. 324, 93 Am.S.R. 732.
34 C.J. p 325 note 16.
Power of court over void judgment after term see supra § 230.

98. Ind.—Isaacs v. Fletcher American Nat. Bank, 185 N.E. 154, 98 Ind.App. 111.

99. N.Y.—Davidson v. Ream, 162 N.Y.S. 875, 175 App.Div. 760.

1. Mo.—In re Henry County Mut. Burial Ass'n, 77 S.W.2d 124, 229 Mo.App. 300.
34 C.J. p 325 note 15 [b].

2. Ariz.—Vasquez v. Dreyfus, 269 P. 80, 34 Ariz. 184.
Colo.—Peterson v. Vanderlip, 278 P. 607, 86 Colo. 130.
Idaho.—Rice v. Rice, 267 P. 1076, 46 Idaho 418.
N.D.—**Corpus Juris cited in** Ellison v. Baird, 293 N.W. 793, 794, 70 N.D. 226—Miller v. Benecke, 212 N.W. 925, 55 N.D. 231.
34 C.J. p 256 note 87.
Time for opening default judgments see infra § 337.

3. Ariz.—Vasquez v. Dreyfus, 269 P. 80, 34 Ariz. 184.
Colo.—Peterson v. Vanderlip, 278 P. 607, 86 Colo. 130.
Del.—Hendrix v. Kelley, 143 A. 460, 4 W.W.Harr. 120.
Idaho.—Rice v. Rice, 267 P. 1076, 46 Idaho 418.
N.D.—Miller v. Benecke, 212 N.W. 925, 55 N.D. 231.
34 C.J. p 256 note 88.
Vacation on court's own motion after term see supra § 287.

"Under some circumstances a void judgment which was a nullity in law when entered may or should be stricken off notwithstanding the term has ended."—U. S. v. Certain Land in Falls Tp., Bucks County, D. C.Pa., 38 F.2d 109, 111.

4. Fla.—Chisholm v. Chisholm, 125 So. 694, 98 Fla. 1196—Kroier v. Kroier, 116 So. 753, 95 Fla. 865—Einstein v. Davidson, 17 So. 563, 35 Fla. 342.
Idaho.—Rice v. Rice, 267 P. 1076, 46 Idaho 418.
Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—Thayer v. Village of Downers Grove, 16 N.E.2d 717, 369 Ill. 334—Industrial Nat. Bank of Chicago v. Altenberg, 64 N.E.2d 219, 327 Ill.App. 337.
Kan.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P. 2d 903, 144 Kan. 626.
Ky.—Hill v. Walker, 180 S.W.2d 93, 297 Ky. 257, 154 A.L.R. 814—Brown's Adm'r v. Gabhart, 23 S. W.2d 551, 232 Ky. 336.
Neb.—Foster v. Foster, 196 N.W. 702, 111 Neb. 414.
Nev.—Scheeline Banking & Trust Co. v. Stockgrowers' & Ranchers' Bank of Reno, 16 P.2d 368, 54 Nev. 346.
N.J.—Collyer v. McDonald, 10 A.2d 284, 123 N.J.Law 547—Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 115 N.J.Law 86—Gimbel Bros. v. Corcoran, 192 A. 715, 15 N.J.Misc. 538.
N.C.—Johnston County v. Ellis, 38 S.E.2d 31, 226 N.C. 268—City of Monroe v. Niven, 20 S.E.2d 311, 221 N.C. 362.
N.D.—Taylor v. Oulie, 212 N.W. 931, 55 N.D. 253—Miller v. Benecke, 212 N.W. 925, 55 N.D. 231.
Pa.—School Dist. of Haverford Tp., to Use of Tedesco, v. Herzog, 171 A. 455, 314 Pa. 161—Stickel v. Barron, Com.Pl., 7 Fay.L.J. 35—Yoder v. Universal Credit Co., Com.Pl., 8 Sch.Reg. 76.
Utah.—In re Goddard's Estate, 278 P. 961, 73 Utah 298.
Invalidity of judgment as ground for vacating see supra § 267.
Power of court as to void judgments after term generally see supra § 230.

Filing false affidavit
Decree against unknown defendants obtained by filing false affidavit may be set aside at any time.—Graham v. O'Connor, 182 N.E. 764, 350 Ill. 36.

Under statute
(1) In some jurisdictions the text rule has been enacted by statute.
Kan.—Board of Com'rs of Labette County v. Abbey, 100 P.2d 720, 151 Kan. 710.
Okl.—Neal v. Travelers Ins. Co., 106 P.2d 311, 188 Okl. 131—State v. City of Tulsa, 5 P.2d 744, 153 Okl. 262—Central Nat. Oil Co. v. Continental Supply Co., 249 P. 347, 119 Okl. 190—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247.

(2) Under such statutes, action of court in denying motions to vacate void judgment, from which no appeal was taken, did not preclude movant from obtaining vacation of judgment on motion subsequently filed, since void judgment may be attacked at any time by party affected thereby.—Hinkle v. Jones, 66 P.2d 1073, 180 Okl. 17.

(3) Also, a judgment entirely outside the issues in the case and on a matter not submitted to the court for its determination is a nullity and may be vacated and set aside at any time.—Hinkle v. Jones, 66 P.2d 1073, 180 Okl. 17—Winters v. Birch, 36 P. 2d 907, 169 Okl. 237.

Void and voidable judgments
Void judgment may be set aside and stricken from record on motion at any time, but judgment voidable

to set aside such a judgment unless the lapse of time has been so great that the rights of innocent persons may be prejudicially affected by the delay;[5] other authorities so hold with respect to a judgment which is void on the face of the record or judgment roll.[6] Within these rules fall cases where the judgment is vacated because it is void for want of jurisdiction,[7] or because it was entered as the

only because irregular or erroneous must be timely attacked by motion to vacate or by appeal or it becomes absolute verity.

U.S.—Parker Bros. v. Fagan, C.C.A. Fla., 68 F.2d 616, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490.

Fla.—In re Begg's Estate, 12 So.2d 115, 152 Fla. 277—Malone v. Meres, 109 So. 677, 91 Fla. 709.

5. Ky.—Hill v. Walker, 180 S.W.2d 93, 297 Ky. 257—Allen v. Sweeney, 213 S.W. 217, 185 Ky. 94.

6. U.S.—Simonds v. Norwich Union Indemnity Co., C.C.A.Minn., 73 F. 2d 412, certiorari denied Norwich Union Indemnity Co. v. Simonds, 55 S.Ct. 507, 294 U.S. 711, 79 L.Ed. 1246—Woods Bros. Const. Co. v. Yankton County, C.C.A.S.D., 54 F. 2d 304, 81 A.L.R. 300.

Ala.—State v. Smith, 111 So. 28, 215 Ala. 449.

Cal.—In re Dahnke's Estate and Guardianship, 222 P. 381, 64 Cal. App. 555—King v. Superior Court in and for San Diego County, 56 P.2d 268, 12 Cal.App.2d 501—Fisch & Co. v. Superior Court in and for Los Angeles County, 43 P.2d 855, 6 Cal.App.2d 21—In re Callaway's Guardianship, 26 P.2d 698, 135 Cal. App. 158.

Fla.—McGee v. McGee, 22 So.2d 788.

Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521—Savage v. Stokes, 28 P.2d 900, 54 Idaho 109—Baldwin v. Anderson, 8 P.2d 461, 51 Idaho 614—Jensen v. Gooch, 211 P. 551, 36 Idaho 457—Miller v. Prout, 197 P. 1023, 33 Idaho 709.

Okl.—Town of Watonga v. Crane Co., 114 P.2d 941, 189 Okl. 184—Petty v. Roberts, 98 P.2d 602, 186 Okl. 269—Caraway v. Overholser, 77 P. 2d 688, 182 Okl. 357—Ritchie v. Keeney, 73 P.2d 397, 181 Okl. 207—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572—Latimer v. Vanderslice, 62 P.2d 1197, 178 Okl. 501—First Nat. Bank v. Darragh, 19 P.2d 551, 162 Okl. 243—Roubedeaux v. Givens, 292 P. 343, 145 Okl. 221—Simmons v. Howard, 276 P. 718, 136 Okl. 118—Maryland Casualty Co. v. Apple, 267 P. 239, 130 Okl. 270—Crowther v. Schoonover, 266 P. 777, 130 Okl. 249—Central Nat. Oil Co. v. Continental Supply Co., 249 P. 347, 119 Okl. 190—B-R Electric & Telephone Mfg. Co. v. Town of Wewoka, 239 P. 919, 113 Okl. 225—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247—Mason v. Slonecker, 219 P. 357, 92 Okl. 227—Good v. First Nat. Bank, 211 P. 1051, 88 Okl. 110.

S.D.—Corpus Juris cited in Lessert v. Lessert, 263 N.W. 559, 561, 64 S. D. 3.

34 C.J. p 257 note 89 [a].

"A judgment which is void upon its face and requires only an inspection of the judgment roll to demonstrate its want of validity is a 'dead limb upon the judicial tree which may be lopped off at any time;' it can bear no fruit to the plaintiff, but is a constant menace to the defendant, and may be vacated by the court rendering it 'at any time on motion of a party or any person affected thereby,' either before or after the expiration of three years from the rendition of such void judgment. Such motion is unhampered by a limitation of time."—Grubb v. Fay State Bank of Fay, 249 P. 341, 119 Okl. 199.

Invalidity not appearing on face

(1) At common law, court's authority to vacate judgment not void on face of judgment roll, but void in fact for want of jurisdiction of person of defendant, ceased with ending of term at which judgment was entered.—Richert v. Benson Lumber Co., 34 P.2d 840, 139 Cal.App. 671.

(2) It has been held that a void judgment may be vacated on motion made within reasonable time where invalidity does not appear on judgment roll.—Savage v. Stokes, 28 P. 2d 900, 54 Idaho 109—Baldwin v. Anderson, 8 P.2d 461, 51 Idaho 614—Miller v. Prout, 197 P. 1023, 33 Idaho 709.

(3) In some jurisdictions, however, a judgment that is not void on its face can be attacked only within the time provided by statute.—Latimer v. Vanderslice, 62 P.2d 1197, 178 Okl. 501—Crowther v. Schoonover, 266 P. 777, 130 Okl. 249.

Judgment held not void on face

Ala.—Ex parte R. H. Byrd Contracting Co., 156 So. 579, 26 Ala.App. 171, certiorari denied 156 So. 582, 229 Ala. 248.

When judgment void on face

(1) Within this rule, a judgment is void on its face when its invalidity is apparent on inspection of judgment roll.

Cal.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221—Application of Behymer, 19 P.2d 829, 130 Cal.App. 200.

Okl.—Dale v. Carson, 283 P. 1017, 141 Okl. 105—Carson v. Carson, 283 P. 1015, 141 Okl. 106—Savoy Oil Co. v. Emery, 277 P. 1029, 137 Okl. 67—Pennsylvania Co. v. Potter, 233 P. 700, 108 Okl. 49.

(2) Within this rule, a judgment is void on its face when the judgment roll affirmatively shows that the trial court lacked either jurisdiction over the person, jurisdiction over the subject matter, or judicial power to render the particular judgment.—Town of Watonga v. Crane Co., 114 P.2d 941, 189 Okl. 184.

(3) A judgment which on its face discloses that the court had jurisdiction of the subject matter and of the parties is not void on its face.—Pennsylvania Co. v. Potter, 233 P. 700, 108 Okl. 49.

7. U.S.—U. S. v. Turner, C.C.A.N.D., 47 F.2d 86.

Cal.—Jellen v. O'Brien, 264 P. 1115, 89 Cal.App. 505.

Fla.—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.

Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—Sherman & Ellis v. Journal of Commerce and Commercial Bulletin, 259 Ill.App. 453.

Kan.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P. 2d 903, 144 Kan. 626.

Mont.—Kosonen v. Waara, 285 P. 668, 87 Mont. 24.

N.D.—Corpus Juris cited in Ellison v. Baird, 293 N.W. 793, 794, 70 N. D. 226—Miller v. Benecke, 212 N. W. 925, 55 N.D. 231—Freeman v. Wood, 88 N.W. 721, 11 N.D. 1.

Ohio.—Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445.

Or.—May v. Roberts, 286 P. 546, 133 Or. 643—Ladd & Tilton v. Mason, 10 Or. 308.

Pa.—Mintz v. Mintz, 83 Pa.Super. 85—Keister v. Ritter, Com.Pl., 53 Dauph.Co. 299—Yoder v. Universal Credit Co., Com.Pl., 8 Sch.Reg. 76.

S.D.—Lessert v. Lessert, 263 N.W. 559, 64 S.D. 3.

Wis.—In re Cudahy's Estate, 219 N. W. 203, 196 Wis. 260.

34 C.J. p 217 note 32, p 257 note 89.

Want of jurisdiction of person

(1) Generally.

U.S.—U. S. v. Sotis, C.C.A.Ill., 131 F.2d 783.

Ala.—State v. Smith, 111 So. 28, 215 Ala. 449.

Colo.—Peterson v. Vanderlip, 278 P. 607, 86 Colo. 130.

Fla.—McGee v. McGee, 22 So.2d 788.

Ill.—Graham v. O'Connor, 182 N.E. 764, 350 Ill. 86—Anderson v. Anderson, 11 N.E.2d 216, 292 Ill.App. 421.

Neb.—Foster v. Foster, 196 N.W. 702, 111 Neb. 414.

(2) "It would be an absurdity to suppose that a person, against whom a judgment has been rendered without any service of process whatever,

result of clerical mistake or inadvertence,[8] or because of irregularity by reason of mistake of fact,[9] or, as appears infra subdivision e of this section, because of fraud, deception, or collusion in obtaining the judgment, in all of which classes of cases the court has inherent power to vacate the judgment after expiration of the term, and without limitation as to time, unless a limitation is prescribed by statute,[10] and it has also been held that a judgment made through mistake may be vacated at any time.[11]

It has been said that ordinarily it is a litigant's duty to take steps during the term of court to set aside any unsatisfactory judgment.[12] The power to vacate a judgment because the court has changed its mind, and desires to change its ruling on the merits, expires with the term.[13] A premature motion will not be granted.[14]

Court rules. A motion to open or vacate a judgment may be denied where not made within the time prescribed by rule of court.[15]

b. Statutory Provisions

Statutory limitations on the time for making an application to open or vacate a judgment must be observed in all applications made under, or within the operation of, the statute.

Statutes in many jurisdictions expressly providing that a judgment may be set aside, opened, or vacated on grounds enumerated therein, and specifying the time within which the application shall be made, have been construed and applied in a number of cases.[16] Any statutory limitation of the

could be precluded by any lapse of time from contesting its validity. Even though he has become aware of its existence, there is no rule of law or of reason that requires him to take any action for its annulment. He may wait until it is sought to be enforced against him. This is a position so well settled that it would be useless to enlarge upon it, or to cite authorities in its support."—Harper v. Cunningham, 8 App.D.C. 430, 439.

Invalidity on face of record

(1) Judgment is not legally void for want of jurisdiction unless invalidity appears on face of record.—Dale v. Carson, 283 P. 1017, 141 Okl. 105—Carson v. Carson, 283 P. 1015, 141 Okl. 106—Savoy Oil Co. v. Emery, 277 P. 1029, 137 Okl. 67.

(2) A judgment, void for want of valid service on defendant appearing from an inspection of the judgment roll, may be vacated at any time.—Good v. First Nat. Bank, 211 P. 1051, 88 Okl. 110.

Judgment held not void

Kan.—Westerman v. Westerman, 247 P. 863, 121 Kan. 501.

Okl.—Petty v. Roberts, 98 P.2d 602, 186 Okl. 269.

8. Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205.
34 C.J. p 257 note 90.

9. N.D.—Martinson v. Marzolf, 103 N.W. 937, 14 N.D. 301.
34 C.J. p 257 note 91.
Irregular judgments generally see infra subdivision d of this section.

10. Tex.—Watson v. Texas & P. R. Co., Civ.App., 73 S.W. 330.
34 C.J. p 257 note 94.

11. Fla.—Zemurray v. Kilgore, 177 So. 714, 130 Fla. 317—Eli Witt Cigar & Tobacco Co. v. Somers, 127 So. 333, 99 Fla. 592.

12. Tex.—Dallas Development Co. v. Reagan, Civ.App., 25 S.W.2d 240.

Petition during term ordinarily required

Pa.—Brosch v. Brosch, Com.Pl., 56 Dauph.Co. 376.

13. Cal.—Hanson v. Hanson, 20 P. 736, 3 Cal.Unrep.Cas. 66.

14. N.Y.—Woods v. Pangburn, 75 N. Y. 495.
34 C.J. p 257 note 96.

15. Nev.—Scheeline Banking & Trust Co. v. Stockgrowers' & Ranchers' Bank of Reno, 16 P.2d 368, 54 Nev. 346.
34 C.J. p 258 note 97.

Purpose and application of rule

The district court rule fixing a period of six months within which a judgment might be vacated was adopted to take place of former rule requiring motions to vacate judgments to be noticed during terms at which they were rendered; by virtue of rule, judgments which formerly could not be set aside by a district court after expiration of terms at which they were rendered cannot now be set aside by motion noticed more than six months after they are rendered; rule does not apply to a judgment void on its face, or to separate or independent suits brought to set aside judgments; rule applies only to motions in the original case to vacate judgments.—Lauer v. Eighth Judicial District Court in and for Clark County, 140 P.2d 953, 62 Nev. 78.

16. N.D.—Freeman v. Wood, 103 N. W. 392, 14 N.D. 95.
34 C.J. p 258 note 99.

In Alabama

(1) Under statute, circuit court has no power to open or set aside a final judgment or decree after the lapse of thirty days from the date of its rendition.—Maya Corporation v. Smith, 196 So. 125, 239 Ala. 470—First Nat. Bank v. Garrison, 180 So. 690, 235 Ala. 687.

(2) Under statute, a proceeding for rehearing must be initiated within four months from rendition of the judgment; otherwise jurisdiction of the court is not quickened into exercise, and the proceedings are void.—Marshall County v. Critcher, 17 So.2d 540, 245 Ala. 357—Venable v. Turner, 183 So. 644, 236 Ala. 433—34 C.J. p 258 note 99 [a] (1).

(3) Other holdings under the Alabama statutes see 34 C.J. p 258 note 99 [a].

In California

(1) Under Code Civ.Proc. § 473, an application for relief against a judgment on the ground of mistake, inadvertence, surprise, or excusable neglect must be made within a reasonable time, but in no case exceeding six months after the judgment was taken.—Hewins v. Walbeck, 141 P.2d 241, 60 Cal.App.2d 603—34 C.J. p 258 note 99 [b] (1), (6).

(2) Under the statute, now Code Civ.Proc. § 473a, when from any cause the summons in an action has not been personally served on defendant, the court may allow defendant, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action.—Richert v. Benson Lumber Co., 34 P.2d 840, 139 Cal.App. 671—34 C.J. p 258 note 99 [b] (2).

(3) It has been held that a court has no power to set aside on motion a judgment not void on its face unless the motion is made within a reasonable time.—Thompson v. Cook, 127 P.2d 909, 20 Cal.2d 564—Richert v. Benson Lumber Co., supra—F. E. Young Co. v. Fernstrom, 79 P.2d 1117, 31 Cal.App.2d Supp. 763—34 C.J. p 258 note 99 [b] (4).

(4) What constitutes a reasonable time depends on the circumstances of the particular case.—In re Dahnke's Estate and Guardianship,

time within which an application to open or vacate a judgment may be made must be observed in all

222 P. 381, 64 Cal.App. 555—34 C.J. p 258 note 99 [b] (7).

(5) It has been declared to have been definitely determined that such time will not extend beyond the time fixed by Code Civ.Proc. § 473.—In re Andrews' Guardianship, 110 P.2d 399, 17 Cal.2d 500—Hall v. Imperial Water Co. No. 3, 251 P. 912, 200 Cal. 77—Thompson v. Thompson, 101 P.2d 160, 38 Cal.App.2d 377—Cikuth v. Loero, 57 P.2d 1009, 14 Cal. App.2d 32—In re Callaway's Guardianship, 26 P.2d 698, 135 Cal.App. 158—In re Dahnke's Estate and Guardianship, 222 P. 381, 64 Cal.App. 555.

(6) In determining what constitutes a reasonable time, by analogy to the statute, now Code Civ.Proc. § 473a, it has been held that the motion must be made within the year next following the entry of judgment, except in the case of bad faith on the part of the process server.—F. E. Young Co. v. Fernstrom, 79 P. 2d 1117, 31 Cal.App.2d Supp. 763—Richert v. Benson Lumber Co., 34 P.2d 840, 139 Cal.App. 671—34 C.J. p 258 note 99 [b] (5).

(7) To these rules, however, there is a well established exception which provides that, although the judgment is valid on its face, if the party in favor of whom the judgment runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, it is the duty of the court to declare the judgment void.—Thompson v. Cook, 127 P.2d 909, 20 Cal.2d 564, prior opinion 120 P.2d 54.

(8) On the other hand, it has also been held that under certain circumstances the trial court has the inherent power, but not equivalent duty, to set aside its decrees after the expiration of the six-month period.—McCarthy v. McCarthy, 72 P.2d 255, 23 Cal.App.2d 151.

(9) A judgment void on its face is not within the statutory limitation and may be vacated on motion without regard to the lapse of time.—Michel v. Williams, 56 P.2d 546, 13 Cal.App.2d 198—34 C.J. p 258 note 99 [b] (3).

(10) California legislation and decisions reviewed.—F. E. Young Co. v. Fernstrom, 79 P.2d 1117, 31 Cal.App. 2d Supp. 763—Richert v. Benson Lumber Co., 34 P.2d 840, 139 Cal. App. 671.

In Georgia

(1) Under Code § 8-702, proceedings to set aside judgments or decrees must be brought within three years from the rendition thereof.—Sewell v. Anderson, 30 S.E.2d 102, 197 Ga. 623—34 C.J. p 258 note 99 [d] (1).

(2) Under Civ.Code, 1910, §§ 4358, 5957, 5958, judgment may be set aside within three years from rendition for any defect not amendable which appears on face of record.—Byers v. Byers, 154 S.E. 456, 41 Ga. App. 671.

(3) Single judgment for defendant on cross actions in bail trover and attachment cases by same plaintiff, tried together, was held voidable by plaintiff and his sureties on motion within three-year limitation period.—Pipkin v. Garrett, 162 S.E. 645, 44 Ga.App. 616.

(4) Affidavit that affiant had never seen decree, enforcement of which he sought to enjoin, until his property had been levied on and advertised for sale, or known thereof, was held not to prevent application of statute requiring motion to set aside decree to be made within three years.—Phillips v. Whelchel, 170 S.E. 480, 177 Ga. 489.

(5) Prior decisions see 34 C.J. p 258 note 99 [d].

In Idaho

(1) Court cannot set judgment aside on motion after statutory time for vacating it, which, under Comp. St. § 6726, as amended by L.1921, c 235, in cases where defendant was not personally served with process, is one year within entry of judgment, unless judgment is void on face of record.—Rice v. Rice, 267 P. 1076, 46 Idaho 418.

(2) Under Code, 1932, § 5-905, application to vacate judgment must be made within six months after adjournment of term whether movant moves on ground of mistake, inadvertence, surprise, or excusable neglect, or by reason of neglect or failure of movant's attorney to file or serve any paper within time limited therefor.—Roberts v. Wehe, 27 P.2d 964, 53 Idaho 783—34 C.J. p 258 note 99 [g] (1).

(3) Other particulars of Idaho rules see 34 C.J. p 258 note 99 [g].

In Kentucky

(1) Jefferson circuit court is one of continuous session, and under statute has control over its judgments for sixty days; order of Jefferson circuit court of September 15, attempting to set aside decree of February 13, was erroneous for want of power to set aside order seven months after expiration of term during which it was entered.—Baumlisberger v. Dorman, 81 S.W.2d 876, 259 Ky. 37.

(2) Other decisions under the Kentucky statutes see 34 C.J. p 258 note 99 [j].

In Minnesota

(1) A motion to set aside a judgment for judicial error must be made within time limited to appeal since relief asked for would be same as that obtainable on appeal, but, where judgment is sought to be modified or vacated for good cause shown, the statutory limitation of one year after notice of entry of the judgment is applicable and, within the one year, the party seeking to vacate must act with diligence.—Holmes v. Conter, 295 N.W. 649, 209 Minn. 144—Alexander v. Hutchins, 197 N.W. 754, 158 Minn. 391—Alexander v. Hutchins, 197 N.W. 756, 158 Minn. 396.

(2) Other decisions under the Minnesota statutes see 34 C.J. p 258 note 99 [k].

In Missouri

(1) The motion permitted by statute, Mo.Rev.St.Annot. § 1267, providing that judgment shall not be set aside for irregularity on motion unless made within three years after term at which such judgment was rendered, is not an ordinary motion, within the usual meaning of that word, but is in the nature of a writ of error coram nobis, or an independent proceeding.—Poindexter v. Marshall, App., 198 S.W.2d 622—34 C.J. p 258 note 99 [l] (1).

(2) The statute contemplates assault on an irregularity patent on record, and not one depending on proof dehors the record.—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173—Buchholz v. Manzella, App., 158 S.W.2d 200—Stulz v. Lentin, 295 S.W. 487, 220 Mo.App. 840—34 C.J. p 258 note 99 [l] (2).

(3) Decree rendering judgment for improvement of two distinct projects was not responsive to petition for improvement of one project, and, therefore, irregular on its face, so as to come within statute.—Johnson v. Underwood, 24 S.W.2d 133, 324 Mo. 578.

(4) Other decisions under the Missouri statutes see 34 C.J. p 258 note 99 [l].

In New Mexico

(1) Under statute, after the expiration of thirty days and within a year from the making and entry of a judgment, it may be set aside only for an irregularity.—Miera v. State, 129 P.2d 334, 45 N.M. 369—Board of Com'rs of Quay County v. Wasson, 24 P.2d 1098, 37 N.M. 503, followed in Board of Com'rs of Quay County v. Gardner, 24 P.2d 1104, 37 N.M. 514.

(2) A denied motion filed within statutory time, to vacate final judgment, cannot be refiled after such time and subsequent motion consid-

applications to open or vacate made under, or with- / in the operation of, the statute.[17] This statutory

ered as amended original motion.—Board of Com'rs of Quay County v. Wasson, 24 P.2d 1098, 37 N.M. 503, followed in Board of Com'rs of Quay County v. Gardner, 24 P.2d 1104, 37 N.M. 514.

In New Jersey

(1) An interlocutory decree passes beyond the control of the chancery court one month after date thereof, but a final decree is for three months subject to reconsideration by chancery court.—Reilly v. Mahoney, 19 A.2d 887, 129 N.J.Eq. 599.

(2) A decree in partition suit confirming report of master, and adjudging that complainant had no interest in land and that defendants owned the whole of the land and ordering sale thereof was "final decree."—Reilly v. Mahoney, supra.

(3) The court does not lose jurisdiction of a timely motion to vacate by reason of a continuance.—Reilly v. Mahoney, supra.

In New York

(1) Under Civ.Pract.Act § 528 a motion to set aside a final judgment for error in fact not arising on the trial cannot be heard after expiration of two years since the filing of the judgment roll, unless noticed for a day within that time and adjourned or renoticed for failure to hold the term.—Petition of Holman, 51 N.Y.S.2d 246, 268 App. Div. 330—34 C.J. p 258 note 99 [m] (3).

(2) This statute is inapplicable to a motion to set aside a judgment for error of law.—Siegel v. State, 246 N. Y.S. 652, 138 Misc. 474.

(3) Judgment of county court without its jurisdiction was void, and not mere irregularity, within statutory limitation of time on motions to vacate judgments for irregularity.—Kline v. Snyder, 231 N. Y.S. 275, 133 Misc. 128.

(4) Other decisions under New York statutes see 34 C.J. p 258 note 99 [m].

In Oklahoma

(1) If judgment is valid on its face, or if it is necessary to resort to intrinsic evidence to show its invalidity, motion or petition to vacate it must be presented within period, varying with nature of ground for vacation relied on, as provided for in successive statutes.—Honeycutt v. Severin, 98 P.2d 1093, 186 Okl. 509—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273—Caraway v. Overholser, 77 P.2d 688, 182 Okl. 357—Yahola Oil Co. v. Causey, 72 P.2d 817, 181 Okl. 129—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572—Jones v. Norris, 55 P.2d 984, 176 Okl. 434—First Nat. Bank v. Darrough, 19 P.2d 551, 162 Okl. 243—Roubedeaux v. Givens, 292 P. 348, 145 Okl. 221—Simmons v. Howard, 276 P. 718, 136 Okl. 118—Crowther v. Schoonover, 266 P. 777, 130 Okl. 249—B-R Electric & Telephone Mfg. Co. v. Town of Wewoka, 239 P. 919, 113 Okl. 225—34 C.J. p 258 note 99 [p].

(2) Where service was by publication and journal entry of judgment recited that service had been made by publication as required by law, the judgment was not void on its face, within such statute.—Ritchie v. Keeney, 73 P.2d 397, 181 Okl. 207.

(3) Judgment rendered on notice by publication, requiring defendant to answer within forty-one days after date of first publication, is irregular and may be set aside on appeal or timely motion, but is not void on its face, and cannot be vacated on motion filed more than three years after rendition, under such statute.—Burns v. Pittsburg Mortg. Inv. Co., 231 P. 887, 105 Okl. 150.

In Oregon

(1) Under Code Civ.Proc. § 1-1007, the court may, at any time within one year after notice thereof, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect.—Haas v. Scott, 239 P. 202, 115 Or. 580.

(2) Fact that defendant's attorney had been informed on inquiry from deputy clerk that decree was not on file, although the record showed the contrary, was not surprise, mistake, or excusable neglect, within statute.—Haas v. Scott, supra.

In Texas

(1) Under statute, the trial court has control of its judgments for a period of thirty days after rendition thereof, and may set aside any judgment on motion filed, or on its own motion.—Christner v. Mayer, Civ. App., 123 S.W.2d 715, error dismissed, judgment correct—American Soda Fountain Co. v. Hairston, Civ.App., 69 S.W.2d 546.

(2) Where no motion for a new trial was filed before expiration of thirty days from the date of the judgment, such judgment became final and, if not void, could be set aside only by a bill of review and not by motion to set aside the judgment; a motion made after such thirty-day period to set aside judgment and for judgment non obstante veredicto was a collateral attack on judgment and court was unauthorized to set it aside unless it was void.—Bridgman v. Moore, 183 S.W. 2d 705, 143 Tex. 250.

(3) Other decisions under Texas statutes see 34 C.J. p 258 note 99 [s].

In Utah

Under statute, judgment not void on its face cannot be opened or vacated in same proceeding except within six months after term.—In re Goddard's Estate, 273 P. 961, 73 Utah 298—34 C.J. p 258 note 99 [t].

17. Cal.—Thompson v. Cook, 127 P. 2d 909, 20 Cal.2d 564—King v. Superior Court in and for San Diego County, 56 P.2d 268, 12 Cal.App.2d 501—Fisch & Co. v. Superior Court in and for Los Angeles County, 43 P.2d 855, 6 Cal.App.2d 21—F. E. Young v. Fernstrom, 79 P.2d 1117, 31 Cal.App.2d Supp. 763.

Colo.—Levand v. North America Realty Co., 271 P. 177, 84 Colo. 445.

Ga.—Phillips v. Whelchel, 170 S.E. 480, 177 Ga. 489—Mobley v. Phinizy, 157 S.E. 182, 172 Ga. 339.

Idaho.—Rice v. Rice, 267 P. 1076, 46 Idaho 418.

Ill.—Gertz v. Neiman, 66 N.E.2d 108, 328 Ill.App. 356—La Salle Mortgage & Discount Co. v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 32 N.E.2d 643, first case, 309 Ill.App. 135—Davis v. East St. Louis & S. Ry. Co., 9 N.E.2d 254, 290 Ill.App. 540.

Iowa.—Shaw v. Addison, 18 N.W.2d 796.

Kan.—Brooks v. National Bank of Topeka, 113 P.2d 1069, 153 Kan. 831—Bemis v. Bemis, 98 P.2d 156, 151 Kan. 186—Harder v. Johnson, 76 P.2d 763, 147 Kan. 440.

Minn.—Cox v. Selover, 225 N.W. 282, 177 Minn. 369.

N.D.—Bellingham State Bank of Bellingham v. McCormick, 215 N. W. 152, 55 N.D. 700.

Ohio.—Baylor v. Killinger, 186 N.E. 512, 44 Ohio App. 523.

Okl.—Honeycutt v. Severin, 98 P.2d 1093, 186 Okl. 509—Babb v. National Life Ass'n, 86 P.2d 771, 184 Okl. 273—Caraway v. Overholser, 77 P.2d 688, 182 Okl. 357—Ritchie v. Keeney, 73 P.2d 397, 181 Okl. 207—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572—First Nat. Bank v. Darrough, 19 P.2d 551, 162 Okl. 243—Simmons v. Howard, 276 P. 718, 136 Okl. 118—B-R Electric & Telephone Mfg. Co. v. Town of Wewoka, 239 P. 919, 113 Okl. 225—Burns v. Pittsburg Mortg. Inv. Co., 231 P. 887, 105 Okl. 150—Walker v. Gulf Pipe Line Co., 226 P. 1046, 102 Okl. 7.

Utah.—In re Goddard's Estate, 273 P. 961, 73 Utah 298.

Wash.—Nevers v. Cochrane, 229 P. 738, 131 Wash. 225—Collins v. Sea Products Co., 215 P. 15, 124 Wash. 635.

Wis.—Volland v. McGee, 300 N.W. 506, 238 Wis. 598—Application of Dane County for Condemnation of

power of the court over the judgment absolutely ceases on the expiration of such time, and thereafter it has no discretion, or even jurisdiction, to grant relief under the statute by opening or vacating the judgment.[18] A judgment, however, may be vacated on statutory grounds at any time within the time limited, by statute, either during or after the term at which it was rendered.[19]

The period within which an application on statutory grounds may be made begins to run, depending on the language of the statute, from the rendition or entry of the judgment,[20] or after notice or knowledge of the judgment,[21] or service of a copy of it,[22] or after the adjournment of the term at which the judgment was rendered,[23] or from the taking of the proceeding against a party.[24] The time of the pendency of an appeal is not considered as any portion of the statutory period.[25] The

Certain Lands for Park Purposes, 298 N.W. 616, 238 Wis. 156—Harris v. Golliner, 294 N.W. 9, 235 Wis. 572.

Wyo.—Boulter v. Cook, 234 P. 1101, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.

34 C.J. p 255 note 85—47 C.J. p 437 note 39.

Judgment voidable as prematurely entered

After expiration of statutory period for attacking judgment prematurely entered and therefore voidable, judgment became invulnerable to motion.—Merchants' Collection Co. v. Sherburne, 290 P. 991, 158 Wash. 426.

18. Ala.—Maya Corporation v. Smith, 196 So. 125, 239 Ala. 470.

Ariz.—Hartford Accident & Indemnity Co. v. Sorrells, 69 P.2d 240, 50 Ariz. 90—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434—Vazquez v. Dreyfus, 269 P. 80, 34 Ariz. 184.

Cal.—Thompson v. Cook, 127 P.2d 909, 20 Cal.2d 564.

Ill.—Rome Soap Mfg. Co. v. John T. La Forge & Sons, 54 N.E.2d 252, 322 Ill.App. 231—Madigan Bros. v. Garfield State Bank, 34 N.E.2d 92, 310 Ill.App. 358—Trupp v. First Englewood State Bank of Chicago, 30 N.E.2d 198, 307 Ill.App. 258.

Iowa.—Albright v. Moeckley, 237 N. W. 309.

Ky.—Baumlisberger v. Dorman, 81 S.W.2d 876, 259 Ky. 37.

Minn.—In re Belt Line, Phalen, and Hazel Park Sewer Assessment, 222 N.W. 520, 176 Minn. 59.

N.J.—Dietsch v. Smith, 186 A. 598, 5 N.J.Misc. 388.

N.D.—Patterson Land Co. v. Lynn, 199 N.W. 766, 51 N.D. 329.

Or.—Lawson v. Hughes, 270 P. 922, 127 Or. 16.

Tenn.—Payne v. Eureka-Security Fire & Marine Ins. Co., 122 S.W.2d 431, 173 Tenn. 659, affirmed 133 S. W.2d 456, 175 Tenn. 134.

Utah.—In re Goddard's Estate, 273 P. 961, 73 Utah 298.

Wis.—In re Cudahy's Estate, 219 N. W. 203, 196 Wis. 260.

34 C.J. p 232 note 86 [a], p 260 note 1.

"The judgment is immune from attack by the statutory methods after the time limit imposed by the statute."—Foster v. Foster, 227 P. 514, 515, 130 Wash. 376.

"The statute . . . is as inflexible as to the maximum time as any of our statutes of limitations."—Kosonen v. Waara, 285 P. 668, 673, 87 Mont. 24.

19. Ga.—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga. App. 568—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287.

Ill.—Clausen v. Varrin, 11 N.E.2d 820, 292 Ill.App. 641.

Okl.—Denton v. Walker, 217 P. 386, 90 Okl. 222.

Or.—Anderson v. Guenther, 25 P.2d 146, 144 Or. 446.

34 C.J. p 261 note 2.

Laches within statutory period of limitation see infra subdivision c of this section.

Want of jurisdiction

Remedy by statutory motion to set aside judgment is proper, notwithstanding lapse of judgment term without appeal being perfected, if record discloses want of jurisdiction. —Dewey v. Union Electric Light & Power Co., Mo.App., 83 S.W.2d 203.

Renewal of oral motion after term

Where plaintiff orally moved to set aside judgment of dismissal, but procured no ruling on motion and filed no written motion, a renewal of the oral motion at a subsequent term came too late.—Haddon v. Brinson, 148 S.E. 541, 39 Ga.App. 798.

20. Ill.—Rome Soap Mfg. Co. v. John T. La Forge & Sons, 54 N.E. 2d 252, 322 Ill.App. 231.

Wash.—Scottish American Mortg. Co. v. Stone, 232 P. 289, 132 Wash. 487.

34 C.J. p 261 note 3.

Judgment is that of lower court, not that of higher court affirming it.—Shaw v. Addison, Iowa, 18 N.W. 2d 796.

Judgment need not be formally entered before motion may be made to vacate it if there is sufficient entry of memorandum to sustain formal entry to be made at later date.—Dorrough v. Mackenson, 165 So. 575, 231 Ala. 431.

Terms of court as obsolete

A statute providing that trial courts may vacate judgments and orders for good cause any time within six months after entry thereof affirms common-law doctrine with respect to right of setting aside judgments and orders, but fixes period during which court may act in place of obsolete terms of court.—In re Ralph's Estate, 67 P.2d 230, 49 Ariz. 391—Intermountain Building & Loan Ass'n v. Allison Steel Mfg. Co., 22 P.2d 413, 42 Ariz. 51.

21. Minn.—Holmes v. Conter, 295 N.W. 649, 209 Minn. 144.

Or.—Anderson v. Guenther, 25 P.2d 146, 144 Or. 446.

34 C.J. p 262 note 4.

22. Tenn.—Brown v. Brown, 6 S.W. 869, 7 S.W. 640, 86 Tenn. 277.

34 C.J. p 262 note 5.

23. Colo.—Levand v. North America Realty Co., 271 P. 177, 84 Colo. 445.

Idaho.—Roberts v. Wehe, 27 P.2d 964, 53 Idaho 783.

Utah.—In re Goddard's Estate, 273 P. 961, 73 Utah 298.

34 C.J. p 232 note 86 [a], p 262 note 6.

24. **In California**

(1) Under Code Civ.Proc. § 473, authorizing the court to relieve a party from a judgment, order, or other proceeding taken against him, provided the application therefor is made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken, the signing and filing of a formal order constitutes a "taking."—Brownell v. Yolo County Super. Ct., 109 P. 91, 157 Cal. 703.

(2) Court cannot by antedating order or entry of it cut off right of party to move to set aside judgment. —In re Harris, 52 P.2d 605, 10 Cal. App.2d 586.

25. Wash.—Pacific Telephone & Telegraph Co. v. Henneford, 92 P.2d 214, 199 Wash. 462, certiorari denied Henneford v. Pacific Telephone & Telegraph Co., 59 S.Ct. 483, 306 U.S. 637, 83 L.Ed. 1038.

Vacation after expiration of time for appeal

Where judgment was unauthorized because of plaintiff's failure to give defendant notice of application for order for judgment, rather than merely erroneous, it could be vacated, notwithstanding the time for appeal from the judgment expired before application for relief was made. —Kemerer v. State Farm Mut. Auto

fact that a judgment does not include costs and disbursements does not have the effect of extending the statutory period.[26]

A statute extending the time limit cannot be given a retroactive effect so as to authorize the vacation of judgments which have become vested property rights by expiration of the time within which they could be vacated or modified;[27] but such statutes may apply to judgments previously rendered provided jurisdiction over them has not been lost.[28]

Statutory limitations of the time within which a motion for a new trial may be made have no application to motions to vacate the judgment,[29] because, as appears supra § 265, a motion to vacate a judgment is not a motion for a new trial.

Where the statute limits the time for applying for the vacation of a judgment, the moving party, to bring himself within its terms, must not only file his motion or petition within the prescribed time, but must also issue or serve such process or notice as may be necessary to bring the opposite party into court,[30] and present his case in a condition to be heard within the limited time.[31] When this has been done in due season, it has been held that the petition may be amended, or a new one substituted, after the expiration of the time,[32] or new parties added,[33] or the application continued for further hearing.[34]

Under some statutes it has been held that the relief must be granted as well as the application therefor made within the time prescribed by statute;[35] but under other statutes, if the motion was made within the limited time, it is competent for the court to act on it and grant the relief demanded although the time has expired before the order is made.[36]

c. Laches and Delay

An application for the opening or vacating of a judgment must be made with reasonable promptness, and delay amounting to laches will justify refusal of the application.

A party who has knowledge of the judgment against him is required to exercise reasonable diligence and promptness in seeking to have it opened, vacated, or set aside, and his unexcused delay in making the application, amounting to laches, will justify the court in refusing the relief asked,[37] es-

Ins. Co. of Bloomington, Ill., 288 N. W. 719, 206 Minn. 325.

26. Minn.—Cox v. Selover, 225 N. W. 282, 177 Minn. 369.

27. Minn.—Wieland v. Shillock, 24 Minn. 345.
N.Y.—New York Health Dept. v. Babcock, 84 N.Y.S. 604.

28. Wash.—Marston v. Humes, 28 P. 520, 3 Wash. 267.

29. Ariz.—Blair v. Blair, 62 P.2d 1321, 48 Ariz. 501.
Ohio.—In re Kleinhen's Estate, App., 63 N.E.2d 315.
34 C.J. p 258 note 99 [j] (3), p 262 note 10.

Striking inadvertent decree

Such a statute does not apply to order striking an inadvertent decree, in view of statute permitting court to amend judgment.—Nevitt v. Wilson, 285 S.W. 1079, 116 Tex. 29, 48 A.L.R. 355.

30. Cal.—Brownell v. Yolo County Super. Ct., 109 P. 91, 157 Cal. 703.
34 C.J. p 262 note 12.

31. Mo.—Underwood v. Dollins, 47 Mo. 259.

32. Neb.—Rine v. Rine, 135 N.W. 1051, 91 Neb. 248.
34 C.J. p 262 note 14.

33. Ohio.—Bever v. Beardmore, 40 Ohio St. 70.

34. Ill.—People v. Wells, 99 N.E. 606, 255 Ill. 450.
Minn.—Nornborg v. Larson, 72 N.W. 564, 69 Minn. 344.

35. Or.—Lawson v. Hughes, 270 P. 922, 127 Or. 16.
Wis.—Harris v. Golliner, 294 N.W. 9, 235 Wis. 572.
34 C.J. p 263 note 17.

36. Okl.—Hill v. Bucy, 219 P. 124, 95 Okl. 275.
Tenn.—Payne v. Eureka-Security Fire & Marine Ins. Co., 122 S.W.2d 431, 173 Tenn. 659, affirmed 133 S. W.2d 456, 175 Tenn. 134.
34 C.J. p 263 note 18.

37. U.S.—Henry v. U. S., C.C.A. Pa., 46 F.2d 640.
Ark.—**Corpus Juris quoted in** O'Neal v. B. F. Goodrich Rubber Co., 162 S.W.2d 52, 54, 204 Ark. 371.
Cal.—Cowan v. Cowan, App., 166 P.2d 21—Sepulveda v. Apablasa, 77 P.2d 530, 25 Cal.App.2d 390.
Ind.—Harvey v. Rodger, 143 N.E. 8, 84 Ind.App. 409.
Ky.—Richardson v. Louisville & N. R. Co., 164 S.W.2d 602, 291 Ky. 357—Ballman v. Ballman, 67 S.W. 2d 39, 252 Ky. 332—Alexander v. Tipton, 291 S.W. 1019, 218 Ky. 666.
Mass.—Borst v. Young, 18 N.E.2d 544, 302 Mass. 124.
Minn.—In re Belt Line, Phalen, and Hazel Park Sewer Assessment, 222 N.W. 520, 176 Minn. 59—Brockman v. Brockman, 157 N.W. 1086, 133 Minn. 148.
Miss.—**Corpus Juris quoted in** Carraway v. State, 148 So. 340, 344, 167 Miss. 390.
N.Y.—West 158th Street Garage Corporation v. State, 10 N.Y.S.2d 990, 256 App.Div. 401, reargument denied 12 N.Y.S.2d 759, 257 App. Div. 875—In re White's Estate, 46 N.Y.S.2d 917, 182 Misc. 223, affirmed In re Bishop's Will, 49 N.Y. S.2d 275, 268 App.Div. 759, appeal denied 51 N.Y.S.2d 83, 268 App. Div. 893, appeal dismissed 57 N.E. 2d 845, 293 N.Y. 767.
N.C.—Cincinnati Coffin Co. v. Yopp, 175 S.E. 164, 206 N.C. 716—Fowler v. Fowler, 130 S.E. 315, 190 N. C. 536—S. J. Bartholomew & Co. v. Parrish, 129 S.E. 190, 190 N.C. 151.
N.D.—Patterson Land Co. v. Lynn, 199 N.W. 766, 51 N.D. 329.
Or.—Cook v. Cook, 118 P.2d 1070, 167 Or. 474.
Pa.—Bianca v. Kaplan, 160 A. 143, 105 Pa.Super. 98—Kupres v. Citizens' Nat. Bank, 101 Pa.Super. 351—McKenzie Co. v. Fidelity & Deposit Co. of Maryland, Com.Pl., 54 Dauph.Co. 294—Stickel v. Barron, Com.Pl., 7 Fay.L.J. 35—Schantz v. Clemmer, Com.Pl., 21 Lehigh Co.L.J. 394—Secretary of Banking v. Koppenhaver, Com.Pl., 8 Sch.Reg. 17.
W.Va.—Seymour v. Alkire, 34 S.E. 953, 47 W.Va. 302.
34 C.J. p 263 note 19—47 C.J. p 436 note 20.
Laches as bar to equitable relief see infra § 381.

First opportunity

A court has power to open a judgment on good cause shown, at any time while the cause remains under its control, provided the moving par-

pecially where, under the circumstances of the particular case, the vacating of the judgment would work undue hardship to the opposing party,[38] or where rights of innocent third persons have intervened.[39] Even if the application is made within the statutory time, it will be regarded with disfavor, and may be refused, if there is unexplained delay in presenting it, or such unreasonable dilatoriness as amounts to laches;[40] but some cases hold that a party has the whole of the statutory period in which to move, and that laches cannot be imputed to him within that time,[41] and that delay within the term is immaterial.[42]

However great the lapse of time, laches is not imputable to a party who had no knowledge of the judgment against him; it is only required of him to be diligent in seeking relief after he has notice of it,[43] although it has also been held that a person asking that a judgment be set aside must show that he used diligence to learn the facts.[44] A person under legal disability is not chargeable with laches for failure to move during the period of disability,[45] but he must exercise reasonable diligence in moving to vacate after the removal of the disability.[46]

Laches is not mere lapse of time, but is unreasonable delay under the circumstances, generally involving injustice or injury to the opposite party,[47] and accordingly it is impossible to lay down a precise rule as to what lapse of time will constitute reasonable diligence, or what amounts to laches in moving to open or vacate a judgment; what is a reasonable time is a matter within the court's sound legal discretion,[48] and depends on the facts and circumstances of each case.[49]

ty embraces the first opportunity he has of presenting his case.—Assets Development Co. v. Wall, 119 A. 10, 97 N.J.Law 468.

Voidable judgment

If party knows judgment which was merely voidable was rendered against him, unexcused laches or delay generally precludes him from having it vacated.

Fla.—Chisholm v. Chisholm, 125 So. 694, 98 Fla. 1196—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.

Pa.—McK Beckman v. Zerbe, Com. Pl., 10 Sch.Reg. 49.

Vacating and opening judgment distinguished

Although there is no time limit within which to act in striking off or vacating a judgment, it must be in a reasonable time after knowledge, while applications to open judgment, where cause has been litigated, must be made within term time, except in extraordinary equitable circumstances requiring a contrary result.—Nixon v. Nixon, 198 A. 154, 329 Pa. 256.

38. Miss.—**Corpus Juris quoted in** Carraway v. State, 148 So. 340, 344, 167 Miss. 390.

34 C.J. p 265 note 20.

Injury to opposing party as rule of decision generally see infra § 299.

39. Ind.—Harvey v. Rodger, 143 N. E. 8, 84 Ind.App. 409.

Miss.—**Corpus Juris quoted in** Carraway v. State, 148 So. 340, 344, 167 Miss. 390.

34 C.J. p 265 note 21.

40. Minn.—Holmes v. Conter, 295 N. W. 649, 209 Minn. 144—Alexander v. Hutchins, 197 N.W. 756, 158 Minn. 396—Alexander v. Hutchins, 197 N.W. 754, 158 Minn. 391.

34 C.J. p 265 note 22.

41. Ill.—Central Cleaners and Dyers v. Schild, 1 N.E.2d 90, 284 Ill. App. 267.

34 C.J. p 265 note 23.

42. Tex.—Mitchell v. Gregory, Civ. App., 283 S.W. 211.

43. Ill.—Reisman v. Central Mfg. Dist. Bank, 15 N.E.2d 903, 296 Ill. App. 61—**Corpus Juris quoted in** Cummer v. Cummer, 283 Ill.App. 220, 239.

Mass.—Borst v. Young, 18 N.E.2d 544, 302 Mass. 124.

N.C.—S. J. Bartholomew & Co. v. Parrish, 129 S.E. 190, 190 N.C. 151.

Pa.—Bianca v. Kaplan, 160 A. 143, 105 Pa.Super. 98.

34 C.J. p 265 note 24.

Rights of innocent third persons

Delay in moving to vacate judgment, as long as party had no notice thereof and rights of innocent third persons did not intervene, will not usually bar relief.—Chisholm v. Chisholm, 125 So. 694, 98 Fla. 1196—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.

Use of check

Debtor moving to vacate judgment was not barred by laches from claiming that use of check, sent as payment, constituted accord and satisfaction, where he did not discover use for two years.—Hemingway v. Mackenzie, 244 N.Y.S. 48, 137 Misc. 876, affirmed 245 N.Y.S. 766, 230 App.Div. 819, and 249 N.Y.S. 910, 233 App.Div. 652.

44. Ky.—Ballman v. Ballman, 67 S. W.2d 39, 252 Ky. 332.

45. Tenn.—Fitzsimmons v. Johnson, 17 S.W. 100, 90 Tenn. 416.

34 C.J. p 265 note 25.

46. Tex.—Johnson v. Johnson, 85 S.W. 1023, 38 Tex.Civ.App. 385.

34 C.J. p 265 note 26.

47. Ill.—Reisman v. Central Mfg. Dist. Bank, 15 N.E.2d 903, 296 Ill.App. 61—**Corpus Juris quoted in** Cummer v. Cummer, 283 Ill.App. 220, 239—First Nat. Bank v. Trott, 236 Ill.App. 412.

Pa.—Eastman Kodak Co. v. Osenider 193 A. 284, 127 Pa.Super. 332.

48. Cal.—McGuinness v. Superior Court in and for City and County of San Francisco, 237 P. 42, 196 Cal. 222, 40 A.L.R. 1110—McCarthy v. McCarthy, 72 P.2d 255, 23 Cal. App.2d 151—McKeever v. Superior Court of California in and for San Mateo County, 259 P. 373, 85 Cal. App. 381.

Pa.—Citizens' Bank v. Gwinner, 170 A. 471, 112 Pa.Super. 12.

34 C.J. p 266 note 28.

Discretion of court as to hearing and determination in general see infra § 300.

Discretion held abused because of excessive delay.—Ayer v. Chicago, M., St. P. & P. R. Co., 249 N.W. 581, 189 Minn. 359.

Discretion held not abused

Pa.—Philadelphia Fixture & Equipment Corporation v. Carroll, 191 A. 216, 126 Pa.Super. 454.

Delay because of attorney's illness

Where motion to vacate was delayed because of attorney's illness, trial judge should exercise sound legal discretion.—Deen v. Baxley State Bank, 15 S.E.2d 194, 192 Ga. 300.

49. Pa.—Eastman Kodak Co. v. Osenider, 193 A. 284, 127 Pa.Super. 332—Bianca v. Kaplan, 160 A. 143, 105 Pa.Super. 98.

34 C.J. p 266 note 28.

Delay held laches under particular circumstances:

(1) Nine years.

U.S.—Henry v. U. S., C.C.A.Pa., 46 F.2d 640—U. S. v. Certain Land in Falls Tp., Bucks County, Pa., D.C. Pa., 38 F.2d 109.

Laches cannot run against a void judgment,[50] at least where no injury is shown,[51] and delay does not estop one from attacking a void or invalid judgment entered against him,[52] or a judgment which has been discharged in fact by accord and satisfaction.[53]

d. Irregular Judgments

Apart from statutory provisions as to time, which must be observed, a judgment will generally not be vacated after the term for mere irregularity not rendering it void; and an application to set aside a judgment for mere technical irregularities has been required to be made at the first opportunity or within a reasonable time.

Where it is sought to set aside a judgment for a mere technical irregularity, and not a matter of substance, the application, being without merits, has been required to be made at the first opportunity, or within a reasonable time, or the irregularity will be deemed waived.[54] This rule does not apply where the motion is based on substantial, and not merely technical, irregularities.[55] Application should be made to vacate before taking any subsequent step in the cause.[56]

Generally a judgment will not be vacated after the end of the term for any mere irregularity not affecting the jurisdiction, and therefore not rendering the judgment void,[57] unless the statute grants an extended time for moving to vacate it on this

Pa.—Eastman Kodak Co. v. Osenider, 193 A. 284, 127 Pa.Super. 332.

(2) Year and eight months.—Sepulveda v. Apablasa, 77 P.2d 530, 25 Cal.App.2d 390.

(3) Other circumstances.

Ind.—Harvey v. Rodger, 143 N.E. 8, 84 Ind.App. 409.

Ky.—Ballman v. Ballman, 67 S.W.2d 39, 252 Ky. 332.

Minn.—Ayer v. Chicago, M., St. P. & P. R. Co., 249 N.W. 581, 189 Minn. 359.

N.J.—Somers v. Holmes, 177 A. 434, 114 N.J.Law 497.

N.Y.—In re White's Estate, 46 N.Y.S.2d 917, 182 Misc. 223, affirmed In re Bishop's Will, 49 N.Y.S.2d 275, 268 App.Div. 759, appeal denied 51 N.Y.S.2d 83, 268 App.Div. 893, appeal dismissed 57 N.E.2d 845, 293 N.Y. 767.

N.D.—Patterson Land Co. v. Lynn, 199 N.W. 766, 51 N.D. 329.

Pa.—Liberty Trust Co. of Emporium v. Emporium Land Co., 25 Pa.Dist. & Co. 619—Commonwealth v. Jones, Com.Pl., 36 Luz.L.Reg. 190—Bridgeport Realty Co. v. Ionnone, Com.Pl., 61 Montg.Co. 284—Kelly v. Dervin, Com.Pl., 55 Montg. Co. 317.

S.C.—Gleaton v. Gleaton, 151 S.E. 276, 154 S.C. 140.

W.Va.—Seymour v. Alkire, 34 S.E. 953, 47 W.Va. 302.

34 C.J. p 266 note 28 [a]—19 C.J. p 1212 note 69 [b] (1).

Delay held not laches under particular circumstances:

(1) Two years.—Hendrix v. Kelley, 143 A. 460, 4 W.W.Harr.Del. 120.

(2) More than one year.—Pink v. Deering, 4 A.2d 790, 122 N.J.Law 277, motion denied 17 A.2d 603, 125 N.J.Law 569.

(3) Five months.—Gedrich v. Yaroscz, 156 A. 575, 102 Pa.Super. 127.

(4) Other circumstances.

U.S.—Edwards v. Lathan, D.C.La., 24 F.Supp. 138, reversed on other grounds, C.C.A., Lathan v. Edwards, 121 F.2d 183.

Ill.—Reisman v. Central Mfg. Dist. Bank, 15 N.E.2d 903, 296 Ill.App. 61—Cummer v. Cummer, 283 Ill. App. 220—First Nat. Bank v. Trott, 236 Ill.App. 412—Reid v. Chicago Rys. Co., 231 Ill.App. 58.

Mass.—Borst v. Young, 18 N.E.2d 544, 302 Mass. 124.

Mich.—Williams v. Truax, 251 N.W. 375, 265 Mich. 328.

N.Y.—Hemingway v. Mackenzie, 244 N.Y.S. 48, 137 Misc. 876, affirmed 245 N.Y.S. 766, 230 App.Div. 819, and 249 N.Y.S. 910, 233 App.Div. 652.

Pa.—Roundsley v. Tuscarora Tp. School Dist., 47 Pa.Super. 623—The Conestoga Nat. Bank v. Hallman, 20 Pa.Dist. & Co. 193, 43 Lanc.L. Rev. 659, 6 Som.Leg.J. 354.

34 C.J. p 266 note 28 [b].

Delay until after execution

Where evidence showed conclusively that summons was personally served on defendant and a judgment duly entered in trial court, and defendant had knowledge of entry of judgment and did not question service or entry until after execution was issued against his salary, an order vacating judgment was unauthorized.—Suffin v. Cavanagh, 29 N.Y.S.2d 170.

50. Ill.—Thayer v. Village of Downers Grove, 16 N.E.2d 717, 369 Ill. 334.

N.J.—Collyer v. McDonald, 10 A.2d 284, 123 N.J.Law 547—Westfield Trust Co. v. Court of Common Pleas, 178 A. 546, 115 N.J.Law 86—Gimbel Bros. v. Corcoran, 192 A. 715, 15 N.J.Misc. 538.

N.C.—Johnston County v. Ellis, 38 S.E.2d 31, 226 N.C. 268.

Pa.—Romberger v. Romberger, 139 A. 159, 290 Pa. 454—Peoples Nat. Bank of Reynoldsville, to Use of Mottern, v. D. & M. Coal Co., 187 A. 452, 124 Pa.Super. 21—Cadwallader v. Firestone, Com.Pl., 7 Fay. L.J. 259.

Misinterpretation by clerk

Where court clerk's entry of judgment on record not only misinterpreted trial judge's entry on calendar, but was such an interpretation as would constitute action which was beyond jurisdiction of court, aggrieved party's right to have judgment set aside was not waived by delay and negligence.—Yost v. Gadd, 288 N.W. 667, 227 Iowa 621.

51. Del.—Hendrix v. Kelley, 143 A. 460, 4 W.W.Harr. 120.

Condemnation decree

Court should not set aside condemnation decree entered nine years previously, where decree, even if void, was consent decree, coupled with voluntary conveyances, and former owners failed to tender back money received or to give notice of proceeding to subsequent purchasers of land.—U. S. v. Certain Land in Falls Tp., Bucks County, Pa., D.C.Pa., 38 F.2d 109.

52. Ill.—Thayer v. Village of Downers Grove, 16 N.E.2d 717, 369 Ill. 334.

Pa.—School Dist. of Haverford Tp., to use of Tedesco, v. Herzog, 171 A. 455, 314 Pa. 161—Peoples Nat. Bank of Ellwood City v. Weingartner, 33 A.2d 469, 153 Pa.Super. 40—Davis v. Tate, Com.Pl., 26 Erie Co. 141—Smith v. Press, Com. Pl., 54 Montg.Co. 169.

53. Pa.—Peoples Nat. Bank of Ellwood City of Weingartner, 33 A.2d 469, 153 Pa.Super. 40.

54. Pa.—Eastman Kodak Co. v. Osenider, 193 A. 284, 127 Pa.Super. 332.

34 C.J. p 267 note 29.

55. N.Y.—Lucas v. Geneva Second Baptist Church, 4 How.Pr. 353.

56. N.Y.—Chicago Corn Exch. Bank v. Blye, 23 N.E. 805, 119 N.Y. 414.

34 C.J. p 267 note 31.

Appeal as waiver see supra § 284.

57. U. S.—Loeser v. Savings Deposit Bank & Trust Co., Ohio, 163 F. 212, 89 C.C.A. 642.

34 C.J. p 267 note 32.

ground;[58] and in any case the application is too late if not made within the statutory period.[59]

Some cases hold that a motion to vacate for irregularity may be made at any time within a reasonable period.[60]

e. Fraudulent or Collusive Judgments

Under some authorities, an application under the court's inherent power to set aside a judgment obtained by fraud may be made at any time; others limit it to a reasonable time after discovery of the fraud. A statute limiting the time for applications on statutory grounds, unless expressly made applicable, does not apply to an application on the ground of fraud, at least where the fraud is extrinsic.

Under some authorities, the inherent power of courts to set aside or vacate a judgment obtained through fraud, deception, or collusion may be exercised at any time,[61] even after the expiration of the term at which it was rendered;[62] but it has also been held that an application to vacate must be made within a reasonable time after discovery of the fraud,[63] and that laches is ground for denying relief.[64]

A statute limiting the time within which applications to vacate judgments on statutory grounds must be made does not apply to an application to vacate on the ground of fraud,[65] at least where the fraud is extrinsic,[66] and unless the statute is

58. Mo.—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173—Johnson v. Underwood, 24 S.W. 2d 133, 324 Mo. 578—Buchholz v. Manzella, App., 158 S.W.2d 200—Stulz v. Lentin, 295 S.W. 487, 220 Mo.App. 340.
Okl.—Haggerty v. Terwilliger, 169 P. 872, 67 Okl. 194.
Wyo.—Boulter v. Cook, 234 P. 1101, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.
34 C.J. p 258 note 99 [1].

59. Kan.—Harder v. Johnson, 76 P. 2d 763, 147 Kan. 440.
Okl.—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572.
Wyo.—Boulter v. Cook, 234 P. 1101, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.

First three days of succeeding term
Under some statutes, a proceeding to set aside a judgment on the ground of irregularity in taking and entering the judgment is not limited to the period within the first three days of the succeeding term.—Lemieux v. Kountz, 140 N.E. 637, 107 Ohio St. 84.

Irregularity not shown
N.M.—Miera v. State, 129 P.2d 334, 45 N.M. 369.

Extension of time
Statute providing that judgment shall not be set aside on motion for irregularity unless such motion is made within three years after term at which such judgment was rendered merely extends the time for filing after the term at which the judgment was rendered, as compared with the common-law practice of filing during the term.—Poindexter v. Marshall, Mo.App., 193 S.W.2d 622.

60. N.C.—Cincinnati Coffin Co. v. Yopp, 175 S.E. 164, 206 N.C. 716.
34 C.J. p 267 note 35.

61. Ariz.—Vazquez v. Dreyfus, 269 P. 80, 34 Ariz. 184—Kendall v. Silver King of Arizona Mining Co., 226 P. 540, 26 Ariz. 456.
Colo.—Peterson v. Vanderlip, 278 P. 607, 86 Colo. 130.
Fla.—Zemurray v. Kilgore, 177 So. 714, 130 Fla. 317.
N.Y.—Davidson v. Ream, 175 App. Div. 760, 162 N.Y.S. 375.
Or.—May v. Roberts, 286 P. 546, 133 Or. 643.
34 C.J. p 257 note 92.
"A court . . . has authority to purge its own records and may set aside a judgment at any time when it appears that the court has been imposed upon by extrinsically fraudulent acts."—Rivieccio v. Bothan, Cal., 165 P.2d 677, 680.

Effect on property rights
The court's power to set aside a judgment at any time when it appears that it has been imposed on by extrinsically fraudulent acts is not dependent on whether or not property rights are involved.—Rivieccio v. Bothan, supra.

Fraud held not shown
Ill.—Madigan Bros. v. Garfield State Bank, 34 N.E.2d 92, 310 Ill.App. 358.

62. Miss.—Horne v. Moorehead, 153 So. 668, 169 Miss. 362.
N.M.—Corpus Juris cited in Kerr v. Southwest Fluorite Co., 294 P. 324, 326, 35 N.M. 232.
34 C.J. p 267 note 36.

Fraud of party, not perjury of witness, is required.—Thorne v. Thorne, 45 N.E.2d 85, 316 Ill.App. 451.

63. Cal.—McGuinness v. Superior Court in and for City and County of San Francisco, 237 P. 42, 196 Cal. 222, 40 A.L.R. 1110—Cowan v. Cowan, App., 166 P.2d 21—Kasparian v. Kasparian, 23 P.2d 802, 132 Cal.App. 773.
Mont.—Gillen v. Gillen, 159 P.2d 511.
Or.—Cook v. Cook, 118 P.2d 1070, 167 Or. 474.
34 C.J. p 268 note 41.

What is a reasonable time is a matter within the sound legal discretion of the court.—McGuinness v. Superior Court in and for City and County of San Francisco, 237 P. 42, 196 Cal. 222, 40 A.L.R. 1110—McKeever v. Superior Court of California in and for San Mateo County, 259 P. 373, 85 Cal.App. 381.

64. Minn.—Brockman v. Brockman, 157 N.W. 1086, 133 Minn. 148.
Laches generally see supra subdivision c of this section.

65. Ariz.—Vasquez v. Dreyfus, 269 P. 80, 34 Ariz. 184.
Colo.—Peterson v. Vanderlip, 278 P. 607, 86 Colo. 130.
Wis.—In re Cudahy's Estate, 219 N. W. 203, 196 Wis. 260.
34 C.J. p 257 note 92, p 267 note 37.

Statutes held inapplicable
(1) Cases of fraud are not within statutory periods of limitation prescribed for setting aside judgments because of mistake, irregularity, or error in fact not arising on trial.—Gysin v. Gysin, 189 N.E. 568, 263 N. Y. 509, reargument denied 191 N.E. 581, 264 N.Y. 595—In re Humpfner's Estate, 3 N.Y.S.2d 143, 166 Misc. 672.

(2) A judgment obtained by fraud practiced on the court is not validated by lapse of time prescribed by statute for vacation thereof on ground of surprise or excusable neglect.—Lamb. v. King, 296 N.W. 185, 70 N.D. 469.

66. Cal.—Chiarodit v. Chiarodit, 21 P.2d 562, 218 Cal. 147—Kasparian v. Kasparian, 23 P.2d 802, 132 Cal. App. 773.
Mont.—Gillen v. Gillen, 159 P.2d 511—Kosonen v. Waara, 285 P. 668, 87 Mont. 24.
N.M.—Kerr v. Southwest Fluorite Co., 294 P. 324, 35 N.M. 232.

Where process server's affidavit of personal service is willfully false or made with reckless disregard for truth, judgment is procured by extrinsic fraud practiced on court, so that motion to vacate is not limited by statute which by analogy governed time limit within which motion to vacate must be brought; where such affidavit is not true because of honest mistake of identity or for some reason compatible with good faith, judgment in such case is not procured by extrinsic fraud practiced on the court, so that motion to

made applicable by express language.[67] If the statute applies, a motion made after the statutory time has run comes too late, as discussed supra subdivision b of this section.

§ 289. Requisites and Sufficiency of Application

An application to open or vacate a judgment must conform to the ordinary requirements of a motion, petition, complaint, or bill, and must set forth facts showing adequate ground for the relief requested and freedom from fault or negligence.

An application to open or vacate a judgment must conform to the ordinary requirements of a motion, petition, complaint, or bill, according to the form of proceeding adopted.[68] Where applicant has erred as to his proper remedy and proceeding, the court may treat his application as in the proper form if it contains the matter and allegations required in the proper proceeding.[69] Where the application is under a statute, the provisions of the statute must be substantially complied with, in order to authorize the court to act,[70] but a strict compliance with the statute is unnecessary, trifling irregularities not being sufficient to oust the jurisdiction of the court.[71] Harmless errors may be disregarded[72] and amendments may be allowed.[73]

A motion, petition, or complaint to vacate a judgment must state the nature of the cause of action on which it was rendered,[74] describe the judgment or portion of it sought to be opened or vacated,[75] show

vacate is limited by such statute.—Richert v. Benson Lumber Co., 34 P.2d 840, 139 Cal.App. 671.

67. Okl.—Caraway v. Overholser, 77 P.2d 688, 182 Okl. 357.
34 C.J. p 268 note 38.

In Kansas

(1) Under statute, in order to vacate a judgment on ground of fraud, the petition must be filed within two years from the rendition of the judgment.—Bemis v. Bemis, 98 P.2d 156, 151 Kan. 186—Sanford v. Weeks, 31 P. 1088, 50 Kan. 339.

(2) Statute applies to duress, as being a species of fraud.—Brooks v. National Bank of Topeka, 113 P.2d 1069, 153 Kan. 831.

68. Cal.—Liebman v. Choynski, 99 P.2d 1119, 37 Cal.App.2d 565.
Nature and form of proceeding see supra § 286.

Application in judgment term

Motion to vacate judgments filed within term at which such judgments are entered are addressed to trial court's sound discretion, and need not conform to statutes relating to vacating of judgments and decrees after expiration of term of court at which they were rendered.—McDonald v. Olla State Bank, 93 S.W.2d 325, 192 Ark. 603.

Jurisdiction not affected

Fact that an application to vacate a judgment is defective in form, does not deprive court of jurisdiction.—Finlen v. Skelly, 141 N.E. 388, 310 Ill. 170.

Motion for new trial

Motion to set aside verdict based on matters not appearing on record must have substantially the form and contents of motion for new trial, and must comply with rules governing such motion.—Wrenn v. Allen, 180 S.E. 104, 180 Ga. 613.

The completeness and formality of the pleading in an ordinary action at law are not required in a petition to vacate a judgment.—Herlihy v. Kane, 38 N.E.2d 620, 310 Mass. 457.

69. Alaska.—Smith v. Coucher, 9 Alaska 730.
Ark.—Merriott v. Kilgore, 189 S.W. 2d 387, 200 Ark. 394.
Cal.—Miller v. Lee, 125 P.2d 627, 52 Cal.App.2d 10.
Mo.—Harrison v. Slaton, 49 S.W.2d 31.
Okl.—Petty v. Roberts, 98 P.2d 602, 186 Okl. 269—Corliss v. Davidson & Case Lumber Co., 84 P.2d 7, 183 Okl. 618—Morgan v. City of Ardmore ex rel. Love & Thurmond, 78 P.2d 785, 182 Okl. 542—Welborn v. Whitney, 65 P.2d 971, 179 Okl. 420—Cooper v. State ex rel. Com'rs of Land Office, 63 P.2d 698, 178 Okl. 532—Lane v. O'Brien, 49 P. 2d 171, 173 Okl. 475.
Pa.—Siddall v. Burke, Com.Pl., 30 Del.Co. 47—Kemmerer, Inc. v. Snyder, Com.Pl., 18 Leh.L.J. 146—Franks v. Aponick, Com.Pl., 42 Sch.L.R. 24.
34 C.J. p 327 note 35 [a].

Particular applications

(1) Motion for new trial was treated as motion to set aside judgment.—Driver v. Treadway, 1 S.W.2d 84, 175 Ark. 1028.

(2) Motion to set aside judgment was treated as petition.—Fulton v. National Finance & Thrift Corporation, 4 N.W.2d 406, 232 Iowa 378.

(3) Petition to set aside judgment was treated as motion therefor.—Fugate v. Fugate, 81 S.W.2d 889, 259 Ky. 18—Klarer Provision Co. v. Frey, 66 S.W.2d 63, 252 Ky. 206—First State Bank v. Thacker's Adm'x, 284 S.W. 1020, 215 Ky. 186.

70. Ark.—Moon v. Moseley, 167 S.W. 2d 871, 205 Ark. 134.
Ill.—Freedman v. Hunt, Hartford Accident & Indemnity Co., Intervenor, 22 N.E.2d 864, 301 Ill.App. 604.
Okl.—Featherstone v. Southwestern Lumber Co., 243 P. 240, 116 Okl. 86.
34 C.J. p 326 note 25.

Application to court which rendered judgment

The legislative intent is that the petition for vacation or modification of judgment should be filed in the action in which the judgment sought to be vacated or modified is rendered.—Terry v. Claypool, 65 N.E.2d 883, 77 Ohio App. 77.

Motion in open court

The statutory provisions for setting aside judgments and orders on notice contemplate actual presentation of motions for such relief to trial judge in open court, and mere filing and service of notice of intention to make such motions is insufficient to give court jurisdiction to consider and determine them.—Milstein v. Sartain, 133 P.2d 836, 56 Cal. App.2d 924.

Signatures of attorneys

Application to vacate judgment denied where application was signed by attorneys from foreign state, signature of resident attorney was ineffective because at that time he was justice of supreme court and was not party on record, and signatures of other resident attorneys were affixed more than six months after adjournment of term at which judgment was rendered.—Roberts v. Wehe, 27 P.2d 964, 53 Idaho 783.

71. Iowa.—Sitzer v. Fenzloff, 84 N. W. 514, 112 Iowa 491.
34 C.J. p 326 note 26.

72. Mass.—Magee v. Flynn, 139 N.E. 842, 245 Mass. 128.
34 C.J. p 326 note 27.

73. Ga.—Wilby v. McRae, 191 S.E. 662, 56 Ga.App. 140—Hardwick v. Shahan, 113 S.E. 575, 30 Ga.App. 526.
34 C.J. p 326 note 28.

74. Ind.—Thompson v. Harlow, 50 N.E. 474, 150 Ind. 450.
34 C.J. p 327 note 37.

75. Okl.—Richards v. Baker, 99 P. 2d 113, 186 Okl. 533—Myers v. Chamness, 228 P. 988, 102 Okl. 131.
34 C.J. p 327 note 38.

an interest in the judgment sufficient to entitle applicant to apply for its vacation,[76] show compliance with all preliminary requisites or conditions precedent,[77] contain an appropriate demand for relief,[78] and show a meritorious cause of action, or defense, available to applicant if the judgment is vacated, as discussed infra § 290. Unless prescribed by statute, no particular form or formula of words is necessary.[79] It is enough if the application shows a case for relief under the statute, or the inherent power of the court.[80] An application substantially in the language of the statute will generally be sufficient.[81] Ordinarily the application is required to be in writing,[82] unless made during the term at which the judgment was rendered, in which case a mere suggestion will suffice,[83] since at such time, as discussed supra § 287, the court may act on its own motion without any form of application. A statutory requirement of writing has been held to be directory only, and not mandatory.[84]

An application which is insufficient on its face is subject to demurrer;[85] but a demurrer is not necessary to authorize the court to dismiss such an application.[86]

Separate and distinct judgments may not be vacated on one and the same application.[87]

Grounds for relief. Facts constituting sufficient ground for vacating the judgment must be set forth in the application,[88] although it is sufficient if such

76. Wash.—Kuhn v. Mason, 64 P. 182, 24 Wash. 94.
34 C.J. p 327 note 39.

77. Mass.—Magee v. Flynn, 139 N. E. 842, 245 Mass. 128.
34 C.J. p 327 note 43.

Offer to return benefits received

(1) A petition to set aside a judgment in condemnation must include an offer to return all benefits received.—Henry v. U. S., C.C.A.Pa., 46 F.2d 640.

(2) Where suits by fire insurance companies to enjoin superintendent of insurance from interfering with collection of proposed increased rates were dismissed, and amount of increase which had been collected and impounded pending the litigation was distributed in specified proportions to the insurance companies, to trustees, and to the policyholders, the court was not barred from reopening the decrees after term by fact that superintendent did not restore or offer to restore the status quo by returning to court custodian the funds distributed to policyholders and the portion of funds distributed to trustees and paid by them to superintendent for expenses and attorney's fees.—American Ins. Co. v. Lucas, D.C.Mo., 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466, and affirmed, C.C.A., American Ins. Co. v. Scheufler, 129 F.2d 143, certiorari denied 63 S. Ct. 257, 317 U.S. 687, 87 L.Ed. 551, rehearing denied 63 S.Ct. 433, 317 U. S. 712, 87 L.Ed. 567.

78. N.Y.—Lowry v. Himmler, 239 N. Y.S. 347, 136 Misc. 215.
34 C.J. p 327 note 44.

Errors of fact

Under statute authorizing the court on motion in writing to correct errors in fact within five years after rendition of judgment, a motion to correct errors should not only point out the errors of fact committed, but should affirmatively show in the prayer for relief, in what way those errors could be corrected.—Dressor v. Baldwin, 32 N.E. 2d 959, 309 Ill.App. 182.

79. N.Y.—Yudin v. Stoller, 142 N. Y.S. 484.
34 C.J. p 326 note 33.

80. Wash.—Chaney v. Chaney, 105 P. 229, 56 Wash. 145.
34 C.J. p 327 note 35.

81. Ind.—Beatty v. O'Connor, 5 N. E. 880, 106 Ind. 81, 83.
34 C.J. p 327 note 38.

82. N.C.—Union Nat. Bank v. Hagaman, 179 S.E. 759, 208 N.C. 191.
34 C.J. p 326 note 29.

83. Ill.—Geisler v. Bank of Brussels, 44 N.E.2d 754, 316 Ill.App. 309.
34 C.J. p 326 note 30.

84. Tex.—Dorsey v. Brotherhood of Friends, Civ.App., 202 S.W. 350.

85. Ga.—Fields v. Arnall, 34 S.E.2d 692, 199 Ga. 491—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287—Hood v. Duren, 117 S.E. 260, 30 Ga.App. 144.
Ill.—Reid v. Chicago Rys. Co., 231 Ill.App. 58.
Okl.—Wolfe v. Freeman, 238 P. 460, 111 Okl. 123—Thomas v. Deming Inv. Co., 232 P. 111, 105 Okl. 187.

Well-pleaded facts are admitted by demurrer.
Alaska.—Smith v. Coucher, 9 Alaska 730.
Ill.—Barnett v. Gitlitz, 8 N.E.2d 517, 290 Ill.App. 212—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 224 Ill.App. 367, reversed on other grounds 140 N.E. 836, 309 Ill. 147.

Where plaintiffs elected to stand on demurrer and refused to plead further, defendant was not required to prove that he had a valid defense, but court could enter order vacating judgment, and such order was a sufficient adjudication that defense alleged was valid as required by statute.—Federal Tax Co. v. Board of Com'rs of Okmulgee County, 102 P. 2d 148, 187 Okl. 223.

86. Wyo.—Luman v. Hill, 256 P. 339, 36 Wyo. 427.

87. Ga.—James v. Equitable Mortg. Co., 60 S.E. 258, 130 Ga. 87.

88. Ark.—H. G. Pugh & Co. v. Martin, 262 S.W. 308, 164 Ark. 423.
Ga.—Merritt v. Mott, 117 S.E. 252, 30 Ga.App. 212.
Ill.—Trupp v. First Englewood State Bank of Chicago, 30 N.E.2d 198, 307 Ill.App. 258—Atkinson v. McKeogh's Estate, 1 N.E.2d 267, 284 Ill.App. 85—Fitzgerald v. Power, 225 Ill.App. 118.
Ind.—Vail v. Department of Financial Institutions of Indiana, 17 N. E.2d 854, 106 Ind.App. 39.
Iowa.—In re Kinnan's Estate, 255 N. W. 632, 218 Iowa 572—Cedar Rapids Finance & Thrift Co. v. Bowen, 233 N.W. 495, 211 Iowa 1207—Dillard v. Van Heukelom, 200 N.W. 567, 198 Iowa 915.
Ky.—Morris v. Morris, 185 S.W.2d 244, 299 Ky. 235—Cecil v. Dorman, 97 S.W.2d 797, 265 Ky. 771—Carter v. Carter, 265 S.W. 478, 205 Ky. 96.
La.—Adkins' Heirs v. Crawford, Jenkins & Booth, 24 So.2d 246.
N.Y.—O'Neill v. Bender, 25 Hun 189.
N.C.—Farmers' & Merchants' Bank v. Duke, 122 S.E. 1, 187 N.C. 386.
Okl.—Moran v. City Nat. Bank of Lawton, 82 P.2d 682, 183 Okl. 308—Carlin v. Prudential Ins. Co. of America, 52 P.2d 721, 175 Okl. 398—Myers v. Chamness, 228 P. 988, 102 Okl. 131.
Pa.—Philadelphia Fixture & Equipment Corporation v. Carroll, 191 A. 216, 126 Pa.Super. 454.
Tex.—Phœnix Oil Co. v. Illinois Torpedo Co., Civ.App., 261 S.W. 487.
Wis.—In re Coloma State Bank, 282 N.W. 568, 229 Wis. 475.
34 C.J. p 327 note 47.
Grounds for opening or vacating see supra §§ 266–281.

Compared to motion for new trial

A motion to open up the case after judgment requires virtually the same showing as for a motion for a new

facts appear from affidavits contained in the motion papers instead of the petition or motion itself.[89] Facts as distinguished from conclusions of law must be stated.[90] It is not enough to allege "mistake," "surprise," "fraud," "unavoidable casualty or misfortune," or the like, in general terms; the very facts which led up to the taking of the judgment or which prevented the party from defending the suit must be stated explicitly.[91] An averment of the facts, without stating the legal conclusion to be drawn therefrom, is sufficient.[92]

Freedom from fault or negligence. The petition, complaint, or moving papers must show, not generally or inferentially, but by specific averments, that applicant has not been in fault, or that he has exercised due diligence and vigilance.[93] If a prima facie case of negligence appears, there must be a showing of facts excusing such negligence.[94]

Verification. Under a statute or court rule so providing, an application to vacate a judgment must be verified,[95] but such a statutory requirement has been held to be directory only, and not jurisdictional.[96]

§ 290. —— Meritorious Cause of Action or Defense in General

a. In general
b. Sufficiency of showing
c. Sufficiency of cause of action or defense

a. In General

Although there are some exceptions to the rule, an application to open or vacate a judgment generally must be supported by a showing of a meritorious cause of action or defense.

To obtain an order opening or vacating a judgment, the party applying therefor must generally allege and show to the court that he has a good and meritorious defense,[97] or, if the application is made by plaintiff, that he has a good and meritorious

trial, and will not be granted unless petitioner shows that he was prevented from making the defense by surprise, accident, mistake, or fraud of his adversary, without fault on his part.—Estes v. Nell, 63 S.W. 724, 163 Mo. 387.

Waiver

Failure to state grounds on which motion to vacate judgment was made was waived, where opposing party did not object but filed counter affidavit.—Hecq v. Conner, 265 P. 130, 203 Cal. 504.

Applications held sufficient

Iowa.—First Nat. Bank v. Federal Reserve Bank of Chicago, 231 N. W. 453, 210 Iowa 521, 69 A.L.R. 1329.

Okl.—Thompson v. Board of Com'rs of Okmulgee County, 102 P.2d 867, 187 Okl. 312.

Pa.—Weiner v. Targan, 100 Pa.Super. 278.

Applications held insufficient

Fla.—State v. Wright, 145 So. 598, 107 Fla. 178.

Ga.—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636.

Ill.—Emcee Corporation v. George, 12 N.E.2d 333, 293 Ill.App. 240.

Kan.—Mayer v. Harrison, 166 P.2d 674, 161 Kan. 80—Rogers v. J. R. Oil & Drilling Co., 89 P.2d 847, 149 Kan. 807.

Pa.—Gsell v. Helman, 164 A. 853, 108 Pa.Super. 258.

S.C.—Roberts v. Drayton, 116 S.E. 744, 121 S.C. 124.

Wyo.—Luman v. Hill, 252 P. 1019, 36 Wyo. 48, rehearing denied 256 P. 339, 36 Wyo. 427.

89. Iowa.—Comes v. Comes, 178 N. W. 403, 190 Iowa 547.
34 C.J. p 328 note 48.

90. Mo.—Bess v. Bothwell, App., 163 S.W.2d 125.
Tex.—Wadell Connally Hardware Co. v. Brooks, 275 S.W. 168.
34 C.J. p 328 note 49.

91. Pa.—Silent Auto Corporation of Northern New Jersey v. Folk, 97 Pa.Super. 588.
34 C.J. p 328 note 50.

92. Iowa.—Oliver v. Riley, 60 N.W. 180, 92 Iowa 23.
34 C.J. p 329 note 51.

93. Ala.—Ex parte New Home Sewing Mach. Co., 189 So. 374, 238 Ala. 159.
Neb.—**Corpus Juris quoted in** In re Reikofski's Estate, 14 N.W.2d 379, 382, 144 Neb. 735.
Pa.—Peace v. Reinhart, 18 Pa.Dist. & Co. 9.
34 C.J. p 329 note 52, p 354 note 71.

94. Ill.—Viedenschek v. Johnny Perkins Playdium, 49 N.E.2d 339, 319 Ill.App. 523.
34 C.J. p 329 note 53.

95. Ark.—Farmers Union Mut. Ins. Co. v. Jordan, 140 S.W.2d 430, 200 Ark. 711.
Okl.—Scott v. Bailey, 169 P.2d 208—American Inv. Co. v. Wadlington, 244 P. 435, 114 Okl. 124.
34 C.J. p 343 note 46.

No judgment rendered

Failure of plaintiff to swear to motion to set aside judgment was immaterial where no judgment had been rendered.—Greggers v. Gleason, 29 S.W.2d 183, 224 Mo.App. 1108.

96. Ky.—Berryhill v. Holland, 99 S. W. 902, 123 Ky. 615, 30 Ky.L. 831.
34 C.J. p 343 note 47.

Amendment of application so as to add verification permitted.—State Life Ins. Co. v. Liddell, 61 P.2d 1075, 178 Okl. 114—34 C.J. p 343 note 47 [a].

97. U.S.—**Corpus Juris cited in** Koen v. Beardsley, C.C.A.Colo., 63 F.2d 595, 597.
Ala.—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854, 244 Ala. 98—Union Indemnity Co. v. Goodman, 144 So. 108, 225 Ala. 499.
Alaska.—Rubenstein v. Imlach, 9 Alaska 62.
Ark.—Nichols v. Arkansas Trust Co., 179 S.W.2d 857, 207 Ark. 174—Davis v. Bank of Atkins, 167 S.W. 2d 876, 205 Ark. 144—Merriott v. Kilgore, 139 S.W.2d 387, 200 Ark 394—Sweet v. Nix, 122 S.W.2d 538, 197 Ark. 284.
Cal.—Hewins v. Walbeck, 141 P.2d 241, 60 Cal.App.2d 603.
Ga.—Johnson v. Lock, 137 S.E. 910, 36 Ga.App. 620—Dabney v. Benteen, 132 S.E. 916, 35 Ga.App. 203.
Ill.—Buchanan v. Stephens, 26 N.E. 2d 733, 304 Ill.App. 477—Emcee Corporation v. George, 12 N.E.2d 333, 293 Ill.App. 240—Fitzgerald v. Power, 225 Ill.App. 118.
Ky.—Workingmen's Perpetual Bldg. & Loan Ass'n v. Stephens, 184 S. W.2d 575, 299 Ky. 177—Overstreet v. Grinstead's Adm'r, 140 S.W.2d 836, 283 Ky. 73—Kammerer v. Brown, 27 S.W.2d 959, 234 Ky. 199.
Md.—**Corpus Juris cited in** C. I. T. Corporation v. Powell, 170 A. 740, 743, 166 Md. 208.
Mass.—Russell v. Foley, 179 N.E. 619, 278 Mass. 145—Lovell v. Lovell, 176 N.E. 210, 276 Mass. 10.
Mich.—Electric Ry. Securities Co. v. Hendricks, 232 N.W. 367, 251 Mich. 602.
Miss.—Hurst v. Gulf States Creosoting Co., 141 So. 346, 163 Miss. 512.

cause of action.[98] It must be made to appear that a retrial will result in a judgment different from the one sought to be vacated.[99] In the absence of such a showing, or where the contrary affirmatively appears, the judgment will not be opened or vacated.[1] Statutes regulating the proceedings sometimes expressly require such a showing of merits,[2] but, even under statutes not so providing, the courts generally impose such requirement in the exercise of their equitable discretion.[3] The reason for this rule is that if defendant has no valid defense, or plaintiff has no cause of action, as the case may be, so that a

Mo.—**Corpus Juris quoted in** Savings Trust Co. of St. Louis v. Skain, 131 S.W.2d 566, 573, 345 Mo. 46.
N.J.—Simon v. Calabrese, 46 A.2d 58, 137 N.J.Eq. 581—Kaffitz v. Clawson, 36 A.2d 215, 134 N.J.Eq. 494.
N.Y.—In re Gori's Will, 222 N.Y.S. 250, 129 Misc. 541.
N.C.—State v. O'Connor, 27 S.E.2d 88, 223 N.C. 469—Roediger v. Sapos, 6 S.E.2d 801, 217 N.C. 95—Hooks v. Neighbors, 190 S.E. 236, 211 N.C. 382—Woody v. Privett, 154 S.E. 625, 199 N.C. 378—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
Ohio.—Beachler v. Ford, 60 N.E.2d 330, 77 Ohio App. 41—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871—In re Veselich, 154 N.E. 55, 22 Ohio App. 528.
Okl.—Jupe v. Home Owners Loan Corp., 167 P.2d 46—McVean v. Challes, 69 P.2d 383, 180 Okl. 375—Methvin v. Mutual Savings & Loan Ass'n, 67 P.2d 792, 180 Okl. 80—Carlin v. Prudential Ins. Co. of America, 52 P.2d 721, 175 Okl. 398—Crosbie v. Absher, 51 P.2d 970, 174 Okl. 593—Couch v. Garman, 50 P.2d 1103, 174 Okl. 515—Edge v. Security Building & Loan Ass'n, 45 P.2d 1108, 172 Okl. 513—Harlow Pub. Co. v. Tallant, 43 P.2d 106, 171 Okl. 579—In re Bruner's Estate, 256 P. 722, 125 Okl. 101—Woodley v. McKee, 223 P. 346, 101 Okl. 120.
Pa.—Ferguson v. O'Hara, 132 A. 801, 286 Pa. 37—Moyer v. Diehl, 11 A.2d 651, 139 Pa.Super. 59—Philadelphia Fixture & Equipment Corporation v. Carroll, 191 A. 216, 126 Pa.Super. 454—Commonwealth v. Eclipse Literary and Social Club, 178 A. 341, 117 Pa.Super. 339—Shelinski v. Obrekes, 97 Pa.Super. 340—Green v. Davis, 19 Pa.Dist. & Co. 156, 32 Sch.Leg.Rec. 307—Williams & Co. v. Orlando, 6 Pa.Dist. & Co. 153, 19 North Co. 295—McKenzie Co. v. Fidelity & Deposit Co. of Maryland, Com.Pl., 54 Dauph.Co. 294—Harr v. Kelly, Com.Pl., 43 Lack.Jur. 221—Dunlap Tire & Rubber Corporation v. Powell, Com.Pl., 33 Luz.Leg.Reg. 216—Kalna v. Sopata, Com.Pl., 33 Luz. Leg.Reg. 96—Favinger v. Favinger, Com.Pl., 60 Montg.Co. 149—First Baptist Church v. Entress, Com.Pl., 94 Pittsb.Leg.J. 132—Stetsko v. Lea, Com.Pl., 26 West.Co. 97—Eyster v. Peterman, Com.Pl., 55 York Leg.Rec. 131.
S.C.—Savage v. Cannon, 30 S.E.2d 70, 204 S.C. 473—Detroit Fidelity & Surety Co. v. Foster, 169 S.E. 871, 170 S.C. 121.
Tex.—Commercial Credit Corp. v. Smith, 187 S.W.2d 263, 143 Tex. 612—Yellow Transit Co. v. Klaff, Civ.App., 145 S.W.2d 264—Benson v. Drummond, Civ.App., 137 S.W.2d 125—Hubbard v. Tallal, Civ.App., 57 S.W.2d 226, reversed on other grounds and appeal dismissed 92 S.W.2d 1022, 127 Tex. 242—Sembera v. Usener, Civ.App., 295 S.W. 200.
Wash.—Morsbach v. Thurston County, 268 P. 135, 148 Wash. 87.
Wyo.—Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.
34 C.J. p 329 note 55.
Confessed judgments see infra § 324.
Default judgments see infra § 336.
On bill for equitable relief see infra § 349.

Coram nobis

(1) On an application in the nature of a writ of error coram nobis, the matter of a meritorious cause of action or defense is immaterial.—Reid v. Chicago Rys. Co., 231 Ill. App. 58.

(2) Writ of error coram nobis generally see infra §§ 311–313.

One seeking as a favor opportunity to reopen a litigation, must show that a meritorious controversy exists.—In re Gross' Will, 31 N.Y.S.2d 479, 263 App.Div. 818.

Petition to strike off judgment

Defendant filing a petition to strike off judgment is not required to set forth a meritorious defense, since a rule to "strike off judgment" is not an equitable proceeding, and in that respect it differs fundamentally from a "rule to open a judgment."—Hotel Redington v. Guffey, 25 A.2d 773, 148 Pa.Super. 502.

98. U.S.—Peters v. Mutual Life Ins. Co. of New York, D.C.Pa., 17 F. Supp. 246, reversed on other grounds, C.C.A., 92 F.2d 301.
Cal.—Doyle v. Rice Ranch Oil Co., 31 P.2d 980, 28 Cal.App.2d 18.
Mass.—Maki v. New York, N. H. & H. R. Co., 199 N.E. 760, 293 Mass. 223.
Miss.—Hurst v. Gulf States Creosoting Co., 141 So. 346, 163 Miss. 512.
Neb.—Morrill County v. Bliss, 249 N.W. 98, 125 Neb. 97, 89 A.L.R. 932.
N.Y.—Manzo v. Ajello, 214 N.Y.S. 251, 216 App.Div. 733—Lunghino v. Marine Trust Co. of Buffalo, 298 N.Y.S. 659, 163 Misc. 765, affirmed 6 N.Y.S.2d 650, 254 App.Div. 934, reargument denied 8 N.Y.S.2d 1012, 255 App.Div. 936—In re Gori's Will, 222 N.Y.S. 250, 129 Misc. 541—Mandel v. Donohue, 208 N.Y.S. 807, 124 Misc. 861.
N.C.—Roediger v. Sapos, 6 S.E.2d 801, 217 N.C. 95.
Okl.—Methvin v. Mutual Savings & Loan Ass'n, 67 P.2d 792, 180 Okl. 80—Carlin v. Prudential Ins. Co. of America, 52 P.2d 721, 175 Okl. 398—In re Bruner's Estate, 256 P. 722, 125 Okl. 101.
Pa.—Derbyshire Bros. v. McManamy, 101 Pa.Super. 514—Franks v. Aponick, 42 Sch.Leg.Rec. 24.
S.C.—Savannah Supply Co. v. Ross, 122 S.E. 772, 128 S.C. 293.
34 C.J. p 332 note 56.

99. N.J.—Somers v. Holmes, 177 A. 434, 114 N.J.Law 497.
Okl.—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16.
S.C.—Wise v. First Nat. Ins. Co., 172 S.E. 764, 172 S.C. 53.
Tex.—Harris v. Sugg, Civ.App., 143 S.W.2d 149, error dismissed, judgment correct.
34 C.J. p 336 note 80, p 372 note 83.

1. Cal.—Bixby v. Hotchkis, App., 164 P.2d 808.
Ga.—Louis K. Liggett Co. v. Foster, 136 S.E. 93, 36 Ga.App. 185—Dabney v. Benteen, 132 S.E. 916, 35 Ga.App. 203.
Iowa.—In re Kinnan's Estate, 255 N. W. 632, 218 Iowa 572.
Mass.—Woods v. Woods, 195 N.E. 377, 290 Mass. 392.
Pa.—Phillips & Sons Co. v. Worley Corporation, 97 Pa.Super. 506—Williams & Co. v. Orlando, 6 Pa. Dist. & Co. 153, 19 North.Co. 295—Bloch & Son v. Schweitzer, Com. Pl., 30 Berks Co. 31—Markle Bank & Trust Co. v. Paladino, Com.Pl., 31 Luz.Leg.Reg. 210—Quandel v. Orff, Com.Pl., 4 Sch.Reg. 439—Donora Real Estate. Co. v. Coulter, Com.Pl., 18 Wash.Co. 26—Eyster v. Peterman, Com.Pl., 55 York Leg. Rec. 131.
Wyo.—Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.
34 C.J. p 333 note 59, p 372 note 83.

2. Ark.—Nichols v. Arkansas Trust Co., 179 S.W.2d 857, 207 Ark. 174.
Wyo.—Bales v. Brome, 105 P.2d 568, 56 Wyo. 111.

3. Ind.—Wills v. Browning, 96 Ind. 149.
34 C.J. p 332 note 53.

second trial must result in an identical judgment, then no actual injustice has been done, and it would be a vain and idle thing to disturb the judgment already entered.[4]

Exceptions to the rule have been made in a variety of cases.[5] It has been held that a judgment may be opened or vacated without the showing of a meritorious action or defense where the judgment is void,[6] as for want of jurisdiction,[7] although some cases hold that merits must be shown even in the case of a void judgment.[8] It has been held that, where the judgment was obtained by fraud, a meritorious defense or action need not be shown,[9] although in some jurisdictions merits must be shown in such case.[10] Where judgment was irregularly taken against a person under legal disabilities, such as an infant or an insane person, a showing of merits is not required,[11] but there is also authority to the contrary.[12] It has likewise been held that a meritorious action or defense need not be shown where the judgment was entered without authority, by mistake, or improvidently,[13] or where the ground of objection to the judgment is clearly well founded.[14] It has generally been held that the application need not show a meritorious defense or action where the application is made during the judgment term,[15] but the court, in its discretion, may impose such requirement.[16]

b. Sufficiency of Showing

The facts constituting the cause of action or defense must be set forth in an application to open or vacate a judgment; it is not sufficient to allege that the applicant has a meritorious cause of action or defense.

Where it is necessary to show merits, it is not sufficient to allege in general terms that defendant has a good or meritorious defense to the action, or that plaintiff has a good and sufficient cause of action;[17] the nature of the defense, or cause of action, must be shown.[18] The facts constituting the proposed defense, or claimed cause of action, must

4. Wyo.—Bales v. Brome, 105 P.2d 568, 56 Wyo. 111.
34 C.J. p 333 note 61.

5. N.C.—Campbell v. Campbell, 102 S.E. 737, 179 N.C. 413.
34 C.J. p 334 note 72.

6. Md.—C. I. T. Corporation v. Powell, 170 A. 740, 166 Md. 208.
Ohio.—Snyder v. Clough, 50 N.E.2d 334, 71 Ohio App. 440—**Corpus Juris quoted in** Kinsman Nat. Bank v. Jerko, 25 Ohio N.P.,N.S., 445, 457.
Okl.—Abernathy v. Bonaparte, 26 P. 2d 947, 166 Okl. 192.
Wash.—**Corpus Juris quoted in** John Hancock Mut. Life Ins. Co. v. Cooley, 83 P.2d 221, 229, 196 Wash. 357—Ballard Savings & Loan Ass'n v. Linden, 62 P.2d 1364, 188 Wash. 490.
Wis.—**Corpus Juris cited in** Chippewa Valley Securities Co. v. Herbst, 278 N.W. 872, 875, 227 Wis. 422.
Wyo.—Elstermeyer v. City of Cheyenne, 120 P.2d 599, 57 Wyo. 421.
Judgment void on face of record
Tex.—Ferguson v. Ferguson, Civ. App., 98 S.W.2d 847—Carson v. Taylor, Civ.App., 261 S.W. 824.
Where it is established that no judgment was rendered, the purported judgment may be vacated in proper proceeding instituted for that purpose by party affected thereby without establishing a meritorious defense.—City of Clinton ex rel. Richardson v. Cornell, 132 P.2d 340, 191 Okl. 600.

7. Ohio.—Beachler v. Ford, 60 N.E. 2d 330, 77 Ohio App. 41.
Okl.—Jupe v. Home Owners Loan Corp., 167 P.2d 46—Methvin v. Mutual Savings & Loan Ass'n, 67 P. 2d 792, 180 Okl. 80—Carlin v. Prudential Ins. Co. of America, 52 P.2d 721, 175 Okl. 398—Myers v. Chamness, 228 P. 988, 102 Okl. 131.
Wis.—Chippewa Valley Securities Co. v. Herbst, 278 N.W. 872, 227 Wis. 422.
34 C.J. p 333 note 62.
Party not served
Cal.—Shelley v. Casa De Oro, Limited, 24 P.2d 900, 133 Cal.App. 720.
Colo.—Bray v. Germain Inv. Co., 98 P.2d 993, 105 Colo. 403.
Okl.—Jones v. Norris, 55 P.2d 984, 176 Okl. 434—Mayhue v. Clapp, 261 P. 144, 128 Okl. 1—Myers v. Chamness, 228 P. 988, 102 Okl. 131.
Tex.—Goodman v. Mayer, Civ.App., 105 S.W.2d 281, reversed on other grounds 128 S.W.2d 1156, 133 Tex. 319.

8. Ark.—Nichols v. Arkansas Trust Co., 179 S.W.2d 857, 207 Ark. 174.

9. N.D.—Williams v. Fairmount School Dist., 129 N.W. 1027, 21 N. D. 198.
34 C.J. p 334 note 64.

10. Ark.—Holland v. Wait, 86 S.W. 2d 415, 191 Ark. 405.
Okl.—Abernathy v. Huston, 26 P.2d 939, 166 Okl. 184—Myers v. Chamness, 228 P. 988, 102 Okl. 131.
34 C.J. p 334 note 65.

11. N.Y.—Kent v. West, 50 N.Y.S. 339, 22 Misc. 403, affirmed 53 N.Y. S. 244, 33 App.Div. 112, appeal dismissed 57 N.E. 1114, 163 N.Y. 589.
34 C.J. p 334 notes 66–68.

12. Ark.—Ryan v. Fielder, 138 S.W. 973, 99 Ark. 374.
34 C.J. p 334 note 69.

13. Ariz.—Gila Valley Electric, Gas & Water Co. v. Arizona Trust & Savings Bank, 215 P. 159, 25 Ariz. 177.
34 C.J. p 334 note 71.

14. N.D.—Naderhoff v. Benz, 141 N. W. 501, 25 N.D. 165, 47 L.R.A.,N. S., 853.
34 C.J. p 334 note 72.

15. Mo.—Savings Trust Co. of St. Louis v. Skain, 131 S.W.2d 566, 345 Mo. 46—National City Bank of St. Louis v. Pattiz, App., 26 S.W. 2d 815.
Neb.—Morrill County v. Bliss, 249 N. W. 98, 125 Neb. 97, 89 A.L.R. 932.
Ohio.—Ames Co. v. Busick, App., 47 N.E.2d 647—Edge v. Stuckey, 178 N.E. 210, 40 Ohio App. 122.
Okl.—Long v. Hill, 145 P.2d 434, 193 Okl. 463—Montague v. State ex rel. Commissioners of Land Office of Oklahoma, 89 P.2d 283, 184 Okl. 574—Methvin v. Mutual Savings & Loan Ass'n, 67 P.2d 792, 180 Okl. 80—Carlin v. Prudential Ins. Co. of America, 52 P.2d 721, 175 Okl. 398.
Wyo.—Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.

16. Ohio.—Harbine v. Davis, App., 57 N.E.2d 421.

17. Ala.—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854, 244 Ala. 98—Union Indemnity Co. v. Goodman, 144 So. 108, 225 Ala. 499.
Ky.—Horn v. Green, 178 S.W.2d 430, 296 Ky. 714.
Miss.—**Corpus Juris cited in** Cocke v. Wilson, 134 So. 686, 687, 161 Miss. 1.
Mo.—**Corpus Juris cited in** Jeffrey v. Kelly, App., 146 S.W.2d 850, 852.
Tex.—Bishop v. Galbraith, Civ.App., 246 S.W. 416, reversed on other grounds Galbraith v. Bishop, Com. App., 287 S.W. 1087.
34 C.J. p 335 note 76.

18. Tex.—Commercial Credit Corp.

be set forth in detail, so that the court may judge whether or not it is meritorious and sufficient.[19] A statement of the facts is sufficient; it is not necessary to allege the legal conclusion that applicant has a meritorious defense or cause of action.[20] It has been held that an unverified declaration or complaint is not sufficient,[21] and that the facts must be stated positively, and not merely on information and belief.[22] Amendments to make a more adequate showing as to the meritorious action or defense may be allowed in furtherance of justice.[23]

c. Sufficiency of Cause of Action or Defense

To constitute a meritorious defense or cause of action in support of an application to open or vacate a judgment, the claim must be legally sufficient; it must not be merely technical, unjust, or inequitable.

A meritorious and substantial cause of action or defense must be shown in support of an application to open or vacate a judgment, that is, one which raises questions of law deserving investigation or a real controversy as to the essential facts.[24] Matter which would be a sufficient defense to an action is not necessarily a meritorious defense warranting the vacation of a judgment which has been entered;[25] a judgment will not be opened or vacated if the defense or cause of action is not meritorious, but is purely technical in its character, or is dishonest or unconscionable;[26] and the defense or

v. Smith, 187 S.W.2d 363, 143 Tex. 612.
34 C.J. p 336 note 77.

Showing was liberally construed to support order vacating final judgment on motion.—Kerr v. Southwest Fluorite Co., 294 P. 324, 35 N.M. 232.

19. Ill.—Fitzgerald v. Power, 225 Ill.App. 118.
Mo.—Meyerhardt v. Fredman, App., 131 S.W.2d 916.
N.C.—Hooks v. Neighbors, 190 S.E. 236, 211 N.C. 382.
Ohio.—Canal Winchester Bank v. Exline, 22 N.E.2d 528, 61 Ohio App. 253.
Pa.—White v. Consumers Finance Service, Com.Pl., 33 Luz.Leg.Reg. 164—Kalna v. Sopata, Com.Pl., 33 Luz.Leg.Reg. 96.
Tex.—Bishop v. Galbraith, Civ.App., 246 S.W. 416, reversed on other grounds, Galbraith v. Bishop, Com. App., 287 S.W. 1087.
34 C.J. p 335 note 76.

Reference to record
Defendant's sworn motion to vacate judgment, setting up that he has meritorious defense "upon record," is sufficient, where record showed a legal defense and answer, which, although unverified, expressly denied allegation of unverified petition with regard to notice for attorney's fees.—Donalson v. Bank of Jakin, 127 S.E. 229, 33 Ga.App. 428.

20. Mass.—Herlihy v. Kane, 38 N.E. 2d 620, 310 Mass. 457.

21. Miss.—Hurst v. Gulf States Creosoting Co., 141 So. 346, 163 Miss. 512.

22. Wis.—Union Lumbering Co. v. Chippewa County, 2 N.W. 281, 47 Wis. 245.
34 C.J. p 336 note 81.

23. Kan.—Chandler v. Caples, 144 P. 191, 93 Kan. 813.
34 C.J. p 336 note 82.

24. Cal.—Doyle v. Rice Ranch Oil Co., 81 P.2d 980, 28 Cal.App.2d 18.
Mass.—Russell v. Foley, 179 N.E. 619, 278 Mass. 145—Lovell v. Lovell, 176 N.E. 210, 276 Mass. 10.
Tex.—Miles v. Dana, 36 S.W. 848, 13 Tex.Civ.App. 240.
Wyo.—Elstermeyer v. City of Cheyenne, 120 P.2d 599, 57 Wyo. 421.

Defenses passed on in previous trial were not available on motion to vacate judgment unless fraud in procuring judgment is alleged.—Howe v. Farmers' & Merchants' Bank, 263 P. 673, 129 Okl. 140.

Defense not provable under pleadings is not sufficient.—Sohn v. Flavin, 244 N.W. 349, 60 S.D. 305.

Meritorious action or defense shown
Ariz.—Swisshelm Gold Silver Co. v. Farwell, 124 P.2d 544, 59 Ariz. 162.
Cal.—Fallon v. Superior Court in and for City and County of San Francisco, 90 P.2d 858, 33 Cal.App.2d 48.
Ga.—Lester v. Graham, 123 S.E. 37, 32 Ga.App. 379.
Iowa.—Rock Island Plow Co. v. Brunkan, 248 N.W. 32, 215 Iowa 1264—Newlove v. Stern, 196 N.W. 51, 196 Iowa 1111.
Mass.—Herlihy v. Kane, 38 N.E.2d 620, 310 Mass. 457.
Ohio.—Buckeye State Building & Loan Co. v. Ryan, 157 N.E. 811, 24 Ohio App. 481.
Okl.—Abernathy v. Huston, 26 P.2d 939, 166 Okl. 184.
Pa.—Cramer v. Sizemore, Com.Pl., 48 Dauph.Co. 169—Hanover Trust Co. v. Keagy, Com.Pl., 51 York Leg. Rec. 157, reversed on other grounds 6 A.2d 786, 335 Pa. 356.

Meritorious action or defense not shown
Ark.—Nichols v. Arkansas Trust Co., 179 S.W.2d 857, 207 Ark. 174.
Ill.—Bird-Sykes Co. v. McNamara, 252 Ill.App. 262.
Kan.—Haggart v. Wheeler, 229 P. 357, 116 Kan. 702.
Mo.—Audsley v. Hale, 261 S.W. 117, 303 Mo. 451.
N.J.—Manufacturers' Finance Co. v. Miller, 137 A. 717, 5 N.J.Misc. 676—Dingfeld v. McGackin, 132 A. 92, 4 N.J.Misc. 117.
N.D.—Dennis v. Pease, 240 N.W. 611, 61 N.D. 718.
Okl.—Moran v. City Nat. Bank of Lawton, 82 P.2d 682, 183 Okl. 308—Couch v. Garman, 50 P.2d 1103, 174 Okl. 515.
Pa.—Roper v. Scevcnik, 194 A. 333, 128 Pa.Super. 453—Waldman v. Baer, 81 Pa.Super. 390.

25. Ohio.—Canal Winchester Bank v. Exline, 22 N.E.2d 528, 61 Ohio App. 253.

26. Okl.—Featherstone v. Southwestern Lumber Co., 243 P. 240, 116 Okl. 86.
Pa.—Richey v. Gibboney, 34 A.2d 913, 154 Pa.Super. 1—Philadelphia Fixture & Equipment Corporation v. Carroll, 191 A. 216, 126 Pa.Super. 454—Bury & Holman v. Pezalla, Com.Pl., 27 Del.Co. 405—Harr v. Kelly, Com.Pl., 43 Lack.Jur. 221—Cronauer v. Bayer, Com.Pl., 37 Luz.Leg.Reg. 94.
Wyo.—Elstermeyer v. City of Cheyenne, 120 P.2d 599, 57 Wyo. 421.
34 C.J. p 337 note 83, note 85—p 339 note 13.

Capacity to contract
A judgment will not be opened on the ground that defendant was incapacitated by habitual drunkenness to make the contract sued on, where no fraud or imposition is charged, and the evidence does not show that he was entirely incapable of making a contract.—Spetz v. Howard, 23 Pa. Super. 420.

Compounding a felony
A judgment entered on a bond given to secure any indebtedness that might be found against the obligor by award of arbitrators will not be opened on the ground that it was given to compound a felony, where the evidence shows that there was no actual agreement not to prosecute, and that the obligor, although charged with a felony, did not actually commit it.—Woelfel v. Hammer, 28 A. 146, 159 Pa. 446.

Gambling contract
The fact that plaintiff's cause of action was based on a contract made in state for purchase of "punch

cause of action must be such that the judgment in disregard of it is unjust and inequitable.[27]

§ 291. —— Proposed Answer

The requirement that an application for the opening or vacation of a default judgment be supported by a showing of the answer which defendant proposes to interpose is discussed infra § 336 e.

Examine Pocket Parts for later cases.

§ 292. Answer and Other Pleadings

An answer is required where the proceeding to open or vacate the judgment is by action, but not where it is by motion in the cause.

Where an application to open or vacate a judgment takes the form of a motion in the cause, it is governed by the rules applicable to motions generally, and no formal pleadings in opposition are required.[28] A like rule has been applied to a proceeding by complaint under a statute providing that the application may be by complaint or motion,[29] but in most jurisdictions, where the application is made by formal action, or petition, the usual rules of pleading are applicable, and the holder of the judgment must controvert the allegations of the petition or complaint by an answer.[30] The answer must raise an issue by direct and positive averments; if it fails to do so, the petition or complaint may be taken as confessed and the judgment set aside.[31] The answer is sometimes required to be verified.[32] The petition may be dismissed for failure to file a replication, if one would be required by the ordinary rules of pleading.[33]

A cross complaint seeking affirmative relief may not be interposed in opposition to an application to open or vacate a judgment.[34]

§ 293. Parties; Persons by and against Whom Proceedings May Be Brought

a. In general
b. Who may apply

a. In General

Generally all the parties to a judgment should be joined in a proceeding to open or vacate the judgment.

As a general rule all the parties to a judgment should be made parties to a proceeding to vacate or open it,[35] as well as those who may have acquired interests in the judgment, or under it, and therefore have an interest in maintaining it,[36] and gener-

board," which was gambling device, was a prima facie showing of a valid defense against such judgment.—K. & S. Sales Co. v. Lee, 261 S.W. 903, 164 Ark. 449.

27. Wyo.—Elstermeyer v. City of Cheyenne, 120 P.2d 599, 57 Wyo. 421.
34 C.J. p 337 note 84.

28. Md.—Craig v. Hebron Building & Loan Ass'n No. 2, 189 A. 218, 171 Md. 522.
Mass.—Lynch v. Springfield Safe Deposit & Trust Co., 13 N.E.2d 611, 300 Mass. 14.
34 C.J. p 343 note 50.

Special matter
While, in general, pleadings are not necessary in proceeding under some statutes to vacate judgments, defendant relying on special matter not going to merits of case must raise it by special pleading.—Wrinn v. Sellers, 147 N.E. 899, 252 Mass. 423.

Where party did not respond to motion to vacate and submitted no proof to refute that offered by plaintiffs, affidavits submitted in support would be considered as prima facie true.—Holland v. Wait, 86 S.W.2d 415, 191 Ark. 405.

29. Ind.—Douglass v. Keehn, 78 Ind. 199.
34 C.J. p 343 note 52.

30. Pa.—Silent Auto Corporation of Northern New Jersey v. Folk, 97 Pa.Super. 588.
34 C.J. p 343 note 55.

Waiver
Answer on the merits waives question of sufficiency of the application.—Smyth v. Fargo, 138 N.E. 610, 307 Ill. 300.

A statutory motion in nature of writ of error coram nobis being declaration in new suit, other party thereto should be required to file pleading to such motion.—Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 290 Ill.App. 558.

31. N.Y.—Lansing v. McKillup, 1 Cow. 35.
Pa.—Hunter v. Mahoney, 23 A. 1004, 148 Pa. 232.

32. Ohio.—Metzger v. Zeissler, 13 Ohio N.P.,N.S., 49.
Pa.—Appeal of Russell, 93 Pa. 384.

33. Pa.—Appeal of Russell, supra.

34. Ark.—Jerome Hardwood Lumber Co, v. Jackson-Vreeland Land Corporation, 254 S.W. 660, 160 Ark. 303.

35. U.S.—U. S. v. Peacock, D.C.Fla., 34 F.Supp. 557.
Tex.—Hartel v. Dishman, 145 S.W.2d 865, 135 Tex. 600—Hannon v. Henson, Com.App., 15 S.W.2d 579—Wixom v. Bowers, Civ.App., 152 S.W.2d 896, error refused.
34 C.J. p 344 note 59.

The real parties in interest must be brought before the court.
Ark.—State v. West, 254 S.W. 828, 160 Ark. 413.
Ky.—Morris v. Morris, 185 S.W.2d 244, 299 Ky. 235.

Intervention
Trial court could allow owner of property to be made party on hearing to set aside judgment requiring sheriff to deliver tax deed of owner's property to purchaser.—Bartholomew v. Ruffner, 273 P. 986, 35 Ariz. 12.

Right to object
Maker of notes who was not party to original suit thereon could not question right of holder of notes to set aside, as void, original judgment rendered against wrong party and to commence another suit thereon.—Ford v. Vetsch, La.App., 167 So. 842.

36. Minn.—Aldrich v. Chase, 73 N.W. 161, 70 Minn. 243.
34 C.J. p 344 note 60.

Assignee of judgment
(1) On a proceeding to vacate a judgment, the assignee of the judgment is a necessary party and entitled to notice.—Robinson v. American Chemical Co., 9 N.Y.Civ.Proc. 78.

(2) Filing and recording assignment of judgment held not constructive notice to judgment debtors that assignee had become owner thereof, and thereby to oblige them to serve notice and make her a party in proceedings to set aside judgment and grant new trial, there being no statute pertaining to assignment of a judgment.—Miller v. Greenfield Sav. Bank, 203 N.W. 236, 199 Iowa 1039.

ally one not party to the judgment should not be joined.[37] A merely nominal party need not be joined.[38] Where a judgment against joint defendants is not deemed an entirety, codefendants are not necessary parties to an application by one defendant to vacate a judgment on grounds peculiar to himself,[39] such as lack of jurisdiction.[40] A codefendant against whom no relief is sought, and who will not be affected by an order vacating the judgment, need not be made a party to the motion.[41]

It has been held that where defendant seeks to avoid judgment on the ground that he was not duly served, and there is an entry of service purporting to have been made by a sheriff, he must traverse the return and make the officer a party to the proceeding.[42]

b. Who May Apply

An application to open or vacate a judgment may generally be made only by a party to the record who has been prejudicially affected; but in some cases one not a party who has been injured may apply.

The general rule is that an application to open or vacate a judgment can be made only by a party to the record[43] who in some way has been prejudicially affected by the judgment,[44] and that a stranger to the record who was neither a party nor a privy to the action cannot make such an application.[45] If it appears that the parties really in interest are content that the judgment shall stand and submit to the irregularities affecting its validity, it should not be set aside at the instance of a stranger,[46] and this is particularly true where he would not be benefited.[47]

37. Ga.—Buchannon v. Park, 104 S.E. 20, 25 Ga.App. 635.
34 C.J. p 344 note 66.

Garnisher

Garnisher has no standing to resist motion by garnishee to quash judgment obtained against garnishee.—Home Telephone Co. v. North Arkansas Highway Improvement Dist. No. 2, 19 S.W.2d 1014, 179 Ark. 875.

38. Ohio.—Fitzgerald v. Cross, 30 Ohio St. 444.

39. Ind.—Durre v. Brown, 34 N.E. 577, 7 Ind.App. 127.

40. Ind.—Durre v. Brown, supra.
W.Va.—Carlon v. Ruffner, 12 W.Va. 297.

41. Cal.—Schart v. Schart, 47 P. 927, 116 Cal. 91.
34 C.J. p 344 note 65.

42. Ga.—Green v. Grant, 32 S.E. 846, 108 Ga. 751.

43. Ark.—Golightly v. New York Life Ins. Co., 120 S.W.2d 697, 196 Ark. 1024.
Colo.—Scott v. Sullivan, 244 P. 466, 79 Colo. 173.
Del.—Rhoads v. Mitchell, Super., 47 A.2d 174.
Ga.—Ingram & Le Grand Lumber Co. v. Burgin Lumber Co., 13 S.E.2d 370, 191 Ga. 584—Thomas v. Lambert, 1 S.E.2d 443, 187 Ga. 616—Pope v. U. S. Fidelity & Guaranty Co., 21 S.E.2d 289, 67 Ga.App. 560—Rowe v. People's Credit Clothing Co., 140 S.E. 800, 37 Ga. App. 535.
Ill.—Continental Ill. Nat. Bank & Trust Co. of Chicago v. University of Notre Dame Du Lac, 63 N.E.2d 127, 326 Ill.App. 567.
Ind.—**Corpus Juris quoted in** Brokaw v. Brokaw, 192 N.E. 728, 729, 99 Ind.App. 385.
Ky.—Brewer v. Herndon, 300 S.W. 858, 222 Ky. 419.
Mo.—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S.W. 2d 865.
N.Y.—People ex rel. Ferris v. Agostinelli, 291 N.Y.S. 66, 249 App.Div. 638.
N.D.—**Corpus Juris cited in** Guenther v. Funk, 274 N.W. 839, 843, 67 N.D. 543.
Okl.—Fidelity Building & Loan Ass'n v. Newell, 55 P.2d 131, 176 Okl. 134.
Pa.—Kupres v. Citizens' Nat. Bank, 101 Pa.Super. 351.
Tex.—**Corpus Juris cited in** Standard Oil Co. v. State, Civ.App., 132 S.W.2d 612, 614, error dismissed, judgment correct.
Wash.—State v. Superior Court for Pierce County, 7 P.2d 604, 166 Wash. 592.
Wis.—Home Owners' Loan Corp. v. Mascari, 19 N.W.2d 283, 247 Wis. 190, rehearing denied 19 N.W.2d 851, 247 Wis. 190.
34 C.J. p 344 note 69.

Amicus curiæ

Court may set aside judgment, in interest of justice, during term on suggestion of amicus curiæ.—Cherry v. Cherry, 35 S.W.2d 659, 225 Mo.App. 998.

Estoppel

A fraudulent judgment will not be set aside at the instance of a party who has participated in the fraud.—Sherner v. Spear, 92 N.C. 148—34 C.J. p 347 note 84.

Plaintiff's assignee

Where payee, after instituting action on note insured by United States, assigned all payee's right, title, and interest in note to United States, defendant moved for summary judgment against payee, payee defaulted on motion, and summary judgment was granted dismissing complaint on merits, the United States was not entitled to have the judgment vacated and to be substituted as party plaintiff.—Central Nat. Bank of Yonkers v. Richmond, 22 N.Y.S.2d 747, 175 Misc. 425.

44. Mich.—Detroit Fidelity & Surety Co. v. Donaldson, 237 N.W. 380, 255 Mich. 129.
N.Y.—Peters v. Berkeley, 219 N.Y.S. 709, 219 App.Div. 261—Gordon v. Sterling, 13 How.Pr. 405.
Okl.—Savoy Oil Co. v. Emery, 277 P. 1029, 137 Okl. 67.
34 C.J. p 344 note 69.

45. Ark.—Gulf Refining Co. v. Haire, 1 S.W.2d 76, 175 Ark. 1036.
Colo.—Denver & R. G. W. R. Co. v. Town of Castle Rock, 62 P.2d 1164, 99 Colo. 340.
Ind.—**Corpus Juris quoted in** Brokaw v. Brokaw, 192 N.E. 728, 730, 99 Ind.App. 385.
Mont.—Moore v. Capital Gas Corp., 158 P.2d 302.
N.C.—In re Hood ex rel. Carolina State Bank of Gibson, 181 S.E. 621, 208 N.C. 509.
Ohio.—Suiter v. Suiter, 57 N.E.2d 616, 74 Ohio App. 44.
Pa.—Mooney v. Marchetti, Com.Pl., 31 Luz.Leg.Reg. 293—Young v. Findley, Com.Pl., 4 Sch.Reg. 442.
Wash.—Ballard Savings & Loan Ass'n v. Linden, 62 P.2d 1364, 188 Wash. 490.
34 C.J. p 345 note 70.

"Privity" which will entitle persons not parties to judgment to move directly for its nullification rests on some actual mutual or successive relationship as to the same right of property and has no personal basis as mere matter of sentiment.—Thomas v. Lambert, 1 S.E.2d 443, 187 Ga. 616.

46. N.Y.—Assets Realization Co. v. Howard, 127 N.Y.S. 798, 70 Misc. 651, affirmed 136 N.Y.S. 1130, 152 App.Div. 900.
34 C.J. p 345 note 71.

47. U.S.—Foster v. Mansfield, C. & I. M. R. Co., Ohio, 13 S.Ct. 28, 146 U.S. 88, 36 L.Ed. 899.
34 C.J. p 345 note 72.

This rule is, however, subject to the limitation that a person not a party may apply for the opening or vacation of the judgment where his rights are injuriously affected thereby.[48] Persons who, while not parties to the record, are the real parties in interest affected by the judgment stand in such relation to the judgment that they are entitled to move to set aside or vacate it.[49] Where the statute under which the proceeding is instituted specifies the persons entitled to relief, only persons within the statute may apply.[50] An application to vacate may be made by a receiver for a party,[51] by his trustee in bankruptcy,[52] by a garnishee,[53] by a surety for the principal debtor,[54] or by an indemnitor.[55] A subrogee has the necessary interest to procure the revocation of an order irregularly rescinding the decree by which he was subrogated.[56]

Persons who by reason of the filing of a lis pendens are bound to a judgment as though they were parties may move the court and be heard with reference to any judgment affecting their rights.[57] It has been held that a void judgment may be vacated and stricken from the record as a nullity at the instance of any person interested or affected thereby,[58] but a person whose interest was acquired after judgment cannot have the judgment vacated for irregularities of which the parties do not complain.[59]

Successful party. The courts have power in a proper case to open or set aside a judgment at the instance of the party in whose favor it was rendered, since, although nominally in his favor, it may be really prejudicial to him, or not so favorable as it should have been,[60] but a party cannot object to so much of a judgment as is clearly favorable to him although it is unauthorized,[61] or to a judgment in his favor rendered at his instance with knowledge of its irregularity.[62]

48. Alaska.—**Corpus Juris quoted in** Smith v. Coucher, 9 Alaska 730, 738.
Cal.—Greif v. Dullea, 153 P.2d 581, 66 Cal.App.2d 986.
Kan.—White v. Central Mut. Ins. Co., 91 P.2d 1, 150 Kan. 47.
N.C.—Carter v. Smith, 185 S.E. 15, 209 N.C. 788.
N.D.—**Corpus Juris cited in** Guenther v. Funk, 274 N.W. 839, 843, 67 N. D. 543.
Pa.—Hollinger v. Lynch, 52 Pa.Dist. & Co. 537, 56 Dauph.Co. 159.
S.C.—Ex parte Hart, 2 S.E.2d 52, 190 S.C. 473, certiorari denied Bowen v. Hart, 60 S.Ct. 82, 308 U.S. 569, 84 L.Ed. 477.
34 C.J. p 345 note 73.

Rights directly and necessarily affected

Where the rights of one not a party to a judgment are directly and necessarily affected, he may intervene after judgment and have his rights protected.—Standard Oil Co. v. State, Tex.Civ.App., 132 S.W.2d 612, error dismissed, judgment correct.

Judgment procured by fraud

Exception to rule that direct attack may not be made on judgment by one not a party thereto exists where such judgment was procured by fraud and materially affects interest of person making the attack. —Turman Oil Co. v. Roberts, Tex. Civ.App., 96 S.W.2d 724, error refused.

Indian lands

Where lands are held by the Five Civilized Tribes under patents in fee with restraints on alienation, a decree undertaking the alienation of the Indians' interest in the lands in a suit to which the United States is not a party has no binding effect and the United States may sue to cancel the decree.—Town of Okemah, Okl., v. U. S., C.C.A.Okl., 140 F.2d 963.

Intervention

(1) A person not a party of record cannot be heard to challenge a judgment or decree until he obtains leave to become a party by application to intervene based on sufficient ground. —In re Jordan, 1 A.2d 152, 332 Pa. 270.

(2) Order granting motion of bankruptcy trustee of one of the litigants to vacate judgment and to permit trustee to appear in cause was the equivalent of an order making the trustee a party to the action.—Nuckolls v. Bank of California, Nat. Ass'n, 74 P.2d 264, 10 Cal.2d 266, 114 A.L.R. 708.

49. N.C.—**Corpus Juris quoted in** Buncombe County v. Penland, 173 S.E. 609, 612, 206 N.C. 299.
34 C.J. p 346 note 77.

Enforcement unjust

Where enforcement of a judgment against petitioners who were not parties to the action would be unjust because of judgment having been paid or its never having been a lien or claim against the property, petitioners may apply for relief in the original action.—Home Owners' Loan Corp. v. Mascari, 19 N.W.2d 851, 247 Wis. 190.

50. Ind.—Bundy v. Hall, 60 Ind. 177.

51. N.Y.—Kubie v. Miller, 64 N.Y.S. 448, 31 Misc. 460.
34 C.J. p 346 note 78.

52. Cal.—Nuckolls v. Bank of California, Nat. Ass'n, 74 P.2d 264, 10 Cal.2d 266, 114 A.L.R. 708.

53. N.D.—Atwood v. Tucker, 145 N. W. 587, 26 N.D. 622, 51 L.R.A.,N. S., 597.
34 C.J. p 346 note 79.

54. Ala.—Bean v. Harrison, 104 So. 244, 213 Ala. 33.
34 C.J. p 346 note 80.

55. N.Y.—Manahan v. Petroleum Producing & Refining Co., 139 N. Y.S. 127, 198 App.Div. 192.
34 C.J. p 346 note 81.

56. La.—Buck v. Blair, 34 La.Ann. 767.

57. N.Y.—Ladd v. Stevenson, 19 N. E. 842, 112 N.Y. 325, 8 Am.S.R. 748.
34 C.J. p 347 note 83.

58. La.—In re Webster's Tutorship, 177 So. 638, 188 La. 623—Logwood v. Logwood, 168 So. 310, 185 La. 1.
Mich.—Williams v. Truax, 251 N.W. 375, 265 Mich. 323.
N.C.—**Corpus Juris quoted in** Buncombe County v. Penland, 173 S.E. 609, 612, 206 N.C. 299.
Okl.—Simmons v. Howard, 276 P. 718, 136 Okl. 118.
34 C.J. p 346 note 75.

59. Wis.—Ætna Ins. Co. v. Aldrich, 38 Wis. 107.
34 C.J. p 345 note 74.

60. La.—Ford v. Vetsch, App., 167 So. 842.
Mont.—Meyer v. Lemley, 282 P. 268, 86 Mont. 83.
N.J.—Grant Inventions Co. v. Grant Oil Burner Corporation, 145 A. 721, 104 N.J.Eq. 341.
34 C.J. p 347 note 85.

Void judgment

Judgment entered without due service of process is void, and can be moved against by prevailing party.—State v. Fishing Appliances, 16 P.2d 822, 170 Wash. 426.

61. Cal.—Kellett v. Kellett, 294 P. 755, 110 Cal.App. 691.
34 C.J. p 347 note 86.

62. Miss.—**Corpus Juris cited in**

Joint defendants. A judgment against several defendants jointly, which is void or irregular as to one of them, may be vacated on the application of that defendant.[63] In such a case it is not necessary that the judgment should be vacated as to all the defendants if their liability is several as well as joint,[64] unless they are inseparably connected in interest,[65] except in those jurisdictions where a joint judgment is regarded as an entirety for all purposes.[66] One joint defendant cannot object to errors and irregularities affecting only his codefendants.[67]

Legal representatives. Under statutes regulating the opening or vacating of judgments which provide that an application for such relief may be made by the "legal representatives of the defendant," or by "any person legally representing him," an application may be made not only by the executor or administrator of a deceased defendant[68] and his widow and heirs,[69] but also one who by deed or other grant has acquired his entire interest in the subject matter of the action.[70] Even in the absence of such a statute, the executor or administrator of a deceased judgment debtor is not a stranger to the record and may move to vacate in proper cases.[71] Persons applying in this character for the vacation of the judgment must show a state of facts which would have supported the application if made by the original party.[72]

Creditors whose claims have not been reduced to judgment have been held to have no standing on an application to vacate a judgment against their debtor.[73]

Judgment creditors whose interests are affected may maintain an application to vacate a prior judgment against their debtor on the ground that such judgment is fraudulent as to them,[74] or wholly void for want of jurisdiction,[75] but mere irregularities not rendering the judgment void cannot be taken advantage of by subsequent judgment creditors.[76]

A subsequent purchaser of land, on which a judgment has become a lien, takes cum onere, and cannot maintain an application to vacate the judgment for irregularity,[77] although there is also authority to the contrary;[78] but a void judgment, as distinguished from one that is merely irregular,[79] or a judgment voidable as fraudulent,[80] may be vacated at the instance of a subsequent purchaser. A transferee pendente lite of all the interest of defendant becomes the real party in interest, and as such may apply to set aside the judgment.[81] An execution purchaser may have a fraudulent judgment vacated.[82]

Mortgagors and lienors have sufficient interest to attack a judgment for invalidity,[83] but a prior mort-

Cratin v. Cratin, 174 So. 255, 256, 178 Miss. 881.
Mo.—Downing v. Still, 43 Mo. 309.

63. Mont.—Morse v. Callantine, 47 P. 635, 19 Mont. 67.
34 C.J. p 347 note 88.

64. N.Y.—Hewlett v. Van Voorhis, 187 N.Y.S. 533, 196 App.Div. 322, affirmed 135 N.E. 952, 233 N.Y. 642.
34 C.J. p 347 note 89.

65. Neb.—Sturgis, Cornish & Burn Co. v. Miller, 112 N.W. 595, 79 Neb. 404.
34 C.J. p 347 note 90.

66. W.Va.—Steubenville Nat. Exch. Bank v. McElfish Clay Mfg. Co., 37 S.E. 541, 48 W.Va. 406.
34 C.J. p 347 note 91.

67. Pa.—Cleary v. Quaker City Cab Co., 132 A. 135, 285 Pa. 241.
34 C.J. p 347 note 92.

68. N.Y.—Hartigan v. Nagle, 32 N. Y.S. 220, 11 Misc. 449.
Pa.—Dick v. Mahoney, 21 Pa.Co. 241.

69. Iowa.—Wood v. Wood, 113 N.W. 492, 136 Iowa 128, 125 Am.S.R. 223, 12 L.R.A.,N.S., 891.
34 C.J. p 348 note 95.

70. N.C.—Hood ex rel. Merchants' & Manufacturers' Bank of Andrews v. Freel, 174 S.E. 310, 206 N.C. 432.
34 C.J. p 348 note 96.

71. Ill.—Whitney v. Bohlen, 42 N.E. 162, 157 Ill. 571.
34 C.J. p 348 note 97.

72. Cal.—Corwin v. Bensley, 43 Cal. 253.
Iowa.—Wood v. Wood, 113 N.W. 492, 136 Iowa 128, 125 Am.S.R. 223, 12 L.R.A.,N.S., 891.

73. N.J.—Melville v. Brown, 16 N. J.Law 363.
34 C.J. p 348 note 99.

Attaching creditor

A judgment will not be opened at the instance of plaintiff in attachment against the same defendant, since prior to judgment he is not a creditor in legal contemplation, but merely one who may turn out to be such.—Burtis v. Dickinson, 30 N.Y. S. 836, 81 Hun 343—34 C.J. p 348 note 2.

74. Mo.—**Corpus Juris quoted in** Shepard v. Shepard, 186 S.W.2d 472, 475, 353 Mo. 1057.
N.C.—**Corpus Juris quoted in** Buncombe County v. Penland, 173 S.E. 609, 612, 206 N.C. 299.
Ohio.—**Corpus Juris quoted in** Hooffstetter v. Adams, 35 N.E.2d 896, 901, 67 Ohio App. 21.
34 C.J. p 346 note 76, p 348 note 3.

75. Wyo.—O'Keefe v. Foster, 40 P. 525, 5 Wyo. 343.
34 C.J. p 348 note 4.

76. Pa.—Silverstein v. Cohen, 12 Pa.Dist. & Co. 218, 21 North Co. 377—Ziarko v. Harun, Com.Pl., 17 Northumb.Leg.J. 53, 59 York Leg. Rec. 25.
34 C.J. p 348 note 5.

Statutory right of creditor to attack judgment of another creditor because of an alleged defect appearing on face of record or pleadings does not extend to mere irregularities previous to judgment, but defects must be such as are not amendable.—Mell v. McNulty, 195 S. E. 181, 185 Ga. 343.

77. Neb.—Powell v. McDowell, 20 N.W. 271, 16 Neb. 424.
34 C.J. p 349 note 9.

78. Kan.—Leslie v. Gibson, 103 P. 115, 80 Kan. 504, 133 Am.S.R. 219, 26 L.R.A.,N.S., 1063.
34 C.J. p 349 note 10.

79. N.J.—In re Mullineaux, 69 A. 968, 76 N.J.Law 396.
34 C.J. p 349 note 11.

80. Mich.—Vincent v. Benzie Cir. Judge, 102 N.W. 369, 139 Mich. 90.
34 C.J. p 349 note 12.

81. Cal.—McKendrick v. Western Zinc Min. Co., 130 P. 865, 165 Cal. 24.
34 C.J. p 349 note 14.

82. N.Y.—Easton Nat. Bank v. Buffalo Chemical Works, 1 N.Y.S. 250, 43 Hun 557.

83. W.Va.—George v. Male, 153 S. E. 507, 109 W.Va. 222.

gagor or lienor who was not a party, and whose rights are not affected by the judgment, cannot move to vacate it.[84]

"Unknown parties." Persons who are actually affected by a judgment by reason of having been made parties as "unknown" defendants may apply to have such judgment opened or vacated.[85]

§ 294. Notice or Process

An application to open or vacate a judgment is generally required to be on notice to the adverse parties, and, where the proceeding is by way of action, process must be served.

As a general rule an application to open or vacate a judgment must be on notice to the adverse parties,[86] particularly where the application is made after the expiration of the term.[87] It has been held that during the term at which a judgment is rendered it may be set aside for sufficient cause without notice to the party affected,[88] but there is also authority to the contrary.[89] Where the court would have been justified in setting the judgment aside on its own motion, want or insufficiency of notice has been held to be immaterial.[90] It has likewise been held that leave to withdraw a motion to vacate may be granted without notice to the adverse party,[91] and an order vacating a judgment may be set aside, and the judgment reinstated, without notice.[92] Notice may be waived by appearance or otherwise.[93]

Where the proceedings are by action, or by way of statutory petition or complaint and summons, a summons must be served;[94] but process need not be served where the proceeding is by motion in the original action.[95]

Sufficiency. A notice of motion to vacate should be in writing[96] and must be sufficiently full and explicit to advise the party of the nature of the proceeding, the judgment to be affected, and the grounds on which the motion will be based,[97] as well as the time and place of hearing.[98] A notice is sufficient when it informs the party entitled thereto of the thing which is to be done and leads him to the place of doing it at the proper time.[99] Stat-

Wyo.—O'Keefe v. Foster, 40 P. 525, 5 Wyo. 343.

84. Wis.—Bean v. Fisher, 14 Wis. 57.

85. Minn.—Boeing v. McKinley, 46 N.W. 766, 44 Minn. 392.
34 C.J. p 349 note 19.

86. U.S.—American Ins. Co. v. Lucas, D.C.Mo., 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466, and affirmed, C.C.A., American Ins. Co. v. Scheufler, 129 F.2d 143, certiorari denied 63 S.Ct. 257, 317 U.S. 687, 87 L.Ed. 551, rehearing denied 63 S.Ct. 433, 317 U.S. 712, 87 L.Ed. 567.
Ark.—State v. West, 254 S.W. 828, 160 Ark. 413.
Cal.—Harth v. Ten Eyck, 108 P.2d 675, 16 Cal.2d 829—Bond v. Farmers & Merchants Nat. Bank, Los Angeles, 149 P.2d 722, 64 Cal.App. 2d 842—Colby v. Pierce, 62 P.2d 778, 17 Cal.App.2d 612—Linstead v. Superior Court in and for Mendocino County, 61 P.2d 355, 17 Cal. App.2d 9.
Ga.—Jackson v. Jackson, 35 S.E.2d 258, 199 Ga. 716—Citizens' & Contractors' Bank v. Maddox, 166 S.E. 227, 175 Ga. 779.
Ill.—Schmahl v. Aurora Nat. Bank, 35 N.E.2d 689, 311 Ill.App. 228.
Ind.—Penn v. Ducomb, 12 N.E.2d 116, 213 Ind. 133—State ex rel. Symons v. Wells County Bank, 196 N.E. 873, 208 Ind. 543, 103 A.L.R. 611.
Mich.—McHenry v. Merriam, 204 N.W. 99, 231 Mich. 479.
N.J.—Surety Building & Loan Ass'n of Newark v. Risack, 179 A. 630, 118 N.J.Eq. 425.
N.C.—Virginia-Carolina Joint Stock Land Bank v. Alexander, 160 S.E. 462, 201 N.C. 453.
Okl.—Neff v. Edwards, 226 P. 358, 99 Okl. 176.
Pa.—German Trust Co. of Davenport, Iowa, v. Plotke, 118 A. 508, 274 Pa. 483.
W.Va.—Smith v. Wallace, 182 S.E. 538, 116 W.Va. 546.
Wis.—In re Meek's Estate, 227 N.W. 270, 199 Wis. 602.
34 C.J. p 351 note 25.

87. Alaska.—**Corpus Juris quoted in** Smith & Coucher, 9 Alaska 730, 736.
Ind.—Zimmerman v. Zumpfe, 33 N.E.2d 102, 218 Ind. 476.
Ky.—First State Bank v. Thacker's Adm'x, 284 S.W. 1020, 215 Ky. 186.
Mo.—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386.
34 C.J. p 350 note 23.

88. Alaska.—**Corpus Juris quoted in** Smith v. Coucher, 9 Alaska 730, 736.
Ark.—Stinson v. Stinson, 159 S.W.2d 446, 203 Ark. 883.
N.M.—Arias v. Springer, 78 P.2d 153, 42 N.M. 350.
S.D.—In re Barnes' Estate, 220 N.W. 527, 53 S.D. 200.
Tex.—Brannon v. Wilson, Civ.App., 260 S.W. 201.
Wyo.—In re Shaul, 30 P.2d 478, 46 Wyo. 549.
34 C.J. p 349 note 21.

89. Mo.—Savings Trust Co. of St. Louis v. Skain, 131 S.W.2d 566, 345 Mo. 46.
34 C.J. p 350 note 22.

90. Kan.—Hetzer v. Koogler, 123 P. 876, 87 Kan. 37.
34 C.J. p 351 note 27.

91. Mont.—Jensen v. Barbour, 31 P. 592, 12 Mont. 566.

92. N.C.—Perry v. Pearce, 68 N.C. 367.

93. Ind.—Penn v. Ducomb, 12 N.E. 2d 116, 213 Ind. 133.
S.D.—In re Barnes' Estate, 220 N. W. 527, 53 S.D. 200.
34 C.J. p 351 note 24.
Knowledge of hearing dispenses with notice, unless complaint is made of date of notice and postponement is sought in order to make preparation.—Ex parte Fidelity & Deposit Co. of Maryland, 134 So. 861, 223 Ala. 98.

94. Okl.—Purcell Wholesale Grocery v. Cantrell, 255 P. 704, 124 Okl. 273—American Inv. Co. v. Wadlington, 244 P. 435, 114 Okl. 124—Myers v. Chamness, 228 P. 988, 102 Okl. 131.
34 C.J. p 351 note 32.

95. Ark.—State v. West, 254 S.W. 828, 160 Ark. 413.

96. N.C.—Harper v. Sugg, 16 S.E. 173, 111 N.C. 324.
34 C.J. p 351 note 35.

97. Cal.—O'Brien v. Leach, 72 P. 1004, 139 Cal. 220, 96 Am.S.R. 105.
34 C.J. p 351 note 36.

98. Nev.—Horton v. New Pass Gold & Silver Min. Co., 27 P. 376, 21 Nev. 184, reheard 27 P. 1018, 21 Nev. 184.
34 C.J. p 351 note 37.

99. Neb.—Fisk v. Thorp, 70 N.W. 498, 51 Neb. 1.
34 C.J. p 351 note 39.

utes as to the time, form, and manner of notice must be observed.[1]

Service. Process must be served on the party, and service on his attorney is insufficient, where the proceeding to vacate is by action, or by statutory petition, or complaint, and summons.[2] Notice of motion may be served either on the party[3] or on his attorney of record,[4] but under some decisions service on the attorney is insufficient.[5] If the party is dead, notice must be served on his legal representative.[6]

Notice by publication. A motion to set aside a judgment is not such a proceeding as will authorize notice to the opposing party by publication pursuant to statutes providing for service by publication in actions,[7] but service by publication may be had in otherwise proper cases, where the proceeding is by way of action, or by statutory petition or complaint and summons.[8]

§ 295. Affidavits on Application

A motion to open or vacate a judgment should be supported by affidavits as to the facts on which the applicant relies.

A petition or motion to vacate a judgment should be verified or supported by affidavits as to the facts set forth,[9] except where the facts necessary to support the application appear on the face of the record,[10] or rest within the personal knowledge of the judge, where the application is made at the same term at which the judgment was rendered, and while the cause is still in fieri.[11] A copy of the affidavits should be served on the opposite party or his counsel,[12] but ordinarily the affidavits need not be filed until the hearing of the motion.[13]

Requisites and sufficiency. The affidavits in support of the application should show the existence and nature of the judgment sought to be set aside,[14] state the grounds on which relief is asked, not inferentially but directly, and not generally but specifically and in detail,[15] show the existence of a meritorious cause of action or defense, as discussed supra § 290, and show that applicant has not been negligent or lacking in due diligence, as discussed supra § 289. In all these particulars the affidavit is to be construed most strongly against the party

1. Cal.—Jameson v. Warren, 267 P. 372, 91 Cal.App. 590.
34 C.J. p 351 note 40.

2. Wash.—State v. Superior Court for King County, 3 P.2d 1098, 164 Wash. 618, 78 A.L.R. 366—Foster v. Foster, 227 P. 514, 130 Wash. 376.
34 C.J. p 352 notes 41, 42.

Service of summons in another county is proper.—Buckeye State Building & Loan Co. v. Ryan, 157 N. E. 811, 24 Ohio App. 481.

Waiver

Attorney's agreement that petition to vacate judgment rendered at previous term may be continued does not constitute waiver of service of summons.—Purcell Wholesale Grocery v. Cantrell, 255 P. 704, 124 Okl. 273.

3. Cal.—Vallejo v. Green, 16 Cal. 160.
N.Y.—Lusk v. Hastings, 1 Hill 656.
Okl.—Neff v. Edwards, 226 P. 358, 99 Okl. 176.

Nominal plaintiff as "adverse party"

Where a judgment is recovered by one person for the use of others in a proceeding to open the judgment where the statute requires notice to be given to the "adverse party," the notice need not be given to the nominal plaintiff, but it is sufficient to notify the usee.—Fitzgerald v. Cross, 30 Ohio St. 444.

4. Ark.—State v. West, 254 S.W. 828, 160 Ark. 413.
N.Y.—Langrick v. Rowe, 32 N.Y.S.2d 328, affirmed 41 N.Y.S.2d 82, 265 App.Div. 793, appeal denied 41 N. Y.S.2d 949, 266 App.Div. 767, motion denied 50 N.E.2d 309, 290 N. Y. 926, affirmed 52 N.E.2d 964, 291 N.Y. 756.
Okl.—Neff v. Edwards, 226 P. 358, 99 Okl. 176.
Wash.—Foster v. Foster, 227 P. 514, 130 Wash. 376.
34 C.J. p 352 note 44.

5. Iowa.—McCoy v. Philadelphia Fire Assoc., 185 N.W. 101, 192 Iowa 452.
34 C.J. p 352 note 45.

6. Ga.—Grier v. Jones, 54 Ga. 154.
34 C.J. p 352 note 46.

Revocation of agency

Death of defendant prior to the filing of plaintiff's petition to vacate judgment for defendant terminated the authority of defendant's attorneys to act further as his agents and to receive order of notice of petition to vacate the judgment.—Noyes v. Bankers Indemnity Ins. Co., 30 N.E.2d 867, 307 Mass. 567.

7. Ind.—Beck v. Koester, 79 Ind. 135.
Iowa.—Des Moines Union R. Co. v. Polk County Dist. Ct., 153 N.W. 217, 170 Iowa 568.

8. Ohio.—Whitehead v. Post, 2 Ohio Dec., Reprint, 468, 3 West.L.Month. 195.
Okl.—**Corpus Juris cited in** Parker v. Board of County Com'rs of Okmulgee County, 102 P.2d 880, 882, 187 Okl. 308.

Action in rem

An action to vacate a judgment was not an action in which service of process could be made by publication of summons, since it was not "an action in rem" in which the court already had jurisdiction of the res.—Stevens v. Cecil, 199 S.E. 161, 214 N.C. 217.

9. Cal.—Hecq v. Conner, 265 P. 180, 203 Cal. 504.
Pa.—Elliott-Lewis Co. v. Clarke, Com.Pl., 28 Del.Co. 250.
34 C.J. p 353 note 62.

Affidavit unnecessary where petition verified

Neb.—Nelson v. Nielsen, 203 N.W. 640, 113 Neb. 453.

Requirement may be waived

Ill.—Martin J. Hecht, Inc., v. Steigerwald, 24 N.E.2d 394, 302 Ill.App. 556.

10. Ind.—Wabash R. Co. v. Gary, 132 N.E. 737, 191 Ind. 394.
34 C.J. p 354 note 63.

11. Ill.—Geisler v. Bank of Brussels, 44 N.E.2d 754, 316 Ill.App. 309.
34 C.J. p 354 note 64.

12. Ill.—Scales v. Labar, 51 Ill. 232.
34 C.J. p 354 note 66.

13. Cal.—San Diego Realty Co. v. McGinn, 94 P. 374, 7 Cal.App. 264.
N.C.—Jones v. Swepson, 94 N.C. 700.

14. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
34 C.J. p 354 note 68.

15. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
34 C.J. p 354 note 69.

making it.[16] The affidavit must state the facts positively and directly; it is not sufficient to allege them on information and belief;[17] but affidavits made only on information and belief may serve to initiate the proceeding, since the defect is not jurisdictional and may be cured by subsequently filing amended or supplemental affidavits made on knowledge.[18] Substantial compliance with statutory requirements is sufficient.[19] Ordinarily the application should be supported by an affidavit made by the party himself, but the necessary affidavits may be made by the attorney, or other person, provided they are made on knowledge, instead of on information and belief, and a sufficient reason is shown why an affidavit is not made by the party.[20] An affidavit which fails to show why it was not made by the party has been held to be insufficient.[21] One of several defendants, having personal knowledge of the facts, may make the affidavit on behalf of all.[22] Affidavits used in the original suit, but not referred to, and not made part of the affidavits on the proceedings to vacate, cannot be considered.[23] An unsigned affidavit of the attorney presented with the motion papers may be treated by the court as a professional statement of counsel.[24] Matters of record should be shown by the record itself, or a transcript thereof, and not merely by affidavit.[25]

§ 296. Counter-Affidavits

Counter-affidavits, in opposition to opening or vacating the judgment, may be submitted.

The party seeking to sustain a judgment, as against a motion to set it aside, may present for the consideration of the court affidavits in opposition to those of the moving party, with regard to the alleged grounds for vacating the judgment or the matters set up in excuse of defendant's failure to make his defense in due time,[26] but the existence of a meritorious cause of action or defense, as shown by the moving party's affidavit of merits, cannot be controverted by counter-affidavits,[27] because, as discussed infra § 299, on the application to vacate the court does not try and determine whether or not a cause of action or defense exists in point of fact, but only whether such a prima facie case has been made as ought to be tried and determined in the regular way.

Counter-affidavits must set forth facts, and not merely matters of inference, conjecture, or belief.[28]

§ 297. Evidence

General rules of evidence apply in a proceeding to open or vacate a judgment.

The party who seeks to have a judgment opened or set aside must assume the burden of proving the facts essential to entitle him to the relief asked.[29]

16. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 122, 35 N.M. 491.
34 C.J. p 354 note 72.

17. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
34 C.J. p 354 note 73.

18. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
34 C.J. p 355 note 74.

19. W.Va.—Ceranto v. Trimboli, 60 S.E. 138, 63 W.Va. 340.

20. Mass.—Magee v. Flynn, 139 N. E. 842, 245 Mass. 128.
34 C.J. p 355 note 76.

Party or his legal representative

An affidavit by a lawyer who was a regular employee of plaintiff's attorney and was especially delegated to handle plaintiff's case was properly filed in support of motion to relieve plaintiff from judgment allegedly obtained through mistake, notwithstanding statute was construed as requiring that affidavit be made by party or his legal representative. —Salazar v. Steelman, 71 P.2d 79, 22 Cal.App.2d 402.

21. Okl.—Crowley - Southerland Commn. Co. v. Husband, 140 P. 1144, 42 Okl. 77.
34 C.J. p 355 note 77.

22. Cal.—Palmer v. Barclay, 28 P. 226, 92 Cal. 199.
34 C.J. p 355 note 78.

23. Ind.—Williams v. Kessler, 62 Ind. 183.
34 C.J. p 355 note 79.

24. Iowa.—McMillan v. Osterson, 183 N.W. 487, 191 Iowa 983.

25. Mo.—Heilburn v. Jennings, 111 S.W. 857, 132 Mo.App. 216.

26. Ill.—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N. E.2d 736, 310 Ill.App. 465.
N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
Pa.—Patterson Building & Loan Ass'n No. 2 v. Bolif, 18 Pa.Dist. & Co. 119.
34 C.J. p 355 note 82.

Leave to file affidavit

Trial court properly disregarded affidavit of defense in passing on defendant's motion to vacate an ex parte judgment, where defendant had not obtained leave to file affidavit of defense.—Latham v. Salisbury, 61 N.E.2d 306, 326 Ill.App. 253.

27. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
N.D.—Bothum v. Bothum, 10 N.W.2d 603, 72 N.D. 649.
34 C.J. p 355 note 84.

28. Cal.—Pelegrinelli v. McCloud River Lumber Co., 82 P. 695, 1 Cal.App. 593.
34 C.J. p 356 note 87.

29. U.S.—Erie R. Co. v. Irons, C.C. A.N.J., 48 F.2d 60, certiorari denied 51 S.Ct. 649, 283 U.S. 857, 75 L.Ed. 1463.
Ala.—Ex parte New Home Sewing Mach. Co., 189 So. 874, 238 Ala. 159—Bean v. Harrison, 104 So. 244, 213 Ala. 33.
Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.
Ark.—Karnes v. Gentry, 172 S.W.2d 424, 205 Ark. 1112—Farmers Union Mut. Ins. Co. v. Jordan, 140 S.W.2d 430, 200 Ark. 711—Merchants' & Planters' Bank & Trust Co. v. Ussery, 38 S.W.2d 1087, 183 Ark. 838.
Cal.—Hewins v. Walbeck, 141 P.2d 241, 60 Cal.App.2d 603—Bruskey v. Bruskey, 41 P.2d 203, 4 Cal.App.2d 472.
Ga.—Hamilton v. Kinnebrew, 131 S. E. 470, 161 Ga. 495—Benton v. Maddox, 184 S.E. 788, 52 Ga.App. 813.
Ill.—Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 290 Ill. App. 558—Central Cleaners and Dyers v. Schild, 1 N.E.2d 90, 284 Ill.App. 267.
Iowa.—In re Kinnan's Estate, 255 N. W. 632, 218 Iowa 572.

General inferences and presumptions of fact apply in such proceedings.[30] On an inquiry of this kind presumptions will be indulged, requiring evidence to overcome them, of the regularity and validity of proceedings in the case anterior to judgment,[31] of the correctness of recitals in the record,[32] and of the jurisdiction of the court.[33] In a direct attack of this character all these presumptions are prima facie only, and may be contradicted by proof,[34] and it has been held that no presumption of regularity will be indulged in support of the judgment.[35] On the other hand, it has been held that the record cannot be impeached in a proceeding instituted at a subsequent term.[36] Where the application is by motion to strike, and such proceeding is available only to reach defects apparent on the face of the record, the record must be taken as true and matters outside the record cannot be considered.[37]

Admissibility. General rules govern as to the admissibility of evidence in a proceeding to open or vacate a judgment.[38] Evidence, in order to be admissible, must be competent, relevant, and material.[39] The evidence should be confined to the matters stated in applicant's moving papers.[40]

Weight and sufficiency. The facts on which the judgment is sought to be opened or vacated must be established by clear, strong, and satisfactory proof,[41] and this is especially true where it is nec-

La.—Smith v. Crescent Chevrolet Co., App., 1 So.2d 421.
N.J.—Strong v. Strong, 47 A.2d 427—Simon v. Calabrese, 46 A.2d 58, 137 N.J.Eq. 581—**Corpus Juris cited in** In re Gilbert's Estate, 15 A.2d 111, 114, 18 N.J.Misc. 540.
N.D.—Jacobson v. Brey, 6 N.W.2d 269, 72 N.D. 269.
Ohio.—Kight v. Boren, App., 67 N.E. 2d 48.
Okl.—Welden v. Home Owners Loan Corporation, 141 P.2d 1010, 193 Okl. 167—Pruner v. McKee, 258 P. 749, 126 Okl. 121—Elias v. Smith, 246 P. 409, 117 Okl. 273.
Pa.—Keystone Bank of Spangler, Pa., v. Booth, 6 A.2d 417, 334 Pa. 545—Griffith v. Hamer, 173 A. 874, 113 Pa.Super. 239—Steehler v. Volk, 167 A. 424, 109 Pa.Super. 190—Schwartz v. Stewart, Com.Pl., 55 Pa.Dist. & Co. 633, 5 Lawrence L. J. 1—Frazier v. Pursel, 6 Pa.Dist. & Co. 102, 39 York Leg.Rec. 117—Roth v. Cranmer, Com.Pl., 21 Leh. L.J. 97—Landau Bros. v. McIntosh, Com.Pl., 35 Luz.Leg.Reg. 16—Favinger v. Favinger, Com.Pl., 60 Montg.Co. 149.
Tex.—Kern v. Smith, Civ.App., 164 S.W.2d 193, error refused—Snell v. Knowles, Civ.App., 87 S.W.2d 871, error dismissed.
Wis.—**Corpus Juris cited in** Harris v. Golliner, 294 N.W. 9, 11, 235 Wis. 572.
34 C.J. p 352 note 50.

30. N.Y.—Vernon v. Gillen Printing Co., 39 N.Y.S. 172, 16 Misc. 507.
34 C.J. p 353 note 53.

Time of discovery of judgment
In proceeding to vacate a judgment, no intendments can be indulged to establish the time of discovery of entry of judgment except such as are shown by the record.—Harris v. Golliner, 294 N.W. 9, 235 Wis. 572.

31. U.S.—Baumgartner v. U. S., C.C.A.Mo., 138 F.2d 29, reversed on other grounds 64 S.Ct. 1240, 322 U. S. 665, 88 L.Ed. 1525.
Cal.—Bank of Italy v. E. N. Cadenasso, 274 P. 534, 206 Cal. 436.
Ga.—Benton v. Maddox, 192 S.E. 316, 56 Ga.App. 132.
Ky.—Commonwealth ex rel. Love v. Reynolds, 146 S.W.2d 41, 284 Ky. 809.
N.D.—Jacobson v. Brey, 6 N.W.2d 269, 72 N.D. 269.
Ohio.—McCullough v. Luteman, 15 Ohio App. 207.
Tex.—Smith v. Pegram, 80 S.W.2d 354, error refused.
34 C.J. p 353 note 51.

Absolute verities
In a suit to set aside a judgment it has been stated that judgments and decrees import absolute verities.—Rice v. Moore, 109 S.W.2d 148, 194 Ark. 585.

32. Ark.—First Nat. Bank v. Dalsheimer, 248 S.W. 575, 157 Ark. 464.
34 C.J. p 353 note 52, p 356 note 93.

33. Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.
Cal.—Spahn v. Spahn, App., 162 P. 2d 53.
Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
Mass.—Robinson v. Freeman, 128 N. E. 718, 236 Mass. 446.

34. Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.
Ark.—State v. West, 254 S.W. 828, 160 Ark. 413.
Cal.—In re Dahnke's Estate and Guardianship, 222 P. 381, 64 Cal. App. 555.
Ill.—Reid v. Chicago Rys. Co., 231 Ill.App. 58.
Miss.—Bank of Richton v. Jones, 121 So. 823, 153 Miss. 796.
Mo.—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173.
N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
Okl.—City of Clinton ex rel. Richardson v. Cornell, 132 P.2d 340, 191 Okl. 600—Morrissey v. Hurst, 229 P. 431, 107 Okl. 1—Myers v. Chamness, 228 P. 988, 102 Okl. 131.
Tex.—Levy v. Roper, Civ.App., 230 S.W. 514, modified on other grounds 256 S.W. 251, 118 Tex. 356.
34 C.J. p 353 note 55, p 356 note 94—p 357 note 96.

Presumptions on collateral attack are not applicable.—City of Clinton ex rel. Richardson v. Cornell, 132 P.2d 340, 191 Okl. 600.

35. U.S.—Blythe v. Hinckley, C.C. Cal., 84 F. 228, affirmed 111 F. 827, 49 C.C.A. 647, certiorari denied 22 S.Ct. 941, 184 U.S. 701, 46 L.Ed. 766.
34 C.J. p 353 note 56.

36. Mo.—Harrison v. Slaton, 49 S. W.2d 31—In re Henry County Mut. Burial Ass'n, 77 S.W.2d 124, 229 Mo.App. 300.

37. Pa.—Broadway Nat. Bank of Scottdale v. Diskin, 161 A. 470, 105 Pa.Super. 279.

38. Idaho.—Baldwin v. Anderson, 8 P.2d 461, 51 Idaho 614.
N.H.—Barclay v. Dublin Lake Club, 1 A.2d 633, 89 N.H. 500.
Va.—Brame v. Nolen, 124 S.E. 299, 139 Va. 413.
34 C.J. p 356 note 88.

A petition to vacate is not evidence of allegations therein.—Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 290 Ill.App. 558.

Failure to object
Judge could consider statements of petitioner's counsel at hearing on petition to vacate judgment, in absence of exception to erroneous ruling that it was unnecessary to introduce supporting evidence.—Mellet v. Swan, 168 N.E. 732, 269 Mass. 173.

39. Cal.—Cresta v. Ocean Shore R. Co., 206 P. 460, 56 Cal.App. 687.
Pa.—Kines v. Grossman, Com.Pl., 51 Dauph.Co. 58.
34 C.J. p 356 note 89.

40. N.Y.—Zeltner v. Henry Zeltner Brewing Co., 83 N.Y.S. 366, 85 App. Div. 387.
34 C.J. p 356 note 90.

41. Ala.—Ex parte Dayton Rubber Mfg. Co., 122 So. 643, 219 Ala. 482.
Ark.—**Corpus Juris quoted in** Gra-

essary to overcome an officer's return of service.[42] According to some authorities, the application should be denied where the evidence is evenly balanced,[43] but others hold that where the court is in doubt the better course is to give applicant the benefit of the doubt.[44] Where the proofs in support of the application are uncontradicted and unimpeached, they must be accepted as true.[45] Appli-

ham v. Graham, 133 S.W.2d 627, 630, 199 Ark. 165.

Iowa.—In re Carpenter's Estate, 5 N.W.2d 175, 232 Iowa 919.

Mont.—Burgess v. Lasby, 9 P.2d 164, 91 Mont. 482.

N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.

Okl.—Welden v. Home Owners Loan Corporation, 141 P.2d 1010, 193 Okl. 167—Cummins v. Chandler, 97 P.2d 765, 186 Okl. 200—Burkhart v. Lasley, 75 P.2d 1124, 182 Okl. 43—Morrison v. Swink, 261 P. 209, 128 Okl. 97.

Pa.—Plunkett v. Raniszewski, 166 A. 500, 108 Pa.Super. 506—Nellis v. McSweeney, 6 Pa.Dist. & Co. 608, 6 Erie Co. 166—Frazier v. Pursel, 6 Pa.Dist. & Co. 102, 39 York Leg. Rec. 117—Kines v. Grossman, Com. Pl., 51 Dauph.Co. 58—Hollenbaugh v. Welchans, Com.Pl., 46 Dauph.Co. 165—Neon Electric Mfg. Co. v. Hultzapple, Com.Pl., 27 Del.Co. 174—E. P. Wilbur Trust Co. v. Armstrong, Com.Pl., 20 Leh.L.J. 112—Miller v. Miller, Com.Pl., 37 Luz. Leg.Reg. 19—Dinicuola v. Agresta, Com.Pl., 34 Luz.Leg.Reg. 204—Fish v. Regula, Com.Pl., 33 Luz.Leg. Reg. 249—Lincoln Deposit & Savings Bank v. Kline, Com.Pl., 33 Luz.Leg.Reg. 117—Kurlancheek v. Aruscavage, Com.Pl., 32 Luz.Leg. Reg. 272—Goeringer v. Bonner, Com.Pl., 32 Luz.Leg.Reg. 231—Bridgeport Realty Co. v. Ionnone, Com.Pl., 61 Montg.Co. 284—Favinger v. Favinger, Com.Pl., 60 Montg. Co. 149—Austra v. Yurgenc, Com. Pl., 8 Sch.Reg. 96.

Wis.—**Corpus Juris quoted in** Harris v. Golliner, 294 N.W. 9, 11, 235 Wis. 572.

34 C.J. p 358 note 99.

Presumption

Judgment or order of court of general jurisdiction should not be set aside merely on a statutory presumption, such as presumption of regular performance of official duty.—Burgess v. Lasby, 9 P.2d 164, 91 Mont. 482.

Want of jurisdiction must be established by more than a preponderance of the evidence where the record recites jurisdictional facts.—Hayes v. Kerr, 45 N.Y.S. 1050, 19 App.Div. 91.

Clerical misprision can only be shown by record, and, where not so shown, exception to judgment based thereon cannot avail.—Newman v. Ohio Valley Fire & Marine Ins. Co., 299 S.W. 559, 221 Ky. 616.

Evidence held sufficient

Ill.—Central Cleaners and Dyers v. Schild, 1 N.E.2d 90, 284 Ill.App. 267.

Iowa.—First Nat. Bank v. Federal Reserve Bank of Chicago, 231 N. W. 453, 210 Iowa 521, 69 A.L.R. 1329.

Ky.—Klarer Provision Co. v. Frey, 66 S.W.2d 63, 252 Ky. 206.

Mass.—Maki v. New York, N. H. & H. R. Co., 199 N.E. 760, 293 Mass. 223.

N.Y.—Karchman v. Karchman, 230 N.Y.S. 856, 224 App.Div. 773.

Okl.—Eastland v. Oklahoma City, 246 P. 830, 118 Okl. 97.

Pa.—Bickel v. Maddak, 158 A. 614, 104 Pa.Super. 325—Safe Deposit & Trust Co. v. Cassella, 83 Pa.Super. 255—Trump v. Barr, Com.Pl., 48 Dauph. Co. 455—Cramer v. Sizemore, Com.Pl., 48 Dauph.Co. 169—Hayes v. Mack, Com.Pl., 19 Erie Co. 501.

34 C.J. p 358 note 99 [a].

Evidence held insufficient

U.S.—Erie R. Co. v. Irons, C.C.A.N. J., 48 F.2d 60, certiorari denied 51 S.Ct. 649, 283 U.S. 857, 75 L.Ed. 1463.

Ariz.—Patterson v. Connolly, 77 P.2d 813, 51 Ariz. 443.

Ga.—Burch v. Dodge County, 20 S.E. 2d 428, 193 Ga. 890.

Ky.—Spencer v. Martin Mining Co., 83 S.W.2d 39, 259 Ky. 697—Citizens' Ins. Co. of New Jersey v. Railey, 77 S.W.2d 420, 256 Ky. 838—Barnes v. Montjoy's Adm'r, 290 S.W. 349, 217 Ky. 465.

Md.—Wagner v. Scurlock, 170 A. 539, 166 Md. 284.

Mass.—Mellet v. Swan, 168 N.E. 732, 269 Mass. 173.

Minn.—Wilcox v. Hedwall, 243 N.W. 709, 186 Minn. 504—In re Belt Line, Phalen, and Hazel Park Sewer Assessment, 222 N.W. 520, 176 Minn. 59—Hede v. Minneapolis Const. Co., 215 N.W. 859, 172 Minn. 462.

N.M.—Board of Com'rs of Quay County v. Wasson, 24 P.2d 1098, 37 N.M. 503, followed in Board of Com'rs of Quay County v. Gardner, 24 P.2d 1104, 37 N.M. 514.

N.Y.—Halper v. Broadmain Const. Corp., 60 N.Y.S.2d 533.

Okl.—Cummins v. Chandler, 97 P. 2d 765, 186 Okl. 200—State ex rel. Williams v. Smith, 59 P.2d 410, 177 Okl. 321—Coker v. Vierson, 41 P.2d 95, 170 Okl. 528.

Pa.—Keystone Bank of Spangler, Pa., v. Booth, 6 A.2d 417, 334 Pa. 545—Kaufman v. Feldman, 180 A. 101, 118 Pa.Super. 435—Ferrainolo v. Locker, 167 A. 651, 110 Pa.Super. 128—Phillips & Sons Co. v. Worley Corporation, 97 Pa.Super. 506—Bixler & Co. v. Stoker & Son, 91 Pa.Super. 265—Farmers' & Merchants' Deposit Co. v. McAvoy, 87 Pa.Super. 569—Lapensohn v. Swann, 83 Pa.Super. 192—Commonwealth v. Burke, 34 Pa.Dist. & Co. 447, 46 Dauph.Co. 270—Dymond v. DeLong, Com.Pl., 38 Luz.Leg.Reg. 265—Lincoln Deposit & Savings Bank v. Kline, Com.Pl., 33 Luz.Leg. Reg. 117—Favinger v. Favinger, Com.Pl., 60 Montg.Co. 149.

S.C.—Detroit Fidelity & Surety Co. v. Foster, 169 S.E. 871, 170 S.C. 121.

Tex.—Turner v. Larson, Civ.App., 72 S.W.2d 397, error dismissed—First State Bank of Loraine v. Jackson, Civ.App., 13 S.W.2d 979.

34 C.J. p 358 note 99 [b].

Evidence held to establish laches

Okl.—Walker v. Gulf Pipe Line Co., 226 P. 1046, 102 Okl. 7.

42. Ala.—Ex parte New Home Sewing Mach. Co., 139 So. 874, 238 Ala. 159.

Tex.—Johnson v. Cole, Civ.App., 138 S.W.2d 910, error refused.

34 C.J. p 358 note 1.

43. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.

Pa.—Kaufman v. Feldman, 180 A. 101, 118 Pa.Super. 435—Nelly v. Diskin, 173 A. 735, 113 Pa.Super. 249—Saslow v. Saslow, 100 Pa.Super. 414—Frazier v. Pursel, 6 Pa. Dist. & Co. 102, 39 York Leg.Rec. 117—Charles B. Scott Co. v. Oliver, Com.Pl., 1 Monroe L.R. 143.

34 C.J. p 359 note 3, p 360 note 8.

Mere conflict of evidence or oaths does not warrant opening of judgment.—Pierce, to Use of Snipes, v. Kaseman, 192 A. 105, 326 Pa. 280—Mielcuszny v. Rosol, 176 A. 236, 317 Pa. 91—Kienberger v. Lally, 198 A. 453, 130 Pa.Super. 583—McCarty, to Use of Hoblitzell Nat. Bank of Hyndman, v. Emerick, 170 A. 326, 111 Pa.Super. 463—New York Joint Stock Land Bank v. Kegerise, Com. Pl., 29 Berks Co. 296—Kines v. Grossman, Com.Pl., 51 Dauph.Co. 58—Aponikas v. Skrypkun, Com.Pl., 5 Sch.Reg. 1—Gapes v. Lawrenitis, Com.Pl., 4 Sch.Reg. 403—Stetsko v. Lea, Com.Pl., 26 West.Co. 97—M. & H. Pure Food Stores v. Moul, Com. Pl., 51 York Leg.Rec. 197.

44. Cal.—Salazar v. Steelman, 71 P. 2d 79, 22 Cal.App.2d 402—Callaway v. Wolcott, 266 P. 574, 90 Cal.App. 753.

34 C.J. p 360 note 9.

45. Colo.—Burlington Ditch, Reser-

cant's own sworn statement alone may be sufficient to warrant opening the judgment.[46] Various circumstances may render opposing affidavits of unequal weight.[47] In case of a decided and irreconcilable conflict in the evidence for and against the motion, it has been held that the court must decide according to the fair preponderance of the evidence.[48] Thus, where there are opposing affidavits, but one party or the other is corroborated by circumstances, admissions, or evidence drawn from the record, the decision will be in his favor.[49] The court can act on knowledge of facts which occurred in open court without formal proof.[50]

Fraud or collusion must be clearly shown in order to authorize the vacation of a judgment on this ground;[51] a balanced case is not enough.[52] However, the requirement as to proof is less stringent where the application is made during the judgment term.[53]

Unauthorized appearance. While a judgment based on an unauthorized appearance by an attorney is generally voidable, and subject to be set aside on that ground, in order that a judgment may be vacated on such ground, want of authority on the part of the attorney must be clearly shown,[54] especially where innocent third persons have acquired rights under the judgment or decree sought to be set aside.[55]

§ 298. Status of Judgment Pending Application

An application to open or vacate a judgment does not suspend or stay the operation of the judgment.

The filing of a motion or petition to vacate a judgment does not suspend its operation, or prevent the issue and execution of final process on it.[56] On the contrary, some cases hold that such action admits the regularity of the judgment and waives any objections to it on that score,[57] but an application to vacate a void judgment does not make it effectual for any purpose.[58]

§ 299. Hearing and Determination in General

An application to open or vacate a judgment is to be disposed of on equitable principles. The parties are entitled to a hearing, and it is proper to determine the existence and sufficiency of alleged grounds for relief before considering whether a meritorious cause of action or defense exists.

The applicant for the opening or vacation of a judgment is entitled to a hearing;[59] on a contested application to open or vacate a judgment, the court should hear both parties and examine into all pertinent facts and circumstances,[60] and it is error to

voir & Land Co. v. Ft. Morgan Reservoir & Irrigation Co., 151 P. 432, 59 Colo. 571.
34 C.J. p 359 note 6.

46. Ind.—International Bldg. & Loan Ass'n v. Stark, 89 N.E. 611, 44 Ind.App. 535.
34 C.J. p 359 note 2.

Applicant's unsupported oath
As a general rule, the court will not open a judgment on the unsupported oath of defendant, where the testimony of plaintiff is directly contradictory; but where there is corroboration, or where there are circumstances on which corroborative inferences may be drawn in favor of defendant, the court ordinarily will open the judgment and submit the question in dispute to a jury.—Hotaling v. Fisher, 79 Pa.Super. 103.

47. Mont.—Haggin v. Lorentz, 34 P. 607, 13 Mont. 406.
34 C.J. p 359 note 4.

48. Pa.—Appeal of Jenkintown Nat. Bank, 17 A. 2, 124 Pa. 337, 345.
34 C.J. p 360 note 7.

49. Minn.—Fitzgerald v. Fitzgerald, 152 N.W. 772, 129 Minn. 414.
34 C.J. p 359 note 5.

50. Iowa.—State Ins. Co. v. Granger, 17 N.W. 504, 62 Iowa 272.
34 C.J. p 360 note 10.

Facts within the trial judge's personal knowledge may be considered in determining whether a judgment should be vacated on grounds of a clerical error, and in vacating or correcting a clerical error or mistake the judge may give effect to his own recollection.—Bastajian v. Brown, 120 P.2d 9, 19 Cal.2d 209.

51. U.S.—Fiske v. Buder, C.C.A.Mo., 125 F.2d 841.
Cal.—Cowan v. Cowan, App., 166 P. 2d 21.
Ill.—In re Togneri's Estate, 15 N.E. 2d 908, 296 Ill.App. 33.
Iowa.—Watt v. Dunn, 17 N.W.2d 811.
34 C.J. p 360 note 12—23 C.J. p 25 note 27.

Evidence held insufficient
U.S.—Sorenson v. Sutherland, C.C.A. N.Y., 109 F.2d 714, affirmed Jackson v. Irving Trust Co., 61 S.Ct. 326, 311 U.S. 494, 85 L.Ed. 297.
Ark.—Karnes v. Gentry, 172 S.W.2d 424, 205 Ark. 1112—Bank of Russellville v. Walthall, 96 S.W.2d 952, 192 Ark. 1111.
N.D.—Jacobson v. Brey, 6 N.W.2d 269, 72 N.D. 269.
Okl.—Pruner v. McKee, 258 P. 749, 126 Okl. 121.
Tex.—Burge v. Broussard, Civ.App., 258 S.W. 502.
Wash.—Harter v. King County, 119 P.2d 919, 11 Wash.2d 583.
34 C.J. p 360 note 12 [b].

52. N.Y.—Hill v. Northrop, 9 How. Pr. 525.
34 C.J. p 361 note 13.

53. Iowa.—Cedar Rapids Finance & Thrift Co. v. Bowen, 233 N.W. 495, 211 Iowa 1207.

54. Mo.—Patterson v. Yancey, 71 S. W. 845, 97 Mo.App. 681, 695.
34 C.J. p 361 note 16.

55. Ill.—Kenyon v. Shreck, 52 Ill. 382.

56. Mo.—Childs v. Kansas City, St. J. & C. B. R. Co., 23 S.W. 373, 117 Mo. 414, 423.
34 C.J. p 361 note 18.

57. Neb.—Tootle v. Jones, 27 N.W. 635, 19 Neb. 588.
34 C.J. p 361 note 19.

58. Kan.—Morris v. Winderlin, 142 P. 944, 92 Kan. 935.

59. N.C.—Cincinnati Coffin Co. v. Yopp, 175 S.E. 164, 206 N.C. 716.

60. N.M.—Arias v. Springer, 78 P.2d 153, 157, 42 N.M. 350—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
Okl.—McNac v. Kinch, 238 P. 424, 113 Okl. 59—McNac v. Chapman, 223 P. 350, 101 Okl. 121.
Pa.—Kingston Nat. Bank v. Wruble, Com.Pl., 38 Luz.Leg.Reg. 321.
Tex.—Kern v. Smith, Civ.App., 164 S.W.2d 193, error refused.
34 C.J. p 363 note 48.
Hearing and determination of application to open or vacate:
Default judgment see infra § 337.
Judgment by confession see infra § 326.

grant or dismiss the motion summarily or on an ex parte hearing, unless the question at issue is one which can be determined from an inspection of the record, or unless the facts are such as do not admit of dispute.[61]

Except where the statute gives a right to trial by jury, the issues of fact arising on a motion of this kind are triable by the court,[62] although it is within the power of the court in a proper case to award an issue to be tried by a jury,[63] or to order a reference,[64] or itself to proceed to take an accounting.[65] In conducting the investigation, the court possesses all the powers of a chancellor,[66] and it is its duty to weigh the evidence and determine the credibility of the witnesses.[67]

The application may be tried on affidavits or depositions where the proceeding is by motion or petition in the cause,[68] or by statutory complaint and summons,[69] although in the latter case it has been said that the trial should be on legal evidence, as in the case of an action, and not on affidavit.[70] If not satisfied with the affidavits, the court may require the parties to present oral evidence.[71] It has been held that, where the affidavits are in conflict, testimony must be taken,[72] but it has also been held that where the conflict is not likely to be resolved by the taking of testimony it is not necessary.[73]

The inquiry will generally be limited to the matters set up in support of the motion and in opposition to it.[74] Since, as discussed supra § 292, formal pleadings in opposition are often not required, an objection to the petition which has not been em-

Consideration not limited to record
On motion to set aside judgment for irregularities patent on record and errors of fact calling for introduction of evidence dehors the record, contention that only matter of record proper could be considered was not well taken.—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173.

Failure of court to pass on all issues raised by petition to vacate judgment was not error, if it properly determined determinative issue of res judicata.—Harju v. Anderson, 234 P. 15, 133 Wash. 506, 44 A.L.R. 450.

61. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
34 C.J. p 364 notes 49, 50.

62. Pa.—McCarty, to Use of Hoblitzell Nat. Bank of Hyndman, v. Emerick, 170 A. 326, 111 Pa.Super. 463.
34 C.J. p 364 note 51.

Questions of fact
Motion to set aside judgment on ground that no summons, execution, or other notice was ever legally served on defendant presented "questions of fact" and not "issues of fact," so that it was for the judge to hear the evidence, find the facts, and render judgment thereon.—Cleve v. Adams, 22 S.E.2d 567, 222 N.C. 211.

63. Pa.—McCarty, to Use of Hoblitzell Nat. Bank of Hyndman, v. Emerick, 170 A. 326, 111 Pa.Super. 463—Kingston Nat. Bank v. Wruble, Com.Pl., 38 Luz.Leg.Reg. 321—Foulk v. Oswald, Com.Pl., 5 Sch. Reg. 164.
34 C.J. p 364 note 53.

Conflicting testimony
On petition to open judgment, court need not, in every case of conflicting testimony, send case to jury.—Bader v. Kell, 151 A. 683, 301 Pa. 139.

Issue properly submitted to jury
Tex.—Johnson v. Cole, Civ.App., 138 S.W.2d 910, error refused.

Presumption of payment of judgment by virtue of lapse of more than twenty years since entry thereof was enough to carry case to jury on motion to open judgment.—Ott v. Ott, 166 A. 556, 311 Pa. 130.

Questions held for jury
In suit to vacate judgment, whether plaintiff was served, whether debt forming basis of judgment existed, and whether instrument transferring property was intended as mortgage, held question of fact determinable only by the jury which was impaneled in the case.—Farmers' State Bank of Burkburnett v. Jameson, Tex.Com.App., 11 S.W.2d 299, rehearing denied Farmers' State Bank of Burkburnett v. Jameson, 16 S.W. 2d 526.

Where several questions are to be determined by issue, the jury should be required to answer them separately.—Austen v. Marzolf, 161 A. 72, 307 Pa. 232.

64. N.Y.—Vilas v. Plattsburgh & M. R. Co., 25 N.E. 941, 123 N.Y. 440, 20 Am.S.R. 771, 9 L.R.A. 844, 19 N.Y.Civ.Proc. 333, 26 Abb.N.Cas. 100.
34 C.J. p 364 note 54.

65. Kan.—Ross v. Noble, 51 P. 792, 6 Kan.App. 361.

66. Pa.—Nelly v. Diskin, 173 A. 735, 113 Pa.Super. 249.
34 C.J. p 364 note 56.

67. Pa.—Helzlsouer v. Golub, 160 A. 118, 306 Pa. 474—Warren Sav. Bank & Trust Co. v. Foley, 144 A. 84, 294 Pa. 176—Kaufman v. Feldman, 180 A. 101, 118 Pa.Super. 435—McCarty, to Use of Hoblitzell Nat. Bank of Hyndman, v. Emerick, 170 A. 326, 111 Pa.Super. 463.

68. Ill.—Bird-Sykes Co. v. McNamara, 252 Ill.App. 262.
N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
34 C.J. p 353 note 58.

Determination on pleadings
Where an answer is filed, applicant may have depositions taken and have the application determined on the petition, answer, and depositions, or he may have the application determined on the petition and answer, in which case the averments of the answer will be taken as true.—M. A. Long Co. v. Keystone Portland Cement Co., 153 A. 429, 302 Pa. 308.

On a law question raised by the answer, averments of petition for rule to open judgment must be taken as true.—Gsell v. Helman, 164 A. 853, 108 Pa.Super. 258.

69. Ind.—Lake v. Jones, 49 Ind. 297.

70. Kan.—Fullenwider v. Ewing, 1 P. 300, 30 Kan. 15.
34 C.J. p 353 note 60.

71. Ark.—Union Sawmill Co. v. Langley, 66 S.W.2d 300, 188 Ark. 316.
34 C.J. p 364 note 57.
However, it has also been held that oral testimony may not be taken on a motion.—Carr v. Commercial Bank, 18 Wis. 255.

72. N.Y.—Dege v. Mascot Realty Corporation, 275 N.Y.S. 884, 243 App.Div. 546—Gaines v. Bryant Park Bldg., 28 N.Y.S.2d 215, appeal denied 32 N.Y.S.2d 1018, 263 App. Div. 876.

73. N.Y.—Halper v. Broadmain Const. Corp., 60 N.Y.S.2d 533.

74. Pa.—Keystone Nat. Bank of Manheim, now to Use of Balmer v. Deamer, 18 A.2d 540, 144 Pa.Super. 52.
Wash.—Harter v. King County, 119 P.2d 919, 11 Wash.2d 583.
34 C.J. p 364 note 58.

bodied in a pleading may nevertheless be urged at the hearing.[75]

A continuance or postponement of the hearing may be had at the discretion of the court because of the absence of a party[76] or to allow the filing of additional affidavits or the presentation of additional evidence.[77]

A proper and timely motion must be decided on its merits, and not simply stricken from the files.[78] The motion may be dismissed for want of jurisdiction if it appears that notice of it was not served on the party opposing,[79] or it may be withdrawn by the party presenting it,[80] or dismissed for his failure to appear at the hearing.[81]

Rules of decision. An application to open or vacate a judgment is an appeal to the equitable powers of the court,[82] addressed to the discretion of the court, as discussed infra § 300, and is to be disposed of on equitable principles so as to do justice to all persons concerned.[83] Generally the discretion will not be favorably exercised unless the enforcement of the judgment would be unjust, oppressive, or inequitable as to the moving party, who must be actually or prospectively injured or prejudiced by it,[84] and be benefited by its opening or vacation,[85] or unless the motion can be granted without material injustice or injury to the opposing party[86] or prejudice to the intervening rights of third persons.[87] It has been held that there is no fixed rule which determines whether an application to open or vacate a judgment will be granted, but that each case is to be

75. Mass.—Lynch v. Springfield Safe Deposit & Trust Co., 13 N.E. 2d 611, 300 Mass. 14.

76. Iowa.—Wilson v. Pfaffe, 103 N. W. 992.
34 C.J. p 364 note 61.

77. Ill.—Central Cleaners and Dyers v. Schild, 1 N.E.2d 90, 284 Ill. App. 267.
34 C.J. p 364 note 62.

Denial of continuance held not abuse of discretion
Ill.—Central Cleaners and Dyers v. Schild, 1 N.E.2d 90, 284 Ill.App. 267.

78. Mo.—Dower v. Conrad, 232 S.W. 174, 207 Mo.App. 176.

79. Ga.—Aiken v. Wolfe, 76 Ga. 816.

80. Ga.—Cherry v. Home Building & Loan Assoc., 55 Ga. 19.

81. N.Y.—Levine v. Munchik, 101 N. Y.S. 14, 51 Misc. 556.

82. Ill.—Fitzgerald v. Power, 225 Ill.App. 118.
Minn.—Tankar Gas v. Lumbermen's Mut. Casualty Co., 9 N.W.2d 754, 215 Minn. 265, 146 A.L.R. 1223.
N.J.—Grant Inventions Co. v. Grant Oil Burner Corporation, 145 A. 721, 104 N.J.Eq. 341—**Corpus Juris quoted in** Davis v. City of Newark, 17 A.2d 305, 307, 19 N.J.Misc. 85—**Corpus Juris quoted in** West Jersey Trust Co. v. Bigham, 191 A. 743, 744, 118 N.J.Law 160.
N.D.—Smith v. Smith, 299 N.W. 693, 71 N.D. 110—**Corpus Juris quoted in** Guenther v. Funk, 274 N.W. 839, 843, 67 N.D. 543.
Pa.—Keystone Bank of Spangler, Pa., v. Booth, 6 A.2d 417, 334 Pa. 545—George v. George, 178 A. 25, 318 Pa. 203—Reidlinger v. Cameron, 134 A. 418, 287 Pa. 24—First Nat. Bank v. Smith, 200 A. 215, 132 Pa.Super. 73—Ferrainolo v. Locker, 167 A. 651, 110 Pa.Super. 128—McKenzie Co. v. Fidelity & Deposit Co. of Maryland, Com.Pl., 54 Dauph.Co. 294.
34 C.J. p 371 note 76.

Questions determinable in equity
Court has jurisdiction to determine all questions which could be determined in an equity proceeding.—Kowatch v. Home Building & Loan Ass'n of Latrobe, 200 A. 111, 131 Pa.Super. 517.

83. Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206.
Mass.—Town of Hopkinton v. B. F. Sturtevant Co., 189 N.E. 107, 285 Mass. 272—Alpert v. Mercury Pub. Co., 172 N.E. 223, 272 Mass. 43.
N.J.—Davis v. City of Newark, 17 A. 2d 305, 19 N.J.Misc. 85.
N.D.—Smith v. Smith, 299 N.W. 693, 71 N.D. 110.
Pa.—Richey v. Gibboney, 34 A.2d 913, 154 Pa.Super. 1—Page v. Wilson, 28 A.2d 706, 150 Pa.Super. 427.
Wash.—**Corpus Juris cited in** Roth v Nash, 144 P.2d 271, 275, 19 Wash. 2d 731.
34 C.J. p 371 note 78.

Application during judgment term
(1) Courts usually act liberally in those cases in which application to strike out a judgment is made during term in which judgment was entered.—Pioneer Oil Heat v. Brown, 16 A.2d 880, 179 Md. 155.

(2) Time for application see supra § 288.

Contempt
Judgment of contempt is not necessary to deny relief against court order, but relief will be denied if person stands in position of contemner.—Cooper v. Cooper, 143 A. 559, 103 N.J.Eq. 416.

Defect cured
Garnishee's motion to set aside judgment on ground of variance in name of plaintiff was properly stricken after judgment had been amended.—Merchants' Grocery Co. v Albany Hardware & Mill Supply Co., 160 S.E. 658, 44 Ga.App. 112.

Irregular judgment
Action of court in passing on application to set aside judgment, voidable for irregularity, is largely controlled by promptness with which application is made.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.

84. N.J.—**Corpus Juris cited in** La Bell v. Quasdorf, 184 A. 750, 753, 116 N.J.Law 368.
N.Y.—Adair v. Adair, 201 N.Y.S. 398, 206 App.Div. 394.
N.C.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
Pa.—Koenig v. Curran's Restaurant & Baking Co., 159 A. 553, 306 Pa. 345.
34 C.J. p 372 note 79.
Rule as to opening of default judgments see infra § 337.

Petitions to vacate judgment are extraordinary in nature, and should be granted only after careful consideration, and where required to accomplish justice.—Russell v. Foley, 179 N.E. 619, 278 Mass. 145.

There should be finality and permanency to court decrees, which should not be vacated and set aside without careful consideration, but court should be slow to say that an injustice may not be corrected by such means.—In re Macior's Will, 52 N.Y.S.2d 389.

85. N.J.—**Corpus Juris quoted in** West Jersey Trust Co. v. Bigham, 119 A. 743, 744, 118 N.J.Law 160.
34 C.J. p 372 note 80.

86. N.J.—**Corpus Juris quoted in** West Jersey Trust Co. v. Bigham, 119 A. 743, 744, 118 N.J.Law 160.
34 C.J. p 372 note 81.

87. N.J.—**Corpus Juris quoted in** West Jersey Trust Co. v. Bigham, 119 A. 743, 744, 118 N.J. Law 160.
34 C.J. p 372 note 82.

determined on its particular facts.[88] The application should be denied where the averments of the petition are denied and are not supported by proof.[89]

Grounds of application. A judgment should not be opened or vacated unless it is found that one of the statutory or other recognized grounds for such action exists.[90] It has generally been held that the court should limit its consideration to such grounds for opening or vacating the judgment as are set forth in the application,[91] but it has been held that the application should be granted where sufficient grounds appear of record, although not relied on by the party seeking relief.[92] The application should not be granted in any case where the relief to which the party is entitled can more appropriately be awarded in some other action or proceeding, as discussed supra § 283, or where another suit is pending between the same parties in which the court can grant all the relief or protection called for by the equities of the case.[93] After a motion for a new trial has been denied, a motion to vacate based on the same grounds is improper and will be denied.[94] It has generally been held, sometimes under statutes so providing, that it is proper for the court to try and determine the existence and sufficiency of the alleged grounds for opening or vacating the judgment before trying or deciding the existence of a meritorious cause of action or defense.[95] With respect to the grounds of relief, evidence will be heard on both sides.[96] Should the court find that the grounds relied on are not sufficient, or are not proved, it is unnecessary to go into the inquiry as to the validity of the defense.[97] However, both issues may be tried together where the parties waive the right to have them tried separately.[98]

Merits of cause of action or defense. Where a meritorious cause of action or defense is required, as discussed supra § 290, a judgment should not be opened or vacated until it is found and adjudged that there is a cause of action, or a defense to the action in which the judgment was rendered.[99] After it has been decided that the grounds of the application are sufficient, in order that the validity of the defense may be adjudged, an issue or issues may be made up and a trial had thereon.[1] The court is not to try and decide the merits of the proposed cause of action or defense,[2] but is only to

88. Ga.—Deen v. Baxley State Bank, 15 S.E.2d 194, 192 Ga. 300.
Mont.—Rieckhoff v. Woodhull, 75 P. 2d 56, 106 Mont. 22.

89. Pa.—Ferguson v. O'Hara, 132 A. 801, 286 Pa. 37.

90. N.Y.—Duffield v. Franklin Lumber Co., 248 N.Y.S. 5, 231 App.Div. 510.
Ohio.—Washington v. Levinson, 35 N.E.2d 161, 66 Ohio App. 461—Minetti v. Einhorn, 173 N.E. 243, 36 Ohio App. 310.
34 C.J. p 373 note 85.

Convenience of party

An application will not be granted for the mere convenience of the moving party or to restore to him some right or advantage which he has forfeited.—Davis v. Pierce, 52 Pa.Super. 615—34 C.J. p 373 note 86.

Court's change of view

The trial justice is not authorized to vacate a judgment merely because his views have changed, and to sustain order granting new trial the record must reveal sufficient grounds for the exercise of discretionary power.—Albright v. New York Life Ins. Co., 26 N.Y.S.2d 210, 261 App. Div. 419.

Finding of intent to defraud was unnecessary to set aside judgment where affidavit for publication was fraudulent.—Wells v. Zenz, 256 P. 484, 83 Cal.App. 137.

91. Ga.—White v. Hutcheson, 154 S. E. 157, 41 Ga.App. 602.
Minn.—Wilcox v. Hedwall, 243 N.W. 709, 186 Minn. 504.
N.D.—Lee v. Luckasen, 204 N.W. 831, 52 N.D. 934.
Pa.—Keystone Nat. Bank of Manheim, now to Use of Balmer v. Deamer, 18 A.2d 540, 144 Pa.Super. 52.

92. N.C.—Skinner v. Terry, 12 S.E. 118, 107 N.C. 103.
34 C.J. p 373 note 88, p 374 notes 99, 1.

93. N.Y.—Wade v. De Leyer, 40 N. Y.Super. 541.

94. Cal.—Treat v. Treat, 150 P. 57, 170 Cal. 337.
Ga.—Manry v. Stephens, 9 S.E.2d 58, 190 Ga. 305.

95. Ark.—Jerome Hardwood Lumber Co. v. Jackson-Vreeland Land Corporation, 254 S.W. 660, 160 Ark. 303.
N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
Ohio.—Horwitz v. Murri, 156 N.E. 420, 24 Ohio App. 109.
34 C.J. p 373 notes 94, 95.

96. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
34 C.J. p 374 note 96.

97. N.M.—**Corpus Juris cited in** Woodson v. Raynolds, 76 P.2d 34, 41, 42 N.M. 161.
Wash.—Harter v. King County, 119 P.2d 919, 11 Wash.2d 583.
34 C.J. p 374 note 97.

98. N.M.—**Corpus Juris quoted in** Singleton v. Sanabrea, 2 P.2d 119, 121, 35 N.M. 491.
34 C.J. p 374 note 98.

99. Ill.—Emcee Corporation v. George, 12 N.E.2d 333, 293 Ill. App. 240.
Mo.—**Corpus Juris cited in** Crow v. Crow-Humphrey, 73 S.W.2d 807, 813, 335 Mo. 636.
Neb.—Morrill County v. Bliss, 249 N. W. 93, 125 Neb. 97, 89 A.L.R. 932.
N.C.—Garrett v. Trent, 4 S.E.2d 319, 216 N.C. 162.
Ohio.—Minetti v. Einhorn, 173 N.E. 243, 36 Ohio App. 310—Horwitz v. Murri, 156 N.E. 420, 24 Ohio App. 109.
Pa.—Fidelity Title & Trust Co. v. Garrett, 194 A. 398, 327 Pa. 305—Helzlsouer v. Golub, 160 A. 118, 306 Pa. 474—Roper v. Scevcnik, 194 A. 333, 128 Pa.Super. 453.
34 C.J. p 374 notes 2, 3, p 375 note 9, p 376 notes 10, 11.

Dismissal

A finding that applicant is without a meritorious defense warrants a dismissal of the application.—Draughon v. Warren, 199 S.E. 629, 214 N.C. 404.

1. Kan.—List v. Jockheck, 27 P. 134, 45 Kan. 349, 748.
34 C.J. p 375 note 5.

2. Ohio.—Lutkenhouse v. Vella, App., 60 N.E.2d 793—Mosher v. Gross, App., 60 N.E.2d 730—Washington v. Levinson, 35 N.E.2d 161, 66 Ohio App. 461.

inquire whether it is meritorious, interposed in good faith, and prima facie sufficient.[3]

§ 300. —— Discretion of Court

The determination of an application to open or vacate a judgment generally rests in the sound legal discretion of the court.

An application to open or vacate a judgment is generally addressed to the sound legal discretion of the court on the particular facts of the case,[4] and

Okl.—Nero v. Brooks, 244 P. 588, 116 Okl. 279.
Wash.—State v. Superior Court in and for Spokane County, 267 P. 775, 148 Wash. 24.
34 C.J. p 375 note 6.

3. Ohio.—Luktenhouse v. Vella, App., 60 N.E.2d 798—Mosher v. Goss, App., 60 N.E.2d 730—Washington v. Levinson, 35 N.E.2d 161, 66 Ohio App. 461.
Okl.—**Corpus Juris cited in** Honeycutt v. Severin, 98 P.2d 1093, 1095, 186 Okl. 509.
Wash.—State v. Superior Court in and for Spokane County, 267 P. 775, 148 Wash. 24.
34 C.J. p 375 notes 7, 8.

4. U.S.—Western Union Telegraph Co. v. Dismang, C.C.A.Okl., 106 F. 2d 362—Coggeshall v. U. S., C.C. A.S.C., 95 F.2d 986—Peters v. Mutual Life Ins. Co. of New York, D. C.Pa., 17 F.Supp. 246, reversed on other grounds, C.C.A., 92 F.2d 301.
Ariz.—School Dist. No. 9 of Apache County v. First Nat. Bank of Holbrook, 118 P.2d 78, 58 Ariz. 86—Blair v. Blair, 62 P.2d 1321, 49 Ariz. 501—**Corpus Juris cited in** Smith v. Washburn & Condon, 297 P. 879, 38 Ariz. 149—Faltis v. Colachis, 274 P. 776, 35 Ariz. 78.
Ark.—Clark v. Bowen, 56 S.W.2d 1032, 186 Ark. 931.
Cal.—Miller v. Lee, 125 P.2d 627, 52 Cal.App.2d 10—In re Bartholomew's Adoption, 84 P.2d 199, 29 Cal.App.2d 343—In re McCarthy's Estate, 73 P.2d 914, 23 Cal.App.2d 398.
Colo.—**Corpus Juris cited in** Mountain v. Stewart, 149 P.2d 176, 112 Colo. 302.
Conn.—Boushay v. Boushay, 27 A.2d 800, 129 Conn. 347.
D.C.—Bush v. Bush, 63 F.2d 134, 61 App.D.C. 357.
Fla.—Lawyers Co-op. Pub. Co. v. Williams, 5 So.2d 871, 149 Fla. 390—Alabama Hotel Co. v. J. L. Mott Iron Works, 98 So. 825, 86 Fla. 608.
Ga.—Raines v. Lane, 31 S.E.2d 403, 198 Ga. 317—Hurt Bldg. v. Atlanta Trust Co., 182 S.E. 187, 181 Ga. 274—Landau Bros. v. Towery, 179 S. E. 647, 51 Ga.App. 113.
Ill.—Village of La Grange Park v. Hess, 163 N.E. 672, 332 Ill. 236—Albers v. Martin, 45 N.E.2d 102, 316 Ill.App. 446—Gliwa v. Washington Polish Loan & Building Ass'n, 34 N.E.2d 736, 310 Ill.App. 465—Simon v. Foyer, 17 N.E.2d 632, 297 Ill.App. 640.
Iowa.—Scott v. Union Mut. Casualty Co., 252 N.W. 85, 217 Iowa 390—Albright v. Moeckley, 237 N.W. 309—Swan v. McGowan, 231 N.W. 440, 212 Iowa 631.
Kan.—Hoffman v. Hoffman, 135 P.2d 887, 156 Kan. 647—Ford v. Blasdel, 276 P. 283, 128 Kan. 43.
La.—Hanson v. Haynes, App., 170 So. 257, rehearing denied 171 So. 146.
Mass.—Town of Hopkinton v. B. F. Sturtevant Co., 189 N.E. 107, 283 Mass. 272—Sweeney v. Morey & Co., 181 N.E. 782, 279 Mass. 495—Waltham Bleachery & Dye Works v. Clark-Rice Corporation, 175 N. E. 174, 274 Mass. 488—Powdrell v. Du Bois, 174 N.E. 220, 274 Mass. 106—Mellet v. Swan, 168 N.E. 732, 269 Mass. 173—Beserosky v. Mason, 168 N.E. 726, 269 Mass. 325—Draper v. Draper, 166 N.E. 874, 267 Mass. 528—Lee v. Fowler, 161 N. E. 910, 263 Mass. 440.
Mich.—**Corpus Juris cited in** Mack International Truck Corporation v. Palmer, 242 N.W. 898, 259 Mich. 234—Curtis v. Curtis, 229 N.W. 622, 250 Mich. 105.
Minn.—In re Holum's Estate, 229 N. W. 133, 179 Minn. 315.
Mo.—Gerber v. Schutte Inv. Co., 194 S.W.2d 25—Allen v. Fewel, 87 S. W.2d 142, 337 Mo. 955.
Mont.—Kosonen v. Waara, 285 P. 668.
N.J.—Davis v. City of Newark, 17 A. 2d 305, 19 N.J.Misc. 85.
N.M.—**Corpus Juris quoted in** Hot Springs Nat. Bank v. Kenney, 48 P. 2d 1029, 1031, 39 N.M. 428—Board of Com'rs of Quay County v. Wasson, 24 P.2d 1098, 37 N.M. 503, followed in Board of Com'rs of Quay County v. Gardner, 24 P.2d 1104, 37 N.M. 514.
N.Y.—Albright v. New York Life Ins. Co., 26 N.Y.S.2d 210, 261 App.Div. 419—Quigg v. Treadway, 219 N.Y. S. 897, 219 App.Div. 739.
N.D.—Bothum v. Bothum, 10 N.W.2d 603, 72 N.D. 649—Jacobson v. Brey, 6 N.W.2d 269, 72 N.D. 269—Smith v. Smith, 299 N.W. 693, 71 N.D. 110—**Corpus Juris cited in** Guenther v. Fink, 274 N.W. 839, 843, 67 N.D. 543.
Ohio.—Central Nat. Bank of Cleveland v. Ely, App., 44 N.E.2d 822.
Okl.—Le Roi Co. v. Grimes, 144 P. 2d 973, 193 Okl. 430—Stull v. Hoehn, 126 P.2d 1007, 191 Okl. 190—Donley v. Donley, 89 P.2d 312, 184 Okl. 567—Park v. Continental Oil Co., 87 P.2d 324, 184 Okl. 314—Babb v. National Life Ass'n, 86 P. 2d 771, 184 Okl. 273—Sabin v. Sunset Gardens Co., 85 P.2d 294, 184 Okl. 106—Brockman v. Penn Mut. Life Ins. Co., 64 P.2d 1203, 179 Okl. 98—Fellows v. Owens, 62 P.2d 1215, 178 Okl. 224—Small v. White, 46 P.2d 517, 173 Okl. 83—Stumpf v. Stumpf, 46 P.2d 315, 173 Okl. 1—Johnson v. Bearden Plumbing & Heating Co., 38 P.2d 500, 170 Okl. 63—Vacuum Oil Co. v. Brett, 300 P. 632, 150 Okl. 153—American Inv. Co. v. Wadlington, 277 P. 583, 136 Okl. 246—Eastland v. Oklahoma City, 246 P. 830, 118 Okl. 97—Bell v. Knoble, 225 P. 897, 99 Okl. 110—Wilson v. Porter, 221 P. 713, 94 Okl. 259—Tidal Oil Co. v. Hudson, 219 P. 95, 95 Okl. 209—Denton v. Walker, 217 P. 386, 90 Okl. 222—McBride v. Cowen, 216 P. 104, 90 Okl. 130.
Or.—Merryman v. Colonial Realty Co., 120 P.2d 230, 168 Or. 12—Bronn v. Soules, 11 P.2d 284, 140 Or. 308.
Pa.—Berkowitz v. Kass, 40 A.2d 691, 351 Pa. 263—Bekelja v. James E. Strates Shows, 37 A.2d 502, 349 Pa. 442—Fidelity Title & Trust Co. v. Garrett, 194 A. 398, 327 Pa. 305—Pierce, to Use of Snipes, v. Kaseman, 192 A. 105, 326 Pa. 280—Schuylkill Trust Co. v. Sobolewski, 190 A. 919, 325 Pa. 422—U. S. v. Savings & Trust Co. of Conemaugh to Use of Hindes v. Helsel, 188 A. 167, 325 Pa. 1—Bader v. Kell, 151 A. 683, 301 Pa. 139—Ferguson v. O'Hara, 132 A. 801, 286 Pa. 37—Tressler v. Emerich, 122 A. 229, 278 Pa. 128—Brill v. Haifetz, 44 A.2d 311, 158 Pa.Super. 158—Richey v. Gibboney, 34 A.2d 913, 154 Pa.Super. 1—Roper v. Scevcnik, 194 A. 333, 128 Pa.Super. 453—Philadelphia Fixture & Equipment Corporation v. Carroll, 191 A. 216, 126 Pa.Super. 454—Kaufman v. Feldman, 180 A. 101, 118 Pa.Super. 435—Landis v. Hoch, 164 A. 828, 108 Pa.Super. 285—McCoy v. Royal Indemnity Co., 164 A. 77, 107 Pa.Super. 486—Bianca v. Kaplan, 160 A. 143, 105 Pa.Super. 98—Silent Auto Corporation of Northern New Jersey v. Folk, 97 Pa.Super. 588—J. S. Bache & Co. v. Locke, 86 Pa.Super. 501—Deane v. Geilfuss & Co., 86 Pa.Super. 405—Schmitt v. Yuhazy, 84 Pa.Super. 76—Foos v. Pogar & Pogar, 84 Pa. Super. 54—Rasp v. Rasp, 79 Pa. Super. 29—Mann v. Schneller, 11 Pa.Dist. & Co. 205, 21 North.Co. 240—Renschler v. Pizano, Com.Pl., 38 Lack.Jur. 157, 51 York Leg.Rec. 109, affirmed 198 A. 33, 329 Pa. 249—Sheaffer v. Sheaffer, Com.Pl., 45 Lanc.Rev. 613—Kingston Nat. Bank v. Wruble, Com.Pl., 38 Luz. Leg.Reg. 321.

ordinarily its determination is conclusive and will not be disturbed except for abuse of discretion.[5] This rule is particularly applicable where relief against the judgment is sought during the term at which the judgment is entered.[6] The discretionary rule applies whether or not the application to open

S.C.—Betsill v. Betsill, 196 S.E. 381, 187 S.C. 50—Jefferson Standard Life Ins. Co. v. Hydrick, 141 S.E. 278, 143 S.C. 127—Ex parte Clark, 118 S.E. 27, 125 S.C. 34.

Wash.—**Corpus Juris cited in** Roth v. Nash, 144 P.2d 271, 275, 19 Wash. 2d 731—Agricultural & Live Stock Credit Corporation v. McKenzie, 289 P. 527, 157 Wash. 597—Robertson v. Wise, 279 P. 106, 152 Wash. 624.

Wis.—People's Trust & Savings Bank v. Wassersteen, 276 N.W. 330, 226 Wis. 249—In re Meek's Estate, 227 N.W. 270, 199 Wis. 602—Erickson v. Patterson, 211 N.W. 775, 191 Wis. 628.

34 C.J. p 365 note 67.

Purpose of rule

The discretionary nature of jurisdiction to vacate a decree is designed to prevent too ready unravelling of judgments, avoid putting a premium on continued litigation and promote considerateness of judicial decision. —W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, C.C.A.N.Y., 155 F.2d 321.

Wholly discretionary

An application to open a judgment is addressed wholly to the discretion of the court.

N.J.—Assets Development Co. v. Wall, 119 A. 10, 97 N.J.Law 468.

Pa.—Perri v. Perri, 6 A.2d 775, 335 Pa. 394.

Largely, but not exclusively, discretionary

The granting of a petition for vacation of a judgment is addressed largely, although not exclusively, to the sound discretion of the court.—Herlihy v. Kane, 38 N.E.2d 620, 310 Mass. 457—Lynch v. Springfield Safe Deposit & Trust Co., 13 N.E.2d 611, 300 Mass. 14—Kravetz v. Lipofsky, 200 N.E. 865, 294 Mass. 80—Maki v. New York, N. H. & H. R. Co., 199 N. E. 760, 293 Mass. 223—Russell v. Foley, 179 N.E. 619, 278 Mass. 145—Alpert v. Mercury Pub. Co., 172 N.E. 223, 272 Mass. 43.

Motion to vacate interlocutory order is addressed to trial court's sound discretion.—Kirn v. Bembury, 178 S.E. 53, 163 Va. 891.

Void judgment

Even where the judgment is wholly void, the court may in its discretion refuse to vacate it and leave the party affected to show that it is void whenever it is invoked against him. —**Corpus Juris quoted in** Guenther v. Funk, 274 N.W. 839, 843, 67 N.D. 543—34 C.J. p 369 note 69.

Attorney's neglect

Grant of relief from consequences of attorney's neglect or denial thereof, on motion to vacate judgment, lies within the discretion of the court.—First State Bank of Thompson Falls v. Larsen, 233 P. 960, 72 Mont. 400.

5. U.S.—Western Union Telegraph Co. v. Dismang, C.C.A.Okl., 106 F. 2d 362.

Cal.—Potts v. Whitson, 125 P.2d 947, 52 Cal.App.2d 199—Miller v. Lee, 125 P.2d 627, 52 Cal.App.2d 10—In re Bartholomew's Adoption, 84 P.2d 199, 29 Cal.App.2d 343—In re McCarthy's Estate, 73 P.2d 914, 23 Cal.App.2d 398.

Colo.—Mountain v. Stewart, 149 P.2d 176, 112 Colo. 302.

Ga.—Deen v. Baxley, 15 S.E.2d 194, 192 Ga. 300.

Ill.—Albers v. Martin, 45 N.E.2d 102, 316 Ill.App. 446—Simon v. Foyer, 17 N.E.2d 632, 297 Ill.App. 640.

Kan.—Epperson v. Kansas State Department of Inspections and Registration, 78 P.2d 850, 147 Kan. 762.

Mass.—Town of Hopkinton v. B. F. Sturtevant, 189 N.E. 107, 283 Mass. 272.

N.C.—Price v. Life & Casualty Ins. Co. of Tennessee, 160 S.E. 367, 201 N.C. 376.

Pa.—Berkowitz v. Kass, 40 A.2d 691, 351 Pa. 263—Perri v. Perri, 6 A.2d 775, 335 Pa. 394—Tressler v. Emerick, 122 A. 229, 278 Pa. 128—First Nat. Bank v. Smith, 200 A. 215, 132 Pa.Super. 73—Kaufman v. Feldman, 180 A. 101, 118 Pa.Super. 435.

S.C.—Jefferson Standard Life Ins. Co. v. Hydrick, 141 S.E. 278, 143 S.C. 127.

A decision either way ordinarily is not an abuse of discretion.—Davis v. Teachnor, Ohio App., 53 N.E.2d 208.

Court's decision presumed to be exercise of discretion

Ga.—Milton v. Mitchell County Electric Membership Ass'n, 12 S.E.2d 367, 64 Ga.App. 63.

Discretion held not abused

(1) By denial of relief.

Ariz.—School Dist. No. 9 of Apache County v. First Nat. Bank of Holbrook, 118 P.2d 78, 58 Ariz. 36.

Cal.—In re Mallon's Estate, 93 P.2d 245, 34 Cal.App.2d 147.

Conn.—Kaiser v. Second Nat. Bank, 193 A. 761, 123 Conn. 248.

Ga.—American Commercial Service v. Bailey, 130 S.E. 370, 34 Ga.App. 540.

Ill.—Herr v. Morgan, 57 N.E.2d 141, 324 Ill.App. 16—Albers v. Martin, 45 N.E.2d 102, 316 Ill.App. 446.

Mont.—First State Bank of Thompson Falls v. Larsen, 233 P. 960, 72 Mont. 400.

N.M.—Board of Com'rs of Quay County v. Wasson, 24 P.2d 1098, 37 N.M. 503, followed in Board of Com'rs of Quay County v. Gardner, 24 P.2d 1104, 37 N.M. 514.

Pa.—Bekelja v. James E. Strates Shows, 37 A.2d 502, 349 Pa. 442—Perri v. Perri, 6 A.2d 775, 335 Pa. 394—Griffith v. Hamer, 173 A. 874, 113 Pa.Super. 239—Meehan v. Shreveport-Eldorado Pipe Line Co., 164 A. 364, 107 Pa.Super. 530—Roberts Electric Supply Co. v. Crouthamel, 97 Pa.Super. 463—Peters v. Alter, 89 Pa.Super. 34.

(2) By grant of relief.

Ga.—Deen v. Baxley State Bank, 15 S.E.2d 194, 192 Ga. 300—Allison v. Garber, 178 S.E. 158, 50 Ga.App. 333.

Mass.—Smith v. Brown, 184 N.E. 333, 282 Mass. 81.

Okl.—Long v. Hill, 145 P.2d 434, 193 Okl. 463—American Inv. Co. v. Wadlington, 277 P. 583, 136 Okl. 246.

Pa.—H. H. Robertson Co. v. Pfotzer, 28 A.2d 721, 150 Pa.Super. 457.

6. Ala.—Reese & Reese v. Burton & Watson Undertaking Co., 184 So. 320, 28 Ala.App. 384.

Colo.—London Option Gold Mining Co. v. Dempsey, 66 P.2d 327, 100 Colo. 156.

Conn.—Kaiser v. Second Nat. Bank, 193 A. 761, 123 Conn. 248—Ideal Financing Ass'n v. LaBonte, 180 A. 300, 120 Conn. 190—Connecticut Mortgage & Title Guaranty Co. v. Di Francesco, 151 A. 491, 112 Conn. 673.

Ga.—Hardwick v. Shahan, 118 S.E. 575, 30 Ga.App. 526.

Kan.—Epperson v. Kansas State Department of Inspections and Registration, 78 P.2d 850, 147 Kan. 762 —Schubach v. Hammer, 232 P. 1041, 117 Kan. 615.

Ky.—Kentucky Home Mut. Life Ins. Co. v. Hardin, 126 S.W.2d 427, 277 Ky. 565.

Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206—Silverberg v. Dearholt, 22 A.2d 588, 180 Md. 38.

Neb.—Holman v. Stull, 267 N.W. 149, 130 Neb. 876.

Ohio.—Thompson v. Stonom, App., 57 N.E.2d 788—Davis v. Teachnor, App., 53 N.E.2d 208—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871.

Okl.—Long v. Hill, 145 P.2d 434, 193 Okl. 463—Pitts v. Walker, 105 P.2d 760, 188 Okl. 17—Montague v. State ex rel. Commissioners of Land Office of Oklahoma, 89 P.2d 283, 184 Okl. 574—Harlow Pub. Co. v. Tallant, 43 P.2d 106, 171 Okl. 579—Halliburton v. Illinois Life Ins. Co., 40 P.2d 1086, 170 Okl. 360 —Goodwin v. Scruggs, 9 P.2d 436, 156 Okl. 118—Curtis v. Bank of

or vacate the judgment is made at common law[7] or under statutory provisions.[8]

On the other hand, the court's discretion is not to be exercised arbitrarily, oppressively, or from mere caprice; it is a judicial discretion to be exercised in accordance with legal and equitable principles,[9] and should be so exercised as to promote the ends of justice.[10] The court's action must rest on competent evidence.[11] It is an abuse of discretion to open or vacate a judgment where the moving party shows absolutely no legal ground therefor, or offers no excuse for his own negligence or default,[12] or where the application is granted purely for the purpose of extending applicant's time to appeal.[13] If, however, applicant shows himself plainly and justly entitled to the relief demanded, the court must grant the application and it is an abuse of discretion to refuse it.[14] Under no circumstances will the court be justified in refusing to receive and hear a motion to vacate the judgment; its discretion is to be exercised on the facts as developed on a hearing, not in advance of it.[15]

§ 301. Relief Awarded

On an application to open or vacate a judgment, the court may generally grant such relief as is appropriate under the circumstances.

On an application to open or vacate a judgment, the court may award such relief as is appropriate under the circumstances.[16] It has been held that the court, on vacating a judgment, may set aside conclusions of law,[17] and that a judgment regularly entered on a verdict may not be vacated unless the verdict is also set aside;[18] but it has been held that on vacating a judgment the court is without power to make new findings inconsistent with those

Dover, 241 P. 173, 113 Okl. 224—McNac v. Kinch, 238 P. 424, 113 Okl. 59—McNac v. Chapman, 223 P. 350, 101 Okl. 121.
34 C.J. p 207 note 5.
Power of court during judgment term see supra § 229.
Time for application see supra § 288.

Elapse of time to appeal does not terminate court's discretion.—Deen v. Baxley State Bank, 15 S.E.2d 194, 192 Ga. 300.

Wide discretion
Okl.—Welborn v. Whitney, 65 P.2d 971, 179 Okl. 420—Cooper v. State ex rel. Com'rs of Land Office, 63 P.2d 698, 178 Okl. 532.

7. Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.
N.J.—Somers v. Holmes, 177 A. 434, 114 N.J.Law 497.

8. Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.
Mont.—Rieckhoff v. Woodhull, 75 P.2d 56, 106 Mont. 22.

9. Cal.—Elms v. Elms, App., 164 P.2d 936—Potts v. Whitson, 125 P.2d 947, 52 Cal.App.2d 199.
Ga.—Grogan v. Deraney, 143 S.E. 912, 38 Ga.App. 287.
N.Y.—Albright v. New York Life Ins. Co., 26 N.Y.S.2d 210, 261 App. Div. 419.
Or.—Bratt v. State Industrial Accident Commission, 236 P. 478, 114 Or. 644.
34 C.J. p 369 note 70.

"Sound judicial discretion" as regards petition to vacate judgment implies calmness, conscience, courage, impartiality, wisdom, and discernment of just result.—Russell v. Foley, 179 N.E. 619, 278 Mass. 145.

Court has reasonable discretion
Cal.—Palomar Refining Co. v. Prentice, 136 P.2d 83, 57 Cal.App.2d 954.

Discretion held abused
(1) By denial of relief.—Boyd v. Lemmon, 189 N.W. 681, 49 N.D. 64.
(2) By grant of relief.—Holbrook v. Weiss, 3 N.E.2d 915, 52 Ohio App. 458.

10. Mass.—Alpert v. Mercury Pub. Co., 172 N.E. 223, 272 Mass. 43.
Okl.—Donley v. Donley, 89 P.2d 312, 184 Okl. 567—Vacuum Oil Co. v. Brett, 300 P. 632, 150 Okl. 153.

Orderly administration
Discretion should be exercised so as to promote orderly administration of justice and not to encourage carelessness, ignorance, or laxity in practice.—Kravetz v. Lipofsky, 200 N.E. 865, 294 Mass. 80.

Legislative policy
In exercising discretion to set aside judgments, courts should maintain liberal spirit prompting legislature to grant such power.—Kosonen v. Waara, 285 P. 668, 87 Mont. 24.

11. Pa.—Tradesmens Nat. Bank & Trust Co. v. Lewis, 34 A.2d 818, 154 Pa.Super. 17—Silent Auto Corporation of Northern New Jersey v. Folk, 97 Pa.Super. 588.
34 C.J. p 370 note 71.

12. Minn.—Ayer v. Chicago, M., St. P. & P. R. Co., 249 N.W. 581, 189 Minn. 359.
Ohio.—Holbrook v. Weiss, 3 N.E.2d 915, 52 Ohio App. 458.
34 C.J. p 370 note 72.

13. Conn.—Connecticut Mortgage & Title Guaranty Co. v. Di Francesco, 151 A. 491, 112 Conn. 673.
Ohio.—Sullivan v. Cloud, 24 N.E.2d 625, 62 Ohio App. 462.

14. Ga.—Donalson v. Bank of Jakin, 127 S.E. 229, 33 Ga.App. 428.
N.D.—Boyd v. Lemmon, 189 N.W. 681, 49 N.D. 64.
34 C.J. p 370 note 73, p 371 note 74.

15. Cal.—Cahill v. San Francisco Super. Ct., 78 P. 467, 145 Cal. 42.
34 C.J. p 371 note 75.

16. Cal.—Berning v. Colodny & Colodny, 284 P. 496, 103 Cal.App. 188.
Pa.—Shiffer, to Use of Shiffer, v. Shiffer, Com.Pl., 46 Dauph.Co. 313—Cadwallader v. Firestone, Com. Pl., 7 Fay.L.J. 259—Nuss v. Kemmerer, Com.Pl., 17 Leh.L.J. 379, 52 York Leg.Rec. 15.

Decree should go no further than is necessary to correct the wrong.—Indianapolis Life Ins. Co. v. Lundquist, 53 N.E.2d 338, 222 Ind. 359.

Suspension of judgment
In action to set aside a judgment rendered at a prior term, if the court finds that defendant has a valid defense, it does not render judgment in the original action but makes an order suspending the judgment until such time as the issues in the original action can be joined and determined as though no judgment had ever been entered.—Washington v. Levinson, 35 N.E.2d 161, 66 Ohio App. 461.

Violation of settlement agreement
Judgment will not be opened where appeal was not taken due to compromise, but issue will be framed to determine amount due.—Brader v. Alinikoff, 85 Pa.Super. 285.

Provision transferring cause to another district court held illegal.—Schubert v. District Court of Third Judicial Dist. of Bergen County, 159 A. 615, 10 N.J.Misc. 414.

17. Ind.—Tri-City Electric Service Co. v. Jarvis, 185 N.E. 136, 206 Ind. 5.

18. Ga.—Dabney v. Benteen, 132 S.E. 916, 35 Ga.App. 203.
34 C.J. p 376 note 16.

already made,[19] and that it may not, on opening or vacating a judgment against applicant, proceed to enter a judgment in his favor[20] where the parties have the right to a jury trial.[21] Either on opening or vacating the judgment, the relief granted may include the setting aside of an execution or a sale thereunder.[22] Where a court or judge is authorized to set aside or vacate a judgment, the jurisdiction includes the right to grant any less or incidental relief by which justice may be obtained and the rights of the parties may be protected.[23] Where justice can be done between the parties by amending or correcting the judgment, or reducing its amount, the court will be warranted in entering a new judgment in the proper form.[24] Under a special statutory motion to vacate a judgment and enter a different judgment based on the findings, it has been held that the court may not consider any facts except those included in the findings,[25] and that it may not change the findings of fact.[26] Under a statute so providing, the failure to determine the application within a specified time constitutes a denial of the application.[27]

§ 302. —— Partial Vacation

A court having power to vacate a judgment entirely may grant less relief by vacating it in part only, where justice so requires.

A court having power to vacate a judgment entirely may grant less relief by vacating it in part only, where justice so requires.[28] Where one portion of the judgment is separable from the balance thereof, and the objection goes only to a separable part, the court should not set aside the whole judgment but only the objectionable part.[29] A motion to vacate the whole of a judgment is too broad, and may properly be overruled, if any separable portion of the judgment is free from objection.[30] A judgment against several persons may be set aside as to one or more of them, and allowed to stand as to the others,[31] except where a judgment is entire and indivisible, when, being irregular and erroneous as to a part of the defendants, it is of necessity so as to all and must be opened or vacated as to all.[32] A judgment may be opened or vacated with respect to a part of the amount of recovery,[33] except where the recovery is not apportionable,[34] or as to the recovery on one or more separate counts or causes of action united in the same suit.[35]

§ 303. —— Terms and Conditions

The court may generally impose reasonable terms and conditions on opening or vacating a judgment.

19. N.Y.—Citizens' Nat. Bank of East Northport v. Caldwell, 251 N.Y.S. 319, 233 App.Div. 875.

20. Tex.—Marmion v. Herrin Transp. Co., Civ.App., 127 S.W.2d 558, error refused.

21. Tex.—Schaffer v. Speckels, Com. App., 62 S.W.2d 85—Wichita Falls Traction Co. v. Cook, 60 S.W.2d 764, 122 Tex. 446.

22. Or.—Anderson v. Guenther, 25 P.2d 146, 144 Or. 446.
34 C.J. p 376 note 15.

23. N.Y.—McCall v. McCall, 54 N.Y. 541.
34 C.J. p 376 note 18.

24. Ind.—Marion Mfg. Co. v. Harding, 58 N.E. 194, 155 Ind. 648.
34 C.J. p 376 note 17.

25. Cal.—Westervelt v. McCullough, 228 P. 734, 68 Cal.App. 198.

26. Cal.—Akley v. Bassett, 209 P. 576, 189 Cal. 625—Herz v. Hereford, 263 P. 382, 88 Cal.App. 290.

27. N.M.—King v. McElroy, 21 P.2d 80, 37 N.M. 238.

Bill of review treated as motion to vacate

Where purported bill of review was treated on appeal as a motion for rehearing or a motion to vacate because filed before judgment in cause became final, bill was overruled by operation of law where it had not been acted on before judgment became final and appellant had made no request to act on it before that time or that term of court be extended for purpose of acting on the motion.—Joy v. Young, Tex.Civ. App., 194 S.W.2d 159.

28. Ark.—Taylor v. O'Kane, 49 S.W. 2d 400, 185 Ark. 782.
Cal.—People v. Barnes City, 288 P. 442, 105 Cal.App. 618.
Conn.—Persky v. Puglisi, 127 A. 351, 101 Conn. 658.
Tex.—**Corpus Juris quoted in** Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 269, 138 Tex. 1—**Corpus Juris cited in** Kern v. Smith, Civ.App., 164 S.W. 2d 193, 195—Pavelka v. Overton, Civ.App., 47 S.W.2d 869, error refused.
34 C.J. p 376 note 19.

29. Cal.—People v. Barnes City, 288 P. 442, 105 Cal.App. 618.
Ga.—George A. Rheman Co. v. May, 31 S.E.2d 738, 71 Ga.App. 651.
Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521.
Ky.—Phillips v. Green, 155 S.W.2d 841, 288 Ky. 202.
Tex.—**Corpus Juris quoted in** Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 269, 138 Tex. 1.
34 C.J. p 376 note 20.

Collusion

Judgment against principal and surety, which was canceled as against surety on ground of collusion and fraud of judgment creditor and principal, remained valid adjudication between judgment creditor and principal.—Goldberg v. Fuller, 172 S.E. 52, 178 Ga. 58.

30. Ga.—Smith v. Knowles, 78 S.E. 264, 12 Ga.App. 715.
34 C.J. p 377 note 21.

31. Cal.—Michel v. Williams, 56 P. 2d 546, 13 Cal.App.2d 198—Bishop v. Superior Court in and for Los Angeles County, 209 P. 1012, 59 Cal.App. 46.
Okl.—Galeener v. Reynolds, 69 P.2d 49, 180 Okl. 200.
Tex.—**Corpus Juris quoted in** Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 269, 138 Tex. 1.
34 C.J. p 377 note 22.

32. Ill.—Fredrich v. Wolf, 50 N.E. 2d 755, 383 Ill. 638—Central Cleaners and Dyers v. Schild, 1 N.E.2d 90, 284 Ill.App. 267.
Ohio.—Beachler v. Ford, App., 60 N.E.2d 330.
Tex.—McClaren Rubber Co. v. Williams Auto Supply Co. of Big Spring, Civ.App., 81 S.W.2d 255.
34 C.J. p 377 note 23.

33. N.Y.—Uptown Transp. Corporation v. Fisk Discount Corporation, 271 N.Y.S. 723, 151 Misc. 469.
34 C.J. p 377 note 24.

34. N.Y.—Irwin v. Knox, 10 Johns. 365.
34 C.J. p 377 note 25.

35. Kan.—Weaver v. Leach, 26 Kan. 179.
34 C.J. p 377 note 26.

Where, as is generally the case, as considered supra § 300, the opening or vacation of the judgment is discretionary with the court, it is within the sound discretion of the court to impose, as a condition to granting the application, such terms as may be just and reasonable,[36] provided, of course, there are no statutory provisions to the contrary;[37] and the court's decision will not be disturbed except for abuse of discretion.[38] The imposition of terms, however, is not a necessary condition on opening the judgment; and the opposing party may not complain that terms were not imposed, unless he can also show that the action of the court was arbitrary and unjust.[39] The circumstances may be such that it would be an abuse of discretion to impose terms, and in such cases terms should not be imposed.[40] Where the opening or setting aside of the judgment is demandable as of right, it is not proper to impose any terms.[41] Where the judgment is void for want of jurisdiction, terms may not be imposed as a condition to granting relief.[42] In any event, the discretion of the court with respect to imposing terms must be exercised in a reasonable manner.[43] Under some circumstances, a court may refuse to open a judgment on some condition to be performed by the successful party.[44] An order setting aside a judgment for plaintiff at his request should be conditioned on his remitting payments made on the judgment.[45] The court, on opening a judgment, may limit the issues to be determined.[46]

§ 304. Findings

In some jurisdictions, but not in others, the court is required to make findings of fact and conclusions of law in passing on an application to open or vacate a judgment.

In some jurisdictions, on an application to open or vacate a judgment, the trial court is required to find the facts separately from the conclusions of law, much as in the case of a special verdict, and to set them forth on the record;[47] in other jurisdictions findings are not required,[48] although it has been said that the court ought to file an opinion setting forth its findings of facts and the grounds of its decision.[49] Findings are unnecessary where the court exercises its plenary power and discretion to set aside a judgment at the same term at which it was rendered.[50] Where parties desire to insist on findings, they must request them.[51] Except where separate findings are required by statute, an order vacating a judgment is an implied finding of the facts necessary to support it.[52] Similarly a denial

36. Fla.—**Corpus Juris** cited in Knabb v. Reconstruction Finance Corporation, 197 So. 707, 711, 144 Fla. 110.
La.—McCoy v. Arkansas Natural Gas Corporation, 196 So. 28, 195 La. 82.
Md.—Pioneer Oil Heat v. Brown, 16 A.2d 880, 179 Md. 155—Commercial Sav. Bank v. Quall, 142 A. 488, 156 Md. 16.
34 C.J. p 377 note 28.
Terms and conditions on opening:
Default judgment see infra § 337.
Judgment by confession see infra § 326.

Applicant cannot accept beneficial part of order and reject part considered burdensome.—Beck v. Beck, 192 N.E. 791, 48 Ohio App. 105.

Attorney's fees
It was erroneous to order, as a condition to setting aside a judgment, that attorney's fees be paid to plaintiff's attorney, since the attorney was not a litigant.—Smith v. Zuta, 247 Ill.App. 203.

Default in paying compromise settlement
Judgment entered pursuant to stipulation for settlement, which permitted entry of judgment on failure to pay installment when due, should be set aside at instance of defendants, on imposition of terms, where defendant's check in payment of installment was returned for insufficient funds due to error of bank's bookkeeper or delay in entering deposit to defendant's account.—Goldstein v. Goldsmith, 276 N.Y.S. 861, 243 App.Div. 268.

37. Tex.—Hargrave v. Boero, Civ. App., 23 S.W. 403, following Secrest v. Best, 6 Tex. 199.
34 C.J. p 379 note 29.

38. Pa.—Huston Tp. Co-op. Mut. Fire Ins. Co. v. Beale, 1 A. 926, 110 Pa. 321.
34 C.J. p 379 note 30.

39. Cal.—Robinson v. Merrill, 22 P. 260, 80 Cal. 415.
34 C.J. p 379 note 31.

40. Colo.—Sidwell v. First Nat. Bank, 233 P. 153, 76 Colo. 547.
34 C.J. p 379 note 32.

41. N.Y.—Yates v. Guthrie, 23 N.E. 741, 119 N.Y. 420.
34 C.J. p 379 note 37.

42. Colo.—**Corpus Juris** cited in Sidwell v. First Nat. Bank, 233 P. 153, 154, 76 Colo. 547.
N.Y.—Amusement Securities Corporation v. Academy Pictures Distributing Corporation, 295 N.Y.S. 436, 251 App.Div. 227, motions denied 295 N.Y.S. 472, 250 App.Div. 749, affirmed 13 N.E.2d 471, 277 N.Y. 557, reargument denied 14 N.E.2d 383, 277 N.Y. 672.
34 C.J. p 379 note 33.

43. Tex.—Continental Oil Co. v. Henderson, Civ.App., 180 S.W.2d 998, error refused.
34 C.J. p 379 note 38.

44. Pa.—Irwin's Appeal, 12 A. 840, 9 Pa.Cas. 479.
34 C.J. p 379 note 39.

45. Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.
Restitution generally see infra § 307.

46. Pa.—Cassler v. Cassler, 144 A. 88, 294 Pa. 197.

47. N.C.—Turner v. J. I. Case Threshing Mach. Co., 45 S.E. 781, 133 N.C. 381.
34 C.J. p 384 note 81.

Formal finding as to meritorious defense is required where showing of defense is by affidavit, but not where defendant has filed a pleading setting forth his defense.—Sutherland v. McLean, 154 S.E. 662, 199 N.C. 345.

48. Wash.—Frieze v. Powell, 140 P. 690, 79 Wash. 483.
34 C.J. p 384 note 82.

49. Pa.—Haines v. Elfman, 84 A. 349, 235 Pa. 341.
34 C.J. p 384 note 83.

Finding not supported by evidence
Pa.—Barnes v. Silveus, 19 Pa.Dist. & Co. 581.

50. N.C.—Allison v. Whittier, 8 S.E. 338, 101 N.C. 490.

51. Kan.—Moore v. Zeman, 200 P. 270, 109 Kan. 566.
34 C.J. p 384 note 85.

52. Kan.—Moore v. Zeman, supra.
34 C.J. p 384 note 87.

of the application is an implied finding that grounds for such relief do not exist.[53] The findings, if proper, have the same effect as a verdict.[54]

§ 305. Order

General rules as to orders apply to orders opening or vacating judgments.

An order opening or vacating a judgment must comply with the requirements of orders generally,[55] and also with any special statutory requirements.[56] The order must be the judicial act of the court[57] and should show clearly what disposition of the judgment the court intended to make.[58] The judgment affected must be described with sufficient accuracy to be identified,[59] but mere inaccuracy of description does not invalidate the order.[60] While it has been held that the order must recite the grounds for granting the application,[61] there is also authority to the contrary.[62] The order must be duly entered of record.[63]

§ 306. —— Operation and Effect in General

Where a judgment is vacated or set aside, it is as though no judgment had ever been entered; but a judgment which has been opened generally remains operative as security until the termination of the litigation.

Where a judgment is vacated or set aside by a valid order or judgment, it is entirely destroyed and the rights of the parties are left as though no such judgment had ever been entered.[64] No further steps can be legally taken to enforce the vacated judgment.[65] The action, however, is left still pend-

53. Cal.—Chavez v. Scully, 232 P. 165, 69 Cal.App. 633.

54. Iowa.—Genco v. Northwestern Mfg. Co., 214 N.W. 545, 203 Iowa 1390.

55. Ky.—Lovill v. Hatfield, 268 S.W. 807, 207 Ky. 142.

Order as judgment

An order vacating a judgment or an order for a judgment is not a judgment and does not determine an application to enter another and different judgment.—Prothero v. Superior Court of Orange County, 238 P. 357, 196 Cal. 439.

Improper caption and index

Where intent of order, made in term in which judgment was entered, to set aside judgment was unmistakable, court thereafter properly disregarded judgment notwithstanding order may have been improperly captioned and indexed.—City of Hazard v. Duff, 175 S.W.2d 357, 295 Ky. 701.

56. N.D.—Harris v. Hessin, 151 N. W. 4, 30 N.D. 33.
34 C.J. p 384 note 89.

Time of entry

Where the court's inherent power to open or vacate a judgment is limited to the judgment term, an order rendered under its inherent power is ineffective if rendered after the expiration of the judgment term.—Davis v. Oaks, 60 S.W.2d 922, 187 Ark. 501.

57. Ind.—Barton v. Bryant, 2 Ind. 189.
34 C.J. p 384 note 90.

58. Pa.—Fisher v. Hestonville, M. & F. Pass. R. Co., 40 A. 97, 185 Pa. 602.
34 C.J. p 384 note 91.

Full relief

On a statutory proceeding to set aside a judgment as inconsistent with the findings and to enter a different judgment based on the findings, the court must grant full relief in one order; it cannot vacate the judgment in one order and leave the entry of a proper judgment for another order.—Stanton v. Superior Court within and for Los Angeles County, 261 P. 1001, 202 Cal. 478—34 C.J. p 376 note 17 [a].

Orders inconsistent with judgment

(1) Where, after judgment is entered, an order is made which is inconsistent with the continued operation of the judgment, as where a party is given leave to file a plea to the complaint, the effect of the order is to vacate the judgment.—Box v. Metropolitan Life Ins. Co., 168 So. 216, 232 Ala. 1.

(2) The granting of defendant's motion to dismiss complaint after judgment had been entered in defendant's favor was equivalent to a "vacation of judgment," and defendant was thereafter precluded from relying on alleged finality of the judgment.—Ericson v. Slomer, C.C.A. Ill., 94 F.2d 437.

59. Mont.—Morehouse v. Bynum, 152 P. 477, 51 Mont. 289.

60. Mont.—Morehouse v. Bynum, supra.
34 C.J. p 384 note 93.

61. N.Y.—Strassner v. Thompson, 57 N.Y.S. 546, 40 App.Div. 28.
34 C.J. p 384 note 94.

62. Mo.—Spickard v. McNabb, App., 130 S.W.2d 611.

63. Tex.—Witty v. Rose, Civ.App., 148 S.W.2d 962, error dismissed.
34 C.J. p 385 note 97.

Notation on docket did not have effect of setting aside judgment.—Burleson v. Moffett, Tex.Civ.App., 3 S.W.2d 544.

64. Conn.—**Corpus Juris cited in** Union & New Haven Trust Co. v. Taft Realty Co., 192 A. 268, 271, 123 Conn. 9.

Fla.—**Corpus Juris cited in** Adelhelm v. Dougherty, 176 So. 775, 777, 129 Fla. 680.

Kan.—Hoffman v. Hoffman, 135 P.2d 887, 156 Kan. 647—**Corpus Juris quoted in** Standard Life Ass'n v. Merrill, 75 P.2d 825, 827, 147 Kan. 121.

Ky.—Morris v. Morris, 10 S.W.2d 277, 225 Ky. 823.

Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.

N.Y.—In re Grube's Will, 294 N.Y.S. 311, 162 Misc. 267—**Corpus Juris cited in** Hammond v. Hammond, 11 N.Y.S.2d 585, 587.

Pa.—Bergen v. Lit Bros., 47 A.2d 671.
34 C.J. p 385 note 98.

Void order vacating judgment is wholly ineffective.—Mountain States Implement Co. v. Arave, 2 P.2d 314, 50 Idaho 624.

Erroneous order is operative and effective.—Hibben, Holiweg & Co. v. Western & Southern Life Ins. Co., 169 N.E. 693, 90 Ind.App. 683.

Denial of application

Judgment overruling defendant's motion to set aside judgment against him on ground that plaintiff had not filed a verified petition was in effect ruling that plaintiff did not have to verify petition.—Garrison v. Bradford Supply Co., 51 S.W.2d 254, 244 Ky. 430.

Partition

Where a partition, long before made, is set aside, the court in decreeing new partition will direct that former allotments be followed as far as justice will permit.—Oneal v. Stimson, 74 S.E. 413, 70 W.Va. 452.

Merits

In setting aside a judgment obtained by one party litigant on motion filed by other party at same term of court at which judgment was taken, the court would provide that action in setting aside judgment should not prejudice rights of the parties on a trial of the merits.—South Texas Life Ins. Co. v. Danhaus, Tex.Civ.App., 146 S.W.2d 1098.

65. Kan.—**Corpus Juris quoted in** Standard Life Ass'n v. Merrill, 75

ing and undetermined, and further proceeding may be had and taken therein.[66] The case stands again for trial or for such other disposition as may be appropriate to the situation.[67] It has been held that the effect of setting aside a judgment based on the verdict of a jury is to set aside the verdict and grant a new trial,[68] but it does not necessarily vacate prior interlocutory orders or judgments.[69] The vacation of a judgment vacates all proceedings taken under the judgment.[70] Where the judgment is vacated, the lien falls with the judgment, and cannot be made to attach to the judgment ultimately entered.[71] Where a judgment of which a transcript has been entered in another county is set aside, the judgment on the transcript falls with it.[72] It has been held that a vacated judgment affords no justification for acts done before the order of vacation,[73] except to mere ministerial officers,[74] and affords no bar to a new action.[75]

Generally the rights of third persons, such as purchasers in good faith who have relied on the judgment, will be saved so far as is consistent with the rights of the judgment debtor.[76] Where the judgment vacated is void, the rights of an intervening purchaser of the property affected will not be protected.[77] Where the judgment is voidable but not void, its vacation will not divest the title of third persons acquired under it in good faith for a valuable consideration.[78] One having acquired title under an irregular judgment will not be affected by proceedings to set it aside unless he is made a party thereto.[79]

Although it has been held that the effect of opening the judgment is to leave the case standing as though no judgment had ever been rendered,[80] it is generally held that a judgment which is opened, as distinguished from one which is vacated, does not lose its status as a judgment;[81] it does not determine any rights of the parties in the action, but subsists only for the purpose of security,[82] its lien remaining unimpaired.[83] Merely opening a judgment does not necessarily vacate prior interlocutory judgments, orders, or proceedings in the case except such as are dependent on the judgment.[84] If the party who obtains the opening of a judgment is afterward defeated in the action, the effect is to restore the original judgment to full force and finally conclude his rights in the premises;[85] if the defense is successful, the judgment is vacated.[86]

An order denying a motion to set aside a judg-

P.2d 825, 827, 147 Kan. 121.
34 C.J. p 385 note 99.

66. Kan.—**Corpus Juris quoted in** Standard Life Ass'n v. Merrill, 75 P.2d 825, 827, 147 Kan. 121.
N.J.—Dorman v. Usbe Building & Loan Ass'n, 180 A. 413, 115 N.J. Law 337.
34 C.J. p 385 note 1.

67. Conn.—Simpson v. Young Men's Christian Ass'n of Bridgeport, 172 A. 855, 118 Conn. 414.
34 C.J. p 385 note 2, p 376 note 12.

68. Tex.—Smith v. Thornton, 29 S.W.2d 314, 119 Tex. 344.

69. Mo.—Davidson v. I. M. Davidson Real Estate & Investment Co., 155 S.W. 1, 249 Mo. 474.

70. Wash.—Hillman v. Gordon, 219 P. 46, 126 Wash. 614.

71. Ill.—Chicago Title & Trust Co. v. Benjamin Moore & Co., 277 Ill. App. 340.
34 C.J. p 387 note 17.

72. Pa.—Nelson v. Guffey, 18 A. 1073, 131 Pa. 273, 289.
34 C.J. p 387 note 18.

73. Wis.—Anderson v. Sloane, 40 N.W. 214, 72 Wis. 566, 7 Am.S.R. 885.
34 C.J. p 385 note 3.

When a judgment is set aside as void, all proceedings thereunder are also void.—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818.

74. Kan.—Morris v. Hardie, 113 P. 308, 84 Kan. 9.
34 C.J. p 385 note 4.

75. Ind.—Martin v. Baugh, 27 N.E. 110, 1 Ind.App. 20.
34 C.J. p 385 note 5.

76. Minn.—Gowen v. Conlow, 53 N.W. 365, 51 Minn. 213.
34 C.J. p 385 note 6.

77. Kan.—Bryner v. Fernetti, 41 P.2d 712, 141 Kan. 446.
34 C.J. p 385 note 6 [a].

78. N.J.—Ostrom v. Ferris, 134 A. 305, 99 N.J.Eq. 551, affirmed 141 A. 920, two cases, 103 N.J.Eq. 22.
34 C.J. p 386 note 7.

Purchaser must show bona fides
Ky.—Rouse v. Rouse, 262 S.W. 596, 203 Ky. 415.

Interlocutory judgment
Vendee, granted new trial after judgment foreclosing vendor's lien, could recover for conversion of oil taken from land, judgment being merely interlocutory.—Texas Co. v. Dunlap, Tex.Com.App., 41 S.W.2d 42, rehearing denied 43 S.W.2d 92.

79. Minn.—Aldrich v. Chase, 73 N.W. 161, 70 Minn. 243, 247.
34 C.J. p 386 note 8.

80. Conn.—Padaigis v. Kane, 4 A.2d 335, 125 Conn. 727.

81. Ohio.—Washington v. Levinson, 35 N.E.2d 161, 66 Ohio App. 461.
Pa.—Markofski v. Yanks, 146 A. 569, 297 Pa. 74.

A decree of partition cannot be opened to change results without also setting aside the titles obtained under it.—Walsh v. Varney, 38 Mich. 73.

82. N.Y.—Pomeroy v. Hocking Valley R. Co., 175 N.Y.S. 489, 187 App. Div. 164.
34 C.J. p 386 note 12.

83. Ill.—Park Ridge v. Murphy, 101 N.E. 524, 258 Ill. 365.
34 C.J. p 386 note 14.

Vacating judgment held erroneous
Vacating judgment against sureties on official bond before final determination of cause was held to be error, since plaintiff should have been allowed to retain his lien until final determination of the case.—City of Luverne v. Skyberg, 211 N.W. 5, 169 Minn. 234.

84. Mo.—McLaran v. Wilhelm, 50 Mo.App. 658.
34 C.J. p 386 note 9.

85. U.S.—Leonard v. St. Joseph Lead Co., C.C.A.Mo., 75 F.2d 390—U. S. v. A. Bentley & Sons Co., D.C.Ohio, 293 F. 229.
34 C.J. p 386 note 15.

86. U.S.—Leonard v. St. Joseph Lead Co., C.C.A.Mo., 75 F.2d 390.
34 C.J. p 387 note 16.

Original judgment is superseded by new judgment where applicant is successful on motion to set aside judgment and enter a different judgment based on the findings.—Karsh v. Superior Court in and for Los

ment does not give jurisdiction where none before existed or confer on the judgment any validity it did not originally possess.[87] A refusal to set aside a judgment alleged to be void for want of jurisdiction is not a conclusive determination that the judgment is valid.[88] An order erroneously awarding relief against a judgment is not void where the court had jurisdiction.[89]

Subsequent proceedings. It has been held that the order opening the judgment rather than a general practice act controls the subsequent pleadings in the action.[90] Unless the order otherwise provides, defendant on the opening of a judgment may interpose any defense,[91] including one not previously raised.[92] Where a judgment is opened generally, the burden is on plaintiff to prove his cause of action,[93]

Persons bound. An order granting or denying a motion to open or vacate a judgment is binding and conclusive on all parties to the application and on those in privity with them.[94]

Renewal of application. The remedy of a party aggrieved by the denial of a motion to open or vacate a judgment is by appeal,[95] and not by resort to independent proceedings to obtain the same relief,[96] although it has been held that a denial of relief on motion is no bar to an action on the same grounds for the same relief,[97] and particularly not to an action for the same relief but on different grounds.[98] While the decision on a motion to vacate or set aside a judgment is not in the strict sense res judicata,[99] it has been held that a plea of res judicata may be sustained where the second application is on the same grounds as the first,[1] and it is general rule of practice that a second application for the same purpose, based on the same grounds as the first, will not be entertained[2] without first obtaining leave of the court,[3] unless the order denying the motion is made without prejudice to its renewal[4] or is made in a manner too defective or imperfect to prevent a renewal.[5]

A second application to vacate a judgment founded on facts which were known or which should have been known to the applicant at the time of making the first application will not, as a rule, be considered,[6] although a refusal to vacate a judgment on one ground is no bar to an application to vacate it on other grounds.[7] If, however, the court is satisfied that there was excusable neglect in not bringing forward all the grounds in the first instance, leave may properly be granted to renew the application.[8] A new motion should always be entertained when based on new grounds, not covered by the former motion and not then known or available to the party.[9] Where leave to renew an application to vacate or set aside a judgment is granted, such second application must be in accordance with the terms imposed on granting such relief.[10] Where the second application is for different relief, as, for instance, where the former motion was to vacate a judgment as a nullity, and the second is to open such judgment and let applicant in to defend, or vice versa, the denial of the first motion is no bar as to the second.[11]

Angeles County, 12 P.2d 658, 124 Cal.App. 373.

87. Cal.—Smith v. Los Angeles & P. R. Co., 34 P. 242, 4 Cal.Unrep.Cas. 237.
34 C.J. p 387 note 19.

88. N.Y.—Pendleton v. Weed, 17 N. Y. 72.

89. Wis.—Volland v. McGee, 295 N. W. 635, 236 Wis. 358.

90. Pa.—Cassler v. Cassler, 144 A. 88, 294 Pa. 197.

91. Pa.—Austen v. Marzolf, 161 A. 72, 307 Pa. 232.
Plaintiff is not required to anticipate defense or sustain greater than normal burden of proof.—Austen v. Marzolf, supra.

92. Conn.—Padaigis v. Kane, 4 A.2d 335, 125 Conn. 727.

93. Pa.—Austen v. Marzolf, 161 A. 72, 307 Pa. 232—Knierim v. Pfeil, Com.Pl., 6 Sch.Reg. 329.
34 C.J. p 386 note 14 [a].

94. N.Y.—Bush v. O'Brien, 62 N.Y. S. 685, 47 App.Div. 581, reversed on other grounds 58 N.E. 106, 164 N.Y. 205.
34 C.J. p 387 note 21.

95. Ill.—Emcee Corporation v. George, 12 N.E.2d 333, 293 Ill.App. 240.
34 C.J. p 387 note 23.

96. Ga.—Palmer v. Jackson, 4 S.E. 2d 28, 188 Ga. 336.
34 C.J. p 387 note 24.

97. N.Y.—Monroe v. Monroe, 21 N.Y. S. 655.
34 C.J. p 387 note 25.

98. Cal.—Estudillo v. Security Loan & Trust Co., 87 P. 19, 149 Cal. 556.
34 C.J. p 387 note 26.

99. Conn.—Santoro v. Kleinberger, 163 A. 107, 115 Conn. 631.
34 C.J. p 387 note 27.

1. Ga.—Revels v. Kilgo, 121 S.E. 209, 157 Ga. 39.

2. Ill.—Emcee Corporation v. George, 12 N.E.2d 333, 293 Ill.App. 240.
Mass.—Old Colony Trust Co. v. Pepper, 167 N.E. 656, 268 Mass. 467.
34 C.J. p 388 note 28.

3. Minn.—Carlson v. Carlson, 52 N. W. 214, 49 Minn. 555.
34 C.J. p 388 note 29.

4. Mass.—Soper v. Manning, 33 N. E. 516, 158 Mass. 381.
34 C.J. p 388 note 30.

5. Va.—Webb v. McNeil, 3 Munf. 184, 17 Va. 184.

6. Ga.—Palmer v. Jackson, 4 S.E.2d 28, 188 Ga. 336.
34 C.J. p 388 note 32.
A special plea setting up the judgment and facts as to the first attack is not required.—Palmer v. Jackson, supra.

7. Ga.—Palmer v. Jackson, supra.
34 C.J. p 388 note 33.

8. Mont.—Jensen v. Barbour, 31 P. 592, 12 Mont. 566.
34 C.J. p 388 note 34.

9. S.D.—Olson v. Advance Rumely Thresher Co., 178 N.W. 141, 43 S. D. 90.
34 C.J. p 389 note 35.

10. N.Y.—People v. Samuels, 8 N.Y. S. 475.
34 C.J. p 389 note 36.

11. Pa.—Albert M. Greenfield & Co.

§ 307. —— Restitution

A party who has received benefits under a judgment which is vacated should be required to make restitution.

Where a final judgment is absolutely vacated, after it has been paid, or satisfied by execution or by possession of the property in controversy, the party benefiting by it should be ordered to make restitution,[12] but not where the judgment is merely opened to permit a defense; in the latter case there should be no order of restitution until after trial and final judgment.[13] An attorney who has shared in the proceeds of a vacated judgment may be ordered to make restitution.[14]

§ 308. Objections and Exceptions

Objections to defects in proceedings to open or vacate a judgment may be waived.

Defects or irregularities in the proceedings to vacate a judgment, or in the action of the court thereon, are waived if the party fails to object in due season, or shows his acquiescence by participating in the further proceedings in the action.[15]

§ 309. Vacation and Review of Order

An order opening or vacating a judgment may itself be vacated.

The court has power to reverse, correct, or modify orders made by it on an application to open or vacate a judgment.[16] An order opening or vacating a judgment may itself be vacated or rescinded,[17] as where the order was made without jurisdiction,[18] or was obtained irregularly or fraudulently,[19] or because it was erroneous,[20] or on failure to comply with the conditions imposed.[21]

An application to vacate an order vacating or opening a judgment must be timely made,[22] and due notice must be given.[23] It has been held that the application must be made to the judge who rendered the order sought to be vacated.[24]

The effect of vacating such an order is to restore the original judgment.[25] When this is done, provision should be made for saving the intervening rights of third persons.[26] The court may pro-

v. Roberts, 5 A.2d 642, 135 Pa. Super. 328.
34 C.J. p 389 note 37.

12. U.S.—U. S. v. Morgan, Mo., 59 S.Ct. 795, 307 U.S. 183, 83 L.Ed. 1211, mandate conformed to, D.C., Morgan v. U. S., 32 F.Supp. 546, reversed on other grounds U. S. v. Morgan, 61 S.Ct. 999, 313 U.S. 409, 85 L.Ed. 1429.
Cal.—Brown v. Howard, 261 P. 732, 86 Cal.App. 532.
Fla.—State ex rel. Revell v. City of Wauchula, 189 So. 247, 138 Fla. 184—Revell v. Dishong, 175 So. 905, 129 Fla. 9—Hazen v. Smith, 135 So. 813, 101 Fla. 767.
Mo.—**Corpus Juris cited in** In re Main's Estate, 152 S.W.2d 696, 701, 236 Mo.App. 88.
N.J.—Westfield Trust Co. v. Court of Common Pleas of Morris County, 183 A. 165, 116 N.J.Law 191—Westfield Trust Co. v. Cherry, 183 A. 165, 116 N.J.Law 190.
Wyo.—Healy v. Wostenberg, 38 P. 2d 325, 47 Wyo. 375.
34 C.J. p 389 note 38.

Right to restitution is not absolute, to be had by litigant regardless of justice of matter.—Healy v. Wostenberg, supra.

One in privity with successful party
When a void judgment is set aside, party receiving benefit thereof or one in privity with him is obligated to make restitution to other party of all property received under judgment.—Peoples Building & Loan Ass'n v. Wagner, 180 S.W.2d 295, 297 Ky. 558.

Trust fund; identity
With respect to the right of bankruptcy trustee to recover from judgment creditor money obtained under execution on judgment which was subsequently vacated, trust for money so obtained did not come into being until order setting aside judgment became final, after which time law imposed on judgment creditor obligation of returning money to bankrupt, notwithstanding failure of bankruptcy trustee to identify trust res.—Levy v. Drew, 50 P.2d 435, 4 Cal.2d 456, 101 A.L.R. 1144.

Discharge of lien
The tender of special assessments was not required as a condition to vacate a judgment void on its face, rendered in action to foreclose delinquent special assessments, where property was purchased by judgment creditor and lien was not discharged since judgment was void.—Morgan v. City of Ardmore ex rel. Love & Thurmond, 78 P.2d 785, 182 Okl. 542.

13. N.Y.—Ketcham v. Elliott, 20 N. Y.S. 745.

14. Mo.—Warren v. Order of Railway Conductors of America, 201 S. W. 368, 199 Mo.App. 200.

15. Ill.—National Lead Co. v. Mortell, 261 Ill.App. 332—Cooper v. Handelsman, 247 Ill.App. 454.
34 C.J. p 389 note 41.

16. N.J.—Wardell v. Warshofsky, 159 A. 694, 10 N.J.Misc. 519.

17. U.S.—Thomas v. Newton, C.C. Pa., 23 F.Cas.No.13,905, Pet.C.C. 4444.
Kan.—Mayall v. American Well Works Co., 89 P.2d 846, 149 Kan. 781.
Ky.—Commonwealth v. Partin, 3 S. W.2d 779, 223 Ky. 405.
34 C.J. p 389 note 46.

Compared with power to vacate judgment
The power of court to set aside judgment should be no greater than its power to set aside an order vacating judgment.—Morey v. Morey, 299 N.Y.S. 161, 164 Misc. 527.

18. Fla.—State v. Wright, 145 So. 598, 107 Fla. 178.
34 C.J. p 389 note 42.

19. Wash.—Hays v. Mercantile Inv. Co., 132 P. 406, 73 Wash. 586.
34 C.J. p 389 note 43.

20. Mo.—Wilson v. Teale, App., 88 S.W.2d 422.
34 C.J. p 389 note 44.

21. Cal.—Gregory v. Haynes, 21 Cal. 443.
34 C.J. p 389 note 45.

22. Ind.—Kolb v. Raisor, 47 N.E. 177, 17 Ind.App. 551.
34 C.J. p 389 note 47.

23. Wash.—Chehalis County v. Ellingson, 59 P. 485, 21 Wash. 638.
34 C.J. p 390 note 49.

24. U.S.—Newcomb v. Burbank, C.C. N.Y., 159 F. 569.

Collateral proceeding
The decree or order of a court of competent jurisdiction, although vacated or modified by subsequent order fraudulently procured, may not be reinstated by decree in collateral proceeding.—Goodman v. Goodman, 194 A. 866, 15 N.J.Misc. 716.

25. Ky.—Vanderpool v. Stewart, 279 S.W. 645, 212 Ky. 373.
34 C.J. p 390 note 51.

26. N.J.—Keogh v. Delany, 40 N.J. Law 97.

vide that the judgment be reinstated as of the date it was originally entered.[27]

Review on appeal or error of an order granting or denying an application to open or vacate a judgment is considered in Appeal and Error § 132.

§ 310. Liabilities on Bonds Given in Proceedings to Vacate

The imposition of terms on the opening or vacating of judgments is discussed supra § 303.

Examine Pocket Parts for later cases.

D. WRIT OF ERROR CORAM NOBIS

§ 311. In General

A writ of error coram nobis is a common-law writ used in a proper case to obtain a review and correction of a judgment by the court which rendered it. Although widely replaced by more convenient remedies, the writ still obtains in some jurisdictions.

A writ of error coram nobis, sometimes called a "writ of error coram vobis,"[28] is an ancient common-law writ,[29] used for the purpose of obtaining a review and correction of a judgment by the same court which rendered it, with respect to some error of fact affecting the validity and regularity of the judgment.[30] The writ has grown out of use and become substantially obsolete both in England and in this country,[31] the more convenient and sum-

27. Neb.—Shafer v. Wilsonville Elevator Co., 237 N.W. 155, 121 Neb. 280.

28. U.S.—Hiawassee Lumber Co. v. U. S., C.C.A.N.C., 64 F.2d 417—United States v. One Trunk Containing Fourteen Pieces of Embroidery, D.C.N.Y., 155 F. 651—McGinn v. U. S., D.C.Mass., 2 F.R.D. 562.
Ala.—Snodgrass v. Snodgrass, 101 So. 837, 212 Ala. 74.
Colo.—Tatarsky v. De Vere, 242 P. 973, 78 Colo. 496.
Md.—Hawks v. State, 157 A. 900, 162 Md. 30.
34 C.J. p 390 note 54.

Distinctions considered

(1) "It is called a writ of error coram nobis in King's Bench, because the record and proceedings are stated in the writ to remain 'before us'. It was a fiction of old English law that the King was supposed to preside in person in that court. In the Court of Common Pleas, where the king is not supposed to reside, the writ is called a writ of error coram vobis, because the record and proceedings are stated in the record to remain 'before you,' meaning the king's justices. . . . The difference referred only to the form appropriate to each court, neither of which exists in the United States, and as a result there is no difference between a writ of error coram nobis and a writ of error coram vobis in this country."—Baker v. Smith's Estate, 18 S.W.2d 147, 151, 223 Mo.App. 1234, 226 Mo.App. 510.

(2) Other statements.
Ill.—McGrath & Swanson Const. Co. v. Chicago Rys. Co., 252 Ill.App. 476.
Md.—Keane v. State, 166 A. 410, 164 Md. 685.
34 C.J. p 390 note 54 [a].

29. U.S.—New England Furniture & Carpet Co. v. Willcuts, D.C.Minn., 55 F.2d 983—McGinn v. U. S., D.C.Mass., 2 F.R.D. 562.
Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158—Marab'a v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516—Frank v. Newburger, 19 N.E.2d 147, 298 Ill.App. 548—Swiercz v. Nalepka, 259 Ill. App. 262.
Kan.—Gibson v. Enright, 37 P.2d 1017, 140 Kan. 700.
Md.—Keane v. State, 166 A. 410, 164 Md. 685—Hawks v. State, 157 A. 900, 162 Md. 30.
Mo.—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867—Ragland v. Ragland, App., 258 S.W. 728.
Wis.—Ernst v. State, 192 N.W. 65, 179 Wis. 646, 30 A.L.R. 681.
34 C.J. p 390 note 55.

"The writ of error coram nobis is one of the oldest writs known to the English Common Law. Blackstone refers to it as a 'writ of most remedial nature which seems to have been invented lest in any way there should be an oppressive defeat of justice.' "—Central Franklin Process Co. v. Gann, 133 S.W.2d 503, 508, 175 Tenn. 267.

"Coram nobis means 'before us' or quae coram nobis resident, which roughly translated is 'which before us remain,' so called 'from its being founded on the record and process, which are stated in the writ to remain in the court of the king before the king himself.' Bouvier's Law Dictionary."—McGrath & Swanson Const. Co. v. Chicago Rys. Co., 252 Ill.App. 476, 478.

30. U.S.—Hiawassee Lumber Co. v. U. S., C.C.A.N.C., 64 F.2d 417—New England Furniture & Carpet Co. v. Willcuts, D.C.Minn., 55 F.2d 983—United States v. One Trunk Containing Fourteen Pieces of Embroidery, D.C.N.Y., 155 F. 651—McGinn v. U. S., D.C.Mass., 2 F. R.D. 562.
Ark.—**Corpus Juris cited in** State v. Hudspeth, 88 S.W.2d 858, 860, 191 Ark. 963.
Colo.—Tatarsky v. De Vere, 242 P. 973, 78 Colo. 496.
Del.—**Corpus Juris cited in** Tweed v. Lockton, 167 A. 703, 705, 5 Harr. 474.
Ill.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101—Maher v. New York, C. & St. L. R. Co., 8 N.E.2d 512, 290 Ill.App. 267—Lynn v. Multhauf, 279 Ill.App. 210—Swiercz v. Nalepka, 259 Ill.App. 262—McGrath & Swanson Const. Co. v. Chicago Rys. Co., 252 Ill. App. 476.
Ind.—Berry v. State, 173 N.E. 705, 202 Ind. 294, 72 A.L.R. 1177.
Md.—**Corpus Juris cited in** Keane v. State, 166 A. 410, 412, 164 Md. 685—Hawks v. State, 157 A. 900, 162 Md. 30.
Mo.—City of St. Louis v. Franklin Bank, 173 S.W.2d 837, 351 Mo. 688—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—Bank of Skidmore v. Ripley, App., 84 S. W.2d 185—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W.2d 1101, 228 Mo.App. 1102—Moutier v. Sherman, App., 25 S.W.2d 490—Schneider v. Schneider, App., 273 S.W. 1081—Ragland v. Ragland, App., 258 S.W. 728.
Tex.—Ex parte Minor, 27 S.W.2d 805, 115 Tex.Cr. 634.
34 C.J. p 390 note 56.

The earliest known use of the writ was to disclose misprision of clerk, infancy, coverture, or death of a party.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.

31. U.S.—New England Furniture & Carpet Co. v. Willcuts, D.C.Minn., 55 F.2d 983.
Kan.—Gibson v. Enright, 37 P.2d 1017, 140 Kan. 700.
Colo.—**Corpus Juris cited in** Grandbouche v. People, 89 P.2d 577, 582, 104 Colo. 175.
Md.—Keane v. State, 166 A. 410, 164

mary remedy by motion having taken its place, either as a matter of practice or by express statutory provision,[32] although, of course, distinctions do exist between a motion to open or vacate a judgment, and proceedings on a writ of error coram nobis.[33]

The writ is still an available remedy, and is occasionally used,[34] except where it has been abolished by statute;[35] and in some jurisdictions the writ is expressly authorized by statute,[36] or is preserved by operation of a general constitutional provision retaining common-law remedies.[37] However, in modern practice the writ is not so comprehensive as at common law because of the existence of statutory remedies, such as motion to vacate, motion for new trial, and appeal.[38]

§ 312. When Writ Lies

a. In general
b. Other adequate remedies
c. Errors of fact
d. Errors of law

a. In General

Except as otherwise provided by statute, all courts of record exercising general original jurisdiction at common law have power to issue the writ. The writ is inappropriate in chancery proceedings.

A writ of error coram nobis will not ordinarily lie after affirmance of the judgment on writ of error or appeal;[39] nor will the writ lie after the dismissal of a certiorari for want of merits in the petition.[40] Where a petition for a writ is denied and a second petition is subsequently brought in the same court that court has jurisdiction to decide whether or not the denial of the first petition is res judicata.[41]

In what courts and proceedings. All courts of record exercising general original jurisdiction at common law have power to issue writs of error coram nobis, as part of their common-law jurisdiction,[42] except as otherwise provided by statute.[43] It has been held that, in courts exercising only appellate jurisdiction, the writ does not lie;[44] but there is authority to the contrary,[45] The extent of the power of other courts to entertain the

Md. 685—Hawks v. State, 157 A. 900, 162 Md. 30.
Mo.—Baker v. Smith's Estate, 18 S. W.2d 147, 223 Mo.App. 1234, 226 Mo.App. 510—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867.
34 C.J. p 391 note 63.

32. U.S.—New England Furniture & Carpet Co. v. Willcuts, D.C.Minn., 55 F.2d 933—McGinn v. U. S., D.C. Mass., 2 F.R.D. 562.
Colo.—**Corpus Juris cited in** Grandbouche v. People, 89 P.2d 577, 582, 104 Colo. 175.
Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158—Harris v. Chicago House-Wrecking Co., 145 N.E. 666, 314 Ill. 500—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516—Frank v. Newburger, 19 N.E.2d 147, 298 Ill.App. 548—Maher v. New York, C. & St. L. R. Co., 8 N.E.2d 512, 290 Ill. App. 267—Josten Mfg. Co. v. Keeler, 2 N.E.2d 586, 284 Ill.App. 646—Lynn v. Multhauf, 279 Ill.App. 210—Reid v. Chicago Rys. Co., 231 Ill.App. 58.
Kan.—Gibson v. Enright, 37 P.2d 1017, 140 Kan. 700.
Md.—Hawks v. State, 157 A. 900, 162 Md. 30.
Mo.—Baker v. Smith's Estate, 18 S. W.2d 147, 223 Mo.App. 1234, 226 Mo.App. 510—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867.
34 C.J. p 391 note 64.

33. Mo.—Scott v. Rees, 253 S.W. 998, 300 Mo. 123.
34 C.J. p 391 note 66.
34. U.S.—Hiawassee Lumber Co. v. U. S., C.C.A.N.C., 64 F.2d 417.
Md.—Hawks v. State, 157 A. 900, 162 Md. 30.
Mo.—Baker v. Smith's Estate, 18 S. W.2d 147, 223 Mo.App. 1234, 226 Mo.App. 510.
Tex.—Ex parte Minor, 27 S.W.2d 805, 115 Tex.Cr. 634.
34 C.J. p 392 note 67.

After time for motion

A motion to vacate a judgment made three years after the term at which judgment was rendered, for matters outside the record, will be considered as a motion for writ coram nobis, in view of the similarities of the two motions as independent proceedings.—Scott v. Rees, 253 S.W. 998, 300 Mo. 123.

35. Or.—State v. Rathie, 200 P. 790, 101 Or. 368.
34 C.J. p 392 note 68.

Essentials of remedy remain

While the statute abolishes the writ, it does not abolish the essentials of the proceeding, which remain the same.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101—Frank v. Salomon, 34 N.E.2d 424, 376 Ill. 439—People v. Sullivan, 171 N.E. 122, 339 Ill. 146—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141—Harris v. Chicago House-Wrecking, Co., 145 N.E. 666, 314 Ill. 500—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147—Coultry v. Yellow Cab Co., 252 Ill. App. 443—Waldron v. Tarpey, 234 Ill. App. 287—Reid v. Chicago Rys. Co., 231 Ill.App. 58—34 C.J. p 392 note 68 [c] (1).

36. Tenn.—Cates v. City of McKenzie, 141 S.W.2d 471, 176 Tenn. 313—Central Franklin Process Co. v. Gann, 133 S.W.2d 503, 175 Tenn. 267—Hyde v. Dunlap, 8 Tenn.App. 260.
34 C.J. p 392 note 69.
37. Wis.—Ernst v. State, 192 N.W. 65, 179 Wis. 646, 30 A.L.R. 681.
38. Ind.—Berry v. State, 173 N.E. 705, 202 Ind. 294, 72 A.L.R. 1177.
Wis.—Ernst v. State, 192 N.W. 65, 179 Wis. 646, 30 A.L.R. 681.
34 C.J. p 392 note 70.
39. N.C.—Latham v. Hodges, 35 N. C. 267.
34 C.J. p 392 note 77.
40. Tenn.—Welsh v. Harman, 8 Yerg. 103.
34 C.J. p 392 note 79.
41. Ind.—State ex rel. Emmert v. Hamilton Circuit Court, 61 N.E.2d 182.
42. Mo.—Reed v. Bright, 134 S.W. 653, 232 Mo. 399.
34 C.J. p 392 note 80.
43. Mich.—Teller v. Wetherill, 6 Mich. 46.
34 C.J. p 392 note 81.
44. Tenn.—Lamb v. Sneed, 4 Baxt. 349.
34 C.J. p 392 note 82.
45. Ohio.—Dows v. Harper, 6 Ohio 518, 521, 27 Am.D. 270.
34 C.J. p 392 note 83.

writ depends on the statutes controlling their jurisdiction and practice.[46] In England the writ did not lie either in the house of lords,[47] or in the exchequer chamber,[48] but did lie in the king's bench and common pleas.[49]

Since the writ of error coram nobis, is a common-law writ, it is inappropriate in chancery proceedings.[50] A divorce decree cannot be reviewed by writ of error coram nobis.[51] As appears in Criminal Law § 1606, the writ may be available in criminal, as well as in civil, proceedings.

b. Other Adequate Remedies

The writ of error coram nobis will not lie where there is another adequate remedy.

The writ of error coram nobis will not lie where there is another adequate remedy,[52] as by motion to vacate the judgment,[53] which, as discussed supra § 311, is now widely substituted for the writ, or by motion for a new trial,[54] or by appeal.[55] As falling within this rule, it has been held that a writ of error coram nobis will not lie on any of the following grounds, namely: Defenses available at the trial;[56] accident and surprise;[57] verdict against evidence;[58] newly discovered evidence;[59] and other like matters.[60]

c. Errors of Fact

(1) In general
(2) Jurisdictional facts
(3) Disability or death
(4) Fraud, mistake, and clerical errors
(5) New or adjudicated facts

(1) In General

A writ of error coram nobis lies for an error of fact not apparent on the record, not attributable to the applicant's negligence, and which, if known by the court, would have prevented rendition of the judgment.

A writ of error coram nobis lies, sometimes by virtue of statutory provisions, for an error of fact,[61]

46. Ky.—Breckinridge v. Coleman, 7 B.Mon. 331.
34 C.J. p 393 note 84.
47. Ill.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.
34 C.J. p 393 note 85.
48. Ill.—Nikola v. Campus Towers Apartment Bldg. Corporation, supra.
34 C.J. p 393 note 86.
49. Ohio.—Dows v. Harper, 6 Ohio 518, 27 Am.D. 270.
34 C.J. p 393 note 87.
50. Ala.—Snodgrass v. Snodgrass, 101 So. 837, 212 Ala. 74.
Ill.—Frank v. Salomon, 34 N.E.2d 424, 376 Ill. 439—**Corpus Juris cited in** Frank v. Newburger, 19 N.E. 2d 147, 153, 298 Ill.App. 548—**Corpus Juris cited in** People v. Janssen, 263 Ill.App. 101, 104.
34 C.J. p 393 note 89.

Reason for rule

In chancery the court may at any time, either by motion or by a nunc pro tunc order or by a motion in the nature of a bill of review, correct the record or make the decree or judgment speak the truth.—People v. Janssen, 263 Ill.App. 101.

51. Tenn.—Tarver v. Tarver, 10 Tenn.App. 677.
52. Colo.—Tatarsky v. De Vere, 242 P. 973, 78 Colo. 496.
Kan.—Gibson v. Enright, 37 P.2d 1017, 140 Kan. 700.
Mo.—Bank of Skidmore v. Ripley, App., 84 S.W.2d 185.
34 C.J. p 393 note 90.

Other remedy inadequate

Fact that motion to set aside judgment for irregularities patent on record and errors of fact calling for introduction of evidence dehors the record was filed within one year after rendition of judgment did not preclude substitution of coram nobis proceeding for writ of error, since writ of error proceeding would preclude establishment of errors of fact dehors the record.—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173.

53. Wis.—Second Ward Bank v. Upman, 14 Wis. 596.
54. Miss.—Fugate v. State, 37 So. 554, 85 Miss. 94, 107 Am.S.R. 268, 3 Ann.Cas. 326.
34 C.J. p 393 note 93.
55. Ind.—Sanders v. State, 85 Ind. 318, 44 Am.R. 29.
56. Ill.—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392.
Ind.—Sanders v. State, 85 Ind. 318, 44 Am.R. 29.
Mo.—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85.
57. Ind.—Sanders v. State, 85 Ind. 318, 44 Am.R. 29.
Error of fact caused by accident or surprise see infra subdivision c (4) of this section.
58. Ind.—Sanders v. State, supra.
59. Ind.—Sanders v. State, supra.
34 C.J. p 393 note 98.
New evidence as showing error of fact see infra subdivision c (5) of this section.
60. Miss.—Fugate v. State, 37 So. 554, 85 Miss. 94, 107 Am.S.R. 268, 3 Ann.Cas. 326.
34 C.J. p 393 note 99.
61. U.S.—Hiawassee Lumber Co. v. U. S., C.C.A.N.C., 64 F.2d 417—New England Furniture & Carpet Co. v. Willcuts, D.C.Minn., 55 F.2d 933—United States v. One Trunk Containing Fourteen Pieces of Embroidery, D.C.N.Y., 155 F. 651—McGinn v. U. S., D.C.Mass., 2 F. R.D. 562.
Colo.—Tatarsky v. De Vere, 242 P. 973, 78 Colo. 496.
Fla.—Catlett v. Chestnut, 163 So. 26, 120 Fla. 636—Williams v. Yelvington, 137 So. 156, 103 Fla. 145.
Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158—Harris v. Chicago House-Wrecking Co., 145 N.E. 666, 314 Ill. 500—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516—Reid v. Dolan, 19 N.E.2d 764, 299 Ill.App. 612—Martin v. Starr, 255 Ill.App. 189—Waldron v. Tarpey, 234 Ill.App. 287.
Ind.—Berry v. State, 173 N.E. 705, 202 Ind. 294, 72 A.L.R. 1177.
Mo.—Badger Lumber Co. v. Goodrich, 184 S.W.2d 435, 353 Mo. 769—**Corpus Juris cited in** City of St. Louis v. Franklin Bank, 173 S.W.2d 837, 846, 351 Mo. 688—Spotts v. Spotts, 55 S.W.2d 984, 331 Mo. 942—Scott v. Rees, 253 S.W. 998, 300 Mo. 123—Pike v. Pike, App., 193 S.W.2d 637—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—Haines v. Jeffrey Mfg. Co., App., 31 S.W.2d 269—Mefford v. Mefford, App., 26 S.W. 2d 804—Schneider v. Schneider, App., 273 S.W. 1081—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867—Ragland v. Ragland, App., 258 S.W. 728.
Tenn.—Central Franklin Process Co. v. Gann, 133 S.W.2d 503, 175 Tenn. 267.
34 C.J. p 393 note 1, p 395 note 13.

not appearing on the face of the record,[62] which fact was unknown to the court,[63] and which, if known in season, would have prevented the rendition and entry of the judgment challenged.[64] The court will

62. U.S.—New England Furniture & Carpet Co. v. Willcuts, D.C. Minn., 55 F.2d 983—McGinn v. U. S., D.C.Mass., 2 F.R.D. 562.
Fla.—Cole v. Walker Fertilizer Co., for Use and Benefit of Walker, 1 So.2d 864, 147 Fla. 1—Williams v. Yelvington, 137 So. 156, 103 Fla. 145.
Ill.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101—Jerome v. 5019-21 Quincy Street Bldg. Corporation, 53 N.E.2d 444, 385 Ill. 524—Linehan v. Travelers Ins. Co., 18 N.E.2d 178, 370 Ill. 157—People v. Sullivan, 171 N.E. 122, 339 Ill. 146—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158—Jacobson v. Ashkinaze, 168 N. E. 647, 337 Ill. 141—Marabia v. Mary Thompson Hospital of Chicago for Women and Children. 140 N.E. 836, 309 Ill. 147—Frank v. Newburger, 19 N.E.2d 147, 298 Ill. App. 548—Maher v. New York, C. & St. L. R. Co., 8 N.E.2d 512, 290 Ill.App. 267—Chicago Faucet Co. v. 839 Lake St. Bldg. Corporation, 1 N.E.2d 865, 285 Ill.App. 151—Swierez v. Nalepka, 259 Ill.App. 262—Martin v. Starr, 255 Ill.App. 189—Mitchell v. Eareckson, 250 Ill.App. 508—Waldron v. Tarpey, 234 Ill. App. 287.
Miss.—**Corpus Juris quoted in** Carraway v. State, 141 So. 342, 343, 163 Miss. 639.
Mo.—Badger Lumber Co. v. Goodrich, 184 S.W.2d 435, 353 Mo. 769—City of St. Louis v. Franklin Bank, 173 S.W.2d 837, 351 Mo. 688—**Corpus Juris cited in** Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 106, 341 Mo. 1173—Fadler v. Gabbert, 63 S.W.2d 121, 333 Mo. 851—Scott v. Rees, 253 S.W. 998, 300 Mo. 123—Pike v. Pike, App., 193 S.W.2d 637—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—Jeffrey v. Kelly, App., 146 S.W.2d 850—State ex rel. Caplow v. Kirkwood, App., 117 S.W.2d 652—Bank of Skidmore v. Ripley, App., 84 S.W.2d 185—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W.2d 1101, 228 Mo.App. 1102—Hecht Bros. Clothing Co. v. Walker, 35 S.W.2d 372, 224 Mo.App. 1156—Schneider v. Schneider, App., 273 S.W. 1081.
Tenn.—Roller v. Burrow, 175 S.W.2d 537, 180 Tenn. 380, rehearing denied 177 S.W.2d 547, 180 Tenn. 380—Roy Newman Cigar Co. v. Murphy, 2 Tenn.App. 321.
Wis.—Ernst v. State, 192 N.W. 65, 179 Wis. 646, 30 A.L.R. 681.
Wyo.—**Corpus Juris cited in** School Dist. No. 7 in Weston County v. School Dist. No. 1 in Weston County, 236 P. 1029, 1031, 33 Wyo. 65. 34 C.J. p 394 note 2.

63. U.S.—McGinn v. U. S., D.C. Mass., 2 F.R.D. 562.
Colo.—Tatarsky v. De Vere, 242 P. 973, 78 Colo. 496.
Fla.—Cole v. Walker Fertilizer Co., for Use and Benefit of Walker, 1 So.2d 864, 147 Fla. 1—Catlett v. Chestnut, 163 So. 26, 120 Fla. 636—Williams v. Yelvington, 137 So. 156, 103 Fla. 145.
Ill.—Linehan v. Travelers Ins. Co., 18 N.E.2d 178, 370 Ill. 157—People v. Sullivan, 171 N.E. 122, 339 Ill. 146—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147—Joseph Kaszab, Inc. v. Gibson, App., 63 N.E.2d 629—Reid v. Dolan, 19 N.E.2d 764, 299 Ill. App. 612—Chicago Faucet Co. v. 839 Lake St. Bldg. Corporation, 1 N.E.2d 865, 285 Ill.App. 151—Lynn v. Multhauf, 279 Ill.App. 210—Martin v. Starr, 255 Ill.App. 189—Hickman v. Ritchey Coal Co., 252 Ill.App. 560—McGrath & Swanson Const. Co. v. Chicago Rys. Co., 252 Ill.App. 476—Mitchell v. Eareckson, 250 Ill.App. 508—Waldron v. Tarpey, 234 Ill.App. 287—Reid v. Chicago Rys. Co., 231 Ill.App. 58.
Miss.—**Corpus Juris quoted in** Carraway v. State, 141 So. 342, 343, 163 Miss. 639.
Mo.—Badger Lumber Co. v. Goodrich, 184 S.W.2d 435, 353 Mo. 769—City of St. Louis v. Franklin Bank, 173 S.W.2d 837, 351 Mo. 688—Pike v. Pike, App., 193 S.W.2d 637—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—Ross v. Davis, 139 S.W.2d 542, 234 Mo. App. 1079—Ex parte Messina, 128 S.W.2d 1082, 233 Mo.App. 1234—Bank of Skidmore v. Ripley, App., 84 S.W.2d 185—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W. 2d 1101, 228 Mo.App. 1102—Hecht Bros. Clothing Co. v. Walker, 35 S.W.2d 372, 224 Mo.App. 1156—Haines v. Jeffrey Mfg. Co., App., 31 S.W.2d 269—Mefford v. Mefford, App., 26 S.W.2d 804—Schneider v. Schneider, App., 273 S.W. 1081—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867.
Wyo.—**Corpus Juris cited in** School Dist. No. 7 in Weston County v. School Dist. No. 1 in Weston County, 236 P. 1029, 1031, 33 Wyo. 65. 34 C.J. p 394 note 3.

The judgment must be silent as to the matter complained of as constituting an error of fact.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158.

64. Colo.—**Corpus Juris cited in** Grandbouche v. People, 89 P.2d 577, 582, 104 Colo. 175—Tatarsky v. De Vere, 242 P. 973, 78 Colo. 496.
Del.—**Corpus Juris cited in** Tweed v. Lockton, 167 A. 703, 705, 5 Harr. 474.
Fla.—Cole v. Walker Fertilizer Co., for Use and Benefit of Walker, 1 So.2d 864, 147 Fla. 1—Catlett v. Chestnut, 163 So. 26, 120 Fla. 636—Williams v. Yelvington, 137 So. 156, 103 Fla. 145.
Ill.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101—Linehan v. Travelers Ins. Co., 18 N.E.2d 178, 370 Ill. 157—People v. Sullivan, 171 N.E. 122, 339 Ill. 146—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141—Loew v. Krauspe, 150 N.E. 683, 320 Ill. 244—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147—Joseph Kaszab, Inc., v. Gibson, App., 63 N.E. 2d 629—Reid v. Dolan, 19 N.E.2d 764, 299 Ill.App. 612—Chicago Faucet Co. v. 839 Lake St. Bldg. Corporation, 1 N.E.2d 865, 285 Ill. App. 151—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392—Heinsius v. Poehlmann, 282 Ill.App. 472—Lynn v. Multhauf, 279 Ill.App. 210—Swiercz v. Nalepka, 259 Ill.App. 262—Martin v. Starr, 255 Ill.App. 189—Hickman v. Ritchey Coal Co., 252 Ill.App. 560—McGrath & Swanson Const. Co. v. Chicago Rys. Co., 252 Ill. App. 476—Coultry v. Yellow Cab Co., 252 Ill.App. 443—Mitchell v. Eareckson, 250 Ill.App. 508—Waldron v. Tarpey, 234 Ill.App. 287—Reid v. Chicago Rys. Co., 231 Ill. App. 58.
Md.—**Corpus Juris cited in** Keane v. State, 166 A. 410, 412, 164 Md. 685—Hawks v. State, 157 A. 900, 162 Md. 30.
Miss.—**Corpus Juris quoted in** Carraway v. State, 141 So. 342, 343, 163 Miss. 639.
Mo.—**Corpus Juris cited in** Badger Lumber Co. v. Goodrich, 184 S.W. 2d 435, 438, 353 Mo. 769—**Corpus Juris cited in** City of St. Louis v. Franklin Bank, 173 S.W.2d 837, 846, 351 Mo. 688—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173—Pike v. Pike, App., 193 S.W.2d 637—Quattrochi v. Quattrochi, App., 179 S.W.2d 757—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—Jeffrey v. Kelly, App., 146 S.W.2d 850—Ex parte Messina, 128 S.W.2d 1082, 233 Mo.App. 1234—State ex rel. Caplow v. Kirkwood, App., 117 S. W.2d 652—Bank of Skidmore v. Ripley, App., 84 S.W.2d 185—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W.2d 1101, 228 Mo. App. 1102—Hecht Bros. Clothing

not consider any facts which might have been presented to the court on the trial of the cause;[65] and the writ will not lie where the party complaining knew the fact complained of, at the time of, or before trial, or, by the exercise of reasonable diligence, might have known it,[66] or is otherwise guilty of negligence in the matter.[67]

While the court will not look into the cause of action on which the judgment was rendered,[68] or consider facts going to the merits of the cause,[69] the error of fact to be corrected by this writ must be an error of fact pertinent to the issues in the case, and not mere extraneous matters.[70] Only such errors may be assigned as are consistent with the record before the court.[71] An absolutely correct record cannot be annulled, changed, or expunged by a writ coram nobis.[72]

(2) Jurisdictional Facts

A mistake as to the existence of a fact on which ju-

Co. v. Walker, 35 S.W.2d 372, 224 Mo.App. 1156—Haines v. Jeffrey Mfg. Co., App., 31 S.W.2d 269—Mefford v. Mefford, App., 26 S.W. 2d 804—Degener v. Kelly, App., 6 S.W.2d 998—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867—Ragland v. Ragland, App., 258 S.W. 728.

Tex.—Ex parte Minor, 27 S.W.2d 805, 115 Tex.Cr. 634.

Wash.—Pacific Telephone & Telegraph Co. v. Henneford, 92 P.2d 214, 199 Wash. 462, certiorari denied Henneford v. Pacific Telephone & Telegraph Co., 59 S.Ct. 483, 306 U.S. 637, 83 L.Ed. 1038.

Wyo.—**Corpus Juris cited in** School Dist. No. 7 in Weston County v. School Dist. No. 1 in Weston County, 236 P. 1029, 1031, 33 Wyo. 65.

34 C.J. p 394 note 4.

65. Ark.—**Corpus Juris quoted in** State v. Hudspeth, 88 S.W.2d 858, 861, 191 Ark. 963.

Ill.—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392—Lynn v. Multhauf, 279 Ill. App. 210—Coultry v. Yellow Cab Co., 252 Ill.App. 443.

Mo.—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W.2d 1101, 228 Mo. App. 1102.

34 C.J. p 395 note 7.

66. Ark.—**Corpus Juris quoted in** State v. Hudspeth, 88 S.W.2d 858, 861, 191 Ark. 963.

Colo.—Tatarsky v. De Vere, 242 P. 973, 78 Colo. 496.

Fla.—Cole v. Walker Fertilizer Co. for Use and Benefit of Walker, 1 So.2d 864, 147 Fla. 1.

Ill.—Carroll, Schendorf & Boenicke v. Hastings, 259 Ill.App. 564—Mitchell v. Eareckson, 250 Ill.App. 508.

Mo.—**Corpus Juris cited in** City of St. Louis v. Franklin Bank, 173 S. W.2d 837, 846, 351 Mo. 688—Pike v. Pike, App., 193 S.W.2d 637—Quattrochi v. Quattrochi, App., 179 S.W.2d 757—**Corpus Juris cited in** Jeffrey v. Kelly, App., 146 S. W.2d 850, 852—State ex rel. Caplow v. Kirkwood, App., 117 S.W. 2d 652—Bank of Skidmore v. Ripley, App., 84 S.W.2d 185—State ex rel. Chadd v. American Surety Co. of New York, App., 66 S.W.2d 941—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W.2d 1101, 228 Mo.App. 1102—Schneider v. Schneider, App., 273 S.W. 1081—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867.

Tenn.—Hyde v. Dunlap, 8 Tenn.App. 260—Inman v. Fox, 1 Tenn.App. 119.

Wyo.—**Corpus Juris cited in** School Dist. No. 7 in Weston County v. School Dist. No. 1 in Weston County, 236 P. 1029, 1031, 33 Wyo. 65.

34 C.J. p 394 note 5.

67. Ark.—**Corpus Juris quoted in** State v. Hudspeth, 88 S.W.2d 858, 861, 191 Ark. 963.

Fla.—Williams v. Yelvington, 137 So. 156, 103 Fla. 145.

Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158—Joseph Kaszab, Inc., v. Gibson, App., 63 N.E.2d 629—Blaha v. Turk, 12 N. E.2d 338, 293 Ill.App. 626—In re McKeogh's Estate, 11 N.E.2d 856, 293 Ill.App. 621—Sixty-First & Calument Apartments v. Woo, 9 N. E.2d 491, 291 Ill.App. 607—Lynn v. Multhauf, 279 Ill.App. 210.

Mo.—Badger Lumber Co. v. Goodrich, 184 S.W.2d 435, 353 Mo. 769—Pike v. Pike, App., 193 S.W.2d 637—Haines v. Jeffrey Mfg. Co., App., 31 S.W.2d 269—Degener v. Kelly, App., 6 S.W.2d 998.

Tenn.—Inman v. Fox, 1 Tenn.App. 119.

Wash.—Pacific Telephone & Telegraph Co. v. Henneford, 92 P.2d 214, 199 Wash. 462, certiorari denied Henneford v. Pacific Telephone & Telegraph Co., 59 S.Ct. 483, 306 U.S. 637, 83 L.Ed. 1038.

Wyo.—**Corpus Juris cited in** School Dist. No. 7 in Weston County v. School Dist. No. 1 in Weston County, 236 P. 1029, 1031, 33 Wyo. 65.

34 C.J. p 394 note 6.

68. Ill.—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392.

Mo.—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—General Motors Acceptance Corporation v. Lyman, 78 S.W.2d 109, 229 Mo.App. 455—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W.2d 1101, 228 Mo.App. 1102.

34 C.J. p 395 note 11.

69. Ill.—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill. App. 392.

Mo.—Badger Lumber Co. v. Goodrich, 184 S.W.2d 435, 353 Mo. 769—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—State ex rel. Caplow v. Kirkwood, App., 117 S.W.2d 652—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W.2d 1101, 228 Mo.App. 1102.

70. U.S.—McGinn v. U. S., D.C. Mass., 2 F.R.D. 562.

Mo.—Spotts v. Spotts, 55 S.W.2d 984, 331 Mo. 942—Jeude v. Sims, 166 S. W. 1048, 258 Mo. 26—Ross v. Davis, 139 S.W.2d 542, 234 Mo.App. 1079—Schneider v. Schneider, App., 273 S.W. 1081—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867—Ragland v. Ragland, App., 258 S.W. 728.

71. Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516—Reid v. Dolan, 19 N.E.2d 764, 299 Ill.App. 612—Waldron v. Tarpey, 234 Ill.App. 287—Reid v. Chicago Rys. Co., 231 Ill.App. 58.

Mo.—Jeffrey v. Kelly, App., 146 S.W. 2d 850—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W.2d 1101, 228 Mo.App. 1102—Baker v. Smith's Estate, 18 S.W.2d 147, 223 Mo.App. 1234, 226 Mo.App. 510.

Tenn.—Roller v. Burrow, 175 S.W. 2d 537, 180 Tenn. 380, rehearing denied 177 S.W.2d 547, 180 Tenn. 380.

34 C.J. p 395 note 9.

Nonessential recital

"Writ of error coram nobis" cannot be used to attack the verity of recitals in a judgment essential to its validity, but a recital that defendant had been duly notified could be attacked thereby, since such recital was not essential to validity of the judgment.—General Motors Acceptance Corporation v. Lyman, 78 S.W.2d 109, 229 Mo.App. 455.

72. Iowa.—Coppock v. Reed, 178 N. W. 382, 189 Iowa 581, 10 A.L.R. 1407.

risdiction to proceed depends, the defect not appearing on the record, is ground for a writ of error coram nobis.

A mistake in regard to the existence of a fact on which jurisdiction to proceed depends and which defect does not appear on the face of the record is ground for a writ of error coram nobis.[73] However, where the jurisdictional defect appears on the record, the error in giving judgment without jurisdiction is one of law and not ground for this writ;[74] and similarly, if the court erroneously determines that the jurisdictional requirements have been met, such determination is not subject to review on error coram nobis.[75] The writ lies to obtain relief against a judgment rendered by the court without knowledge of the fact that there has been no process or notice,[76] or that there were such defects in the process[77] or in the service of the process[78] as to have prevented the rendition of the judgment had the fact been known to the court. The writ lies where a resident defendant was brought in by publication, or other form of substituted service, on the mistaken assumption that he was a nonresident of the state.[79]

Under the rule, as considered in the C.J.S. title Process § 100, also 50 C.J. p 574 note 94–p 575 note 7, that, after the term has ended in which the judgment was entered, the sheriff's return of service, on which jurisdiction of defendant depends, cannot be contradicted in the same suit, but is conclusive as between parties and privies, a writ of error coram nobis does not lie to vacate a judgment on the ground that, contrary to the sheriff's return, there was in fact no valid service,[80] unless such false return has been procured by the fraud of plaintiff;[81] but, where the sheriff's return is held not conclusive, it may be contradicted on error coram nobis.[82]

Where the rule prevails that a judgment based on an unauthorized appearance by attorney is conclusive, as discussed supra § 26, the authority of an attorney to enter defendant's appearance cannot be questioned on error coram nobis.[83] A mistake in assuming an appearance for "defendants" was an appearance for all defendants, including those not served, is ground for the writ to vacate the judgment as against those not served.[84]

(3) Disability or Death

The writ lies to correct a judgment where the fact of death or disability of a party was unknown to the court when judgment was rendered.

The writ of error coram nobis will lie to correct a judgment for or against a party under a disability which would have prevented the rendition thereof had the fact been known to the court.[85]

Infancy. A judgment for or against an infant on the assumption that he is an adult, since he did not appear by next friend or guardian ad litem as the case may be, is irregular, and the mistake is ground for relief on writ of error coram nobis.[86]

73. Ill.—Heinsius v. Poehlmann, 282 Ill.App. 472.
Mo.—Badger Lumber Co. v. Goodrich, 184 S.W.2d 435, 353 Mo. 769—City of St. Louis v. Franklin Bank, 173 S.W.2d 837, 351 Mo. 688—Crabtree v. Ætna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—General Motors Acceptance Corporation v. Lyman, 78 S.W.2d 109, 229 Mo.App. 455—Baker v. Smith's Estate, 18 S.W.2d 147, 223 Mo.App. 1234, 226 Mo.App. 510—Sowers-Taylor Co. v. Collins, App., 14 S.W.2d 692.
34 C.J. p 396 note 23.

74. Ill.—Chapman v. North American Life Ins. Co., 126 N.E. 732, 292 Ill. 179.
Mo.—Baker v. Smith's Estate, 18 S.W.2d 147, 223 Mo.App. 1234, 226 Mo.App. 510.

75. Mo.—Hadley v. Bernero, 78 S.W. 64, 103 Mo.App. 549.
34 C.J. p 396 note 24.
Adjudicated facts generally see infra subdivision c (5) of this section.

76. Mo.—Badger Lumber Co. v. Goodrich, 184 S.W.2d 435, 353 Mo. 769—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85.
34 C.J. p 396 note 26.
After continuance
Judgment entered for defendant after ex parte setting aside of order for continuance, entered by agreement, is subject to attack by motion in nature of writ of error coram nobis.—Carroll, Schendorf & Boenicke v. Hastings, 259 Ill.App. 564.

77. Ill.—Chapman v. North American Life Ins. Co., 126 N.E. 732, 292 Ill. 179.
34 C.J. p 396 note 27.

78. U.S.—Phillips v. Russell, Super. Ark., 19 F.Cas.No.11,105a, Hempst. 62.

79. Mo.—Hadley v. Bernero, 78 S.W. 64, 103 Mo.App. 549.
34 C.J. p 396 note 29.

80. Ill.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516—Chicago Faucet Co. v. 839 Lake St. Bldg. Corporation, 1 N.E.2d 865, 285 Ill.App. 151—Adams v. Butman, 264 Ill.App. 378—Satin v. Twin City Fire Ins. Co. of Minneapolis, Minn., 238 Ill.App. 440—Marquette Nat. Fire Ins. Co. v. Minneapolis Fire & Marine Ins. Co., 233 Ill.App. 102.
34 C.J. p 396 note 31.

81. Ill.—Chicago Faucet Co. v. 839 Lake St. Bldg. Corporation, 1 N.E. 2d 865, 285 Ill.App. 151—Adams v. Butman, 264 Ill.App. 378.
34 C.J. p 396 note 32.

82. N.Y.—Tracy v. Shannon, 3 N.Y. S. 245, 16 N.Y.Civ.Proc. 448, 22 Abb.N.Cas. 136.
34 C.J. p 396 note 34.

83. Miss.—Miller v. Ewing, 16 Miss. 421.
34 C.J. p 396 note 36.

84. Mo.—Craig v. Smith, 65 Mo. 536.

85. Ill.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147.

86. U.S.—McGinn v. U. S., D.C. Mass., 2 F.R.D. 562.
Ill.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147.
Mo.—Schneider v. Schneider, App., 273 S.W. 1081.
34 C.J. p 395 note 17.

Insanity. It is generally stated that a judgment irregularly entered against an insane person may be corrected by a writ of error coram nobis,[87] although there is authority to the contrary.[88] If, however, the fact of insanity is known to the court at the entry of the judgment, the writ will not lie.[89]

Coverture. Where coverture is a disability rendering a judgment for or against a married woman irregular, as discussed in Husband and Wife § 389, the irregularity may be remedied by writ of error coram nobis.[90]

Death of party. Since a judgment for or against a party after his death is irregular and erroneous, as stated supra § 29, a writ of error coram nobis lies to correct it.[91]

(4) Fraud, Mistake, and Clerical Errors

There is a conflict among the authorities on whether the writ of error coram nobis will lie for fraud, accident, or mistake, preventing a party from presenting his defense. The writ lies to correct clerical errors or misprisions.

According to some authorities, a writ of error coram nobis will not lie for fraud,[92] or for accident or mistake,[93] whereby the party was prevented from presenting his defense; but there is also authority to the contrary.[94] Under some statutes, the writ will lie as for a material error of fact where applicant was prevented from making a defense through fraud, accident, mistake, or surprise, without fault on his part.[95] The writ has been held not to lie for alleged false testimony at the trial.[96]

Clerical errors. The writ of error coram nobis lies to correct clerical errors or misprisions.[97]

(5) New or Adjudicated Facts

A writ of error coram nobis may not be grounded on newly discovered evidence or newly arising facts after judgment, or on facts adjudicated on the trial.

Neither newly discovered evidence on the issues already heard and determined,[98] nor facts newly arising after judgment,[99] are ground for relief on error coram nobis. Facts which were in issue and adjudicated on the trial cannot be retried on writ of error coram nobis;[1] and this rule will be adhered to, even though it is shown that the party applying

87. Ill.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147.
Mo.—Bank of Skidmore v. Ripley, App., 84 S.W.2d 185.
34 C.J. p 396 note 20.

88. W.Va.—Withrow v. Smithson, 17 S.E. 316, 37 W.Va. 757, 19 L.R.A. 762.

89. Mo.—Graves v. Graves, 164 S.W. 496, 255 Mo. 468.

90. U.S.—McGinn v. U. S., D.C. Mass., 2 F.R.D. 562.
Ill.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147.
Mo.—Schneider v. Schneider, App., 273 S.W. 1081.
34 C.J. p 395 note 19.

91. U.S.—McGinn v. U. S., D.C. Mass., 2 F.R.D. 562.
Ill.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147.
Mo.—Schneider v. Schneider, App., 273 S.W. 1081.
34 C.J. p 395 note 15.

92. Mo.—Spotts v. Spotts, 55 S.W. 2d 934, 331 Mo. 942—Haines v. Jeffrey Mfg. Co., App., 31 S.W.2d 269—Schneider v. Schneider, App., 273 S.W. 1081—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867—Ragland v. Ragland, App., 258 S.W. 728.
34 C.J. p 397 note 40.
Fraud as to jurisdictional facts see supra subdivision c (2) of this section.

93. Mo.—Simms v. Thompson, 236 S.W. 876, 291 Mo. 493—Haines v. Jeffrey Mfg. Co., App., 31 S.W.2d 269.

94. Ill.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101—Jerome v. 5019-21 Quincy Street Bldg. Corporation, 53 N.E. 2d 444, 385 Ill. 524—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141—Chapman v. North American Life Ins. Co., 126 N.E. 732, 292 Ill. 179—Joseph Kaszab, Inc., v. Gibson, App., 63 N.E.2d 629—Gunn v. Britt, 39 N.E.2d 76, 313 Ill.App. 13.

95. Tenn.—Hyde v. Dunlap, 8 Tenn. App. 260—Inman v. Fox, 1 Tenn. App. 119.
34 C.J. p 397 note 43.
Construction of allegations
Whenever a petitioner for a writ of coram nobis has a meritorious defense which he has for any reason failed to make on trial, he is entitled to as favorable a construction of allegations of the petition showing surprise, accident, mistake, or fraud without fault as is consistent with the provisions of the statute regulating issuance of such a writ.—Central Franklin Process Co. v. Gann, 133 S.W.2d 503, 175 Tenn. 267—Rose v. Morrow, 10 Tenn.App. 698.

96. Ill.—Conway v. Gill, 257 Ill.App. 606.

97. U.S.—Hiawassee Lumber Co. v. U. S., C.C.A.N.C., 64 F.2d 417.
Del.—**Corpus Juris cited in** Tweed v. Lockton, 167 A. 703, 705, 5 Harr. 474.
Ill.—Simon v. Balasic, 39 N.E.2d 685, 313 Ill.App. 266—Butterick Pub. Co. v. Goldfarb, 242 Ill.App. 228.
34 C.J. p 397 note 39.
What constitutes clerical error
Dismissal of case because of no advancement in pleadings for a year is not a "clerical mistake, error or default," cognizable by writ of error coram nobis.—New England Furniture & Carpet Co. v. U. S., D.C.Minn., 2 F.Supp. 648.

98. Fla.—**Corpus Juris quoted in** Cole v. Walker Fertilizer Co., for Use and Benefit of Walker, 1 So.2d 364, 147 Fla. 1—**Corpus Juris cited in** Baker v. Peavy-Wilson Lumber Co., 200 So. 528, 146 Fla. 217—Jennings v. Pope, 136 So. 471, 101 Fla. 1476.
Kan.—Gibson v. Enright, 37 P.2d 1017, 140 Kan. 700.
Mo.—Callicotte v. Chicago, R. I. & P. Ry. Co., 204 S.W. 528—Kings Lake Drainage Dist. v. Winkelmeyer, 62 S.W.2d 1101, 228 Mo.App. 1102.
34 C.J. p 397 note 44.

99. Fla.—**Corpus Juris quoted in** Cole v. Walker Fertilizer Co. for Use and Benefit of Walker, 1 So.2d 364, 367, 147 Fla. 1—**Corpus Juris cited in** Baker v. Peavy-Wilson Lumber Co., 200 So. 528, 146 Fla. 217.
Mo.—Ragland v. Ragland, App., 258 S.W. 728.
34 C.J. p 397 note 45.

1. Ala.—Snodgrass v. Snodgrass, 101 So. 837, 212 Ala. 74.
Fla.—**Corpus Juris quoted in** Cole v. Walker Fertilizer Co. for Use and Benefit of Walker, 1 So.2d 364,

for the writ will be able to produce most convincing evidence which was not available at the time of the trial.[2]

d. Errors of Law

A writ of error coram nobis has been held not available to correct errors of law.

A writ of error coram nobis has been held not available to correct errors of law.[3]

§ 313. Proceedings and Relief

a. In general
b. Jurisdiction
c. Limitations and laches
d. Parties
e. Application
f. Allowance and issuance of writ and supersedeas
g. Pleadings
h. Evidence
i. Trial, judgment, and costs

a. In General

A writ of error coram nobis is in substance a new suit commenced to reverse a former judgment.

As will appear in the succeeding subdivisions of this section, proceedings to obtain a writ of error coram nobis are generally instituted by petition or motion, on notice to the adverse party, and, after the issuance of the writ, plaintiff makes a formal assignment of errors in the nature of a declaration, and to this assignment defendant may plead or demur; the issues resulting from the pleadings are thereafter tried, and judgment either revoking or affirming the original judgment is thereupon rendered. The proceeding is in substance a new suit commenced to reverse a former judgment.[4] The proceeding is not for irregularity, but for error,[5] and therefore is not governed by statutory provisions relating to vacation of judgments for irregularity.[6]

b. Jurisdiction

Jurisdiction of a writ of error coram nobis is exclusively in the court which rendered the judgment.

The court which rendered the judgment has exclusive jurisdiction of a writ of error coram nobis to vacate it.[7] The writ cannot be employed to re-

867, 147 Fla. 1—**Corpus Juris cited in** Baker v. Peavy-Wilson Lumber Co., 200 So. 528, 146 Fla. 217—Jennings v. Pope, 136 So. 471, 101 Fla. 1476.

Ill.—Joseph Kaszab, Inc., v. Gibson, App., 63 N.E.2d 629—Waldron v. Tarpey, 234 Ill.App. 287.

Mo.—Callicotte v. Chicago, R. I. & P. Ry. Co., 204 S.W. 528—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85.

Tenn.—Roller v. Burrow, 175 S.W.2d 537, 180 Tenn. 380, rehearing denied 177 S.W.2d 547, 180 Tenn. 380—Davis v. Robertson, 56 S.W. 2d 752, 165 Tenn. 609—Roy Newman Cigar Co. v. Murphy, 2 Tenn. App. 321.

34 C.J. p 397 note 46.

Jurisdictional fact

Determination of fact necessary to jurisdiction prevents new trial on that issue by writ of error coram nobis.—Baker v. Smith's Estate, 18 S. W.2d 147, 223 Mo.App. 1234, 226 Mo. App. 510.

2. Fla.—Baker v. Peavy-Wilson Lumber Co., 200 So. 528, 146 Fla. 217.

3. Ill.—People ex rel. Waite v. Bristow, 62 N.E.2d 545, 391 Ill. 101—Jerome v. 5019-21 Quincy Street Bldg. Corporation, 53 N.E.2d 444, 385 Ill. 524—Linehan v. Travelers Ins. Co., 18 N.E.2d 178, 370 Ill. 157—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147—Pickard v. Rice, App., 67 N.E. 2d 425, appeal transferred, see, 63 N.E.2d 743, 391 Ill. 615—Joseph Kaszab, Inc., v. Gibson, App., 63 N.E.2d 629—Waldron v. Tarpey, 234 Ill.App. 287.

Md.—Hawks v. State, 157 A. 900, 162 Md. 30.

Mo.—City of St. Louis v. Franklin Bank, 173 S.W.2d 837, 351 Mo. 688—**Corpus Juris cited in** Spotts v. Spotts, 55 S.W.2d 984, 985, 331 Mo. 942—Townsend v. Boatmen's Nat. Bank, App., 148 S.W.2d 85—State ex rel. Caplow v. Kirkwood, App., 117 S.W.2d 652—Hecht Bros. Clothing Co. v. Walker, 35 S.W.2d 372, 224 Mo.App. 1156—Haines v. Jeffrey Mfg. Co., App., 31 S.W.2d 269—Mefford v. Mefford, App., 26 S.W.2d 804—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867.

Tenn.—Central Franklin Process Co. v. Gann, 133 S.W.2d 503, 175 Tenn. 267—Roy Newman Cigar Co. v. Murphy, 2 Tenn.App. 321.

Wash.—Pacific Telephone & Telegraph Co. v. Henneford, 92 P.2d 214, 199 Wash. 462, certiorari denied Henneford v. Pacific Telephone & Telegraph Co., 59 S.Ct. 483, 306 U.S. 637, 83 L.Ed. 1038.

Wyo.—**Corpus Juris cited in** School Dist. No. 7 in Weston County v. School Dist. No. 1 in Weston County, 236 P. 1029, 1031, 33 Wyo. 65.

34 C.J. p 397 note 47.

Construction of court rules

Error of court in construing its rules is error of law to correct which writ of error coram nobis will not lie.—Swiercz v. Nalepka, 259 Ill.App. 262—La Page v. Devine, 195 Ill.App. 140.

4. Ill.—Christian v. Smirinotis, 57 N.E.2d 457, 388 Ill. 73—Joseph Kaszab, Inc., v. Gibson, App., 63 N.E.2d 629—Reid v. Dolan, 19 N. E.2d 764, 299 Ill.App. 612—Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 290 Ill.App. 558—Seither & Cherry Co. v. Board of Education, 283 Ill.App. 392—Martin v. Starr, 255 Ill.App. 189.

Mo.—In re Sheldon's Estate, 139 S. W.2d 235—Bank of Skidmore v. Bartram, App., 142 S.W.2d 657—State ex rel. Bank of Skidmore v. Roberts, 116 S.W.2d 166, 232 Mo. App. 1220.

Tenn.—Rose v. Morrow, 10 Tenn. App. 698—Inman v. Fox, 1 Tenn. App. 119.

34 C.J. p 398 note 57.

Statement qualified

"While with respect to process, pleadings and judgment the writ may be considered as a new and independent action, yet it is not wholly so but is supplementary in its nature for the purpose of correcting errors committed in a preceding cause."—McGrath & Swanson Const. Co. v. Chicago Rys. Co., 252 Ill.App. 476, 477.

5. Mo.—Dugan v. Scott, 37 Mo.App. 663.

6. Mo.—Dugan v. Scott, supra.

7. Ala.—Snodgrass v. Snodgrass, 101 So. 837, 212 Ala. 74.

Ill.—**Corpus Juris quoted in** McGrath & Swanson Const. Co. v. Chicago Rys. Co., 252 Ill.App. 476, 478.

34 C.J. p 398 note 60.

verse the judgment of another court,[8] especially a higher one;[9] nor can it be employed in an appellate court to set aside the judgment of an inferior court.[10]

c. Limitations and Laches

Unless prescribed by statute, the time for prosecuting a writ of error coram nobis is not limited, but the relief may be barred by laches.

It has been held that there is no limitation of time within which a writ of error coram nobis lies[11] except where such a limitation is prescribed by statute.[12] Relief may be refused, however, on the ground of laches.[13] A statute of limitations applicable to writs of error generally does not apply to the writs of error coram nobis.[14] In some jurisdictions statutes limiting the time for prosecuting the remedy in analogous proceedings have been held applicable, such as motions for a new trial,[15] or the prosecution of a writ of review.[16]

d. Parties

Only a party or privy to the record may procure a writ of error coram nobis, and all those who may be affected by the vacating of the judgment should be joined.

A writ of error coram nobis can be procured only by one who is a party, or privy to the record, and who is prejudiced thereby,[17] and not by a stranger to the record.[18] It has been held that the petition must be brought in the names of all the parties against whom the judgment was given,[19] but there is authority holding that only those parties as to whom there was error of fact need be joined,[20] and it has also been held that only those who have rights against petitioner and who may be prejudiced by the vacating of the judgment are necessary parties.[21] Where a married woman is under the common-law disability, her husband must join in the application.[22]

e. Application

Ordinarily notice of the application for a writ of error coram nobis must be given to the opposing party. The application must set forth with certainty and particularity the errors or defects on which it is based.

Notice of the application must be given to the opposing party or to his attorney,[23] unless sufficient reason for omitting notice is made to appear,[24] or unless notice is waived.[25]

Moving papers. The proper mode of proceeding is by petition or motion,[26] in writing,[27] setting forth with certainty and particularity the errors or defects complained of;[28] but the want of such allegations may be cured by failure of the adverse party to move for a dismissal.[29] If the petition is insufficient, advantage may be taken of the defect by motion to dismiss,[30] made at any time,[31] unless

8. Wash.—Pacific Telephone & Telegraph Co. v. Henneford, 92 P.2d 214, 199 Wash. 462, certiorari denied Henneford v. Pacific Telephone & Telegraph Co., 59 S.Ct. 483, 306 U.S. 637, 83 L.Ed. 1038.
34 C.J. p 398 note 61.

9. N.C.—Latham v. Hodges, 35 N.C. 267.

10. Mo.—Forest Lumber Co. v. Osceola Lead & Zinc Min. Co., 222 S.W. 398.

11. U.S.—McGinn v. U. S., D.C. Mass., 2 F.R.D. 562.
Mo.—**Corpus Juris cited in** In re Sheldon's Estate, 189 S.W.2d 235, 237.
34 C.J. p 398 note 64.

Expiration of the term at which the challenged judgment was rendered does not prevent allowance of the writ at a subsequent term.—Bank of Skidmore v. Ripley, Mo. App., 84 S.W.2d 185.

12. Tenn.—Cates v. City of McKenzie, 141 S.W.2d 471, 176 Tenn. 313.
34 C.J. p 398 note 65.

The purpose of statute providing that a writ of error coram nobis may be had within one year from rendition of the judgment is to limit right to proceed thereunder to one year from time when matters complained of in petition for review had been considered and adjudicated, having in mind that such proceedings should be brought before such a lapse of time as would make it unlikely that witnesses could be reproduced and the facts correctly reviewed.—Cates v. City of McKenzie, supra.

13. Mo.—Gibson v. Pollock, 166 S. W. 874, 179 Mo.App. 188.
Tenn.—Sisson v. Delaney, 8 Tenn. App. 442.

14. U.S.—Strode v. Stafford Justices, C.C.Va., 23 F.Cas.No.13,537, 1 Brock. 162.
34 C.J. p 398 note 67.

15. Conn.—Jeffery v. Fitch, 46 Conn. 601.

16. Tex.—Weaver v. Shaw, 5 Tex. 286.

17. Ala.—Snodgrass v. Snodgrass, 101 So. 837, 212 Ala. 74.
Mo.—Baker v. Smith's Estate, 18 S. W.2d 147, 223 Mo.App. 1234, 226 Mo.App. 510.
34 C.J. p 398 note 70.

Bank depositors
Writ of error coram nobis to reverse consent decree dismissing bank superintendent's suit on bond would lie at instance of depositors, although not parties to original suit.—Davis v. Robertson, 56 S.W.2d 752, 165 Tenn. 609.

18. Tenn.—Hillman v. Chester, 12 Heisk. 34.

19. Ky.—Watson v. Whaley, 2 Bibb. 392.
34 C.J. p 399 note 72.

20. N.C.—Roughton v. Brown, 53 N. C. 393.

21. Tenn.—Rose v. Morrow, 10 Tenn.App. 698.

22. N.C.—Roughton v. Brown, 53 N. C. 393.

23. U.S.—Wetmore v. Karrick, App. D.C., 27 S.Ct. 434, 205 U.S. 141, 51 L.Ed. 745.
34 C.J. p 399 note 75.

24. N.Y.—Ferris v. Douglass, 20 Wend. 626.

25. Tenn.—Crawford v. Williams, 1 Swan 341.

26. Ill.—Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 290 Ill.App. 558.
34 C.J. p 399 note 78.

27. Ky.—Handley v. Fitzhugh, 3 A. K.Marsh. 561.
34 C.J. p 399 note 79.

28. Tenn.—Dunnivant v. Miller, 1 Baxt. 237.
34 C.J. p 399 note 80.

29. Tenn.—Hicks v. Haywood, 4 Heisk. 598.

30. Tenn.—Inman v. Fox, 1 Tenn. App. 119.
34 C.J. p 399 note 82.

31. Tenn.—Elliott v. McNairy, 1

the right to do so is waived.[32] A motion to dismiss admits the allegations of the petition.[33] A petition or motion must be accompanied by an affidavit showing the occasion therefor.[34] A petition may be amended but, in allowing it, the court will exercise great caution.[35] The papers on the application should not be entitled in any suit.[36]

Bond. Petitioner must comply with a statutory provision requiring a bond to be given at the time of the filing of the petition.[37]

f. Allowance and Issuance of Writ and Supersedeas

The granting of the writ of error coram nobis depends on a showing of cause and is generally held to be a matter of discretion, not of right; and the granting of a supersedeas is likewise discretionary.

While it has been held that a writ of error coram nobis is a writ of right,[38] it usually has been held that it is not a writ of right but is granted only on a showing of cause,[39] and even then it is in the court's discretion whether or not, on the affidavits presented, to allow the writ.[40] However, if the circumstances warrant the allowance of the writ, relief should not be denied on immaterial grounds.[41] At common law, the trial of the sufficiency of the petition was preliminary to the trial on the assignment of errors, and was independent of it,[42] but in some jurisdictions the two are now blended together.[43] On an application for the writ, the fact assigned is not decided by the court definitively;[44] nor will the court look at the cause of action on which the judgment was recovered.[45] The fact that applicant acted with palpable dishonesty and bad faith is not ground for its refusal.[46] If, on an application for such a writ, plaintiff elects to vacate the judgment,[47] or if the writ will avail nothing,[48] the application will be denied. It must appear with reasonable certainty that there has been some error in fact, before the writ will be allowed.[49]

Although the writ issues on an order of the court allowing it,[50] it is necessary to obtain something more than a mere rule that writ of error issue.[51] The usual rule in such cases is that a writ of error in the nature of error coram nobis be allowed.[52] In practice, however, the actual issuance of the writ is a fiction, as the writ never issues,[53] the writ being presumed to issue on the fiat of the judge.[54] In some states the writ issues in the name of the people and is directed to the supreme court.[55] The writ coram nobis properly commands, "that the record and proceedings remaining before you being inspected, you cause further to be done," etc.,[56] and it must assign errors.[57]

The name of the parties in the judgment sought to be reversed must be correctly stated, or the writ

Baxt. 342—Inman v. Fox, 1 Tenn. App. 119.

32. Tenn.—Inman v. Fox, 1 Tenn. App. 119—Elliott v. McNairy, 1 Baxt. 342.

33. Ill.—Chapman v. North American Life Ins. 126 N.E. 732, 292 Ill. 179.
34 C.J. p 399 note 85.

34. Tenn.—Reid v. Hoffman, 6 Heisk. 440.
34 C.J. p 399 note 86.

35. Tenn.—Baxter v. Grandstaff, 3 Tenn.Ch. 244.
34 C.J. p 399 note 87.

36. N.Y.—Maher v. Comstock, 1 How.Pr. 175.
34 C.J. p 399 note 88.

37. Tenn.—Roller v. Burrow, 175 S.W.2d 537, 180 Tenn. 380, rehearing denied 177 S.W.2d 547, 180 Tenn. 380.

38. Ky.—Breckinridge v. Coleman, 7 B.Mon. 331.

39. Colo.—**Corpus Juris quoted in** Medberry v. People, 108 P.2d 243, 247, 107 Colo. 15—**Corpus Juris cited in** Grandbouche v. People, 89 P.2d 577, 582, 104 Colo. 175.
Fla.—Williams v. Yelvington, 137 So. 156, 103 Fla. 145.
34 C.J. p 399 note 90.

40. U.S.—Lupfer v. Carlton, for Use and Benefit of Board of Public Instruction of Dade County, C.C.A. Fla., 64 F.2d 272.
Colo.—**Corpus Juris quoted in** Medberry v. People, 108 P.2d 243, 247, 107 Colo. 15—**Corpus Juris cited in** Grandbouche v. People, 89 P.2d 577, 582, 104 Colo. 175.
Fla.—Cole v. Walker Fertilizer Co., for Use and Benefit of Walker, 1 So.2d 864, 147 Fla. 1—Williams v. Yelvington, 137 So. 156, 103 Fla. 145.
Kan.—Gibson v. Enright, 37 P.2d 1017, 140 Kan. 700.
Mo.—Pike v. Pike, App., 193 S.W.2d 637.
34 C.J. p 400 note 91.

41. Mo.—Badger Lumber Co. v. Goodrich, 184 S.W.2d 435, 353 Mo. 769—Bank of Skidmore v. Ripley, App., 84 S.W.2d 185.

42. Tenn.—Jacobs v. Silverman, 93 S.W.2d 648, 19 Tenn.App. 629—Bolling v. Anderson, 1 Tenn.Ch. 127.

43. Tenn.—Jacobs v. Silverman, 93 S.W.2d 648, 19 Tenn.App. 629—Bolling v. Anderson, 1 Tenn.Ch. 127.

44. N.C.—Tyler v. Morris, 20 N.C. 487, 34 Am.D. 395.

45. N.Y.—Higbie v. Comstock, 1 Den. 652.

46. N.Y.—Higbie v. Comstock, supra.

47. N.Y.—Higbie v. Comstock, supra.

48. Mo.—Hartman v. Hartman, 133 S.W. 669, 154 Mo.App. 243.

49. Fla.—Catlett v. Chestnut, 163 So. 26, 120 Fla. 636.
Miss.—**Corpus Juris cited in** Carraway v. State, 141 So. 342, 343, 163 Miss. 639.
N.Y.—Ferris v. Douglass, 20 Wend. 626.

50. N.Y.—Comstock v. Van Schoonhoven, 3 How.Pr. 258.
34 C.J. p 400 note 1.

51. N.Y.—Comstock v. Van Schoonhoven, supra.

52. N.Y.—Comstock v. Van Schoonhoven, supra.

53. Tenn.—Elliott v. McNairy, 1 Baxt. 342.

54. Mo.—Jeude v. Sims, 166 S.W. 1048, 258 Mo. 26, 41.
34 C.J. p 400 note 5.

55. N.Y.—Comstock v. Van Schoonhoven, 3 How.Pr. 258.

56. N.Y.—Comstock v. Van Schoonhoven, supra.
34 C.J. p 400 note 7.

57. Miss.—Fellows v. Griffin, 17 Miss. 362.

will be quashed,[58] and a scire facias issued on the writ on the ground that the adverse party is dead must be directed to the adverse party's legal representative.[59] The writ is not made returnable, as it is merely in the nature of a commission to the court to examine the record and rectify the error.[60] While it is usual to have the allowance of such a writ indorsed thereon by the clerk in open court, it is not indispensable to the regularity of the writ.[61] If it appears that a party is entitled to the writ and will be remediless if the writ is quashed because of an irregularity in the issuance, the writ will be allowed as of the time it was filed, nunc pro tunc.[62]

While the writ did not of itself operate as a supersedeas,[63] at common law execution could not be taken out after the issuance of the writ without leave of court.[64] If an applicant wishes a stay he should make that a part of a motion for the allowance of the writ, stating the facts on which the stay is asked.[65] While a supersedeas may be granted ex parte without notice,[66] whether a supersedeas shall issue depends on the discretion of the court.[67] In general, the stay will be ordered only on put ting in and justifying bail.[68] Where there are several applicants for the writ of error coram nobis and a supersedeas, the supersedeas may be retained as to some of the applicants and dismissed as to the others.[69]

g. Pleadings

After a writ of error coram nobis is allowed, the applicant makes a formal assignment of errors in the nature of a declaration, to which defendant may either plead or demur.

The writ being allowed, applicant makes a formal assignment of errors in the nature of a declaration,[70] which should be verified,[71] stating the errors in fact on which he relies.[72] Errors in fact and in law cannot be assigned together.[73] The grounds set forth in the petition must be the basis of the issue presented in the more formal assignment of errors.[74] The assignment of errors having been filed, the rules of pleading in actions at law obtain.[75]

Pleadings in defense. Defendant may either plead or demur to the assignment of errors.[76] A demurrer admits the facts assigned as error.[77] The common plea is in nulla est erratum,[78] which is in the nature of a demurrer[79] and admits the fact to be as alleged, but insists that in law it is not error.[80] If the assignment of errors embraces the reasons for the application as well as the grounds for the revocation of the judgment, a general demurrer to the assignment is good if the reasons are insufficient.[81] If defendant would deny the truth of the error in fact assigned, he must traverse it by plea and take issue thereon,[82] or, if the case requires it, he may plead specially matter in confession and avoidance,[83] such as a statutory limitation.[84]

Reply. A plea of new matter in avoidance may be met by a reply or demurrer as the circumstances may demand.[85]

h. Evidence

Presumptions are in favor of rather than against the validity of the judgment; evidence dehors the record is admissible.

58. N.Y.—Brown v. Davenport, 4 Wend. 205.
59. Ky.—Rochester v. Anderson, 2 Bibb. 569.
60. N.Y.—Comstock v. Van Schoonhoven, 3 How.Pr. 258.
61. N.Y.—Comstock v. Van Schoonhoven, supra.
62. N.Y.—Ferris v. Douglass, 20 Wend. 626.
63. N.Y.—Ferris v. Douglass, supra.
34 C.J. p 400 note 14.
64. N.Y.—Tyler v. Morris, 20 N.C. 487, 34 Am.D. 395.
34 C.J. p 400 note 15.
65. N.Y.—Ferris v. Douglass, 20 Wend. 626.
16 C.J. p 400 note 16.
66. Tenn.—Crawford v. Williams, 1 Swan 341.
Tex.—Milam County v. Robertson, 47 Tex. 222.
67. N.C.—Tyler v. Morris, 20 N.C. 487, 34 Am.D. 395.
34 C.J. p 400 note 18.
68. N.Y.—Ferris v. Douglass, 20 Wend. 626—Smith v. Kingsley, 19 Wend. 620.
69. Miss.—Miller v. Ewing, 16 Miss. 421.
34 C.J. p 400 note 20.
70. Tenn.—Gallena v. Sudheimer, 9 Heisk. 189.
34 C.J. p 400 note 22.
71. Ill.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147.
72. Tenn.—Crawford v. Williams, 1 Swan 341.
Tex.—Milam County v. Robertson, 47 Tex. 222.
73. Ky.—Rightfoot v. Commonwealth Bank, 4 Dana 492.
74. Tenn.—Elliott v. McNairy, 1 Baxt. 342—Gallena v. Sudheimer, 9 Heisk. 189.
75. Tenn.—Crouch v. Mullinix, 1 Heisk. 478.
76. Ky.—Case v. Ribelin, 1 J.J. Marsh. 29.
34 C.J. p 401 note 27.
77. Ill.—Chapman v. North American Life Ins. Co., 126 N.E. 732, 292 Ill. 179.
34 C.J. p 401 note 28.
78. Ky.—Case v. Ribelin, 1 J.J. Marsh. 29.
34 C.J. p 401 note 29.
79. Ky.—Shoffett v. Menifee, 4 Dana 150.
34 C.J. p 401 note 30.
80. Ill.—Chapman v. North American Life Ins. Co., 126 N.E. 732, 292 Ill. 179.
34 C.J. p 401 note 31.
81. Tenn.—Bolling v. Anderson, 1 Tenn.Ch. 127.
82. Ky.—Case v. Ribelin, 1 J.J. Marsh. 29.
34 C.J. p 401 note 33.
83. Tenn.—Crawford v. Williams, 1 Swan 341.
84. Va.—Eubank v. Rall, 4 Leigh. 303, 31 Va. 303.
85. Tenn.—Crawford v. Williams, 1 Swan 341.

Any presumptions that are indulged on the hearing must be in favor of the validity of the judgment rather than against it.[86] The petition is not evidence,[87] although sworn to,[88] as its office is merely to point out the errors of fact on which relief is sought.[89] The record in the original cause becomes a part of the proceedings, without being made so by the petition.[90] Since, as discussed supra § 312 c, the office of the writ is to make apparent to the court some error of fact not apparent on the face of the record and which was unknown to the court, evidence dehors the record may be admitted,[91] but the general rule is that the record may not be directly contradicted.[92] General rules are applicable in determining the sufficiency of the evidence.[93]

i. Trial, Judgment, and Costs

If the pleadings in proceedings on a writ of error coram nobis result in an issue of fact, such issue must be tried, and judgment rendered in accordance with its determination; costs are within the discretion of the court.

If the pleadings result in an issue of fact, such issue must be tried[94] by a jury.[95] Issues of law are tried by the court.[96] The writ does not open up the whole case for a new trial, but only those points and questions raised by the application for it.[97] In some states the matter must be tried at the first term; otherwise defendant may move to discharge the supersedeas on denying on oath the facts stated in the petition.[98]

Judgment. The judgment on a writ of error coram nobis is that the judgment complained of be recalled, revoked, and annulled, if the issue is found in favor of petitioner,[99] whereupon the original suit is placed in the same position as it was when the judgment was rendered.[1] If the original judgment has been satisfied, the court cannot order that the money be refunded, but only that the judgment be vacated and annulled.[2] The judgment complained of is affirmed if the issue is found in favor of defendant in error.[3] In some jurisdictions if the trial court dismisses the writ, it may affirm the main judgment with a statutory penalty.[4]

Costs. Unless otherwise provided by statute,[5] costs are discretionary with the court.[6]

E. ACTION TO REVIEW JUDGMENT

§ 314. In General
- a. General principles
- b. Presentation and reservation of error at trial, and bill of exceptions
- c. Election of remedies

a. General Principles

Under some statutes an action to review a judgment may be maintained in the court which rendered the judgment.

Under some statutes, as in Indiana, an action may be maintained on specified grounds to review a judgment in the same court which rendered the judgment.[7] This statutory action is modeled after a

Tex.—Milam County v. Robertson, 47 Tex. 223.

86. Ill.—Chapman v. North American Life Ins. Co., 212 Ill.App. 389, affirmed 126 N.E. 732, 292 Ill. 179.
Tenn.—Inman v. Fox, 1 Tenn.App. 119.

87. Tenn.—Inman v. Fox, supra.
34 C.J. p 401 note 38.

88. Ala.—Johnson v. Straus Saddlery Co., 56 So. 755, 2 Ala.App. 300.
Ill.—**Corpus Juris cited in** Ruehr v. Continental Illinois Nat. Bank & Trust Co., 16 N.E.2d 180, 182, 296 Ill.App. 293—**Corpus Juris cited in** Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 79, 290 Ill.App. 558—**Corpus Juris cited in** Mitchell v. Eareckson, 250 Ill.App. 508, 511.

89. Ill.—**Corpus Juris cited in** Ruehr v. Continental Illinois Nat. Bank & Trust Co., 16 N.E.2d 180, 182, 296 Ill.App. 293—**Corpus Juris cited in** Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 79, 290 Ill.App. 558—**Corpus Juris cited in** Mitchell v. Eareckson, 250 Ill.App. 508, 511.

Tenn.—Hicks v. Haywood, 4 Heisk. 598.

90. Tenn.—Hicks v. Haywood, supra.

91. Mo.—State v. Riley, 118 S.W. 647, 219 Mo. 667.
34 C.J. p 401 note 43.

92. Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158—Reid v. Chicago Rys. Co., 231 Ill. App. 58.
Tenn.—Roller v. Burrow, 175 S.W.2d 537, 180 Tenn. 380, rehearing denied 177 S.W.2d 547, 180 Tenn. 380.
34 C.J. p 401 note 44.

93. Tenn.—Rose v. Morrow, 10 Tenn.App. 698.

94. Mo.—Simms v. Thompson, 236 S. W. 876, 291 Mo. 493.
34 C.J. p 401 note 45.

95. Mo.—Simms v. Thompson, supra.
34 C.J. p 401 note 46.

96. Tenn.—Crawford v. Williams, 1 Swan 341.

97. Ill.—Joseph Kaszab, Inc., v. Gibson, App., 63 N.E.2d 629.

Tenn.—Rose v. Morrow, 10 Tenn. App. 698.
34 C.J. p 401 note 48.

98. Tenn.—Gallena v. Sudheimer, 9 Heisk. 189.

99. Ill.—Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 290 Ill.App. 558.
34 C.J. p 401 note 50.

1. Ill.—Topel v. Personal Loan & Savings Bank, supra.
34 C.J. p 401 note 51.

2. Tenn.—Bigham v. Brewer, 4 Sneed 432.

3. Ill.—Topel v. Personal Loan & Savings Bank, 9 N.E.2d 75, 290 Ill. App. 558.
34 C.J. p 401 note 53.

4. Tenn.—Wright v. Curtis, 237 S. W. 1103, 145 Tenn. 623.

5. N.Y.—Arnold v. Sanford, 15 Johns. 534.
34 C.J. p 402 note 55.

6. Va.—Gordon v. Frazier, 2 Wash. 130, 2 Va. 130.

7. Ind.—Clark v. Hillis, 34 N.E. 13, 134 Ind. 421—Jones v. Tipton, 41 N.E. 831, 13 Ind.App. 393.

bill of review in equity,[8] and is in the nature of a petition for a rehearing[9] and necessarily involves the merits of the original cause.[10] It is not strictly an independent action,[11] but is a continuation of the original action[12] and incidental to it.[13] The object of the action is to set aside the judgment and obtain a new trial,[14] but the proceeding is to be distinguished from a motion for a new trial,[15] and from an appeal,[16] although an action to review for error of law at the trial is in the nature of an appeal[17] and is governed largely by the same rules of procedure.[18] A void judgment may be attacked by a statutory action to review it;[19] but the action to review is to be distinguished from an action to vacate a judgment for invalidity; the latter is an independent proceeding not governed by the statute.[20]

b. Presentation and Reservation of Error at Trial, and Bill of Exceptions

An error of law, in order to be the basis of an action to review, must, unless waived, be presented to the trial court by proper and timely objection and exception; and unless the error is apparent on the record it must be incorporated in a bill of exceptions.

An error of law not presented to the trial court cannot be made the basis of an action to review the judgment.[21] In order to reserve questions for such review, objections must be made at the trial of the original cause,[22] exceptions reserved to the court's rulings,[23] and the errors assigned made the ground of a motion for a new trial,[24] and exceptions reserved to the court's ruling thereon.[25]

Objections to a judgment must be presented either by a motion to modify or correct the judgment[26] or by a motion to set the judgment aside,[27] and exceptions must be taken to the court's ruling on the motion.[28] The sufficiency of a complaint may be presented without having been demurred to, in the original action.[29]

Waiver of error. Ordinarily failure to except to the ruling of the court amounts to a waiver of the error.[30] Where, however, the failure to except does not amount to a waiver,[31] as where the court is without jurisdiction of the subject matter,[32] or

Writ of review, a somewhat similiar statutory remedy prevailing in some states, see the C.J.S. title Review § 1, also 54 C.J. p 748 note 1-p 749 note 19.

8. Ind.—Ross v. Banta, 34 N.E. 865, 140 Ind. 120, rehearing denied 39 N.E. 732, 140 Ind. 120.
34 C.J. p 402 note 58.
Bill of review see Equity §§ 635–655.
Equitable means of reviewing judgments, including statutory bills of review see infra §§ 341–400.

9. Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E.2d 483, 492, 216 Ind. 192.
"It is a method by which the court that tried the case may have opportunity to correct its own error."—Attica Building & Loan Ass'n of Attica v. Colvert, supra.

10. Ind.—Ex parte Kiley, 34 N.E. 989, 135 Ind. 225.

11. Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E. 2d 483, 216 Ind. 192—Ex parte Kiley, 34 N.E. 989, 135 Ind. 225.

12. Ind.—Evansville & R. R. Co. v. Maddux, 33 N.E. 345, 134 Ind. 571, rehearing denied 34 N.E. 511, 134 Ind. 571.

13. Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E.2d 483, 216 Ind. 192—Jones v. Tipton, 41 N.E. 831, 13 Ind.App. 392.

14. Ind.—Hoppes v. Hoppes, 24 N.E. 139, 123 Ind. 397—Hornaday v. Shields, 21 N.E. 554, 119 Ind. 201.

15. Ind.—Hill v. Roach, 72 Ind. 57—Hall v. Palmer, 18 Ind. 5.
34 C.J. p 402 note 67.
Motion for new trial generally see the C.J.S. title New Trial § 117, also 46 C.J. p 286 note 40-p 287 note 62.

16. Ind.—Bartmess v. Holliday, 61 N.E. 750, 27 Ind.App. 544.
34 C.J. p 402 note 68.

17. Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 583, 218 Ind. 468—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E.2d 483, 216 Ind. 192—Eilts v. Henderlong Lumber Co., 33 N.E. 2d 373, 109 Ind.App. 559—In re Boyer's Guardianship, 174 N.E. 714, 96 Ind.App. 161.
34 C.J. p 402 note 69.
An action to review presents same question to reviewing trial court that might be presented to appellate court on an appeal.—Calumet Teaming & Trucking Co. v. Young, 33 N.E. 2d 583, 218 Ind. 468.

18. Ind.—Murphy v. Branaman, 59 N.E. 274, 156 Ind. 77.
34 C.J. p 402 note 70.

19. Ind.—Bartmess v. Holliday, 61 N.E. 750, 27 Ind.App. 544.
34 C.J. p 402 note 72.

20. Ind.—Willman v. Willman, 57 Ind. 500.
34 C.J. p 402 note 71.
Action in equity to annul a judgment see infra §§ 341–400.

21. Ind.—Shoaf v. Joray, 86 Ind. 70.
34 C.J. p 403 note 85.

22. Ind.—Eilts v. Henderlong Lumber Co., 33 N.E.2d 373, 109 Ind.App. 559.
34 C.J. p 403 note 86.

23. Ind.—Egoff v. Madison County Children's Guardians, 84 N.E. 151, 170 Ind. 238.
34 C.J. p 403 note 87.

24. Ind.—Eilts v. Henderlong Lumber Co., 33 N.E.2d 373, 109 Ind. App. 559.
34 C.J. p 404 note 88.
Insufficiency of defense
An alleged insufficiency of facts pleaded and proved to constitute a defense could not be presented by proceeding to review judgment for defendants where such alleged error was not called to attention of trial court by motion for a new trial.—Eilts v. Henderlong Lumber Co., supra.

25. Ind.—Slussman v. Kensler, 88 Ind. 190.

26. Ind.—Egoff v. Madison County Children's Guardians, 84 N.E. 151, 170 Ind. 238.
34 C.J. p 404 note 90.

27. Ind.—Baker v. Ludlam, 20 N.E. 648, 118 Ind. 87—Searle v. Whipperman, 79 Ind. 424.

28. Ind.—Baker v. Ludlam, 20 N.E. 648, 118 Ind. 87.

29. Ind.—Ferguson v. Hull, 36 N.E. 254, 136 Ind. 339—Berkshire v. Young, 45 Ind. 461.

30. Ind.—Collins v. Rose, 59 Ind. 33.
34 C.J. p 404 note 96.

31. Ind.—Berkshire v. Young, 45 Ind. 461—Davis v. Perry, 41 Ind. 305.

32. Ind.—Davis v. Perry, supra.

where the judgment is void for want of jurisdiction of the person,[33] or where the complaint fails to state facts sufficient to constitute a cause of action,[34] exceptions are not necessary.

Bill of exceptions. In order to make proceedings, which are not properly of record, apparent of record, they must be incorporated in a bill of exceptions,[35] filed within the time limited.[36]

c. Election of Remedies

The complaining party may appeal from the judgment to an appellate court or he may maintain the statutory action to review the judgment in the same court in which it was rendered.

The statutory action to review is not an exclusive remedy.[37] The complaining party to a judgment may appeal from the judgment in the original action to an appellate court for an error of law or bring an action, under the statute, to review the judgment in the same court,[38] but he must elect between the two courses; he cannot pursue both remedies.[39]

§ 315. Grounds of Action and Judgments Reviewable

The statutory action will lie to review all judgments, at law or in equity, with certain exceptions, on the ground of error of law on the face of the record or because of newly discovered material matter.

All judgments, at law or in equity, are reviewable by this statutory action,[40] except judgments in criminal actions,[41] judgments concerning decedents' estates,[42] and, by the express provisions of statute, judgments in divorce actions.[43]

The statutory action lies for error of law,[44] available on appeal,[45] apparent on the face of the record.[46] It will not lie because a witness committed perjury at the prevailing party's solicitation in the trial of the cause;[47] nor will it lie to review the act of a clerical or ministerial officer after the rendition of the judgment.[48]

The action will lie for material new matter discovered since the rendition of the judgment,[49] provided it could not have been discovered by the exercise of reasonable diligence before the rendition of the judgment,[50] and provided it is such new matter of fact that, if presented in the original action, the complaining party would have been entitled to a different judgment.[51] An action to review for new matter discovered after the rendition of the orig-

33. Ind.—McCormack v. Greensburgh First Nat. Bank, 53 Ind. 466.
34 C.J. p 404 note 99.

34. Ind.—Berkshire v. Young, 45 Ind. 461—Davis v. Perry, 41 Ind. 305.

35. Ind.—Hancher v. Stephenson, 46 N.E. 916, 147 Ind. 498.
34 C.J. p 404 note 3.

36. Ind.—Graves v. State, 36 N.E. 275, 136 Ind. 406—Yuknavich v. Yuknavich, 58 N.E.2d 447, 115 Ind. App. 530.
34 C.J. p 404 note 4.

37. Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E. 2d 483, 216 Ind. 192.
34 C.J. p 402 note 57 [a].

38. Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 583, 218 Ind. 468—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E.2d 483, 216 Ind. 192.
34 C.J. p 404 note 5.

39. Ind.—McCurdy v. Love, 97 Ind. 62.
34 C.J. p 404 note 6.
Right to different remedies for review in same case and election of remedies see Appeal and Error § 32.

40. Ind.—Ross v. Banta, 34 N.E. 865, 140 Ind. 120, rehearing denied 39 N.E. 732, 140 Ind. 120.
34 C.J. p 402 note 74.

41. Ind.—Frazier v. State, 7 N.E. 378, 106 Ind. 562.

42. Ind.—McCurdy v. Love, 97 Ind. 62.

43. Ind.—Keller v. Keller, 38 N.E. 337, 139 Ind. 38.
34 C.J. p 402 note 77.
Setting aside divorce judgment or decree generally see Divorce §§ 168–172.

44. Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E. 2d 483, 216 Ind. 192.
34 C.J. p 402 note 78.
Lack of jurisdiction of the subject matter in the court rendering the judgment constitutes such an error of law as will support the action.—Shoaf v. Joray, 86 Ind. 70.

45. Ind.—Eilts v. Henderlong Lumber Co., 33 N.E.2d 373, 109 Ind.App. 559—In re Boyer's Guardianship, 174 N.E. 714, 96 Ind.App. 161.
34 C.J. p 403 note 79.

46. Ind.—Hancher v. Stephenson, 46 N.E. 916, 147 Ind. 498.
34 C.J. p 403 note 80.

47. Ind.—Yuknavich v. Yuknavich, 58 N.E.2d 447, 115 Ind.App. 530—Walker v. State ex rel. Laboyteaux, 86 N.E. 502, 43 Ind.App. 605.

48. Ind.—Ferguson v. Hull, 36 N.E. 254, 136 Ind. 339.
34 C.J. p 403 note 84.

49. Ind.—Yuknavich v. Yuknavich, 58 N.E.2d 447, 115 Ind.App. 530.
34 C.J. p 403 note 82.

50. Ind.—Egoff v. Madison County Children's Guardians, 84 N.E. 151, 170 Ind. 238.
34 C.J. p 403 note 83.

51. Ind.—Egoff v. Madison County Children's Guardians, supra.
34 C.J. p 403 note 82 [d], [e].
Facts held not material new matter
(1) Newly discovered receipts, documents, and other evidence of facts set up by defendants' pleadings in action for fraud and constituting defense which was known to exist and was employed in such action.—Yuknavich v. Yuknavich, 58 N.E.2d 447, 115 Ind.App. 530.

(2) Other facts held not material see 34 C.J. p 403 note 82 [h].

Changed conditions since rendition of judgment, in that judgments were fully paid and that there was no one to whom money might be paid if collected, do not entitle defendant to a review of judgment, where judgments were paid by sureties on order of court, and who therefore had right to be subrogated to all rights of creditors whom they had paid, including their right to judgment for damages:—Trust & Savings Bank of Rensselaer v. Brusnahan, 147 N.E. 168, 88 Ind.App. 257, rehearing denied Trust & Savings Bank of Rensselaer v. Brusham, 148 N.E. 427, 88 Ind.App. 257.

Matter already in issue
Newly-discovered evidence will not justify a review of judgment, where at most it concerns matter al-

inal judgment is of a different character from an action to review for error committed at the trial[52] and is much like a coram nobis proceeding.[53]

§ 316. Jurisdiction and Procedure Generally

A statutory action to review a judgment may be brought only in the court which rendered the judgment. The complaint may be filed only by a party to the judgment, or one claiming under or representing him; it must be filed within the time fixed by the statute, and notice thereof must be given to the defendant.

The statutory action to review a judgment may be brought only in the court which rendered the judgment.[54] Under the statute the complaint to review may be filed without leave of court;[55] but defendant must be notified of the filing.[56] The filing of a complaint for review does not of itself stay proceedings on the original judgment,[57] but at any time after the filing of the complaint and before the final hearing the court may on the application of plaintiff stay all further proceedings on the judgment, and direct that bond be given as in cases of appeal.[58]

Limitations of time. The action to review must be brought within the time fixed by the statute[59] in force at the time of the institution of the action to review,[60] and with reasonable promptness within such time.[61] A person under a legal disability, however, is excepted from the operation of the statute for a fixed period of time after the disability is removed.[62]

Parties. Under the express provisions of the statute, the complaint may be filed only by a party to the judgment sought to be reviewed, or by the heirs, devisees, or personal representatives of a deceased party,[63] and ordinarily all the parties who were in the original proceeding should be before the court,[64] either as complainants or defendants in accordance with their respective interests in the matter to be reviewed.[65]

§ 317. Pleading and Evidence

a. Complaint
b. Pleadings in defense
c. Evidence

a. Complaint

A complaint in an action to review must be sufficient without resorting to the record. If based on error of law, the complaint must set forth the errors relied on, and show that objections and exceptions were duly taken and reserved; if based on new matter, it must allege all the elements of this ground for review.

An action to review a judgment is commenced by a complaint,[66] which stands on the same footing as the complaint in other actions,[67] and which must be sufficient without resorting to the exhibits.[68] A complaint stating a cause of action in general terms will be good, after verdict, as against a motion in arrest of judgment.[69] A complaint is not bad on demurrer for want of facts, if otherwise sufficient, merely because it fails to show that the suit was commenced within the time limited by the statute,[70] unless the complaint shows on its face

ready in issue, and if introduced would not have produced different result.—Trust & Savings Bank of Rensselaer v. Brusnahan, 147 N.E. 168, 88 Ind.App. 257, rehearing denied Trust & Savings Bank of Rensselaer v. Brushaham, 148 N.E. 427, 88 Ind.App. 257.

52. Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 583, 218 Ind. 468.

53. Ind.—Calumet Teaming & Trucking Co. v. Young, supra.
Writ of error coram nobis see supra §§ 311–313.

54. Ind.—Ex parte Kiley, 34 N.E. 989, 135 Ind. 225.
34 C.J. p 404 note 7.

55. Ind.—Hornady v. Shields, 21 N. E. 554, 119 Ind. 201—Webster v. Maiden, 41 Ind. 124.

56. Ind.—Hornady v. Shields, 21 N. E. 554, 119 Ind. 201.

57. Ind.—State v. King, 66 N.E. 35, 30 Ind.App. 339.
Status of judgment pending motion or petition to vacate see supra § 298.

58. Ind.—State v. King, supra.

59. Ind.—Talge Mahogany Co. v. Astoria Mahogany Co., 145 N.E. 495, 195 Ind. 433.
34 C.J. p 404 note 9.

60. Ind.—Rupert v. Martz, 18 N.E. 381, 116 Ind. 72.

61. Ind.—Simpkins v. Wilson, 11 Ind. 541.
34 C.J. p 404 note 11 [c].

62. Ind.—Rupert v. Martz, 18 N.E. 381, 116 Ind. 72—Rosa v. Prather, 2 N.E. 575, 103 Ind. 191.
34 C.J. p 404 note 11.

Within time to appeal

Where action to review, for alleged error, a judgment rendered against plaintiff while an infant was commenced by plaintiff within the time in which plaintiff might have perfected an appeal from such judgment, the action to review judgment could be maintained by plaintiff.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E.2d 483, 216 Ind. 192.

63. Ind.—Michener v. Springfield Engine & Thresher Co., 40 N.E. 679, 142 Ind. 130, 31 L.R.A. 59.
34 C.J. p 404 note 12.

64. Ind.—Douglay v. Davis, 45 Ind. 493.
34 C.J. p 405 note 13.

65. Ind.—Concannon v. Noble, 96 Ind. 326—Burns v. Singer Mfg. Co., 87 Ind. 541.
34 C.J. p 405 note 14.

66. Ind.—Hornady v. Shields, 21 N. E. 554, 119 Ind. 201.
34 C.J. p 405 note 17.

67. Ind.—Hague v. Huntington First Nat. Bank, 65 N.E. 907, 159 Ind. 636.
34 C.J. p 405 note 18.

68. Ind.—Clark v. Clark, 172 N.E. 124, 202 Ind. 104.
34 C.J. p 405 note 22.

Setting forth original pleading

The complaint should contain enough of the pleading in the cause, or the substance or nature or character thereof, to present the question of the alleged error without resorting to the transcript of the record, filed as an exhibit.—Clark v. Clark, supra—Jamison v. Lake Erie & W. R. Co., 48 N.E. 223, 149 Ind. 521.

69. Ind.—Johnson v. Ahrens, 19 N. E. 335, 117 Ind. 600—Jones v. Ahrens, 19 N.E. 334, 116 Ind. 490.

70. Ind.—Boyd v. Fitch, 71 Ind. 306—Whitehall v. Crawford, 67 Ind. 84.

that it is barred by lapse of time.[71] A complaint to review a judgment which is insufficient will not be held good as an application to be relieved from a judgment on the ground of mistake, inadvertence, surprise, or excusable neglect.[72] Leave to amend the complaint may be granted in a proper case.[73]

In action for error of law. If the action is based on an error of law, the complaint must set forth the errors relied on[74] and show that objections and exceptions to the errors alleged were duly taken and reserved in the original proceedings;[75] but this rule does not apply where the error is one which is not waived by a failure to except,[76] as where the complaint does not state any cause of action,[77] or where the court has no jurisdiction over the subject matter.[78] The complaint should itself set forth a complete record of the case,[79] or as much thereof as is necessary fully to present the errors complained of,[80] either by embodying it in the complaint or by referring to and identifying it as an exhibit so as to become substantially a part of the complaint;[81] but it is not necessary that the copy of the record set forth in the complaint should be a certified copy.[82] A bill of exceptions, even though a part of the record, is not such a written instrument as may be filed as an exhibit with the complaint.[83]

In action for new matter. When the complaint is based on material new matter discovered after the rendition of the judgment, it must set forth the character of the action,[84] the facts discovered since the rendition of the judgment,[85] the materiality of the new matter,[86] plaintiff's ignorance of it at the time of the trial,[87] the fact that the new matter could not have been discovered before the judgment by the exercise of reasonable diligence,[88] and that the complaint was filed without delay after the discovery.[89] The complaint must be verified by complainant.[90] The pleadings and evidence in the original case and the newly discovered evidence may be filed with the complaint as an exhibit,[91] but the affidavit of the witness by whom the new matter is expected to be established is not required to be filed with the complaint.[92]

b. Pleadings in Defense

The defendant may demur to the complaint, interpose a general or special denial, or plead proper affirmative defenses.

Defendant may demur to the complaint for its failure to state facts sufficient to constitute a cause of action,[93] or he may interpose a general or special denial,[94] or he may plead proper affirmative defenses,[95] such as would have been available on appeal,[96] or he may plead the pendency of an appeal.[97] However, he cannot make any defense which was available in the original action.[98]

c. Evidence

In an action to review for error of law, the question must be determined by the record itself; but to review

71. Ind.—Harlen v. Watson, 63 Ind. 143.

72. Ind.—Baker v. Ludlam, 20 N.E. 648, 118 Ind. 87.

73. Ind.—Foster v. Potter, 24 Ind. 363.

74. Ind.—Hague v. Huntington First Nat. Bank, 65 N.E. 907, 159 Ind. 636.
34 C.J. p 405 note 25.

75. Ind.—Wohadlo v. Fary, 46 N.E. 2d 489, 221 Ind. 219—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 109, 218 Ind. 468, rehearing denied 33 N.E.2d 583, 218 Ind. 468—Lambert v. Smith, 23 N.E.2d 430, 216 Ind. 226—Eilts v. Henderlong Lumber Co., 33 N.E.2d 373, 109 Ind.App. 559.
34 C.J. p 405 note 26.

Complaint held demurrable
Ind.—Lambert v. Smith, 23 N.E.2d 430, 216 Ind. 226.

76. Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 109, 218 Ind. 468, rehearing denied 33 N.E. 583, 218 Ind. 468—Lambert v. Smith, 23 N.E.2d 430, 216 Ind. 226—Davis v. Perry, 41 Ind. 305.

77. Ind.—Lambert v. Smith, 23 N. E.2d 430, 216 Ind. 226.

78. Ind.—Lambert v. Smith, supra.

79. Ind.—Findling v. Lewis, 47 N.E. 831, 148 Ind. 429.
34 C.J. p 405 note 27.

80. Ind.—Eilts v. Henderlong Lumber Co., 33 N.E.2d 373, 109 Ind. App. 559.
34 C.J. p 405 note 28.

81. Ind.—Findling v. Lewis, 47 N.E. 831, 148 Ind. 429.
34 C.J. p 405 note 29.

82. Ind.—Hoppes v. Hoppes, 24 N.E. 139, 123 Ind. 397.
34 C.J. p 405 note 27 [b].

83. Ind.—Yuknavich v. Yuknavich, 58 N.E.2d 447, 115 Ind.App. 530.

84. Ind.—Jamison v. Lake Erie & W. R. Co., 48 N.E. 223, 149 Ind. 521.

85. Ind.—Hornady v. Shields, 21 N. E. 554, 119 Ind. 201—Francis v. Davis, 69 Ind. 452.

86. Ind.—Jamison v. Lake Erie & W. R. Co., 48 N.E. 223, 149 Ind. 521—Francis v. Davis, 69 Ind. 452.

87. Ind.—Whitehall v. Crawford, 67 Ind. 84.

88. Ind.—Warne v. Irwin, 53 N.E. 926, 153 Ind. 20.
34 C.J. p 406 note 34.

89. Ind.—Osgood v. Smock, 40 N.E. 37, 144 Ind. 387.
34 C.J. p 406 note 35.

90. Ind.—Dippel v. Schicketanz, 100 Ind. 376.
34 C.J. p 406 note 36.

91. Ind.—Hill v. Roach, 72 Ind. 57.
34 C.J. p 406 note 37.

92. Ind.—Hill v. Roach, supra.

93. Ind.—Hornady v. Shields, 21 N. E. 554, 119 Ind. 201.
34 C.J. p 406 note 39.

94. Ind.—Kiley v. Murphy, 34 N.E. 112, 7 Ind.App. 239, rehearing denied 34 N.E. 650, 7 Ind.App. 239.
34 C.J. p 406 note 40.

95. Ind.—Kiley v. Murphy, supra.
34 C.J. p 406 note 41.

Cross errors
To a complaint pleading errors of law, defendant may set up cross errors.—Kiley v. Murphy, supra.

96. Ind.—Richardson v. Howk, 45 Ind. 451—Kiley v. Murphy, 34 N.E. 112, 7 Ind.App. 239, rehearing denied 34 N.E. 650, 7 Ind.App. 239.

97. Ind.—Kiley v. Murphy, supra.
34 C.J. p 406 note 41 [c].

98. Ind.—Richardson v. Howk, 45 Ind. 451—Kiley v. Murphy, 24 N.E. 112, 7 Ind.App. 239, rehearing denied 24 N.E. 650, 7 Ind.App. 239.

for new matter, the plaintiff must prove the averment of material new matter.

In an action to review for error of law the question must be determined by the record itself,[99] and the recitals of the record will control, and cannot be contradicted by, the allegations of the complaint.[1] In an action to review a judgment for new matter plaintiff must prove the averment of material new matter,[2] and that it could not have been discovered by proper diligence.[3]

§ 318. Hearing, Determination, and Relief

The hearing in a statutory action to review is by the court, as an appellate court, and it may reverse, affirm, or modify the judgment.

In an action to review a judgment for an error of law, the hearing is by the court[4] which sits as an appellate court.[5] No right to a jury in such an action exists,[6] and the application should be determined on the principles governing motions for a new trial.[7] The judgment being reviewed will not be disturbed because of the insufficiency of the evidence to sustain the finding of the court, or the verdict of the jury, if there is any evidence legally tending to support the finding or the verdict.[8]

Judgment. Under the statute the court may reverse or affirm the judgment in whole or in part, or modify it as the justice of the case may require,[9] the same as on an appeal to an appellate court;[10] but it has been held that a substantial error requires reversal of the judgment and that it is not necessary to show substantial error plus great injustice.[11] Leave to amend the pleadings in the original case cannot be granted.[12]

At least in the absence of an appeal, a judgment for or against a review of a former judgment puts an end to the action for review,[13] unless, on the overruling of a demurrer to the complaint, leave is granted to answer over.[14] If the judgment is against the review, the whole proceedings are at an end.[15] A judgment of reversal reverses and sets aside the judgment in the original action, leaving the action to proceed as though no trial had taken place;[16] and, moreover, a judgment of reversal will not bar another suit for the same cause of action.[17] A judgment of affirmance bars a second action to review the same judgment.[18]

§ 319. Review and Costs

An appeal may be taken from the judgment in an action to review, and costs may be awarded according to the rules for awarding costs on appeal in general.

An appeal lies from the judgment in an action to review,[19] provided the party had a right to appeal from the judgment in the original action when he filed his complaint for review.[20] The appeal lies to the same court to which an appeal from the original judgment lies.[21] The determination of an action for relief from a judgment taken through mistake, inadvertence, surprise, or excusable neglect does not bar the right of another party to the main action to have the judgment reviewed for error.[22]

Costs. Under the statute the court may award costs according to the rule prescribed for the awarding of costs on an appeal.[23]

99. Ind.—Eilts v. Henderlong Lumber Co., 33 N.E.2d 373, 109 Ind. App. 559—Edwards v. Van Cleave, 94 N.E. 596, 47 Ind.App. 347.
34 C.J. p 406 note 46.

1. Ind.—State v. Holmes, 69 Ind. 577—Weathers v. Doerr, 53 Ind. 104—Hall v. Palmer, 18 Ind. 5.

2. Ind.—Hill v. Roach, 72 Ind. 57.

3. Ind.—Alsop v. Wiley, 17 Ind. 452.

4. Ind.—Hornady v. Shields, 21 N.E. 554, 119 Ind. 201—Richardson v. Howk, 45 Ind. 451.

5. Ind.—Searle v. Whipperman, 79 Ind. 424—Eilts v. Henderlong Lumber Co., 33 N.E.2d 373, 109 Ind.App. 559.

6. Ind.—Hornady v. Shields, 21 N. E. 554, 119 Ind. 201.

7. Ind.—Hornady v. Shields, supra.
34 C.J. p 407 note 53.

8. Ind.—Terry v. Bronnenberg, 87 Ind. 95.

9. Ind.—Hornady v. Shields, 21 N. E. 554, 119 Ind. 201.
34 C.J. p 407 note 55.

10. Ind.—Wright v. Churchman, 35 N.E. 335, 135 Ind. 683—Indianapolis Mut. Fire Ins. Co. v. Routledge, 7 Ind. 25.
Judgment on appeal see Appeal and Error §§ 1846–1952.

11. Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 583, 218 Ind. 468.
Prejudice presumed
If it appears that error was committed, it will be presumed to have been prejudicial unless the contrary is made to appear, and where a party's substantial rights have been prejudiced he has not had a "fair trial," and that is injustice enough to require a reversal.—Calumet Teaming & Trucking Co. v. Young, supra.

12. Ind.—Leech v. Perry, 77 Ind. 422.

13. Ind.—Brown v. Keyser, 53 Ind. 85.
34 C.J. p 407 note 57.

14. Ind.—Leech v. Perry, 77 Ind. 422.

15. Ind.—Brown v. Keyser, 53 Ind. 85.

16. Ind.—Leech v. Perry, 77 Ind. 422—Brown v. Keyser, 53 Ind. 85.
34 C.J. p 407 note 60.

17. Ind.—Maghee v. Collins, 27 Ind. 83.

18. Ind.—Coen v. Funk, 26 Ind. 289.
34 C.J. p 407 note 62.

19. Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E. 2d 483, 216 Ind. 192—Keepfer v. Force, 86 Ind. 81—Brown v. Keyser, 53 Ind. 85.

20. Ind.—McCurdy v. Love, 97 Ind. 62—Klebar v. Corydon, 80 Ind. 95.
A judgment denying a petition to review a judgment from which no appeal has been taken within the statutory period provided therefor is not appealable.—Talge Mahogany Co. v. Astoria Mahogany Co., 141 N.E. 50, 195 Ind. 433, rehearing overruled 145 N.E. 495, 195 Ind. 433.

21. Ind.—Ex parte Kiley, 34 N.E. 989, 135 Ind. 225—Jones v. Tipton, 41 N.E. 831, 13 Ind.App. 392.

22. Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E. 2d 483, 216 Ind. 192.

23. Ind.—Francis v. Davis, 69 Ind. 452—Davidson v. King, 49 Ind. 338.

F. CONFESSED JUDGMENTS

§ 320. Amendment

A judgment by confession may be amended to correct mistakes or omissions, but an invalid judgment may not be amended.

A judgment by confession, like other judgments, as discussed supra § 236, may be amended by rectifying mistakes, correcting the form of the judgment, or supplying omissions,[24] but an invalid judgment may not be amended.[25] The court has no authority at a subsequent term to substitute a judgment on nil dicit for a judgment by confession, on the ground that the latter was entered by mistake.[26] Generally it is not necessary to join in the proceeding to amend the judgment creditors or persons subsequently acquiring interests in the property affected.[27]

§ 321. Opening and Vacating

a. In general

b. Who may apply

c. Time for application

a. In General

Proceedings to open or vacate a judgment by confession must be in accordance with the requirements of statutes and court rules.

Proceedings to open or vacate a judgment by confession must be in accordance with the requirements of statutes and court rules.[28] As a general rule an application to open or set aside a judgment by confession should be made by petition or motion in the cause.[29] In some jurisdictions the vacation of a judgment may be secured on certain grounds, such as fraud on creditors, by action,[30] and it has been held that, if the confession and judgment are regular, they may be impeached only by a suit in equity on the ground of fraud.[31] It has been held that an application to open a judgment by confession, is, or is in the nature of, an equitable proceeding,[32] and that a motion or petition to open judg-

Costs on:
Appeal see Costs §§ 292–350.
Award or refusal of new trial see Costs §§ 404–409.

24. N.J.—Haddonfield Nat. Bank v. Hipple, 164 A. 575, 110 N.J.Law 271.
Pa.—Harr v. Furman, 29 A.2d 527, 346 Pa. 138, 144 A.L.R. 828—Household Finance Corporation v. MacMorris, Com.Pl., 32 Del.Co. 65.
34 C.J. p 407 note 69.

25. S.C.—Ex parte Carroll, 17 S.C. 446—Southern Porcelain Mfg. Co. v. Thew, 5 S.C. 5.

26. Va.—Richardson v. Jones, 12 Gratt. 53, 53 Va. 53.

27. Ill.—Adam v. Arnold, 86 Ill. 185.
N.Y.—Mann v. Brooks, 7 How.Pr. 449, affirmed 8 How.Pr. 40.

28. Ill.—State Bank of Blue Island v. Kott, 54 N.E.2d 897, 323 Ill.App. 27—Moore v. Monarch Distributing Co., 32 N.E.2d 1019, 309 Ill.App. 339—McKenna v. Forman, 283 Ill. App. 606.
Pa.—Wayne v. International Shoe Co., 18 Pa.Dist. & Co. 521—Chiara v. Johnston, Com.Pl., 55 Dauph.Co. 60—Rule v. Elchinski, Com.Pl., 38 Luz.Leg.Reg. 103.
Procedure to open or vacate judgment generally see supra § 286.

Purpose of rule

(1) The purpose of the court rules governing motions to open a judgment by confession is to regulate and prescribe the procedure whereby a court may determine whether or not a defense exists, and to prevent frivolous defenses and defeat attempt to use formal pleadings as a means to delay the recovery of just demands.—Kirchner v. Boris & Dave Goldenhersh, 42 N.E.2d 953, 315 Ill. App. 305.

(2) The rule requiring a defendant to be summoned, and to show cause why a judgment by confession under power in note should be vacated, opened, or modified, provides a means to inform judgment debtor of the judgment and affords him an opportunity to move that it be vacated, opened, or modified.—Foland v. Hoffman, Md., 47 A.2d 62.

Notice of application

(1) Formal notice to plaintiff of defendant's motion and of the court's action in granting defendant leave to plead is not required, where he had actual notice thereof.—Rock Falls First Nat. Bank v. Deneen, 196 Ill. App. 427.

(2) Issuance of rule to show cause why judgment by confession should not be opened may be waived, and plaintiff in judgment may appear by counsel without service of writ, or service may be had in usual way.—Chandler v. Miles, 193 A. 576, 8 W.W.Harr.,Del., 431.

(3) Order setting aside order denying motion to vacate judgments by confession, without notice to movant or showing that first order was improvidently made or fraudulently obtained, was void.—Vale v. Maryland Casualty Co., 281 P. 1058, 101 Cal.App. 599.

Motion to open may be treated as motion to vacate or strike judgment and vice versa.
Ill.—Jefferson Trust & Savings Bank v. W. Heller & Son, 280 Ill.App. 399—First Nat. Bank v. Yakey, 253 Ill.App. 128.
Pa.—Fairview Cemetery Ass'n v. Goranflo, Com.Pl., 23 Erie Co. 101, 102—Hayes v. Goranflo, Com.Pl., 23 Erie Co. 100.

29. Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 113 A.L.R. 786.
Ill.—Moore v. Monarch Distributing Co., 32 N.E.2d 1019, 309 Ill.App. 339.
Md.—Foland v. Hoffman, 47 A.2d 62.
34 C.J. p 408 note 85.

30. N.Y.—Miller v. Earle, 24 N.Y. 110.
34 C.J. p 408 note 90.

31. Or.—Miller v. Bank of British Columbia, 2 Or. 291.
Equitable relief in general see infra § 341 et seq.

32. Del.—Chandler v. Miles, 193 A. 576, 8 W.W.Harr. 431.
Pa.—Perfect Building & Loan Ass'n v. Mandel, 29 A.2d 484, 345 Pa. 616—Jamestown Banking Co. v. Conneaut Lake Dock & Dredge Co., 14 A.2d 325, 339 Pa. 26—Welch v. Sultez, 13 A.2d 399, 338 Pa. 583—Kweller, now for Use of Caplan v. Becker, 12 A.2d 567, 338 Pa. 169—Horn v. Witherspoon, 192 A. 654, 327 Pa. 295—Sferra v. Urling, 188 A. 185, 324 Pa. 344—Mutual Building & Loan Ass'n of Shenandoah v. Walukiewicz, 185 A. 648, 322 Pa. 240—Mielcuszny v. Rosol, 176 A. 236, 317 Pa. 91—Associates Discount Corp. v. Wise, 41 A.2d 418, 156 Pa.Super. 659—First Nat. Bank of Mount Holly Springs v. Cumbler, 21 A.2d 120, 145 Pa.Super. 595—Werner v. Deutsch, 7 A.2d 511,

ment is in effect a bill in equity.[33]

Where the application is under a statute or court rule, the petition and supporting papers must comply substantially therewith.[34] The petition or motion and the supporting affidavits must set forth the grounds for the relief requested,[35] and where, within the rules discussed infra § 324, a meritorious defense must be shown, must show that applicant has a meritorious defense to the claim for which the judgment was entered,[36] and must account for any delay in instituting the proceeding.[37] In stating the grounds for relief or a meritorious defense the application and supporting affidavits must set forth the facts[38] in reasonable detail,[39] and the allegation of mere conclusions is insufficient.[40] It has been

135 Pa.Super. 519—Babcock Lumber Co. v. Allison, 7 A.2d 374, 136 Pa.Super. 353—Miller v. Mastrocola, 2 A.2d 550, 133 Pa.Super. 210—Michaels v. Moritz, 200 A. 176, 131 Pa.Super. 426—Kienberger v. Lally, 198 A. 453, 130 Pa.Super. 533—Burger, for use of Henderson v. Township of Freedom, 190 A. 387, 126 Pa.Super. 128—Gardner v. Salem, 187 A. 94, 123 Pa.Super. 418—Cramer Oil Burner Co. v. Ferguson, 89 Pa.Super. 471—Mid-City Bank & Trust Co. v. Wear, Com.Pl., 31 Del.Co. 319—South Side Bank & Trust Co. v. Hornbaker, Com.Pl., 45 Lack.Jur. 197.

33. Pa.—Commonwealth v. Miele, 14 A.2d 337, 140 Pa.Super. 313—Miller v. Mastrocola, 2 A.2d 550, 133 Pa.Super. 210—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa.Super. 402—Lukac v. Morris, 164 A. 834, 108 Pa.Super. 453.

Motion may be treated as beginning of new suit

Ill.—Brinkman v. Paulciewski, 245 Ill.App. 307.

34. Ill.—Kirchner v. Boris & Dave Goldenhersh, 42 N.E.2d 953, 315 Ill.App. 305—Moore v. Monarch Distributing Co., 32 N.E.2d 1019, 309 Ill.App. 339.

Sufficiency of application to open or vacate judgment generally see supra § 289.

Signature

The application must be signed by applicant or his attorney.—Wyoming Valley Trust Co. v. Tisch, 18 Pa.Dist. & Co. 581, 27 Luz.Leg.Reg. 277.

35. Ill.—Houston v. Ingels, 48 N.E.2d 196, 318 Ill.App. 383—Harris v. Bernfeld, 250 Ill.App. 446.

Pa.—Stevenson v. Dersam, 119 A. 491, 275 Pa. 412—Potter Title & Trust Co. v. Vance Engineering Co., 18 Pa.Dist. & Co. 682, 13 Wash.Co. 10—Colonial Lumber & Timber Co. v. Mallander, Com.Pl., 32 Luz.Leg.Reg. 460.

34 C.J. p 408 notes 86, 87.

Grounds for opening or vacating see infra § 323.

If motion is made on behalf of creditors it should allege fraud or collusion between the parties and consequent injury to applicants' rights.—Grazebrook v. McCreedie, 9 Wend.,N.Y., 437.

If application is based on an irregularity, it should specify the irregularity.—Winnebrenner v. Edgerton, 30 Barb.,N.Y., 185, 8 Abb.Pr. 419, 17 How.Pr. 368.

Piecemeal application

Defendant moving to set aside judgment was under duty to urge all grounds tending to show bias in judgment, since courts do not look favorably on trying issues piecemeal.—Hot Springs Nat. Bank v. Kenney, 48 P.2d 1029, 39 N.M. 428.

36. Ill.—Zipperman v. Wiltse, 47 N.E.2d 365, 317 Ill.App. 654—Lieberman v. Kanter, 33 N.E.2d 129, 309 Ill.App. 444—Automatic Oil Heating Co. v. Lee, 16 N.E.2d 919, 296 Ill.App. 628—Mandel Bros. v. Cohen, 248 Ill.App. 188—Harris Trust & Savings Bank v. Neighbors, 222 Ill.App. 201.

Pa.—Citizens Bank of Wind Gap v. Sparrow, Com.Pl., 27 North.Co. 213—Hill Top Lumber Co. v. Gillman, Com.Pl., 92 Pittsb.Leg.J. 350—Harr v. Kelly, Com.Pl., 43 Lack.Jur. 221, 56 York Leg.Rec. 151.

37. Ill.—Hannan v. Biggio, 189 Ill.App. 460.

Pa.—Cooke v. Edwards, 9 Pa.Dist. 182.

Diligence held properly shown

Ill.—Stranak v. Tomasovic, 32 N.E.2d 994, 309 Ill.App. 177.

38. Ill.—Bankers Bldg. v. Bishop, 61 N.E.2d 276, 326 Ill.App. 256, certiorari denied Bishop v. Bankers Bldg., 66 S.Ct. 1352—Prairie State Bank v. Baer, 35 N.E.2d 536, 311 Ill.App. 248—Davis v. Mosbacher, 252 Ill.App. 536—Parent Mfg. Co. v. Oil Products Appliance Co., 246 Ill.App. 222—Harris Trust & Savings Bank v. Neighbors, 222 Ill.App. 201.

Pa.—Joslin v. Albrewczynski, Com.Pl., 93 Pittsb.Leg.J. 32—Potts v. Mitchell, Com.Pl., 27 West.Co.L.J. 63.

34 C.J. p 415 note 90.

Applications held sufficient

Ill.—Fidler v. Kennedy, 62 N.E.2d 10, 326 Ill.App. 449—Great Northern Store Fixture Mfg. Co. v. Lamm, 58 N.E.2d 745, 324 Ill.App. 587—Selimos v. Marinos, 54 N.E.2d 836, 323 Ill.App. 144—Moore v. Monarch Distributing Co., 32 N.E.2d 1019, 309 Ill.App. 339—Jefferson Trust & Savings Bank v. W. Heller & Son, 280 Ill.App. 399—Ross v. Wrightwood-Hampden Bldg. Corporation, 271 Ill.App. 22—Grossman v. Lifshitz, 261 Ill.App. 523.

Applications held insufficient

Ill.—Chicago Bank of Commerce v. Kraft, 269 Ill.App. 295—Sternberger v. Wright, 239 Ill.App. 490.

Applications held too vague and general

Ill.—University State Bank v. Kelly, 35 N.E.2d 559, 311 Ill.App. 248—Mandel Bros. v. Cohen, 248 Ill.App. 188.

Pa.—Potts v. Mitchell, Com.Pl., 27 West. 63.

39. Del.—Chandler v. Miles, 193 A. 576, 8 W.W.Harr. 431.

Ill.—Parent Mfg. Co. v. Oil Products Appliance Co., 246 Ill.App. 222.

Damages claimed by buyer as result of seller's alleged breaches of warranty constituting difference in value between fixtures furnished and those contracted for were general damages and were not required to be alleged with greater particularity.—Great Northern Store Fixture Mfg. Co. v. Lamm, 58 N.E.2d 745, 324 Ill.App. 587.

Degree of certainty

The facts need not be stated with the same detail and certainty as is required in a formal pleading.

Colo.—McGinnis v. Hukill, 208 P. 248, 71 Colo. 476.

Ill.—State Bank v. Parkhurst, 155 Ill.App. 101.

40. Ill.—Bankers Bldg. v. Bishop, 61 N.E.2d 276, 326 Ill.App. 256, certiorari denied Bishop v. Bankers Bldg., 66 S.Ct. 1352—Freudenthal v. Lipman, 51 N.E.2d 794, 320 Ill.App. 681—Kirchner v. Boris & Dave Goldenhersh, 42 N.E.2d 953, 315 Ill.App. 305—Larson v. Lybyer, 38 N.E.2d 177, 312 Ill.App. 188—Chicago Bank of Commerce v. Kraft, 269 Ill.App. 295—Davis v. Mosbacher, 252 Ill.App. 536—Harris Trust & Savings Bank v. Neighbors, 222 Ill.App. 201.

Ohio.—Canal Winchester Bank v. Exline, 22 N.E.2d 528, 61 Ohio App. 253.

Pa.—Harr v. Kelly, Com.Pl., 43 Lack.Jur. 221, 56 York Leg.Rec. 151.

34 C.J. p 415 note 90.

Fraud

A general allegation of fraud is insufficient; the facts constituting the fraud must be set forth.—Potter Title & Trust Co. v. Vance Engineer-

held that the motion or petition and the affidavits in support thereof must state positively, and not by way of inference or belief, the facts on which applicant relies.[41] The affidavits should be closely scrutinized, and be construed most strongly against the party making the motion.[42]

Mere defects or irregularities in a petition are amendable,[43] and the filing of an amended petition averring additional facts may be permitted where such facts do not constitute a new ground for the opening of the judgment.[44]

A petition or motion to open or vacate a judgment by confession is subject to attack by demurrer or motion to dismiss where it is insufficient on its face.[45]

The answer to an application to open a judgment by confession is subject to much the same pleading requirements as an answer to a bill in equity.[46]

b. Who May Apply

An application to open or vacate a judgment by confession may be made by the defendant, his personal representatives, a judgment creditor of the defendant, or, in some jurisdictions, by a general creditor of the defendant.

An application to vacate or set aside a judgment by confession may be made by the debtor or defendant himself,[47] or his executors or administrators,[48] or, in the case of a dissolved corporation, by its receiver.[49] A judgment against two or more defendants may be opened on the application of only one of them;[50] and, where such application is made at the term when the judgment is entered, it may be continued, and the other debtors be joined by amendment.[51]

A judgment by confession may be vacated or set aside, for good cause shown, on an application by other judgment creditors of defendant,[52] or by an attaching creditor,[53] or, it has been held, by any general creditor of the judgment defendant;[54] but it has also been held that only a judgment creditor has the right to move to set aside a judgment by confession.[55] A judgment confessed by several defendants will not be set aside on the motion of a creditor who has recovered judgment against some only of the defendants,[56] and a judgment, although defective, will not be set aside on a motion of a creditor whose judgment is subject to the same objection.[57]

A judgment entered without the principal credi-

ing Co., 18 Pa.Dist. & Co. 682, 13 Wash.Co. 10.

41. Ill.—Giddings v. Senneff, 41 N.E.2d 106, 314 Ill.App. 205.
Pa.—Baldwin & Welcomer Co. v. Haines, Com.Pl., 28 Erie Co. 85.
34 C.J. p 415 note 91.

Facts as to which affiant competent to testify

An affidavit in support of a motion to vacate a judgment by confession must be made on personal knowledge of affiant and must consist only of such facts as would be admissible in evidence, and it must affirmatively appear from affidavit that if affiant were sworn as a witness he could testify competently thereto.—Barkhausen v. Naugher, Ill.App., 64 N.E.2d 561—Bankers Bldg. v. Bishop, 61 N.E.2d 276, 326 Ill.App. 256, certiorari denied Bishop v. Bankers Bldg., 66 S.Ct. 1352—Kirchner v. Boris & Dave Goldenhersh, 42 N.E.2d 953, 315 Ill.App. 305.

42. Ill.—Automobile Supply Co. v. Scene-in-Action Corporation, 172 N.E. 35, 340 Ill. 196, 69 A.L.R. 1035—Paluszewski v. Tomczak, 273 Ill.App. 245—Chicago Bank of Commerce v. Kraft, 269 Ill.App. 295—Mandel Bros. v. Cohen, 248 Ill.App. 188—Sternberger v. Wright, 239 Ill.App. 490—Great Western Hat Works v. Pride Hat Co., 224 Ill.App. 249.
34 C.J. p 415 note 93.

43. Pa.—Standard Furnace Co. v. Roth, 156 A. 600, 102 Pa.Super. 341.

44. Pa.—Standard Furnace Co. v. Lorincz, 161 A. 573, 106 Pa.Super. 116.

45. Ill.—Brinkman v. Paulciewski, 245 Ill.App. 307.
Pa.—Bekelja v. James E. Strates Shows, 37 A.2d 502, 349 Pa. 442—Potts v. Mitchell, Com.Pl., 27 West.Co.L.J. 63.

At any time

If verified petition for rule to show cause why judgment entered on warrant of attorney should not be opened is insufficient, motion to dismiss may be made and heard at any time by court.—Chandler v. Miles, 193 A. 576, 8 W.W.Harr.,Del., 431.

Implication from failure to move to strike

Plaintiff, by failing to file motion to strike, conceded impliedly that defendant's verified motion set up meritorious defense.—Gilmore v. Mix, Ill.App., 67 N.E.2d 313—Security Discount Corporation v. Jackson, 51 N.E.2d 618, 320 Ill.App. 440.

46. Pa.—George v. George, 178 A. 25, 318 Pa. 203.

47. Del.—Hollis v. Kinney, 120 A. 356, 13 Del.Ch. 366.
N.J.—Harrison v. Dobkin, 168 A. 837, 11 N.J.Misc. 892.
Pa.—Arrott Steam Power Mills Co. v. Philadelphia Wood Heel Co., 50 D. & C. 462.
34 C.J. p 409 note 1.

48. N.J.—Young v. Stout, 10 N.J.Law 302—Wood v. Hopkins, 3 N.J.Law 263.

49. Del.—Rhoads v. Mitchell, Super., 47 A.2d 174.

50. N.Y.—President & Directors of Manhattan Co. v. Elton, 39 N.Y.S.2d 327.
34 C.J. p 409 note 3.

51. Ohio.—Knox County Bank v. Doty, 9 Ohio St. 505, 75 Am.D. 479.

52. N.Y.—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.
34 C.J. p 349 note 7, p 409 note 5.

53. Cal.—Pehrson v. Hewitt, 21 P. 950, 79 Cal. 594.
34 C.J. p 409 note 6.

54. Pa.—Potter Title & Trust Co. v. Vance Engineering Co., 18 Pa.Dist. & Co. 682, 13 Wash.Co. 10—Wansacz v. Wansacz, Com.Pl., 43 Lack.Jur. 127—Bach v. Morley, 1 Leh.Val.L.R. 58.

55. N.Y.—Williams v. Mittlemann, 20 N.Y.S.2d 690, 259 App.Div. 697, appeal denied 22 N.Y.S.2d 822, 260 App.Div. 811, appeal denied.
34 C.J. p 410 note 7 [a].

56. Mo.—Powell v. January, 35 Mo. 134.

57. N.Y.—Williams v. Mittlemann, 20 N.Y.S.2d 690, 259 App.Div. 697, appeal denied 22 N.Y.S.2d 822, 260 App.Div. 811, appeal denied—Rae v. Lawser, 9 Abb.Pr. 380 note, 18 How.Pr. 23.

tor's consent or knowledge may be vacated on his motion.[58]

A judgment by confession may be vacated or set aside for good cause shown at the instance of a bona fide purchaser or claimant of property on which the judgment is an apparent lien,[59] or by others whose rights or interests are affected by the judgment,[60] but it has been held that one who is not a party to the record may not apply to set aside the judgment for irregularities in entering it.[61]

The court may, in a proper case, act on its own motion.[62]

c. Time for Application

In the absence of a statute to the contrary, as a general rule there is no limitation of time for exercising the equitable power of the court to open or set aside a confessed judgment, although an application to open or set aside such a judgment may be denied where the defendant has been guilty of laches.

As a general rule there is no limitation of time for exercising the equitable power of the court to open or set aside a confessed judgment,[63] except when a limitation is fixed by statute,[64] and except that, where the application is made after such unreasonable delay on defendant's part as to make him chargeable with laches, it is viewed with great disfavor, and ordinarily will not be granted[65] unless a sufficient excuse for the delay is shown.[66] Laches, however, is not necessarily a bar to the

58. Ind.—Chapin v. McLaren, 5 N.E. 688, 105 Ind. 563.
Iowa.—Farmers' & Mechanics' Bank v. Mather, 30 Iowa 283.

59. N.Y.—Kendall v. Hodgins, 14 N.Y.Super. 659, 7 Abb.Pr. 309.
34 C.J. p 410 note 11.

60. Ga.—Howell v. Gordon, 40 Ga. 302.
Pa.—Whitaker v. Whitaker, 28 Pa. Dist. 193.

61. Pa.—Williams v. Robertson, 8 Pittsb. 32.
Wis.—Packard v. Smith, 9 Wis. 184.

62. Ohio.—Roberts v. Davis, 35 N.E. 2d 609, 66 Ohio App. 527.

63. Pa.—Salus v. Fogel, 153 A. 547, 302 Pa. 268—Dormont Motors v. Hoerr, 1 A.2d 493, 132 Pa.Super. 567—Kappel v. Meth, 189 A. 795, 125 Pa.Super. 443—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa.Super. 402—Rudolph v. Matura, Com.Pl., 27 Del.Co. 521.
34 C.J. p 409 note 93.

General limitation inapplicable
A proceeding to vacate a judgment obtained by confession on warrant of attorney is not subject to the same limitation of time that prevails as to judgments regularly entered after service of process or trial, but time will be considered in connection with all other features.—Rhoads v. Mitchell, Del.Super., 47 A.2d 174.

64. Wis.—Wessling v. Hieb, 192 N.W. 458, 180 Wis. 160.
34 C.J. p 409 note 94.

Defective statement of confession
Motion to set aside confession judgment on ground of defective statement of confession was not subject to one-year statute of limitations applicable to motions to set aside judgments for irregularities, since defective statement of confession was not a mere "irregularity."—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.

Judgment procured by fraud
One-year statutory limitation does not apply to judgment procured by fraud.—Gardner v. Rule, 289 P. 606, 87 Colo. 544—Investors' Finance Co. v. Luxford, 271 P. 625, 84 Colo. 519.

65. Ill.—Tackett v. Rebmann, 45 N.E.2d 58, 316 Ill.App. 443.
Pa.—Horn v. Witherspoon, 192 A. 654, 327 Pa. 295—McDowell Nat. Bank of Sharon, to Use of Nathan Rosenblum & Co. v. Rosenblum, 200 A. 679, 132 Pa.Super. 48—First Nat. Bank of Mt. Holly Springs v. Cumbler, Com.Pl., 50 Dauph.Co. 203, affirmed 21 A.2d 120, 145 Pa.Super. 595—Duquesne City Bank v. McDermott, Com.Pl., 94 Pittsb.Leg.J. 177.
34 C.J. p 409 note 95.

Delay held to constitute laches
(1) In general.
Ill.—Foreman v. Martin, 11 N.E.2d 856, 292 Ill.App. 640—Sternberger v. Wright, 239 Ill.App. 490.
Pa.—Horn v. Witherspoon, 192 A. 654, 327 Pa. 295—Beckman v. Clapko, Com.Pl., 33 Luz.Leg.Reg. 348—North Wales Nat. Bank v. Nuss, Com.Pl., 60 Montg.Co. 94, 58 York Leg.Rec. 69.
34 C.J. p 409 note 95 [a].

(2) Eight months.—Jones v. Laderman, 198 A. 528, 9 W.W.Harr.,Del., 308.

(3) Seven years.—Jankovich v. Lajevich, 57 N.E.2d 216, 324 Ill.App. 85.

(4) Nine years.—St. Clair Savings & Trust Co., for Use of Billhartz v. Hahne, 29 A.2d 21, 345 Pa. 420.

Delay held not to constitute laches
(1) In general.
Colo.—Mitchell v. Miller, 252 P. 886, 81 Colo. 1.
Ill.—Gilmore v. Mix, App., 67 N.E.2d 313—Kolmar, Inc., v. Moore, 55 N.E.2d 524, 323 Ill.App. 323.
Md.—Automobile Brokerage Corporation v. Myer, 139 A. 539, 154 Md. 1.
Pa.—Austen v. Marzolf, 143 A. 908, 294 Pa. 226—Ransberry, to Use of Ransberry, v. Predmore, Com.Pl., 1 Monroe L.R. 141—Lorey v. Kauffman, Com.Pl., 57 Montg.Co. 57.

(2) Twenty days, but within one day after learning of judgment.—Handley v. Wilson, 242 Ill.App. 66.

(3) Three months.—Johnstown & S. Ry. Co. v. Hoffman, 123 A. 302, 278 Pa. 314.

(4) One year, where delay was satisfactorily explained.—Grossman v. Lifshitz, 261 Ill.App. 523.

(5) Four years, where there was no change in situation of parties.—Finance Co. of America v. Myerly, 155 A. 148, 161 Md. 23.

Delay in perfecting motion or proceeding with hearing may constitute laches.
Colo.—Parham v. Johnson, 292 P. 599, 88 Colo. 127—Sullivan v. International Harvester Co. of America, 279 P. 43, 86 Colo. 177.
Ill.—Heritage Coal Co. v. Dreves, 20 N.E.2d 114, 296 Ill.App. 652.
Pa.—Seaboard Finance Corporation v. Harding, Com.Pl., 33 Luz.Leg.Reg. 80.

Delay short of statutory period of limitations at law may call for the application of the doctrine of laches to petition to open judgment by confession.—Horn v. Witherspoon, 192 A. 654, 327 Pa. 295.

Irregularities
It has been held that no irregularity in the form of proceeding may be inquired into after the lapse of one year.—State ex rel. Thompson v. Police Jury of Catahoula Parish, 160 So. 414, 181 La. 789—Parker v. Scogin, 11 La.Ann. 629.

What constitutes laches depends on the particular circumstances.
Md.—Denton Nat. Bank of Maryland v. Lynch, 142 A. 103, 155 Md. 333.
Pa.—Cronauer v. Bayer, 13 A.2d 75, 140 Pa.Super. 91—South Side Bank & Trust Co. v. Hornbaker, Com.Pl., 45 Lack.Jur. 197.

66. Del.—Jones v. Laderman, 198 A. 528, 9 W.W.Harr. 308.
Ill.—Stranak v. Tomasovic, 32 N.E.2d

opening or setting aside of a confessed judgment,[67] particularly where the rights of third persons have not intervened;[68] and laches will not bar the application where the judgment is void.[69]

During or subsequent to term. A judgment by confession may be opened or vacated on motion during the term at which it was entered,[70] and in the absence of a statutory limitation to the contrary, or of circumstances constituting laches, it may be opened after the end of such term,[71] such as at a subsequent term,[72] unless, under some statutes, the party has in the meantime unsuccessfully prosecuted another remedy against the judgment.[73]

§ 322. —— Jurisdiction and Authority

The court has equitable jurisdiction and power to open or vacate a judgment by confession.

While a judgment by confession operates as a release or waiver of formal errors and irregularities, as discussed supra § 169, nevertheless the judgment confessed remains within the control of the court,[74] and it may exercise an equitable jurisdiction over a judgment entered in this way, and has power to open, vacate, or set aside the judgment for good cause shown.[75]

994, 309 Ill.App. 177—Spindler v. McKay, 13 N.E.2d 864, 294 Ill.App. 610.
Md.—Johnson v. Phillips, 122 A. 7, 143 Md. 16.
Pa.—Jamestown Banking Co. v. Conneaut Lake Dock & Dredge Co., 14 A.2d 325, 339 Pa. 26—Cronauer v. Bayer, 13 A.2d 75, 140 Pa.Super. 91—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480.

Excuses held sufficient

(1) Fact that defendant had been patient in hospital in another state at time of judgment entry.—Elaborated Ready Roofing Co. v. Hunter, 262 Ill.App. 380.

(2) Fact that defendant was away from home moving from place to place with no known address during period in which judgment by confession was obtained, execution issued, and defendant's property sold.—Lucero v. Smith, 132 P.2d 791, 110 Colo. 165.

(3) Misconception of appropriate remedy.—Miller Bros. v. Keenan, 94 Pa.Super. 79.

Delays caused by judgment creditor's attorney could not be charged as laches against defendant.—Kolmar, Inc., v. Moore, 55 N.E.2d 524, 323 Ill.App. 323.

67. Ill.—Ross v. Wrightwood-Hampden Bldg. Corporation, 271 Ill.App. 22.
Pa.—Miller Bros. v. Keenan, 94 Pa. Super. 79.

Application by trustee

Delay in applying to open confessed judgment against corporation was immaterial where judgment debtor's trustee in bankruptcy was not guilty of laches.—Klein v. Lancaster Trust Co., 138 A. 768, 290 Pa. 280.

Question not raised

The question of laches should not be considered where it is not raised by the pleadings.—Warren Sav. Bank & Trust Co. v. Foley, 144 A. 84, 294 Pa. 176.

68. Ill.—Kolmar, Inc., v. Moore, 55 N.E.2d 524, 323 Ill.App. 323.

69. Del.—Rhoads v. Mitchell, Super., 47 A.2d 174.
Ill.—Solomon v. Dunne, 264 Ill.App. 415—State Bank of Prairie du Rocher v. Brown, 263 Ill.App. 312.

70. Md.—Sunderland v. Braun Packing Co., 86 A. 126, 119 Md. 125, Ann.Cas.1914D 156.
34 C.J. p 409 note 96.

Courts usually act liberally in those cases in which application to strike out a judgment is made during term in which judgment was entered.—Pioneer Oil Heat v. Brown, 16 A.2d 880, 179 Md. 155.

71. Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.
Ill.—Solomon v. Dunne, 264 Ill.App. 415—Elaborated Ready Roofing Co. v. Hunter, 262 Ill.App. 380—Lathrop-Paulson Co. v. Perksen, 229 Ill.App. 400.
Md.—Denton Nat. Bank of Maryland v. Lynch, 142 A. 103, 155 Md. 333.
Pa.—Salus v. Fogel, 153 A. 547, 302 Pa. 268—Markeim-Chalmers-Ludington, Inc., v. Mead, 14 A.2d 152, 140 Pa.Super. 490—New Amsterdam Building & Loan Ass'n v. Moyerman, 95 Pa.Super. 47.
34 C.J. p 409 note 97.

72. Del.—Dover Motors Corporation v. North & South Motor Lines, 193 A. 592, 8 W.W.Harr. 467—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.
Ill.—Mutual Life of Illinois v. Little, 227 Ill.App. 436.
34 C.J. p 409 note 98.

73. Ohio.—Kesting v. East Side Bank Co., 33 Ohio Cir.Ct. 77, affirmed 81 N.E. 1138, 76 Ohio St. 591.
34 C.J. p 409 note 99.

74. Cal.—Vale v. Maryland Casualty Co., 281 P. 1058, 101 Cal.App. 599.
Ill.—First Nat. Bank v. Galbraith, 271 Ill.App. 240.
Pa.—Farmers Trust Company v. Egulf, 32 Pa.Dist. & Co. 598—Household Finance Corporation v. MacMorris, Com.Pl., 32 Del.Co. 65—Sterling Land Co. v. Kline, Com. Pl., 37 Pittsb.Leg.J. 279.
W.Va.—Yost v. O'Brien, 130 S.E. 442, 100 W.Va. 408.
34 C.J. p 407 note 75.

75. Del.—Smulski v. H. Feinberg Furniture Co., 193 A. 585, 8 W.W. Harr. 451.
Ill.—Kolmar, Inc., v. Moore, 55 N. E.2d 524, 323 Ill.App. 323—Treager v. Totsch, 53 N.E.2d 719, 322 Ill. App. 75—Automatic Oil Heating Co. v. Lee, 16 N.E.2d 919, 296 Ill. App. 628—First Nat. Bank v. Galbraith, 271 Ill.App. 240.
Ohio.—Bliss v. Smith, 156 N.E. 618, 24 Ohio App. 366.
Pa.—Luce v. Reed Colliery Co., 78 Pa.Super. 248—Barrasso v. Catarino, 49 Pa.Dist. & Co. 540, 45 Lack. Jur. 57—Evans v. Stilley, 8 Pa. Dist. & Co. 466—Potts v. Mitchell, Com.Pl., 27 West.Co.L.J. 63.
Wis.—State v. Braun, 245 N.W. 176, 209 Wis. 483—Wessling v. Hieb, 192 N.W. 458, 180 Wis. 160.
34 C.J. p 407 note 76, p 408 notes 77, 78.

Inherent power

The superior court in entertaining application to open judgment by confession under warrant of attorney exercises jurisdiction because of inherent power over its own records, and not under statutory authority.—Chandler v. Miles, 193 A. 576, 8 W. W.Harr.,Del., 431—Hollis v. Kinney, 120 A. 356, 13 Del.Ch. 366.

Exhaustion of power

(1) Orders made after denial of regularly submitted motion to vacate judgments by confession were invalid.—Vale v. Maryland Casualty Co., 281 P. 1058, 101 Cal.App. 599.

(2) Order opening judgment confessed under warrant of attorney is proper, although rule to open such judgment had been discharged at previous term of court.—Johnson v. Nippert, 133 A. 150, 286 Pa. 175.

Power to control execution

The trial court had power to control judgment by confession and any execution issued thereon.—Keystone Bank of Spangler, Pa., v. Booth, 6 A.

§ 323. —— Grounds

In the absence of a statute to the contrary, a confessed judgment will be opened or vacated only where some equitable ground or reason therefor is shown.

An application to open or vacate a judgment ordinarily is addressed to the equitable power of the court,[76] and, except where other grounds are specified by statute,[77] the judgment will be opened or vacated only where some equitable ground or reason therefor is shown.[78] A judgment by confession will not be opened or vacated for mere technical errors or irregularities.[79]

A judgment by confession may, in the discretion of the court, be opened or vacated on the following grounds: A failure substantially to comply with material requirements of the statute or rule authorizing such judgments;[80] forgery of defendant's signature to the confession or warrant of attorney;[81] that his name was never signed by him or by anyone authorized to sign it for him;[82] that the power to confess judgment was void;[83] that the attorney who assumed to appear for him and confess the judgment had no authority to do so, or acted beyond the scope of his authority;[84] that there was

2d 417, 334 Pa. 545—Markofski v. Yanks, 146 A. 569, 297 Pa. 74—South Side Bank & Trust Co. v. Scheuer, Pa.Com.Pl., 43 Lack.Jur. 95.

Opening in part

The trial court was authorized to open revived judgment by confession to such extent as might be necessary to do justice between the parties, and to continue it as to the balance.—Keystone Bank of Spangler, Pa., v. Booth, 6 A.2d 417, 334 Pa. 545.

Relief desired by both parties

Pa.—McConnell v. Bowden, 41 A.2d 849, 352 Pa. 48.

76. Ill.—Mayer v. Tyler, 19 N.E.2d 211, 298 Ill.App. 632—Alton Banking & Trust Co. v. Gray, 259 Ill. App. 20, affirmed 179 N.E. 469, 347 Ill. 99.

N.J.—**Corpus Juris quoted in** Knoettner v. Integrity Corporation of New Jersey, 160 A. 527, 528, 109 N. J.Law 186.

Pa.—Bonebrake v. Koons, 5 A.2d 184, 333 Pa. 443—Newtown Title & Trust Co. v. Underwood, 177 A. 27, 317 Pa. 212—Certelli v. Braum, 144 A. 403, 294 Pa. 488—Baker's Estate v. Woodworth, 198 A. 469, 130 Pa.Super. 452—Lukac v. Morris, 164 A. 834, 108 Pa.Super. 453—McEnery v. Nahlen, Com.Pl., 21 Erie Co. 172—Minet Motor Co. v. Lehn, Com.Pl., 54 York Leg.Rec. 3.

34 C.J. p 408 note 78.

77. Ohio.—Ames Co. v. Busick, App., 47 N.E.2d 647.

Wis.—Wessling v. Hieb, 192 N.W. 458, 180 Wis. 160.

78. Ill.—Elaborated Ready Roofing Co. v. Hunter, 262 Ill.App. 380—Barrow v. Phillips, 250 Ill.App. 587—Long v. Coffman, 230 Ill.App. 527.

Md.—Denton Nat. Bank of Maryland v. Lynch, 142 A. 103, 155 Md. 333.

N.J.—**Corpus Juris quoted in** Knoettner v. Integrity Corporation of New Jersey, 160 A. 527, 528, 109 N.J.Law 186.

Pa.—Grant Const. Co., for Use of Home Credit Co., v. Stokes, 167 A. 643, 109 Pa.Super. 421—Klein v. Brookside Distilling Products Corp., Com.Pl., 47 Lack.Jur. 165.

34 C.J. p 410 note 15.

Existence of a meritorious defense as ground for opening or vacating see infra § 324.

Excessive cumulation of remedies

Lease or bailment contract, providing for cumulation of remedies in such manner as to produce results so grossly inequitable as to be unconscionable, will not be sustained. —Lukac v. Morris, 164 A. 834, 108 Pa.Super. 453.

Judgment held valid and not to be subject to vacation.—Rhoads v. Mitchell, Del.Super., 47 A.2d 174.

79. N.J.—Stetz v. Googer, 18 A.2d 416, 126 N.J.Law 213.

Pa.—Albert M. Greenfield & Co. v. Roberts, 5 A.2d 642, 135 Pa.Super. 328—Hefer v. Hefner, 95 Pa.Super. 551—Waldman v. Baer, 81 Pa.Super. 290—Casey Heat Service Co. v. Klein, 55 Pa.Dist. & Co. 293—Industrial Fibre Products Co. of Caldwell, N. J., v. Arters, 49 Pa. Dist. & Co. 304, 26 Erie Co. 202—Cohen v. Stergiakis, 26 Pa.Dist. & Co. 699—Scouton v. Saunders, Com.Pl., 39 Luz.Leg.Reg. 102—Barney v. Nogen, Com.Pl., 35 Luz.Leg. Reg. 441—Ward & Wiener v. Casterline, Com.Pl., 33 Luz.Leg.Reg. 54—Crane v. Harris, Com.Pl., 8 Monroe L.R. 24—Rapp v. Schlichtman, Com.Pl., 54 Montg.Co. 16.

34 C.J. p 412 note 57.

80. Ga.—Thomas v. Bloodworth, 160 S.E. 709, 44 Ga.App. 44.

Pa.—Gorchov v. Moran, 17 Pa.Dist. & Co. 248—Heller v. Goldsmith, 14 Pa.Dist. & Co. 746, 33 Dauph.Co. 377—Orner v. Hurwitch, 12 Pa. Dist. & Co. 403, affirmed 97 Pa.Super. 263—Heller v. Bloom, Com. Pl., 51 Dauph.Co. 360—Bell v. Lawler, Com.Pl., 45 Lack.Jur. 181—Limbert v. Nossal, Com.Pl., 32 Luz. Leg.Reg. 352.

34 C.J. p 410 note 16.

Confession not filed

N.Y.—Williams v. Mittlemann, 20 N. Y.S.2d 690, 259 App.Div. 697, appeal denied 22 N.Y.S.2d 822, 260 App.Div. 811, appeal denied.

Mortgage foreclosure

Under statute authorizing recovery of deficiency existing after mortgage foreclosure sale, obligors on mortgage bond who executed warrant of attorney to enter judgment by confession waived the commencement of suit for deficiency by process and were not entitled to set aside judgment for deficiency entered by confession on bond and warrant, notwithstanding statutory provision that obligor may file an answer in suit on the bond.—Chambers v. Boldt, 8 A.2d 73, 123 N.J.Law 111.

Notice to surety

Failure to give surety notice of proceedings for revocation of liquor dealer's license was held not to entitle surety to open judgment confessed on liquor license bond, where statute did not contemplate that surety should be party to such proceedings.—Commonwealth v. McMenamin, 184 A. 679, 122 Pa.Super. 91.

Venue

Judgment by cognovit on note authorizing entry of judgment thereon in any state or county cannot be disturbed merely for failure to lay proper venue.—State v. Braun, 245 N.W. 176, 209 Wis. 483.

81. Pa.—Sobieski Building & Loan Ass'n v. McGrady, 80 Pa.Super. 277—South Side Bank & Trust Co. v. Hornbaker, Com.Pl., 45 Lack. Jur. 197—Szabari v. Kuzman, Com. Pl., 18 Leh.L.J. 421—Makarewicz v. Yova, Com.Pl., 33 Luz.Leg.Reg. 336.

34 C.J. p 410 note 17.

82. Pa.—Charles D. Kaier Co. v. O'Brien, 51 A. 760, 202 Pa. 153—Keystone Brewing Co. v. Varzaly, 39 Pa.Super. 155.

83. Ill.—Barrow v. Phillips, 250 Ill. App. 587.

84. Ill.—Handley v. Wilson, 242 Ill. App. 66.

N.Y.—President and Directors of Manhattan Co. v. Elton, 39 N.Y.S. 2d 327.

Pa.—Disanto v. Rowland, 33 Pa.Super. 155—Medvidovich v. Sterner, 50 Pa.Dist. & Co. 690, 92 Pittsb. Leg.J. 223—Guardian Financial

a material alteration in the judgment note;[85] that a joint judgment was entered on separate warrants;[86] that judgment was not entered in favor of the proper party plaintiff;[87] that plaintiff has broken an agreement with defendant as to entering up or enforcing the judgment;[88] or that defendant had died before entry of the judgment.[89] It has been held that it is not a ground for opening or setting aside the judgment that it was in violation of an injunction issuing from another court.[90]

Time of entering judgment. A judgment by confession will not be opened or vacated on the mere ground that it was taken prematurely,[91] such as before the maturity of the obligation secured,[92] unless it is entered under a warrant of attorney which authorizes a confession only after maturity.[93]

Objections to affidavit or statement. Mere defects or irregularities in the affidavit or statement of the indebtedness required by the statute constitute no ground for vacating or setting aside the judgment;[94] although even in such a case some of the decisions hold that the judgment should not be set aside where no fraud or injustice is shown, and the debt is admitted to be due, unless some equitable ground is shown for the court's interposition,[95] but this relief may be granted where the affidavit or statement is wholly lacking or entirely insufficient.[96] It has been held that before a judgment, confessed under a warrant of attorney which is over a year and a day old, will be set aside because an affidavit is not filed showing that defendant was alive and that the debt was due and unpaid, the party making the application must show in addition some equitable reason therefor.[97]

Defects in pleading or evidence. A judgment by confession cannot be set aside because of immaterial defects in the pleadings or evidence in the case[98] or because of immaterial variances,[99] but it may be vacated for want of proof of the execution of the power of attorney by defendant,[1] or where the petition for judgment does not state facts necessary to give jurisdiction.[2]

Corporation v. Pish, Com.Pl., 32 Luz.Leg.Reg. 408.
34 C.J. p 410 note 19—6 C.J. p 646 note 37.

Judgment entered by prothonotary will be stricken where the amount of the indebtedness cannot be ascertained from the face of the authority to confess judgment.—Orner v. Hurwitch, 97 Pa.Super. 263.

85. Ill.—Heldman v. Gunnell, 201 Ill.App. 172.
Pa.—Colonial Finance Co. v. Hoover, 170 A. 338, 112 Pa.Super. 60.
34 C.J. p 410 note 20.

86. Pa.—Peoples Nat. Bank of Reynoldsville, to Use of Mottern, v. D. & M. Coal Co., 187 A. 452, 124 Pa.Super. 21.

87. Pa.—Rome Sales & Service Station v. Finch, 169 A. 476, 111 Pa. Super. 226—Market St. Trust Co. now for Use of Swalls v. Grove, 46 Pa.Dist. & Co. 605, 53 Dauph.Co. 114—Hogsett v. Lutrario, 34 Pa. Dist. & Co. 637, 87 Pittsb.Leg.J. 73, 2 Fay.Co.Leg.J. 1, affirmed 13 A.2d 902, 140 Pa.Super. 419.

Agent
Where lease provided that certain person who signed lease as agent, was acting as agent, failure to enter judgment by confession in lease in favor of such person, as well as in favor of admitted lessors was not ground for striking off judgment, since it sufficiently appeared, in absence of contrary averment, that such person had no other status than that of agent.—Forgeng v. Blank, 185 A. 729, 322 Pa. 208.

Fictitious plaintiff
Defendant could not have judgment entered pursuant to warrant of attorney stricken as void because judgment designated allegedly unregistered fictitious name as plaintiff.—Rome Sales & Service Station v. Finch, 169 A. 476, 111 Pa.Super. 226.

88. Pa.—Byrod v. Sweigert, 12 Pa. Dist. 565.
34 C.J. p 410 note 21.

89. Del.—Rhoads v. Mitchell, Super., 47 A.2d 174.
34 C.J. p 410 note 22.

90. N.Y.—Grazebrook v. McCreedie, 9 Wend. 437.
34 C.J. p 410 note 23.

91. Pa.—Spiese v. Shee, 95 A. 555, 250 Pa. 399.
34 C.J. p 411 note 24.

92. Miss.—Black v. Pattison, 61 Miss. 599.
34 C.J. p 411 note 25.

93. Wis.—Reid v. Southworth, 36 N.W. 866, 71 Wis. 288.

94. Ill.—Larson v. Lybyer, 38 N.E. 2d 177, 312 Ill.App. 188.
N.J.—Harrison v. Dobkin, 168 A. 837, 11 N.J.Misc. 892.
Pa.—Prosewicz v. Gorski, 30 A.2d 224, 151 Pa.Super. 309—New Amsterdam Building & Loan Ass'n v. Moyerman, 95 Pa.Super. 47—Joyce, to Use of v. Hawtof, 30 Pa.Dist. & Co. 642, affirmed 4 A.2d 599, 135 Pa.Super. 30—Hazleton Motor Co. v. Siroski, Com.Pl., 36 Luz.Leg. Reg. 237.
34 C.J. p 411 note 28.

95. N.J.—Ely v. Parkhurst, 25 N. J.Law 188.
Tex.—Chestnutt v. Pollard, 13 S.W. 852, 77 Tex. 86.

96. Ill.—Preisler v. Gulezynski, 264 Ill.App. 12.
N.J.—Fortune Building & Loan Ass'n v. Codomo, 7 A.2d 880, 122 N.J.Law 565—Harrison v. Dobkin, 168 A. 837, 11 N.J.Misc. 892.
N.Y.—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 39, 162 Misc. 881.
Pa.—Advance-Rumely Thresher Co. v. Frederick, 98 Pa.Super. 560—Jordan v. Kirschner, 94 Pa.Super. 252—Lillis v. Reed, Com.Pl., 21 Erie Co. 8—Newswander v. Fox, Com.Pl., 86 Pittsb.Leg.J. 342.
34 C.J. p 411 note 29.

Objection available to creditor only
A motion to vacate a judgment by confession on ground of alleged deficiency in statement of confession was properly denied, since alleged deficiency was not available to judgment debtor, statute relating to such judgment being intended only to protect creditors of a defendant from judgments entered on confession by collusion.—Magalhaes v. Magalhaes, 5 N.Y.S.2d 43, 254 App. Div. 880.

97. Ill.—Larson v. Lybyer, 38 N.E. 2d 177, 312 Ill.App. 188.
34 C.J. p 411 note 31.

98. Ill.—Adam v. Arnold, 86 Ill. 185—Hall v. Jones, 32 Ill. 38.

99. Ill.—Hall v. Jones, supra.

1. Ill.—Stein v. Good, 3 N.E. 735, 115 Ill. 93.

2. Ohio.—Hower v. Jones, 4 Ohio Dec., Reprint, 302, 1 Clev.L.Rep. 257.

Fraud. A confessed judgment may be vacated on a sufficient showing that it was obtained by means of fraud, deception, or imposition practiced on defendant,[3] although it has been held that the judgment will not be vacated on such ground where the evidence in support of the petition to vacate shows that defendant has no defense to the action.[4] Where a judgment is confessed directly to a third party, who takes the same in good faith and for value, it cannot be impeached for fraud existing between the other parties;[5] but it is otherwise if such third party takes such judgment as collateral security only after it has been confessed.[6] Where there is no evidence of fraud or undue influence, it is no ground for setting aside the judgment that defendant is of weak understanding and in the habit of making improvident bargains,[7] that he is illiterate,[8] or that he was intoxicated at the time,[9] or that defendant did not know that his note contained authority for confession of judgment.[10]

Fraud or collusion between the original parties to the judgment will be cause for setting it aside at the instance of other creditors, as discussed in Fraudulent Conveyances § 44 b, or other parties in interest;[11] but not at the instance of defendant or the other original party.[12]

Duress. A judgment by confession may be set aside where it was obtained by duress.[13] A judgment will not be set aside for duress, however, where it is confessed in the presence of the court;[14] nor is the mere fact that defendant makes the confession while under arrest sufficient ground for setting aside the judgment, where it is shown that it was his voluntary act.[15]

Objection to amount of judgment. A judgment by confession may be opened or set aside where the amount of it is excessive.[16] The fact, however, that the judgment includes costs is no ground for setting it aside, if they are reasonable in amount;[17] and the mere fact that the judgment was confessed for less than the amount apparently due is no ground for setting it aside on the motion of defendant.[18] Where a judgment for less than authorized is confessed under a warrant of attorney, it has been held that an amended judgment thereafter entered for the proper sum is voidable and that it may be opened.[19]

Distinction between grounds for striking and opening judgment. A distinction is made, in some ju-

3. Colo.—Investors' Finance Co. v. Luxford, 271 P. 625, 84 Colo. 519.
Ill.—Preisler v. Gulezynski, 264 Ill. App. 12—Beard v. Baxter, 242 Ill. App. 480.
Pa.—Standard Furnace Co. v. Lorincz, 161 A. 573, 106 Pa.Super. 116—Davis v. Tate, Com.Pl., 26 Erie Co. 141—Guth v. Raymond, Com. Pl., 19 Leh.L.J. 126—Bonat v. Filer, Com.Pl., 10 Sch.Reg. 112.
34 C.J. p 411 note 36.

Mistake
Where it is made to appear that a note on which a judgment has been taken by confession was executed in belief that some other document, not a note, was being signed, leave to plead should be allowed on due application.—Stranak v. Tomasovic, 32 N.E.2d 994, 309 Ill.App. 177.

Fraud held shown
Colo.—Investors' Finance Co. v. Luxford, 271 P. 625, 84 Colo. 519.

Fraud held not shown
Del.—Testardo v. Bresser, 153 A. 800, 17 Del.Ch. 312.
Ga.—Thomas v. Bloodworth, 160 S.E. 709, 44 Ga.App. 44.
Ill.—Glanz v. Mueller, 54 N.E.2d 639, 322 Ill.App. 507—Stellwagen v. Schmidt, 234 Ill.App. 325.
Pa.—Keystone Bank of Spangler, Pa., v. Booth, 6 A.2d 417, 334 Pa. 545—Vaughan & Co. v. Hopewell, 79 Pa.Super. 239—Eastern Light Co. v. Wojciechowski, Com.Pl., 36 Luz. Leg.Reg. 233.
34 C.J. p 411 note 36 [a].

4. Neb.—Osborn v. Gehr, 46 N.W. 84, 29 Neb. 661.
Necessity of meritorious defense see infra § 324.

5. N.Y.—Kirby v. Fitzgerald, 31 N.Y. 417.

6. N.Y.—Kirby v. Fitzgerald, supra.

7. Va.—Mason v. Williams, 3 Munf. 126, 17 Va. 126, 5 Am.D. 505.

8. N.J.—Modern Security Co. v. Lockett, Sup., 143 A. 511.

9. Wis.—Kissinger v. Zieger, 120 N.W. 249, 138 Wis. 368.
34 C.J. p 411 note 41.

10. Md.—International Harvester Co. v. Neuhauser, 97 A. 372, 128 Md. 173.

11. Cal.—Crescent Canal Co. v. Montgomery, 56 P. 797, 124 Cal. 134.

12. Pa.—Harbaugh v. Butner, 23 A. 988, 148 Pa. 273.
34 C.J. p 411 note 45.

Assignee for benefit of creditors
A judgment by confession good as against the debtor, even though it is fraudulent as against creditors, cannot be set aside on motion of the assignee for the benefit of creditors.—Beekman v. Kirk, 15 How. Pr., N.Y., 228—34 C.J. p 349 note 8.

13. Pa.—Guadiere v. Simeone, 29 A. 2d 702, 151 Pa.Super. 65.
34 C.J. p 411 note 46.

Threat of prosecution
Fact that note was procured by threat of prosecution did not warrant opening judgment confessed on note.—First Nat. Bank v. Reynolds, 256 Ill.App. 553.

14. Ky.—Hamilton v. Clarke, 1 Bibb 251.

15. Ill.—Baldwin v. Murphy, 82 Ill. 485.
N.Y.—Storm v. Smith, 1 Wend. 37.

16. Ill.—Enzelis v. Enzelis, 4 N.E. 2d 750, 287 Ill.App. 617.
Ohio.—Meyer v. Meyer, 158 N.E. 320, 25 Ohio App. 249.
Pa.—Peerless Soda Fountain Service Co. v. Lipschutz, 101 Pa.Super. 568—Rothstein v. Satz, Com.Pl., 7 Sch.Reg. 124—York Concrete Co. v. Harvey, Com.Pl., 57 York Leg. Rec. 1.
34 C.J. p 412 note 49.

Such error is not jurisdictional
Ill.—Stead v. Craine, 256 Ill.App. 445.

17. Wis.—Milwaukee Second Ward Sav. Bank v. Schranck, 73 N.W. 81, 97 Wis. 250, 39 L.R.A. 569.

18. Ill.—Mayer v. Tyler, 19 N.E.2d 211, 298 Ill.App. 632.
Pa.—Miller v. Desher, 12 Pa.Dist. & Co. 315, 41 Lanc.L.Rev. 335.
Wis.—Blaikie v. Griswold, 10 Wis. 293.

19. Pa.—Mars Nat. Bank v. Hughes, 89 A. 1130, 243 Pa. 223.

risdictions, between grounds for striking off or vacating and opening the judgment. It can be stricken off or vacated, on petition or motion, only for an irregularity appearing on the face of the record.[20] If it has been regularly entered, and defendant is entitled to relief, such relief must come through a motion or petition to open it and let defendant into a defense;[21] and in such a case it cannot be stricken off on motion.[22]

§ 324. —— Meritorious Defenses

Unless the judgment by confession is void, a meritorious defense to the claim on which it was entered must be shown to warrant its opening or vacation, and the showing of a meritorious defense is in itself sufficient to warrant such relief.

It has generally been held that the fact that defendant has a meritorious defense to the claim for which judgment by confession was entered is in itself a sufficient ground for opening or vacating the judgment.[23] Moreover, unless the judgment by

20. Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.

Pa.—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454—Prosewicz v. Gorski, 30 A.2d 224, 151 Pa.Super. 309—Peerless Soda Fountain Service Co. v. Lipschutz, 101 Pa.Super. 568—Ginter v. Bloser, 47 Pa.Dist. & Co. 660—Commonwealth v. Sands, 27 Pa.Dist. & Co. 367—Hunter v. Wertz, Com. Pl., 91 Pittsb.Leg.J. 348, 57 York Leg.Rec. 111—Gilfillan v. Stack, Com.Pl., 85 Pittsb.Leg.J. 720—Miller v. Miller, Com.Pl., 10 Sch.Reg. 109.

34 C.J. p 408 note 82.

Truth of record

Averments in sworn statement accompanying confessed judgment must be taken as true in proceedings to strike off judgment.—Gold v. Fox Film Corporation, 137 A. 605, 289 Pa. 429.

21. Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.

Pa.—R. S. Noonan, Inc., v. Hoff, 38 A.2d 53, 350 Pa. 295—Wilson v. Vincent, 150 A. 642, 300 Pa. 321—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454—Brumbaugh v. Brumbaugh, 16 Pa. Dist. & Co. 281—Miners Sav. Bank of Pittston v. Falzone, Com.Pl., 35 Luz.Leg.Reg. 315.

34 C.J. p 408 note 83.

Existence of meritorious defense as ground for opening or vacating confessed judgments generally see infra § 324.

Denial of motion to strike

Defendant whose motion to strike off judgment, entered by warrant of attorney, for irregularity on face of record was denied, was not precluded from presenting defense to judgment on petition to open judgment.—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa. Super. 402.

Waiver of irregularities in entry

(1) Party moving to open judgment and to be let into defense on merits waives irregularities in entry of judgment, which might have been attacked by motion to strike off.—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa.Super. 402—Parsons v. Kuhn, 45 Pa.Dist. & Co. 356—Noonan v. Hoff, Com.Pl., 57 York Leg.Rec. 113, affirmed R. S. Noonan, Inc., v. Hoff, 38 A.2d 53, 350 Pa. 295.

(2) Irregularity in entering joint judgment on separate warrants of attorney to confess judgment is not waived by filing petition to open.—Peoples Nat. Bank of Reynoldsville, to Use of Mottern, v. D. & M. Coal Co., 187 A. 452, 124 Pa.Super. 21.

22. Pa.—Harr v. Bernheimer, 185 A. 857, 322 Pa. 412—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454—Stevenson v. Dersam, 119 A. 491, 275 Pa. 412—Collins v. Tracy Grill & Bar Corporation, 19 A.2d 617, 144 Pa.Super. 440—Lyman Felheim Co. v. Walker, 193 A. 69, 128 Pa.Super. 1—Durso v. Fiorini, 98 Pa.Super. 111—Melnick v. Hamilton, 87 Pa. Super. 575—Picone v. Barbano, Com.Pl., 32 Del.Co. 88—Baldwin & Welcomer Co. v. Haines, Com.Pl., 28 Erie Co. 85—Kahler v. Shaffer, Com.Pl., 32 Luz.Leg.Reg. 68.

34 C.J. p 408 note 84.

Matters purely defensive and going in denial of plaintiff's right to recover do not afford grounds to set aside a judgment by confession.—Thomas v. Bloodworth, 160 S.E. 709, 44 Ga.App. 44.

23. Colo.—Lucero v. Smith, 132 P. 2d 791, 110 Colo. 165—Parham v. Johnson, 292 P. 599, 88 Colo. 127—Mitchell v. Miller, 252 P. 886, 81 Colo. 1—Commercial Credit Co. v. Calkins, 241 P. 529, 78 Colo. 257.

Ill.—Gilmore v. Mix, App., 67 N.E. 2d 313—Fidler v. Kennedy, 62 N.E. 2d 10, 326 Ill.App. 449—Albany v. Phillips, 48 N.E.2d 453, 318 Ill. App. 642—Kirchner v. Boris & Dave Goldenhersh, 42 N.E.2d 953, 315 Ill.App. 305—Moore v. Monarch Distributing Co., 32 N.E.2d 1019, 309 Ill.App. 339—Stranak v. Tomasovic, 32 N.E.2d 994, 309 Ill. App. 177—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137—Mutual Life of Illinois v. Little, 227 Ill.App. 436—Harris Trust & Savings Bank v. Neighbors, 222 Ill.App. 201.

Md.—Vane v. Stanley Heating Co., 152 A. 511, 160 Md. 24—Cardwell-Fisher Fixture Co. v. Commerce Trust Co., 141 A. 121, 154 Md. 366—Automobile Brokerage Corporation v. Myer, 139 A. 539, 154 Md. 1.

Pa.—Bonebrake v. Koons, 5 A.2d 184, 333 Pa. 443—Marshall v. Jackson, 145 A. 584, 296 Pa. 16—Commonwealth v. Cohen, 14 A.2d 362, 140 Pa.Super. 361—Improve Your Home System v. Collins, 94 Pa. Super. 575—Hoffman v. Winston, 86 Pa.Super. 130—Siddall v. Burke, Com.Pl., 29 Del.Co. 530—Walker v. Oakley, Com.Pl., 43 Lack.Jur. 249, 56 York Leg.Rec. 197, modified on other grounds 32 A.2d 563, 347 Pa. 405—Cleland-Simpson Co. v. Lynch, Com.Pl., 41 Lack.Jur. 94—Kintzer v. Williams, Com.Pl., 34 Luz.Leg. Reg. 285—Landes Motor Co. v. Rhoads, Com.Pl., 54 Montg.Co. 408, 9 Som.Co.Leg.J. 162—Gordon v. Brickley, Com.Pl., 92 Pittsb.Leg.J. 343—Newswander v. Fox, Com.Pl., 86 Pittsb.Leg.J. 342—Holland Furnace Co. v. Davis, Com.Pl., 7 Sch. Reg. 297—Williamsport Auto Parts Co. v. Sprenkle, Com.Pl., 54 York Leg.Rec. 154—Wildwood Strand Realty Co. v. Skipper, Com.Pl., 53 York 19.

34 C.J. p 412 note 55.

Distinction between grounds for striking and opening confessed judgments see supra § 323.

Defense to whole or part of claim is sufficient.

Ohio.—Edge v. Stuckey, 178 N.E. 210, 40 Ohio App. 122.

Pa.—Plympton Cabinet Co. v. Rosenberg, 96 Pa.Super. 330.

Judgments are freely stricken to let in defenses

Md.—Craig v. Hebron Building & Loan Ass'n No. 2, 189 A. 218, 171 Md. 522.

Opening not mandatory

Since, as discussed infra § 326, the opening of such a judgment rests largely in the discretion of the court, a judgment need not be opened merely because testimony offered by defendant would, if true, constitute a defense.—St. Clair Savings & Trust Co., for Use of Billhartz, v. Hahne, 29 A.2d 21, 345 Pa. 420.

confession is void, it will not be opened or vacated for a defect or irregularity therein unless it is shown that defendant has a meritorious defense to the claim for which the judgment was entered.[24] If no meritorious defense is shown and it appears to the court that an action on the debt or claim ought to go against the moving party, a judgment by confession will not be disturbed.[25] Where, however, a judgment by confession is entirely void, the court may vacate it without regard to the question whether defendant has a good defense to the claim on which it was based.[26]

The proposed defense must be meritorious; it must raise questions of law deserving investigation or a real controversy as to the essential facts.[27] The judgment may be opened or set aside on a

24. U.S.—Glinski v. U. S., C.C.A. Ill., 93 F.2d 418.
Ill.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137—Walrus Mfg. Co. v. Wilcox, 25 N.E.2d 132, 303 Ill.App. 286—Freedman v. Hunt, Hartford Accident & Indemnity Co., Intervenor, 22 N.E.2d 864, 301 Ill.App. 604—Browning v. Spurrier, 245 Ill.App. 276.
Md.—Crothers v. National Bank of Chesapeake City, 149 A. 270, 158 Md. 587.
Ohio.—Canal Winchester Bank v. Exline, 22 N.E.2d 528, 61 Ohio App. 253.
Pa.—Commonwealth v. J. & A. Moeschlin, Inc., 170 A. 119, 314 Pa. 34—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454—Commonwealth v. Mahoningtown Ry. Men's Club, 14 A.2d 356, 140 Pa.Super. 413—Commonwealth v. Eclipse Literary and Social Club, 178 A. 341, 117 Pa.Super. 339—Heyer-Kemner, Inc., v. Sachs, Com.Pl., 57 Montg.Co. 73—Citizens Bank of Wind Gap v. Sparrow, Com.Pl., 27 North.Co. 213.
34 C.J. p 412 note 55.

Defects held insufficient unless meritorious defense shown

(1) Technical errors or irregularities.
Ill.—Mayer v. Tyler, 19 N.E.2d 211, 298 Ill.App. 632.
N.J.—Stetz v. Googer, 18 A.2d 416, 126 N.J.Law 213.

(2) Insufficient power of attorney.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137—Sekela v. Tokarz, 6 N.E.2d 489, 288 Ill.App. 617—Alton Banking & Trust Co. v. Gray, 259 Ill.App. 20, affirmed 179 N.E. 469, 347 Ill. 99.

(3) Power of attorney revoked by death.—Terendy v. Swierski, 15 N.E.2d 613, 296 Ill.App. 635.

(4) Transfer of note by payee to cut off defenses.—Davis v. Wirth, 249 Ill.App. 544.

Importance of question

Generally on motion to open a judgment entered by confession and for leave to defend the question of a meritorious defense is of much more importance than the question of defendant's diligence or the lack of it.—Gilmore v. Mix, Ill.App., 67 N.E.2d 313—Stranak v. Tomasovic, 32 N.E.2d 994, 309 Ill.App. 177.

25. Pa.—Sferra v. Urling, 188 A. 185, 324 Pa. 344—Commonwealth v. Miele, 14 A.2d 337, 140 Pa.Super. 313—C. Trevor Dunham, Inc. v. Pursel, 12 Pa.Dist. & Co. 425.
34 C.J. p 412 note 56.

26. Ill.—Rixmann v. Witwer, 63 N.E.2d 607, 327 Ill.App. 205—Gillham v. Troeckler, 26 N.E.2d 413, 304 Ill.App. 596—Duggan v. Kupitz, 22 N.E.2d 392, 301 Ill.App. 230—Merrion v. O'Donnell, 279 Ill.App. 435—Genden v. Bailen, 275 Ill.App. 382.
Wis.—Chippewa Valley Securities Co. v. Herbst, 278 N.W. 872, 227 Wis. 422.
34 C.J. p 412 note 54.

Vacation and opening distinguished

Motion to vacate judgment by confession based on court's lack of jurisdiction does not embrace request to plead to merits, whereas motion to open up judgment by confession carries request for leave to plead to merits.—First Nat. Bank v. Yakey, 253 Ill.App. 128.

27. Ill.—Busse v. Muller, 14 N.E.2d 669, 295 Ill.App. 101—Dixie Dairy Co. v. Schultz, 14 N.E.2d 506, 295 Ill.App. 623—Cohen v. Gaytime Frocks, 2 N.E.2d 590, 284 Ill.App. 649.
Pa.—Shinn v. Stemler, 45 A.2d 242, 158 Pa.Super. 350—Commonwealth v. Rubenstein, 184 A. 687, 122 Pa.Super. 101—Zanfino v. Moretti, Com.Pl., 86 Pittsb.Leg.J. 605.

Inconsistent defenses

Defendant who urges inconsistent defenses as grounds for opening judgment should not be required to elect between them until after application is granted.—Cole v. Hess, 63 P.2d 882, 99 Colo. 417.

Matter already passed on

If denying continuance on facts provable by due diligence was not abuse of discretion, denying motion on same facts to vacate judgment by confession was not abuse of discretion.—Smith v. Washburn & Condon, 297 P. 879, 38 Ariz. 149.

Parties in pari delicto

The judgment will not be opened merely to let in an equitable defense that might have been pertinent if no judgment had been entered, where under the defense the parties were in pari delicto.—Sebring v. Rathbun, 1 Johns.Cas., N.Y., 331.

Penalty

Judgment entered on judgment note constituting part of deposit on sale of land should be set aside where provision for forfeiture of deposit amounted to penalty.—Ellis v. Roberts, 98 Pa.Super. 49.

Meritorious defense shown

Colo.—Denver Industrial Corporation v. Kesselring, 8 P.2d 767, 90 Colo. 295.
Ill.—Kolmar, Inc., v. Moore, 55 N.E.2d 524, 323 Ill.App. 323—Moore v. Monarch Distributing Co., 32 N.E.2d 1019, 309 Ill.App. 339—Stranak v. Tomasovic, 32 N.E.2d 994, 309 Ill.App. 177—Bauer v. Parker, 17 N.E.2d 335, 297 Ill.App. 639—Edison Const. Co. v. Kurzeja, 15 N.E.2d 899, 296 Ill.App. 638—Doss v. Sievers, 14 N.E.2d 677, 295 Ill.App. 107—Elaborated Ready Roofing Co. v. Hunter, 262 Ill.App. 380—Beard v. Baxter, 242 Ill.App. 480—Mutual Life of Illinois v. Little, 227 Ill.App. 436.
N.J.—Wills v. Atkinson, 192 A. 67, 15 N.J.Misc. 418.
Ohio.—Canton Implement Co. v. Rauh, 175 N.E. 230, 37 Ohio App. 544.
Pa.—Bonebrake v. Koons, 5 A.2d 184, 333 Pa. 443—Pine Brook Bank v. Kearney, 154 A. 365, 303 Pa. 223—Lyda v. Edwards, 146 A. 111, 296 Pa. 434—Stevenson v. Dersam, 119 A. 491, 275 Pa. 412—First Nat. Bank v. Smith, 200 A. 215, 132 Pa.Super. 73—Hobart Mfg. Co. v. Rodziewicz, 189 A. 580, 125 Pa.Super. 240—Newman v. Herron, 184 A. 310, 121 Pa.Super. 370—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa.Super. 402—McCarty, to Use of Hoblitzell Nat. Bank of Hyndman v. Emerick, 170 A. 326, 111 Pa.Super. 463—Holland Furnace Co. v. Gabriel, 157 A. 373, 102 Pa.Super. 578—Greco v. Woodlawn Furniture Co., 99 Pa.Super. 290—Goodis v. Stehle, 87 Pa.Super. 336—Hotaling v. Fisher, 79 Pa.Super. 103—Commonwealth v. Mahoningtown Ry. Men's Club and Continental Casualty Co., Com.Pl., 46 Dauph.Co. 405, affirmed 14 A.2d 357, 140 Pa.Super. 413—Commonwealth v. Coldren, 46 Dauph.Co. 403, affirmed 14 A.2d 340, 140 Pa.Super. 321—Commonwealth v. Miele, 46 Dauph.Co. 400, affirmed 14 A.2d 337, 140 Pa.Super. 313—Commonwealth v. Steiner, Com.Pl., 46 Dauph.Co. 398—Baldwin & Welcomer Co. v. Haines, Com.Pl., 28

showing that there was a want of consideration for the note, bond, or other obligation on which it was entered,[28] or a failure of such consideration,[29] or that the consideration was illegal or immoral,[30] or that the claim is subject to the defense of usury,[31] or that the debt had already been paid or otherwise released or discharged[32] or was subject to credits for which no allowance was made,[33] or that the debt was secured by a mortgage which, by statute, must first be resorted to,[34] or that defendant was under a personal disability as to the debt or obligation.[35]

Erie Co. 85—Stickel v. Barron, Com.Pl., 6 Fay.Co.L.J. 213—Palumbo Realtors v. Occulto, Com.Pl., 46 Lack.Jur. 66—Conlon Keystone Coal Co. v. Perugia Ben. Soc., Com. Pl., 36 Luz.Leg.Reg. 384—Empire Furniture Co. v. Dryda, Com.Pl., 36 Luz.Leg.Reg. 352—Bokin v. Rusackas, Com.Pl., 32 Luz.Leg.Reg. 321—Guarantee Trust Co. v. Yadlowski, Com.Pl., 15 Northumb.L.J. 359—Burgunder v. Cerceo, Com.Pl., 91 Pittsb.Leg.J. 576—Pennsylvania Trust Co. v. Billings, Com.Pl., 90 Pittsb.Leg.J. 614—Secretary of Banking v. Hako, Com.Pl., 23 Wash.Co. 70.

Meritorious defense not shown

Ill.—Stead v. Craine, 256 Ill.App. 445—Handel v. Curry, 254 Ill.App. 36—Davis v. Mosbacher, 252 Ill.App. 536—Harris v. Bernfeld, 250 Ill. App. 446—Davis v. Wirth, 249 Ill. App. 544—Brinkman v. Paulciewski, 245 Ill.App. 307—Hirsch v. Home Appliances, Inc., 242 Ill.App. 418—Sternberger v. Wright, 239 Ill.App. 490—Stellwagen v. Schmidt, 234 Ill.App. 325—Bradshaw v. Hansen, 232 Ill.App. 44—Harris Trust & Savings Bank v. Neighbors, 222 Ill.App. 201.

Md.—Johnson v. Phillips, 122 A. 7, 143 Md. 16.

N.J.—Modern Security Co. of Philadelphia v. De Vito, 165 A. 282, 11 N.J.Misc. 258.

Ohio.—Roberts v. Third Nat. Exchange Bank of Sandusky, 18 Ohio App. 185.

Pa.—Freeman v. Greenberg, 40 A.2d 457, 351 Pa. 206—Ulick v. Vibration Specialty Co., 35 A.2d 332, 348 Pa. 241—Schuylkill Trust Co. v. Sobolewski, 190 A. 919, 325 Pa. 422—Nathan Rosenblum & Co. v. Rosenblum, 169 A. 79, 313 Pa. 49, followed in 169 A. 886, 313 Pa. 50—Breslin v. Mooney, 161 A. 736, 307 Pa. 473—Gold v. Fox Film Corporation, 137 A. 605, 289 Pa. 429—Werdebach v. Abel, 120 A. 267, 276 Pa. 368—Shinn v. Stemler, 45 A.2d 242, 158 Pa.Super. 350—Krewson v. Erny, 45 A.2d 240, 158 Pa.Super. 380—Tradesmens Nat. Bank & Trust Co. v. Lewis, 34 A. 2d 818, 154 Pa.Super. 17—Babcock Lumber Co. v. Allison, 7 A.2d 374, 136 Pa.Super. 353—Sebastianelli v. Frank, 165 A. 664, 108 Pa.Super. 550—Plympton Cabinet Co. v. Rosenberg, 96 Pa.Super. 330—Brady v. Laskowsky, 90 Pa.Super. 370—Wallace v. Shifflet, 86 Pa.Super. 327—Graham v. Hay, 81 Pa.Super. 594—Wagner v. Lenarth, 80 Pa. Super. 547—Meehan v. De Leo, 45 Pa.Dist. & Co. 85—New York Joint Stock Land Bank v. Kegerise, Com. Pl., 29 Berks Co.L.J. 296—Commonwealth v. Penelope Club, Com. Pl., 46 Dauph.Co. 278, affirmed 7 A. 2d 558, 136 Pa.Super. 505—Commonwealth v. Holloway, Com.Pl., 46 Dauph.Co. 248—Picone v. Barbano, Com.Pl., 32 Del.Co. 88—Mid-City Bank & Trust Co. v. Wear, Com.Pl., 31 Del.Co. 219—Szczepanski v. Filipkowski, Com.Pl., 20 Erie Co. 272—Oleski v. Oleski, Com.Pl., 20 Erie Co. 226—Latrobe Coal & Coke Co. v. Kahley, Com.Pl., 6 Fay. Co.L.J. 242—Pinkus v. Frank, Com. Pl., 41 Lack.Jur. 173—Billiowski v. Boruch, Com.Pl., 40 Lack.Jur. 135—Pienkos v. Kulatz, Com.Pl., 36 Luz.Leg.Reg. 50—Fidelity-Philadelphia Trust Co. v. Watkins, Com. Pl., 62 Montg.Co. 191—Hever-Kemner, Inc., v. Sachs, Com.Pl., 57 Montg.Co. 73—Shoup v. North Diamond Candy Co., Com.Pl., 89 Pittsb.Leg.J. 357—Kiefer v. Rosanoff, Com.Pl., 87 Pittsb.Leg.J. 443—Balkus v. Elchisak, Com.Pl., 6 Sch.Reg. 21—Gopes v. Lawrenitis, Com.Pl., 4 Sch.Reg. 403—Miller v. Glendenning, Com.Pl., 26 Wash.Co. 164—Peoples Pittsburgh Trust Co. v. Evans, Com.Pl., 23 West.Co.L.J. 86—Allegheny Valley Trust Co. v. City of Monessen, Com.Pl., 22 West.Co.L.J. 36—Pressel v. Harvey, Com.Pl., 57 York Leg.Rec. 5.

28. Ill.—Aidner v. Cobin, 258 Ill. App. 245.

Pa.—First Nat. Bank v. Smith, 200 A. 215, 132 Pa.Super. 73.

34 C.J. p 413 note 59.

29. Ill.—Automatic Oil Heating Co. v. Lee, 16 N.E.2d 919, 296 Ill.App. 628—Continental Const. Co. v. Henderson County Public Service Co., 227 Ill.App. 43.

Md.—Vane v. Stanley Heating Co., 152 A. 511, 160 Md. 24.

Pa.—Welch v. Suitez, 13 A.2d 399, 338 Pa. 583—Cooper v. Frost, 43 Pa.Dist. & Co. 636, 5 Fay.L.J. 5, 55 York Leg.Rec. 203—Lutz v. Heim, Com.Pl., 5 Sch.Reg. 190.

34 C.J. p 413 note 60.

Failure of plaintiff to perform is good reason for opening judgment entered by confession in warrant of attorney contained in contract.—Hoffman v. Winston, 86 Pa.Super. 130.

Breach of warranty

Ohio.—Ames Co. v. Busick, App., 47 N.E.2d 647.

Pa.—Plympton Cabinet Co. v. Rosenberg, 96 Pa.Super. 330.

34 C.J. p 413 note 60 [a].

Note under seal

Judgment confessed on note may be struck out to let in defense of failure of consideration, although note was under seal.—Crothers v. National bank of Chesapeake City, 149 A. 270, 158 Md. 587.

Failure of consideration not shown

Ill.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137.

30. Pa.—Murray v. McDonald, 84 A. 579, 236 Pa. 26.

34 C.J. p 413 note 61.

Purchase of contraband liquor

Pa.—Brady v. Laskowsky, 90 Pa.Super. 370.

31. Ill.—Morton v. Wilson, 3 N.E.2d 891, 286 Ill.App. 619.

Pa.—Moll v. Lafferty, 153 A. 557, 302 Pa. 354.

34 C.J. p 413 note 62.

32. Ill.—Ford Roofing Products Co. v. Servatius, 20 N.E.2d 126, 299 Ill.App. 617—Finley v. Paige, 11 N.E.2d 126, 292 Ill.App. 636—Rogers v. Cowen, 4 N.E.2d 880, 287 Ill.App. 617.

Md.—Redding v. Redding, 26 A.2d 18, 180 Md. 545.

Pa.—U. S. Savings & Trust Co. of Conemaugh to use of Hindes v. Helsel, 133 A. 167, 324 Pa. 1—Gardner v. Salem, 137 A. 94, 123 Pa.Super. 418—Witherow v. Kessler, Com.Pl., 28 Del.Co. 81—Rudolph v. Matura, Com.Pl., 27 Del. 521—South Side Bank & Trust Co. v. Scheuer, Com.Pl., 43 Lack.Jur. 95—Flammer v. Smith, Com.Pl., 19 Leh.L.J. 271—Schneck v. Borsos, Com.Pl., 32 Luz.Leg.Reg. 401—Kerr v. Emch, Com.Pl., 91 Pittsb. Leg.J. 245—Potts v. Mitchell, Com. Pl., 27 West.Co.L.J. 63.

34 C.J. p 413 note 63.

33. Md.—Webster v. People's Loan, Savings & Deposit Bank of Cambridge, 152 A. 815, 160 Md. 57.

Ohio.—Mosher v. Goss, App., 60 N.E. 2d 730.

Pa.—Jacob v. Corey, 83 Pa.Super. 605—Central Nat. Bank v. Reisinger, 31 Pa.Dist. & Co. 119, 19 Erie Co. 446, 51 York Leg.Rec. 162.

34 C.J. p 413 note 64.

34. N.J.—Knight v. Cape May Sand Co., 83 A. 964, 83 N.J.Law 597.

34 C.J. p 413 note 65.

35. N.J.—Crosby v. Washburn, 49 A. 455, 66 N.J.Law 494.

It has been held that the judgment may be opened to permit defendant to interpose a counterclaim or set-off,[36] unless the counterclaim is not liquidated[37] or arises out of a collateral transaction;[38] but it has also been held that a counterclaim or set-off does not meet the requirement of a meritorious defense.[39]

The judgment will not be opened on the ground that defendant had been mistaken as to the legal effect of a stipulation in the bond on which the judgment was entered;[40] nor will it be opened to let in matters of defense which arise subsequent to the entry of the judgment.[41]

Statute of limitations. The court may in its discretion open a judgment where it appears that the statute of limitations had run against the debt at the time the judgment was entered;[42] but a judgment should not be opened for the sole purpose of affording an opportunity to plead the statute of limitations to a defendant who has already had his day in court.[43]

§ 325. —— Affidavits and Other Evidence

a. Affidavits and counter-affidavits
b. Presumptions and burden of proof
c. Admissibility and weight and sufficiency

a. Affidavits and Counter-Affidavits

It is generally held to be within the discretion of the court to hear and determine an application to open or vacate a confessed judgment either on affidavits or on oral testimony given in open court.

It is generally held to be within the discretion of the court to hear and determine an application to open or vacate a confessed judgment either on affidavits or on oral testimony given in open court.[44]

Pa.—C. & S. Motor Co. v. Schroeder Bros., Com.Pl., 40 Lack.Jur. 73. 34 C.J. p 413 note 66.

Disaffirmance

Where judgment by warrant of attorney was entered on a note made by adult defendant during his minority and, on motion to set aside the judgment, defendant made no showing of disaffirmance of note, there was no "valid defense" to the action.—McKenzie v. Tellis, Ohio App., 47 N.E.2d 253.

Incompetency not shown

Pa.—Greiner v. Brubaker, 16 A.2d 689, 142 Pa.Super. 538.

36. Pa.—Walter v. Fees, 25 A. 829, 155 Pa. 55.
34 C.J. p 413 note 64.

Where the application is made during the judgment term it may be based on a counterclaim.—Ames Co. v. Busick, Ohio App., 47 N.E.2d 647.

In Illinois

(1) Denial of motion to open up judgment by confession on a promissory note, supported by affidavit of defendant that he had a counterclaim has been held to be error.—State Bank of Blue Island v. Kott, 54 N.E.2d 897, 323 Ill.App. 27.

(2) Verified motion to vacate judgment by confession in action on note given for part of purchase price of business, requesting leave to file counterclaim against plaintiff for damages for false representations of material facts by way of inducing defendant to enter into oral agreement to purchase, and stating desire to include charge against plaintiff for difference between contract purchase price of truck and O.P.A. selling price, alleged a good defense, and court should have set aside judgment and permitted defense to be made.—Gilmore v. Mix, App., 67 N.E.2d 313.

(3) It has also been held, however, that a judgment by confession will not be opened to permit a defendant to file a counterclaim or cross-statement.—Bankers Bldg. v. Bishop, 61 N.E.2d 276, 326 Ill.App. 256, certiorari denied Bishop v. Bankers Bldg., 66 S.Ct. 1352—Mayer v. Tyler, 19 N.E.2d 211, 298 Ill.App. 632—Busse v. Muller, 14 N.E.2d 669, 295 Ill.App. 101—Smysor v. Glasscock, 256 Ill. App. 29.

37. Pa.—Kramer v. Moss, 90 Pa. Super. 550—Baird v. Otto, 90 Pa. Super. 452—Trostel v. Steinle, Com.Pl., 61 Montg.Co. 187, 59 York Leg.Rec. 77.

38. Pa.—Pollard & Brant, Inc., v. Stein, 81 Pa.Super. 374.

39. Ohio.—Bulkley v. Greene, 120 N.E. 216, 98 Ohio St. 55.
34 C.J. p 413 note 64 [b].

40. Pa.—Shields v. Hitchman, 96 A. 1039, 251 Pa. 455.

41. Ill.—Handley v. Moburg, 266 Ill. App. 356.
Ohio.—Mosher v. Goss, App., 60 N.E. 2d 730.
Pa.—International Finance Co. v. Magilansky, 161 A. 613, 105 Pa. Super. 309.
34 C.J. p 414 note 68.

42. Ill.—Rixmann v. Witwer, 63 N.E.2d 607, 327 Ill.App. 205—Friedlund v. Cunnally, 48 N.E.2d 747, 319 Ill.App. 36—Buchanan v. Stephens, 26 N.E.2d 733, 304 Ill.App. 477.
Minn.—Berg v. Burkholder Lumber Co., 204 N.W. 923, 164 Minn. 81.
Pa.—American Surety Co. v. Mitchneck, Com.Pl., 31 Luz.Leg.Reg. 356.
34 C.J. p 414 note 69.

43. Pa.—Woods v. Irwin, 21 A. 603, 141 Pa. 278, 23 Am.S.R. 282.
34 C.J. p 414 note 70.

44. Del.—Chandler v. Miles, 193 A. 576, 8 W.W.Harr. 431.
Md.—Johnson v. Phillips, 122 A. 7, 143 Md. 16.
Ohio.—Saulpaugh v. Born, 154 N.E. 166, 22 Ohio App. 275.
Pa.—Welch v. Sultez, 13 A.2d 399, 338 Pa. 583—Harr v. Mahalsky, Com.Pl., 33 Luz.Leg.Reg. 65—Pennsylvania Trust Co. v. Billings, Com.Pl., 90 Pittsb.Leg.J. 614.
34 C.J. p 414 note 71.

Where issues were sharply contested, issues should not have been resolved on affidavits and motion should have been denied without prejudice to plenary action to vacate judgment since in such an action, court could afford adequate protection to the parties.—Smith v. Kent, 18 N.Y.S.2d 262, 259 App.Div. 117.

Plaintiff entitled to hearing

Where defendant against whom a judgment on confession without an action had been entered made application to vacate such judgment, plaintiff was entitled to an opportunity to present the facts in connection with the execution, delivery, and filing of the confession of judgment and the entry thereof.—Gotham Credit Corporation v. Ferdman, 13 N.Y.S.2d 1011.

Granting reargument and taking additional depositions at hearing on matter of opening judgment entered by confession held discretionary.—Holland Furnace Co. v. Gabriel, 157 A. 373, 102 Pa.Super. 573.

Testimony offered

Where answer accompanying motion to vacate judgment showed grounds for vacation, court should have heard testimony offered.—Canton Implement Co. v. Rauh, 175 N.E. 230, 37 Ohio App. 544.

It has been held, however, that the question of a meritorious defense is to be determined solely on the affidavits submitted in support of the application,[45] and that for such purpose the allegations of the affidavits are to be taken as true.[46] Under this rule a showing sufficient to warrant opening the judgment is made where the evidence contained in the affidavits in support of the application makes out a prima facie defense to the claim for which judgment was entered.[47]

Counter-affidavits in opposition to those submitted in support of the application may be received and considered where the question involved is purely one for the court,[48] and the court may refuse to disturb the judgment if the counter-affidavits are as strong and convincing as the affidavits of the moving party,[49] but it has been held that counter-affidavits cannot be considered on the question of the merits of defendant's proposed defense.[50]

b. Presumptions and Burden of Proof

Ordinarily in a proceeding to open or vacate a confessed judgment the burden of proof is on the applicant.

As a general rule the party who moves to have a judgment by confession opened or vacated must assume the burden of proving the facts on which he relies as the ground of his application,[51] except that in some jurisdictions, where defendant alleges that the note on which the judgment was entered is a forgery, the burden of establishing the genuineness of the note is on plaintiff in the judgment.[52] General presumptions and inferences of fact apply,[53] including the presumption in favor of the regularity and validity of a judgment.[54]

45. Ill.—Walrus Mfg. Co. v. Wilcox, 25 N.E.2d 132, 303 Ill.App. 286.

Right to cross-examine

A defendant seeking to vacate judgment against him by confession on a cognovit in a lease cannot be examined by counsel for plaintiff on hearing of motion to vacate.—Stone v. Levinson, 228 Ill.App. 342.

46. Ill.—Walrus Mfg. Co. v. Wilcox, 25 N.E.2d 132, 303 Ill.App. 286.

Facts but not conclusions or deductions in affidavit must be taken as true.—Automobile Supply Co. v. Scene-in-Action Corporation, 172 N. E. 35, 340 Ill. 196, 69 A.L.R. 1085.

47. Ill.—Ruwisch v. Theis, 60 N.E. 2d 108, 325 Ill.App. 307—Nudelman v. Haimowitz, 52 N.E.2d 822, 321 Ill.App. 306—Bauer v. Parker, 17 N.E.2d 336, 297 Ill.App. 80—Shapiro v. Masor, 242 Ill.App. 63.

Showing held sufficient

Ill.—Becker v. Ketter, 56 N.E.2d 649, 323 Ill.App. 656.

Showing held insufficient

Ill.—Davis v. Mosbacher, 252 Ill.App. 536.

48. Ill.—Jankovich v. Lajevich, 57 N.E.2d 216, 324 Ill.App. 85—Stranak v. Tomasovic, 32 N.E.2d 994, 309 Ill.App. 177—Elaborated Ready Roofing Co. v. Hunter, 262 Ill.App. 380.

34 C.J. p 416 note 94.

Allegations deemed admitted

(1) Where no counter-affidavits are filed, the court must accept as true the material allegations in a verified motion to vacate a judgment by confession on a note.—Gilmore v. Mix, 67 N.E.2d 313, 329 Ill. App. 177.

(2) In proceeding by defendant to vacate plaintiff's confession judgment, the truth of allegations of material facts contained in plaintiff's counter-affidavit was necessarily admitted, where such allegations were not denied in defendant's additional affidavit.—May v. Chas. O. Larson Co., 26 N.E.2d 139, 304 Ill.App. 137.

(3) Where plaintiff failed to file a counter-affidavit in defense of judgment, case was properly heard on motion to vacate and supporting affidavit.—Doss v. Sievers, 14 N.E. 2d 677, 295 Ill.App. 107.

(4) If defendants placed application to open confession judgment on argument list for disposition on petition and answer, pertinent facts set forth in answer could be accepted as true.—Matovich v. Gradich, 187 A. 65, 123 Pa.Super. 355.

49. Ill.—Morgan v. Park Nat. Bank, 44 Ill.App. 582.

34 C.J. p 416 note 95.

50. Colo.—Parham v. Johnson, 292 P. 599, 88 Colo. 127—Mitchell v. Byers State Bank, 252 P. 887, 81 Colo. 4—Mitchell v. Miller, 252 P. 886, 81 Colo. 1.

Ill.—Fidler v. Kennedy, 62 N.E.2d 10, 326 Ill.App. 449—Bankers Bldg. v. Bishop, 61 N.E.2d 276, 326 Ill. App. 256, certiorari denied Bishop v. Bankers Bldg., 66 S.Ct. 1352—Kolmar, Inc., v. Moore, 55 N.E.2d 524, 323 Ill.App. 323—Stranak v. Tomasovic, 32 N.E.2d 994, 309 Ill. App. 177—Mutual Life of Illinois v. Little, 227 Ill.App. 436—Continental Const. Co. v. Henderson County Public Service Co., 227 Ill. App. 43.

Purpose of rule

The rule preventing use of counter-affidavits going to the merits of defense on motion to vacate judgment entered by confession was intended to prevent depriving a party of the right of a trial by jury.—Walrus Mfg. Co. v. Wilcox, 25 N.E.2d 132, 303 Ill.App. 286.

51. Md.—Hart v. Hart, 166 A. 414, 165 Md. 77—Cardwell-Fisher Fixture Co. v. Commerce Trust Co., 141 A. 121, 154 Md. 366.

Pa.—Boggs v. Levin, 146 A. 533, 297 Pa. 131—Warren Sav. Bank & Trust Co. v. Foley, 144 A. 84, 294 Pa. 176—Pacific Lumber Co. of Illinois v. Rodd, 135 A. 122, 287 Pa. 454—Babcock Lumber Co. v. Allison, 7 A.2d 374, 136 Pa.Super. 353—Fish v. Kaye, 4 A.2d 190, 134 Pa.Super. 49—Matovich v. Gradich, 187 A. 65, 123 Pa.Super. 355—Lukac v. Morris, 164 A. 834, 108 Pa.Super. 453—First Credit Corporation v. Lindstrom, Com.Pl., 31 Del.Co. 202—Eastern Light Co. v. Wojciechowski, Com.Pl., 36 Luz. Leg.Reg. 233—Fidelity-Philadelphia Trust Co. v. Watkins, 62 Montg.Co. 191—Campbell v. Dierolf, Com.Pl., 58 Montg.Co. 144—Heyer-Kemner, Inc., v. Sachs, Com. Pl., 57 Montg.Co. 73—First Nat. Bank v. Reidinger, Com.Pl., 14 Northumb.Leg.J. 22—Canfield v. Hornung, Com.Pl., 9 Sch.Reg. 111—Perrino v. Bematre, Com.Pl., 28 West.Co. 113.

34 C.J. p 414 note 72.

52. Pa.—Mutual Building & Loan Ass'n of Shenandoah v. Walukiewicz, 185 A. 648, 322 Pa. 240—Jones & Sons, Inc. v. Rishkofski, Com.Pl., 37 Luz.Leg.Reg. 229.

34 C.J. p 414 note 73.

53. Ill.—Rixmann v. Witwer, 63 N. E.2d 607, 327 Ill.App. 205.

Pa.—Little v. Gardner-Denver Co., Com.Pl., 41 Lack.Jur. 9.

54. N.J.—Stetz v. Googer, 18 A.2d 416, 126 N.J.Law 213.

N.M.—Hot Springs Nat. Bank v. Kenney, 48 P.2d 1029, 39 N.M. 428.

Judgment entered in vacation

The same presumptions exist in favor of a judgment by confession entered in term time as in case of a judgment entered by service of process, but the rule is different where judgment is entered by confession in vacation.—Rixmann v. Witwer, 63 N.E.2d 607, 327 Ill.App. 205.

c. Admissibility and Weight and Sufficiency

The general rules of admissibility of evidence apply in proceedings to open or vacate a confessed judgment; and the court will open or set aside the judgment where, and only where, there is clear, positive, and satisfactory evidence of the grounds alleged in the petition or motion and of the existence of a meritorious defense.

The general rules relating to the relevancy, materiality, and competency of the evidence in civil actions apply in determining the admissibility of evidence.[55]

It has been held that the measure of proof required to open a judgment by confession cannot be defined by rule,[56] that the court will open or set aside the judgment where, and only where, there is clear, positive, and satisfactory evidence of the grounds alleged in the petition or motion and of the existence of a meritorious defense,[57] and that

55. Del.—Dolby v. Whaley, 197 A. 161, 9 W.W.Harr. 155.
Ill.—First Nat. Bank v. Galbraith, 271 Ill.App. 240.
Md.—Denton Nat. Bank of Maryland v. Lynch, 142 A. 103, 155 Md. 333.
Pa.—Hoffman v. Winston, 86 Pa.Super. 130—Wetzel v. Keefer, 20 Pa. Dist. & Co. 576, 11 Northumb.Leg. J. 379.
34 C.J. p 414 note 76.

Comparison of disputed signature to note with admitted signatures of purported signer and peculiarities of such signature were proper matters for jury's consideration on application to open judgment by confession thereon.—First Nat. Bank v. Albright, 170 A. 370, 111 Pa.Super. 392.

Consideration of testimony, not technically admissible under petition to open confessed judgment, and order reopening case for further testimony, without requiring amendment, is not error.—Johnson v. Nippert, 133 A. 150, 286 Pa. 175.

Pleadings as evidence

Motion to vacate judgment and accompanying answer are not evidence, but are only basis for proof to be offered thereon.—Canton Implement Co. v. Rauh, 175 N.E. 230, 37 Ohio App. 544.

Payments on note may be shown on rule to open judgment thereon and determine amount due after allowing credit for payments.—Keiber v. Keiber, 90 Pa.Super. 116.

56. Pa.—Jacob v. Corey, 83 Pa.Super. 605.
34 C.J. p 415 note 79.

57. Pa.—Schmitt v. Yuhazy, 84 Pa. Super. 76—Johnstown & Somerset Ry. Co. v. Mostollar, 83 Pa.Super. 492—Sugarman v. Baldini, Com.Pl., 28 West.Co. 41.
Wis.—Harris v. Golliner, 294 N.W. 9, 235 Wis. 572.
34 C.J. p 414 note 78.

Answer not responsive

In proceeding on petition to vacate a judgment obtained on a judgment note, on ground of failure of consideration, wherein plaintiff filed answer which was evasive in not averring real consideration for the note, plaintiff was held to a higher degree of proof since his answer was not responsive.—Welch v. Sultez, 13 A.2d 399, 338 Pa. 583.

Negligence barring defense

Testimony of defendant, denying his signature of note sued on, as to presence of rubber stamp facsimile of his signature on his desk, did not show negligence barring defense of forgery as matter of law.—First Nat. Bank v. Albright, 170 A. 370, 111 Pa.Super. 392.

Pleadings as well as evidence may be taken into consideration to determine whether meritorious defense is indicated.—Lloyd v. Jacoby, 39 A.2d 525, 156 Pa.Super. 105.

Evidence held sufficient to authorize or require opening of judgment.
Md.—Denton Nat. Bank of Maryland v. Lynch, 142 A. 103, 155 Md. 333—Cardwell-Fisher Fixture Co. v. Commerce Trust Co., 141 A. 121, 154 Md. 366—Automobile Brokerage Corporation v. Myer, 139 A. 539, 154 Md. 1.
N.Y.—Delaney v. Wyman, 251 N.Y.S. 5, 232 App.Div. 607.
Pa.—Points v. Gibboney, 17 A.2d 365, 340 Pa. 522—Lansford Building & Loan Ass'n v. Sheerin, 190 A. 901, 325 Pa. 474—Austen v. Marzolf, 143 A. 908, 294 Pa. 226—Humbert v. Meyers, 123 A. 733, 279 Pa. 171—Riedrich v. Mistarz, 13 A.2d 106, 140 Pa.Super. 73—Rosenblum v. Edwards, 8 A.2d 468, 137 Pa.Super. 33—Michaels v. Moritz, 200 A. 176, 131 Pa.Super. 426—Messmer v. McLaughlin, 186 A. 286, 122 Pa.Super. 531—First Nat. Bank v. Albright, 170 A. 370, 111 Pa.Super. 392—White Co. v. Francis, 95 Pa.Super. 315—Farling v. Urich, 84 Pa.Super. 105—Boyer v. Community Park Ass'n of Gratz, Pennsylvania, Com.Pl., 45 Dauph. Co. 23—Boyer v. Bellis, Com.Pl., 45 Dauph.Co. 21—Fisher v. Bonini, Com.Pl., 39 Lack.Jur. 170—Lumley v. Barrett, Com.Pl., 19 Leh.L.J. 166—National Radiator Corporation v. Rydzewski, Com.Pl., 36 Luz. Leg.Reg. 114—Bronson v. Milman, Com.Pl., 36 Luz.Leg.Reg. 33—Ransberry, to the use of Ransberry, v. Predmore, Com.Pl., 1 Monroe L.R. 141—Lorey v. Kauffman, Com.Pl., 57 Montg.Co. 57—Kerr v. Emch, Com.Pl., 91 Pittsb. Leg.J. 245—Ebert v. Wayne, Com. Pl., 86 Pittsb.Leg.J. 34—McCool v. Chowanes, Com.Pl., 8 Sch.Reg. 165—Williamsport Auto Parts Co. v. Sprenkle, Com.Pl., 54 York Leg. Rec. 154.
Va.—Hartman v. Melfa Banking Co., 174 S.E. 653, 162 Va. 433.

Evidence held insufficient to authorize or require opening of judgment.
Ill.—Davis v. Mosbacher, 252 Ill.App. 536.
Pa.—Kait v. Rose, 41 A.2d 750, 351 Pa. 560—Pierce, to Use of Snipes v. Kaseman, 192 A. 105, 326 Pa. 280—Schuylkill Trust Co. v. Sobolewski, 190 A. 919, 325 Pa. 422—Hallgarten & Co. v. Schwing, 185 A. 753, 322 Pa. 355—Spanko v. Trisick, 160 A. 718, 307 Pa. 166—Helzlsouer v. Golub, 160 A. 118, 306 Pa. 474—Hein v. Fetzer, 152 A. 388, 301 Pa. 403—Merit Square Building & Loan Ass'n v. Atkins, 149 A. 315, 299 Pa. 244—Certelli v. Braum, 144 A. 403, 294 Pa. 488—Tradesmens Nat. Bank & Trust Co. v. Lewis, 34 A.2d 818, 154 Pa. Super. 17—Greiner v. Brubaker, 30 A.2d 621, 151 Pa.Super. 515, certiorari denied Royer v. Greiner, 64 S. Ct. 42, 320 U.S. 742, 88 L.Ed. 440, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491, rehearing denied 64 S.Ct. 434, 320 U.S. 816, 88 L.Ed. 493—Fish v. Kaye, 4 A.2d 190, 134 Pa.Super. 49—Kienberger v. Lally, 198 A. 453, 130 Pa.Super. 583—Landis v. Hoch, 164 A. 828, 108 Pa.Super. 285—International Finance Co. v. Magilansky, 161 A. 613, 105 Pa.Super. 309—Public Security Co. v. Turnbull, 100 Pa. Super. 367—Seidel v. Welzel, 94 Pa.Super. 345—Kaufman v. Lehman, 94 Pa.Super. 306—Art-Acceptible Furniture Co. v. Maratta, 94 Pa.Super. 263—Cramer Oil Burner Co. v. Ferguson, 89 Pa.Super. 471—Grotefend v. Valley Laundry Co., 88 Pa.Super. 510—C. Trevor Dunham, Inc. v. Pursel, 12 Pa.Dist. & Co. 425—Commercial Credit Co. v. Young, Com.Pl., 31 Berks Co. 326—Durbin v. Connelly, Com.Pl., 55 Dauph.Co. 349—Warshall Bros. v. Hall, Com.Pl., 36 Luz.Leg.Reg. 261—Schrader v. Schrader, Com.Pl., 35 Luz.Leg.Reg. 321—Roth v. Mirmak, Com.Pl., 33 Luz.Leg.Reg. 480—Beckman v. Ciapko, Com.Pl., 33 Luz.Leg.Reg. 343—Whitenight Cor-

the grounds relied on for opening or setting aside the judgment must be established by a preponderance of the evidence.[58] It has also been held that applicant is entitled to relief where the evidence establishes that there is a real and substantial conflict as to the merits of the claim for which the judgment was entered.[59] The test has been held to be whether or not the evidence would justify a verdict or decree in defendant's favor on the merits;[60] the mere fact alone that there is a conflict of evidence is not sufficient,[61] and the judgment should not be opened where the preponderance of the evidence is against defendant,[62] or where the moving party's testimony is contradicted, and is in no way corroborated.[63]

On the other hand, the judgment should be opened and defendant allowed a trial where he has made out a case by a preponderance of the evidence sufficient to sustain a verdict in his favor,[64] or where the evidence is such that the contested matter is in such doubt as would warrant submitting the issue to a jury,[65] or where defendant, although contradicted, presents evidence, which, if true, constitutes a good defense to the judgment, and such evidence is corroborated by one or more witnesses or circumstances.[66]

Where the claim for which judgment was entered is attacked for fraud, it has been held that the evidence of fraud must be clear, precise, and indubitable.[67] It has also been held that, where there is clear evidence to sustain the averment of forgery, the judgment should be opened, notwithstanding such evidence is contradicted.[68] More than a pre-

poration v. Brezna, Com.Pl., 33 Luz.Leg.Reg. 48—Campbell v. Dierolf, Com.Pl., 58 Montg.Co. 144—Heyer-Kemner, Inc., v. Sachs, Com. Pl., 57 Montg.Co. 73—International Finance Co. v. Barnes, Com.Pl., 86 Pittsb.Leg.J. 44—McBurney v. Williams, Com.Pl., 22 Wash.Co. 199—Deardorff v. Witmer, Com.Pl., 57 York Leg.Rec. 94—Minet Motor Co. v. Lehn, Com.Pl., 54 York Leg. Rec. 3.

34 C.J. p 414 note 78 [a].

58. Pa.—Jacob v. Corey, 83 Pa.Super. 605.

34 C.J. p 415 note 80.

59. Md.—Finance Co. of America v. Myerly, 155 A. 148, 161 Md. 23—Cardwell-Fisher Fixture Co. v. Commerce Trust Co., 141 A. 121, 154 Md. 366.

Ohio.—Mosher v. Goss, App., 60 N.E. 2d 730.

If proper prima facie grounds for opening of judgment are shown at hearing, rule to open judgment is made absolute.—Miles v. Layton, 193 A. 567, 8 W.W.Harr., Del., 411, 112 A.L.R. 786.

60. Pa.—Williams v. Caples, 12 A. 2d 566, 338 Pa. 451—Gardner v. Salem, 187 A. 94, 123 Pa.Super, 418—Landis v. Hoch, 164 A. 828, 108 Pa.Super. 285—Schultz v. Rudman, 81 Pa.Super. 239—Durbin v. Connelly, Com.Pl., 55 Dauph.Co. 349—Soutter v. Soutter, Com.Pl., 52 Dauph.Co. 359—Palumbo Realtors v. Occulto, Com.Pl., 46 Lack. Jur. 66—Household Finance Corp. v. Krzywicki, Com.Pl., 38 Luz.Leg. Reg. 436—Bokin v. Rusackas, Com. Pl., 32 Luz.Leg.Reg. 321.

34 C.J. p 415 note 81.

61. Pa.—Stoner v. Sley System Garages, 46 A.2d 172, 353 Pa. 532—Machalicka v. Lukasevic, 31 A.2d 164, 346 Pa. 487—Michaels v. Moritz, 200 A. 176, 131 Pa.Super. 426—Lukac v. Morris, 164 A. 834, 108 Pa.Super. 453—Schultz v. Rudman, 81 Pa.Super. 239—Wayne Title & Trust Co. v. Sweet, Com.Pl., 32 Del.Co. 106—Mid-City Bank & Trust Co. v. Wear, Com.Pl., 31 Del.Co. 219—Landau Bros. v. Revitt, Com.Pl., 33 Luz.Leg.Reg. 64—Whitenight Corporation v. Brezna, Com.Pl., 33 Luz.Leg.Reg. 48—King v. Van Sciver, Com.Pl., 62 Montg. Co. 141.

34 C.J. p 415 note 82.

Oath against oath

There must be more than oath against oath or mere conflict of testimony.—Sferra v. Urling, 188 A. 185, 324 Pa. 344—Mutual Building & Loan Ass'n of Shenandoah v. Walukiewicz, 185 A. 648, 322 Pa. 240—Van Scoten v. Botsford & Kunes, 98 Pa.Super. 270—Voegler v. Klingensmith Co., 88 Pa.Super. 34—Schultz v. Rudman, 81 Pa.Super. 239—Maryland Coal & Coke Co. v. Gonzales Coal Mining Co., 12 Pa.Dist. & Co. 311—Spangler v. Zimmerman, Com. Pl., 50 Dauph.Co. 93—Silver v. Palmer, Com.Pl., 49 Dauph.Co. 219—Lackawanna Thrift & Loan Corporation v. Katsanis, Com.Pl., 45 Lack.Jur. 169—Cassalia v. Dushney, Com.Pl., 40 Lack.Jur. 131—Heyer-Kemner, Inc., v. Sachs, Com.Pl., 57 Montg. Co. 73—Deardorff v. Witmer, Com. Pl., 57 York Leg.Rec. 94.

62. Pa.—Eagler v. Cherewfka, 86 Pa.Super. 122—Durbin v. Connelly, Com.Pl., 55 Dauph.Co. 349.

34 C.J. p 415 note 83.

63. Pa.—Fish v. Kaye, 4 A.2d 190, 134 Pa.Super. 49—Snyder v. Arnold, 36 Pa.Dist. & Co. 689—Miller v. Leonard, Com.Pl., 48 Lanc.Rev. 337.

34 C.J. p 415 notes 84, 85.

Single witness uncorroborated

Application was denied where supported only by the oath of defendant without corroborative circumstances, or circumstances from which inferences could be drawn corroborative of his statements.—Chubb v. Kelly, 80 Pa.Super. 487—Rasp v. Rasp, 79 Pa.Super. 29.

64. Pa.—Heimgartner v. Stewart, 37 A. 93, 180 Pa. 500.

34 C.J. p 415 note 86.

65. Pa.—Stoner v. Sley System Garages, 46 A.2d 172, 353 Pa. 532—Arata v. Wright, 101 Pa.Super. 575—Webber, Inc. v. Gehry, Com. Pl., 38 Berks Co. 135—Soutter v. Soutter, Com.Pl., 52 Dauph.Co. 359—Dailey v. Woods, Com.Pl., 28 Erie Co. 337—Ecoma Building & Loan v. Klemm, Com.Pl., 21 Erie Co. 153—Munson v. Mummart, Com.Pl., 7 Fay.L.J. 27—Graft v. Bell, Com.Pl., 6 Fay.L.J. 91—Flammer v. Smith, Com.Pl., 19 Leh.L. J. 271—Heyer-Kemner, Inc., v. Sachs, Com.Pl., 57 Montg.Co. 73.

34 C.J. p 415 note 87.

66. Pa.—Ritter v. Henry, 17 Pa. Dist. & Co. 523.

34 C.J. p 415 note 88.

67. Pa.—Exchange Bank & Trust Co. v. Bartley, 39 A.2d 833, 350 Pa. 585—Reidlinger v. Cameron, 134 A. 418, 287 Pa. 24—McEnery v. Nahlen, Com.Pl., 21 Erie Co. 172—Security Finance Co. v. Stradnick, Com.Pl., 35 Luz.Leg.Reg. 308.

Evidence held sufficient

Pa.—Simcoe v. Szukegs, 13 A.2d 103, 140 Pa.Super. 75—Werner v. Deutsch, 7 A.2d 511, 135 Pa.Super. 519.

Evidence held insufficient

Pa.—Exchange Bank & Trust Co. v. Bartley, 39 A.2d 833, 350 Pa. 585.

68. Pa.—Austen v. Marzolf, 143 A. 908, 294 Pa. 226—Levy v. Gilligan, 90 A. 647, 244 Pa. 272—Bailey v. Brown, Com.Pl., 52 Pa.Dist. & Co. 56.

Evidence may establish that instrument is not a forgery; there is no inflexible rule requiring court to

ponderance of evidence is required to open a judgment by confession on a note given in settlement.[69]

The sufficiency of evidence to show various matters has been adjudicated in particular cases.[70]

§ 326. —— Hearing, Determination, and Relief

An application to open or vacate a judgment is to be determined in accordance with equitable principles, and its determination rests largely in the sound discretion of the court.

It is generally held that an application to open or vacate a judgment by confession should be determined in accordance with equitable principles,[71] and that the disposition of the application rests largely within the sound discretion of the court,[72] whose determination will not be disturbed except for abuse

open judgment entered on a warrant of attorney on an averment of forgery.—Mutual Building & Loan Ass'n of Shenandoah v. Walukiewicz, 185 A. 648, 322 Pa. 240—Jones & Sons v Rishkofski, Pa., Com.Pl., 37 Luz.Leg.Reg. 229—Schrader v. Schrader, Pa. Com.Pl., 35 Luz.Leg.Reg. 321.

Evidence held to establish genuineness of instrument.—Mutual Building & Loan Ass'n of Shenandoah v. Walukiewicz, 185 A. 648, 322 Pa. 240.

Weight given to note itself

Under defense of forgery, note is given no weight of itself, in the absence of proof that defendant actually signed it.—Austen v. Marzolf, 143 A. 908, 294 Pa. 226.

69. U.S.—Willett v. Fister, D.C., 18 Wall. 91, 21 L.Ed. 804.
Pa.—English's Appeal, 13 A. 479, 119 Pa. 533, 4 Am.S.R. 656.

70. **Evidence held sufficient**
Md.—Cardwell-Fisher Fixture Co. v. Commerce Trust Co., 141 A. 131, 154 Md. 366.
Pa.—Thompson v. Carns, 93 Pa.Super. 575—Eastern Light Co. v. Wojciechowski, Com.Pl., 36 Luz. Leg.Reg. 233—Sugarman v. Baldini, Com.Pl., 28 West.Co. 41.

Evidence held insufficient
Colo.—Lucero v. Smith, 132 P.2d 791, 110 Colo. 165.
Pa.—Kienberger v. Lally, 198 A. 453, 130 Pa.Super. 583—Hobart Mfg. Co. v. Rodziewicz, 189 A. 580, 125 Pa.Super. 240.

Former verdict

Verdict in action of scire facias sur mortgage which was set aside by court as against weight of evidence was without persuasive force in subsequent proceeding on rule to show cause why judgment entered on bond accompanying mortgage under warrant of attorney should not be opened.—Schuylkill Trust Co. v. Sobolewski, 190 A. 919, 325 Pa. 422—New York Joint Stock Land Bank v. Kegerise, Pa.Com.Pl., 29 Berks Co. 296—Gapes v. Lawrenitis, Pa.Com. Pl., 4 Sch.Reg. 403.

71. Del.—Chandler v. Miles, 193 A. 576, 8 W.W.Harr. 431.
Ill.—Browning v. Spurrier, 245 Ill. App. 276.
Pa.—Perfect Building & Loan Ass'n v. Mandel, 29 A.2d 484, 345 Pa. 616—Horn v. Witherspoon, 192 A. 654, 327 Pa. 295—Mutual Building & Loan Ass'n of Shenandoah v Walukiewicz, 185 A. 648, 322 Pa 240—Mielcuszny v. Rosol, 176 A 236, 317 Pa. 91—Babcock Lumber Co. v. Allison, 7 A.2d 374, 136 Pa. Super. 353—Miller v. Mastrocola, 2 A.2d 550, 133 Pa.Super. 210—Kienberger v. Lally, 198 A. 453, 130 Pa.Super. 583—Burger, for Use of Henderson, v. Township of Freedom, 190 A. 387, 126 Pa.Super. 128—Gardner v. Salem, 187 A. 94, 123 Pa.Super. 418—Jacob v. Corey, 83 Pa.Super. 605—Bates v. Kirk, 83 Pa.Super. 273—Luce v. Reed Colliery Co., 78 Pa.Super. 248—Bailey v. Brown, 52 Pa.Dist. & Co. 56—McEnery v. Nahlen, Com.Pl., 21 Erie Co. 172—Holland Furnace Co. v. Davis, Com.Pl., 7 Sch.Reg. 297.
34 C.J. p 408 note 78.

Remedial action

Judgments entered by confession on warrant of attorney are in nature of summary proceedings, and remedial action as to them will not be unduly limited.—Miles v. Layton, 193 A. 567, 8 W.W.Harr.,Del., 411, 112 A. L.R. 786.

Where defendant shows no equitable reasons why the judgment should not have been rendered against him, the court will not inquire as to errors in rendering the judgment against him alone, on a declaration against him and another jointly.—Robey v. Updyke, 61 Ill.App. 328.

72. Ala.—Kendrick v. Ward, 21 So. 2d 676, 246 Ala. 550—Koonce v. Arnold, 14 So.2d 512, 244 Ala. 518.
Ariz.—Smith v. Washburn & Condon, 297 P. 879, 38 Ariz. 149.
Del.—Chandler v. Miles, 193 A. 576, 8 W.W.Harr. 431.
Ill.—Bankers Bldg. v. Bishop, 61 N. E.2d 276, 326 Ill.App. 256, certiorari denied Bishop v. Bankers Bldg., 66 S.Ct. 1352—Mayer v. Tyler, 19 N.E.2d 211, 298 Ill.App. 632—Automatic Oil Heating Co. v. Lee, 16 N.E.2d 919, 296 Ill.App. 628—First Nat. Bank v. Galbraith, 271 Ill.App. 240—Mandel Bros. v. Cohen, 248 Ill.App. 188—Parent Mfg. Co. v. Oil Products Appliance Co., 246 Ill.App. 222—Handley v. Wilson, 242 Ill.App. 66.
Pa.—Stoner v. Sley System Garages, 46 A.2d 172, 353 Pa. 532—Machalicka v. Lukasevic, 31 A.2d 164, 346 Pa. 487—Kweller, now for use of Caplan v. Becker, 12 A.2d 567, 333 Pa. 169—Bonebrake v. Koons, 5 A.2d 184, 333 Pa. 443—Mutual Building & Loan Ass'n of Shenandoah v. Walukiewicz, 185 A. 648, 322 Pa. 240—George v. George, 178 A. 25, 318 Pa. 203—Mielcuszny v. Rosol, 176 A. 236, 317 Pa. 91—William B. Rambo Building & Loan Ass'n v. Dragone, 166 A. 888, 311 Pa. 422—Spanko v. Trisick, 160 A. 718, 307 Pa. 166—Stevenson v. Dersam, 119 A. 491, 275 Pa. 412—Lloyd v. Jacoby, 39 A.2d 525, 156 Pa.Super. 105—First Nat. Bank of Mount Holly Springs v. Cumbler, 21 A.2d 130, 145 Pa.Super. 595—Sprenger, now for Use of Stoecker, v. Litten, 15 A.2d 527, 142 Pa.Super. 194—Babcock Lumber Co. v. Allison, 7 A.2d 374, 136 Pa.Super. 353—Miller v. Mastrocola, 2 A.2d 550, 133 Pa.Super. 210—Baker's Estate v. Woodworth, 198 A. 469, 130 Pa.Super. 452—Kienberger v. Lally, 198 A. 453, 130 Pa.Super. 583—Philadelphia Fixture & Equipment Corporation v. Carroll, 191 A. 216, 126 Pa.Super. 454—Burger, for Use of Henderson v. Township of Freedom, 190 A. 387, 126 Pa.Super. 128—Gardner v. Salem, 187 A. 94, 123 Pa.Super. 418—Messmer v. McLaughlin, 186 A. 286, 122 Pa.Super. 531—Landis v. Hoch, 164 A. 828, 108 Pa.Super. 285—Brady v. Laskowsky, 90 Pa.Super. 370—Cramer Oil Burner Co. v. Ferguson, 89 Pa. Super. 471—Jacob v. Corey, 83 Pa. Super. 605—Bates v. Kirk, 83 Pa. Super. 273—Luce v. Reed Colliery Co., 78 Pa.Super. 248—Bailey v. Brown, 52 Pa.Dist. & Co. 56—Klein v. Brookside Distilling Products Corp., Com.Pl., 47 Lack.Jur. 165—South Side Bank & Trust Co. v. Hornbaker, Com.Pl., 45 Lack. Jur. 197—Keene v. Ryman, Com. Pl., 38 Luz.Leg.Reg. 330—Jones & Sons, Inc. v. Rishkofski, Com.Pl., 37 Luz.Leg.Reg. 229—Williamsport Auto Parts Co. v. Sprenkle, Com.Pl., 54 York Leg.Rec. 154—Minet Motor Co. v. Lehn, Com.Pl., 54 York Leg.Rec. 3.
Wis.—Wessling v. Hieb, 192 N.W. 458, 180 Wis. 160.
34 C.J. p 408 note 78.

Prior determination

Judgment debtor's rule to show cause why confession of judgment should not be stricken off and money held by garnishee decreed not sub-

of discretion.[73] On the other hand, it has been held that where it is shown that defendant has a good legal defense, it is the duty of the court to set aside or open the judgment to let in such defense, and a refusal to do so is erroneous.[74]

The court may determine the issues itself[75] or may direct an issue to be tried by a jury.[76] It has been held that the court in submitting an issue to

ject to attachment did not raise defense on merits of judgment, and hence order discharging such rule was not res judicata precluding consideration of subsequent rule to show cause why judgment should not be opened and debtor let into a defense.—Albert M. Greenfield & Co. v. Roberts, 5 A.2d 642, 135 Pa.Super. 328.

73. Ala.—Kendrick v. Ward, 21 So. 2d 676, 246 Ala. 550.
Ill.—Automatic Oil Heating Co. v. Lee, 16 N.E.2d 919, 296 Ill.App. 628.
Pa.—Bekelja v. James E. Strates Shows, 37 A.2d 502, 349 Pa. 442—Machalicka v. Lukasevic, 31 A.2d 164, 346 Pa. 487—Perfect Building & Loan Ass'n v. Mandel, 29 A.2d 484, 345 Pa. 616—Kweller, now for Use of Caplan, v. Becker, 12 A.2d 567, 338 Pa. 169—George v. George, 178 A. 25, 318 Pa. 203—Lloyd v. Jacoby, 39 A.2d 525, 156 Pa.Super. 105—First Nat. Bank of Mount Holly Springs v. Cumbler, 21 A.2d 120, 145 Pa.Super. 595—Sprenger, now for Use of Stoecker, v. Litten, 15 A.2d 527, 142 Pa.Super. 194—Foos v. Pogar & Pogar, 84 Pa.Super. 54.

Discretion of court must rest on competent evidence

Pa.—Baird v. Otto, 90 Pa.Super. 452.

Opening judgment of revival

Where a judgment of revival is entered on a confession to revive an old judgment, and evidence is offered in support of the petition to open that the confession of judgment was made in pursuance of a conspiracy to cheat and defraud, it is not an abuse of discretion for the court to open the judgment of revival, but such order should not include the original judgment, where the petition does not ask that it be opened, or the evidence does not call for any interference with it.—McPherson v. Cole, 87 A. 708, 240 Pa. 444, followed in 87 A. 709, 240 Pa. 448—34 C.J. p 417 note 13.

Discretion held not abused

(1) By opening or vacating judgment.

Ill.—Treager v. Totsch, 53 N.E.2d 719, 322 Ill.App. 75.
Md.—Silverberg v. Dearholt, 22 A.2d 588, 180 Md. 38.
Pa.—Commonwealth v. Keirsted, 17 A.2d 188, 340 Pa. 512—E. P. Wilbur Trust Co., now to Use of Federal Deposit Ins. Corporation, v. Eberts, 10 A.2d 397, 337 Pa. 161—George v. George, 178 A. 25, 318 Pa. 203—William B. Rambo Building & Loan Ass'n v. Dragone, 166 A. 888, 311 Pa. 422—Schline v. Kine, 152 A. 845, 301 Pa. 536—Slattery Bros. v. Powers, 131 A. 859, 285 Pa. 286—Lloyd v. Jacoby, 39 A.2d 525, 156 Pa.Super. 105—West, for Use of West v. Hotel Pennsylvania, 25 A.2d 593, 148 Pa. Super. 373—Sprenger, now for Use of Stoecker, v. Litten, 15 A.2d 527, 142 Pa.Super. 194—Baker's Estate v. Woodworth, 198 A. 469, 130 Pa. Super. 452—Heilman v. Rutherford, 158 A. 203, 103 Pa.Super. 595—Standard Furnace Co. v. Roth, 156 A. 600, 102 Pa.Super. 341—Commercial Acceptance Corporation v. Burrell, 87 Pa.Super. 571—Farling v. Urich, 84 Pa.Super. 105.

(2) By refusal to open or vacate judgment.

Ariz.—Smith v. Washburn & Condon, 297 P. 879, 38 Ariz. 149.
N.M.—Hot Springs Nat. Bank v. Kenney, 48 P.2d 1029, 39 N.M. 428.
Pa.—Berkowitz v. Kass, 40 A.2d 691, 351 Pa. 263—Machalicka v. Lukasevic, 31 A.2d 164, 346 Pa. 487—United Natural Gas Co. v. James Bros. Lumber Co., 191 A. 12, 325 Pa. 469—Schuylkill Trust Co. v. Sobolewski, 190 A. 919, 325 Pa. 422—Matovich v. Gradich, 187 A. 65, 123 Pa.Super. 355—Howard v. Flanigan, 184 A. 34, 320 Pa. 569—Sirant v. Solkosky, 166 A. 561, 311 Pa. 142—First Nat. Bank of Mount Holly Springs v. Cumbler, 21 A.2d 120, 145 Pa.Super. 595—Greiner v. Brubaker, 16 A.2d 689, 142 Pa.Super. 538—Rosen v. Seidenberg, 170 A. 351, 111 Pa.Super. 534—Citizens' Nat. Bank of Lehighton v. Kupres, 161 A. 466, 106 Pa.Super. 164—Lutz v. Voulopos, 101 Pa.Super. 359—Van Scoten v. Botsford & Kunes, 93 Pa.Super. 270—Bloom v. Lundberg, 96 Pa. Super. 248—Volkmar v. Vladi, 95 Pa.Super. 420—Commonwealth v. Spinelli, 90 Pa.Super. 502.

(3) By opening, but refusing to strike, judgment.—Kweller, now for Use of Caplan, v. Becker, 12 A.2d 567, 338 Pa. 169.

Discretion held abused by refusal to open or vacate judgment.

Ohio.—Lutkenhouse v. Vella, App., 60 N.E.2d 798.
Pa.—Vidmar v. Martincic, 21 A.2d 470, 146 Pa.Super. 47—Race v. Novis, 178 A. 164, 117 Pa.Super. 357—Martz v. McKinley, 96 Pa.Super. 213.

74. Ill.—Handley v. Wilson, 242 Ill. App. 66.
34 C.J. p 417 note 10.

Discretion should be exercised liberally where a meritorious defense is shown.—Kolmar, Inc. v. Moore, 55 N.E.2d 524, 323 Ill.App. 323.

Where the undisputed evidence would establish a defense, it is error, in absence of any legal barrier, not to open the judgment and let the case go to a jury.—Cronauer v. Bayer, 13 A.2d 75, 140 Pa.Super. 91.

75. Pa.—Spanko v. Trisick, 160 A. 718, 307 Pa. 166.
34 C.J. p 416 note 97.

The weight of evidence and credibility of witnesses are for the judge who sits as a chancellor.—Stoner v. Sley System Garages, 46 A.2d 172, 353 Pa. 532—Schuylkill Trust Co. v. Sobolewski, 190 A. 919, 325 Pa. 422—Mutual Building & Loan Ass'n of Shenandoah v. Walukiewicz, 185 A. 648, 322 Pa. 240.

76. Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.
Pa.—Martz v. McKinley, 96 Pa.Super. 213—Olekszyk v. Walelko, 92 Pa. Super. 565—Whittaker v. Towkanecs, 86 Pa.Super. 118—Auto Security Co. v. Canelli, 80 Pa.Super. 43—Vaughan & Co. v. Hopewell, 79 Pa.Super. 239—Sisemore & Kierbow Co. v. Nicholas, Com.Pl., 27 North.Co. 193, reversed on other grounds Sizemore & Kierbow Co., to Use of Bastian-Blessing Co. v. Nicholas, 27 A.2d 473, 149 Pa.Super. 376.
34 C.J. p 416 notes 98, 99.

A "feigned issue" framed to try questions of fact, on making absolute rule to open judgment to permit defendant to interpose defense, means issue at instance of court or of parties to determine fact which court has either not power or is unwilling to decide, and such issue proceeds, not from right of parties to have matter determined by jury, but from fact that in rule to open judgment court is exercising its inherent equitable powers and may prefer question of fact to be determined by jury.—Miles v. Layton, 193 A. 567, 8 W.W.Harr.,Del., 411, 112 A.L.R. 786.

Purpose of submission

Submission of issue to jury on hearing of rule to show cause why judgment by confession entered on warrant of attorney should not be opened is for purpose of informing conscience of court on particular questions embraced in issue.—Chandler v. Miles, 193 A. 576, 8 W.W. Harr.,Del., 431.

a jury is in effect opening the judgment for a limited purpose.[77]

Scope of inquiry. Where the matter is heard on motion or petition and answer, the hearing is limited to matters raised by such pleadings,[78] and it has been held that if the answer is responsive and denies the facts averred in the petition and no evidence is taken in support of the petition, the court is bound to decide all disputed facts in favor of plaintiff in the judgment,[79] and the only question remaining for discussion is as to the validity of the entry of the judgment.[80] It has been held that the hearing should be limited to the questions whether defendant has a valid defense prima facie and whether he has acted with due diligence,[81] and that the court should not pass on the merits of the defense alleged where a valid defense is prima facie shown,[82] since such determination deprives defendant of his day in court and of a right to appeal from the decision.[83] It has also been held that the court should not consider the question of a meritorious defense until it has first determined whether grounds to vacate the judgment exist.[84]

Relief. In a proceeding to open or vacate a confessed judgment, the court may grant such relief against the judgment as is appropriate under the circumstances.[85] On a proper showing the court may vacate the judgment,[86] open the judgment gen-

Questions of law and fact

(1) The question whether the note on its face purported to be a sealed instrument but not question of whether the corporation intended to adopt the word "seal" as its corporate seal for the occasion was a "question of law" to be determined by the court on inspection.—Collins v. Tracy Grill & Bar Corporation, 19 A.2d 617, 144 Pa.Super. 440.

(2) A petition to open judgment on a judgment note under seal which averred that petitioner "never received any consideration by reason of the execution . . . of said judgment note," and answer averring that petition did not present a valid defense, raised the issue and presented a legal rather than a factual question.—Shinn v. Stemler, 45 A.2d 242, 158 Pa.Super. 350.

(3) Particular questions held to be questions of fact for the jury.—Guadiere v. Simeone, 29 A.2d 702, 151 Pa.Super. 65—White Co. v. Francis, 95 Pa.Super. 315—Kaufman v. Karuza, Pa.Com.Pl., 33 Luz.Leg.Reg. 416.

77. Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.

78. Pa.—Bloom v. Lundberg, 96 Pa. Super. 248—Heyer-Kemner, Inc., v. Sachs, Com.Pl., 57 Montg.Co. 73. 34 C.J. p 416 note 1.

Estoppel

The court was not required to consider question whether defendant was estopped to question validity of note where question of estoppel was not raised in answer to amended petition.—Sprenger, now for Use of Stoecker, v. Litten, 15 A.2d 527, 142 Pa.Super. 194.

Void instrument

A petition to set aside confession of judgment on a note need not allege error or fraud respecting signing of note, to admit evidence concerning proof of maturity of debt subsequent to signing thereof, where note was an absolute nullity because executed and given in contravention of prohibitory law.—Taylor v. Shreveport Fertilizer Works, La. App., 197 So. 164.

79. Pa.—McKee v. Verner, 86 A. 646, 239 Pa. 69, 44 L.R.A.,N.S., 727. 34 C.J. p 416 note 2.

80. Pa.—United Security Life Ins. & Trust Co. v. Vaughn, 8 Pa.Dist. 302, 22 Pa.Co. 167.

81. Ill.—Becker v. Ketter, 56 N.E. 2d 649, 323 Ill.App. 656—Elaborated Ready Roofing Co. v. Hunter, 262 Ill.App. 380.

82. Ill.—Great Northern Store Fixture Mfg. Co. v. Lamm, 58 N.E.2d 745, 324 Ill.App. 587—Kolmar, Inc., v. Moore, 55 N.E.2d 524, 323 Ill. App. 323—Freudenthal v. Lipman, 51 N.E.2d 794, 320 Ill.App. 681. 34 C.J. p 416 note 4.

83. Ariz.—Arizona Mining & Trading Co. v. Benton, 100 P. 952, 12 Ariz. 373.
Ill.—Great Northern Store Fixture Mfg. Co. v. Lamm, 58 N.E.2d 745, 324 Ill.App. 587.

84. Ohio.—Canton Implement Co. v. Rauh, 175 N.E. 230, 37 Ohio App. 544.

85. **Judgment may be reduced** to the amount which the court finds to be justly due.—Walker v. Oakley, 32 A. 2d 563, 347 Pa. 405—34 C.J. p 417 note 19.

Vacation in part

If the judgment includes several claims or items, some of which are due and others not, or some of which are sufficiently described in the statement and others not, it may be vacated or set aside as to those demands which cannot be supported and left standing as to the others.—Wells v. Gieseke, 8 N.W. 380, 27 Minn. 478—34 C.J. p 417 note 18.

Joint judgment

(1) A judgment in assumpsit is an entity and where it is rendered against several persons it cannot be set aside as to one party without setting it aside as to all.—First Nat. Bank v. Yakey, 253 Ill.App. 128.

(2) Order made on motion of one of two makers sued jointly on judgment note, directing court to open judgment entered by confession to admit defense of material alteration after execution of note, was held to reopen judgment as to both defendants.—First Nat. Bank v. May, 231 Ill.App. 509.

(3) Where, however, a joint confession of judgment on a note is entered against the two signers thereof, and one of the signers had been discharged from his liability on the note by bankruptcy proceedings, it has been held that the court may properly vacate the judgment as to the bankrupt and open up the judgment only as to the cosignor.—Goodman American Ice Cream Co. v. Mendelsohn, 274 Ill.App. 253.

(4) Where court vacated joint judgment as to deceased defendant, it could subsequently enter vacation as to other joint defendant.—Saulpaugh v. Born, 154 N.E. 166, 22 Ohio App. 275.

(5) Where judgment is entered by confession against joint and several obligors after the death of one of them and the warrant of attorney is joint and not joint and several and the court, on motion of the surviving obligor, vacates the judgment, the rights of the obligee are not prejudiced thereby where the obligee is granted leave to file an amended statement of claim and to proceed against the surviving obligor.—Genden v. Bailen, 275 Ill.App. 382.

86. N.J.—Fortune Building & Loan Ass'n v. Codomo, 7 A.2d 880, 122 N. J.Law 565.
Pa.—Morris v. Chevalier, Com.Pl., 20 Leh.L.J. 133—Worthington Bldrs. v. Rutt, Com.Pl., 30 North.Co. 155—Yurko v. Jurkuv, Com.Pl., 87 Pittsb.Leg.J. 8.

When entry of judgment by confession was unauthorized, order striking off judgment was appropriate remedy.—Lansdowne Bank & Trust Co. v. Robinson, 154 A. 17, 303 Pa. 58.

erally,[87] open the judgment, but restrict the issues to be tried,[88] or open the judgment and frame an issue for a jury.[89] On the other hand, relief will be denied where a proper showing is not made.[90]

Imposition of terms. Terms or conditions may be imposed on defendant, on granting his application to open the judgment,[91] such as the payment of costs[92] and reasonable attorney's fees,[93] if the judgment is confirmed. It has been held that it is not proper to impose as a condition precedent that defendant shall bring into court the sum which is supposed to be due,[94] but the deposit of a sum concededly due may be required,[95] although it has been held that the court may set aside the judgment to let in the defense of usury, without a tender of the amount due.[96] The judgment may be allowed to stand as security to abide the result,[97] although, as discussed infra § 327, it has been held that this is the normal effect of an order which simply opens the judgment as distinguished from an order vacating or setting aside the judgment. Terms may also be imposed on plaintiff as a condition of a refusal to open the judgment.[98]

87. Pa.—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa. Super. 402—Witwer v. Baer, Com. Pl., 32 Berks Co. 269—Wayne Title & Trust Co. v. Sweet, Com.Pl., 32 Del.Co. 106—Dickel v. Tyson, Com. Pl., 50 Lanc.Rev. 163—Keene v Ryman, Com.Pl., 38 Luz.Leg.Reg. 330—Mathewson v. Lehigh Valley Coal Co., Com.Pl., 38 Luz.Leg.Reg. 116—Pierce Street Automobile Co. v. Sparlow, Com.Pl., 33 Luz.Leg. Reg. 432—Wildwood Strand Realty Co. v. Och, Com.Pl., 53 Montg.Co. 264—Associates Discount Corporation v. Debles, Com.Pl., 90 Pittsb. Leg.J. 569.

Opening the judgment is the appropriate relief where the court is exercising its equitable power to permit defendant to interpose a defense.
Del.—Dolby v. Whaley, 197 A. 161, 9 W.W.Harr. 155.
Ill.—Farmers Bank of North Henderson v. Stenfeldt, 258 Ill.App. 428.

Lack of jurisdiction
In suit to vacate decree pro confesso which is void for lack of service, where parties are the same, court may rehear cause and deny relief not warranted by merits.—Snyder v. Abbott, 161 S.E. 11, 111 W.Va. 201.

88. Pa.—A. B. C. Oil Burner & Engineering Co. v. Duncan, Com.Pl., 28 Del.Co. 308.

89. Pa.—Lyman Felheim Co. v. Walker, 193 A. 69, 128 Pa.Super. 1—Peerless Roofing & Siding Corporation v. Bryson, Com.Pl., 29 Del.Co. 448—Waterhouse v. Burdick, Com.Pl., 90 Pittsb.Leg.J. 399, 24 Erie Co. 366—Colonial Finance Co. v. Mitchell, Com.Pl., 87 Pittsb. Leg.J. 383, 2 Fay.L.J. 154—Latrobe Trust Co., for Use of, v. Ruffner, Com.Pl., 22 West.Co. 46.

90. Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.
N.Y.—Hays v. Smith, 58 N.Y.S.2d 439, 269 App.Div. 1008, appeal denied 61 N.Y.S.2d 526, 270 App.Div. 867, appeal dismissed 67 N.E.2d 527, 295 N.Y. 896.
Pa.—Held v. Held, 45 A.2d 16, 353 Pa. 389—Wilson v. Richard, 147 A. 833, 298 Pa. 17—Bush v. Frutchey, 83 Pa.Super. 208—Armitage v. Ulrich, Com.Pl., 38 Berks Co. 79—Commonwealth ex rel. Reno v. Snyderwine, Com.Pl., 56 Dauph.Co. 9—Chiara v. Johnston, Com.Pl., 55 Dauph.Co. 60—First Nat. Bank of Mt. Holly Springs v. Cumbler, Com.Pl., 50 Dauph.Co. 203, affirmed 21 A.2d 120, 145 Pa.Super. 595—Spangler v. Zimmerman, Com.Pl., 50 Dauph.Co. 93—Peerless Roofing & Siding Corporation v. Bryson, Com.Pl., 29 Del.Co. 448—Williams v. Puline, Com.Pl., 28 Erie Co. 256—Hebrew Loan Society of Wyoming Valley v. Margolis, Com.Pl., 33 Luz.Leg.Reg. 101—Empire Furniture Co. v. Yale, Com.Pl., 32 Luz. Leg.Reg. 397—Gawinowicz v. Yurkewicz, Com.Pl., 14 Northumb. Leg.J. 15—Hill Top Lumber Co. v. Gillman, Com.Pl., 92 Pittsb.Leg.J. 350—Automobile Finance Co. v. Varner, Com.Pl., 90 Pittsb.Leg.J. 169—Sterling Land Co. v. Kline, Com.Pl., 87 Pittsb.Leg.J. 279—Lutz v. Heim, Com.Pl., 5 Sch.Reg. 190—Sugarman v. Baldini, Com. Pl., 28 West.Co. 41.
34 C.J. p 416 note 7.

If no sufficient ground is shown for opening judgment by confession on warrant of attorney, rule to show cause is discharged and petition dismissed.—Chandler v. Miles, 193 A. 576, 8 W.W.Harr.,Del., 431.

Defects cured
(1) Where the objections relied on in the motion are corrected on the hearing thereof the application will be denied.
Ill.—Evans v. Barclay, 38 Ill.App. 496.
Pa.—Peerless Soda Fountain Service Co. v. Hummer, 19 Pa.Dist. & Co. 302, 46 York Leg.Rec. 201.

(2) Court could on argument of rule to strike judgment entered on copy of obligation containing warrant of attorney to confess judgment grant leave to file original obligation.—Altoona Trust Co. v. Fockler, 165 A. 740, 311 Pa. 426.

Stay of execution
Recital in order confirming judgment by confession that order was without prejudice to any parties as to subsequent action did not permit judgment debtors subsequently to attack court's action in confirming the judgment by applying for perpetual stay of execution.—Local Loan Co. v. Norman, 48 N.E.2d 303, 319 Ill. App. 114.

91. Colo.—Axelson v. Dailey Co-op. Co., 298 P. 957, 88 Colo. 555.
Ill.—Western Cold Storage Co. v. Keeshin, 252 Ill.App. 165.
34 C.J. p 417 note 20.

92. Wis.—Port Huron Engine & Thresher Co. v. Clements, 89 N. W. 160, 113 Wis. 249.

93. Ill.—West v. McNaughton, 211 Ill.App. 259—Fisher v. Wecker, 210 Ill.App. 345.

94. Ill.—Page v. Wallace, 87 Ill. 84.
34 C.J. p 417 note 23.

95. Md.—Taylor v. Gorman, 126 A. 897, 146 Md. 207.

96. Ohio.—Riddle v. Canby, 2 Ohio Dec., Reprint, 586, 4 West.L.Month. 124.

97. Ill.—First Nat. Bank v. Hahnemann Institutions of Chicago, 190 N.E. 707, 356 Ill. 366.
Ohio.—Commercial Credit Corp. v. Wasson, 63 N.E.2d 560, 76 Ohio App. 181.
34 C.J. p 417 note 16.

Retention of lien
Where court strikes out a judgment for plaintiff on motion of defendant, whether court should retain the lien is a question entirely within the court's discretion.—Silverberg v. Dearholt, 22 A.2d 588, 180 Md. 38.

Where execution has been levied it is error to set aside such execution and the levies made thereunder, in the absence of other equivalent security substituted therefor.
Ill.—Farmers' Bank of North Henderson v. Stenfeldt, 258 Ill.App. 428.
Pa.—Adams v. James L. Leeds Co., 42 A. 195, 189 Pa. 544.

98. Pa.—Murray v. Auman, 42 Pa. Super. 574—Williams v. Puline, Com.Pl., 28 Erie Co. 250.

§ 327. —— Operation and Effect of Opening or Vacating

The opening of a judgment by confession does not vacate the judgment, but the vacation of such a judgment places the action in the same state as though it had been commenced in the ordinary procedure by summons.

The opening of a judgment by confession does not vacate the judgment;[99] it stands as security until the determination of the case on the merits.[1] The vacation of a judgment by confession places the action in the same state as though it had been commenced in the ordinary procedure by summons.[2]

If the judgment is opened generally, and without terms, plaintiff is put to the proof of his cause of action precisely as though no judgment had been entered.[3] Where the court in opening the judgment did not direct the parties to file pleadings, the petition to open and the answer thereto may be taken as the pleadings.[4] It has been held that plaintiff is restricted to the cause of action for which the judgment was entered and that he cannot change it,[5] but defendant may set up on the trial any defense which would have been available to him if an action had been brought, instead of a judgment being entered, on the debt or instrument in suit,[6] although he cannot set up matters of defense which have arisen subsequent to the judgment.[7]

The court in opening judgment may frame an issue,[8] and in such case the trial should be confined to such issue.[9]

By asking for and obtaining leave to plead in the case of a judgment entered by confession, all technicalities and objections to the judgment are waived,[10] and defendant is limited to the merits.[11] It is not sufficient for defendant to file a general demurrer to the declaration,[12] and, if he declines to plead to the declaration, he may be defaulted for failure to comply with the rule to plead.[13] An order setting aside a judgment as to one only of several defendants merely restrains plaintiff from executing the judgment on defendant as to whom it is set aside.[14]

On the trial of the action after the judgment is opened, general rules apply as to procedure,[15] pre-

99. Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786.
Ill.—Sharp v. Barr, 234 Ill.App. 214.
Pa.—Braum v. Rohrbach, 147 A. 519, 297 Pa. 496.

1. Ill.—Mayer v. Tylor, 19 N.E.2d 211, 298 Ill.App. 632—Ross v. Wrightwood-Hampden Bldg. Corporation, 271 Ill.App. 22—Farmers' Bank of North Henderson v. Stenfeldt, 258 Ill.App. 428—Streeter v. Junker, 230 Ill.App. 366.

2. Ill.—George J. Cooke Co. v. Johnson, 179 Ill.App. 83.

Attack on garnishment
Judgment debtor's rule to show cause why confession of judgment should not be stricken off and money held by garnishee under attachment execution on judgment decreed not subject to attachment and debtor afforded opportunity to show that attached money was not his personal funds was not a rule to show cause why judgment should not be opened generally and debtor let into defense on merits, and did not raise question of defense on merits of judgment.—Albert M. Greenfield & Co. v. Roberts, 5 A.2d 642, 135 Pa.Super. 328.

Judgment against maker of note
When a judgment against the maker on a note is vacated, the same relief is afforded the indorsers.—Gilmore v. Mix, 67 N.E.2d 313, 329 Ill.App. 177.

Judgment on transcript
Where a judgment by confession is stricken off, a judgment on a transcript thereof entered in another county falls with the original judgment.—Banning v. Taylor, 24 Pa. 297.

Power over order vacating judgment
Where court vacated judgment by confession instead of entering order merely allowing judgment to be opened up, and thereafter court entered a summary judgment, and on realizing within thirty days that it was a mistake to vacate the judgment, court still had jurisdiction and was justified in rectifying mistake by setting aside the order of vacation and reinstating judgment by confession, leaving two judgments, which was permissible under statute.—National Builders Bank of Chicago v. Simons, 31 N.E.2d 269, 307 Ill.App. 552.

3. Ill.—Streeter v. Junker, 230 Ill. App. 366.
Pa.—Austen v. Marzolf, 161 A. 72, 307 Pa. 232—First Nat. Bank v. St. John's Church, Windber, 146 A. 102, 296 Pa. 467.
34 C.J. p 417 note 28.

Filing of plea
Under rule requiring defendant to be summoned and show cause why judgment by confession under power in note should be vacated, opened, or modified, no plea should have been filed until trial court reopened the judgment and permitted defendant to file pleas.—Foland v. Hoffman, Md., 47 A.2d 62.

4. Pa.—Rzasa v. Gorniak, 174 A. 659, 115 Pa.Super. 47.

5. Pa.—Beers v. Fallen Timber Coal Co., 161 A. 409, 307 Pa. 261—Keal v. Feissner, Com.Pl., 37 Luz.Leg. Reg. 36.

6. Colo.—Axelson v. Dailey Co-op. Co., 298 P. 957, 88 Colo. 555.
Pa.—Ankeny v. Lohr, 99 Pa.Super. 203.
34 C.J. p 417 note 29.

Pleas tendered late
It is not an abuse of discretion to deny leave to file additional pleas tendered after the case had been placed on the calendar for trial.—Northeastern Coal Co. v. Tyrrell, 133 Ill.App. 472.

7. Pa.—Curtis v. Slosson, 6 Pa. 265.

8. Pa.—International Finance Co. v. Magilansky, 161 A. 613, 105 Pa. Super. 309—Goenner v. Glumicich, 81 Pa.Super. 521—Fogel v. Newberg, Com.Pl., 37 Pa.Dist. & Co. 254.

9. Pa.—Weber v. Roland, 39 Pa.Super. 611.
34 C.J. p 418 note 34.

10. Ill.—Robey v. Updyke, 61 Ill. App. 328.
Pa.—Treasurer Div. No. 168 A. A. of S. R. E. of A. v. Keller, 23 Pa. Super. 135.

11. Ill.—Dazey v. Williams, 252 Ill. App. 329.

12. Ill.—Feldman v. Polishuck, 200 Ill.App. 15.

13. Ill.—Feldman v. Polishuck, supra.

14. N.J.—Reynolds v. Silvers, 18 N. J.Law 238.

15. Ill.—Security Discount Corporation v. Jackson, 51 N.E.2d 618, 320 Ill.App. 440.

sumptions and burden of proof,[16] questions of law and fact,[17] admissibility of evidence,[18] the weight and sufficiency of evidence,[19] and instructions.[20]

Judgment on retrial. If on the retrial the issues are found for plaintiff, the judgment should direct that the previous judgment continue in full force and effect,[21] and should not be for a greater sum than was allowed by the prior judgment.[22] Under such circumstances the entry of a separate and independent judgment is erroneous.[23] Where the issues are found for defendant after the judgment is opened, the judgment should be vacated and declared null and void.[24]

G. JUDGMENTS BY CONSENT, OFFER AND ACCEPTANCE, AND ON MOTION OR SUMMARY PROCEEDINGS

§ 328. Consent Judgments

The amendment, opening, or vacating of judgments by consent is considered infra §§ 329, 330.

Examine Pocket Parts for later cases.

§ 329. —— Amendment

The consent of all parties is generally required to permit amendment of a consent judgment, except for fraud or mutual mistake, but this rule does not preclude correction of clerical errors or prevent amendment where the judgment reserves the cause for further orders.

As a general rule, a consent judgment may not be amended, modified, or corrected in any essential particular except with the consent of all the parties thereto,[25] in the absence of fraud or mutual mis-

16. Ill.—Security Discount Corporation v. Jackson, 51 N.E.2d 618, 320 Ill.App. 440.
Pa.—Austen v. Marzolf, 161 A. 72, 307 Pa. 232—Jones & Sons, Inc. v. Rishkofski, Com.Pl., 37 Luz.Leg. Reg. 229.

17. Ill.—Farmers' Bank of North Henderson v. Stenfeldt, 258 Ill. App. 428.
Pa.—Collins v. Tracy Grill & Bar Corporation, 19 A.2d 617, 144 Pa. Super. 440—Murray v. Flesher, 88 Pa.Super. 592.
34 C.J. p 418 note 34 [c].

18. Ill.—Teuber v. Schumacher, 44 Ill.App. 577.
Pa.—Austen v. Marzolf, 161 A. 72, 307 Pa. 232.

Contradiction of writing
On a petition to open judgment averring a parol contemporaneous agreement as one of the inducements to the signing of a judgment note, the effect of granting the petition is not to permit defendant to contradict the terms of a written instrument, but to prove by parol evidence the existence of the agreement and the circumstances under which it was made.—Hotaling v. Fisher, 79 Pa.Super. 103.

19. **Fraud**
If fraud is set up as a defense, it must be affirmatively and positively proved.—Hipps v. Wardle, 1 A. 727, 1 Pa.Cas. 147—Davis v. Neel, 61 Pa. Super. 299.

Evidence held sufficient
(1) To justify confirmation of judgment by confession.—Automatic Oil Heating Co. v. Lee, 33 N.E.2d 129, 309 Ill.App. 444—Aurora Nat. Bank v. Funk, 16 N.E.2d 442, 296 Ill.App. 437.

(2) To sustain judgment for defendant.
Ill.—Miller Fur Co. v. Gombossy, 44 N.E.2d 341, 316 Ill.App. 159.
Pa.—Rosenblum v. Edwards, 8 A.2d 468, 137 Pa.Super. 33.

(3) To show that obligation was not supported by consideration.—Klovas v. Wedeskis, 41 N.E.2d 222, 314 Ill.App. 384.

(4) To show that obligation was not conditional.—Mitchell v. Comstock, 27 N.E.2d 620, 305 Ill.App. 360.

Evidence held insufficient
(1) To sustain judgment.—Carroll Graham Glass Co. v. Stattman, 32 N.E.2d 930, 309 Ill.App. 132.

(2) To show payment.—Balt v. Hartman, 11 N.E.2d 240, 292 Ill.App. 639.

20. Pa.—U. S. Savings & Trust Co. of Conemaugh, to Use of Hindes, v. Helsel, 2 A.2d 823, 332 Pa. 433.
34 C.J. p 418 note 34 [6].

Instruction held erroneous
Pa.—Sears v. Birbeck, 184 A. 6, 321 Pa. 375.

21. Colo.—Axelson v. Dailey Co-op. Co., 298 P. 957, 88 Colo. 555.
Ill.—Schrader v. Heflebower, 243 Ill. App. 139—Bowers v. Heflebower, 243 Ill.App. 129—Sharp v. Barr, 234 Ill.App. 214.
34 C.J. p 418 note 40.

Where the judgment was improperly opened, the subsequent proceedings should be vacated and the original judgment reinstated.
Ill.—Shinner v. Raschke, 213 Ill.App. 324.
Pa.—Rosenblum v. Edwards, 8 A.2d 468, 137 Pa.Super. 33.

On order that judgment stand as of date of rendition, case is substantially same as when judgment was entered.—Sharp v. Barr, 234 Ill.App. 214.

22. Ill.—King v. Heilig, 203 Ill.App. 117.

23. Ill.—Excelsior Stove & Manufacturing Co. v. Venturelli, 8 N.E. 2d 702, 290 Ill.App. 502.
34 C.J. p 418 note 42.

24. Ill.—Shumway v. Shumway, 280 Ill.App. 104.

25. U.S.—Steingruber v. Johnson, D. C.Tenn., 35 F.Supp. 662.
Ky.—Boone v. Ohio Valley Fire & Marine Ins. Co.'s Receiver, 55 S. W.2d 374, 246 Ky. 489.
Mich.—Orban v. Stelle, 290 N.W. 821, 292 Mich. 341.
Neb.—McArthur v. Thompson, 299 N. W. 519, 140 Neb. 408, 139 A.L.R. 413.
N.Y.—Fred Medart Mfg. Co. v. Rafferty, 276 N.Y.S. 678, 243 App.Div. 632—Brooklyn Children's Aid Soc. v. Mein, 218 N.Y.S. 557, 218 App. Div. 773.
N.C.—Deitz v. Bolch, 183 S.E. 884, 209 N.C. 202—Weaver v. Hampton, 161 S.E. 480, 201 N.C. 798—Town of Cary v. Templeton, 152 S.E. 797, 198 N.C. 604—First Nat. Bank v. Mitchell, 131 S.E. 656, 191 N.C. 190.
Pa.—Commonwealth v. Highland, 28 West.Co.L.J. 45.
34 C.J. p 418 note 46.
Judgments by consent generally see supra §§ 173–178.

Liability on note
Validity of amendment to consent judgment entered by parties to show that one defendant was primarily and other secondarily liable on notes depended on whether defendant primarily liable consented to amendment.—Deitz v. Bolch, 183 S.E. 884, 209 N.C. 202.

Where the amendment is not material, the rule does not apply.—Wiggam Milk Co. v. Johnson, 13 N.E.2d 522, 213 Ind. 508.

take,[26] and this rule applies to cases where a party has acquired rights in the final result, which would be jeopardized by a change in the terms of the consent judgment.[27] In this connection it has been said that, if the court should change a consent judgment in any material respect without the consent of the parties, it would cease to be the judgment agreed on by them,[28] and that such exercise of judicial power would be a practical denial of the right of the party prejudiced to be heard according to law.[29]

It has been said, however, that the power of a court to revise its judgments for protection of adjudicated rights in relation to changed conditions that affect those rights in respect of their judicial enforcement is inherent, and that such power exists whether the judgment was entered after litigation or by consent,[30] and that a formal order of correction is not essential to granting relief consistent with the agreement.[31] It has also been held that, where a judgment fails, in a material respect, to accord with the stipulation made, relief should be sought by motion for new trial or appeal, and that such a judgment cannot be corrected under code provisions governing amendment of judgments.[32]

Clerical defects or omissions in the judgment, caused by mistake, may be amended nunc pro tunc,[33] and the court may amend a judgment to correct a misnomer of defendant either during or after the term at which the judgment was rendered.[34] The rule requiring consent to effect a modification or amendment of a consent judgment or decree will not be carried so far as to confer on a party seeking to enforce an unconscionable penalty provided for in a consent judgment the right to obtain affirmative relief contrary to the paramount duty of the court to do equity,[35] and, where a consent decree or judgment may indirectly affect the rights of many persons in addition to those of the litigants, the rule that courts will not modify a consent decree except on the consent of the parties will not be too rigidly enforced.[36]

Reservation for further orders; interlocutory judgments. Where a consent judgment reserves the cause for further orders, the court may thereafter modify the judgment as conditions may require in conformity with justice and the legal rights of the parties.[37] It has been held that an interlocutory consent judgment may be modified by the court to meet changed conditions,[38] but that such a judgment, in strict accordance with a stipulation entered into between the parties, cannot be amended on a motion made by one of the parties and opposed by the other,[39] the remedy of the party objecting to the form of the judgment being to make a motion to be relieved from the stipulation and to have the judgment vacated.[40]

§ 330. —— Opening or Vacating

a. In general
b. Grounds
c. Procedure and relief

a. In General

Ordinarily, a consent judgment may not be opened, set aside, or vacated without consent of the parties or proof of grounds adequate for such relief, but, before the judgment has become final, the trial court retains plenary power to set it aside.

Generally speaking, a judgment by consent may

26. N.Y.—Feinberg v. Feinberg, 41 N.Y.S.2d 868, 180 Misc. 305.
N.C.—Johnson v. Futrell Bros. Lumber Co., 35 S.E.2d 889.
Wyo.—Midwest Refining Co. v. George, 7 P.2d 213, 44 Wyo. 25.
Boundary dispute
Supreme court had jurisdiction to correct consent decree fixing boundary line between states, and to establish true boundary line, where decree was erroneous in certain respects due to mutual mistakes.—State of Wisconsin v. State of Michigan, 55 S.Ct. 786, 295 U.S. 455, 79 L.Ed. 1541.

27. N.C.—Fowler v. Winders, 116 S.E. 177, 185 N.C. 105.

28. Ky.—Karnes v. Black, 215 S.W. 191, 185 Ky. 410.
N.C.—Lynch v. Loftin, 69 S.E. 143, 153 N.C. 270.

29. Ky.—Karnes v. Black, 215 S.W. 191, 185 Ky. 410.

30. Fla.—State ex rel. Klemm v. Baskin, 150 So. 517, 111 Fla. 667.

31. U.S.—Butler v. Denton, D.C.Okl., 57 F.Supp. 656, affirmed, C.C.A., 150 F.2d 687.
Wyo.—Midwest Refining Co. v. George, 7 P.2d 213, 44 Wyo. 25.

32. Cal.—Chavez v. Scully, 232 P. 165, 69 Cal.App. 633.

33. Ill.—People v. Quick, 92 Ill. 580.
W.Va.—Stewart v. Stewart, 20 S.E. 862, 40 W.Va. 65.

34. Ind.—Wiggam Milk Co. v. Johnson, 13 N.E.2d 522, 213 Ind. 508.
Appearance without objection
The modification of consent judgment made by court in changing name of defendant from a certain "Company Inc." to such "Company" was not a material change and was within authority of court, where president of company was personally served with summons, the company appeared by attorney and filed answer in general denial, and did not make objection to name under which it was being sued.—Wiggam Milk Co. v. Johnson, 13 N.E.2d 522, 213 Ind. 508.

35. Mich.—Orban v. Stelle, 290 N.W. 821, 292 Mich. 341.

36. Mich.—Royal Oak Tp. v. City of Huntington Woods, 20 N.W.2d 840.

37. U.S.—Chrysler Corporation v. U. S., Ind., 62 S.Ct. 1146, 316 U.S. 556, 86 L.Ed. 1668.
N.C.—Harriss v. Hughes, 17 S.E.2d 679, 220 N.C. 473—Coburn v. Board of Com'rs of Swain County, 131 S.E. 372, 191 N.C. 68.
Tex.—State v. Swift & Co., Civ.App., 187 S.W.2d 127, error refused.

38. N.C.—Hales v. National Land Exchange, 14 S.E.2d 667, 219 N.C. 651—Fowler v. Winders, 116 S.E. 177, 185 N.C. 105.

39. N.Y.—Beer v. Orthaus, 109 N.Y.S. 997, 125 App.Div. 574—Aronson v. Sire, 83 N.Y.S. 862, 85 App.Div. 607.

40. N.Y.—Aronson v. Sire, supra.

not be opened, set aside, or vacated without the consent of all the parties,[41] except in due proceedings on proper grounds, as discussed infra subdivisions b and c of this section. The trial court has power, however, to open or vacate a judgment entered by consent or agreement of the parties where a good cause therefor is shown,[42] the granting or refusing of the application being within the sound discretion of the court.[43] It has been held that, before lapse of the time necessary to make a consent judgment final in character, the court may lawfully vacate it,[44] and under some practice the court has plenary power over consent judgments during the term at which they are rendered and within such time may vacate and set aside such a judgment whenever justice and equity so require.[45]

b. Grounds

A consent judgment will not be opened or vacated in the absence of adequate grounds, but such a judgment may be opened or vacated for want of consent, fraud, collusion, or mutual mistake of fact.

A judgment by consent will not be opened or vacated in the absence of adequate grounds therefor,[46] especially where the conditions have become such that the opposing party would be prejudiced thereby,[47] and, where the court rendering the judgment had jurisdiction of both the parties and the general subject matter of the action, no objection to the merits is reviewable on motion to vacate a consent judgment.[48] Generally speaking, a judgment by consent will not be opened or vacated in the absence of fraud or mistake or want of consent in fact.[49] A consent judgment may not be set aside on such grounds as that applicant made a bad bargain;[50] erroneous advice of counsel;[51] the existence of a legal defense which might have been pleaded in the action;[52] errors and irregularities of procedure;[53] misconduct or negligence of party's

41. Ind.—Scaros v. Chacker, App., 56 N.E.2d 503.
Mich.—Goldberg v. Trustees of Elmwood Cemetery, 275 N.W. 663, 281 Mich. 647—In re Meredith's Estate, 266 N.W. 351, 275 Mich. 278, 104 A.L.R. 348.
Neb.—McArthur v. Thompson, 299 N. W. 519, 140 Neb. 408, 139 A.L.R. 413.
N.J.—Fidelity Union Trust Co. v. Union Cemetery Ass'n, 40 A.2d 205, 136 N.J.Eq. 15, affirmed 45 A.2d 670, 137 N.J.Eq. 455, and 45 A.2d 698, 137 N.J.Eq. 456.
N.Y.—In re Kenny's Will, 220 N.Y. S. 188, 128 Misc. 553, modified on other grounds 230 N.Y.S. 74, 224 App.Div. 152, affirmed 166 N.E. 337, 250 N.Y. 594.
N.C.—Weaver v. Hampton, 161 S.E. 480, 201 N.C. 798—Town of Cary v. Templeton, 152 S.E. 797, 198 N.C. 604—Lentz v. Lentz, 138 S.E. 12, 193 N.C. 742—Ellis v. Ellis, 136 S.E. 350, 193 N.C. 216—First Nat. Bank v. Mitchell, 131 S.E. 656, 191 N.C. 190—Walker v. Walker, 117 S.E. 167, 185 N.C. 380.

42. Ala.—Louisville & N. R. Co. v. Bridgeforth, 101 So. 807, 20 Ala. App. 326.
Mich.—J. L. Hudson Co. v. Barnett, 238 N.W. 243, 255 Mich. 465.
34 C.J. p 418 note 55.

Improper order of dismissal

Where action was dismissed pursuant to stipulation of the parties but without any formal reference to the agreement of settlement, trial court had jurisdiction under statute to set aside the order of dismissal and to enter judgment on the stipulation.—Anderson v. Ludwig, 22 N. W.2d 530, 248 Wis. 464.

43. Ga.—Raines v. Lane, 31 S.E.2d 403, 198 Ga. 217.
Mich.—J. L. Hudson Co. v. Barnett, 238 N.W. 243, 255 Mich. 465.
N.Y.—Whitson v. Bates, 283 N.Y.S. 663, 246 App.Div. 726.
34 C.J. p 419 note 56.

Abuse of discretion not shown

Mo.—Allen v. Fewel, 87 S.W.2d 142, 337 Mo. 955.
Okl.—Sherrill v. Board of Com'rs of Stephens County, 130 P.2d 100, 191 Okl. 373.

44. Ill.—In re Reemts' Estate, 50 N. E.2d 514, 383 Ill. 447.

45. U.S.—McDonnell v. Wasenmiller, C.C.A.Neb., 74 F.2d 320.

46. La.—**Corpus Juris cited in** Sonnier v. Sonnier, 140 So. 49, 50, 19 La.App. 234.
Okl.—Starr v. Tennant, 128 P. 733, 35 Okl. 125.
34 C.J. p 419 note 70.

47. Ky.—Karnes v. Black, 215 S.W. 191, 185 Ky. 410.
34 C.J. p 419 note 73.

48. U.S.—Walling v. Miller, C.C.A. Minn., 138 F.2d 629, certiorari denied 64 S.Ct. 781, 321 U.S. 784, 88 L.Ed. 1076.

49. U.S.—Lustgarten v. Felt & Tarrant Mfg. Co., C.C.A.N.J., 92 F.2d 277—Butler v. Denton, D.C.Okl., 57 F.Supp. 656, affirmed, C.C.A., 150 F. 2d 687.
Ala.—Garrett v. Davis, 112 So. 342, 216 Ala. 74.
Ind.—Scaros v. Chacker, App., 56 N. E.2d 505.
Ky.—Myers v. Myers, 100 S.W.2d 693, 266 Ky. 831.
N.H.—Hubley v. Goodwin, 17 A.2d 96, 91 N.H. 200.
N.C.—King v. King, 35 S.E.2d 893—Jones v. Griggs, 25 S.E.2d 862, 223 N.C. 279—Smith v. Land & Mineral Co., 8 S.E.2d 225, 217 N.C. 346—Keen v. Parker, 8 S.E.2d 209, 217 N.C. 378—Board of Education of Sampson County v. Board of Com'rs of Sampson County, 134 S. E. 852, 192 N.C. 274—First Nat. Bank v. Mitchell, 131 S.E. 656, 191 N.C. 190.
Tex.—Commercial Credit Co. v. Ramsey, Civ.App., 138 S.W.2d 191, error dismissed, judgment correct.
34 C.J. p 419 note 75.

Change of mind

Consent decree confirming commissioners' report was binding on parties, who could not have it set aside because they changed minds and employed new attorneys.—Bergman v. Rhodes, 165 N.E. 598, 334 Ill. 137, 65 A.L.R. 344.

Threats

Threat of foreclosure and agreement to extend time made out of court were not ground for vacating judgment entered by consent.—Arnot v Fischer, 295 P. 1117, 161 Wash. 67.

50. Minn.—Rusch v. Prudential Ins. Co. of America, 266 N.W. 86, 197 Minn. 81.
N.Y.—In re Del Drago's Estate, 36 N.Y.S.2d 811, 179 Misc. 383.

51. Ga.—Murray v. Willoughby, 66 S.E. 267, 133 Ga. 514.
La.—Doll v. Doll, 19 So.2d 249, 206 La. 550.
34 C.J. p 420 note 83.

52. Ark.—Blair v. Askew-Jones Lumber Co., 55 S.W.2d 78, 186 Ark. 687.
34 C.J. p 420 note 85.

Limitations

Ark.—Blair v. Askew-Jones Lumber Co., 55 S.W.2d 78, 186 Ark. 687.

53. Mo.—Henry v. Gibson, 55 Mo. 570.
S.C.—Jones v. Webb, 8 S.C. 202.

attorney, unmixed with collusion or fraud of the other party;[54] failure of a defendant duly cited to employ counsel or file an answer;[55] nonperformance of stipulations to be performed subsequent to entry of judgment;[56] improper distribution of the proceeds of the judgment;[57] or breach of parol agreement made out of court consenting to entry of judgment by default, where a rule of court refuses to recognize such parol agreements.[58]

Want of consent. A purported consent judgment may generally be opened or vacated where it was entered without the authority or consent of the moving party,[59] or in violation of the agreement of the parties.[60] This rule has been applied to invalidate judgments entered on the unauthorized consent of the attorneys,[61] although there is authority to the effect that a judgment regularly entered pursuant to agreement of the attorneys may not be opened after the term on the ground that the agreement was not authorized,[62] that showing that a party did not consent will not justify vacation of the judgment where there is failure to show nonconsent of his attorney,[63] and that the client is bound by the unauthorized consent of his attorney within the scope of his apparent authority so as to preclude the client from securing vacation of a judgment entered on the unauthorized consent or agreement of the attorney.[64] It has also been stated that courts are not inclined to set aside a judgment rendered pursuant to a compromise, even though the attorney who agreed may have lacked actual authority to do so, in the absence of a showing of injury to the party seeking to set aside the judgment.[65] An amendment of a consent judgment may be set aside on proof that the amendment was made without consent of the party concerned.[66] It has been held that a judgment affecting the rights of persons under disability, entered by consent of representatives of such persons, may be set aside if found prejudicial to their interests.[67]

Fraud, collusion, mistake, unavoidable casualty, or usury. A consent judgment may be opened or va-

54. N.C.—Painter v. Norfolk & W. R. Co., 57 S.E. 151, 144 N.C. 436.
Tex.—Adams v. Beaumont First Nat. Bank, Civ.App., 52 S.W. 642.

Disregard of petitioner's wishes

Fact that consent judgment by insane petitioner's counsel in prior litigation was against petitioner's wishes is not ground for setting aside prior adjudication in absence of fraud, it not being presumed that an insane person is capable of giving proper direction as to conduct of litigation, and no more appearing from the application to set aside the consent judgment than that petitioner's guardian ad litem may have been negligent.—Gray v. Georgia Loan & Trust Co., 143 S.E. 501, 166 Ga. 445.

55. Tex.—Baldwin v. Stamford State Bank, Civ.App., 82 S.W.2d 701, error refused.

56. N.Y.—Cohen v. Orlove, 202 N.Y.S. 517, 207 App.Div. 603.
Wis.—Duras v. Keller, 186 N.W. 149, 176 Wis. 88.

57. Pa.—Automobile-Securities Co. v. Wilson, 151 A. 889, 301 Pa. 232.

Payment of whole proceeds to one plaintiff

Fact that entire amount of settlement of judgment was paid to use-plaintiff, although nominal plaintiff claimed part, was held not to require setting judgment aside, where settlement was not challenged but only distribution made thereunder by the attorney to whom defendant had properly paid over the money.—Automobile Securities Co. v. Wilson, 151 A. 889, 301 Pa. 232.

58. Ind.—Barnes v. Smith, 34 Ind. 516.

59. Ala.—National Bread Co. v. Bird, 145 So. 462, 226 Ala. 40.
Colo.—Lewis v. Vache, 20 P.2d 554, 92 Colo. 358.
Tenn.—Cummins v. Woody, 152 S.W. 2d 246, 177 Tenn. 636—Jones v. Williamson, 5 Cold. 371.
W.Va.—Dwight v. Hazlett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102.
34 C.J. p 420 note 81.

60. Ky.—Sebree v. Sebree, 99 S.W. 282, 30 Ky.L. 670.
34 C.J. p 420 note 82.

Ex parte extension of time

Judgment granted ex parte extending time for payment under consent decree was void and could be vacated at subsequent term.—Baker v. McCord, 162 S.E. 110, 173 Ga. 819.

61. Ala.—National Bread Co. v. Bird, 145 So. 462, 226 Ala. 40.
Colo.—Lewis v. Vache, 20 P.2d 554, 92 Colo. 358.
Okl.—Walker v. Gulf Pipe Line Co., 226 P. 1046, 102 Okl. 7.
34 C.J. p 420 note 81 [c].

Seasonable application

Judgment pursuant to compromise by attorney without authority of client may be vacated on seasonable application.—Dwight v. Hazlett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102.

If the parties can be put in statu quo, a consent judgment entered on agreement of the attorneys may be set aside on the ground that the attorney of applicant acted against the express instructions of his client.—City of Medford v. Corbett, 20 N.E. 2d 402, 302 Mass. 573—Dalton v. West End St. Ry. Co., 34 N.E. 261, 159 Mass. 221.

62. Ky.—Karnes v. Black, 215 S.W. 191, 185 Ky. 410, 414.

63. Ky.—De Charette v. St. Matthews Bank & Trust Co., 283 S.W. 410, 214 Ky. 400, 50 A.L.R. 34.

64. Mich.—Holmes v. Heywood, 1 Mich.,N.P., 292.
34 C.J. p 420 note 81 [b].

65. Tex.—Commercial Credit Co. v. Ramsey, Civ.App., 138 S.W.2d 191, error dismissed, judgment correct.

66. N.C.—Deitz v. Bolch, 183 S.E. 384, 209 N.C. 203.
Consent of all parties as prerequisite to amendment of consent judgment see supra § 329.

67. Tenn.—Ledford v. Johnson City Foundry & Machine Co., 88 S.W.2d 804, 169 Tenn. 430.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, Civ.App., 130 S.W.2d 1048, reversed on other grounds 156 S.W.2d 265, 138 Tex. 1.

Workmen's compensation

Where statutory provisions state that no settlement or compromise shall be made except on the terms provided by the statute in workmen's compensation cases, the employer and employee cannot make a settlement except on the statutory terms, and a consent judgment entered on agreement of counsel and not in accordance with the statute may be set aside, and in fact should be set aside for noncompliance with the statute even if it is rendered after proof and a full hearing.—Ledford v. Johnson City Foundry & Machine Co., 88 S.W.2d 804, 169 Tenn. 430.

cated on the ground of collusion[68] or fraud,[69] as where defendant was tricked or misled by false representations,[70] but may not be set aside on this ground where the facts fail to disclose fraud of a remediable character.[71]

Generally speaking, a trial court may set aside or vacate a consent judgment on the ground of a mistake of fact,[72] at least if mutual in character,[73] or shared by the court,[74] but it may not vacate a consent judgment on the basis of a mistake of law.[75] Where the party or his authorized counsel consents to entry of judgment with full knowledge of the facts, ordinarily it may not be set aside or vacated on the alleged ground of inadvertence or mistake,[76] surprise or excusable neglect,[77] or unavoidable casualty and misfortune;[78] but it has been held ground for vacation of a consent judgment that it resulted from a mistake of fact arising from excusable neglect,[79] or that defendant was prevented from appearing or defending by unavoidable casualty.[80] While usury has been held a ground for vacating a consent judgment,[81] it has also been held that consenting to judgment waives the defense of usury precluding defendant from having judgment vacated for usury as matter of right.[82]

c. Procedure and Relief

(1) In general
(2) Time for application
(3) Relief; effect of setting judgment aside

(1) In General

Ordinarily, vacation of a consent judgment may be sought by motion or petition, although an independent action may lie in some jurisdictions. The attack on the judgment by action or motion should be on notice to the other party and the burden rests on the plaintiff or movant to show grounds for the relief sought.

As a general rule a consent judgment may be vacated on a petition or motion,[83] addressed to the court which entered it.[84] Under some practice it has been held that ordinarily the proper procedure to vacate a consent judgment is by independent action,[85] but that, when a party to an action denies that he gave consent to the judgment as entered,

68. Ala.—Louisville & N. R. Co. v. Bridgeforth, 101 So. 807, 20 Ala. App. 326.
34 C.J. p 419 note 77.

69. U.S.—U. S. v. Radio Corporation of America, D.C.Del., 46 F. Supp. 654, appeal dismissed 63 S. Ct. 851, 318 U.S. 796, 87 L.Ed. 1161.
Ala.—Louisville & N. R. Co. v. Bridgeforth, 101 So. 807, 20 Ala. App. 326.
Ky.—Honaker v. Honaker, 101 S.W.2d 679, 267 Ky. 129.
34 C.J. p 419 note 76.

70. Tex.—Cetti v. Dunman, 64 S.W. 787, 26 Tex.Civ.App. 433.
34 C.J. p 420 note 80.

71. Ark.—Haydon v. Haydon, 158 S.W.2d 689, 203 Ark. 1147.
N.J.—Mathews v. American Tobacco Co., 23 A.2d 301, 130 N.J.Eq. 470, affirmed 37 A.2d 99, 135 N.J.Eq. 11.
N.Y.—Evans v. Stein, 59 N.Y.S.2d 544, second case, affirmed 59 N.Y.S. 2d 625, second case, 269 App.Div. 1052, appeal denied 60 N.Y.S.2d 288, 270 App.Div. 810.
Tex.—Clark v. W. L. Pearson & Co., Civ.App., 26 S.W.2d 382, affirmed 39 S.W.2d 27, 121 Tex. 34.

Elements of remediable fraud
Consent judgment will not be set aside for fraud, unless it is shown that material misrepresentation of material fact was made by party who knew, or should have known, of its falsity, for purpose of having misrepresentation relied on by prejudiced party who had right to, and in good faith did, rely thereon.—Harrel v. Yonts, 113 S.W.2d 426, 271 Ky. 783—Boone v. Ohio Valley Fire & Marine Ins. Co.'s Receiver, 55 S.W.2d 374, 246 Ky. 489.

"Intrinsic" fraud insufficient
Tex.—O'Meara v. O'Meara, Civ.App., 181 S.W.2d 891, error refused.

72. Iowa.—**Corpus Juris cited in** Hall v. District Court of Taylor County, 215 N.W. 606, 607, 206 Iowa 179.
R.I.—Everett v. Cutler Mills, 160 A. 924, 52 R.I. 330.
34 C.J. p 419 note 79.

73. Iowa.—Hall v. District Court of Taylor County, 215 N.W. 606, 206 Iowa 179.

Mutual mistake not shown
Minn.—Rusch v. Prudential Ins. Co. of America, 266 N.W. 86, 197 Minn. 81.

74. R.I.—Everett v. Cutler Mills, 160 A. 924, 52 R.I. 330.

75. Iowa.—Steiner v. Lenz, 81 N.W. 190, 110 Iowa 49.
La.—Doll v. Doll, 19 So.2d 249, 206 La. 550.
N.C.—King v. King, 35 S.E.2d 893.

Mutual mistake
Doubt has been expressed as to whether a mistake of law is sufficient ground for vacation of a consent judgment, even though the mistake was mutual in character.—The Amaranth, C.C.A.N.Y., 68 F.2d 893.

76. S.C.—Wilson v. Wilson, 150 S. E. 897, 153 S.C. 472—Dixon v. Floyd, 53 S.E. 167, 73 S.C. 202.

77. N.C.—Morris v. Patterson, 105 S.E. 25, 180 N.C. 484—Hairston v. Garwood, 31 S.E. 653, 123 N.C. 345.
S.C.—Wilson v. Wilson, 150 S.E. 897, 153 S.C. 472—Dixon v. Floyd, 53 S.E. 167, 73 S.C. 202.

78. Iowa.—Mains v. Des Moines Nat. Bank, 85 N.W. 758, 113 Iowa 395.

79. S.C.—Maybank Fertilizer Co. v. Jeffcoat, 127 S.E. 835, 131 S.C. 418.

Confusion with different case
Affidavit showing that defendant's attorney had consented to judgment without contest under mistake due to confusion of facts with those of similar case was held to warrant finding of excusable neglect inuring to benefit of client, and warranting court in vacating judgment.—Maybank Fertilizer Co. v. Jeffcoat, supra.

80. Ark.—Union Sav. Building & Loan Ass'n v. Grayson, 76 S.W.2d 963, 190 Ark. 62.

81. Pa.—Marr v. Marr, 20 A. 592, 110 Pa. 60.

82. Wash.—Arnot v. Fischer, 295 P. 1117, 161 Wash. 67.

83. N.Y.—Fred Medart Mfg. Co. v. Rafferty, 276 N.Y.S. 678, 243 App. Div. 632.
34 C.J. p 419 note 60.

84. Ky.—Hargis v. Hargis, 66 S.W. 2d 59, 252 Ky. 198—Boone v. Ohio Valley Fire & Marine Ins. Co.'s Receiver, 55 S.W.2d 374, 246 Ky. 489.

Special term
N.Y.—Whitson v. Bates, 283 N.Y.S. 663, 246 App.Div. 726.

85. N.C.—King v. King, 35 S.E.2d 893—Weaver v. Hampton, 161 S.E. 480, 201 N.C. 798.
34 C.J. p 419 note 61.

the proper procedure in attacking such judgment is by motion in the cause.[86] Where a motion to set aside the judgment is based solely on the moving party's want of consent, he may not attack the court's jurisdiction in a motion for rehearing after denial of the original motion to set aside the judgment.[87] Where the court on its own motion orders a case dismissed "as to personal judgment of defendant," there is a clerical misprision not precluding the court from entering a personal consent judgment.[88]

An action or application to set aside or vacate a consent judgment should be instituted on due notice to the other party,[89] and a motion or petition in the cause should show adequate grounds for vacating the judgment,[90] and under some practice should be supported by affidavit, or sworn to by applicant or his representative,[91] and then supported by proof.[92] It has been held, however, that, where allegations of a petition to vacate a consent judgment are undenied, they may be accepted as true.[93] One seeking to set aside or vacate a consent judgment against him should sufficiently show a meritorious defense,[94] and the burden rests on him to prove his allegations as to the grounds for the relief sought.[95] The judge need not invoke findings of fact by a jury on his own motion where no such motion is made by the parties, but on the contrary both counsel appear and enter on a trial of the application before the court,[96] and it has been held that, where motion is made to vacate the judgment for lack of consent, the court may determine the fact of consent without allowing a jury trial as matter of right.[97]

(2) Time for Application

An application to set aside or vacate a consent judgment should be made in due time and ordinarily during the term at which the judgment was entered, although under certain circumstances the application may properly be made after the term.

A motion or other application to vacate a consent judgment should be timely made,[98] as within the

86. N.C.—King v. King, 35 S.E.2d 893—Boucher v. Union Trust Co., 190 S.E. 226, 211 N.C. 377—Cason v. Shute, 189 S.E. 494, 211 N.C. 195.
Grounds for opening or vacating consent judgment see supra § 330 b.
Incapacity to consent
Where judgment was entered on compromise in action for negligence, and plaintiff did not consent, or was incapable of consenting, proper procedure in attacking judgment would be by motion in the cause.—Gibson v. Gordon, 197 S.E. 135, 213 N.C. 666.

87. Mo.—Thomas v. Craghead, 58 S.W.2d 281, 332 Mo. 211, transferred, see, App., 22 S.W.2d 1057.

88. Ky.—Boone v. Ohio Valley Fire & Marine Ins. Co.'s Receiver, 55 S.W.2d 374, 246 Ky. 489.

89. N.C.—Board of Education of Sampson County v. Board of Com'rs of Sampson County, 134 S.E. 852, 192 N.C. 274.
Tex.—Commercial Credit Co. v. Ramsey, Civ.App., 138 S.W.2d 191, error dismissed, judgment correct.
Actual party
Fact that party in whose name former suit had been brought was not made party to suit to set aside consent judgment in former suit was not ground for refusing to set such judgment aside, where such party had not been actual party to former suit, had no interest in subject matter, and obtained no benefit by judgment therein.—Willson v. Kuhn, Tex. Civ.App., 96 S.W.2d 128, error dismissed, rehearing denied 96 S.W.2d 236.

90. Ga.—Raines v. Lane, 31 S.E.2d 403, 198 Ga. 217.

91. Tex.—Commercial Credit Co. v. Ramsey, Civ.App., 138 S.W.2d 191, error dismissed, judgment correct.

92. Tex.—Commercial Credit Co. v. Ramsey, supra.

93. W.Va.—Dwight v. Hazlett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102.

94. Miss.—Cocke v. Wilson, 134 So. 686, 161 Miss. 1.
Meritorious defense generally see supra § 290.
Prima facie defense necessary
U.S.—The Amaranth, C.C.A.N.Y., 68 F.2d 893.
Facts on which defense is based
Allegation, or proof, simply that defendant has meritorious defense, is insufficient to obtain setting aside of judgment, but the facts constituting the meritorious defense must be set forth with sufficient detail to enable court to determine therefrom whether defense is meritorious.—Cocke v. Wilson, 134 So. 686, 161 Miss. 1.
Petition held defective
U.S.—The Amaranth, C.C.A.N.Y., 68 F.2d 893.

95. U.S.—Watson v. U. S., D.C.N.C., 34 F.Supp. 777.
34 C.J. p 419 note 74.
Prima facie showing
Tex.—Willson v. Kuhn, Civ.App., 96 S.W.2d 128, error dismissed, rehearing denied 96 S.W.2d 236.
Weight and sufficiency of evidence
(1) Evidence held sufficient to justify denial of application to open or vacate consent judgment.
D.C.—Torrens v. Proctor, 133 F.2d 25, 77 U.S.App.D.C. 55.
Pa.—Finn v. Fiedorowicz, Com.Pl., 31 Luz.Leg.Reg. 448.
(2) Evidence held sufficient to sustain the overruling of plaintiff's motion to strike defendants' motion to open up consent judgment.—Parish Bank & Trust Co. v. Wennerholm Bros., 39 N.E.2d 383, 313 Ill.App. 121.
(3) Evidence held to support finding that judgment establishing road was entered by consent of party moving to set it aside.—Thomas v. Craghead, 58 S.W.2d 281, 332 Mo. 211, transferred, see, App., 22 S.W.2d 1057.
Waiver
Where counsel impliedly consents that a judgment not conforming to the stipulation of the parties should be opened or modified in the event of a certain contingency as provided by the stipulation but not by the judgment, he thereby waives the necessity of any showing that the defect in the judgment was not the fault of the other party seeking to open it.—Midwest Refining Co. v. George, 7 P.2d 213, 44 Wyo. 25.

96. Ga.—Raines v. Lane, 31 S.E.2d 403, 198 Ga. 217.

97. N.C.—King v. King, 35 S.E.2d 893.

98. N.J.—Mathews v. American Tobacco Co., 37 A.2d 99, 135 N.J.Eq. 11.
Okl.—Walker v. Gulf Pipe Line Co., 226 P. 1046, 102 Okl. 7.
Tex.—Pendery v. Panhandle Refining Co., Civ.App., 169 S.W.2d 766, error refused—Sanders v. O'Connor, Civ. App., 98 S.W.2d 401, error dismissed.
Wis.—Amalgamated Meat Cutters & Butcher Workmen of N. A., A. F. of L., Local Union No. 73, v.

period prescribed by statute,[99] and may be denied for delay amounting to laches.[1] Where a motion to vacate a consent judgment is made within the period prescribed by statute, the court retains jurisdiction to consider and pass on the motion after expiration of such period.[2]

In accordance with the general rules discussed supra §§ 228–235, an application to set aside or vacate a consent judgment may be made at the same term in which the judgment was entered,[3] but ordinarily may not be made in vacation,[4] or at a subsequent term,[5] unless a sufficient excuse for the delay is shown,[6] or the ground for vacation is one available after the term.[7] There is authority, however, to the effect that the common-law rule limiting the control of the court over its judgments to the term at which they were rendered applies only to judgments in controversial cases and not to judgments entered by consent without contest.[8]

(3) Relief; Effect of Setting Judgment Aside

A consent judgment, if vacated, should be set aside in its entirety and as to all joint defendants. The effect of setting aside a consent judgment is to reinstate the former case.

If a consent judgment is set aside, it must be set aside in its entirety;[9] a party may not have it set aside as far as it is unfavorable to him, and claim the benefit of the favorable part;[10] and, where the judgment is against several joint defendants, if it is set aside as to part of them, it must be set aside as to all.[11] The fact that an order vacates a consent judgment, although the notice of motion asked merely for a modification, so that the order granted went beyond the relief asked by the motion, does not in itself constitute sufficient ground for vacating the order;[12] but on appeal from such an order the superior court may, in an otherwise proper case, reverse the order with instructions to the trial court to modify the consent judgment in compliance with the relief asked in the original motion.[13]

Where a consent judgment is set aside, the former case will be reinstated and the parties given the same rights as to the prosecution and defense thereof as they would have had before the consent judgment was entered, together with any additional right germane to the litigation.[14]

§ 331. Judgments on Offer and Acceptance

A judgment entered on offer and acceptance may be vacated on sufficient grounds, such as the absence of an authorized offer, or noncompliance with statutory requirements, but it may not be amended without consent of all parties.

In accordance with the general rules governing amendment and vacation of consent judgments, as discussed supra §§ 329–331, a judgment entered on acceptance of defendant's offer may be vacated on

Smith, 10 N.W.2d 114, 243 Wis. 390.
34 C.J. p 419 note 62.

99. Wis.—Amalgamated Meat Cutters & Butcher Workmen of N. A., A. F. of L., Local Union No. 73, v. Smith, supra.
34 C.J. p 419 note 63.

Period for review or appeal
Where statutory period for review of judgment entered under stipulation had elapsed before any motion to review was made, and time for appeal had passed and there was no claim of fraud, mistake, surprise, or excusable neglect, defendants were not entitled to have judgment set aside on ground that the stipulation was a contract for a penalty and unenforceable.—Amalgamated Meat Cutters & Butcher Workmen of N. A., A. F. or L., Local Union No. 73, v. Smith, supra.

Mutual mistake
A statute authorizing the court within one year after notice, in its discretion, to relieve a party from a judgment taken against him through his mistake refers to a unilateral mistake and does not control a motion to vacate a consent judgment for mutual mistake, which latter the court may vacate on motion after expiration of the statutory period.—Elsen v. State Farmers Mut. Ins. Co., 17 N.W.2d 652, 219 Minn. 315.

1. N.J.—Mathews v. American Tobacco Co., 37 A.2d 99, 135 N.J.Eq. 11.
Tex.—Pendery v. Panhandle Refining Co., Civ.App., 169 S.W.2d 766, error refused.
34 C.J. p 419 note 64.

Laches not shown
Minn.—Elsen v. State Farmers Mut. Ins. Co., 17 N.W.2d 652, 219 Minn. 315.

2. Cal.—Marston v. Rood, 144 P.2d 863, 62 Cal.App.2d 435.
3. Ohio.—Sponseller v. Sponseller, 144 N.E. 48, 110 Ohio St. 395.
34 C.J. p 419 note 65.
4. Ga.—O'Neal v. Neal Veneering Co., 143 S.E. 381, 166 Ga. 376.
5. U.S.—Mallinger v. U. S., C.C.A. Pa., 82 F.2d 705.
34 C.J. p 419 note 66.
6. Tex.—Lindsley v. Sparks, 48 S. W. 204, 20 Tex.Civ.App. 56.
34 C.J. p 419 note 67.
7. N.C.—People's Bank of Burnsville, 173 S.E. 345, 206 N.C. 323.
Ohio.—Sponseller v. Sponseller, 144 N.E. 48, 110 Ohio St. 395.

Jurisdiction and power after expiration of term generally see supra § 230.

Lack of consent in fact
Where defendant in purported consent judgment showed that she neither agreed, nor authorized anyone to agree, to the judgment, court, on defendant's motion after expiration of term, was held authorized to set aside such judgment.—People's Bank of Burnsville v. Penland, 173 S.E. 345, 206 N.C. 323.

8. Minn.—Elsen v. State Farmers Mut. Ins. Co., 17 N.W.2d 652, 219 Minn. 315.
9. N.C.—Edwards v. Sutton, 116 S. E. 163, 185 N.C. 102.
34 C.J. p 419 note 57.
10. Wash.—Connor v. Seattle, 144 P. 52, 82 Wash. 296.
11. N.C.—Glade Spring Bank v. McEwen, 76 S.E. 222, 160 N.C. 414, Ann.Cas.1914C 542.
Okl.—Outcalt v. Collier, 58 P. 642, 8 Okl. 473, 52 P. 738, 6 Okl. 615.
12. Cal.—Marston v. Rood, 144 P.2d 863, 62 Cal.App.2d 435.
13. Cal.—Marston v. Rood, supra.
14. Ga.—Davis v. Blakely First Nat. Bank, 78 S.E. 190, 139 Ga. 702, 46 L.R.A.,N.S., 750.

sufficient grounds.[15] Thus the judgment may be vacated if the offer of judgment was made without authority,[16] or the offer was not accepted in time,[17] or there was a noncompliance with statutory requirements.[18] A mistake of law is not sufficient ground for vacating the judgment.[19] However, a judgment entered on acceptance of defendant's offer ordinarily may not be changed without consent of all the parties.[20]

§ 332. Summary Judgments

A summary judgment on motion may be opened or vacated for good cause.

A summary judgment on motion may be opened or vacated for good cause shown.[21] A statutory provision relating to the opening and setting aside of judgments by default in actions does not, however, apply to judgments in summary proceedings.[22] Where defendant is permitted to file an amended answer, after plaintiff's motion for judgment has been sustained, such permission is, in effect, an informal setting aside of the order sustaining the motion.[23]

H. JUDGMENTS BY DEFAULT

§ 333. Opening, Amending, and Vacating Generally

A court has jurisdiction and power to amend, open, or vacate default judgments rendered by it during the term at which they are rendered, but not usually after expiration of the time prescribed by statute or at a subsequent term, although the latter rule is subject to some exceptions.

Subject to the rules of general application as to opening, amending, or vacating judgments, which are discussed supra §§ 228–235, a judgment by default may be amended or corrected in a proper case, at the instance of either party.[24] Likewise the power to open or to vacate a judgment extends to judgments rendered on default,[25] particularly under

15. Neb.—Becker v. Breen, 94 N.W. 614, 68 Neb. 379.
34 C.J. p 420 note 93.

16. N.Y.—Garrison v. Garrison, 67 How.Pr. 271—Bridenbecker v. Mason, 16 How.Pr. 203.

17. Neb.—Becker v. Breen, 94 N.W. 614, 68 Neb. 379.

18. Neb.—Becker v. Breen, supra.
34 C.J. p 420 note 96.

19. N.Y.—Walsh v. Empire Brick & Supply Co., 85 N.Y.S. 538, 90 App. Div. 498.
34 C.J. p 420 note 98.

20. N.Y.—Shepherd v. Moodhe, 44 N.E. 963, 150 N.Y. 183—Stillwell v. Stillwell, 30 N.Y.S. 961, 81 Hun 392, 24 N.Y.Civ.Proc. 124.

21. Idaho.—**Corpus Juris quoted in** Baldwin v. Anderson, 13 P.2d 650, 655, 52 Idaho 243.
34 C.J. p 420 note 2.

Modification held improper

Where, in action on bond indemnifying owner against liability for cost of building constructed by lessee, summary judgment was granted for amount of liens adjudicated to be due in mechanics' lien action, order reducing summary judgment to amount realized on sale of property in mechanics' lien foreclosure action was improper, since no new situation arose subsequent to entry of judgment which could not have been foreseen and pleaded as defense in action on bond.—755 Seventh Ave. Corporation v. Carroll, 194 N.E. 69, 266 N.Y. 157.

22. N.Y.—Cochran v. Reich, 46 N.Y. S. 441, 20 Misc. 593.
34 C.J. p 421 note 3.

23. Kan.—Fritts v. Reidel, 165 P. 671, 101 Kan. 68.

24. Ga.—Columbus Heating & Ventilating Co. v. Upchurch, 171 S.E. 180, 47 Ga.App. 673.
Kan.—Burris v. Reinhardt, 242 P. 143, 120 Kan. 32.
La.—Jackson v. Brewster, App., 169 So. 166.
Mo.—Faulkner v. F. Bierman & Sons Metal & Rubber Co., App., 294 S. W. 1019.
N.C.—Federal Land Bank of Columbia v. Davis, 1 S.E.2d 350, 215 N.C. 100.
Pa.—Brummer v. Linker, 196 A. 834, 329 Pa. 192.
Wis.—Parish v. Awschu Properties, 10 N.W.2d 166, 243 Wis. 269.
34 C.J. p 207 note 5.

Bringing in additional defendants

In action against individuals, where default judgment was entered against individuals, title and judgment were not amendable by bringing in such defendants as trustees and making them additionally liable as trustees without opportunity to defend as such.—Greater New York Export House v. Hurtig, 267 N.Y.S. 173, 239 App.Div. 183, appeal dismissed Greater New York Export House v. Peirson, 193 N.E. 290, 265 N.Y. 500.

Clerical error

Where docket entry for default judgment was dated and judgment was filed Monday, October 15, but judgment as written and recorded bore date of Sunday, October 14, by clerical error, nunc pro tunc order correcting date of judgment was not erroneous, as against contention that judgment could not be corrected since it was void because it was rendered on Sunday.—Hays v. Hughes, Tex.Civ.App., 106 S.W.2d 724, error refused.

Excessive judgment

(1) Trial court had authority to reduce default judgment on showing that judgment was for a sum in excess of the amount due.—Spikings v. Ellis, 8 N.E.2d 962, 290 Ill.App. 585.

(2) Court should correct default judgment to extent that it included unauthorized interest.—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632.

Relief unwarranted by complaint

Defendant is concluded by default decree only as far as it is supported by the allegations in complaint and, if it gives relief in excess of, or different from, that to which plaintiff is entitled under complaint, decree may be modified to conform to the allegations.—Federal Land Bank of Columbia v. Davis, 1 S.E.2d 350, 215 N.C. 100.

Where defendant appeared after entry of default judgment against her, the only relief to which plaintiff would be entitled under its motion to amend judgment would be such relief as might be granted as a matter of course.—Irving Trust Co. v. Seltzer, 40 N.Y.S.2d 451, 265 App.Div. 696.

25. Ala.—Marshall County v. Critcher, 17 So.2d 540, 245 Ala. 357—Drennen Motor Co. v. Patrick, 141 So. 681, 225 Ala. 36.
Cal.—Penland v. Goodman, 111 P.2d 913, 44 Cal.App.2d 14—Stuart v.

statutes expressly authorizing or regulating the opening or vacating of default judgments.[26] Accordingly, the court has power to open or vacate its default judgments during the term at which they are rendered,[27] and also to the extent provided for by statute, after expiration of the term;[28] but as a general rule the court has no power to grant relief after expiration of the time prescribed therefor by statute,[29] or, except as authorized by statute, after expiration of the term,[30] unless pursuant to

Alexander, 43 P.2d 557, 6 Cal.App. 2d 27.
Del.—Yerkes v. Dangle, Super., 33 A.2d 406.
Ill.—Jerome v. 5019-21 Quincy Street Bldg. Corporation, 45 N.E.2d 878, 317 Ill.App. 335, reversed on other grounds 53 N.E.2d 444, 385 Ill. 524—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.
Md.—Armour Fertilizer Works, Division of Armour & Co. of Del. v. Brown, 44 A.2d 753.
N.J.—New Jersey Cash Credit Corporation v. Zaccaria, 19 A.2d 448, 126 N.J.Law 334.
N.Y.—Baldwin v. Yellow Taxi Corporation, 225 N.Y.S. 423, 221 App. Div. 717, followed in Woodward v. Weekes, 241 N.Y.S. 842, 228 App. Div. 870.
Okl.—Thompson v. Hensley, 261 P. 931, 128 Okl. 139.
Pa.—Nixon v. Nixon, 198 A. 154, 329 Pa. 256.
24 C.J. p 887 note 78 [a]—34 C.J. p 421 notes 9, 10 [a].
Opening and vacating distinguished see supra § 265.

At chambers

Under statute a default judgment may be opened by the judge at chambers.—Whiteside v. Logan, 17 P. 34, 7 Mont. 373.

Failure of party to comply with statutes with regard to motions for new trial does not affect the jurisdiction of the court to set aside a default judgment.—Missouri Quarries Co. v. Brady, 219 P. 368, 95 Okl. 279.

In partition suit, where, at time of default by one defendant, mortgagee defendant had not answered but answer and cross petition of other defendants, which were subsequently adopted by defaulting defendant, were on file, and allegations of such pleadings, if true, would prevent partition and invalidate mortgagee's lien against defaulting defendant's interest, court had jurisdiction to set aside default.—Redding v. Redding, 284 N.W. 167, 226 Iowa 327.

Neglect or failure of attorneys

Statute relating to the general power of courts to permit amendments and relieve from defaults, etc., was held to refer only to default judgment taken through neglect or failure of an attorney.—Atwood v. Northern Pac. Ry. Co., 217 P. 600, 37 Idaho 554.

Spurious entry

A motion to set aside default judgment on ground that entry thereof was spurious invoked power and duty of court to expunge from record spurious entry rather than discretionary power incident to ordinary motion to set aside default judgment.—Du Pree v. Hart, 3 So.2d 183, 242 Ala. 690.

Judgment taken in defendant's absence on affidavit of proof was taken at trial within contemplation of statute authorizing new trial in cases tried by courts, provided application therefor is made within thirty days after judgment.—Nutley Finance Co. v. De Federicis, 150 A. 241, 8 N.J. Misc. 382.

26. Neb.—Strine v. Kaufman, 11 N. W. 867, 12 Neb. 423.
34 C.J. p 421 note 11.

Statutes were held inapplicable in absence of showing that case was marked in default or that judgment was rendered before movant filed motion to set aside judgment.—Guthrie v. Spence, 191 S.E. 188, 55 Ga.App. 669.

27. Ala.—Drennen Motor Co. v. Patrick, 141 So. 681, 225 Ala. 36.
Ark.—Supreme Lodge, Woodmen of Union v. Johnson, 17 S.W.2d 323, 179 Ark. 589.
Ky.—Guyan Machinery Co. v. Premier Coal Co., 163 S.W.2d 284, 291 Ky. 84—Zimmerman v. Segal, 155 S.W.2d 20, 288 Ky. 33—Farris v. Ball, 79 S.W.2d 7, 257 Ky. 683—Northcutt v. Nicholson, 55 S.W. 2d 659, 246 Ky. 641—Latham v. Commonwealth, 43 S.W.2d 44, 240 Ky. 826—Corbin Bldg. Supply Co. v. Martin, 39 S.W.2d 480, 239 Ky. 272—Farmers' Nat. Bank of Somerset v. Board of Sup'rs of Pulaski County, 8 S.W.2d 401, 225 Ky. 246—Hackney v. Charles, 295 S.W. 869, 220 Ky. 574—Sachs v. Hensley, 294 S.W. 1073, 220 Ky. 226.
Me.—Diplock v. Blasi, 149 A. 149, 128 Me. 528.
Mo.—Faulkner v. F. Bierman & Sons Metal & Rubber Co., App., 294 S. W. 1019.
Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 36 Ohio App. 481.
Okl.—Mays v. Board of Com'rs of Creek County, 23 P.2d 664, 164 Okl. 231.
Tex.—Johnson v. Henderson, Civ. App., 132 S.W.2d 458—Gann v. Hopkins, Civ.App., 119 S.W.2d 110.
W.Va.—Sigmond v. Forbes, 158 S.E. 677, 110 W.Va. 442.
34 C.J. p 207 note 5.
Time for application see infra § 337.
Showing of good cause not necessary see infra § 334 a.

28. Ark.—Hill v. Teague, 108 S.W. 2d 889, 194 Ark. 552.
Iowa.—Fulton v. National Finance & Thrift Corporation, 4 N.W.2d 406, 232 Iowa 378.
N.J.—Geithner v. Paechiana, 150 A. 240, 8 N.J.Misc. 384.
Ohio.—Dayton Morris Plan Bank v. Graham, App., 62 N.E.2d 98—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 36 Ohio App. 481.
24 C.J. p 887 note 78 [a] (2), (3).

During vacation

Under statute, the judge of a circuit court in vacation may, for errors appearing on the record, set aside a default judgment entered at the preceding term of court.—State v. O'Brien, 122 S.E. 919, 96 W.Va. 353.

29. Cal.—Washko v. Stewart, 112 P. 2d 306, 44 Cal.App.2d 311—Knox v. Superior Court in and for Riverside County, 280 P. 375, 100 Cal. App. 452.
Fla.—Cornelius v. State ex rel. Tampa West Coast Realty Co., 183 So. 754, 136 Fla. 506.
Idaho.—McAllister v. Erickson, 261 P. 242, 45 Idaho 211.
Mont.—Housing Authority of City of Butte v. Murtha, 144 P.2d 183, 115 Mont. 405.
N.J.—Steinhauser v. Friedman, 170 A. 630, 12 N.J.Misc. 167—New Jersey Cash Credit Corporation v. Linehan, 142 A. 650, 6 N.J.Misc. 740.
N.Y.—Gilmore v. De Witt, 10 N.Y.S. 2d 903, 256 App.Div. 1046.
Tex.—Ridley v. McCallum, 163 S.W. 2d 833, 139 Tex. 540.
Utah.—J. B. Colt Co. v. District Court of Fifth Judicial Dist. in and for Millard County, 269 P. 1017, 72 Utah 281.
34 C.J. p 260 note 1, p 430 note 92.

Judgment held final

Where defendants file no motion to set aside, and do not appeal from, default judgment perpetuating injunction against them by court having jurisdiction of parties and subject matter, judgment becomes final.—Miller-Link Lumber Co. v. Stephenson, Tex.Civ.App., 265 S.W. 215, affirmed Stephenson v. Miller-Link Lumber Co., Com.App., 277 S.W. 1039.

30. Ark.—Hill v. Teague, 108 S.W. 2d 889, 194 Ark. 552.
Ga.—Avery & Co. v. Sorrell, 121 S.E. 828, 157 Ga. 476, answers to certified questions conformed to 122 S.E. 638, 32 Ga.App. 41.

proceedings begun within the proper time and lawfully continued to the subsequent term.[31] The general rule is also subject to certain other exceptions;[32] and in at least one jurisdiction the court has power at any time to open a default judgment in order to give the parties a hearing or trial.[33] The only remedy after the term for irregular and erroneous, as distinguished from void, judgments is usually by new trial, review, writ of error, or appeal, as either may be appropriate and allowable by law, or by some other mode specially provided by statute.[34]

The authority to relieve a party in default, on application made in apt and proper time, is inherent in all courts of record exercising general jurisdiction,[35] and does not depend on statute unless expressly regulated thereby;[36] but, where the court is of special or limited jurisdiction, it cannot be exercised unless conferred by statute.[37]

In the exercise of a sound judicial discretion, courts may take off a default at any time before judgment,[38] or set aside a preliminary entry of default,[39] and a naked or simple default may be set aside at a subsequent term, on a proper showing.[40]

Interlocutory judgments. An interlocutory judg-

Ill.—National Lead Co. v. Mortell, 261 Ill.App. 332.
Ky.—Guyan Machinery Co. v. Premier Coal Co., 163 S.W.2d 284, 291 Ky. 84—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632.
Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 36 Ohio App. 481.
Or.—Marsters v. Ashton, 107 P.2d 981, 165 Or. 507.
Tex.—Ridley v. McCallum, 163 S.W. 2d 833, 139 Tex. 540.
34 C.J. p 212 note 13.

Court having jurisdiction of subject matter and of parties, and rendering default judgment where plea was on file, could not set aside judgment after term elapsed.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.

Inherent discretionary power

It has been held, however, that the common-law right to set aside a default judgment, either at term at which it is rendered, or at a subsequent term, is part of inherent discretionary power of a court of general jurisdiction.—Kelly v. Serviss, 39 A.2d 336, 114 Vt. 52—Greene v. Riley, 172 A. 633, 106 Vt. 319.

31. Ark.—Metz v. Melton Coal Co., 47 S.W.2d 803, 185 Ark. 486.
Ky.—Riggs v. Ketner, 187 S.W.2d 287, 299 Ky. 754.
34 C.J. p 214 note 13.

Nonpayment of appearance fee within term

Where defendant presented petition to vacate judgment within term and defendant's appearance fee was paid after term, and hearing on petition and amendment was postponed by series of continuances without any break in continuity, court had jurisdiction thereafter to vacate judgment, notwithstanding appearance fee required by statute had not been paid when petition was presented and within term, since statute requiring appearance fee did not require defendant to pay fee until court allowed defendant to come into case and defend.—Wolf v. Proviso Hospital Ass'n, 33 N.E.2d 632, 309 Ill. App. 479.

County court

Under some statutes, however, a county court's order continuing to next term motion to set aside default judgment is void, and motion to set aside default judgment, not acted on before adjournment of term at which made, is discharged by operation of law, and, in effect, overruled.—Motor Inv. Co. v. Killman, Tex.Civ.App., 43 S.W.2d 633.

32. Utah.—Park v. Higbee, 24 P. 524, 6 Utah 414.
34 C.J. p 215 note 16—p 216 note 24.

33. Pa.—Richey v. Gibboney, 34 A. 2d 913, 154 Pa.Super. 1—Dormont Motors v. Hoerr, 1 A.2d 493, 132 Pa.Super. 567—Rome Sales & Service Station v. Finch, 183 A. 54, 120 Pa.Super. 402—Horrocks v. White, 94 Pa.Super. 413—Rudolph v. Matura, Com.Pl., 27 Del.Co. 521.
34 C.J. p 212 note 12 [d], p 431 note 97 [a].

34. Ky.—Guyan Machinery Co. v. Premier Coal Co., 163 S.W.2d 284, 291 Ky. 84.
Tex.—Ridley v. McCallum, 163 S.W. 2d 833, 139 Tex. 540.
34 C.J. p 215 note 15.

35. Ala.—Sovereign Camp, W. O. W. v. Gay, 104 So. 895, 20 Ala.App. 650, reversed on other grounds 104 So. 898, 213 Ala. 5.
Ark.—Supreme Lodge, Woodmen of Union v. Johnson, 17 S.W.2d 323, 179 Ark. 589.
Ky.—Zimmerman v. Segal, 155 S.W. 2d 20, 288 Ky. 33—Farris v. Ball, 79 S.W.2d 7, 257 Ky. 683—Northcutt v. Nicholson, 55 S.W.2d 659, 246 Ky. 641—Latham v. Commonwealth, 43 S.W.2d 44, 240 Ky. 826—Corbin Bldg. Supply Co. v. Martin, 39 S.W.2d 480, 239 Ky. 272—Hackney v. Charles, 295 S.W. 869, 220 Ky. 574—Sachs v. Hensley, 294 S.W. 1073, 220 Ky. 226.
N.Y.—Baldwin v. Yellow Taxi Corporation, 225 N.Y.S. 423, 221 App. Div. 717, followed in Woodward v. Weekes, 241 N.Y.S. 842, 228 App. Div. 870.
N.D.—Ellison v. Baird, 293 N.W. 793, 70 N.D. 226—Odland v. O'Keeffe Implement Co., 229 N.W. 923, 59 N.D. 335.
Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 36 Ohio App. 481.
Tex.—Johnson v. Henderson, Civ. App., 132 S.W.2d 458.
34 C.J. p 252 note 72, p 421 note 12.
Inherent power of court over judgments generally see supra §§ 228—235.

36. Ky.—Farris v. Ball, 79 S.W.2d 7, 257 Ky. 683—Northcutt v. Nicholson, 55 S.W.2d 659, 246 Ky. 641—Latham v. Commonwealth, 43 S.W.2d 44, 240 Ky. 826—Corbin Bldg. Supply Co. v. Martin, 39 S.W.2d 480, 239 Ky. 272—Hackney v. Charles, 295 S.W. 869, 220 Ky. 574.
34 C.J. p 253 note 76, p 254 note 77.

Inadvertent or improvident judgment

A trial court, entering default judgment through inadvertence or improvidence, has power, independently of statute, to correct such mistake by amending or setting aside judgment, as such action presents no question of judicial review on merits.—Phillips v. Trusheim, 156 P. 2d 25, 25 Cal.2d 913.

37. Or.—American Building & Loan Ass'n v. Fulton, 28 P. 636, 21 Or. 492.
34 C.J. p 421 note 14.

Rule to show cause why judgment of nonsuit by default should not be opened is a supreme court issue, and circuit court judge has no jurisdiction to hear and determine such a rule.—Giordano v. Asbury Park & Ocean Grove Bank, 129 A. 202, 3 N.J.Misc. 554, affirmed 134 A. 915, 103 N.J.Law 171.

38. Mass.—Cohen v. Industrial Bank & Trust Co., 175 N.E. 78, 274 Mass. 498.

39. La.—Wilcox v. Huie, 18 La. 426.
34 C.J. p 190 note 65.

40. Iowa.—Weinhart v. Meyer, 247 N.W. 811, 215 Iowa 1317.

ment by default remains in the breast of the court until it is made final, and may, for good cause shown, be set aside at any time, even at a subsequent term, before the damages are assessed, or final judgment is rendered.[41]

Void judgments. Subject to any existing statutory provisions, where a default judgment is entirely void for want of jurisdiction, the power to vacate it or set it aside is not limited to the term at which it was rendered or otherwise, but may be exercised at a succeeding term, or at any time.[42]

Jurisdiction of particular courts and judge. Under some statutes, a judge is without power to set aside a default judgment entered by another judge unless the latter is absent or unable to act,[43] but generally the power to open or set aside default judgments is inherent in the court, not in the judge,[44] and the fact that a writ of inquiry after default was executed before another division of the court presided over by a different judge is immaterial.[45] The judge presiding in the division in which the action was pending may, in the absence of rules specifically prohibiting such procedure, order the hearing on application to vacate the default to be before the judge, then presiding in another division, who made the default order.[46] Where a default judgment rendered in the court of one county was opened on petition of one defendant who had the cause transferred to the court of another county on motion for change of venue, a codefendant's subsequent petition to open the judgment is properly filed in the court to which the cause had been transferred rather than in the court in which the default judgment was originally rendered.[47] The mere docketing of a district court judgment in common pleas court does not deprive the former of jurisdiction thereof to the extent of vacating it for want of jurisdiction over the person of defendant.[48] When authorized by statute, a default judgment rendered by the clerk of court may be vacated by the clerk or, on appeal from the clerk, by the presiding judge.[49]

Waiver. A person who ordinarily would be entitled to apply for the vacation of a default judgment may waive the right to such relief, or be estopped to ask for it, where he submits to and ratifies the judgment by participating in the further proceedings in the action.[50]

§ 334. Right to and Grounds for Opening or Vacating

a. In general
b. Invalidity or irregularity of judgment
c. Fraud
d. Agreement with, or statement by, party taking default or his counsel
e. Statement or order of judge or clerk
f. Defense to action
g. Error in law
h. Error or mistake of fact
i. Objections as to parties

41. Mo.—O'Connell v. Dockery, App., 102 S.W.2d 748—Ornellas v. Moynihan, App., 16 S.W.2d 1007.
34 C.J. p 216 note 30, p 422 notes 19, 20.

42. D.C.—Ray v. Bruce, Mun.App., 31 A.2d 693.
Ill.—Lewis v. West Side Trust & Savings Bank, 36 N.E.2d 573, 377 Ill. 384.
Minn.—Pugsley v. Magerfleisch, 201 N.W. 323, 161 Minn. 246.
N.J.—New Jersey Cash Credit Corporation v. Zaccaria, 19 A.2d 448, 126 N.J.Law 334—Westfield Trust Co. v. Cherry, 183 A. 165, 116 N.J. Law 190.
Or.—Mutzig v. Hope, 158 P.2d 110.
Utah.—Park v. Higbee, 24 P. 524, 6 Utah 414.
34 C.J. p 217 note 32, p 219 note 33, p 220 note 46.
Invalidity as ground for vacating default judgment see infra § 334 b.
In California
(1) The court has power at any time on motion or on the court's own motion to vacate a judgment void on its face.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221.
(2) The court has power to vacate a judgment not void on the face of the judgment roll, but void in fact for want of jurisdiction of the person of the defendant by reason of nonservice of process on such defendant, independently of statute, provided motion is made within a reasonable time.—In re Estrem's Estate, 107 P.2d 36, 16 Cal.2d 563—Penland v. Goodman, 111 P.2d 913, 44 Cal.App.2d 14.

43. Mich.—Jageriskey v. Kelemen, 193 N.W. 208, 222 Mich. 575.

44. Ala.—Ex parte Richerzhagen, 113 So. 85, 216 Ala. 262.
Power to amend, open, or vacate judgments generally see supra § 235.
Judge sitting in motion part has power to open a default taken after a denial by the trial judge of a request for an adjournment.—Dressler v. Baron, 201 N.Y.S. 683.

45. Ala.—Ex parte Richerzhagen, 113 So. 85, 216 Ala. 262.

46. Colo.—Koin v. Mutual Ben. Health & Accident Ass'n, 41 P.2d 306, 96 Colo. 163.

47. Ind.—State ex rel. Karsch v. Eby, 33 N.E.2d 336, 218 Ind. 431.

48. N.J.—Andersen v. Independent Order of Foresters, 126 A. 631, 98 N.J.Law 648.

49. N.C.—Gunter v. Dowdy, 31 S.E. 2d 524, 224 N.C. 522—Dunn v. Jones, 142 S.E. 320, 195 N.C. 354—Acme Mfg. Co. v. Kornegay, 142 S.E. 224, 195 N.C. 373—Page Trust Co. v. Pumpelly, 132 S.E. 594, 191 N.C. 675.

50. N.C.—Burke v. Stokely, 65 N.C. 569.
34 C.J. p 363 note 36.
Error not waived
Error in awarding actual and punitive damages by default without aid of jury on unliquidated demand in slander action was not waived where defendant filed motion to set aside judgment on two jurisdictional grounds, and generally for an order opening the judgment and for permission to answer, and motion was refused on the two jurisdictional grounds, but was in effect granted on remaining grounds.—Nettles v. MacMillan Petroleum Corp., 37 S.E. 2d 184, 208 S.C. 81.

j. Objections as to pleadings
k. Ignorance or illiteracy
l. Absence of party or counsel
m. Illness or death
n. Mistake, inadvertence, surprise, excusable neglect, casualty, or misfortune
o. Other grounds

a. In General

An application to open a default judgment will ordinarily be granted where a legal excuse is presented and the default suffered was neither willful nor deliberate; but the party seeking to be relieved must show a good excuse for failing to appear or plead in due season unless the judgment is void or irregularly entered, or, according to some authority, unless the application is made during the term at which the judgment is rendered.

In accordance with the usual rules, as discussed supra §§ 266–281, as to the grounds on which judgments may be opened or vacated generally, and subject to the rules, as considered infra § 336, relating to the existence of a meritorious defense, an application to open a default judgment will be granted where a legal excuse for unreadiness to proceed to trial is presented and where the default suffered was neither willful nor deliberate.[51] A default judgment which has resulted in no prejudice to movant, however, will not be set aside,[52] and the court may refuse on defendant's motion to vacate a default judgment where plaintiff would suffer prejudice therefrom and an injustice would be done.[53] Each case must depend on its own par-

51. Cal.—Grace Corset Co. v. Brown Bros., 263 P. 234, 203 Cal. 199—Waybright v. Anderson, 253 P. 148, 200 Cal. 374.
Fla.—Coggin v. Barfield, 8 So.2d 9, 150 Fla. 551.
Ill.—Hogan v. Ermovick, 166 N.E. 503, 335 Ill. 181.
Iowa.—Allemang v. White, 298 N.W. 658, 230 Iowa 526—Tate v. Delli, 269 N.W. 871, 222 Iowa 635.
Ky.—Vanover v. Ashley, 183 S.W.2d 944, 298 Ky. 722—Carr Creek Community Center v. Home Lumber Co., 125 S.W.2d 777, 276 Ky. 840—Welch v. Mann's Ex'r, 88 S.W. 2d 1, 261 Ky. 470—Farris v. Ball, 79 S.W.2d 7, 257 Ky. 683.
La.—Surgi v. McDonough Motor Express, App., 187 So. 693.
Minn.—Pilney v. Funk, 8 N.W.2d 792, 212 Minn. 398—Tiden v. Shurstead, 254 N.W. 617, 191 Minn. 518.
Mo.—Leis v. Massachusetts Bonding & Insurance Co., App., 125 S.W.2d 906—Anspach v. Jansen, 78 S.W.2d 137, 229 Mo.App. 321.
Mont.—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332.
N.J.—Ross v. C. D. Mallory Corporation, 37 A.2d 766, 132 N.J.Law 1—Shaw v. Morris, Sup., 146 A. 196—Kenter Co. v. Errath, 32 A. 2d 592, 21 N.J.Misc. 214.
N.Y.—Hilton v. Mack, 15 N.Y.S.2d 187, 257 App.Div. 709, appeal dismissed Hilton v. Gaston, 24 N.E.2d 506, 281 N.Y. 881—Kelly v. Braunschweig, 286 N.Y.S. 505, 247 App. Div. 809—Fuller & Robinson Co. v. New York State Normal College Alumni Ass'n, 285 N.Y.S. 108, 246 App.Div. 884—G. H. Crandall Co. v. Shanley, 280 N.Y.S. 918, 245 App. Div. 787—In re Schroeder's Will, 280 N.Y.S. 905, 245 App.Div. 762—Hogan v. Johnson, 272 N.Y.S. 113, 241 App.Div. 914—Allen v. Lake, 201 N.Y.S. 882, 207 App.Div. 886—Decatur Contracting Co. v. Edward S. Murphy Bldg. Co., 2 N.Y.S.2d 970, 166 Misc. 614—Watsky v. 212th St. Realty Corporation, 252 N.Y.S. 533, 141 Misc. 312—210 West Fifty-Sixth Street Co. v. Pantinakis, 211 N.Y.S. 851, 125 Misc. 762—Martin v. Reiber, 61 N.Y.S.2d 473—Arlene Furs v. Kurtz, 53 N.Y.S.2d 884—Kefer v. Gunches, 48 N.Y.S.2d 767—Valerioti v. Brooklyn & Queens Transit Corporation, 22 N.Y.S.2d 82.
N.C.—Carter v. Anderson, 181 S.E. 750, 208 N.C. 529—Dunn v. Jones, 142 S.E. 330, 195 N.C. 354.
N.D.—Mantel v. Pickle, 218 N.W. 605, 56 N.D. 568—Goddard v. Great Northwest Land Co., 195 N.W. 656, 50 N.D. 357.
Okl.—Wade v. Farmers Union Co-op. Royalty Co., 103 P.2d 511, 187 Okl. 402—Halliburton v. Illinois Life Ins. Co., 40 P.2d 1086, 170 Okl. 360—Standard v. Fisher, 35 P.2d 878, 169 Okl. 18—First Nat. Bank v. Kerr, 24 P.2d 985, 165 Okl. 16—Claussen v. Amberg, 249 P. 330, 119 Okl. 187—Slyman v. State, 228 P. 979, 102 Okl. 241—Hoffman v. Deskins, 221 P. 37, 94 Okl. 177.
Or.—Irwin v. Klamath County, 223 P. 736, 110 Or. 374.
Pa.—Atkins v. Canadian SKF Co., 45 A.2d 28, 353 Pa. 312—Quaker City Chocolate & Confectionery Co. v. Warnock Bldg. Ass'n, 32 A.2d 5, 347 Pa. 186—Emery v. Union County, 192 A. 645, 326 Pa. 479—Linker v. Fidelity-Philadelphia Trust Co., 28 A.2d 704, 150 Pa.Super. 440—Sturges v. Page, 163 A. 327, 106 Pa.Super. 520—Esterbrook v. Fisk Tire Co., 13 Pa.Dist. & Co. 514—Bott v. Aronimink Transp. Co., Com.Pl., 31 Del.Co. 172—Herring v. Abromitis, Com.Pl., 15 Northum.Leg.J. 213.
S.C.—Gaskins v. California Ins. Co., 11 S.E.2d 436, 195 S.C. 376—Ex parte Peden, 199 S.E. 693, 188 S.C. 456.
Tex.—Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 134 Tex. 388—Hubbard v. Tallal, 92 S.W.2d 1022, 127 Tex. 242—Foster v. Christensen, Com.App., 67 S.W.2d 246—Southwestern Specialty Co. v. Brown, Civ.App., 188 S.W.2d 1002, error refused—Motor Inv. Co. v. Killman, Civ.App., 43 S.W.2d 633—Chaney v. Allen, Civ.App., 25 S.W.2d 1115—Trigg v. Gray, Civ. App., 288 S.W. 1098—Hadad v. Ellison, Civ.App., 283 S.W. 193—Caldwell Oil Co. v. Hickman, Civ.App., 270 S.W. 214—Green v. Cammack, Civ.App., 248 S.W. 739.
Wash.—Johnston v. Medina Improvement Club, 116 P.2d 272, 10 Wash. 2d 44.
Wis.—Welfare Building & Loan Ass'n v. Breuer, 250 N.W. 846, 213 Wis. 97, followed in West Side Building & Loan Ass'n v. Anderson, 250 N.W. 849, 213 Wis. 104, East Side Mut. Building & Loan Ass'n v. Lock, 250 N.W. 849, 213 Wis. 105, Mortgage Discount Co. v. Continental Discount Corporation, 250 N.W. 849, 213 Wis. 106, West Side Building & Loan Ass'n v. Breuer, 250 N.W. 850, 213 Wis. 107, West Side Building & Loan Ass'n v. Continental Discount Corporation, 250 N.W. 850, 213 Wis. 108 and East Side Mut. Building & Loan Ass'n v. Thoreson, 250 N.W. 850, 213 Wis. 109.
34 C.J. p 423 note 34 [e].
Discretion of court see infra § 337.
Default judgment against convict in state prison who never had chance to present defense, and who offered affidavit stating good defense, was properly set aside.—Roy v. Tanguay, R.I., 131 A. 553.

52. Cal.—Antonsen v. San Francisco Container Co., 66 P.2d 716, 20 Cal.App.2d 214—McCauley v. Eyraud, 261 P. 760, 87 Cal.App. 121.
Ga.—Mulling v. First Nat. Bank, 118 S.E. 495, 30 Ga.App. 587.

53. Cal.—Hewins v. Walbeck, 141 P.2d 241, 60 Cal.App.2d 603.

ticular facts.[54]

A party seeking to be relieved against a judgment regularly taken against him by default must show a good excuse for failing to appear or plead in due season;[55] and that his own conduct with regard to the action has not been so reprehensible from a le-

Tex.—Borger v. Mineral Wells Clay Products Co., Civ.App., 80 S.W.2d 333.

54. Colo.—Carpenter-Liebhardt Fruit Co. v. Nelson, 234 P. 1067, 77 Colo. 175—Drinkard v. Spencer, 211 P. 379, 72 Colo. 396.
Ind.—United Taxi Co. v. Dilworth, 20 N.E.2d 699, 106 Ind.App. 627.
Iowa.—Hatt v. McCurdy, 274 N.W. 72, 223 Iowa 974—Tate v. Delli, 269 N.W. 871, 222 Iowa 635.
Mont.—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266—Pacific Acceptance Corporation v. McCue, 228 P. 761, 71 Mont. 99.
Okl.—Leslie v. Spencer, 42 P.2d 119, 170 Okl. 642—Morrell v. Morrell, 299 P. 866, 149 Okl. 187—Hale v. McIntosh, 243 P. 157, 116 Okl. 40—Boaz v. Martin, 225 P. 516, 101 Okl. 243.
Tex.—Sunshine Bus Lines v. Craddock, Civ.App., 112 S.W.2d 248, affirmed Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 134 Tex. 388.
Wash.—Moe v. Wolter, 235 P. 803, 134 Wash. 340, reheard 240 P. 565, 136 Wash. 696.
Wyo.—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509.

55. Ala.—Harnischfeger Sales Co. v. Burge, 129 So. 37, 221 Ala. 387—Griffin Burial Ass'n v. Snead, 149 So. 875, 25 Ala.App. 543.
Ariz.—Brown v. Beck, 169 P.2d 855—Postal Ben. Ins. Co. v. Johnson, 165 P.2d 173—Swissheim Gold Silver Co. v. Farwell, 124 P.2d 544, 59 Ariz. 162—Perrin v. Perrin, Properties, 86 P.2d 23, 53 Ariz. 121, 122 A.L.R. 621—Daniel v. Telford, 75 P.2d 373, 51 Ariz. 197—MacNeil v. Vance, 60 P.2d 1078, 48 Ariz. 187—Huff v. Flynn, 60 P.2d 931, 48 Ariz. 175—Michener v. Standard Accident Ins. Co., 47 P.2d 438, 46 Ariz. 66—Martin v. Sears, 44 P.2d 526, 45 Ariz. 414—Bryant v. Bryant, 14 P.2d 712, 40 Ariz. 519—Faltis v. Colachis, 274 P. 776, 35 Ariz. 78.
Ark.—Barringer v. Whitson, 168 S.W.2d 395, 205 Ark. 260.
Cal.—Beard v. Beard, 107 P.2d 385, 16 Cal.2d 645—Waybright v. Anderson, 253 P. 148, 200 Cal. 374—Elms v. Elms, App., 164 P.2d 936—Hughes v. Wright, 149 P.2d 392, 64 Cal.App.2d 897—Weinberger v. Manning, 123 P.2d 531, 50 Cal. App.2d 494—Equitable Life Assur. Soc. of U. S. v. Milstein, 93 P.2d 843, 34 Cal.App.2d 436—People's Finance & Thrift Co. of Porterville v. Phoenix Assur. Co., Limited, of London, 285 P. 857, 104 Cal.App. 334—Grey v. Milligan, 281 P. 656, 101 Cal.App. 328—Brooks v. Nelson, 272 P. 610, 95 Cal.App. 144—Williams v. McQueen, 265 P. 339, 89 Cal.App. 659—Fink & Schindler Co. v. Gavros, 237 P. 1083, 72 Cal. App. 688.
Colo.—Carpenter-Liebhardt Fruit Co. v. Nelson, 234 P. 1067, 77 Colo. 175.
D.C.—Bush v. Bush, 63 F.2d 134, 61 App D.C. 357.
Fla.—Streety v. John Deere Plow Co., 109 So. 632.
Ga.—Brown v. Hammond, 128 S.E. 66, 160 Ga. 446—Cavan v. A. M. Davis Co., 189 S.E. 684, 55 Ga.App. 200—Coker v. Elson, 151 S.E. 682, 40 Ga.App. 835—Sherman v. Stephens, 118 S.E. 567, 30 Ga.App. 509—Mulling v. First Nat. Bank, 118 S.E. 495, 30 Ga.App. 587.
Idaho.—Kingsbury v. Brown, 92 P. 2d 1053, 60 Idaho 464, 124 A.L.R. 149—Boise Valley Traction Co. v. Boise City, 214 P. 1037, 37 Idaho 20.
Ind.—Hoag v. Jeffers, 159 N.E. 753, 201 Ind. 249—Falmouth State Bank v. Hayes, 185 N.E. 662, 97 Ind.App. 68.
Iowa.—Genco v. Northwestern Mfg. Co., 214 N.W. 545, 203 Iowa 1390—Standard Oil Co. v. Marvill, 206 N.W. 37, 201 Iowa 614.
Kan.—Sparks v. Nech, 26 P.2d 586, 138 Kan. 843—Farmers' State Bank of Whiting v. Bokel, 235 P. 1053, 118 Kan. 491.
Ky.—Bond v. W. T. Congleton Co., 129 S.W.2d 570, 278 Ky. 829—Mergenthaler Linotype Co. v. Griffin, 10 S.W.2d 633, 226 Ky. 159.
La.—Cutrer v. Cutrer, App., 169 So. 807.
Md.—Armour Fertilizer Works, Division of Armour & Co. of Del. v. Brown, 44 A.2d 753—Dixon v. Baltimore American Ins. Co. of New York, 188 A. 215, 171 Md. 695—Wagner v. Scurlock, 170 A. 539, 166 Md. 284.
Mich.—Bartnik v. Samonek, 21 N.W. 2d 817, 313 Mich. 464—First Nat. Bank v. Pine Shores Realty Co., 241 N.W. 190, 257 Mich. 289.
Minn.—National Guardian Life Ins. Co. v. Schwartz Bros., 14 N.W.2d 347, 217 Minn. 288—Peterson v. W. Davis & Sons, 11 N.W.2d 800, 216 Minn. 60—Lodahl v. Hedburg, 238 N.W. 41, 184 Minn. 154—Marthaler Machine & Engineering Co. v. Meyers, 218 N.W. 127, 173 Minn. 606—Moot v. Searle, 206 N.W. 447, 165 Minn. 308.
Mo.—Allen v. Fewel, 87 S.W.2d 142, 337 Mo. 955—Quattrochi v. Quattrochi, App., 179 S.W.2d 757—O'Connell v. Dockery, App., 102 S.W.2d 748—Williams v. Barr, App., 61 S.W.2d 420—Karst v. Chicago Fraternal Life Ass'n, App., 22 S.W.2d 178—McFarland v. Lasswell, App., 282 S.W. 447.
Mont.—Madson v. Petrie Tractor & Equipment Co., 77 P.2d 1038, 106 Mont. 382—Middle States Oil Corporation v. Tanner-Jones Drilling Co., 235 P. 770, 73 Mont. 180.
N.J.—E. J. Lavino & Co. v. National Surety Co., 141 A. 663, 104 N.J.Law 475, 6 N.J.Misc. 478.
N.Y.—Perlmutter v. Gross, 40 N.Y.S. 2d 37, 266 App.Div. 694—Booraem v. Gibbons, 34 N.Y.S.2d 198, 263 App.Div. 665, appeal denied 35 N. Y.S.2d 717, 264 App.Div. 768—Centerville Creamery Co. v. Wexler, 30 N.Y.S.2d 232, 262 App.Div. 1055—Sobel v. Sobel, 4 N.Y.S.2d 194, 254 App.Div. 203, reargument denied 6 N.Y.S.2d 328, 254 App. Div. 836—Falvey v. Cornwall Terminal Co., 294 N.Y.S. 525, 209 App. Div. 448—Hogan v. Johnson, 272 N.Y.S. 113, 241 App.Div. 914—Goldstein v. Friedland, 271 N.Y.S. 236, 241 App.Div. 829—Utica Gas & Electric Co. v. Sherman, 208 N.Y.S. 594, 212 App.Div. 472—Zaza v. Zaza, 246 N.Y.S. 148, 138 Misc. 218—Schulte Leasing Corp. v. Friedman, 61 N.Y.S.2d 665—General Exchange Ins. Corporation v. Stern, 25 N.Y.S.2d 266—Pesner v. H. M. Goldman, Inc., 23 N.Y.S.2d 698.
N.C.—Johnson v. Sidbury, 34 S.E.2d 67, 225 N.C. 208—Hendricks v. Town of Cherryville, 153 S.E. 112, 198 N.C. 659—Dunn v. Jones, 142 S.E. 320, 195 N.C. 354—Buchanan v. B. & D. Coach Line, 140 S.E. 439, 194 N.C. 812—Crye v. Stoltz, 138 S.E. 167, 193 N.C. 802—Helderman v. Hartzell Mills Co., 135 S.E. 627, 192 N.C. 626.
N.D.—Croonquist v. Walker, 196 N. W. 108, 50 N.D. 388.
Ohio.—Horwitz v. Franklin, 171 N.E. 415, 35 Ohio App. 32—Balind v. Lanigan, 159 N.E. 103, 26 Ohio App. 149.
Okl.—Nolen v. Nolen, 167 P.2d 68—Franklin v. Hunt Dry Goods Co., 123 P.2d 258, 190 Okl. 296—Sautbine v. Jones, 18 P.2d 871, 161 Okl. 292—Morrell v. Morrell, 299 P. 866, 149 Okl. 187—New v. Elliott, 211 P. 1025, 88 Okl. 126.
Or.—Steeves v. Steeves, 9 P.2d 815, 139 Or. 261—Peterson v. Hutton, 284 P. 279, 132 Or. 252.
Pa.—Quaker City Chocolate & Confectionery Co. v. Warnock Bldg. Ass'n, 32 A.2d 5, 347 Pa. 186—Linker v. Fidelity-Philadelphia Trust Co., 28 A.2d 704, 150 Pa.Super. 440—Planters Nut & Chocolate Co. v. Brown-Murray Co., 193 A. 381, 128 Pa.Super. 239—Dippy

gal point of view as to bar relief,[56] and, if he fails to do so, the fact that he alleges a meritorious defense is immaterial.[57] It is otherwise where the judgment is void, or irregularly entered; in such cases applicant need show only invalidity of the judgment, or prejudicial or dangerous irregularity, to authorize or require the court to open or vacate it, and need not excuse the default,[58] and, as discussed infra § 336, it is not necessary in such case to show a meritorious defense. Furthermore, during the term at which a default judgment is rendered, the court may set it aside without first requiring the party to show good cause for being in default,[59] and it has been held that the trial court should ordinarily sustain a motion made at the same term to set aside the judgment and permit the cause to be heard on the merits,[60] particularly where no intervening rights have arisen between the entry of the judgment and the making of the mo-

v. Emerson C. Custis & Co., 176 A. 551, 116 Pa.Super. 274—Kanai v. Sowa, 167 A. 429, 109 Pa.Super. 426—Page v. Patterson, 161 A. 878, 105 Pa.Super. 438—Schwartz v. Stewart, 55 Pa.Dist. & Co. 633, 5 Lawrence L.J. 1—Risser v. Kaylor, Com.Pl., 54 Dauph.Co. 202—Commonwealth v. Dr. Crandall's Health School, Com.Pl., 51 Dauph. Co. 333—Klein v. Brookside Distilling Products Corp., Com.Pl., 47 Lack.Jur. 165—Moyer v. Moyer, Com.Pl., 34 Luz.Leg.Reg. 176.

R.I.—Vingi v. Vigliotti, 6 A.2d 719, 63 R.I. 9—Dimond v. Marwell, 190 A. 683, 57 R.I. 477.

S.C.—Baitary v. Gahagan, 12 S.E.2d 735, 195 S.C. 520—Rutledge v. Junior Order of United American Mechanics, 193 S.E. 434, 185 S.C. 142—Lucas v. North Carolina Mut. Life Ins. Co., 191 S.E. 711, 184 S.C. 119—Bissonette v. Joseph, 170 S.E. 467, 170 S.C. 407—Epworth Orphanage of South Carolina Conference v. Strange, 155 S.E. 594, 158 S.C. 379.

S.D.—Sohn v. Flavin, 244 N.W. 349, 60 S.D. 305—Squires v. Meade County, 239 N.W. 747, 59 S.D. 293—Connelly v. Franklin, 210 N.W. 785, 50 S.D. 512.

Tex.—Wear v. McCallum, 33 S.W.2d 723, 119 Tex. 473—Lawther Grain Co. v. Winniford, Com.App., 249 S.W. 195—Brown v. St. Mary's Temple No. 5 S. M. T. United Brothers of Friendship of Texas, Civ.App., 127 S.W.2d 531—Babington v. Gray, Civ.App., 71 S.W.2d 293—Aviation Credit Corporation of New York v. University Aerial Service Corporation, Civ.App., 59 S.W.2d 870, error dismissed—Peters v. Hubb Diggs Co., Civ.App., 35 S.W.2d 449, error dismissed—Hooser v. Wolfe, Civ.App., 30 S.W. 2d 728—Chaney v. Allen, Civ.App., 25 S.W.2d 1115—Griffin v. Burrus, Civ.App., 24 S.W.2d 805, affirmed Com.App., 24 S.W.2d 810—Humphrey v. Harrell, Civ.App., 19 S.W. 2d 410, affirmed, Com.App., 29 S.W. 2d 963—Sneed v. Sneed, Civ.App., 296 S.W. 643—St. Paul Fire & Marine Ins. Co. v. Earnest, Civ.App., 293 S.W. 677, affirmed 296 S.W. 1088, 116 Tex. 565—Trigg v. Gray, Civ.App., 288 S.W. 1098—Colorado River Syndicate Subscribers v. Alexander, Civ.App., 288 S.W. 586—Paggi v. Rose Mfg. Co., Civ. App., 285 S.W. 852—Stoudenmeier v. First Nat. Bank, Civ.App., 246 S.W. 761.

Wash.—Skidmore v. Pacific Creditors, 138 P.2d 664, 18 Wash.2d 157—Marsh v. West Fir Logging Co., 281 P. 340, 154 Wash. 137—Lawrence v. Rawson, 217 P. 1019, 126 Wash. 158.

W.Va.—Winona Nat. Bank v. Fridley, 10 S.E.2d 907, 122 W.Va. 479—Arnold v. Reynolds, 2 S.E.2d 433, 121 W.Va. 91—State ex rel. Alkire v. Mill, 180 S.E. 183, 116 W.Va. 277—Sands v. Sands, 138 S.E. 463, 103 W.Va. 701—Gainer v. Smith, 132 S.E. 744, 101 W.Va. 314—Ellis v. Gore, 132 S.E. 741, 101 W.Va. 273.

Wis.—Farmington Mut. Fire Ins. Co. v. Gerhardt, 257 N.W. 595, 216 Wis. 457.

Wyo.—Kelley v. Eidam, 231 P. 673, 32 Wyo. 271.

34 C.J. p 422 note 25—19 C.J. p 1213 note 88½.

Excusable neglect generally see infra subdivision n (5) of this section.

56. Mass.—Manzi v. Carlson, 180 N. E. 134, 278 Mass. 267.

Freedom from fault or negligence as requisite to relief see infra subdivision n (5) (b) of this section.

"Such motions will be denied ordinarily only when there has been some persistent wrongful conduct, willfulness, or bad faith by a party."—Baldwin v. Yellow Taxi Corporation, 225 N.Y.S. 423, 425, 221 App.Div. 717, followed in Woodward v. Weekes, 241 N.Y.S. 842, 228 App. Div. 870.

57. Ark.—Karnes v. Ramey, 287 S. W. 743, 172 Ark. 125.

Tex.—San Antonio Paper Co. v. Morgan, Civ.App., 53 S.W.2d 651, error dismissed.

Defense to action as ground for vacating judgment see infra subdivision f of this section.

58. Iowa.—Dewell v. Suddick, 232 N.W. 118, 211 Iowa 1352.

Mont.—Paramount Publix Corporation v. Boucher, 19 P.2d 223, 93 Mont. 340.

N.J.—Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 115 N.J.Law 86, affirmed 183 A. 165, 116 N.J.Law 191.

34 C.J. p 423 notes 28, 29.

Invalidity or irregularity as ground for relief see infra subdivision b of this section.

59. Ky.—Latham v. Commonwealth, 43 S.W.2d 44, 240 Ky. 826.

Ohio.—Davis v. Teachnor, App., 53 N.E.2d 208.

34 C.J. p 268 note 48.

Power of trial court to open default judgments during term see supra § 333.

In Texas

(1) A distinction is recognized between cases in which a good, sufficient, legal, or equitable excuse is required to be shown to support a motion to vacate, and cases in which only a slight showing, amounting only to some excuse, would be sufficient. The distinction turns on the presence, or absence, of facts showing that by the granting of the application the adverse party would be injured. Presumably the setting aside of a judgment at a subsequent term would be injurious, and hence in such a case a good excuse must be shown which implies a showing of the absence of negligence or exercise of ordinary care. On the other hand, if the application is made promptly at the same term, and the facts show that there will be no material delay, and the failure of the party to answer or appear in time is not due wholly to his fault or neglect, or that of his attorney, but there are some extenuating circumstances, then the application should be granted.—Borger v. Mineral Wells Clay Products Co., Civ. App., 80 S.W.2d 333.

(2) During the term at which it was rendered, the trial court may set aside a default judgment with, or without, express cause.—Gann v. Hopkins, Civ.App., 119 S.W. 2d 110.

60. Neb.—Barney v. Platte Valley Public Power & Irr. Dist., 23 N.W. 2d 335—Britt v. Byrkit, 268 N.W. 83, 131 Neb. 350—Lacey v. Citizens' Lumber & Supply Co., 248 N.W. 378, 124 Neb. 813.

tion to set it aside, and the ends of justice will be furthered thereby.[61]

The default, for which relief is provided, must be that of a litigant and not of a stranger to the proceeding;[62] and a stranger to the record is not in a position to ask to be relieved of a default or to have a decree set aside which was taken at a time when he was not a party to the action.[63]

Statutory provisions. Statutes relating to the setting aside of default judgments have been held to be constitutional,[64] and, being remedial, should be liberally construed so as to give litigants an opportunity to have the case disposed of on the merits to the end that justice be done;[65] but, where the matter is governed by statute, one of the statutory grounds must be shown.[66] Statutes dealing with vacation and modification of judgments are exclusive on a motion to vacate a default judgment, unless by reason of special circumstances the statutory remedy is inadequate.[67] A statute providing that no judgment may be set aside for matter not previously objected to if the complaint contain a substantial cause of action does not apply to a default judgment entered against an innocent party.[68] In order to have both a default and a judgment thereon set aside under some statutes a showing as to mistake, or the like, must be shown as to each.[69] An amendatory statute applies to a motion to set aside a judgment entered before the statute goes into effect where the motion was made after the effective date of the statute and within the time allowed for the motion by the statute in force at the time the judgment was entered.[70] A statutory provision requiring the court to render judgment in specified actions if defendant does not appear and defend does not preclude defendant from showing cause for a failure to answer or demur within the prescribed time.[71]

b. Invalidity or Irregularity of Judgment

(1) Invalidity of judgment in general
(2) Irregularity of judgment in general
(3) Want or insufficiency of notice of proceedings
(4) Unauthorized, inadvertent, improvident, or premature entry

(1) Invalidity of Judgment in General

Invalidity of a default judgment rendering it void, as distinguished from merely voidable or erroneous, is ground for vacating it.

Invalidity of a default judgment rendering it void,

61. Ky.—Hackney v. Charles, 295 S.W. 869, 220 Ky. 574—South Mountain Coal Co. v. Rowland, 265 S.W. 320, 204 Ky. 820.
Furtherance of justice as ground for setting aside default judgment generally see infra subdivision o of this section.
Question, on motion to set aside a default judgment made promptly at the same term of court is whether the ends of justice will be furthered by reopening case in which one party has obtained a judgment without the other having been heard when the latter shows the court that prima facie he has a meritorious defense.—Columbia Coal & Min. Co. v. Radcliff, 186 S.W.2d 419, 299 Ky. 596—Vanover v. Ashley, 183 S.W.2d 944, 298 Ky. 722—Latham v. Commonwealth, 43 S.W.2d 44, 240 Ky. 826.

62. Idaho.—Hanson v. Rogers, 32 P.2d 126, 54 Idaho 360.

63. Idaho.—Hanson v. Rogers, supra.
Indemnity insurer could not have default judgment against insured set aside because insured had not given notice of automobile accident, insurer not being party to judgment.—Earle v. Earle, 151 S.E. 884, 198 N.C. 411.

64. N.C.—Foster v. Allison Corporation, 131 S.E. 648, 191 N.C. 166, 44 A.L.R. 610.

65. Cal.—Riskin v. Towers, 148 P.2d 611, 24 Cal.2d 274, 153 A.L.R. 442—Waybright v. Anderson, 253 P. 148, 200 Cal. 374—Hughes v. Wright, 149 P.2d 392, 64 Cal.App.2d 897—Tearney v. Riddle, 149 P.2d 387, 64 Cal.App.2d 783—Potts v. Whitson, 125 P.2d 947, 52 Cal.App.2d 199—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257—Stub v. Harrison, 96 P.2d 979, 35 Cal.App.2d 685—Application of Mercereau, 14 P.2d 1019, 126 Cal.App. 590—Williams v. McQueen, 265 P. 339, 89 Cal.App. 659—Corgiat v. Realty Mortg. Corporation of California, 260 P. 573, 86 Cal.App. 37—Sofuye v. Pieters-Wheeler Seed Co., 216 P. 990, 62 Cal.App. 198.
Ga.—Bradley v. Henderson, 193 S.E. 79, 56 Ga.App. 488.
Ind.—Padol v. Home Bank & Trust Co., 27 N.E.2d 917, 108 Ind.App. 401—Falmouth State Bank v. Hayes, 185 N.E. 662, 97 Ind.App. 68.
Minn.—Lentz v. Lutz, 9 N.W.2d 505, 215 Minn. 230.
Mo.—Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.
Nev.—Bowman v. Bowman, 217 P. 1102, 47 Nev. 207.
Or.—Snyder v. Consolidated Highway Co., 72 P.2d 932, 157 Or. 479—Peters v. Dietrich, 27 P.2d 1015, 145 Or. 589.
34 C.J. p 296 note 7.

66. Iowa.—Heuer v. Hartman, 200 N.W. 314.
Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
S.D.—Connelly v. Franklin, 210 N.W. 735, 50 S.D. 512.
False return of service
Where service of original writ was in fact made by sheriff and judgment for default of appearance entered, statute permitting "taking off" of judgment by following certain procedure at or before term following entry of default judgment did not authorize reopening of judgment, such statute covering only the situations where sheriff had returned that defendant had been served, when in fact this was not the case.—Yerkes v. Dangle, Del.Super., 33 A.2d 406.

67. Okl.—Jupe v. Home Owners Loan Corp., 167 P.2d 46.

68. Ala.—Ex parte Crumpton, 109 So. 184, 21 Ala.App. 446.

69. Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 272 P. 525, 83 Mont. 400.

70. Idaho.—Brainard v. Cœur d'Alene Antimony Mining Co., 208 P. 855, 35 Idaho 742.

71. Wash.—State v. Superior Court for Thurston County, 271 P. 87, 149 Wash. 443.

as distinguished from merely voidable or erroneous, is ground for vacating it,[72] as where the judgment is invalid for want of jurisdiction of the person,[73] or where the judgment is based on a defective affidavit for publication of summons,[74] or where the court is without jurisdiction to adjudicate the question determined or to give the particular relief granted.[75] A party has a right to presume that no other or different judgment will be taken against him by default than the facts alleged will warrant,[76] and a judgment against a party in his individual capacity which is void because no facts were alleged in the complaint which would permit a judgment against him in that capacity will be vacated.[77] Also, a final judgment after default will be set aside for want of jurisdiction where summons was addressed to defendant as an individual and the declaration declared against him in a representative capacity.[78]

(2) Irregularity of Judgment in General

A default judgment may be vacated for irregularity in the proceedings leading to the entry of the judgment, as distinguished from mere error, but not ordinarily for merely technical, formal, and unimportant irregularities.

A default judgment, like any other, may be vacated for irregularity in the proceedings leading to the entry of a judgment, as distinguished from mere error,[79] but such a judgment will not ordinarily be

72. Cal.—Baird v. Smith, 14 P.2d 749, 216 Cal. 408—Sheehy v. Roman Catholic Archbishop of San Francisco, 122 P.2d 60, 49 Cal.App. 2d 537.
Fla.—Kellog-Citizens Nat. Bank of Green Bay, Wis. v. Felton, 199 So. 50, 145 Fla. 68—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.
Ill.—Rau v. Village of Warrensburg, 23 N.E.2d 371, 302 Ill.App. 37.
Ky.—Fugate v. Creech, 111 S.W.2d 402, 271 Ky. 3.
Md.—Fick v. Towers, 136 A. 648, 152 Md. 335.
N.J.—New Jersey Cash Credit Corporation v. Zaccaria, 19 A.2d 448, 126 N.J.Law 334—Gloucester City Trust Co. v. Goodfellow, 3 A.2d 561, 121 N.J.Law 546—Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 115 N.J.Law 86, affirmed 183 A. 165, 116 N.J.Law 191—Greenbaum v. Higgins, 147 A. 722, 7 N. J.Misc. 1012.
N.Y.—Valz v. Sheepshead Bay Bungalow Corporation, 163 N.E. 124, 249 N.Y. 122, certiorari denied 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 560.
N.D.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261.
Okl.—Okmulgee Northern Ry. Co. v. Oklahoma Salvage & Supply Co., 271 P. 167, 133 Okl. 64—Hoffman v. Deskins, 221 P. 37, 94 Okl. 117.
Or.—Mutzig v. Hope, 158 P.2d 110.
Pa.—Borough of Wilkinsburg v. School Dist. of Borough of Wilkinsburg, 148 A. 77, 298 Pa. 193—Simko v. Kunkle, Com.Pl., 36 Pa. Dist. & Co. 229, 22 West.Co. 149.
Tex.—Uvalde Rock Asphalt Co. v. Lacy, Civ.App., 131 S.W.2d 698.
34 C.J. p 269 note 57, p 423 note 28.
Error in law as ground for vacating default judgment see infra subdivision g of this section.
Invalidity as ground for vacating judgment generally see supra § 267.
Necessity for excusing default see supra subdivision a of this section.
"Void judgment" within text rule is one which has semblance but lacks some essential element, as jurisdiction or service of process.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379—Wynne v. Conrad, 17 S.E.2d 514, 220 N.C. 355—Wellons v. Lassiter, 157 S.E. 434, 200 N.C. 474—Finger v. Smith, 133 S.E. 186, 191 N.C. 818—Duffer v. Brunson, 125 S.E. 619, 188 N.C. 789.
Judgment void on its face
Invalidity apparent from inspection of judgment roll renders judgment void on its face and subject to be vacated at any time.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221.
Judgments held not subject to vacation as void
Cal.—Phillips v. Trusheim, 156 P. 2d 25, 25 Cal.2d 913—Pavlovich v. Watts, 115 P.2d 511, 46 Cal. App.2d 103.
Ga.—Southern Fertilizer & Chemical Co. v. Kirby, 184 S.E. 363, 52 Ga. App. 688—McCray v. Empire Inv. Co., 174 S.E. 219, 49 Ga.App. 117.
Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521.
Kan.—Hawkins v. Smith, 111 P.2d 1108, 153 Kan. 542.
Ky.—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632—Fowler v. Wiley, 33 S.W.2d 14, 236 Ky. 313.
Mass.—Moll v. Town of Wakefield, 175 N.E. 81, 274 Mass. 505.
Minn.—City of Luverne v. Skyberg, 211 N.W. 5, 169 Minn. 234.
N.C.—Duffer v. Brunson, 125 S.E. 619, 188 N.C. 789.
Pa.—Eastman Kodak Co. v. Osenider, 193 A. 284, 127 Pa.Super. 332.

73. Cal.—Hollywood Garment Corporation v. J. Beckerman, Inc., 148 P.2d 738, 61 Cal.App.2d 658—Reichert v. Rabun, 265 P. 260, 89 Cal.App. 375.
Ga.—Davis-Washington Co. v. Vickers, 155 S.E. 92, 41 Ga.App. 818—Anderson v. Turner, 133 S.E. 306, 35 Ga.App. 428—Smoyer v. Jarman, 114 S.E. 924, 29 Ga.App. 305.
Ill.—Lewis v. West Side Trust & Savings Bank, 36 N.E.2d 573, 377 Ill. 384.
Md.—Piedmont-Mt. Airy Guano Co. of Baltimore v. Merritt, 140 A. 62, 154 Md. 226.
Minn.—Pugsley v. Magerfleisch, 201 N.W. 323, 161 Minn. 246.
N.D.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261—Odland v. O'Keeffe Implement Co., 229 N.W. 923, 59 N.D. 335—Beery v. Peterson, 225 N.W. 798, 58 N.D. 273—Gallagher v. National Nonpartisan League, 205 N.W. 674.
Wyo.—Kimbel v. Osborne, 156 P.2d 279.
34 C.J. p 269 note 57.
Judgment entered without sufficient service
D.C.—Ray v. Bruce, Mun.App., 31 A. 2d 693.

74. Cal.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221.

75. Ga.—Woodall v. Exposition Cotton Mills, 120 S.E. 423, 31 Ga.App. 269.
N.Y.—Coles v. Carroll, 6 N.E.2d 107, 273 N.Y. 86—Seeley v. Greene, 247 N.Y.S. 679, 139 Misc. 90.
Or.—Leonard v. Bennett, 106 P.2d 542, 165 Or. 157.
S.C.—Nettles v. MacMillan Petroleum Corp., 37 S.E.2d 134, 208 S.C. 81.
34 C.J. p 269 note 57.
Vacation of default judgment rendered for amount in excess of that claimed in writ or declaration see infra subdivision g of this section.

76. Wash.—Sandgren v. West, 115 P.2d 724, 9 Wash.2d 494.

77. Wash.—Sandgren v. West, supra.

78. Fla.—Frostproof State Bank v. Mallett, 131 So. 822, 100 Fla. 1464.

79. Ariz.—Burbage v. Jedlicka, 234 P. 32, 27 Ariz. 426—Gila Valley Electric, Gas & Water Co. v. Ari-

vacated for merely technical, formal, and unimportant irregularities which may be disregarded on the principle of harmless error,[80] or which may be deemed cured or waived as by failure to object in

zona Trust & Savings Bank, 215 P. 159, 25 Ariz. 177.
Cal.—Harris v. Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396.
Ill.—Stanke v. Atherton, 7 N.E.2d 467, 289 Ill.App. 614.
Iowa.—Brenton v. Lewiston, 216 N. W. 6, 204 Iowa 892—Chandler Mill. & Mfg. Co. v. Sinaiko, 208 N.W. 323, 201 Iowa 791.
Kan.—Samuel Ach Co. v. Thorpe, 273 P. 15, 128 Kan. 296.
Md.—Martin v. Long, 120 A. 875, 142 Md. 348.
Mich.—Smak v. Gwozdik, 291 N.W. 270, 293 Mich. 185—Dades v. Central Mut. Auto Ins. Co., 248 N.W. 616, 263 Mich. 260.
Mo.—Fleming v. McCall, App., 35 S.W.2d 60—Boggess v. Jordan, App., 283 S.W. 57.
Mont.—Stenner v. Colorado-Montana Mines Ass'n, 149 P.2d 546.
N.M.—Animas Consol. Mines Co. v. Frazier, 69 P.2d 927, 41 N.M. 389—Dallam County Bank v. Burnside, 249 P. 109, 31 N.M. 537.
N.Y.—Hilton v. Mack, 15 N.Y.S.2d 187, 257 App.Div. 709, appeal dismissed Hilton v. Gaston, 24 N.E.2d 506, 281 N.Y. 881—Cowperthwait v. Critchley, 276 N.Y.S. 133, 243 App. Div. 70—Devonia Discount Corporation v. Bianchi, 271 N.Y.S. 413, 241 App.Div. 838—Mills v. Nedza, 227 N.Y.S. 156, 222 App.Div. 615—Christal v. Fifty-Five Columbus Corporation, 5 N.Y.S.2d 227, 168 Misc. 118.
N.C.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379—Everett v. Johnson, 14 S.E.2d 520, 219 N.C. 540—Clegg v. Canady, 195 S.E. 770, 213 N.C. 258—Wellons v. Lassiter, 157 S.E. 434, 200 N.C. 474—Standard Supply Co. v. Vance Plumbing & Electric Co., 143 S.E. 248, 195 N. C. 629—Finger v. Smith, 133 S.E. 186, 191 N.C. 818.
N.D.—Ruchverg v. Russell, 3 N.W. 2d 459, 71 N.D. 658, 139 A.L.R. 1474.
Ohio.—Morrison v. Baker, App., 58 N.E.2d 708—French v. Friesinger, App., 38 N.E.2d 90—Mt. Ida School v. Clark, 177 N.E. 604, 39 Ohio App. 389.
Okl.—Gill v. Meis, 12 P.2d 692, 158 Okl. 154—Adachi v. Bickford, 275 P. 306, 135 Okl. 228—McKinney v. Swift, 274 P. 659, 135 Okl. 164—Okmulgee Northern Ry. Co. v. Oklahoma Salvage & Supply Co., 271 P. 167, 133 Okl. 64—Great American Ins. Co. v. Keswater, 268 P. 258, 131 Okl. 196—Nation v. Savely, 260 P. 32, 127 Okl. 117.
Pa.—Richard v. Camden Fire Ins. Co., 46 Pa.Dist. & Co. 365, 4 Monroe L.R. 65—Simko v. Kunkle, 36 Pa.Dist. & Co. 229, 22 West.Co. 149—Norton v. Frantz, Com.Pl., 42 Lack.Jur. 97.
Tex.—Daniel Miller Co. v. Puett, Civ. App., 252 S.W. 333.
Wash.—State v. Superior Court for Thurston County, 271 P. 87, 149 Wash. 443.
Wis.—Federal Land Bank of St. Paul v. Olson, 1 N.W.2d 752, 239 Wis. 448.
Wyo.—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509.
34 C.J. p 275 note 81, p 423 notes 28, 32.
Error in law as ground for vacating default judgment see infra subdivision g of this section.
Irregularity as ground for vacating judgments generally see supra § 268.
Objections as to pleadings as ground for setting aside default judgments see infra subdivision j of this section.

"Irregularity" defined

(1) Irregularity authorizing setting aside judgment on motion is want of adherence to some prescribed rule or mode of proceeding, by omitting to do something necessary for orderly conduct of suit, or doing it in unseasonable time or in improper manner.—Ealy v. McGahen, 21 P.2d 84, 37 N.M. 246.

(2) An irregularity is a departure in legal procedure from things which are regular; it is something by way of procedure which is unusual and irregular.—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 257, 36 Ohio App. 481.

Irregular and erroneous judgments defined and distinguished

An "irregular judgment" is one rendered contrary to the course and practice of the court, whereas an "erroneous judgment" is one rendered according to the course and practice of court, but contrary to law, or on a mistaken view of the law, or on an erroneous application of legal principles, an erroneous judgment being not necessarily irregular.—Simms v. Sampson, 20 S. E.2d 554, 221 N.C. 379—Wynne v. Conrad, 17 S.E.2d 514, 220 N.C. 355—Wellons v. Lassiter, 157 S.E. 434, 200 N.C. 474—Finger v. Smith, 133 S.E. 186, 191 N.C. 818—Duffer v. Brunson, 125 S.E. 619, 188 N.C. 789.

Voidable judgment

(1) Where a judgment by default is entered in an action on a petition not filed by the date fixed in the notice and ten days before the term, it is the right of defendant directly to attack the judgment as voidable, and the duty of the court to set it aside and have it vacated.—Sioux County v. Kosters, 191 N.W. 315, 194 Iowa 1300.

(2) Fact that entry of default judgment without a jury was without authority, however, was held not proper ground of motion to set aside the judgment, but under statute merely rendered it voidable on direct bill of exceptions.—McDuffie Oil & Fertilizer Co. v. Iler, 118 S.E. 772, 30 Ga.App. 671.

Failure to serve copy of statement of claim

A judgment entered for want of appearance will be stricken off on defendant's application where plaintiff failed to serve on defendant a copy of the statement of claim filed, as required by court rule.—Northwestern Nat. Bank & Trust Co. v. Heenerfauth, 18 Pa.Dist. & Co. 534.

Held not irregularity within rule

(1) Convening term hour before customary.—Kingery v. Reliance Fertilizer Co., 158 S.E. 346, 43 Ga. App. 240.

(2) Correction of recorded notice of materialman's lien by interlineation of correct description of property in notice without new acknowledgment or verification.—Ealy v. McGahen, 21 P.2d 84, 37 N.M. 246.

(3) Court order, allowing defendants to withdraw their pleadings, which specified answer only and not cross complaint.—Sheppard v. Sandfer, 102 P.2d 668, 44 N.M. 357.

(4) Erroneous finding of fact.—Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.

(5) Failure to introduce evidence to show that note had been registered with county treasurer and tax paid thereon as provided by statute. —Thomas v. Tucker, 86 P.2d 1011, 184 Okl. 304.

(6) Inclusion in judgment foreclosing materialman's lien a nonlienable item.—Ealy v. McGahen, 21 P. 2d 84, 37 N.M. 246.

(7) Making order of revivor without first spreading on the record, a conditional order of revivor as provided by code.—French v. Friesinger, Ohio App., 38 N.E.2d 90.

(8) Mere failure to plead.—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 36 Ohio App. 481.

(9) Other matters.
Mo.—Allen v. Allen, App., 14 S.W.2d 686.
Mont.—Smith v. Hamill, 112 P.2d 195, 111 Mont. 535.

80. Ala.—Gray v. Bank of Moundville, 107 So. 804, 214 Ala. 260.
Mich.—Bartnik v. Samonek, 21 N.W. 2d 817, 313 Mich. 464.
Mo.—Daugherty v. Lanning-Harris Coal & Grain Co., 265 S.W. 866, 218 Mo.App. 187.

due season,[81] particularly where the proceeding to set aside the default was belatedly taken.[82] In order to set aside a default judgment as being irregularly entered, the court must test the right of movant by the same principles as those by which it tests the right of a movant against whom a judgment was entered in a litigated action.[83]

(3) Want or Insufficiency of Notice of Proceedings

Want or insufficiency of the required notice of the action or intermediate proceedings therein is ground for opening or vacating a default judgment.

It is good ground for vacating or opening a default judgment that defendant had no notice of the action, either because of a failure to serve him with process, or because the process or service was fatally irregular or defective,[84] and this rule has been applied where an attempted service by publication

N.M.—Bourgeious v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.

N.Y.—Quist v. Gwinup, 46 N.Y.S.2d 105, 267 App.Div. 224.

34 C.J. p 276 note 84.

Failure to demand appointment of attorney

Statute providing that, when one party's attorney ceases to act as such, adverse party must, before any further proceedings may be had, by written notice require such party to appoint another attorney or to appear in person, has no application where adverse party has personal knowledge of withdrawal of her attorney and of setting of case for trial, and denial of plaintiff's motion to vacate judgment on cross complaint, because no written demand had been made on plaintiff by defendants to appoint attorney in lieu of attorney of record who had withdrawn, or to appear in person, was not abuse of discretion under such circumstances.—Savage v. Stokes, 28 P.2d 900, 54 Idaho 109—Smith-Nieland v. Reed, 231 P. 102, 39 Idaho 786.

Failure to serve proposed form of default

(1) Where defendants, while demurrers to complaint were pending before circuit court, knew that their original attorney had withdrawn but took no steps to have other counsel substituted or to notify plaintiffs of defendants' addresses, and defendants did not show that plaintiffs knew where defendants could be found, and defendants made no showing that default order and decree for plaintiffs were taken against defendants through their mistake, inadvertence, surprise, or excusable neglect, refusal to set aside default on ground that plaintiffs did not serve copies of proposed forms thereof on defendants personally before order and decree were entered was not an abuse of discretion.—Merryman v. Colonial Realty Co., 120 P.2d 230, 168 Or. 12.

(2) Even if a firm of attorneys were attorneys for defendants when a default order was taken, failure to serve such form was immaterial in determining whether order and decree entered thereon should have been set aside, where defendants were served with a copy of order overruling demurrers and setting time for defendants to answer and with a copy of motion for default and setting time for hearing on merits.—Merryman v. Colonial Realty Co., supra.

81. Pa.—Caromono v. Garman, 42 Pa.Dist. & Co. 96, affirmed 23 A.2d 92, 147 Pa.Super. 1.

34 C.J. p 278 note 86.

82. Mich.—Bartnik v. Samonek, 21 N.W.2d 817, 313 Mich. 464.

Time for application to set aside default judgment generally see infra § 337.

83. N.M.—Bourgeious v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.

84. Ala.—Murphree v. International Shoe Co., 20 So.2d 782, 246 Ala. 384—Ex parte Whitehead, 199 So. 876, 29 Ala.App. 583, certiorari denied Ex parte Whisler, 199 So. 879, 240 Ala. 447.

Ariz.—Lore v. Citizens Bank of Winslow, 75 P.2d 371, 51 Ariz. 191.

Ark.—First Nat. Bank v. Turner, 275 S.W. 703, 169 Ark. 393.

Cal.—Riskin v. Towers, 148 P.2d 611, 24 Cal.2d 274, 153 A.L.R. 442—Washko v. Stewart, 112 P.2d 306, 44 Cal.App.2d 311—Penland v. Goodman, 111 P.2d 913, 44 Cal.App. 2d 14—Doxey v. Doble, 54 P.2d 1143, 12 Cal.App.2d 62.

D.C.—Wise v. Herzog, 114 F.2d 486, 72 App.D.C. 335.

Ga.—Walker v. T. H. Sirmans & Co., 148 S.E. 592, 168 Ga. 658—Courier-Herald Pub. Co. v. Georgian Co., 128 S.E. 744, 160 Ga. 583—Smoyer v. Jarman, 114 S.E. 924, 29 Ga.App. 305.

Ill.—McCoy v. HY-G Corporation, 47 N.E.2d 384, 318 Ill.App. 229—Jerome v. 5019-21 Quincy Street Bldg. Corporation, 45 N.E.2d 878, 317 Ill.App. 335, reversed on other grounds 53 N.E.2d 444, 385 Ill. 524—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.

Ind.—Kilmer v. McCormick, 150 N.E. 794, 84 Ind.App. 215.

Iowa.—Jackson v. Jones, 300 N.W. 668, 231 Iowa 106.

Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206—Plummer v. Rosenthal, 12 A.2d 530, 178 Md. 149.

Mont.—Housing Authority of City of Butte v. Murtha, 144 P.2d 183, 115 Mont. 405.

N.J.—Porter v. Building Associates, 169 A. 515, 127 N.J.Misc. 42—Joyce v. Bauman, 165 A. 425, 11 N.J.Misc. 237.

N.Y.—Devonia Discount Corporation v. Bianchi, 271 N.Y.S. 413, 241 App. Div. 838—Katz v. Silverberg, 50 N.Y.S.2d 83, 183 Misc. 492.

N.C.—Hershey Corporation v. Atlantic Coast Line R. Co., 165 S.E. 550, 203 N.C. 184.

N.D.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261—Ellison v. Baird, 293 N.W. 793, 70 N.D. 226.

Okl.—Roth v. Fern Oil & Gas Co., 8 P.2d 63, 155 Okl. 154—Hawkins v. Payne, 264 P. 179, 129 Okl. 243.

Pa.—Sasso's Inc. v. Progansky, Com. Pl., 38 Luz.Leg.Reg. 323.

Tex.—Foster v. Christensen, Com. App., 67 S.W.2d 246—Wyman v. American Mortg. Corporation, Civ. App., 45 S.W.2d 629—Motor Inv. Co. v. Killman, Civ.App., 43 S.W. 2d 633—Southern Trading Co. of Texas v. Feldman, Civ.App., 247 S.W. 702, reversed on other grounds, Com.App., 259 S.W. 566.

Utah.—State Tax Commission v. Larsen, 110 P.2d 558, 100 Utah 103.

Wash.—Golson v. Carscallen, 283 P. 681, 155 Wash. 176.

Wyo.—Kimbel v. Osborn, 156 P.2d 279.

34 C.J. p 270 note 63, p 423 note 34 [a] (2).

Right to relief held absolute

N.D.—Odland v. O'Keeffe Implement Co., 229 N.W. 923, 59 N.D. 335—Beery v. Peterson, 225 N.W. 798, 58 N.D. 273.

Right held not absolute

Cal.—Tucker v. Tucker, 139 P.2d 348, 59 Cal.App.2d 557.

Leaving at defendant's abode in his absence

Where copy of petition and process was left at defendant's most notorious place of abode while defendant was absent from county, and first discovered after default was entered, vacating default was held proper.—Carr-Lee Grocery Co. v. Brannen, 167 S.E. 536, 46 Ga.App. 225.

was fatally defective.[85] A judgment will not be set aside, however, for mere clerical errors, omissions, or irregularities in the process, not affecting the jurisdiction,[86] especially where defendant had actual notice of the commencement of the action,[87] and it has been held that a defendant who knew about the suit in time to make a defense, even though he was not served with summons, is not entitled to have a default judgment against him set aside.[88] Where the party knew of the claim a codefendant was making against him, and had actual notice that he was a codefendant, the court properly refused to vacate a judgment on the ground that the moving party did not know that a pleading such as a cross petition in which the claim was made had been filed.[89] A default will not be set aside where defendant's objections to process or service are waived by his voluntary appearance[90] or by his failure promptly to claim immunity from service made on him.[91] A default judgment will not be set aside on the ground of defective return of service where the return could have been amended so as truthfully to show good service.[92]

It has been held that parties to litigation are entitled to actual or constructive notice of every step to be taken, and, if anything is done affecting their rights without notice and they apply in a timely manner for redress, the trial court should grant it,[93]

Service held proper, precluding relief

Ill.—Groth v. Schueneman-Flynn's Logan Square, 33 N.E.2d 914, 310 Ill.App. 260.

Mo.—State ex rel. Fabrico v. Trimble, 274 S.W. 712, 309 Mo. 415.

N.D.—Beery v. Peterson, 225 N.W. 798, 58 N.D. 273.

Tex.—Pacific Mut. Life Ins. Co. v. Williams, 15 S.W. 478, 79 Tex. 633.

Wash.—Larson v. Zabroski, 152 P.2d 154, 21 Wash.2d 572, opinion adhered to 155 P.2d 284, 21 Wash. 2d 572.

Substituted defendant

County treasurer, substituted for predecessor without notice to treasurer, was held entitled to have default set aside on proper motion.—Dewell v. Suddick, 232 N.W. 118, 211 Iowa 1352.

Want of actual notice

Judgment against foreign corporation, having constructive notice of institution of suit but not actual notice until after rendition, was properly set aside under statute authorizing defense after judgment "upon good cause shown" but protecting bona fide purchasers.—Foster v. Allison Corporation, 131 S.E. 648, 191 N.C. 166, 44 A.L.R. 610.

85. Ariz.—Evans v. Hallas, 167 P.2d 94.

86. Ark.—Furst v. Boatman, 122 S.W.2d 189, 197 Ark. 1175.

Mich.—Foster v. Talbot, 241 N.W. 141, 257 Mich. 489.

Minn.—Whipple v. Mahler, 10 N.W. 2d 771, 215 Minn. 578.

N.Y.—Abo v. Panish, 239 N.Y.S. 669, 135 Misc. 792.

Pa.—Caromono v. Garman, 42 Pa. Dist. & Co. 96, affirmed 23 A.2d 92, 147 Pa.Super. 1.

Tex.—Caldwell Oil Co. v. Hickman, Civ.App., 270 S.W. 214.

Wash.—Hurby v. Kwapil, 286 P. 664, 156 Wash. 225.

34 C.J. p 271 note 66.

Failure to return original summons with proof of service

The failure of the person who made service of summons on corporate defendant's statutory agent, and who made return, to return original summons with proof of service, as required by statute, was not such an irregularity that defendant was entitled to have execution recalled and judgment vacated pursuant to statute.—Bourgeious v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453.

87. Ark.—Furst v. Boatman, 122 S.W.2d 189, 197 Ark. 1175.

34 C.J. p 272 note 67.

88. Ark.—O'Neal v. B. F. Goodrich Rubber Co., 162 S.W.2d 52, 204 Ark. 371—Furst v. Boatman, 122 S.W.2d 189, 197 Ark. 1175—United Order of Good Samaritans v. Roebuck, 32 S.W.2d 435, 182 Ark. 731—Stewart v. California Grape Juice Corporation, 29 S.W.2d 1077, 181 Ark. 1140—Lambie v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019—C. A. Blanton Co. v. First Nat. Bank, 1 S.W.2d 558, 175 Ark. 1107—Karnes v. Ramey, 287 S.W. 743, 172 Ark. 125—First Nat. Bank v. Turner, 275 S.W. 703, 169 Ark. 393—Fore v. Chenault, 271 S.W. 704, 168 Ark. 747.

Cal.—Tucker v. Tucker, 139 P.2d 348, 59 Cal.App.2d 557.

Mont.—Skinner v. Carlysle Oil Development Co., 260 P. 1038, 80 Mont. 464.

Service by little boy

Where decree recited that summons had been duly served on defendant, sheriff's return recited service on defendant, defendant admitted that summons was brought to him, allegedly by a little boy, and defendant was in court room while case was being tried, chancery court properly refused to set aside decree entered after defendant's default on ground that defendant was not properly served.—Rockamore v. Pembroke, 188 S.W.2d 616, 208 Ark. 995.

Actual notice of some, but not all, codefendants

Fact that one of many bondholders, against whom a default judgment was rendered without personal service, in a suit to foreclose a lien for materials furnished to the company issuing the bonds, had no actual notice of the action in time to appear and defend, did not entitle another of such bondholders, who had actual and timely notice, to have the judgment opened under statute, in the absence of any motion on behalf of the former or anything in the latter's motion indicating that it was made for or on the former's behalf or because of any authority or assignment from him.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 48 S.Ct. 302, 296 U.S. 595, 72 L.Ed. 722.

89. Kan.—Suter v. Schultz, 7 P.2d 55, 134 Kan. 538.

90. Cal.—James v. Hall, 264 P. 516, 88 Cal.App. 528.

34 C.J. p 272 note 69.

91. Kan.—Phœnix Joint Stock Land Bank v. Eells, 148 P.2d 732, 158 Kan. 530.

92. U.S.—Mandel Bros. v. Victory Belt Co., C.C.A.Ill., 15 F.2d 610.

93. Ariz.—Daniel v. Telford, 75 P.2d 373, 151 Ariz. 197—Faltis v. Colachis, 274 P. 776, 35 Ariz. 78.

Tex.—Morris v. National Cash Register Co., Civ.App., 44 S.W.2d 433, error dismissed.

Wyo.—Barrett v. Oakley, 278 P. 538, 40 Wyo. 449.

Alien property custodian

Where judgment by default against a French banking corporation was entered, at a time when executive order authorizing alien property custodian to take measures in representing alien in a proceeding in interest of United States was entered without notice to custodian who was entitled under executive order to opportunity of contesting the action on being appointed corporation's representative, judgment was vacated on custodian's motion.—Metzger v. Credit Industrial D'Alsace

and this is particularly true where a party failed to receive a notice to which he was entitled by established custom[94] or rule of court;[95] and a default judgment has been opened where defendant tendered a good defense and defendant's counsel was absent from court because he unwarrantedly relied on the clerk of the court or opposing counsel to give him timely notice of the trial day.[96] On the other hand, it has been held that, where a party has once been properly served with proper process, he is in court for every purpose connected with the action, and cannot have the judgment vacated for the failure to notify him of some intermediate step in the case;[97] and, where it is the duty of a party and his counsel to know when the case will be called for trial, it is no ground for setting aside a default judgment that neither was notified of the time the case was set for trial,[98] or that neither had any notice or knowledge that a term of court would be held or was being held on the date on which the judgment was rendered.[99] So, in the absence of statute requiring the clerk of the court to notify parties or attorneys as to the day on which a particular case is set for trial, a party who relies on the clerk so to notify him acts at his peril,[1] and failure of the clerk to give him such notice does not require the vacation of a judgment taken in his absence[2] even, it has been held, if the clerk promised to do so.[3] It is not error to refuse to set aside a default judgment for failure to notify defendant of the setting of the case after the filing of a formal answer where the answer expressly stated that defendant disclaimed interest in, or responsibility for, the suit.[4]

(4) Unauthorized, Inadvertent, Improvident, or Premature Entry

A default judgment may be set aside where entry thereof was unauthorized, inadvertent, improvident, or premature.

A default judgment may be set aside where it was entered by the clerk without any authority therefor,[5]

Et De Lorraine, 44 N.Y.S.2d 575, 181 Misc. 75.

Hearing set on condition of notice

Where hearing was set on condition that attorney for plaintiff notify attorneys for defendants, finding that one of the attorneys representing defendants was notified and that through some oversight, lapse of memory, or misunderstanding, he failed to notify defendants and their other attorneys, was insufficient to warrant the conclusion that they had notice of time and place of hearing, and hence judgment entered in their absence should be set aside.—Everett v. Johnson, 14 S.E.2d 520, 219 N.C. 540.

Failure to serve counterclaim

In view of statute, where defendant's answer containing counterclaim was not served on plaintiff, and no answer, demurrer, or reply was filed by plaintiff, court properly set aside judgment entered by default and inquiry on defendant's counterclaim.—Williams Fulgham Lumber Co. v. Welch, 148 S.E. 250, 197 N.C. 249.

94. Colo.—Drinkard v. Spencer, 211 P. 379, 72 Colo. 396.
Fla.—Segel v. Staiber, 144 So. 875, 106 Fla. 946.
Iowa.—Lunt v. Van Gorden, 281 N. W. 743, 225 Iowa 1120.

95. U.S.—Marion County Court, W. Va., v. Ridge, C.C.A.W.Va., 13 F. 2d 969.
Ill.—Marland Refining Co. v. Lewis, 264 Ill.App. 163.
Utah.—Okerlund v. Robinson, 281 P. 300, 74 Utah 602.
34 C.J. p 423 note 34 [a] (1).

Judgment taken immediately after overruling demurrer and in violation of a rule requiring notice and time to answer is properly vacated on that ground.
Cal.—Harris v. Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396.
Philippine.—Fresseli v. Agustin, 8 Philippine 529.

96. N.J.—First Nat. Bank v. Stoneley, 160 A. 764, 10 N.J.Misc. 785.

97. Ark.—Hill v. Teague, 108 S.W. 2d 889, 194 Ark. 552.
N.H.—Lewellyn v. Follansbee, 47 A. 2d 572.
Tex.—Grand United Order of Odd Fellows v. Wright, Civ.App., 76 S.W.2d 1073—Oldham v. Heatherly, Civ.App., 17 S.W.2d 113.
34 C.J. p 272 note 70.

Failure of counsel to disclose location

Where defendant was kept in court by adjournments and files did not disclose location of defendant's counsel, refusal to set aside judgment taken without notice was not abuse of discretion.—O'Neill v. Hendrickson, 147 A. 721, 7 N.J.Misc. 1022.

Hearing of demurrer

In absence of fraud or mistake, it is not ground to vacate default that defendant or attorneys had no notice of hearing of demurrer, and granting time to further plead after overruling it, after which judgment was rendered.—Graham Production Co. v. Western Drilling Co., 251 P. 1004, 123 Okl. 79.

98. Okl.—MacDonnell v. Maiers, 3 P.2d 681, 152 Okl. 244—Green v. James, 296 P. 743, 147 Okl. 273—Wilson v. Porter, 231 P. 713, 94 Okl. 259.
Duty of party to know when case will be called for trial see infra subdivision n (5) (b) of this section.
Duty of counsel to know when case will be called for trial see infra subdivision n (6) (b) of this section.
Mistake as to time or place of hearing or trial as ground for opening or vacating default judgment see infra subdivision n (2) (c) of this section.

99. Ala.—McCord v. Harrison & Stringer, 93 So. 428, 207 Ala. 480.

1. Okl.—Colley v. Sapp, 216 P. 454, 90 Okl. 139.

2. Okl.—Colley v. Sapp, supra.

3. Okl.—Colley v. Sapp, supra.
Inaccuracy of information given by, or reliance on statements of, judge or clerk of court as ground for opening default judgment see infra subdivision e of this section.

4. Tex.—University Development Co. v. Wolf, Civ.App., 93 S.W.2d 1187.

5. Ala.—Ex parte Anderson, 4 So. 2d 420, 242 Ala. 31.
Cal.—Baird v. Smith, 14 P.2d 749, 216 Cal. 408—Crofton v. Young, 119 P.2d 1003, 48 Cal.App.2d 452.
Fla.—Albert M. Travis Co. v. Atlantic Coast Line R. Co., 136 So. 884, 102 Fla. 1117, rehearing denied 102 Fla. 1117, 139 So. 141.
N.Y.—Sobel v. Sobel, 4 N.Y.S.2d 194, 254 App.Div. 203, reargument denied 6 N.Y.S.2d 328, 254 App.Div. 836.
N.C.—Cook v. Bradsher, 12 S.E.2d 690, 219 N.C. 10—Clegg v. Canady, 195 S.E. 770, 213 N.C. 258.
Wyo.—Kimbel v. Osborne, 156 P.2d 279.
34 C.J. p 294 note 86.

as where default was improperly entered for failure of plaintiff to answer a cross complaint which under the circumstances was unnecessary.[6] Also a judgment entered contrary to the course of the court by inadvertence, improvidence, mistake, or the like may be set aside.[7] A judgment may be set aside whether there was a total lack of authority to enter any judgment or only lack of authority to enter a particular judgment, when the entry of such a judgment was premature,[8] as where it was entered before expiration of the time for the filing of an answer,[9] before expiration of a continuance granted by the trial judge,[10] pending an application for a change of venue,[11] prior to the day on which the cause was docketed for trial,[12] or prior to the date reserved for decision on a demurrer.[13] A default judgment erroneously rendered where defendant was not in default may be vacated.[14]

c. Fraud

A default judgment may be vacated for extrinsic and collateral fraud in obtaining the judgment.

A default judgment, like any other, may be vacated for fraud,[15] including legal fraud practiced by the prevailing parties without it being intentional,[16] according to the decisions on the ques-

Unauthorized, inadvertent, improvident, or premature entry as ground for setting aside judgments generally see supra § 278.

6. Cal.—Crofton v. Young, 119 P. 2d 1003, 48 Cal.App.2d 452.

7. Cal.—Harris v. Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396.
N.M.—Ealy v. McGahen, 21 P.2d 84, 37 N.M. 246.
34 C.J. p 294 note 87.
Inadvertence in permitting default as ground for relief see infra subdivision n (4) of this section.

Adoption of pleadings
In partition suit, where, at time of default by one defendant, mortgagee defendant had not answered but answer and cross-petition of other defendants, which were subsequently adopted by defaulting defendant, were on file, and allegations of such pleadings, if true, would prevent partition and invalidate mortgagee's lien against defaulting defendant's interest, court did not abuse discretion in setting aside default.—Redding v. Redding, 284 N.W. 167, 226 Iowa 327.

8. U.S.—In re Nelson, D.C.Idaho, 36 F.2d 979.
Ill.—Phegley v. Kroger Grocery & Baking Co., 281 Ill.App. 544.
Mont.—Paramount Publix Corporation v. Boucher, 19 P.2d 223, 93 Mont. 340.
Ohio.—Ramsey v. Holland, 172 N.E. 411, 35 Ohio App. 199.
34 C.J. p 294 note 88, p 295 notes 90, 91.

9. Ariz.—Michener v. Standard Accident Ins. Co., 47 P.2d 438, 46 Ariz. 66.
Cal.—Harris v. Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396.
Mo.—Poindexter v. Marshall, App., 193 S.W.2d 622.
Mont.—Paramount Publix Corporation v. Boucher, 19 P.2d 223, 93 Mont. 340.
N.J.—Gloucester City Trust Co. v. Goodfellow, 3 A.2d 561, 121 N.J. Law 546—**Corpus Juris cited in** Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 549, 115 N.J.Law 86, affirmed 183 A. 165, 116 N.J.Law 191.
N.M.—Dallam County Bank v. Burnside, 249 P. 109, 31 N.M. 537.
N.D.—Kaull v. Johnson, 218 N.W. 606, 56 N.D. 563.
Tex.—Andrus v. Andrus, Civ.App., 168 S.W.2d 891.
34 C.J. p 294 note 89.

Nonappearance within time for answer
Fact that defendant did not appear before expiration of time allowed to answer did not preclude her from making direct attack on prematurely entered default judgment by timely motion to vacate judgment.—Netland v. Baughman, Colo., 162 P.2d 601.

10. Tenn.—Fidelity-Phenix Fire Ins. Co. v. Oliver, 152 S.W.2d 254, 25 Tenn.App. 114.

After order granting continuance was set aside without notice
Ill.—Coen-Berkson & Co. v. Gordon, 283 Ill.App. 28.

11. Mo.—Carpenter v. Alton R. Co., App., 148 S.W.2d 68.

Plea of privilege
Refusal to set aside default was held abuse of discretion, in view of moving party's reliance on plea of privilege to be sued in county of his residence, not properly disposed of before trial.—Sun Lumber Co. v. Huttig Sash & Door Co., Tex.Civ. App., 36 S.W.2d 561—Federal Supply Co. v. Bailey, Tex.Civ.App., 297 S.W. 235.

12. Ky.—Clements v. Kell, 39 S.W. 2d 663, 239 Ky. 396.

13. Ariz.—Garner v. Towler, 218 P. 390, 25 Ariz. 101.

14. Ill.—Harris v. Juenger, 11 N.E. 2d 929, 367 Ill. 478.
Okl.—Joplin Furniture Co. v. Bank of Picher, 3 P.2d 173, 151 Okl. 158.

15. Md.—Martin v. Long, 120 A. 875, 142 Md. 348.
N.Y.—Mills v. Nedza, 227 N.Y.S. 156, 222 App.Div. 615.
Tex.—Halbrook v. Quinn, Civ.App., 286 S.W. 954, certified questions dismissed Quinn v. Halbrook, 285 S.W. 1079, 115 Tex. 513—Marsh v. Tiller, Civ.App., 279 S.W. 283.
Wash.—Bishop v. Illman, 126 P.2d 582, 14 Wash.2d 13—State v. Superior Court for Thurston County, 271 P. 87, 149 Wash. 443.
34 C.J. p 278 note 89.
Fraud or collusion as ground for vacating judgments generally see supra § 269.

Adverse interest of parties
Judgment obtained against corporation by default in action wherein four of five directors had adverse interest constituted extrinsic fraud or collusion, warranting vacation of judgment at instance of stockholder, where directors' interest had not been disclosed and was not known to the court.—Kerr v. Southwest Fluorite Co., 294 P. 324, 35 N.M. 232.

Collusion
Where there was some proof of an understanding or collusive agreement between officers of judgment debtor and judgment creditor whereby judgment creditor's judgment was obtained, opening of default judgment and permitting answer to be filed was proper.—Adler v. Atlas Brick Corporation, 11 N.Y.S.2d 920, 257 App.Div. 876, rehearing denied 14 N.Y.S.2d 412, 257 App.Div. 1063, affirmed 27 N.E.2d 434, 283 N.Y. 64.

Fraud held not shown
Ark.—Magnolia Grocer Co. v. Farrar, 115 S.W.2d 1094, 195 Ark. 1069—Hill v. Teague, 108 S.W.2d 889, 194 Ark. 552.

16. Okl.—Lane v. O'Brien, 49 P.2d 171, 173 Okl. 475.

Test
Whether statements of plaintiff's attorney misled and induced defendant to omit assertion of right is test whether statements amounted to constructive fraud warranting setting aside default judgment.—Kirby v. Hoeh, 21 P.2d 732, 94 Mont. 218.

Undue delay in bringing case to trial
Where advantage has been taken of defendant through undue delay in bringing a case to trial, a judgment

tion, as well as intentional or deliberate fraud.[17] The authority to set aside judgments for this cause is limited to cases where the fraud complained of was practiced in the very act of obtaining the judgment, and all cases of fraud which might have been used as a defense to defeat the action are excluded; the fraud must be extrinsic and collateral to the matter tried, and not a matter which was potentially in issue in the action.[18] The mere sending of statements by plaintiff to defendant after institution of the suit showing that the amount due was different and substantially less than that sued for does not amount to a representation that a judgment would not be taken for the amount alleged to be due in the petition.[19]

d. Agreement with, or Statement by, Party Taking Default or His Counsel

It is ground for vacating a default judgment that it was entered in violation of an explicit agreement or promise on which the party was entitled to rely.

A default which arises from reliance placed by a party or his counsel on assurances given him by the opposing party or counsel is excusable within the meaning of the law.[20] So, where there is an agreement between the parties or their counsel, such as an agreement that the case should be continued, or that time to plead should be extended, or that th action should be dismissed as the result of a compromise or settlement, or a promise of a party that he would not press the case to judgment, or a promise that the case would be heard at a time mutually to be agreed on, or other agreement in violation of which one party without notice to the other enters a default, or secures a judgment in his absence, it is good ground for vacating the judgment.[21] The agreement or promise must have been explicit, however, and of such a character that the party could rely on it and remain inactive without being thereby chargeable with negligence or lack of due diligence in guarding his own interests.[22]

An oral agreement, not communicated to the court, is entitled to little favor,[23] and when of uncertain and indefinite character will not afford ground for vacation of a judgment;[24] but relief may be granted on the basis of an oral agreement satisfactorily established,[25] although where a statute

taken against him in his absence should be set aside and a new trial awarded.—Stansberry v. Dennison, 158 S.E. 716, 110 W.Va. 470.

17. Okl.—Lane v. O'Brien, 49 P.2d 171, 173 Okl. 475.
34 C.J. p 282 note 4.

18. Kan.—Irvine v. Eysenbach, 267 P. 995, 126 Kan. 362.
N.Y.—Schlegel v. Wagner, 29 N.Y.S. 2d 389.
34 C.J. p 280 note 96.

Delay in giving notice of taking judgment

The alleged fact that no notice was given to defendants of the taking of a default judgment until it was too late to have default judgment set aside on motion was not ground for the setting aside of the default judgment.—Nicholson v. Thomas, 127 S.W.2d 155, 277 Ky. 760.

Failure to disclose facts to court

The alleged fact that assignee of subject matter of suit did not make disclosure of facts and status of case to the trial court would not authorize the setting aside of a default judgment.—Nicholson v. Thomas, 127 S.W.2d 155, 277 Ky. 760.

False allegations in pleadings are not such fraud as will justify or require vacation of the judgment.—Irvine v. Eysenbach, 267 P. 995, 126 Kan. 362—34 C.J. p 280 note 96 [c].

19. Ga.—Courier-Herald Pub. Co. v. Georgian Co., 128 S.E. 744, 160 Ga. 583.

20. Cal.—Ackerman v. Beach, 285 P. 895, 104 Cal.App. 299, followed in 285 P. 896, 104 Cal.App. 788.
Colo.—Mountain States Silver Mining Co. v. Hukill, 244 P. 605, 79 Colo. 128.
Conn.—Crane v. Loomis, 25 A.2d 650, 128 Conn. 697.
Ky.—Hackney v. Charles, 295 S.W. 869, 220 Ky. 574.
N.Y.—Linden v. West 21st Street Holding Corporation, 12 N.Y.S.2d 77, 257 App.Div. 844—Jacoby v. Jacoby, 280 N.Y.S. 611, 245 App. Div. 768.
N.C.—Edwards v. Butler, 119 S.E. 7, 186 N.C. 200.
Or.—Leonard v. Bennett, 106 P.2d 542, 165 Or. 157.
S.D.—Jones v. Johnson, 222 N.W. 688, 54 S.D. 149.
Tex.—Metropolitan Casualty Ins. Co. of New York v. City of Junction, Civ.App., 55 S.W.2d 655—Dickinson v. Reeder, Civ.App., 22 S.W.2d 725—Lewis v. Bell, Civ.App., 12 S.W. 2d 237—Trigg v. Gray, Civ.App., 288 S.W. 1098—Marsh v. Tiller, Civ.App., 279 S.W. 283.
Wash.—Melosh v. Graham, 210 P. 667, 122 Wash. 299.

21. Ariz.—Bartholomew v. Ruffner, 273 P. 986, 35 Ariz. 12.
Ark.—Wrenn v. Manufacturers' Furniture Co., 289 S.W. 769, 172 Ark. 599.
Cal.—Waybright v. Anderson, 253 P. 148, 200 Cal. 374—Taranto v. Dick, 6 P.2d 334, 119 Cal.App. 161.
Conn.—Crane v. Loomis, 25 A.2d 650, 128 Conn. 697.
Ga.—Landau Bros. v. Towery, 179 S. E. 647, 51 Ga.App. 113.
Kan.—American Nat. Bank v. Marshall, 253 P. 214, 122 Kan. 793.
Neb.—National Co-op. Hail Ass'n v. Doran Bros. 238 N.W. 527, 121 Neb. 746.
N.J.—Geithner v. Paechiana, 150 A. 240, 8 N.J.Misc. 384.
Okl.—Welborn v. Whitney, 65 P.2d 971, 179 Okl. 420—Sudik v. Sinclair Oil & Gas Co., 44 P.2d 954, 172 Okl. 334.
Pa.—Welzel v. Link-Belt Co., 35 A. 2d 596, 154 Pa.Super. 66.
34 C.J. p 285 note 16, p 423 note 34 [a] (1).
Violation of agreement as ground for opening or vacating judgments generally see supra § 271.

22. Ky.—Harris v. First Nat. Bank, 98 S.W.2d 468, 266 Ky. 174.
N.Y.—Cusano v. Mitterloff, 298 N. Y.S. 870, 252 App.Div. 803.
34 C.J. p 286 note 17.

Mere correspondence about possible settlement was held not to excuse default in pleading.—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266.

23. Iowa.—Standard Oil Co. v. Marvill, 206 N.W. 37, 201 Iowa 614—Dixon v. Brophey, 29 Iowa 460.
Mont.—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266.

24. Iowa.—Holtz v. Sweet, 206 N.W. 286.
Mont.—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266.

25. Cal.—Waybright v. Anderson, 253 P. 148, 200 Cal. 374.

or rule of court requires agreements of the character relied on to be reduced to writing and filed, or communicated to the court, a mere oral agreement of the parties not brought to the notice of the court will not be sufficient to authorize the vacation of a judgment taken in violation of its terms.[26]

Where the agreement to withhold proceedings on the suit is terminated or expressly withdrawn, a default judgment subsequently taken will not be vacated.[27]

e. Statement or Order of Judge or Clerk

A default judgment may be opened if it is due to the inaccuracy of information given by, or reliance on statements of, the judge or clerk of court, although some cases hold that even official assurances will not relieve litigants from the duty of exercising vigilance in watching the progress of their cases.

Litigants are entitled to rely on statements by officials charged with the custody and control of papers and records relating to judicial proceedings in which they are interested, and about which information is sought; and accordingly a judgment by default will be opened if it is due to the inaccuracy of information given by, or reliance on statements of, such officials,[28] such as a judge[29] or the clerk of the court.[30] Accordingly if the court or an officer of the court by his conduct has misled parties as to the time cases will be tried, the absence of such parties may be excused,[31] although some cases hold that even official assurances will not relieve litigants or their counsel from the duty of exercising vigilance in watching the progress of their cases.[32]

f. Defense to Action

The existence of a complete defense available to the defendant before entry of a default judgment is not ground for opening or vacating the judgment, although the rule is otherwise as to a defense which arose after the default or of which the defendant was ignorant.

A default judgment regularly entered cannot be opened or vacated on defendant's motion on the ground of the existence of a complete defense which was available to defendant before entry of the judgment,[33] but the court may open or vacate the judgment to give the defaulted party the ad-

Neb.—Howard Stove & Furnace Co. v. Rudolf, 260 N.W. 189, 128 Neb. 665.
34 C.J. p 286 note 20.

23. Colo.—Newland v. Frost, 263 P. 715, 83 Colo. 207.
Mont.—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266.
N.J.—O'Neill v. Hendrickson, 147 A. 721, 7 N.J.Misc. 1022.
Pa.—Planters Nut & Chocolate Co. v. Brown-Murray Co., 193 A. 381, 128 Pa.Super. 239—Lucia v. Prudential Ins. Co. of America, 173 A. 441, 113 Pa.Super. 323.
34 C.J. p 286 note 18.

27. Iowa.—Iowa Cord Tire Co. v. Babbitt, 192 N.W. 431, 195 Iowa 922.
Tex.—Jackson v. Manning, Civ.App., 287 S.W. 1103.
Where agreement is conditioned on payment of stipulated sum in settlement of the claim against defendant, which defendant on reasonable demand fails to pay notwithstanding notice by plaintiff that on nonpayment the case would be set for trial, defendant is not justified in concluding that the case would not be tried on the date set, and the circumstances afford no ground for setting aside a default judgment taken on that date.—Walker County Fertilizer Co. v. Napier, 149 S.E. 705, 40 Ga.App. 387.

29. Del.—**Corpus Juris cited** in Yerkes v. Dangle, Super., 33 A.2d 406, 408.
34 C.J. p 299 note 28, p 300 note 29.
Mistake as to time for appearance or trial as ground for vacating:
Default judgments see infra subdivisions n (2) (c), n (6) (c) of this section.
Judgments generally see supra § 280.

29. Ky.—Cumberland Fluorspar Corp. v. Waddell, 183 S.W.2d 641, 293 Ky. 594.
Miss.—**Corpus Juris quoted in** Gardner v. Price, 25 So.2d 459, 461.
34 C.J. p 299 note 28.

30. Ariz.—Beltran v. Roll, 7 P.2d 248, 39 Ariz. 417.
Del.—**Corpus Juris cited in** Yerkes v. Dangle, Super., 33 A.2d 406, 408.
Pa.—De Kalb v. Rollison, 90 Pa.Super. 128—Kozuhowski & Reuss v. Snigel & Snigel, 90 Pa.Super. 75.
34 C.J. p 300 note 29.

31. Okl.—Carter v. Grimmett, 213 P. 732, 89 Okl. 37.
34 C.J. p 299 note 28, p 300 note 29.
Reason for rule
It is policy of law to afford every litigant fair opportunity to present his cause.—Hale v. McIntosh, 243 P. 157, 116 Okl. 40—Hoffman v. Deskins, 221 P. 37, 94 Okl. 117.

32. Cal.—Taecker v. Parker, 93 P. 2d 197, 34 Cal.App.2d 143.
Ill.—Blaha v. Turk, 12 N.E.2d 338, 293 Ill.App. 636.
N.C.—Gaster v. Thomas, 124 S.E. 609, 188 N.C. 346.
Okl.—Schuman v. Sternberg, 65 P. 2d 410, 179 Okl. 115—Foster v. State, 270 P. 84, 132 Okl. 256.
S.C.—Kerr v. Cleveland, 188 S.E. 370, 182 S.C. 29.
34 C.J. p 300 note 33.
Diligence required of suitors generally see infra subdivision n (5) (b) of this section.
Facts not warranting relief
A default judgment would not be set aside because one of the defendants had asked the court not to call the matter up while she was in another city, and court told her that the matter would not be set before certain date, where the judgment was not rendered until that date, and defendant did not leave the city at the time she had specified.—Sabin v. Sunset Gardens Co., 85 P.2d 294, 184 Okl. 106.

33. Ariz.—Postal Ben. Ins. Co. v. Johnson, 165 P.2d 173.
N.M.—Ealy v. McGahen, 21 P.2d 84, 37 N.M. 246.
Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 36 Ohio App. 481.
Okl.—Woodruff v. Moore, 77 P.2d 62, 182 Okl. 120—Boles v. MacLaren, 4 P.2d 106, 106 Okl. 265—U. S. Smelting Co. v. McGuire, 253 P. 79, 123 Okl. 272.
Pa.—Planters Nut & Chocolate Co. v. Brown-Murray Co., 193 A. 381, 128 Pa.Super. 239.
34 C.J. p 286 note 21–p 287 note 28.
Defense to action as ground for opening or vacating judgments generally see supra § 272.
Existence of meritorious defense as requisite to opening or vacating default judgment see infra § 336.

vantage of a defense which arose after the default[34] or of which he was ignorant.[35]

g. Error in Law

In the absence of a statute authorizing such relief, a default judgment ordinarily cannot be vacated by the trial court, after expiration of the term at which it is rendered, on the sole ground that it is erroneous in matter of law not going to the jurisdiction.

Unless, as shown supra subdivision b (1) of this section, the error is one going to the jurisdiction, a default judgment, in the absence of statute authorizing such relief, may not be vacated or set aside by the trial court, after expiration of the term at which it is rendered, on the sole ground that it is erroneous in matter of law,[36] the remedy in such case being by appeal.[37] A judgment may, however, be vacated when it improperly exceeds the relief prayed for, or is rendered for an amount in excess of that claimed in the writ or declaration.[38]

h. Error or Mistake of Fact

Error or mistake of fact going to the validity or regularity of the judgment, such as furnished ground for the writ of error coram nobis at common law, is ground for opening or vacating a default judgment.

Error or mistake of fact going to the validity or regularity of the judgment, such as furnished ground for the writ of error coram nobis at common law, is ground for opening or vacating a default judgment.[39] Errors in fact within this rule are errors in material matters, prejudicial to the judgment debtor, and which, if known, would have prevented rendition of the judgment,[40] and which do not appear on the face of the record.[41]

i. Objections as to Parties

A default judgment may, in a proper case, be vacated because of defects or objections as to parties.

A default judgment may be vacated as to one who was not definitely named as a party defendant

34. Pa.—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, 5 A. 2d 139, 333 Pa. 344.
34 C.J. p 288 note 32.

35. Pa.—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, supra.
Ignorance as ground for excuse for default generally see infra subdivision k of this section.

36. Ark.—Magnolia Grocery Co. v. Farrar, 115 S.W.2d 1094, 195 Ark. 1069.
Ind.—Colvert v. Colvert, 180 N.E. 192, 95 Ind.App. 325.
Ky.—Stratton v. Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632—Fowler v. Wiley, 33 S.W.2d 14, 236 Ky. 313.
Mass.—Moll v. Town of Wakefield, 175 N.E. 81, 274 Mass. 505.
N.M.—Ealy v. McGahen, 21 P.2d 84, 37 N.M. 246.
N.C.—Finger v. Smith, 133 S.E. 186, 191 N.C. 818.
Wash.—Hurley v. Wilson, 225 P. 441, 129 Wash. 567.
34 C.J. p 289 note 42, p 290 note 43.
Error of law as ground for vacating judgment generally see supra § 274.
Mistake as ground for vacating default judgment generally see infra subdivisions n (2), (6) of this section.

Want or insufficiency of evidence
A default judgment will not be reopened and set aside because evidence or sufficient legal evidence was not introduced as a basis for its rendition.—Citizens' Bank v. Brandau, Tex.Civ.App., 1 S.W.2d 466, error refused.

37. Ill.—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392.
N.C.—Wellons v. Lassiter, 157 S.E. 434, 200 N.C. 474—Finger v. Smith, 133 S.E. 186, 191 N.C. 818—Duffer v. Brunson, 125 S.E. 619, 188 N.C. 789.
Right of appeal from default judgment generally see Appeal and Error § 155.

38. Cal.—Pease v. City of San Diego, App., 169 P.2d 973.
Iowa.—Rayburn v. Maher, 288 N.W. 136, 227 Iowa 274.
Mo.—Boggess v. Jordan, App., 283 S. W. 57.
N.C.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379—Federal Land Bank of Columbia v. Davis, 1 S.E. 2d 350, 215 N.C. 100.
Or.—Leonard v. Bennett, 106 P.2d 542, 165 Or. 157.
S.D.—Jones v. Johnson, 222 N.W. 688, 54 S.D. 149.
34 C.J. p 290 note 46.

39. Ill.—Rapp v. Goerlitz, 40 N.E. 2d 766, first case, 314 Ill.App. 191—Simon v. Balasic, 39 N.E.2d 685, 313 Ill.App. 266—Katauski v. Eldridge Coal & Coke Co., 255 Ill. App. 41—Marquette Nat. Fire Ins. Co. v. Minneapolis Fire & Marine Ins. Co., 283 Ill.App. 102.
34 C.J. p 290 notes 55, 57.
Error or mistake of fact as ground for opening or vacating judgments generally see supra § 275.
Mistake of fact generally as ground for opening or vacating default judgment see infra subdivision n (2) of this section.

"Clerical error"
Clerk's placing of case, pleadings in which were not advanced for one year, on calendar without notice, was "clerical error" authorizing vacation of judgment dismissing action for want of appearance within rule.—New England Furniture & Carpet Co. v. Willcuts, D.C.Minn., 55 F.2d 983.

Ignorance of want of notice
Where court was unaware at time of entering default and judgment thereon that notice of such proceedings had not been served on defendant or his attorney, court properly set the judgment aside on ground of error of fact unknown to the court when judgment was rendered.—Lusk v. Bluhm, 58 N.E.2d 135, 321 Ill.App. 349.

40. Ill.—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392—Katauski v. Eldridge Coal & Coke Co., 255 Ill.App. 41—Loew v. Krauspe, 237 Ill.App. 441, affirmed 150 N.E. 683, 320 Ill. 244—Precision Products Co. v. Cady, 233 Ill. App. 77.
34 C.J. p 290 note 59.

Dismissal of other defendants without notice was not an error of fact within text rule.—McNulty v. White, 248 Ill.App. 572.

Pendency of another action
Where at time plaintiff obtained default judgment for purchase price of a fur coat, there was withheld from the court the information that purchaser's action in small claims court against plaintiff to recover payments made on the coat had been continued that same day, setting aside the default judgment even after expiration of the term was proper.—Marvin's Credit v. Kitching, D. C.Mun.App., 34 A.2d 866.

41. Ill.—Sherman & Ellis v. Journal of Commerce and Commercial Bulletin, 259 Ill.App. 453.

in the complaint,[42] particularly where the complaint did not allege that plaintiffs were ignorant of the name of such defendant and plaintiffs did not seek before entry of default judgment to amend the complaint to show that movant was the party sued as "John Doe."[43] Inasmuch as nonjoinder of a comaker or surety is a curable defect, and inasmuch as in a suit against joint or joint and several obligors, where some are not served, the judgment is good as against those served, there is no error in overruling a motion to set aside the judgment on allegation and proof of such defects.[44]

j. Objections as to Pleadings

A default judgment will not be set aside because of mere defects or insufficiency in the pleadings, although failure of the declaration or complaint to state a cause of action is ground for vacating a default judgment.

A default judgment will not be set aside because of defects or insufficiency in the pleadings,[45] especially where the alleged fault is amendable[46] or the facts alleged are sufficient to challenge the attention of the court having jurisdiction of the subject matter and parties.[47] It has been held, however, that failure of the declaration or complaint to state a cause of action is ground for vacating a default judgment.[48] A default judgment rendered on a petition which shows on its face that the alleged cause of action was barred by the statute of limitations may, it has been held, be set aside for irregularity;[49] but, on the other hand, the view has been taken that no ground to set aside the judgment exists in such case, since such a petition does not fail to set out a cause of action.[50]

Default in service. Plaintiff suing defendant individually and as executor, but not serving the complaint in both actions, may have his default opened and the actions consolidated.[51]

k. Ignorance or Illiteracy

A party's ignorance or illiteracy, standing alone, is no excuse for a default, although such ignorance in connection with other circumstances may move the court, in the exercise of its discretion, to vacate a default judgment.

Standing alone, ignorance,[52] such as ignorance

42. Cal.—Flores v. Smith, 117 P.2d 712, 47 Cal.App.2d 253.
34 C.J. p 292 note 63.
Objection as to parties as basis for vacating judgments generally see supra § 276.

43. Cal.—Flores v. Smith, supra.

44. Ga.—Henderson v. Ellarbee, 131 S.E. 524, 35 Ga.App. 5.

45. Ga.—Burch v. Wofford-Terrell Co., 184 S.E. 419, 52 Ga.App. 685.
Ind.T.—Merrill v. Martin, 64 S.W. 539, 3 Ind.T. 571.
N.C.—Hood ex rel. Citizens Bank & Trust Co. v. Stewart, 184 S.E. 36, 209 N.C. 424.
34 C.J. p 293 note 76.
Setting aside judgments because of defects or insufficiency in pleadings generally see supra § 277.

46. Ga.—Henderson v. Ellarbee, 131 S.E. 524, 35 Ga.App. 5.
34 C.J. p 293 note 77.

47. Wyo.—James v. Lederer-Strauss & Co., 233 P. 137, 32 Wyo. 377.

Petition stating prima facie cause of action

In motion to vacate default judgment after expiration of term at which judgment was rendered, defendant cannot question sufficiency of petition, allegations of which state prima facie cause of action.—Royse v. Grage, 28 P.2d 732, 138 Kan. 779.

48. Ga.—Tolbert v. Tolbert, 154 S.E. 655, 41 Ga.App. 737.
Ill.—Baxter v. Atchison, T. & S. F. Ry. Co., 35 N.E.2d 563, 310 Ill.App. 616.
Minn.—Pilney v. Funk, 3 N.W.2d 792, 212 Minn. 398.
Pa.—Borough of Wilkinsburg v. School Dist. of Borough of Wilkinsburg, 148 A. 77, 298 Pa. 193—Waber v. Schaffhauser, 34 Pa.Dist. & Co. 348.
34 C.J. p 293 note 83.

There is a difference between a defective statement of a good cause of action and a statement of no cause of action where the complaint is wholly insufficient to make out a cause of action. A judgment by default on the former is erroneous and must be appealed from; the latter is irregular and can be set aside within a reasonable time where merit is shown and there is no laches.—Hood ex rel. Citizens Bank & Trust Co. v. Stewart, 184 S.E. 36, 209 N.C. 424.

Failure to file exhibits

Where the basis of plaintiff's action consisted of two exhibits said to have been filed therewith, and his petition did not purport to copy or use the language of either one of those exhibits, and plaintiff had never filed either one of them, and it appeared that attorney for defendants moved the court to require plaintiff to file with his petition the exhibits referred to therein, the court abused its discretion in overruling motion to set aside default judgment.—Miller v. Sachs, 258 S.W. 84, 201 Ky. 630.

Default judgment for want of affidavit of defense will be opened if plaintiff's statement was not sufficient to call for such affidavit.—Richey v. Gibboney, 34 A.2d 913, 154 Pa.Super. 1—Nikulnikoff v. Orthodox Russian Church of St. Andrew, Inc., 97 Pa.Super. 291—Cadwallader v. Firestone, Pa.Com.Pl., 7 Fay.L.J. 259.

Default judgment properly set aside

A default judgment against individual defendants doing business as association, not named in caption of summons and complaint, or charged in complaint, as defendant, was properly set aside as against contention that lack of partnership or common name in such caption could not nullify judgment, as attack on judgment was based on entire absence of material allegations in body of complaint, not merely words in caption.—Burns v. Downs, 108 P.2d 953, 42 Cal.App.2d 322.

49. Okl.—Nordman v. School Dist. No. 32 of Choctaw County, 121 P. 2d 290, 190 Okl. 135.
Irregularity as ground for vacating default judgment generally see supra subdivision b (2) of this section.

50. Ga.—Burch v. Wofford-Terrell Co., 184 S.E. 419, 52 Ga.App. 685.

51. N.Y.—Von Wilmowsky v. Prindle, 234 N.Y.S. 15, 225 App.Div. 594.

52. Ariz.—Daly v. Okamura, 213 P. 339, 25 Ariz. 50.
N.J.—Nutley Finance Co. v. De Federicis, 150 A. 241, 8 N.J.Misc. 382.
S.D.—Languein v. Olson, 227 N.W. 369, 56 S.D. 1.
Ignorance as ground for vacation of judgments generally see supra § 280.

of the law[53] or rules of court,[54] is not a sufficient excuse for failure to plead or for a default. So the illiteracy of a defendant, or ignorance of the English language, of the course of judicial procedure, or of his rights and duties, will furnish no excuse for failing to defend the action, or justify the vacation of the judgment, where he at least knew that he had been sued, and neglected to ask information or advice from others.[55] Where, however, defendant has failed to answer because of ignorance of the law, and it is properly shown that he has a meritorious defense, and that no harm has resulted or will result, the default judgment may, in the discretion of the court, be vacated.[56]

l. Absence of Party or Counsel

The mere unexcused absence of a party or his counsel from the trial is not ground for opening or setting aside a default judgment, although such relief may be granted on a showing of sufficient excuse for the absence.

In the absence of a statute providing otherwise,[57] the mere fact that a party was absent from the trial is no cause for opening or setting aside a default judgment where his absence is not excused or shown to have been unavoidable.[58] Also the mere absence of one's attorney at the time of the trial is no cause for opening or setting aside a default judgment,[59] and relief will not be granted for this reason unless counsel was prevented from appearing by accident, mistake, or other reasonable cause.[60] It has been considered a sufficient excuse that the absent attorney was engaged at the time in trying a case in another court,[61] or that he was

53. Ariz.—Daly v. Okamura, 213 P. 389, 25 Ariz. 50.
Cal.—Williams v. McQueen, 265 P. 339, 89 Cal.App. 659.
Minn.—Application of Bonley, 6 N. W.2d 245, 213 Minn. 214.
Mo.—Reuck v. Strickland, 12 S.W.2d 764, 222 Mo.App. 1171.
Pa.—Commonwealth v. Dr. Crandall's Health School, Com.Pl., 51 Dauph. Co. 333.
S.D.—Languein v. Olson, 227 N.W. 369, 56 S.D. 1.
Attorney's ignorance of law as excuse for default see infra subdivision n (6) (d) of this section.

54. Mo.—Reuck v. Strickland, 12 S. W.2d 764, 222 Mo.App. 1171.

55. Ariz.—Daly v. Okamura, 213 P. 389, 25 Ariz. 50.
S.D.—Languein v. Olson, 227 N.W. 369, 56 S.D. 1.
34 C.J. p 301 note 44.

56. Mo.—Reuck v. Strickland, 12 S. W.2d 764, 222 Mo.App. 1171.
34 C.J. p 301 notes 45, 46.
Discretion of court generally see infra § 337.
Existence of defense of which defaulted party was ignorant as ground for opening judgment see supra subdivision f of this section.

57. Ga.—Lankford v. Milhollin, 28 S.E.2d 752, 197 Ga. 227.

Judgment of partition

The statute providing that when judgment of partition is had any party in interest absent from state or not notified may move to set aside such judgment within twelve months is not dependent on absence of service, but applies where party in interest is absent from state or has not been notified.—Lankford v. Milhollin, supra.

58. Mass.—Beserosky v. Mason, 168 N.E. 726, 269 Mass. 325.
Mo.—Harrison v. McNergney, App., 111 S.W.2d 191.
Tex.—Cauble v. Key, Civ.App., 256 S. W. 654.
34 C.J. p 315 note 26.
Absence of:
Counsel as unavoidable casualty or misfortune see infra subdivision n (7) of this section.
Party or counsel as ground for opening or setting aside judgment generally see supra § 280.

Attendance at school

Fact that defendant was a university student, and had to attend to his duties at time of trial, is insufficient ground for vacating default judgment.—Lynch v. Powers, 200 N. W. 725, 198 Iowa 1060.

59. Ark.—Morrow v. Lindsey, 262 S.W. 641, 164 Ark. 606.
Cal.—Taecker v. Parker, 93 P.2d 197, 34 Cal.App.2d 143.
Kan.—Johnson v. Salkeld, 271 P. 385, 126 Kan. 807.
La.—Rodick v. Jacobs, 116 So. 583, 166 La. 30.
Mo.—McFarland v. Lasswell, App., 282 S.W. 447.
N.Y.—Dewey v. Agostini Bros. Bldg. Corporation, 283 N.Y.S. 174, 246 App.Div. 667—Zaza v. Zaza, 246 N.Y.S. 148, 138 Misc. 218—Eno v. Tracy, 223 N.Y.S. 674, 130 Misc. 198—United Textile Print Works v. Black Knitting Mills, 205 N.Y.S. 196, 123 Misc. 299.
Ohio.—Balind v. Lanigan, 159 N.E. 103, 26 Ohio App. 149.
Okl.—Runyan v. Hecker, 66 P.2d 1072, 179 Okl. 595—Wheeler v. Walker, 294 P. 641, 147 Okl. 63.
Tex.—Briggs v. Ladd, Civ.App., 64 S.W.2d 389—Colorado River Syndicate Subscribers v. Alexander, Civ. App., 288 S.W. 586.
W.Va.—Hill v. Long, 150 S.E. 6, 107 W.Va. 664.
34 C.J. p 315 note 29.
Attorney's abandonment of, or withdrawal from, case as ground for vacating default see infra subdivision n (6) (f) of this section.

Refusal of jury trial on tardy arrival

Defendant, not present with his counsel at time assigned for trial of case, which court offered to hear on its merits without intervention of jury when defendant's attorney, appearing after default was entered and jury panel excused, asked court to set aside default and permit defense, was offered all he was entitled to, and, having refused to proceed as directed by court cannot complain of default and permission of plaintiff to prove his case on appeal from order overruling his motion to set aside default and judgment for plaintiff.—Vaux v. Hensal, 277 N.W. 718, 224 Iowa 1055.

60. Conn.—Barton v. Barton, 196 A. 141, 123 Conn. 487.
N.M.—Abbott v. Sherman Mines, 71 P.2d 1037, 41 N.M. 531.
N.Y.—Posin v. Hawley, 232 N.Y.S. 441, 225 App.Div. 763—Zaza v. Zaza, 246 N.Y.S. 148, 138 Misc. 218.
34 C.J. p 315 note 32.

61. Cal.—Nicol v. Davis, 265 P. 867, 90 Cal.App. 337.
N.Y.—Kefer v. Gunches, 48 N.Y.S.2d 767.
Tex.—Yellow Transit Co. v. Klaff, Civ.App., 145 S.W.2d 264.
34 C.J. p 316 note 33.

Tolerance of court in enforcing attendance

With respect to right to set aside a default judgment, generally courts recognize that counsel are at times unable to transact business in court at the particular time required on account of urgent business or on account of being busily engaged with other legal matters, and under such a showing they are tolerant in enforcing attendance of counsel.—United Taxi Co. v. Dilworth, 20 N.E.2d 699, 106 Ind.App. 627.

delayed by obstruction to travel,[62] or even that the multiplicity and pressure of his professional engagements prevented him from giving attention to the case.[63]

On the other hand it has been held to be no excuse that the attorney was absent because of trying another case in another court where he took insufficient steps to notify the other party and the court of the reason for his absence,[64] and many courts have refused to accept the excuse that the attorney was detained elsewhere by important business, even when it was of a public character, such as his attendance on the legislature, of which he was a member.[65] According to some cases, if the attorney is detained on his way to the place of trial, he should telephone or telegraph to the judge, and ask him to have the case held;[66] and one seeking to vacate a judgment obtained in his absence must show not only good excuse for his absence, but also that he was unable to notify the court thereof.[67] A judgment entered during the absence of a party and his counsel may be set aside where such absence was due to the mistake, neglect, or omission of the clerk of the court in placing the case on a docket to which it did not belong without notice to counsel and then not notifying them of the assignment of the case for trial.[68]

m. Illness or Death

The illness of a party or his close relative, the illness or death of an attorney or his close relative, or the illness of a material and necessary witness is a sufficient excuse for a default, provided the alleged consequence thereof could not have been prevented or obviated by the exercise of due care or diligence.

Illness is not a sufficient excuse for a default where the exercise of due care or diligence would have prevented or obviated the alleged consequences of such illness.[69] If a party is prevented by sickness from preparing his case or attending the trial, and the circumstances are such that his personal attention and presence are necessary to the due protection of his rights, a default judgment against him may be set aside;[70] and default judgments have been opened or vacated largely, if not altogether, on the ground of serious illness of a close relative actually preventing attendance of the party.[71] It is otherwise where the party's interests were, or could have been, adequately protected by attorney or agent without the personal presence or attention of the party.[72]

Of counsel or his relative. The illness of a par-

62. Ark.—Supreme Lodge, Woodmen of Union, v. Johnson, 17 S.W.2d 323, 179 Ark. 589.
Cal.—Peterson v. Taylor, 152 P.2d 349, 66 Cal.App.2d 333.
34 C.J. p 316 note 37.

63. Kan.—Gordan v. Tennhardt, 8 P.2d 328, 134 Kan. 799.
Miss.—Planters' Lumber Co. v. Sibley, 93 So. 440, 130 Miss. 26.
Mo.—Goodwin v. Kochititzky, App., 3 S.W.2d 1051.
34 C.J. p 316 note 38.

64. Mo.—Williams v. Barr, App., 61 S.W.2d 420—Schopp v. Continental Underwriters' Co., App., 284 S.W. 808—Daugherty v. Lanning-Harris Coal & Grain Co., 265 S.W. 866, 218 Mo.App. 187—Case v. Arky, App., 253 S.W. 484.

65. Ark.—Morrow v. Lindsey, 262 S.W. 641, 164 Ark. 606.
Kan.—Royse v. Grage, 42 P.2d 942, 141 Kan. 702.
34 C.J. p 316 note 43.

66. Cal.—Hall v. Bru, 18 P.2d 716, 216 Cal. 153.
Minn.—Caughey v. Northern Pac. El. Co., 53 N.W. 545, 51 Minn. 324.

67. Ga.—Eves v. Davison-Paxon Co., 161 S.E. 275, 44 Ga.App. 322.
Ind.—United Taxi Co. v. Dilworth, 20 N.E.2d 699, 106 Ind.App. 627.

68. Kan.—Samuel Ach Co. v. Thorpe, 278 P. 15, 128 Kan. 296.

69. Ark.—Thomas v. Arnold, 96 S.W.2d 1108, 192 Ark. 1127.
Ill.—Conard v. Camphouse, 230 Ill. App. 598.
Mont.—Pacific Acceptance Corporation v. McCue, 228 P. 761, 71 Mont. 99.
34 C.J. p 317 note 47.

Illness:
As unavoidable casualty or misfortune authorizing vacation of default judgment see infra subdivision n (7) of this section.
Or death as ground for vacating judgment generally see supra §§ 276, 280.

70. Ariz.—Swisshelm Gold Silver Co. v. Farwell, 124 P.2d 544, 59 Ariz. 162.
Cal.—Salsberry v. Julian, 277 P. 516, 98 Cal.App. 638, followed in 277 P. 518, amended 278 P. 257, 98 Cal. App. 645—Fink & Schindler Co. v. Gavros, 237 P. 1083, 72 Cal.App. 688.
Me.—Bolduc v. Nadeau, 148 A. 565, 128 Me. 542.
Minn.—Deaver v. Nelson, 230 N.W. 122, 180 Minn. 36.
Mo.—Anspach v. Jansen, 78 S.W.2d 137, 229 Mo.App. 321.
34 C.J. p 316 note 44.

Mental condition
Ill.—Kemper v. Fournier, 12 N.E.2d 339, 293 Ill.App. 629.
Neb.—Citizens' State Bank of Cedar Rapids v. Young, 244 N.W. 294 123 Neb. 786.
34 C.J. p 316 note 44 [b], [c].

Childbirth
Court properly set aside judgment granting writ of possession against defendant who failed to appear because of childbirth but who immediately thereafter sued to set aside judgment.—Hazard Lumber & Supply Co. v. Horn, 15 S.W.2d 492, 228 Ky. 554.

Illness of officer of defendant
Where officer of defendant bank, who attended to its litigation, became ill, and as a result services of attorney were not secured until an employee happened to run across matter, and attorney on same day prepared plea of privilege and mailed it to clerk of trial court, fact that plea was not filed until shortly after hour citation was returnable, and default judgment entered, was excusable.—First Nat. Bank v. Southwest Nat. Bank of Dallas, Tex. Civ.App., 273 S.W. 951.

71. Ky.—Welch v. Mann's Ex'r, 88 S.W.2d 1, 261 Ky. 470.
34 C.J. p 317 note 49.

72. Ill.—Conard v. Camphouse, 230 Ill.App. 598.
N.Y.—Quist v. Gwinup, 46 N.Y.S.2d 105, 267 App.Div. 224.
Philippine.—Adela v. Judge of Ilocos Sur. Court of First Instance, 6 Philippine 674, 4 Off.Gaz. 728.
W.Va.—State ex rel. Alkire v. Mili, 180 S.E. 183, 116 W.Va. 277.
34 C.J. p 317 note 45.

ty's counsel, so severe as to prevent him from appearing and trying the case, is good ground for vacating a default judgment, provided such party did not know of it in time to retain other counsel or was prevented in some other way from doing so;[73] otherwise such illness of counsel is not ground for vacating the judgment.[74] The same rule applies in the case of the illness of a member of the attorney's family, or a near relative, withdrawing his attention from professional business and leaving the client without legal aid and without opportunity to retain other counsel.[75] Death of one's attorney may be ground for vacating a default judgment.[76]

Of material and necessary witness. A default judgment may be set aside on the ground of the illness of a material and necessary witness at the time originally scheduled for trial.[77]

n. Mistake, Inadvertence, Surprise, Excusable Neglect, Casualty, or Misfortune

(1) In general
(2) Mistake
(3) Surprise
(4) Inadvertence
(5) Excusable neglect
(6) Negligence, mistake, or misconduct of counsel
(7) Unavoidable casualty or misfortune

(1) In General

A default judgment ordinarily may be opened or vacated for mistake, inadvertence, surprise, excusable neglect, casualty, or misfortune.

A default judgment ordinarily may be opened or vacated for mistake, inadvertence, surprise, excusable neglect, casualty, or misfortune;[78] but, in or-

73. Fla.—Johnson v. City of Sebring, 140 So. 672, 104 Fla. 584.
Iowa.—Equitable Life Ins. Co. of Iowa v. McNamara, 259 N.W. 231, 220 Iowa 297, supplemented and rehearing denied 262 N.W. 466, 220 Iowa 297.
N.J.—Jarrett v. Standard Diesel Engine Co., 12 A.2d 671, 124 N.J.Law 429.
N.Y.—Gawel v. Deluca, 31 N.Y.S.2d 567, 263 App.Div. 838—Allen v. Lake, 201 N.Y.S. 882, 207 App.Div. 886.
Pa.—Lichterman v. Hanlon, 100 Pa. Super. 245.
R.I.—Hoye v. Red Top Cab Co. of Rhode Island, 150 A. 125.
Tex.—Stollenwerck v. State Nat. Bank in Terrell, Civ.App., 63 S.W. 2d 312.
34 C.J. p 317 note 52.

Mental confusion or aberration
Cal.—Hayes v. Pierce, 64 P.2d 728, 18 Cal.App.2d 531.

Mental incompetency
N.Y.—Kamelhaar v. National Transp. Co., 29 N.Y.S.2d 745, 176 Misc. 1005.

74. Ala.—Brown v. Brown, 105 So. 171, 213 Ala. 339.
Cal.—Thomas v. Toppins, 272 P. 1042, 206 Cal. 18.
Tex.—Welsch v. Keeton, Civ.App., 287 S.W. 692.
34 C.J. p 317 note 52.

Vacation properly denied
(1) The trial judge did not abuse his discretion in refusing to vacate default judgment for excusable neglect on affidavit of defendant's officer that he became suddenly ill and was confined to his home "for two weeks or more" after placing summons and complaint on his desk, that a clerk filed away such papers and failed to call matter to affiant's attention after his return to work, and that absence thereof from his desk caused affair to escape his notice.—Rutledge v. Junior Order of United American Mechanics, 193 S. E. 434, 185 S.C. 142.

(2) Defendant's motion to vacate default judgment, on the ground that failure to appear was due to sickness of counsel, was properly denied where it did not appear that such counsel agreed to represent defendant, defendant was present in court on the day the case was called without attempting to have case continued and the application to vacate default was not timely made.—Dodd v. State, Tex.Civ.App., 193 S.W.2d 569.

Inability to notify court
Defendant seeking to vacate judgment entered in his absence, as result of serious illness of attorney, must show attorney's inability to notify court.—Eves v. Davison-Paxon Co., 161 S.E. 275, 44 Ga.App. 322.

75. Ark.—Johnson v. Jett, 159 S.W. 2d 78, 203 Ark. 861.
Cal.—Stub v. Harrison, 96 P.2d 979, 35 Cal.App.2d 685.
S.C.—Jenkins v. Jones, 38 S.E.2d 255.
34 C.J. p 318 note 53.

Illness of attorney and wife
Where failure to file an answer was due to illness and death of attorney's wife, and prolonged illness of attorney himself failure or neglect of attorney to file answer was excusable.—Gunter v. Dowdy, 31 S.E. 2d 524, 224 N.C. 522.

76. Fla.—Johnson v. City of Sebring, 140 So. 672, 104 Fla. 584.
34 C.J. p 318 note 54.

77. N.Y.—Braverman v. Monterey Operating Corporation, 283 N.Y.S. 874, 246 App.Div. 735.

78. U.S.—Little v. Cox & Carpenter, C.C.A.Miss., 66 F.2d 84, certiorari denied 54 S.Ct. 102, 290 U. S. 678, 78 L.Ed. 585.
Ala.—Ex parte Southern Amiesite Asphalt Co., 200 So. 435, 30 Ala. App. 3, certiorari denied 200 So. 434, 240 Ala. 618.
Cal.—McNeil v. Blumenthal, 81 P.2d 566, 11 Cal.2d 566, followed in Le Duc v. Blumenthal, 81 P.2d 567, 11 Cal.2d 780—Pease v. City of San Diego, App., 169 P.2d 973—Potts v. Whitson, 125 P.2d 947, 52 Cal.App. 2d 199—Sofuye v. Pieters-Wheeler Seed Co., 216 P. 990, 62 Cal.App. 198.
Colo.—Calkins v. Smalley, 294 P. 534, 88 Colo. 227.
D.C.—Barnes v. Conner, Mun.App., 44 A.2d 925.
Ind.—Falmouth State Bank v. Hayes, 185 N.E. 662, 97 Ind.App. 68.
Md.—Martin v. Long, 130 A. 875, 142 Md. 348.
N.Y.—Luckenbach S. S. Co. v. Musso, 16 N.Y.S.2d 378, 258 App.Div. 914.
N.D.—Chittenden & Eastman Co. v. Sell, 227 N.W. 188, 58 N.D. 664—Yesel v. Watson, 216 N.W. 199, 66 N.D. 98—First State Bank of Crosby v. Thomas, 208 N.W. 852, 54 N.D. 108—Engen v. Medberry Farmers' Equity Elevator Co., 204 N.W. 7, 52 N.D. 681.
S.C.—Jenkins v. Jones, 38 S.E.2d 255.
Tex.—Sunshine Bus Lines v. Craddock, Civ.App., 112 S.W.2d 248, affirmed Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 124 Tex. 388—Hadad v. Ellison, Civ.App., 283 S.W. 193.
W.Va.—Sigmond v. Forbes, 158 S.E. 677, 110 W.Va. 442—Sands v. Sands, 138 S.E. 463, 103 W.Va. 701.
34 C.J. p 296 notes 4–7.
Mistake, inadvertence, surprise, excusable neglect, casualty, or misfortune as ground for opening or vacating judgments generally see supra § 280.

der to obtain relief under statutes authorizing it in such cases, the default judgment from which relief is sought must be valid and regular in all respects,[79] although, as shown supra subdivision b of this section, relief from void or irregular default judgments may be had in proper cases. The mistake, inadvertence, surprise, or excusable neglect referred to in such statutes does not apply only to the mistake, inadvertence, surprise, or excusable neglect of the attorney for one of the parties, but also applies to that of the parties themselves;[80] and such statutes do not apply to, or afford relief from, errors of law committed by the court.[81] The mistake or neglect relied on as a basis for relief, to be sufficient, must be such as may be expected on the part of a reasonably prudent person situated as was the party against whom the judgment was entered.[82]

(2) Mistake

(a) In general

(b) As to cause of action or defense

(c) As to time or place of appearance or trial

(d) As to process

(e) As to employment of counsel

(a) In General

A default judgment may be opened or vacated where the appearance of a party or his pleading was prevented by mistake, particularly a mistake of fact, although under some circumstances a mistake of law may afford sufficient basis for the relief.

A default may be excused and a default judgment opened or vacated where the appearance of the party or his pleading was prevented by mistake.[83] To vacate a default judgment, it is generally incumbent on the defaulted party to show that his mistake was one of fact, and not of law,[84] but in some jurisdictions it has been held that, if a mistake of law is a reasonable one under the facts as they are made to appear, the neglect to file an answer because of the belief entertained is at least excusable.[85] According to some authorities, the mistake contemplated by statutes relating to relief from default judgments is such as might be expected on the part of a reasonably prudent person under the circumstances.[86] If a statute gives the right to open

79. N.C.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379—Abbitt v. Gregory, 141 S.E. 587, 195 N.C. 203—Foster v. Allison Corporation, 131 S.E. 648, 191 N.C. 166, 44 A.L.R. 610—Duffer v. Brunson, 125 S.E. 619, 188 N.C. 789.

80. N.Y.—Pember v. Meyer, 45 N.Y.S.2d 673.

81. Ind.—Colvert v. Colvert, 180 N.E. 192, 95 Ind.App. 325.
Error in law as ground for vacating default judgment generally see supra subdivision g of this section.

82. Idaho.—Savage v. Stokes, 28 P.2d 900, 54 Idaho 109.
"If judgment be entered against a party in his absence before he can be relieved therefrom he must show that it was the result of a mistake or inadvertence which reasonable care could not have avoided, a surprise which reasonable precaution could not have prevented, or a neglect which reasonable prudence could not have anticipated."—Elms v. Elms, Cal.App., 164 P.2d 936, 939.
"It is not every inadvertence or negligence that warrants judicial relief, but only such inadvertence or negligence as may reasonably be characterized as excusable."—Hughes v. Wright, 149 P.2d 392, 395, 64 Cal.App.2d 897.

83. U.S.—Marion County Court, W.Va., v. Ridge, C.C.A.W.Va., 13 F.2d 969.
Cal.—Bonfilio v. Ganger, 140 P.2d 861, 60 Cal.App.2d 405.
Or.—Snyder v. Consolidated Highway Co., 72 P.2d 932, 157 Or. 479.
Pa.—Giles v. Ryan, 176 A. 1, 317 Pa. 65.
34 C.J. p 296 note 9.
Mistake as ground for opening or vacating judgments generally see supra § 280.
Opening or vacating default judgment for mistake of counsel see infra subdivision n (6) of this section.

Vacation of judgment during term at which rendered
Okl.—Illinois Electric Porcelain Co. v. B. & M. Const. Corporation, 117 P.2d 106, 189 Okl. 336.

84. Idaho.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.
Ill.—Loew v. Krauspe, 150 N.E. 683, 320 Ill. 244.
N.C.—Lerch Bros. v. McKinne Bros., 122 S.E. 9, 187 N.C. 419—Battle v. Mercer, 122 S.E. 4, 187 N.C. 437, rehearing denied 123 S.E. 258, 188 N.C. 116.
Philippine.—Adela v. Judge of Ilocos Sur. Court of First Instance, 6 Philippine 674, 4 Off.Gaz. 728.
S.C.—Savage v. Cannon, 30 S.E.2d 70, 204 S.C. 473—**Corpus Juris cited in** Lucas v. North Carolina Mut. Life Ins. Co., 191 S.E. 711, 712, 184 S.C. 119.
34 C.J. p 297 note 10.
Counsel's ignorance or mistake of law as affecting right to open or vacate default judgment see infra subdivision n (6) (d) of this section.
Error or mistake of fact going to validity or regularity of judgment as ground for opening or vacating default judgment see supra subdivision h of this section.
Mistake as to process as ground for vacating default judgment see infra subdivision n (2) (d) of this section.
Vacating default judgment on ground that it is erroneous in matter of law see supra subdivision g of this section.

Held mistake of law
Mistaken belief of defendant that complaint would be served on it after summons had been served was a "mistake of law."—Anderson v. Toledo Scale Co., 6 S.E.2d 465, 192 S.C. 300.

Mistaken belief as to effect of judgment taken against a party with his knowledge and on his willful default is not ground for vacation of the judgment.—Messing v. Mattikow, 197 N.Y.S. 620, 120 Misc. 68.

85. Cal.—Waite v. Southern Pac. Co., 221 P. 204, 192 Cal. 467—Roehl v. Texas Co., 291 P. 262, 107 Cal.App. 728—Mahana v. Alexander, 263 P. 260, 88 Cal.App. 111—Williams v. Thompson, 213 P. 705, 60 Cal.App. 658.
Or.—Federal Reserve Bank of San Francisco v. Weant, 231 P. 134, 113 Or. 1.
S.C.—Savage v. Cannon, 30 S.E.2d 70, 204 S.C. 473.
34 C.J. p 298 note 11.

86. Idaho.—Cleek v. Virginia Gold Mining & Milling Co., 122 P.2d 232, 63 Idaho 445—Atwood v. Northern Pac. Ry. Co., 217 P. 600, 37 Idaho 554.

or vacate a judgment taken against a party through "his" mistake, no mistake made by any other person will justify this action.[87]

(b) As to Cause of Action or Defense

A default suffered because of a reasonable and excusable misapprehension as to the cause of action or defense may be set aside.

Where a party suffers a default judgment because of a reasonable and excusable misapprehension as to the cause of action or defense, the judgment should be set aside,[88] and this has been held to be the rule even though the misapprehension was as to the law.[89]

(c) As to Time or Place of Appearance or Trial

A party may have a default judgment opened or set aside when he has made an honest and excusable mistake as to the time or place for appearance, pleading, or trial.

A party may have a default judgment opened or set aside when he has made an honest and excusable mistake as to the time when he was required to plead or answer[90] or as to the time of trial,[91] but not where the mistake was the result of his own heedlessness or lack of due attention and care.[92] In view of a court rule that all cases at issue on the merits at the commencement of a term shall stand for trial on the first day of the term, a party is not warranted in assuming that his case would not be reached on that day, and his failure to appear for trial on that day is not ground for vacating a decree taken in his absence.[93]

Where an inexperienced suitor attempted to comply with a summons by appearing in the office of plaintiff's attorney, understanding such appearance to be sufficient, a default judgment may be opened on the ground that his failure to appear was due to excusable neglect, other requisites being present.[94]

(d) As to Process

A default judgment may be vacated where the defendant's failure to appear was due to an excusably mistaken belief as to process.

A default judgment may be vacated where defendant's failure to appear was due to an excusably mistaken belief that no process had been served[95] or where defendant thought the summons

87. N.C.—**Corpus Juris quoted in** Earle v. Earle, 151 S.E. 884, 887, 198 N.C. 411.
34 C.J. p 298 note 12.

88. N.Y.—Zimmer v. Wilber, 5 N.Y.S.2d 573, 254 App.Div. 917.
Or.—Federal Reserve Bank of San Francisco v. Weant, 231 P. 134, 113 Or. 1.
34 C.J. p 298 note 19–p 299 note 24.
Mistake as to cause of action as ground for setting aside judgments generally see supra § 280.

89. Or.—Federal Reserve Bank of San Francisco v. Weant, supra.
Vacation of default judgment for mistake of law generally see supra subdivision n (2) (a) of this section.

90. Ariz.—Brown v. Beck, 169 P.2d 855.
N.D.—Burgett v. Porter, 205 N.W. 623, 53 N.D. 312.
Pa.—Remick v. Letterle, 89 Pa.Super. 322.
34 C.J. p 299 note 25.
Mistake:
As to time for pleading or trial as ground for opening or setting aside judgments generally see supra § 280.
Of counsel as to time or place of appearance or trial as ground for opening or vacating default judgment see infra subdivision n (6) (c) of this section.

91. Conn.—Mountain States Silver Mining Co. v. Hukill, 244 P. 605, 79 Colo. 128.
Kan.—Kansas City Power & Light Co. v. City of Elkhart, 31 P.2d 62, 139 Kan. 374.
Ky.—Lewis v. Browning, 4 S.W.2d 734, 223 Ky. 771.
N.Y.—Kopisar v. Paley, 219 N.Y.S. 82, 128 Misc. 463.
Okl.—Carter v. Grimmett, 213 P. 732, 89 Okl. 37.
Or.—Snyder v. Consolidated Highway Co., 72 P.2d 932, 157 Or. 479.
R.I.—Rhode Island Discount Corporation v. Carr, 136 A. 244.
S.D.—Johnson v. Johnson, 210 N.W. 155, 50 S.D. 341.
Tex.—Meckel v. State Bank of Barksdale, Civ.App., 256 S.W. 668.
Va.—Morriss v. White, 131 S.E. 835, 146 Va. 553.
34 C.J. p 299 note 25.
Want or insufficiency of notice of proceedings as ground for opening or vacating default judgment see supra subdivision b (3) of this section.
Time for filing papers
Where defendant had made clear to court and to plaintiff that defendant intended to defend the case, continuance of one day was granted, court's alleged intention that defendant should file his papers prior to call of next day's calendar was not clearly expressed and defendant filed his affidavit of defense and demand for jury trial a few hours after default was entered, default should be vacated.—Barnes v. Conner, D.C.Mun. App., 44 A.2d 925.

92. Colo.—Scott v. Sullivan, 244 P. 466, 79 Colo. 173.
Ill.—Latham v. Salisbury, 61 N.E. 2d 306, 326 Ill.App. 253—Travelers Ins. Co. v. Wagner, 279 Ill.App. 13.
La.—Brownlee-Wells Motors v. Hollingsworth, 127 So. 754, 13 La. App. 19.
Okl.—Hall v. Price, 277 P. 239, 136 Okl. 202.
34 C.J. p 299 note 26.
Duty of party to know when case will be called for trial see infra subdivision n (5) (b) of this section.

93. Conn.—Scott v. Sullivan, 244 P. 466, 79 Colo. 173.

94. N.Y.—Pember v. Meyer, 45 N.Y.S.2d 673.
Opening or vacating default judgments where appearance or pleading was prevented by excusable neglect see infra subdivision n (5) of this section.

95. Mont.—Madson v. Petrie Tractor & Equipment Co., 77 P.2d 1038, 106 Mont. 382.
Mistake as to process as ground for vacating judgments generally see supra § 280.
Failure to file statutory return
Where return of service was not filed as required by statute, defendant's attorney was justified in assuming that no service had been made within fifteen-day period.—Reynolds' v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332.

served on him was for his employer[96] or was misled by a belief that the process was in a different suit.[97] Where defendant reasonably entertained a belief that the service of process was invalid, a default judgment based on failure to answer will be set aside under the statutory rule obtaining in some jurisdictions that a reasonable mistake of law is excusable,[98] but, on the other hand, it has been held that relief will not be granted merely because defendant, through ignorance of the law, believed that the process served was invalid,[99] and the discretion of the trial court in refusing to vacate a judgment on failure of defendant to appear where defendant was erroneously advised that the service was not good has been held properly exercised.[1]

(e) As to Employment of Counsel

A party ordinarily cannot procure the setting aside of a default judgment against him on the ground of his mistaken belief that he had retained an attorney to protect his interests, but the circumstances of the case may warrant the exercise of the court's discretion in granting the relief.

A party ordinarily cannot procure the setting aside of a default judgment against him on the ground of his mistaken belief that he had retained an attorney to protect his interests;[2] but there are cases of this kind where the court in the exercise of its discretion has granted relief.[3] Where the mistake was as to the employment of counsel by a person on whom defendant justifiably relied to attend to that matter, it may furnish cause for vacating the judgment.[4]

(3) Surprise

In a number of jurisdictions a default may be excused and a default judgment opened or set aside where the appearance of the party or his pleading was prevented by surprise.

In a number of jurisdictions a default may be excused and a default judgment opened or set aside where the appearance of the party or his pleading was prevented by surprise,[5] and there is authority holding that, before a judgment by default regularly entered will be opened for the purpose of interposing a defense, the one seeking to invoke the aid of the court must establish surprise.[6] There can be no fixed formula by which the necessary element of surprise may be measured in every case,[7] but the extenuating factors of each particular situation must be the ultimate determinants.[8] Neglect of an

96. Ky.—Steuerle v. T. B. Duncan & Co., 299 S.W. 205, 221 Ky. 501.

97. Colo.—Green v. Halsted, 238 P. 40, 77 Colo. 578.
Mass.—Hyde Park Sav. Bank v. Davankoskas, 11 N.E.2d 3, 298 Mass. 421.

98. Cal.—Riskin v. Towers, 148 P.2d 611, 614, 24 Cal.2d 274, 153 A.L.R. 442, distinguishing Thorndyke v. Jenkins, 142 P.2d 848, 61 Cal.App. 2d 119, and Wheat v. McNeill, 295 P. 102, 111 Cal.App. 72—Roehl v. Texas Co., 291 P. 262, 107 Cal.App. 708.
Vacation of default judgment for mistake of law generally see supra subdivision n (2) (a) of this section.

99. N.D.—Foley v. Davis, 211 N.W. 818, 54 N.D. 864.
Ignorance as excuse for default generally see supra subdivision k of this section.

1. Cal.—Moskowitz v. McGlinchey, 259 P. 105, 85 Cal.App. 189.
Setting aside default judgment suffered in consequence of receiving erroneous advice from attorney see infra subdivision n (6) (e) of this section.

2. Cal.—Noble v. Reid-Avery Co., 264 P. 341, 89 Cal.App. 75.
Tex.—**Corpus Juris quoted in** Dempsey v. Gibson, Civ.App., 100 S.W. 2d 430, 432—Colorado River Syndicate Subscribers v. Alexander, Civ.App., 288 S.W. 586.
34 C.J. p 300 note 39.
Duty to see that attorney understands and accepts retainer see infra subdivision n (5) (b) of this section.
Mistake as to retainer of counsel as ground for setting aside judgments generally see supra § 280.
Miscarriage of letter
Default judgment could not be set aside on mere showing that attorney did not receive letter requesting him to make defense.—George County Bridge Co. v. Catlett, 144 So. 704, 165 Miss. 652.

3. Ark.—American Co. of Arkansas v. Wilson, 61 S.W.2d 453, 187 Ark. 625.
Cal.—John A. Vaughan Corporation v. Title Insurance & Trust Co., 12 P.2d 117, 123 Cal.App. 709.
34 C.J. p 300 note 40.
Miscarriage of letter
Relief has been granted where foreign corporation's letter to its attorney directing him to attend to case miscarried.—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332.

4. Okl.—Bearman v. Bracken, 240 P. 713, 112 Okl. 237.
34 C.J. p 300 note 41.

5. U.S.—Marion County Court, W. Va., v. Ridge, C.C.A.W.Va., 13 F. 2d 969.
N.J.—Viviano v. Service Bottling Works, 158 A. 395, 10 N.J.Misc. 187.
34 C.J. p 301 note 47.
Surprise as ground for opening or vacating judgments generally see supra § 280.

6. N.J.—Hanover Trust Co. v. Rizzo, 166 A. 326, 110 N.J.Law 581—McCarthy v. Guire, 187 A. 739, 14 N. J.Misc. 795.

7. N.J.—McCarthy v. Guire, supra.

8. N.J.—McCarthy v. Guire, supra.
Circumstances held to warrant relief
(1) Calling a case for trial in the absence of a party who had made several unsuccessful attempts to learn the probable date of trial.—McCarthy v. Guire, supra.
(2) Entering judgment privately in room adjoining courtroom without notice to defendant's attorney who was present in court waiting for the case to be called, and without mention of case in open court.—Taylor v. Combs, 23 S.W.2d 545, 232 Ky. 333.
Circumstances held not to warrant relief
(1) Fact that plaintiff took judgment against defendant without indicating intention to press claim to final determination, defendant being detained to answer criminal charge.—Gainer v. Smith, 132 S.E. 744, 101 W.Va. 314.
(2) Fact that defendant erroneously thought he was insured and sent papers in suit to an insurance company for attention, which retained them until after the time to answer had expired.—Busching v. Vandenberg, 152 A. 704, 9 N.J.Misc. 43.

attorney to file a pleading within the time allowed by law may fairly be considered a surprise on his client warranting the vacation of a default judgment against the latter.[9]

(4) Inadvertence

A default judgment inadvertently permitted may be opened or set aside.

The trial court has great latitude in relieving a party from a default judgment inadvertently permitted.[10] To be ground for relief, however, the inadvertence must be based on more than mere forgetfulness,[11] and must be such as might be expected on the part of a reasonably prudent person under the circumstances.[12]

(5) Excusable Neglect

(a) In general

(b) Diligence required of suitors

(a) In General

In many jurisdictions a default may be excused and a default judgment opened or set aside where the appearance of the party or his pleading was prevented by excusable neglect based on more than mere forgetfulness or utter indifference and inattention to business.

In many jurisdictions a default may be excused and a default judgment opened or set aside where the appearance of the party or his pleading was prevented by excusable neglect.[13] Excusable neglect must be based on more than mere forgetfulness

(3) Rendering default judgment, where defendant had notice that complaint would be filed and did not show meritorious defense.—Perkins v. Sharp, 131 S.E. 584, 191 N.C. 224.

(4) Rendering default judgment where defendant was properly served, and was chargeable with knowing consequences of law-suit, but ignored such consequences.—Hanover Trust Co. v. Rizzo, 166 A. 326, 110 N.J.Law 581.

9. S.D.—W. B. Foshay Co. v. Springfield Light & Power Co., 206 N.W. 239, 49 S.D. 92.

Negligence of attorney as ground for vacating default judgment generally see infra subdivision n (6) (b) of this section.

10. Cal.—Weck v. Sucher, 274 P. 579, 96 Cal.App. 422.

N.Y.—Baldwin v. Yellow Taxi Corporation, 225 N.Y.S. 423, 221 App. Div. 717, followed in Woodward v. Weekes, 241 N.Y.S. 842, 228 App. Div. 870.

Inadvertent entry of judgment as ground for opening or vacating it see supra subdivision b (4) of this section.

Vacation of judgment during term at which rendered

Okl.—Illinois Electric Porcelain Co. v. B. & M. Const. Corporation, 117 P.2d 106, 189 Okl. 336.

Inadvertence of insurance carrier

In trespass to recover damages for injuries to one struck by defendant's automobile, trial court did not abuse discretion in opening default judgment on prompt application, where default occurred through no neglect of defendant or his counsel, but through inadvertence of defendant's insurance carrier.—Scott v. McEwing, 10 A.2d 436, 337 Pa. 273, 126 A.L.R. 367.

Inadvertence as to process served

Default judgment against corporation was held properly vacated for inadvertent failure to call president's attention to summons and complaint served on secretary.—Gorman v. California Transit Co., 248 P. 923, 199 Cal. 246.

Inadvertence of clerk in placing summons and complaint in a file where the mayor of respondent city did not see them does not constitute such inadvertence as is contemplated by statute authorizing relief.—Boise Valley Traction Co. v. Boise City, 214 P. 1037, 37 Idaho 20.

11. Cal.—Gorman v. California Transit Co., 248 P. 923, 199 Cal. 246.

12. Idaho.—Atwood v. Northern Pac. Ry. Co., 217 P. 600, 37 Idaho 554.

Diligence required of suitors see infra subdivision n (5) (b) of this section.

13. U.S.—Marion County Court, W. Va. v. Ridge, C.C.A.W.Va., 13 F.2d 969.

Cal.—Pease v. City of San Diego, App., 169 P.2d 973—Tearney v. Riddle, 149 P.2d 387, 64 Cal.App. 2d 783—Potts v. Whitson, 125 P.2d 947, 52 Cal.App.2d 199—Wright v. Snyder, 32 P.2d 991, 138 Cal.App. 495—Toon v. Pickwick Stages, Northern Division, 226 P. 628, 66 Cal.App. 450.

Minn.—First Trust & Savings Bank v. U. S. Fidelity & Guaranty Co., 194 N.W. 376, 156 Minn. 231.

Neb.—Ak-Sar-Ben Exposition Co. v. Sorenson, 229 N.W. 13, 119 Neb. 358.

N.Y.—Leslie I. Gumport, Inc., v. Groell, 232 N.Y.S. 414, 225 App.Div. 696—Baldwin v. Yellow Taxi Corporation, 225 N.Y.S. 423, 221 App. Div. 717, followed in Woodward v. Weekes, 241 N.Y.S. 842, 228 App. Div. 870—Union Trust Co. v. J. A. Smith Milling Co., 216 N.Y.S. 505, 217 App.Div. 176—Pember v. Meyer, 45 N.Y.S.2d 673.

N.C.—Parker v. Smith, 18 S.E.2d 118, 220 N.C. 821—Hershey Corporation v. Atlantic Coast Line R. Co., 165 S.E. 550, 203 N.C. 184—J. B. Colt Co. v. Martin, 160 S.E. 287, 201 N.C. 354.

N.D.—Beehler v. Schantz, 1 N.W.2d 344, 71 N.D. 409.

Okl.—Haskell v. Cutler, 108 P.2d 146, 188 Okl. 239.

S.C.—Jenkins v. Jones, 38 S.E.2d 255.

S.D.—Gubele v. Methodist Deaconess Hospital of Rapid City, 225 N.W. 57, 55 S.D. 100.

Tex.—Roberts v. Schlather & Steinmeyer, Civ.App., 8 S.W.2d 296, error dismissed—Holland v. Stark, Civ.App., 281 S.W. 590.

Wash.—Larson v. Zabroski, 152 P.2d 154, 21 Wash.2d 572, opinion adhered to 155 P.2d 284, 21 Wash.2d 572—Bishop v. Illman, 126 P.2d 582, 14 Wash.2d 13—Agricultural & Live Stock Credit Corporation v. McKenzie, 289 P. 527, 157 Wash. 597—Jacobsen v. Defiance Lumber Co., 253 P. 1088, 142 Wash. 642.

34 C.J. p 302 note 58.

Excusable neglect as ground for opening or vacating judgments generally see supra § 280.

The word "neglect," as in civil procedure rule authorizing court to set aside default for excusable neglect, means omission of proper attention, disregard of duty from indifference or willfulness, failure to do, use, or heed anything, and negligence. —Booth v. Central States Mut. Ins Ass'n, 15 N.W.2d 893, 235 Iowa 5.

Carelessness and negligence are not akin to "excusable neglect" specified by statute as grounds for vacating default judgment.—Doyle v. Rice Ranch Oil Co., 81 P.2d 980, 28 Cal.App.2d 18.

Defendant's failure to answer trover suit, because he was informed different proceeding would have to be filed, was not excusable neglect. —Coker v. Hison, 151 S.E. 682, 40 Ga.App. 835.

Failure to notify general manager or attorney

The president of board of directors of power and irrigation district and superintendent of power and irrigation were at fault in not notifying district's general manager

on the part of the person or official charged with the duty of responding to the legal process in due time,[14] and is such as might be expected on the part of a reasonably prudent person under the circumstances;[15] utter indifference and inattention to business is not excusable neglect,[16] and failure to pay personal attention to the case is inexcusable negligence.[17] Thus, although under the peculiar circumstances of the particular case a different holding may be required,[18] as a general rule, where service of process has been made on a duly appointed agent who fails to notify his principal through mere carelessness, such a showing does not constitute excusable neglect,[19] but constitutes inexcusable neglect,[20] and the same rule applies where the agent has been made so by law rather than by appointment.[21]

Reliance on the assurance of one not a party to the action that he will take care of the matter does not show such excusable neglect as would require the trial court to set aside a default,[22] although the circumstances of the particular case may be such as to warrant the court, in the exercise of its discretion, to grant the relief.[23] Negligence of defendant's employee in mislaying a summons or failing timely to notify defendant that he was served has under varying circumstances been held to constitute[24] or not to constitute[25] sufficient grounds for vacating a default judgment. Neglect attributable to a miscarriage of the mails may be excusable,[26] although the circumstances of the case may be such as to warrant a denial of relief.[27]

Defendant's neglect may be excusable where default was entered while his proposal for settlement was pending,[28] or while he believed negotiations for a settlement were pending,[29] or that the action against him had been ended in fact by virtue of a compromise.[30] Conduct of defendant in informing his attorney that the facts alleged in the complaint were true when in fact they were not is inexcusable neglect and no ground for setting aside a judgment for plaintiff in an undefended action.[31]

(b) Diligence Required of Suitors

Since inexcusable negligence imputable to a party seeking to open or set aside a default judgment may defeat the application, such a party must have been dili-

or attorney that action was pending against the district, but their conduct was not so inexcusable as to defeat the district's right to a trial of the issues on the merits, and hence default judgment against the district would be set aside on motion of district.—Barney v. Platte Valley Public Power & Irr. Dist., Neb., 23 N.W.2d 335.

Judgment taken against petitioner, after petitioner failed timely to amend petition, demurrer to which was sustained, was within purview of statute authorizing relief from judgment taken through excusable neglect, and order vacating judgment was not clear abuse of trial court's discretion.—Greenamyer v. Board of Trustees of Lugo Elementary School Dist. in Los Angeles County, 2 P.2d 848, 116 Cal.App. 319.

14. Cal.—Gorman v. California Transit Co., 248 P. 923, 199 Cal. 246.
Idaho.—Boise Valley Traction Co. v. Boise City, 214 P. 1037, 37 Idaho 20.
Minn.—Whipple v. Mahler, 10 N.W. 2d 771, 215 Minn. 578.
Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266—Pacific Acceptance Corporation v. McCue, 228 P. 761, 71 Mont. 99.

15. Idaho.—Cleek v. Virginia Gold Mining & Milling Co., 122 P.2d 232, 63 Idaho 445—Atwood v. Northern Pac. Ry. Co., 217 P. 600, 37 Idaho 554.
Duty to give litigation such attention as prudent man bestows on important business see infra subdivision n (5) (b) of this section.

16. Idaho.—Atwood v. Northern Pac. Ry. Co., supra.

17. Ga.—Metropolitan Life Ins. Co. v. Scarboro, 156 S.E. 726, 42 Ga. App. 423.
N.C.—Harrell v. Welstead, 175 S.E. 283, 206 N.C. 817.
Tex.—**Corpus Juris quoted in** Dempsey v. Givson, Civ.App., 100 S.W.2d 430, 432.
34 C.J. p 300 note 39.

18. **Held excusable neglect**
Act of foreign corporation's process agent in mailing papers to corporation's attorney, and corporation's failure to notify agent of attorney's discharge, constituted excusable neglect.—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332.

19. Ariz.—Postal Benefit Ins. Co. v. Johnson, 165 P.2d 173.
Del.—Penn Central Light & Power Co. v. Central Eastern Power Co., 171 A. 332, 6 W.W.Harr. 74.
Ill.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147.
Iowa.—Lawler v. Roman Catholic Mut. Protective Soc. of Iowa, 197 N.W. 633, 198 Iowa 233.

20. Ariz.—Postal Benefit Ins. Co. v. Johnson, 165 P.2d 173.
Ky.—Metropolitan Life Ins. Co. v. Ditto, 269 S.W. 527, 207 Ky. 434.

21. Ariz.—Postal Benefit Ins. Co. v. Johnson, 165 P.2d 173.
Service on corporation commission
Where service of process in suit against benefit insurance company was made on chairman of corporation commission, as authorized by statute, proof that summons was placed in files of the commission, and nothing further done to advise defendant company of the summons, did not establish "excusable neglect", so as to authorize setting aside default judgment.—Postal Benefit Ins. Co. v. Johnson, supra.

22. Ind.—Carty v. Toro, 57 N.E.2d 434.

23. Idaho.—Ward v. Burley State Bank, 225 P. 497, 38 Idaho 764.
34 C.J. p 304 note 66.

24. Pa.—McDevitt v. Teague, 89 Pa. Super. 332.

25. Tex.—San Antonio Paper Co. v. Morgan, Civ.App., 53 S.W.2d 651, error dismissed.

26. Mont.—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332.
Tex.—Yellow Transit Co. v. Klaff, Civ.App., 145 S.W.2d 264.

27. Tex.—Texas Indemnity Ins. Co. v. Rice, Civ.App., 271 S.W. 134.

28. Or.—Peters v. Dietrich, 27 P.2d 1015, 145 Or. 589.

29. Or.—Peters v. Dietrich, supra.

30. Philippine.—Salazar v. Salazar, 8 Philippine 183.

31. S.D.—Rose v. Babington, 263 N.W. 557, 64 S.D. 8.

gent and free from culpable neglect in the proceedings leading up to the default, and must not have ignored a writ willfully or through inattention or forgetfulness, or neglected to retain an attorney.

In order to open or set aside a default judgment regularly obtained by due process of law, the party complaining must have been diligent in the proceedings leading up to the default[32] and free from culpable neglect;[33] inexcusable negligence imputable to the applicant may defeat the application,[34] but where the judgment is evidently unjust a certain

32. Ga.—Flanigan v. Hutchins, 138 S.E. 793, 164 Ga. 313—Fraser v. Neese, 137 S.E. 550, 163 Ga. 843—Fitzgerald v. Ferran, 124 S.E. 530, 158 Ga. 755.
Ill.—Harris v. Juenger, 7 N.E.2d 376, 289 Ill.App. 467, reversed on other grounds 11 N.E.2d 929, 367 Ill. 478—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Ky.—Zimmerman v. Segal, 155 S.W. 2d 20, 288 Ky. 33.
Md.—Dixon v. Baltimore American Ins. Co. of New York, 188 A. 215, 171 Md. 695.
N.C.—Carter v. Anderson, 181 S.E. 750, 208 N.C. 529.
Okl.—Wheeler v. Walker, 294 P. 641, 147 Okl. 63.
Tex.—Humphrey v. Harrell, Civ.App., 19 S.W.2d 410, affirmed, Com.App., 29 S.W.2d 963—Welsch v. Keeton, Civ.App., 287 S.W. 692—Thomas v. Goldberg, Civ.App., 283 S.W. 230—Cauble v. Key, Civ.App., 256 S. W. 654.
Wyo.—Kelley v. Eidam, 231 P. 678, 32 Wyo. 271.
34 C.J. p 305 note 70.
Diligence required of suitors in proceedings:
Leading up to judgment generally see supra § 280.
To open or vacate default see infra § 337.

33. Ala.—Harnischfeger Sales Co. v. Burge, 129 So. 37, 221 Ala. 387—Dulin v. Johnson, 113 So. 397, 216 Ala. 393.
Ariz.—Brown v. Beck, 169 P.2d 855—Postal Benefit Ins. Co. v. Johnson, 165 P.2d 173—Perrin v. Perrin Properties, 86 P.2d 23, 53 Ariz. 121, 122 A.L.R. 631—Beltran v. Roll, 7 P.2d 248, 39 Ariz. 417.
Ark.—Bickerstaff v. Harmonia Fire Ins. Co., 133 S.W.2d 890, 199 Ark. 424.
Cal.—Elms v. Elms, App., 164 P.2d 936—Hughes v. Wright, 149 P.2d 392, 64 Cal.App.2d 897—Weinberger v. Manning, 123 P.2d 531, 50 Cal. App.2d 494—Gordon v. Harbolt, App., 280 P. 701, rehearing denied 281 P. 1048.
Ill.—Bird-Sykes Co. v. McNamara, 252 Ill.App. 262.
Iowa.—Ryan v. Phœnix Ins. Co. of Hartford, Conn., 215 N.W. 749, 205 Iowa 655.
Ky.—Bond v. W. T. Congleton Co., 129 S.W.2d 570, 278 Ky. 829.
Mo.—Williams v. Barr, App., 61 S. W.2d 420—Case v. Arky, App., 253 S.W. 484.
N.Y.—Dewey v. Agostini Bros. Bldg. Corporation, 283 N.Y.S. 174, 246 App.Div. 667.
N.C.—Crye v. Stoltz, 138 S.E. 167, 193 N.C. 802.
N.D.—Moos v. Northwestern Improvement Co., 6 N.W.2d 73, 72 N.D. 223.
Tex.—Yellow Transit Co. v. Klaff, Civ.App., 145 S.W.2d 264—Dempsey v. Gibson, Civ.App., 100 S.W.2d 430—Briggs v. Ladd, Civ.App., 64 S.W.2d 389—Homuth v. Williams, Civ.App., 42 S.W.2d 1048—Hooser v. Wolfe, Civ.App., 30 S.W.2d 728—Humphrey v. Harrell, Civ.App., 19 S.W.2d 410, affirmed, Com.App., 29 S.W.2d 963—Colorado River Syndicate Subscribers v. Alexander, Civ.App., 288 S.W. 586—Stoudenmeier v. First Nat. Bank, Civ. App., 246 S.W. 761.
W.Va.—Winona Nat. Bank v. Fridley, 10 S.E.2d 907, 122 W.Va. 479—State ex rel. Alkire v. Mili, 180 S.E. 183, 116 W.Va. 277—Gainer v. Smith, 132 S.E. 744, 101 W.Va. 314—Ellis v. Gore, 132 S.E. 741, 101 W.Va. 273—Hill v. Long, 150 S.E. 6, 107 W.Va. 664—Sands v. Sands, 138 S.E. 463, 103 W.Va. 701.
34 C.J. p 305 note 70.

34. Ariz.—Garden Development Co. v. Carlaw, 263 P. 625, 33 Ariz. 232.
Ark.—Magnolia Grocer Co. v. Farrar, 115 S.W.2d 1094, 195 Ark. 1069—Stewart v. California Grape Juice Corporation, 29 S.W.2d 1077, 181 Ark. 1140.
Cal.—Hughes v. Wright, 149 P.2d 392, 64 Cal.App.2d 897—Bodin v. Webb, 62 P.2d 155, 17 Cal.App.2d 422—W. J. Wallace & Co. v. Growers Sec. Bank, 57 P.2d 998, 13 Cal. App.2d 743—Essig v. Seaman, 264 P. 552, 89 Cal.App. 295—Brennan v. Weissbaum, 245 P. 1104, 77 Cal. App. 120—Rudy v. Slotwinsky, 238 P. 783, 73 Cal.App. 459.
Ga.—Flanigan v. Hutchins, 138 S.E. 793, 164 Ga. 313.
Idaho.—Cleek v. Virginia Gold Mining & Milling Co., 122 P.2d 232, 63 Idaho 445.
Ill.—Maclaskey v. Kurz, 45 N.E.2d 566, 316 Ill.App. 671—Gray v. Kroger Grocery & Baking Co., 13 N.E. 2d 672, 294 Ill.App. 151—Alfred M. Best Co. v. Index Pub. Co., 9 N.E. 2d 439, 291 Ill.App. 612—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000—Lynn v. Multhauf, 279 Ill.App. 210—Travelers Ins. Co. v. Wagner, 279 Ill.App. 13.
Ind.—Gibson v. Searcy, 137 N.E. 182, 192 Ind. 515.
Iowa.—Dewell v. Suddick, 232 N.W. 118, 211 Iowa 1352—Bossenberger v. Bossenberger, 229 N.W. 833, 210 Iowa 825—Anderson v. Anderson, 229 N.W. 694, 209 Iowa 1143—Lawler v. Roman Catholic Mut. Protective Soc. of Iowa, 197 N.W. 633, 198 Iowa 233.
Ky.—Zimmerman v. Segal, 155 S.W. 2d 20, 288 Ky. 33—Kengreen Gas Utilities Corporation v. Crozer, 51 S.W.2d 262, 244 Ky. 440.
Md.—Moss v. Annapolis Sav. Inst., 8 A.2d 881, 177 Md. 135.
Miss.—Strain v. Gayden, 20 So.2d 697, 197 Miss. 353.
N.H.—Lewellyn v. Follansbee, 47 A. 2d 572.
N.Y.—Allen v. Lake, 198 N.Y.S. 815, reversed on other grounds 201 N. Y.S. 882, 207 App.Div. 886—Dewey v. Agostini Bros. Bldg. Corporation, 283 N.Y.S. 174, 246 App.Div. 667.
N.C.—Standard Fertilizer Co. v. Whorton, 195 S.E. 349, 213 N.C. 211—Carolina Discount Corporation v. Butler, 158 S.E. 249, 200 N.C. 709—Strickland v. Shearon, 137 S.E. 803, 193 N.C. 599.
Okl.—Johnson v. Bearden Plumbing & Heating Co., 38 P.2d 500, 170 Okl. 63.
Pa.—Hamilton v. Sechrist, 16 A.2d 671, 142 Pa.Super. 354—In re Stroud's Estate, 22 Pa.Dist. & Co. 591, 40 Dauph.Co. 207—Cook v. Jenkins, 21 Pa.Dist. & Co. 331, 19 West.Co. 166—Rusynyk v. Holy Resurrection Russian Orthodox Greek Catholic Church, Com.Pl., 28 Wash.Co. 87.
Philippine.—Dougherty v. Evangelista, 7 Philippine 37—Adela v. Judge of Court of First Instance of Ilocos Sur, 6 Philippine 674.
R.I.—Tew v. Rhode Island Coach Co., 133 A. 660—Charles B. Maguire Co. v. Miller, 118 A. 625.
S.D.—Languein v. Olson, 227 N.W. 369, 56 S.D. 1.
Tex.—San Antonio Paper Co. v. Morgan, Civ.App., 58 S.W.2d 651, error dismissed—Hooser v. Wolfe, Civ.App., 30 S.W.2d 728—St. Paul Fire & Marine Ins. Co. v. Earnest, Civ.App., 293 S.W. 677, affirmed 296 S.W. 1088, 116 Tex. 565—Colorado River Syndicate Subscribers v. Alexander, Civ.App., 288 S.W. 586.
Wash.—Riddell v. David, 23 P.2d 22, 173 Wash. 370.
W.Va.—Sands v. Sands, 138 S.E. 463,

degree of neglect may be held excusable,[35] and it has been held, considering the language of controlling statutes and the circumstances of their enactment, that a party's mere negligence is not fatal to the exercise of discretion to vacate a final judgment against him pursuant to an interlocutory judgment of default.[36] During the term at which it was rendered, moreover, a default judgment may be vacated in the discretion of the court notwithstanding defendant's negligence.[37]

A person of mature years and judgment may not idly ignore a summons to defend an action,[38] and the courts will seldom relieve one who has disregarded the command of a writ willfully[39] or through mere inattention or neglect[40] or sheer forgetfulness,[41] or who ignores a notice that on a specified date plaintiff will apply for a default judgment,[42] or who willfully slumbers on his rights and makes no effort to protect himself.[43] So a party will not be relieved from a judgment taken against him with his knowledge and on his willful default,[44] as where the default was suffered as a part of a policy of intentional delay on the part of defendant,[45] or where the judgment was not due to an oversight, but was the result of a decision, after deliberation, not to defend,[46] although thereafter he changes his mind and desires to defend because of changing circumstances.[47]

Furthermore, in order to be able to set aside a judgment for excusable neglect, a party must give the litigation such attention as a man of ordinary prudence usually bestows on important business.[48]

103 W.Va. 701—Gainer v. Smith, 132 S.E. 744, 101 W.Va. 314.

34 C.J. p 305 note 70.

Effect of negligence where application based on unavoidable casualty or misfortune see infra subdivision n (7) of this section.

Negligence of defendant's insurer has been held imputable to defendant, thus defeating the application. —Homuth v. Williams, Tex.Civ.App., 42 S.W.2d 1048.

35. Or.—Astoria Sav. Bank v. Normand, 267 P. 524, 125 Or. 347.

36. N.M.—Dyne v. McCullough, 9 P. 2d 385, 36 N.M. 122—Gilbert v. New Mexico Const. Co., 295 P. 291, 35 N.M. 262.

37. Okl.—Illinois Electric Porcelain Co. v. B. & M. Const. Corporation, 117 P.2d 106, 189 Okl. 336.

Jurisdiction and power to vacate default judgment during term see supra § 333.

38. Ill.—Stasel v. American Home Security Corporation, 199 N.E. 798, 362 Ill. 350, affirming 279 Ill.App. 172.

Ind.—Carty v. Torro, 57 N.E.2d 434.

39. Wash.—Larson v. Zabroski, 152 P.2d 154, 21 Wash.2d 572, opinion adhered to 155 P.2d 284, 21 Wash. 2d 572—Bishop v. Illman, 126 P.2d 582, 14 Wash.2d 13—Rule v. Somervill, 274 P. 177, 150 Wash. 605—Jacobsen v. Defiance Lumber Co., 253 P. 1088, 142 Wash. 642.

40. Ill.—Gray v. Kroger Grocery & Baking Co., 13 N.E.2d 672, 294 Ill. App. 151—Giles v. Grady & Neary Ink Co., 8 N.E.2d 120, 284 Ill.App. 651.

Ky.—Kengreen Gas Utilities Corporation v. Crozer, 51 S.W.2d 262, 244 Ky. 440.

Wash.—Larson v. Zabroski, 152 P.2d 154, 21 Wash.2d 572, opinion adhered to 155 P.2d 284, 21 Wash.2d 572—Rule v. Somervill, 274 P. 177, 150 Wash. 605.

Mislaying summons and complaint

Denial of motion to open default judgment on ground that summons and complaint were mislaid in the confusion of moving and forgotten was not an abuse of discretion.—Whipple v. Mahler, 10 N.W.2d 771, 215 Minn. 578.

Preoccupation with other matters

Fact that original notice was served on defendant's president at his residence while he was working in yard during afternoon after defendant's office was closed, and facts that his duties as president were principally confined to defendant's production and that he had nothing to do with its claim department, and fact that he devoted much time to supervision of drives for war bond sales, made over three months after such service, were not reasonable excuses for defendant's default and hence afforded no basis for its motion to set aside default on ground of excusable neglect.—Booth v. Central States Mut. Ins. Ass'n, 15 N.W. 2d 393, 235 Iowa 5.

41. S.C.—Rutledge v. Junior Order of United American Mechanics, 193 S.E. 434, 185 S.C. 142.

42. Colo.—Mountain v. Stewart, 149 P.2d 176, 112 Colo. 302.

43. Cal.—Williams v. McQueen, 265 P. 339, 89 Cal.App. 659.

Minn.—Barwald v. Thuet, 195 N.W. 768, 157 Minn. 94.

Pa.—Caromono v. Garman, 42 Pa. Dist. & Co. 96, affirmed 23 A.2d 92, 147 Pa.Super. 1.

Notice of orders or decrees

As respects negligence in suffering default, litigants were chargeable with notice of orders and decrees made by the court in their case, especially when entered on the date set for action thereon, with notice to litigants of such setting.—Tyler v. Henderson, Tex.Civ.App., 162 S.W.2d 170, error refused.

44. N.Y.—Messing v. Mattikow, 107 N.Y.S. 620, 120 Misc. 68.

Wash.—Bishop v. Illman, 126 P.2d 582, 14 Wash.2d 13.

45. Cal.—Steineck v. Coleman, 236 P. 962, 72 Cal.App. 244.

46. Idaho.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.

Ky.—Bond v. W. T. Congleton Co., 129 S.W.2d 570, 278 Ky. 829.

N.Y.—Booraem v. Gibbons, 34 N.Y.S. 2d 198, 263 App.Div. 665, appeal denied 35 N.Y.S.2d 717, 264 App. Div. 768—Tabakin v. Freiman, 217 N.Y.S. 378, 217 App.Div. 665—Demuth v. Kemp, 139 N.Y.S. 249, 144 App.Div. 287—Clark v. Pearsall, 252 N.Y.S. 556, 141 Misc. 387—Schlegel v. Wagner, 29 N.Y.S.2d 389.

Pa.—Kanai v. Sowa, 167 A. 429, 109 Pa.Super. 426.

"Where a party suffers an intentional default and abandons its cause, and judgment results therefrom, there is, in fact, no default, and the judgment may not be vacated."—Colonial Fuel Corporation v. Kahn, 211 N.Y.S. 50, 52, 214 App. Div. 83.

47. Idaho.—Mason v. Pelkes, 59 P. 2d 1087, 57 Idaho 10, certiorari denied Pelkes v. Mason, 57 S.Ct. 319, 299 U.S. 615, 81 L.Ed. 453.

Ky.—Bond v. W. T. Congleton Co., 129 S.W.2d 570, 278 Ky. 829.

48. N.C.—Sutherland v. McLean, 154 S.E. 662, 199 N.C. 345.

Excusable neglect as that which might be expected on part of prudent person under circumstances see supra subdivision n (5) (a) of this section.

Rule criticized

"We do not think the requests [resting on the proposition that whatever is or ought to be the conduct of the reasonable man in stated circumstances sets the standard by which all must be judged and by

Thus he must, unless he means to try his own case, retain an attorney practicing in the particular court,[49] and see that the attorney understands and accepts the retainer,[50] and in case his counsel dies, or withdraws, or is discharged from the case he must promptly engage another.[51] It is the duty of a party to take account of the time and place of holding court, the position of the case on the calendar, and the state of the calendar,[52] and to keep himself informed of the progress of the case, when it is set for trial, or when it is likely to be reached,[53] and then to attend court prepared to establish his case,[54] but it has been held that a client may rely on his counsel to inform him as to the time the case will be set for trial and to advise him as to all matters necessary to a proper presentation of the case to the court.[55]

(6) Negligence, Mistake, or Misconduct of Counsel

(a) In general
(b) Negligence
(c) Mistake as to time or place of appearance or trial
(d) Ignorance or mistake of law
(e) Erroneous advice
(f) Misconduct
(g) Misunderstanding

(a) In General

Generally a default judgment may be opened or vacated for the excusable, but not the inexcusable, neglect or surprise, or mistake or oversight of counsel for the party against whom the default was taken.

The general rule is that a default judgment may be opened or vacated for the excusable neglect or surprise[56] or mistake or oversight[57] of counsel for the party against whom the default was taken. The law does not look with favor, however, on setting aside defaults resulting from inexcusable inadvertence, surprise, or neglect of attorneys in the performance of their duties to their clients.[58] Such failure on the part of attorneys ordinarily is imputable to their clients, unless their default can be excused as being the result of accident or surprise, that which ordinary prudence on their part could not have avoided.[59] So it has been said that mistakes of one's counsel, unaccompanied by fraud, accident, or improper conduct of the opposite side, are not ground for setting aside a judgment by de-

which sound judicial discretion must be bounded] state accurately the pertinent rule of law. One may be stupid or ignorant, or otherwise under disability so as not to be capable of exercising reasonable care and diligence with respect to an action brought against him in court, and yet be found by the court, even after judgment has been entered against him, to have such a meritorious defence as to be the victim of injustice if the judgment is allowed to stand. In such circumstances, the law does not prevent remedial action."—Manzi v. Carlson, 180 N.E. 134, 137, 278 Mass. 267.

49. Ga.—Metropolitan Life Ins. Co. v. Scarboro, 156 S.E. 726, 42 Ga. App. 423.
Idaho.—Cleek v. Virginia Gold Mining & Milling Co., 122 P.2d 232, 63 Idaho 445—Boyle v. Miles, 288 P. 893, 49 Idaho 412.
Ind.—Carty v. Torro, 57 N.E.2d 434.
N.C.—Harrell v. Welstead, 175 S.E. 283, 206 N.C. 817—Sutherland v. McLean, 154 S.E. 662, 199 N.C. 345.
Tex.—**Corpus Juris cited in** Dempsey v. Givson, Civ.App., 100 S.W.2d 430, 432—Thomas v. Goldberg, Civ. App., 283 S.W. 230—Cauble v. Key, Civ.App., 256 S.W. 654.
34 C.J. p 306 note 71.

Inability after exercise of due diligence

Where defendant had used diligence to procure an attorney to represent him, but failed because of refusal of one attorney to act, absence of another, and defendant's own illness, it was an abuse of discretion to deny relief.—Landgraf v. Muchow, Tex.Civ.App., 102 S.W.2d 308.

Reliance on advice of another's attorney

Surety on forthcoming bond cannot have new trial after default, on showing of reliance on advice of attorney for attachment defendant.—Holbrook v. Holbrook, 288 S.W. 1039, 217 Ky. 77.

50. N.Y.—Dewey v. Agostini Bros. Bldg. Corporation, 283 N.Y.S. 174, 246 App.Div. 667.
Tex.—**Corpus Juris cited in** Dempsey v. Gibson, Civ.App., 100 S.W.2d 430, 432.
34 C.J. p 300 note 39, p 306 note 72.
Mistake as to employment of counsel as ground for vacating default judgment see supra subdivision n (2) (e) of this section.

51. Cal.—Hughes v. Wright, 149 P. 2d 892, 64 Cal.App.2d 897.
Idaho.—Cleek v. Virginia Gold Mining & Milling Co., 122 P.2d 232, 63 Idaho 445.
Ky.—Zimmerman v. Segal, 155 S.W. 2d 30, 288 Ky. 33.
34 C.J. p 306 note 73.

52. Wyo.—**Corpus Juris cited in** Boulter v. Cook, 234 P. 1101, 1104, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.
34 C.J. p 299 note 27, p 307 notes 77, 78.

53. Ark.—Metropolitan Life Ins. Co. v. Duty, 126 S.W.2d 921, 197 Ark. 1118.

54. Ala.—McCord v. Harrison & Stringer, 93 So. 428, 207 Ala. 480.
34 C.J. p 307 note 79.

55. Okl.—Hale v. McIntosh, 243 P. 157, 116 Okl. 40.

56. Colo.—Beyer v. Petersen, 21 P. 2d 1115, 92 Colo. 462.
34 C.J. p 307 note 80.
Negligence, mistake, or misconduct of counsel as ground for opening or vacating judgments generally see supra §§ 279, 280.

57. Pa.—Pinsky v. Master, 23 A.2d 727, 343 Pa. 451—Curran v. James Regulator Co., 36 A.2d 187, 154 Pa. Super. 261—Horning v. David, 8 A. 2d 729, 137 Pa.Super. 252—Planters Nut & Chocolate Co. v. Brown-Murray Co., 193 A. 881, 128 Pa.Super. 239—Kanai v. Sowa, 167 A. 429, 109 Pa.Super. 426—Page v. Patterson, 161 A. 878, 105 Pa.Super. 438—Robert Baile Co. v. Stong & Stong, 84 Pa.Super. 241—Leschinski v. W. C. Hack & Sons, 47 Pa.Dist. & Co. 475—Stevenson v. Rhoades, Com.Pl., 25 Wash.Co. 82.
34 C.J. p 310 note 94.

58. Cal.—People's Finance & Thrift Co. of Porterville v. Phœnix Assur. Co., Limited, of London, 285 P. 857, 104 Cal.App. 334.

59. Cal.—People's Finance & Thrift Co. of Porterville v. Phœnix Assur. Co., Limited, of London, supra.

fault.[60] In the determination of motions to set aside defaults, mistakes of attorneys and those of parties to the action are to be measured by the same rules.[61]

(b) Negligence

Although negligence of counsel does not necessarily bar relief, generally a client cannot be relieved from a default judgment taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney unless such neglect was excusable under the circumstances.

As a general rule, the negligence of an attorney is imputable to his client, and the latter cannot be relieved from a default judgment taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of the former[62] unless the neglect was excusable under the circumstances.[63] This rule applies where the negligence of

60. Tex.—St. Paul Fire & Marine Ins. Co. v. Earnest, Civ.App., 293 S.W. 677, affirmed 296 S.W. 1088, 116 Tex. 565.

61. Cal.—Morgan v. Brothers of Christian Schools, 92 P.2d 925, 34 Cal.App.2d 14.

"Ordinarily a party will not be relieved from a judgment or decree taken against him through the mistake, negligence, or inadvertence of his attorney, unless the act or omission of the attorney was such that had it been committed or omitted by the party himself, he would be entitled to a vacation of the judgment or decree."—Carlson v. Bankers' Discount Corporation, 215 P. 986, 988, 107 Or. 686.

62. Ala.—Brown v. Brown, 105 So. 171, 213 Ala. 339.

Cal.—Flores v. Smith, 117 P.2d 712, 47 Cal.App.2d 253—Zuver v. General Development Co., 28 P.2d 939, 136 Cal.App. 411—U. S. v. Duesdieker, 5 P.2d 916, 118 Cal.App. 723—Massimino v. Taranto, 292 P. 139, 108 Cal.App. 692.

Ga.—Smith v. Cone, 156 S.E. 612, 171 Ga. 697—Strother v. Harper, 136 S.E. 828, 36 Ga.App. 445.

Idaho.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.

Ill.—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000—Travelers Ins. Co. v. Wagner, 279 Ill.App. 13—Gaines v. Chicago Rys. Co., 255 Ill.App. 30.

Ind.—Smith v. Heyns, 186 N.E. 563, 78 Ind.App. 565.

Iowa.—Pride v. Kittrell, 257 N.W. 204, 218 Iowa 1247—Anderson v. Anderson, 229 N.W. 694, 209 Iowa 1143—Iowa Cord Tire Co. v. Babbitt, 192 N.W. 431, 195 Iowa 922—Starkey v. Porter Tractor Co., 192 N.W. 135.

Mass.—Kravetz v. Lipofsky, 200 N.E. 865, 294 Mass. 80.

Mich.—Petersen v. Moynihan, 220 N. W. 791, 248 Mich. 600.

Miss.—Britton v. Beltzhoover, 113 So. 346, 147 Miss. 737.

Mo.—O'Connell v. Dockery, App., 102 S.W.2d 748.

Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604—St. Germain v. Vollmer, 216 P. 788, 68 Mont. 264.

Neb.—Lyman v. Dunn, 252 N.W. 197, 125 Neb. 770—Beem v. Davis, 195 N.W. 948, 111 Neb. 96.

Nev.—Guardia v. Guardia, 229 P. 386, 48 Nev. 230.

N.J.—O'Neill v. Hendrickson, 147 A. 721, 7 N.J.Misc. 1022.

Ohio.—Lazarus v. Cleveland Household Supply Co., 154 N.E. 343, 23 Ohio App. 15.

Okl.—Grayson v. Stith, 72 P.2d 820, 181 Okl. 131, 114 A.L.R. 276.

Pa.—Schweikart v. American Slicing Mach. Co., 173 A. 427, 113 Pa. Super. 485—Derbyshire Bros. v. McManamy, 101 Pa.Super. 514.

S.C.—Poston v. State Highway Department, 5 S.E.2d 729, 192 S.C. 137.

S.D.—**Corpus Juris cited in** Smith v. Wordeman, 240 N.W. 325, 326, 59 S.D. 368.

Tex.—Briggs v. Ladd, Civ.App., 64 S.W.2d 389—Hubbard v. Tallal, Civ.App., 57 S.W.2d 226, reversed on other grounds and appeal dismissed 92 S.W.2d 1022, 127 Tex. 242—St. Paul Fire & Marine Ins. Co. v. Earnest, Civ.App., 293 S.W. 677, affirmed 296 S.W. 1088, 116 Tex. 565.

Wash.—Wolfe v. Henry Gerlich Tie & Timber Co., 211 P. 753, 123 Wash. 70.

34 C.J. p 307 note 81.

Neglect of attorney timely to file pleading as surprise on client warranting vacation of default judgment see supra subdivision n (3) of this section.

Negligence of counsel as ground for opening or vacating judgments generally see supra § 280.

Rule held inapplicable where defendant's lessor agreed but neglected to defend any suit brought by plaintiff.—Sofuye v. Pieters-Wheeler Seed Co., 216 P. 990, 62 Cal.App. 198.

Repudiation

Defendant may not repudiate attorney of record after trial resulting in adverse judgment in order to have judgment set aside.—Hendricks v. Town of Cherryville, 153 S.E. 112, 198 N.C. 659.

63. Cal.—Bonfilio v. Ganger, 140 P. 2d 861, 60 Cal.App.2d 405—Potts v. Whitson, 125 P.2d 947, 52 Cal.App. 2d 199—Hicks v. Sanders, 104 P.2d 549, 40 Cal.App.2d 211—Stub v. Harrison, 96 P.2d 979, 35 Cal.App. 2d 685.

Colo.—Drinkard v. Spencer, 211 P. 379, 72 Colo. 396.

Fla.—Segel v. Staiber, 144 So. 875, 106 Fla. 946.

Ill.—Haller v. Rieth, 247 Ill.App. 541.

Ky.—South Mountain Coal Co. v. Rowland, 265 S.W. 320, 204 Ky. 820.

Mo.—Faulkner v. F. Bierman & Sons Metal & Rubber Co., App., 294 S. W. 1019.

Nev.—Guardia v. Guardia, 229 P. 386, 48 Nev. 230.

N.C.—Abbitt v. Gregory, 141 S.E. 587, 195 N.C. 203.

N.D.—Moos v. Northwestern Improvement Co., 6 N.W.2d 73, 72 N. D. 223.

Or.—McAuliffe v. McAuliffe, 298 P. 239, 136 Or. 168.

S.C.—Gaskins v. California Ins. Co., 11 S.E.2d 436, 195 S.C. 376.

S.D.—**Corpus Juris cited in** Smith v. Wordeman, 240 N.W. 325, 326, 59 S.D. 368.

Tex.—Presidio Cotton Gin & Oil Co. v. Dupuy, Civ.App., 2 S.W.2d 341—Paggi v. Rose Mfg. Co., Civ.App., 259 S.W. 962.

34 C.J. p 308 note 82.

Reliance on rule of court

Where the rules of a trial court made every Monday law day, on which all matters then pending would be disposed of, counsel is warranted in relying on that rule and in presuming that it will be followed unless informed to the contrary. —Garner v. Towler, 213 P. 390, 25 Ariz. 101.

Reliance on official records

Attorney is justified in relying on official records showing condition of case pending in court, and court should relieve client from effect of error in record.—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332.

Attorney recently discharged from army

In view of difficulties facing an attorney recently discharged from army in picking up threads of his practice, some latitude should be extended in passing on such attorney's motion to open default judgment against his client entered after expiration of time to serve pleading.—Cunningham v. Port Washington Synagogue, 56 N.Y.S.2d 786.

the attorney consisted in his failure to enter an appearance or file a pleading in due season,[64] and also where it consisted of a failure to pursue and follow up the case with due care and watchfulness,[65] or where, being present in court, he refused to proceed with the trial and failed to avail himself of the privileges which the law affords to him in such case.[66]

Negligence or misconduct of the petitioner's attorney, however, does not necessarily bar a petition to vacate a judgment,[67] and a considerable number of cases have held that, where the party himself has not been guilty of negligence, a judgment against him may be set aside because it was obtained through the negligence of his counsel[68] if it can be done without prejudicing the rights of the other

64. Ariz.—Martin v. Sears, 44 P.2d 526, 45 Ariz. 414.
Ark.—Alger v. Beasley, 20 S.W.2d 317, 180 Ark. 46.
Cal.—Woolner v. Hawthorne Improvement Co., 265 P. 194, 203 Cal. 547—Pickerill v. Strain, 239 P. 323, 196 Cal. 683.
Mo.—State ex rel. Schwettman v. Oberheide, App., 39 S.W.2d 395—Allen v. Allen, App., 14 S.W.2d 686.
N.J.—Barenson v. Zaritsky, 167 A. 671, 11 N.J.Misc. 530.
Pa.—Herbst v. Derrick, 175 A. 297, 115 Pa.Super. 205—Page v. Patterson, 161 A. 878, 105 Pa.Super. 438.
Tex.—St. Paul Fire & Marine Ins. Co. v. Earnest, Civ.App., 293 S. W. 677, affirmed 296 S.W. 1088, 116 Tex. 565.
34 C.J. p 308 note 83.

Failure timely to plead held excusable

(1) Where defendant's motion for security for costs was undisposed of, notwithstanding such motion was not an answer sufficient to prevent default from being taken.—Huff v. Flynn, 60 P.2d 931, 48 Ariz. 175.

(2) Where failure was caused by attorney's absence from office on business when process was forwarded by defendant.—Collister v. Inter-State Fidelity Building & Loan Ass'n of Utah, 88 P.2d 626, 44 Ariz. 427, 98 A.L.R. 1020.

(3) Where failure was caused by one of defendant's three attorneys being away on business at the time the plea was due, and who supposed it would be filed by his associates, both of whom were unavoidably prevented from doing so.—Planters' Lumber Co. v. Sibley, 93 So. 440, 130 Miss. 26.

(4) Where defendants' attorney, through inadvertence, had failed to note expiration of time to answer the new pleading.—Shively v. Kochman, 73 P.2d 637, 23 Cal.App.2d 420.

(5) Where failure was due to rush of business and associate's absence.—Carbondale Mach. Co. v. Eyraud, 271 P. 349, 94 Cal.App. 356.

(6) Where plaintiff's attorney received case in 1942, during which year he was inducted into army, and did not reëstablish his office until April, 1945, and despite search did not locate file until March, 1945.—Cunningham v. Port Washington Synagogue, 56 N.Y.S.2d 786.

(7) Other facts.—Waybright v. Anderson, 253 P. 148, 200 Cal. 374—Stub v. Harrison, 96 P.2d 979, 35 Cal.App.2d 685—Eberhart v. Salazar, 235 P. 86, 71 Cal.App. 336—Rahn v. Peterson, 218 P. 464, 63 Cal.App. 199.

65. Ariz.—MacNeil v. Vance, 60 P.2d 1078, 48 Ariz. 187—Faltis v. Colachis, 274 P. 776, 35 Ariz. 78.
Cal.—People's Finance & Thrift Co. of Porterville v. Phœnix Assur. Co., Limited, of London, 285 P. 857, 104 Cal.App. 334—Anglo California Trust Co. v. Kelly, 272 P. 1080, 95 Cal.App. 390.
Ga.—Henderson v. American Hat Mfg. Co., 194 S.E. 254, 54 Ga.App. 10.
N.Y.—Mandel v. Donohue, 208 N.Y.S. 807, 124 Misc. 861.
N.C.—Chapman v. Lineberry, 140 S. E. 302, 194 N.C. 311.
Okl.—Pickering Lumber Co. v. Lacy, 44 P.2d 42, 170 Okl. 447—Sautbine v. Jones, 18 P.2d 871, 161 Okl. 292—Key v. Minnetonka Lumber Co., 241 P. 143, 112 Okl. 301.
Pa.—East Pittsburgh Building & Loan Ass'n v. Teets, 186 A. 166, 123 Pa.Super. 117.
Tex.—Brown v. St. Mary's Temple No. 5 S. M. T. United Brothers of Friendship of Texas, Civ.App., 127 S.W.2d 531—Ladd v. Coleman, Civ. App., 285 S.W. 1096.
34 C.J. p 309 note 84.

Duty to ascertain time for trial

(1) The duty rests on an attorney to be diligent and ascertain the time for trial.
Ala.—McCord v. Harrison & Stringer, 93 So. 428, 207 Ala. 480.
Okl.—Thornton v. Eoff, 84 P.2d 5, 183 Okl. 504—Mid-Texas Petroleum Co. v. Western Lumber & Hardware Co., 52 P.2d 15, 175 Okl. 260.
Wyo.—Boulter v. Cook, 234 P. 1101, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.

(2) Defendant's attorney has no right to rely on counsel for plaintiff to notify him of setting of cause, in absence of agreement providing for such notice.—Grand United Order of Odd Fellows v. Wright, Tex.Civ.App., 76 S.W.2d 1073.

(3) While courts frequently, and ordinarily in fact, have counsel notified or called when a case is reached for trial, that is done as a courtesy and not as a duty.—Boulter v. Cook, supra.

66. Ill.—Gaines v. Chicago Rys. Co., 255 Ill.App. 30.

67. Mass.—Manzi v. Carlson, 180 N. E. 134, 278 Mass. 267.
Neb.—Beem v. Davis, 195 N.W. 948, 111 Neb. 96.
N.C.—Helderman v. Hartsell Mills Co., 135 S.E. 627, 192 N.C. 626.

Negligence of co-counsel named as compliment

The alleged negligence of person who had been admitted to practice law and whose name appeared on some of pleadings as of counsel for defendants did not preclude them from having set aside default decree entered against them without knowledge of their counsel, where it appeared that such person's name had been inserted merely as a compliment and that he actually had no responsibility for any matters connected with case.—Lunt v. Van Gorden, 281 N.W. 748, 225 Iowa 1120.

68. Colo.—Calkins v. Smalley, 294 P. 534, 88 Colo. 227.
Iowa.—Hatt v. McCurdy, 274 N.W. 72, 223 Iowa 974.
Ky.—Adams v. Nelson, 283 S.W. 405, 214 Ky. 411.
Minn.—Kennedy v. Torodor, 276 N. W. 650, 201 Minn. 422—Wagner v. Broquist, 231 N.W. 241, 181 Minn. 39—Unowsky v. Show, 201 N.W. 936, 161 Minn. 489—Hasara v. Swaney, 200 N.W. 847, 161 Minn. 94—Zell v. Friend Crosby & Co., 199 N.W. 928, 160 Minn. 181.
Mo.—Goodwin v. Kochititzky, App., 3 S.W.2d 1051—Amos James Grocery Co. v. Prichard, App., 297 S. W. 721.
Neb.—Lacey v. Citizens' Lumber & Supply Co., 248 N.W. 378, 124 Neb. 813.
N.J.—Jarrett v. Standard Diesel Engine Co., 12 A.2d 671, 124 N.J.Law 429.
N.M.—Ambrose v. Republic Mortg. Co., 34 P.2d 294, 38 N.M. 370.
N.Y.—Kyles v. City of New York, 80 N.Y.S.2d 314, 262 App.Div. 1033—Jensen v. Backman, 283 N.Y.S. 862, 246 App.Div. 741—Marcus v. Simotone & Combined Sound & Color Films, 237 N.Y.S. 509, 135 Misc. 228.
N.C.—Gunter v. Dowdy, 31 S.E.2d 524, 224 N.C. 522—Meece v. Commercial Credit Co., 159 S.E. 17, 201 N.C. 139—Sutherland v. Mc-

party,[69] that is, without loss to such other party other than that which might result from establishing the claim or defense of the party applying.[70] Furthermore, under some statutes a default is required to be set aside when taken against a party otherwise without default through the neglect or failure of his attorney to file or serve any paper within the time limited therefor,[71] although such statutes do not apply where the party asking for relief was not represented by attorney at the time of the default and the default was not taken by reason of the negligence of counsel.[72] The negligence of an attorney may be excusable when attributable to an honest mistake, an accident, or any cause which is not incompatible with proper diligence on his part, and in these circumstances it will be proper to set aside or open a default judgment taken in consequence thereof.[73] The fact that an attorney was lulled into a sense of security by continued negotiations between the parties for settling the case out of court has been held a sufficiently reasonable excuse for failure to file an answer,[74] but there is authority holding that mere discussion by litigants of settlement pending action does not excuse failure to plead.[75]

In any case, however, the client himself must be free from fault; negligence of his counsel is not excusable negligence for which a judgment will be set aside if the client wholly neglected the case and took no interest in the issue,[76] even though fraud reasonably discoverable exists.[77] He must show that he employed counsel practicing habitually in the particular court, or who specially agreed to attend to the case,[78] and the relief will not be granted on this ground where to do so would delay trial of the cause to the consequent injury of the party not in default.[79] Where an attorney is employed simply to retain counsel to appear at another place, he is a mere agent and his negligence is imputable to his client.[80]

(c) Mistake as to Time or Place of Appearance or Trial

A default judgment may be opened or vacated for excusable mistake of counsel as to time or place of appearance or trial.

A default judgment may be opened or vacated when the default was due to a mistake or miscalculation of the party's attorney as to the time allowed him for appearing, pleading, or taking some other step in the action,[81] or as to the day at which the

Lean, 154 S.E. 662, 199 N.C. 345—Abbitt v. Gregory, 141 S.E. 587, 195 N.C. 203—Helderman v. Hartsell Mills Co., 135 S.E. 627, 192 N.C. 626.
Okl.—State ex rel. Higgs v. Muskogee Iron Works, 103 P.2d 101, 187 Okl. 419.
Or.—Astoria Sav. Bank v. Normand, 267 P. 524, 125 Or. 347.
Pa.—National Finance Corporation v. Bergdoll, 151 A. 12, 300 Pa. 540—Horning v. David, 8 A.2d 729, 137 Pa.Super. 252—Robert Baile Co. v. Stong & Stong, 84 Pa.Super. 241—Public Ledger Co. v. Kleinman, 75 Pa.Super. 345—Roth v. Lehigh Valley Trust Co., Com.Pl., 18 Leh. L.J. 176.
R.I.—Dooley v. Slavit, 165 A. 771, 53 R.I. 264.
S.D.—W. B. Foshay Co. v. Springfield Light & Power Co., 206 N.W. 239, 49 S.D. 92—Conley v. Lunzmann, 197 N.W. 294, 47 S.D. 241.
Wyo.—**Corpus Juris cited in** McDaniel v. Hoblit, 245 P. 295, 297, 34 Wyo. 509.
34 C.J. p 309 note 86—24 C.J. p 887 note 78 [a] (2).

69. Minn.—Kennedy v. Torodor, 276 N.W. 650, 201 Minn. 422.
Mo.—Goodwin v. Kochititzky, App., 3 S.W.2d 1051.
Wyo.—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509.

70. Wyo.—McDaniel v. Hoblit, supra.

71. Idaho.—State ex rel. Sweeley v. Braun, 110 P.2d 835, 62 Idaho 258—Miller v. Brinkman, 281 P. 372, 42 Idaho 232—Consolidated Wagon & Machine Co. v. Housman, 221 P. 143, 38 Idaho 343—Weaver v. Rambow, 217 P. 610, 37 Idaho 645.

72. Idaho.—Day v. Burnett, 224 P. 427, 38 Idaho 620.

73. Ark.—**Corpus Juris cited in** Metropolitan Life Ins. Co. v. Duty, 126 S.W.2d 921, 925, 197 Ark. 1118.
34 C.J. p 309 note 89.

74. Cal.—Beard v. Beard, 107 P.2d 885, 16 Cal.2d 645—Pease v. City of San Diego, App., 169 P.2d 973.
Or.—McAuliffe v. McAuliffe, 298 P. 239, 136 Or. 168.

75. Mont.—Middle States Oil Corporation v. Tanner-Jones Drilling Co., 235 P. 770, 73 Mont. 180.

76. Alaska.—Rubenstein v. Imlach, 9 Alaska 62.
Ky.—Carter v. Miller, 95 S.W.2d 29, 264 Ky. 532.
Miss.—Britton v. Beltzhoover, 113 So. 346, 147 Miss. 737.
N.C.—Kerr v. North Carolina Joint Stock Land Bank of Durham, 171 S.E. 367, 205 N.C. 410.
Wash.—Luger v. Littau, 288 P. 277, 157 Wash. 40.
34 C.J. p 310 note 90.

77. Miss.—Britton v. Beltzhoover, 113 So. 346, 147 Miss. 737.
Fraud as ground for opening or vacating default judgment see supra subdivision c of this section.

78. N.C.—Kerr v. North Carolina Joint Stock Land Bank of Durham, 171 S.E. 367, 205 N.C. 410.
S.D.—**Corpus Juris cited in** Smith v. Wordeman, 240 N.W. 325, 326, 59 S.D. 368.
34 C.J. p 310 note 91.
Duty to retain counsel generally see supra subdivision n (5) (b) of this section.

79. Miss.—Lee v. Spikes, 112 So. 538, 145 Miss. 897.
Delaying trial six months would result in injury sufficient to justify refusal to interfere with default judgment resulting from counsel's neglect.—Lee v. Spikes, supra.

80. Idaho.—Brainard v. Cœur d'Alene Antimony Mining Co., 208 P. 855, 35 Idaho 742.
N.C.—Kerr v. North Carolina Joint Stock Land Bank of Durham, 171 S.E. 367, 205 N.C. 410—Pailin v. Richmond Cedar Works, 136 S.E. 635, 193 N.C. 256.
34 C.J. p 310 note 92.

81. Cal.—Morgan v. Brothers of Christian Schools, 92 P.2d 925, 34 Cal.App.2d 14—Salsberry v. Julian, 277 P. 516, 98 Cal.App. 638, followed in 277 P. 518, amended 278 P. 257, 98 Cal.App. 645—Weck v. Sucher, 274 P. 579, 96 Cal.App. 422—Rahn v. Peterson, 218 P. 464, 63 Cal.App. 199.
Colo.—Brennan-Tucker Motor Co. v. Tucker, 242 P. 970, 78 Colo. 550.
34 C.J. p 311 note 99.

case would be tried or the hour of the day,[82] or as to the case being on the calendar for trial,[83] or as to the position of the case on the calendar,[84] or as to the place of trial,[85] provided, however, there was sufficient excuse for the mistake.[86]

(d) Ignorance or Mistake of Law

While ignorance of the law on the part of an attorney ordinarily is not sufficient ground for setting aside a default judgment, a party may, in a proper case, be granted relief notwithstanding an attorney's mistake of law.

Ignorance of the law on the part of an attorney ordinarily is not sufficient ground for setting aside a default judgment,[87] but the mere fact that an attorney erroneously stated a proposition of law in court, which error would not justify setting aside a default judgment, does not bar him from asserting other grounds for setting aside the default which the court might find sufficient.[88] Furthermore, the court, in its discretion, may grant relief from an attorney's mistake of law as to the legal effect of an order[89] or as to the proper procedure.[90]

(e) Erroneous Advice

The fact that a default judgment was suffered by a party in consequence of receiving erroneous advice from his attorney is generally no ground for setting aside the judgment, although under the facts of the particular case relief may be justified on this ground.

The responsibility of a person of mature years and judgment is independent of that of the attorney by whom he is advised.[91] So it is generally held not to be good ground for setting aside a default judgment that it was suffered by the party in consequence of receiving erroneous advice from his attorney as to the necessity of making a defense or as to the validity of the defense;[92] but under the facts of a particular case relief may be justified on this ground.[93]

(f) Misconduct

A default judgment may be set aside where it was obtained through the misconduct of the party's attorney or because of his abandonment of, or withdrawal from, the case without timely notice to his client.

A default judgment may be set aside where it was obtained through the misconduct of the party's attorney.[94] Abandonment of, or withdrawal from,

Mistake of:
Counsel as to time for appearance, pleading, or trial as ground for opening or vacating judgments generally see supra § 280.
Party as to time or place of appearance or trial as ground for opening or setting aside default judgment see supra subdivision n (2) (c) of this section.
Want or insufficiency of notice of proceedings as ground for opening or vacating default judgment see supra subdivision b (3) of this section.

82. Ala.—Sovereign Camp, W. O. W., v. Gay, 104 So. 895, 20 Ala. App. 650, reversed on other grounds 104 So. 898, 213 Ala. 5.
Cal.—Johnston v. Liffman, 287 P. 558, 105 Cal.App. 187.
N.D.—Central Metropolitan Bank v. American State Bank of Burlington, 190 N.W. 813, 49 N.D. 165.
34 C.J. p 311 note 2.

83. N.Y.—Marcus v. Simotone & Combined Sound & Color Films, 237 N.Y.S. 509, 135 Misc. 228.
34 C.J. p 311 note 3.

84. N.J.—Le Pore v. De Meester, 147 A. 863, 7 N.J.Misc. 1110.

85. Minn.—Kennedy v. Torodor, 276 N.W. 650, 201 Minn. 422.

86. Ga.—Turner v. Citizens' Bank of Valdosta, 121 S.E. 698, 31 Ga. App. 549.
Ill.—Travelers Ins. Co. v. Wagner, 279 Ill.App. 13.
34 C.J. p 311 note 5.

Miscalculation held insufficient ground
Attorney's miscalculation of time to plead or appear was held insufficient ground to set aside default judgment.—Guardia v. Guardia, 229 P. 386, 48 Nev. 230.

87. Cal.—Beard v. Beard, 107 P.2d 385, 16 Cal.2d 645—Schoenfeld v. Gerson, 120 P.2d 674, 48 Cal.App. 2d 739.
Idaho.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.
Minn.—Application of Bonley, 6 N. W.2d 245, 212 Minn. 214.
Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
34 C.J. p 312 note 6.
Counsel's ignorance or mistake of law as ground for opening or vacating judgments generally see supra § 280.
Ignorance of party as excuse for default see supra subdivision k of this section.

88. Cal.—Beard v. Beard, 107 P.2d 385, 16 Cal.2d 645.

89. Cal.—Schoenfeld v. Gerson, 120 P.2d 674, 48 Cal.App.2d 739.

Bankruptcy adjudication
The trial court did not abuse its discretion in vacating a judgment, where it appeared that defendant had advised plaintiff's attorney, the court, and the clerk that he had been adjudicated a bankrupt and that he left the courtroom in the belief that in view of such bankruptcy no further proceedings would be had, and thereafter plaintiff and his attorney appeared without further notice to defendant and proved up plaintiff's case as on default.—Davenport v. Sackett, 288 N.W. 167, 206 Minn. 69.

90. S.C.—Savage v. Cannon, 80 S.E. 2d 70, 204 S.C. 473.

91. Ind.—Carty v. Toro, 57 N.E.2d 434.

92. Ind.—Carty v. Toro, supra.
Pa.—In re Stroud's Estate, 22 Pa. Dist. & Co. 591, 40 Dauph.Co. 207.
Tex.—Johnson v. Whatley, Civ.App., 45 S.W.2d 766, error refused.
34 C.J. p 312 note 8.
Erroneous advice of counsel as ground for setting aside judgments generally see supra § 280.

93. Cal.—Mahana v. Alexander, 268 P. 260, 88 Cal.App. 111.
Wash.—Moe v. Wolter, 235 P. 803, 134 Wash. 340, affirmed 240 P. 565, 136 Wash. 696.
34 C.J. p 312 note 9.

94. Colo.—Calkins v. Smalley, 294 P. 534, 88 Colo. 227.
34 C.J. p 312 note 10, p 313 notes 11–14.
Misconduct of counsel as ground for opening or vacating judgments generally see supra § 279.

Refusal to accept notice of trial
Where defendant's attorney of record refused to accept notice of trial, stating that he intended to withdraw from the case, and never notified defendant that the case had been noticed or set for trial, and defendant received no information of the proposed trial from any source, a judgment rendered in the absence of defendant should be vacated.—Calkins v. Smalley, 294 P. 534, 88 Colo. 227.

the case by an attorney without timely notice to his client has been held sufficient ground for vacating a resulting default judgment,[95] although relief on such ground has been denied in view of the circumstances of the particular case.[96]

(g) Misunderstanding

The fact that a default judgment was the consequence of a genuine, accidental, and excusable misunderstanding of counsel is ground for opening or vacating it.

A default judgment may be opened or set aside where the default occurred when the party's counsel, who was guilty of no negligence or omission of duty to his client, failed, because of a genuine and accidental misunderstanding, to perform an act which would otherwise have been performed,[97] and this rule applies where the misunderstanding was between the party and his counsel,[98] between opposing counsel,[99] or between counsel and the court,[1] or where, without fault on their part, counsel were misled by the record.[2] In all such cases, however, in order that the judgment may be set aside, it is necessary that the mistake shall be shown to be excusable.[3]

(7) Unavoidable Casualty or Misfortune

Under some statutes a default may be excused and a default judgment opened or vacated where the appearance of a party or his pleading was prevented by unavoidable casualty or misfortune, which is defined as that which could not have been prevented by the exercise of reasonable skill and diligence or human prudence or foresight, and which does not exist where the complaining party was himself guilty of negligence in allowing the default judgment to be taken.

Under statutes in some jurisdictions a default may be excused and a default judgment opened or vacated where the appearance of the party or his pleading was prevented by unavoidable casualty or misfortune.[4] While it has been said that such statutes are in derogation, not only of the common law, but of the policy of holding judgments final after the close of the term,[5] on the other hand, the view has been taken that they are consistent with the

95. Cal.—People's Finance & Thrift Co. of Porterville v. Phœnix Assur. Co., Limited, of London, 285 P. 857, 104 Cal.App. 334.
Ill.—Hogan v. Ermovick, 166 N.E. 503, 335 Ill. 181.
Iowa.—Ferris v. Wulf, 249 N.W. 156, 216 Iowa 289.
N.C.—Gosnell v. Hilliard, 171 S.E. 52, 205 N.C. 297.
Okl.—Bearman v. Bracken, 240 P. 713, 112 Okl. 237—Shuler v. Viger, 229 P. 280, 103 Okl. 129.
R.I.—Shapiro v. Albany Ins. Co., 163 A. 747.
Absence of attorney from trial as ground for setting aside default judgment see supra subdivision l of this section.
Withdrawal of attorney as unavoidable casualty or misfortune see infra subdivision n (7) of this section.

96. Cal.—De Recat Corporation v. Dunn, 242 P. 936, 197 Cal. 787—Newman v. Menne, 244 P. 951, 76 Cal.App. 331.
Ill.—B. A. Railton Co. v. Kearns, 10 N.E.2d 689, 291 Ill.App. 614.
Kan.—American Oil & Refining Co. v. Liberty-Texas Oil Co., 211 P. 137, 112 Kan. 309.
Ky.—Ebner v. Official Board of M. E. Church of Pineville, 282 S.W. 785, 214 Ky. 70.
N.Y.—Dewey v. Agostini Bros. Bldg. Corporation, 263 N.Y.S. 174, 246 App.Div. 667—New York State Labor Relations Board v. Paragon Oil Co., 45 N.Y.S.2d 152.
N.C.—Baer v. McCall, 193 S.E. 406, 212 N.C. 389.

97. Fla.—Stevens-Davis Co. v Stock, 193 So. 745, 141 Fla. 714.
Misunderstanding:
As unavoidable casualty or misfortune see infra subdivision n (7) of this section.
Of counsel as ground for vacating judgments generally see supra § 280.

98. Ariz.—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz. 239.
34 C.J. p 313 note 17.
Language difficulties
Default judgment on notes against Japanese defendants was properly set aside on showing of meritorious defense and that defendants and their attorney did not understand each other, defendants having little knowledge of the English language and the laws.—Daly v. Okamura, 213 P. 389, 25 Ariz. 50.

99. U.S.—Rogers v. Arzt, D.C.N.Y., 1 F.R.D. 581.
Ark.—Kochtitzky & Johnson v. Malvern Gravel Co., 92 S.W.2d 385, 192 Ark. 523.
Cal.—Waybright v. Anderson, 253 P. 148, 200 Cal. 374.
Or.—Leonard v. Bennett, 106 P.2d 542, 165 Or. 157.
R.I.—De Santis v. Amicarelli, 131 A. 197.
S.C.—Jenkins v. Jones, 38 S.E.2d 255.
W.Va.—**Corpus Juris cited in** Black v. Foley, 185 S.E. 902, 903, 117 W. Va. 490—Sigmond v. Forbes, 158 S.E. 677, 110 W.Va. 442.
34 C.J. p 313 note 20.
Effect of court rule as to verbal agreements
District court rule providing that verbal agreement between opposing counsel with respect to proceedings in suit will not be noticed does not stand in the way of granting a new trial in the interests of justice, where a judgment has gone by default against defendant because of misunderstanding resulting from verbal negotiations between opposing counsel, provided motion for new trial is timely filed.—Elchinger v. Lacroix, 189 So. 572, 192 La. 908.

1. N.D.—Central Metropolitan Bank v. American State Bank of Burlington, 190 N.W. 813, 49 N.D. 165.

2. Idaho.—Kivett v. Crouch, 104 P. 2d 21, 61 Idaho 536.

3. Ky.—Pinnacle Motor Co. v. Simpson, 287 S.W. 566, 216 Ky. 184.
Okl.—Key v. Minnetonka Lumber Co., 241 P. 143, 112 Okl. 301.
34 C.J. p 313 note 21.
Reasonableness of belief
Whether judgments were taken through plaintiffs' excusable neglect depended on whether counsel reasonably believed oral stipulation gave extension for amending complaints.—Waybright v. Anderson, 253 P. 148, 200 Cal. 374.

4. Ark.—Barringer v. Whitson, 168 S.W.2d 395, 205 Ark. 260—Metropolitan Life Ins. Co. v. Duty, 126 S.W.2d 921, 197 Ark. 1118.
Okl.—Tippins v. Turben, 19 P.2d 605, 162 Okl. 136.
34 C.J. p 314 note 23.
Unavoidable casualty or misfortune as ground for opening or vacating judgments generally see supra § 280.

5. Ark.—Bickerstaff v. Harmonia Fire Ins. Co., 133 S.W.2d 890, 199 Ark. 424.

fundamental rule that each case should be tried on the merits, and a strict construction of the word "unavoidable" as used therein will not be countenanced.[6] A casualty within the statutes is something in the nature of an accident,[7] something unexpected;[8] it is in the nature of a misfortune, and in a sense the two words are legally synonymous.[9] Forgetfulness is not in and of itself a misfortune; if anything, it is the basis of the misfortune.[10] While there is some question as to whether the word "unavoidable" in the statutory phrase "unavoidable casualty or misfortune" applies to the word "misfortune" as it does to "casualty,"[11] that has been held to be the significance and legal effect of the word as it stands alone.[12] Unavoidable casualty or misfortune is distinguished from a mere ordinary casualty or misfortune;[13] it is such casualty or misfortune as could not have been avoided by the exercise of reasonable skill and diligence[14] or human prudence or foresight;[15] it is an event or casualty happening against the will and without the negligence or default of a party,[16] and it does not exist where the complaining party was himself guilty of negligence in allowing the default judgment to be taken.[17]

The lack of diligence of a party or his attorney,[18] an attorney's negligence,[19] or the mere failure of an attorney to follow his client's instructions[20] is not unavoidable casualty or misfortune within the statute. Unavoidable casualty may be based on mistake of counsel,[21] but a mistake of counsel in thinking that he had an agreement with opposing counsel is not unavoidable casualty.[22] The mere absence of employed counsel from court because of other business engagements is not such an unavoidable casualty as will necessarily entitle the defaulting party to a new trial,[23] although the court in its discretion may vacate a judgment for this reason.[24]

The act of an attorney in abandoning his client's case without notice to the latter, and in permitting a default judgment to be rendered against his client without his knowledge or consent, has been held

6. Iowa.—Lunt v. Van Gorden, 281 N.W. 743, 225 Iowa 1120.

7. Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 36 Ohio App. 481.

8. Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, supra.

9. Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, supra.

10. Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, supra.

11. Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, supra.

12. Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, supra.

13. Ky.—Carter v. Miller, 95 S.W.2d 29, 264 Ky. 532.
34 C.J. p 314 note 23 [l].

14. Ky.—Carter v. Miller, supra.
Okl.—Mid-Texas Petroleum Co. v. Western Lumber & Hardware Co., 52 P.2d 15, 175 Okl. 260.
34 C.J. p 314 note 23.

15. Okl.—Sabin v. Sunset Gardens Co., 85 P.2d 294, 184 Okl. 106.

16. Okl.—Sabin v. Sunset Gardens Co., supra.

17. Okl.—Sabin v. Sunset Gardens Co., 85 P.2d 294, 184 Okl. 106—Thornton v. Eoff, 84 P.2d 5, 183 Okl. 504—Schuman v. Sternberg, 65 P.2d 410, 179 Okl. 115—Mid-Texas Petroleum Co. v. Western Lumber & Hardware Co., 52 P.2d 15, 175 Okl. 260—Upton v. Shipley, 40 P.2d 1048, 170 Okl. 422—Foster v. State, 270 P. 84, 132 Okl. 256—Hunter v. National Bank of Hastings, 241 P. 186, 113 Okl. 220—Eagle Loan & Investment Co. v. Turner, 241 P. 138, 113 Okl. 251.
34 C.J. p 314 note 23.
Negligence as defeating application for relief generally see supra subdivision n (5) (b) of this section.

Negligence of agent

Physician carrying indemnity insurance against suits for malpractice, who referred defense of suit to insurance carrier, made insurance company his agent for conducting defense, and negligence of company's adjuster in failing to transmit information concerning suit to company's attorneys was imputed to physician on physician's application to set aside default judgment against him, and physician was not entitled to have default judgment set aside for "unavoidable casualty or misfortune."—Leslie v. Spencer, 42 P.2d 119, 170 Okl. 642.

18. Neb.—Lyman v. Dunn, 252 N.W. 197, 125 Neb. 770.
Okl.—Leslie v. Spencer, 42 P.2d 119, 170 Okl. 642.

19. Iowa.—Starkey v. Porter Tractor Co., 192 N.W. 135.
Kan.—Johnson v. Salkeld, 271 P. 385, 126 Kan. 807.
Ky.—Carter v. Miller, 95 S.W.2d 29, 264 Ky. 532.
Neb.—Lyman v. Dunn, 252 N.W. 197, 125 Neb. 770.
Okl.—Grayson v. Stith, 72 P.2d 820, 181 Okl. 131, 114 A.L.R. 276—Mid-Texas Petroleum Co. v. Western Lumber & Hardware Co., 52 P.2d 15, 175 Okl. 260—Pickering Lumber Co. v. Lacy, 44 P.2d 42, 170 Okl. 447—Upton v. Shipley, 40 P.2d 1048, 170 Okl. 422—Gavin v. Heath, 256 P. 745, 125 Okl. 118—Vincent v. Kelly, 249 P. 942, 121 Okl. 302.
34 C.J. p 314 note 23 [b] (1).
Negligence of counsel as ground for opening or vacating default judgment generally see supra subdivision n (6) (b) of this section.

20. Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 36 Ohio App. 481.

21. Okl.—Langley v. Moulton, 13 P.2d 120, 158 Okl. 212.
Mistake of counsel as ground for opening or vacating default judgment generally see supra subdivision n (6) of this section.

22. Ky.—Pinnacle Motor Co. v. Simpson, 287 S.W. 566, 216 Ky. 184.

23. Ark.—Morrow v. Lindsey, 262 S.W. 641, 164 Ark. 606.
Absence of counsel as ground for opening or vacating default judgment generally see supra subdivision l of this section.

Attendance on legislature

Facts that defendant's attorney depended on plaintiff's attorney for information regarding filing of action, and that after action was filed defendant's attorney became member of state legislature, and by reason thereof was absent from office for period of three months, unable to remain in contact with source of information which would have apprised him of pendency of action, did not constitute unavoidable casualty or misfortune, so as to entitle defendant to have judgment vacated.—Royse v. Grage, 42 P.2d 942, 141 Kan. 702.

24. Kan.—Gordon v. Tennhardt, 8 P.2d 328, 134 Kan. 799.

to constitute unavoidable casualty or misfortune,[25] but there is also authority apparently to the contrary.[26] Sickness which prevents an attorney from being in attendance on the court is an unavoidable casualty,[27] whether it be sickness of the attorney himself[28] or of members of his family;[29] but the illness of defendant is not such unavoidable casualty or misfortune as will entitle him to vacation of the judgment where he was able to attend to the case at his home and his physical presence either at the courthouse or at his attorney's office was not required.[30] A misunderstanding between opposing counsel and the defaulted party as to the intent of the former to press the suit may constitute unavoidable casualty or misfortune preventing defendant from appearing and defending.[31] Loss or miscarriage of mail may constitute unavoidable casualty or misfortune;[32] but, where service of process has been made on a duly appointed statutory agent who fails to notify his principal through mere carelessness, such a showing does not constitute unavoidable casualty or misfortune.[33]

o. Other Grounds

Various matters have been held to constitute, or not to constitute, grounds for opening or vacating default judgments.

In addition to those discussed supra subdivisions b-n of this section, miscellaneous other matters have been held to constitute[34] or not to constitute[35] grounds for opening or vacating default judgments.

Advice of sheriff. It is no ground for vacating a default judgment that the sheriff, in delivering the summons, advised defendant that it would not be necessary for him to appear.[36]

Conduct of codefendant. Defendant's reliance on the promise of a codefendant to settle or defend the cause of action in behalf of all defendants is not in itself sufficient to require the court to vacate a default judgment against defendant,[37] although under the circumstances of the particular case such relief may be warranted.[38]

Furtherance of justice. Courts may not legally

25. Okl.—Grayson v. Stith, 72 P.2d 820, 181 Okl. 131, 114 A.L.R. 276.
34 C.J. p 314 note 23 [a] (4).
Attorney's abandonment of, or withdrawal from, case as ground for opening or vacating default judgment generally see supra subdivision n (6) (f) of this section.

Withdrawal of attorney
An attorney's act in abandoning case and withdrawing therefrom without notice to client, thus permitting default judgment to be rendered against client without client's knowledge and consent, is "unavoidable casualty and misfortune" which justifies setting such judgment aside; and, where defendants' attorney did not formally withdraw, but without notice to clients stated to court that clients had no defense, this amounted to withdrawal as attorney and abandonment of clients' interests within rule.—Grayson v. Stith, Okl., 165 P.2d 984.

26. Kan.—Johnson v. Salkeld, 271 P. 385, 126 Kan. 807.

27. Ark.—Johnson v. Jett, 159 S.W. 2d 78, 203 Ark. 861.
34 C.J. p 317 note 52, p 318 note 53.
Illness as ground for opening or vacating default judgment generally see supra subdivision m of this section.

28. Ky.—Ætna Ins. Co. v. Hensley, 284 S.W. 425, 215 Ky. 45.
Ohio.—Lazarus v. Cleveland Household Supply Co., 154 N.E. 843, 23 Ohio App. 15.
34 C.J. p 317 note 52.

29. Ark.—Johnson v. Jett, 159 S.W. 2d 78, 203 Ark. 861.
34 C.J. p 318 note 53.

30. Okl.—Upton v. Shipley, 40 P.2d 1048, 170 Okl. 422.

31. Ark.—McElroy v. Underwood, 281 S.W. 368, 170 Ark. 794.
Misunderstanding of counsel as ground for opening or vacating default judgment generally see supra subdivision n (6) (g) of this section.

32. Okl.—Kellogg v. Smith, 42 P.2d 493, 171 Okl. 355—Nevins v. Seiber, 236 P. 415, 110 Okl. 126.
34 C.J. p 314 note 23 [f].

33. Ky.—Metropolitan Life Ins. Co. v. Ditto, 269 S.W. 527, 207 Ky. 434.

Failure of secretary of state to notify foreign corporation of service of process on him in action against corporation does not constitute such unavoidable casualty or misfortune as to warrant vacation of default judgment.—Geo. O. Richardson Machinery Co. v. Scott, 251 P. 482, 122 Okl. 125, certiorari granted 47 S.Ct. 587, 274 U.S. 729, 71 L.Ed. 1319, certiorari dismissed 48 S.Ct. 264, 276 U.S. 128, 72 L.Ed. 497.

34. Tex.—Weatherford v. Van Alstyne, 22 Tex. 22.
34 C.J. p 423 note 34 [a] (4), [d].

Appearance before execution of writ of inquiry
Default judgment on depositary bond should be set aside as to defendant filing before execution of writ of inquiry affidavit denying owing any debt.—State v. Picklesimer, 138 S.E. 813, 103 W.Va. 561.

Variance
Where state of demand in action on guarantee of a sealed note alleged that plaintiff was owner and holder of note but affidavit on default did not so aver or explain how plaintiff was the owner, it was proper for the court to open the default judgment.—Ehnes v. Quinn, 23 A.2d 295, 127 N.J.Law 447.

35. S.D.—McDonald v. Egan, 178 N. W. 296, 43 S.D. 147.
34 C.J. p 423 note 34 [b].

Pendency of another suit
Tex.—Simpson v. Glenn, Civ.App., 103 S.W.2d 433—Dempsey v. Gibson, Civ.App., 100 S.W.2d 430.

Settlement between parties subsequent to entry of judgment did not entitle defendant to be relieved from his default which had occurred previously.—G. H. Poppenberg, Inc., v. Martin, 270 N.Y.S. 561, 241 App.Div. 792.

36. Cal.—Cann v. Parker, 258 P. 105, 84 Cal.App. 379.

37. Cal.—Handy v. Samaha, 290 P. 492, 107 Cal.App. 565.
Mich.—First Nat. Bank v. Pine Shores Realty Co., 241 N.W. 190, 257 Mich. 289.
N.C.—Elramy v. Abeyounis, 126 S.E. 743, 189 N.C. 278.

38. Ariz.—Yeast v. Fleck, 121 P.2d 426, 58 Ariz. 469.
Cal.—John A. Vaughan Corporation v. Title Insurance & Trust Co., 12 P.2d 117, 123 Cal.App. 709.
Wash.—Johnston v. Medina Improvement Club, 116 P.2d 272, 10 Wash. 2d 44.

set aside a judgment by default confirmed in strict conformity with the requirements of the law solely on the alleged ground that such action would be in furtherance of justice where defendant has been properly cited.[39] The action of the trial court in setting aside an order adjudging defendant in default has been upheld, however, under the broad power of the court to modify, set aside, or vacate any order previously made where to do so would be, in the opinion of the court, to further the principles of justice and rights;[40] and, as shown supra subdivision a of this section whether the ends of justice will be furthered thereby is a matter for consideration on a motion to set aside a default judgment made at the same term. The removal of a default by judicial action is proper where there is a substantial defense, and where it is necessary for the promotion of justice.[41]

Good cause or adventitious circumstances. Under some statutes a default judgment may be vacated on a showing of "good cause"[42] or some "adventitious circumstance" beyond the control of the party.[43]

§ 335. Judgment on Constructive Service

In accordance with express statutory provisions which are liberally construed, a defendant who has been only constructively served by publication of summons, and against whom a judgment is given by default, may appear and have the judgment vacated and be admitted to defend the action, within a limited period of time.

Under express statutes in a number of jurisdictions, a defendant, or a nonresident defendant, who has been only constructively served by publication of summons, and against whom a judgment is given by default, may appear and have the judgment vacated and be admitted to defend the action, within a limited time after the rendition of the judgment or after receiving notice of it.[44] Such statutes are remedial, and should be construed liberally so as to advance the remedy,[45] and the showing defendant is required to make should not be

Insurer of codefendant

Where one defendant in good faith believed, from what an insurance agent told him, that the insurance company, having insured a codefendant, would defend the action on behalf of all the defendants, and therefore did not appear to defend, the court should have set aside the default.—Newton v. De Armond, 212 P. 630, 60 Cal.App. 231.

39. La.—Stout v. Henderson, 102 So. 193, 157 La. 169—Raphiel v. Louisiana Ry. & Nav. Co., 99 So. 459, 155 La. 590—Item Co. v. St. Tammany Hotel, App., 175 So. 421—Brownlee-Wells Motors v. Hollingsworth, 127 So. 754, 13 La.App. 19.

40. Okl.—Bunger v. Rogers, 112 P. 2d 361, 188 Okl. 620.

41. Mass.—Cohen v. Industrial Bank & Trust Co., 175 N.E. 78, 274 Mass. 498.

42. Cal.—Elms v. Elms, App., 164 P.2d 936.
W.Va.—Wagner v. Edgington Coal Co., 130 S.E. 94, 100 W.Va. 117.

Held to constitute "good cause"

(1) Surprise, mistake, and excusable neglect.—Marion County Court, W. Va., v. Ridge, C.C.A.W.Va., 13 F. 2d 969.

(2) Error in proceeding with trial as though defendant, whose answer was on file, was in default.—Turbeville v. McCarrell, 30 P.2d 496, 43 Ariz. 236.

(3) Where active jurisdiction of case attaches to extent conferred by citation of nonresident defendants by publication, that movant did not know of rendition of judgment against him in time to attack it during term at which rendered and had good defense to cause of action on which judgment was based.—Watts v. City of El Paso, Tex.Civ. App., 133 S.W.2d 249, error refused.

43. **What constitutes**

"Adventitious circumstance," authorizing setting aside default judgment, is one which is unusual, beyond movant's control, and free from his neglect.—Rollins v. North River Ins. Co., 149 S.E. 838, 107 W.Va. 602, dissenting opinion 150 S.E. 753, 107 W.Va. 698.

Failure to receive registered mail

Failure of foreign insurance corporation to receive summons by registered mail was held adventitious circumstance, authorizing setting aside of default judgment.—Rollins v. North River Ins. Co., 149 S.E. 838, 107 W.Va. 602, dissenting opinion 150 S.E. 753, 107 W.Va. 698.

44. Ariz.—Southwest Metals Co. v. Snedaker, 129 P.2d 314, 59 Ariz. 374.
Cal.—Hiltbrand v. Hiltbrand, 23 P. 2d 277, 218 Cal. 321—Application of Mercereau, 14 P.2d 1019, 126 Cal.App. 590.
Ind.—Padol v. Home Bank & Trust Co., 27 N.E.2d 917, 108 Ind.App. 401.
Kan.—Boller v. Boller, 150 P.2d 157, 158 Kan. 742—Board of Com'rs of Wyandotte County v. Axtell, 5 P. 2d 1078, 134 Kan. 304—Adams v. Snyder, 26 P.2d 827, 137 Kan. 365—Martens v. Green, 213 P. 642, 113 Kan. 142.
La.—Miller v. Krouse, App., 177 So. 472.
Mo.—Chilton v. Cady, 259 S.W. 403, 298 Mo. 101—Osage Inv. Co. v. Sigrist, 250 S.W. 39, 298 Mo. 139.
Nev.—Nahas v. Nahas, 90 P.2d 223, 59 Nev. 220, rehearing denied 92 P. 2d 718, 59 Nev. 220.
N.C.—Blankenship v. De Casco, 189 S.E. 773, 211 N.C. 290.
Okl.—Wall v. Snider, 219 P. 671, 93 Okl. 99.
Tex.—Hunsinger v. Boyd, 26 S.W.2d 905, 119 Tex. 132—Seymour v. Schwartz, Civ.App., 172 S.W.2d 138—Winn v. Federal Land Bank of Houston, Civ.App., 164 S.W.2d 864, error refused.
34 C.J. p 424 note 38.

Personal service outside state

The words "personally served" or "personal service" in the statute mean personal service of summons and complaint on a defendant within the state, and do not include personal service of summons and complaint on defendant without the state.

Cal.—Tucker v. Tucker, 139 P.2d 348, 59 Cal.App.2d 557.
Minn.—Kane v. Stallman, 296 N.W. 1, 209 Minn. 138.
Nev.—Nahas v. Nahas, 90 P.2d 223, 59 Nev. 220, rehearing denied 92 P.2d 718, 59 Nev. 220.

45. Ariz.—Gordon v. Gordon, 231 P. 215, 35 Ariz. 532.
Cal.—Application of Mercereau, 14 P.2d 1019, 126 Cal.App. 590.
Ind.—Padol v. Home Bank & Trust Co., 27 N.E.2d 917, 108 Ind.App. 401.
Kan.—Board of Com'rs of Wyandotte County v. Axtell, 5 P.2d 1078, 134 Kan. 304.
34 C.J. p 425 note 39.

unnecessarily strict.[46] Under some statutes actual knowledge of the pending action has been held not to preclude defendant from subsequently moving to reopen the judgment;[47] but generally a defendant may not avail himself of these statutes, although constructively summoned, if he had actual knowledge or notice of the action in time to make his defense,[48] or if he appeared in the action,[49] and, of course, such statutes do not apply where defendant was personally served, and thereafter suffered a default.[50]

Defendant need not present any excuse for his failure to appear except the fact that he was not personally served with the summons.[51] While some of this class of statutes in terms require "cause" or "good cause" to be shown,[52] the existence of a meritorious defense, together with want of notice of the action in time to present it, is sufficient "cause" within the meaning of the statute.[53] No irregularity in the proceedings or defect in the judgment need be shown.[54] The application presupposes the validity of the judgment by default, and the regularity of the proceeding may not be attacked.[55]

Defendant is not precluded from having the judgment reopened by entering a general appearance and attaching a cross petition to his motion.[56]

§ 336. Showing Meritorious Defense

a. In general
b. Sufficiency of showing
c. Sufficiency of defense
d. Affidavit of merits
e. Proposed answer

a. In General

Subject to some exceptions, as where the judgment is void for want of jurisdiction, an application to open or vacate a default judgment must generally be supported by a showing that the applicant has a meritorious defense.

As a general rule, a judgment by default will not be opened or vacated unless defendant shows that he has a meritorious defense to the action.[57] It

46. Ariz.—Gordon v. Gordon, 281 P. 215, 35 Ariz. 532.

47. Mo.—Miners' Bank v. Kingston, 103 S.W. 27, 204 Mo. 687.
Nev.—Nahas v. Nahas, 90 P.2d 223, 59 Nev. 220, rehearing denied 92 P.2d 718, 59 Nev. 220.

48. Ark.—Horn v. Hull, 275 S.W. 905, 169 Ark. 463.
Cal.—Palmer v. Lantz, 9 P.2d 821, 215 Cal. 320—Tucker v. Tucker, 139 P.2d 348, 59 Cal.App.2d 557.
Kan.—Suter v. Schultz, 7 P.2d 55, 134 Kan. 538.
Minn.—Kane v. Stallman, 296 N.W. 1, 209 Minn. 138.
Tex.—Watts v. City of El Paso, Civ. App., 183 S.W.2d 249, error refused.
34 C.J. p 425 note 44.

Actual notice held not given
Utah.—Naisbitt v. Herrick, 290 P. 950, 76 Utah 575.

49. Mo.—Boas v. Cliffdale Land & Farm Co., 193 S.W. 806.
34 C.J. p 425 note 45.

50. Mo.—Boas v. Cliffdale Land & Farm Co., supra.
34 C.J. p 426 note 46.

Service other than by publication
A statute permitting an application to set aside the default judgment if it has been rendered without other service than publication in a newspaper has been held not to apply if notice has been mailed to defendant.—Lynch v. Collins, 233 P. 709, 106 Okl. 133.

51. Ariz.—Collins v. Streitz, 54 P. 2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373.
Cal.—Randall v. Randall, 264 P. 751, 203 Cal. 462—In re Stanfield's Guardianship, 89 P.2d 696, 32 Cal. App.2d 283.
34 C.J. p 426 note 49.

52. Alaska.—Inland Finance Co. v. Standard Salmon Packers, 7 Alaska 131.
Mo.—Chilton v. Cady, 250 S.W. 403, 298 Mo. 101.
Tex.—Watts v. City of El Paso, Civ. App., 183 S.W.2d 249, error refused.
34 C.J. p 426 note 51.

Good cause held not shown
Tex.—Devereaux v. Daube, Civ.App., 185 S.W.2d 211.

53. Alaska.—Inland Finance Co. v. Standard Salmon Packers, 7 Alaska 131.
Ariz.—Collins v. Streitz, 54 P.2d 264, 47 Ariz. 146, appeal dismissed 56 S.Ct. 835, 298 U.S. 640, 80 L.Ed. 1373—Gordon v. Gordon, 281 P. 215, 35 Ariz. 532.
Mo.—Osage Inv. Co. v. Sigrist, 250 S.W. 39, 298 Mo. 139.
Tex.—Devereaux v. Daube, Civ.App., 185 S.W.2d 211—Ashton v. Farrell & Co., Civ.App., 121 S.W.2d 611, error dismissed—Smalley v. Octagon Oil Co., Civ.App., 82 S.W.2d 1049, error dismissed.
34 C.J. p 427 note 52.

Personal service prevented by defendant
Defendant is not required to show affirmatively anything more than that he has a good defense on the merits, but, if it appears from the record that defendant has deliberately prevented personal service of summons on him, there is not "good cause" within statute and trial court does not abuse its discretion in refusing a new trial.—Perrin v. Perrin Properties, 86 P.2d 23, 53 Ariz. 121, 122 A.L.R. 621.

54. N.Y.—Marvin v. Brandy, 9 N.Y.S. 593, 56 Hun 242, 18 N.Y.Civ. Proc. 343.

55. Kan.—Durham v. Moore, 29 P. 472, 48 Kan. 135, 136.
34 C.J. p 427 note 54.

56. Okl.—Bagsby v. Bagsby, 89 P.2d 345, 184 Okl. 627, 122 A.L.R. 155.

57. U.S.—Atlantic Dredging & Construction Co. v. Nashville Bridge Co., C.C.A.Fla., 57 F.2d 519—Mandel Bros. v. Victory Belt Co., C.C. A.Ill., 15 F.2d 610.
Ala.—Ex parte Anderson, 4 So.2d 420, 242 Ala. 31—Harnischfeger Sales Co. v. Burge, 129 So. 37, 221 Ala. 387.
Ariz.—Brown v. Beck, 169 P.2d 855—Swisshelm Gold Silver Co. v. Farwell, 124 P.2d 544, 59 Ariz. 162—Perrin v. Perrin Properties, 86 P.2d 23, 53 Ariz. 121, 122 A.L.R. 621—MacNeil v. Vance, 60 P.2d 1078, 48 Ariz. 187—Huff v. Flynn, 60 P.2d 931, 48 Ariz. 175—Sturges v. Sturges, 50 P.2d 886, 46 Ariz. 331—Michener v. Standard Accident Ins. Co., 47 P.2d 438, 46 Ariz. 66—Martin v. Sears, 44 P.2d 526, 45 Ariz. 414—Bryant v. Bryant, 14 P.2d 712, 40 Ariz. 519—Beltran v. Roll, 7 P.2d 248, 39 Ariz. 417—Security Trust & Savings Bank v. Moseley, 234 P. 828, 27 Ariz. 562.
Ark.—Rockamore v. Pembroke, 188 S.W.2d 616, 208 Ark. 995—Barringer v. Whitson, 168 S.W.2d 395, 205 Ark. 260—O'Neal v. B. F. Goodrich Rubber Co., 162 S.W.2d 52, 204 Ark. 371—Mayberry v. Penn, 146 S.W.2d 925, 201 Ark. 756—Federal Land Bank of St.

Louis v. Cottrell, 126 S.W.2d 279, 197 Ark. 783—Hill v. Teague, 108 S.W.2d 883, 194 Ark. 552—Quirles v. Smith, 56 S.W.2d 427, 186 Ark. 835—Lambie v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019—C. A. Blanton Co. v. First Nat. Bank, 1 S.W.2d 558, 175 Ark. 1107—United Order of Good Samaritans v. Brooks, 270 S.W. 955, 168 Ark. 570—Minick v. Ramey, 269 S. W. 565, 168 Ark. 180.

Cal.—Beard v. Beard, 107 P.2d 385, 16 Cal.2d 645—Elms v. Elms, App., 164 P.2d 936—Bonfilio v. Ganger, 140 P.2d 861, 60 Cal.App.2d 405—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272—Doyle v. Rice Ranch Oil Co., 81 P.2d 980, 28 Cal. App.2d 18—Antonsen v. San Francisco Container Co., 66 P.2d 716, 20 Cal.App.2d 214—Application of Mercereau, 14 P.2d 1019, 126 Cal. App. 590—Sharp v. Paulson, 295 P. 856, 111 Cal.App. 515—Brooks v. Nelson, 272 P. 610, 95 Cal.App. 144.

Colo.—Connell v. Continental Casualty Co., 290 P. 274, 87 Colo. 573.

Fla.—State Bank of Eau Gallie v. Raymond, 138 So. 40, 103 Fla. 649.

Ga.—Golightly v. Line, 121 S.E. 878, 31 Ga.App. 550.

Idaho.—State ex rel. Sweeley v. Braun, 110 P.2d 835, 62 Idaho 258—Voellmeck v. Northwestern Mut. Life Ins. Co., 92 P.2d 1076, 60 Idaho 412.

Ill.—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349—Brown v. Zaubawky, 52 N.E.2d 725, 321 Ill.App. 297, reversed on other grounds 57 N.E.2d 856, 388 Ill. 351—Harris v. Juenger, 7 N.E.2d 376, 289 Ill.App. 467, reversed on other grounds 11 N.E.2d 929, 367 Ill. 478—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000—Crystal Lake Country Club v. Scanlan, 264 Ill. App. 44—People v. Wade, 258 Ill. App. 138.

Ind.—Hoag v. Jeffers, 159 N.E. 753, 201 Ind. 249—Falmouth State Bank v. Hayes, 185 N.E. 662, 97 Ind.App. 68.

Iowa.—Bates v. Ely Trust & Savings Bank, 261 N.W. 614, 219 Iowa 1356—Borden v. Voegtlin, 245 N.W. 331, 215 Iowa 882—Ryan v. Phœnix Ins. Co. of Hartford, Conn., 215 N.W. 749, 205 Iowa 655—Upmier v. Freese, 202 N.W. 3, 199 Iowa 405—Sioux County v. Kosters, 191 N.W. 315, 194 Iowa 1300.

Kan.—Pilsen State Bank v. Riffel, 21 P.2d 348, 137 Kan. 678—Board of Com'rs of Wyandotte County v. Kerr, 211 P. 128, 112 Kan. 463.

Ky.—Carr Creek Community Center v. Home Lumber Co., 125 S.W.2d 777, 276 Ky. 840.

Mass.—Manzi v. Carlson, 180 N.E. 134, 278 Mass. 267.

Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206—Martin v. Long, 120 A. 875, 142 Md. 348.

Mich.—Feierabend v. Manistee, Circuit Judge, 234 N.W. 148, 253 Mich. 115.

Mo.—Quattrochi v. Quattrochi, App., 179 S.W.2d 757—Jeffrey v. Kelly, App., 146 S.W.2d 850—O'Connell v. Dockery, App., 102 S.W.2d 748—Williams v. Barr, App., 61 S.W.2d 420, transferred, see, Sup., 55 S.W. 2d 467—Karst v. Chicago Fraternal Life Ass'n, App., 22 S.W.2d 178—Case v. Arky, App., 253 S.W. 484.

Neb.—Ak-Sar-Ben Exposition Co. v. Sorensen, 229 N.W. 13, 119 Neb. 358.

N.J.—Hanover Trust Co. v. Rizzo, 166 A. 326, 110 N.J.Law 581—McCarthy v. Guire, 137 A. 739, 14 N. J.Misc. 795—E. J. Lavino & Co. v. National Surety Co., 141 A. 663, 104 N.J.Law 475, 6 N.J.Misc. 478—Auto Brokerage Co. v. Ullrich, 134 A. 885, 4 N.J.Misc. 808.

N.Y.—Hogan v. Johnson, 272 N.Y.S. 113, 241 App.Div. 914—Katzenberg v. Land Estates, 271 N.Y.S. 282, 241 App.Div. 874—Tabakin v. Freiman, 217 N.Y.S. 378, 217 App.Div. 665—Titus v. Halsted, 204 N.Y.S. 241, 209 App.Div. 66—Procter & Gamble Distributing Co. v. Scher, 200 N.Y.S. 428, 206 App.Div. 737—Broderick v. Saretsky, 39 N.Y.S. 2d 802, 179 Misc. 737—Hutchinson v. Weston, 290 N.Y.S. 334, 160 Misc. 890—Zaza v. Zaza, 246 N.Y.S. 148, 138 Misc. 218—Crouse Grocery Co. v. Valentine, 226 N.Y.S. 613, 131 Misc. 571—Mandel v. Donohue, 208 N.Y.S. 807, 124 Misc. 861—Lennox v. Meehan, 201 N.Y.S. 710, 121 Misc. 678—Schulte Leasing Corp. v. Friedman, 61 N.Y.S.2d 665—Hospital Credit Exchange v. Mintz, 53 N.Y.S.2d 330—Federal Schools v. Saponaro, 25 N.Y.S.2d 313—General Exchange Ins. Corporation v. Stern, 25 N.Y.S.2d 266—National Advertising Agency v. Greco, 201 N.Y.S. 704.

N.C.—Craver v. Spaugh, 33 S.E.2d 525, 226 N.C. 450—Johnson v. Sidbury, 34 S.E.2d 67, 225 N.C. 208—Cayton v. Clark, 193 S.E. 404, 212 N.C. 374—Carter v. Anderson, 181 S.E. 750, 208 N.C. 529—Fellos v. Allen, 162 S.E. 905, 202 N.C. 375—Sutherland v. McLean, 154 S.E. 662, 199 N.C. 345—Bowie v. Tucker, 150 S.E. 200, 197 N.C. 671—Dunn v. Jones, 142 S.E. 320, 195 N.C. 354—Baker v. Corey, 141 S.E. 892, 195 N.C. 299—Crye v. Stoltz, 138 S.E. 167, 193 N.C. 802—Helderman v. Hartsell Mills Co., 135 S.E. 627, 192 N.C. 626—Taylor & Fetzer v. Gentry, 135 S.E. 327, 192 N.C. 503—Duffer v. Brunson, 125 S.E. 619, 188 N.C. 789—Hill v. Huffines Hotel Co., 125 S.E. 266, 188 N.C. 586.

N.D.—Berry v. Berry, 234 N.W. 520, 60 N.D. 353—Hart v. Hone, 223 N.W. 346, 57 N.D. 590—Kozak v. Ashbridge, 222 N.W. 620, 57 N.D. 496—Warren v. Resaake, 208 N.W. 564, 54 N.D. 65.

Ohio.—Lazarus v. Cleveland Household Supply Co., 154 N.E. 343, 28 Ohio App. 15.

Okl.—Jupe v. Home Owners Loan Corp., 167 P.2d 46—Turner v. Dexter, 44 P.2d 984, 172 Okl. 252—Petros v. Fox-Vliet Drug Co., 280 P. 812, 138 Okl. 253.

Or.—Snyder v. Consolidated Highway Co., 72 P.2d 932, 157 Or. 479—Finch v. Pacific Reduction & Chemical Mfg. Co., 234 P. 296, 113 Or. 670.

Pa.—Quaker City Chocolate & Confectionery Co. v. Warnock Bldg. Ass'n, 32 A.2d 5, 347 Pa. 186—Sturges v. Page, 163 A. 327, 106 Pa.Super. 520—Page v. Patterson, 161 A. 878, 105 Pa.Super. 438—Silent Auto Corporation of Northern New Jersey v. Folk, 97 Pa. Super. 588—Brown v. Bray, 90 Pa. Super. 180—Remick v. Letterle, 89 Pa.Super. 322—Henderson v. Oshirak, 56 Pa.Dist. & Co. 25—Leschinski v. W. C. Hack & Sons, 47 Pa. Dist. & Co. 475—Green v. Davis, 19 Pa.Dist. & Co. 156, 32 Sch.Leg.Rec. 307—Commonwealth v. Dr. Crandall's Health School, Com.Pl., 51 Dauph.Co. 333—Davis v. Tate, Com.Pl., 26 Erie Co. 141—Kopec v. Sullivan, Com.Pl., 23 Erie Co. 413—Smith v. Morris, Com.Pl., 41 Lack.Jur. 18—White v. Consumers Finance Service, Com.Pl., 33 Luz. Leg.Reg. 461—Thomas Bros. v. Grohowski, Com.Pl., 32 Luz.Leg. Reg. 454—Herring v. Abromitis, Com.Pl., 15 Northum.Leg.J. 213.

Philippine.—Lerma v. Antonio, 6 Philippine 236—Wahl v. Donaldson, 2 Philippine 801.

R.I.—Chernick v. Annelfo, 17 A.2d 848, 66 R.I. 95—Nelen v. Wells, 123 A. 599, 45 R.I. 424—Milbury Atlantic Mfg. Co. v. Rocky Point Amusement Co., 118 A. 737, 44 R.I. 458—Whitney v. Jenks, 118 A. 689.

S.C.—Lillard v. Searson, 170 S.E. 449, 170 S.C. 304—Savannah Supply Co. v. Ross, 122 S.E. 772, 128 S.C. 298.

S.D.—Connelly v. Franklin, 210 N.W. 735, 50 S.D. 512.

Tex.—Commercial Credit Corp. v. Smith, 187 S.W.2d 363, 143 Tex. 612—Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 134 Tex. 388—City of Fort Worth v. Gause, 101 S.W.2d 221, 129 Tex. 25—Lawther Grain Co. v. Winniford, Com. App., 249 S.W. 195—Southwestern Specialty Co. v. Brown, Civ.App., 188 S.W.2d 1002, error refused—Harris v. Elm Oil Co., Civ.App., 183 S.W.2d 216, error refused—Brown v. St. Mary's Temple No. 5 S. M. T. United Brothers of Friendship of Texas, Civ.App., 127 S.W.2d 531—Ferguson v. Chapman, Civ.App., 94 S.W.2d 593, error dismissed—University Development Co. v. Wolf, Civ.App., 93 S.W.2d

must appear that a retrial will result in a judgment different from the one sought to be vacated.[58] The existence of a meritorious defense is an express or implied condition of relief under some of the statutes providing for the opening or vacating of default judgments taken on constructive service of process,[59] but such a showing is not necessary under all of the statutes.[60]

Exceptions to the rule have been made in a variety of cases.[61] A meritorious defense need not be shown where the application to open or vacate the default judgment is made during the judgment term;[62] but there is also authority to the contrary.[63] It has been held that a meritorious defense need not be shown where the judgment is void,[64] or at least where it is void on the face of the rec-

1187—Babington v. Gray, Civ.App., 71 S.W.2d 293—Aviation Credit Corporation of New York v. University Aerial Service Corporation, Civ.App., 59 S.W.2d 870, error dismissed—Peters v. A. Brandt Upholstering Co., Civ.App., 50 S.W.2d 409, error dismissed—Homuth v. Williams, Civ.App., 42 S.W.2d 1048—Housewright v. Housewright, Civ.App., 41 S.W.2d 1071, error refused—Sun Lumber Co. v. Huttig Sash & Door Co., Civ.App., 36 S.W.2d 561—Peters v. Hubb Diggs Co., Civ.App., 35 S.W.2d 449, error dismissed—Chaney v. Allen, Civ.App., 25 S.W.2d 1115—Griffin v. Burrus, Civ.App., 24 S.W.2d 805, affirmed, Com.App., 24 S.W.2d 810—Humphrey v. Harrell, Civ.App., 19 S.W.2d 410, affirmed, Com.App., 29 S.W.2d 963—Sneed v. Sneed, Civ.App., 296 S.W. 643—St. Paul Fire & Marine Ins. Co. v. Earnest, Civ.App., 293 S.W. 677, affirmed 296 S.W. 1033, 116 Tex. 565—Thompson v. Glover Johns Auto Co., Civ.App., 289 S.W. 124—Trigg v. Gray, Civ.App., 288 S.W. 1093—Colorado River Syndicate Subscribers v. Alexander, Civ.App., 288 S.W. 586—Welsch v. Keeton, Civ.App., 287 S.W. 692—Paggi v. Rose Mfg. Co., Civ.App., 285 S.W. 852—Thomas v. Goldberg, Civ.App., 283 S.W. 230—First Nat. Bank v. Southwest Nat. Bank of Dallas, Civ.App., 273 S.W. 951—Allen v. Frank, Civ.App., 252 S.W. 347—Stoudenmeier v. First Nat. Bank, Civ.App., 246 S.W. 761.

Vt.—Greene v. Riley, 172 A. 633, 106 Vt. 319.

Wash.—Person v. Plough, 24 P.2d 591, 174 Wash. 160—Luger v. Littau, 288 P. 277, 157 Wash. 40—Hurby v. Kwapil, 286 P. 664, 156 Wash. 225—Jacobsen v. Defiance Lumber Co., 253 P. 1033, 142 Wash. 642—Boeringa v. Brockway, 234 P. 1015, 134 Wash. 43—Hurley v. Wilson, 225 P. 441, 129 Wash. 567.

W.Va.—Arnold v. Reynolds, 2 S.E.2d 433, 121 W.Va. 91—State ex rel. Alkire v. Mill, 180 S.E. 183, 116 W.Va. 277—Gainer v. Smith, 132 S.E. 744, 101 W.Va. 314.

34 C.J. p 329 note 55, p 428 note 69.

Showing meritorious defense generally see supra § 290.

Defense in whole or in part

Kan.—American Oil & Refining Co. v. Liberty-Texas Oil Co., 211 P. 137, 112 Kan. 309.

N.D.—Croonquist v. Walker, 196 N.W. 108, 50 N.D. 388.

Default order and judgment distinguished

Under the statutes, the distinction between an order vacating a default judgment and an order vacating a default order entered before judgment is that in the former the prerequisite is showing a meritorious defense, while in the latter only good and sufficient cause need be set out.—Johnston v. Medina Improvement Club, 116 P.2d 272, 10 Wash.2d 44.

58. Cal.—Greenamyer v. Board of Trustees of Lugo Elementary School Dist. in Los Angeles County, 2 P.2d 842, 116 Cal.App. 319.

Colo.—Bray v. Germain Inv. Co., 98 P.2d 993, 105 Colo. 403.

Kan.—Miner v. Blakeman, 210 P. 1089, 112 Kan. 393.

Pa.—Citizens' Nat. Bank of Tunkhannock v. Hallock, 154 A. 304, 303 Pa. 205.

S.D.—Sohn v. Flavin, 244 N.W. 349, 60 S.D. 305.

Tex.—Cragin v. Henderson County Oil Development Co., Com.App., 280 S.W. 554—Sanns v. Chapman, Civ.App., 144 S.W.2d 341, error dismissed, judgment correct—Dickson v. Navarro County Levee Improvement Dist. No. 3, Civ.App., 124 S.W.2d 943, followed in Dickson v. Ellis County Levee Improvement Dist. No. 10, 124 S.W.2d 946, reversed on other grounds 139 S.W.2d 260, 135 Tex. 102, set aside Dickson v. Navarro County Levee Dist. No. 3, 139 S.W.2d 257, 135 Tex. 95.

34 C.J. p 336 note 80—37 C.J. p 656 note 15 [a].

59. Alaska.—Inland Finance Co. v. Standard Salmon Packers, 7 Alaska 131.

Kan.—Board of Com'rs of Sherman County v. Demaree, 142 P.2d 722, 157 Kan. 478.

Tex.—Watts v. City of El Paso, Civ.App., 183 S.W.2d 249, error refused.

34 C.J. p 427 note 55.

Statutes of limitation

On motion to open default judgments and to be permitted to defend, statutes of limitation specifically pleaded constituted a "full answer" within the meaning of the statute dealing with the opening of a default judgment rendered on service by publication after the filing of a "full answer."—Tawney v. Blankenship, 90 P.2d 1111, 150 Kan. 41.

60. Ala.—May v. Granger, 139 So. 569, 224 Ala. 208.

34 C.J. p 427 note 56.

61. Ind.—Gary Hobart Inv. Realty Co. v. Earle, 135 N.E. 798, 78 Ind.App. 412.

Iowa.—Wagoner v. Ring, 240 N.W. 634, 213 Iowa 1123.

Pa.—Eastman Kodak Co. v. Osenider, 193 A. 284, 127 Pa.Super. 332.

34 C.J. p 427 note 65.

Constructive service

A defendant who was constructively served had right under statute to seek to set aside default judgment within two years thereafter and to make her defense on giving bond for costs, without first showing meritorious defense.—Wright v. Burlison, 128 S.W.2d 238, 198 Ark. 187.

Default induced by plaintiff

Defendant, seeking to set aside verdict for plaintiff rendered in absence of defendant and his counsel, who was misled by statements of plaintiff's counsel, was not required to make showing on merits.—Black v. Foley, 135 S.E. 902, 117 W.Va. 490.

Default due to negligence of defendant's attorney

Idaho.—Weaver v. Rambow, 217 P. 610, 37 Idaho 645.

Where a sufficient answer is on file, a meritorious defense need not be shown.—Gause v. Cities Service Oil Co., Civ.App., 70 S.W.2d 224, affirmed City of Fort Worth v. Gause, 101 S.W.2d 221, 129 Tex. 25.

62. Mo.—Faulkner v. F. Bierman & Sons Metal & Rubber Co., App., 294 S.W. 1019.

Okl.—Joplin Furniture Co. v. Bank of Picher, 3 P.2d 173, 151 Okl. 158.

Tex.—Atkinson v. Leonard, Civ.App., 287 S.W. 525.

Before judgment entered

A meritorious defense need not be shown on an application to vacate a default, where made before judgment is entered.—Johnston v. Medina Improvement Club, 116 P.2d 272, 10 Wash.2d 44.

63. Iowa.—Sioux County v. Kosters, 191 N.W. 315, 194 Iowa 1300.

64. D.C.—Wise v. Herzog, 114 F.2d 486, 72 App.D.C. 335.

Ga.—McCray v. Empire Inv. Co., 174 S.E. 219, 49 Ga.App. 117.

ord,[65] or where the judgment is void for want of jurisdiction,[66] as where defendant was never served;[67] but it has been held that a meritorious defense must be shown where the judgment recites facts sustaining jurisdiction,[68] or where the judgment is voidable.[69] It has been held that, a meritorious defense need not be shown where the default judgment was entered without authority, by mistake, irregularity, or improvidently,[70] as where a judgment was taken by default before defendant's time to answer had expired or after the case was at issue;[71] but it has also been held that the fact that the judgment was irregularly entered does not dispense with the need of showing a meritorious defense.[72] It has been held that a meritorious defense need not be shown where the judgment is fundamentally erroneous.[73]

b. Sufficiency of Showing

The facts constituting the defense must be set forth in the application to open or vacate a default judgment; it is not sufficient to allege that the applicant has a meritorious defense.

The defense must be set forth in sufficient detail in an application to open or vacate a default judgment to permit the court to determine whether or not it is meritorious and sufficient;[74] it is not suf-

N.J.—Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 115 N.J.Law 86, affirmed 183 A. 165, 116 N.J.Law 191.
Tex.—City of Corpus Christi v. Scruggs, Civ.App., 89 S.W.2d 458.
Wash.—Person v. Plough, 24 P.2d 591, 174 Wash. 160.

Attorney's fees

Where default judgment entered by clerk of district court in action on note was void because judgment included an amount for reasonable attorney's fees, defendant was entitled to have judgment opened at subsequent term without necessity of showing a meritorious defense to note.—Wunnicke v. Leith, Wyo., 157 P.2d 274.

65. Tex.—City of Fort Worth v. Gause, 101 S.W.2d 221, 129 Tex. 25—Hitt v. Bell, Civ.App., 111 S.W.2d 1164.

66. Cal.—Hollywood Garment Corporation v. J. Beckerman, Inc., 143 P.2d 738, 61 Cal.App.2d 658.
Iowa.—Dewell v. Suddick, 232 N.W. 118, 211 Iowa 1352.

67. D.C.—Wise v. Herzog, 114 F.2d 486, 72 App.D.C. 335.
Minn.—Pugsley v. Magerfleisch, 201 N.W. 323, 161 Minn. 246.
N.C.—City of Monroe v. Niven, 20 S.E.2d 311, 221 N.C. 362.
Ohio.—Hayes v. Kentucky Joint Stock Land Bank of Lexington, 181 N.E. 542, 125 Ohio St. 359.
Okl.—Burnett v. Clayton, 252 P. 397, 123 Okl. 156.
Or.—Finch v. Pacific Reduction & Chemical Mfg. Co., 234 P. 296, 113 Or. 670.

68. Tex.—Bell v. Cobb, Civ.App., 296 S.W. 976—Tanton v. State Nat. Bank of El Paso, Civ.App., 277 S.W. 449.

69. Okl.—Brazell v. Brockins, 217 P. 847, 95 Okl. 38.
Tex.—Commercial Credit Corp. v. Smith, 187 S.W.2d 363, 143 Tex. 612.

70. Ala.—Ex parte State ex rel. Harle Haas Co., 97 So. 680, 19 Ala. App. 400.
Ariz.—Gila Valley Electric, Gas & Water Co. v. Arizona Trust & Savings Bank, 215 P. 159, 25 Ariz. 177.
Colo.—Netland v. Baughman, 162 P. 2d 601.
Mich.—Flewelling v. Prima Oil Co., 289 N.W. 160, 291 Mich. 281.
Tex.—Sun Lumber Co. v. Huttig Sash & Door Co., Civ.App., 36 S.W.2d 561.
Utah.—Sanders v. Milford Auto Co., 218 P. 126, 62 Utah 110.
34 C.J. p 428 note 66.

71. Mo.—**Corpus Juris quoted in** Savings Trust Co. of St. Louis v. Skain, 131 S.W.2d 566, 573, 345 Mo. 46.
Wash.—Batchelor v. Palmer, 224 P. 685, 129 Wash. 150.
W.Va.—Arnold v. Reynolds, 2 S.E. 2d 433, 121 W.Va. 91.
34 C.J. p 334 note 70, p 428 note 67.

72. N.C.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379—Chozen Confections v. Johnson, 11 S.E.2d 472, 218 N.C. 500—Cayton v. Clark, 193 S.E. 404, 212 N.C. 374—Standard Supply Co. v. Vance Plumbing & Electric Co., 143 S.E. 248, 195 N.C. 629.
Wash.—Penfound v. Gagnon, 20 P.2d 17, 172 Wash. 311.

73. Tex.—City of Fort Worth v. Gause, 101 S.W.2d 221, 129 Tex. 25.

74. Ala.—Little v. Peevy, 189 So. 720, 238 Ala. 106.
Ariz.—Beltran v. Roll, 7 P.2d 248, 39 Ariz. 417—Security Trust & Savings Bank v. Moseley, 234 P. 828, 27 Ariz. 562.
Ark.—Rockamore v. Pembroke, 188 S.W.2d 616, 208 Ark. 995—Davis v. Bank of Atkins, 167 S.W.2d 876, 205 Ark. 144—O'Neal v. B. F. Goodrich Rubber Co., 162 S.W.2d 52, 204 Ark. 871—Merriott v. Kilgore, 139 S.W.2d 887, 200 Ark. 894—Hill v. Teague, 108 S.W.2d 889, 194 Ark. 552—Quirles v. Smith, 56 S.W.2d 427, 186 Ark. 835.
Cal.—Thaler v. Thaler, 15 P.2d 192, 127 Cal.App. 28—Los Angeles Bond & Securities Co. v. Tyler, 7 P.2d 1052, 120 Cal.App. 412.
Idaho.—State ex rel. Sweeley v. Braun, 110 P.2d 835, 62 Idaho 258—Voellmeck v. Northwestern Mut. Life Ins. Co., 92 P.2d 1076, 60 Idaho 412.
Iowa.—Boody v. Sawyer, 207 N.W. 589, 201 Iowa 496.
Kan.—American Oil & Refining Co. v. Liberty-Texas Oil Co., 211 P. 137, 112 Kan. 309.
Miss.—Planters' Lumber Co. v. Sibley, 93 So. 440, 130 Miss. 26.
Mont.—First Nat. Corporation v. Perrine, 43 P.2d 1073, 99 Mont. 454—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332—Brothers v. Brothers, 230 P. 60, 71 Mont. 378.
N.J.—Zippler v. Westney, 149 A. 539, 105 N.J.Eq. 661.
N.Y.—Hannel v. Serbert, 255 N.Y.S. 758, 143 Misc. 61—Crouse Grocery Co. v. Valentine, 226 N.Y.S. 613, 131 Misc. 571—Lennox v. Meehan, 201 N.Y.S. 710, 121 Misc. 678.
Okl.—Fair Department Store v. Dallas Jobbing House, 46 P.2d 529, 172 Okl. 486.
Or.—Finch v. Pacific Reduction & Chemical Mfg. Co., 234 P. 296, 113 Or. 670.
Tex.—Dickson v. Navarro County Levee Improvement Dist. No. 3, Civ.App., 124 S.W.2d 943, followed in Dickson v. Ellis County Levee Improvement Dist. No. 10, 124 S.W.2d 946, reversed on other grounds 139 S.W.2d 260, 135 Tex. 102, set aside Dickson v. Navarro County Levee Imp. Dist. No. 3, 139 S.W.2d 257, 135 Tex. 95—University Development Co. v. Wolf, Civ. App., 93 S.W.2d 1137.
Wash.—Penfound v. Gagnon, 20 P.2d 17, 172 Wash. 311.

Affidavit by counsel was held to be sufficient.—Bowman v. Bowman, 217 P. 1102, 47 Nev. 207.

Failure to file affidavit until after hearing on motion to vacate default judgment did not vitiate proceeding, where contents were read in open court.—Rhode Island Discount Corporation v. Carr, R.I., 136 A. 244.

Evidence

On motion by foreign mining corporation which was served by publication, and which did not appear, to set aside judgment, an affidavit

ficient to allege that defendant has a good and meritorious defense.[75] A bare formal affidavit of merits, while it may be necessary, as discussed infra subdivision d of this section, is not a sufficiently specific showing.[76] A verified answer, however, is generally sufficient,[77] unless it consists only of a general denial.[78] The showing need not be made by affidavit where the record of the proceeding shows a meritorious defense.[79]

c. Sufficiency of Defense

A defense to be meritorious must be legally sufficient, and it must not be unjust, inequitable, or merely technical.

A meritorious and substantial defense which must

showing a meritorious defense to the action was sufficient without the presentation of evidence to support such defense.—Southwest Metals Co. v. Snedaker, 129 P.2d 314, 59 Ariz. 374.

In trespass action, wherein no affidavit of defense is necessary to put case at issue, court may grant petition to open default judgment in its discretion, without requiring defendant to state exact nature of defense in petition for such relief, where equities are clear.—Scott v. McElwing, 10 A.2d 436, 337 Pa. 273, 126 A.L.R. 367.

Prima facie showing

(1) Must be made.

U.S.—The Amaranth, C.C.A.N.Y., 68 F.2d 893.

Ark.—Smith v. Globe & Rutgers Fire Ins. Co., 295 S.W. 388, 174 Ark. 346, followed in Deatherage v. Dennison, 295 S.W. 390, 173 Ark. 1180.

Pa.—Henderson v. Hendricks, 94 Pa. Super. 568.

Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed.

(2) Is sufficient.

Ark.—O. O. Scroggin & Co. v. Merrick, 5 S.W.2d 344, 176 Ark. 1205.

Cal.—Hallett v. Slaughter, 140 P.2d 8, 22 Cal.2d 552—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272.

Mass.—Hyde Park Sav. Bank v. Davankoskas, 11 N.E.2d 3, 298 Mass. 421.

Mont.—Kirby v. Hoeh, 21 P.2d 732, 94 Mont. 218.

N.J.—McArdle Real Estate Co. v. McGowan, 163 A. 24, 109 N.J.Law 595—McCarthy v. Guire, 187 A. 739, 14 N.J.Misc. 795.

Pa.—Popky v. Shimpkus, Com.Pl., 42 Lack.Jur. 125.

S.D.—Johnson v. Johnson, 210 N.W. 155, 50 S.D. 341.

Written statement required

Pa.—Sturges v. Page, 163 A. 327, 106 Pa.Super. 520.

Pleading as evidence

Verified complaint may be used as evidence in determining fact of good cause of action, but the allegations therein are not conclusive, nor will they override a finding of the judge made on conflicting testimony.—Craver v. Spaugh, 38 S.E.2d 525, 226 N.C. 450.

Probative and ultimate facts

Where defendants who claimed easement on land sought relief from default and judgment entered against them in a suit to partition the land, defendants, in alleging facts to show that they had a good defense to the action on the merits, were not required to state probative facts concerning origin of their title to easement.—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272.

Reference to other documents

In determining sufficiency of affidavit of merits supporting motion to vacate default judgment, affidavit cannot be aided by reference to documents or records which are not part thereof.—Beltran v. Roll, 7 P.2d 248, 39 Ariz. 417.

Sworn testimony

In order to justify the setting aside of a default judgment, a showing of a meritorious defense, if based on oral testimony, contemplates sworn testimony developed in connection with the proceedings to set aside the judgment.—Jeffrey v. Kelly, Mo.App., 146 S.W.2d 850.

75. Ariz.—Beltran v. Roll, 7 P.2d 248, 39 Ariz. 417.

Ark.—Quirles v. Smith, 56 S.W.2d 427, 186 Ark. 835.

Cal.—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272.

Idaho.—Voellmeck v. Northwestern Mut. Life Ins. Co., 92 P.2d 1076, 60 Idaho 412.

Ill.—Latham v. Salisbury, 61 N.E.2d 306, 326 Ill.App. 253—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

Iowa.—Boody v. Sawyer, 207 N.W. 539, 201 Iowa 496.

Mo.—Jeffrey v. Kelly, App., 146 S.W.2d 850.

Okl.—Fair Department Store v. Dallas Jobbing House, 46 P.2d 529, 172 Okl. 486.

Tex.—Dickson v. Navarro County Levee Improvement Dist. No. 3, 124 S.W.2d 943, followed in Dickson v. Ellis County Levee Improvement Dist. No. 10, Civ.App., 124 S.W.2d 946, reversed on other grounds 139 S.W.2d 260, 135 Tex. 102, set aside Dickson v. Navarro County Levee Imp. Dist. No. 3, 139 S.W.2d 257, 135 Tex. 95—Hall v. Kynerd, Civ.App., 97 S.W.2d 278, error dismissed—Welsch v. Keeton, Civ.App., 287 S.W. 692—Mutual Oil Consolidated v. Beavers, Civ.App., 272 S.W. 507.

Wash.—Penfound v. Gagnon, 20 P.2d 17, 172 Wash. 311.

76. N.Y.—Hannel v. Serbert, 255 N.Y.S. 758, 143 Misc. 61—Crouse Grocery Co. v. Valentine, 226 N.Y.S. 613, 131 Misc. 571—Lennox v. Meehan, 201 N.Y.S. 710, 121 Misc. 678.

W.Va.—**Corpus Juris cited in** State ex rel. Alkire v. Mill, 180 S.E. 183, 185, 116 W.Va. 277.

34 C.J. p 336 note 79.

77. Cal.—Beard v. Beard, 107 P.2d 385, 16 Cal.2d 645—Fulweiler v. Hog's Back Cons. Min. Co., 28 P. 65, 83 Cal. 126.

Mont.—Brothers v. Brothers, 230 P. 60, 71 Mont. 378.

N.D.—Yesel v. Watson, 216 N.W. 199, 56 N.D. 98—Jesse French & Sons Piano Co. v. Getts, 192 N.W. 765, 49 N.D. 577.

Or.—Peters v. Dietrich, 27 P.2d 1015, 145 Or. 589.

S.C.—Maybank Fertilizer Co. v. Jeffcoat, 127 S.E. 835, 131 S.C. 418.

Complaint was sufficient showing of merits in application by plaintiff to open default.

Cal.—Waybright v. Anderson, 253 P. 148, 200 Cal. 374.

Wash.—Graham v. Yakima Stock Brokers, 72 P.2d 1041, 192 Wash. 121.

Deficiencies in affidavit may be cured by verified answer.—Alexander v. Mayer, 102 P.2d 540, 39 Cal.App.2d 157—Shively v. Kochman, 73 P.2d 637, 28 Cal.App.2d 420—John A. Vaughan Corporation v. Title Insurance & Trust Co., 12 P.2d 117, 123 Cal.App. 709.

Exceptions filed by defendant to a report of a referee were held to constitute a sufficient showing of merit to entitle him to be heard.—Everett v. Johnson, 14 S.E.2d 520, 219 N.C. 540.

78. Mont.—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332.

N.D.—Kozak v. Ashbridge, 222 N.W. 620, 57 N.D. 496.

Okl.—Petros v. Fox-Vliet Drug Co., 280 P. 812, 138 Okl. 253.

79. Minn.—Unowsky v. Show, 201 N.W. 936, 161 Minn. 489.

be shown in support of an application to open or vacate a default judgment is one which raises questions of law deserving investigation or a real controversy as to the essential facts.[80] A defense which is legally sufficient is not necessarily a meritorious defense which will support such an application; a defense to be meritorious must be just and equitable,[81] and a defense which is purely technical or unconscionable is not a meritorious defense.[82] It is not necessary that the defense should go to the entire action; it is sufficient if it purports to defeat any substantial part of plaintiff's claim.[83]

80. Ala.—Little v. Peevy, 189 So. 720, 238 Ala. 106—Stephens v. Bruce, 114 So. 306, 216 Ala. 677.
Ill.—Melick v. Metropolitan Casualty Ins. Co. of New York, 4 N.E.2d 769, 287 Ill.App. 613.
Kan.—American Oil & Refining Co. v. Liberty-Texas Oil Co., 211 P. 137, 112 Kan. 309—Miner v. Blakeman, 210 P. 1089, 112 Kan. 393.
Mo.—Jeffrey v. Kelly, App., 146 S.W. 2d 850.
N.Y.—Larney v. S. & I. Lefkowitz, 296 N.Y.S. 679, 251 App.Div. 404—City Bank Farmers Trust Co. v. Klein, 283 N.Y.S. 490, 246 App.Div. 633.
N.C.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379.
N.D.—Hart v. Hone, 223 N.W. 346, 57 N.D. 590.
Okl.—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16.
Pa.—Planters Nut & Chocolate Co. v. Brown-Murray Co., 193 A. 381, 128 Pa.Super. 239—West Susquehanna Building & Loan Ass'n v. Sinclair, 183 A. 371, 124 Pa.Super. 133—Page v. Patterson, 161 A. 878, 105 Pa.Super. 438—Henderson v. Hendricks, 94 Pa.Super. 568—Ensminger v. Bentz, Com.Pl., 54 Dauph.Co. 219.
R.I.—Whitney v. Jenks, 118 A. 689.
Tex.—Lamb-McAshan Co. v. Ellis, Com.App., 270 S.W. 547—Harris v. Elm Oil Co., Civ.App., 183 S.W.2d 216, error refused—Brown v. St. Mary's Temple No. 5 S. M. T. United Brothers of Friendship of Texas, Civ.App., 127 S.W.2d 531.

Defense demurrable

Defense set up in affidavit of merits in support of motion to set aside default judgment is sufficient unless such defense would be subject to general demurrer.—Huff v. Flynn, 60 P.2d 931, 48 Ariz. 175.

Special defense not provable under general denial pleaded is not sufficient.—Security Nat. Bank of Mobridge v. Boekhout, 211 N.W. 806, 51 S.D. 31.

Meritorious defense shown

Ala.—Ex parte Southern Amiesite Asphalt Co., 200 So. 435, 30 Ala. App. 3, certiorari denied 200 So. 434, 240 Ala. 618—Ex parte Crumpton, 109 So. 184, 21 Ala.App. 446.
Ariz.—Evans v. Hallas, 167 P.2d 94—Huff v. Flynn, 60 P.2d 931, 48 Ariz. 175—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz. 239.
Cal.—Hallett v. Slaughter, 140 P.2d 3, 22 Cal.2d 552—Beard v. Beard, 107 P.2d 385, 16 Cal.2d 645.
Colo.—Wenig v. Lyons, 252 P. 889, 81 Colo. 6.
Ky.—Columbia Coal & Min. Co. v. Radcliff, 186 S.W.2d 419, 299 Ky. 596—Bishop v. Bishop, 281 S.W. 824, 213 Ky. 703.
Minn.—City of Luverne v. Skyberg, 211 N.W. 5, 169 Minn. 234—First Trust & Savings Bank v. U. S. Fidelity & Guaranty Co., 194 N.W. 376, 156 Minn. 231.
N.Y.—Hogan v. Johnson, 272 N.Y.S. 113, 241 App.Div. 914—Clifton Springs Sanitarium Co. v. De Voyst, 240 N.Y.S. 729, 136 Misc. 293—Grushka v. Bentwood Products Corporation, 206 N.Y.S. 714, 123 Misc. 927.
N.C.—Chozen Confections v. Johnson, 11 S.E.2d 472, 218 N.C. 500—Byerly v. General Motors Acceptance Corporation, 145 S.E. 236, 196 N.C. 256—Standard Supply Co. v. Vance Plumbing & Electric Co., 143 S.E. 243, 195 N.C. 629.
S.D.—Leech v. Brady, 231 N.W. 936, 57 S.D. 271.
Tenn.—Fidelity-Phenix Fire Ins. Co. v. Oliver, 152 S.W.2d 254, 25 Tenn. App. 114.
Tex.—Commercial Credit Corp. v. Smith, 187 S.W.2d 363, 143 Tex. 612—Camden Fire Ins. Co. v. Hill, Com.App., 276 S.W. 887—Yellow Transit Co. v. Klaff, Civ.App., 145 S.W.2d 264—Lissner v. State Mortg. Corporation, Civ.App., 29 S.W.2d 849, error dismissed—Sneed v. Sneed, Civ.App., 296 S.W. 643—Missouri State Life Ins. Co. v. Rhyne, Civ.App., 276 S.W. 757, reversed in part on other grounds and affirmed in part Rhyne v. Missouri State Life Ins. Co., Com.App., 291 S.W. 845—Caldwell Oil Co. v. Hickman, Civ.App., 270 S.W. 214.

Meritorious defense not shown

Ala.—Stephens v. Bruce, 114 So. 306, 216 Ala. 677.
Ark.—O. O. Scroggin & Co. v. Merrick, 5 S.W.2d 344, 176 Ark. 1205.
Cal.—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272.
Colo.—Connell v. Continental Casualty Co., 290 P. 274, 87 Colo. 573.
Ga.—Henderson v. American Hat Mfg. Co., 194 S.E. 254, 57 Ga.App. 10.
Ill.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.
Iowa.—Wade v. Swartzendruber, 220 N.W. 67, 206 Iowa 637—Starkey v. Porter Tractor Co., 192 N.W. 135.
Kan.—Board of Com'rs of Wyandotte County v. Kerr, 211 P. 128, 112 Kan. 463.
Minn.—Madsen v. Powers, 260 N.W. 510, 194 Minn. 418.
N.J.—Warren v. Dilkes, 131 A. 98, 3 N.J.Misc. 1239.
N.Y.—Municipal Investors v. Hessian Hills Corporation, 10 N.Y.S. 2d 737, 256 App.Div. 1000.
N.C.—Craver v. Spaugh, 38 S.E.2d 525, 226 N.C. 450—Duffer v. Brunson, 125 S.E. 619, 188 N.C. 789—Garner v. Quakenbush, 122 S.E. 474, 187 N.C. 603, modified on other grounds 124 S.E. 154, 188 N.C. 180, 36 A.L.R. 1095.
Tex.—Pacific Mut. L. Ins. Co. v. Williams, 15 S.W. 478, 79 Tex. 633—Lawther Grain Co. v. Winniford, Com.App., 249 S.W. 195—Aviation Credit Corporation of New York v. University Aerial Service Corporation, Civ.App., 59 S.W.2d 870, error dismissed—Sfiris v. Madis, Civ. App., 13 S.W.2d 750—St. Paul Fire & Marine Ins. Co. v. Earnest, Civ. App., 293 S.W. 677, affirmed 296 S.W. 1088, 116 Tex. 565—Allen v. Frank, Civ.App., 252 S.W. 347.
Wash.—Hurby v. Kwapil, 286 P. 664, 156 Wash. 225.

81. N.J.—Cameron v. Penn Mut. Life Ins. Co., 173 A. 344, 116 N.J. Eq. 311.
Pa.—Krall v. Lebanon Valley Savings & Loan Ass'n, 121 A. 405, 277 Pa. 440.
Tex.—Rasmussen v. Grimes, Civ. App., 13 S.W.2d 959, affirmed, Com. App., 24 S.W.2d 346.

82. Okl.—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16.
Pa.—Krall v. Lebanon Valley Savings & Loan Ass'n, 121 A. 405, 277 Pa. 440.

Demurrer

A default judgment will not be vacated merely to permit the interposition of a demurrer.
Mont.—Bowen v. Webb, 85 P. 739, 34 Mont. 61.
Neb.—Sloan v. Hallowell, 120 N.W. 449, 83 Neb. 762.

83. Fla.—**Corpus Juris** cited in State Bank of Eau Gallie v. Raymond, 138 So. 40, 42, 103 Fla. 649.
Wyo.—Wunnicke v. Leith, 157 P.2d 274.
34 C.J. p 339 note 12.

Among the defenses which have been held to be so technical, unconscionable, or lacking in equity as not to be sufficiently meritorious to support an application to open or vacate a default judgment are usury,[84] coverture of defendant,[85] plaintiff's want of capacity to sue,[86] ultra vires,[87] nul tiel record,[88] the statute of frauds,[89] a forfeiture or breach of condition,[90] fraudulent conduct in which defendant participated[91] or which he could have discovered and pleaded by using due diligence,[92] and a failure to allow proper credits,[93] although as to the latter there is also authority to the contrary.[94]

On the other hand, a variety of matters have been held to be sufficiently meritorious defenses to support an application to open or vacate a judgment;[95] such as a discharge in bankruptcy or insolvency,[96] invalidity of the statute or ordinance on which the action is founded,[97] release,[98] payment or tender,[99] failure of consideration,[1] non est factum,[2] denial of partnership on which liability depends,[3] want of title in plaintiff to the property in suit,[4] want of authority in an agent or trustee to make the contract or conveyance in suit,[5] want of service of process,[6] contributory negligence,[7] and res judicata.[8] The statute of limitations has been held to be[9] and not to be[10] a meritorious defense. A specific denial of material allegations on which the alleged liability rests is usually deemed sufficient.[11] Where the amount of the judgment is greatly in excess of what plaintiff is entitled to recover, the judgment may be opened or vacated.[12] A set-off or counterclaim will not support an application to open or vacate a judgment.[13]

d. Affidavit of Merits

An application to open a default judgment must in some jurisdictions be supported by an affidavit to the effect that the defendant has stated the case to his attorney, and that he is advised and believes that he has a good and substantial defense.

Under the practice prevailing in some jurisdictions, an application to open or vacate a default judgment must be supported by a formal affidavit of merits substantially to the effect that defendant has fully and fairly stated the case to his counsel, and that he has a good and substantial defense on the merits to the action, as he is advised by his counsel and verily believes.[14] The required affidavit has

84. Pa.—Moll v. Lafferty, 153 A. 557, 302 Pa. 354.
34 C.J. p 337 note 85.

85. Ala.—Marion v. Regenstein, 13 So. 334, 98 Ala. 475.
34 C.J. p 337 note 86.

86. Pa.—Wilson's Estate, to Use of Patterson, v. Transportation Ins. Co. of New York, 173 A. 722, 113 Pa.Super. 405.
34 C.J. p 337 note 87.

87. Ark.—Missouri & N. A. R. Co. v. Killebrew, 132 S.W. 454, 96 Ark. 520.
34 C.J. p 337 note 88.

88. Iowa.—Stratton Bank v. Dixon, 74 N.W. 919, 105 Iowa 148.
34 C.J. p 337 note 89.

89. Ark.—Missouri & N. A. R. Co. v. Killebrew, 132 S.W. 454, 96 Ark. 520.
34 C.J. p 337 note 90.

90. Tex.—Union Cent. Life Ins. Co. v. Lipscomb, Civ.App., 27 S.W. 307.

91. Kan.—Johnson v. Richardson, 73 P. 113, 67 Kan. 521.
N.Y.—Parker v. Grant, 1 Johns.Ch. 630.

92. Ky.—Overstreet v. Brown, 62 S. W. 885, 23 Ky.L. 317.

93. N.Y.—Tallman v. Sprague, 18 N. Y.S. 207, 60 N.Y.Super. 425.
34 C.J. p 337 note 92.

94. Pa.—Bright v. Diamond, 42 A. 45, 189 Pa. 476.
34 C.J. p 337 note 92 [a].

95. Ark.—First Nat. Bank v. Turner, 275 S.W. 703, 169 Ark. 393.
34 C.J. p 338 note 10.

96. Minn.—Bearman Fruit Co. v. Parker, 3 N.W.2d 501, 212 Minn. 327.
34 C.J. p 338 note 98.

97. Mo.—Welch v. Mastin, 71 S.W. 1090, 98 Mo.App. 273.

98. N.C.—Sircey v. Rees, 71 S.E. 310, 155 N.C. 296.

99. S.D.—Jones v. Johnson, 222 N. W. 688, 54 S.D. 149.
Tex.—First Nat. Bank v. Southwest Nat. Bank of Dallas, Civ.App., 273 S.W. 951.
34 C.J. p 338 note 2.

1. N.D.—Racine-Sattley Mfg. Co. v. Pavlicek, 180 N.W. 228, 21 N.D. 222.
34 C.J. p 338 note 3.

2. Wash.—Wheeler v. Moore, 38 P. 1053, 10 Wash. 309.
34 C.J. p 338 note 4.

3. Ind.—Bristor v. Galvin, 62 Ind. 352.
N.Y.—Newark Electric Supply Co. v. Sarajian, 173 N.Y.S. 462.

4. Mo.—Lindell Real Estate Co. v. Lindell, 43 S.W. 368, 142 Mo. 61.
34 C.J. p 338 note 6.

5. Iowa.—Wishard v. McNeil, 42 N. W. 578, 78 Iowa 40.
Wis.—Bloor v. Smith, 87 N.W. 870, 112 Wis. 340.

6. N.C.—City of Monroe v. Niven, 20 S.E.2d 311, 221 N.C. 362.

7. Iowa.—Barto v. Sioux City Electric Co., 93 N.W. 268, 119 Iowa 179.

8. N.Y.—Audubon v. Excelsior Fire Ins. Co., 10 Abb.Pr. 64.

9. U.S.—U. S. v. Oregon Lumber Co., Or., 43 S.Ct. 100, 260 U.S. 290, 67 L.Ed. 261.
Mich.—Smak v. Gwozdik, 291 N.W. 270, 293 Mich. 185.
Mo.—Osage Inv. Co. v. Sigrist, 250 S.W. 39, 298 Mo. 139.
Okl.—Richards v. Baker, 99 P.2d 118, 186 Okl. 533.
Pa.—Commonwealth, for Use of Fayette County, v. Perry, 199 A. 204, 330 Pa. 355.
Tex.—Corpus Juris cited in Cain v. Thomson, Civ.App., 72 S.W.2d 339, 340.
34 C.J. p 338 note 97.

10. Cal.—Eldred v. White, 36 P. 944, 102 Cal. 600.
34 C.J. p 338 note 97 [a].

11. Fla.—Corpus Juris cited in State Bank of Eau Gallie v. Raymond, 138 So. 40, 42, 103 Fla. 649.
34 C.J. p 339 note 11.

12. Ohio.—Taylor Bros. v. Clingerman, 187 N.E. 578, 45 Ohio App. 560.
Tex.—Roberts v. Schlather & Steinmeyer, Civ.App., 8 S.W.2d 296, error dismissed.
34 C.J. p 339 note 13.

13. Pa.—Brown v. Bray, 90 Pa.Super. 180—Favinger v. Favinger, Com.Pl., 60 Montg.Co. 149.
34 C.J. p 337 note 91.

14. Cal.—Beard v. Beard, 107 P.2d 385, 16 Cal.2d 645—Pingree v. Reynolds, 73 P.2d 1266, 23 Cal.App. 2d 649—Vernon v. Deesy, 15 P.2d 788, 127 Cal.App. 313—Finn &

been held to be a jurisdictional prerequisite.[15] Where such an affidavit is necessary, it has been held that its lack cannot be supplied by a proposed answer or any other paper;[16] but a verified pleading has been accepted as a sufficient affidavit of merits,[17] and, where it fairly appears from the records and papers on which the motion is based that the moving party has a good defense on the merits, the sufficiency of an affidavit of merits, or the necessity for one, has been said to be discretionary with the trial court.[18]

The affidavit should be made by applicant himself, unless good reasons exist for having it made by another person;[19] but it may be made by his attorney, or by some other person, on showing a sufficient reason why the party himself does not make it.[20] In that case, however, the affidavit must show that affiant has personal knowledge of the facts of the case, and its averments must be based on such knowledge, and not on information or belief.[21] An affidavit by a third person not based on personal information has been held to be insufficient.[22]

e. Proposed Answer

An application to open or vacate a default judgment must in some jurisdictions be supported by a copy of the answer that the defendant proposes to interpose in the action.

In some jurisdictions, applicant for the vacation of a default judgment is required to present or file with his moving papers a copy of the answer which he proposes to put in when the judgment is opened, and the motion cannot be granted unless this is done,[23] unless, it has been held, the application is

Schindler Co. v. Gavros, 237 P. 1033, 72 Cal.App. 688.
N.Y.—Harrison v. Gargiulo, 276 N.Y. S. 482, 243 App.Div. 616—Brownsville Lumber Co. v. Weiner, 232 N. Y.S. 643, 225 App.Div. 874—Crouse Grocery Co. v. Valentine, 226 N.Y. S. 613, 131 Misc. 571.
S.D.—Squires v. Meade County, 239 N.W. 747, 59 S.D. 293—Wendel v. Wendel, 236 N.W. 468, 58 S.D. 438.
34 C.J. p 339 note 17.

Defendant's case

Affidavit was insufficient where it alleged that defendant had fully and thoroughly stated his defense or his case to his attorney rather than that he had fully and fairly stated facts of the case to attorney.
Cal.—Pingree v. Reynolds, 73 P.2d 1266, 23 Cal.App.2d 649.
Wis.—Velte v. Zeh, 206 N.W. 197, 188 Wis. 401.

15. Cal.—Morgan v. McDonald, 11 P. 350, 70 Cal. 32.
34 C.J. p 340 note 19.

16. S.D.—W. T. Rawleigh Co. v. Keely, 220 N.W. 857, 53 S.D. 425.
34 C.J. p 340 note 20.

17. Cal.—Greenamyer v. Board of Trustees of Lugo Elementary School Dist. in Los Angeles County, 2 P.2d 848, 116 Cal.App. 319—Salsberry v. Julian, 277 P. 516, 98 Cal.App. 638, followed in 277 P. 518, amended 278 P. 257, 98 Cal.App. 645—Eberhart v. Salazar, 235 P. 86, 71 Cal.App. 336—Park v. Hillman, 224 P. 100, 67 Cal.App. 92—Montijo v. Sherer, 91 P. 261, 5 Cal. App. 736.
Minn.—Peterson v. W. Davis & Sons, 11 N.W.2d 800, 216 Minn. 60.
N.D.—Madden v. Dunbar, 201 N.W. 991, 52 N.D. 74.
34 C.J. p 340 note 21.

Unverified or improperly verified answer

(1) An unverified answer is not sufficient.—Pingree v. Reynolds, 73 P.2d 1266, 23 Cal.App.2d 649.

(2) Trial court did not abuse its discretion in granting motion of defendant to vacate default, although motion was not supported by such defendant's affidavit, and although copy of his proposed answer tendered on hearing of motion did not purport to be verified, where trial court, in light of verified answers of other defendants, which answers were included among papers specified in the notice of motion as a basis thereof, might well have concluded that such defendant had a meritorious defense. —Eustace v. Dechter, 128 P.2d 367, 53 Cal.App.2d 726.

(3) Improperly verified answer being equivalent at least to affidavit of merits, court did not err in setting aside default and permitting answer.—Hubble v. Hubble, 279 P. 550, 130 Or. 177.

18. Cal.—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272.
34 C.J. p 340 note 22.

19. S.D.—Wendel v. Wendel, 236 N. W. 468, 58 S.D. 438.
34 C.J. p 341 note 23.

20. S.C.—Savage v. Cannon, 30 S.E. 2d 70, 204 S.C. 473.
S.D.—Wendel v. Wendel, 236 N.W. 468, 58 S.D. 438.
34 C.J. p 341 note 24.

21. N.C.—Montague v. Lumpkins, 100 S.E. 417, 178 N.C. 270.
34 C.J. p 341 note 25.

22. Minn.—People's Ice Co. v. Schlenker, 52 N.W. 219, 50 Minn. 1.
34 C.J. p 341 note 26.

23. Cal.—Beard v. Beard, 107 P.2d 385, 16 Cal.2d 645—Roseborough v. Campbell, 115 P.2d 839, 46 Cal. App.2d 257—Vernon v. Deesy, 15 P.2d 788, 127 Cal.App. 313—La Bonte & Ransome Co. v. Scellers, 265 P. 550, 90 Cal.App. 183.
D.C.—Cockrell v. Fillah, 50 F.2d 500, 60 App.D.C. 210.
Idaho.—Miller v. Brinkman, 281 P. 372, 42 Idaho 232.
N.Y.—Crouse Grocery Co. v. Valentine, 226 N.Y.S. 613, 131 Misc. 571 —Pember v. Meyer, 45 N.Y.S.2d 673 —Schlegel v. Wagner, 29 N.Y.S.2d 389.
Ohio.—Davis v. Teachnor, App., 53 N.E.2d 203.
Or.—Snyder v. Consolidated Highway Co., 72 P.2d 932, 157 Or. 479—Johnston v. Braymill White Pine Co., 19 P.2d 93, 142 Or. 95—Bronn v. Soules, 11 P.2d 284, 140 Or. 303 —Finch v. Pacific Reduction & Chemical Mfg. Co., 234 P. 296, 113 Or. 670.
S.C.—Savage v. Cannon, 30 S.E.2d 70, 204 S.C. 473.
S.D.—Wendel v. Wendel, 236 N.W. 468, 58 S.D. 438.
Tenn.—Wright v. Lindsay, 140 S.W. 2d 793, 24 Tenn.App. 77.
Wis.—Velte v. Zeh, 206 N.W. 197, 188 Wis. 401.
34 C.J. p 341 note 27.

Answer on file

Where defendants filed verified amended answer two days after default judgment was entered, it constituted part of record and files in case, and fact that no copy thereof was served on plaintiff or produced in court on motion to vacate default judgment was immaterial, where notice of motion stated that it was made on notice and record.—Eberhart v. Salazar, 235 P. 86, 71 Cal. App. 336.

The term "full answer" as used in statute requiring applicant to have judgment opened up, to file a "full answer," means an answer setting up a meritorious defense as to all or a material part of the petition.—

made during the judgment term,[24] or the complaint fails to state a cause of action.[25] Even where not required by mandatory statute or court rule, it has been deemed the better practice to accompany an application to open or vacate a judgment with a copy of the proposed answer.[26] While it has been held that an affidavit showing a meritorious defense may be accepted in lieu of a verified answer, in the discretion of the court,[27] generally such answer is required in addition to an affidavit of merits, both being required.[28] In cases where it is not necessary to show merits, as where the judgment is void for want of jurisdiction, it is not necessary to present or file the proposed answer.[29]

Requisites and sufficiency. The answer filed with the motion must present an issuable plea to the merits,[30] meeting fully the matters contained in the declaration or complaint,[31] or some distinct part of it.[32] It has been held that the averments must be made on knowledge and not only on information and belief;[33] but there is also authority that the averments may be on information and belief,[34] except as to matters peculiarly within defendant's knowledge.[35] If the answer fails to state a defense, the motion must be overruled.[36] Facts as distinguished from mere conclusions must be alleged.[37] An answer consisting only of a general denial has been held insufficient,[38] but such an answer has been held sufficient when supported by affidavits setting out sufficient facts to support it.[39] Verification of the answer is required by some courts,[40] but not by others.[41] In any event, the failure to verify the answer is a curable defect.[42]

§ 337. Procedure and Relief

a. In general
b. Time for application
c. Requisites and sufficiency of application generally
d. Answer and other pleadings
e. Parties
f. Notice or process
g. Affidavits on application
h. Counter-affidavits
i. Evidence
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a. In General

The proceeding to open or vacate a default judgment

Bemis v. Bemis, 98 P.2d 156, 151 Kan. 186—34 C.J. p 342 note 37 [a].

24. Kan.—Wichita Motors Co. v. United Warehouse Co., 255 P. 30, 123 Kan. 235.

25. Cal.—Reid v. Merrill, 52 P.2d 218, 4 Cal.2d 693.

26. Cal.—Bailey v. Taaffe, 29 Cal. 422.
Neb.—Barney v. Platte Valley Public Power & Irr. Dist., 23 N.W.2d 335.
34 C.J. p 341 note 29.

27. Mont.—Brothers v. Brothers, 230 P. 60, 71 Mont. 378.
Ohio.—Lutkenhouse v. Vella, App., 60 N.E.2d 798.
34 C.J. p 342 note 30.

28. S.D.—Wendel v. Wendel, 236 N. W. 468, 58 S.D. 438.
34 C.J. p 342 note 32.

29. Cal.—Barnett v. Reynolds, 13 P. 2d 514, 124 Cal.App. 750.
34 C.J. p 342 notes 34, 35.

30. Fla.—**Corpus Juris cited in** State Bank of Eau Gallie v. Raymond, 138 So. 40, 43, 103 Fla. 649.
34 C.J. p 342 note 36.

Answer held sufficient
Okl.—Jones v. American Inv. Co., 274 P. 673, 135 Okl. 112.

Answer held insufficient
Kan.—Bemis v. Bemis, 98 P.2d 156, 151 Kan. 186.

31. Fla.—**Corpus Juris cited in** State Bank of Eau Gallie v. Raymond, 138 So. 40, 43, 103 Fla. 649.
34 C.J. p 342 note 37.

32. Fla.—**Corpus Juris cited in** State Bank of Eau Gallie v. Raymond, 138 So. 40, 43, 103 Fla. 649.
34 C.J. p 342 note 38.

33. Fla.—**Corpus Juris cited in** State Bank of Eau Gallie v. Raymond, 138 So. 40, 43, 103 Fla. 649.
34 C.J. p 342 note 39.

34. Ariz.—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz. 239.

35. Cal.—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272.

36. U.S.—Glenn v. W. C. Mitchell Co., C.C.A.N.D., 282 F. 440, modified on other grounds 285 F. 381.
Minn.—Peterson v. W. Davis & Sons, 11 N.W.2d 800, 216 Minn. 60—Central Hanover Bank & Trust Co. v. Price, 248 N.W. 287, 189 Minn. 36.
34 C.J. p 342 note 40.

37. Ky.—Ray v. Ellis, 172 S.W. 951, 162 Ky. 517.
34 C.J. p 342 note 41.

38. Ohio.—Davis v. Teachnor, App., 53 N.E.2d 208.
Okl.—Givens v. Anderson, 249 P. 339, 119 Okl. 212.
34 C.J. p 342 note 42.

Specific and general denial may be technically sufficient, but good practice requires full and frank statement of fact relative to all asserted defenses.—Kane v. Stallman, 296 N. W. 1, 209 Minn. 138.

39. Mont.—Farmers' Co-op. Ass'n v. Roper, 138 P. 141, 57 Mont. 42.
Okl.—Haskell v. Cutler, 108 P.2d 146, 188 Okl. 239.

40. Ariz.—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz. 239.
Ohio.—Strain v. Isaacs, 18 N.E.2d 816, 59 Ohio App. 495.
Okl.—McAdams v. C. D. Shamburger Lumber Co., 240 P. 124, 112 Okl. 173.
34 C.J. p 342 note 44.

If the judgment is a joint judgment against two or more as joint defendants, the answer must be verified by all.—Dunlap v. McIlvoy, 3 Litt., Ky., 269—34 C.J. p 343 note 45.

41. Cal.—Eustace v. Dechter, 128 P. 2d 367, 59 Cal.App.2d 726—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257.

42. Cal.—Williams v. Thompson, 213 P. 705, 60 Cal.App. 658.

must be direct and appropriate to the relief sought, and there must be a compliance with the statutes governing the matter of procedure. As a general rule the proper procedure under the statutes is by a motion to open, vacate, or set aside the judgment.

The proceeding to open or vacate a default judgment must be a direct proceeding, and one which is appropriate to the relief sought,[43] unless the judgment is an absolute nullity, in which case defendant may have it declared void when plaintiff seeks to enforce it, without the necessity of a direct action to obtain its annulment.[44] The proceedings are equitable in nature and are to be governed by equitable principles.[45] Statutory regulations or court rules applicable to judgments by default govern in cases falling within the scope of their provisions,[46] and the party seeking to open or vacate a default judgment must proceed in accordance therewith,[47] and such statutes are to be given a liberal construction.[48] The statutory rules for vacating judgments have no application except as provided for therein.[49] Where both a default and a final judgment have been rendered, it has been held that defendant may not have the default opened without first vacating the judgment.[50]

As a general rule under the statutes providing for the opening or vacating of default judgments, the proper procedure is by a motion to open, vacate, or set aside the judgment,[51] and not by an

43. Ill.—Glanz v. Mueller, 54 N.E.2d 639, 322 Ill.App. 507.
34 C.J. p 318 note 63.

Motion held direct attack

Cal.—Hollywood Garment Corporation v. J. Beckerman, Inc., 143 P.2d 738, 61 Cal.App.2d 658.

44. La.—McClelland v. District Household of Ruth, App., 151 So. 246.

45. Okl.—Farmers' Guaranty State Bank v. Bratcher, 241 P. 340, 113 Okl. 254.
Pa.—Linker v. Fidelity-Philadelphia Trust Co., 28 A.2d 704, 150 Pa.Super. 440—Caromono v. Garman, 23 A.2d 92, 147 Pa.Super. 1—Planters Nut & Chocolate Co. v. Brown-Murray Co., 193 A. 381, 128 Pa.Super. 239—Henderson v. Hendricks, 94 Pa.Super. 568.
Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.
Wyo.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.

Substitute for bill in equity

The practice of opening of judgments by default on motion and rule is a substitute for bill in equity adopted by Pennsylvania judges when no courts of chancery existed in Pennsylvania and continued after establishment of such courts with limited jurisdiction.—Welzel v. Link-Belt Co., 35 A.2d 596, 154 Pa.Super. 66.

46. Ga.—McCray v. Empire Inv. Co., 174 S.E. 219, 49 Ga.App. 117—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568.
Ind.—Olds v. Hitzemann, 42 N.E.2d 35, 220 Ind. 300.
N.Y.—Redfield v. Critchley, 14 N.E.2d 377, 277 N.Y. 336, reargument denied 15 N.E.2d 73, 278 N.Y. 483.
34 C.J. p 428 note 75.

Unlawful detainer action

Relief from default judgment in unlawful detainer action may be had under either of two sections of code of civil procedure.—Shupe v. Evans, 261 P. 492, 86 Cal.App. 700.

47. Ala.—Dulin v. Johnson, 113 So. 397, 216 Ala. 393.
Ark.—Merriott v. Kilgore, 139 S.W.2d 387, 200 Ark. 394—American Inv. Co. v. Keenehan, 291 S.W. 56, 172 Ark. 332.
Ga.—Craft v. Miles, 186 S.E. 188, 182 Ga. 584—Johnston v. Ford, 158 S.E. 527, 43 Ga.App. 132—Riggs v. Kinney, 140 S.E. 41, 37 Ga.App. 307.
La.—Cohn Flour & Feed Co. v. Mitchell, 136 So. 782, 18 La.App. 534.
Mont.—Galbreath v. Aubert, 157 P.2d 105.
N.Y.—Walton Foundry Co. v. A. D. Granger Co., 196 N.Y.S. 719, 203 App.Div. 226.
Okl.—Vinson v. Oklahoma City, 66 P.2d 933, 179 Okl. 590—Samuels v. Granite Sav. Bank & Trust Co., 1 P.2d 145, 150 Okl. 174—Missouri Quarries Co. v. Brady, 219 P. 368, 95 Okl. 279.
Tex.—Commercial Credit Corp. v. Smith, 187 S.W.2d 363, 143 Tex. 612—Foster v. Martin, 20 Tex. 113.
W.Va.—Shenandoah Valley Nat. Bank v. Hiett, 6 S.E.2d 769, 121 W.Va. 454.
Wyo.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.

Judgment for less than amount due

Where default judgment was rendered for less than amount allegedly due, because of mistake in drafting original petition, plaintiff's remedy was to have the judgment vacated or set aside and to be granted a new trial pursuant to statutory procedure, and an amendment of the pleadings to state the correct amount due is not of itself sufficient.—Johnson v. Dry Creek Oil & Gas Co., 141 S.W.2d 263, 283 Ky. 340.

Statute held complied with

Ill.—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349.

48. Kan.—Wyatt v. Collins, 180 P.789, 105 Kan. 182, reheard 180 P. 992, 105 Kan. 182.

49. Ga.—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568.

Statute relating to action

Where attack on default judgment, based on alleged fraud, was made by motion and not by action, the statute relating to an action to set aside judgment for fraud was inapplicable.—Lenhart v. Lenhart Wagon Co., 2 N.W.2d 421, 211 Minn. 572.

50. Ga.—Cavan v. A. M. Davis Co., 189 S.E. 684, 55 Ga.App. 200—Tennessee Oil & Gas Co. v. American Art Works, 72 S.E. 517, 10 Ga.App. 45.

51. Cal.—Bodin v. Webb, 62 P.2d 155, 17 Cal.App.2d 422.
Ga.—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568.
Ill.—Viedenschek v. Johnny Perkins Playdium, 49 N.E.2d 339, 319 Ill.App. 523—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392.
Ky.—Holcomb v. Creech, 56 S.W.2d 998, 247 Ky. 199.
Mont.—Paramount Publix Corporation v. Boucher, 19 P.2d 223, 93 Mont. 340—Rowan v. Gazette Printing Co., 220 P. 1104, 69 Mont. 170.
N.Y.—Coastal Equipment Co. v. Herrick, 276 N.Y.S. 183, 243 App.Div. 97—Nelson v. Hirsch, 268 N.Y.S. 225, 240 App.Div. 933, appeal dismissed 190 N.E. 653, 264 N.Y. 316—White v. Sebring, 240 N.Y.S. 477, 228 App.Div. 413—Ornstein v. Goldberg, 233 N.Y.S. 586, 226 App.Div. 746.
N.C.—City of Monroe v. Niven, 20 S.E.2d 311, 221 N.C. 362—Wynne v. Conrad, 17 S.E.2d 514, 220 N.C. 355—Federal Land Bank of Columbia v. Davis, 1 S.E.2d 350, 215 N.C. 100—Jordan v. McKenzie, 155 S.E. 868, 199 N.C. 750—Simon v. Masters, 135 S.E. 861, 192 N.C. 731—

appeal,[52] or, as discussed in the C.J.S. title New Trial § 3, also 34 C.J. p 421 note 16, 46 C.J. p 62 note 57, by a motion for a new trial, but under some statutes an application to set aside a default judgment is in the nature of a motion for a new trial.[53] In some jurisdictions the motion to set aside a default judgment made more than a prescribed period of time after entry of the judgment is in the nature of a petition for a writ of error coram nobis.[54] If want of jurisdiction to render the default judgment appears on the face of the record the remedy has been held to be by application to the court to expunge the judgment from the court record.[55] Where the judgment is attacked because of defective service of summons although the return shows substantial compliance with the statute, a rule to show cause why the judgment should not be vacated has been held to be the proper procedure in some jurisdictions.[56]

The proceedings to open or set aside the judgment should be instituted in the same court in which the judgment was rendered.[57]

Petition or bill to review. Under some statutes a petition to review a default judgment[58] or a petition in the nature of a bill of review[59] may be filed under proper circumstances to set aside a default judgment. In accordance with some statutes, an action to review a default judgment will lie to review questions of jurisdiction and of the sufficiency of the complaint without a motion to set aside the judgment having first been made,[60] but an action of review to test the correctness of the entry of default will not lie unless a motion to set aside the default was first made, overruled, and exception taken.[61]

As continued or new proceeding. Dependent on the provisions of the statutes under which the application to open or set aside the default judgment has been instituted, the proceedings have been held to be a continuation of the suit in which the judgment complained of was rendered,[62] or they have

Whitehurst v. Merchants' & Farmers' Transp. Co., 13 S.E. 937, 109 N. C. 342.

N.D.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261.

Ohio.—Ramsey v. Holland, 172 N.E. 411, 35 Ohio App. 199.

Okl.—Arnold v. McTon Oil Co., 233 P. 192, 109 Okl. 287.

S.D.—Sohn v. Flavin, 244 N.W. 349, 60 S.D. 305.

Tenn.—Wright v. Lindsay, 140 S.W. 2d 793, 24 Tenn.App. 77.

Utah.—Madsen v. Hodson, 256 P. 792, 69 Utah 527.

34 C.J. p 421 note 15—46 C.J. p 62 note 57 [a].

During and after term

Under some statutes an application during term should be by motion and subsequent to the term by petition or complaint.—National Life Ins. Co. of U. S. v. Wheeler, 137 N. E. 529, 79 Ind.App. 184.

Default in absence of judgment

Where defendants were defaulted, proper procedure, in absence of judgment, is by motion, not new suit, to set aside default.—Commercial Acceptance Co. v. Betzler, 132 N.E. 714, 95 Ind.App. 177.

Dependent on grounds

Under some statutes after the expiration of the term a judgment can be set aside on motion only on certain grounds and on all other grounds the proceeding must be by petition or complaint.—Boulter v. Cook, 234 P. 1101, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.

Motion to strike judgment

Proper practice to seek relief against judgment by default is by motion to open it, and not by motion to strike it off.—Welzel v. Link-Belt Co., 35 A.2d 596, 154 Pa.Super. 66.

Error by the clerk in entering judgment may be corrected on motion.—Bertagnolli v. Bertagnolli, 148 P. 374, 23 Wyo. 228—34 C.J. p 179 note 50.

52. Neb.—Strine v. Kingsbaker, 10 N.W. 584, 12 Neb. 52.
34 C.J. p 422 note 17.
Default judgment as a decision reviewable by appeal see Appeal and Error § 155.

53. Ind.—State ex rel. Krodel v. Gilkison, 198 N.E. 323, 209 Ind. 213.
La.—Wallace v. Martin, App., 166 So. 874—Cohn Flour & Feed Co. v. Mitchell, 136 So. 782, 18 La.App. 534.
Tex.—Callahan v. Staples, 161 S.W.2d 489, 139 Tex. 8—Foster v. Martin, 20 Tex. 118.

Equivalent to bill of review

The "motion for new trial on judgment following citation by publication" provided for in rules of civil procedure is the equivalent of an equitable bill of review.—Rimbow v. Rimbow, Tex.Civ.App., 191 S.W.2d 89.

54. Ill.—Chicago Securities Corporation v. Olsen, 14 N.E.2d 893, 295 Ill.App. 615—Bornman v. Rabb, 8 N.E.2d 374, 290 Ill.App. 604—Chicago Securities Corporation v. McBride, 5 N.E.2d 752, 288 Ill.App. 65—Lynn v. Multhauf, 279 Ill.App. 210—National Lead Co. v. Mortell, 261 Ill.App. 332.
Writ of error coram nobis as remedy for relief against judgment see supra §§ 311–313.

55. Ala.—Marshall County v. Critcher, 17 So.2d 540, 245 Ala. 357.

56. N.J.—Sullivan v. Walburn, 154 A. 617, 9 N.J.Misc. 280.

57. Ind.—Kemp v. Mitchell, 29 Ind. 163—Padol v. Home Bank & Trust Co., 27 N.E.2d 917, 108 Ind.App. 401.
N.Y.—Collins v. Izzo, 48 N.Y.S.2d 192, 267 App.Div. 1023.
Jurisdiction of particular courts and judges see supra § 333.

58. Mo.—Garrison v. Schmicke, 193 S.W.2d 614—Dillbeck v. Johnson, 129 S.W.2d 885, 344 Mo. 845.

59. Tex.—Ridley v. McCallum, 163 S.W.2d 833, 139 Tex. 540.

Attack on judgment prior to default

Suit in nature of bill of review to set aside default judgments for estoppel by prior judgment has been held to be neither direct nor collateral attack on the prior judgment.—Bray v. First Nat. Bank, Tex.Civ. App., 10 S.W.2d 235, error dismissed.

60. Ind.—Searle v. Whipperman, 79 Ind. 424.
34 C.J. p 402 note 78 [b].
Action to review judgment generally see supra §§ 314–319.

61. Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 109, 218 Ind. 468, rehearing denied 33 N.E.2d 583, 218 Ind. 468—Baker v. Ludlam, 20 N.E. 648, 118 Ind. 87—Searle v. Whipperman, 79 Ind. 424.

62. Tex.—Callahan v. Staples, 161 S. W.2d 489, 139 Tex. 8—Lovenstein v. Lovenstein, Civ.App., 35 S.W.2d 271, error dismissed.
Wash.—Harju v. Anderson, 215 P. 327, 125 Wash. 161.

been held to be new or independent proceedings[63] even though the application has been filed under the title of the cause in which the original judgment was rendered.[64]

Vacation on motion of court. As a general rule, where the court has retained jurisdiction of the cause it may set aside a default judgment on its own motion,[65] but it cannot set aside a default judgment on its own motion where the statute gives the right to act only on request by the aggrieved party.[66]

b. Time for Application

(1) In general
(2) Under statutory provisions generally
(3) Under rule of court generally
(4) During and after term generally
(5) Requirement of diligence
(6) Default before final judgment
(7) Void or irregular judgments
(8) Commencement and termination of time

(1) In General

The motion or application for opening or vacating a default judgment must be made while the court may exercise jurisdiction over its judgment.

The motion or application for opening or vacating a default judgment must be made while the court may exercise jurisdiction over its judgment.[67] It has been held that, after execution has been returned satisfied, a default judgment cannot properly be vacated on a motion to set it aside,[68] but, as discussed infra § 379, a suit in equity may be available. A default judgment based on service by publication after garnishment may not be set aside on the motion of the garnishee under the claim that no assets of the principal defendant are in the possession of the garnishee until the issue of whether or not the garnishee holds assets is litigated in the garnishee action.[69]

(2) Under Statutory Provisions Generally

An application based on statutory grounds to open a default judgment must be made within the time limited by the statute.

Statutes in a number of jurisdictions specify the time within which an application to set aside a default judgment must be made, and, accordingly, the judgment may properly be opened or vacated within the period of time specified.[70] An appli-

Mode of service in original case

A distinction exists between an equitable bill of review as against a previously rendered judgment under process served on defendant, and similar action on judgment rendered when process was by publication, since, in the former, actions are docketed separately from action sought to be reviewed, and are tried out on issues made, while, in latter cases, motions are treated as motions for new trials in original case and are filed in that case and heard as part of it, irrespective of how they are indorsed, styled or docketed. —Smith v. Higginbotham, Tex.Civ. App., 112 S.W.2d 770.

63. Ala.—Kelley v. Chavis, 142 So. 423, 225 Ala. 218—Mosaic Templars of America v. Hall, 124 So. 879, 220 Ala. 305—Evans v. Wilhite, 52 So. 845, 167 Ala. 587.
Ill.—Adams v. Butman, 264 Ill.App. 378.
Ind.—State ex rel. Krodel v. Gilkison, 198 N.E. 828, 209 Ind. 213—General Outdoor Advertising Co. v. City of Indianapolis, 172 N.E. 309, 202 Ind. 85, 72 A.L.R. 453.
Wyo.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 43 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.

Petition for review of default judgment is of the nature of an independent action.—Garrison v. Schmicke, Mo., 193 S.W.2d 614—Dillbeck v. Johnson, 129 S.W.2d 885, 344 Mo. 845.

Invalid judgment

Where motion asserts invalidity of judgment, as where it has been entered without sufficient service, the attack may be regarded as an independent proceeding.—Ray v. Bruce, D.C.Mun.App., 31 A.2d 693.

64. Ind.—Padol v. Home Bank & Trust Co., 27 N.E.2d 917, 108 Ind. App. 401—Globe Mining Co. v. Oak Ridge Coal Co., 134 N.E. 508, 79 Ind.App. 76.

65. Mo.—Faulkner v. F. Bierman & Sons Metal & Rubber Co., App., 294 S.W. 1019.
Or.—Milton v. Hare, 280 P. 511, 130 Or. 590.
Tex.—Gann v. Hopkins, Civ.App., 119 S.W.2d 110—Allison v. American Surety Co. of New York, Civ.App., 248 S.W. 829.

Judgment prematurely entered

Trial court had inherent power on its own motion to set aside default judgment prematurely entered.—Stuart v. Alexander, 43 P.2d 557, 6 Cal.App.2d 27.

66. Ariz.—Swisshelm Gold Silver Co. v. Farwell, 124 P.2d 544, 59 Ariz. 162.

67. D.C.—Ray v. Bruce, Mun.App., 31 A.2d 693.
Time for opening or vacating judgments generally see supra § 288.

68. Mont.—State ex rel. Redle v. District Court in and for Missoula County, 59 P.2d 58, 102 Mont. 541—Green v. Wiederhold, 181 P. 981, 56 Mont. 237—Foster v. Hauswirth, 6 P. 19, 5 Mont. 566.

69. Kan.—Herd v. Chambers, 122 P. 2d 784, 155 Kan. 55.
Opening or vacating default judgments against garnishee see Garnishment § 256 b.

70. Ala.—Ex parte Haisten, 149 So. 213, 227 Ala. 183—Ex parte Dayton Rubber Mfg. Co., 122 So. 643, 219 Ala. 482—Ex parte Richerzhagen, 113 So. 85, 216 Ala. 262—Ex parte Motley, 170 So. 81, 27 Ala. App. 241—Ex parte Crumpton, 109 So. 184, 21 Ala.App. 446.
Ariz.—Collister v. Inter-State Fidelity Building & Loan Ass'n of Utah, 38 P.2d 626, 44 Ariz. 427, 98 A.L.R. 1020.
Cal.—Gould v. Richmond School Dist., 136 P.2d 864, 58 Cal.App.2d 497—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257.
Mo.—Garrison v. Schmicke, 193 S.W. 2d 614—Dillbeck v. Johnson, 129 S. W.2d 885, 344 Mo. 845.
Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 272 P. 525, 83 Mont. 400.
Nev.—Nahas v. Nahas, 92 P.2d 718, 59 Nev. 220.
N.M.—Bourgeious v. Santa Fe Trail Stages, 95 P.2d 204, 43 N.M. 453—Ealy v. McGahen, 21 P.2d 84, 37 N.M. 246.

cation based on statutory grounds to open a default judgment must be made within the time limited by the statute[71] or the application must be denied.[72] In some jurisdictions statutes setting forth the procedure for opening default judgments within a limited time have been construed as affording an additional and not an exclusive remedy, and the court may exercise its inherent power to afford relief in proper cases, in proceedings not based on such statutes, without regard to the statutory limitation of time.[73] An application to open a default judgment has been held not to come within the time limit prescribed for an application for a new trial[74] unless the statutory procedure for setting aside the

Okl.—Gassin v. McJunkin, 48 P.2d 320, 173 Okl. 210.
Tex.—Callahan v. Staples, 161 S.W. 2d 489, 139 Tex. 8—Pellum v. Fleming, Civ.App., 283 S.W. 531, error refused Fleming v. Pellum, 287 S.W. 492, 116 Tex. 130.
34 C.J. p 258 note 99.

Before case ripe for judgment

(1) Where defendant filed motion to remove default day after default, case was not "ripe for judgment" so as to go to judgment without clerk's making note to that effect.—Cohen v. Industrial Bank & Trust Co., 175 N.E. 78, 274 Mass. 498.

(2) In general, case is "ripe for judgment" when under last entry case has been brought to final determination and everything seems to have been done that should have been done before entry of final adjudication.—Cohen v. Industrial Bank & Trust Co., supra.

71. Ark.—Horn v. Hull, 275 S.W. 905, 169 Ark. 463.
Cal.—Phillips v. Trusheim, 156 P.2d 25, 25 Cal.2d 913—Hunt Mirk & Co. v. Patterson, 253 P. 317, 20 Cal. 382—Scott v. Crosthwaite, 159 P. 2d 660, 69 Cal.App.2d 663—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257—Washko v. Stewart, 112 P.2d 306, 44 Cal.App. 2d 311—Bouvett v. Layer, 104 P. 2d 115, 40 Cal.App.2d 43—Doyle v. Rice Ranch Oil Co., 81 P.2d 980, 28 Cal.App.2d 18—Jackson v. Shaw, 68 P.2d 310, 20 Cal.App.2d 740—McNeill v. Wheat, 295 P. 105, 111 Cal.App. 79—Wheat v. McNeill, 295 P. 102, 111 Cal.App. 72—Jones v. Moers, 266 P. 821, 91 Cal.App. 65—Vaughn v. Pine Creek Tungsten Co., 265 P. 491, 89 Cal.App. 759—Keown v. Trudo, 234 P. 910, 71 Cal.App. 155—Hinds v. Superior Court of Los Angeles County, 223 P. 422, 65 Cal.App. 223.
Fla.—Atlanta Life Ins. Co. v. Hopps, 183 So. 15, 133 Fla. 300.
Idaho.—Hanson v. Rogers, 32 P.2d 126, 54 Idaho 360—McAllister v. Erickson, 261 P. 242, 45 Idaho 211—Smith v. Peterson, 169 P. 290, 31 Idaho 34.
Iowa.—Kern v. Woodbury County, 14 N.W.2d 687, 234 Iowa 1321—Vaux v. Hensal, 277 N.W. 718, 224 Iowa 1055—Borden v. Voegtlin, 245 N.W. 331, 215 Iowa 882.
La.—Wallace v. Martin, App., 166 So. 874.
Mich.—Zirkaloso v. Merriam, 224 N. W. 361, 246 Mich. 210.
Minn.—Lentz v. Lutz, 9 N.W.2d 505, 215 Minn. 230—Marthaler Machine & Engineering Co. v. Meyers, 218 N.W. 127, 173 Minn. 606.
Miss.—Britton v. Beltzhoover, 113 So. 346, 147 Miss. 737.
Mont.—Galbreath v. Aubert, 157 P. 2d 105—Kosonen v. Waara, 285 P. 668, 87 Mont. 24.
N.Y.—Gilmore v. De Witt, 10 N.Y.S. 2d 903, 256 App.Div. 1046—Schlimmer v. Ontario & W. R. Co., 209 N. Y.S. 547, 212 App.Div. 782.
N.C.—Foster v. Allison Corporation, 131 S.E. 648, 191 N.C. 166, 44 A. L.R. 610.
Ohio.—In re Veselich, 154 N.E. 55, 22 Ohio App. 528.
Okl.—Rodesney v. Robins, 88 P.2d 333, 184 Okl. 457—Vinson v. Oklahoma City, 66 P.2d 933, 179 Okl. 590—Bradshaw v. Tinker, 264 P. 162, 129 Okl. 244.
Philippine.—Almadin v. Almadin, 1 Philippine 748, 1 Off.Gaz. 142.
Tex.—Ridley v. McCallum, 163 S.W. 2d 833, 139 Tex. 540.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
Wyo.—Boulter v. Cook, 234 P. 1101, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.
34 C.J. p 430 note 91.

Irregularity in taking default judgment before cause stood for trial in accordance with court rule was waived by failure to move for vacation of judgment within first three days of succeeding term of court as provided by statute.—Strain v. Isaacs, 18 N.E.2d 816, 59 Ohio App. 495.

Applications held timely

N.Y.—Coles v. Carroll, 6 N.E.2d 107, 273 N.Y. 86.
Or.—Leonard v. Bennett, 106 P.2d 542, 165 Or. 157—Galbraith v. Monarch Gold Dredging Co., 84 P.2d 1110, 160 Or. 282.

72. Ala.—Ex parte Cunningham, 99 So. 834, 19 Ala.App. 584, certiorari denied Ex parte Ewart-Brewer Motor Co., 99 So. 836, 211 Ala. 191.
Cal.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221—Wasko v. Stewart, 112 P.2d 306, 44 Cal.App.2d 311—Knox v. Superior Court in and for Riverside County, 280 P. 375, 100 Cal.App. 452.
Fla.—Cornelius v. State ex rel. Tampa West Coast Realty Co., 133 So. 754, 136 Fla. 506.
Ga.—Fraser v. Neese, 137 S.E. 550, 163 Ga. 843.
Idaho.—Backman v. Douglas, 270 P. 618, 46 Idaho 671—McAllister v. Erickson, 261 P. 242, 45 Idaho 211—Commonwealth Trust Co. of Pittsburgh v. Lorain, 255 P. 909, 43 Idaho 784.
Ill.—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Iowa.—Kern v. Woodbury County, 14 N.W.2d 687, 234 Iowa 1321.
Ky.—Stokes v. Commonwealth, 150 S. W.2d 892, 286 Ky. 391—Fowler v. Wiley, 33 S.W.2d 14, 236 Ky. 313.
La.—McClelland v. District Household of Ruth, App., 151 So. 246.
Mont.—Housing Authority of City of Butte v. Murtha, 144 P.2d 183, 115 Mont. 405—Kosonen v. Waara, 285 P. 668, 87 Mont. 24.
N.J.—Steinhauser v. Friedman, 170 A. 630, 12 N.J.Misc. 167—New Jersey Cash Credit Corporation v. Linehan, 142 A. 650, 6 N.J.Misc. 740.
N.M.—Clark v. Rosenwald, 247 P. 306, 31 N.M. 443.
N.Y.—Gilmore v. De Witt, 10 N.Y.S. 2d 903, 256 App.Div. 1046.
Okl.—Yahola Oil Co. v. Causey, 72 P. 2d 817, 181 Okl. 129.
Tex.—Ridley v. McCallum, 163 S.W. 2d 833, 139 Tex. 540.
Utah.—J. B. Colt Co. v. District Court of Fifth Judicial Dist. in and for Millard County, 269 P. 1017, 72 Utah 281.
34 C.J. p 260 note 1, p 430 note 92.

73. Cal.—Barnett v. Reynolds, 13 P. 2d 514, 124 Cal.App. 750.
N.Y.—Malicky v. Rosenberg, 273 N. Y.S. 818, 152 Misc. 197—White v. Sebring, 233 N.Y.S. 497, 133 Misc. 784.
Tex.—Travelodge Corporation v. Schwake, Civ.App., 126 S.W.2d 523.
34 C.J. p 430 note 95.
Time for equitable proceedings for relief against judgment see infra § 379.

74. N.J.—Finkel v. District Court for First Judicial Dist. of Union County, 21 A.2d 306, 127 N.J.Law 132, affirmed 28 A.2d 119, 129 N. J.Law 97.

Constructive service

Laws relating to time for filing motions for new trial were inapplicable where suit was by publication and only appearance by attorney ad

default judgment is in the nature of a motion for a new trial.[75]

(3) Under Rule of Court Generally

An application to open or vacate a default judgment which is not made within the time fixed by rule of court may properly be denied.

An application to open or vacate a default judgment not made within the time fixed by rule of court may properly be denied.[76] The court in its discretion may grant relief after the time limited therefor by its own rule,[77] but if the rules are made by a superior tribunal the court must deny an application made after the prescribed time.[78]

(4) During and after Term Generally

Where the application is filed during the term at which the default judgment was rendered, the judgment may properly be opened or vacated on any ground that moves the favorable discretion of the court. If the application is filed after the term, the judgment may not be opened or vacated except under statutory authorization or except on some ground on which the court has inherent power to act after term.

Where the application is filed during the term at which the default judgment is rendered, the judgment may properly be opened or vacated on any ground that moves the favorable discretion of the court.[79] If the application is filed after the term, the default judgment may not be opened or vacated[80] except on some ground on which the court has inherent power to act after the term,[81] or where statutory authority exists to open or vacate a judgment after term.[82] A motion filed during the term

litem.—Hunsinger v. Boyd, 26 S.W.2d 905, 119 Tex. 182.

75. La.—Wallace v. Martin, App., 166 So. 874.

76. D.C.—Ray v. Bruce, Mun.App., 31 A.2d 693.
Mich.—Tymkiew v. Nicolopolus, 22 N.W.2d 66—Sczesny v. Collingwood, 222 N.W. 759, 245 Mich. 433.
34 C.J. p 431 note 2.
Application to set aside default judgment not regularly entered see infra subdivision b (7) of this section.

77. S.C.—Sargent v. Wilson, 13 S.C. L. 512.

78. Mich.—Kunsky-Trendle Broadcasting Corporation v. Kent Circuit Judge, 275 N.W. 175, 281 Mich. 367—Domzalski v. Guzynski, 274 N.W. 753, 281 Mich. 175—Vozbut v. Pomputis, 269 N.W. 149, 277 Mich. 212—Watkins v. Hunt, 225 N.W. 554, 247 Mich. 237—Sczesny v. Collingwood, 222 N.W. 759, 245 Mich. 433—Rosen v. Brennan, 221 N.W. 276, 244 Mich. 397—Westlawn Cemetery Ass'n v. Codd, 213 N.W. 143, 238 Mich. 119—Newman v. Hunt, 183 N.W. 745, 215 Mich. 185.
34 C.J. p 431 note 2 [a] (2), (3).

79. Ark.—Young v. Young, 147 S.W.2d 736, 201 Ark. 984.
Iowa.—Kern v. Sanborn, 7 N.W.2d 801, 233 Iowa 458.
Kan.—Wichita Motors Co. v. United Warehouse Co., 255 P. 30, 123 Kan. 235.
Ky.—Corbin Bldg. Supply Co. v. Martin, 89 S.W.2d 480, 239 Ky. 272.
Neb.—Fremont Joint Stock Land Bank v. Harding, 266 N.W. 714, 130 Neb. 842.
Ohio.—State ex rel. Hughes v. Cramer, 34 N.E.2d 772, 138 Ohio St. 267—Davis v. Teachnor, App., 53 N.E.2d 208.
Tex.—Dorsey v. Cutbirth, Civ.App., 178 S.W.2d 749, error refused.
34 C.J. p 431 note 96.

80. D.C.—Ray v. Bruce, Mun.App., 31 A.2d 693.
Ill.—Chicago Faucet Co. v. 839 Lake St. Bldg. Corporation, 1 N.E.2d 865, 285 Ill.App. 151.
Iowa.—Clarke v. Smith, 192 N.W. 136, 195 Iowa 1299.
Ky.—Wood's Ex'x v. City of Middlesboro, 90 S.W.2d 1018, 262 Ky. 627—National Surety Corporation v. Mullins, 90 S.W.2d 707, 262 Ky. 465—Stratton & Terstegge Co. v. Begley, 61 S.W.2d 287, 249 Ky. 632—Pinnacle Motor Co. v. Simpson, 287 S.W. 566, 216 Ky. 184.
Mo.—State ex rel. Sterling v. Shain, 129 S.W.2d 1048, 344 Mo. 891—Buchholz v. Manzella, App., 158 S.W.2d 200—Boggess v. Jordan, App., 283 S.W. 57—Barkwell v. Carlisle, 256 S.W. 513, 215 Mo.App. 214.
Neb.—Cronkleton v. Lane, 263 N.W. 388, 130 Neb. 17.
Ohio.—Ryan v. Buckeye State Building & Loan Co., 163 N.E. 719, 29 Ohio App. 476.
34 C.J. p 431 note 98.

Trial term

(1) Statutory right to open default judgment must be exercised before beginning of trial term.—McCray v. Empire Inv. Co., 174 S.E. 219, 49 Ga.App. 117—W. H. Coker & Son v. Lipscomb, 87 S.E. 704, 17 Ga. App. 506.

(2) Default judgment cannot be opened after trial term has passed, although court may not be held at trial term.—Miller v. Phœnix Mut. Life Ins. Co., 147 S.E. 527, 168 Ga. 321.

81. Pa.—Salus v. Fogel, 153 A. 547, 302 Pa. 268—Lichterman v. Hanlon, 100 Pa.Super. 245—Ames Shovel & Tool Co. v. Schock, 100 Pa. Super. 84—New Prague Flouring Mill Co. v. Kirschner, 70 Pa.Super. 74.
34 C.J. p 431 notes 97, 99.
Void or irregular judgment see infra subdivision b (7) of this section.

Necessity for equitable ground for relief

An adverse judgment may not be opened after expiration of term at which it was entered, unless fraud or some other recognized equitable ground for relief is shown.—Kappel v. Meth, 189 A. 795, 125 Pa.Super. 443.

Deprivation of rights

Where it appears that defendant has been deprived of his rights by a default judgment, the common-law principle that the power of courts to vacate their judgments does not extend beyond the term at which they were entered is not adhered to, and a judgment may be vacated after term.—Webb Packing Co. v. Harmon, 193 A. 596, 8 W.W.Harr., Del., 476.

Substituted service

Where court was without jurisdiction to enter judgment against nonresident motorist because of insufficient notice of effect of service of process on secretary of state, petition to vacate judgment by default, although made at subsequent term, was granted.—Webb Packing Co. v. Harmon, supra.

82. Ill.—Korner v. Weinshenk, 7 N.E.2d 635, 289 Ill.App. 625.
Ohio.—State ex rel. Hughes v. Cramer, 34 N.E.2d 772, 138 Ohio St. 267.
Okl.—Hoffman v. Deskins, 221 P. 37, 94 Okl. 117.
34 C.J. p 431 note 1.

Within time prescribed by statute

A default judgment may be set aside after the term if within the period of time prescribed by statute.—Lake v. Williams & Nobbs, 147 So. 221, 109 Fla. 78—Eli Witt Cigar & Tobacco Co. v. Somers, 127 So. 333, 99 Fla. 592.

Statutory grounds

The court may set aside a default

at which the judgment is rendered may be considered at a subsequent term.[83]

(5) Requirement of Diligence

A defendant must proceed with reasonable diligence in moving to set aside a default judgment.

Defendant must proceed with reasonable diligence in moving to set aside a default judgment,[84] and any apparent laches or delay must be explained and excused.[85] Laches or undue delay will bar relief[86] even in cases where the application has been made

judgment after term only on the grounds specified by statute.
Ark.—American Inv. Co. v. Keenehan, 291 S.W. 56, 172 Ark. 332.
Ky.—Wood's Ex'x v. City of Middlesboro, 90 S.W.2d 1018, 262 Ky. 627.
Mo.—Force v. Margulius, App., 33 S.W.2d 1023.
Neb.—Cronkleton v. Lane, 268 N.W. 388, 130 Neb. 17.

83. Okl.—Hawkins v. Payne, 264 P. 179, 129 Okl. 243—Claussen v. Amberg, 249 P. 330, 119 Okl. 137—Missouri Quarries Co. v. Brady, 219 P. 368, 95 Okl. 279.

84. Cal.—Massimino v. Taranto, 292 P. 139, 108 Cal.App. 692.
Ill.—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349—Blackman v. Illinois Cent. R. Co., 52 N.E.2d 825, 321 Ill.App. 310—Crystal Lake Country Club v. Scanlan, 264 Ill. App. 44.
Md.—Harvey v. Slacum, 29 A.2d 276, 181 Md. 206—Weisman v. Davitz, 199 A. 476, 174 Md. 447.
Minn.—Lentz v. Lutz, 9 N.W.2d 505, 215 Minn. 230—Pilney v. Funk, 3 N.W.2d 792, 212 Minn. 398—In re Belt Line, Phalen, and Hazel Park Sewer Assessment, 222 N.W. 520, 176 Minn. 59.
Mont.—Madson v. Petrie Tractor & Equipment Co., 77 P.2d 1038, 106 Mont. 382—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266—Middle States Oil Corporation v. Tanner-Jones Drilling Co., 235 P. 770, 73 Mont. 180.
N.J.—Kiefer v. Fleming, 134 A. 110, 4 N.J.Misc. 635.
Or.—Steeves v. Steeves, 9 P.2d 815, 139 Or. 261.
Tex.—Callahan v. Staples, 161 S.W.2d 489, 139 Tex. 8—Stoudenmeier v. First Nat. Bank, Civ.App., 246 S. W. 761.
Wash.—Moe v. Wolter, 235 P. 803, 134 Wash. 340, affirmed 240 P. 565, 136 Wash. 696.
34 C.J. p 263 note 19.
Necessity for diligence where judgment void see infra subdivision b (7) of this section.

Earliest moment practicable
One in default must move to set it aside at the earliest moment practicable.—In re East Bench Irr. Dist., 224 P. 859, 70 Mont. 186.

Prompt application for relief after learning of default judgment is necessary.
Or.—Snyder v. Consolidated Highway Co., 72 P.2d 932, 157 Or. 479.
Pa.—Quaker City Chocolate & Confectionery Co. v. Warnock Bldg. Ass'n, 32 A.2d 5, 347 Pa. 186—Silent Auto Corporation of Northern New Jersey v. Folk, 97 Pa.Super. 538—Commonwealth v. Dr. Crandall's Health School, Com.Pl., 51 Dauph.Co. 333—Hotel Redington v. Guffey, 36 Luz.Leg.Reg. 209, 3 Monroe L.R. 82, affirmed 25 A.2d 773, 148 Pa.Super. 502.
Tex.—Farrell v. Truett, Abernathy & Wolford, Civ.App., 60 S.W.2d 475, error dismissed.

Claim of fraud
Even though defendant claims that default judgment was obtained against him by extrinsic fraud, defendant should not be permitted to wait until more than a year after he concededly had actual notice of judgment before attacking it by motion to set judgment aside on ground that defendant was not served with summons.—Washko v. Stewart, 112 P.2d 306, 44 Cal.App.2d 311.

Mere forgetfulness has been held no excuse for failure to move promptly to set aside default, notwithstanding disorganization of attorneys' business because of death of partner.—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266.

85. Tex.—Simpson v. Glenn, Civ. App., 103 S.W.2d 433—Welsch v. Keeton, Civ.App., 287 S.W. 692—Stoudenmeier v. First Nat. Bank, Civ.App., 246 S.W. 761.
34 C.J. p 427 note 62.

86. Ala.—Craft v. Hirsh, 149 So. 683, 227 Ala. 257, appeal dismissed 54 S.Ct. 455, 291 U.S. 644, 78 L. Ed. 1041.
Ariz.—Postal Ben. Ins. Co. v. Johnson, 165 P.2d 173—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz. 239—Garden Development Co. v. Carlaw, 263 P. 625, 33 Ariz. 232.
Ark.—O'Neal v. B. F. Goodrich Rubber Co., 162 S.W.2d 52, 204 Ark. 371—Bickerstaff v. Harmonia Fire Ins. Co., 133 S.W.2d 890, 199 Ark. 424.
Cal.—Hiltbrand v. Hiltbrand, 23 P.2d 277, 218 Cal. 321—Scott v. Crosthwaite, 159 P.2d 660, 69 Cal.App. 2d 663—Sharp v. Paulson, 295 P. 856, 111 Cal.App. 515—Grey v. Milligan, 281 P. 656, 101 Cal.App. 328.
Idaho.—Nielson v. Garrett, 43 P.2d 380, 55 Idaho 240—Savage v. Stokes, 28 P.2d 900, 54 Idaho 109.
Ill.—Shaw v. Carrara, 38 N.E.2d 785, 312 Ill.App. 410.
Iowa.—Anderson v. Anderson, 229 N.W. 694, 209 Iowa 1143.
Md.—Wagner v. Scurlock, 170 A. 539, 166 Md. 284.
Mich.—In re State Highway Com'r, 279 N.W. 883, 284 Mich. 414, certiorari denied Halsted v. State Highway Commissioner, 59 S.Ct. 148, 305 U.S. 644, 83 L.Ed. 416.
Minn.—Kane v. Stallman, 296 N.W. 1, 209 Minn. 138—Nystrom v. Nystrom, 243 N.W. 704, 186 Minn. 490—Beelman v. Beck, 205 N.W. 636, 164 Minn. 504—Ladwig v. Peterson, 199 N.W. 226, 160 Minn. 13.
Mo.—O'Connell v. Dockery, App., 102 S.W.2d 748.
N.J.—Kiefer v. Fleming, 134 A. 110, 4 N.J.Misc. 635—Vanderbilt v. Chioscinski, 129 A. 178, 3 N.J.Misc. 584.
N.Y.—Booraem v. Gibbons, 34 N.Y.S. 2d 198, 263 App.Div. 665, appeal denied 35 N.Y.S.2d 717, 264 App. Div. 768—Carpello v. Carana, 220 N.Y.S. 81, 219 App.Div. 736—Broderick v. Saretsky, 39 N.Y.S.2d 802, 179 Misc. 737—Sobel v. Steinberg, 273 N.Y.S. 630, 152 Misc. 443—Hannel v. Serbert, 255 N.Y.S. 758, 143 Misc. 61—Stewart v. Barry, 250 N.Y.S. 67, 139 Misc. 724—Kefer v. Gunches, 49 N.Y.S.2d 554—Rocki v. Chiprut, 203 N.Y.S. 100.
Pa.—Quaker City Chocolate & Confectionery Co. v. Warnock Bldg. Ass'n, 32 A.2d 5, 347 Pa. 186—Planters Nut & Chocolate Co. v. Brown-Murray Co., 193 A. 381, 128 Pa.Super. 239—Commonwealth v. Dr. Crandall's Health School, Com. Pl., 51 Dauph.Co. 333—Oltorik v. Bozer, Com.Pl., 40 Lack.Jur. 25.
S.C.—Brown v. Nix, 37 S.E.2d 579.
S.D.—Heitman v. Gross, 19 N.W.2d 508—Smith v. Wordeman, 240 N.W. 325, 59 S.D. 368.
Tex.—Dodd v. State, Civ.App., 193 S.W.2d 569—Simpson v. Glenn, Civ. App., 103 S.W.2d 433—Farrell v. Truett, Abernathy & Wolford, Civ. App., 60 S.W.2d 475, error dismissed—Oldham v. Heatherly, Civ.App., 17 S.W.2d 113—Cauble v. Key, Civ. App., 256 S.W. 654—Stoudenmeier v. First Nat. Bank, Civ.App., 246 S.W. 761.
Wyo.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.
34 C.J. p 427 note 57.

Necessity for knowledge
Mere passage of time since entry of judgment sought to be enforced does not create "laches" without precedent of knowledge on defendant's

within the statutory time,[87] but it is not laches to make the application at the latest period prescribed by the statute where no intervening facts appear which make it inequitable to grant the application.[88] Under some statutes the motion must be filed within a reasonable time, not to exceed a specified period, after rendition of the default judgment.[89]

What constitutes due diligence[90] or a reasonable time[91] depends on the circumstances of the particular case.

(6) Default before Final Judgment

Statutes limiting the period of time within which proceedings may be instituted to open or set aside a default judgment have been held to be applicable to default judgments which are merely interlocutory.

General statutory limitations on the period of time within which proceedings may be instituted to open or set aside a default judgment have been held to apply only to final, and not to interlocutory, judgments,[92] but where the limitation is inserted in a statute pertaining to both interlocutory and final judgments it has been held to apply to interlocutory as well as to final judgments.[93] The rule against vacating a default judgment after expiration of the term at which it was rendered, discussed supra subdivision b (4) of this section, does not apply to a mere interlocutory entry of default, and such an entry may be vacated on proper grounds after adjournment of the term at which such default was entered;[94] and, in the absence of a statute to the contrary, a default on which no judgment has been entered may be set aside on an application made at any time.[95]

(7) Void or Irregular Judgments

Statutes imposing limitations on the time within which applications may be made to open or set aside default judgments and the doctrine of laches have been held to be inapplicable to default judgments which are void.

Statutes imposing limitations on the time within which an application may be made to open or set aside default judgments have been held to be inapplicable to a default judgment which is void[96] or void on its face,[97] such as where the judgment is illegal for want of jurisdiction[98] due to the lack of

part or existence of such circumstances that defendant should have known of judgment and acted promptly by applying for vacation of default judgment to protect his rights.—Kenter Co. v. Errath, 32 A.2d 592, 21 N.J.Misc. 214.

87. Ariz.—Perrin v. Perrin Properties, 86 P.2d 23, 53 Ariz. 121, 122 A.L.R. 621.
Cal.—Hiltbrand v. Hiltbrand, 23 P.2d 277, 218 Cal. 321.
Minn.—Kane v. Stallman, 296 N.W. 1, 209 Minn. 138.
34 C.J. p 427 note 58.

88. N.Y.—Marvin v. Brandy, 9 N.Y.S. 593, 56 Hun 242, 18 N.Y.Civ. Proc. 343.

89. Cal.—Hollywood Garment Corporation v. J. Beckerman, Inc., 143 P.2d 738, 61 Cal.App.2d 658—Washko v. Stewart, 112 P.2d 306, 44 Cal.App.2d 311—Weinberger v. Manning, 123 P.2d 531, 50 Cal.App.2d 494.
Idaho.—Hanson v. Rogers, 32 P.2d 126, 54 Idaho 360.

90. N.D.—Powell v. Bach, 217 N.W. 172, 56 N.D. 297.

Undue delay held not shown

Ariz.—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz. 239.
Ill.—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349.
Mont.—Brothers v. Brothers, 230 P. 60, 71 Mont. 378.
N.D.—First State Bank of Crosby v. Thomas, 268 N.W. 852, 54 N.D. 108.
Wash.—Moe v. Wolter, 235 P. 803, 134 Wash. 340, affirmed 240 P. 565, 136 Wash. 696.

91. Cal.—Wm. Wolff & Co. v. Canadian Pac. Ry. Co., 26 P. 825, 89 Cal. 332.

Limit for reasonable time

Where the statute requires the motion to be filed within a reasonable time not to exceed a specified period, the limit for reasonable time is the specified period.
Cal.—Smith v. Jones, 163 P. 890, 174 Cal. 513—Hollywood Garment Corporation v. J. Beckerman, Inc., 143 P.2d 738, 61 Cal.App.2d 658.
Idaho.—Hanson v. Rogers, 32 P.2d 126, 54 Idaho 360.

Time held reasonable under circumstances

Cal.—Waybright v. Anderson, 253 P. 148, 200 Cal. 374—Waite v. Southern Pac. Co., 221 P. 204, 192 Cal. 467—Sofuye v. Pieters-Wheeler Seed Co., 216 P. 990, 62 Cal.App. 198.

92. Ala.—Ex parte Bozeman, 104 So. 402, 213 Ala. 223—Ex parte Savage, 186 So. 586, 28 Ala.App. 440.
Tenn.—Gammon v. Robbins, 53 S.W. 2d 223, 165 Tenn. 128.

93. Del.—Yerkes v. Dangle, Super., 33 A.2d 406.

94. Del.—Yerkes v. Dangle, supra.
Iowa.—Redding v. Redding, 284 N.W. 167, 226 Iowa 327—Weinhart v. Meyer, 247 N.W. 811, 215 Iowa 1317.
34 C.J. p 422 note 20.

95. Ala.—Ex parte Savage, 186 So. 586, 28 Ala.App. 440.
Iowa.—Weinhart v. Meyer, 247 N.W. 811, 215 Iowa 1317.
34 C.J. p 422 note 19.

96. D.C.—Ray v. Bruce, Mun.App., 31 A.2d 693.
Fla.—Kellogg-Citizens Nat. Bank of Green Bay, Wis., v. Felton, 199 So. 50, 145 Fla. 68—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.
Ill.—Lewis v. West Side Trust & Savings Bank of Chicago, 36 N.E. 2d 573, 377 Ill. 384.
N.J.—New Jersey Cash Credit Corporation v. Zaccaria, 19 A.2d 443, 126 N.J.Law 334—Gloucester City Trust Co. v. Goodfellow, 3 A.2d 561, 121 N.J.Law 546—Andersen v. Independent Order of Foresters, 126 A. 631, 98 N.J.Law 648.
Tex.—Smith v. Lightfoot, Civ.App., 143 S.W.2d 151.

97. Cal.—Vaughn v. Pine Creek Tungsten Co., 265 P. 491, 89 Cal. App. 759.
Idaho.—Hanson v. Rogers, 32 P.2d 126, 54 Idaho 360—Savage v. Stokes, 28 P.2d 900, 54 Idaho 109.
Mont.—Hodson v. O'Keeffe, 229 P. 722, 71 Mont. 322.
Wash.—Marinovich v. Lindh, 220 P. 807, 127 Wash. 349.

Rule held inapplicable to valid judgment

Cal.—Vaughn v. Pine Creek Tungsten Co., 265 P. 491, 89 Cal.App. 759—Hinds v. Superior Court of Los Angeles County, 223 P. 422, 65 Cal.App. 223.

98. Mont.—Hodson v. O'Keeffe, 229 P. 722, 71 Mont. 322.
N.J.—Andersen v. Independent Order of Foresters, 126 A. 631, 98

proper summons or notice,[99] or where the default judgment has been entered by the clerk of the court without legal authority.[1] Some statutes have also been held not to apply to irregular judgments,[2] but other statutes have been held to apply if the judgment is merely irregular and voidable.[3]

The doctrine of laches does not apply in the case of a judgment by default which is void,[4] and under such circumstances a showing of diligence is not necessary.[5]

During or after term. A void judgment may properly be set aside at a subsequent term.[6] A judgment irregularly entered may be opened or vacated after term,[7] particularly where a statute so provides.[8]

Rules of court. A rule of court requiring an application to be filed within a fixed period of time has been held to apply only to a default judgment which is regularly entered,[9] and not to apply if there has not been a proper legal service of process,[10] although only a substantial compliance with the statute with respect to notice is required.[11] Such a court rule has also been held to require that the proceedings after default be regular.[12] Where the default was due to the judge having misled defendant, an order setting aside the default has been permitted even though the application was filed after the time prescribed by rule of court.[13]

(8) Commencement and Termination of Time

Under statutes prescribing the time within which applications to open or set aside default judgments must be filed, the commencement of the period limited depends on the terms of the particular statute under which application is made.

Under the various statutes prescribing the time

N.J.Law 648—Palansky v. Reich, 164 A. 701, 11 N.J.Misc. 106, affirmed 168 A. 297, 11 N.J.Law 241—**Corpus Juris cited in** Greenbaum v. Higgins, 147 A. 722, 723, 7 N.J. Misc. 1012.

34 C.J. p 257 note 89.

99. Cal.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221.
N.D.—Ellison v. Baird, 293 N.W. 793, 70 N.D. 226.
Ohio.—Vida v. Parsley, App., 47 N. E.2d 663.

1. Cal.—Potts v. Whitson, 125 P.2d 947, 52 Cal.App.2d 199—Crofton v. Young, 119 P.2d 1003, 48 Cal.App. 2d 452.
Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla. 205—Eli Witt Cigar & Tobacco Co. v. Somers, 127 So. 333, 99 Fla. 592—Kroier v. Kroier, 116 So. 753, 95 Fla. 865—Ex parte Jones, 110 So. 532, 92 Fla. 1015—Mickler v. Reddick, 21 So. 287, 38 Fla. 341.

2. N.C.—Hood ex rel. Citizens Bank & Trust Co. v. Stewart, 184 S.E. 86, 209 N.C. 424—Foster v. Allison Corporation, 131 S.E. 648, 191 N. C. 166, 44 A.L.R. 610.

A mere clerical error which does not affect the substantial rights of the parties will be disregarded.—Galbreath v. Aubert, Mont., 157 P. 2d 105.

Failure to give notice of judgment
Default and judgment entered against defendant which had filed affidavit of defense was held properly vacated, notwithstanding that more than thirty days had elapsed from date of entry of judgment where no notice was given defendant of entry of judgment as required by rule of court, since such fact, if known to court, would have prevented entry of judgment.—Josten Mfg. Co. v. Keeler, 2 N.E.2d 586, 284 Ill.App. 646.

3. N.M.—Dallam County Bank v. Burnside, 249 P. 109, 31 N.M. 537.

4. N.J.—Weiner v. Wittman, 27 A. 2d 866, 129 N.J.Law 35—Westfield Trust Co. v. Court of Common Pleas of Morris County, 178 A. 546, 115 N.J.Law 86, affirmed 183 A. 165, 116 N.J.Law 191.
N.Y.—Valz v. Sheepshead Bay Bungalow Corporation, 166 N.E. 124, 249 N.Y. 122, certiorari denied 49 S. Ct. 82, 278 U.S. 647, 73 L.Ed. 560.
Or.—Mutzig v. Hope, 158 P.2d 110.
Pa.—Borough of Wilkinsburg v. School Dist. of Borough of Wilkinsburg, 148 A. 77, 298 Pa. 193.

5. Minn.—Pugsley v. Magerfleisch, 201 N.W. 323, 161 Minn. 246.

6. Ky.—Corbin Bldg. Supply Co. v. Martin, 39 S.W.2d 480, 239 Ky. 272.

7. Pa.—Kappel v. Meth, 189 A. 795, 125 Pa.Super. 443.

8. Mo.—Boggess v. Jordan, App., 283 S.W. 57.
Ohio.—Levy v. Foley, 61 N.E.2d 615, 75 Ohio App. 220—Davis v. Teachnor, App., 53 N.E.2d 208—Lyons v. Weihe, 24 N.E.2d 835, 62 Ohio App. 527.
Okl.—Mayhue v. Clapp, 261 P. 144, 128 Okl. 1—Nation v. Savely, 260 P. 32, 127 Okl. 117.

9. Mich.—Smak v. Gwozdik, 291 N. W. 270, 293 Mich. 185—McHenry v. Village of Grosse Pointe Farms, 251 N.W. 783, 265 Mich. 581—Watkins v. Hunt, 225 N.W. 554, 247 Mich. 237—Rosen v. Brennan, 221 N.W. 276, 244 Mich. 397—Westlawn Cemetery Ass'n v. Codd, 213 N.W. 143, 238 Mich. 119.
34 C.J. p 431 note 2 [a] (1).

Determination from face of record
Whether or not default judgment was irregularly entered so as to authorize setting it aside after prescribed period must be determined from face of record.—Rosen v. Brennan, 221 N.W. 276, 244 Mich. 397.

Defective caption to default decree will not prevent tolling of circuit court rule limiting time for vacation of default.—Westlawn Cemetery Ass'n v. Codd, 213 N.W. 143, 238 Mich. 119.

Signature by deputy clerk
Where default was entered, the fact that order pro confesso was signed by deputy clerk instead of plaintiff's attorney was held not to toll rule limiting time for setting aside default.—Westlawn Cemetery Ass'n v. Codd, supra.

10. Mich.—John W. Masury & Son v. Lowther, 300 N.W. 866, 299 Mich. 516.

Where service of writ of garnishment issued against foreign corporation was unauthorized because person served was the principal defendant who was an employee of the corporation, corporation's motion to set aside default and default judgment was timely, even though not made until more than four months after entry of default judgment.—John W. Masury & Son v. Lowther, supra.

11. Mich.—Westlawn Cemetery Ass'n v. Codd, 213 N.W. 143, 238 Mich. 119—Kentucky Wagon Mfg. Co. v. Kalamazoo Circuit Judge, 175 N.W. 150, 208 Mich. 267.

12. Mich.—Foster v. Talbot, 241 N. W. 141, 257 Mich. 489—Westlawn Cemetery Ass'n v. Codd, 213 N.W. 143, 238 Mich. 119.
34 C.J. p 431 note 2 [a] (1).

Award of damages in excess of claim
Mich.—Foster v. Talbot, 241 N.W. 141, 257 Mich. 489.

13. Mich.—Geib v. Kent Circuit Judge, 19 N.W.2d 124, 311 Mich. 631.

within which applications to open or set aside default judgments must be filed, the period limited has been held to begin to run at the date of the rendition of the judgment[14] and not at the time of the entry of the default,[15] at the time of the entry of the default rather than at the time of the entry of the judgment based on the default,[16] at the date of entry of the judgment in the default docket,[17] or at the time of notice of the entry of the judgment.[18] Notice, within the contemplation of statutes providing for the latter rule, has been held to mean actual knowledge of the judgment,[19] but it has also been held that the constructive notice afforded by recordation of the entry of judgment is sufficient.[20] Under some statutes notice must be given through actual service before the period limited will commence to run.[21]

Some statutes of this character have been held to cease to run at the time the motion to set aside the default judgment is filed although it is not heard or disposed of within the statutory period,[22] but under other statutes it has been held that not only the motion, but also the time for the hearing on the motion, must be within the statutory period.[23]

The running of the statutory period within which default judgments may be opened or vacated has been held not to be suspended by postponements by consent,[24] by the pendency of negotiations for a settlement,[25] or by a stipulation of counsel to waive the tardy filing of the motion.[26] Where, however, delay in applying to vacate a default judgment is attributed to the opposite party's acts and declarations, the lapse of time may become more or less immaterial.[27] The statutory period has been held to commence to run even though a motion for removal from a state court to a federal court is pending at the time of the rendition of the default judgment.[28]

The period limited for setting aside default judgments has been held not to be tolled by reason of defendant's insanity.[29]

14. Ala.—Marshall County v. Critcher, 17 So.2d 540, 245 Ala. 357.
Cal.—Bell v. McDermoth, 246 P. 805, 198 Cal. 594.
Iowa.—Tracy v. McLaughlin, 223 N. W. 475, 207 Iowa 793.
Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 272 P. 525, 83 Mont. 400.
34 C.J. p 430 note 91 [a], [b].

Entry in official minutes
"Rendition of judgment," within statute relating to vacation thereof, occurred when court's order for judgment was entered in official minutes.—Azadian v. Superior Court in and for Los Angeles County, 263 P. 298, 88 Cal.App. 296.

15. **Default without personal service**
Period of time from rendition of default judgment in action wherein defendant has not been personally served with summons within which default may be set aside commences at date of rendition of judgment and not entry of default.
Cal.—Doxey v. Doble, 54 P.2d 1143, 12 Cal.App.2d 62.
Iowa.—Tracy v. McLaughlin, 223 N. W. 475, 207 Iowa 793.

16. Cal.—Macbeth v. Macbeth, 25 P. 2d 11, 219 Cal. 47—Title Ins. & Trust Co. v. King Land & Improvement Co., 120 P. 1066, 162 Cal. 44—Washko v. Stewart, 112 P.2d 306, 44 Cal.App.2d 311—Brooks v. Nelson, 272 P. 610, 95 Cal.App. 144—McLain v. Llewellyn Iron Works, 204 P. 869, 56 Cal. App. 58.
Idaho.—Commonwealth Trust Co. of Pittsburgh v. Lorain, 255 P. 909, 43 Idaho 784.
Mont.—Galbreath v. Aubert, 157 P. 2d 105.

17. Fla.—Security Finance Co. v. Gentry, 109 So. 220, 91 Fla. 1015, followed in 109 So. 222, 91 Fla. 1024.

18. N.Y.—Redfield v. Critchley, 14 N.E.2d 377, 277 N.Y. 336, reargument denied 15 N.E.2d 73, 278 N.Y. 483—Cowperthwait v. Critchley, 276 N.Y.S. 133, 243 App.Div. 70.
S.C.—Witt v. Leysath, 158 S.E. 226, 160 S.C. 251.
34 C.J. p 430 note 91 [a], [b], [d].

Actual knowledge of entry of default judgment satisfies requirement of notice.—Walrod v. Nelson, 210 N. W. 525, 54 N.D. 753.

19. Or.—Anderson v. Guenther, 25 P.2d 146, 144 Or. 446—Chapman v. Multnomah County, 126 P. 996, 63 Or. 180—Evans v. Evans, 118 P. 177, 60 Or. 195—Fildew v. Milner, 109 P. 1092, 57 Or. 16.

20. S.C.—Anderson v. Toledo Scale Co., 6 S.E.2d 465, 192 S.C. 300—Witt v. Leysath, 158 S.E. 226, 160 S.C. 251.

21. N.Y.—Redfield v. Critchley, 14 N.E.2d 377, 277 N.Y. 336, reargument denied 15 N.E.2d 73, 278 N. Y. 483—Stapen's Radio Shop v. Black, 21 N.Y.S.2d 650.
34 C.J. p 430 note 91 [d].

22. Ark.—Davis v. Collums, 168 S. W.2d 1103, 205 Ark. 390.
Cal.—Wm. Wolff & Co. v. Canadian Pac. Ry. Co., 26 P. 825, 89 Cal. 332—Roseborough v. Campbell, 115 P. 2d 839, 46 Cal.App.2d 257.
Nev.—Bowman v. Bowman, 217 P. 1102, 47 Nev. 207.
Tenn.—Life & Casualty Ins. Co. v. Baber, 57 S.W.2d 791, 166 Tenn. 10.

Attention of court
Defendant's motion to take off default need not be brought to court's attention for affirmative action before time when under general rules case will be ripe for judgment.—Cohen v. Industrial Bank & Trust Co., 175 N.E. 78, 274 Mass. 498.

23. Okl.—Rodesney v. Robins, 83 P. 2d 333, 184 Okl. 457.

Calling judge's attention to motion
(1) Duty to call judge's attention to motion to vacate default judgment is on movant and not on clerk.—Kelley v. Chavis, 142 So. 423, 225 Ala. 213.

(2) Failure to cause judge to act on or continue motion to vacate default judgment within statutory period of time has been held to require the denial of the motion.—Kelley v. Chavis, supra.

(3) Presence of judge in another county has been held not to be an excuse for failure to cause him timely to act on or continue motion to vacate default judgment.—Kelley v. Chavis, supra.

24. Cal.—Colthurst v. Harris, 275 P. 868, 97 Cal.App. 430.

25. Mich.—Zirkaloso v. Merriam, 224 N.W. 361, 246 Mich. 210.

26. S.D.—Bon Homme County Bank v. Bainbridge, 200 N.W. 107, 47 S. D. 563.

27. N.D.—Powell v. Bach, 217 N.W. 172, 56 N.D. 297.

28. Fla.—Hewitt v. International Shoe Co., 154 So. 838, 114 Fla. 743, motion denied 155 So. 725, 115 Fla. 508.

29. N.D.—Walrod v. Nelson, 210 N. W. 525, 54 N.D. 753.

c. Requisites and Sufficiency of Application Generally

An application to open or vacate a default judgment must comply with the requirements of the statutes and court rules.

An application to open or vacate a default judgment must be in compliance with the requirements of the statutes and court rules,[30] although it is generally held that a substantial compliance therewith is sufficient.[31] The application must contain allegations which show that defendant is entitled to the relief sought,[32] and it has been held that it should contain an offer to go to trial immediately.[33] The allegations must set forth facts as distinguished from mere conclusions.[34] The application must also state a proper ground for setting aside the default judgment,[35] and accordingly it must present facts reasonably excusing the failure to answer or appear,[36] such as by a showing of surprise, mistake, or excusable neglect,[37] or unavoidable casualty or misfortune,[38] and that defendant exercised due dil-

30. Ala.—Dulin v. Johnson, 113 So. 397, 216 Ala. 393.
Ark.—American Inv. Co. v. Keenehan, 291 S.W. 56, 172 Ark. 832.
Ga.—Fitzgerald v. Ferran, 124 S.E. 530, 158 Ga. 755.
Tex.—Commercial Credit Corp. v. Smith, 137 S.W.2d 363, 143 Tex. 612.

Applications held sufficient
Cal.—Weck v. Sucher, 274 P. 579, 96 Cal.App. 422.
Ga.—Walker v. T. H. Sirmans & Co., 148 S.E. 592, 168 Ga. 658.
Ill.—Manaster v. Harry's New York Cabaret, 3 N.E.2d 349, 286 Ill.App. 609.
N.Y.—Luckenbach S. S. Co. v. Musso, 16 N.Y.S.2d 378, 258 App.Div. 914.
Okl.—Hale v. McIntosh, 243 P. 157, 116 Okl. 40.

Motions held insufficient
Ark.—American Inv. Co. v. Keenehan, 291 S.W. 56, 172 Ark. 832.
Ill.—Chicago Securities Corporation v. McBride, 5 N.E.2d 752, 288 Ill. App. 65.
Ind.—Hessong v. Wolf, 151 N.E. 15, 85 Ind.App. 581.

31. Ky.—Cumberland Fluorspar Corp. v. Waddell, 183 S.W.2d 641, 298 Ky. 594—Bishop v. Bishop, 281 S.W. 824, 213 Ky. 703.

Default foreclosure judgment
In mortgage foreclosure suit, to which junior mortgagee is party defendant, a motion, made by such mortgagee before distribution of proceeds of foreclosure sale and served on all parties, who are thereafter given opportunity to plead and be heard, is proper means for opening up default foreclosure judgment to allow junior mortgagee to make claim to surplus proceeds, as such motion is equivalent to motion to set aside default.—Cowan v. Stoker, 115 P.2d 153, 100 Utah 377.

32. Ala.—Craft v. Hirsh, 149 So. 683, 227 Ala. 257, appeal dismissed 54 S.Ct. 455, 291 U.S. 644, 78 L.Ed. 1041.
Ill.—Shaw v. Carrara, 38 N.E.2d 785, 312 Ill.App. 410.
Okl.—Foltz v. Deshon, 249 P. 358, 122 Okl. 42.
Pa.—Liberal Credit Clothing Co. v. Tropp, 4 A.2d 565, 135 Pa.Super. 53.
Tex.—Tyler v. Henderson, Civ.App., 162 S.W.2d 170, error refused—University Development Co. v. Wolf, Civ.App., 93 S.W.2d 1137.
Affidavits in support of application see infra subdivision g of this section.
Necessity and sufficiency of showing of meritorious defense see supra § 336.

Relief in furtherance of justice
In order to open a default judgment, there must be a prima facie showing from which court itself may infer that the relief asked would be in furtherance of justice.
S.C.—Gaskins v. California Ins. Co., 11 S.E.2d 436, 195 S.C. 376.
Wyo.—Kelley v. Eidam, 231 P. 678, 32 Wyo. 271.

33. Fla.—State Bank of Eau Gallie v. Raymond, 138 So. 40, 103 Fla. 649—Benedict v. W. T. Hadlow Co., 42 So. 239, 52 Fla. 183.

34. Colo.—Redeker v. Denver Music Co., 265 P. 681, 83 Colo. 370.
Ill.—Katauski v. Eldridge Coal & Coke Co., 255 Ill.App. 41.
Tex.—Allen v. Frank, Civ.App., 252 S.W. 347.

Injustice of judgment
It is not sufficient for the moving party to say as a legal conclusion that the judgment is improper or unjust.—Gaskins v. California Ins. Co., 11 S.E.2d 436, 195 S.C. 376.

Trial not according to law
A motion to set aside a default judgment and reinstate the case on the ground that the cause was not set down for trial according to law states a mere conclusion and is insufficient.—Gibson v. Searcy, 137 N. E. 182, 192 Ind. 515.

Fraud
(1) A general allegation that default judgment resulted from fraud and collusion would be a mere "conclusion" and would not authorize vacation of judgment in absence of allegation of facts constituting fraud and collusion.—Higginbotham v. Adams, 14 S.E.2d 856, 192 Ga. 203.

(2) Allegations setting forth the facts constituting fraud are sufficient.—Sutton v. Davis, 140 S.W.2d 1020, 283 Ky. 146.

35. Ark.—American Inv. Co. v. Keenehan, 291 S.W. 56, 172 Ark. 832.
Pa.—Kopec v. Sullivan, Com.Pl., 23 Erie Co. 413.

36. Ariz.—Beltran v. Roll, 7 P.2d 248, 39 Ariz. 417.
Fla.—State Bank of Eau Gallie v. Raymond, 138 So. 40, 103 Fla. 649.
Ga.—Fitzgerald v. Ferran, 124 S.E. 530, 158 Ga. 755.
N.Y.—Falvey v. Cornwall Terminal Co., 204 N.Y.S. 525, 209 App.Div. 448.
Pa.—Eastman Kodak Co. v. Osenider, 193 A. 284, 127 Pa.Super. 332.

"Good cause," within statute providing that defendant against whom judgment is rendered on service by publication may move for new trial on showing good cause, means that verified motion must show good cause why movant did not appear at the trial and present his defenses shown by motion to exist.—Smith v. Higginbotham, Tex.Civ.App., 112 S. W.2d 770.

Sufficient excuse held not shown
Pa.—West Susquehanna Building & Loan Ass'n v. Sinclair, 188 A. 371, 124 Pa.Super. 133.

37. Mont.—Madson v. Petrie Tractor & Equipment Co., 77 P.2d 1038, 106 Mont. 382.
Wyo.—Kelley v. Eidam, 231 P. 678, 32 Wyo. 271.

Excusable neglect of counsel
A motion to set aside a default judgment obtained on a cross complaint was not fatally defective because it specified the mistake, inadvertence, surprise, and excusable neglect of counsel of plaintiff, rather than of plaintiff, since an attorney is agent of his client, and neglect of the agent is the neglect of his principal.—Hicks v. Sanders, 104 P.2d 549, 40 Cal.App.2d 211.

38. Okl.—Gavin v. Heath, 256 P. 745, 125 Okl. 118.

Existence of complete defense
Where record on face shows jurisdiction of parties and subject matter, petition to vacate judgment at subsequent term on ground of un-

igence;[39] and, where the default judgment was obtained on constructive or substituted service, it has been held that the application must allege that petitioner had no actual notice in time to appear and defend.[40] The petitioner's name should be correctly stated in the application even though it was incorrectly stated in the original proceedings.[41]

Construction of pleadings. The application is to be construed most strongly against the pleader.[42] A petition in an independent action when timely made may be treated as a statutory motion to set aside the judgment.[43]

Bond. Defendant cannot assail a default judgment where he fails to file a bond, as required by statute, unless he is excused therefrom.[44] Failure to give a bond on filing the petition has been held not to be a fatal defect since the court may require the bond after the order to reopen and retry the case is made.[45]

Proposed answer. The answer filed with the motion must present an issuable plea to the merits,[46] by averments made on knowledge and not only on information and belief.[47]

Amendment. The amendment of an application may be permitted,[48] and an amendment may be granted on the same day that a hearing on the motion is had,[49] but, after the statutory period of time for moving to set aside the judgment has expired, an amendment which would add new and distinct grounds may properly be denied.[50] The trial court may properly refuse permission to file an amendment which is insufficient to entitle petitioner to the relief sought.[51] After an adverse ruling it has been held that the motion cannot be amended.[52]

d. Answer and Other Pleadings

Plaintiff may raise an issue of fact by his answer, or he may by demurrer test the legal sufficiency of the motion to open or vacate the default judgment.

Plaintiff may raise an issue of fact on a motion to set aside a default judgment by filing a plea denying the facts alleged by the motion, or the legal sufficiency of the motion may be raised by demurrer.[53] Plaintiff's motion to strike defendant's motion to vacate a default judgment tests the sufficien-

avoidable casualty or misfortune is subject to demurrer when facts pleaded do not show unavoidable casualty or misfortune, even though defense pleaded would be complete.—Foltz v. Deshon, 249 P. 358, 122 Okl. 42.

Impossibility of attorney's attendance at court

Petition to vacate a default judgment on ground of unavoidable casualty or misfortune was insufficient to warrant vacating the judgment, where it merely stated that it was impossible for defendants' attorney to be present in court on day when judgment was rendered without any explanation of why it was impossible.—Stockgrowers State Bank v. Clay, 90 P.2d 1102, 150 Kan. 93.

Ineffectiveness of diligence to prevent judgment

Defendant seeking to vacate default judgment because of unavoidable casualty or misfortune must state facts showing that no reasonable or proper diligence could have prevented trial or judgment.—Geo. O. Richardson Machinery Co. v. Scott, 251 P. 482, 122 Okl. 125, certiorari granted 47 S.Ct. 587, 274 U.S. 729, 71 L.Ed. 1319, certiorari dismissed 48 S.Ct. 264, 276 U.S. 128, 72 L.Ed. 497.

39. Iowa.—Hawthorne v. Smith, 197 N.W. 9, 197 Iowa 1306.
Kan.—Stockgrowers State Bank v. Clay, 90 P.2d 1102, 150 Kan. 93.
Pa.—Kopec v. Sullivan, Com.Pl., 23 Erie Co. 413.
Tex.—Knight v. Sledge Mfg. Co., Civ. App., 144 S.W.2d 607, error dismissed.

A mere conclusion of the pleader that he exercised due diligence to present his defense is insufficient.—Allen v. Frank, Tex.Civ.App., 252 S. W. 347.

40. Colo.—Redeker v. Denver Music Co., 265 P. 681, 83 Colo. 370.
Kan.—Irvine v. Eysenbach, 267 P. 995, 126 Kan. 362.
Tex.—Sanns v. Chapman, Civ.App., 144 S.W.2d 341, error dismissed, judgment correct.

41. R.I.—Feldman v. Silva, 171 A. 922, 54 R.I. 202.

42. Ill.—Standard Statistics Co. v. Davis, 45 N.E.2d 1005, 317 Ill.App. 377—Shaw v. Carrara, 38 N.E.2d 785, 312 Ill.App. 410.

43. Ky.—Holcomb v. Creech, 56 S. W.2d 998, 247 Ky. 199.

Motion for new trial

The pleadings may be construed as a statutory motion for a new trial although a new trial is not specifically requested where the facts alleged are sufficient to entitle petitioner to that remedy under the prayer for general relief.—Ashton v. Farrell & Co., Tex.Civ.App., 121 S.W.2d 611. Error dismissed.

44. N.C.—Jones v. Best, 28 S.E. 187, 121 N.C. 154.

45. Ark.—Davis v. Collums, 168 S. W.2d 1103, 205 Ark. 390.

46. Fla.—**Corpus Juris cited in** State Bank of Eau Gallie v. Raymond, 138 So. 40, 43, 103 Fla. 649. 34 C.J. p 342 note 36.

General denial

On motion to open default judgments and to be permitted to defend, general denial constituted a "full answer" within statute dealing with opening of default judgments rendered on service by publication after the filing of a "full answer."—Tawney v. Blankenship, 90 P.2d 1111, 150 Kan. 41.

47. Fla.—**Corpus Juris cited in** State Bank of Eau Gallie v. Raymond, 138 So. 40, 43, 103 Fla. 649. 34 C.J. p 342 note 39.

48. Iowa.—Fulton v. National Finance & Thrift Corporation, 4 N.W.2d 406, 232 Iowa 373.

49. Ill.—Hayden v. Bredemeier, 27 N.E.2d 477, 305 Ill.App. 484.

Amendment to correspond with evidence

Judge may order that petition to vacate default judgment be made to correspond with evidence.—Mt. Ida School v. Clark, 177 N.E. 604, 39 Ohio App. 389.

50. Ala.—Ex parte U. S. Shipping Board Emergency Fleet Corporation, 110 So. 469, 215 Ala. 321.

51. Iowa.—Hawthorne v. Smith, 197 N.W. 9, 197 Iowa 1306.

52. Iowa.—Lynch v. Powers, 200 N. W. 725, 198 Iowa 1060.

53. Ill.—Marquette Nat. Fire Ins. Co. v. Minneapolis Fire & Marine Ins. Co., 233 Ill.App. 102.

cy of defendant's motion.[54] A demurrer[55] or a motion to strike[56] admits all well-pleaded allegations of fact in defendant's motion, but not conclusions or inferences drawn by the pleader.[57]

By reason of his unconscionable conduct plaintiff may be precluded from pleading laches as a defense to the motion.[58]

e. Parties

A party in interest who is prejudiced by the default judgment may apply to have it set aside even though he is not a party to the record.

A party in interest who is prejudiced by the default judgment may apply to have it set aside,[59] even though he is not a party to the record.[60] An application may be made only by a person who has an interest in the subject matter of the suit[61] and who has been in some way prejudicially affected by the judgment or decree.[62] Where a person seeks to have a default judgment opened because of the death of a party prior to the judgment, he must show an interest derived from the decedent.[63]

Plaintiff may apply to have a default opened,[64] but if plaintiff is the successful party he cannot have a default judgment opened in the absence of a showing that he has been unjustly deprived of rights to which he is entitled.[65]

Judgment on constructive service. Statutes which provide for the vacating of default judgments obtained on constructive service have been held to be open to any person not personally served with process and whose rights are affected, whether or not he was named in the action,[66] including the rep-

54. Ill.—Standard Statistics Co. v. Davis, 45 N.E.2d 1005, 317 Ill.App. 377—Adams v. Butman, 264 Ill. App. 378—McNulty v. White, 248 Ill.App. 572.

55. Ill.—Swiercz v. Nalepka, 259 Ill.App. 262.

Consideration of demurrer

A demurrer to motion to strike out default judgment can be considered only as an admission of truth of facts alleged in the motion and sworn to by defendant and as evidence of willingness of plaintiff to submit question on affidavit of defendant without filing counter-affidavits or testimony in contradiction of the facts alleged in the motion.—Eddy v. Summers, 39 A.2d 812, 183 Md. 683.

56. Ill.—Standard Statistics Co. v. Davis, 45 N.E.2d 1005, 317 Ill.App. 377—Rapp v. Goerlitz, 40 N.E.2d 766, first case, 314 Ill.App. 191.

57. **Non compos mentis**

In action on note, defendant's motion to vacate default judgment on ground that he was non compos mentis at time of execution of note, commencement of suit, and entry of judgment was vulnerable to plaintiff's motion to strike as against contention that such motion admitted defendant's mental incompetency at such times, in absence of allegations in defendant's motion as to foreign state court proceedings and judgments by which motion alleged that defendant was found non compos mentis and restored to legal capacity.—Standard Statistics Co. v. Davis, 45 N.E.2d 1005, 317 Ill.App. 377.

58. **Imposition on court**

Where plaintiff in an action of ejectment against an owner in fee and some of his tenants, after the cause had been placed on the calendar of one judge, went before a different judge, without notice to the owner, and without informing the judge that the answering defendant was the owner and the other defendants his tenants, and procured a dismissal as to the answering defendant and judgment by default against the other defendants, there was such a flagrant imposition on the court as to preclude plaintiff from pleading laches as a defense to a motion in the nature of a writ of error coram nobis to vacate the order of dismissal and default judgment.—Chicago Securities Corporation v. Olsen, 14 N.E.2d 893, 295 Ill.App. 615.

59. Wash.—Johnston v. Medina Improvement Club, 116 P.2d 272, 10 Wash.2d 44.

Guardian appointed for one who is mentally incompetent may be entitled to have a default judgment rendered against the ward vacated.—Citizens' State Bank of Cedar Rapids v. Young, 244 N.W. 294, 123 Neb. 786.

Payor of obligation

Fact that defendant, a seed company, paid to a lessor of land all that was due to the lessee for the services of the latter in raising a crop of seed on the land, such payment being made under agreement of all parties concerned to secure the payment of the rent due, did not deprive defendant of interest, so as to preclude it from moving to open a default judgment against it in favor of an assignee of the lessee, although the payment was made under an agreement of the lessor to defend any suit for the services rendered.—Sofuye v. Pieters-Wheeler Seed Co., 216 P. 990, 62 Cal.App. 193.

Grantors in an absolute conveyance of lands to secure payment of debt had equitable interest in the land, resulting in such an interest in subject matter of action to set aside such conveyance that they could maintain petition for review of default judgment obtained on service by publication, setting aside the conveyance.—Garrison v. Schmicke, Mo., 193 S.W.2d 614.

Transferee

A judgment in suit to quiet title, purporting to cancel trust deed securing payment of notes, which was void for lack of service on noteholders, was void as to transferee of notes after entry of judgment in quiet title suit, and such transferee, having interest in realty forming subject matter of quiet title suit, should be permitted to defend such suit.—Bray v. Germain Inv. Co., 98 P.2d 993, 105 Colo. 403.

60. Cal.—Burns v. Downs, 108 P.2d 953, 42 Cal.App.2d 322.

61. Wyo.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.

A board of education has no standing to vacate a judgment different from that of any other defendant.—Seither & Cherry Co. v. Board of Education of District No. 15, Town of La Harpe, 283 Ill.App. 392.

A stockholder cannot in the name of the corporation move to have a default judgment against the corporation set aside.—Hamill v. Great Northern Copper Co., 217 N.W. 195, 52 S.D. 271.

62. Pa.—Young v. Findley, 31 Pa. Dist. & Co. 630, 5 Sch.Reg. 176.

63. Wyo.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.

64. N.Y.—Wolfert v. New York City Ry. Co., 103 N.Y.S. 768, 53 Misc. 536.

65. Del.—Tweed v. Lockton, 167 A. 703, 5 W.W.Harr. 474.

66. Kan.—Withers v. Miller, 34 P.2d 110, 140 Kan. 123, 104 A.L.R. 692—Board of Com'rs of Wyandotte County v. Axtell, 5 P.2d 1078, 134

resentative or successor of defendant.[67] An application may not be made by one who has no interest in the subject matter of the action,[68] such as a person who has parted with all his interest before suit was filed,[69] but the application may be made in the name of a person who has parted with his interest after suit was filed where by statute or rules of practice an action may be continued in the name of the original party if the interest has been transferred.[70]

f. Notice or Process

Where a statute so requires, notice of a motion to set aside a default judgment must be given to the adverse party, unless the notice is waived.

In the absence of statute, notice of a motion to set aside a default judgment is unnecessary,[71] but if a statute so requires notice must be given to the adverse party,[72] unless notice is waived.[73] Persons who no longer have an interest in the subject matter of the suit are not adverse parties within such a statute.[74] Under some statutes it has been held that plaintiff must give notice where he seeks to reopen a default judgment in his favor in order to obtain additional relief,[75] but no notice to defendant is required where plaintiff seeks merely to vacate a judgment in favor of himself.[76]

The notice must comply substantially with the requirements of the statute,[77] and service of the notice must be timely made.[78] A statute which requires the grounds for the motion to be stated in

Kan. 804—Board of Com'rs of Cheyenne County v. Walter, 112 P. 599, 83 Kan. 743.

34 C.J. p 425 note 41.

67. Or.—Felts v. Boyer, 144 P. 420, 73 Or. 83.

34 C.J. p 425 note 42.

68. Neb.—Browne v. Palmer, 92 N. W. 315, 66 Neb. 287.

34 C.J. p 425 note 43.

69. Neb.—Browne v. Palmer, supra.

70. Kan.—Withers v. Miller, 34 P. 2d 110, 140 Kan. 123, 104 A.L.R. 692.

71. Okl.—Crook v. Heizer, 263 P. 447, 129 Okl. 36.

During term

A judgment by default may be set aside during the term at which it was rendered, without notice to the party in whose favor it was rendered.

Ark.—Metz v. Melton Coal Co., 47 S. W.2d 803, 185 Ark. 486.

Miss.—Planters' Lumber Co. v. Sibley, 93 So. 440, 130 Miss. 26.

72. Ala.—Dulin v. Johnson, 113 So. 397, 216 Ala. 393.

Cal.—Hicks v. Sanders, 104 P.2d 549, 40 Cal.App.2d 211.

Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521.

N.Y.—Walton Foundry Co. v. A. D. Granger Co., 196 N.Y.S. 719, 203 App.Div. 226.

Pa.—Hotel Redington v. Guffey, Com. Pl., 36 Luz.Leg.Reg. 209, 3 Monroe L.R. 82, affirmed 25 A.2d 773, 148 Pa.Super. 502.

Wyo.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, writ of error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.

Purpose of statute requiring complaint to be filed and notice to be issued as in original action in proceeding to set aside default judgment was to give sufficient notice to all of adverse parties of proceeding, and was not to create original civil action in which change of venue could be had.—State ex rel. Krodel v. Gilkison, 198 N.E. 323, 209 Ind. 213.

Notice to codefendant

(1) Where codefendant was a "necessary party" to defendant's motion to set aside default judgment and no notice of motion was given codefendant, trial court was without jurisdiction to set aside default judgment, as far as codefendant was affected thereby.—Washko v. Stewart, 112 P.2d 306, 44 Cal.App.2d 311.

(2) A motion to set aside a default judgment, made by one of several codefendants, need be served only on the party in whose favor the judgment runs where the statute simply provides for notice to the adverse party without defining that term.—Consolidated Wagon & Machine Co. v. Housman, 221 P. 143, 38 Idaho 343.

73. Cal.—Hicks v. Sanders, 104 P.2d 549, 40 Cal.App.2d 211.

Waiver by appearance

(1) Notice may be waived by appearing and participating in proceedings to open default judgment.

Ind.—Schaffner v. Preston Oil Co., 154 N.E. 780, 94 Ind.App. 554.

Okl.—Lofton v. McLucas, 113 P.2d 966, 189 Okl. 115.

(2) An appearance to defend against vacating the judgment in proceedings brought under one statute does not waive the notice required in proceedings under another statute.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.

74. **Transferor**

In suit by bondholders' trustee to foreclose trust deed on patented mining claims which were transferred by mortgagor, wherein default judgment was rendered against transferee, mortgagor corporation and its statutory trustees were held not "adverse parties" within statute requiring notice to adverse party on motion to vacate judgment.—Nielson v. Garrett, 43 P.2d 380, 55 Idaho 240.

75. Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521.

76. Okl.—Franklin v. Hunt Dry Goods Co., 123 P.2d 258, 190 Okl. 296.

77. Wyo.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.

Service at residence

Where attempted service, in suit to set aside default judgment quieting title, was defective because summons was not left at defendant's usual or last place of residence, court could not set aside default judgment.—Papuschak v. Burich, 185 N.E. 876, 97 Ind.App. 100.

Service of copy of petition

Ala.—Dulin v. Johnson, 113 So. 397, 216 Ala. 393.

Possible ambiguity held not fatal to motion

N.Y.—Conrad v. Harbaugh, 287 N.Y. S. 1012, 248 App.Div. 655.

Notice held sufficient

Nev.—Bowman v. Bowman, 217 P. 1102, 47 Nev. 207.

Okl.—Bagsby v. Bagsby, 89 P.2d 345, 184 Okl. 627, 122 A.L.R. 155.

78. N.Y.—Steinberg v. Blank, 205 N. Y.S. 620, 123 Misc. 388.

Pa.—Hotel Redington v. Guffey, Com. Pl., 36 Luz.Leg.Reg. 209, 3 Monroe L.R. 82, affirmed 25 A.2d 773, 148 Pa.Super. 502.

Before presentation of application

Where the statute requires notice by the applicant of his intention to make an application to set aside a default judgment, the adverse party should be given notice prior to presentation of application to court, but need not be given notice prior to filing of application.—Bagsby v. Bagsby, 89 P.2d 345, 184 Okl. 627, 122 A. L.R. 155.

the notice is sufficiently complied with if the grounds for the motion can be ascertained from the accompanying affidavits[79] or other papers attached to the notice.[80] Under some statutes service may be made on plaintiff outside the state.[81]

It has been held that a party who has been served with proper notice may not raise an objection that notice was not given to another party.[82]

g. Affidavits on Application

As a general rule a petition or motion to open or vacate a default judgment must be verified or supported by affidavits as to the facts set forth.

As a general rule a petition or motion to open or vacate a default judgment must be verified or supported by affidavits as to the facts set forth.[83] The affidavits in support of the motion must include all the facts which are essential to entitle movant to the relief sought,[84] and a mere statement of legal conclusions is not sufficient.[85] An affidavit need not aver that defendant had no actual notice of the pendency of the action in time to answer where such condition is not a prerequisite to a right to relief[86] or where the statute provides that the party moving to set aside the default must make it appear by affidavit or other evidence that he had no notice of the pendency of the action.[87] In the absence of a statutory requirement, the court may properly consider a motion which is not sworn to,[88] and, where an affidavit is required only by the court's own rule, the court may dispense with the affidavit when its action does not prejudice the other party.[89]

A verification or affidavit may be made by defendant's attorney if it states that the matters sworn to are true of the attorney's own knowledge;[90] it is

79. Cal.—Steuri v. Junkin, 298 P. 828, 113 Cal.App. 553—Gordon v. Harbolt, App., 280 P. 701, rehearing denied 281 P. 1048.

80. Cal.—Fink & Schindler Co. v. Gavros, 237 P. 1033, 72 Cal.App. 688.

81. Wash.—Harju v. Anderson, 215 P. 327, 125 Wash. 161.

Right to longer period for appearance

Where an action was still pending in the superior court for the purpose of proceeding to vacate the judgment when defendant or his attorneys were served in a foreign state, he cannot insist, as a matter of right, on a longer period for his appearance than he would have if he or his attorneys had been served physically within the state.—Harju v. Anderson, 215 P. 327, 125 Wash. 161.

82. Kan.—Board of Com'rs of Wyandotte County v. Axtell, 5 P.2d 1078, 134 Kan. 304.

Service on codefendants

Plaintiff could not complain that defendant's notice of motion for relief against default judgment was served on plaintiff alone and not on codefendants where defendant was seeking relief against plaintiff and not against codefendants, and no codefendant was complaining, and plaintiff had not been injured.—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257.

83. Ala.—Dulin v. Johnson, 113 So. 397, 216 Ala. 393.
Ark.—Merriott v. Kilgore, 139 S.W. 2d 387, 200 Ark. 394—Furst v. Boatman, 122 S.W.2d 139, 197 Ark. 1175.
Colo.—Nash v. Gurley, 3 P.2d 791, 89 Colo. 418.
N.J.—Kravitz Mfg. Corporation v. Style-Kraft Shirt Corporation, 21 A.2d 761, 127 N.J.Law 253.
Tenn.—Wright v. Lindsay, 140 S.W. 2d 793, 24 Tenn.App. 77.
Tex.—Peters v. Hubb Diggs Co., Civ. App., 35 S.W.2d 449, error dismissed.
Wash.—Johnston v. Medina Improvement Club, 116 P.2d 272, 10 Wash. 2d 44.
W.Va.—Sands v. Sands, 133 S.E. 463, 103 W.Va. 701.

Unverified motion amended by affidavit

An unverified motion to set aside a default judgment as amended by a supporting affidavit was the equivalent of a verified petition, and sufficient compliance with statute relating to proceedings for vacating judgments after term time, to warrant the court in entertaining the proceeding.—Fulton v. National Finance & Thrift Corporation, 4 N.W.2d 406, 232 Iowa 378.

84. Ky.—Guyan Machinery Co. v. Premier Coal Co., 163 S.W.2d 284, 291 Ky. 84.
34 C.J. p 354 note 71 [a] [b].
Grounds for opening or vacating default judgment see supra § 334.

Affidavits held insufficient

(1) In general.
Ill.—Hayden v. Bredemeier, 27 N.E. 2d 477, 305 Ill.App. 484—McNulty v. White, 248 Ill.App. 572—Precision Products Co. v. Cady, 233 Ill. App. 77.
Ky.—Bond v. W. T. Congleton Co., 129 S.W.2d 570, 278 Ky. 829.
Wyo.—Kelley v. Eidam, 231 P. 678, 32 Wyo. 271.

(2) To show excusable neglect.—Elms v. Elms, Cal.App., 164 P.2d 936—Doyle v. Rice Ranch Oil Co., 81 P.2d 980, 28 Cal.App.2d 18.

Affidavits held sufficient

(1) In general.
Cal.—Bodin v. Webb, 62 P.2d 155, 17 Cal.App.2d 422—Salsberry v. Julian, 277 P. 516, 93 Cal.App. 638, followed in 277 P. 518, amended 278 P. 257, 93 Cal.App. 645.
Mich.—Tallis v. Stuart, 255 N.W. 354, 268 Mich. 84.
N.Y.—Martin v. Peters, 60 N.Y.S.2d 122.

(2) To show lack of personal service.—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272.

(3) To show mistake of law.—John A. Vaughan Corporation v. Title Insurance & Trust Co., 12 P.2d 117, 123 Cal.App. 709.

85. Idaho.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521.
Ill.—McGregor v. Lamont, 225 Ill. App. 451.

Oversight and inadvertence

An affidavit to set aside a judgment or default is insufficient where it merely states that the judgment or order sought to be vacated was taken by oversight and inadvertence and does not state the facts and circumstances which it is claimed constitute the oversight and inadvertence.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521.

86. Nev.—Bowman v. Bowman, 217 P. 1102, 47 Nev. 207.

87. Okl.—Lofton v. McLucas, 113 P.2d 966, 189 Okl. 115.

88. Ga.—Hooper v. Weathers, 165 S.E. 52, 175 Ga. 133.

89. Pa.—McFadden v. Pennzoil Co., 191 A. 584, 326 Pa. 277.

90. Ariz.—Huff v. Flynn, 60 P.2d 931, 48 Ariz. 175.
Ind.—Padol v. Home Bank & Trust Co., 27 N.E.2d 917, 108 Ind.App. 401.
Nev.—Bowman v. Bowman, 217 P. 1102, 47 Nev. 207.

insufficient if it does not allege personal knowledge[91] or the source of the information.[92] Under some statutes the affidavit need not be made by applicant but may be made by anyone knowing the facts, for and on behalf of all concerned.[93]

Affidavits are to be construed most strongly against the pleader.[94]

The necessity and sufficiency of an affidavit of merits are considered supra § 336.

h. Counter-Affidavits

The party seeking to sustain the default judgment may present counter-affidavits with respect to the alleged grounds for vacating the judgment or to the matters set up in excuse of the defendant's failure to make his defense in good time.

The party seeking to sustain the default judgment may present affidavits in opposition to those of the moving party with respect to the alleged grounds for vacating the judgment or to the matters set up in excuse of defendant's failure to make his defense in due time,[95] but if a trial on the merits is improper, as discussed infra subdivision j (3) of this section, counter-affidavits on the merits of the defense are improper[96] and are insufficient as a basis for precluding relief to defendant.[97]

i. Evidence

(1) Presumptions and burden of proof
(2) Admissibility
(3) Weight and sufficiency

(1) Presumptions and Burden of Proof

As a general rule the defaulted party has the burden of proving the facts entitling him to have the judgment opened or vacated. A judgment regular on its face will be presumed to have been properly entered where the record shows nothing inconsistent with the presumption.

As a general rule the party who seeks to have the default judgment opened or vacated has the burden of proving the facts entitling him to the relief asked,[98] such as excusable neglect,[99] due diligence or freedom from negligence,[1] unavoidable casualty

Mistake of attorney

Where the default is sought to be set aside because of the mistake of the attorney, an affidavit of the party himself in support of the motion is not necessary.—Morgan v. Brothers of Christian Schools, 92 P.2d 935, 34 Cal.App.2d 14.

91. N.Y.—Titus v. Halsted, 204 N.Y.S. 241, 209 App.Div. 66—Crouse Grocery Co. v. Valentine, 226 N.Y.S. 613, 131 Misc. 571.

92. Pa.—Borteck v. Goldenburg, 87 Pa.Super. 602.

Statements by client

Defaults are not opened on attorney's averments of what client told him, unless client swears that information imparted is true.—Crouse Grocery Co. v. Valentine, 226 N.Y.S. 613, 131 Misc. 571.

93. Ind.—Padol v. Home Bank & Trust Co., 27 N.E.2d 917, 108 Ind. App. 401.
34 C.J. p 428 note 75 [b].

94. Ill.—Stellwagen v. Schmidt, 234 Ill.App. 325.

95. Ill.—Sheehan v. Pioneer Lucky Strike Gold Mining Co., 54 P.2d 72, 11 Cal.App.2d 530—Gilchrist Transp. Co. v. Northern Grain Co., 68 N.E. 558, 204 Ill. 510—Reed v. Curry, 35 Ill. 536—Crystal Lake Country Club v. Scanlan, 264 Ill. App. 44—Elaborated Ready Roofing Co. v. Hunter, 262 Ill.App. 380—Kloepher v. Osborne, 177 Ill. App. 384.

96. Cal.—Salsberry v. Julian, 277 P. 516, 93 Cal.App. 638, followed in 277 P. 518, amended 278 P. 257, 93 Cal.App. 645.
Ill.—Gilchrist Transp. Co. v. Northern Grain Co., 68 N.E. 558, 204 Ill. 510—Mendell v. Kimball, 85 Ill. 582—Crystal Lake Country Club v. Scanlan, 264 Ill.App. 44—Mutual Life of Illinois v. Little, 227 Ill. App. 436—Kloepher v. Osborne, 177 Ill.App. 384—Scrafield v. Sheeler, 18 Ill.App. 507—Kalkaska Mfg. Co. v. Thomas, 17 Ill.App. 235—Thelin v. Thelin, 8 Ill.App. 421.

Waiver of objections

On a motion to vacate a default judgment where plaintiff introduced counter-affidavits on the merits and no objection was then raised to their consideration or motion made to strike them out, having failed to make objection in the court below, defendant waived the right to object to them thereafter on appeal.—Washington Mill Co. v. Marks, 67 P. 565, 27 Wash. 170.

97. Cal.—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272.

98. Colo.—Connell v. Continental Casualty Co., 290 P. 274, 87 Colo. 573—Redeker v. Denver Music Co., 265 P. 631, 83 Colo. 370.
Ill.—Shaw v. Carrara, 38 N.E.2d 785, 312 Ill.App. 410.
Ind.—Carty v. Toro, 57 N.E.2d 434.
Mass.—Kravetz v. Lipofsky, 200 N.E. 865, 294 Mass. 80.
Ohio.—Rabinovitz v. Novak, App., 31 N.E.2d 151.
Okl.—Gavin v. Heath, 256 P. 745, 125 Okl. 118.
Or.—**Corpus Juris cited in** Peterson v. Hutton, 284 P. 279, 280, 132 Or. 252.
Pa.—Caromono v. Garman, 23 A.2d 92, 147 Pa.Super. 1—Planters Nut & Chocolate Co. v. Brown-Murray Co., 193 A. 381, 128 Pa.Super. 239.
Tex.—Commercial Credit Corp. v. Smith, 137 S.W.2d 363, 143 Tex. 612—Harris v. Sugg, Civ.App., 143 S.W.2d 149, error dismissed, judgment correct—Smalley v. Octagon Oil Co., Civ.App., 82 S.W.2d 1049, error dismissed—Babington v. Gray, Civ.App., 71 S.W.2d 293.
Wash.—Larson v. Zabroski, 152 P.2d 154, 21 Wash.2d 572, opinion adhered to 155 P.2d 284, 21 Wash.2d 572.
34 C.J. p 352 note 50.

Appeal to court's discretion

Before trial court will set aside default judgment, facts must be shown which appeal to court's discretion.—Savage v. Stokes, 28 P.2d 900, 54 Idaho 109.

99. Cal.—Weinberger v. Manning, 123 P.2d 531, 50 Cal.App.2d 494.
Iowa.—Booth v. Central States Mut. Ins. Ass'n, 15 N.W.2d 893, 235 Iowa 5.
Ohio.—Rabinovitz v. Novak, App., 31 N.E.2d 151.
Wash.—Jacobsen v. Defiance Lumber Co., 253 P. 1088, 142 Wash. 642.

Absence of requirement at common law

Showing of facts and circumstances constituting oversight and inadvertence, alleged as ground for vacation of default and judgment thereon, cannot be dispensed with because they are not required at common law.—Occidental Life Ins. Co. v. Niendorf, 44 P.2d 1099, 55 Idaho 521.

1. Mo.—Meyerhardt v. Fredman, App., 131 S.W.2d 916—Anspach v. Jansen, 78 S.W.2d 137, 229 Mo. App. 321.
Pa.—Caromono v. Garman, 23 A.2d

and misfortune,[2] nonservice of summons,[3] absence of knowledge of the proceedings in time to make a defense,[4] prompt action to set aside the default,[5] irregularity in the entry of the judgment,[6] or fraud.[7]

A default judgment will be presumed to have been properly entered where it is regular on its face and the record shows nothing inconsistent with the presumption,[8] but, if the record does not affirmatively show that the proceedings were according to law, it has been held that nothing will be presumed in favor of the judgment.[9] Presumptions will be indulged, requiring evidence to overcome them, that the recitals in the record are correct,[10] and that a public officer fulfilled his duty.[11] The presumptions are prima facie only and may be overcome by proof.[12]

There is no presumption against a defendant only constructively served of notice or lack of diligence,[13] and, where the party seeking to set aside a default judgment rendered on constructive service makes a prima facie showing for relief, the burden is on plaintiff to show laches or inexcusable neglect or other circumstances which would make the granting of relief inequitable.[14] However, where the statute requires a showing that defendant had no actual notice, the burden of proving the absence of actual notice is on defendant.[15] In a proceeding to vacate a judgment rendered on con-

92, 147 Pa.Super. 1—Planters Nut & Chocolate Co. v. Brown-Murray Co., 193 A. 381, 128 Pa.Super. 239.
Tex.—Sunshine Bus Lines v. Craddock, Civ.App., 112 S.W.2d 248, affirmed Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 134 Tex. 388—San Antonio Paper Co. v. Morgan, Civ.App., 53 S.W.2d 651, error dismissed.

2. Ky.—Carter v. Miller, 95 S.W.2d 29, 264 Ky. 532.

3. Ark.—Rockamore v. Pembroke, 188 S.W.2d 616, 208 Ark. 995—O'Neal v. B. F. Goodrich Rubber Co., 162 S.W.2d 52, 204 Ark. 371.
N.D.—First State Bank of Strasburg v. Schmaltz, 237 N.W. 644, 61 N.D. 150—Beery v. Peterson, 225 N.W. 798, 58 N.D. 273.
Or.—Peterson v. Hutton, 284 P. 279, 132 Or. 252.

Impropriety of service by publication
In order to show a lack of jurisdiction in the court to render the judgment when service was had by publication, defendant must show that service by publication was improper.—Van Rhee v. Dysert, 191 N. W. 53, 154 Minn. 32.

4. Ark.—O'Neal v. B. F. Goodrich Rubber Co., 162 S.W.2d 52, 204 Ark. 371.

5. S.D.—Connelly v. Franklin, 210 N.W. 735, 50 S.D. 512.

Within statutory limitation
Defendant who sought to have default judgment against him in action on note set aside because he was designated throughout the proceedings by the wrong middle initial had burden of proving that he had knowledge of entry of judgment for not more than one year prior to date when judgment was sought to be set aside, where the statute requires proceedings to be instituted within one year after knowledge of judgment.—Cacka v. Gaulke, 3 N.W.2d 791, 212 Minn. 404.

6. Ohio.—Davis v. Teachnor, App., 53 N.E.2d 208.

7. Ohio.—Rabinovitz v. Novak, App., 31 N.E.2d 151.

8. Ind.—Walsh v. H. P. Wasson & Co., 13 N.E.2d 696, 213 Ind. 556—Hoag v. Jeffers, 159 N.E. 753, 201 Ind. 249.
Ohio.—Davis v. Teachnor, App., 53 N.E.2d 208—Strain v. Isaacs, 18 N. E.2d 816, 59 Ohio App. 495.

Facts outside record
On petition to vacate default judgment against defendant, plaintiff was not required to support judgment by proof of facts outside record.—Strain v. Isaacs, 18 N.E.2d 816, 59 Ohio App. 495.

Failure of attorney to act
Where motion for judgment by default was served on a regular practicing attorney in the division, who was a clerk for defendant's attorney and who accepted service as one of defendant's attorneys, if there was any reason why default judgment should not have been entered, the attorney had duty to inform himself and make the proper showing, and on failure to do so the court was required to conclude that default and judgment were duly and regularly entered.—Rubenstein v. Imlach, 9 Alaska 62.

9. Ark.—Vaccinol Products Corporation v. State, for Use and Benefit of Phillips County, 148 S.W.2d 1069, 201 Ark. 1066.

10. **Sheriff's return**
Fact that no attempt had been made to levy on personal estate of garnishee before proceeding against real estate was held not to justify opening default judgment against garnishee, in view of presumption that sheriff's return of nulla bona as to personalty was true.—Jennings v. Yanovitz, 175 A. 721, 115 Pa.Super. 427.

11. **Duty to mail process**
Where default judgment entered by circuit court was made subject of direct attack on ground of insufficient service of process on agent of defendant, presumption that copy of process was duly mailed by clerk to home office of defendant association by registered letter was held to prevail, in absence of affirmative showing that copy of process was not duly mailed.—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604.

12. Ark.—First Nat. Bank v. Turner, 275 S.W. 703, 169 Ark. 393.

Service of summons
(1) On a motion by a defendant to vacate a judgment on the ground that no service of summons was made on him, the proof of service on which the judgment is predicated may be contradicted, and defendant may show that such proof of service is untrue.—Baird v. Ellison, 293 N. W. 794, 70 N.D. 261.

(2) Defendant could, on petition, after term, in order to vacate default judgment, show that place where copy of summons was left was not defendant's usual place of residence as recited in sheriff's return.—Hayes v. Kentucky Joint Stock Land Bank of Lexington, 181 N.E. 542, 125 Ohio St. 359.

13. Cal.—Randall v. Randall, 264 P. 751, 203 Cal. 462.
34 C.J. p 427 note 61.

14. Cal.—Gray v. Lawlor, 90 P. 691, 151 Cal. 352, 12 Ann.Cas. 990.
Nev.—Nahas v. Nahas, 92 P.2d 718, 59 Nev. 220.

Service not calculated to give actual notice
With respect to opening default judgment, if manner of constructive service is not calculated to give actual notice, notice is not presumed, and adversary has burden of proving it. —Naisbitt v. Herrick, 290 P. 950, 76 Utah 575.

15. Wyo.—Clarke v. Shoshoni Lumber Co., 224 P. 845, 31 Wyo. 205, error dismissed 48 S.Ct. 302, 276 U.S. 595, 72 L.Ed. 722.

structive service, it has been held that it is not incumbent on applicant to show that the original judgment was wrong.[16]

(2) Admissibility

As a general rule in passing on an application to open or set aside a default judgment, the court may admit any evidence which may properly aid it in reaching a conclusion, but irrelevant and immaterial evidence may properly be excluded.

Unless the decision in a proceeding to open or set aside a default judgment is to be made only on the motion and supporting affidavits,[17] or on the record,[18] as a general rule the court may admit any evidence which may properly aid it in reaching a conclusion,[19] but irrelevant and immaterial evidence may properly be excluded.[20] The exclusion of evidence showing that defendant is protected by insurance is not necessary.[21]

Meritorious defense. Evidence of a meritorious defense is admissible where the existence of a meritorious defense is properly at issue,[22] or where the court is entitled to determine whether a prima facie valid defense exists,[23] but it is not admissible where the existence of a defense is not in issue;[24] and, if the existence of the defense must be determined on the motion and affidavits alone, evidence as to whether the defense could be sustained is inadmissible.[25]

(3) Weight and Sufficiency

The defaulted party should establish the facts on which he relies as grounds for relief by a preponderance of the evidence, or by clear, convincing, and satisfactory proof.

In order to be entitled to have a regularly entered default judgment opened or vacated, the defaulted party should establish the facts on which he relies as grounds for relief by a preponderance of the evidence,[26] or by clear, convincing, and satisfactory proof;[27] but it has been held that a showing of the excusability of neglect need not be strong where the showing of a meritorious defense is con-

16. Ind.—Padol v. Home Bank & Trust Co., 27 N.E.2d 917, 108 Ind. App. 401—Gary Hobart Inv. Realty Co. v. Earle, 135 N.E. 798, 78 Ind.App. 412.

17. Tenn.—Fidelity - Phenix Fire Ins. Co. v. Oliver, 152 S.W.2d 254, 25 Tenn.App. 114.

18. Mo.—Jeffrey v. Kelly, App., 146 S.W.2d 850.

19. **Knowledge of action**
Where defendants' notice of motion to set aside default judgment recited that they did not have knowledge of pendency of action until after judgment was rendered, admitting evidence tending to show that defendants had such knowledge before judgment was rendered, and part of which threw light on issue of service, was held not error.—Wood v. Peterson Farms Co., 22 P.2d 565, 132 Cal.App. 233.

Evidence of error of fact unknown to judge at the time he rendered judgment may be admissible.—Stanke v. Atherton, 7 N.E.2d 467, 289 Ill.App. 614.

Evidence of custom and practice of attorneys may be admitted.—Lunt v. Van Gorden, 281 N.W. 743, 225 Iowa 1120.

Evidence to rebut proof of service may be admitted.
D.C.—James E. Colliflower & Co. v. McCallum-Sauber Co., 63 F.2d 366, 61 App.D.C. 390.
N.D.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261.

Evidence in support of judgment
Ill.—Marland Refining Co. v. Lewis, 264 Ill.App. 163.
Tex.—Pellum v. Fleming, Civ.App., 283 S.W. 531, error refused Fleming v. Pellum, 287 S.W. 492, 116 Tex. 130.

Amended return of service
Where, on hearing of motion to set aside default judgment because of allegedly defective service of citation, amended return was admitted in evidence over objection and motion denied, court's conclusion was held tantamount to definite finding in favor of validity of return as amended, warranting inference that amendment was made with knowledge and consent of court and was, therefore, presumptively with its authority.—Employer's Reinsurance Corporation v. Brock, Tex.Civ.App., 74 S.W.2d 435, error dismissed.

20. Ill.—Standard Statistics Co. v. Davis, 45 N.E.2d 1005, 317 Ill.App. 377.
Okl.—Elias v. Smith, 246 P. 409, 117 Okl. 273.
Tex.—Allen v. Frank, Civ.App., 252 S.W. 347.

21. **References to insurance in affidavit**
Refusal to strike references that defendant carried indemnity insurance, inserted in plaintiff's affidavit counter to defendant's affidavits in support of motion to open default judgment in automobile accident case, was held not error, since the reason for refusing to admit evidence, in a trial before a jury, that defendant is protected by insurance does not apply.—Bissonette v. Joseph, 170 S.E. 467, 170 S.C. 407.

22. Ark.—Metropolitan Life Ins. Co. v. Duty, 126 S.W.2d 921, 197 Ark. 1118.

23. Okl.—Kellogg v. Smith, 42 P.2d 493, 171 Okl. 355.
Tex.—Lawther Grain Co. v. Winniford, Com.App., 249 S.W. 195—Babington v. Gray, Civ.App., 71 S.W.2d 293.

24. La.—Cutrer v. Cutrer, App., 169 So. 807.

Absence of excuse for default
If there has been no excuse for failure of defendant to answer, evidence of a meritorious defense is inadmissible.—Metropolitan Life Ins. Co. v. Duty, 126 S.W.2d 921, 197 Ark. 1118.

25. R.I.—Milbury Atlantic Mfg. Co. v. Rocky Point Amusement Co., 118 A. 737, 44 R.I. 458.

26. Cal.—Weinberger v. Manning, 123 P.2d 531, 50 Cal.App.2d 494.

27. Cal.—Dunn v. Standard Accident Ins. Co., 299 P. 575, 114 Cal. App. 208.
Colo.—Redeker v. Denver Music Co., 265 P. 681, 83 Colo. 370.
Md.—Weisman v. Davitz, 199 A. 476, 174 Md. 447—Dixon v. Baltimore American Ins. Co. of New York, 188 A. 215, 171 Md. 695.
Mo.—State ex rel. Sterling v. Shain, 129 S.W.2d 1043, 344 Mo. 891.
N.Y.—De Marco v. McConnell, 260 N.Y.S. 540, 146 Misc. 9.
Okl.—Tidal Oil Co. v. Hudson, 219 P. 95, 95 Okl. 209.
Tex.—Grand United Order of Odd Fellows v. Wright, Civ.App., 76 S.W.2d 1073.

Fraud
In petition to vacate judgment for fraud evidence must be clear and convincing.—In re Veselich, 154 N.E. 55, 22 Ohio App. 528.

vincing.[28] In order to show lack of notice or process, defendant may impeach an officer's return of process by parol evidence,[29] but the evidence must be clear, cogent, and convincing,[30] and the testimony of a single witness, however credible, has been held not to be sufficient.[31] A motion to set aside a default judgment for irregularities on the face of the record must be denied where it is supported only by evidence outside the record.[32]

Under the particular facts and circumstances of the case, the evidence has been held sufficient[33] or insufficient[34] generally to entitle defendant to have the default judgment set aside or vacated, or it has been specifically held sufficient[35] or insufficient[36] to show lack of proper notice or process; sufficient[37] or insufficient[38] to show mistake, inadvertence, or excusable neglect; sufficient to show unmoved to set aside judgment on ground that alleged agent was not its agent, a letter appearing in record showing that alleged agent once represented corporation in securing a contract was, without more, insufficient to prove fact of agency to receive process.—Consolidated Radio Artists v. Washington Section, National Council of Jewish Juniors, 105 F.2d 785, 70 App.D.C. 262.

28. Wash.—Jacobsen v. Defiance Lumber Co., 253 P. 1088, 142 Wash. 642.

29. N.C.—Dunn v. Wilson, 187 S.E. 802, 210 N.C. 493.

30. Okl.—Neff v. Edwards, 230 P. 234, 167 Okl. 101—Okmulgee Producing & Refining Co. v. Pilsbry-Becker Engineering & Supply Co., 214 P. 185, 89 Okl. 200.
Tex.—San Antonio Paper Co. v. Morgan, Civ.App., 53 S.W.2d 651, error dismissed.
Clear and unequivocal proof
N.C.—Dunn v. Wilson, 187 S.E. 802, 210 N.C. 493.
N.D.—First State Bank of Strasburg v. Schmaltz, 237 N.W. 644, 61 N. D. 150.

31. Tex.—San Antonio Paper Co. v. Morgan, Civ.App., 53 S.W.2d 651, error dismissed.
Uncorroborated parol testimony of defendant that summons was not served on him is insufficient to warrant the setting aside of a default judgment.
N.Y.—Biala v. Abramow, 277 N.Y.S. 416, 154 Misc. 536.
Okl.—Bates v. Goode, 281 P. 558, 139 Okl. 141—Neff v. Edwards, 230 P. 234, 167 Okl. 101.

32. Mo.—Buchholz v. Manzella, App., 158 S.W.2d 200—Jeffrey v. Kelly, App., 146 S.W.2d 850.

33. Ark.—Smith v. Globe & Rutgers Fire Ins. Co., 295 S.W. 388, 174 Ark. 346, followed in Deatherage v. Dennison, 295 S.W. 390, 173 Ark. 1180.
Cal.—Palmer v. Lantz, 9 P.2d 831, 215 Cal. 320—Rogers v. Schneider, 270 P. 451, 205 Cal. 202—Paul v. Walburn, 26 P.2d 1002, 135 Cal. App. 364.
Ill.—Clausen v. Varrin, 11 N.E.2d 320, 292 Ill.App. 641—Marland Refining Co. v. Lewis, 264 Ill.App. 163—Crystal Lake Country Club v. Scanlan, 264 Ill.App. 44.
Iowa.—Fulton v. National Finance & Thrift Corporation, 4 N.W.2d 406, 232 Iowa 378.
Mass.—Almeida v. Socony-Vacuum Oil Co., 49 N.E.2d 217, 314 Mass. 28.
N.J.—Niagara Realty Co. v. Consolidated Indemnity & Insurance Co., 166 A. 118, 11 N.J.Misc. 361—Phillips v. Adams, 136 A. 596, 5 N.J. Misc. 377.
N.Y.—Di Maggio v. Magnelli, 16 N. Y.S.2d 735.
Okl.—Lane v. O'Brien, 49 P.2d 171, 173 Okl. 475—W. W. Bennett & Co. v. La Fayette, 271 P. 248, 133 Okl. 233—Thompson v. Hensley, 261 P. 931, 128 Okl. 139—Carter v. Grimmett, 213 P. 732, 89 Okl. 37.
R.I.—Chernick v. Annelfo, 17 A.2d 848, 66 R.I. 95.

34. La.—P. E. Fitzpatrick & Co. v. Hessler, App., 150 So. 392.
Miss.—Lee v. Spikes, 112 So. 588, 145 Miss. 897.
Mo.—Cornoyer v. Oppermann Drug Co., App., 56 S.W.2d 612.
Neb.—Drake v. Ralston, 288 N.W. 377, 137 Neb. 72.
N.J.—Smith v. White, 16 A.2d 628, 125 N.J.Law 493.
N.Y.—Rose v. Romano, 28 N.Y.S.2d 16, 262 App.Div. 731.
N.C.—Pailin v. Richmond Cedar Works, 136 S.E. 635, 193 N.C. 256.
Pa.—Anderson v. Shaffer, 18 Pa.Dist. & Co. 334—Sanders v. Krater, Com. Pl., 57 York Leg.Rec. 33.
Tex.—Dickson v. Navarro County Levee Improvement Dist. No. 3, Civ.App., 124 S.W.2d 943, reversed on other grounds 139 S.W.2d 260, 135 Tex. 102, and followed in Dickson v. Ellis County Levee Improvement Dist. No. 10, 124 S.W.2d 946, set aside Dickson v. Navarro County Levee Imp. Dist. No. 3, 139 S. W.2d 257, 135 Tex. 95—Smalley v. Octagon Oil Co., Civ.App., 32 S.W. 2d 1049, error dismissed—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed—Briggs v. Ladd, Civ. App., 64 S.W.2d 389—Humphrey v. Harrell, Civ.App., 19 S.W.2d 410, affirmed, Com.App., 29 S.W.2d 963.
Wash.—Turner v. Brassesco, 219 P. 11, 126 Wash. 658.

35. N.J.—Deighan v. Beverage Retailer Weekly & Trade Newspaper Corporation, 16 A.2d 612, 18 N.J. Misc. 705.
N.D.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261.
Agency to receive process
In action against foreign corporation wherein service of process was had on alleged agent of corporation, default judgment was entered, and corporation appeared specially and

36. Ark.—Federal Land Bank of St. Louis v. Cottrell, 126 S.W.2d 279, 197 Ark. 733.
Ky.—Joseph v. Bailey, 277 S.W. 466, 211 Ky. 394.
Md.—Weisman v. Davitz, 199 A. 476, 174 Md. 447.
Minn.—Van Rhee v. Dysert, 191 N. W. 53, 154 Minn. 32.
Or.—Peterson v. Hutton, 284 P. 279, 132 Or. 252.
Tex.—San Antonio Paper Co. v. Morgan, Civ.App., 53 S.W.2d 651, error dismissed.

37. Cal.—Hadges v. Kouris, 162 P. 2d 476, 71 Cal.App.2d 213—Fink & Schindler Co. v. Gavros, 237 P. 1083, 72 Cal.App. 688.
Mental and physical distress
Evidence that plaintiff, seeking to reform default judgment, was in mental and physical distress at time citation was served on her was held to justify finding that her failure to answer was excusable.—Hadad v. Ellison, Tex.Civ.App., 283 S.W. 193.
Failure to receive notice of hearing
Evidence was held to sustain chancellor's decree setting aside default judgment because of failure of plaintiff's attorney to receive notice of hearing.—Metz v. Melton Coal Co., 47 S.W.2d 803, 185 Ark. 486.

38. Cal.—Dunn v. Standard Accident Ins. Co., 299 P. 575, 114 Cal.App. 208.
Ind.—Walsh v. H. P. Wasson & Co., 13 N.E.2d 696, 213 Ind. 556—Hoag v. Jeffers, 159 N.E. 753, 201 Ind. 249—Kuhn v. Indiana Ice & Fuel Co., 11 N.E.2d 508, 104 Ind.App. 387.
Miss.—Lee v. Spikes, 112 So. 588, 145 Miss. 897.
Mo.—Koester v. McNealey, App., 274 S.W. 475.
Mont.—Grant v. Hewitt, 208 P. 887, 63 Mont. 422.
Tex.—Canion v. Brown, Civ.App., 48 S.W.2d 1031.

avoidable casualty or misfortune;[39] sufficient[40] or insufficient[41] to show proper diligence; sufficient to show a legal excuse for delay in filing the motion;[42] or insufficient to show fraud,[43] irregularities,[44] or lack of good faith.[45]

j. Hearing and Determination

(1) In general
(2) Discretion of court generally
(3) Merits of cause of action or defense
(4) Principles and rules of decision

(1) In General

Generally, where issues of fact are presented in proceedings to open or set aside a default judgment, the court should conduct a hearing or require further depositions or affidavits, and thereupon determine the questions of law and of fact which are properly presented.

Where an application to open or set aside a default judgment is contested and issues of fact are presented, the court should conduct a hearing or require further depositions or affidavits on the issues raised,[46] and, unless the question can be determined from an inspection of the record, it has been held to be error to grant or dismiss the motion summarily or on an ex parte hearing.[47] Except to the extent to which the proceedings are governed by statute, the court has a reasonable discretion with respect to the form and manner of proof.[48]

Under some statutes the court may receive oral evidence,[49] or it may consider affidavits[50] in addition to those presented with the motion,[51] but under the statutes or rules of practice in some jurisdictions a verified petition which was the basis of the rule to show cause and ex parte affidavits may not be considered,[52] and applicant must supply proof by deposition taken on notice.[53] It is proper for the court to try and determine the existence and sufficiency of the alleged grounds for opening or vacating a default judgment before trying, or deciding the existence of, a meritorious cause of action or defense.[54]

The credibility or veracity of affiants or witnesses,[55] and the weight of the evidence,[56] are for the trial court's determination, and it must determine the questions of law and of fact which are properly presented in the proceedings.[57] Accord-

39. Ark.—Mayberry v. Penn, 146 S.W.2d 925, 201 Ark. 756.

40. Minn.—Van Rhee v. Dysert, 191 N.W. 53, 154 Minn. 32.
Mo.—Karst v. Chicago Fraternal Life Ass'n, App., 22 S.W.2d 178.
Tex.—Camden Fire Ins. Co. v. Hill, Com.App., 276 S.W. 887.

Evidence held not to show negligence
Tex.—Hubbard v. Tallal, Civ.App., 57 S.W.2d 226, reversed on other grounds and appeal dismissed 92 S.W.2d 1022, 127 Tex. 242.

41. Ill.—Rome v. D. Warshafsky, Inc., 19 N.E.2d 759, 299 Ill.App. 609.

42. Tex.—Camden Fire Ins. Co. v. Hill, Com.App., 276 S.W. 887.

43. N.D.—Walrod v. Nelson, 210 N.W. 525, 54 N.D. 753.

44. Ohio.—Davis v. Teachnor, App., 53 N.E.2d 208.

45. Kan.—Withers v. Miller, 34 P.2d 110, 140 Kan. 123, 104 A.L.R. 692.

46. Pa.—Hamilton v. Sechrist, 16 A.2d 671, 142 Pa.Super. 354.
Wash.—Baer v. Lebek, 219 P. 22, 120 Wash. 576.

Where averments are not denied, no depositions are required to support the application.—Sockett v. Philadelphia Toilet & Laundry Co., 92 Pa.Super. 254.

Hearing held sufficient
Wis.—Wujcik v. Globe & Rutgers Fire Ins. Co. of New York, 207 N.W. 710, 189 Wis. 366.

47. Pa.—Hamilton v. Sechrist, 16 A.2d 671, 142 Pa.Super. 354.

Ex parte affidavits should be strictly scrutinized.
U.S.—Silver Peak Gold Min. Co. v. Harris, C.C.Nev., 116 F. 439.
Ill.—Mendell v. Kimball, 85 Ill. 582.

48. Cal.—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257.

Limiting time for proof
Trial court was held not to have abused discretion in limiting time within which defendant might introduce testimony in proof of his contention that he had received no notice of intended hearing in case prior to rendition of default judgment against him, in view of defendant's previous dilatory conduct.—Woodsville Fire Dist. v. Cray, 187 A. 473, 88 N.H. 264.

49. Cal.—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257.
Ill.—Simon v. Foyer, 17 N.E.2d 632, 297 Ill.App. 640.
Okl.—Turner v. Dexter, 44 P.2d 984, 172 Okl. 252.
Pa.—Bott v. Aronimink Transp. Co., Com.Pl., 31 Del.Co. 172.

50. Cal.—Hollywood Garment Corporation v. J. Beckerman, Inc., 143 P.2d 738, 61 Cal.App.2d 658.
D.C.—Marvin's Credit v. Kitching, Mun.App., 34 A.2d 866.
Kan.—York v. Bundy, 23 P.2d 447, 138 Kan. 20.

Affidavit attached to pleadings on application to vacate default judgment and for new trial is not evidence respecting lack of negligence in suffering default.—Canion v. Brown, Tex.Civ.App., 48 S.W.2d 1031.

A motion for new trial after judgment on service of process against defendant not appearing, although sworn to, was not evidence of the facts therein alleged, especially where answer thereto was a sworn denial.—Harris v. Sugg, Tex.Civ.App., 143 S.W.2d 149, error dismissed, judgment correct.

51. Cal.—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257.

52. N.J.—Kravitz Mfg. Corporation v. Style-Kraft Shirt Corporation, 21 A.2d 761, 127 N.J.Law 253—Atlantic Casualty Ins. Co. v. Warnock Bros., 1 A.2d 482, 121 N.J.Law 71.

53. N.J.—Kravitz Mfg. Corporation v. Style-Kraft Shirt Corporation, 21 A.2d 761, 127 N.J.Law 253.

54. S.C.—**Corpus Juris cited** in Lucas v. North Carolina Mut. Life Ins. Co., 191 S.E. 711, 712, 184 S.C. 119.
34 C.J. p 373 note 94.

55. Ariz.—Beltran v. Roll, 7 P.2d 248, 39 Ariz. 417.
Cal.—Zuver v. General Development Co., 28 P.2d 939, 136 Cal.App. 411.

56. Cal.—Bonfilio v. Ganger, 140 P.2d 861, 60 Cal.App.2d 405—Zuver v. General Development Co., 28 P.2d 939, 136 Cal.App. 411.

57. Cal.—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272—Greenamyer v. Board of Trustees of Lugo Elementary School Dist. in

ingly, the court must decide whether defendant exercised reasonable diligence in making the motion to open or vacate the default judgment,[58] whether defendant's failure to defend was excusable,[59] whether service of notice was properly made,[60] and whether the court had jurisdiction to enter judgment.[61] Issues not involved in the proceedings are not to be determined.[62] In consonance with equity practice the court may elect to have questions of fact submitted to a jury for decision,[63] but in such cases the verdict of the jury is merely advisory, and it is not binding on the court.[64]

The trial court may take all the matters and circumstances bearing on the case into consideration,[65] including events which occur after entry of the default judgment,[66] and it may rest its action on matters within its own knowledge.[67] Facts and circumstances which are not material to the motion should not be considered.[68] Uncontradicted facts stated in motions or affidavits should be taken as

Los Angeles County, 2 P.2d 348, 116 Cal.App. 319.
Fla.—Kellerman v. Commercial Credit Co., 189 So. 689, 138 Fla. 133.
Ind.—Haley v. Burke-Cadilac Co., 170 N.E. 791, 91 Ind.App. 603.
Okl.—Turner v. Dexter, 44 P.2d 984, 172 Okl. 252.

Judgment entered in ignorance of facts

Whether motion to vacate default judgment discloses that judgment has been entered by court in ignorance of existing facts, which if known would have prevented entry of the judgment, is question of law for the court.—Katauski v. Eldridge Coal & Coke Co., 255 Ill.App. 41.

58. Minn.—Roe v. Widme, 254 N.W. 274, 191 Minn. 251.

59. Ala.—Mosaic Templars of America v. Hall, 124 So. 879, 220 Ala. 305.
Ariz.—Brown v. Beck, 169 P.2d 855—Michener v. Standard Accident Ins. Co., 47 P.2d 438, 46 Ariz. 66.
Cal.—Tucker v. Tucker, 139 P.2d 348, 59 Cal.App.2d 557—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272—Cann v. Parker, 258 P. 105, 84 Cal.App. 379.
Fla.—Streety v. John Deere Plow Co., 109 So. 632, 92 Fla. 210.
Idaho.—Atwood v. Northern Pac. Ry. Co., 217 P. 600, 37 Idaho 554.
Ind.—Walsh v. H. P. Wasson & Co., 13 N.E.2d 696, 213 Ind. 556.
Okl.—Lott v. Kansas Osage Gas Co., 281 P. 297, 139 Okl. 6.
S.D.—Jones v. Johnson, 222 N.W. 688, 54 S.D. 149.
Tex.—Lawther Grain Co. v. Winniford, Com.App., 249 S.W. 195—Sunshine Bus Lines v. Craddock, Civ.App., 112 S.W.2d 248, affirmed Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 134 Tex. 388.

60. N.D.—Beery v. Peterson, 225 N. W. 798, 58 N.D. 273.
Wash.—Skidmore v. Pacific Creditors, 138 P.2d 664, 18 Wash.2d 157.

61. N.D.—Beery v. Peterson, 225 N. W. 798, 58 N.D. 273.
Wash.—Peha's University Food Shop v. Stimpson Corporation, 31 P.2d 1023, 177 Wash. 406.

62. Cal.—Waite v. Southern Pac. Co., 221 P. 204, 192 Cal. 467.
Ill.—Marland Refining Co. v. Lewis, 264 Ill.App. 163.

Defects in the original declaration will not be considered on a motion to vacate a default judgment entered at a prior term for the reason that errors in pleading cannot be questioned collaterally.—Lynn v. Multhauf, 279 Ill.App. 210.

Jurisdiction over subject matter

A motion to set aside a default judgment for lack of proper service does not raise question of jurisdiction over subject matter, but only goes to jurisdiction over person.—State ex rel. Compagnie Générale Transatlantique v. Falkenhainer, 274 S.W. 758, 309 Mo. 224.

63. Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.

64. Wash.—Roth v. Nash, supra.

65. Cal.—Bonfilio v. Ganger, 140 P. 2d 861, 60 Cal.App.2d 405.
Md.—Dixon v. Baltimore American Ins. Co. of New York, 188 A. 215, 171 Md. 695.

Failure to demand bill of particulars before motion therefor may be considered by trial court in passing on motion to vacate default.—Butler v. Robinson, 244 P. 162, 76 Cal.App. 223.

Possibility of further litigation

On motion to set aside default judgment restraining defendants from discharging sewage on plaintiff's land, trial court, for purpose of avoiding "multiplicity of actions," was authorized to consider that defendants' claim of an easement for a drainage ditch over plaintiff's land would result in further litigation.—Bonfilio v. Ganger, 140 P.2d 861, 60 Cal.App.2d 405.

Defects of judgment

Where defects of the judgment are apparent on its face, they may be considered by the court, although they are not alleged in the application.—Watson Co., Builders, v. Bleeker, Tex.Civ.App., 269 S.W. 147.

Local customs and practices at bar may be considered by the court.—Lunt v. Van Gorden, 281 N.W. 743, 225 Iowa 1130—Chandler Mill. & Mfg. Co. v. Sinaiko, 208 N.W. 323, 201 Iowa 791.

Proof offered under allegations

On motion to set aside default judgment, in determining question of excuse for delay in filing answer, court will look not only to allegations in motions, but also to proof offered thereunder.—First Nat. Bank v. Southwest Nat. Bank of Dallas, Tex.Civ.App., 273 S.W. 951.

66. **Facts pertinent to diligence after default** are properly considered.—Hicks v. Sanders, 104 P.2d 549, 40 Cal.App.2d 211.

67. Iowa.—Mitchell v. Brennan, 241 N.W. 408, 213 Iowa 1375.
34 C.J. p 430 note 90.

Knowledge of issues in original suit

The trial judge, who tried case and entered judgment sought to be set aside by motion for new trial under statute authorizing such motion where judgment is rendered on service by publication against defendant who has not appeared, could employ knowledge of issues involved in original suit in passing on plaintiff's exception to the motion.—Devereaux v. Daube, Tex.Civ.App., 185 S.W.2d 211.

Telephone conversation

Where plaintiff's showing in support of motion to set aside default judgment was largely based on claim of an ex parte telephone conversation between counsel and the trial judge, trial judge could have appropriately filed affidavit setting out his own recollection of what telephone conversation was in order to make his own account of it a matter of record as preliminary to passing on application to set aside the default.—Taecker v. Parker, 93 P.2d 197, 34 Cal.App.2d 143.

68. Ill.—Standard Statistics Co. v. Davis, 45 N.E.2d 1005, 317 Ill.App. 377.

Acts of other persons

On defendant's motion to set aside a default judgment on ground of inadvertence and excusable neglect, court could not consider acts and negligence of other persons which were not material to the motion.—Gorman v. Yorke, 199 S.E. 729, 214 N. C. 524.

Review of evidence in original case

The right to open a default judg-

true.[69] The failure of defendant to produce available evidence may authorize an inference that the evidence would not corroborate him.[70]

Rights of purchasers. The rights of purchasers of the property which was the subject of the judgment may be determined in proceedings to open the judgment or in subsequent proceedings in which they are made parties.[71]

Diligence after filing motion. Defendant must exercise diligence in ascertaining the disposition made by the court of the motion.[72] Where defendant, after filing a motion to set aside the default judgment, delays in prosecuting the motion, the court should permit defendant to show, if he can, a sufficient excuse for the delay before dismissing the motion.[73]

Proceedings after error. Where the court has erred in failing to sustain a motion to dismiss the motion to set aside the judgment, the error has been held to render further proceedings nugatory.[74]

Time of hearing. The mere fact that the motion is not heard until a subsequent term after filing has been held not to preclude the court from granting relief on the ground that the motion has been overruled by operation of law.[75] Postponement of a hearing on the motion does not result in a discontinuance of the proceedings.[76]

Reopening case; rehearing. The court may properly reopen the case after it has been submitted for decision to receive additional evidence[77] even on its own motion,[78] or it may properly receive additional evidence without formally reopening the case.[79] Plaintiff's right to a reargument is not lost by accepting the costs ordered to be paid by defendant as a condition for reopening, receiving his answer, and excepting to the sufficiency of the sureties to the undertaking.[80] A motion for a rehearing filed after the court has lost jurisdiction is ineffectual.[81]

(2) Discretion of Court Generally

Except in cases where the statute gives an absolute right to relief, the court may exercise a large discretion in granting or denying an application to open or vacate a default judgment; but the discretion is not to be exercised arbitrarily or capriciously.

Except in cases where the statute gives an absolute right to relief, in which case the court cannot refuse to open the default judgment,[82] as a general rule, a default judgment will not be opened or vacated as a matter of course;[83] but the court may exercise a large discretion in granting or denying

ment is not to be determined by a review of the evidence which supports the original judgment.—Naisbitt v. Herrick, 290 P. 950, 76 Utah 575.

69. Del.—Yerkes v. Dangle, Super., 33 A.2d 406.
Ky.—Bond v. W. T. Congleton Co., 129 S.W.2d 570, 278 Ky. 829.
Tex.—Trigg v. Gray, Civ.App., 288 S. W. 1098.

70. Ind.—Carty v. Toro, 57 N.E.2d 434.

71. Okl.—Swartz v. Fariss, 72 P.2d 738, 181 Okl. 115.

Lack of notice

For the subsequent purchase of land to be protected by the order entered in an action to set aside default judgment and for new trial, burden is on purchaser to plead and, if denied, to show that he purchased without notice of infirmity in judgment.—Rouse v. Rouse, 262 S.W. 596, 203 Ky. 415.

72. Tex.—Tyler v. Henderson, Civ. App., 162 S.W.2d 170, error refused.

Negligence of counsel

Allegations in judgment debtors' petition to set aside judgment, filed after debtors learned of order overruling their motion for new trial, that debtors were deprived of their right to appear and present their grounds for new trial because of alleged negligence of their counsel in failing to represent them at hearing on motion, were insufficient to entitle debtors to the relief sought.—Tyler v. Henderson, supra.

73. Tex.—Callahan v. Staples, 161 S. W.2d 489, 139 Tex. 8.

74. Ga.—Coker v. Eison, 151 S.E. 632, 40 Ga.App. 835.

75. Tex.—Smith v. Higginbotham, 158 S.W.2d 481, 138 Tex. 227—Smith v. Higginbotham, Civ.App., 112 S.W.2d 770.
Commencement and termination of time for application see supra subdivision b (8) of this section.
Jurisdiction of court see supra § 333.

76. Ala.—Ex parte Doak, 66 So. 64, 188 Ala. 406—Ex parte Southern Amiesite Asphalt Co., 200 So. 435, 30 Ala.App. 3, certiorari denied 200 So. 434, 240 Ala. 618.

77. Ariz.—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz. 239.

After upholding service

Where, however, the trial court had originally denied a motion to vacate a default judgment for nonservice of process and had thus upheld service, it was held that the court was unwarranted in subsequently granting a motion to reargue the motion to vacate the judgment.—Danowitz v. Fero, 21 N.Y.S.2d 813.

78. Ariz.—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz. 239.

79. Ariz.—Avery v. Calumet & Jerome Copper Co., supra.

80. N.Y.—Lanahan v. Drew, 17 N. Y.S. 840.

81. Ohio.—Balind v. Lanigan, 159 N. E. 103, 26 Ohio App. 149.

82. Ala.—Marshall County v. Critcher, 17 So.2d 540, 245 Ala. 357.
Mich.—McDowell v. Mecosta Cir. Judge, 144 N.W. 498, 178 Mich. 103.

In Georgia

(1) The statutory right to open default within thirty days or before the beginning of the trial term is not dependent on discretion of judge.—McCray v. Empire Inv. Co., 174 S.E. 219, 49 Ga.App. 117—Rawls v. Bowers, 172 S.E. 687, 48 Ga.App. 324—J. S. Schofield's Sons Co. v. Vaughn, 150 S.E. 569, 40 Ga.App. 568.

(2) At a subsequent term the matter is within the trial court's discretion.—Hardwick Bank & Trust Co. v. Manis, 183 S.E. 63, 181 Ga. 498—Rawls v. Bowers, supra.

83. Ky.—Bond v. W. T. Congleton Co., 129 S.W.2d 570, 278 Ky. 829.
W.Va.—Winona Nat. Bank v. Fridley, 10 S.E.2d 907, 122 W.Va. 479.
34 C.J. p 422 note 23.

Reason for rule

Demand which has ripened into regular valid judgment becomes established right, which must be protected not only by court which rendered it, but by other courts.—Healy v. McGahen, 21 P.2d 84, 87 N.M. 246.

an application to open or vacate a default judgment,[84] and, as discussed in Appeal and Error §

84. U.S.—Mandel Bros. v. Victory Belt Co., C.C.A.Ill., 15 F.2d 610.
Ala.—Du Pree v. Hart, 8 So.2d 183, 242 Ala. 690—Ex parte Anderson, 4 So.2d 420, 242 Ala. 31—Ex parte Richerzhagen, 113 So. 85, 216 Ala. 262—Ex parte Savage, 186 So. 586, 28 Ala.App. 440—Ex parte Motley, 170 So. 81, 27 Ala.App. 241—Ex parte Crumpton, 109 So. 184, 21 Ala.App. 446—Sovereign Camp, W. O. W., v. Gay, 104 So. 895, 20 Ala. App. 650, reversed on other grounds 104 So. 898, 213 Ala. 5.
Ariz.—Brown v. Beck, 169 P.2d 855—Swisshelm Gold Silver Co. v. Farwell, 124 P.2d 544, 59 Ariz. 162—Huff v. Flynn, 60 P.2d 931, 48 Ariz. 175—Michener v. Standard Accident Ins. Co., 47 P.2d 438, 46 Ariz. 66—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz. 239—Western Indemnity Co. v. Kendall, 233 P. 583, 27 Ariz. 342—Daly v. Okamura, 213 P. 389, 25 Ariz. 50.
Ark.—Johnson v. Jett, 159 S.W.2d 78, 203 Ark. 861—Hamburg Bank v. Jones, 151 S.W.2d 990, 202 Ark. 622—Urschel Lead & Zinc Mines v. Smith, 111 S.W.2d 480, 195 Ark. 36.
Cal.—Beard v. Beard, 107 P.2d 385, 16 Cal.2d 645—McNeil v. Blumenthal, 81 P.2d 566, 11 Cal.2d 566, followed in Le Duc v. Blumenthal, 81 P.2d 567, 11 Cal.2d 780—Brill v. Fox, 297 P. 25, 211 Cal. 739—Rogers v. Schneider, 270 P. 451, 205 Cal. 202—Gomes v. Bragg, 255 P. 499, 201 Cal. 70—Waybright v. Anderson, 253 P. 148, 200 Cal. 374—Gorman v. California Transit Co., 248 P. 923, 199 Cal. 246—Pickerill v. Strain, 239 P. 328, 196 Cal. 633—Waite v. Southern Pac. Co., 221 P. 204, 192 Cal. 467—Hadges v. Kouris, 162 P.2d 476, 71 Cal.App.2d 213—Peterson v. Taylor, 152 P.2d 349, 66 Cal.App.2d 333—Tearney v. Riddle, 149 P.2d 387, 64 Cal.App.2d 783—Bonfilio v. Ganger, 140 P.2d 861, 60 Cal.App.2d 405—Weinberger v. Manning, 123 P.2d 531, 50 Cal. App.2d 494—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272—Schoenfeld v. Gerson, 120 P.2d 674, 48 Cal.App.2d 739—Flores v. Smith, 117 P.2d 712, 47 Cal.App.2d 253—Hicks v. Sanders, 104 P.2d 549, 40 Cal.App.2d 211—Stub v. Harrison, 96 P.2d 979, 35 Cal.App.2d 685—Taecker v. Parker, 93 P.2d 197, 34 Cal.App.2d 143—Morgan v. Brothers of Christian Schools, 92 P.2d 925, 34 Cal.App.2d 14—Shively v. Kochman, 73 P.2d 637, 23 Cal.App. 2d 420—Bodin v. Webb, 62 P.2d 155, 17 Cal.App.2d 422—Wright v. Snyder, 32 P.2d 991, 138 Cal.App. 495—Bole v. McAdams, 28 P.2d 431, 136 Cal.App. 6—John A. Vaughan Corporation v. Title Insurance & Trust Co., 12 P.2d 117, 123 Cal.App. 709—Golish v. Feinstein, 11 P.2d 893, 123 Cal.App. 547—U. S. v. Duesdieker, 5 P.2d 916, 118 Cal.App. 723—Greenamyer v. Board of Trustees of Lugo Elementary School Dist. in Los Angeles County, 2 P.2d 848, 116 Cal. App. 319—Dunn v. Standard Accident Ins. Co., 299 P. 575, 114 Cal. App. 208—Roehl v. Texas Co., 291 P. 262, 107 Cal.App. 708—Johnston v. Liffman, 287 P. 558, 105 Cal.App. 137—Hammond Lumber Co. v. Bloodgood, 281 P. 1101, 101 Cal. App. 561—Grey v. Milligan, 281 P. 656, 101 Cal.App. 328—Gordon v. Harbolt, 280 P. 701, rehearing denied 281 P. 1048—Anglo California Trust Co. v. Kelly, 272 P. 1080, 95 Cal.App. 390—Carbondale Mach. Co. v. Eyraud, 271 P. 349, 94 Cal. App. 356—Noble v. Reid-Avery Co., 264 P. 341, 89 Cal.App. 75—Corgiat v. Realty Mortgage Corporation of California, 260 P. 573, 86 Cal.App. 37—Butler v. Robinson, 244 P. 162, 76 Cal.App. 223—Eberhart v. Salazar, 235 P. 36, 71 Cal.App. 336.
Colo.—Koin v. Mutual Ben. Health & Accident Ass'n, 41 P.2d 306, 96 Colo. 163—Lock v. Berkins, 33 P. 2d 393, 95 Colo. 135—Connell v. Continental Casualty Co., 290 P. 274, 87 Colo. 573—Mosco v. Jeannot, 232 P. 874, 86 Colo. 441—Diebold v. Diebold, 243 P. 630, 79 Colo. 7—Carpenter-Liebhardt Fruit Co. v. Nelson, 234 P. 1067, 77 Colo. 175—Drinkard v. Spencer, 211 P. 379, 72 Colo. 396.
Conn.—Barton v. Barton, 196 A. 141, 123 Conn. 487.
D.C.—Cockrell v. Fillah, 50 F.2d 500, 60 App.D.C. 210—Ray v. Bruce, Mun.App., 31 A.2d 693.
Fla.—Coggin v. Barfield, 8 So.2d 9, 150 Fla. 551—Stevens-Davis Co. v. Stock, 193 So. 745, 141 Fla. 714—Segel v. Staiber, 144 So. 875, 106 Fla. 946—State Bank of Eau Gallie v. Raymond, 138 So. 40, 103 Fla. 649.
Ga.—McCray v. Empire Inv. Co., 174 S.E. 219, 49 Ga.App. 117—Carr-Lee Grocery Co. v. Brannen, 167 S.E. 536, 46 Ga.App. 225—Nix v. Bassett, 123 S.E. 37, 32 Ga.App. 345—Golightly v. Line, 121 S.E. 878, 31 Ga.App. 550.
Idaho.—Cleek v. Virginia Gold Mining & Milling Co., 122 P.2d 232, 63 Idaho 445—Nielson v. Garrett, 43 P.2d 380, 55 Idaho 240—Savage v. Stokes, 28 P.2d 900, 54 Idaho 109—Mortgage Co. Holland America v. Yost, 228 P. 232, 39 Idaho 489—Day v. Burnett, 224 P. 427, 38 Idaho 620.
Ill.—Borman v. Oetzell, 46 N.E.2d 914, 382 Ill. 110—Kunde v. Prentice, 160 N.E. 193, 329 Ill. 82—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349—Maclaskey v. Kurz, 45 N.E.2d 566, 316 Ill.App. 671—Baxter v. Atchison, T. & S. F. Ry. Co., 35 N.E.2d 563, 310 Ill.App. 616—Simon v. Foyer, 17 N.E.2d 632, 297 Ill.App. 640—Whalen v. Twin City Barge & Gravel Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Ind.—Carty v. Toro, 57 N.E.2d 434.
Iowa.—Kern v. Sanborn, 7 N.W.2d 801, 233 Iowa 453—Craig v. Welch, 2 N.W.2d 745, 231 Iowa 1009—Allemang v. White, 298 N.W. 653, 230 Iowa 526—Brunswick - Balke - Collender Co. v. Dillon, 283 N.W. 872, 226 Iowa 244—Tate v. Delli, 269 N.W. 871, 222 Iowa 635—Lemley v. Hopson, 232 N.W. 811—Bossenberger v. Bossenberger, 229 N. W. 833, 210 Iowa 825—Anderson v. Anderson, 229 N.W. 694, 209 Iowa 1143—Chandler Mill. & Mfg. Co. v. Sinaiko, 208 N.W. 323, 201 Iowa 791—Lawler v. Roman Catholic Mut. Protective Soc. of Iowa, 197 N.W. 633, 198 Iowa 233—Iowa Cord Tire Co. v. Babbitt, 192 N.W. 431, 195 Iowa 922.
Kan.—American Oil & Refining Co. v. Liberty-Texas Oil Co., 211 P. 137, 112 Kan. 309.
Ky.—Northcutt v. Nicholson, 55 S. W.2d 659, 246 Ky. 641—Hackney v. Charles, 295 S.W. 869, 220 Ky. 574.
La.—Iberville Bank & Trust Co. v. Zito, 125 So. 435, 169 La. 421.
Me.—Diplock v. Blasi, 149 A. 149, 128 Me. 528.
Mass.—Kravetz v. Lipofsky, 200 N.E. 865, 294 Mass. 80—Manzi v. Carlson, 180 N.E. 134, 278 Mass. 267—Moll v. Town of Wakefield, 175 N. E. 31, 274 Mass. 505.
Mich.—Orlich v. Stone, 224 N.W. 610, 246 Mich. 487.
Minn.—Peterson v. W. Davis & Sons, 11 N.W.2d 800, 216 Minn. 60—Whipple v. Mahler, 10 N.W.2d 771, 215 Minn. 578—Application of Bonley, 6 N.W.2d 245, 213 Minn. 214—Pilney v. Funk, 3 N.W.2d 792, 212 Minn. 398—Isensee Motors v. Rand, 264 N.W. 782, 196 Minn. 267—Central Hanover Bank & Trust Co. v. Price, 243 N.W. 287, 189 Minn. 36—Nystrom v. Nystrom, 243 N.W. 704, 186 Minn. 490—McMahon v. Pequot Rural Telephone Co., 242 N.W. 620, 186 Minn. 141—Child v. Henry, 236 N.W. 292, 183 Minn. 170—Johnson v. Hallman, 225 N.W. 283, 177 Minn. 619—In re Belt Line, Phalen, and Hazel Park Sewer Assessment, 222 N.W. 520, 176 Minn. 59—Marthaler Machine & Engineering Co. v. Meyers, 218 N.W. 127, 173 Minn. 606—City of Luverne v. Skyberg, 211 N.W. 5, 169 Minn. 234—Zell v. Friend, Crosby & Co., 199 N.W. 928, 160

1632, the court's action will not be disturbed on appeal unless it clearly appears that there has been

Minn. 181—First Trust & Savings Bank v. U. S. Fidelity & Guaranty Co., 194 N.W. 376, 156 Minn. 231.

Mo.—Hartle v. Hartle, App., 184 S.W.2d 786—Quattrochi v. Quattrochi, App., 179 S.W.2d 757—Williams v. Barr, App., 61 S.W.2d 420—Karst v. Chicago Fraternal Life Ass'n, App., 22 S.W.2d 178—Goodwin v. Kochititzky, App., 3 S.W.2d 1051—Amos James Grocery Co. v. Prichard, App., 297 S.W. 721—Boggess v. Jordan, App., 283 S.W. 57—Case v. Arky, App., 253 S.W. 484.

Mont.—Madson v. Petrie Tractor & Equipment Co., 77 P.2d 1038, 106 Mont. 382—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604—Skinner v. Carlysle Oil Development Co., 260 P. 1038, 80 Mont. 464—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332—Pacific Acceptance Corporation v. McCue, 228 P. 761, 71 Mont. 99—In re East Bench Irr. Dist., 224 P. 859, 70 Mont. 186.

Neb.—Barney v. Platte Valley Public Power & Irr. Dist., 28 N.W.2d 335.

N.J.—Becker v. Welliver, 34 A.2d 893, 131 N.J.Law 64—Jarrett v. Standard Diesel Engine Co., 12 A.2d 671, 124 N.J.Law 429—McDermott v. City of Paterson, 4 A.2d 306, 122 N.J.Law 81—Benedetto v. Fleckenstein, 154 A. 769, 108 N.J.Law 184—Limpert Bros. v. Manufacturers' Liability Ins. Co., 137 A. 712, 5 N.J.Misc. 675.

N.M.—Grant v. Booker, 249 P. 1013, 31 N.M. 639.

N.Y.—Allen v. Fink, 207 N.Y.S. 428, 211 App.Div. 411, modified on other grounds 208 N.Y.S. 827—Decatur Contracting Co. v. Edward S. Murphy Bldg. Co., 2 N.Y.S.2d 970, 166 Misc. 614—In re Miller's Will, 295 N.Y.S. 943, 162 Misc. 563, affirmed 300 N.Y.S. 798, 252 App.Div. 872—Crouse Grocery Co. v. Valentine, 226 N.Y.S. 613, 131 Misc. 571.

N.C.—Garner v. Quakenbush, 122 S.E. 474, 187 N.C. 603, modified on other grounds 124 S.E. 154, 188 N.C. 180, 36 A.L.R. 1095.

N.D.—Beehler v. Schantz, 1 N.W.2d 344, 71 N.D. 409—Chittenden & Eastman Co. v. Sell, 227 N.W. 188, 58 N.D. 664—Beery v. Peterson, 225 N.W. 798, 58 N.D. 273—Mantel v. Pickle, 218 N.W. 605, 56 N.D. 568—Powell v. Bach, 217 N.W. 172, 56 N.D. 297—Mueller v. Occident Elevator Co., 212 N.W. 830, 55 N.D. 206—First State Bank of Crosby v. Thomas, 208 N.W. 852, 54 N.D. 108—Burgett v. Porter, 205 N.W. 623, 53 N.D. 312—Croonquist v. Walker, 196 N.W. 108, 50 N.D. 388—Farmers' & Merchants' State Bank of Tolna v. Stavn, 194 N.W. 689, 49 N.D. 993.

Okl.—Franklin v. Hunt Dry Goods Co., 123 P.2d 258, 190 Okl. 296—State Life Ins. Co. v. Liddell, 61 P.2d 1075, 178 Okl. 114—Fair Department Store v. Dallas Jobbing House, 46 P.2d 529, 172 Okl. 486—Leslie v. Spencer, 42 P.2d 119, 170 Okl. 642—Mays v. Board of Com'rs of Creek County, 23 P.2d 664, 164 Okl. 231—Tippins v. Turben, 19 P.2d 605, 162 Okl. 136—Sautbine v. Jones, 18 P.2d 871, 161 Okl. 292—Boles v. MacLaren, 4 P.2d 106, 152 Okl. 265—McKinney v. Swift, 274 P. 659, 135 Okl. 164—Nation v. Savely, 260 P. 32, 127 Okl. 117—Givens v. Anderson, 249 P. 339, 119 Okl. 212—Nave v. Conservative Loan Co., 245 P. 65, 117 Okl. 85—Farmers' Guaranty State Bank v. Bratcher, 241 P. 340, 112 Okl. 254—Goodwill Oil Co. v. Elliott, 230 P. 902, 107 Okl. 127—Colley v. Sapp, 216 P. 454, 90 Okl. 139.

Or.—Merryman v. Colonial Realty Co., 120 P.2d 230, 168 Or. 12—Snyder v. Consolidated Highway Co., 72 P.2d 932, 157 Or. 479—Hubble v. Hubble, 279 P. 550, 130 Or. 177—E. J. Struntz Planing Mill Co. v. Paget, 262 P. 263, 123 Or. 651, rehearing denied 263 P. 389, 123 Or. 651—Anderson v. Morse, 222 P. 1083, 110 Or. 39.

Pa.—Quaker City Chocolate & Confectionery Co. v. Warnock Bldg. Ass'n, 32 A.2d 5, 347 Pa. 186—McFadden v. Pennzoil Co., 191 A. 584, 326 Pa. 277—Luzerne Nat. Bank v. Gosart, 185 A. 640, 322 Pa. 446—Krall v. Lebanon Valley Savings & Loan Ass'n, 121 A. 405, 277 Pa. 440—Welzel v. Link-Belt Co., 35 A.2d 596, 154 Pa.Super. 66—Horning v. David, 8 A.2d 729, 137 Pa.Super. 252—Schweikart v. American Slicing Mach. Co., 173 A. 427, 113 Pa.Super. 485.

Philippine.—Wait v. Rogers, 10 Philippine 94—Wahl v. Donaldson, 5 Philippine 11—Quiros v. Carman, 4 Philippine 722—California-Manila Lumber Commercial Co. v. Garchitorena, 2 Philippine 628.

R.I.—Vingi v. Vigliotti, 6 A.2d 719, 63 R.I. 9—Fudim v. Kane, 136 A. 306, 48 R.I. 155—Rhode Island Discount Corporation v. Carr, 136 A. 244—Roy v. Tanguay, 131 A. 553—Nelen v. Wells, 123 A. 599, 45 R.I. 424—Milbury Atlantic Mfg. Co. v. Rocky Point Amusement Co., 118 A. 737, 44 R.I. 458.

S.C.—Savage v. Cannon, 30 S.E.2d 70, 204 S.C. 473—Poston v. State Highway Department, 5 S.E.2d 729, 192 S.C. 137—Rutledge v. Junior Order of United American Mechanics, 193 S.E. 434, 185 S.C. 142—Mrs. Hall's Cafeteria v. Phœnix Ins. Co. of Hartford, Conn., 122 S.E. 580, 128 S.C. 209.

S.D.—Smith v. Wordeman, 240 N.W. 325, 59 S.D. 363—Squires v. Meade County, 239 N.W. 747, 59 S.D. 293—Gubele v. Methodist Deaconess Hospital of Rapid City, 225 N.W. 57, 55 S.D. 100—Connelly v. Franklin, 210 N.W. 735, 50 S.D. 512.

Tex.—Lawther Grain Co. v. Winniford, Com.App., 249 S.W. 195—Sunshine Bus Lines v. Craddock, Civ.App., 112 S.W.2d 248, affirmed Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 134 Tex. 388—Simpson v. Glenn, Civ.App., 103 S.W.2d 433—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed—Farrell v. Truett, Abernathy & Wolford, Civ.App., 60 S.W.2d 475, error dismissed—San Antonio Paper Co. v. Morgan, Civ.App., 53 S.W.2d 651, error dismissed—Homuth v. Williams, Civ.App., 42 S.W.2d 1048—Green v. Jackson, Civ.App., 42 S.W.2d 91—Federal Supply Co. v. Bailey, Civ.App., 297 S.W. 235—Sneed v. Sneed, Civ.App., 296 S.W. 643—Ætna Casualty & Surety Co. v. Austin, Civ.App., 285 S.W. 951, affirmed Austin v. Ætna Casualty & Surety Co., Com.App., 300 S.W. 638, rehearing denied 3 S.W.2d xx, and followed in Ætna Casualty & Surety Co. v. Austin, Civ.App., 285 S.W. 955, affirmed Austin v. Ætna Casualty & Surety Co., Com.App., 300 S.W. 639—Thomas v. Goldberg, Civ.App., 283 S.W. 230—Mutual Oil Consolidated v. Beavers, Civ.App., 272 S.W. 507—Celeste State Bank v. Security Nat. Bank, Civ.App., 254 S.W. 653—Allen v. Frank, Civ.App., 252 S.W. 347.

Utah.—Madsen v. Hodson, 256 P. 792, 69 Utah 527—Cornelius v. Mohave Oil Co., 239 P. 475, 66 Utah 22.

Wash.—Larson v. Zabroski, 152 P.2d 154, 21 Wash.2d 572, opinion adhered to 155 P.2d 284, 21 Wash.2d 572—**Corpus Juris cited in** Roth v. Nash, 144 P.2d 271, 275, 19 Wash.2d 731—Bishop v. Illman, 126 P.2d 582, 14 Wash.2d 13—Riddell v. David, 23 P.2d 22, 173 Wash. 370—Penfound v. Gagnon, 20 P.2d 17, 172 Wash. 311—Marsh v. West Fir Logging Co., 281 P. 340, 154 Wash. 137—Rule v. Somervill, 274 P. 177, 150 Wash. 605.

W.Va.—Arnold v. Reynolds, 2 S.E.2d 433, 121 W.Va. 91.

Wis.—Welfare Building & Loan Ass'n v. Breuer, 250 N.W. 846, 213 Wis. 97, followed in West Side Building & Loan Ass'n v. Anderson, 250 N.W. 849, 213 Wis. 104, East Side Mut. Building & Loan Ass'n v. Lock, 250 N.W. 849, 213 Wis. 105, Mortgage Discount Co. v. Continental Discount Corpora-

an abuse of discretion. The court's discretion is not a limitless discretion[85] to be exercised arbitrarily or capriciously[86] without reference to any guiding rule or principle,[87] and its action must rest on competent evidence.[88] In particular cases the circumstances may be such as to leave no room for the exercise of discretion.[89]

Principles and rules as controlling the court's discretion are discussed infra subdivision j (4) of this section.

Judgment on constructive service. Under statutes which permit defendant, against whom a default judgment was taken on constructive service only, to vacate the judgment and to be admitted to defend the action, discussed generally supra § 335, it has been held that, on complying with the conditions of the statute, express and implied, the moving party acquires an absolute right to have the judgment opened, which the court has no discretion to deny,[90] but under some statutes of this nature it has been

tion, 250 N.W. 849, 213 Wis. 106, West Side Building & Loan Ass'n v. Breuer, 250 N.W. 850, 213 Wis. 107, West Side Building & Loan Ass'n v. Continental Discount Corporation, 250 N.W. 850, 213 Wis. 108, and East Side Mut. Building & Loan Ass'n v. Thoreson, 250 N. W. 850, 213 Wis. 109—Black Hawk State Bank v. Kinzler, 215 N.W. 433, 194 Wis. 29—Marshall Field & Co. v. Fishkin, 192 N.W. 463, 180 Wis. 149.

34 C.J. p 429 note 79.

During term

(1) Where motion to set aside default judgment, with supporting affidavits, is filed during term at which default judgment was entered, trial court exercises a wide discretion.—Allemang v. White, 298 N.W. 658, 230 Iowa 526.

(2) A motion to set aside a default judgment, made promptly at the same term of court, is addressed to judicial discretion of trial court without the restrictions of code provisions relating to granting of a new trial when there has been a hearing on the merits of the case.—Vanover v. Ashley, 183 S.W.2d 944, 298 Ky. 722—Carr Creek Community Center v. Home Lumber Co., 125 S.W.2d 777, 276 Ky. 840.

(3) The rule that trial court has wide discretion in setting aside default judgment and that appellate court will not intervene until such discretion is abused is applicable only when timely application has been made at the same term in which judgment was rendered.—State ex rel. Sterling v. Shain, 129 S.W.2d 1048, 344 Mo. 891.

(4) The granting of motion to vacate default judgment during term rests within trial court's sound discretion, regardless of statute relating to judgments after term.—Miller v. Smith, 12 N.E.2d 296, 57 Ohio App. 127.

(5) Application, during term, to vacate default judgment, where not founded on statutory ground, is addressed to court's discretion.—Wheeler v. Walker, 294 P. 641, 147 Okl. 63—Arrington v. Wallace, 288 P. 986, 143 Okl. 286—Kennedy v. Martin, 223 P. 652, 101 Okl. 87.

(6) The discretion granted trial judges in opening or vacating their judgments during the term extends to a reasonable degree in both directions.—Woodruff v. Moore, 77 P.2d 62, 182 Okl. 120.

After term

Application to vacate default judgment, filed after term in which judgment was rendered, is addressed to sound legal discretion of court.—Upton v. Shipley, 49 P.2d 1048, 170 Okl. 423—Standard v. Fisher, 35 P.2d 878, 169 Okl. 18—First State Bank of Vian v. Armstrong, 300 P. 763, 150 Okl. 60—Morrell v. Morrell, 299 P. 866, 149 Okl. 187—Lott v. Kansas Osage Gas Co., 281 P. 297, 139 Okl. 6—W. W. Bennett & Co. v. La Fayette, 271 P. 248, 133 Okl. 233—Thompson v. Hensley, 261 P. 931, 128 Okl. 139—Bearman v. Bracken, 240 P. 713, 112 Okl. 237.

Before entry of final judgment

(1) Trial court has discretionary power, for promotion of justice, to remove default at any time before judgment.—Doodlesack v. Superfine Coal & Ice Corporation, 198 N.E. 773, 292 Mass. 424, 101 A.L.R. 1247.

(2) Under the statute, a motion to set aside an order of default made before entry of final judgment is within the discretion of trial court to grant or deny.—Johnston v. Medina Improvement Club, 116 P.2d 272, 10 Wash.2d 44.

85. N.M.—Ambrose v. Republic Mortg. Co., 34 P.2d 294, 38 N.M. 370.
S.D.—Cook v. Davis, 230 N.W. 765, 57 S.D. 82.

86. Cal.—Riskin v. Towers, 148 P. 2d 611, 24 Cal.2d 274, 153 A.L.R. 442—Peterson v. Taylor, 152 P. 2d 349, 66 Cal.App.2d 333—Weinberger v. Manning, 123 P.2d 531, 50 Cal.App.2d 494—Toon v. Pickwick Stages, Northern Division, 226 P. 628, 66 Cal.App. 450.
Ga.—Rawls v. Bowers, 172 S.E. 687, 48 Ga.App. 324.
Ky.—Farris v. Ball, 79 S.W.2d 7, 257 Ky. 683.
Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.

"Sound judicial discretion"

Exercise of "sound judicial discretion" in ruling on petition to vacate default judgment imports invocation by clear and trained mind of reason, courage, impartiality, and conscience to accomplish in calm spirit result in conformity to law and just and equitable to all parties. —Kravetz v. Lipofsky, 200 N.E. 865, 294 Mass. 80.

As rebuke or favor

(1) The trial court's power to set aside default judgment should never be withheld as a rebuke for shortcomings in practice, and it should never be granted as a favor.—Zimmerman v. Segal, 155 S.W.2d 20, 288 Ky. 33—Latham v. Commonwealth, 43 S.W.2d 44, 240 Ky. 826.

(2) Court's discretion to set aside default judgment is not to be exercised ex gratia.—Essig v. Seaman, 264 P. 552, 89 Cal.App. 295.

87. Tex.—Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 134 Tex. 388—Southwestern Specialty Co. v. Brown, Civ.App., 188 S.W.2d 1002, error refused.

88. Pa.—Hamilton v. Sechrist, 16 A. 2d 671, 142 Pa.Super. 354.
Tenn.—Wright v. Lindsay, 140 S.W. 2d 793, 24 Tenn.App. 77.

89. Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.

90. Cal.—Daniels v. Colkins, 255 P. 182, 201 Cal. 10.
Ind.—State ex rel. Karsch v. Eby, 33 N.E.2d 336, 218 Ind. 431—Padol v. Home Bank & Trust Co., 27 N.E. 2d 917, 108 Ind.App. 401.
Kan.—Cassell v. Cassell, 166 P.2d 669, 161 Kan. 72.
Mich.—McDowell v. Mecosta Cir. Judge, 144 N.W. 498, 178 Mich. 103.
Minn.—Kane v. Stallman, 296 N.W. 1, 209 Minn. 138—Madsen v. Powers, 260 N.W. 510, 194 Minn. 418.
Mo.—Osage Inv. Co. v. Sigrist, 250 S.W. 39, 298 Mo. 139.
N.J.—Security Trust Co. of Pottstown v. Anderson, 159 A. 310, 10 N.J.Misc. 352.
N.C.—J. B. Bassett Lumber Co. v. Rhyne, 135 S.E. 926, 192 N.C. 735.
Okl.—Richards v. Baker, 99 P.2d 118, 186 Okl. 533—Ambrister v. Donehew, 83 P.2d 544, 183 Okl. 595—Wise v. Davis, 269 P. 248, 132 Okl. 65—Berkey v. Rader, 244 P.

held that the granting of the application by the court is not mandatory but is dependent on the court's sound legal discretion,[91] although it is an abuse of discretion to refuse to vacate the judgment if a meritorious defense is presented which, if proved, would as a matter of law require a judgment in favor of defendant.[92]

(3) Merits of Cause of Action or Defense

As a general rule under the statutes providing for proceedings to open or vacate a default judgment the court must determine whether or not the applicant has a valid cause of action or a meritorious defense before it may open or vacate a default judgment.

As a general rule under the statutes the court may not open or vacate a default judgment until it has determined that applicant has a valid cause of action or a meritorious defense to the judgment rendered.[93] In proceedings under some statutes the court is limited to a determination of whether or not a valid defense is presented by the motion and affidavits, and it may not conduct a hearing on the merits,[94] or consider controverting affidavits or evidence,[95] to determine whether the asserted cause of action or defense should prevail, but under other statutes it has been held that a judgment will not be vacated until a trial on the merits has been had and the validity of the defense asserted has been established.[96] Under the latter statutes the court

184, 116 Okl. 258—Wall v. Snider, 219 P. 671, 93 Okl. 99.
Tex.—Middleton v. Moore, Civ.App., 4 S.W.2d 988, reversed on other grounds Moore v. Middleton, Com. App., 12 S.W.2d 995.
Utah.—Naisbitt v. Herrick, 290 P. 950, 76 Utah 575.
W.Va.—State v. American Planograph Co., 123 S.E. 410, 96 W.Va. 574.
34 C.J. p 426 note 47.

Laches

If the question of laches is presented, a case arises for the exercise of the discretion of the court, and it must determine whether or not the laches is of a character that should preclude the relief.—Boland v. All Persons, Etc., 117 P. 547, 160 Cal. 486—Tucker v. Tucker, 139 P. 2d 348, 59 Cal.App.2d 557.

Good cause

Whether a motion states "good cause," within statute providing that defendant against whom judgment is rendered on service by publication may move for new trial on showing good cause, is within trial court's discretion.—Smith v. Higginbotham, Tex.Civ.App., 112 S.W.2d 770—Strickland v. Baugh, Tex.Civ.App., 169 S.W. 181.

Filing motion and service of notice

The filing and service of a notice of motion to set aside default judgment, followed by a motion for relief from the default and proof that notice and motion is seasonably given and made, constitutes a prima facie showing in favor of a defendant against whom a default judgment has been obtained.—Nahas v. Nahas, 92 P.2d 718, 59 Nev. 220.

91. Ariz.—Southwest Metals Co. v. Snedaker, 129 P.2d 314, 59 Ariz. 374—Perrin v. Perrin Properties, 86 P. 2d 23, 53 Ariz. 121, 122 A.L.R. 621.
Colo.—Redeker v. Denver Music Co., 265 P. 681, 83 Colo. 370—Perry v. Perry, 219 P. 221, 74 Colo. 106—Bunnell v. Holmes, 171 P. 365, 64 Colo. 345.

92. Ariz.—Evans v. Hallas, 167 P.2d 94—Southwest Metals Co. v. Snedaker, 129 P.2d 314, 59 Ariz. 374.

93. Ariz.—Brown v. Beck, 169 P.2d 855—Michener v. Standard Accident Ins. Co., 47 P.2d 438, 46 Ariz. 66.
Iowa.—Allemang v. White, 298 N.W. 658, 230 Iowa 526.
N.C.—Parnell v. Ivey, 197 S.E. 128, 213 N.C. 644—Cayton v. Clark, 193 S.E. 404, 212 N.C. 374.
Ohio.—Morrison v. Baker, App., 58 N.E.2d 708.
Okl.—Turner v. Dexter, 44 P.2d 984, 172 Okl. 252.
R.I.—Nelen v. Wells, 123 A. 599, 45 R.I. 424.
Wyo.—James v. Lederer-Strauss & Co., 233 P. 137, 32 Wyo. 377.
34 C.J. p 374 note 2, p 375 note 9—p 376 note 11.

Matters not raised by pleadings

On motion to set aside default judgment, insurance companies, claiming defense of failure to file proof of loss, were not required to introduce question of waiver not raised by pleadings.—Smith v. Globe & Rutgers Fire Ins. Co., 295 S.W. 388, 174 Ark. 346, followed in Deatherage v. Dennison, 295 S.W. 390, 173 Ark. 1180.

Postponement until retrial

Final determination of defense, claimed on motion to vacate judgment, is postponed until retrial.—Smith v. Globe & Rutgers Fire Ins. Co., 295 S.W. 388, 174 Ark. 346, followed in Deatherage v. Dennison, 295 S.W. 390, 173 Ark. 1180.

94. Cal.—Sheehan v. Pioneer Lucky Strike Gold Mining Co., 54 P.2d 72, 11 Cal.App.2d 530—Cann v. Parker, 258 P. 105, 84 Cal.App. 379.
Iowa.—Hatt v. McCurdy, 274 N.W. 72, 223 Iowa 974—Brotk v. Ellsworth State Sav. Bank, 186 N.W. 3, 192 Iowa 1042.
N.Y.—Karchman v. Karchman, 227 N. Y.S. 194, 131 Misc. 462, reversed on other grounds 230 N.Y.S. 856, 224 App.Div. 773.
R.I.—Nelen v. Wells, 123 A. 599, 45 R.I. 424.
S.D.—Cleveland Stone Co. v. Hollingworth, 244 N.W. 917, 60 S.D. 499.
W.Va.—Womeldorff & Thomas Co. v. Moore, 163 S.E. 47, 111 W.Va. 591.
34 C.J. p 375 notes 6–8.

Availability of evidence

Whether the defense alleged could be supported by evidence is not considered on the hearing.—Roseborough v. Campbell, 115 P.2d 839, 46 Cal.App.2d 257.

95. Cal.—Salsberry v. Julian, 277 P. 516, 98 Cal.App. 638, followed in 277 P. 518, amended 278 P. 257, 98 Cal.App. 645.
S.D.—Cleveland Stone Co. v. Hollingworth, 244 N.W. 917, 60 S.D. 499.
Counter-affidavits generally see supra subdivision h of this section.

Allegations deemed true

(1) In considering whether a meritorious defense was presented by defendant moving to have default judgment rendered on service by publication set aside, allegations of answer and cross-complaint are deemed to be true.—Evans v. Hallas, Ariz., 167 P.2d 94.

(2) Statements, in verified petition for review of default judgment, that allegations of plaintiff's petition were untrue and that defendants had a good defense to the action, were considered conclusively true for purpose of showing good cause for setting aside the judgment.—Garrison v. Schmicke, Mo., 193 S.W. 2d 614.

96. Ohio.—National Guaranty & Finance Co. v. Lindimore, App., 31 N.E.2d 155—Rabinovitz v. Novak, App., 31 N.E.2d 151.
Wyo.—Cottonwood Sheep Co. v. Murphy, 44 P.2d 1000, 48 Wyo. 250, 98 A.L.R. 1373—James v. Lederer-Strauss & Co., 233 P. 137, 32 Wyo. 377.
34 C.J. p 375 note 5.

On motion within term time where the court's jurisdiction is not dependent on statute, the truth of allegations of valid defense is not to be considered on motion to vacate

must first adjudicate that a meritorious ground for vacating the judgment exists, and after it does so it proceeds to a trial on the merits.[97] Under some statutes, where a default judgment is based on personal service of process, on a motion to vacate made on grounds such as excusable neglect or unavoidable casualty a final determination of the validity of the defense may not be made,[98] but at most the court can hear evidence only to determine whether defendant could present a prima facie defense;[99] but if judgment has been rendered on constructive service the merits of the suit may be determined in connection with the hearing of the motion in order to avoid trial of the two issues by piecemeal.[1]

(4) Principles and Rules of Decision

An application to open or vacate a default judgment should be disposed of in accordance with fixed legal and equitable principles to serve the ends of substantial justice. The court should exercise its power liberally to relieve from the judgment and it should resolve a real doubt in favor of the application.

An application to open or vacate a default judgment should be disposed of in accordance with fixed legal[2] and equitable[3] principles in such a manner as to serve, and not to defeat or impede, the ends of substantial justice.[4] Courts usually are liberal in opening judgments entered for want of appearance if the default was not willful,[5] and, where defendant has a reasonable excuse and appears to have a

default.—Resnick v. Paryzek, 154 N. E. 350, 23 Ohio App. 327.

Judgment on constructive service

If judgment has been rendered on constructive service the judgment will not be vacated until after a hearing on the merits.—Davis v. Collums, 168 S.W.2d 1103, 205 Ark. 390—American Inv. Co. v. Gleason, 28 S.W.2d 70, 181 Ark. 739—Moreland v. Youngblood, 247 S.W. 385, 157 Ark. 86—Gleason v. Boone, 185 S.W. 1093, 123 Ark. 523.

97. Ohio.—Rabinovitz v. Novak, App., 31 N.E.2d 151.

98. Tex.—Cragin v. Henderson County Oil Development Co., Com. App., 280 S.W. 554—Smith v. Higginbotham, Civ.App., 141 S.W.2d 752, affirmed 158 S.W.2d 481, 138 Tex. 227—Babington v. Gray, Civ. App., 71 S.W.2d 293—Chaney v. Allen, Civ.App., 25 S.W.2d 1115—Sneed v. Sneed, Civ.App., 296 S.W. 643—First Nat. Bank v. Southwest Nat. Bank of Dallas, Civ.App., 273 S.W. 951.

99. Tex.—Cragin v. Henderson County Oil Development Co., Com. App., 280 S.W. 554—Lawther Grain Co. v. Winniford, Com.App., 249 S. W. 195—Babington v. Gray, Civ. App., 71 S.W.2d 293—Chaney v. Allen, Civ.App., 25 S.W.2d 1115—Sneed v. Sneed, Civ.App., 296 S. W. 643.

1. Tex.—Harris v. Sugg, Civ.App., 143 S.W.2d 149, error dismissed, judgment correct—Smith v. Higginbotham, Civ.App., 141 S.W.2d 752, affirmed 158 S.W.2d 481, 138 Tex. 227—Ashton v. Farrell & Co., Civ.App., 121 S.W.2d 611, error dismissed.

New cause of action

Where motion for new trial was filed by party who was served by publication in action on note, and, in answer to the motion, plaintiff filed amended answer wherein plaintiff set up cause of action on a renewal of the note, action of trial court in refusing to grant motion to confine hearing to question of new trial and to strike the new cause of action set up by plaintiff was not error.—Smith v. Higginbotham, 158 S.W.2d 481, 138 Tex. 227.

2. Cal.—Weinberger v. Manning, 123 P.2d 531, 50 Cal.App.2d 494.
Idaho.—Voellmeck v. Northwestern Mut. Life Ins. Co., 92 P.2d 1076, 60 Idaho 412.
Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731—Bishop v. Illman, 126 P.2d 582, 14 Wash.2d 13.

Statutory law

(1) Court cannot ignore statutory law in exercising discretion in permitting default judgment to be vacated.—Essig v. Seaman, 264 P. 552, 89 Cal.App. 295.

(2) While trial court has large discretion in setting aside a default, such discretion cannot be exercised in contravention of statute.—Upmier v. Freese, 202 N.W. 3, 199 Iowa 405.

3. Ky.—Clements v. Kell, 39 S.W.2d 663, 239 Ky. 396.
Pa.—Quaker City Chocolate & Confectionery Co. v. Warnock Bldg. Ass'n, 32 A.2d 5, 347 Pa. 186—Welzel v. Link-Belt Co., 35 A.2d 596, 154 Pa.Super. 66.
Tex.—Sunshine Bus Lines v. Craddock, Civ.App., 112 S.W.2d 248, affirmed Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 134 Tex. 388.

4. Ala.—Sovereign Camp, W. O. W., v. Gay, 104 So. 895, 20 Ala.App. 650, reversed on other grounds 104 So. 898, 213 Ala. 5.
Cal.—Peterson v. Taylor, 152 P.2d 349, 66 Cal.App.2d 333—Bodin v. Webb, 62 P.2d 155, 17 Cal.App.2d 422—Toon v. Pickwick Stages, Northern Division, 226 P. 628, 66 Cal.App. 450.
Ill.—Cooper v. Handelsman, 247 Ill. App. 454.
Ky.—Farris v. Ball, 79 S.W.2d 7, 257 Ky. 683.
N.Y.—Glamore Motor Sales v. Broderick, 20 N.Y.S.2d 553, 259 App.Div. 1022.
Okl.—State Life Ins. Co. v. Liddell, 61 P.2d 1075, 178 Okl. 114—Upton v. Shipley, 40 P.2d 1048, 170 Okl. 422—Standard v. Fisher, 35 P.2d 878, 169 Okl. 18—First State Bank of Vian v. Armstrong, 300 P. 763, 150 Okl. 60—Morrell v. Morrell, 299 P. 866, 149 Okl. 187—Lott v. Kansas Osage Gas Co., 281 P. 297, 139 Okl. 6—Thompson v. Hensley, 261 P. 931, 128 Okl. 139—Bearman v. Bracken, 240 P. 713, 112 Okl. 237.
Or.—Nichols v. Nichols, 149 P.2d 572, 174 Or. 390—Snyder v. Consolidated Highway Co., 72 P.2d 932, 157 Or. 479—Peters v. Dietrich, 27 P. 2d 1015, 145 Or. 589.
S.C.—Savage v. Cannon, 30 S.E.2d 70, 204 S.C. 473.
Wash.—Larson v. Zabroski, 152 P.2d 154, 21 Wash.2d 572, opinion adhered to 155 P.2d 284, 21 Wash.2d 572.

5. Cal.—Hammond Lumber Co. v. Bloodgood, 281 P. 1101, 101 Cal. App. 561.
Iowa.—Allemang v. White, 298 N.W. 658, 230 Iowa 526.
Mass.—Cohen v. Industrial Bank & Trust Co., 175 N.E. 78, 274 Mass. 498.
Minn.—Zell v. Friend, Crosby & Co., 199 N.W. 928, 160 Minn. 181.
N.Y.—Iger v. Boyd-Scott Co., 290 N. Y.S. 619, 248 App.Div. 902—Long Island Trading Corporation v. Tuthill, 276 N.Y.S. 477, 243 App.Div. 617—Baldwin v. Yellow Taxi Corporation, 225 N.Y.S. 428, 221 App. Div. 717, followed in Woodward v. Weekes, 241 N.Y.S. 842, 228 App. Div. 870—New York State Labor Relations Board v. Paragon Oil Co., 45 N.Y.S.2d 152.
Or.—Marsters v. Ashton, 107 P.2d 981, 165 Or. 507.
R.I.—**Corpus Juris cited in** Borden v. Briggs, 142 A. 144, 49 R.I. 207. 34 C.J. p 429 note 80.

In ejectment, where a proposed defense has merits the courts are very liberal in setting aside a regular default on equitable terms.—Tennessee Coal, Iron & R. Co. v. Wise, 49 So. 253, 159 Ala. 632—19 C.J. p 1213 notes 82–86.

meritorious defense, the court should freely and liberally exercise its power to relieve from the default judgment,[6] unless the granting of the application will unduly prejudice plaintiff by delay or otherwise.[7] A real doubt should be resolved in favor of the application,[8] as the law favors a disposition of cases on the merits.[9] Default judgments will be opened or vacated more readily than a judg-

During term

(1) An effort to set aside a default judgment, made promptly at the same term of court when no such fixation of rights has occurred that the setting aside of judgment would prejudice anybody, is regarded with favor.—Vanover v. Ashley, 183 S.W.2d 944, 298 Ky. 722.

(2) Courts adopt a liberal attitude in setting aside default judgments during the term at which they were rendered, and permitting defense to be made, and a party applying to have a default judgment set aside is not required to show himself strictly entitled to the legal relief under statutes regulating granting of new trial.—Bond v. W. T. Congleton Co., 129 S.W.2d 570, 278 Ky. 829.

(3) In passing on applications to strike out default judgment when such applications are made at the same term at which judgments are entered, courts usually act liberally and on reasonable proof of merit and other equitable circumstances, strike out the judgment, and let defendant in to be heard.—Eddy v. Summers, Me., 39 A.2d 812.

(4) Courts are usually liberal in opening default or setting aside decree or judgment during term, but different rule obtains after term.—Steeves v. Steeves, 9 P.2d 815, 139 Or. 261.

Proceedings under statute or independent suit

The courts are more inclined to open up default judgment under statute authorizing such relief for mistake, inadvertence, surprise, or excusable neglect than to vacate judgment in an independent suit.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664—Hartley v. Rice, 261 P. 689, 123 Or. 237.

6. Cal.—Dunn v. Standard Accident Ins. Co., 299 P. 575, 114 Cal.App. 208—Carbondale Mach. Co. v. Eyraud, 271 P. 349, 94 Cal.App. 356.
Colo.—Drinkard v. Spencer, 211 P. 379, 72 Colo. 396.
Fla.—Coggin v. Barfield, 8 So.2d 9, 150 Fla. 551.
Iowa.—Lemley v. Hopson, 232 N.W. 811.
Kan.—**Corpus Juris quoted in** American State Bank of Hill City v. Richardson, 38 P.2d 96, 97, 140 Kan. 555.
Ky.—Bond v. W. T. Congleton Co., 129 S.W.2d 570, 278 Ky. 829—Steuerle v. T. B. Duncan & Co., 299 S.W. 205, 221 Ky. 501.
Minn.—Bearman Fruit Co. v. Parker, 3 N.W.2d 501, 212 Minn. 327.
Mo.—Henneke v. Strack, App., 101 S.W.2d 743.
Mont.—Madson v. Petrie Tractor & Equipment Co., 77 P.2d 1038, 106 Mont. 382—First Nat. Corporation v. Perrine, 43 P.2d 1073, 99 Mont. 454.
Okl.—Slyman v. State, 228 P. 979, 102 Okl. 241.
S.C.—Savage v. Cannon, 30 S.E.2d 70, 204 S.C. 473—Gaskins v. California Ins. Co., 11 S.E.2d 436, 195 S.C. 376.
S.D.—Gubele v. Methodist Deaconess Hospital of Rapid City, 225 N.W. 57, 55 S.D. 100.
Tex.—Gordon v. Williams, Civ.App., 164 S.W.2d 867.
34 C.J. p 372 note 84, p 430 notes 84–88.

Default due to counsel's mistake

Generally default judgment due to mistake of counsel will be opened where application is promptly made, reasonable excuse is offered, and defense on merits shown.—Page v. Patterson, 161 A. 878, 105 Pa.Super. 438.

7. Tex.—Southwestern Specialty Co. v. Brown, Civ.App., 188 S.W.2d 1002, error refused—National Mut. Casualty Co. v. Lambert, Civ.App., 149 S.W.2d 1086, error dismissed, judgment correct.
34 C.J. p 430 note 88.

Caution must be used in setting aside default decree, lest negligent be rewarded to detriment of honest and diligent.—Hyde Park Sav. Bank v. Davankoskas, 11 N.E.2d 3, 298 Mass. 421.

Factors for consideration

In considering whether plaintiff will suffer injury by vacation of judgment, it is not considered that plaintiff has any vested rights in shutting out a meritorious defense, but questions of unreasonable delay, expense, or hardship are determinative factors.—Borger v. Mineral Wells Clay Products Co., Tex.Civ.App., 80 S.W.2d 333.

Prejudice not shown

Cal.—Morgan v. Brothers of Christian Schools, 92 P.2d 925, 34 Cal.App.2d 14.

8. Ariz.—Brown v. Beck, 169 P.2d 855.
Cal.—Brill v. Fox, 297 P. 25, 211 Cal. 739—Waite v. Southern Pac. Co., 221 P. 204, 192 Cal. 467—Bodin v. Webb, 62 P.2d 155, 17 Cal.App.2d 422—Endicott v. Southern California Cleaners and Dyers, App., 6 P.2d 556—Williams v. McQueen, 265 P. 339, 89 Cal.App. 659—Corgiat v. Realty Mortg. Corporation of California, 260 P. 573, 86 Cal.App. 37.
Fla.—State Bank of Eau Gallie v. Raymond, 138 So. 40, 103 Fla. 649.
Ind.—United Taxi Co. v. Dilworth, 20 N.E.2d 699, 106 Ind.App. 627—Riddle v. McNaughton, 163 N.E. 846, 88 Ind.App. 352—Christ v. Jovanoff, 151 N.E. 26, 84 Ind.App. 676, rehearing denied 152 N.E. 2, 84 Ind.App. 676.
Kan.—**Corpus Juris quoted in** American State Bank of Hill City v. Richardson, 38 P.2d 96, 97, 140 Kan. 555.
Okl.—Morrell v. Morrell, 299 P. 866, 149 Okl. 187.
Utah.—Hurd v. Ford, 276 P. 908, 74 Utah 46.
34 C.J. p 372 note 84, p 429 note 82.

9. Ariz.—Brown v. Beck, 169 P.2d 855.
Cal.—Kalson v. Percival, 20 P.2d 330, 217 Cal. 568—Waite v. Southern Pac. Co., 221 P. 204, 192 Cal. 467—McMahon v. McMahon, 160 P.2d 892, 70 Cal.App.2d 126—Potts v. Whitson, 125 P.2d 947, 52 Cal.App.2d 199—Thompson v. Sutton, 122 P.2d 975, 50 Cal.App.2d 272—Nicholls v. Anders, 56 P.2d 1289, 13 Cal.App.2d 440—Endicott v. Southern California Cleaners and Dyers, App., 6 P.2d 556—Shupe v. Evans, 261 P. 492, 86 Cal.App. 700.
Colo.—Mountain States Silver Mining Co. v. Hukill, 244 P. 605, 79 Colo. 128.
Ill.—Rapp v. Goerlitz, 40 N.E.2d 767, 314 Ill.App. 191.
Iowa.—Craig v. Welch, 2 N.W.2d 745, 231 Iowa 1009—Allemang v. White, 298 N.W. 658, 230 Iowa 526—Ferris v. Wulf, 249 N.W. 156, 216 Iowa 289—Cedar Rapids Finance & Thrift Co. v. Bowen, 233 N.W. 495, 211 Iowa 1207—Lemley v. Hopson, 232 N.W. 811—Rounds v. Butler, 227 N.W. 417, 208 Iowa 1391, followed in 227 N.W. 419.
Miss.—Strain v. Gayden, 20 So.2d 697, 197 Miss. 353.
Mo.—Hartle v. Hartle, App., 184 S.W.2d 786—Karst v. Chicago Fraternal Life Ass'n, App., 22 S.W.2d 178.
Mont.—Madson v. Petrie Tractor & Equipment Co., 77 P.2d 1038, 106 Mont. 382—First Nat. Corporation v. Perrine, 43 P.2d 1073, 99 Mont. 454.
Okl.—Haskell v. Cutler, 108 P.2d 146, 188 Okl. 239—State ex rel. Higgs v. Muskogee Iron Works, 103 P.2d 101, 187 Okl. 419—Morrell v. Morrell, 299 P. 866, 149 Okl. 187—Bearman v. Bracken, 240 P. 713, 112 Okl. 237.
Or.—Marsters v. Ashton, 107 P.2d

ment rendered after defendant has had his day in court and been heard in his own behalf,[10] or one entered on a confession of judgment.[11] Where there are circumstances of fraud or great oppression in the case, a default will be readily opened.[12] Generally courts look with more favor on an application by a defaulted defendant than on a similar application by a defaulted plaintiff.[13]

The court cannot properly vacate a default judgment without sufficient cause,[14] and where defendant fails to show good grounds for setting the default judgment or decrec aside,[15] or fails to bring himself within the terms of the statute granting relief,[16] the application is properly denied.

Whether or not relief should be granted to applicant or whether the court has abused its discretion in granting or refusing relief depends on the peculiar facts and circumstances of the individual case,[17] and under particular facts and circumstances the opening or vacating of a default judgment has been held to be,[18] or has been held not to be,[19] improper or an abuse of discretion, or a refusal to

981, 165 Or. 507—Steeves v. Steeves, 9 P.2d 815, 139 Or. 261.
34 C.J. p 429 note 83.

10. Kan.—**Corpus Juris quoted in** American State Bank of Hill City v. Richardson, 88 P.2d 96, 97, 140 Kan. 555.
Okl.—Haskell v. Cutler, 108 P.2d 146, 188 Okl. 239.
34 C.J. p 429 note 80.

11. Pa.—Roth v. Pechin, 103 A. 894, 260 Pa. 450—Scranton Supply Co. v. Cooper, 4 Pa.C.Pl. 103.

12. N.Y.—Greer v. Tweed, 13 Abb. Pr.,N.S., 427.
Tex.—Crosby v. Di Palma, Civ.App., 141 S.W. 321.

13. Or.—Snyder v. Consolidated Highway Co., 72 P.2d 932, 157 Or. 479.

Reason for rule
Plaintiff, who begins the litigation, generally may withdraw his suit and begin again without material prejudice, while defendant cannot abandon the case against himself.—McAuliffe v. McAuliffe, 298 P. 239, 136 Or. 168.

14. N.Y.—Utica Gas & Electric Co. v. Sherman, 208 N.Y.S. 594, 212 App.Div. 472.
S.D.—Cook v. Davis, 230 N.W. 765, 57 S.D. 82.

15. Ala.—Kaplan v. Potera, 105 So. 177, 213 Ala. 334.
Ill.—Pikora v. Pilgrim Nat. Life Ins. Co., 10 N.E.2d 894, 292 Ill.App. 634.
N.C.—Kerr v. North Carolina Joint Stock Land Bank of Durham, 171 S.E. 367, 205 N.C. 410—Chapman v. Lineberry, 140 S.E. 302, 194 N.C. 811.
Pa.—Schwartz v. Stewart, 55 Pa.Dist. & Co. 633, 5 Lawrence L.J. 1—Wood v. Whitmore, 27 Pa.Dist. & Co. 545, 37 Lack.Jur. 57—Oltorik v. Bozer, Com.Pl., 40 Lack.Jur. 25.

Great injustice as sole grounds
Fact that refusal to open default judgment would result in great injustice to defendant, failing to answer without sufficient excuse, does not justify vacation thereof.—Rutledge v. Junior Order of United American Mechanics, 193 S.E. 434, 185 S.C. 142.

Failure to redeem
Where a judgment by default, barring redemption, has been rendered against a junior encumbrancer through his excusable neglect, and he learns of the judgment while the period of redemption is running, but fails to redeem, he cannot have the judgment vacated.—Becker v. Tell City Bank, 41 N.E. 323, 142 Ind. 99.

Failure to except to sale
The chancellor properly refused to reopen a mortgage foreclosure action wherein a default judgment was rendered where parties, although sui juris and properly before the court when judgment was rendered, failed to except to the report of sale which was confirmed.—Colston v. Mitchell's Adm'x, 175 S.W.2d 1020, 296 Ky. 1.

16. Ga.—Fitzgerald v. Ferran, 124 S.E. 530, 158 Ga. 755.
Iowa.—Upmier v. Freese, 202 N.W. 8, 199 Iowa 405.

Refusal of relief on motion
Where the facts are not sufficient to justify relief on motion filed under the statute, defendant may be left to his remedy by action to have it set aside.—Warren v. Resaake, 208 N.W. 564, 54 N.D. 65—Campbell v. Coulston, 124 N.W. 689, 19 N.D. 645.

Absence of objection
Where failure to comply with statutory provisions regarding opening a default was not objected to at time of hearing, motion to set aside default judgment was held properly sustained.—Hooper v. Weathers, 165 S.E. 52, 175 Ga. 133.

17. Mont.—Reynolds v. Gladys Belle Oil Co., 243 P. 576, 75 Mont. 332.
Okl.—Sudik v. Sinclair Oil & Gas Co., 44 P.2d 954, 172 Okl. 334—First Nat. Bank v. Kerr, 24 P.2d 985, 165 Okl. 16—Hall v. Price, 277 P. 239, 136 Okl. 202—Shuler v. Viger, 229 P. 280, 103 Okl. 129—Boaz v. Martin, 235 P. 516, 101 Okl. 243.
Or.—Peters v. Dietrich, 27 P.2d 1015, 145 Or. 589.
Discretionary power of court generally see supra subdivision j (2) of this section.

Showing abuse of discretion
Where default judgment has been set aside much stronger showing of abuse of discretion must be made than where application to set aside such judgment has been refused.—First State Bank of Vian v. Armstrong, 300 P. 763, 150 Okl. 60—Morrell v. Morrell, 299 P. 866, 149 Okl. 187—Bearman v. Bracken, 240 P. 713, 112 Okl. 237—34 C.J. p 372 note 82 [b].

18. Ala.—Ex parte Motley, 170 So. 81, 27 Ala.App. 241.
Cal.—Weinberger v. Manning, 123 P. 2d 531, 50 Cal.App.2d 494.
Idaho.—Kingsbury v. Brown, 92 P.2d 1053, 60 Idaho 464, 124 A.L.R. 149.
Minn.—Cacka v. Gaulke, 3 N.W.2d 791, 212 Minn. 404.
Ohio.—Davis v. Teachnor, App., 53 N.E.2d 208.
S.D.—Cook v. Davis, 230 N.W. 765, 57 S.D. 82.

19. Ala.—Ex parte Haisten, 149 So. 213, 227 Ala. 183—Ex parte Savage, 186 So. 536, 28 Ala.App. 440.
Cal.—Kalson v. Percival, 20 P.2d 330, 217 Cal. 568—Endicott v. Southern California Cleaners and Dyers, App., 6 P.2d 556—Greenamyer v. Board of Trustees of Lugo Elementary School Dist. in Los Angeles County, 2 P.2d 848, 116 Cal.App. 319—Hammond Lumber Co. v. Bloodgood, 281 P. 1101, 101 Cal.App. 561—Corgiat v. Realty Mortg. Corporation of California, 260 P. 573, 86 Cal.App. 37.
Fla.—Kellerman v. Commercial Credit Co., 189 So. 689, 138 Fla. 133.
Ill.—Bornman v. Rabb, 8 N.E.2d 374, 290 Ill.App. 604—Cooper v. Handelsman, 247 Ill.App. 454.
Ind.—Alexander v. Pate, 14 N.E.2d 328, 105 Ind.App. 219.
Iowa. — Brunswick-Balke-Collender Co. v. Dillon, 283 N.W. 872, 226 Iowa 244.
Mass.—Manzi v. Carlson, 180 N.E. 134, 278 Mass. 267.
Mich.—Rosen v. Brennan, 221 N.W. 276, 244 Mich. 397.
Minn.—High v. Supreme Lodge of the World, Loyal Order of Moose, 290 N.W. 425, 207 Minn. 228—Isensee Motors v. Rand, 264 N.W. 782, 196 Minn. 267—Chamber of Commerce of Minneapolis v. Thomas, 214 N.W. 57, 171 Minn. 327.

open or vacate a default judgment has been held to be,[20] or has been held not to be,[21] improper or an abuse of discretion. The court may refuse to grant the application even in cases where the existence of a meritorious defense is shown,[22] but if defendant shows a legal excuse for failure to appear and a meritorious defense to the action, and in all matters complies with the requisites of the statute, it has been held that the court no longer has discretion but must set aside the judgment.[23]

The fact that defendant may have challenged the validity of service by publication and the jurisdiction of the court to render any judgment will not justify a denial of the application to have the judgment opened.[24] Where the order of default[25] or the default judgment[26] has been entered prematurely, an order setting aside the judgment is proper. Where the judgment has been entered without jurisdiction the court must grant the application to vacate the judgment.[27] It has been held that the

Mont.—Kirby v. Hoeh, 21 P.2d 732, 94 Mont. 218.
N.Y.—Konnight v. Terpak, 54 N.Y.S.2d 796, 269 App.Div. 759—People ex rel. Morgan v. Cucci, 22 N.Y.S.2d 330, 260 App.Div. 827—Conrad v. Harbaugh, 287 N.Y.S. 1012, 248 App.Div. 655.
N.C.—Spell v. Arthur, 171 S.E. 362, 205 N.C. 405—Cagle v. Williamson, 158 S.E. 391, 200 N.C. 727.
N.D.—Mueller v. Occident Elevator Co., 212 N.W. 830, 55 N.D. 206.
Okl.—Blakeney v. Ashford, 81 P.2d 309, 183 Okl. 213—State Life Ins. Co. v. Liddell, 61 P.2d 1075, 178 Okl. 114—First State Bank of Vian v. Armstrong, 300 P. 763, 150 Okl. 60—Morrell v. Morrell, 299 P. 866, 149 Okl. 187—Farmers' Guaranty State Bank v. Bratcher, 241 P. 340, 112 Okl. 254.
Or.—Oeder v. Watt, 214 P. 591, 107 Or. 600.
Pa.—Bianca v. Kaplan, 160 A. 143, 105 Pa.Super. 98—Markovitz v. Ritter, 92 Pa.Super. 394—Sockett v. Philadelphia Toilet & Laundry Co., 92 Pa.Super. 254—Kozuhowski & Reuss v. Snigel & Snigel, 90 Pa.Super. 75—Auberle v. Ciliberto, Com.Pl., 31 Del.Co. 32.
Tex.—Green v. Jackson, Civ.App., 42 S.W.2d 91.

20. Ark.—Urschel Lead & Zinc Mines v. Smith, 111 S.W.2d 480, 195 Ark. 36.
Ill.—Revzen v. Brown, 17 N.E.2d 1011, 397 Ill.App. 476.
Minn.—Bearman Fruit Co. v. Parker, 3 N.W.2d 501, 212 Minn. 327.
Neb.—Ak-Sar-Ben Exposition Co. v. Sorensen, 229 N.W. 13, 119 Neb. 358.
Okl.—First Nat. Bank v. Kerr, 24 P.2d 985, 165 Okl. 16.
Tex.—Craddock v. Sunshine Bus Lines, 133 S.W.2d 124, 134 Tex. 388—Travelodge Corporation v. Schwake, Civ.App., 126 S.W.2d 523—Watson Co., Builders, v. Bleeker, Civ.App., 269 S.W. 147.
Utah.—Naisbitt v. Herrick, 290 P. 950, 76 Utah 575.
Wash.—Golson v. Carscallen, 283 P. 681, 155 Wash. 176.

21. U.S.—Glenn v. W. C. Mitchell Co., C.C.A.N.D., 282 F. 440, modified on other grounds 285 F. 381.
Ark.—Stephenson v. Union Nat. Bank of Little Rock, 132 S.W.2d 173, 198 Ark. 1187—Thomas v. Arnold, 96 S.W.2d 1108, 192 Ark. 1127.
Cal.—Cooper v. Deon, 137 P.2d 733, 58 Cal.App.2d 789—Flores v. Smith, 117 P.2d 712, 47 Cal.App.2d 253—Thaler v. Thaler, 15 P.2d 192, 127 Cal.App. 28—Dwyer v. Davis, 8 P.2d 168, 120 Cal.App. 435—Ratliff v. Ratliff, 2 P.2d 222, 116 Cal.App. 39—Mahana v. Alexander, 263 P. 260, 88 Cal.App. 111.
Ga.—Jones v. Empire Furniture Co., 142 S.E. 694, 38 Ga.App. 98.
Ill.—Whalen v. Twin City Barge & Gravel Co., 380 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co. v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Ind.—National Fire Ins. Co. of Hartford, Conn., v. Burton, 168 N.E. 37, 91 Ind.App. 196.
Iowa.—Bleakley v. Long, 268 N.W. 152, 222 Iowa 76—Lemley v. Hopson, 232 N.W. 811—Cedar Rapids Nat. Bank v. Todd, 203 N.W. 390, 199 Iowa 957.
Kan.—American Oil & Refining Co. v. Liberty-Texas Oil Co., 211 P. 137, 112 Kan. 309.
Md.—Martin v. Long, 120 A. 875, 142 Md. 348.
Mass.—Burnham v. Ellsworth, 60 N.E.2d 959.
Minn.—Scott v. Van Sant, 258 N.W. 817, 193 Minn. 465—Ramsay v. Barnard, 249 N.W. 192, 189 Minn. 333—McMahon v. Pequot Rural Telephone Co., 242 N.W. 620, 186 Minn. 141—Child v. Henry, 236 N.W. 202, 183 Minn. 170—Jennrich v. Moeller, 234 N.W. 638, 182 Minn. 445—MacLean v. Reynolds, 220 N.W. 435, 175 Minn. 112—Lambertz v. Daniels, 199 N.W. 904, 160 Minn. 180.
Mo.—Bedell v. Garton, App., 86 S.W.2d 1073—Acme Roofing Co. v. Johnson, App., 26 S.W.2d 854—Stevens v. Hurst Automatic Switch & Signal Co., App., 270 S.W. 414—Daugherty v. Lanning-Harris Coal & Grain Co., 265 S.W. 866, 218 Mo.App. 187.
Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 85 Mont. 604.
N.J.—Becker v. Welliver, 34 A.2d 893, 131 N.J.Law 64—Kravitz Mfg. Corporation v. Style-Kraft Shirt Corporation, 21 A.2d 761, 127 N.J.Law 253—McDermott v. City of Paterson, 4 A.2d 306, 122 N.J.Law 81—Benedetto v. Fleckenstein, 151 A. 98, 8 N.J.Misc. 590, affirmed 154 A. 769, 108 N.J.Law 184.
N.M.—McCanna v. Mutual Investment & Agency Co., 26 P.2d 231, 37 N.M. 597—Grant v. Booker, 249 P. 1013, 31 N.M. 639.
N.C.—Marvin Wade Co. v. Stewart, 129 S.E. 192, 190 N.C. 854.
N.D.—Galloway v. Patzer, 226 N.W. 491, 58 N.D. 443, followed in Paul v. Patzer, 226 N.W. 495, 58 N.D. 442—Madden v. Dunbar, 201 N.W. 991, 52 N.D. 74—Jesse French & Sons Piano Co. v. Getts, 192 N.W. 765, 49 N.D. 577.
Okl.—Thornton v. Eoff, 84 P.2d 5, 183 Okl. 504—Nave v. Conservative Loan Co., 245 P. 65, 117 Okl. 85—Mid-West Fruit Co. v. Davis, 231 P. 208, 104 Okl. 254.
Pa.—Caromono v. Garman, 23 A.2d 92, 147 Pa.Super. 1.
R.I.—Delerson Press v. Silverman, 159 A. 735—Fudim v. Kane, 136 A. 306, 48 R.I. 155.
S.C.—Bissonette v. Joseph, 170 S.E. 467, 170 S.C. 407.
Tex.—Southwestern Specialty Co. v. Brown, Civ.App., 188 S.W.2d 1002, error refused—Briggs v. Ladd, Civ.App., 64 S.W.2d 389—Celeste State Bank v. Security Nat. Bank, Civ.App., 254 S.W. 653—Fay v. Roberts, Civ.App., 249 S.W. 533.
Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.

22. Ga.—Taylor v. Stovall, 118 S.E. 795, 30 Ga.App. 678.
Ill.—Maclaskey v. Kurz, 45 N.E.2d 566, 316 Ill.App. 671.
N.M.—McCanna v. Mutual Investment & Agency Co., 26 P.2d 231, 37 N.M. 597.
34 C.J. p 422 note 24.

23. Idaho.—Wagner v. Mower, 237 P. 118, 41 Idaho 380—Consolidated Wagon & Machine Co. v. Housman, 221 P. 143, 38 Idaho 343.

24. Okl.—Seekatz v. Brandenburg, 300 P. 678, 150 Okl. 53—Wise v. Davis, 269 P. 248, 132 Okl. 65.

25. Ill.—Barthelemy v. Braun, 272 Ill.App. 321.

26. Mont.—Rowan v. Gazette Printing Co., 220 P. 1104, 69 Mont. 170.

27. D.C.—Consolidated Radio Artists v. Washington Section, National Council of Jewish Juniors, 105 F.2d 785, 70 App.D.C. 262.

court cannot vacate the judgment where the evidence does not correspond with the petition.[28]

Where a default judgment is subject to be set aside because of the lack of necessary allegations in the original petition on which judgment was rendered, it has been held that allegations or proof on the motion to set aside the judgment may not be used to supply the defects in the original petition.[29]

k. Relief Awarded

(1) In general
(2) Modification or partial vacation
(3) Terms and conditions of relief

(1) In General

The relief which may be awarded in a proceeding to open or vacate a default judgment depends in a large measure on the terms of the particular statute under which the proceeding is brought.

In accordance with the provisions of the statutes and the interpretation thereof in the several jurisdictions, the court may render final judgment on the merits after vacating the judgment;[30] it can only enter an order setting aside the judgment and cannot give judgment on the merits;[31] or, before it has adjudicated the merits of the case, the only order it may make is one suspending the operation of the judgment.[32] It is improper for the court to restrain plaintiff from collecting the judgment pending proceedings to have the judgment vacated where there has not been a compliance with the statutory conditions for granting such relief.[33] Where the court acts under its inherent powers it may award relief other than that provided for in proceedings solely under the statute.[34]

It is an idle act for the court to set aside a judgment entered on a default if it has no jurisdiction to set aside the default.[35]

Rights of third persons. Intervening rights of third persons acquired in good faith will be saved, either by provision of the statute itself or by the order of the court.[36]

(2) Modification or Partial Vacation

Where a default judgment is severable, the portion of the judgment which is irregular or erroneous may be set aside and other portions of the judgment may be permitted to stand.

Where a judgment is severable, the portion of the judgment which is irregular or erroneous may be set aside and other portions of the judgment may be permitted to stand,[37] and if a partial defense is presented the court may modify or set aside the decree to that extent.[38] Although the court allows the judgment itself to stand, it may permit the question as to the quantum of damages to be opened for hearing.[39] Where a default judgment is entered as a unit against two or more defendants and is so irregular or erroneous as to necessitate its vacation as to one defendant, it has been held that it must be set aside as to all;[40] but where a default judg-

N.D.—Odland v. O'Keeffe Implement Co., 229 N.W. 923, 59 N.D. 335—Beery v. Peterson, 225 N.W. 798, 58 N.D. 273.

28. **Statutory ground not alleged**
Where petition to vacate default judgment alleged fraud, court was held unauthorized to vacate judgment on proved statutory ground of irregularity, in absence of order amending petition to correspond with evidence.—Mt. Ida School v. Clark, 177 N.E. 604, 39 Ohio App. 389.

29. Tex.—Nueces Hardware & Implement Co. v. Jecker, Civ.App., 56 S.W.2d 474.

30. Tex.—Smith v. Higginbotham, Civ.App., 141 S.W.2d 752, affirmed 158 S.W.2d 481, 138 Tex. 227.
Right to determine merits see supra subdivision j (3) of this section.
Right to accounting
Where there was no dispute about original amount of mortgage indebtedness and no dispute about the payments made or about the fact that payments were to be made monthly on mortgage on which a default judgment was taken, the mortgagors who filed suit to set aside default judgment as having been obtained by fraud were not entitled to an accounting.—Brown v. Merchants & Planters Bank & Trust Co., 152 S.W. 2d 548, 202 Ark. 684.

31. N.Y.—Tilney v. Gerner, 286 N. Y.S. 919, 247 App.Div. 859.

32. Ohio.—National Guaranty & Finance Co. v. Lindimore, App., 31 N.E.2d 155—Rabinovitz v. Novak, App., 31 N.E.2d 151.

33. N.Y.—Walton Foundry Co. v. A. D. Granger Co., 196 N.Y.S. 719, 203 App.Div. 226.

34. Vt.—Greene v. Riley, 172 A. 633, 106 Vt. 319.

35. Cal.—Brooks v. Nelson, 272 P. 610, 95 Cal.App. 144.
Idaho.—Commonwealth Trust Co. of Pittsburgh v. Lorain, 255 P. 909, 43 Idaho 784.

36. Okl.—Berkey v. Rader, 244 P. 184, 116 Okl. 258.
34 C.J. p 427 note 63.

37. Cal.—Stack v. Welder, 43 P.2d 270, 3 Cal.2d 71.
Idaho.—Backman v. Douglas, 270 P. 618, 46 Idaho 671.
N.J.—Paterson Stove Repair Co. v. Ritzer, 8 A.2d 133, 123 N.J.Law 145.

38. Ark.—Minick v. Ramey, 269 S. W. 565, 168 Ark. 180.
Ky.—Welch v. Mann's Ex'r, 88 S.W. 2d 1, 261 Ky. 470.

39. N.J.—Horner v. Atchison, 132 A. 513, 4 N.J.Misc. 342.
Nominal damages
Where error in entering judgment in replevin action for more than nominal damages appeared on the face of record, defendants were entitled to have that part of the judgment set aside.—Barslund v. Anderson, 103 P.2d 23, 106 Colo. 238.
Reduction to amount admittedly due
Pa.—Farmers Trust Co. v. Egulf, 32 Pa.Dist. & Co. 598.

40. Ill.—Skiras v. Magenis, 58 N.E. 2d 322, 324 Ill.App. 250.
Husband and wife
Where default judgment in personal injury action was entered jointly against husband and wife, and judgment was so defective as to husband because of insufficiency in the process as to necessitate its vacation as to him, judgment was required to also be set aside as to wife without regard to whether sufficient cause otherwise existed.—Brown v. Zaubawky, 57 N.E.2d 856, 388 Ill. 351.

ment has been rendered against codefendants whose interests are distinct and severable, and where only one defendant moves to vacate it, it may be improper to vacate the judgment as a whole.[41]

On denying a petition to vacate based on insufficiency of service and fraud, it has been held that the court may not modify the original judgment.[42]

(3) Terms and Conditions of Relief
- (a) In general
- (b) Paying or securing costs and expenses
- (c) Limiting defenses
- (d) Securing payment of judgment
- (e) Allowing judgment to stand as security
- (f) Performance of conditions

(a) In General

Where the court has discretion in opening or vacating a default judgment it may impose, as a condition to granting the application, such terms as may be just and reasonable.

Where the opening or vacation of a default judgment is discretionary with the court, the court may impose, as a condition to granting the application, such terms as may be just and reasonable[43] and which will preserve plaintiff's rights.[44] Likewise, under some statutes which entitle defendant to have a default judgment obtained on constructive service opened or vacated, as discussed supra § 334, the court may impose such terms as may be just.[45] Terms are not properly imposed where the default was caused by the other party's wrongful conduct,[46] where the judgment was taken without notice to defendant,[47] where the judgment was entered prematurely or improvidently,[48] or where it was procured by fraud and collusion.[49] Where the power to impose terms is regulated by statute it has been held that the court may not exceed the statutory restrictions.[50]

The amount of the judgment may be reduced to correspond with the prayer for relief before it is vacated on condition.[51]

Payment of amount admitted to be due. It is proper, on opening a default, to require defendant to pay as much of plaintiff's claim as he admits to be due, as a condition of allowing him to dispute the rest.[52]

Judgment against coöwners

Where default judgment was entered as unit against all coöwners of tavern for automobile accident injuries because driver of automobile which caused injuries was intoxicated on liquor purchased in such tavern, and thereafter court vacated the default as to infant coöwner because no guardian ad litem had been appointed to represent her, the default judgment was required to be vacated as to all other coöwners.—Skiras v. Magenis, 58 N.E.2d 322, 324 Ill.App. 250.

41. Ala.—Ex parte C. W. Hooper & Co., 93 So. 283, 18 Ala.App. 490, certiorari denied Ex parte Jones, 93 So. 661, 207 Ala. 697.
Colo.—Green v. Halsted, 238 P. 40, 77 Colo. 578.

42. Okl.—Holshouser v. Holshouser, 26 P.2d 189, 166 Okl. 45.

43. Ala.—**Corpus Juris cited in** Mosaic Templars of America v. Hall, 124 So. 879, 220 Ala. 305.
Cal.—Sheffler v. Hutchings, 13 P.2d 527, 124 Cal.App. 760.
Fla.—Knabb v. Reconstruction Finance Corporation, 197 So. 707, 144 Fla. 110.
N.Y.—Iger v. Boyd-Scott Co., 290 N.Y.S. 619, 248 App.Div. 902—Bellinger v. Gallo, 224 N.Y.S. 162, 221 App.Div. 482—Famigletti v. Del Terzo, 60 N.Y.S.2d 766.
Okl.—Halliburton v. Illinois Life Ins. Co., 40 P.2d 1086, 170 Okl. 360.
Or.—Burkitt v. Vail, 260 P. 1014, 123 Or. 461.
R.I.—Borden v. Briggs, 142 A. 144, 49 R.I. 207.
Wash.—Roth v. Nash, 144 P.2d 271, 19 Wash.2d 731.
34 C.J. p 377 note 28.

Use of testimony of deceased witness

Defendant's application to open default judgment which had been entered on inquest sought favor of the court, and, therefore, irrespective of whether under present circumstances right of plaintiff to use, without defendant's consent, testimony of witness who had died since taking of inquest was sanctioned by law, trial court should have required defendant to stipulate that such testimony might be used as a condition to opening the default.—New Amsterdam Casualty Co. v. Augner, 28 N.Y.S.2d 277, 262 App.Div. 113.

Examination before trial

Trial court could reasonably require defendant to submit to an examination before trial as a condition of opening defendant's default.—Becker v. Niagara Textile Co., 26 N.Y.S.2d 62, 175 Misc. 963.

Trial of case without jury

N.Y.—Zeesell Realty Co. v. Cunningham, 211 N.Y.S. 591, 125 Misc. 444, modified without opinion 213 N.Y.S. 942, 215 App.Div. 811.

Uncontroverted facts taken as true

In imposing conditions for opening default of defendant, uncontroverted facts alleged in complaint must be taken as true.—Sheffler v. Hutchings, 13 P.2d 527, 124 Cal.App. 760.

44. N.Y.—O'Neal v. Seifert, 288 N.Y.S. 125, 248 App.Div. 638—Warren v. Boehm, 260 N.Y.S. 474, 236 App.Div. 602.

45. Cal.—Gray v. Lawlor, 90 P. 691, 151 Cal. 352, 12 Ann.Cas. 990.
34 C.J. p 426 note 48.

46. N.Y.—Mitzas v. Spector, 212 N.Y.S. 295, 125 Misc. 923.

47. N.Y.—Pearson Bros. v. Fratianni, 20 N.Y.S.2d 680.
34 C.J. p 379 note 34.

48. Or.—Mitchell v. Campbell, 13 P. 190, 14 Or. 454.
34 C.J. p 379 note 35.

49. N.Y.—Marotta v. Marvullo, 160 N.Y.S. 1002.
34 C.J. p 379 note 36.

50. N.Y.—Wood v. Gallagher, 200 N.Y.S. 361, 206 App.Div. 738.
Utah.—Hurd v. Ford, 276 P. 908, 74 Utah 46.

51. N.Y.—Famigletti v. Del Terzo, 57 N.Y.S.2d 101, 185 Misc. 453, modified on other grounds 60 N.Y.S.2d 766.

52. Cal.—Youngman v. Tonner, 38 P. 120, 82 Cal. 611.
34 C.J. p 382 note 67.

(b) Paying or Securing Costs and Expenses

Unless otherwise provided by statute, the trial court in opening or vacating a default judgment may impose such terms as to the payment of costs as in its discretion it determines to be proper.

Unless otherwise provided by statute,[53] the trial court in opening or vacating a default judgment may impose such terms as to the payment of costs as in its discretion it determines to be proper.[54] It is usually proper for the court to impose as a condition a requirement that defendant shall pay the accrued costs in the action,[55] and also, in a proper case and where justice requires it, the disbursements of the opposite party,[56] his reasonable personal expense incurred in connection with the suit,[57] a proper fee to his attorneys,[58] and the costs of the motion itself.[59] Where a judgment is opened or vacated as a matter of favor or grace to defendant and on his motion, costs ordinarily should be imposed on him.[60]

Under some statutes payment of all the costs which have accrued is a mandatory condition for opening the default,[61] but, if not required by statute, the court may properly omit the imposition of costs as a condition,[62] particularly if it is not insisted on by plaintiff[63] or if defendant is not chargeable with any negligence or fault in suffering the judgment.[64] The imposition of a condition that defendant pay all costs may be erroneous.[65] The court may properly require the payment of a lump sum as a condition for opening the judgment.[66]

Where it is improper to impose any terms as a condition of opening the judgment, it is not proper to require payment of costs, etc., as a condition of relief,[67] as where the court had no jurisdiction of defendant,[68] where the entry of the default judgment was erroneous,[69] or where judgment by default was entered at a time when the party was not in default[70] or in violation of an agreement not to do so.[71]

Defendant may be required to secure any costs and disbursements that may thereafter be adjudged in favor of plaintiff in the action.[72]

Costs to abide event. It has been held that costs may be left to abide the event,[73] and, where this

53. Ala.—Mosaic Templars of America v. Hall, 124 So. 879, 220 Ala. 305.

54. Neb.—Barney v. Platte Valley Public Power & Irr. Dist., 23 N.W.2d 335.

55. Mo.—Crown Drug Co. v. Raymond, App., 51 S.W.2d 215.
Pa.—Horning v. David, 8 A.2d 729, 137 Pa.Super. 252.
34 C.J. p 380 note 47.
Imposition of costs generally see infra subdivision p of this section.

Default opened by plaintiff
Costs may be awarded to defendant where he is without fault on opening of default judgment by plaintiff.—Delbon v. Krautwald, 171 N.Y.S. 392.

56. Pa.—Horning v. David, 8 A.2d 729, 137 Pa.Super. 252.
34 C.J. p 381 note 48.

Reimbursement for trouble caused by defendant's conduct
N.Y.—O'Neal v. Seifert, 288 N.Y.S. 125, 248 App.Div. 638.

57. Wis.—Brihm v. Ætna Ins. Co. of Hartford, Conn., 211 N.W. 759, 191 Wis. 633.
34 C.J. p 381 note 49.

Additional expense for witnesses
Trial court did not abuse its discretion in overruling defendant's motion to set default judgment aside and grant a new trial in suit for damages sustained as result of automobile accident, where plaintiffs lost contact with two witnesses who were present at scene of accident and defendant did not offer to bear any additional expense to which plaintiffs would be put in case a new trial should be granted and defendant refused to agree to immediate trial.—Southwestern Specialty Co. v. Brown, Tex.Civ.App., 183 S.W.2d 1002, error refused.

58. R.I.—Shapiro v. Albany Ins. Co., 163 A. 747.
34 C.J. p 381 note 50.

59. N.J.—Fox v. Simon & Krivit, Inc., Sup., 109 A. 900.
34 C.J. p 381 note 51.

Costs on appeal from order denying application
Neb.—Barney v. Platte Valley Public Power & Irr. Dist., 23 N.W.2d 335.
Wash.—Melosh v. Graham, 210 P. 667, 122 Wash. 299.

60. N.Y.—Linden v. West 21st Street Holding Corporation, 12 N.Y.S.2d 77, 257 App.Div. 844.
34 C.J. p 381 notes 57, 58.

61. Ga.—Miller v. Phœnix Mut. Life Ins. Co., 147 S.E. 527, 168 Ga. 321—Fitzgerald v. Ferran, 124 S.E. 530, 158 Ga. 758—Rawls v. Bowers, 172 S.E. 687, 48 Ga.App. 324—Henderson v. Ellarbee, 131 S.E. 524, 35 Ga.App. 5—Sweat v. L. Mohr & Sons, 94 S.E. 79, 21 Ga.App. 93.
W.Va.—Shenandoah Valley Nat. Bank v. Hiett, 6 S.E.2d 769, 121 W.Va. 454.

62. Cal.—Carbondale Mach. Co. v. Elyraud, 271 P. 349, 94 Cal.App. 356.
34 C.J. p 381 note 53.

63. Cal.—Robinson v. Merrill, 22 P. 260, 80 Cal. 415.
Ga.—Butler v. Richmond & D. R. Co., 15 S.E. 668, 88 Ga. 594.

64. Wis.—Reeves v. Kroll, 113 N.W. 440, 133 Wis. 196.
34 C.J. p 381 note 55.

65. N.Y.—Voelker v. Fieldman, 226 N.Y.S. 919, 222 App.Div. 826.
34 C.J. p 381 note 56.

66. **Twenty-five dollars**
Cal.—Stub v. Harrison, 96 P.2d 979, 35 Cal.App.2d 685.
N.Y.—Iger v. Boyd-Scott Co., 290 N.Y.S. 619, 248 App.Div. 902—Voelker v. Fieldman, 226 N.Y.S. 919, 222 App.Div. 826.
Wash.—Melosh v. Graham, 210 P. 667, 122 Wash. 299.

67. N.Y.—Girbekian v. Castikyan, 111 N.Y.S. 243, 126 App.Div. 812.
34 C.J. p 381 note 60.

68. Cal.—Waller v. Weston, 57 P. 892, 125 Cal. 261.
34 C.J. p 381 note 61.

69. Ohio.—McCabe v. Tom, 171 N.E. 368, 35 Ohio App. 73.

70. N.Y.—Gillespie v. Satterlee, 42 N.Y.S. 463, 18 Misc. 606.

71. N.Y.—Marotta v. Marvulla, 160 N.Y.S. 1002.
34 C.J. p 381 note 63.

72. Or.—Russell v. Piper, 201 P. 436, 101 Or. 680.
34 C.J. p 382 note 66.

Approval of bond nunc pro tunc
Superior court can approve bond nunc pro tunc as of time prior to proceedings without objection subsequently to entry of order vacating judgment of dismissal.—Smith v. Brown, 184 N.E. 333, 282 Mass. 81.

73. Ky.—Williams v. Taylor, 11 Bush 375.

is done, the court may impose the condition that defendant shall furnish security for them,[74] but it has also been held to be error to award costs of the motion to abide the event.[75]

(c) Limiting Defenses

The court in its discretion may require, as a condition to opening a default judgment, that the defendant shall plead issuably or to the merits, or it may restrict him to the defenses set up in his petition or moving papers.

It is in the discretion of the court on opening a default judgment to require as a condition that defendant shall plead issuably or to the merits,[76] and that he shall not resort to a demurrer[77] or dilatory plea.[78] In like manner, it may, if it deems proper, restrict him to the defenses set up in his petition or moving papers.[79] So the court, in its discretion, may make it a condition that defendant shall forbear to set up some particular defense which is considered unconscionable or purely technical.[80] It is an abuse of discretion, however, to require defendant to waive a meritorious defense.[81] The statute of limitations has been held to be a meritorious defense which should not be excluded as a condition for opening the default judgment,[82] if it would have been available as a defense at the time the default judgment was entered,[83] but if the statute of limitations would not have been a defense at the time the default was taken,[84] or if the action is one to which a statute of limitations cannot apply,[85] defendant may be required to waive or abandon it as a condition to opening the judgment.

(d) Securing Payment of Judgment

Where conditions may be imposed on the opening of a default judgment the court may require the defendant to give a bond or undertaking to pay any judgment plaintiff may eventually recover.

Where conditions may be imposed, it is within the authority of the court, on opening a default judgment, to impose the condition that defendant shall give a bond or undertaking to pay any judgment plaintiff may eventually recover.[86] This, however, is regarded as a severe condition, and will be held to be an abuse of discretion unless the facts of the case and the situation of the parties fully justify it.[87] Security for payment of the judgment must be made a condition when so provided by statute.[88] It is also competent for the court in proper cases to require defendant to give an undertaking that he will not sell or encumber any of his property so as to hinder plaintiff in the collection of his claim,[89] or even to require him to deposit with the clerk of the court a sum sufficient to secure plaintiff's claim.[90]

74. Ky.—Williams v. Taylor, supra. 34 C.J. p 382 note 65.

75. N.Y.—Richardson v. Sun Printing & Publishing Ass'n, 46 N.Y.S. 814, 20 App.Div. 329—Roome v. Unger, 12 N.Y.S.2d 523, 171 Misc. 293.

76. Kan.—Kansas Torpedo Co. v. Erie Petroleum Co., 89 P. 913, 75 Kan. 530.
34 C.J. p 379 note 40.

77. Iowa.—Perkins v. Davis, 3 Greene 235.
Wis.—Doty v. Strong, 1 Pinn. 313, 40 Am.D. 773.
Where no terms should be imposed on defendant, a requirement that defendant shall answer by a certain time has been held to be erroneous, since it deprives him of the right to demur.—Berg v. Pohl, 53 N.Y.S. 799, 24 Misc. 740.

78. Cal.—Dennison v. Chapman, 36 P. 943, 102 Cal. 618.
34 C.J. p 380 note 42.

79. S.C.—Powers v. Fidelity & Deposit Co. of Maryland, 166 S.E. 729, 167 S.C. 513.
34 C.J. p 380 note 43.

80. Md.—Cornblatt v. Bloch, 103 A. 137, 132 Md. 44.
34 C.J. p 380 note 44.
Want of jurisdiction
Where the court has jurisdiction of the class of cases to which the one at bar belongs, but for some reason failed to acquire jurisdiction in the particular case, it has power, on opening a default at defendant's request, to impose the condition that he shall waive the want of jurisdiction.—Putney v. Collins, 8 Grant, Pa., 72.

81. Or.—Mitchell v. Campbell, 13 P. 190, 14 Or. 454.
34 C.J. p 380 notes 45, 46.

82. R.I.—**Corpus Juris cited in** Borden v. Briggs, 142 A. 144, 49 R.I. 207.
34 C.J. p 380 note 46 [b] (2), (3).
However, there are general statements in some cases to the contrary.—Audubon v. Excelsior Fire Ins. Co., 10 Abb.Pr.,N.Y., 64—Fox v. Baker, 2 Wend.,N.Y., 244.

83. N.Y.—Musgrave v. Musgrave, 176 N.Y.S. 314, 188 App.Div. 908.

84. Ala.—Sawyer v. Patterson, 12 Ala. 295.

85. Wis.—Meiners v. Frederick Miller Brewing Co., 47 N.W. 430, 78 Wis. 364, 10 L.R.A. 586.

86. Cal.—Sheffler v. Hutchings, 13 P.3d 527, 124 Cal.App. 760.
Md.—Taylor v. Gorman, 126 A. 897, 146 Md. 207.
N.Y.—Goldstein v. Marks, 59 N.Y.S. 2d 663—Rosenstreich & Ballon v. Scher, 202 N.Y.S. 265.
Okl.—Halliburton v. Illinois Life Ins. Co., 40 P.2d 1086, 170 Okl. 360.
34 C.J. p 382 note 69.

87. N.Y.—Dietz v. Weisthal, 227 N.Y.S. 568, 131 Misc. 597.
34 C.J. p 382 note 70.
Unintentional or unwilful default
Where defendants' default was neither intentional nor willful, it was improper to require the filing of cash or a bond as a condition for opening the default.—Gustavus J. Esselen, Inc., v. Visor, 45 N.Y.S.2d 258, 180 Misc. 537.

88. Del.—Penn Central Light & Power Co. v. Central Eastern Power Co., 171 A. 332, 6 W.W.Harr. 74.
Applicability of statute
Code provision, authorizing court, without requiring security, to take off default judgments if defendant files affidavit of lack of notice of suit, has been held applicable only to judgments in default of appearance entered under same code section, not to judgments for want of affidavit of defense obtained under different code section.—Penn Central Light & Power Co. v. Central Eastern Power Co., 171 A. 332, 6 W.W. Harr. 74.

89. N.Y.—Schwartz v. Schendel, 53 N.Y.S. 773, 24 Misc. 701.

90. N.Y.—Fuchs & Lang Mfg. Co. v.

(e) Allowing Judgment to Stand as Security

On opening a default judgment the court may properly impose the condition that the judgment already entered shall stand as security for the amount ultimately recovered.

On opening a default judgment to let in a defense it is proper to impose the condition that the judgment already entered shall stand as security for the amount ultimately recovered.[91] Where this is done the judgment exists only for the purpose of security.[92] Such condition, however, need not be imposed where it is not necessary for plaintiff's protection;[93] and, where the judgment debtor has a right to have the judgment opened or vacated unconditionally, such right cannot be clogged with the condition that the judgment shall stand as security.[94]

Where the statute requires security for payment of the judgment, the court cannot accept the judgment itself as security by ordering it to remain cautionary.[95]

(f) Performance of Conditions

Compliance with the terms imposed on the opening of a default judgment is a condition precedent to the granting of relief.

Compliance with the terms imposed on the opening of a default judgment is a condition precedent to the relief granted; unless and until they are complied with the judgment remains in full force and effect.[96] The performance of the conditions, however, may be waived by the party for whose benefit they were prescribed,[97] and, where a judgment which should never have been entered is stricken off on terms, an order reinstating it for noncompliance with the terms is erroneous.[98]

l. Findings

In a proceeding to open or vacate a default judgment, only the specific findings required by statute need be made by the court.

In a proceeding to open or vacate a default judgment, the court must make specific findings required

Springer & Welty Co., 37 N.Y.S. 24, 15 Misc. 443.
34 C.J. p 382 note 72.

91. Ind.—Christ v. Jovanoff, 152 N. E. 2, 84 Ind.App. 676.
Okl.—Halliburton v. Illinois Life Ins. Co., 40 P.2d 1086, 170 Okl. 360.
S.D.—Boshart v. National Ben. Ass'n of Mitchell, 273 N.W. 7, 65 S.D. 260.
34 C.J. p 382 note 73.

92. Ill.—Kroer v. Smith, 48 N.E.2d 743, 318 Ill.App. 489.

93. Wis.—Bond v. Neuschwander, 57 N.W. 54, 86 Wis. 391.
34 C.J. p 383 note 75.

94. N.Y.—Yates v. Guthrie, 23 N.E. 741, 119 N.Y. 420.
34 C.J. p 383 note 77.

95. Del.—Penn Central Light & Power Co. v. Central Eastern Power Co., 171 A. 332, 6 W.W.Harr. 74.

96. Ga.—Coker v. Lipscomb, 87 S. E. 704, 17 Ga.App. 506.
34 C.J. p 383 note 78.

Filing answer originally tendered

(1) Where order vacating default judgment was on condition that defendant file answer originally tendered, defendant could not raise jurisdictional questions invoking additional relief from that contemplated in original answer.—Powers v. Fidelity & Deposit Co. of Maryland, 166 S. E. 729, 167 S.C. 513.

(2) Defaulting defendant's serving of answer adding new matter was held not noncompliance with order vacating default judgment, directing defendant to file answer originally tendered, where such order required defendant to serve itemized statement and authorized plaintiff to plead thereto.—Powers v. Fidelity & Deposit Co. of Maryland, 166 S.E. 729, 167 S.C. 513.

Order requiring surety company bond

Bond signed by individual surety was held not to comply with order for setting aside default judgment on filing surety company bond.—Boyle v. Berg, 218 N.W. 757, 242 Mich. 225.

Payment of costs

Under statute dealing with the opening of judgment after default on service by publication, the requirement that applicant must "pay all costs, if the court require them to be paid," does not require of applicant a formal offer to pay costs before the court orders that they be paid.—Bagsby v. Bagsby, 89 P.2d 345, 184 Okl. 627, 122 A.L.R. 155.

Sending check by registered mail

Defendants' tender to plaintiff's attorney of cashier's check, payable to plaintiff, for sum which trial court directed defendants to pay plaintiff as costs in order conditionally granting defendants' motion to set aside default and judgment thereon, and sending of check by registered mail, addressed to plaintiff at room near that of plaintiff in same building, after plaintiff's attorney had refused check, but within time limited by court order, was sufficient compliance with terms thereof, so as to authorize final order unconditionally setting aside default and judgment.—Hayes v. Pierce, 104 P.2d 499, 15 Cal.2d 662—Hayes v. Pierce, 64 P.2d 728, 13 Cal.App.2d 531.

Search for accrued costs

Where the trial court orders a default judgment reopened pursuant to statute on condition that defendant pay costs, defendant is not ordinarily required to search beyond appearance docket for accrued costs in an effort to comply with order.—Lofton v. McLucas, 113 P.2d 966, 189 Okl. 115.

Payment from account with clerk

Defendant was held not to have failed to pay costs required by order vacating default judgment where credit of defense counsel's running account with clerk of court relieved plaintiff from responsibility of payment.—Powers v. Fidelity & Deposit Co. of Maryland, 166 S.E. 729, 167 S. C. 513.

Relief from consequences of noncompliance

Although practice of moving at special term after same question has been passed on by another special term is not approved, the special term had power under circumstances to relieve defendant from noncompliance with order of special term as made by official referee, where the order conditionally opened defendant's default, which, however, was never opened, since defendant defaulted in complying with such order.—Schleeter v. Bommer, 53 N.Y. S.2d 167, 268 App.Div. 1020.

97. N.Y.—Bimboni v. McCormack, 157 N.Y.S. 314.
34 C.J. p 383 note 79.

98. Md.—Wolfe v. Murray, 54 A. 876, 96 Md. 727.

by statute,[99] but it need not make specific findings which are not required by statute.[1]

m. Order

(1) In general
(2) Operation and effect
(3) Renewal of application

(1) In General

An order vacating a default judgment is properly limited to the issues which are before the court, and which are necessary to a decision.

An order vacating a default judgment is properly limited to the issues which are before the court,[2] and which are necessary to a decision.[3] Although a statute requires the grounds on which a new trial is granted to be specified of record, it has been held that the court in setting aside a default judgment need not specify the grounds for its action.[4] On denial of a motion to vacate a default judgment it has been held that it is error for the court to insert in the order a provision permitting defendant to answer.[5] An order that the judgment be set aside and that the cause be retained to be heard on the merits has been held to vacate the verdict on which the judgment was based as well as the judgment.[6]

Where the statute provides that a judgment shall not be vacated until it is adjudged that a valid defense exists, the entry of the order vacating the judgment must show that the court adjudged that a valid defense existed if not otherwise apparent on the record.[7]

An order may constitute a judicial order although it is not entered in the court's minutes.[8] The trial court's memorandum may be considered with the order vacating the judgment to determine the reason for the order.[9]

Nunc pro tunc entry. Where no formal order appears of record although a hearing was had and judgment reopened, the court may enter a nunc pro tunc order in accordance with the facts reflected by the minutes.[10] An order containing no recital that it is entered as of an earlier date and which relates to a subject other than an earlier order cannot be regarded as a nunc pro tunc entry as of the time of the earlier order.[11]

Right to knowledge of order. If the court sustains defendant's motion to set aside a default judgment, plaintiff is entitled to know that fact.[12]

(2) Operation and Effect

An order vacating a default judgment is binding on all parties and must be given full faith and credit until vacated or reversed.

An order vacating a default judgment is binding on all parties[13] and must be given full faith and credit until vacated or reversed.[14] As a general rule the order leaves the case pending for further and final action on the merits,[15] and the case stands in the docket in the same condition as though the judgment had never been rendered.[16] The order

99. N.C.—Parnell v. Ivey, 197 S.E. 128, 213 N.C. 644—Cayton v. Clark, 193 S.E. 404, 212 N.C. 374.

1. Cal.—Wood v. Peterson Farms Co., 22 P.2d 565, 132 Cal.App. 233.

2. Ga.—Maynard v. Luton, 146 S.E. 640, 39 Ga.App. 242.

Vacating judgment to bring in party
Vacating default judgment in order to allow the bringing in of a necessary party did not justify setting aside the default itself but only the judgment.—Taylor v. Western States Land & Mortgage Co., 147 P.2d 36, 63 Cal.App.2d 401.

Lack of jurisdiction
An order vacating default judgment because of lack of jurisdiction is not void as transcending scope of rule to show cause why default judgment should not be reopened.—Palansky v. Reich, 164 A. 701, 11 N.J. Misc. 106, affirmed 168 A. 297, 11 N. J.Law 241.

3. Ky.—Welch v. Mann's Ex'r, 88 S. W.2d 1, 261 Ky. 470.

4. Mo.—Crossland v. Admire, 24 S. W. 154, 118 Mo. 87.

5. N.Y.—Levine v. Berger, 21 N.Y. S.2d 449.

6. N.C.—Gosnell v. Hilliard, 171 S. E. 52, 205 N.C. 297.

Default entered by clerk
An order relating to vacating judgment rendered by court has been held sufficient to vacate default entered by clerk.—Weck v. Sucher, 274 P. 579, 96 Cal.App. 422.

7. Ohio.—National Guaranty & Finance Co. v. Lindimore, App., 31 N.E.2d 155.

8. Tex.—Buttrill v. Occidental Life Ins. Co., Civ.App., 45 S.W.2d 636.

9. Minn.—Marthaler Machine & Engineering Co. v. Meyers, 218 N.W. 127, 173 Minn. 606.

10. Okl.—Lofton v. McLucas, 113 P. 2d 966, 189 Okl. 115.

Order made by agreement of parties
Court erred in denying motion to enter nunc pro tunc in minutes of court order made by agreement of parties vacating default judgment as to sureties on waiver of jury, particularly where entry did not contradict record.—Buttrill v. Occidental Life Ins. Co., Tex.Civ.App., 45 S.W.2d 636.

11. Ohio.—Levy v. Foley, 61 N.E.2d 615, 75 Ohio App. 220.

12. N.Y.—National Advertising Agency v. Greco, 201 N.Y.S. 704.

13. Fla.—Adelhelm v. Dougherty, 176 So. 775, 129 Fla. 680.

14. Ill.—Haller v. Rieth, 247 Ill. App. 541.
R.I.—Feldman v. Silva, 171 A. 922, 54 R.I. 202.

15. Ga.—Ryles v. Moore, 13 S.E.2d 672, 191 Ga. 661.
Ind.—State ex rel. Krodel v. Gilkison, 198 N.E. 323, 209 Ind. 213.
Determination of merits in the proceedings see supra subdivision j (3) of this section.

Order at same term
Setting aside default judgment on motion at same term judgment was rendered does not affect merits, but provides means whereby merits may be tried.—Metz v. Melton Coal Co., 47 S.W.2d 803, 185 Ark. 486.

Granting new trial
Setting aside of default judgment amounted to granting of new trial at term of court at which judgment was entered and set aside.—Saunders v. Hornsby, Tex.Civ.App., 173 S. W.2d 795, error refused.

16. Tex.—Trujillo v. Piarote, 53 S.

gives defendant only a right to be heard and does not preclude the court on final hearing from entering such judgment as is warranted by the facts of the case.[17] In a statutory proceeding an order vacating a decree will not be given greater effect than that contemplated by the statute.[18]

A judgment overruling a motion to vacate a default judgment for lack of jurisdiction constitutes a decision that the default judgment was valid in a jurisdictional sense.[19]

A judgment setting aside a default may be amended during the term.[20]

Void orders. An order, entered without jurisdiction, opening a judgment of default is void,[21] and the court may properly disregard such order.[22] Subsequent orders based on a void order vacating a default are also invalid.[23]

(3) Renewal of Application

The strict rule of res judicata does not apply to a decision on a motion to vacate a default judgment and the court in its discretion may allow and act on a renewal of the motion.

The strict rule of res judicata does not apply to a decision on a motion to vacate a default judgment and the court in its discretion may allow and act on a renewal of the motion,[24] at least where the order denying the first motion is vacated[25] or where different grounds are alleged in the second motion,[26] but it may also properly dismiss a motion for the reason that it has formerly been refused.[27] In some jurisdictions a second application may be permitted even on the same grounds which were previously ruled on adversely,[28] but in other jurisdictions a judgment refusing to open a default judgment concludes defendant as to a second motion on the same grounds,[29] although defendant may not have been present when the first motion was heard and a judgment was rendered.[30] To justify granting the second motion, the motion must show additional facts to excuse the default and not merely newly discovered evidence,[31] and if it does not refer to the first motion it must contain a full showing of facts to excuse the default.[32] Where the second application is for different relief, as, for instance, where the former motion was to vacate a judgment as a nullity, and the second is to open up such judgment and let the applicant in to defend, or vice versa, the denial of the first motion is no bar as to the second.[33]

Where defendant after two opportunities has failed to show a meritorious defense, it has been held that an order denying an application to open a default should not grant leave to renew the application.[34]

Application in different court. After a motion to remove a default has been denied, it has been held that the party may not petition another court of concurrent jurisdiction for relief on the same grounds.[35]

Necessity for leave. It has been held that leave

W.2d 466, 122 Tex. 173—Saunders v. Hornsby, Civ.App., 173 S.W.2d 795, error refused.

17. Ky.—Joseph v. Bailey, 277 S.W. 466, 211 Ky. 394.

18. U.S.—U. S. v. Mayse, C.C.A.Or., 5 F.2d 885, certiorari denied Leatherman v. Mayse, 46 S.Ct. 105, 269 U.S. 580, 70 L.Ed. 422.

19. D.C.—Operative Plasterers' and Cement Finishers' International Ass'n of U. S. and Canada v. Case, 93 F.2d 56, 68 App.D.C. 43.

20. Ind.—Butcher v. Olmstead, 182 N.E. 265, 99 Ind.App. 92.

21. Cal.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221.
Ga.—Avery & Co. v. Sorrell, 121 S. E. 828, 157 Ga. 476, answers to certified questions conformed to 122 S.E. 638, 32 Ga.App. 41.
Ohio.—Ryan v. Buckeye State Building & Loan Co., 163 N.E. 719, 29 Ohio App. 476.

22. Cal.—Gibbons v. Clapp, 277 P. 490, 207 Cal. 221.

23. Fla.—Hewitt v. International Shoe Co., 154 So. 833, 114 Fla. 743, motion denied 155 So. 725, 115 Fla. 508.

24. Ariz.—Collister v. Inter-State Fidelity Building & Loan Ass'n of Utah, 38 P.2d 626, 44 Ariz. 427, 98 A.L.R. 1020.
Minn.—Wilhelm v. Wilhelm, 276 N. W. 804, 201 Minn. 462—La Plante v. Knutson, 219 N.W. 184, 174 Minn. 344.
N.J.—Finkel v. District Court for First Judicial Dist. of Union County, 21 A.2d 306, 127 N.J.Law 132, affirmed 28 A.2d 119, 129 N.J.Law 97.
Wis.—State ex rel. C. W. Fischer Furniture Co. v. Detling, 279 N.W. 616, 228 Wis. 68.
Statement of doctrine of res judicata see infra § 592.

Discretion held not abused
Cal.—Tearney v. Riddle, 149 P.2d 387, 64 Cal.App.2d 783.
Wis.—State ex rel. C. W. Fischer Furniture Co. v. Detling, 279 N. W. 616, 228 Wis. 68.

25. Cal.—Tearney v. Riddle, 149 P. 2d 387, 64 Cal.App.2d 783.

26. Okl.—Tippins v. Turben, 19 P. 2d 605, 162 Okl. 136.
34 C.J. p 387 note 26.

27. Minn.—Universal Ins. Co. v. Brasie, 243 N.W. 393, 186 Minn. 648.

28. Ariz.—Swisshelm Gold Silver Co. v. Farwell, 124 P.2d 544, 59 Ariz. 162—Collister v. Inter-State Fidelity Building & Loan Ass'n of Utah, 38 P.2d 626, 44 Ariz. 427, 98 A.L.R. 1020.
Minn.—La Plante v. Knutson, 219 N. W. 184, 174 Minn. 344.

29. Ga.—Miller v. Phœnix Mut. Life Ins. Co., 147 S.E. 527, 168 Ga. 321.

30. Ga.—Miller v. Phœnix Mut. Life Ins. Co., supra.

31. N.Y.—White v. Sebring, 240 N. Y.S. 477, 228 App.Div. 413.

32. N.Y.—White v. Sebring, supra.

33. Kan.—Corpus Juris quoted in Ford v. Blasdel, 276 P. 283, 284, 128 Kan. 43.
34 C.J. p 389 note 37.

34. N.Y.—De Fini v. Imperatori, 215 N.Y.S. 175, 127 Misc. 42.

35. R.I.—Feldman v. Silva, 171 A. 922, 54 R.I. 202.

to renew a motion to open a default must be procured,[36] but the irregularity of failing to procure leave is cured where the court overrules an objection to a hearing of the second motion.[37]

n. Objections and Exceptions

By participating in a trial on the merits after entry of an order vacating the default judgment, the plaintiff waives, or is estopped to question, the propriety of the order.

Where plaintiff participates in a trial on the merits which takes place after entry of an order vacating the default judgment he waives, or is estopped to question, the propriety of the order,[38] but he is not estopped to raise the question of the court's jurisdiction.[39] Parties moving to set aside a judgment as a nullity and recognizing it as a nullity in the proceedings after the motion has been granted are estopped to deny the nullity of the judgment.[40] Where objections to the introduction of an amended return of service of process are specifically stated by movant, other grounds not mentioned as a basis of objection are waived.[41]

o. Vacation and Review of Order

The court, while it retains jurisdiction, may cancel a former order granting or overruling a motion to set aside a default judgment if a sufficient reason exists for that action.

While the court retains jurisdiction of the cause, it may cancel a former order granting or overruling a motion to set aside or vacate a default judgment,[42] if a sufficient reason exists for such action.[43] After a default judgment has been set aside and defendant has filed a plea, it has been held that the court cannot vacate the order setting aside the judgment.[44] An order signed by the trial judge may not be impeached in a proceeding against the clerk.[45]

Where an affidavit in the original action has not been regarded as a pleading by plaintiff, defendant, or the court, it will not be regarded as a pleading in proceedings to review the propriety of an order refusing to vacate a default.[46]

p. Costs

Where a default judgment is opened or vacated as a matter of favor or grace to the defendant and on his motion, it is error to impose the costs on the plaintiff.

Where a judgment is opened or vacated as a matter of favor or grace to defendant and on his motion, it is error to impose the costs on plaintiff.[47] Plaintiff will not be compelled to pay costs as a penalty for his refusal to stipulate for a new trial on defendant's proffer of costs and disbursements.[48]

36. N.Y.—Mandel v. Schoenfeld, 233 N.Y.S. 227, 226 App.Div. 676.

An order to show cause why a previous order of the court denying a motion to vacate a judgment and permit defendant to answer should not be vacated, the default removed, and defendant permitted to answer, is equivalent to leave by the court to renew the first motion.—First Trust & Savings Bank v. U. S. Fidelity & Guaranty Co., 194 N.W. 376, 156 Minn. 231.

37. Minn.—Wilhelm v. Wilhelm, 276 N.W. 804, 201 Minn. 462—La Plante v. Knutson, 219 N.W. 184, 174 Minn. 344.

38. Ga.—Avery & Co. v. Sorrell, 121 S.E. 838, 157 Ga. 476, answers to certified questions conformed to 122 S.E. 638, 32 Ga.App. 41.

Ill.—Thomas v. Melmed, 33 N.E.2d 919, 310 Ill.App. 262—National Lead Co. v. Mortell, 261 Ill.App. 332.

Filing bill of particulars

Plaintiff's conduct in filing bill of particulars after entry of order vacating default judgment obtained by plaintiff was tantamount to filing an amended complaint, and constituted acquiescence in such order which precluded writ of review.—Matson v. Rhodes, 149 P.2d 974, 174 Or. 550.

39. Cal.—Knox v. Superior Court in and for Riverside County, 280 P. 375, 100 Cal.App. 452.

40. La.—White v. Hill, 121 So. 585, 168 La. 92—White v. Hill, 124 So. 578, 12 La.App. 412.

41. Tex.—Employer's Reinsurance Corporation v. Brock, Civ.App., 74 S.W.2d 435, error dismissed.

42. Iowa.—Kern v. Sanborn, 7 N.W. 2d 801, 233 Iowa 458—Braverman v. Burns, 224 N.W. 596, 207 Iowa 1382.

Renewal of application see supra subdivision m of this section.

43. **Order in ex parte proceedings**

Where default decree was set aside ex parte during term in which it was rendered, but later in the term, case was fully reviewed in presence of both parties, and showing previously made as to reasonable excuse for default, if any, was found insufficient, court properly reinstated default decree.—Kern v. Sanborn, 7 N.W.2d 801, 233 Iowa 458.

Affidavit filed but not indorsed as filed

Where, in an action of debt on foreign judgment, the declaration was accompanied by affidavit required by statute, and at the following term, after office judgment, defendant filed plea of nul tiel record, duly verified, and an order was entered reciting tender and filing of such plea with affidavit, and setting aside the office judgment, it was error to set aside such order, reject the plea, and render judgment for plaintiff on the ground that there had been no counter affidavit filed under the statute, although a verified affidavit was found in the file, sworn to prior to the entry of the order, but not indorsed as filed by the clerk, which affidavit the court treated as a stray paper.—Forest Glen Land Co. v. George, 122 S.E. 543, 96 W.Va. 209.

44. Ill.—Marland Refining Co. v. Lewis, 264 Ill.App. 163.

45. Mich.—Boyle v. Berg, 218 N.W. 757, 242 Mich. 225.

46. Ky.—Pinnacle Motor Co. v. Simpson, 287 S.W. 566, 216 Ky. 184.

47. Wis.—Port Huron Engine & Thresher Co. v. Clements, 89 N.W. 160, 113 Wis. 249.

34 C.J. p 381 note 53.

Payment of costs as condition for opening default see supra subdivision k (3) of this section.

48. Wis.—Port Huron Engine & Thresher Co. v. Clements, 89 N.W. 160, 113 Wis. 249.

Reason for rule

Plaintiff is under no obligation voluntarily to consent to the opening of a default, although defendant presents a sufficient excuse.—Camp v. Stewart, 2 E.D.Smith., N.Y., 88.

q. Liabilities on Bonds

The surety on a bond given in proceedings to open or vacate a default judgment may not be held liable on the bond unless its conditions are violated.

The surety on a bond given in proceedings to open or vacate a default judgment is not liable on the bond unless its conditions are violated.[49] A judgment canceling the bond is conclusive written evidence of the termination of the surety's liability.[50]

§ 338. Proceedings in Cause Operating to Open Default

A default judgment may be vacated by subsequent proceedings in the same action which are inconsistent with the judgment continuing in force.

A default judgment may be vacated in effect, although not in terms set aside, by subsequent proceedings in the same action which are inconsistent with the judgment continuing in force.[51] As a general rule, an amendment of the complaint after a default has been taken, which introduces a new cause of action or goes to the substance of the pleading operates to open the default,[52] but an amendment in matters of form rather than substance does not operate to open the default.[53] Where the court tries the case on the merits it has been held that the default judgment is impliedly set aside or vacated without a specific order to that effect,[54] but it has also been held that the default judgment is not impliedly vacated if there has been no finding as to whether defendant was excused from filing an answer in the original proceeding.[55] Where plaintiff participates in a trial on the merits after rendition of the default judgment he impliedly consents to the vacation of the judgment.[56] A nonsuit which is entered on the motion of plaintiff after a default judgment has been entered against defendant has the effect of setting aside the default judgment.[57]

§ 339. Proceedings after Opening Default

Where a default is opened the defendant should be allowed or required to serve or file his plea or answer. The case should be placed on the calendar or set for trial, and should thereupon be proceeded with as though no default had been entered.

Where a default is opened, defendant should be allowed or required to serve or file, within a prescribed or reasonable time, his plea or answer,[58]

49. Failure of principal to pay

Where judgment by default was set aside on defendant's filing a bond in effect that, if the principal should fail to pay costs and judgment recovered, the bond should be in effect, judgment could not be entered against the surety, as until failure of the principal to pay, the conditions of the bond were not violated.—Sunset Motor Co. v. Woodruff, 228 P. 519, 130 Wash. 516.

Limitation to defendant furnishing bond

Words "any recovery," in bond, were held not to include judgments against any defendants, where surety undertook to answer only for defendant furnishing bond.—Guaranty Trust Co. of New York v. National Surety Co., 227 N.Y.S. 139, 131 Misc. 679.

50. N.Y.—Guaranty Trust Co. of New York v. National Surety Co., supra.

51. Idaho.—Vincent v. Black, 166 P. 923, 30 Idaho 636.
34 C.J. p 325 note 18.

52. Ark.—Shepherd v. Grayson Motor Co., 139 S.W.2d 54, 200 Ark. 199.
Cal.—Thompson v. Cook, 127 P.2d 909, 20 Cal.2d 564—Stack v. Welder, 43 P.2d 270, 3 Cal.2d 71—Lubarsky v. Richardson, 21 P.2d 557, 218 Cal. 27—Sheehy v. Roman Catholic Archbishop of San Francisco, 122 P.2d 60, 49 Cal.App.2d 537—Bley v. Dessin, 87 P.2d 889, 31 Cal.App.2d 338—Strosnider v. Superior Court in and for El Dorado County, 62 P.2d 1394, 17 Cal. App.2d 647—Gutleben v. Crossley, 56 P.2d 954, 13 Cal.App.2d 249.
Ga.—Elrod v. Hulett, 9 S.E.2d 279, 62 Ga.App. 659—Land v. Pikes Peak Lumber Co., 132 S.E. 644, 35 Ga.App. 159—Henderson v. Ellarbee, 131 S.E. 524, 35 Ga.App. 5.
Ill.—Lusk v. Bluhm, 53 N.E.2d 135, 321 Ill.App. 349—Dahlin v. Maytag Co., 238 Ill.App. 85.
Mont.—Price v. Skylstead, 222 P. 1059, 69 Mont. 453.
34 C.J. p 157 note 64.
Necessity for notice of amendment see supra § 194.

53. Ark.—Shepherd v. Grayson Motor Co., 139 S.W.2d 54, 200 Ark. 199.
Cal.—Stack v. Welder, 43 P.2d 270, 3 Cal.2d 71.
Mont.—Price v. Skylstead, 222 P. 1059, 69 Mont. 453.

Curing defects

While filing of material amendment will open default, filing of amendment, merely alleging facts defectively alleged in original petition will not affect validity of default judgment, since judgment cured defects.—Henderson v. Ellarbee, 131 S.E. 524, 35 Ga.App. 5.

Nonmaterial amendment

An amendment to petition in trover, amplifying description of article sued for, and alleging title or right of possession, not being material, was held not, after default, to open case for answer.—Land v. Pikes Peak Lumber Co., 132 S.E. 644, 35 Ga.App. 159.

54. Ill.—Green v. Drew, 57 N.E.2d 227, 324 Ill.App. 84.
S.D.—Boshart v. National Ben. Ass'n of Mitchell, 273 N.W. 7, 65 S.D. 260.

55. Tex.—Griffin v. Burrus, Com. App., 24 S.W.2d 810.

56. Cal.—Nicholls v. Anders, 56 P. 2d 1289, 13 Cal.App.2d 440.

57. Ala.—Green v. NuGrape Co., 100 So. 84, 19 Ala.App. 663.

58. N.Y.—Luke v. Polstein, 51 N.Y. S.2d 427, 268 App.Div. 921, followed in 51 N.Y.S.2d 429, 268 App.Div. 921, appeal denied 55 N.Y.S.2d 665, 269 App.Div. 784. Motion granted 61 N.E.2d 731, 294 N.Y. 775. Affirmed 63 N.E.2d 27, 294 N.Y. 896.
34 C.J. p 431 notes 8, 10.

Application for leave to answer

(1) Application for leave to file answer, after vacation of default judgment, is not a pleading and, if not required by statute, need not be in writing.—Schaffner v. Preston Oil Co., 154 N.E. 780, 94 Ind.App. 554.

(2) Although made in writing, the application is not demurrable.—Schaffner v. Preston Oil Co., supra.

Extension of time

(1) Extension of time to answer may be permitted where the court is obliged to open default.—Naderhoff v. Benz, 141 N.W. 501, 25 N.D. 501, 47 L.R.A.,N.S., 853.

except where the judgment is vacated because it is void for want of jurisdiction of defendant, in which case it is not proper to require defendant to appear and plead.[59] The case should be placed on the calendar or set for trial,[60] and should thereupon be proceeded with as though no default had been entered.[61] Plaintiff is not bound to serve the declaration on a party who is let in to defend after a default.[62] The issues of the case should be determined,[63] and the trial should be before a jury if, under usual rules, a jury case is presented.[64] The court may require defendant to proceed with his defense rather than cause plaintiff to prove his case,[65] but, where judgment is entered generally and without terms, plaintiff, in the absence of a statute otherwise providing, is put to proof of the cause of action as though judgment had not been entered.[66] The action may be dismissed for want of prosecution,[67] or it may be dismissed as to defendants against whom no cause of action is stated.[68] If defendant defaults again, a second judgment by default may be entered against him.[69] Where a trial on the merits results in the same decision as before, it has been held that a new judgment should not be rendered but that the original judgment should be reinstated.[70] A partial reversal of the judgment does not automatically work a reversal of the entire judgment.[71]

Amendment of pleadings. The trial court may use its sound discretion in refusing or permitting the amendment or withdrawal of pleadings.[72]

Notice or service of amended pleadings after opening of default by amendment of the declaration or complaint is considered supra § 194.

§ 340. —— Defenses Available

Except to the extent to which the defendant is limited by the conditions imposed by the court, he may avail himself of any meritorious defense existing at the time of the vacation of a default judgment.

Where the court, as a condition of opening or vacating the judgment, has limited the defenses which defendant may make to the action, defendant will not be allowed to set up matters outside the

(2) On motion to set aside judgment, extension of time beyond twenty days for filing answer was held authorized where time for filing answer had not expired when judgment was entered, and defendants had meritorious defense.—Town of Greenville v. Munford, 131 S.E. 740, 191 N.C. 373.

59. Cal.—Merced Co. v. Hicks, 7 P. 181, 2 Cal.Unrep.Cas. 483.

60. Ill.—Chicago v. English, 64 N. E. 976, 198 Ill. 211.
N.Y.—Martin v. Universal Trust Co., 78 N.Y.S. 465, 76 App.Div. 320.

61. Colo.—Swanson v. First Nat. Bank, 219 P. 784, 74 Colo. 135.
34 C.J. p 432 note 12.

After default by plaintiff

Plaintiff who failed to serve notice of controverting affidavit to defendant's plea of privilege, which resulted in default judgment, could, after twenty-eight terms, contest such plea, where plaintiff, after judgment became final, acted promptly in setting aside judgment and giving notice of hearing on such plea.—Gribble v. Scruggs, Tex.Civ.App., 55 S.W.2d 867, error dismissed.

62. N.Y.—Hitchcock v. Barlow, 2 Wend. 629.

63. N.J.—Ehnes v. Quinn, 23 A.2d 295, 127 N.J.Law 447.

Issues affecting codefendants

Where testator's widow at same term moved to set aside default judgment against widow and executor on note and mortgage and showed that executor was without power to make mortgage and that testator's children had not been made parties, widow's showing was held to have inured to benefit of executor who made no application for relief until subsequent term, and after vacation of the judgment the court was authorized to consider the issue as it affected the executor.—Welch v. Mann's Ex'r, 88 S.W.2d 1, 261 Ky. 470.

64. Ohio.—Minetti v. Einhorn, 173 N.E. 243, 36 Ohio App. 310.

65. Ind.—Butcher v. Olmstead, 182 N.E. 265, 99 Ind.App. 92.

66. Pa.—Austen v. Marzolf, 161 A. 72, 307 Pa. 232.
34 C.J. p 432 notes 15, 16.

67. Ill.—Charles H. Thompson Co. v. Burns, 199 Ill.App. 418.
N.Y.—Hewlett v. Van Voorhis, 187 N. Y.S. 533, 196 App.Div. 322, affirmed 135 N.E. 952, 233 N.Y. 642.

68. Ga.—R. E. Jarman & Sons v. Drew, 21 S.E.2d 444, 67 Ga.App. 850.

69. La.—White v. Hill, 121 So. 585, 168 La. 92.
N.C.—Wilson v. Thaggard, 34 S.E. 2d 140, 225 N.C. 348.
34 C.J. p 432 note 17.

Proposed answer as pleading

Although defendant filed proposed verified answer at time of filing motion to set aside first default, ordering second default for failure to file answer was held within discretion of court.—James A. Clay & Co. v. Shafer, 35 P.2d 572, 140 Cal.App. 625.

Terms

Where defendant's default was twice opened on identical terms which were not met, the default should not have been opened a third time on more favorable terms on an application for reargument, particularly where defendant not only deliberately failed to comply with original terms, but also failed to answer a subpœna for his examination in proceeding supplementary to execution of the default judgment, for which he was adjudged in contempt and fined.—General Exchange Ins. Corporation v. Stern, 25 N.Y.S.2d 366.

70. Ill.—Walentarski v. Racine, 264 Ill.App. 369.
Kan.—Cox v. Brown, 224 P. 908, 115 Kan. 709, rehearing overruled 225 P. 1044, 116 Kan. 213.

Right to regain title after redemption period

Defendant who procures opening of judgment based on service by publication without actual notice, after sale of land on execution and expiration of period of redemption, does not acquire right to end litigation and regain title by payment of debt with interest and costs, unless final decision is in his favor on some defense or partial defense set out in answer.—Cox v. Brown, 225 P. 1044, 116 Kan. 213.

71. Ark.—First Nat. Bank v. Bank of Horatio, 255 S.W. 881, 161 Ark. 259.

Judgment for reduced amount

Judgment, vacated as to one defendant with permission to defend, stands in reduced amount adjudged against such defendant after hearing without further proceeding.—Johnson v. Dakota Nat. Bank, 207 N.W. 217, 49 S.D. 381.

72. Wyo.—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509.

specifications of the order;[73] but otherwise he may avail himself of any meritorious defense,[74] existing at the time of the judgment vacated, but not a defense subsequently accruing.[75] Merely formal and technical objections[76] or dilatory pleas[77] usually will not be permitted, and defendant may be limited to issuable pleas, excluding special demurrers which do not go to the merits,[78] although demurrers[79] or pleas in abatement[80] may be permitted. Under statutes permitting defendants served only constructively, as by publication, to be let in to defend, as discussed supra § 335, the defense is not limited to matters which if pleaded in apt time would defeat the action,[81] but includes any matter of defense or exception which would have prevented or modified the judgment.[82]

XI. EQUITABLE RELIEF AGAINST JUDGMENT

A. IN GENERAL

§ 341. Nature of Remedy and Right to Relief in General

a. In general

b. Requisites of relief in general

a. In General

Equitable relief against a judgment, although not regarded with favor by the courts, may nevertheless be had where sufficient grounds appear; and under some circumstances the remedy in equity is exclusive.

On a showing of proper circumstances, and when required by the ends of justice, appropriate relief against a judgment may be had in equity,[83] the

73. Colo.—Gumaer v. Bell, 149 P. 255, 59 Colo. 213.
34 C.J. p 432 note 21.

74. Okl.—Pollack v. Leonard & Braniff, 241 P. 158, 112 Okl. 276.
34 C.J. p 432 note 22.

Statute of limitations may be pleaded.
Minn.—Roe v. Wildme, 254 N.W. 274, 191 Minn. 251.
N.Y.—Luke v. Polstein, 51 N.Y.S.2d 427, 268 App.Div. 921, followed in 51 N.Y.S.2d 429, 268 App.Div. 921, appeal denied 55 N.Y.S.2d 665, 269 App.Div. 784. Motion granted 61 N.E.2d 781, 294 N.Y. 775. Affirmed 63 N.E.2d 27, 294 N.Y. 896.
34 C.J. p 432 note 22 [b].

75. Tex.—Howell v. Fidelity Lumber Co., Com.App., 228 S.W. 181.
34 C.J. p 432 note 23.

76. Pa.—Ekel v. Snevily, 8 Watts & S. 272, 38 Am.D. 758.
34 C.J. p 432 note 24.

77. La.—Citizens' Bank v. Beard, 5 La.Ann. 41.
34 C.J. p 432 note 25.

78. Ky.—Violett v. Dale, 1 Bibb. 144.
34 C.J. p 432 note 27.

79. Ill.—Chicago v. English, 64 N.E. 976, 198 Ill. 211.
Va.—Syme v. Griffin, 4 Hen. & M. 277, 14 Va. 277.

80. Ala.—Ex parte Haisten, 149 So. 213, 227 Ala. 183.

Premature action
Allowance of plea in abatement, averring that suit on group insurance certificate was premature, after withdrawal of demurrer to complaint and vacation of judgment thereon, was within trial court's discretion.—Box v. Metropolitan Life Ins. Co., 168 So. 209, 27 Ala.App. 21, reversed on other grounds 168 So. 217, 232 Ala. 321, certiorari denied 168 So. 220, 232 Ala. 447.

Matter existing at time of original suit
A plea in abatement on the setting aside of a default is improper, where the matter in abatement existed at the time of the institution of the suit.—Bradley v. Welch, 1 Munf. 284, 15 Va. 284.

81. N.C.—Rhodes v. Rhodes, 34 S.E. 271, 125 N.C. 191.

82. N.C.—Rhodes v. Rhodes, supra.
34 C.J. p 432 note 31.

83. Ala.—Barrow v. Lindsey, 159 So. 232, 230 Ala. 45—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677—Florence Gin Co. v. City of Florence, 147 So. 417, 226 Ala. 478, followed in 147 So. 420, three cases, 226 Ala. 482, 147 So. 421, 226 Ala. 482, and 147 So. 421, 226 Ala. 483—King v. Dent, 93 So. 823, 208 Ala. 78.
Cal.—Hallett v. Slaughter, 140 P.2d 3, 22 Cal.2d 552—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—Caldwell v. Taylor, 23 P.2d 758, 218 Cal. 471, 88 A.L.R. 1194—Bank of Italy v. E. N. Cadenasso, 274 P. 534, 206 Cal. 436—King v. Superior Court in and for San Diego County, 56 P.2d 268, 12 Cal.App.2d 501—Fisch & Co. v. Superior Court in and for Los Angeles County, 43 P.2d 855, 6 Cal.App.2d 21—Fletcher v. Superior Court of Sacramento County, 250 P. 195, 79 Cal.App. 468.
Conn.—Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.
Del.—Commercial Realty Incorporation v. Jackson, 166 A. 657, 5 W.W. Harr. 395.
Fla.—Gamble v. Gamble Holding Corporation, 162 So. 886, 120 Fla. 340.
Ill.—Balsay v. Conte, 264 Ill.App. 60.
Iowa.—Shaw v. Addison, 18 N.W.2d 796—Foote v. State Sav. Bank, Missouri Valley, Iowa, 206 N.W. 819, 201 Iowa 174.
Mass.—Liberty Mut. Ins. Co. v. Hathaway Baking Co., 28 N.E.2d 425, 306 Mass. 428—Connor v. Morse, 20 N.E.2d 424, 303 Mass. 42.
Mich.—Blehm v. Hanzek, 262 N.W. 403, 272 Mich. 541.
Minn.—Lenhart v. Lenhart Wagon Co., 2 N.W.2d 421, 211 Minn. 572.
Mo.—Fadler v. Gabbert, 63 S.W.2d 121, 333 Mo. 851—Overton v. Overton, 37 S.W.2d 565, 327 Mo. 530.
N.J.—Young v. Weber, 175 A. 273, 117 N.J.Eq. 242—Di Paola v. Trust Co. of Orange, 156 A. 439, 109 N.J. Eq. 80—William Peter Brewing Corporation v. Bernhardt, 137 A. 828, 101 N.J.Eq. 60.
Ohio.—Seeds v. Seeds, 156 N.E. 193, 116 Ohio St. 144, 52 A.L.R. 761—Hinman v. Executive Committee of Communistic Party of U. S. A., 47 N.E.2d 820, 71 Ohio App. 76—Eckfield v. State, 155 N.E. 160, 23 Ohio App. 150.
Pa.—Mook v. Larsen, Com.Pl., 23 Erie Co. 320.
S.C.—Scott v. Newell, 144 S.E. 82, 146 S.C. 385.
Tex.—Sedgwick v. Kirby Lumber Co., 107 S.W.2d 358, 130 Tex. 163—Humphrey v. Harrell, Com.App., 29 S.W.2d 963—Garza v. Kenedy, Com. App., 299 S.W. 231—Stone v. Stone, Civ.App., 101 S.W.2d 638—Bonner v. Pearson, Civ.App., 7 S.W.2d 930—Cook v. Panhandle Refining Co., Civ.App., 267 S.W. 1070—Waurika

power of equity in this connection being inherent,[84] and existing irrespective of any statute authorizing such relief.[85] A bill attacking a judgment is not regarded with favor by the courts,[86] and will lie only in exceptional cases.[87] Such relief may be had, not of right, but in the exercise of a sound legal discretion,[88] and each case must stand on its own peculiar merits.[89]

Under some circumstances, relief against a judgment ordinarily must or should be sought by a suit in equity.[90] Thus it has been held that the only re-

Oil Ass'n v. Ellis, Civ.App., 267 S. W. 523—Cooper v. Cooper, Civ. App., 260 S.W. 679—Vacuum Oil Co. v. Liberty Refining Co., Civ. App., 251 S.W. 321.

W.Va.—Weldon v. Callison, 193 S.E. 441, 119 W.Va. 306—Williams v. Stratton, 174 S.E. 417, 114 W.Va. 837.

Wis.—Ellis v. Gordon, 231 N.W. 585, 202 Wis. 134—Kiel v. Scott & Williams, 202 N.W. 672, 186 Wis. 415.

Nature and form of remedy for opening and vacating judgments in general see supra § 286.

"One of the methods of directly attacking a judgment, which is as old as the common law, is by bill in equity."—McElroy v. Puget Sound Nat. Bank, 288 P. 241, 242, 157 Wash. 43.

Enjoining enforcement of judgment

It has been held that, in the absence of statutory authority, a court has no power to enjoin a judgment creditor from enforcing his judgment against a judgment debtor.—Pisciotta v. Preston, 10 N.Y.S.2d 44, 170 Misc. 376.

84. Mont.—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.

N.J.—Miller v. Bond & Mortgage Guaranty Co., 188 A. 678, 121 N.J. Eq. 197.

Tex.—McMillan v. McMillan, Civ. App., 72 S.W.2d 611.

Correction of court's own record

In suit to set aside decree entered by chancery court clerk without approval by such court or aggrieved party's counsel, court has inherent right to make its record speak truth at any time, either in or out of term, by canceling such decree as not that of court.—Henderson v. Freeman, 171 S.W.2d 66, 205 Ark. 856.

85. La.—Vinson v. Picolo, App., 15 So.2d 778.

Ohio.—Northern Ohio Power & Light Co. v. Smith, 186 N.E. 712, 126 Ohio St. 601.

Tex.—Bonner v. Pearson, Civ.App., 7 S.W.2d 930—Robbie v. Upson, Civ. App., 153 S.W. 406.

Statute held not to broaden power of equity

A statute providing for relief before judgment becomes final where rendered against party through his neglect has been held not to broaden power of equity court to vacate final judgment in independent proceeding calling for exercise of equitable powers based on established rules.—Wattson v. Dillon, 56 P.2d 220, 6 Cal.2d 33.

86. Ill.—Chandler v. Chandler, App., 63 N.E.2d 272.

Mo.—Sanders v. Brooks, App., 183 S.W.2d 353.

Or.—Olsen v. Crow, 290 P. 233, 133 Or. 310—**Corpus Juris cited in** Dixon v. Simpson, 279 P. 939, 942, 130 Or. 211—Parker v. Reid, 273 P. 334, 127 Or. 578.

Tex.—Citizens' Bank v. Brandau, Civ.App., 1 S.W.2d 466, error refused—King v. King, Civ.App., 279 S.W. 899.

34 C.J. p 432 note 1.

Excuse of moment

Although there is no inflexible rule, some excuse of moment must exist to carry rights over to another judicial forum.—Blazewicz v. Weberski, 208 N.W. 452, 234 Mich. 431.

Comparison with collateral attack

Except in cases of palpable fraud, the rules and limitations established and recognized by courts of equity render a direct attack on a judgment almost as difficult of accomplishment as would be a collateral attack.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.

Rehearing of litigated issues not desired

Statute authorizing bill of review to revise judgment must be construed so as not to allow unending rehearing of litigated issues or furnish uncertainty of administration of guardian's estate.—Watts v. Moss, Tex.Civ.App., 63 S.W.2d 1095, error dismissed.

Adjudication of title to land

Statutory bill of review cannot be employed directly to adjudicate title to land.—Johnson v. Oritz Oil Co., Tex.Civ.App., 104 S.W.2d 543.

Different interpretation of will

In the absence of extrinsic fraud or certain jurisdictional defects, an action in equity does not lie to secure an interpretation of a will different from that adopted by the probate court whose decree of distribution has become final.—Vincent v. Security-First Nat. Bank of Los Angeles, 155 P.2d 63, 67 Cal.App.2d 602.

87. Mass.—Long v. MacDougall, 173 N.E. 507, 273 Mass. 386.

Pa.—Frantz v. City of Philadelphia, 3 A.2d 917, 333 Pa. 220.

Extreme and restricted cases

Equitable proceedings to set aside a final judgment after the term are jealously watched, and granted only in extreme and restricted cases.—Floyd v. Eggleston, Tex.Civ.App., 137 S.W.2d 182, error refused, certiorari denied 61 S.Ct. 314, 311 U.S. 708, 85 L.Ed. 460, rehearing denied 61 S. Ct. 609, 312 U.S. 713, 85 L.Ed. 1143.

88. Cal.—In re Davis' Estate, 101 P. 2d 761, 38 Cal.App.2d 579, rehearing denied 102 P.2d 545, 38 Cal. App.2d 579.

N.M.—Quintana v. Vigil, 147 P.2d 356, 48 N.M. 195.

Or.—Parker v. Reid, 273 P. 334, 127 Or. 578.

Pa.—Simcoe v. Szukegs, Com.Pl., 27 North.Co. 182.

89. Pa.—Sherwood Bros. Co. v. Kennedy, 200 A. 689, 132 Pa.Super. 154.

Proceeding to enjoin execution of garnishment judgment on replevin bond is determinable by ordinary rules applicable to judgments.—Southern Surety Co. v. Texas Oil Clearing House, Tex.Com.App., 281 S. W. 1045.

90. U.S.—Glinski v. U. S., C.C.A.Ill., 93 F.2d 418.

Cal.—Sepulveda v. Apablasa, 77 P.2d 530, 25 Cal.App.2d 390.

Fla.—Sauer v. Sauer, 19 So.2d 247, 154 Fla. 827—State ex rel. Lorenz v. Lorenz, 6 So.2d 620, 149 Fla. 265.

Iowa.—Shaw v. Addison, 18 N.W.2d 796.

Mo.—In re Beauchamp's Estate, App., 184 S.W.2d 729.

Presence of innocent third parties

Where a judgment, although not void on its face, is for some collateral reason void, as, for instance, where it has been procured by means of fraud extrinsic to the merits of the case, and innocent third parties have acquired interests through or by virtue of the judgment, the more orderly course is to proceed by an independent suit in equity to set it aside or to restrain and prevent the party in whose favor the judgment has thus been procured from making an equitable use thereof.—Sharp v. Eagle Lake Lumber Co., 212 P. 933, 60 Cal.App. 386.

Mistake affecting rights of all partitioners

A mistake which, if corrected, would affect the rights of all partitioners cannot, unless by agreement of all the parties, be corrected except by suit in equity.—Hutton v. Ward, 128 S.E. 647, 99 W.Va. 364.

Exclusive jurisdiction

Generally, courts of equity have

lief against a judgment after adjournment of the term of court at which it was rendered is by plenary suit in equity,[91] and that a judgment which is voidable, rather than void, may be set aside only in an equitable proceeding.[92] On the other hand, a party attacking a judgment is not always restricted to the remedy of injunction against enforcement of the judgment,[93] and it has been judicially observed that in modern practice, the remedies at law by amending, opening, vacating, and reviewing judgments or by granting new trials have greatly lessened the occasions for resorting to equity for relief against a judgment.[94] It has been asserted that a judgment which becomes unjust by subsequent developments may be corrected by proceeding in equity;[95] but it has also been asserted that an action will not lie in equity to modify or discharge a judgment by reason of matters arising subsequent to the entry of the judgment.[96]

Nature of remedy. A suit to set aside a judgment and retry the original case, or an attack on a judgment on the ground of fraud, is generally an equitable proceeding or in the nature of such a proceeding.[97] The equitable remedy against a judgment is not a proceeding in rem, but is a proceeding in personam against a party to the judgment seeking to deprive him of the benefit of the judgment by enjoining him from enforcing it.[98] The remedy in equity does not assail the court in which the judgment was rendered;[99] it need not seek to change, modify, suspend, or vacate the judgment,[1] but may be employed to secure relief against the judgment on the ground that the rights acquired thereunder cannot be retained in good conscience.[2] An action in equity to vacate a decree is analogous to a motion for a new trial in so far as it involves a reexamination of the issues.[3]

b. Requisites of Relief in General

In general, one seeking equitable relief against a judgment must show that there is some recognized ground for equitable interference, and also that his situation is not due to his own fault and that he is entitled to the favorable consideration of the court.

In order to entitle a party to relief in equity against a judgment, he must show that there is in the case a recognized ground, such as fraud, accident, mistake, or the like, for equitable interference,[4] and, as discussed infra § 343, that there is

exclusive jurisdiction to annul judgments at law, as well as their own decrees because of fraud or mistake. —Jordan v. Tharp, 137 So. 667, 223 Ala. 619.

91. Tex.—Squyres v. Rasmussen, Civ.App., 296 S.W. 977—Peters v. Pursley, Civ.App., 278 S.W. 229.

92. Tex.—Bryan v. Jacoby, Civ.App., 11 S.W.2d 373.

93. D.C.—Consolidated Radio Artists v. Washington Section, National Council of Jewish Juniors, 105 F.2d 785, 70 App.D.C. 262.

94. U.S.—U. S. v. Mani, D.C.S.D., 196 F. 160.

Preferable procedure

Procedure by petition to open final decree and order to show cause is substitute for bill of review and is preferable as simpler and more direct procedure.—Cameron v. Penn Mut. Life Ins. Co., 173 A. 344, 116 N.J.Eq. 311.

95. U.S.—In re Drainage Dist. No. 7, D.C.Ark., 25 F.Supp. 372, affirmed, C.C.A., Luehrmann v. Drainage Dist. No. 7 of Poinsett County, 104 F.2d 696, certiorari denied Haverstick v. Drainage Dist. No. 7 of Poinsett County, Ark., 60 S.Ct. 141, 308 U.S. 604, 84 L.Ed. 505, rehearing denied 60 S.Ct. 260, 308 U.S. 638, 84 L.Ed. 530.

96. Wis.—Libby v. Central Wisconsin Trust Co., 197 N.W. 206, 182 Wis. 599.

97. Okl.—Schulte v. Board of Com'rs of Pontotoc County, 250 P. 123, 119 Okl. 261.

Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498—Sedgwick v. Kirby Lumber Co., 107 S.W.2d 358, 130 Tex. 163—Winters Mut. Aid Ass'n Circle No. 2 v. Reddin, Com.App., 49 S.W.2d 1095—Green v. Green, Com.App., 288 S.W. 406—Floyd v. Eggleston, Civ. App., 137 S.W.2d 182, error refused, certiorari denied 61 S.Ct. 314, 311 U.S. 708, 85 L.Ed. 460, rehearing denied 61 S.Ct. 609, 312 U.S. 713, 85 L.Ed. 1143.

Bill of review

An independent suit for relief against a judgment, while not strictly speaking a bill of review, is largely of the same nature.—Halbrook v. Quinn, Civ.App., 286 S.W. 954, certified questions dismissed Quinn v. Halbrook, 285 S.W. 1079, 115 Tex. 513.

A petition to open a judgment is essentially an equitable proceeding, and the opening of the judgment an exercise of equity powers.—Sherwood Bros. Co. v. Kennedy, 200 A. 689, 132 Pa.Super. 154.

Motion treated as plenary suit

Motion to set aside judgment alleging excuse for failure to defend and meritorious defense, on which citation was duly issued, should be treated as plenary suit in equity to obtain relief from judgment.—Squyres v. Rasmussen, Tex.Civ.App., 296 S.W. 977.

Equity administered under common-law forms

In proceeding to open judgment, court of common pleas administers equity under common-law forms.—Kowatch v. Home Building & Loan Ass'n of Latrobe, 200 A. 111, 131 Pa. Super. 517.

Suit in partition by heirs against other heirs who obtained property by representing that they were the only heirs was held neither direct nor collateral attack on judgment, but equity proceeding based on fraud.—Beatty v. Beatty, 242 P. 766, 114 Okl. 5.

Proceeding held not action in equity

A proceeding to vacate or set aside an order or judgment filed in original suit is not an action in equity, although it is equitable in character and relief is granted on equitable terms.—In re Vanderlip's Estate, 12 Ohio Supp. 123.

98. Ohio.—Kundert v. Kundert, 156 N.E. 237, 24 Ohio App. 342.

99. Ohio.—Kundert v. Kundert, supra.

1. U.S.—Hiawassee Lumber Co. v. U. S., C.C.A.N.C., 64 F.2d 417.
Ohio.—Kundert v. Kundert, 156 N. E. 237, 24 Ohio App. 342.

2. U.S.—Hiawassee Lumber Co. v. U. S., C.C.A.N.C., 64 F.2d 417.

3. Cal.—Foy v. Foy, 73 P.2d 618, 23 Cal.App.2d 543.

4. U.S.—Simonds v. Norwich Union Indemnity Co., C.C.A.Minn., 73 F. 2d 412, certiorari denied Norwich Union Indemnity Co. v. Simonds,

no other available or adequate remedy. It must appear that his situation is not due to his own fault, neglect, or carelessness,[5] and that he did not procure or consent to the judgment attacked, or ac-

55 S.Ct. 507, 294 U.S. 711, 79 L.Ed. 1246—Continental Nat. Bank of Jackson County, at Kansas City, Mo. v. Holland Banking Co., C.C.A. Mo., 66 F.2d 823.

Ala.—Carson v. Rains, 187 So. 707, 237 Ala. 534.

Cal.—Kupfer v. MacDonald, 122 P.2d 271, 19 Cal.2d 566—Hendricks v. Hendricks, 14 P.2d 83, 216 Cal. 321—Molema v. Molema, 283 P. 956, 103 Cal.App. 79.

Fla.—Rosenstone v. Johnston, 111 So. 630, 93 Fla. 319.

Ga.—Croom v. Bennett, 147 S.E. 560, 168 Ga. 178.

Md.—Redding v. Redding, 26 A.2d 18, 180 Md. 545.

Mich.—Barr v. Payne, 298 N.W. 460, 298 Mich. 85—Broadwell v. Broadwell, 209 N.W. 923, 236 Mich. 60.

Okl.—Kennedy v. Uhrich, 62 P.2d 994, 178 Okl. 366.

Or.—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.

Pa.—Conemaugh Iron Works Co. v. Delano Coal Co., 148 A. 94, 298 Pa. 182.

Tenn.—Tallent v. Sherrell, 184 S.W.2d 561, 27 Tenn.App. 683—Johnson v. Sharpe, 7 Tenn.App. 685.

Tex.—Gehret v. Hetkes, Com.App., 36 S.W.2d 700—Humphrey v. Harrell, Com.App., 29 S.W.2d 963—Grayson v. Johnson, Civ.App., 181 S.W.2d 312—Cotten v. Stanford, Civ.App., 169 S.W.2d 489—Union Bank & Trust Co. of Fort Worth v. Smith, Civ.App., 166 S.W.2d 928—Brannen v. City of Houston, Civ.App., 153 S.W.2d 676, error refused—Padalecki v. Dreibrodt, Civ.App., 129 S.W.2d 481, error dismissed, judgment correct—Poland v. Risher, Civ.App., 88 S.W.2d 1106, affirmed Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498—Ricketts v. Ferguson, Civ.App., 64 S.W.2d 416, error refused—Griggs v. Brewster, Civ.App., 16 S.W.2d 839, affirmed 62 S.W.2d 980, 122 Tex. 588—Shaw v. Etheridge, Civ.App., 15 S.W.2d 722—Massa v. Guardian Trust Co., Civ.App., 258 S.W. 598.

W.Va.—Brinegar v. Bank of Wyoming, 130 S.E. 151, 100 W.Va. 64.

34 C.J. p 433 note 8.

Grounds for relief see infra §§ 350–376.

Prima facie case for vacation of judgment

Injunctive relief to prevent enforcement of judgment will not be granted, unless prima facie case for vacation of such judgment is presented.—Smith v. Patterson, 280 S.W. 930, 213 Ky. 142.

Lack of jurisdiction over person

Party seeking to have judgment set aside in equity on ground that court had acquired no jurisdiction over him must bring himself within rules of law or equity applicable for such relief.—Reynolds v. Volunteer State Life Ins. Co., Tex.Civ.App., 80 S.W.2d 1087, error refused.

Question held not cognizable

Question whether attorneys and court acted in pursuance of mandate of appellate court in proceedings which followed receipt of mandate is not cognizable in independent suit in equity based on ground that judgment was procured by fraud.—Matheson v. National Surety Co., C.C.A. Alaska, 69 F.2d 914.

Intent of testatrix

In an equity action to amend and construe a decree of distribution affecting a testamentary trust, where no mistake appeared, it was immaterial that testatrix may have intended or done something different in a former will, later revoked.—Vincent v. Security-First Nat. Bank of Los Angeles, 155 P.2d 63, 67 Cal.App.2d 602.

Personal judgment in foreclosure suit

Purchaser of mortgaged property was held not entitled to set aside personal judgment against him by default in foreclosure suit, wherein he was personally served, and wherein it was alleged that he assumed mortgage indebtedness, where decree recited that cause was heard on documentary and oral evidence, and there was no evidence that judgment was procured through fraud.—Fort Smith Building & Loan Ass'n v. Hight, 86 S.W.2d 923, 191 Ark. 415.

5. U.S.—Simonds v. Norwich Union Indemnity Co., C.C.A.Minn., 73 F.2d 412, certiorari denied Norwich Union Indemnity Co. v. Simonds, 55 S.Ct. 507, 294 U.S. 711, 79 L.Ed. 1246—Continental Nat. Bank of Jackson County, at Kansas City, Mo., v. Holland Banking Co., C.C.A. Mo., 66 F.2d 823.

Ala.—Carson v. Rains, 187 So. 707, 237 Ala. 534—Timmerman v. Martin, 176 So. 198, 234 Ala. 622—Leath v. Lister, 173 So. 59, 233 Ala. 595—Barrow v. Lindsey, 159 So. 232, 230 Ala. 45—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677.

Ill.—Metzger v. Horn, 143 N.E. 408, 312 Ill. 173—Zimel v. Southern Pac. Co., 40 N.E.2d 830, 314 Ill.App. 198.

La.—Surety Credit Co. v. Bauer, 1 La.App. 285.

Md.—Redding v. Redding, 26 A.2d 18, 180 Md. 545.

Mich.—Barr v. Payne, 298 N.W. 460, 298 Mich. 85.

Mo.—Silent Automatic Sales Corporation v. Stayton, App., 58 S.W.2d 800.

Ohio.—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871.

Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.

Tenn.—Tallent v. Sherrell, 184 S.W.2d 561, 27 Tenn.App. 683—Johnson v. Sharpe, 7 Tenn.App. 685.

Tex.—Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498—Stewart v. Byrne, Com.App., 42 S.W.2d 234—Humphrey v. Harrell, Com.App., 29 S.W.2d 963—Duncan v. Smith Bros. Grain Co., 260 S.W. 1027, 113 Tex. 555—Grayson v. Johnson, Civ.App., 181 S.W.2d 312—Union Bank & Trust Co. of Fort Worth v. Smith, Civ.App., 166 S.W.2d 928—Garcia v. Jones, Civ.App., 155 S.W.2d 671, error refused—Brannen v. City of Houston, Civ.App., 153 S.W.2d 676, error refused—Padalecki v. Dreibrodt, Civ.App., 129 S.W.2d 481, error dismissed, judgment correct—Hacker v. Hacker, Civ.App., 110 S.W.2d 928—Traders & General Ins. Co. v. Keith, Civ.App., 107 S.W.2d 710, error dismissed—**Corpus Juris cited in** Cooper v. Walker, Civ.App., 96 S.W.2d 847, 848—Poland v. Risher, Civ.App., 88 S.W.2d 1106, affirmed Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498—Ricketts v. Ferguson, Civ.App., 64 S.W.2d 416, error refused—Watts v. Moss, Civ.App., 63 S.W.2d 1095, error dismissed—Lindsey v. Dougherty, Civ.App., 60 S.W.2d 300, error refused—Shaw v. Etheridge, Civ.App., 15 S.W.2d 722—Bray v. First Nat. Bank, Civ.App., 10 S.W.2d 235, error dismissed—Citizens' Bank v. Brandau, Civ.App., 1 S.W.2d 466, error refused—Taylor v. Masterson, Civ.App., 259 S.W. 629—Barton v. Pochyla, Civ.App., 243 S.W. 785.

W.Va.—Brinegar v. Bank of Wyoming, 130 S.E. 151, 100 W.Va. 64.

6 C.J. p 661 note 50—34 C.J. p 433 note 3, p 442 note 14, p 459 note 13.

Defenses not interposed at law as ground for relief see infra §§ 361, 362.

Discovery of defense

Statute limiting time in which proceedings to set aside judgment may be commenced does not confer right to set aside judgment within time limit, regardless of negligence or diligence of judgment debtor in discovering defense.—W. T. Rawleigh Co. v. Seagraves, 173 S.E. 167, 178 Ga. 459.

Negligence held not shown

Tex.—Eddingston v. Acom, Civ.App., 287 S.W. 96.

quiesce in it, or waive the errors complained of.[6] He must also show that he is not liable for the debt for which judgment was rendered;[7] that he is injured by the judgment as it stands or will be injured by its enforcement;[8] that there is an attempt or threat to enforce the judgment against him;[9] that he is in a position equitably to seek relief;[10] and that he comes into equity with clean hands and is entitled to the favorable consideration of the court.[11]

Equity will never interfere to vacate a judgment where the party seeking the relief could not possibly derive any benefit from the relief sought,[12] and thus he is generally required to show that if relief were granted a different result would obtain than that reached in the judgment of which he complains.[13]

§ 342. Jurisdiction

A court having general equity powers has jurisdiction to grant equitable relief against a judgment in a proper case; but its jurisdiction in this respect is not supervisory over courts of law, and cannot be made to serve the purpose of an appellate review.

A court possessing general equity powers has authority in a proper case to grant equitable relief against a judgment,[14] Courts of equity have no supervisory jurisdiction over courts of law, and, accordingly, a suit in equity for relief against a judgment at law cannot be made to serve the purposes of an appellate review of the judgment with regard to alleged errors therein,[15] and the power of a court of equity to enjoin enforcement of a judgment is

6. Ala.—Henley v. Foster, 125 So. 662, 220 Ala. 420.
Fla.—Hall v. Hall, 112 So. 622, 93 Fla. 709.
La.—Napoleonville Moss Mfg. Co. v. Templet, 139 So. 546, 19 La.App. 61.
Mass.—McNally v. Clare, 183 N.E. 173, 281 Mass. 82.
N.Y.—Franz v. Nigri, 249 N.Y.S. 218, 232 App.Div. 150.
Tex.—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.
34 C.J. p 432 note 2.

Assent to settlement

Where parties to suit appeared before judge in open court and stated that they had settled suit on specified terms, which judge noted on docket, and parties and their attorneys all assented to, or made no complaint of, such terms after judge read to them his understanding of settlement, and judgment was rendered in accordance with such statement, defendant was not entitled to have judgment set aside on ground of additional settlement agreement, covering questions at issue in another suit pending in different chancery court, in absence of fraud or bad faith.—Tallent v. Sherrell, 184 S.W. 2d 561, 27 Tenn.App. 683.

Waiver held not shown

Fact that defendants, discovering trial judge's disqualification, petitioned supreme court for rehearing, did not constitute waiver of right to vacate judgment.—Cadenasso v. Bank of Italy, 6 P.2d 944, 214 Cal. 562.

7. Tex.—Duncan v. Smith Bros. Grain Co., 260 S.W. 1027, 113 Tex. 555.
Meritorious defense see infra § 349.

8. Tex.—Cotten v. Stanford, Civ. App., 169 S.W.2d 489.
34 C.J. p 433 note 5, p 459 note 13.

Proceeds of sale as sufficient to satisfy judgment

Where, although personal judgment against a particular defendant was not authorized, it was possible that sufficient would be realized on the sale of the property involved to satisfy the judgment in full, so that such defendant would not be injured by a personal judgment, it would be premature to grant relief to him in a suit to set aside the decree until the question of injury should be determined by the result of the sale.—Marsters v. Ashton, 107 P.2d 981, 165 Or. 507.

Actual eviction held unnecessary

It has been held that a purchaser in possession under a contract of sale need not show that he has been actually evicted in order to secure injunctive relief against a judgment obtained on a note given for the purchase price; it is sufficient that a judgment of ejectment has been rendered against him.—Green v. McDonald, 21 Miss. 445.

9. Conn.—Chambers v. Robbins, 28 Conn. 552.
34 C.J. p 433 note 4.

10. U.S.—Glinski v. U. S., C.C.A.Ill., 93 F.2d 418—Smith v. Apple, C.C. A.Kan., 6 F.2d 559.

Fair conduct and dealings

Complainant, in order to invoke aid of equity to restrain execution of judgment, must show that his own conduct and dealings were fair and consistent with equity.—Harper v. Farmers' & Merchants' Nat. Bank of Cambridge, 142 A. 590, 155 Md. 693.

Restoration of benefits

Party accepting benefits of judgment cannot challenge validity of judgment without restoring benefits. —State v. Marsh, 169 N.E. 564, 121 Ohio St. 477—State v. Marsh, 168 N. E. 473, 121 Ohio St. 321.

11. U.S.—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A. Wyo., 74 F.2d 827—Corpus Juris cited in Byram v. Miner, C.C.A., 47 F.2d 112, 119.
Fla.—Hall v. Hall, 112 So. 622, 93 Fla. 709.
N.Y.—Franz v. Nigri, 249 N.Y.S. 218, 232 App.Div. 150—Rubin v. Yedlin, 230 N.Y.S. 463, 224 App.Div. 768.
34 C.J. p 433 note 6.
Clean hands generally see Equity §§ 93–99.

Public policy

Even though the parties are in pari delicto and applicant does not come into court with clean hands, equity may grant relief where required by reasons of public policy.—Dahms v. Swinburne, 167 N.E. 486, 31 Ohio App. 512.

12. Cal.—Hite v. San Francisco Mercantile Trust Co., 106 P. 102, 156 Cal. 765.
Ga.—Howell v. Howell, 9 S.E.2d 149, 190 Ga. 371.
Useless relief see Equity § 16.

Value of collateral

Burden is on plaintiff, seeking to set aside judgment on note on ground that it did not direct sale of collateral, to plead and prove that collateral had some value, and that proceeds thereof would at least have partially satisfied judgment.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.

13. Ark.—Horn v. Hull, 275 S.W. 905, 169 Ark. 463.
Cal.—Wilson v. Wilson, 130 P.2d 732, 55 Cal.App.2d 421—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400—Hogan v. Horsfall, 266 P. 1002, 91 Cal.App. 37, followed in 266 P. 1005, 91 Cal.App. 797.
Tenn.—Whitson v. Johnson, 123 S. W.2d 1104, 22 Tenn.App. 427.
34 C.J. p 433 note 10.

14. Tex.—Barton v. Pochyla, Civ. App., 243 S.W. 785.

15. N.J.—Weinstein v. Chelsea Se-

not dependent on its jurisdiction to review the proceedings on which the judgment is based.[16] Where no proper grounds exist, equity has no jurisdiction to afford relief against a judgment.[17]

§ 343. —— Existence of or Resort to Other Remedy; Inadequacy of Remedy at Law

a. In general
b. Statutory remedies
c. Remedy by review

a. In General

Equitable relief against a judgment generally will not be granted where other adequate remedies, as by motion for a new trial or independent action at law, are available, or by the exercise of proper diligence would have been available; and this rule has been applied by some authorities even to judgments which are void or have been procured by fraud. Equity will interfere, however, where there has been a loss of legal remedies without fault on the part of the one seeking relief.

As a general rule, equity will not grant relief against a judgment where the party complaining of the judgment has, or by exercising proper diligence would have had, an adequate remedy at law, or by proceedings in the original action, by motion, petition, or the like to open, vacate, modify, or otherwise obtain relief against, the judgment.[18] Equity will not interfere to relieve against a judgment where the complaining party has an adequate remedy by a motion in an appellate court,[19] or by a motion or proceedings to arrest judgment,[20] or to stay or quash execution.[21] Under some circumstances, however, it has been held that injunction may be granted, although relief against the judgment might be obtained at law, or by motion to vacate or set aside, and the time for obtaining such

curities & Investment Co., 145 A. 231, 104 N.J.Eq. 258.
34 C.J. p 433 note 12.
Jurisdiction of particular courts see infra § 382.

16. Iowa.—Shaw v. Addison, 18 N. W.2d 796.
Mo.—Overton v. Overton, 37 S.W.2d 565, 327 Mo. 530—Loveland v. Davenport, App., 188 S.W.2d 850.
Wis.—Amberg v. Deaton, 271 N.W. 396, 223 Wis. 653.
34 C.J. p 433 note 12.

Examination of evidence

It is not the province of a court of equity to examine the evidence adduced at a former trial and to determine whether the evidence supports the judgment rendered thereon.—Sabin v. Levorsen, 145 P.2d 402, 193 Okl. 320, certiorari denied 64 S. Ct. 205, 320 U.S. 792, 88 L.Ed. 477, rehearing denied 64 S.Ct. 368, 320 U. S. 815, 88 L.Ed. 492.

17. Iowa.—Shaw v. Addison, 18 N. W.2d 796.
34 C.J. p 433 note 16.

18. Ala.—Riley v. Wilkinson, 23 So. 2d 582.
Ark.—**Corpus Juris cited in** Twin City Bank of North Little Rock v. J. S. McWilliams Auto Co., 34 S.W. 2d 229, 230, 182 Ark. 1086.
Cal.—Harris v. Harris, 52 P.2d 985, 10 Cal.App.2d 734, hearing denied, Sup., 54 P.2d 459, 10 Cal.App.2d 734—De Tray v. Chambers, 297 P. 575, 112 Cal.App. 697.
Ga.—Cone v. Eubanks, 145 S.E. 652, 167 Ga. 384.
Idaho.—Lind v. Moyes, 20 P.2d 794, 52 Idaho 785.
Ill.—Calbreath v. Beckwith, 260 Ill. App. 7—Kahn v. Rasof, 253 Ill. App. 546.
Ky.—Campbell v. Campbell, 4 S.W.2d 1112, 223 Ky. 836.
Me.—Fort Fairfield Nash Co. v. Noltemier, 189 A. 415, 135 Me. 84, 108 A.L.R. 1276.
Md.—Pioneer Oil Heat v. Brown, 16 A.2d 880, 179 Md. 155.
Mich.—Barr v. Payne, 298 N.W. 460, 298 Mich. 85—Thompson v. Doore, 257 N.W. 864, 269 Mich. 466.
Mo.—Jones v. Overall, 13 S.W.2d 581, 223 Mo.App. 266.
Mont.—Meyer v. Lemley, 282 P. 268, 86 Mont. 83.
N.J.—Rafferty v. Schutzer, 153 A. 626, 107 N.J.Eq. 613.
N.Y.—**Corpus Juris cited in** Williamsburgh Sav. Bank v. Bernstein, 12 N.E.2d 551, 553, 277 N.Y. 11—Franz v. Nigri, 249 N.Y.S. 218, 232 App.Div. 150.
N.D.—**Corpus Juris cited in** Ellison v. Baird, 293 N.W. 793, 794, 70 N. D. 226.
Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602—**Corpus Juris quoted in** Olsen v. Crow, 290 P. 233, 235, 133 Or. 310.
Pa.—Dunn v. Hild, 188 A. 834, 324 Pa. 530—Rocks v. Santella, 38 A. 2d 718, 155 Pa.Super. 473—Sherwood Bros. Co. v. Kennedy, 200 A. 689, 132 Pa.Super. 154.
S.C.—Baker v. Brewer, 123 S.E. 771, 129 S.C. 74.
Tex.—Stewart v. Byrne, Com.App., 42 S.W.2d 234—Arenstein v. Jencks, Civ.App., 179 S.W.2d 831, error dismissed—Thomas v. Mullins, Civ.App., 175 S.W.2d 276—Brannen v. City of Houston, Civ. App., 153 S.W.2d 676, error refused—Hacker v. Hacker, Civ.App., 110 S.W.2d 923—Birge v. Conwell, Civ. App., 105 S.W.2d 407, error refused—Bennett v. Carter, Civ.App., 102 S.W.2d 450, error dismissed—Reynolds v. Volunteer State Life Ins. Co., Civ.App., 80 S.W.2d 1087, error refused—Cox, Inc., v. Knight, Civ.App., 50 S.W.2d 915—Pass v. Ray, Civ.App., 44 S.W.2d 470—Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418, reversed on other grounds Greathouse v. Fort Worth & Denver City Ry. Co., Com.App., 65 S.W.2d 762—Camden Fire Ins. Ass'n v. Hill, Civ.App., 264 S.W. 123, reversed on other grounds, Com. App., 276 S.W. 887—Galloway v. Marietta State Bank, Civ.App., 258 S.W. 532, reversed on other grounds Marietta State Bank v. Galloway, Com.App., 269 S.W. 776—First Nat. Bank v. Curtis, Civ. App., 244 S.W. 225—Taylor v. Hustead & Tucker, Civ.App., 243 S.W. 766, reversed on other grounds, Com.App., 257 S.W. 232.
34 C.J. p 433 note 7, p 434 note 20, p 435 note 28, p 439 note 67, p 440 note 83—24 C.J. p 888 note 82.
Adequate remedy at law as affecting jurisdiction of equity generally see Equity §§ 19–38.

Intervention

A complaint demanding an injunction staying execution and opening a default judgment to allow plaintiffs to intervene as parties to the original action does not involve the application of any equitable remedy not available by a motion in the original action, and hence cannot be maintained.—Tolbert v. Roark, 119 S. E. 571, 126 S.C. 207.

19. Ala.—J. A. Roebling Sons Co. v. Stevens Electric Co., 9 So. 369, 93 Ala. 39.
34 C.J. p 435 note 30.

20. Tex.—Stewart v. Byrne, Com. App., 42 S.W.2d 234—Brannen v. City of Houston, Civ.App., 153 S.W. 2d 676, error refused—Hacker v. Hacker, Civ.App., 110 S.W.2d 923.

21. W.Va.—Howell v. Thomason, 12 S.E. 1088, 34 W.Va. 794.
34 C.J. p 435 note 29.

relief has not yet expired.[22] Equitable relief is of course available in a proper case where there is no other or adequate remedy;[23] and in this connection there is ordinarily no adequate remedy at law where the facts relied on as rendering it inequitable to enforce the judgment did not exist when the judgment was rendered.[24]

Fraud. The general rule requiring inadequacy of other remedies as a prerequisite to equitable relief against a judgment is usually applied to a judgment procured by fraud.[25] In some cases, however, it has been held that, where the element of fraud is present, the party aggrieved may go into either a court of equity or a court of law for relief,[26] and, having applied to equity, he cannot be sent back to a court of law, although he may also have a remedy there.[27] Clearly, a party may, in a proper case, have equitable relief against a judgment secured by fraud where his remedies at law are inadequate or have been exhausted.[28]

Void judgment. In the case of a void judgment the cases are not harmonious.[29] According to some decisions, equity will grant relief by injunction, although there may be an adequate remedy in the original cause.[30] It has generally been held, however, that in order to obtain relief on this ground, it is necessary for complainant to show that he has no adequate remedy at law,[31] or that he has exhausted his legal remedies without obtaining relief.[32] These decisions proceed on the theory that, where there is an ordinary remedy for error, an extraordinary one will not be allowed.[33] Equitable relief against a void judgment will be granted where an adequate remedy at law is not available.[34]

New trial. Injunction will not be granted to restrain the enforcement of a judgment or to order a new trial, where the party still has an opportunity to move the trial court for a new trial, or had such opportunity and negligently omitted to avail himself of it.[35] However, only parties to a suit are required to move for new trials, and a person against whom a judgment is rendered in an action to which

22. Tenn.—Williams v. Pile, 56 S.W. 833, 104 Tenn. 278.
34 C.J. p 435 note 32.

23. Del.—Hollis v. Kinney, 120 A. 356, 13 Del.Ch. 366.
Ill.—Printers Corporation v. Hamilton Inv. Co., 14 N.E.2d 517, 295 Ill.App. 34.
Mich.—Doering v. Baker, 270 N.W. 185, 277 Mich. 683.
N.D.—Vinquist v. Siegert, 225 N.W. 806, 58 N.D. 295.
34 C.J. p 435 note 33.

24. Md.—Michael v. Rigler, 120 A. 382, 142 Md. 125.

25. Iowa.—Swartzendruber, v. Polke, 218 N.W. 62, 205 Iowa 382.
Mont.—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.
Neb.—Johnson v. Marsh, 19 N.W.2d 366, 146 Neb. 257.
34 C.J. p 434 note 21.

26. Cal.—Sontag v. Denio, 78 P.2d 248, 23 Cal.App.2d 319.
34 C.J. p 434 note 22.

27. Ala.—Merrill v. Travis, 26 So.2d 258.
Cal.—Sontag v. Denio, 78 P.2d 248, 23 Cal.App.2d 319.
Ga.—Griffin v. Sketoe, 30 Ga. 300.
Mo.—Crow v. Crow-Humphrey, 78 S.W.2d 807, 335 Mo. 636.
Concurrent jurisdiction over fraud generally see Equity § 49.

28. Mont.—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.
Or.—Fain v. Amend, 100 P.2d 481, 164 Or. 123.

29. Utah.—**Corpus Juris quoted in** Kramer v. Pixton, 268 P. 1029, 1032, 72 Utah 1.

30. Colo.—Watkins v. Perry, 139 P. 551, 25 Colo.App. 425.
34 C.J. p 434 note 24.

31. Ill.—Calbreath v. Beckwith, 260 Ill.App. 7.
Mich.—**Corpus Juris cited in** Blehm v. Hanzek, 262 N.W. 403, 404, 272 Mich. 541.
Utah.—**Corpus Juris quoted in** Kramer v. Pixton, 268 P. 1029, 1032, 72 Utah 1.
34 C.J. p 434 note 25, p 435 note 31.

In Texas

(1) The rule set forth in the text has been followed.—Mills v. Disney, Civ.App., 54 S.W.2d 596—34 C.J. p 434 note 25.

(2) However, it has also been held that a judgment void on its face may be enjoined at any time in an independent action without resort to the remedy of appeal.—D. F. Connolly Agency, Inc., v. Popejoy, Civ. App., 290 S.W. 881.

32. Mich.—**Corpus Juris cited in** Blehm v. Hanzek, 262 N.W. 403, 404, 272 Mich. 541.
Utah.—**Corpus Juris quoted in** Kramer v. Pixton, 268 P. 1029, 1032, 72 Utah 1.
34 C.J. p 434 note 26.

33. Utah.—**Corpus Juris quoted in** Kramer v. Pixton, 268 P. 1029, 1032, 72 Utah 1.
34 C.J. p 435 note 27.

34. Conn.—Clover v. Urban, 142 A. 389, 108 Conn. 13.

35. Mo.—Kingshighway Bridge Co. v. Farrell, App., 136 S.W.2d 335.
Tex.—Southern Surety Co. v. Texas Oil Clearing House, Com.App., 281 S.W. 1045—Duncan v. Smith Bros. Grain Co., Com.App., 260 S.W. 1027, 113 Tex. 555—Arenstein v. Jencks, Civ.App., 179 S.W.2d 831, error dismissed—Metropolitan Life Ins. Co. v. Pribble, Civ.App., 130 S.W.2d 332, error refused—Allen v. Trentman, Civ.App., 115 S.W.2d 1177—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed—Birge v. Conwell, Civ.App., 105 S.W.2d 407, error refused—Smith v. Poppe, Civ.App., 102 S.W.2d 1108—Chapman v. DeBogory, Civ.App., 83 S.W.2d 447—Reynolds v. Volunteer State Life Ins. Co., Civ.App., 80 S.W.2d 1087, error refused—Dennis v. McCasland, Civ.App., 69 S.W.2d 506, reversed on other grounds 97 S.W.2d 684, 128 Tex. 266—Lindsey v. Dougherty, Civ.App., 60 S.W.2d 300, error refused—Pass v. Ray, Civ.App., 44 S.W.2d 470—Hollis v. Seibold, Civ.App., 23 S.W.2d 811, error dismissed—Patton v. Crisp & White, Civ.App., 11 S.W.2d 826, error dismissed—Davis v. Cox, Civ. App., 4 S.W.2d 1008, error dismissed—Hansen v. Bacher, Civ.App., 295 S.W. 816—Madero v. Calzado, Civ.App., 274 S.W. 657.
34 C.J. p 436 note 40.

Lack of counsel; diligence before trial

It is not sufficient to sustain an action to set aside a judgment that plaintiff, without fault or negligence, was deprived of counsel at the trial of the case, but he must show a sufficient excuse for not filing a motion for new trial at the term at which the judgment was rendered; and, in the absence of such showing, the extent of his diligence before trial is immaterial.—Moore v. Moore, Tex.Civ.App., 259 S.W. 322.

he has not been made a party need not move for a new trial before suing to enjoin the judgment.[36]

Independent action or remedy at law. Equity ordinarily will refuse to enjoin or reform a judgment where the party would have an available and adequate remedy for any damage he may suffer from its enforcement, by means of an independent action at law,[37] or an action or remedy against some third person responsible over to him.[38] However, the action for damages must be as complete, practical, and efficient as the equitable remedy in order to bar relief.[39]

Loss of legal remedy. Where the party had a remedy at law by appeal or motion to vacate or for a new trial, and has lost it, without fault on his own part, by causes which he could not control, preventing him from applying for it in due season, equity will not refuse to enjoin the judgment merely because the remedy at law, if it had been available, would have been appropriate and adequate.[40] However, the mere loss or exhaustion of legal remedies is no ground for equity to interfere, unless it is also shown that there is equitable ground of objection to the judgment as it stands;[41] and it has been held that relief will not be granted where the loss of the remedy at law was due to accident[42] or a mistaken mode of proceeding.[43]

Relief will in no case be granted where the loss of the remedy at law was due to the party's own negligence or fault or that of his counsel.[44]

b. Statutory Remedies

Statutes which provide remedies cumulative to those available in equity do not preclude equitable relief against judgments. However, equity will generally decline jurisdiction where the grounds of relief are equally within the cognizance of the law courts under the statutes, and complete and adequate relief may be had at law under the statutes.

The existence of statutes permitting courts of law to open, vacate, modify, or set aside their own judgments, for causes specified, does not exclude the power of courts of equity to relieve against judgments on sufficient grounds, where the statutes are deemed to furnish a cumulative or additional remedy;[45] and, a fortiori, equitable relief will not be

36. Tex.—Owens v. Cage, 106 S.W. 880, 101 Tex. 286.

37. Fla.—Allison v. Handy Andy Community Stores, 143 So. 263, 106 Fla. 274.
Ga.—Beddingfield v. Old Nat. Bank & Trust Co., 165 S.E. 61, 175 Ga. 172—Bishop v. Bussey, 139 S.E. 212, 164 Ga. 642.
34 C.J. p 437 note 54.

38. Va.—Drake v. Lyons, 9 Gratt. 54, 50 Va. 54.

Contribution
Petition to enjoin enforcement of joint judgment against petitioner would not lie where he had an adequate legal remedy to compel contribution.—Autry v. Southern Ry. Co., 144 S.E. 741, 167 Ga. 136.

39. N.M.—Pickering v. Palmer, 138 P. 198, 18 N.M. 473, 50 L.R.A.,N. S., 1055.
34 C.J. p 437 note 56.

40. Ark.—Road Improvement Dist. No. 4, Prairie County v. Mobley, 245 S.W. 482, 156 Ark. 242.
Cal.—In re Hanley's Estate, 142 P. 2d 423, 23 Cal.2d 120, 149 A.L.R. 1250.
Or.—Marsters v. Ashton, 107 P.2d 981, 165 Or. 507.
Tex.—Edwards v. Riverside Royalties Corporation, Civ.App., 99 S.W. 2d 418. Error dismissed.
34 C.J. p 437 note 57.

Denial of motion to vacate
An order denying a motion to vacate a judgment at law does not destroy the jurisdiction of equity to entertain a bill to set aside such judgment, where the motion was made at a time when the court of law had lost jurisdiction to entertain it.—Spring Valley Coal Co. v. Donaldson, 128 Ill.App. 196.

41. Ill.—Pitcairn v. Dreyfuss, 20 N. E.2d 161, 299 Ill.App. 618.
Md.—Pioneer Oil Heat v. Brown, 16 A.2d 880, 179 Md. 155.
34 C.J. p 438 note 58.

42. Ill.—Ballance v. Loomiss, 22 Ill. 82.
34 C.J. p 438 note 59.

43. N.Y.—Jacobs v. Morange, 47 N. Y. 57.
34 C.J. p 438 note 60.

Mortgagor's reliance on attorney's advice that foreclosure judgment rendered against him without service of citation was void and no action was necessary to set aside judgment does not excuse mortgagor from first exhausting legal remedies as condition precedent to suing in equity to set aside judgment.—Reynolds v. Volunteer State Life Ins. Co., Tex. Civ.App., 80 S.W.2d 1087, error refused.

44. Ala.—Hatton v. Moseley, 156 So. 546, 229 Ala. 240—Kelley v. Chavis, 142 So. 423, 225 Ala. 218.
Cal.—Gundelfinger v. Mariposa Commercial & Min. Co., App., 165 P.2d 57—Hogan v. Horsfall, 266 P. 1002, 91 Cal.App. 37, followed in 266 P. 1005, 91 Cal.App. 797.
Ky.—Hoover v. Dudley, 14 S.W.2d 410, 228 Ky. 110.
Md.—Pioneer Oil Heat v. Brown, 16 A.2d 880, 179 Md. 155.
Mich.—**Corpus Juris quoted in** Bryll v. Karchmarz, 235 N.W. 812, 253 Mich. 678.
Miss.—Lamar v. Houston, 184 So. 293, 183 Miss. 260.
Mo.—**Corpus Juris cited in** Brinkerhoff-Faris Trust & Savings Co. v. Hill, 19 S.W.3d 746, 749, 323 Mo. 180, reversed on other grounds 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, conformed to 42 S.W.2d 23, 328 Mo. 836.
Okl.—**Corpus Juris cited in** State v. Wood, 43 P.2d 136, 138, 171 Okl. 341.
Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664—Marsters v. Ashton, 107 P.2d 981, 165 Or. 507—**Corpus Juris cited in** Holmes v. Graham, 80 P.2d 870, 872, 159 Or. 466—**Corpus Juris quoted in** Olsen v. Crow, 290 P. 233, 235, 133 Or. 310.
Tex.—Noble v. Empire Gas & Fuel Co., Civ.App., 20 S.W.2d 849, affirmed Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451—Camden Fire Ins. Ass'n v. Hill, Civ.App., 264 S.W. 123, reversed on other grounds, Com.App., 276 S.W. 887.
34 C.J. p 438 note 61.

Knowledge of rendition of judgment
In suit to enjoin execution and cancel judgment on ground of want of service, relief was denied where president of defendant association knew of pendency of suit and of rendition of judgment therein, had tried to have cause continued, and no excuse was offered for failure to file motion to have judgment set aside or for a new trial.—Citizens Mut. Life & Accident Ass'n of Texas v. Gillespie, Tex.Civ.App., 93 S.W.2d 200.

45. Ala.—Leath v. Lister, 173 So.

denied where the legal remedy under the statute is inadequate.[46] Resort to equity is cut off, however, where the grounds of the application and the relief to which the party is entitled are within the cognizance of the law court under statutes, and a motion or other proceeding under the statute will furnish, or by the exercise of proper diligence by the complaining party would have furnished, an adequate and complete remedy.[47]

During the period in which the statutory remedies are available, courts of law and courts of equity sometimes have concurrent jurisdiction,[48] but, under the rule that the latter will not grant relief where the former have jurisdiction to do so, courts of equity generally will not assume jurisdiction during such statutory period.[49] When, however, the time within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, equity will grant relief.[50]

c. Remedy by Review

One who has, or by taking proper steps would have had, an adequate remedy by appeal or error ordinarily can have no relief against a judgment in equity. This is not an inflexible rule, however, and does not defeat equitable relief in cases where the remedy by review is doubtful or inadequate.

The general rule is that relief will not be granted in equity against a judgment where the party has an adequate remedy as to the matters complained of by review, appeal, or writ of error and makes no effort to avail himself of it, or has lost such remedy by failing to take proper steps to secure or to perfect it.[51] This is equally true whether the party

59, 233 Ala. 595—Kelley v. Chavis, 142 So. 423, 225 Ala. 218—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.
Cal.—Winn v. Torr, 81 P.2d 457, 27 Cal.App.2d 623—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400—Rudy v. Slotwinsky, 238 P. 783, 73 Cal. App. 459.
Minn.—Lenhart v. Lenhart Wagon Co., 2 N.W.2d 421, 211 Minn. 572.
Neb.—Pavlik v. Burns, 278 N.W. 149, 134 Neb. 175—Howard Stove & Furnace Co. v. Rudolf, 260 N.W. 189, 128 Neb. 665.
Ohio.—Seeds v. Seeds, 156 N.E. 193, 116 Ohio St. 144, 52 A.L.R. 761—Young v. Guella, 35 N.E.2d 997, 67 Ohio App. 11.
Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664.
34 C.J. p 435 note 35.

46. Mont.—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.
Okl.—Amos v. Johnston, 19 P.2d 344, 162 Okl. 115.
Utah.—Kramer v. Pixton, 268 P. 1029, 72 Utah 1.

Relief limited to parties

A statute permitting a party to move within a specified period for relief from a judgment taken against him through his mistake, inadvertence, or excusable neglect does not afford an adequate legal remedy, which will exclude relief in equity, to one who was not a party to the action.—Gill v. Frances Inv. Co., C. C.A.Cal., 19 F.2d 880.

Broader power of chancellor

As respects availability of remedy of injunction against collection of judgment entered by confession, although courts exercise equitable powers in motions to vacate judgments entered by confession, the courts do not exercise equity power on such motion as broad as that exercised by the chancellor in a suit in equity; and the distinction between the equitable powers exercised by court on motion to vacate and equity powers of a chancellor in a suit in equity is not entirely abrogated by the statute providing for joinder of legal and equitable causes of action and setting up of all cross-demands in counterclaims.—Printers Corporation v. Hamilton Inv. Co., 14 N.E.2d 517, 295 Ill.App. 84.

47. Cal.—Gundelfinger v. Mariposa Commercial & Min. Co., App., 165 P.2d 57.
Colo.—Wharton v. De Vinna, 246 P. 279 79 Colo. 450.
Mont.—Meyer v. Lemley, 282 P. 268, 86 Mont. 83.
Neb.—Johnson v. Marsh, 19 N.W.2d 366, 146 Neb. 257—Bend v. Marsh, 18 N.W.2d 106, 145 Neb. 780—In re Marsh's Estate, 17 N.W.2d 471, 145 Neb. 559—Lindstrom v. Nilsson, 274 N.W. 485, 132 Neb. 184—Weber v. Allen, 238 N.W. 740, 121 Neb. 833.
Ohio.—Shedenhelm v. Myers, 63 N.E. 2d 34, 76 Ohio App. 28.
Okl.—Flynn v. Vanderslice, 44 P.2d 967, 172 Okl. 320—Reeder v. Mitchell, 32 P.2d 26, 167 Okl. 621—Amos v. Johnston, 19 P.2d 344, 162 Okl. 115—Kendall v. Watts, 273 P. 991, 135 Okl. 66.
34 C.J. p 435 note 36.

Garnishee's ignorance of consequences of default

Where judgment creditor took judgment against garnishee by default, and notified garnishee, which did nothing within time allowed for granting relief from judgments, because garnishee was not aware of consequences following the default, garnishee could not restrain enforcement of judgment.—Plumbers' Woodwork Co. v. Merchants' Credit and Adjustment Bureau, 226 N.W. 303, 199 Wis. 466.

48. Ind.—Hitt v. Carr, 130 N.E. 1, 77 Ind.App. 488.

49. Ala.—Leath v. Lister, 173 So. 59, 233 Ala. 595.
Iowa.—Bates v. Farmers Loan & Trust Co. of Iowa City, 291 N.W. 134, 227 Iowa 1347.
Wash.—Muller v. Hendry, 17 P.2d 602, 171 Wash. 9.
34 C.J. p 436 note 38.

Statutory procedure as preferable

The courts are more inclined to open up default judgment under statute authorizing such relief for mistake, inadvertence, surprise or excusable neglect than to vacate judgment in an independent suit.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664.

50. Ala.—Kelley v. Chavis, 142 So. 423, 225 Ala. 218.
Mont.—Stocking v. Charles Beard Co., 55 P.2d 949, 102 Mont. 65.
Okl.—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572.
34 C.J. p 436 note 39.

Time of discovery of fraud

Equity will afford relief against judgment procured by fraud of successful party when injured party, in exercise of reasonable diligence, did not discover, within time allowed for commencing statutory proceeding to vacate judgment, sufficient evidence of fraud to warrant reasonable belief and expectation that such proceeding would be successful, if instituted.—Hoeppner v. Bruckman, 261 N.W. 572, 129 Neb. 390—Krause v. Long, 192 N.W. 729, 109 Neb. 846.

51. U.S.—Moffett v. Robbins, C.C.A. Kan., 81 F.2d 431, denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397—U. S. v. Davis & Andrews Co., D. C.Tenn., 3 F.Supp. 535.
Ark.—Parker v. Sims, 51 S.W.2d 517, 185 Ark. 1111—Road Improvement Dist. No. 4, Prairie County, v. Mobley, 245 S.W. 482, 156 Ark. 242.

has neglected altogether to take an appeal or has prosecuted a defective or insufficient appeal.[52] Equity will not interfere if there has been a failure to resort to or exhaust an adequate remedy by certiorari[53] or supersedeas.[54]

Failure to resort to or exhaust all remedies by way of review, however, does not always bar relief in equity against a judgment,[55] and some decisions make an exception to the general rule in cases where fraud is alleged against the judgment.[56] Resort to, or exhaustion of, remedies by way of review has been held not a prerequisite to equitable relief against a judgment in cases where an equitable defense fails because it is not cognizable at law,[57] or where a case for equitable interference, independent of a mere reversible error, is stated,[58] and also where the remedy by review is doubtful or inadequate,[59] as where the matters alleged against it lie outside the record and therefore are not cognizable on appeal or writ of error[60] or, likewise, are not

Cal.—Doran v. Sherman, 64 P.2d 442, 18 Cal.App.2d 479.
Fla.—Allison v. Handy Andy Community Stores, 143 So. 263, 106 Fla. 274—Adams v. Reynolds, 134 So. 45, 101 Fla. 271.
Ga.—Barker v. People's Loan & Savings Co., 173 S.E. 704, 178 Ga. 464—Futch v. Olmstead, 165 S.E. 582, 175 Ga. 563—Dixie Realty Finance Co. v. Morgan, 164 S.E. 200, 174 Ga. 807—Adams v. Bishop, 163 S.E. 148, 174 Ga. 420—Hutchings v. Roquemore, 155 S.E. 675, 171 Ga. 359.
Ill.—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 365 Ill. 588—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56—Mecartney v. Hale, 48 N.E.2d 570, 318 Ill.App. 502.
Kan.—Bitsko v. Bitsko, 122 P.2d 753, 155 Kan. 80.
Md.—Pioneer Oil Heat v. Brown, 16 A.2d 880, 179 Md. 155.
Mass.—Untersee v. Untersee, 13 N.E. 2d 34, 299 Mass. 425—Morin v. Ellis, 189 N.E. 95, 285 Mass. 370.
Mich.—Koppas v. Heffner & Flemming, 282 N.W. 245, 286 Mich. 562.
Miss.—Max N. Tobias Bag Co. v. Delta Cotton Oil Co., 11 So.2d 210, 193 Miss. 873.
Mo.—Gee v. Bothwell, App., 176 S.W. 2d 848—Mutual Casualty Co. of Missouri v. Sansone, App., 17 S.W. 2d 558.
Okl.—Wheeler v. Ridpath, 259 P. 247, 126 Okl. 290.
Tenn.—Peoples Tel. & Tel. Co. v. Prye, 10 Tenn.App. 160.
Tex.—Lynn v. Hanna, 296 S.W. 280, 116 Tex. 652—Winters Mut. Aid Ass'n, Circle No. 2, v. Reddin, Com.App., 49 S.W.2d 1095—Southern Surety Co. v. Texas Oil Clearing House, Com.App., 281 S.W. 1045—Smith v. Lockhart, Civ.App., 177 S.W.2d 117—Smith v. Zenith Corporation, Civ.App., 134 S.W.2d 337—Metropolitan Life Ins. Co. v. Pribble, Civ.App., 130 S.W.2d 332, error refused—Smith v. Rogers, Civ.App., 129 S.W.2d 776—Hacker v. Hacker, Civ.App., 110 S.W.2d 923—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed—Robin v. Robin, Civ.App., 106 S.W.2d 1082, error dismissed—Birge v. Conwell, Civ. App., 105 S.W.2d 407, error refused—Snell v. Knowles, Civ.App., 87 S.W.2d 871, error dismissed—Trigg v. Trigg, Civ.App., 83 S.W.2d 1066, error dismissed—Reynolds v. Volunteer State Life Ins. Co., Civ. App., 80 S.W.2d 1087, error refused—Murry v. Citizens' State Bank of Ranger, Civ.App., 77 S.W.2d 1104, error dismissed—Inman v. Texas Land & Mortgage Co., Civ.App., 74 S.W.2d 124—Pass v. Ray, Civ. App., 44 S.W.2d 470—Hollis v. Seibold, Civ.App., 23 S.W.2d 811, error dismissed—Noble v. Empire Gas & Fuel Co., Civ.App., 20 S.W. 2d 849, affirmed Empire Gas & Fuel Co. v. Noble, Com.App., 36 S. W.2d 451—U. O. Colson Co. v. Powell, Civ.App., 13 S.W.2d 405—Patton v. Crisp & White, Civ. App., 11 S.W.2d 826, error dismissed—Crutcher v. Wolfe, Civ.App., 269 S.W. 841—Oetting v. Mineral Wells Crushed Stone Co., Civ.App., 262 S.W. 93—First Nat. Bank v. Curtis, Civ.App., 244 S.W. 225.
34 C.J. p 436 note 42.
Availability of other remedies as bar to opening or vacating judgment see supra § 283.

Mere ignorance of rendition of judgment, after due service of process, is not sufficient showing of diligence to excuse failure to prosecute appeal or writ of error.—Murchison Oil Co. v. Hampton, Tex.Civ.App., 21 S.W.2d 59, error refused.

Refusal to submit issues

Trial court's refusal to submit plaintiff's requested issues is not ground for enjoining enforcement of judgment, since court's action might be properly attacked on appeal.—Cooper v. Walker, Tex.Civ.App., 96 S.W.2d 847.

52. Tex.—Long v. Smith, 89 Tex. 160.
34 C.J. p 437 notes 42, 44.

53. Fla.—Sommers v. Colourpicture Pub., 8 So.2d 281, 150 Fla. 659.
Mich.—Koppas v. Heffner & Flemming, 282 N.W. 245, 286 Mich. 562.
Tex.—Hernandez v. Alamo Motor Co., Civ.App., 299 S.W. 272.
34 C.J. p 437 note 45.

54. Ala.—Leath v. Lister, 173 So. 59, 233 Ala. 595.
34 C.J. p 437 note 46.

Failure to give supersedeas bond

One who has appealed from judgment without giving supersedeas bond cannot stay proceedings on judgment by injunction.—Glenn v. Hollums, Tex.Civ.App., 73 S.W.2d 1068.

55. **Execution defendants who were not parties** to suit or judgment were held entitled to enjoin execution as against contention that they had adequate remedy by writ of error.—Maier v. Davis, Tex.Civ.App., 72 S. W.2d 308.

56. Mo.—Baldwin v. Davidson, 40 S. W. 765, 139 Mo. 118, 61 Am.S.R. 460.
34 C.J. p 437 note 47.

57. N.J.—Gallagher v. Lembeck & Betz Eagle Brewing Co., 98 A. 461, 86 N.J.Eq. 188—Headley v. Leavitt, 55 A. 731, 65 N.J.Eq. 748.

58. Ala.—Robinson v. Reid, 50 Ala. 69.
Tex.—Elstun v. Scanlan, Civ.App., 202 S.W. 762.

59. Colo.—Ferrier v. Morris, 122 P. 2d 880, 109 Colo. 154.
Ill.—Bachechi v. Inlander Paper Co., 252 Ill.App. 178.
Ind.—City of New Albany v. Lemon, 149 N.E. 350, 198 Ind. 127, rehearing denied 152 N.E. 723, 198 Ind. 127.
Mont.—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.
Tex.—Bennett v. Carter, Civ.App., 102 S.W.2d 450, error dismissed—Senter v. Garland, Civ.App., 298 S. W. 614—Cook v. Panhandle Refining Co., Civ.App., 267 S.W. 1070.
34 C.J. p 437 note 49.

Default judgment

As respects right to maintain proceedings to set aside default judgment, legal remedy of appeal is not an adequate remedy.—Bennett v. Carter, Tex.Civ.App., 102 S.W.2d 450, error dismissed.

60. Mo.—Chouteau v. City of St. Louis, App., 131 S.W.2d 902.
Tex.—Edwards v. Riverside Royalties Corporation, Civ.App., 99 S.W. 2d 418, error dismissed—Ritch v. Jarvis, Civ.App., 64 S.W.2d 831, error dismissed.
34 C.J. p 437 note 51.

Agreement not of record

Where plaintiffs took judgment

cognizable on certiorari,[61] or where the amount in controversy was so small that no appeal could be taken.[62]

§ 344. Persons Entitled to Relief

Equitable relief against a judgment ordinarily will be granted only to parties to the action or their privies, or persons directly jeopardized by the judgment. An owner or purchaser of property affected by the judgment may be entitled to relief.

As a rule relief in equity against a judgment at law is given only to the parties to the action[63] or those in privity of interest or estate with them;[64] and a third person or stranger to the proceedings who is not affected by the judgment cannot attack it in equity or enjoin its enforcement.[65] In proper instances, however, particularly in the case of a fraudulent or collusive judgment, relief in equity may be had at the instance of one who, although not a party to the proceeding in which the judgment was rendered, shows that he is directly injured or jeopardized by the judgment as it stands,[66] as where he claims to be the true owner of the property in controversy or sets up a paramount title to it.[67]

One who had full knowledge of the pendency of the suit, and neither sought to become a party thereto nor made any effort to intervene therein so as to protect his rights, may be barred, after rendition of judgment, from suing to set such judgment aside or to restrain its enforcement;[68] but voluntary intervention is not required as a condition of equitable relief to one who was absolutely entitled to a hearing, and such a person, although not a party to the proceedings in which the judgment was rendered, may nevertheless have relief against it in a proper case.[69]

Purchasers, encumbrancers, and creditors. A purchaser of property subject to the lien of a judgment to which his grantor makes no objection cannot maintain a suit to enjoin its enforcement, unless

without notice, contrary to valid agreement not of record, defendants had no remedy by writ of error, but remedy lay in direct attack on judgment.—Caffarelli v. Reasonover, Tex. Civ.App., 54 S.W.2d 170.

Discharge in bankruptcy

As respects right of motorist, after discharge in bankruptcy, to bring bill in equity to vacate judgment for injuries to pedestrian, quash body execution, and discharge jail limits bond, discharge in bankruptcy granted after judgment was rendered would not be ground for appeal from judgment.—Doering v. Baker, 270 N. W. 185, 277 Mich. 683.

61. Mich.—Wilcke v. Duross, 107 N. W. 907, 144 Mich. 243, 115 Am.S.R. 394.
34 C.J. p 437 note 52.

62. Tex.—Gulf, C. & S. F. R. Co. v. Henderson, 18 S.W. 432, 83 Tex. 70.
34 C.J. p 437 note 53.

63. Ga.—Martocello v. Martocello, 30 S.E.2d 108, 197 Ga. 629—Thomas v. Lambert, 1 S.E.2d 443, 187 Ga. 616.
Tex.—Garcia v. Jones, Civ.App., 155 S.W.2d 671, error refused—Hugh Cooper Co. v. American Nat. Exchange Bank of Dallas, Civ.App., 30 S.W.2d 364.
34 C.J. p 438 note 62—47 C.J. p 438 note 62.

Claim of interest

Persons not parties to a partition action could not petition to have the decree set aside merely because they claimed an interest in the property. —Gage v. Lee, 141 N.E. 397, 309 Ill. 614.

"Aggrieved party"

(1) Statute authorizing suit to set aside judgment to be brought by "aggrieved party" against "prevailing party" was held intended to include all those who were parties to action, although having varying interests therein.—Tankar Gas v. Lumbermen's Mut. Casualty Co., 9 N.W. 2d 754, 215 Minn. 265, 146 A.L.R. 1223.

(2) In a proceeding by a minority stockholder, the corporation was the "aggrieved party" within meaning of the statute.—Lenhart v. Lenhart Wagon Co., 298 N.W. 37, 210 Minn. 164, 135 A.L.R. 833, mandate modified on other grounds 2 N.W.2d 421, 211 Minn. 572.

64. Tex.—Jackson v. Wallace, Com. App., 252 S.W. 745.
34 C.J. p 438 note 63.

65. Ga.—Thomas v. Lambert, 1 S.E. 2d 443, 187 Ga. 616.
Ill.—Gage v. Lee, 141 N.E. 397, 309 Ill. 614.
Ohio.—Suiter v. Suiter, 57 N.E.2d 616, 74 Ohio App. 44.
Tex.—Carlton v. Hoff, Civ.App., 292 S.W. 642.
34 C.J. p 439 note 64—24 C.J. p 888 note 85.
Parties to action for equitable relief against judgment see infra § 384.

Injury by reason of nonjoinder

One may not attack judgment voidable for nonjoinder of parties unless he sustained injury by reason of nonjoinder.—State Mortg. Corporation v. Garden, Tex.Civ.App., 11 S. W.2d 212.

Absence of fraud on lienor

One claiming landlord's lien could not enjoin enforcement of conditional seller's judgment in detinue, where bill did not allege facts showing that judgment was concocted in fraud of lien claimant's rights.—Larue v. Loveman, Joseph & Loeb, 132 So. 715, 222 Ala. 472.

66. Ala.—Mudd v. Lanier, 24 So.2d 550—Henley v. Foster, 125 So. 662, 220 Ala. 420.
Cal.—Difani v. Riverside County Oil Co., 256 P. 210, 201 Cal. 210—Harada v. Fitzpatrick, 91 P.2d 941, 33 Cal.App.2d 453.
Mass.—Connor v. Morse, 20 N.E.2d 424, 303 Mass. 42.
Mich.—Casey v. Goetzen, 214 N.W. 948, 240 Mich. 41.
34 C.J. p 439 note 65.

A taxpayer is entitled to equitable relief from a judgment entered against a city when it appears that his case comes within some of the recognized grounds of which a court of equity assumes jurisdiction, such as fraud of either of the parties to the judgment or the collusion of both.—Indiana Harbor Belt R. Co. v. Calumet City, 63 N.E.2d 369, 391 Ill. 280.

67. Cal.—Bernhard v. Waring, 2 P. 2d 32, 213 Cal. 175.
Tex.—McCook v. Amarada Petroleum Corporation, Civ.App., 73 S.W.2d 914.
34 C.J. p 439 note 66.

Cloud on title

Third person, if sufficiently interested, may by suit attack validity of judgment as cloud on title.—Welch v. Morris, 291 P. 1048, 49 Idaho 781—34 C.J. p 439 note 66 [b].

68. Ga.—Fitzgerald v. Bowen, 40 S. E. 735, 114 Ga. 691.
La.—Hawthorne v. Jackson Parish School Board, 5 La.App. 508.
Or.—Corpus Juris quoted in Olsen v. Crow, 290 P. 233, 235, 133 Or. 310.

69. U.S.—Chase Nat. Bank v. City of Norwalk, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894.

he can show that it was fraudulent or expressly designed to injure him;[70] and a similar rule obtains in the case of encumbrancers by mortgage or otherwise,[71] and other creditors of the common debtor.[72] Under proper circumstances, however, the purchaser of property may have the right to impeach a judgment, and the lien thereof against his property, although not a party to the action in which the judgment was rendered,[73] at least in cases in which the judgment is void by reason of facts appearing on the judgment roll.[74]

Sureties. Although there is nothing in the mere character of a surety entitling him to special consideration in the awarding of equitable relief against a judgment,[75] yet there may be circumstances rendering it inequitable and against conscience to allow the enforcement of the judgment.[76] Where judgment is erroneously or wrongfully taken against one as principal, when he is liable only as surety or indorser, equity may relieve him against the judgment, on evidence showing the true character of his liability.[77]

§ 345. Persons against Whom Relief Available

Equitable relief against a judgment may in general be had against any one who attempts to enforce it, except the sovereign and bona fide purchasers of property affected by the judgment.

An action to enjoin a void, fraudulent, or unconscionable judgment may generally be maintained against any person who attempts to enforce it,[78] including the heirs at law of the judgment creditor.[79] Relief ordinarily will not be awarded against purchasers of the property affected, who take it in good faith and without notice of the circumstances affecting the validity of the judgment.[80] An exception to this latter rule exists, however, in the case of gambling contracts, made void by statute, and relief against a judgment on such a contract may be obtained even against a bona fide holder for value without notice.[81]

United States. Since the sovereign is beyond the reach of any prohibitory process, an injunction cannot be issued to restrain the United States from collecting a judgment in its favor.[82]

§ 346. Judgments against Which Relief May Be Granted

It is generally considered that equity may grant relief against judgments of any judicial tribunal, and of whatever form or nature, including decrees in equity and judgments of special tribunals.

Subject to some limitations and exceptions, a court of equity, on sufficient cause shown, ordinarily may grant relief against a judgment, decree, or order of any judicial tribunal,[83] and the form or na-

70. Cal.—Whitney v. Kelley, 29 P. 624, 94 Cal. 146, 28 Am.S.R. 106, 15 L.R.A. 813.
34 C.J. p 439 note 69.

71. Tex.—Livezey v. Putnam Supply Co., Civ.App., 30 S.W.2d 902, error refused.
34 C.J. p 439 note 70.

72. Mich.—Edson v. Cumings, 17 N. W. 693, 52 Mich. 52.
34 C.J. p 439 note 71.

Divestiture of property with intent to defraud creditors

Creditors of persons who through fraudulent contrivance or fraudulent complicity with others cause a judgment to be rendered whereby they are divested of their property with a design to defraud their creditors may resort to courts having equity jurisdiction for relief against such injustice, since the fraud in those cases is regarded not only on the person aggrieved but likewise on the court itself.—Hooffstetter v. Adams, 35 N.E.2d 896, 67 Ohio App. 21.

Future creditor

A judgment creditor may not be precluded from satisfying his judgment from a private fund on the ground that a future creditor may thereby find himself in the position of having an uncollectable judgment against the debtor.—Pisciotta v. Preston, 10 N.Y.S.2d 44, 170 Misc. 376.

73. N.C.—Helsabeck v. Vass, 146 S. E. 576, 196 N.C. 603.

Purchaser under judgment in attachment suit

A purchaser at a sale under the judgment in an attachment suit acquires the title of defendant in attachment, and has the same right to file a bill to annul a judgment in a senior attachment.—McKinney v. Adams, 50 So. 474, 95 Miss. 832.

74. Cal.—Swallow v. Tungsten Products Co., 270 P. 366, 205 Cal. 207.

75. Tex.—Watts v. Moss, Civ.App., 63 S.W.2d 1095, error dismissed.
34 C.J. p 440 note 73.

76. Tex.—Axtell v. Lopp, Civ.App., 152 S.W. 192.
24 C.J. p 888 note 85 [a].

77. S.C.—Baubien v. Stoney, 17 S.C. Eq. 508.
34 C.J. p 440 note 84.

78. Kan.—Chambers v. King Wrought-Iron Bridge Manufactory, 16 Kan. 270.
Parties to action for equitable relief against judgment see infra § 384.

Relief denied as against escrow holder

The purchasers of property under an unrecorded deed, against whom a subsequent purchaser obtained a judgment quieting title in him, were held to have no right of action to set the judgment aside as against a bank which held the unrecorded deed and the contract of sale in escrow.—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400.

79. Va.—Evans v. Spurgin, 11 Gratt. 615, 52 Va. 615.

80. Tex.—Garza v. Kenedy, Civ.App., 291 S.W. 615, reversed on other grounds, Com.App., 299 S.W. 231.
34 C.J. p 440 note 87.

Fundamental jurisdictional defect

In judgment debtor's suit against judgment creditor and third party to set aside judgment and sale thereunder for fundamental jurisdictional defect, third party is not entitled to protection of judgment unless it appears that he is a purchaser in good faith and that the judgment is regular on its face.—Morris v. Soble, 61 S.W.2d 139.

81. Miss.—Lucas v. Waul, 20 Miss. 157.
34 C.J. p 440 note 88.

82. U.S.—Hill v. U. S., Miss., 9 How. 386, 13 L.Ed. 185—U. S. v. McLemore, Tenn., 4 How. 286, 11 L.Ed. 977.

83. U.S.—Smith v. Smith, D.C.Mont.,

ture of the judgment is not generally material in this respect.[84] While it has been broadly held that probate decrees may not be set aside in equity,[85] even for fraud,[86] it has also been held that they may be set aside in a proper case,[87] as for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of complainant,[88] or where a defect in jurisdiction or other fatal error affirmatively appears on the record.[89] A court of equity may, on sufficient reasons for such action being shown, grant relief against the enforcement of a judgment at law in favor of[90] or against[91] an executor or administrator.

Decrees in equity. If, through lapse of time or for other reasons, the remedy by way of bill of review is not available to attack a decree in equity which has been improperly entered, there may be relief by way of an injunction in equity, where justice so demands, and there is no other way open.[92] In a proper case a bill will lie to review a decree in equity against a personal representative.[93]

Interlocutory decrees. A court of equity will not interfere to set aside an interlocutory decree in a cause then pending in another court[94] because the party complaining of such a decree has a sufficient remedy by applying to the court which made it.[95]

Judgments affirmed on appeal. It has been held by some authorities that a judgment which has been affirmed on appeal may not be impeached or set aside by a court of equity, in a suit brought for that purpose;[96] it has also been held, however, that such a judgment may be enjoined[97] on any ground of error apparent on the face of such judgment, or on the record of the case in which it was rendered,[98] at least where it appears that the judgment is void[99] or that it was obtained by fraud.[1]

Pendency of an appeal or a writ of error does not necessarily affect the jurisdiction of a court of equity over a bill to enjoin a judgment,[2] at least where the suit in equity does not draw into question the judgment and proceedings at law, or claim a right to revise them, but sets up an equity independent of the judgment, which admits the validity thereof, but suggests reasons why the party who has obtained it ought not to avail himself of it.[3]

Special tribunals. It has been said that injunction does not lie to restrain the execution of a judgment of a special tribunal created by statute, certiorari being the proper remedy.[4] However, the judgment of such a tribunal which is a nullity may be enjoined.[5]

210 F. 947, affirmed 224 F. 1, 139 C.C.A. 465.
34 C.J. p 440 note 91.

Judgment of court of another county
The district court of one county had no jurisdiction to enjoin execution of judgment of court of another county on ground that there was no service of citation on defendant, where judgment on its face appeared to be valid.—Stewart v. Adams, Tex. Civ.App., 171 S.W.2d 180.

84. Miss.—Brown v. Wesson, 74 So. 831, 114 Miss. 216.
34 C.J. p 441 note 92.

Cognovit judgments
U.S.—Glinski v. U. S., C.C.A.Ill., 93 F.2d 418.
Wis.—Ellis v. Gordon, 231 N.W. 585, 202 Wis. 134.

85. **Decree allowing probate account**
Mass.—Grassie v. Grassie, 61 N.E. 2d 526.

86. Mass.—Mahoney v. Nollman, 35 N.E.2d 265, 309 Mass. 522—Farquhar v. New England Trust Co., 158 N.E. 836, 261 Mass. 209.

87. Ark.—Hill v. Taylor, 135 S.W.2d 825, 199 Ark. 695.
Mich.—Kurant v. Higbee, 9 N.W.2d 824, 305 Mich. 411.
Tex.—Union Bank & Trust Co. of Fort Worth v. Smith, Civ.App., 166 S.W.2d 928.
34 C.J. p 440 note 91 [a] (1).

Acts of county judge
Exercise of circuit court's supervisory power over acts, proceedings, and doings of county judge relating to probate or guardianship matters can be invoked by suit in equity.—Ex parte Hansen, 162 So. 715, 120 Fla. 333—Pitts v. Pitts, 162 So. 708, 120 Fla. 363.

88. Ga.—Bowers v. Dolen, 1 S.E.2d 734, 187 Ga. 653.

89. Mass.—Farquhar v. New England Trust Co., 158 N.E. 836, 261 Mass. 209.

90. Mo.—Link v. Link, 48 Mo.App. 345.
24 C.J. p 888 note 83.

91. Tenn.—Hamilton v. Newman, 10 Humphr. 557.

92. Mass.—Corbett v. Craven, 82 N. E. 37, 196 Mass. 319.
34 C.J. p 441 note 3.

93. Ky.—Head v. Perry, 1 T.B.Mon. 253.
24 C.J. p 889 note 94.

94. Neb.—James v. McNeill, 97 N.W. 22, 70 Neb. 132.
34 C.J. p 441 note 93.

95. U.S.—Furnald v. Glenn, N.Y., 64 F. 49, 12 C.C.A. 27.

96. U.S.—Central Trust Co. of New York v. Evans, Tenn., 73 F. 562, 19 C.C.A. 563.
34 C.J. p 441 note 95.

97. Ind.—Stephenson v. State, 186 N.E. 293, 205 Ind. 141.

98. W.Va.—Armstrong v. Poole, 5 S. E. 257, 30 W.Va. 666.

99. Tex.—Chambers v. Hodges, 23 Tex. 104.
34 C.J. p 441 note 97.

1. Ala.—Chambers v. Crook, 42 Ala. 171, 94 Am.D. 637.
34 C.J. p 441 note 98.

2. U.S.—Dowagiac Mfg. Co. v. McSherry Mfg. Co., Ohio, 155 F. 524, 84 C.C.A. 38—Platt v. Threadgill, C.C.Va., 80 F. 192, appeal dismissed 18 S.Ct. 945, 42 L.Ed. 1208.

3. U.S.—Johnson v. St. Louis, I. M. & S. R. Co., Ark., 12 S.Ct. 124, 141 U.S. 602, 35 L.Ed. 875—Parker v. Judges Maryland Cir. Ct., Md., 12 Wheat. 561, 6 L.Ed. 729.

4. S.C.—Hornesby v. Burdell, 9 S.C. 303.

5. Tenn.—Walt v. Thomasson, 10 Heisk. 151.
34 C.J. p 441 note 5.

Compensation award
Equity court has been held to have jurisdiction to enjoin enforcement of judgment based on compensation award on ground that judgment was fraudulently obtained, as against contention that jurisdiction of courts over compensation awards is limited to review provided by statute, which does not include fraud, since juris-

§ 347. —— By Confession or on Consent or Offer

Equitable relief against a judgment by confession or on consent, although not readily granted, may nevertheless be had on a showing of sufficient grounds.

Where a party to an action at law voluntarily confesses judgment, usually he is not entitled to equitable relief against the judgment, unless without negligence on his part he was prevented from making his defense by fraud, accident, surprise, or mistake.[6] However, if sufficient grounds appear, equitable relief against a judgment by confession may properly be granted.[7] If judgment is confessed for a balance claimed, with the privilege of correcting errors, if any, it can be enjoined only on proof of errors.[8]

Consent judgment. Although equity is little disposed to overhaul judgments settled by consent or compromise,[9] yet on a showing of proper circumstances, such as fraud or mistake in the procurement of the judgment, relief against it may be obtained in equity.[10]

§ 348. —— By Default

A court of equity may grant relief against a default judgment provided the complaining party was not at fault in failing to defend.

A court of equity will not grant relief against a judgment taken by default where the applicant, shown to have been duly served with summons, failed to avail himself of an opportunity to defend, such failure not being the result of fraud, accident, mistake, or the like.[11] On a showing of sufficient grounds, however, a court of equity will grant relief against a default judgment which was obtained without fault on the part of the one seeking relief.[12] Where a judgment by default is obtained against a party by his own neglect, it constitutes no ground for equitable intervention that his adversary obtained more relief than he was entitled to.[13]

§ 349. Meritorious Cause of Action or Defense

As a general rule, the plaintiff must show a meritorious cause of action, and the defendant a meritorious defense, as a condition of equitable relief to him against a judgment. Some authorities, however, do not require such a showing where the attack is made on a void judgment.

A court of equity will not interfere with the enforcement of a judgment recovered at law, unless it is unjust and unconscionable; and therefore as a general rule such relief will not be granted unless complainant shows that he has a good and meritorious defense to the original action, or, where the party seeking relief was the plaintiff in the action in which the judgment was rendered, that he has a meritorious cause of action.[14] This is the rule where the judgment was procured

diction of equity to enjoin a judgment founded on a compensation award has nothing to do with a review of the award.—Amberg v. Deaton, 271 N.W. 396, 223 Wis. 653.

6. Ala.—Moore v. Barclay, 23 Ala. 739.
34 C.J. p 441 note 7.

7. Colo.—Sarchet v. Phillips, 78 P. 2d 1096, 102 Colo. 318.
Pa.—Sherwood Bros. Co. v. Kennedy, 200 A. 689, 132 Pa.Super. 154.
34 C.J. p 441 notes 8–10.

Fraudulently altered power of attorney

Equity may enjoin a judgment on a note entered on a fraudulently altered power of attorney to confess judgment.—Hodge v. Gilman, 20 Ill. 437.

8. U.S.—Gear v. Parish, Wis., 5 How. 168, 12 L.Ed. 100.

9. Ala.—State v. Neuhoff, 196 So. 130, 239 Ala. 584.
Ga.—Elliott v. Elliott, 191 S.E. 465, 184 Ga. 417.
34 C.J. p 442 note 16.

10. Ala.—Mudd v. Lanier, 24 So.2d 550.
Mont.—Hanrahan v. Andersen, 90 P. 2d 494, 108 Mont. 218.
Tenn.—**Corpus Juris cited in** Coley v. Family Loan Co., 80 S.W.2d 87, 88, 168 Tenn. 631.
Tex.—Texas Employers' Ins. Ass'n v. Arnold, 88 S.W.2d 473, 126 Tex. 466.
34 C.J. p 442 note 16.

Unauthorized obligations of municipality

Equity may set aside a consent judgment rendered against a municipality on unauthorized obligations.—Village of Hartford v. First Nat. Bank of Wood River, 30 N.E.2d 524, 307 Ill.App. 447.

11. Or.—**Corpus Juris quoted in** Olsen v. Crow, 290 P. 233, 235, 133 Or. 310.
Tex.—Murry v. Citizens' State Bank of Ranger, Civ.App., 77 S.W.2d 1104, error dismissed—Winn v. Houston Building & Loan Ass'n, Civ.App., 45 S.W.2d 631, error refused.
34 C.J. p 442 note 18.
Negligence or misconduct of counsel as excuse for not defending at law see infra § 368.

Confirmation of default against insolvent

Injunction by surety of insolvent will not lie to prevent confirmation of default against insolvent.—Levee Const. Co. v. Equitable Casualty & Surety Co. of New York, 138 So. 431, 173 La. 648.

12. Ala.—Alabama Chemical Co. v. Hall, 101 So. 456, 212 Ala. 8.
Cal.—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400.
Ill.—Marquette Nat. Fire Ins. Co. v. Minneapolis Fire & Marine Ins. Co., 233 Ill.App. 102.
Mo.—Crown Drug Co. v. Raymond, App., 51 S.W.2d 215.
Tex.—Gehret v. Hetkes, Com.App., 36 S.W.2d 700—Guaranty State Bank of New Braunfels v. Kuehler, Civ.App., 114 S.W.2d 622, error refused.

13. Cal.—Murdock v. De Vries, 37 Cal. 527.
Or.—**Corpus Juris quoted in** Olsen v. Crow, 290 P. 233, 235, 133 Or. 310.

14. U.S.—Simonds v. Norwich Union Indemnity Co., C.C.A.Minn., 73 F. 2d 412, certiorari denied Norwich Union Indemnity Co. v. Simonds, 55 S.Ct. 507, 294 U.S. 711, 79 L.Ed. 1246—Continental Nat. Bank of Jackson County, at Kansas City, Mo., v. Holland Banking Co., C.C.A.Mo., 66 F.2d 823—Miller Rubber Co. of New York v. Massey, C.C.A.Ill., 36 F.2d 466, certiorari denied Massey v. Miller Rubber Co. of New York, 50 S.Ct. 354, 281 U.S. 749, 74 L.Ed. 1161—**Corpus Juris quoted in** David A. Manville

by fraud, accident, or mistake,[15] and although the judgment is by default[16] or confession.[17] It has been said, however, that the rule and the reason for it entirely fail when defendant comes into court with the money and offers to pay the judgment as a condition precedent to its being set aside.[18]

Although the party seeking relief must show at least presumptively that he has a defense,[19] the requirement of a meritorious case does not necessitate an absolute guarantee of victory[20] or a conclusive showing of sufficient cause of action or defense.[21] It is enough to present facts from which it can be ascertained that the complaining party has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding;[22] it suffices to establish good faith and to tender a seriously litigable issue.[23]

& Co. v. Francis Oil & Refining Co., C.C.A.Okl., 20 F.2d 473, 474.
Ala.—Fletcher v. First Nat. Bank of Apelika, 11 So.2d 854, 244 Ala. 98—**Corpus Juris cited in** Hanover Fire Ins. Co. v. Street, 176 So. 350, 353, 234 Ala. 537—Timmerman v. Martin, 176 So. 198, 234 Ala. 622—**Corpus Juris cited in** Snyder v. Woolf, 166 So. 803, 805, 232 Ala. 87—Barrow v. Lindsey, 159 So. 232, 230 Ala. 45—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677—Oden v. King, 114 So. 1, 216 Ala. 597.
Ark.—Sweet v. Nix, 122 S.W.2d 538, 197 Ark. 284—Greer v. Keathly, 87 S.W.2d 26, 191 Ark. 529—McDonald Land Co. v. Shapleigh Hardware Co., 260 S.W. 445, 163 Ark. 524.
Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328—Frost v. Hanscome, 246 P. 53, 198 Cal. 500.
Colo.—Wagner v. Johnson, 247 P. 1058, 79 Colo. 664.
Conn.—Bellonio v. V. R. Thomas Mortg. Co., 149 A. 218, 110 Conn. 103.
Ga.—Felker v. Johnson, 7 S.E.2d 668, 189 Ga. 797—Kilburn v. Mechanics' Loan & Savings Co., 165 S.E. 76, 175 Ga. 146, 83 A.L.R. 1292.
Mo.—**Corpus Juris cited in** Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 1037, 338 Mo. 31.
Ohio.—**Corpus Juris quoted in** Barnhart v. Aiken, 177 N.E. 284, 285, 39 Ohio App. 172.
Or.—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.
Tenn.—Tallent v. Sherrell, 184 S.W. 2d 561, 27 Tenn.App. 683.
Tex.—Stewart v. Byrne, Com.App., 42 S.W.2d 234—Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451—Humphrey v. Harrell, Com. App., 29 S.W.2d 963—Southern Surety Co. v. Texas Oil Clearing House, Com.App., 281 S.W. 1045—Gray v. Moore, Civ.App., 172 S.W. 2d 746, error refused—American Red Cross v. Longley, Civ.App., 165 S.W.2d 233, error refused—Goldapp v. Jones Lumber Co., Civ.App., 163 S.W.2d 229, error refused—Garcia v. Jones, Civ.App., 155 S.W.2d 671, error refused—Brannen v. City of Houston, Civ.App., 153 S.W.2d 676, error refused—Hicks v. Wallis Lumber Co., Civ.App., 137 S.W.2d 93—Smith v. Zenith Corporation, Civ.App., 134 S.W.2d 337—Smith v. Rogers, Civ.App., 129 S.W.2d 776—Donovan v. Young, Civ.App., 127 S.W.2d 517, error refused—Allen v. Trentman, Civ.App., 115 S.W.2d 1177—Hacker v. Hacker, Civ.App., 110 S.W.2d 923—Smith v. Poppe, Civ.App., 102 S.W.2d 1108—Fowzer v. Huey & Philp Hardware Co., Civ.App., 99 S.W.2d 1100, error dismissed—Finlayson v. McDowell, Civ.App., 94 S.W.2d 1234, error dismissed—Hill v. Lester, Civ.App., 91 S.W.2d 1152, error dismissed—Snell v. Knowles, Civ.App., 87 S. W.2d 871, error dismissed—Trigg v. Trigg, Civ.App., 83 S.W.2d 1066, error dismissed—Graves v. Slater, Civ.App., 83 S.W.2d 1041, error dismissed—Schultz v. Mabry, Civ. App., 60 S.W.2d 1045—Stevenson v. Thomas, Civ.App., 56 S.W.2d 1095, error dismissed—National Loan & Investment Co. v. L. W. Pelphrey & Co., Civ.App., 89 S.W.2d 926—Hollis v. Seibold, Civ.App., 23 S. W.2d 811, error dismissed—First State Bank of Loraine v. Jackson, Civ.App., 13 S.W.2d 979—U. O. Colson Co. v. Powell, Civ.App., 13 S. W.2d 405—Smith v. Kraft, Civ. App., 9 S.W.2d 472—Cunningham v. Carpenter, Civ.App., 258 S.W. 607—Broocks v. Lee, 102 S.W. 777, 46 Tex.Civ.App. 372, error refused.
Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.
W.Va.—Brinegar v. Bank of Wyoming, 130 S.E. 151, 100 W.Va. 64.
34 C.J. p 334 note 63, p 442 note 27.
Showing meritorious cause of action or defense on application to open or vacate generally see supra § 290.

Necessity of ground for relief

The question of a meritorious defense is immaterial and is not reached if the complaining party fails otherwise to establish sufficient cause or ground for equitable relief against the judgment.—Baldwin v. Stamford State Bank, Tex.Civ.App., 82 S.W.2d 701, error refused—Winter v. Davis, Tex.Civ.App., 10 S.W. 2d 181, error refused.

15. Cal.—Kupfer v. MacDonald, 122 P.2d 271, 19 Cal.2d 566.
Ill.—Crane Co. v. Parker, 136 N.E. 733, 304 Ill. 331.
Okl.—Fernow v. Fernow, 247 P. 106, 114 Okl. 298.
Tex.—Southern Sales Co. v. Parker, Civ.App., 54 S.W.2d 217.
34 C.J. p 443 note 28.

16. U.S.—Miller Rubber Co. of New York v. Massey, C.C.A.Ill., 36 F. 2d 466, certiorari denied Massey v. Miller Rubber Co. of New York, 50 S.Ct. 354, 281 U.S. 749, 74 L. Ed. 1161.
Neb.—Staben v. Mehrens, 241 N.W. 108, 122 Neb. 683.
Tex.—Honey v. Wood, Civ.App., 46 S.W.2d 334—Citizens' Bank v. Brandau, Civ.App., 1 S.W.2d 466, error refused—Ellis v. Lamb-McAshan Co., Civ.App., 264 S.W. 241, affirmed Lamb-McAshan Co. v. Ellis, Com.App., 270 S.W. 547.
34 C.J. p 443 note 29.

17. Wis.—Ford v. Hill, 66 N.W. 115, 92 Wis. 188, 53 Am.S.R. 902.
34 C.J. p 443 note 30.

18. Mont.—Hauswirth v. Sullivan, 9 P. 798, 6 Mont. 203.

19. U.S.—William Lane, Inc., v. Selby Shoe Co., C.C.A.N.Y., 45 F.2d 581.

Presumptive chance of success on appeal

Plaintiff suing to set aside judgment and claiming that he was deprived of an appeal must show that appeal had at least presumptive chance of success.—William Lane, Inc., v. Selby Shoe Co., C.C.A.N.Y., 45 F.2d 581.

20. Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328.

21. Mo.—**Corpus Juris cited in** Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 1037, 338 Mo. 31.
Or.—**Corpus Juris quoted in** Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 668, 155 Or. 602.
34 C.J. p 443 note 31.

22. Cal.—Olivera v. Grace, 122 P. 2d 564, 19 Cal.2d 570, 140 A.L.R. 1328.

Prima facie meritorious defense

All that is required is for him to show that he had a prima facie meritorious defense.—Missoula Trust & Savings Bank v. Boos, 77 P.2d 385, 106 Mont. 294—Stocking v. Charles Beard Co., 55 P.2d 949, 102 Mont. 65.

23. Mo.—**Corpus Juris cited in**

Void judgment. The authorities are not in harmony in requiring a meritorious defense where the judgment is void, as where it was obtained without service of process, and where defendant had no opportunity to be heard; in some jurisdictions defendant is not required to show a good defense in such case.[24] However, it has generally been held that a showing that defendant has, or at the time of the judgment had, a meritorious defense, is none the less necessary because the judgment is allegedly void,[25] as in the case of a judgment obtained without proper service of the summons or appearance of defendant,[26] or on an unauthorized appearance,[27] or on a false return of service,[28] especially where the lack of jurisdiction does not appear on the face of the record.[29]

Nature of defense. It has been said that equity will not relieve against a judgment on the showing of a merely technical defense[30] or one which would be considered unconscionable.[31] However, it has also been asserted broadly that a meritorious defense is one which, if established on another trial, would produce a different result.[32] The question of whether or not, in any given case, the claim of the complaining party is meritorious must be determined by the particular facts presented.[33] While there is some authority to the contrary,[34] it is generally considered that the statute of limitations is a meritorious defense within the meaning of the rule.[35] A discharge in bankruptcy has also been held a meritorious defense.[36]

Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 1037, 338 Mo. 31.
Or.—**Corpus Juris quoted in** Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 668, 155 Or. 602.
34 C.J. p 443 note 31.

24. Ky.—Holcomb v. Creech, 56 S.W.2d 998, 247 Ky. 199.
Tenn.—Martin v. Slagle, 156 S.W.2d 403, 178 Tenn. 121.
Tex.—Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451—Rosenfield v. Bevill, Civ.App., 143 S.W.2d 414, error dismissed, judgment correct—Jameson v. Farmers' State Bank of Burkburnett, Civ.App., 299 S.W. 458, affirmed Farmers' State Bank of Burkburnett v. Jameson, Com.App., 11 S.W.2d 299, rehearing denied 16 S.W.2d 526—Alexander v. Svoboda, Civ.App., 297 S.W. 560, reversed on other grounds Svoboda v. Alexander, Com.App., 3 S.W.2d 423—Perez v. E. P. Lipscomb & Co., Civ.App., 267 S.W. 748.
Wash.—Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.
34 C.J. p 443 note 32.

25. Cal.—Kupfer v. MacDonald, 122 P.2d 271, 19 Cal.2d 566.
Ill.—Adams & Pigott Co. v. Allen, 141 N.E. 386, 310 Ill. 119.

Rule inapplicable to enforcement of judgment

Rule whereby party seeking aid against void judgment is required to disclose meritorious defense does not apply if plaintiff is seeking to enforce judgment.
Ala.—McCarty v. Yarbrough, 128 So. 786, 221 Ala. 330.
Neb.—Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co., 69 N.W. 774, 50 Neb. 283.

26. Ala.—Murphree v. International Shoe Co., 20 So.2d 782, 246 Ala. 384.
Ark.—Adams v. Mitchell, 74 S.W.2d 969, 189 Ark. 696—North American Provision Co. v. Fischer Lime & Cement Co., 269 S.W. 998, 168 Ark. 106.
Ill.—Nasti v. Cook County, 180 N.E. 847, 348 Ill. 342.
Miss.—Walton v. Gregory Funeral Home, 154 So. 717, 170 Miss. 129.
Neb.—Braun v. Quinn, 199 N.W. 828, 112 Neb. 485, 39 A.L.R. 411.
Ohio.—**Corpus Juris quoted in** Barnhart v. Aiken, 177 N.E. 284, 285, 39 Ohio App. 172.
34 C.J. p 443 note 33.

27. Miss.—Harris v. Gwin, 18 Miss. 563.
34 C.J. p 444 note 34.

28. Kan.—Hope v. Bashor, 163 P. 463, 99 Kan. 804.
34 C.J. p 444 note 35.

29. Neb.—Pilger v. Torrence, 61 N.W. 99, 42 Neb. 903.
34 C.J. p 444 note 36.

30. U.S.—Skirving v. National Life Ins. Co. of Montpelier, Neb., 59 F. 742, 8 C.C.A. 241.
34 C.J. p 444 note 40.

31. U.S.—**Corpus Juris cited in** Byram v. Miner, C.C.A.Minn., 47 F. 2d 112, 119, certiorari denied 51 S. Ct. 648, 283 U.S. 854, 75 L.Ed. 1461.
34 C.J. p 444 note 41.

32. Tex.—Fowzer v. Huey & Philp Hardware Co., Civ.App., 99 S.W.2d 1100, error dismissed.

33. Okl.—Fernow v. Fernow, 247 P. 106, 114 Okl. 298.
34 C.J. p 444 note 42 [a].

The matter of contribution among signers of notes is not a meritorious defense against payment of judgment secured by payee, so as to warrant equitable relief against such judgment at the suit of individual signer against whom judgment was entered by confession under warrants of attorney.—Chandler v. Chandler, 63 N.E.2d 272, 326 Ill.App. 670.

Lack of title

A mortgagor was not entitled to open judgment entered on bond accompanying purchase-money mortgage on ground that, at time of sale, mortgagee had no title, where contract of sale by its terms was made subject to mortgagee's acquisition of title under decree in partition.—Stoner, now for Use of Dinch, v. Wise, 200 A. 320, 331 Pa. 446.

Showing as to merits of cause of action or defense held sufficient to justify equitable relief against judgments rendered in actions for or relating to:

(1) Alimony.—Crow v. Crow-Humphrey, 73 S.W.2d 807, 335 Mo. 636.

(2) Contracts.
N.J.—William Peter Brewing Corporation v. Bernhardt, 137 A. 828, 101 N.J.Eq. 60.
Tex.—Taylor v. Hustead & Tucker, Com.App., 257 S.W. 232.

(3) Foreclosure.—Wade v. Saffell, 9 S.W.2d 803, 177 Ark. 1186.

(4) Insurance.—Collier v. Mississippi Beneficial Life Ins. Co., 261 S.W. 39, 164 Ark. 54.

(5) Mining claims.—Nevada Cornell Silver Mines v. Hankins, 279 P. 27, 51 Nev. 420.

(6) Notes.—Adams v. First Nat. Bank, Tex.Civ.App., 294 S.W. 909.

(7) Sale of personalty.—Clarke v. Smith, 192 N.W. 136, 195 Iowa 1299.

(8) Other matters.—Hill v. Fain, 175 S.E. 921, 179 Ga. 310.

34. Fla.—Budd v. Gamble, 13 Fla. 265.
Tenn.—Estis v. Patton, 3 Yerg. 382.

35. Tex.—Fowzer v. Huey & Philp Hardware Co., Civ.App., 99 S.W.2d 1100, error dismissed—Cain v. Thomson, Civ.App., 72 S.W.2d 339.
34 C.J. p 444 note 42 [b] (1).

36. Tex.—Kerby v. Hudson, Civ. App., 13 S.W.2d 724.

B. GROUNDS FOR RELIEF

§ 350. In General

a. General principles
b. Disability or privilege of party; unauthorized suit

a. General Principles

Generally, any fact showing it to be against good conscience to enforce a judgment may afford ground for equitable relief to a complainant otherwise entitled thereto; but equitable power to relieve against a judgment at law will be exercised sparingly and confined to cases clearly of equitable cognizance.

Injunctive relief from invalid judgments must rest on grounds cognizable in equity.[37] As a general rule any fact which clearly proves it to be against good conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself there, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to set aside or to enjoin the adverse party from enforcing such judgment.[38]

Since the power to set aside or enjoin the enforcement of judgments is liable to abuse, and the abuse thereof is extremely mischievous, as tending to conflicts of jurisdiction, its exercise will be closely and carefully scrutinized, and confined to clear cases and well recognized grounds of equitable interference.[39] In other words, equitable relief against a judgment will not be granted in the absence of clear and sufficient grounds of an equitable character.[40] It should appear that it would be

37. Tex.—Svoboda v. Alexander, Com.App., 3 S.W.2d 423.

38. U.S.—Continental Nat. Bank v. Holland-Banking Co., C.C.A.Mo., 66 F.2d 823—Realty Acceptance Corporation v. Montgomery, D.C. Del., 6 F.Supp. 593, affirmed, C.C.A., 77 F.2d 762, certiorari denied 56 S.Ct. 103, 296 U.S. 590, 80 L.Ed. 418, rehearing denied 56 S.Ct. 167, 296 U.S. 662, 80 L.Ed. 472—Harrington v. Denny, D.C.Mo., 3 F. Supp. 584—Exchange Nat. Bank of Shreveport, La. v. Joseph Reid Gas Engine Co., C.C.A.La., 287 F. 870—Mineral Development Co. v. Kentucky Coal Lands Co., D.C.Ky., 285 F. 761, affirmed, C.C.A., 285 F. 1021.

Ala.—Timmerman v. Martin, 176 So. 198, 234 Ala. 622—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677—**Corpus Juris quoted in** Prestwood v. Bagley, 149 So. 817, 818, 227 Ala. 316.

Cal.—Brown v. Jernigan, 241 P. 108, 74 Cal.App. 524.

Conn.—Hoey v. Investors' Mortgage & Guaranty Co., 171 A. 438, 118 Conn. 226.

Ga.—Bailey v. McElroy, 6 S.E.2d 140, 61 Ga.App. 367, transferred, see 2 S.E.2d 634, 188 Ga. 40.

Idaho.—**Corpus Juris cited in** Lind v. Moyes, 20 P.2d 794, 795, 52 Idaho 785.

Ill.—Kulikowski v. North American Mfg. Co., 54 N.E.2d 411, 322 Ill. App. 202—Stade v. Stade, 42 N.E. 2d 631, 315 Ill.App. 136.

Mo.—Jefferson City Bridge & Transit Co. v. Blaser, 300 S.W. 778, 318 Mo. 373.

N.J.—Palisade Gardens v. Grosch, 185 A. 27, 120 N.J.Eq. 294, affirmed 189 A. 622, 121 N.J.Eq. 240—Crandol v. Garrison, 169 A. 507, 115 N.J.Eq. 11.

N.Y.—755 Seventh Ave. Corporation v. Carroll, 194 N.E. 69, 266 N.Y. 157.

Or.—Adams v. McMickle, 158 P.2d 648.

Tenn.—Coley v. Family Loan Co., 80 S.W.2d 87, 168 Tenn. 631.

Tex.—Thomas v. Mullins, Civ.App., 175 S.W.2d 276—Coffman v. Meeks, Civ.App., 119 S.W.2d 96—Brooks Supply Co. v. Hardee, Civ.App., 32 S.W.2d 384, error refused.

Wis.—Lau v. Harder, 270 N.W. 341, 223 Wis. 208.

21 C.J. p 85 note 16—34 C.J. p 444 note 43.

Lack of legal remedy warranting equitable relief

U.S.—Laycock v. Hidalgo County Water Control and Improvement Dist. No. 12, C.C.A.Tex., 142 F.2d 789, 155 A.L.R. 460, certiorari denied 65 S.Ct. 68, 323 U.S. 731, 89 L.Ed. 587.

Md.—Michael v. Rigler, 120 A. 382, 142 Md. 125.

Partition

(1) Injustice may afford ground for equitable relief from a judgment or decree in partition.—Carter v. Carter, 5 Munf. 108, 19 Va. 108.

(2) Equitable relief may be awarded to secure protection against an eviction of a party by a paramount title.—Ross v. Armstrong, 25 Tex. Suppl. 354, 78 Am.D. 574.

Executors and administrators

(1) In the case of suits involving decedents' estates and funds in the hands of executors and administrators, it is sufficient ground for the intervention of a court of equity that the judgment defendant, although having a good equitable defense to the claim, had no legal defense to the action at law.—Lyon v. Howard, 16 Ga. 481—24 C.J. p 888 note 87.

(2) It is sufficient that, having a legal defense, the judgment creditor was unable for sufficient reason to present it.—Pickett v. Stewart, 1 Rand. 478, 22 Va. 478—24 C.J. p 888 notes 88, 89.

(3) In a proper case an executor or administrator may be relieved in equity from personal liability under a judgment at law, as where there are no assets or there is a deficiency of assets.—Pendleton v. Stuart, 6 Munf. 377, 20 Va. 377—24 C.J. p 888 note 90.

(4) On the other hand, in a number of instances, equitable relief on the foregoing ground has been denied.—Brenner v. Alexander, 19 P. 9, 16 Or. 349, 8 Am.S.R. 301—24 C.J. p 888 note 91.

Grounds of relief available to sureties

(1) Extension of the time of payment of the debt, without surety's knowledge or consent.—Kennedy v. Evans, 31 Ill. 258—34 C.J. p 440 note 74.

(2) Release of the principal or of cosureties.—Johnson v. Givens, 3 Metc., Ky., 91—34 C.J. p 440 note 75.

(3) Promise to the surety not to hold him liable or enforce the debt against him.—Cage v. Cassidy, Miss., 23 How., U.S., 109, 16 L.Ed. 430—34 C.J. p 440 note 76.

39. Ky.—Byron v. Evans, 91 S.W.2d 548, 263 Ky. 49.

Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Citizens' Bank v. Brandau, Civ.App., 1 S.W.2d 466, error refused.

Wash.—**Corpus Juris cited in** Fisch v. Marbler, 97 P.2d 147, 152, 1 Wash.2d 698.

34 C.J. p 445 note 44.

40. Ala.—Mudd v. Lanier, 24 So.2d 550—Exalted Most Excellent Grand Chapter Royal Arch Masons of Al-

unjust and against good conscience to enforce the judgment,[41] that some rule or law of public policy has been violated,[42] or that the defense available to the party seeking relief is one of purely equitable cognizance,[43] and equity will not interfere merely on account of hardship,[44] because of prejudice in the community,[45] or because an equity court in deciding the same case would have reached a different conclusion.[46] It must also reasonably appear that the result would be different from that already reached if the judgment were set aside and a new trial granted.[47] Where a proper case for equitable relief is made out, the fact that the judgment creditor is of undoubted solvency and able to refund the money which may be collected on an execution will not prevent the interposition of equity.[48]

The principal grounds for equitable relief against a judgment are lack of power or jurisdiction in the court rendering it,[49] or procurement of the judgment through fraud, accident, mistake,[50] or oth-

abama v. Calloway, 165 So. 254, 231 Ala. 420—Ex parte Cunningham, 99 So. 834, 19 Ala.App. 584, certiorari denied Ex parte Ewart-Brewer Motor Co., 99 So. 836, 211 Ala. 191.

Cal.—Miller v. Turner, 8 P.2d 1057, 121 Cal.App. 365—Bruno v. Guglielmo, 297 P. 967, 113 Cal.App. 148.

Colo.—Rogers v. Bruce, 193 P. 1076, 69 Colo. 298.

Fla.—Adams v. Reynolds, 134 So. 45, 101 Fla. 271.

Ga.—Nolan v. Southland Loan & Investment Co., 169 S.E. 370, 177 Ga. 59—Whiteside v. Croker, 142 S.E. 139, 165 Ga. 765—John Hancock Mut. Life Ins. Co. v. Ross, 134 S.E. 762, 162 Ga. 654.

Ill.—Reinhold v. Lingbeek, 52 N.E. 2d 294, 321 Ill.App. 119—Gray v. First Nat. Bank, 18 N.E.2d 497, 294 Ill.App. 62.

Ky.—Mason v. Lacy, 117 S.W.2d 1026, 274 Ky. 21.

La.—Couret v. Couret, 18 So.2d 661, 206 La. 85—Wunderlich v. Palmisano, App., 177 So. 843.

Mich.—Racho v. Woeste, 9 N.W.2d 827, 305 Mich. 522—Brewster Loud Lumber Co. v. General Builders' Supply Co., 220 N.W. 697, 243 Mich. 557—Blazewicz v. Weberski, 208 N.W. 452, 234 Mich. 431.

N.Y.—Gerseta Corporation v. Gramatan Nat. Bank of Bronxville, 198 N.Y.S. 385, 205 App.Div. 868.

Pa.—Nixon v. Nixon, 198 A. 154, 329 Pa. 256.

Tex.—Grayson v. Johnson, Civ.App., 181 S.W.2d 312—American Red Cross v. Longley, Civ.App., 165 S.W.2d 233, error refused—Johnson v. Ortiz Oil Co., Civ.App., 104 S.W. 2d 543—Browning-Ferris Machinery Co. v. Thomson, Civ.App., 55 S.W.2d 168—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031—Smith v. Switzer, Civ.App., 293 S.W. 850, affirmed Switzer v. Smith, Com. App., 300 S.W. 31, 68 A.L.R. 377.

Wash.—Puett v. Bernhard, 71 P.2d 406, 191 Wash. 557.

Wis.—Amalgamated Meat Cutters & Butcher Workmen of N. A., A. F. of L., Local Union No. 73, v. Smith, 10 N.W.2d 114, 243 Wis. 390.

Nonresidence or insolvency

Judgment will not be interfered with merely because of nonresidence or insolvency of judgment creditor. —Parker v. Reid, 273 P. 334, 127 Or. 578.

Whim of survivor

It is against public policy of state to permit vacation of decree after change in conditions, assumption of new relations by parties, and death of one of them, at whim of surviving party, particularly in absence of fraud.—Rice v. Moore, 109 S.W.2d 148, 194 Ark. 585.

Judgment or decree of partition

La.—Haas v. Reese, 196 So. 564, 195 La. 376—Amerada Petroleum Corporation v. Reese, 196 So. 558, 195 La. 359—47 C.J. p 438 note 58.

41. U.S.—In re Innis, C.C.A.Ind., 140 F.2d 479, certiorari denied 64 S.Ct. 1048, 322 U.S. 736, 88 L.Ed. 1569—Missouri Pac. Transp. Co. v. Priest, C.C.A.Ark., 117 F.2d 32.

Iowa.—Shaw v. Addison, 18 N.W.2d 796—Coulter v. Smith, 206 N.W. 827, 201 Iowa 984—Bingman v. Clark, 159 N.W. 172, 178 Iowa 1129.

La.—First Nat. Life Ins. Co. v. Bell, 141 So. 379, 174 La. 692.

Mich.—Barr v. Payne, 298 N.W. 460, 298 Mich. 85.

Ohio.—Barnhart v. Aiken, 177 N.E. 284, 39 Ohio App. 172.

S.C.—Cathcart v. Jennings, 135 S.E. 558, 137 S.C. 450.

34 C.J. p 445 note 45.

A judgment in a court of law will not be set aside by a court of equity unless such judgment is so manifestly wrong that it is against good conscience.—Barr v. Payne, 298 N.W. 460, 298 Mich. 85—Smith v. Pontiac Citizens Loan & Investment Co., 293 N.W. 661, 294 Mich. 312—Bassett v. Trinity Bldg. Co., 236 N.W. 237, 254 Mich. 207.

Unconscionable advantage

It is essential to relief in equity against judgment that plaintiff, if permitted to enforce it, will obtain unconscionable advantage.—Ellis v. Gordon, 231 N.W. 585, 202 Wis. 134.

42. La.—Edison Electric Co. v. New Orleans, 58 So. 512, 130 La. 693.

43. N.J.—Raimondi v. Bianchi, 140 A. 584, 102 N.J.Eq. 254.

44. Cal.—Hersom v. Hersom, 226 P. 937, 67 Cal.App. 116.

Tex.—Browning-Ferris Machinery Co. v. Thomson, Civ.App., 55 S.W. 2d 168.

34 C.J. p 445 note 47.

45. W.Va.—Graham v. Citizens' Nat. Bank, 32 S.E. 245, 45 W.Va. 701.

46. U.S.—Town of Boynton v. White Const. Co., C.C.A.Fla., 64 F.2d 190.

Fla.—Peacock v. Feaster, 42 So. 889, 52 Fla. 565.

47. Iowa.—Shaw v. Addison, 18 N. W.2d 796—Bingman v. Clark, 159 N.W. 172, 178 Iowa 1129.

Necessity of showing meritorious defense to action see supra § 349.

48. Conn.—Carrington v. Holabird, 19 Conn. 84.

49. Tex.—Bearden v. Texas Co., Civ. App., 41 S.W.2d 447, affirmed, Com. App., 60 S.W.2d 1031.

Invalidity of judgment as ground for relief generally see infra § 351.

50. Ala.—Barrow v. Lindsey, 159 So. 232, 230 Ala. 45—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677.

Cal.—Anglo California Trust Co. v. Kelley, 4 P.2d 604, 117 Cal.App. 692—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400.

Ga.—Jackson Discount Co. v. Merck, 173 S.E. 647, 178 Ga. 660—Ehrlich v. Bell, 136 S.E. 423, 163 Ga. 547.

Mass.—Byron v. Concord Nat. Bank, 13 N.E.2d 13, 299 Mass. 438.

Mo.—Overton v. Overton, 37 S.W.2d 565, 327 Mo. 530.

N.J.—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115.

Tex.—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.

Accident or mistake as excuse for not defending at law see infra §§ 365, 366.

Fraud, perjury, collusion, or other misconduct as ground for relief generally see infra §§ 371–375.

Rule applied to judgment or decree in partition

N.Y.—Douglass v. Viele, 3 Sandf.Ch. 439.

47 C.J. p 437 notes 50, 51, 54.

er adventitious circumstance beyond complainant's control,[51] without fault, negligence, or fraud on his part.[52] It has been said, however, that equity will afford relief against a judgment irrespective of any issue of inattention or neglect, where the circumstances under which the judgment was rendered show deprivation of the legal rights of the litigant seeking relief and enforcement of the judgment would be unconscientious and inequitable,[53] at least where the other party has not changed his position in reliance on complainant's actions.[54]

Effect of statutory provisions. Statutes providing for the setting aside or vacating of judgments in equity authorize relief on grounds specified therein.[55] Some statutes specifying grounds on which a judgment may be annulled have been construed as not restrictive and as permitting equitable relief against a judgment under general equitable principles, even though the statutory grounds for relief are not shown,[56] but under other statutes the grounds for relief must be among those enumerated therein.[57]

b. Disability or Privilege of Party; Unauthorized Suit

There is a conflict of authority as to whether equity will grant relief against the enforcement of a judgment rendered against one in violation of a privilege or disability precluding suit; it has been held that relief is warranted from a judgment entered in a suit brought without authority of the ostensible party plaintiff.

It has been held that a personal disability,[58] or privilege[59] of defendant in a judgment is not a ground for equitable interference with the judgment, the defect not being jurisdictional, and the remedy being at law. Other decisions, however, regarding a judgment against such a person as void, hold it proper for chancery to restrain its enforcement.[60] Execution on a judgment against a person deceased, it has been held, will not be enjoined, the remedy being at law.[61]

Judgment on suit brought without authority. Enforcement of a judgment obtained by an attorney who had no authority from plaintiff to bring the suit may be enjoined;[62] and a similar rule prevails where complainant was joined as a plaintiff in the suit without his consent,[63] or where the suit was

Mutual mistake of fact

Equity will not permit judgment based on mutual mistake of fact to be enforced so as to work injustice to judgment debtor.—Bankers Trust Co. v. Hale & Kilburn Corporation, C.C.A.N.Y., 84 F.2d 401.

Relief from consent decree, entered as result of unilateral mistake induced by fraudulent concealment of facts by party against whom relief is sought, is available, whether on ground of fraud or mistake, but, in absence of such concealment or other inequitable conduct, relief is not available on either theory.—Mudd v. Lanier, Ala., 24 So.2d 550.

51. Tex.—Smith v. Rogers, Civ.App., 129 S.W.2d 776.
W.Va.—Parsons v. Parsons, 135 S.E. 228, 102 W.Va. 394.

52. N.J.—Raimondi v. Bianchi, 140 A. 584, 102 N.J.Eq. 254—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115.
Tex.—Fidelity Trust Co. of Houston v. Highland Farms Corporation, Civ.App., 109 S.W.2d 1014, error dismissed—Hill v. Lester, Civ.App., 91 S.W.2d 1152, error dismissed.

53. La.—Succession of Gilmore, 102 So. 94, 157 La. 130—Bell v. Holdcraft, App., 196 So. 379—Engeran v. Consolidated Companies, App., 147 So. 743.

54. Mont.—Little Horn State Bank of Wyola v. Gross, 300 P. 277, 89 Mont. 472.

55. Iowa.—Atkin v. Westfall, 17 N.W.2d 532, 235 Iowa 618.

Inability to procure record

Inability to procure record in case after motion for new trial, by diligent search and inquiry of clerk and counsel, while a misfortune, is not character of "casualty" or "misfortune" for which judgment may be vacated on petition in equity.—Ison v. Buskirk-Rutledge Lumber Co., 266 S.W. 243, 205 Ky. 583.

"Fraud or other ill-practices" require more than a mere error or mistake of a party to warrant relief.—Sonnier v. Sonnier, 140 So. 49, 19 La.App. 234.

Patent error

Under some statutes a bill of review lies for error apparent on the face of the judgment or decree.
Md.—Bailey v. Bailey, 30 A.2d 249, 181 Md. 335.
Mo.—Fadler v. Gabbert, 63 S.W.2d 121, 333 Mo. 851.

56. La.—Succession of Gilmore, 102 So. 94, 157 La. 130—Sandfield Oil & Gas Co. v. Paul, App., 7 So.2d 725—Engeran v. Consolidated Companies, App., 147 So. 743—Schneckenberger v. John Bonura & Co., 130 So. 870, 14 La.App. 692.

57. Cal.—Molema v. Molema, 283 P. 956, 103 Cal.App. 79.
Iowa.—Shaw v. Addison, 18 N.W.2d 796—Montagne v. Cherokee County, 205 N.W. 228, 200 Iowa 534.
Ky.—McGuire v. Cope, 9 S.W.2d 528, 225 Ky. 521.
Me.—Jason v. Goddard, 149 A. 622, 129 Me. 483.
Tex.—Turner v. Parker, Civ.App., 14 S.W.2d 931.

58. Ark.—Church v. Gallic, 88 S.W. 307, 88 Ark. 507.
34 C.J. p 449 note 98.
Defects or objections as to parties generally see infra § 357.

Infancy may afford no ground for equitable relief against a judgment.—Weinstein v. Chelsea Securities & Investment Co., 145 A. 231, 104 N.J. Eq. 258—34 C.J. p 449 note 98 [a].

59. Md.—Peters v. League, 13 Md. 58, 71 Am.D. 622.
34 C.J. p 449 note 99.

60. Tex.—Buhrman-Pharr Hardware Co. v. Medford Bros., Civ.App., 118 S.W.2d 345, error refused.
34 C.J. p 449 note 1.

Unenforceable judgment

Judgment debtor against whom assignee of judgment, a joint tortfeasor, could not enforce judgment was entitled to have judgment canceled as to himself.—Manowitz v. Kanov, 154 A. 326, 107 N.J.Law 523, 75 A.L.R. 1464.

61. U.S.—Wynn v. Wilson, C.C.Ark., 30 F.Cas.No.18,116, Hempst. 698.
Va.—Williamson v. Appleberry, 1 Hen. & M. 206, 11 Va. 206.

62. N.H.—Smyth v. Balch, 40 N.H. 363.
S.C.—Latimer v. Latimer, 22 S.C. 257.
Unauthorized appearance of attorney for defendant as ground for relief in suit by judgment debtor see infra § 354.

63. Mo.—Lillibridge v. Ross, 59 Mo. 217.

brought by a nominal plaintiff who had no authority from the real party in interest.[64]

§ 351. Invalidity of Judgment

Some authorities have held that equity will afford relief against a void judgment, such as one rendered without jurisdiction of the subject matter or of the parties, while others take the view that the mere fact that a judgment is void will not alone suffice as a basis for equitable relief, but that there must exist further grounds for equitable cognizance.

Some authorities hold broadly to the effect that a void judgment is open to equitable attack,[65] and that equity may set aside, cancel, or annul a void judgment,[66] or enjoin its enforcement.[67] Equitable relief has been held available against a judgment where the court had no jurisdiction[68] of the subject matter[69] or of the person.[70] While it has been held that the rule applies where the judgment is regular on its face and does not disclose the grounds of its invalidity,[71] and that a suit in equity will not lie to set aside a judgment void on its face,[72] it has also been held that equitable relief may be obtained against a judgment void for lack of jurisdiction appearing from the face of the record.[73]

On the other hand, according to some decisions, the fact that the judgment is void[74] because of a mere defect in jurisdiction[75] of the subject matter[76] will not justify equitable relief in the absence of some further ground of equitable cognizance,[77] as where the judgment is inequitable as between the parties.[78]

Where it affirmatively appears that the court had jurisdiction of the parties and the subject matter, the judgment is at most merely voidable, its enforcement may not be enjoined for mere error,[79] and it has been stated that complainant is entitled to enjoin enforcement of a judgment only if it is void.[80] However, there are also decisions to the

64. Ga.—Marchman v. Sewell, 21 S. E. 172, 93 Ga. 653.
Ohio.—Abbott v. Hughes, 3 Ohio 278.

65. Cal.—Newport v. Superior Court of Stanislaus County, 230 P. 168, 192 Cal. 92.
Ohio.—Snyder v. Clough, 50 N.E.2d 384, 71 Ohio App. 440.
Tex.—Waurika Oil Ass'n v. Ellis, Civ.App., 267 S.W. 523.

Judgment against insane person

Where one is deprived of liberty and property by a void judgment, as in the case of one adjudicated to be insane, it has been held the duty of equity to provide him with a remedy if one does not already exist.—Ritter v. Ritter, 38 N.E.2d 997, 219 Ind. 487.

66. Colo.—Ferrier v. Morris, 122 P. 2d 880, 109 Colo. 154.
Ga.—Henry & Co. v. Johnson, 173 S. E. 659, 178 Ga. 541—Anderson v. Turner, 133 S.E. 306, 35 Ga.App. 428.

A consent decree, authorizing corporation to issue preferred stock to common stockholder in satisfaction of money judgment awarded him by same decree against corporation, was invalid and subject to vacation by proper party as based on contract without valid consideration, regardless of whether contract as a whole was detrimental to such party.—Mudd v. Lanier, Ala., 24 So.2d 550.

67. Iowa.—Shum v. Prow & Leffler, 298 N.W. 868, 230 Iowa 778.
Okl.—Black v. Russell, 266 P. 448, 130 Okl. 180.
Tex.—Smith v. Givens, Civ.App., 97 S.W.2d 532—Maier v. Davis, Civ. App., 72 S.W.2d 308.
34 C.J p 446 note 59—32 C.J. p 116 note 71 [a].

68. Fla.—Krivitsky v. Nye, 19 So. 2d 563, 155 Fla. 45.
Ohio.—Young v. Guella, 35 N.E.2d 997, 67 Ohio App. 11.
Okl.—Kenoly v. Hawley, 202 P. 494, 84 Okl. 120.
Or.—Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 150 Or. 395.

Compliance with statutory provisions

It has been held that a judgment illegal for failure to comply with mandatory statutory provisions prerequisite to the judge's jurisdiction to grant the judgment is open to equitable attack.—Pitts v. Pitts, 162 So. 708, 120 Fla. 363.

Illegality of partition judgment

N.Y.—Corwithe v. Griffing, 21 Barb. 9.
34 C.J. p 437 note 52.

Judgment by confession entered without authority is open to equitable attack.—Christy v. Sherman, 10 Iowa 535—34 C.J. p 441 note 10.

69. Tenn.—Culwell v. Culwell, 133 S.W.2d 1009, 23 Tenn.App. 389.
34 C.J. p 446 note 60.

70. Okl.—Honeycutt v. Severin, 98 P.2d 1093, 186 Okl. 509.
Tenn.—Myers v. Wolf, 34 S.W.2d 201, 162 Tenn. 42—Culwell v. Culwell, 133 S.W.2d 1009, 23 Tenn. App. 389.
34 C.J. p 446 note 61.

71. Kan.—Nelson v. Gossage, 107 P. 2d 682, 152 Kan. 805.
Mo.—Tokash v. Workmen's Compensation Commission, 139 S.W.2d 978, 346 Mo. 100.
Tex.—Ferguson v. Ferguson, Civ. App., 98 S.W.2d 847.
34 C.J. p 446 note 62.

72. Mo.—Tokash v. Workmen's Compensation Commission, 139 S. W.2d 978, 346 Mo. 100—National Union Fire Ins. Co. v. Vermillion, App., 19 S.W.2d 776.

73. Ga.—Stanley v. Metts, 149 S.E. 786, 169 Ga. 101.

74. U.S.—Harrington v. Denny, D.C. Mo., 3 F.Supp. 584.

Qualification of rule

It has been held that the rule that injunction will not lie to restrain collection of a void judgment applies only where the judgment creditor threatens to enforce its collection and nobody is involved except the judgment creditor and judgment debtor, and does not apply as against a garnishee, where he is threatened with several suits and files a bill of interpleader.—Pfeiffer v. McCullough, 115 Ill.App. 251.

75. Colo.—Wagner v. Johnson, 247 P. 1058, 79 Colo. 664.

76. U.S.—Donham v. Springfield Hardware Co., Mo., 62 F. 110, 10 C.C.A. 294.
34 C.J. p 445 note 52.

77. Mo.—St. Louis & S. F. Ry. Co. v. Lowder, 39 S.W. 799, 138 Mo. 533, 60 Am.S.R. 565.
34 C.J. p 445 note 56.

78. U.S.—Harrington v. Denny, D. C.Mo., 3 F.Supp. 584.
Colo.—Wagner v. Johnson, 247 P. 1058, 79 Colo. 664.
34 C.J. p 445 note 55, p 446 note 65.

79. Tex.—Richardson v. Kelly, Civ. App., 179 S.W.2d 991, affirmed, Sup., 191 S.W.2d 857—Dearing v. City of Port Neches, Civ.App., 65 S.W.2d 1105, error refused.

80. N.C.—Cameron v. McDonald, 6 S.E.2d 497, 216 N.C. 712.

effect that, while a court of chancery will not enjoin enforcement of a judgment merely because it is erroneous, it will enjoin one which is either void or voidable for certain reasons recognized as grounds of equitable relief.[81]

Where no judgment at all was in fact rendered, equity will relieve against enforcement of what purports to be a judgment.[82] Enforcement of a judgment may be enjoined where it was obtained in violation of a restraining order.[83] If it is determined that the judgment is neither void nor voidable, relief will, of course, be denied.[84]

§ 352. —— Want of, or Defects in, Process or Service

a. In general
b. Defective process or service

a. In General

As a general rule, one may secure equitable relief from a judgment rendered against him without service of process or essential notice in the suit, unless he has duly waived the defect.

It has generally been held that a party may obtain equitable relief from a judgment rendered against him without service of process or other necessary notice in the suit, by reason whereof he fails to appear and defend,[85] and the rule has been held applicable, even though it is not shown that complainant lacked independent knowledge of the pendency of the action against him,[86] unless the circumstances were sufficient to amount to a waiver of notice.[87] This rule has been held to apply whether the record affirmatively shows want of service of process,[88] or merely omits to show the service, leaving it to be presumed prima facie.[89] There are some decisions, however, which seem to hold, without any qualification, that a judgment void because defendant was not served with process cannot be relieved against in equity by injunction or otherwise,[90] unless there is some further ground of equitable cognizance, as discussed supra § 351.

Where, on a proceeding for final distribution of an estate, personal notice is not required by statute, the want of such notice furnishes no ground for enjoining the judgment.[91] Failure to give notice in the manner directed by a statute which is not mandatory has been held not to render the judg-

81. Tenn.—New York Casualty Co. v. Lawson, 24 S.W.2d 881, 160 Tenn. 329—Clemmons v. Haynes, 3 Tenn.App. 20.

82. Okl.—Cone v. Harris, 330 P. 721, 104 Okl. 114.

83. Tenn.—Hutsell v. Harrington, 12 S.W.2d 370, 157 Tenn. 553.

84. Tex.—Richardson v. Kelly, 191 S.W.2d 857.

85. Ala.—Murphree v. International Shoe Co., 20 So.2d 782, 246 Ala. 384—Timmerman v. Martin, 176 So. 198, 234 Ala. 622—King v. Dent, 93 So. 823, 208 Ala. 78.
Ark.—Morgan v. Leon, 12 S.W.2d 404, 178 Ark. 768.
Cal.—Husar v. Husar, 119 P.2d 798, 48 Cal.App.2d 326.
D.C.—Consolidated Radio Artists v. Washington Section, National Council of Jewish Juniors, 105 F. 2d 785, 70 App.D.C. 262.
Fla.—Fleming v. Fleming, 177 So. 607, 130 Fla. 264.
Ga.—Napier v. Bank of La Fayette, 189 S.E. 822, 183 Ga. 865.
Ind.—Traders' Loan & Inv. Co. v. Houchins, 144 N.E. 879, 195 Ind. 256.
Iowa.—Sloan v. Jepson, 252 N.W. 535, 217 Iowa 1082.
Kan.—Gibson v. Enright, 9 P.2d 971, 135 Kan. 181.
Ky.—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818.
La.—Adkins' Heirs v. Crawford, Jenkins & Booth, 8 So.2d 539, 200 La. 561—Weldon v. Gandy, App., 195 So. 655—Dickey v. Pollock, App., 183 So. 48—Davis v. Southland Inv. Co., App., 149 So. 303.
Md.—Parker v. Berryman, 198 A. 708, 174 Md. 356.
Mich.—Gross v. Kellner, 219 N.W. 620, 242 Mich. 656.
Mo.—Smoot v. Judd, 61 S.W. 854, 161 Mo. 673, 84 Am.S.R. 738—State ex rel. Woolman v. Guinotte, 282 S. W. 68, 221 Mo.App. 466—Patterson v. Yancey, 71 S.W. 845, 97 Mo.App. 681.
N.J.—C. & D. Building Corporation v. Griffithes, 157 A. 137, 109 N.J. Eq. 319.
Tex.—Galbraith v. Bishop, Com.App., 287 S.W. 1087—Cotten v. Stanford, Civ.App., 169 S.W.2d 489—Lee v. Massey, Civ.App., 135 S.W.2d 529—Kerby v. Hudson, Civ.App., 13 S.W.2d 724.
Utah.—Kramer v. Pixton, 268 P. 1029, 72 Utah 1.
Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.
34 C.J. p 447 note 70.

Notice to complainant's agent may be regarded as equivalent to notice to complainant so as to preclude equitable relief.—Avant v. Broun, Tex.Civ.App., 91 S.W.2d 426, error dismissed.

Constructive service
Equitable relief may be obtained against a judgment rendered on constructive service, as by publication or by substitution, where personal service should have been made or attempted.
La.—National Park Bank v. Concordia Land & Timber Co., 97 So. 272, 154 La. 31.
Utah.—Liebhardt v. Lawrence, 120 P. 215, 40 Utah 243.
34 C.J. p 447 note 70 [a].

Expiration of time for other remedies
When the time set by statute for other remedies has expired, defendant may pursue his remedy of a separate suit in equity to secure relief from a judgment rendered against him without his being served with process.—Washko v. Stewart, 112 P. 2d 306, 44 Cal.App.2d 311—34 C.J. p 447 note 70 [b].

86. Md.—Kartman v. Miliman, 125 A. 170, 144 Md. 502.
Or.—Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 150 Or. 395.
34 C.J. p 447 note 71.

87. Cal.—Maple v. Walser, 21 P.2d 984, 131 Cal.App. 631.
34 C.J. p 447 note 72.

88. Colo.—San Juan & St. Louis Mining & Smelting Co. v. Finch, 6 Colo. 214.
Tenn.—Bell v. Williams, 1 Head 229.

89. Ind.—Hill v. Newman, 47 Ind. 187.

90. Mo.—St. Louis & S. F. Ry. Co. v. Lowder, 39 S.W. 799, 138 Mo. 533, 60 Am.S.R. 565.
34 C.J. p 446 note 68.

91. Cal.—Daly v. Pennie, 25 P. 67, 86 Cal. 552, 21 Am.S.R. 61.

ment subject to equitable attack if actual notice was duly received.[92]

Joint defendants. Where judgment was rendered against two defendants, although process was served on only one of them, defendant not served may have relief in equity against the judgment.[93] However, a defendant who has been served with process may not attack the judgment in equity on the ground that his codefendant had not been served.[94]

b. Defective Process or Service

Defective process or notice, or defective service of process, may afford ground for equitable relief, although such relief will ordinarily be denied where the complainant had an adequate remedy at law.

Defects in the process so radical that it does not serve its purpose of notifying defendant of the suit and the time for proceeding in it will be ground for an injunction against the judgment;[95] but it is otherwise where the process or notice is sufficient to put him on inquiry as to the action, which inquiry he negligently fails to pursue.[96] Ground for the interposition of equity may be laid by showing a fatal defect in the manner of serving the process,[97] but a defective return or proof of process duly served has been held not a sufficient ground for equity to interfere.[98] Equitable relief may be denied where the circumstances are such that complainant had an adequate remedy at law of which he negligently failed to avail himself,[99] as where the service was merely irregular,[1] or not in strict compliance with the statute.[2]

§ 353. —— False Return of Service

There is a conflict of authority as to whether equitable relief may be granted against a judgment obtained where there was a false return without due service of process.

It has been acknowledged that there is some difference of judicial opinion as to whether or not equitable relief may be granted against a judgment where there was a false return without due service of process.[3] Some authorities hold that if the process is returned executed on defendant at law, and was not in fact executed, and judgment was rendered without appearance or opportunity to defend, chancery has power to enjoin the judgment.[4] According to these decisions, the return of the officer to the writ is only prima facie evidence of the fact stated by it, and may be contradicted,[5] and, while complainant may be denied the right to attack the sheriff's return regarding service under statutes providing for remedy by motion, nevertheless he retains the right to equitable relief.[6]

On the other hand, there are authorities to the effect that a return is so far conclusive as between the parties that the judgment is not open to equitable attack on the ground that the return was false and complainant not duly served with process unless some further ground for equitable relief appears,[7] as that complainant had a meritorious defense[8] or

92. Tex.—Stewart v. Byrne, Civ. App., 42 S.W.2d 234.

93. Iowa.—Gerrish v. Seaton, 34 N. W. 485, 73 Iowa 15.
34 C.J. p 447 note 76.

94. Tex.—Taylor v. Hustead & Tucker, Com.App., 257 S.W. 232.

95. Ala.—Roberts v. Henry, 2 Stew. 42.
La.—Bird v. Cain, 6 La.Ann. 248.

96. Tex.—Stewart v. Byrne, Com. App., 42 S.W.2d 234.
34 C.J. p 447 note 79.

97. Cal.—Petersen v. Vane, 134 P.2d 6, 57 Cal.App.2d 58.
Fla.—MacKay v. Bacon, 20 So.2d 904.
34 C.J. p 447 note 80.

Service on attorney after disbarment
Cal.—Antonsen v. Pacific Container Co., 120 P.2d 148, 48 Cal.App.2d 535.

98. Tex.—Johnson v. Cole, Civ.App., 138 S.W.2d 910, error refused.
34 C.J. p 448 note 84.
False return see infra § 353.

99. Ala.—Murphree v. International Shoe Co., 20 So.2d 782, 246 Ala. 384.
34 C.J. p 448 note 81.

1. Neb.—Mayer v. Nelson, 74 N.W. 841, 54 Neb. 434.
34 C.J. p 448 note 82.

2. Iowa.—Ballinger v. Tarbell, 16 Iowa 491, 85 Am.D. 527.
34 C.J. p 448 note 83.

3. Mich.—Garey v. Morley Bros., 209 N.W. 116, 234 Mich. 675.
Mo.—Ellis v. Nuckols, 140 S.W. 867, 237 Mo. 290.
Va.—Caskie v. Durham, 147 S.E. 218, 152 Va. 345.

4. Ill.—Marnik v. Cusack, 148 N.E. 42, 317 Ill. 362—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147—Hilt v. Heimberger, 85 N.E. 304, 235 Ill. 235—Kochman v. O'Neill, 66 N.E. 1047, 202 Ill. 110—Michalowski v. Stefanowski, 58 N.E.2d 264, 324 Ill.App. 363—Kulikowski v. North American Mfg. Co., 54 N.E.2d 411, 322 Ill. App. 202—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516—Harper v. Mangel, 98 Ill.App. 526. See Rosenthal v. Loeber, 27 N.E. 2d 539, 305 Ill.App. 624.
Kan.—Board of Com'rs of Labette County v. Abbey, 100 P.2d 720, 151 Kan. 710.
Mich.—Argo Oil Corporation v. R. D. Mitchell, Inc., 257 N.W. 852, 269 Mich. 418—Gross v. Kellner, 219 N.W. 620, 242 Mich. 656—Garey v. Morley Bros., 209 N.W. 116, 234 Mich. 675.
Okl.—Seekatz v. Brandenburg, 300 P. 678, 150 Okl. 53.
Tenn.—Home Ins. Co. v. Webb, 61 S. W. 79, 106 Tenn. 191.
W.Va.—Nuttalburg Smokeless Fuel Co. v. First Nat. Bank, 145 S.E. 824, 106 W.Va. 487.
34 C.J. p 448 note 85.

5. Ill.—Owens v. Ranstead, 22 Ill. 161.

6. Ill.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.

7. Fla.—Cox v. Stuckey, 153 So. 898, 114 Fla. 488—Allison v. Handy Andy Community Stores, Inc., 143 So. 263, 106 Fla. 274—Lewter v. Hadley, 66 So. 567, 68 Fla. 131.
34 C.J. p 448 note 87.
Defective return see supra § 352 b.

8. Ind.—Meyer v. Wilson, 76 N.E. 748, 166 Ind. 651—Brown v.

that his adversary was guilty of fraud in connection with the matter.[9] It has, however, been held that a court of equity has power to entertain a bill containing clear and convincing allegations which, on being proved, would establish that no service of process whatsoever was had on a necessary party defendant in contradiction of the facts appearing on the record,[10] and that statutes precluding attack on a sheriff's return do not prevent complainant from attacking a judgment on the ground that he was not legally cited, as the real basis of such an attack is in respect of the citation and not of the return, which latter is simply evidence of the citation.[11]

Where defendant appears and pleads to the action, the judgment will not be enjoined notwithstanding a false return of service.[12]

§ 354. —— Unauthorized Appearance

There is a conflict of authority as to whether a judgment resting on an unauthorized appearance may be canceled or its enforcement restrained in equity.

According to some decisions, a judgment obtained and resting on an unauthorized appearance for the party may be canceled or its enforcement restrained in equity, irrespective of the question whether the attorney entering the appearance is responsible or irresponsible, or acted by procurement or collusion with his antagonist.[13] According to other decisions, where a regular attorney of the court appears and answers for a defendant in a suit at law, a judgment recovered by plaintiff will not be vacated and execution enjoined by a court of equity, although the attorney appeared without authority from defendant, unless it is shown that the attorney is not of sufficient ability to answer for the damages caused by his unauthorized appearance, or there has been collusion between him and plaintiff in the suit at law; in such a case redress must be sought against the attorney.[14]

There are also authorities to the effect that a judgment obtained on an unauthorized appearance of an attorney will not be enjoined, whether the attorney is or is not solvent and able to respond in damages,[15] unless special circumstances render it necessary,[16] as where the question of unauthorized appearance is complicated by fraud,[17] or where it would be "against conscience" to execute the judgment,[18] or where it is evident that the court cannot properly determine on motion all the interests affected, the only proper method of procedure in such cases being in equity.[19] It has also been held that relief will be denied unless it is shown that the attorney's appearance and answer were prejudicial to the rights of the complaining party and resulted in the judgment against him.[20] Withdrawal by attorneys of their appearance with consent of the court has been held not of itself to deprive the latter of jurisdiction so as to authorize cancellation of the judgment in equity.[21]

§ 355. Payment or Satisfaction of Judgment

In an otherwise proper case the complainant may secure equitable relief against enforcement of a judgment previously paid or satisfied.

It has generally been held that equity may enjoin a judgment creditor from proceeding to collect a judgment which has been in fact paid, discharged,

Rhodes, 155 N.E. 614, 86 Ind.App. 12.

Necessity of meritorious defense generally see supra § 349.

9. U.S.—Knox County v. Harshman, Mo., 10 S.Ct. 257, 133 U.S. 152, 33 L.Ed. 586.
Ky.—Doty v. Deposit Building & Loan Ass'n, 46 S.W. 219, 103 Ky. 710, 20 Ky.L. 625, 43 L.R.A. 551, rehearing denied 47 S.W. 433, 103 Ky. 710, 20 Ky.L. 625, 43 L.R.A. 554.
Mo.—Ellis v. Nuckols, 140 S.W. 867, 237 Mo. 290.
Va.—Caskie v. Durham, 147 S.E. 218, 152 Va. 345—Ramsburg v. Kline, 31 S.E. 608, 96 Va. 465.
W.Va.—McClung v. McWhorter, 34 S.E. 740, 47 W.Va. 150, 81 Am.S.R. 785.
34 C.J. p 448 notes 87, 88.

10. Fla.—Fleming v. Fleming, 177 So. 607, 130 Fla. 264.

11. La.—Dickey v. Pollock, App., 133 So. 48.

12. U.S.—Walker v. Robbins, Miss., 14 How. 584, 14 L.Ed. 552.

13. Ga.—Moon v. Moon, 35 S.E.2d 439, 199 Ga. 808.
Iowa.—Sloan v. Jepson, 252 N.W. 535, 217 Iowa 1082.
Miss.—Hirsch Bros. & Co. v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 88 A.L.R. 1.
34 C.J. p 449 note 96.

Party joined by attorney
Judgment entered against party joined by attorney without authority may be set aside, vacated, or enjoined in appropriate proceedings.—Hirsch Bros. & Co. v. R. E. Kennington Co., supra.

14. N.H.—Everett v. Warner Bank, 58 N.H. 340.
34 C.J. p 449 note 90.

15. N.Y.—Vilas v. Plattsburgh & M. R. Co., 25 N.E. 941, 123 N.Y. 440, 34 N.Y.St. 67, 20 Am.S.R. 771, 9 L.R.A. 844.
34 C.J. p 449 note 9.

Relief in original cause
Relief from domestic judgment, obtained through attorney's unauthorized appearance, must be sought in original cause.—Hunter v. Harrell, 163 N.E. 295, 88 Ind.App. 68.

16. N.Y.—U. S. Life Ins. Co. v. Hellinger, 114 N.Y.S. 885, 130 App.Div. 415—New York v. Smith, 20 N.Y.S. 666, 61 N.Y.Super. 374, appeal dismissed 34 N.E. 400, 138 N.Y. 676.

17. N.Y.—Vilas v. Plattsburgh & M. R. Co., 25 N.E. 941, 123 N.Y. 440, 34 N.Y.St. 67, 20 Am.S.R. 771, 9 L.R.A. 844.
34 C.J. p 449 note 93.

18. Fla.—Budd v. Gamble, 13 Fla. 265.

19. N.Y.—Vilas v. Plattsburgh & M. R. Co., 25 N.E. 941, 123 N.Y. 440, 34 N.Y.S. 67, 20 Am.S.R. 771, 9 L. R.A. 844—Gilman v. Prentice, 3 N. Y.St. 544, 11 N.Y.Civ.Proc. 310.

20. Okl.—Homaokla Oil Co. v. M. K. Tank Co., 247 P. 346, 118 Okl. 144.

21. Iowa.—Sloan v. Jepson, 252 N. W. 535, 217 Iowa 1082.

or satisfied,[22] provided, of course, payment was made to some one having authority to receive the money.[23] Under some circumstances such equitable relief may be proper notwithstanding the court in which the judgment was rendered may have the power to grant the same relief on motion to stay the execution.[24] However, it has been held that equity has no jurisdiction to relieve against a judgment which has been satisfied, where the remedy at law is adequate,[25] either by the ancient writ of audita querela [26] or by motion made in the court in which such judgment was rendered,[27] unless there are questions of law and fact which may be better tried in a court of equity than in a law court, or there is an equitable right involved more appropriate for the jurisdiction of the former tribunal than the latter.[28] Similarly, one who might have set up the fact of payment or discharge of a judgment, by way of defense to an action at law on it, or in a proceeding to revive it, cannot claim equitable relief against its enforcement.[29] In any case, where the legal remedy is not available,[30] or where fraud[31] or injustice[32] appears, the judgment may be enjoined. It has been held that a court cannot rescind or annul a judgment theretofore paid by one of several solidary judgment debtors.[33]

§ 356. Errors and Irregularities

Errors and irregularities in a judgment will not afford ground for relief by a court of equity unless facts extrinsic to the error bring the case within one of the recognized grounds for equitable cognizance or the errors are fundamental.

Equity will not set aside or enjoin a judgment recovered at law, against a party who had a full opportunity to defend himself, in a case of which the court had jurisdiction, simply on the ground that the judgment is irregular or erroneous,[34] as a court of equity may not review judgments of other

22. N.Y.—Allgeier v. Gordon & Co., 9 N.Y.S.2d 848, 170 Misc. 607.
34 C.J. p 440 note 78, p 450 note 7.

Payment to full liability on bond
Sureties on officers' bonds, having paid judgment for full penalty, assigned to judgment creditor's attorney, were entitled to restrain judgment creditor's wife, who also recovered judgment, from enforcing her judgment.—Southern Surety Co. v. Bender, 180 N.E. 198, 41 Ohio App. 541.

Tender of property
Injunction lies to restrain enforcement of alternative money judgment obtained in action to recover personalty, where property had been tendered in good condition.—Lindsey v. Faylor, 1 P.2d 755, 151 Okl. 46.

Satisfaction not shown
Enforcement of judgment regular on its face could not be restrained by virtue of alleged settlement agreement, where application for injunction showed that applicant had paid only part of amount due and failed to show tender of balance.—Bond v. Dugat, Tex.Civ.App., 81 S.W. 2d 736.

23. Md.—Akin v. Denny, 37 Md. 81.
34 C.J. p 450 note 9.

24. Cal.—Thompson v. Laughlin, 27 P. 752, 91 Cal. 313.

25. Cal.—Schwartz v. California Claim Service, 125 P.2d 883, 52 Cal. App.2d 47.
Del.—White v. Osserman, 139 A. 761, 16 Del.Ch. 39.
N.Y.—Allgeier v. Gordon & Co., Inc., 9 N.Y.S.2d 848, 170 Misc. 607.
34 C.J. p 450 note 10.

26. Ill.—Pyle v. Crebs, 112 Ill.App. 480.

27. Ill.—Chandler v. Chandler, 63 N. E.2d 272, 326 Ill.App. 670.
34 C.J. p 450 note 12.

28. Va.—Crawford v. Thurmond, 3 Leigh 85, 30 Va. 85.

29. Va.—Barnett v. Barnett, 2 S.E. 733, 83 Va. 504.
34 C.J. p 450 note 14.

30. N.Y.—Mallory v. Norton, 21 Barb. 424.

31. N.Y.—Shaw v. Dwight, 16 Barb. 536.
34 C.J. p 450 note 16.

32. Ill.—Edwards v. McCurdy, 13 Ill. 496.
N.Y.—Remington Paper Co. v. O'Dougherty, 81 N.Y. 474.

33. La.—Swift & Co. v. Villemeur, 131 So. 855, 15 La.App. 503.

34. U.S.—Town of Boynton v. White Const. Co., C.C.A.Fla., 64 F.2d 190—Mineral Development Co. v. Kentucky Coal Lands Co., D.C.Ky., 285 F. 761, affirmed, C.C.A., 285 F. 1021.
Ala.—**Corpus Juris cited in** Miller v. Miller, 189 So. 768, 769, 238 Ala. 228—Ex parte Cunningham, 99 So. 834, 19 Ala.App. 584, certiorari denied Ex parte Ewart-Brewer Motor Co., 99 So. 836, 211 Ala. 191.
Colo.—Schattinger v. Schattinger, 250 P. 851, 80 Colo. 261.
Fla.—Adams v. Reynolds, 134 So. 45, 101 Fla. 271.
Ga.—Flowers v. Thompson, 124 S.E. 720, 158 Ga. 844.
Ill.—Gray v. First Nat. Bank, 13 N. E.2d 497, 294 Ill.App. 62.
Iowa.—Jensen v. Martinsen, 291 N. W. 422, 228 Iowa 307.
La.—National Park Bank v. Concordia Land & Timber Co., 97 So. 272, 154 La. 31.
Md.—Hansel v. Collins, 23 A.2d 1, 180 Md. 100.
Mich.—Craig v. Black, 229 N.W. 411, 249 Mich. 485—Broadwell v. Broadwell, 209 N.W. 923, 236 Mich. 60.
Mo.—State ex rel. Caplow v. Kirkwood, App., 117 S.W.2d 652—State ex rel. Woolman v. Guinotte, 282 S.W. 68, 321 Mo.App. 466—Bullivant v. Greer, 264 S.W. 95, 216 Mo. App. 324—State ex rel. and to Use of Clinkscales v. Scott, 261 S.W. 680, 216 Mo.App. 114, record quashed State ex rel. Scott v. Trimble, 272 S.W. 66, 308 Mo. 123.
N.J.—Arons v. Haberman, 176 A. 680, 114 N.J.Law 403—Rogers-Ebert Co. v. Century Const. Co., 23 A.2d 905, 131 N.J.Eq. 67, affirmed 25 A.2d 635, 131 N.J.Eq. 469.
N.Y.—Harvey v. Comby, 280 N.Y.S. 958, 245 App.Div. 318.
N.C.—Cameron v. McDonald, 6 S.E. 2d 497, 216 N.C. 712.
Ohio.—Barnhart v. Aiken, 177 N.E. 284, 39 Ohio App. 172.
Tenn.—New York Casualty Co. v. Lawson, 24 S.W.2d 881, 160 Tenn. 329—**Corpus Juris cited in** Clemmons v. Haynes, 3 Tenn.App. 20, 28.
Tex.—Winters Mut. Aid Ass'n, Circle No. 2, v. Reddin, Com.App., 49 S. W.2d 1095—Petty v. Mitchell, Civ. App., 187 S.W.2d 138, error refused—Gray v. Moore, Civ.App., 172 S. W.2d 746, error refused—Urbanec v. Jezik, Civ.App., 138 S.W.2d 1098—Metropolitan Life Ins. Co. v. Pribble, Civ.App., 130 S.W.2d 332, error refused—Snell v. Knowles, Civ.App., 87 S.W.2d 871, error dismissed—Morris v. Soble, Civ.App., 61 S.W.2d 139—Coffman v. National Motor Products Co., Civ.App., 26 S.W.2d 921, error dismissed—Crutcher v. Wolfe, Civ.App., 269 S. W. 841.
Utah.—Logan City v. Utah Power & Light Co., 16 P.2d 1097, 86 Utah

courts of competent jurisdiction,[35] or afford equitable relief for mistakes of fact[36] or errors of law,[37] unless the judgment is against good conscience,[38] or there are facts extrinsic to the error justifying relief,[39] as where the errors are the result of fraud or collusion[40] or of such a nature as to deprive the party of all opportunity of making his defense in the action at law.[41]

Mere irregularities or errors in the proceedings leading up to a judgment constitute no ground for equitable interference,[42] and it has been held immaterial that the judgment is unjust[43] or that the error was such as to warrant a new trial,[44] although under statutes regulating bills of review it has been held that such a bill will lie only if the grounds presented are such as would have required granting of a new trial at law.[45] Where there was in legal contemplation no error committed, equitable relief will, of course, be denied.[46] On the other hand, fundamental errors going to the power or jurisdiction of the court to render the judgment may afford a basis for equitable relief,[47] except, it has been said, where the interests of third persons intervene which should be protected under broad principles of public policy;[48] and where the errors committed are of a character making the judgment a nullity, and it would be against good conscience to enforce it, enforcement of the judgment may be enjoined.[49]

§ 357. —— Defects or Objections as to Parties or Pleadings

Equity will not grant relief against a judgment for defects or objections as to parties or pleadings constituting mere irregularities.

340, adhered to 44 P.2d 698, 86 Utah 354.
Wash.—Manson v. Foltz, 17 P.2d 616, 170 Wash. 652.
Wyo.—North Laramie Land Co. v. Hoffman, 219 P. 561, 30 Wyo. 238, affirmed 45 S.Ct. 491, 268 U.S. 276, 69 L.Ed. 953.
34 C.J. p 451 note 18—47 C.J. p 1015 note 74.

Judgment by confession

(1) A judgment by confession is not subject to equitable relief for mere defects or irregularities in the instrument of confession.—Burch v. West, 25 N.E. 658, 134 Ill. 258—34 C.J. p 441 note 11.

(2) Likewise such relief cannot be granted merely because the affidavit to the complaint on which the judgment was rendered was defective.—Reiley v. Johnston, 22 Wis. 279.

Rule applied in partition suit

Or.—Howell v. Howell, 152 P. 217, 77 Or. 539.
47 C.J. p 437 note 57, p 438 note 79.

35. N.J.—Rogers-Ebert Co. v. Century Const. Co., 23 A.2d 905, 131 N.J.Eq. 67, affirmed 25 A.2d 635, 131 N.J.Eq. 469—Red Oaks v. Dorez, Inc., 184 A. 746, 120 N.J.Eq. 282—Raimondi v. Bianchi, 140 A. 584, 102 N.J.Eq. 254—Boulton v. Scott, 3 N.J.Eq. 231.
Tenn.—New York Casualty Co. v. Lawson, 24 S.W.2d 881, 160 Tenn. 329.

Judgments not appealable

Courts of equity will not interfere to control the judgment of an inferior court although erroneous where the matters are cognizable in the inferior court and have been decided there even though the judgment is not appealable.—Zurich General Accident & Liability Ins. Co. v. Dyess, Tex.Civ.App., 167 S.W.2d 294—Hayes v. Bone, Tex.Civ.App., 69 S.W.2d 180.

36. N.M.—Caudill v. Caudill, 44 P.2d 724, 39 N.M. 248.
Tex.—Metropolitan Life Ins. Co. v. Pribble, Civ.App., 130 S.W.2d 332, error refused.
34 C.J. p 452 note 22, p 462 note 45.

37. U.S.—U. S. v. Irving Trust Co., D.C.N.Y., 49 F.Supp. 663.
Ind.—Attica Building & Loan Ass'n of Attica v. Colvert, 23 N.E.2d 483, 216 Ind. 192.
Mont.—Cocanougher v. Montana Life Ins. Co., 64 P.2d 845, 103 Mont. 536.
N.J.—Red Oaks v. Dorez, Inc., 184 A. 746, 120 N.J.Eq. 282.
Tex.—Metropolitan Life Ins. Co. v. Pribble, Civ.App., 130 S.W.2d 332, error refused.
34 C.J. p 452 note 23.

38. Iowa.—Shaw v. Addison, 18 N. W.2d 796.
34 C.J. p 462 note 43.

39. Tex.—Bearden v. Texas Co., Civ. App., 41 S.W.2d 447, affirmed, Com. App., 60 S.W.2d 1031.

40. Wyo.—Miller v. Hagie, 140 P.2d 746, 59 Wyo. 383.
34 C.J. p 452 note 24.

41. Wyo.—Miller v. Hagie, supra.
34 C.J. p 452 note 25.

42. Cal.—Bley v. Dessin, 87 P.2d 889, 31 Cal.App.2d 338.
Ind.—Globe Mining Co. v. Oak Ridge Coal Co., 177 N.E. 868, 204 Ind. 11.
Ky.—Sexton v. Dorman, 147 S.W.2d 703, 285 Ky. 270—Bass v. Louisville & N. R. Co., 288 S.W. 738, 216 Ky. 796.
Md.—Hansel v. Collins, 23 A.2d 1, 180 Md. 100.
Tex.—Richardson v. Kelly, Civ.App., 179 S.W.2d 991, affirmed, Sup., 191 S.W.2d 857.
Wyo.—Miller v. Hagie, 140 P.2d 746, 59 Wyo. 383.
34 C.J. p 451 note 21.

Misconduct of jury, in discussing facts not in evidence, did not authorize setting aside judgment in separate suit in nature of bill of review.—Reed v. Bryant, Tex.Civ. App., 291 S.W. 605.

43. Tex.—Petty v. Mitchell, Civ. App., 187 S.W.2d 138, error refused —Wood v. Lenox, 23 S.W. 812, 5 Tex.Civ.App. 318.

44. Ky.—Reynolds v. Horine, 13 B. Mon. 234.
Tenn.—Nicholson v. Patterson, 6 Humphr. 394.

45. Tex.—Pearl Assur. Co. v. Williams, Civ.App., 167 S.W.2d 808.

46. Ill.—Carroll, Schendorf & Boenicke v. Hastings, 259 Ill.App. 564.
Md.—Hansel v. Collins, 23 A.2d 1, 180 Md. 100.
Mich.—Koppas v. Heffner & Flemming, 282 N.W. 245, 286 Mich. 562.
Neb.—Wistrom v. Forsling, 9 N.W.2d 294, 143 Neb. 294, rehearing denied and opinion modified on other grounds 14 N.W.2d 217, 144 Neb. 638.
Tex.—Maytag Southwestern Co. v. Thornton, Civ.App., 20 S.W.2d 383, error dismissed.
Wash.—Puett v. Bernhard, 71 P.2d 406, 191 Wash. 557.

Alleged error as to qualification of judge

Ala.—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677.
Tex.—Crutcher v. Wolfe, Civ.App., 269 S.W. 841.

47. Colo.—Ferrier v. Morris, 122 P. 2d 880, 109 Colo. 154.
Tex.—Morris v. Soble, Civ.App., 61 S.W.2d 139.

48. Tex.—Morris v. Soble, supra.

49. Colo.—Ferrier v. Morris, 122 P. 2d 880, 109 Colo. 154.

Where the trial court had jurisdiction to render judgment, defects and objections as to parties amounting to no more than irregularities do not constitute grounds for equitable relief against the judgment.[50] Nonjoinder of a proper party defendant will not authorize equitable relief to other defendants who were properly cited,[51] but failure to join a necessary party defendant may justify equitable relief in an action by such party.[52] A court of equity may not amend a judgment so as to add a new party where there is no statutory provision authorizing such procedure.[53]

If the trial court had jurisdiction of the person and subject matter, equity ordinarily will deny relief against a judgment on the ground of defects, objections, mistakes, or insufficiency with respect to the pleadings,[54] especially where the defects are due to the mistake or negligence of complainant himself[55] and he failed to avail himself of his remedy at law.[56] So it has been held that a court of equity will not restrain enforcement of a judgment because the complaint in the action was fatally defective.[57] Equitable relief may be afforded, however, where the defect in the pleadings is of such character as to deprive the court of jurisdiction,[58] and an independent bill may lie to set aside a judgment where it is beyond the scope of the pleadings[59] or issues.[60]

§ 358. —— Objections to Evidence

Ordinarily equity will not afford relief against a judgment for insufficiency of the evidence to support it, or for erroneous rulings of the trial court in respect of admissibility of evidence.

Ordinarily equity will not afford relief or enjoin the enforcement of a judgment at law on the ground of the insufficiency of the evidence to support it[61] or the lack of evidence of essential facts[62] or because of erroneous action of the court in admitting or excluding particular evidence.[63]

§ 359. —— Error in Amount of Judgment or Relief Granted

Error in respect of the amount of the judgment or the relief awarded affords no ground for equitable relief where the court had jurisdiction of the parties and subject matter, unless other grounds of equitable cognizance appear, such as fraud or mistake, coupled with lack of an adequate remedy at law.

Where the court has jurisdiction of the person and the subject matter, and there is no special ground for equitable interference, the fact that a judgment is erroneous as to the amount awarded,[64] as for a greater amount than claimed,[65] or fails in other respects to grant the proper relief,[66] affords no ground for vacating it in equity or enjoining its enforcement. Similarly, mere error in the taxation of costs,[67] or in the allowance of interest where the

50. La.—Surety Credit Co. v. Bauer, 1 La.App. 285.
Ohio.—Rauch v. Immel, 8 N.E.2d 569, 55 Ohio App. 71.
Tex.—Duncan v. Smith Bros. Grain Co., 260 S.W. 1027, 113 Tex. 555—Smith v. Zenith Corporation, Civ. App., 134 S.W.2d 337—Arcola Sugar Mills Co. v. Doherty, Civ.App., 254 S.W. 650.
Disability and privilege see supra § 350 b.

51. Ga.—Thomasson v. Farmers' & Merchants' Nat. Bank of Rockmart, 153 S.E. 419, 170 Ga. 555.

52. Okl.—Phelps v. Theime, 217 P. 376, 92 Okl. 8.
Purchaser in possession
Enforcement of judgment in summary proceedings for restitution was properly enjoined, where purchaser in possession was not party.—Heppner v. Smith, 213 N.W. 119, 238 Mich. 245.

53. Ga.—Bishop v. Bussey, 139 S.E. 212, 164 Ga. 642.

54. Ga.—Watters v. Southern Brighton Mills, 147 S.E. 87, 168 Ga. 15.
Ky.—Dorsey v. Lawrence, Hard. p 508.
Tex.—Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451—Finlayson v. McDowell, Civ.App., 94 S.W.2d 1234, error dismissed.
Utah.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.
34 C.J. p 452 note 26.
Overruling of demurrer to complaint in suit at law, if error, would be mere irregularity reviewable on appeal, and could not be made basis for bill to vacate judgment.—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677.

55. Tex.—Cooper v. Walker, Civ. App., 96 S.W.2d 847.

56. Tex.—Allen v. Jones, Civ.App., 192 S.W.2d 298, error refused, no reversible error.

57. Utah.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.

58. Tex.—Morris v. Soble, Civ.App., 61 S.W.2d 139.
Unsigned petition
Tex.—Morris v. Soble, supra.

59. Tenn.—Culwell v. Culwell, 133 S.W.2d 1009, 23 Tenn.App. 389.

60. Kan.—Southern Kansas Stage Lines Co. v. Webb, 41 P.2d 1025, 141 Kan. 476.

61. U.S.—Mineral Development Co. v. Kentucky Coal Lands Co., D.C. Ky., 285 F. 761, affirmed, C.C.A., 285 F. 1021.
Ark.—Matkin v. Cramer Cotton Co., 252 S.W. 596, 159 Ark. 508.
Iowa.—Harris v. Bigley, 111 N.W. 432, 136 Iowa 307.
Tenn.—Life & Casualty Ins. Co. v. Clark, 54 S.W.2d 965, 165 Tenn. 219.
Wash.—Manson v. Foltz, 17 P.2d 616, 170 Wash. 652.
34 C.J. p 453 note 27.

62. Cal.—Pico v. Sunol, 6 Cal. 294.
34 C.J. p 453 note 28.

63. Nev.—Douglas Milling & Power Co. v. Rickey, 217 P. 590, 47 Nev. 148.
34 C.J. p 453 note 29.

64. Neb.—Kramer v. Bankers' Surety Co., 133 N.W. 427, 90 Neb. 801.
34 C.J. p 453 note 31.
Attorneys' fees
Dissatisfaction of judgment debtors with amount of attorney's fees for which default judgment was rendered was not ground for annulling judgment.—Treichlingrova v. Layne, 139 So. 659, 19 La.App. 71.

65. Ind.—Gum-Elastic Roofing Co. v. Mexico Pub. Co., 39 N.E. 443, 140 Ind. 158, 30 L.R.A. 700.

66. Tex.—Kalmans v. Baumbush, Civ.App., 187 S.W. 697.
Utah.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.

67. Or.—Nicklin v. Hobin, 10 P. 335, 13 Or. 406.
34 C.J. p 453 note 37.

verdict gives none,[68] affords no ground for enjoining the judgment.

On the other hand, where through fraud, accident, mistake, or miscalculation a judgment is entered for an amount or in terms not intended, or inconsistent with the pleadings, equity may give relief on clear and satisfying proof.[69] Relief will not be granted, however, where the party has an adequate remedy by appeal, motion, or other proceeding in the law court,[70] or where he is chargeable with negligence in permitting the mistake to occur or in failing to seek his remedy in due time.[71]

§ 360. —— Irregular Rendition or Entry

Errors in the time, form, or manner of rendition or entry of a judgment ordinarily afford no ground for equitable relief; but where there are additional grounds of equitable cognizance relief may be granted.

Irregularities or errors in the time, form, or manner of the rendition or entry of a judgment furnish no ground for equity to reform it or enjoin its collection.[72] On the other hand, some cases recognize the right of equity to interfere in a grave emergency produced by an erroneous entry of judgment[73] where there is no other way of obtaining relief[74] or where the party has been prevented from obtaining relief at law by fraud, accident, or the act of the opposite party, without fault or neglect on his own part.[75] So, where the clerk of the law court has made mistakes or erroneous entries in the record of the judgment, it is proper for equity to grant relief.[76] It has been held that a defect in rendition of a judgment going to the jurisdiction of the court may constitute ground for suit in equity.[77]

§ 361. Defenses Not Interposed in Former Action

a. In general
b. Particular defenses

a. In General

A defendant who negligently fails to interpose an available defense in an action, and who is not prevented from interposing it by fraud, accident, or the like, cannot assert such defense as a ground for equitable relief against the judgment.

A defendant in an action who has a defense of which he is or should be fully aware, which is cognizable by and within the jurisdiction of the court in which the action is brought, and which he has an opportunity to interpose, is chargeable with negligence if he fails to set up such defense and insist on it, not being prevented from doing so by any fraud, accident, or surprise; and he cannot have relief in equity against the judgment in that action on the same grounds which constituted such defense.[78] This proposition has been so

68. La.—McMicken v. Milaudon, 2 La. 180.

69. La.—Engeran v. Consolidated Companies, App., 147 So. 743.
Mo.—Chouteau v. City of St. Louis, App., 131 S.W.2d 902.
Wyo.—**Corpus Juris cited in** Midwest Refining Co. v. George, 7 P.2d 213, 214, 44 Wyo. 25.
34 C.J. p 453 note 34.

Violation of agreement
Judgment taken in violation of agreement should have been set aside and defendant given opportunity to defend.—Riddle v. McNaughton, 163 N.E. 846, 88 Ind.App. 352.

If jurisdictional facts do not appear, equity will deny relief.—Prestwood v. Bagley, 149 So. 817, 227 Ala. 316.

70. U.S.—Furnald v. Glenn, C.C.N.Y., 56 F. 372, affirmed 64 F. 49, 12 C.C.A. 27.
34 C.J. p 453 note 35.

71. Wyo.—Edwards v. City of Cheyenne, 114 P. 677, 687, 122 P. 900, 19 Wyo. 110.
34 C.J. p 453 note 36.

72. Mass.—Bromfield v. Gould, 193 N.E. 796, 289 Mass. 80.
Okl.—Missouri, O. & G. Ry. Co. v. Riley, 127 P. 391, 34 Okl. 760.
34 C.J. p 453 note 40.

Entry of default in vacation is insufficient ground for an injunction where the rules of the court in which the judgment was rendered authorize the entry of judgments in vacation.—Porter v. Moffett, Morr., Iowa, 108.

73. Tex.—Houston, E. & W. T. R. Co. v. Skeeter Bros., 98 S.W. 1064, 44 Tex.Civ.App. 105.
34 C.J. p 454 note 41.

Supplying imperfections in partition decree or judgment
U.S.—Gay v. Parpart, Ill., 1 S.Ct. 456, 106 U.S. 679, 27 L.Ed. 256.
47 C.J. p 437 note 56.

74. Iowa.—Partridge v. Harrow, 27 Iowa 96, 99 Am.D. 643.
Okl.—Ellis v. Akers, 121 P. 258, 32 Okl. 96.

75. Okl.—Ellis v. Akers, supra.
34 C.J. p 454 note 43.

76. Va.—Smith v. Wallace, 1 Wash. 254, 1 Va. 254.
34 C.J. p 454 note 44.

77. Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.

78. U.S.—In re Innis, C.C.A.Ind., 140 F.2d 479, certiorari denied 64 S.Ct. 1048, 322 U.S. 736, 88 L.Ed. 1569—Helms v. Holmes, C.C.A.N.C., 129 F.2d 263, 141 A.L.R. 1367—Town of Boynton v. White Const. Co., C.C.A.Fla., 64 F.2d 190—Jenner v. Murray, C.C.A.Fla., 32 F.2d 625.
Ala.—Leath v. Lister, 173 So. 59, 233 Ala. 595—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677—Oden v. King, 114 So. 1, 216 Ala. 597.
Cal.—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—De Tray v. Chambers, 297 P. 575, 112 Cal.App. 697.
Ga.—Lester v. Southern Security Co., 147 S.E. 529, 168 Ga. 307.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56—Meyer v. Surkin, 262 Ill.App. 83.
Ind.—Julien v. Lane, 157 N.E. 114, second case, 95 Ind.App. 139.
Ky.—Holt v. Mahoney, 270 S.W. 795, 208 Ky. 330.
La.—Wunderlich v. Palmisano, App., 177 So. 843—Treichlingrova v. Layne, 139 So. 659, 19 La.App. 71—Mercantile Adjustment Co. v. Powers, 5 La.App. 534.
Md.—Redding v. Redding, 26 A.2d 18, 180 Md. 545.
Mich.—Westin v. Hatfield, 10 N.W.2d 840, 306 Mich. 235—Broadwell v. Broadwell, 209 N.W. 923, 236 Mich. 60.
Mo.—Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 338 Mo. 31—State ex rel.

repeatedly affirmed that it has become a well recognized principle and maxim of equity,[79] and will not be abrogated merely because the judgment may be wrong in law or fact,[80] or may work injustice and hardship,[81] as, for instance, when the effect of allowing the judgment to stand will be to compel the payment of a debt which defendant does not owe or which he owes to a third person.[82] An exception to this rule has been held to exist, however, in cases where relief is sought by persons incapacitated to contract generally or specially;[83] and, as discussed infra §§ 363–368, relief in equity may be had where there was an adequate excuse for not presenting the defense in the original action.

Defenses available either at law or in equity. Where a party's defense to an action is cognizable either at law or in equity, it has been held in some jurisdictions that he may choose in which form he will make his defense, and if he omits to do so at law he may then have recourse to equity for relief against the judgment.[84] However, if in any such case the party makes his defense in the trial at law, he will be regarded as having made his election, and if he fails he will have no ground for a bill in equity for relief against the judgment[85] unless his defeat occurred through fraud, surprise, accident or the like.[86]

In other jurisdictions where a suit is first brought in a court of law, in which defendant may make his defense as fully and adequately as he could in a court of equity, he must make his defense there, and if he neglects to do so a court of equity has no jurisdiction to relieve him,[87] except where some spe-

Ellsworth v. Fidelity & Deposit Co. of Maryland, 147 S.W.2d 131, 235 Mo.App. 850.

N.J.—Brengel v. O'Toole, 143 A. 361, 103 N.J.Eq. 339—Raimondi v. Bianchi, 140 A. 584, 102 N.J.Eq. 254—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115.

N.Y.—755 Seventh Ave. Corporation v. Carroll, 194 N.E. 69, 266 N.Y. 157—Fuhrmann v. Fanroth, 173 N. E. 685, 254 N.Y. 479—Horne v. McGinley, 299 N.Y.S. 1, 252 App.Div. 296.

Okl.—Sabin v. Levorsen, 145 P.2d 402, certiorari denied 64 S.Ct. 205, 320 U.S. 792, 88 L.Ed. 477, rehearing denied 64 S.Ct. 368, 320 U.S. 815, 88 L.Ed. 492—Wheeler v. Ridpath, 259 P. 247, 126 Okl. 290.

Or.—Dixon v. Simpson, 279 P. 939, 130 Or. 211.

Pa.—Graham Roller Bearing Corporation v. Stone, 126 A. 235, 281 Pa. 229.

Tenn.—Sharp v. Kennedy, 13 Tenn. App. 170.

Tex.—Wear v. McCallum, 33 S.W.2d 723, 119 Tex. 473—Winters Mut. Aid Ass'n, Circle No. 2, v. Reddin, Com.App., 49 S.W.2d 1095—Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451—**Corpus Juris cited** in Smith v. Lockhart, Civ.App., 177 S.W.2d 117, 119—American Red Cross v. Longley, Civ.App., 165 S. W.2d 233, error refused—Smith v. Rogers, Civ.App., 129 S.W.2d 776—Sanders v. O'Connor, Civ.App., 98 S.W.2d 401, error dismissed—Smith v. Dunnam, Civ.App., 57 S.W.2d 873, error refused—Hetkes v. Gehret, Civ.App., 16 S.W.2d 395, affirmed, Com.App., 36 S.W.2d 700—Garza v. Kenedy, Civ.App., 291 S. W. 615, reversed on other grounds, Com.App., 299 S.W. 231—Reed v. Bryant, Civ.App., 291 S.W. 605—D. F. Connolly Agency, Inc., v. Popejoy, Civ.App., 290 S.W. 331.

Utah.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.

Wash.—Fisch v. Marler, 97 P.2d 147, 1 Wash.2d 698—Manson v. Foltz, 17 P.2d 616, 170 Wash. 652.

24 C.J. p 889 note 92—34 C.J. p 454 note 45, p 440 notes 80, 82, p 442 note 13—47 C.J. p 1015 note 75.

Cancellation of insurance

Insurance company's suit to set aside judgment on additional insurance certificates, issued to injured employee covered by group policy, was held not maintainable where there was negligence and lack of diligence in failing to present defense of cancellation of additional insurance.—Wheiles v. Ætna Life Ins. Co., C.C.A.Tex., 68 F.2d 99.

Defect patent on face of record

Surety on garnishment bond was held not entitled to enjoin enforcement of garnishor's judgment on bond on ground of discovering after such judgment was rendered that the former judgment on which breach of bond was predicated was void, where alleged defect was patent on face of record.—Ætna Casualty & Surety Co. v. McDougall Co., 150 So. 632, 112 Fla. 408.

Pendency of suit by third person

Where, at the time of a suit to require a partnership accounting from the defendant in respect of a lease held in his name, a suit by a third person against such defendant to establish a prior lease was pending in another court, but defendant did not plead such fact, and a decree for accounting was entered against him, he cannot maintain a suit in equity to enjoin enforcement of such decree because of a subsequent decree against him in the other suit. —Smith v. Apple, C.C.A.Kan., 6 F.2d 559.

79. Va.—Holland v. Trotter, 22 Gratt. 136, 63 Va. 136.

80. U.S.—In re Innis, C.C.A.Ind., 140 F.2d 479, certiorari denied 64 S.Ct. 1048, 322 U.S. 736, 88 L.Ed. 1569.

Tex.—Ridge v. Wood, Civ.App., 140 S.W.2d 536, error dismissed, judgment correct.

Utah.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.

34 C.J. p 456 note 47.

81. U.S.—In re Innis, C.C.A.Ind., 140 F.2d 479, certiorari denied 64 S.Ct. 1048, 322 U.S. 736, 88 L.Ed. 1569.

Utah.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.

34 C.J. p 456 note 48.

82. W.Va.—Braden v. Reitzenberger, 18 W.Va. 286.

83. La.—Medart v. Fasnatch, 15 La. Ann. 621.

84. Ark.—Arrington v. Washington, 14 Ark. 218.

34 C.J. p 457 note 78.

85. Ark.—Conway v. Ellison, 14 Ark. 360.

34 C.J. p 457 note 79.

Matters determined in original action see infra § 369.

86. Ark.—Arrington v. Washington, 14 Ark. 218.

87. U.S.—**Corpus Juris cited** in Coos Bay Lumber Co. v. Collier, C.C.A., 104 F.2d 722, 725.

Md.—Redding v. Redding, 26 A.2d 18, 180 Md. 545.

34 C.J. p 457 note 81.

Statutes requiring interposition of all defenses

The rule set forth in the text applies under statutes requiring defendant in an action to interpose all defenses which he may have, whether legal or equitable.

Ky.—Chinn v. Mitchell, 2 Metc. 92.

Minn.—Fowler v. Atkinson, 6 Minn. 503.

cial ground for relief can be established,[88] or where the statutes provide otherwise.[89]

b. Particular Defenses

(1) Insufficiency or illegality of cause of action

(2) Other defenses

(1) Insufficiency or Illegality of Cause of Action

Insufficiency or illegality of the cause of action on which the judgment was based is generally considered not a ground for equitable relief against the judgment where there was nothing to prevent the interposition of such defense in the original action.

The fact that the cause of action stated by plaintiff is not sufficient to support the judgment or does not entitle him to the relief awarded is a defense which must be interposed at law, and equity will not enjoin the judgment on this ground,[90] unless it appears that there was some good reason why defendant did not or could not plead it[91] or there are circumstances impeaching the justice or validity of the judgment.[92] The fact that the contract or cause of action was illegal, immoral, or contrary to public policy is good ground for enjoining the enforcement of the judgment,[93] although, according to some cases, only when the defense could not have been made at law or was prevented.[94] It has been held that equity will not interfere where the party seeking relief is in pari delicto with the other,[95] except in so far as the contract remains in whole or in part executory.[96]

Gambling contracts. Under statutes which expressly declare that judgments based on gaming contracts shall be void, it is the rule that equity will grant relief against a judgment founded on a gaming consideration although no defense was made at law.[97] This is true although the judgment was obtained by default[98] or by confession.[99] In jurisdictions where there is no statutory declaration that judgments founded on gaming contracts shall be void, the party is bound to make his defense at law, and, having failed to do so, cannot come into equity to enjoin the judgment on the ground of illegality of consideration.[1] Where a party has unsuccessfully attempted to resist the payment of a debt for which he is sued at law, on the ground of its being based on a gaming transaction, he cannot afterward have relief in equity.[2]

Usury. While it has been held in some jurisdictions that it is competent for a party to a usurious contract to go into equity for relief as to the interest, even after a judgment at law, and without assigning any reason for have failed to defend himself at law,[3] the general rule is well settled that where defendant at law failed to make his defense of usury and was not prevented by fraud or the fault of the other party, or by accident, unmixed with negligence on his part, a court of chancery will not take jurisdiction to afford relief,[4] unless under the circumstances such defense could not have been established at law, or would have involved an embarrassing and complicated inquiry.[5]

(2) Other Defenses

The rule prohibiting equitable relief for defenses

88. Ill.—Hopkins v. Medley, 99 Ill. 509.
34 C.J. p 457 note 82.

89. Va.—Hoge v. Fidelity Loan & Trust Co., 48 S.E. 494, 103 Va. 1.
34 C.J. p 457 note 83.

Equitable set-off
Va.—Hoge v. Fidelity Loan & Trust Co., supra.

90. U.S.—Griswold v. Hazard, C.C. R.I., 28 F. 578, affirmed 11 S.Ct. 972, 999, 141 U.S. 260, 35 L.Ed. 678.
34 C.J. p 457 note 88.

91. U.S.—Mather v. Stokely, Mass., 236 F. 124, 149 C.C.A. 334.
34 C.J. p 458 note 89.

92. Tenn.—Scurlock v. Scurlock, 22 S.W. 858, 92 Tenn. 629.
34 C.J. p 458 note 90.

93. Pa.—Given's Appeal, 15 A. 468, 121 Pa. 260, 6 Am.S.R. 795.
34 C.J. p 458 note 91.

94. Idaho.—Donovan v. Miller, 88 P. 82, 12 Idaho 600, 10 Ann.Cas. 444, 9 L.R.A.,N.S., 524.
34 C.J. p 458 note 92.

Excessive loans
Judgment debtor was held not entitled to cancellation of judgments obtained on loans made in excess of the amount permitted by Small Loan Act, where he did not assert violations in suits leading to judgments, and did not show that he was prevented from asserting violations by fraud, accident, or act of adverse party unmixed with his own fraud or negligence.—Nolan v. Southland Loan & Investment Co., 169 S.E. 370, 177 Ga. 59.

95. Cal.—Pacific Debenture Co. v. Caldwell, 81 P. 314. 147 Cal. 106.
34 C.J. p 458 note 93.

96. N.Y.—Schley v. Andrews, 121 N. E. 812, 225 N.Y. 110.
34 C.J. p 458 note 94.

97. Ill.—Boddie v. Brewer & Hofmann Brewing Co., 68 N.E. 394, 204 Ill. 352.
34 C.J. p 458 notes 95 [a], 96.

98. Ala.—Paulding v. Watson, 21 Ala. 279.
Ky.—Clay v. Fry, 3 Bibb, 248, 6 Am. D. 654.

99. Ill.—West v. Carter, 21 N.E. 782, 129 Ill. 249.
N.Y.—Everitt v. Knapp, 6 Johns. 331.

1. Ga.—Owens v. Van Winkle Gin & Machinery Co., 23 S.E. 416, 96 Ga. 408, 31 L.R.A. 767.
34 C.J. p 458 note 1.

2. Va.—White v. Washington, 5 Gratt. 645, 46 Va. 645.
34 C.J. p 458 note 2.

3. Va.—Greer v. Hale, 28 S.E. 873, 95 Va. 533, 64 Am.S.R. 814.
34 C.J. p 458 note 3.

4. N.Y.—Horne v. McGinley, 299 N. Y.S. 1, 252 App.Div. 296.
Tex.—Dallas Trust & Savings Bank v. Brashear, Civ.App., 39 S.W.2d 148, modified on other grounds, Com.App., 65 S.W.2d 288.
34 C.J. p 459 note 4.

5. Tenn.—Bumpass v. Reams, 1 Sneed 595.
34 C.J. p 459 note 5.

which should have been interposed in the original action has been applied to a great many defenses, including such defenses as want of consideration, and payment or discharge of the claim underlying the judgment.

Although some decisions favor the right of equity to enjoin the enforcement of a judgment, because of the want or failure of consideration for the contract on which it is founded, on the broad ground that it would be against conscience to permit the collection of the judgment under such circumstances,[6] it has generally been held that this is a defense which should be interposed in the original action, and will furnish no ground for relief in equity if the party raised it in the original action or might have done so.[7] Relief may be granted under some circumstances, however, as where the failure of consideration occurs or is discovered after the rendition of the judgment,[8] provided the injured party has then no adequate remedy at law,[9] which is the case, for instance, where his remedy would be by an action against the other party and the latter is insolvent,[10] and provided complainant himself is free from all fraud or dishonesty and is injured by the judgment as it stands.[11]

Payment, settlement, or discharge of the claim in suit must generally be set up as a defense before judgment, and will furnish no ground for a court of equity to enjoin the judgment unless the party was prevented from making his defense by fraud, circumvention, or deceit, or by an accident.[12] This applies to a defense that defendant in the original suit was discharged from liability as surety by an extension of time granted to the principal.[13] Clearly a party is not entitled to enjoin the collection of the entire judgment because of the payment of a part.[14]

Miscellaneous defenses. The rule prohibiting equitable relief against a judgment where the ground of relief is based on matters which should have been interposed as a defense in the original action has been applied to a great many defenses in addition to those already considered, including defenses based on breach of warranty,[15] coverture,[16] a discharge in bankruptcy,[17] duress or threats,[18] forgery,[19] infancy,[20] invalidity of a statute,[21] limitation of liability under an insurance policy,[22] misrepresentation in securing a contract,[23] non est factum,[24] the pendency of another action,[25] rescission of the contract in suit prior to judgment,[26] the statute of limitations,[27] and ultra vires.[28] The rule has also been applied to a defense that plaintiff in the action at law was not legally incorporated;[29] that plaintiff, a foreign corporation, was without authority to sue because of noncompliance with the requirements of domestic statutes;[30] that because of collusion complainant's right to a set-off was de-

6. W.Va.—Jarrett v. Goodnow, 20 S. E. 575, 39 W.Va. 602, 32 L.R.A. 321.
34 C.J. p 459 note 6.

7. N.Y.—Fuhrmann v. Fanroth, 173 N.E. 685, 254 N.Y. 479.
Tex.—Browning-Ferris Machinery Co. v. Thomson, Civ.App., 55 S.W. 2d 168.
34 C.J. p 459 note 7.

8. Md.—Michael v. Rigler, 120 A. 382, 142 Md. 125.
34 C.J. p 459 note 10.
Newly discovered evidence see infra § 376.

9. Minn.—Hulett v. Hamilton, 61 N. W. 672, 60 Minn. 21.
34 C.J. p 459 note 11.

10. Ind.—Gillett v. Sullivan, 26 N.E. 827, 127 Ind. 327.
34 C.J. p 459 note 12.

11. Kan.—Cheney v. Hovey, 44 P. 605, 56 Kan. 637.
34 C.J. p 459 note 13.

12. Ark.—Smith v. Thomas, 78 S.W. 2d 380, 190 Ark. 261.
Ill.—Moore v. Robbins Machinery & Supply Co., 252 Ill.App. 24.
Ky.—Nicholson v. Ausmus, 132 S. W.2d 748, 280 Ky. 99.
Tex.—Corcanges v. Childress, Civ. App., 280 S.W. 392.
34 C.J. p 459 note 15, p 440 note 82 [a].
Payment or satisfaction of judgment see supra § 355.

Conveyance to mortgagee in satisfaction of debt

In foreclosure proceedings where mortgagors were served with summons and failed to interpose defense to the suit, mortgagor could not thereafter have the decree of foreclosure set aside on ground of alleged conveyance to mortgagee in satisfaction of debt prior to rendition of decree.—White v. Milburn, 122 S.W.2d 589, 197 Ark. 373.

13. N.Y.—Vilas v. Jones, 1 N.Y. 274, How.A.Cas. 759.

14. Tex.—Alexander v. Baylor, 20 Tex. 560.
34 C.J. p 460 note 18.

15. Tex.—Browning-Ferris Machinery Co. v. Thomson, Civ.App., 55 S.W.2d 168.

16. Tex.—City Nat. Bank of Colorado, Tex., v. Gamel, Civ.App., 241 S.W. 735, affirmed Gamel v. City Nat. Bank, Com.App., 258 S.W. 1043.
34 C.J. p 456 note 58.

17. Ind.—Burke v. Pinnell, 93 Ind. 540.
34 C.J. p 456 note 53.

18. Va.—Hendricks v. Compton, 2 Rob. 192, 41 Va. 192.
34 C.J. p 456 note 60.

19. Minn.—Watkins v. Landon, 69 N.W. 711, 67 Minn. 136.
34 C.J. p 456 note 59.

20. Ohio.—Clark v. Bond, Wright p 282.

21. Fla.—Crum v. Baily, 134 So. 774, 135 Fla. 192.

22. Tex.—Southern Travelers Ass'n v. Stillman, Civ.App., 109 S.W.2d 285, error dismissed.

23. N.J.—Raimondi v. Bianchi, 140 A. 584, 102 N.J.Eq. 254.

24. N.C.—Partin v. Luterloh, 59 N. C. 341.
34 C.J. p 456 note 56.

25. Cal.—Brown v. Campbell, 43 P. 12, 110 Cal. 644.

26. Ala.—Moore v. Dial, 3 Stew. 155.

27. Tex.—Griffin v. Burrus, Civ. App., 24 S.W.2d 805, affirmed, Com. App., 24 S.W.2d 810.
34 C.J. p 456 note 54.

28. Ill.—Atwater v. American Exch. Nat. Bank, 40 Ill.App. 501, reversed on other grounds 38 N.E. 1017, 152 Ill. 605.

29. La.—Mahan v. Accommodation Bank, 26 La.Ann. 34.

30. Mont.—Schilling v. Reagan, 48 P. 1109, 19 Mont. 508.

feated;[31] that a credit to which he was entitled was not given to complainant;[32] that the issues on retrial of the original action were not limited in accordance with the decision of the appellate court;[33] and other defenses.[34]

§ 362. —— Equitable Defenses

Relief against a judgment at law may be had in equity on grounds constituting an equitable defense which could not have been interposed in the law action.

If a party's defense to an action at law is not within the cognizance of a court of law, being purely equitable in its nature, he is, of course, not chargeable with negligence in failing to make it effectual at law; and he may have relief in equity against the judgment, if it is unjust and inequitable, on the grounds constituting such defense.[35] The rule applies whether the party suffers judgment to go against him without attempting to make the defense,[36] or whether, on attempting it, it is adjudged to be purely equitable and not a defense to an action at law.[37] If defendant has both a legal and an equitable defense, the latter not cognizable at law, a failure to use diligence in making his legal defense will not prevent a court of equity from granting an injunction on proof of the equitable defense.[38]

Under codes of practice which blend legal and equitable powers, or confer extensive equitable powers on the courts of common law, it has been held that a defense, if available under the code, must be set up in the original action, and cannot be made the basis of a subsequent application to equity, although it is inherently equitable in its nature.[39]

§ 363. Excuses for Not Defending

Failure to interpose a defense will not bar equitable relief against a judgment where a sufficient excuse exists for such failure, provided the party asserting the excuse was not guilty of any fault or negligence.

Equity may grant relief against a judgment which is unjust and inequitable, where the party had a good defense to the action, but had no opportunity to avail himself of it, or lost such defense through the wrongful acts of the adverse party.[40] Thus

31. U.S.—Marine Ins. Co. of Alexandria v. Hodgson, D.C., 7 Cranch 332, 3 L.Ed. 362.
Tenn.—Thurmond v. Durham, 3 Yerg. 99.

32. Tenn.—Reeves v. Hogan, Cooke 175, 5 Am.D. 684, 1 Overt. 513.

33. Cal.—Harris v. Hensley, 6 P.2d 253, 214 Cal. 420.

34. Cal.—De Tray v. Chambers, 297 P. 575, 112 Cal.App. 697.
Iowa.—West v. Heyman, 241 N.W. 451, 214 Iowa 1173.
Mass.—Lynn Sand & Stone Co. v. Tardiff, 6 N.E.2d 349, 296 Mass. 470.
Mo.—McFadin v. Simms, 273 S.W. 1050, 309 Mo. 312.
Pa.—Graham Roller Bearing Corporation v. Stone, 126 A. 235, 281 Pa. 229.
Tex.—Blackman v. Blackman, Civ. App., 128 S.W.2d 433, error dismissed, judgment correct.
34 C.J. p 456 note 72.

Remarriage of widow
Equity will not grant relief against judgment for death of husband because widow did not disclose fact of remarriage, where matter was available in law action.—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115.

Agreement to cancel notes
Where defendant, in an action to enforce payment of notes, failed to set up his defense that plaintiff had agreed to cancel notes, he could not afterward apply to a court of equity for an injunction to restrain enforcement of a judgment rendered in such action, and in such proceeding assert that defense.—Corcanges v. Childress, Tex.Civ.App., 264 S.W. 175.

Severance of coupons from bonds
The rule has been applied to a defense that coupons which complainant had contracted to buy were invalid because they were severed from the bonds before issuance.—McMullen v. Ritchie, C.C.Ohio, 64 F. 253, modified on other grounds 79 F. 522, 25 C.C.A. 50, certiorari denied 18 S.Ct. 945, 168 U.S. 710, 42 L.Ed. 1212.

Claim of reinsurer against insurer
In insured's action against reinsurers after insurer's insolvency, reinsurer who failed to plead claim against insurer waived it as defense against insured.—Southern Surety Co. v. Globe Nat. Fire Ins. Co., 228 N.W. 56, 210 Iowa 359.

35. U.S.—Coos Bay Lumber Co. v. Collier, C.C.A.Or., 104 F.2d 722—Town of Boynton v. White Const. Co., C.C.A.Fla., 64 F.2d 190—Jenner v. Murray, C.C.A.Fla., 32 F.2d 625—Mineral Development Co. v. Kentucky Coal Lands Co., D.C.Ky., 285 F. 761, affirmed, C.C.A., 285 F. 1021.
Ga.—Simmons v. Camp, 65 Ga. 673.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56—Meyer v. Surkin, 262 Ill.App. 83—Peck v. Peck, 238 Ill.App. 396.
N.J.—Palisade Gardens v. Grosch, 189 A. 622, 121 N.J.Eq. 240.
Or.—Adams v. McMickle, 158 P.2d 648.
34 C.J. p 456 note 73.
Equitable defenses as barred under doctrine of res judicata see infra § 683.

Partly executed accord
Equitable relief based on a partly executed accord was not foreclosed by judgment in the law court, as in that court the defense of a partly executed accord was unavailable.—American Mut. Liability Ins. Co. v. Volpe, C.C.A.N.J., 284 F. 75.

A claim constituting in effect a recoupment rather than an equitable defense does not justify equitable relief under a statute permitting a defendant, who has failed to set up an equitable defense, thereafter to seek equitable relief.—McGhee v. Stevens, 3 S.E.2d 615, 121 W.Va. 430.

36. Ill.—Meyer v. Surkin, 262 Ill. App. 83.
34 C.J. p 457 note 74.

37. N.J.—Palisade Gardens v. Grosch, 189 A. 622, 121 N.J.Eq. 240.
34 C.J. p 457 note 75.

38. Tenn.—Winchester v. Gleaves, 3 Hayw. 213—Cornelius v. Thomas, 1 Tenn.Ch. 283.

39. U.S.—**Corpus Juris cited in** Coos Bay Lumber Co. v. Collier, C.C.A.Or., 104 F.2d 722, 725.
34 C.J. p 457 note 76.

Equitable matters available in partition proceedings
Equity will not enjoin a judgment for partition at law to enable defendant to set up equitable matters as to which complete relief could be had in the proceedings at law.—Hopkins v. Medley, 99 Ill. 509.

40. Ala.—Wise v. Miller, 111 So. 913, 215 Ala. 660.
Fla.—Sommers v. Colourpicture Pub., 8 So.2d 281, 150 Fla. 659.
Ky.—Johnson v. Gernert Bros. Lumber Co., 75 S.W.2d 357, 255 Ky. 734.

equity may relieve against a judgment at law where the defense could not have been set up at law,[41] as where payment or settlement was made after the institution of the suit and was not then pleadable.[42] A judgment may be enjoined if, according to the jurisdiction of a court of common law, it is doubtful whether the grounds of plaintiff's defense were legally available,[43] or if there would have been great difficulty and embarrassment in complainant's legal remedy,[44] especially where such difficulty and embarrassment were produced by the conduct of defendant.[45]

The party asserting the excuse must have been without fault as to the rendition of the judgment and must have exercised due diligence, for a court of equity will not grant relief against a judgment in a former action when the failure to have a full and fair presentation of the case therein resulted from the negligence or fault of the party seeking relief or that of his agents.[46] As a rule it must appear that, notwithstanding the exercise of ordinary diligence, the circumstances on which the complaining party relies were unknown to him before judgment.[47] A defendant is not justified in failing to

Mich.—Lake v. North Branch Tp., 22 N.W.2d 248.
N.J.—Commercial Nat. Trust & Savings Bank of Los Angeles v. Hamilton, 133 A. 703, 99 N.J.Eq. 492, affirmed 137 A. 403, 101 N.J.Eq. 249.
Tex.—Peaslee-Gaulbert Corporation v. Hughes, Civ.App., 79 S.W.2d 149, error refused—Kerby v. Hudson, Civ.App., 13 S.W.2d 724.
34 C.J. p 460 notes 19, 20.
Gambling contract see supra § 361.

Reasonableness of attorney's charges

Where a client has not had an opportunity in a court of law to test the reasonableness or fairness of his attorney's charges, he will not be precluded in equity from so doing.—Raimondi v. Bianchi, 134 A. 866, 100 N.J.Eq. 238.

41. Ill.—Hawkins v. Harding, 81 N. E. 307, 141 Ill. 572, 33 Am.S.R. 347.
34 C.J. p 459 note 8, p 460 notes 16, 19 [a].

Compromise with joint tort-feasor

Defendant tort-feasor's failure to present plaintiff's compromise with another joint tort-feasor in damage action was held not to bar presentment thereof in subsequent proceeding to prohibit enforcement of judgment, where, under the statutes, the compromise was not defense in damage action.—New River & Pocahontas Consol. Coal Co. v. Eary, 174 S.E. 573, 115 W.Va. 46.

Defense originating after rendition of judgment

It has been said to be poor practice to open a judgment, to establish a defense which has originated since the rendition of the judgment; but when the subject matter of defense is attached to the judgment or to the consideration on which it rests, the court under its equitable powers will entertain a petition and, if the facts warrant, will open the judgment.—Pollard & Brant, Inc., v. Stein, 31 Pa.Super. 374.

42. Ohio.—Southern Surety Co. v. Bender, 180 N.E. 198, 41 Ohio App. 541.

43. Va.—Crawford v. Thurmond, 3 Leigh 85, 30 Va. 85.
34 C.J. p 460 note 22.

44. Tenn.—Cornelius v. Morrow, 12 Heisk. 630.
34 C.J. p 460 note 23.

45. Tenn.—Bedford v. Brady, 10 Yerg. 350.

46. U.S.—McIntosh v. Wiggins, C.C. A.Mo., 123 F.2d 316, certiorari denied 62 S.Ct. 800, 315 U.S. 815, 86 L.Ed. 1213, rehearing denied 62 S. Ct. 914, 315 U.S. 831, 86 L.Ed. 1224—Smith v. Apple, C.C.A.Kan., 6 F.2d 559.
Ala.—Leath v. Lister, 173 So. 59, 233 Ala. 595—Oden v. King, 114 So. 1, 216 Ala. 597—Damon v. Gaston, Williams & Wigmore, 104 So. 512, 213 Ala. 164—Alabama Chemical Co. v. Hall, 101 So. 456, 212 Ala. 8.
Cal.—Wattson v. Dillon, 56 P.2d 220, 6 Cal.2d 33—Wilson v. Wilson, 130 P.2d 782, 55 Cal.App.2d 421—Jeffords v. Young, 277 P. 163, 98 Cal. App. 400.
Conn.—Palverari v. Finta, 26 A.2d 229, 129 Conn. 38.
Ga.—Beavers v. Cassells, 196 S.E. 716, 186 Ga. 93—W. T. Rawleigh Co. v. Seagraves, 173 S.E. 167, 178 Ga. 459—Garrison v. Toccoa Electric Power Co., 171 S.E. 564, 177 Ga. 850, followed in Hayes v. Toccoa Electric Power Co., 171 S.E. 566, 177 Ga. 856—Nolan v. Southland Loan & Investment Co., 169 S.E. 370, 177 Ga. 59—Beddingfield v. Old Nat. Bank & Trust Co., 165 S.E. 61, 175 Ga. 172.
Idaho.—Boise Payette Lumber Co. v. Idaho Gold Dredging Corporation, 58 P.2d 786, 56 Idaho 660, certiorari denied 57 S.Ct. 40, 299 U.S. 577, 81 L.Ed. 425.
Ill.—Crane Co. v. Parker, 136 N.E. 733, 304 Ill. 331—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56—Goelitz v. Lathrop, 3 N.E.2d 305, 286 Ill.App. 248.
Ind.—Vail v. Department of Financial Institutions of Indiana, 17 N. E.2d 854, 106 Ind.App. 39—Branham v. Boruff, 145 N.E. 901, 82 Ind.App. 370.
Ky.—Byron v. Evans, 91 S.W.2d 548, 268 Ky. 49—Mussman v. Pepples, 49 S.W.2d 592, 243 Ky. 674—Lee v. Lee, 38 S.W.2d 223, 238 Ky. 477.
Mo.—Millikin v. Anderson, 269 S.W. 675.
N.J.—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115.
Ohio.—Buckeye State Building & Loan Co. v. Ryan, 157 N.E. 811, 24 Ohio App. 481.
Tex.—Kelly v. Wright, Sup., 188 S. W.2d 983—Petty v. Mitchell, Civ. App., 187 S.W.2d 138, error refused—Thomas v. Mullins, Civ.App., 175 S.W.2d 276—Donovan v. Young, Civ.App., 127 S.W.2d 517, error refused—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed—Ricketts v. Ferguson, Civ.App., 64 S.W.2d 416, error refused—Honey v. Wood, Civ.App., 46 S.W.2d 334—Davis v. Cox, Civ.App., 4 S.W.2d 1008, error dismissed—Kahl v. Porter, Civ. App., 296 S.W. 324—R. A. Toombs Sash & Door Co. v. Jamison, Civ. App., 271 S.W. 253—Levine v. Cullum Boren Co., Civ.App., 253 S.W. 894.
Utah.—Anderson v. State, 238 P. 557, 65 Utah 512.
Wash.—Fisch v. Marler, 97 P.2d 147, 1 Wash.2d 698.
Wis.—Grady v. Meyer, 236 N.W. 569, 205 Wis. 147.
21 C.J. p 86 note 17—34 C.J. p 460 note 20—47 C.J. p 438 notes 80, 81.

Failure to present evidence

Fact that existing evidence was not presented because of accident, mistake, or misfortune is not sufficient reason for revocation of final decree in equity suit.—Holyoke Nat. Bank v. Dulitzky, 173 N.E. 405, 273 Mass. 125.

Negligence induced by adverse party

Alleged negligence of the complaining party superinduced by negligence of the party opposing relief cannot be invoked to estop the former to set aside judgment.—Overton v. Overton, 37 S.W.2d 565, 327 Mo. 530.

47. Mich.—Lake v. North Branch Tp., 22 N.W.2d 248.
N.J.—Commercial Nat. Trust & Savings Bank of Los Angeles v. Ham-

present his defense at law simply because plaintiff verbally assures him that he will not be held responsible according to the terms of the judgment prayed for.[48] Equity will not enjoin a judgment where the only reason alleged for the failure of defendant to avail himself of a legal defense is an erroneous ruling of the trial court excluding such defense, for this is to be remedied by appeal.[49]

Availability of evidence at law. Where defendant cannot make good his defense, because the only evidence to sustain it is not admissible or cannot be produced in a court of law, but can be supplied in equity, he may be relieved against the judgment.[50] Relief will not be granted, however, where the same grounds of objection to the proposed evidence are equally prohibitive in equity as at law.[51]

Reliance on advice, statements, or acts of others. It is not a sufficient excuse for failing to defend an action at law that the party relied on others, who were not officially bound to give him correct information or any information at all, to advise him concerning the character or purpose of the suit, the necessity of defending it, the progress of the cause, or its probable time of trial.[52] An exception to the rule has been made in the case of executors and administrators, who are obliged, from the nature of their office, to rely on the information of others.[53] It has been held that one of two defendants has the right to rely on the assurance of the other that he will take care of the matter.[54] A party is not at fault for assuming that commissioners making a partition acted impartially.[55]

§ 364. —— Ignorance of Facts or Law

A party's ignorance of facts which constitute a defense, and which he could not have discovered by the exercise of due diligence, may furnish a ground for equitable relief against a judgment; but ignorance of the law generally will afford no ground for equitable interference.

Equity may grant relief against a judgment at law, where there was a good and valid defense to the action, of which defendant was ignorant during the pendency of the original action, and which he could not have discovered, by the exercise of reasonable and proper diligence, in time to set it up.[56] However, he must show the exercise of due diligence to discover his defense, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his own part; otherwise equity will do nothing for him.[57] Although a party may have suspected the existence of a fact which would have given him a good defense to the action at law, this will not preclude him from relief in equity, if his suspicions did not amount to legal or moral certainty, and if he is not chargeable with laches in failing to make efforts to discover the truth.[58]

Special favor to administrators. Some courts are disposed to show special indulgence in this particular to administrators, on the ground that they are obliged, from the nature of their office, to rely on the information which they may derive from others.[59]

Necessity of seeking discovery. If defendant in an action at law could obtain information concern-

ilton, 133 A. 703, 99 N.J.Eq. 492, affirmed 137 A. 403, 101 N.J.Eq. 249.
W.Va.—Smith Pocahontas Coal Co. v. Morrison, 117 S.E. 152, 93 W.Va. 356.

48. Ala.—Weakley v. Gurley, 60 Ala. 399—Wilson v. Randall, 37 Ala. 74, 76 Am.D. 347.

49. U.S.—Griswold v. Hazard, R.I., 11 S.Ct. 972, 999, 141 U.S. 260, 35 L.Ed. 678.
34 C.J. p 460 note 21.

50. Iowa.—Partridge v. Harrow, 27 Iowa 96, 99 Am.D. 643.
34 C.J. p 461 note 33.

51. U.S.—Hendrickson v. Hinckley, Ohio, 17 How. 443, 15 L.Ed. 128.
34 C.J. p 462 note 34.

52. Ky.—Hoover v. Dudley, 14 S.W. 2d 410, 228 Ky. 110.
34 C.J. p 465 note 75.
Character of process
Failure of debtor to appear and assert defense in response to summons served on him, because person serving process told him it was subpœna to appear as witness, is not sufficient ground to set aside judgment against him.—Brinegar v. Bank of Wyoming, 130 S.E. 151, 100 W.Va. 64.
Availability of remedy in another proceeding
In action by maker of a note against surety thereon, court's statement in opinion that equities between makers and surety could be worked out in another proceeding did not excuse surety's failure to set up prima facie defense to such action, so as to authorize equitable relief. —Graham Roller Bearing Corporation v. Stone, 126 A. 235, 281 Pa. 229.

53. N.Y.—Hewlett v. Hewlett, 4 Edw. 7.

54. Va.—Lee v. Baird, 4 Hen. & M. 453, 14 Va. 453.
34 C.J. p 465 note 77.

55. Mich.—Adair v. Cummin, 12 N. W. 495, 48 Mich. 375.

56. Ga.—Young v. Young, 2 S.E.2d 622, 188 Ga. 29.
Ill.—Tabero v. Stutkowski, 3 N.E.2d 115, 286 Ill.App. 225.
Tex.—Walker v. State, Civ.App., 103 S.W.2d 404.
34 C.J. p 460 notes 20, 25.
Death of principal
Judgments rendered against sureties on bonds without knowledge that principal was dead at time of forfeitures were subject to review by bill of review.—Walker v. State, Tex. Civ.App., 103 S.W.2d 404.

57. Ga.—W. T. Rawleigh Co. v. Seagraves, 173 S.E. 167, 178 Ga. 459.
Tex.—American Red Cross v. Longley, Civ.App., 165 S.W.2d 233, error refused.
34 C.J. p 461 note 26.
Fraud preventing defense see infra § 372.

58. Va.—West v. Logwood, 6 Munf. 491, 20 Va. 491.

59. N.Y.—Hewlett v. Hewlett, 4 Edw. 7.
34 C.J. p 456 note 52.

ing the facts which constitute his defense, and which are necessary to make his defense effectual, by the aid of a bill in equity for a discovery from the adverse party, his failure to avail himself of this means of information will preclude him from afterward obtaining an injunction against the judgment.[60]

Ignorance of the law, of the nature or consequences of the action, or of the party's legal rights and duties, will generally afford no ground for equitable interference.[61] However, in some cases it has been held that ignorance of the unconstitutionality of an act is excusable, and that mistake caused by proceeding under such a law is a ground for relief.[62] A party cannot be permitted to defeat a judgment on the ground that he did not understand the legal effect of papers served on him.[63]

§ 365. —— Mistake or Surprise

a. Mistake
b. Surprise

a. Mistake

An honest, mutual, and extrinsic mistake of fact which deprives a party of an opportunity to present his case affords ground for equitable relief against a judgment. A mistake of law, however, ordinarily is not sufficient.

While in a proper case equity may grant relief against a judgment on the ground of mistake,[64] a mere showing of a mistake of some kind is not of itself sufficient to justify such relief.[65] The mistake must be one of fact;[66] usually it must relate to matters which prevented a party from making a valid defense,[67] and it must be unmixed with the fault, negligence, or laches of the injured party.[68]

60. Ala.—Standard Coal Co. v. Weisel, 74 So. 935, 199 Ala. 468.
34 C.J. p 461 note 32.

61. Idaho.—**Corpus Juris cited in** Scanlon v. McDevitt, 296 P. 1016, 1017, 50 Idaho 449.
Mont.—Federal Land Bank of Spokane v. Gallatin County, 274 P. 288, 84 Mont. 98.
Ohio.—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871.
Tex.—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed.
34 C.J. p 461 note 29.
Mistake of law see infra § 365.

62. Tex.—Cobbs v. Coleman, 14 Tex. 594.
34 C.J. p 461 note 30.

63. Cal.—Toler v. Smith, 23 P.2d 788, 133 Cal.App. 199.

64. U.S.—Russell v. Superior Journal Co., D.C.Wis., 47 F.Supp. 282.
Ala.—Phœnix Chair Co. v. Daniel, 155 So. 363, 228 Ala. 579.
Cal.—Wattson v. Dillon, 56 P.2d 220, 6 Cal.2d 33—Vincent v. Security-First Nat. Bank of Los Angeles, 155 P.2d 63, 67 Cal.App.2d 602—Wilson v. Wilson, 130 P.2d 782, 55 Cal.App.2d 421—Antonsen v. Pacific Container Co., 120 P.2d 148, 48 Cal.App. 535—Boyle v. Boyle, 276 P. 113, 97 Cal.App. 703.
Conn.—Hoey v. Investors' Mortgage & Guaranty Co., 171 A. 438, 118 Conn. 226.
Ga.—Bailey v. McElroy, 2 S.E.2d 634, 188 Ga. 40, transferred, see 6 S.E.2d 140, 61 Ga.App. 367.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56—Izzi v. Ialongo, 248 Ill.App. 50.
Ind.—Globe Mining Co. v. Oak Ridge Coal Co., 177 N.E. 868, 204 Ind. 11—Livengood v. Munns, 27 N.E.2d 92, 108 Ind.App. 27.
Mass.—Byron v. Concord Nat. Bank, 13 N.E.2d 13, 299 Mass. 438.
Miss.—Robertson v. Ætna Ins. Co., 98 So. 833, 134 Miss. 398.
Mo.—Overton v. Overton, 37 S.W.2d 565, 327 Mo. 530—Krashin v. Grizzard, 31 S.W.2d 984, 326 Mo. 606—Loveland v. Davenport, App., 188 S.W.2d 850.
N.H.—Lancaster Nat. Bank v. Whitefield Sav. Bank & Trust Co., 30 A.2d 473, 92 N.H. 337—Lamarre v. Lamarre, 152 A. 272, 84 N.H. 441.
Ohio.—Young v. Guella, 35 N.E.2d 997, 67 Ohio App. 11—In re Vanderlip's Estate, 12 Ohio Supp. 123.
Tenn.—Winters v. Allen, 62 S.W.2d 51, 166 Tenn. 281—Tallent v. Sherrell, 184 S.W.2d 561, 27 Tenn.App. 683.
Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Love v. State Bank & Trust Co. of San Antonio, 90 S.W.2d 819, 126 Tex. 591—Petty v. Mitchell, Civ.App., 187 S.W.2d 138, error refused—Peaslee-Gaulbert Corporation v. Hughes, Civ.App., 79 S.W.2d 149, error refused—Kerby v. Hudson, Civ.App., 13 S.W.2d 724—Hudson v. Kerby, Civ.App., 5 S.W.2d 1007—Rachel v. Bland, Civ.App., 259 S.W. 230—Galloway v. Marietta State Bank, Civ.App., 258 S.W. 532, reversed on other grounds Marietta State Bank v. Galloway, Com.App., 269 S.W. 776.
34 C.J. p 440 note 77, p 460 note 20.

Rights of third persons

An independent suit in equity may be brought to correct an unjust judgment on the ground of mistake, if the rights of others have not intervened.—Ramsey v. McKamey, 152 S.W.2d 322, 137 Tex. 91.

Mistake held not shown

U.S.—McIntosh v. Wiggins, C.C.A. Mo., 123 F.2d 316, certiorari denied 62 S.Ct. 800, 315 U.S. 815, 86 L.Ed. 1213, rehearing denied 62 S.Ct. 914, 315 U.S. 831, 86 L.Ed. 1224.

65. Cal.—De Tray v. Chambers, 297 P. 575, 112 Cal.App. 697.
Ky.—Mussman v. Pepples, 49 S.W.2d 592, 243 Ky. 674—Lee v. Lee, 38 S.W.2d 223, 238 Ky. 477.
Tex.—Kelly v. Wright, Sup., 188 S.W.2d 983—Maytag Southwestern Co. v. Thornton, Civ.App., 20 S.W.2d 383, error dismissed—Davis v. Cox, Civ.App., 4 S.W.2d 1008, error dismissed.

Availability of funds to satisfy claim

The surety on a replevy bond of a defendant was held not entitled to have a judgment against him on the bond set aside on the ground of mistake based on a claim that he was induced to sign the bond by a representation that defendant had deposited with the attorney sufficient funds to satisfy the note and mortgage involved, and that after judgment was entered the money was returned to defendant without the surety's knowledge or consent, in the absence of anything connecting plaintiff with the transaction.—Reeves v. Chapman, Tex.Civ.App., 19 S.W.2d 132.

66. Miss.—Robertson v. Ætna Ins. Co., 98 So. 833, 134 Miss. 398.

67. Tex.—Metropolitan Life Ins. Co. v. Pribble, Civ.App., 130 S.W.2d 332, error refused.

68. Cal.—Wilson v. Wilson, 130 P.2d 782, 55 Cal.App.2d 421.
Conn.—Hoey v. Investors' Mortgage & Guaranty Co., 171 A. 438, 118 Conn. 226.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56.
Mo.—Gorg v. Rutherford, App., 31 S.W.2d 585.
N.H.—Lancaster Nat. Bank v. Whitefield Sav. Bank & Trust Co., 30 A.

As the rule is sometimes expressed, a mistake of fact, provided it is honest and genuine, and such as a man might reasonably make, will be a sufficient excuse for not defending an action at law, and will warrant a court of equity, if the judgment is against conscience, in enjoining its enforcement.[69] The mistake relied on as a ground for equitable relief against a judgment must be a mutual mistake,[70] or a unilateral mistake of the complaining party coupled with some act of the opposing party which brings about the mistake.[71] The mistake must be extrinsic rather than intrinsic.[72]

Mistake of law. It is no ground for relief in equity that the party was prevented from making his defense at law by a mistake of law, not induced by the fraud or misconduct of the other party,[73] or by reason of mistaking or misunderstanding his rights in the premises.[74] This is true even where the mistake is due to an erroneous statement made by the trial judge.[75] Relief, however, may be decreed in cases of mistakes in law induced by the fraud or circumvention of the party profiting thereby[76] or where there are other facts sufficient to take the case out of the general rule.[77]

Mistake of court officers. Relief is sometimes granted for mistake made by officers of the court,[78] at least when the mistake is of a ministerial rather than a judicial character.[79]

b. Surprise

Equity may grant relief against a judgment on the ground of surprise unmixed with negligence on the part of the complaining party; but surprise caused by the evidence given at the trial, and against which the injured party could have protected himself by proper care, is insufficient.

Equity may relieve a party from a judgment obtained against him by surprise,[80] especially where the facts constituting the surprise are tantamount to a perpetration of fraud by the opposite party.[81] Thus a party will be entitled to equitable relief

2d 473, 92 N.H. 337—Lamarre v. Lamarre, 152 A. 272, 84 N.H. 441.
Tex.—American Law Book Co. v. Chester, Civ.App., 110 S.W.2d 950, error dismissed.
34 C.J. p 462 note 37, p 460 note 20.

69. Ala.—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677.
34 C.J. p 462 note 35.

70. Ind.—Wohadlo v. Fary, 46 N.E. 2d 489, 221 Ind. 219—Livengood v. Munns, 27 N.E.2d 92, 108 Ind.App. 27.
Miss.—Robertson v. Ætna Ins. Co., 98 So. 833, 134 Miss. 398.
Mo.—Gorg v. Rutherford, App., 31 S.W.2d 585.
Tex.—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed.
34 C.J. p 462 note 36.

71. Tex.—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed.

Fraudulent concealment or inequitable conduct

Relief from consent decree, entered as result of unilateral mistake induced by fraudulent concealment of facts by party against whom relief is sought, is available; but in absence of such concealment or other inequitable conduct, relief is not available.—Mudd v. Lanier, Ala., 24 So.2d 550.

72. Cal.—Hallett v. Slaughter, 140 P.2d 3, 22 Cal.2d 552—Westphal v. Westphal, 126 P.2d 105, 20 Cal.2d 393—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328—Rogers v. Mulkey, 147 P.2d 62, 63 Cal.App.2d 567—Antonsen v. Pacific Container Co., 120 P.2d 148, 48 Cal.App.2d 535.

A mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court.—Westphal v. Westphal, 126 P.2d 105, 20 Cal.2d 393—Rogers v. Mulkey, 147 P.2d 62, 63 Cal.App.2d 567—Rosenbaum v. Tobias' Estate, 130 P.2d 215, 55 Cal.App.2d 39.

73. Ariz.—Snyder v. Betsch, 130 P. 2d 510, 59 Ariz. 535.
Kan.—Bitsko v. Bitsko, 122 P.2d 753, 155 Kan. 80.
Mich.—Barr v. Payne, 298 N.W. 460, 298 Mich. 85.
Mont.—Federal Land Bank of Spokane v. Gallatin County, 274 P. 288, 84 Mont. 98.
N.M.—Caudill v. Caudill, 44 P.2d 724, 39 N.M. 248.
Tex.—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed.
34 C.J. p 462 note 38.

Time for perfecting appeal

A mistake of law as to the time in which an appeal could be perfected is not a ground for relief.—Wardlow v. McGhee, 63 S.W.2d 332, 187 Ark. 955.

74. Or.—French v. Goin, 146 P. 91, 75 Or. 255.
34 C.J. p 462 note 39.

75. Mo.—Risher v. Roush, 2 Mo. 95, 22 Am.D. 442.
Mistake of court see supra § 356.

Opinions or suggestions of judge

In the absence of some element of fraud or misconduct on the part of the adverse party, equity will not interpose to vacate or enjoin a judgment on the ground of a mistake of law caused by opinions or suggestions of the judge before whom the cause was tried.—Universal Credit Co. v. Cunningham, Tex.Civ.App., 109 S.W.2d 507, error dismissed.

76. Ala.—Jones v. Watkins, 1 Stew. 81.
Ill.—Paine v. Doughty, 96 N.E. 212, 251 Ill. 396.

77. U.S.—Wellman v. Bethea, S.C., 228 F. 382, 143 C.C.A. 280.
34 C.J. p 462 note 42.

78. Ind.—Livengood v. Munns, 27 N.E.2d 92, 108 Ind.App. 27.
Mo.—Anderson Motor Co. v. Sterling, App., 121 S.W.2d 275, opinion quashed on other grounds State ex rel. Sterling v. Shain, 129 S.W.2d 1048, 344 Mo. 891—State ex rel. Woolman v. Guinotte, 282 S.W. 68, 221 Mo.App. 466.

Failure to mark motion as filed

Where motion to stay proceedings was actually filed, but through mistake of clerk was not marked as filed, default judgment thereafter taken against party having meritorious defense could be set aside in equity.—Krashin v. Grizzard, 31 S.W.2d 984, 326 Mo. 606.

79. Mo.—State ex rel. Woolman v. Guinotte, 282 S.W. 68, 221 Mo. App. 466.

80. Ala.—Craft v. Hirsh, 149 So. 683, 227 Ala. 257, appeal dismissed 54 S.Ct. 455, 291 U.S. 644, 78 L. Ed. 1041.
Conn.—Hoey v. Investors' Mortgage & Guaranty Co., 171 A. 438, 118 Conn. 226.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56.
Ind.—Globe Mining Co. v. Oak Ridge Coal Co., 177 N.E. 868, 204 Ind. 11.
Mass.—Byron v. Concord Nat. Bank, 13 N.E.2d 13, 299 Mass. 438.
34 C.J. p 462 note 46, p 460 note 20.

81. N.Y.—Post v. Boardman, 10 Paige 580.
34 C.J. p 462 note 47.

where he had no knowledge of the suit until after judgment had been obtained,[82] where a party for good and sufficient reasons, and without any negligence or inattention, believes that his case will not be reached for trial during the current term or within a certain time, but nevertheless it is called and he is defaulted,[83] or where at a subsequent day of the term judgment was taken in a litigated case, defendant and his counsel having in the meantime left the court, relying on an order of continuance of all cases until the next term.[84] On the other hand, an injunction will not be allowed where the surprise relied on was such as might reasonably have been guarded against,[85] where the party has a remedy in the trial court,[86] or where the surprise was occasioned by his own negligence or lack of care or attention.[87]

Surprise caused by evidence or witnesses. Relief in equity against a judgment ordinarily cannot be had on the ground of surprise caused by the absence of a witness from the trial,[88] by the unexpected character of the testimony given by a witness,[89] by the introduction of unanticipated evidence,[90] or by a discovery that a witness who was relied on to testify is incompetent or privileged,[91] at least where the party could have guarded himself against such a surprise by the exercise of proper care and vigilance.[92] However, where a witness who immediately before the trial assured defendant that he could prove material facts either designedly or from lapse of memory failed to do so, equity will grant relief.[93]

§ 366. —— Accident or Misfortune

Accident or misfortune, such as that preventing a party or his counsel from attending the trial, may afford ground for equitable interference with a judgment, provided the accident or misfortune was unavoidable and not attributable in any way to the fault of the party seeking relief.

Unavoidable accident, misfortune, or casualty preventing the party from making his defense is sufficient ground for the interference of equity in an otherwise meritorious case.[94] However, it must appear that the accident, casualty, or misfortune was in fact unavoidable or in no way attributable to the negligence or lack of diligence of the party seeking equitable relief,[95] and relief will not be

82. Va.—Mosby v. Haskins, 4 Hen. & M. 427, 14 Va. 427.
83. Vt.—Weed v. Hunt, 56 A. 980, 76 Vt. 212.
34 C.J. p 463 note 49.
84. Mo.—Beck v. Jackson, 140 S.W. 919, 160 Mo.App. 427.
34 C.J. p 463 note 50.
85. Iowa.—Finch v. Hollinger, 47 Iowa 173.
34 C.J. p 463 note 51.
86. U.S.—Crim v. Handley, Ga., 94 U.S. 652, 24 L.Ed. 216.
Minn.—Wieland v. Shillock, 23 Minn. 227.
87. Ky.—Logan v. Outen, 4 Bibb 399.
34 C.J. p 463 note 53.

Sale of property to complaining party's agent

Defendants could not, on petition to open foreclosure decree pro confesso, complain of surprise in inadequacy of price of the property, which was sold to their agent.—Etz v. Weinmann, 150 A. 436, 106 N.J.Eq. 209.

88. U.S.—Chapman v. Scott, C.C.D. C., 5 F.Cas.No.2,609, 1 Cranch C.C. 302.
34 C.J. p 463 note 54.
89. Ill.—Bell v. Gardner, 77 Ill. 319.
34 C.J. p 463 note 55.
90. U.S.—Hendrickson v. Hinckley, Ohio, 17 How. 443, 15 L.Ed. 123.
34 C.J. p 463 note 56.
91. Ill.—Abrams v. Camp, 4 Ill. 290.
92. U.S.—Hendrickson v. Hinckley, Ohio, 17 How. 443, 15 L.Ed. 123.
34 C.J. p 463 note 58.
93. Va.—White v. Washington, 5 Gratt. 645, 46 Va. 645.
94. U.S.—Town of Boynton v. White Const. Co., C.C.A.Fla., 64 F.2d 190—Jenner v. Murray, C.C.A.Fla., 32 F.2d 625—Russell v. Superior Journal Co., D.C.Wis., 47 F.Supp. 282.
Ark.—United Order of Good Samaritans v. Bryant, 57 S.W.2d 399, 186 Ark. 960, certiorari denied 54 S. Ct. 59, 290 U.S. 641, 78 L.Ed. 557.
Cal.—Hallett v. Slaughter, 140 P. 2d 3, 22 Cal.2d 552.
Conn.—Hoey v. Investors' Mortgage & Guaranty Co., 171 A. 438, 118 Conn. 226.
Fla.—Sommers v. Colourpicture Pub., 8 So.2d 281, 150 Fla. 659.
Ga.—Bailey v. McElroy, 2 S.E.2d 634, 188 Ga. 40, transferred, see 6 S. E.2d 140, 61 Ga.App. 367—Young v. Young, 2 S.E.2d 622, 188 Ga. 29.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56—Izzi v. Ialongo, 248 Ill.App. 90.
Iowa.—Clarke v. Smith, 192 N.W. 136, 195 Iowa 1299.
Mass.—Byron v. Concord Nat. Bank, 13 N.E.2d 13, 299 Mass. 438.
Miss.—Robertson v. Ætna Ins. Co., 98 So. 833, 134 Miss. 398.
Mo.—Krashin v. Grizzard, 31 S.W.2d 984, 326 Mo. 606—Boeckmann v. Smith, App., 189 S.W.2d 449—Loveland v. Davenport, App., 188 S.W. 2d 850—State ex rel. Woolman v. Guinotte, 282 S.W. 68, 221 Mo. App. 466.
Tenn.—Winters v. Allen, 62 S.W.2d 51, 166 Tenn. 281—Tallent v. Sherrell, 184 S.W.2d 561, 27 Tenn.App. 683.
Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Love v. State Bank & Trust Co. of San Antonio, 90 S.W.2d 819, 126 Tex. 591—Petty v. Mitchell, Civ.App., 187 S.W.2d 138, error refused—American Law Book Co. v. Chester, Civ.App., 110 S.W.2d 950, error dismissed—Peaslee-Gaulbert Corporation v. Hughes, Civ.App., 79 S.W.2d 149, error refused—Kerby v. Hudson, Civ.App., 13 S.W.2d 724—Hudson v. Kerby, Civ.App., 5 S.W.2d 1007—Rachel v. Bland, Civ.App., 259 S. W. 230—Galloway v. Marietta State Bank, Civ.App., 258 S.W. 532, reversed on other grounds Marietta State Bank v. Galloway, Com. App., 269 S.W. 776.
34 C.J. p 463 note 60, p 440 note 77, p 460 note 20.
95. Ark.—Lambie v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019.
Ky.—Mason v. Lacy, 117 S.W.2d 1026, 274 Ky. 21—Elkhorn Coal Corporation v. Cuzzort, 284 S.W. 1005, 215 Ky. 254.
34 C.J. p 464 note 63.

Unavoidable casualty or misfortune held not shown

(1) Neglect of a party and his attorney in failing to examine the record to determine whether the case had been stricken from the docket was held not to constitute an un-

granted on this ground where no counsel was employed, or witnesses summoned, or any other steps taken to defend the action.[96] Misunderstandings between counsel, or between counsel and clients, may constitute unavoidable casualty or misfortune justifying relief against a judgment.[97] It has been held that the required unavoidable casualty and misfortune has reference to the inability of a party to be present and participate in the proceedings, and has no application to the inability of a party to discover evidence necessary to constitute a defense.[98]

Absence or incapacity of counsel. The unavoidable or excusable absence of the party's attorney from the court at the time of the trial may in some circumstances entitle the party to relief in equity,[99] although the courts are not very much disposed to interfere on this account,[1] and will not do so where it appears that defendant could have saved himself by the timely employment of other counsel[2] or where he had another attorney in the case.[3] Equity will furnish relief where, without the knowledge or fault of a party, his attorney becomes physically or mentally incapacitated causing his acts or conduct to lead to damaging result so detrimental and unjust as to shock the conscience.[4]

Sickness of party or relative. The severe illness of defendant, or of a near relative, preventing him from attending the trial may be ground for relief in equity against the judgment,[5] provided his personal presence was necessary to the successful defense of the action,[6] and it appears that, had he been present, there would probably have been a different result and one more favorable to him.[7] However, a party in this situation must use diligence in endeavoring to prepare for the trial, employing counsel, summoning witnesses, asking for a continuance or for a new trial, or otherwise making suitable efforts to save himself; and, if he fails in this, equity will not relieve him.[8]

§ 367. —— Excusable Neglect

Excusable neglect, unmixed with any carelessness on the part of the complaining party, may justify equitable relief against a judgment.

Equity may relieve a party from a judgment taken against him through his excusable neglect.[9] However, if he has carelessly or foolishly omitted

avoidable casualty.—McCommas v. McCawley, 14 S.W.2d 1057, 228 Ky. 263.

(2) Where grantee of realty lent money to owner, took a warranty deed to realty, and pledged realty to secure grantee's debt, fact that when pledgee sued for foreclosure and served summons on owner, owner was informed by attorney that grantee would bid in the realty for owner's benefit, which grantee failed to do, did not constitute unavoidable casualty or misfortune preventing owner from defending, so as to entitle owner to vacation of foreclosure judgment.—Mason v. Lacy, 117 S.W.2d 1026, 274 Ky. 21.

(3) Where mortgagor and wife did not file answer to foreclosure suit and evidence showed that wife at time of service of summons on husband was not too ill to accept service and that illness did not take place until after summons was served on husband with whom copy of summons was left for wife, judgment of foreclosure would not be set aside on ground of unavoidable casualty.—White v. Milburn, 122 S.W.2d 589, 197 Ark. 373.

(4) Other cases.

U.S.—McIntosh v. Wiggins, C.C.A. Mo., 123 F.2d 316, certiorari denied 62 S.Ct. 800, 315 U.S. 815, 86 L.Ed. 1213, rehearing denied 62 S. Ct. 914, 315 U.S. 831, 86 L.Ed. 1224.

Tex.—Reeves v. Chapman, Civ.App., 19 S.W.2d 132.

96. Ky.—Mason v. Lacy, 117 S.W.2d 1026, 274 Ky. 21.
34 C.J. p 464 note 61.

Discharge of attorney

In suit to vacate judgment, record indicating that plaintiff had discharged his attorney after attorney had taken preliminary steps for an appeal precluded contention that plaintiff was prevented from appealing such judgment by reason of unavoidable casualty.—Fernow v. Gubser, Okl., 162 P.2d 529.

97. Ark.—Baskin v. Ætna Life Ins. Co., 79 S.W.2d 724, 190 Ark. 448.
Iowa.—Thoreson v. Central States Electric Co., 283 N.W. 253, 225 Iowa 1406.

98. Okl.—Burton v. Swanson, 285 P. 839, 142 Okl. 134.

Identification of allottee

The facts that an allottee was too young at the time he was enrolled to know who could identify him, that the witnesses to his enrollment were dead, and that he was unable to learn the names of individuals who could identify him as the allottee have been held not to constitute unavoidable casualty and misfortune justifying an attack on a judgment. —Burton v. Swanson, 285 P. 839, 142 Okl. 134.

99. Ga.—Pratt v. Rosa Jarmulowsky Co., 170 S.E. 365, 177 Ga. 522 —Eatonton Oil & Auto Co. v. Ledbetter, 163 S.E. 891, 174 Ga. 715.
34 C.J. p 464 note 64.

1. Ark.—Izard County v. Huddleston, 39 Ark. 107.
34 C.J. p 464 note 65.

2. Ky.—Elkhorn Coal Corporation v. Cuzzort, 284 S.W. 1005, 215 Ky. 254.
Tex.—Harrell v. Humphrey, Civ.App., 292 S.W. 920.
34 C.J. p 464 note 66.

3. Kan.—Brenneisen v. Phillips, 45 P.2d 867, 142 Kan. 98.
34 C.J. p 464 note 67.

4. Cal.—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400.

Serious illness of complainant's counsel, preventing his appearance at trial on fair presentation of case, may warrant equitable intervention to set aside judgment.—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400 —34 C.J. p 464 note 64 [a].

5. Mo.—Jackson v. Chestnut, 131 S. W. 747, 151 Mo.App. 275.
34 C.J. p 464 note 68.

6. Miss.—McDonald v. Myles, 20 Miss. 279.
34 C.J. p 464 note 69.

7. Ga.—McCall v. Miller, 47 S.E. 920, 120 Ga. 262.

8. Mich.—Kelleher v. Boden, 21 N. W. 346, 55 Mich. 295.
34 C.J. p 464 note 71.

9. Cal.—Wilson v. Wilson, 130 P.2d 782, 55 Cal.App.2d 421.
Or.—Hartley v. Rice, 261 P. 689, 123 Or. 237.
34 C.J. p 464 note 72.

Excuse held sufficient

In a suit to vacate and restrain

to attend to his case, to retain and instruct counsel, to gather his witnesses, or otherwise to prepare for the trial, he is in no position to invoke the aid of equity, and it will be refused.[10] If a litigant authorizes another to look after the defense of the action, the failure of such other person to employ an attorney or to take other proper and necessary measures will bar relief in equity in the absence of fraud.[11]

A distinction must be made between such neglect as is attributable solely to the party himself and such as is brought about by the improper or deceitful conduct of the other side; the former is not excusable, the latter sometimes is.[12]

§ 368. —— Negligence or Misconduct of Counsel

Negligence or misconduct of a party's counsel is generally attributable to the party himself, and ordinarily furnishes no ground for equitable relief against a judgment. Under some circumstances, however, as where the party has been betrayed by his attorney, or where the opposite party has caused the misconduct, relief against the judgment may be granted.

It is not sufficient ground for relief in equity that a judgment was obtained against a party in consequence of the neglect, inattention, mistake, or incompetence of his attorney,[13] unless it was caused

collection of a judgment entered by a real estate agent against a landowner for a commission for selling the land, letters written by the agent to the landowner to the effect that he was suing the one who had contracted to purchase, and that although the landowner would be a necessary party the suit could not hurt him, presented a sufficient excuse for failure of the landowner to appear and defend.—Walberg v. Rogers, Tex.Civ.App., 250 S.W. 297.

10. Ala.—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.
Cal.—Wattson v. Dillon, 56 P.2d 220, 6 Cal.2d 33.
Ill.—Goelitz v. Lathrop, 3 N.E.2d 305, 286 Ill.App. 248.
Ky.—Johnson v. Gernert Bros. Lumber Co., 75 S.W.2d 357, 255 Ky. 734.
Tex.—Smith v. Ferrell, Com.App., 44 S.W.2d 962—Stewart v. Byrne, Com.App., 42 S.W.2d 234—Maytag Southwestern Co. v. Thornton, Civ. App., 20 S.W.2d 383, error dismissed.
Wis.—Schulteis v. Trade Press Pub. Co., 210 N.W. 419, 191 Wis. 164.
34 C.J. p 464 note 73.

Failure to verify time of trial

Where judgment was rendered in absence of defendants and their counsel because of reliance by one defendant on alleged announcement of opposing counsel in open court during sounding of docket that case would not be tried during week for which it had been set and such defendants' notice to their counsel of such announcement, without seeking to verify it, defendants were held not entitled to have judgment vacated.—Poland v. Risher, Civ.App., 88 S.W.2d 1106, affirmed Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498.

Discharge of attorneys

Plaintiffs' discharge of attorneys on false assumption that trial would remain in abeyance pending subsequent action has been held negligence precluding equitable relief against judgment.—Davis v. Cox, Tex.Civ.App., 4 S.W.2d 1008, error dismissed.

Belief as to abandonment of case

The fact that the party seeking relief believed that case had been abandoned, because he had not heard from it for a long time, does not excuse his default.—Millikin v. Anderson, Mo.App., 269 S.W. 675.

Failure to file caveat

Petitioner, although nonresident, was held not entitled to set aside judgment setting apart statutory support for widow and children, where he filed no caveat to application on which citation had issued and been published.—Beddingfield v. Old Nat. Bank & Trust Co., 165 S.E. 61, 175 Ga. 172.

11. Ill.—Goelitz v. Lathrop, 3 N.E. 2d 305, 286 Ill.App. 248.

Neglect of codefendant

One intrusting entire defense of action to codefendant, who employed attorney, received notice of latter's withdrawal, employed no other attorney, and was present and represented complaining party when judgment was entered against them, was held not entitled to injunction against enforcement of judgment.—Goelitz v. Lathrop, supra.

12. Tenn.—Rowland v. Jones, 2 Heisk. 321.

13. Ala.—Williams v. Martin, 188 So. 677, 237 Ala. 624.
Cal.—City of San Diego v. California Water & Tel. Co., 162 P.2d 684, 71 Cal.App.2d 261—**Corpus Juris cited in** Greenwood v. Greenwood, 297 P. 589, 591, 112 Cal.App. 691.
Conn.—Palverari v. Finta, 26 A.2d 229, 129 Conn. 38.
Ga.—W. T. Rawleigh Co. v. Seagraves, 173 S.E. 167, 178 Ga. 459—Coleman v. Morris, 168 S.E. 9, 176 Ga. 467.
Iowa.—Ware v. Eckman, 277 N.W. 725, 224 Iowa 783.
Kan.—**Corpus Juris cited in** Huls v. Gafford Lumber & Grain Co., 243 P. 306, 310, 120 Kan. 269.
Ky.—Fuson v. Fuson, 132 S.W.2d 508, 280 Ky. 91—Mussman v. Peppies, 49 S.W.2d 592, 243 Ky. 674—Lee v. Lee, 38 S.W.2d 223, 238 Ky. 477.
Mo.—Texier v. Texier, 119 S.W.2d 778, 342 Mo. 1220—Wuelker v. Maxwell, App., 70 S.W.2d 1100.
Mont.—Khan v. Khan, 105 P.2d 665, 110 Mont. 591—**Corpus Juris cited** in Federal Land Bank of Spokane v. Gallatin County, 274 P. 288, 291 84 Mont. 98.
N.J.—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115.
N.M.—**Corpus Juris quoted in** Sowder v. Citizens Nat. Bank of Lubbock, 50 P.2d 856, 858, 39 N.M. 508.
Tex.—Kelly v. Wright, 188 S.W.2d 983—Whitehurst v. Estes, Civ.App., 185 S.W.2d 154, error refused—Collins v. National Bank of Commerce of San Antonio, Civ.App., 154 S.W.2d 296, error refused—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed—Ricketts v. Ferguson, Civ.App., 64 S.W.2d 416, error refused—**Corpus Juris cited in** Caldwell Oil Co. v. Hickman, Civ. App., 270 S.W. 214, 218.
Va.—Lockard v. Whitenack, 144 S. E. 606, 151 Va. 143.
34 C.J. p 465 note 78.
"The mere employment of counsel is not sufficient to excuse a party from giving his personal attention to a case. . . . There must be something more than misplaced confidence in a negligent attorney to constitute unavoidable casualty or misfortune."—Byron v. Evans, 91 S. W.2d 548, 550, 263 Ky. 49.

Suspension of attorney

The fact that an attorney was suspended shortly after the proceedings complained of is not of itself sufficient to justify relief in equity. —De Tray v. Chambers, 297 P. 575, 112 Cal.App. 697.

Failure of third person to follow attorney's directions

A litigant is not entitled to have default judgment against him vacated by fact that attorney, employed by him to defend suit, on being called out of town, directed third

by the opposite party,[14] the fault of the attorney being attributed to the party himself.[15] The rule is in no way affected by the fact that the attorney is insolvent and unable to respond in damages.[16] Not every act of inadvertence on the part of an attorney, however, is negligence imputable to the client,[17] and the courts have thought proper to grant relief in some cases of misunderstanding or misapprehension on the part of the attorney,[18] especially where the mistake arose from misinformation.[19] Relief may also be granted where the party has been deceived or betrayed by his attorney,[20] or where the attorney withdrew from the case without notice and without lawful cause.[21]

In applying the rule prohibiting relief for negligence or misconduct of counsel, it has been held no ground for relief against a judgment under the circumstances of the particular case that counsel neglected to answer or file a plea for a party, or failed properly to present the defenses of his client;[22] that counsel managed the trial of the cause unskillfully;[23] absented himself from court during the trial, intentionally or otherwise;[24] failed to notify his client of the time of trial;[25] advised his client to remain away from court;[26] failed to in-

person to file answer that attorney had prepared, but third person forgot to do so.—Roberts v. Seymore, 73 P.2d 895, 181 Okl. 201.

14. Cal.—**Corpus Juris cited in** Greenwood v. Greenwood, 297 P. 589, 591, 112 Cal.App. 691.
Fla.—Peacock v. Feaster, 42 So. 889, 52 Fla. 565.
Mont.—**Corpus Juris cited in** Federal Land Bank of Spokane v. Gallatin County, 274 P. 288, 291, 84 Mont. 98.
N.M.—**Corpus Juris quoted in** Sowder v. Citizens Nat. Bank of Lubbock, 50 P.2d 856, 858, 39 N.M. 508.
Tex.—**Corpus Juris cited in** Caldwell Oil Co. v. Hickman, Civ.App., 270 S.W. 214, 218.

15. Ind.—Branham v. Boruff, 145 N. E. 901, 82 Ind.App. 370.
Ky.—Byron v. Evans, 91 S.W.2d 548, 263 Ky. 49.
Mo.—Millikin v. Anderson, App., 269 S.W. 675.
N.M.—**Corpus Juris quoted in** Sowder v. Citizens Nat. Bank of Lubbock, 50 P.2d 856, 858, 39 N.M. 508.
Tex.—Kahl v. Porter, Civ.App., 296 S.W. 324—**Corpus Juris cited in** Caldwell Oil Co. v. Hickman, Civ. App., 270 S.W. 214, 218.
34 C.J. p 442 note 20, p 466 note 80.
"It is a general rule that no mistake, inadvertence, or neglect attributable to an attorney can be successfully used as a ground of relief, unless it would have been excusable if attributable to the client."—Ferrara v. Genduso, 14 N.E.2d 580, 581, 214 Ind. 99.

Failure to set up cancellation of insurance

Negligence of insurance company's attorney in failing to set up cancellation of additional insurance as defense to injured employee's action on group policy and additional insurance certificates was equivalent to insurance company's negligence.—Wheiles v. Ætna Life Ins. Co., C.C. A.Tex., 68 F.2d 99.

16. Ill.—Bardonski v. Bardonski, 33 N.E. 39, 144 Ill. 284.
34 C.J. p 466 note 81.

17. Cal.—Hallett v. Slaughter, 140 P.2d 3, 22 Cal.2d 552.
Iowa.—Clarke v. Smith, 192 N.W. 136, 195 Iowa 1299.

18. Tex.—**Corpus Juris cited in** Caldwell Oil Co. v. Hickman, Civ. App., 270 S.W. 214, 218.
34 C.J. p 466 note 83.

Custom of notifying attorneys

Where judgment was entered in the absence of defendant after the case had been twice set for trial, and defendant had no knowledge of such judgment, until execution was presented by the sheriff, it was not error to grant a temporary injunction restraining plaintiffs and the sheriff from proceeding, it appearing that it was customary to notify defendant's attorneys of the time of trial when they resided in another county.—Dallas Cooperage & Wooden Ware Co. v. Southwestern Cooperage Co., Tex.Civ.App., 254 S.W. 1116.

19. Iowa.—Buena Vista County v. Iowa Falls & S. C. R. Co., 49 Iowa 657.

20. Cal.—Crow v. Madsen, App., 111 P.2d 7, rehearing denied 111 P.2d 663—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400.
La.—Richardson v. Helis, 189 So. 454, 192 La. 856.
Neb.—Seward v. Churn Ranch Co., 287 N.W. 610, 136 Neb. 804.
Tex.—**Corpus Juris cited in** Caldwell Oil Co. v. Hickman, Civ.App., 270 S.W. 214, 218.
34 C.J. p 466 note 82.

21. Tex.—Stanley v. Spann, Civ. App., 21 S.W.2d 305, error dismissed.

Withdrawal after notice

A judgment was held not void or voidable on the ground that a party's counsel abandoned his defense where such counsel, after being employed, advised the party that they held a retainer from the adverse party and dropped out of the suit, after which other counsel took up the defense.—Spence v. State Nat. Bank of El Paso, Tex.Civ.App., 294 S.W. 618, affirmed, Com.App., 5 S.W.2d 754.

22. Ark.—White v. Milburn, 122 S. W.2d 589, 197 Ark. 373.
Iowa.—Ware v. Eckman, 277 N.W. 725, 224 Iowa 783.
Ky.—Byron v. Evans, 91 S.W.2d 548, 263 Ky. 49.
N.J.—Red Oaks v. Dorez, Inc., 184 A. 746, 120 N.J.Eq. 282.
Ohio.—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871.
Okl.—Luna v. Miller, 42 P.2d 809, 171 Okl. 260.
Tex.—Wear v. McCallum, 33 S.W.2d 723, 119 Tex. 473—Thomas v. Mullins, Civ.App., 175 S.W.2d 276—White v. Glenn, Civ.App., 138 S.W. 2d 914, error dismissed, judgment correct—Winn v. Houston Building & Loan Ass'n, Civ.App., 45 S.W.2d 631, error refused.
34 C.J. p 466 note 86.

Failure to set up oral agreement

Fact that defendants' attorneys did not set up oral agreement allegedly constituting a defense to action, but permitted judgment to be entered in favor of plaintiff, did not entitle defendants to have judgment vacated, in absence of any claim of fraud on part of attorneys, or that failure to present defense resulted from connivance or fraud of plaintiff.—Ferrara v. Genduso, 14 N.E.2d 580, 214 Ind. 99.

23. Cal.—Julien v. West, 274 P. 421, 96 Cal.App. 558.
34 C.J. p 466 note 85.

24. U.S.—Miller Rubber Co. of New York v. Massey, C.C.A.Ill., 86 F. 2d 466, certiorari denied Massey v. Miller Rubber Co. of New York, 50 S.Ct. 354, 281 U.S. 749, 74 L.Ed. 1161.
34 C.J. p 466 note 87.

25. Ga.—W. T. Rawleigh Co. v. Seagraves, 173 S.E. 167, 178 Ga. 459.
Mo.—Bowman v. Field, 11 Mo.App. 595.

26. Ga.—Sasser v. Olliff, 16 S.E. 312, 91 Ga. 84.

troduce material witensses;[27] failed to file a motion for a new trial;[28] neglected to take an appeal in the proper time and manner;[29] lost the right of appeal through delay in signing the bill of exceptions,[30] or filing the statement of facts,[31] or by neglect to assign errors,[32] or by failure to call up a motion for a new trial through the mistaken impression that such motion had been overruled,[33] or to take any other requisite step in the case;[34] advised the party that the proof of a material fact was unnecessary, whereby the party failed to prove it;[35] failed to enter a credit on the execution according to agreement;[36] caused the rendition of a judgment on a stipulation, in disobedience of the client's instructions;[37] or lost the right to new trial by adopting the statement of the reporter of the testimony taken down by him, without observing the errors in such statement.[38]

§ 369. Matters Determined in Original Action

Matters determined in the original action, including matters determined on motions for a new trial, to vacate the judgment, or for a continuance, generally cannot again be advanced as a ground for equitable relief against the judgment rendered.

Equity will not entertain a bill for relief against a judgment, founded on any matters which were tried and determined in the prior action, or which were there so put in issue that they might have been adjudicated,[39] however unjust the judgment may appear to be.[40] This rule assumes, however, that there has been a trial in which the respective parties have had an opportunity fully to present their claims.[41]

On motion for new trial or to vacate. Equity will refuse to interfere by injunction, when the grounds presented for its action have been already considered and held insufficient on a motion made in the trial court to open or vacate the judgment or for a new trial.[42]

On motion for continuance. A bill for an injunc-

27. Ala.—Ex parte Walker, 54 Ala. 577.
Tex.—Estey v. Luther, Civ.App., 142 S.W. 649.

28. Mont.—Khan v. Khan, 105 P.2d 665, 110 Mont. 591.

29. Fla.—Sommers v. Colourpicture Pub., 8 So.2d 281, 150 Fla. 659.
Mass.—Barron v. Barronian, 175 N. E. 271, 275 Mass. 77.
Mo.—Bowman v. Field, 11 Mo.App. 595.
Tex.—Thomas v. Mullins, Civ.App., 175 S.W.2d 276.

30. Md.—Ruppertsberger v. Clark, 53 Md. 402.

31. Tex.—Avocato v. Dell'Ara, Civ. App., 91 S.W. 830.

32. Fla.—Peacock v. Feaster, 42 So. 889, 52 Fla. 565.
Mo.—Miller v. Bernecker, 46 Mo. 194.

33. Ark.—Scroggin v. Hammett Grocer Co., 49 S.W. 820, 66 Ark. 183.

34. Fla.—Peacock v. Feaster, 42 So. 889, 52 Fla. 565.

35. Fla.—Peacock v. Feaster, supra. 34 C.J. p 466 note 97.

36. Ga.—Brown v. Wilson, 56 Ga. 534.

37. U.S.—Cowley v. Northern Pac. R. Co., C.C.Wash., 46 F. 325, reversed on other grounds 16 S.Ct. 127, 159 U.S. 569, 40 L.Ed. 263.

38. Cal.—Quinn v. Wetherbee, 41 Cal. 247.

39. U.S.—**Corpus Juris cited in** Coos Bay Lumber Co. v. Collier, C.C.A. Or., 104 F.2d 722, 725.
Ala.—Worthington v. Worthington, 117 So. 645, 218 Ala. 80.
Ark.—Oliver v. Franklin Fire Ins. Co. of Philadelphia, 114 S.W.2d 1071, 195 Ark. 840.
Cal.—**Corpus Juris cited in** Rudy v. Slotwinsky, 238 P. 783, 785, 73 Cal. App. 459.
Fla.—Crum v. Baily, 184 So. 774, 135 Fla. 192.
Ga.—Felker v. Still, 169 S.E. 897, 177 Ga. 160.
Mich.—Graure v. Detroit Lumber Co., 244 N.W. 225, 260 Mich. 47—Bassett v. Trinity Bldg. Co., 236 N.W. 237, 254 Mich. 207.
Minn.—Spears v. Drake, 258 N.W. 149, 193 Minn. 162—Betcher v. Midland Nat. Bank, 209 N.W. 325, 167 Minn. 484.
Mo.—Overton v. Overton, 37 S.W.2d 565, 327 Mo. 530—Loveland v. Davenport, App., 188 S.W.2d 850—Crowley v. Behle, App., 131 S.W. 2d 383.
Neb.—Brandeen v. Beale, 220 N.W. 298, 117 Neb. 291.
N.J.—Raimondi v. Bianchi, 140 A. 584, 102 N.J.Eq. 254—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115.
Okl.—Scott v. Bailey, 169 P.2d 208—Yellow Taxicab & Baggage Co. v. Pettyjohn, 21 P.2d 743, 163 Okl. 103.
Or.—Walker v. Sutherland, 299 P. 335, 136 Or. 355, certiorari denied 52 S.Ct. 30, 284 U.S. 649, 76 L.Ed. 551.
Pa.—Petition of Wilwohl, 166 A. 654, 311 Pa. 152.
R.I.—Havens v. Crandall, 150 A. 76, 51 R.I. 8.
Tex.—Ferguson v. Ferguson, Civ. App., 98 S.W.2d 847.
Wash.—Manson v. Foltz, 17 P.2d 616, 170 Wash. 652.
34 C.J. p 440 note 81, p 466 note 2.
Payment
Mortgagor's petition to vacate foreclosure judgment alleging that mortgage was paid, which was defense to foreclosure, was held demurrable as attempt to obtain retrial after adjournment.—Simpson v. Zuehlke, Tex.Civ.App., 26 S.W.2d 663.
Membership in firm
Party who was joined as codefendant as being a member of debtor firm, but allowed judgment to be entered, cannot attack judgment on ground that he was not member of firm, since that was defense to former action and was concluded by judgment.—Quinn-Marshall Co. v. Hurley, 272 S.W. 402, 209 Ky. 154.

40. Cal.—**Corpus Juris cited in** Rudy v. Slotwinsky, 238 P. 783, 785, 73 Cal.App. 459.
34 C.J. p 466 note 2.

41. Cal.—**Corpus Juris cited in** Rudy v. Slotwinsky, 238 P. 783, 785, 73 Cal.App. 459.
Or.—**Corpus Juris quoted in** Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 668, 155 Or. 602.
34 C.J. p 467 note 4.

42. U.S.—American Bakeries Co. v. Vining, D.C.Fla., 13 F.Supp. 323, affirmed, C.C.A., 80 F.2d 932.
Ala.—Trognitz v. Touart, 122 So. 620, 219 Ala. 404.
Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.
Iowa.—Martin Bros. Box Co. v. Fritz, 292 N.W. 143, 228 Iowa 482.
Kan.—**Corpus Juris quoted in** McNergney v. Harrison, 84 P.2d 944, 948, 148 Kan. 843.
Tex.—Fort Worth & D. C. Ry. Co. v.

tion cannot be maintained on grounds which were presented and overruled on a motion for a continuance, or on the ground that the refusal to continue forced the party to trial at a disadvantage.[43]

§ 370. Compelling Set-Off or Reduction of Damages

a. In general
b. Subject matter of set-off

a. In General

Equitable relief against a judgment may sometimes be had to enable the judgment debtor to set off a claim against the judgment creditor which by reason of the judgment creditor's nonresidence or insolvency, or for some other sufficient reason, would otherwise be uncollectable; but in order to justify such relief it must appear that the complaining party has not been guilty of inexcusable failure to plead his set-off in the original action.

As equity may order one judgment to be set off against another, so it has power to restrain the execution of a judgment to the extent that the judgment debtor has a claim against the judgment creditor which the judgment debtor cannot otherwise collect.[44] If a case for equitable relief is presented, but the amount due on the set-off is less than the amount of the judgment, the court should not enjoin the whole judgment,[45] but should permit the balance to be collected by execution.[46] A party going into equity to enjoin a judgment on the ground of a set-off must show as strong a claim to be paid the amount of his demand as if he were suing on it at law or in equity,[47] and such relief will not be granted where the judgment debtor has an adequate remedy at law,[48] or where he has been guilty of such negligence or lack of diligence as to render inequitable his demand for an offset.[49] In order to justify relief of this nature it must appear that the judgment creditor is in some way unable to respond to the claim against him, so that complainant is in danger of losing it.[50]

Insolvency or nonresidence of judgment creditor. According to some decisions the mere insolvency of the judgment creditor will not of itself justify an injunction against the enforcement of a judgment at law in order to let in a set-off which might have been pleaded at law at the time when such judgment was recovered.[51] The rule laid down by the weight of authority, however, is to the effect that the insolvency of the party seeking to enforce a judgment furnishes a sufficient ground for the interposition of a court of equity to enable the debtor to avail himself of a set-off;[52] and even though insolvency may not of itself be considered a sufficient ground on which to base equitable relief, it is always an important factor and may with other grounds of equitable relief justify the interposition of the court of equity by the process of injunction.[53]

Greathouse, Civ.App., 41 S.W.2d 418, reversed on other grounds Greathouse v. Fort Worth & Denver City Ry. Co., Com.App., 65 S.W.2d 762.
34 C.J. p 467 note 5—19 C.J. p 1212 note 69 [b] (2).

Application for rehearing based on lack of service

Where, after default, defendant filed application for rehearing alleging that summons and complaint had not been served on him and that he had no notice until after judgment was rendered, and judgment was rendered against him on this application, which was afterward affirmed, there was an adjudication, and relief against the judgment will be denied in equity.—Handy v. Gray, 93 So. 614, 207 Ala. 615.

43. Kan.—**Corpus Juris quoted in** McNergney v. Harrison, 84 P.2d 944, 948, 148 Kan. 843.
34 C.J. p 467 note 6.

44. Ala.—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala. 10—Stewart v. Burgin, 121 So. 420, 219 Ala. 131.
La.—Sliman v. Mahtook, 136 So. 749, 17 La.App. 635.
Miss.—**Corpus Juris cited in** Bettman-Dunlap Co. v. Gertz, 116 So. 299, 300, 149 Miss. 892.
Mo.—Jegglin v. Orr, 29 S.W.2d 721, 224 Mo.App. 773.
Neb.—Rogers v. Buettgenback, 211 N.W. 168, 114 Neb. 834—State v. Farmers' State Bank of Bayard, 203 N.W. 629, 113 Neb. 497, followed in 203 N.W. 632, 113 Neb. 503.
34 C.J. p 467 note 8.
Set-off of claim against judgment see infra § 572.

45. La.—Salter v. McHenry, 17 La. 507—Palfrey v. Shuff, 2 Mart.,N.S., 51.

46. Md.—Levy v. Steinbach, 43 Md. 212.

47. Iowa.—Walker v. Ayres, 1 Iowa 449.

48. Ala.—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala. 10.
34 C.J. p 468 note 9.

49. Mo.—Kansas City Rapid Motor & Transp. Co. v. Young, 175 S.W. 95, 188 Mo.App. 289.

Disclosure of set-off in corporate books

Neglect was imputable to corporation seeking to enjoin collection of judgment in having previously failed to assert set-off, where set-off appeared from books and ordinary diligence would have disclosed its existence.—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala. 10.

Absence of injury to assignee

A judgment debtor was held not barred from equitable relief against an assignee of the judgment because of delay in bringing his action where it appeared that the judgment had been assigned for a preexisting debt and that the assignee had not been injured by the delay.—Jegglin v. Orr, 29 S.W.2d 721, 224 Mo.App. 773.

50. U.S.—Montgomery Water Power Co. v. Chapman, C.C.R.I., 128 F. 197.
34 C.J. p 468 note 11.

51. S.C.—Rives v. Rives, 28 S.C.Eq. 353.
34 C.J. p 469 note 37.

52. Ala.—Stewart v. Burgin, 121 So. 420, 219 Ala. 131.
Mo.—Jegglin v. Orr, 29 S.W.2d 721, 224 Mo.App. 773.
Neb.—Rogers v. Buettgenback, 211 N.W. 168, 114 Neb. 834.
34 C.J. p 469 note 38.

53. Ill.—Matson v. Oberne, 25 Ill. App. 213.

It has been held by some decisions that the nonresidence of the party against whom the set-off is asserted is good ground for equitable relief,[54] provided he became a nonresident after the rendition of the judgment,[55] particularly if he has no property within the state;[56] but there are decisions to the contrary.[57]

Failure to plead set-off in original action. Equity will not enjoin a judgment on account of matters which might have been pleaded by way of set-off in the action in which the judgment was recovered, where the party neglected his opportunity in that respect,[58] unless he shows a good and sufficient excuse for his neglect.[59] Still less will equity grant relief because of any set-off or counterclaim which was set up in the action at law and rejected or decided adversely to him.[60] However, if the remedy in equity is more adequate, or rests on equitable principles, the failure to present the set-off at law is no defense,[61] and injunction will not be denied on the ground of an adequate remedy at law where a remedy at law was not in fact available or was extremely doubtful.[62]

Relief to vendee on failure of title. Where a vendor of property has recovered judgment for the purchase money and become insolvent, and the vendee is damnified by a failure of title or possession,[63] or by having to pay off an encumbrance,[64] equity may enjoin the judgment to the extent of the loss which the vendee has suffered; but such relief will not be granted where the vendee has a plain and adequate remedy at law by action for breach of the covenant of warranty or against encumbrances,[65] or where he has neglected an opportunity to set off his damages when sued for the purchase price.[66]

b. Subject Matter of Set-Off

In a proper case, equitable relief may be had to set off one judgment against another, or an equitable debt against a legal one; but relief ordinarily will not be granted to permit the debtor to assert a contingent or unliquidated claim.

Where equitable grounds are shown, injunction may be used as a means of setting off one judgment against another.[67] Equity possesses the power to set off an equitable debt against a legal one, where there are special circumstances of which only a court of chancery may take notice,[68] and, although the claims may not appear on their face to be mutual, a court of equity will look beyond the nominal parties to the real parties in interest and adjudge accordingly.[69] Where a judgment creditor is insolvent, the debtor may, in equity, set off against the judgment in the hands of an assignee thereof a demand against the creditor which became due before the assignment.[70] So, also, a judgment debtor may in this way set off an amount which he has paid in the character of a surety for the judgment creditor.[71]

Equity ordinarily will not grant this relief where the claim set up is contingent, uncertain, or unliq-

54. Miss.—**Corpus Juris cited in** Bettman-Dunlap Co. v. Gertz, 116 So. 299, 300, 149 Miss. 892.
34 C.J. p 470 note 40.

55. Ky.—Walker v. Thomas, 11 S. W. 434, 88 Ky. 486, 11 Ky.L. 20.

56. Ga.—Livingston v. Marshall, 11 S.E. 542, 82 Ga. 281.
Miss.—**Corpus Juris cited in** Bettman-Dunlap Co. v. Gertz, 116 So. 299, 300, 149 Miss. 892.

57. Md.—Smith v. Washington Gaslight Co., 31 Md. 12, 100 Am.D. 49 —Beall v. Brown, 7 Md. 393.

58. Ala.—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala. 10.
34 C.J. p 469 note 34.

59. Tex.—**Corpus Juris cited in** Jackson v. Birk, Civ.App., 88 S. W.2d 632, 633.
34 C.J. p 469 note 35.
Concealment or fraud
No advantage will accrue to judgment creditor if debtor seeking to enjoin collection was precluded from discovering set-off by concealment or fraud.—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala. 10.

60. Ky.—Carlyle v. Long, 5 Litt. 167.
34 C.J. p 469 note 36.
Matters determined in original action see supra § 369.

61. Ala.—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala. 10.

62. Mo.—Jegglin v. Orr, 29 S.W.2d 721, 224 Mo.App. 773.

63. Va.—Jaynes v. Brock, 10 Gratt. 211, 51 Va. 211.
34 C.J. p 469 note 30.

64. Ind.—Shelby v. Marshall, 1 Blackf. 384.
Va.—Shores v. Ware, 1 Rob. 1, 40 Va. 1.

65. N.C.—Henry v. Elliott, 59 N.C. 175.
34 C.J. p 469 note 32.

66. Ga.—Hambrick v. Dickey, 48 Ga. 578.
Mo.—Hall v. Clark, 21 Mo. 415.

67. Ohio.—Barbour v. National Exch. Bank, 33 N.E. 542, 50 Ohio St. 90, 20 L.R.A. 192.
34 C.J. p 468 note 18.
Payment, satisfaction, or discharge of judgment by set-off of another judgment see infra §§ 566–570.

68. Del.—Small v. Collins, 11 Del. 273.
34 C.J. p 468 note 19.

69. Cal.—Hobbs v. Duff, 23 Cal. 596.
34 C.J. p 468 note 20.
Insolvency of owner of beneficial interest in judgment
Where one defendant had legal title to judgment against plaintiff, but the beneficial interest in the judgment was in another defendant who was insolvent and against whom plaintiff's assignor had obtained a judgment which had been assigned to plaintiff, and which was larger than the judgment against plaintiff, plaintiff was entitled to a permanent injunction enjoining the enforcement of the judgment.—Sherwood v. Salisbury, 299 N.W. 185, 139 Neb. 838.

70. Iowa.—De Laval Separator Co. v. Sharpless, 111 N.W. 438, 134 Iowa 28.
34 C.J. p 468 note 21.

71. W.Va.—Hughes v. McDermitt, 102 S.E. 767, 86 W.Va. 86.
34 C.J. p 468 note 22.

uidated,[72] unless the circumstances are such as to warrant the interference of equity to prevent wrong and injustice,[73] as where defendant is insolvent;[74] and it is immaterial whether the demand arises out of the same[75] or different[76] transactions. Equity will not grant relief where the claim accrued or was acquired by complainant after the recovery of the judgment at law;[77] but it is otherwise where the claim was acquired before the rendition of the judgment at law, but too late to plead it by way of set-off in that action.[78]

§ 371. Fraud, Perjury, Collusion, or Other Misconduct

Duress or other misconduct practiced by the successful party on his adversary furnishes ground for equitable relief against a judgment, provided the complaining party is not himself guilty of fault or negligence in the matter.

Courts of equity may grant relief against a judgment for misconduct preventing a bona fide adversary trial;[79] but their willingness so to act is limited to cases where the unsuccessful party has been prevented from presenting the full strength of his case by reason of some wrongful, misleading, or deceptive, act or conduct on the part of the successful party,[80] unmixed with any fault or negligence on the part of the complaining party.[81]

Duress. A judgment may be attacked in equity on the ground of duress,[82] although entered pursuant to ostensible agreement or consent of the parties.[83] In order to warrant the vacation of a judgment for coercion, the means of coercion must be extrinsic or collateral to the subject of dispute in the action wherein the order or judgment complained of was entered,[84] and, where evidence of the coercion or duress could have been presented to the court or to an attorney of complainant's own choosing during the pendency of the action so that full examination of the facts could have been made and full protection given to the rights of the parties, equity will not interfere.[85]

§ 372. —— Fraud or Concealment

a. In general
b. Nature of fraud

a. In General

Equity has inherent power to grant relief against a judgment on the ground of fraud, especially if it was practiced on the court, inducing it wrongfully to assume jurisdiction. To justify such relief, the fraud must be perpetrated by the successful party or his agents, and must be unmixed with any fault or negligence on the part of the complaining party.

A court of equity on a proper application will relieve against, or enjoin a party from enforcing, a

72. Iowa.—Baker v. Ryan, 25 N.W. 890, 67 Iowa 708.
34 C.J. p 468 note 23.

73. Neb.—Rogers v. Buettgenback, 211 N.W. 168, 114 Neb. 834—State v. Farmers' State Bank of Bayard, 203 N.W. 629, 113 Neb. 497, followed in 203 N.W. 632, 113 Neb. 503.
34 C.J. p 468 note 24.

74. Tenn.—Memphis & C. R. Co. v. Greer, 11 S.W. 931, 87 Tenn. 698, 4 L.R.A. 858.
34 C.J. p 468 note 25.

75. Ark.—Dugan v. Cureton, 1 Ark. 31, 31 Am.D. 727.
34 C.J. p 469 note 26.

76. Ky.—Brown v. Scott, 2 Bibb 635.
N.J.—Jackson v. Bell, 31 N.J.Eq. 554, affirmed 32 N.J.Eq. 411.

77. Miss.—Desearn v. Babers, 62 Miss. 421.
34 C.J. p 469 note 28.

78. Tex.—Ellis v. Kerr, Civ.App., 23 S.W. 1050.

79. U.S.—Miller Rubber Co. of New York v. Massey, C.C.A.Ill., 36 F.2d 466, certiorari denied Massey v. Miller Rubber Co. of New York, 50 S.Ct. 354, 281 U.S. 749, 74 L.Ed. 1161.
Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328—Sears v. Rule, 114 P.2d 57, 45 Cal. App.2d 374.

80. U.S.—Miller Rubber Co. of New York v. Massey, C.C.A.Ill., 36 F.2d 466, certiorari denied Massey v. Miller Rubber Co. of New York, 50 S.Ct. 354, 281 U.S. 749, 74 L.Ed. 1161.
Tex.—Ridge v. Wood, Civ.App., 140 S.W.2d 536, error dismissed, judgment correct—Kost v. Rose, Civ. App., 103 S.W.2d 429—Landa v. Bogle, Civ.App., 62 S.W.2d 579, set aside on other grounds Bogle v. Landa, 94 S.W.2d 154, 127 Tex. 317.

Misconduct of jury

Failure of plaintiff to discover jury's misconduct in motion for new trial did not authorize setting aside judgment where his failure was not chargeable to defendant, notwithstanding plaintiff was not negligent in failing sooner to discover alleged misconduct.—Brannen v. City of Houston, Tex.Civ.App., 153 S.W.2d 676, error refused.

A definitive judgment may be annulled, except for defects of form prescribed in statute, only where it appears that it has been obtained through wrong practices of party in whose favor it was rendered.—Adkins' Heirs v. Crawford, Jenkins & Booth, La., 24 So.2d 246.

Misconduct held not shown

Tex.—Traders & General Ins. Co. v. Keith, Civ.App., 107 S.W.2d 710, error dismissed.

81. Tex.—Brannen v. City of Houston, Civ.App., 153 S.W.2d 676, error refused—Ridge v. Wood, Civ. App., 140 S.W.2d 536, error dismissed, judgment correct—Kost v. Rose, Civ.App., 103 S.W.2d 429—Landa v. Bogle, Civ.App., 62 S.W. 2d 579, set aside on other grounds Bogle v. Landa, 94 S.W.2d 154, 127 Tex. 317.

Estoppel may arise precluding the granting of relief against judgment obtained by means of fraudulent act, practice, or representation of prevailing party.—Bloomquist v. Thomas, 9 N.W.2d 337, 215 Minn. 35.

82. Ga.—Young v. Young, 2 S.E.2d 622, 188 Ga. 29—Colclough v. Bank of Penfield, 103 S.E. 489, 150 Ga. 316.

83. U.S.—Griffith v. Bank of N. Y., C.C.A.N.Y., 147 F.2d 899, 160 A.L.R. 1340, certiorari denied Bank of New York v. Griffith, 65 S.Ct. 1414, 325 U.S. 874, 89 L.Ed. 1992.
Ky.—Hargis v. Hargis, 66 S.W.2d 59, 252 Ky. 198.
34 C.J. p 441 note 9.

84. Cal.—Hendricks v. Hendricks, 14 P.2d 83, 216 Cal. 321.

85. Cal.—Hendricks v. Hendricks, supra—Johnson v. Johnson, 128 P. 2d 617, 53 Cal.App.2d 805, appeal denied 128 P.2d 919, 53 Cal.App.2d 805.

judgment obtained by means of fraud,[86] and espe- / cially where the fraud has been imposed or prac-

86. U.S.—Griffith v. Bank of N. Y., C.C.A.N.Y., 147 F.2d 899, 160 A.L.R. 1340, certiorari denied Bank of New York v. Griffith, 65 S.Ct. 1414, 325 U.S. 874, 89 L.Ed. 1992—Whittaker v. Brictson Mfg. Co., C.C.A. S.D., 43 F.2d 485—Twist v. Prairie Oil & Gas Co., C.C.A.Okl., 27 F.2d 470, vacated on other grounds 28 F.2d 1021—Russell v. Superior Journal Co., D.C.Wis., 47 F.Supp. 282—Mineral Development Co. v. Kentucky Coal Lands Co., D.C.Ky., 285 F. 761, affirmed, C.C.A., 285 F. 1021.

Ala.—Mudd v. Lanier, 24 So.2d 550—Farrell v. Farrell, 10 So.2d 153, 243 Ala. 389—Fowler v. Nash, 144 So. 831, 225 Ala. 613—Ex parte Cade, 127 So. 154, 220 Ala. 666—Fowler v. Fowler, 122 So. 440, 219 Ala. 453—Garvey v. Inglenook Const. Co., 104 So. 639, 213 Ala. 267—Danne v. Stroecker, 98 So. 479, 210 Ala. 483.

Ark.—Chronister v. Robertson, 185 S.W.2d 104, 208 Ark. 11.

Cal.—Newport v. Superior Court of Stanislaus County, 230 P. 168, 192 Cal. 92—Cowan v. Cowan, App., 166 P.2d 21—Hosner v. Skelly, App., 164 P.2d 573—Vincent v. Security-First Nat. Bank of Los Angeles, 155 P.2d 63, 67 Cal.App.2d 602—Crow v. Madsen, App., 111 P.2d 7, rehearing denied 111 P.2d 663—Anglo California Trust Co. v. Kelley, 4 P.2d 604, 117 Cal.App. 692—Wells v. Zenz, 256 P. 484, 83 Cal. App. 137.

Colo.—Wilson v. Birt, 235 P. 563, 77 Colo. 206.

Conn.—Hoey v. Investors' Mortgage & Guaranty Co., 171 A. 438, 118 Conn. 226.

Fla.—Gross v. Gross, 18 So.2d 538, 154 Fla. 649—State ex rel. Warren v. City of Miami, 15 So.2d 449, 153 Fla. 644—State ex rel. Fulton Bag & Cotton Mills v. Burnside, 15 So.2d 324, 153 Fla. 599—Miller v. Miller, 7 So.2d 9, 149 Fla. 732—Reybine v. Kruse, 174 So. 720, 128 Fla. 278.

Ga.—Beavers v. Williams, 33 S.E.2d 343, 199 Ga. 113—**Corpus Juris quoted in** Walker v. Hall, 166 S.E. 757, 759, 176 Ga. 12—Clark v. Tennessee Chemical Co., 145 S.E. 73, 167 Ga. 248—Branan v. Feldman, 123 S.E. 710, 158 Ga. 377—Bailey v. McElroy, 6 S.E.2d 140, 61 Ga. App. 367—Mullis v. Bank of Chauncey, 150 S.E. 471, 40 Ga.App. 582.

Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688.

Ill.—Moore v. Sievers, 168 N.E. 259, 336 Ill. 316—Meyer v. Meyer, 33 N.E.2d 738, 309 Ill.App. 643, affirmed 39 N.E.2d 311, 379 Ill. 97, 140 A.L.R. 484—Village of Hartford v. First Nat. Bank of Wood River, 30 N.E.2d 524, 307 Ill.App. 447—Reisman v. Central Mfg. Dist. Bank, 15 N.E.2d 903, 296 Ill.App. 61—Hughes v. First Acceptance Corporation, 260 Ill.App. 176.

Ind.—Wohadlo v. Fary, 46 N.E.2d 489, 221 Ind. 219—Livengood v. Munns, 27 N.E.2d 92, 108 Ind.App. 27.

Iowa.—Foote v. State Sav. Bank, Missouri Valley, Iowa, 206 N.W. 819, 201 Iowa 174.

Kan.—Brown v. Wilson, 286 P. 247, 130 Kan. 359.

Ky.—Metropolitan Life Ins. Co. of New York v. Myers, 109 S.W.2d 1194, 270 Ky. 523—Hargis v. Hargis, 66 S.W.2d 59, 252 Ky. 198.

La.—Hebert v. Hebert, App., 187 So. 317.

Md.—Fetting v. Flanigan, 45 A.2d 355—Green v. Green, 35 A.2d 238, 182 Md. 571—Bailey v. Bailey, 30 A.2d 249, 181 Md. 385.

Mass.—Commonwealth v. Aronson, 44 N.E.2d 679, 312 Mass. 347.

Mich.—Racho v. Woeste, 9 N.W.2d 827, 305 Mich. 522—**Corpus Juris cited in** Grigg v. Hanna, 278 N.W. 125, 130, 283 Mich. 443—Wabash Ry. Co. v. Marshall, 195 N.W. 134, 224 Mich. 593.

Miss.—Keanum v. Southern Ry. Co., 119 So. 301, 151 Miss. 784.

Mo.—Crow v. Crow-Humphrey, 73 S.W.2d 807, 335 Mo. 636—Spotts v. Spotts, 55 S.W.2d 984, 331 Mo. 942—Krashin v. Grizzard, 31 S.W.2d 984, 326 Mo. 606—Boonville Nat. Bank v. Schlotzhauer, 298 S.W. 732, 317 Mo. 1298, 55 A.L.R. 489—Loveland v. Davenport, App., 188 S.W. 2d 850.

Mont.—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.

Neb.—Kielian v. Kent & Burke Co., 268 N.W. 79, 131 Neb. 308—Selleck v. Miller, 264 N.W. 754, 130 Neb. 306.

N.H.—Lamarre v. Lamarre, 152 A. 272, 84 N.H. 441.

N.J.—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115—Nugent v. Hayes, 125 A. 576, 96 N.J.Eq. 485.

N.Y.—Arcuri v. Arcuri, 193 N.E. 174, 265 N.Y. 358—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App.Div. 191—Herring-Curtiss Co. v. Curtiss, 200 N.Y.S. 7, 120 Misc. 733, modified on other grounds 227 N.Y.S. 489, 223 App. Div. 101.

N.C.—Scales v. Wachovia Bank & Trust Co., 143 S.E. 868, 195 N.C. 772.

N.D.—Elm Creek School Dist. No. 21, Mercer County v. Jungers, 205 N.W. 676, 53 N.D. 231.

Ohio.—Harig v. Lepasky, App., 49 N.E.2d 694, first case.

Okl.—Hill v. Cole, 137 P.2d 579, 192 Okl. 476—Fellows v. Owens, 62 P.2d 1215, 178 Okl. 224.

Or.—Fain v. Amend, 100 P.2d 481, 164 Or. 123—Hartley v. Rice, 261 P. 689, 123 Or. 237.

Pa.—In re Culbertson's Estate, 152 A. 540, 301 Pa. 438.

Tenn.—Winters v. Allen, 62 S.W.2d 51, 166 Tenn. 281—Larus v. Bank of Commerce & Trust Co., 257 S.W. 94, 149 Tenn. 126—Tallent v. Sherrell, 184 S.W.2d 561, 27 Tenn. App. 683—Culwell v. Culwell, 133 S.W.2d 1009, 23 Tenn.App. 389—**Corpus Juris cited in** Hartman v. Spivey, 123 S.W.2d 1110, 1114, 22 Tenn.App. 435.

Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Love v. State Bank & Trust Co. of San Antonio, 90 S.W.2d 819, 126 Tex. 591—Strickland v. Ward, Civ.App., 185 S.W.2d 736—Pearl Assur. Co. v. Williams, Civ.App., 167 S.W.2d 808—American Law Book Co. v. Chester, Civ.App., 110 S.W.2d 950, error dismissed—Peaslee-Gaulbert Corporation v. Hughes, Civ.App., 79 S.W.2d 149, error refused—State v. Wright, Civ.App., 56 S.W. 2d 950—Hudson v. Kerby, Civ.App., 5 S.W.2d 1007—**Corpus Juris cited in** Marsh v. Tiller, Civ.App., 279 S.W. 283, 284—Eldridge v. Eldridge, Civ.App., 259 S.W. 209—Galloway v. Marietta State Bank, Civ.App., 258 S.W. 532, reversed on other grounds Marietta State Bank v. Galloway, Com.App., 269 S.W. 776.

34 C.J. p 441 note 8, p 442 note 23, p 459 note 9, p 460 note 20, p 470 note 44—47 C.J. p 437 note 51, p 1015 note 73.

Judgment or decree

Relief in equity on the ground of fraud may be had against any judgment or decree, legal or equitable. U.S.—U. S. v. Gallucci, D.C.Mass., 54 F.Supp. 964.

Ala.—Hooke v. Hooke, 25 So.2d 33.

Unconscionable or fraudulent agreement

Equity may relieve against a judgment founded on an unconscionable or fraudulent agreement, particularly where it arose out of confidential relations, or was obtained by undue influence.—Raimondi v. Bianchi, 134 A. 866, 100 N.J.Eq. 288.

Solvency of defendant

Where a party has obtained a judgment by fraud, it is no ground for refusing to enjoin the judgment that he is solvent.—Sanderson v. Voelcker, 51 Mo.App. 328.

When proceeding is in rem, injured party, without notice of proceeding, and not wanting in diligence, may have equitable relief against decree procured by fraud.—Quick v. McDonald, 108 So. 529, 214 Ala. 587.

ticed on the court.[87] The power of equity in this respect is inherent.[88] Equitable relief may be had on the ground of fraud in inducing the court to assume jurisdiction which it did not have or would not otherwise have exercised.[89] Relief will also be granted where, by reason of fraud, the party loses his right to obtain or move for a new trial[90] or to take an appeal.[91] To justify relief on the ground of fraud it must be shown that the fraud was successfully perpetrated and that the judgment complained of would not have been rendered had it not been for the fraud; there is no ground for equitable intervention where the fraud, if attempted, would have been unsuccessful.[92] It should appear that the judgment complained of is unjust[93] and that

87. Cal.—Scott v. Dilks, 117 P.2d 700, 47 Cal.2d 207—Crow v. Madsen, App., 111 P.2d 7, rehearing denied 111 P.2d 663.

Ga.—**Corpus Juris quoted in** Walker v. Hall, 166 S.E. 757, 759, 176 Ga. 12.

N.Y.—Boston & M. R. R. v. Delaware & H. Co., 260 N.Y.S. 817, 146 Misc. 221, reversed on other grounds 264 N.Y.S. 470, 238 App.Div. 191.

Ohio.—Young v. Guella, 35 N.E.2d 997, 67 Ohio App. 11—Byrne v. Vanderbilt, 187 N.E. 731, 46 Ohio App. 304—Laird v. Holan, 192 N. E. 806, 48 Ohio App. 127.

Okl.—Cone v. Harris, 230 P. 721, 104 Okl. 114.

34 C.J. p 471 note 46.

Conspiracy to give false testimony

Conduct of attorney in conspiring with ostensibly disinterested witness who did not in fact witness accident to give false testimony as to cause of collision and in using such testimony to obtain verdict for plaintiff amounted to a fraud on the court for which equity should grant relief.—Sutter v. Easterly, Mo., 189 S.W.2d 284.

88. Mo.—Wm. H. Johnson Timber & Realty Co. v. Belt, 46 S.W.2d 153, 329 Mo. 515.

Mont.—Gillen v. Gillen, 159 P.2d 511—Bullard v. Zimmerman, 292 P. 730, 88 Mont. 271—State v. District Court of Sixteenth Judicial District in and for Custer County, 214 P. 85, 66 Mont. 496, 33 A.L.R. 464.

Or.—Fain v. Amend, 100 P.2d 481, 164 Or. 123—State Bank of Sheridan v. Heider, 9 P.2d 117, 139 Or. 185.

Origin and flexibility of rule

"Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations."—Hazel-Atlas Glass Co. v. Hartford-Empire Co., 64 S.Ct. 997, 1002, 322 U.S. 238, 88 L.Ed. 1250, rehearing denied 64 S.Ct. 1281, 322 U.S. 772, 88 L.Ed. 1596.

Statutes held not controlling

(1) Statutory limitation for filing petitions to review judgments by persons served by publication who did not appear and defend does not deprive equity of power to set aside after such period judgments procured by fraud.—Fadler v. Gabbert, 63 S.W.2d 121, 333 Mo. 851.

(2) Statutes specifically providing grounds for the vacation of judgments in the court of common pleas, which, by virtue of other statutes, apply equally to the probate court, have been held to have no controlling effect where the proceedings in the probate court are in equity for the purpose of impeaching a judgment for fraud.—Hoffstetter v. Adams, 35 N.E.2d 896, 67 Ohio App. 21.

89. Ala.—Wright v. Fannin, 156 So. 849, 229 Ala. 278—Nichols v. Dill, 132 So. 900, 222 Ala. 455.

Ga.—Abercrombie v. Hair, 196 S.E. 447, 185 Ga. 728—Hamilton v. Bell, 132 S.E. 83, 161 Ga. 739.

Ill.—People v. Sterling, 192 N.E. 229, 357 Ill. 354, followed in People v. Small, 192 N.E. 235, 357 Ill. 388—Hintz v. Moldenhauer, 243 Ill. App. 227.

Ky.—Metropolitan Life Ins. Co. of New York v. Myers, 109 S.W.2d 1194, 270 Ky. 523.

Mass.—McLaughlin v. Feerick, 176 N.E. 779, 276 Mass. 180.

Miss.—Lamar v. Houston, 184 So. 293, 183 Miss. 260.

Okl.—Johnson v. Petty, 246 P. 848, 118 Okl. 178.

Fraudulent concoction of simulated cause of action

Equity will afford relief against a judgment where the jurisdiction of the court was acquired by the fraudulent concoction of a simulated cause of action.—Wright v. Fannin, 156 So. 849, 229 Ala. 278—Bolden v. Sloss-Sheffield Steel & Iron Co., 110 So. 574, 215 Ala. 334, 49 A.L.R. 1206.

Necessity of fraud affecting jurisdiction

(1) A fraud which justifies the court in setting aside a judgment must relate to jurisdictional matters, and not to such matters as may be available as a defense.—Mason v. Lacy, 117 S.W.2d 1026, 274 Ky. 21—Metcalf v. Metcalf, 61 S.W.2d 1083, 250 Ky. 202—Greene v. Fitzpatrick, 295 S.W. 896, 220 Ky. 590.

(2) "It is the general rule that a judgment cannot be impeached for fraud . . . unless the fraud alleged affects the jurisdiction of the court or appears on the face of the judgment roll itself."—Dr. P. Phillips Co. v. Billo, 147 So. 579, 581, 109 Fla. 316.

90. Cal.—Thompson v. Laughlin, 27 P. 752, 91 Cal. 313.

Or.—State Bank of Sheridan v. Heider, 9 P.2d 117, 139 Or. 185.

91. Mo.—Sanderson v. Voelcker, 51 Mo.App. 328.

92. Cal.—Karlslyst v. Fraxier, 2 P. 2d 362, 213 Cal. 377—Church v. Church, 105 P.2d 643, 40 Cal.App. 2d 701.

Kan.—Bitsko v. Bitsko, 122 P.2d 753, 155 Kan. 80—McNergney v. Harrison, 84 P.2d 944, 148 Kan. 843.

Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.

Utah.—Anderson v. State, 238 P. 557, 65 Utah 512.

34 C.J. p 471 note 56.

Inadmissibility of concealed evidence

A suit in equity cannot be maintained to set aside a judgment for insurer in an action on a policy on the ground that insurer fraudulently concealed certain evidence, where such evidence would have been inadmissible because irrelevant to the issues in the former action.—Kithcart v. Metropolitan Life Ins. Co., C.C.A.Mo., 119 F.2d 497, certiorari denied U. S. ex rel. Kithcart v. Gardner, 62 S.Ct. 793, 315 U.S. 808, 86 L. Ed. 1207—Kithcart v. Metropolitan Life Ins. Co., C.C.A.Mo., 88 F.2d 407.

93. Cal.—Karlslyst v. Frazier, 2 P. 2d 362, 213 Cal. 377—Church v. Church, 105 P.2d 643, 40 Cal.App. 2d 701.

Or.—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.

Relief against annulment decree

In considering equities of wife seeking to set aside default annulment decree obtained by husband through extrinsic fraud, and woman who subsequently married husband in good faith, haste of the woman in

some detriment or injury has been occasioned or contributed to by the fraud.[94]

Fraudulent alteration. It is good ground for the intervention of equity that a judgment fairly and regularly obtained has afterward been fraudulently altered so as to increase the amount for which it stands[95] or so as to include a person not originally named in it or made a party to the action.[96]

By and on whom perpetrated. In order to obtain relief against a judgment on the ground of fraud it must appear that the fraud was practiced or participated in by the judgment creditor[97] or his agent[98] or attorney.[99] The fraud must have been practiced on the opposite party[1] or his agents[2] or attorneys,[3] or on the court;[4] fraud between codefendants will not affect the plaintiff, however gross it may be.[5]

Fault or fraud of complaining party. The party seeking relief on the ground of fraud must show that he is free from fault, negligence, or lack of due attention to his case; relief will not be granted where the injured party is chargeable with such timely knowledge of the facts alleged as would have enabled him to prevent the entry of the judgment, if he had used proper diligence.[6] Further, relief will not be granted to one whose conduct has been

marrying the husband was a factor for consideration.—Bloomquist v. Thomas, 9 N.W.2d 337, 215 Minn. 35.

94. U.S.—Brady v. Beams, 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L.Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727.
Ala.—Quick v. McDonald, 108 So. 529, 214 Ala. 587.
Cal.—Church v. Church, 105 P.2d 643, 40 Cal.App.2d 701.

Judgment correct as matter of law
Alleged fact that plaintiff bribed juror did not constitute ground for suit in nature of bill of review to vacate judgment where plaintiff was entitled to judgment on facts as a matter of law, since alleged fraud of plaintiff and juror if true would not taint or impair judgment rendered.—Elder v. Byrd-Frost, Inc., Tex.Civ.App., 110 S.W.2d 172.

95. Ill.—Babcock v. McCamant, 53 Ill. 214.

96. Cal.—Chester v. Miller, 13 Cal. 558.

97. Ga.—Rivers v. Alsup, 2 S.E.2d 632, 188 Ga. 75—Elliott v. Elliott, 191 S.E. 465, 184 Ga. 417.
Iowa.—Ware v. Eckman, 277 N.W. 725, 224 Iowa 783.
Okl.—Davis v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, 103 P.2d 380, 187 Okl. 436.
Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664.
34 C.J. p 471 note 51.

Fraud of officer of complaining corporation
Insurer was not entitled to have default judgment set aside on ground that its own secretary and member of board of directors had fraudulently failed to disclose that he had been served with process and that suit had been filed.—Southern Travelers Ass'n v. Stillman, Tex.Civ.App., 109 S.W.2d 285, error dismissed.

Dispute involving one of several defendants
Where plaintiff is induced by one of several defendants to exchange parcel awarded to plaintiff in partition for tract awarded to such defendant and judgment is entered accordingly, plaintiff may not maintain a separate action to set aside such judgment for extrinsic fraud perpetrated on him where none of other defendants are involved in the dispute and all other parties received their own awards and none of them participated in alleged misrepresentations.—Machado v. Machado, 152 P.2d 457, 66 Cal.App.2d 401.

Correspondence with clerk of court
A defendant who received due notice of the pendency of the action and filed an answer, but failed to appear for trial due to correspondence with the clerk of the court whereby he was informed that the case would not be called, neither plaintiff nor his attorney having knowledge of such correspondence, could not have a judgment thereafter rendered for plaintiff set aside on the ground of fraud.—Farmers' Mut. Fire Ins. Co. v. Defries, 1 S.W.2d 19, 175 Ark. 548.

98. Ga.—Rivers v. Alsup, 2 S.E.2d 632, 188 Ga. 75.
Okl.—Davis v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, 103 P.2d 380, 187 Okl. 436.
34 C.J. p 471 note 52.

99. Ga.—Rivers v. Alsup, 2 S.E.2d 632, 188 Ga. 75.
Iowa.—Ware v. Eckman, 277 N.W. 725, 224 Iowa 783.
N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App. Div. 191.
34 C.J. p 471 note 53.

1. U.S.—Continental Nat. Bank of Jackson County, at Kansas City, Mo., v. Holland Banking Co., C.C.A. Mo., 66 F.2d 823.
Ind.—State v. Holmes, 69 Ind. 577.
Okl.—Davis v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, 103 P.2d 380, 187 Okl. 436.
Wis.—In re MacCormick, 190 N.W. 108, 178 Wis. 408.

Omitting necessary parties
A decree, obtained without making those persons whose rights are affected thereby parties to the suit in which the decree is had, is fraudulent and void as to those parties.—Elieff v. Lincoln Nat. Life Ins. Co., 17 N.E.2d 47, 369 Ill. 408.

2. Okl.—Davis v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, 103 P.2d 380, 187 Okl. 436.

3. Okl.—Davis v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, supra.

4. Ga.—White v. Roper, 167 S.E. 177, 176 Ga. 180.
Mo.—State ex rel. Ellsworth v. Fidelity & Deposit Co. of Maryland, 147 S.W.2d 131, 235 Mo.App. 850.
Wis.—In re MacCormick, 190 N.W. 108, 178 Wis. 408.

5. Ind.—State v. Holmes, 69 Ind. 577.

6. Ark.—Berry v. Sims, 113 S.W.2d 25, 195 Ark. 326—Matkin v. Cramer Cotton Co., 252 S.W. 596, 159 Ark. 503.
Cal.—Hosner v. Skelly, App., 164 P. 2d 573.
Ind.—Atha v. Glenn, 174 N.E. 826, 92 Ind.App. 449—Branham v. Boruff, 145 N.E. 901, 82 Ind.App. 370.
Ky.—Overstreet v. Grinstead's Adm'r, 140 S.W.2d 836, 283 Ky. 73—Commonwealth v. Harkness' Adm'r, 246 S.W. 803, 197 Ky. 198.
La.—First Nat. Life Ins. Co. v. Bell, 141 So. 379, 174 La. 692.
Mo.—Wuelker v. Maxwell, App., 70 S. W.2d 1100.
Neb.—Pinches v. Village of Dickens, 268 N.W. 645, 131 Neb. 573.
N.Y.—In re Gray's Will, 8 N.Y.S.2d 850, 169 Misc. 985.
Tex.—Adams v. First Nat. Bank, Civ. App., 294 S.W. 909—Moore v. Moore, Civ.App., 259 S.W. 322.
Utah.—Wright v. W. E. Callahan Const. Co., 156 P.2d 710—Anderson v. State, 238 P. 557, 65 Utah 512.
34 C.J. p 473 note 70, p 474 note 86.

Misplaced confidence
Fact that one has placed confidence

improper or fraudulent,[7] except in some cases where the parties are not in pari delicto.[8]

b. Nature of Fraud

(1) In general
(2) Extrinsic or intrinsic fraud
(3) Concealment or deceit

(1) In General

In determining whether the circumstances amount to fraud so as to justify equitable relief against a judgment, each case must be judged on its own facts. Mere error of fact or law is insufficient, and it is sometimes necessary to show the elements of actionable fraud.

As respects the right to equitable relief against a judgment on the ground of fraud, the term "fraud" is a generic term,[9] and while it has been held that equitable relief against a judgment may be granted for extrinsic fraud, but not for intrinsic fraud, as discussed infra subdivision b (2) of this section, in the final analysis each case must be judged on its own facts in determining whether the circumstances amount to fraud so as to justify equitable relief against a judgment.[10] Broadly speaking, if

in another is not sufficient to excuse lack of diligence in investigating facts respecting fraud.—Lindsey v. Dougherty, Tex.Civ.App., 60 S.W.2d 300, error refused.

Amendment of pleading

In an action on a note where the answer was sufficient to render a co-defendant served with summons, but who made default, primarily liable, and the answer was afterward amended by adding an allegation of his liability and a prayer for judgment accordingly, and he had knowledge of the contents of the original answer, but was not notified of the amendment, a judgment pursuant to the prayer is not subject to vacation on the ground of fraud.—Scott v. Johnson, 224 P. 41, 115 Kan. 661.

Fault of complaining party held not shown

(1) Generally.

Ga.—Bryant v. Bush, 140 S.E. 366, 165 Ga. 252.

Minn.—Bloomquist v. Thomas, 9 N. W.2d 337, 215 Minn. 35.

(2) In a suit to set aside a judgment on a fraudulent contract, proof that men, apparently working in his interest, were participating in the conspiracy to defraud, excused plaintiff's lack of diligence to discover the fraud until after judgment.—Paulson v. Kenney, 224 P. 634, 110 Or. 688.

(3) Payment of taxes for single year was held not sufficient notice of procurement of judgment accomplished by fraudulent practices, so as to bar relief against the judgment, where adverse claimant paid taxes for other years.—Bernhard v. Waring, 2 P.2d 32, 213 Cal. 175.

7. Ky.—Hoover v. Dudley, 14 S.W. 2d 410, 228 Ky. 110.
Mo.—Crane v. Deacon, 253 S.W. 1068.
N.H.—Lamarre v. Lamarre, 152 A. 272, 84 N.H. 441.
34 C.J. p 474 note 87.

8. **Attorney and client**

Where parties to fraudulent transaction occupy fiduciary relationship of client and attorney, and client relies on advice of counsel, client is not in pari delicto with attorney; attorney is deemed more culpable than client, and equity can relieve client from burden of unjust and fraudulent judgment obtained by attorney against client.—Sontag v. Denio, 73 P.2d 248, 23 Cal.App.2d 319.

9. N.C.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.

10. Cal.—Larrabee v. Tracy, 134 P. 2d 265, 21 Cal.2d 645, followed in Salvation Army v. Security-First Nat. Bank of Los Angeles, 134 P.2d 271, 21 Cal.2d 892.
N.C.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.

Circumstances held to constitute fraud

(1) Plaintiff knowing that notes sued on were given to suppress criminal prosecution was guilty of fraud in initiating litigation.—Dahms v. Swinburne, 167 N.E. 486, 31 Ohio App. 512.

(2) Prosecution of appeal, after representations that appeal without notice would not be taken, constitutes fraud.—American Ry. Express Co. v. Murphy, 234 Ill.App. 346.

(3) Fraud was held established where it appeared that counsel for plaintiffs assisted judge in preparing findings and conclusions without knowledge of defendant's counsel.—Fellows v. Owens, 62 P.2d 1215, 178 Okl. 224.

(4) Other circumstances.

Ark.—Parker v. Nixon, 44 S.W.2d 1088, 184 Ark. 1085.
Ga.—Bryant v. Bush, 140 S.E. 366, 165 Ga. 252—Phillips v. Phillips, 137 S.E. 561, 163 Ga. 899.
Ky.—People's Bank & Trust Co. v. Sleet, 4 S.W.2d 689, 223 Ky. 749.
La.—Cilluffa v. Monreale Realty Co., 24 So.2d 606.
Okl.—Western Paint & Chemical Co. v. Board of Com'rs of Garfield County, 18 P.2d 888, 161 Okl. 300.
Tex.—Pearl Assur. Co. v. Williams, Civ.App., 167 S.W.2d 808.
Wash.—Bates v. Glaser, 227 P. 15, 130 Wash. 328.

Circumstances held not to constitute fraud

(1) The fact alone that the complaining party was without business experience does not establish fraud so as to warrant relief against a judgment.—McLaughlin v. Feerick, 176 N.E. 779, 276 Mass. 180.

(2) Entry of judgment without notice to defendant, on latter's failure to perform settlement agreement, is not fraud for which injunction will lie.—Mutual Casualty Co. of Missouri v. Sansone, Mo.App., 17 S. W.2d 558.

(3) Fact that creditor knew debtor had been discharged in bankruptcy as against debt sued on could not be made basis of charge of fraud in taking judgment by default.—Harding v. Quinlan, 229 N.W. 672, 209 Iowa 1190.

(4) Failure of a party or his attorney to advise the adverse party regarding the competency of the attorney for such adverse party does not constitute fraud justifying an attack on the judgment.—Luna v. Miller, 42 P.2d 809, 171 Okl. 260.

(5) Failure to advise defendant's attorney of setting of case for trial did not constitute fraud justifying vacation of judgment for plaintiff.—Hanover Fire Ins. Co. v. Street, 154 So. 316, 228 Ala. 677.

(6) A mistake of judgment whereby a party consented to or permitted a decree to be entered against him and from which he did not appeal does not constitute extrinsic fraud or misrepresentation warranting equitable relief.—Eskridge v. Brown, 94 So. 353, 208 Ala. 210.

(7) Failure of debtor to appear and assert defense in response to summons served on him, because person serving process told him it was subpœna to appear as witness, is not sufficient ground to set aside judgment against him as procured by fraud.—Brinegar v. Bank of Wyoming, 130 S.E. 151, 100 W.Va. 64.

(8) Fact that judgment in partition was not fraudulently obtained was held shown by recital that party opposed its entry.—Bennis v. Conley, 231 N.Y.S. 635.

(9) A party may in separate and contemporaneous actions against different defendants pursue inconsistent remedies for demands arising

the result complained of is a consequence of fraud, the mode or manner in which the fraud was effected is immaterial;[11] where there is no question that gross fraud has been committed, technicalities of interpretation or refinement of distinction will not be permitted to embarrass the court in exercising its power to do justice.[12]

In order to have a judgment set aside on the ground of fraud, the essential elements of actionable fraud are sometimes required to be shown.[13] Thus, for representations to be sufficient to amount to fraud justifying relief against the judgment, it must appear that the representations were made as to existing facts,[14] that they were false,[15] that the complaining party was ignorant of such falsity and believed and relied on them,[16] and that by reason of such belief and reliance he was injured.[17] A mere error of fact[18] or law[19] does not constitute fraud. Fraud is not established by the fact that a larger judgment was rendered than the facts justified,[20] or by the fact that voluminous, ambiguous, and disorderly testimony has been offered and received on a trial.[21]

Fraud as actual or constructive; breach of fiduciary relation. It is generally considered that the wrong constituting the basis of the fraud must be intentional and done with knowledge[22] or constitute the breach of a duty growing out of a fiduciary relation.[23] Fraud cannot be predicated on a statement or representation which was made without

from a single transaction without advising court thereof, and judgment obtained by such party is not subject to attack as being obtained by fraud on court.—Savery v. Mosely, 76 P.2d 902, 182 Okl. 133.

(10) Other circumstances.

U.S.—McIntosh v. Wiggins, C.C.A. Mo., 123 F.2d 316, certiorari denied 62 S.Ct. 800, 315 U.S. 815, 86 L.Ed. 1213, rehearing denied 62 S. Ct. 914, 315 U.S. 831, 86 L.Ed. 1224—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A.Wyo., 74 F.2d 827—American Surety Co. of New York v. Baldwin, D.C.Idaho, 51 F.2d 596, reversed on other grounds, C.C.A., 55 F.2d 555, reversed on other grounds, Baldwin v. American Surety Co., 53 S.Ct. 98, 287 U.S. 156, 77 L.Ed. 231, 86 A.L.R. 298—U. S. v. Irving Trust Co., D.C.N.Y., 49 F.Supp. 663.

Ala.—Wright v. Fannin, 156 So. 849, 229 Ala. 278.

Ark.—Thornton v. Commonwealth Federal Savings & Loan Ass'n, 152 S.W.2d 304, 202 Ark. 670.

Cal.—Rudy v. Slotwinsky, 238 P. 783, 73 Cal.App. 459.

Ga.—Lloyd v. Milner Motor Co., 190 S.E. 641, 184 Ga. 181.

Ill.—Slocum v. First Nat. Bank, 27 N.E.2d 479, 305 Ill.App. 488, certiorari denied 61 S.Ct. 450, 312 U. S. 678, 85 L.Ed. 1117—Francis v. Legris, 17 N.E.2d 359, 297 Ill.App. 164—Moore v. Robbins Machinery & Supply Co., 252 Ill.App. 24.

Ky.—Elkhorn Coal Corporation v. Cuzzort, 284 S.W. 1005, 215 Ky. 254.

La.—Rowe v. Crichton Co., 123 So. 442, 38 La.App. 454.

Me.—Fort Fairfield Nash Co. v. Noltemier, 189 A. 415, 135 Me. 84, 108 A.L.R. 1276.

Okl.—Stout v. Derr, 42 P.2d 136, 171 Okl. 132.

Or.—Hartley v. Rice, 261 P. 689, 123 Or. 237.

Tex.—O'Quinn v. Tate, Civ.App., 187 S.W.2d 241.

11. N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App.Div. 191.

Okl.—Jones v. Snyder, 249 P. 813, 121 Okl. 254.

Any conduct which tends to trick an adversary out of a defense or to blind him to the pendency of an action constitutes an act of fraud.—Fadler v. Gabbert, 63 S.W.2d 121, 333 Mo. 851.

12. Ky.—Metropolitan Life Ins. Co. of New York v. Myers, 109 S.W.2d 1194, 270 Ky. 523.

13. Cal.—Gundelfinger v. Mariposa Commercial & Min. Co., App., 165 P.2d 57.

14. Tex.—Moore v. Moore, Civ.App., 259 S.W. 322.

Expression of opinion

A statement of plaintiff's counsel, that there was no question but that plaintiff could go into court and recover judgment on the facts, was held a mere expression of opinion, which could not be made the basis of a charge of fraud.—Moore v. Moore, Tex.Civ.App., 259 S.W. 322.

15. Tex.—Moore v. Moore, supra.

16. Ky.—Commonwealth v. Harkness' Adm'r, 246 S.W. 303, 197 Ky. 198.

Tex.—Moore v. Moore, Civ.App., 259 S.W. 322.

Statements in brief on appeal could not have misled defendant in its preparation for trial, so as to entitle it to have the decree set aside as for fraud.—Toledo Scale Co. v. Computing Scale Co., Ohio, 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719.

17. Tex.—Moore v. Moore, Civ.App., 259 S.W. 322.

Misrepresentation which would not have prevented recovery of judgment will not warrant equitable relief against the judgment.—Ellis v. Gordon, 231 N.W. 585, 202 Wis. 134.

18. Kan.—Peterson v. Peterson, 246 P. 506, 121 Kan. 212.

19. Kan.—Peterson v. Peterson, supra.

N.M.—Caudill v. Caudill, 44 P.2d 724, 39 N.M. 248.

Misconception of the law controlling the issues by counsel for either party is not a fraud for which equity can or will give relief.—Phœnix Finance Corporation v. Iowa-Wisconsin Bridge Co., C.C.A.Iowa, 115 F.2d 1, 139 A.L.R. 1490, reversed on other grounds 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100, 137 A.L.R. 967.

Running of statute of limitations

Fact that court may have given an erroneous judgment in holding that statute of limitations had not run would not support a decree to annul judgment for fraud in procurement of judgment.—Bullivant v. Greer, 264 S.W. 95, 216 Mo.App. 324.

20. Ark.—Parker v. Sims, 51 S.W.2d 517, 185 Ark. 1111.

21. U.S.—Phœnix Finance Corporation v. Iowa-Wisconsin Bridge Co., C.C.A.Iowa, 115 F.2d 1, 139 A.L.R. 1490, reversed on other grounds 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100, 137 A.L.R. 967.

22. Ga.—Rivers v. Alsup, 2 S.E.2d 632, 188 Ga. 75—Abercrombie v. Hair, 196 S.E. 447, 185 Ga. 728—**Corpus Juris quoted in** Walker v. Hall, 166 S.E. 757, 759, 176 Ga. 12.

Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664.

34 C.J. p 471 note 49.

Circumstances consistent with honesty

Fraud which will warrant the setting aside of a judgment is not to be presumed where the parties do not stand in fiduciary relation, and will not be imputed when the facts and circumstances from which it is supposed to arise are fairly and reasonably consistent with honesty of intention.—Farrell v. Farrell, 10 So. 2d 153, 243 Ala. 389.

23. Ga.—**Corpus Juris quoted in** Walker v. Hall, 166 S.E. 757, 759, 176 Ga. 12.

knowledge on the part of the alleged wrongdoer of its falsity, or without an intent to deceive,[24] or which was made in the belief that it was true,[25] however implicitly it may have been acted on. It has been held that the fraud must be actual and positive,[26] and not merely constructive.[27] Other authorities, however, have held that intentional wrongdoing or actual fraud is not essential to the granting of relief in equity,[28] and that equity will grant relief, under appropriate circumstances, on the ground of constructive, as well as actual, fraud.[29]

(2) Extrinsic or Intrinsic Fraud

While the authorities are not unanimous, the general rule is that the fraud which will justify equitable relief against a judgment must be extrinsic or collateral to the issues tried in the original action, and that intrinsic fraud, or fraud in the cause of action or instrument in suit, will not suffice.

Generally speaking equitable relief against a judgment may be granted for extrinsic fraud[30] but

Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664.

34 C.J. p 471 note 50.

Inducing person not to protect his interests

Where a person holding confidential relationship with, and charged with duty to, another person, induces him not to protect his interests in a legal proceeding for first person's own gain, with result that judgment is rendered against such other person, invocation of equity to right such wrong is warranted.—Rosenbaum v. Tobias' Estate, 130 P.2d 215, 55 Cal.App.2d 39.

Where there is a duty to speak because of a trust or confidential relation, the failure to do so is a fraud for which equity may afford relief from a judgment thereby obtained, whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule.

U.S.—Ferguson v. Wachs, C.C.A.Ill., 96 F.2d 910.

Cal.—Larrabee v. Tracy, 134 P.2d 265, 21 Cal.2d 645, followed in Salvation Army v. Security-First Nat. Bank of Los Angeles, followed in 134 P.2d 271, 21 Cal.2d 892.

D.C.—Earll v. Picken, 113 F.2d 150, 72 App.D.C. 91.

24. Cal.—Heller v. Dyerville Mfg. Co., 47 P. 1016, 116 Cal. 127.

25. Kan.—Page v. Sawyer, 168 P. 878, 101 Kan. 612.

26. Ala.—Farrell v. Farrell, 10 So.2d 153, 243 Ala. 389—Quick v. McDonald, 108 So. 529, 214 Ala. 587.

Ga.—Rivers v. Alsup, 2 S.E.2d 632, 188 Ga. 75—**Corpus Juris cited in** Abercrombie v. Hair, 196 S.E. 447, 450, 185 Ga. 728—**Corpus Juris quoted in** Walker v. Hall, 166 S.E. 757, 759, 176 Ga. 12.

Me.—In re Baker's Estate, 195 A. 202, 135 Me. 277.

Mich.—**Corpus Juris cited in** Grigg v. Hanna, 278 N.W. 125, 130, 283 Mich. 443.

34 C.J. p 471 note 48.

27. Ga.—Rivers v. Alsup, 2 S.E.2d 632, 188 Ga. 75—**Corpus Juris cited in** Abercrombie v. Hair, 196 S.E. 447, 450, 185 Ga. 728—**Corpus Juris quoted in** Walker v. Hall, 166 S.E. 757, 759, 176 Ga. 12.

Mich.—**Corpus Juris cited in** Grigg v. Hanna, 278 N.W. 125, 130, 283 Mich. 443—Ombrello v. Duluth, S. S. & A. Ry. Co., 233 N.W. 357, 252 Mich. 396.

34 C.J. p 471 note 48.

28. Mo.—Chouteau v. City of St. Louis, App., 131 S.W.2d 902.

Wicked motive unnecessary

The fraud for which relief will be afforded against a judgment is not confined to vicious import of a wicked motive or deliberate deceit, or the like, purposely conceived, but embraces merely leading astray, throwing off guard, or lulling to security and inaction, be its intention or motives good or bad.—Triplett v. Stanley, 130 S.W.2d 45, 279 Ky. 148.

29. Cal.—Antonsen v. Pacific Container Co., 120 P.2d 148, 48 Cal.App. 2d 535.

Mont.—State ex rel. Clark v. District Court of Second Judicial Dist. in and for Silver Bow County, 57 P. 2d 809, 102 Mont. 227.

Interested persons misled and deceived

Relief has been granted where the circumstances, if not constituting actual fraud, at least showed legal or constructive fraud, and interested persons were misled and deceived to such an extent that they suffered an unavoidable casualty.—Kersh Lake Drainage Dist. v. Johnson, 157 S.W. 2d 39, 203 Ark. 315, certiorari denied Johnson v. Kersh Lake Drainage Dist., 62 S.Ct. 1044, 316 U.S. 673, 86 L.Ed. 1748.

30. U.S.—Cohen v. Randall, C.C.A.N. Y., 137 F.2d 441, certiorari denied 64 S.Ct. 263, 320 U.S. 796, 88 L.Ed. 480.

Ariz.—Dragoon Marble & Mining Co. v. McNeish, 235 P. 401, 28 Ariz. 96.

Cal.—Larrabee v. Tracy, 134 P.2d 265, 21 Cal.2d 645, followed in Salvation Army v. Security-First Nat. Bank of Los Angeles, 134 P.2d 271, 21 Cal.2d 892—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A. L.R. 1323—In re Estrem's Estate, 107 P.2d 36, 16 Cal.2d 563—Purinton v. Dyson, 65 P.2d 777, 8 Cal.2d 322, 113 A.L.R. 1230—Wattson v. Dillon, 56 P.2d 220, 6 Cal.2d 33—Baker v. Baker, 18 P.2d 61, 217 Cal. 216—Hendricks v. Hendricks, 14 P.2d 83, 216 Cal. 321—Wilson v. Wilson, 130 P.2d 782, 55 Cal.App.2d 421—Rosenbaum v. Tobias' Estate, 130 P.2d 215, 55 Cal.App.2d 39—Kallmeyer v. Poore, 125 P.2d 924, 52 Cal.App.2d 142—Antonsen v. Pacific Container Co., 120 P.2d 148, 48 Cal.App.2d 535—Gump v. Gump, 108 P.2d 21, 42 Cal.App.2d 64—Giavocchini v. Bank of America Nat. Trust & Savings Ass'n, 103 P.2d 603, 39 Cal.App.2d 444—Harada v. Fitzpatrick, 91 P.2d 941, 33 Cal.App.2d 453—Young v. Young Holdings Corporation, 80 P.2d 723, 27 Cal.App.2d 129—Sontag v. Denio, 73 P.2d 248, 23 Cal.App.2d 319—Mitchell v. Rasey, 33 P.2d 1056, 139 Cal.App. 350—Jones v. Moers, 266 P. 821, 91 Cal.App. 65.

Fla.—Reybine v. Kruse, 174 So. 720, 128 Fla. 278.

Minn.—Bloomquist v. Thomas, 9 N. W.2d 337, 215 Minn. 35.

Mo.—Chouteau v. City of St. Louis, App., 131 S.W.2d 902.

Mont.—Minter v. Minter, 62 P.2d 233, 103 Mont. 219—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58.

Okl.—Kauffman v. McLaughlin, 114 P.2d 929, 189 Okl. 194—Harjo v. Johnston, 104 P.2d 985, 187 Okl. 561—Schulte v. Board of Com'rs of Pontotoc County, 250 P. 123, 119 Okl. 261—Jones v. Snyder, 233 P. 744, superseded 249 P. 313, 121 Okl. 254—Ross v. Breene, 211 P. 417, 88 Okl. 37.

Or.—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.

Pa.—In re Culbertson's Estate, 152 A. 540, 543, 301 Pa. 433.

Inherent power of equity

The power of a court of equity to give relief against judgment obtained by extrinsic fraud is inherent. —Moore v. Capital Gas Corp., Mont., 158 P.2d 302.

Public policy

The demand of public policy that there should be an end of litigation for repose of society yields to ends of justice where extrinsic fraud has been practiced only because main characteristic of such fraud is that it deprives party of opportunity of presenting his case or defense and

not for intrinsic fraud.[31] The fraud which will afford ground for equitable relief against a judgment must be extrinsic, extraneous, or collateral to the matters or issues tried in the action in which the judgment was rendered;[32] relief on the ground of fraud cannot be predicated on matters or issues

renders result as to him no trial at all in legal sense.—Horne v. Edwards, 3 S.E.2d 1, 215 N.C. 622.

Extrinsic or intrinsic nature of fraud as affecting remedy

Generally, where fraud is extrinsic or collateral, operating from without, remedy also may be from without, and judgment may be set aside by an independent action; but when the fraud is intrinsic, operating from within upon some matter within the line of consideration of the court on the merits, remedy must also be from within by motion in the cause made in apt time.—Horne v. Edwards, 3 S.E.2d 1, 215 N.C. 622.

The submission of stipulation for judgment to court for signing of formal judgment did not put it beyond power of court of equity to set aside judgment on ground of extrinsic fraud.—Scott v. Dilks, 117 P.2d 700, 47 Cal.App.2d 207.

31. U.S.—T. J. Moss Tie Co. v. Wabash Ry. Co., C.C.A.Ill., 71 F.2d 107, certiorari denied American Surety Co. of New York v. Conroy, 55 S. Ct. 90, 293 U.S. 578, 79 L.Ed. 675—Toledo Scale Co. v. Computing Scale Co., C.C.A.Ill., 281 F. 488, affirmed 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719—Harrington v. Denny, D.C.Mo., 3 F.Supp. 584.

Cal.—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—La Salle v. Peterson, 32 P.2d 612, 220 Cal. 739—O. A. Graybeal Co. v. Cook, 60 P.2d 525, 16 Cal.App.2d 231—Harvey v. Griffiths, 23 P.2d 532, 133 Cal.App. 17—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400.

Kan.—Huls v. Gafford Lumber & Grain Co., 243 P. 306, 120 Kan. 209.

Minn.—Tankar Gas v. Lumbermen's Mut. Casualty Co., 9 N.W.2d 754, 215 Minn. 265, 146 A.L.R. 1223.

Mo.—Winchell v. Gaskill, 190 S.W.2d 266.

N.C.—Horne v. Edwards, 3 S.E.2d 1, 215 N.C. 622.

Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Mills v. Baird, Civ.App., 147 S.W.2d 312, error refused—Reed v. Bryant, Civ.App., 291 S.W. 605.

32. U.S.—Brady v. Beams, C.C.A. Okl., 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L.Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727—Ætna Casualty & Surety Co. v. Abbott, C.C.A.Md., 130 F.2d 40—Angle v. Shinholt, C.C.A.Tex., 90 F.2d 294, certiorari denied 58 S.Ct. 40, 302 U.S. 719, 82 L.Ed. 555—T. J. Moss Tie Co. v. Wabash Ry. Co., C.C.A.Ill., 71 F.2d 107, certiorari denied American Surety Co. of New York v. Conroy, 55 S.Ct. 90, 293 U.S. 578, 79 L.Ed. 675—Continental Nat. Bank of Jackson County, at Kansas City, Mo., v. Holland Banking Co., C.C.A.Mo., 66 F.2d 823—Toledo Scale Co. v. Computing Scale Co., C.C.A.Ill., 281 F. 488, affirmed 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719—Pittsburgh Forgings Co. v. American Foundry Equipment Co., D.C.Pa., 41 F.Supp. 841.

Ala.—Farrell v. Farrell, 10 So.2d 153, 243 Ala. 389—Miller v. Miller, 175 So. 284, 234 Ala. 453—Kelen v. Brewer, 129 So. 23, 221 Ala. 445—Eskridge v. Brown, 94 So. 353, 208 Ala. 210.

Ariz.—Schuster v. Schuster, 73 P.2d 1345, 51 Ariz. 1—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.

Ark.—Gulley v. Budd, 189 S.W.2d 385—Parker v. Sims, 51 S.W.2d 517, 185 Ark. 1111—American Liberty Mut. Ins. Co. v. Washington, 36 S. W.2d 963, 183 Ark. 497.

Cal.—Neblett v. Pacific Mut. Life Ins. Co. of California, 139 P.2d 934, 22 Cal.2d 393, certiorari denied 64 S. Ct. 428, 320 U.S. 802, 88 L.Ed. 484—Westphal v. Westphal, 126 P.2d 105, 20 Cal.2d 393—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—Horton v. Horton, 116 P.2d 605, 18 Cal.2d 579—La Salle v. Peterson, 32 P.2d 612, 220 Cal. 739—Caldwell v. Taylor, 23 P.2d 758, 218 Cal. 471, 88 A.L.R. 1194—Rogers v. Mulkey, 147 P.2d 62, 63 Cal. App.2d 567—Johnson v. Johnson, 128 P.2d 617, 53 Cal.App.2d 805, rehearing denied 128 P.2d 919, 53 Cal. App.2d 805—Stiebel v. Roberts, 109 P.2d 22, 42 Cal.App.2d 434—McLaughlin v. Security-First Nat. Bank of Los Angeles, 67 P.2d 726, 20 Cal.App.2d 602—Harvey v. Griffiths, 23 P.2d 532, 133 Cal.App. 17—Abels v. Frey, 14 P.2d 594, 126 Cal.App. 48—Jeffords v. Young, 277 P. 163, 98 Cal.App. 400—Stanley v. Westover, 269 P. 468, 93 Cal.App. 97.

D.C.—Fidelity Storage Co. v. Urice, 12 F.2d 143, 56 App.D.C. 202.

Ga.—Stephens v. Pickering, 15 S.E.2d 202, 192 Ga. 199—Elliott v. Marshall, 185 S.E. 831, 182 Ga. 513.

Idaho.—**Corpus Juris cited in** Scanlon v. McDevitt, 296 P. 1016, 1017, 50 Idaho 449.

Iowa.—Shaw v. Addison, 18 N.W.2d 796.

Kan.—Bitsko v. Bitsko, 122 P.2d 753, 155 Kan. 80—McNergney v. Harrison, 84 P.2d 944, 148 Kan. 843—Elfert v. Elfert, 294 P. 921, 132 Kan. 218—Huls v. Gafford Lumber & Grain Co., 243 P. 306, 120 Kan. 209.

Md.—Bachrach v. Washington United Co-op., 29 A.2d 822, 181 Md. 315.

Mass.—Stephens v. Lampron, 30 N.E. 2d 838, 308 Mass. 50, 131 A.L.R. 1516.

Mich.—Fawcett v. Atherton, 299 N. W. 108, 298 Mich. 362.

Minn.—Tankar Gas v. Lumbermen's Mut. Casualty Co., 9 N.W.2d 754, 215 Minn. 265, 146 A.L.R. 1223—Nichols v. Village of Morristown, 283 N.W. 748, 204 Minn. 212—In re Jordan's Estate, 271 N.W. 104, 199 Minn. 53.

Miss.—Lamar v. Houston, 184 So. 293, 183 Miss. 260.

Mo.—Winchell v. Gaskill, 190 S.W.2d 266—Sutter v. Easterly, 189 S.W. 2d 284—Bodine v. Farr, 182 S.W. 2d 173, 353 Mo. 206—Texier v Texier, 119 S.W.2d 778, 342 Mo. 1220—**Corpus Juris cited in** Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 1036, 338 Mo. 31—**Corpus Juris cited in** Phillips v. Air Reduction Sales Co., 85 S.W.2d 551, 559, 337 Mo. 587—Fadler v. Gabbert, 63 S. W.2d 121, 333 Mo. 851—Peeters v. Schultz, 254 S.W. 182, 300 Mo. 324—Crane v. Deacon, 253 S.W. 1068—State ex rel. Ellsworth v. Fidelity & Deposit Co. of Maryland, 147 S.W.2d 131, 235 Mo.App. 850.

Mont.—Khan v. Khan, 105 P.2d 665, 110 Mont. 591—Moser v. Fuller, 86 P.2d 1, 107 Mont. 424—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.

Nev.—Chamblin v. Chamblin, 27 P.2d 1061, 55 Nev. 146.

N.J.—Giehrach v. Rupp, 164 A. 465, 112 N.J.Eq. 296.

N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App. Div. 191—In re Gray's Will, 8 N. Y.S.2d 850, 169 Misc. 985—Eidelberg v. Snyder, 44 N.Y.S.2d 60.

N.C.—Horne v. Edwards, 3 S.E.2d 1, 215 N.C. 622.

Ohio.—Minetti v. Einhorn, 173 N.E. 243, 36 Ohio App. 310.

Okl.—Lewis v. Couch, 154 P.2d 51, 194 Okl. 632—Park v. Continental Oil Co., 87 P.2d 324, 184 Okl. 314—Calkin v. Wolcott, 77 P.2d 96, 182 Okl. 278—Smith v. Smith, 69 P.2d 392, 393, 180 Okl. 312—Stout v. Derr, 42 P.2d 136, 171 Okl. 132—Burton v. Swanson, 285 P. 839, 142 Okl. 134—Estes v. Pickard, 283 P. 1004, 141 Okl. 60.

Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Traders & General Ins. Co. v. Rhodabarger, Civ. App., 109 S.W.2d 1119, error dismissed—State v. Wright, Civ.App., 56 S.W.2d 950.

which actually were, or which with due diligence could have been, presented and adjudicated in the original proceedings.[33] As the rule is sometimes expressed, fraud in the matter on which the judgment or decree was rendered is not sufficient;[34] the fraud must not be something which was actually or potentially in issue in the case, unless the interposition of the defense was prevented by fraud or conduct of the opposite party.[35] On the other hand, it has been said that relief lies in cases of intrinsic as well as extrinsic fraud.[36]

Utah.—Wright v. W. E. Callahan Const. Co., 156 P.2d 710—Logan City v. Utah Power & Light Co., 16 P.2d 1097, 86 Utah 340, adhered to 44 P.2d 698, 86 Utah 354—Anderson v. State, 238 P. 557, 65 Utah 512.

Va.—Taylor v. Taylor, 165 S.E. 414, 159 Va. 338.

W.Va.—**Corpus Juris quoted in** Parsons v. Parsons, 135 S.E. 228, 229, 102 W.Va. 394.

Wis.—Grady v. Meyer, 236 N.W. 569, 205 Wis. 147—In re MacCormick, 190 N.W. 108, 178 Wis. 408.

34 C.J. p 472 note 66.

Matters previously presented

Decree could not be impeached on ground of extrinsic fraud consisting mainly of alleged bribery of witnesses and prevention of plaintiff from presenting his evidence, where same matters had theretofore been presented to the court and found to be without merit.—Harris v. Jackson, D. C.Okl., 30 F.Supp. 185.

33. U.S.—Brady v. Beams, C.C.A. Okl., 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L.Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727—Harrison v. Triplex Gold Mines, C.C.A.Mass., 33 F.2d 667.

Ala.—Wynn v. First Nat. Bank, 159 So. 58, 239 Ala. 639.

Ariz.—Schuster v. Schuster, 73 P.2d 1345, 51 Ariz. 1—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.

Ark.—Gulley v. Budd, 189 S.W.2d 385—Parker v. Sims, 51 S.W.2d 517, 185 Ark. 1111.

Cal.—Horton v. Horton, 116 P.2d 605, 18 Cal.2d 579—Hendricks v. Hendricks, 14 P.2d 83, 216 Cal. 321—Johnson v. Johnson, 128 P.2d 617, 53 Cal.App.2d 805, appeal denied 128 P.2d 919, 53 Cal.App.2d 805—Crow v. Madsen, App., 111 P.2d 7, rehearing granted 111 P.2d 663—Godfrey v. Godfrey, 86 P.2d 357, 30 Cal.App.2d 370—Hersom v. Hersom, 226 P. 937, 67 Cal.App. 116.

Idaho.—Boise Payette Lumber Co. v. Idaho Gold Dredging Corporation, 58 P.2d 786, 56 Idaho 660, certiorari denied 57 S.Ct. 40, 299 U.S. 577, 81 L.Ed. 425.

Ky.—Mason v. Lacy, 117 S.W.2d 1026, 274 Ky. 21.

Md.—Bachrach v. Washington United Co-op., 29 A.2d 822, 181 Md. 315.

Mo.—Winchell v. Gaskill, 190 S.W.2d 266—Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 338 Mo. 31—State ex rel. Ellsworth v. Fidelity & Deposit Co. of Maryland, 147 S.W.2d 131, 235 Mo.App. 850—Crowley v. Behle, App., 131 S.W.2d 383.

N.Y.—Arcuri v. Arcuri, 193 N.E. 174, 265 N.Y. 358—Lerner v. Sheinhorn, 54 N.Y.S.2d 678, 184 Misc. 361.

Okl.—Park v. Continental Oil Co., 87 P.2d 324, 184 Okl. 314.

S.D.—Seubert v. Seubert, 7 N.W.2d 301.

Tex.—Elder v. Byrd-Frost, Inc., Civ. App., 110 S.W.2d 172—Simpson v. Zuehlke, Civ.App., 26 S.W.2d 663—Halbrook v. Quinn, Civ.App., 286 S. W. 954, certified questions dismissed Quinn v. Halbrook, 285 S. W. 1079, 115 Tex. 513.

Wis.—Grady v. Meyer, 236 N.W. 569, 205 Wis. 147.

Fraud is not extrinsic where the court rendering the judgment had before it the same issue of fraud on the same essential facts.—Mills v. Baird, Tex.Civ.App., 147 S.W.2d 312, error refused.

Intrinsic fraud is that which arises within the proceeding itself and concerns some matter necessarily under the consideration of the court on the merits.—Horne v. Edwards, 3 S. E.2d 1, 215 N.C. 622.

Equitable fraud

It has been held that chancery may, for equitable fraud, restrain the enforcement of a judgment at law even though legal fraud in respect of the same matter has been unsuccessfully pleaded in the action at law.—Metropolitan Life Ins. Co. v. Tarnowski, 30 A.2d 421, 130 N.J.Eq. 1.

Allegation as to conveyance of title

In action to cancel deed, grantees' allegation that deed conveyed legal and equitable title was, if untrue, a misstatement as to an issue in controversy, and hence constituted intrinsic and not extrinsic fraud.—Crockett v. Root, 146 P.2d 555, 194 Okl. 3.

Time of discovery of facts

(1) Discovery of the alleged fraud after, not before, the commencement of the original action or the entry of the judgment attacked ordinarily is an essential element to the granting of relief.

U.S.—Brady v. Beams, C.C.A.Okl., 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L.Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727.

Wis.—Nehring v. Niemerowicz, 276 N.W. 325, 226 Wis. 285.

(2) Bill of review would only be allowed if court were satisfied that evidence was not available at time that original suit was litigated and that it was presented without undue delay after discovery.—Sorenson v. Sutherland, C.C.A.N.Y., 109 F.2d 714, reversing 27 F.Supp. 44, affirmed Jackson v. Irving Trust Co., 61 S.Ct. 326, 311 U.S. 494, 85 L.Ed. 297.

34. U.S.—Pittsburgh Forgings Co. v. American Foundry Equipment Co., D.C.Pa., 41 F.Supp. 841.

Cal.—Crow v. Madsen, App., 111 P. 2d 7, rehearing granted 111 P.2d 663.

Fla.—Dr. P. Phillips Co. v. Billo, 147 So. 579, 109 Fla. 316.

Mass.—McLaughlin v. Feerick, 176 N.E. 779, 276 Mass. 180.

Miss.—Lamar v. Houston, 184 So. 293, 183 Miss. 260.

Mo.—Bodine v. Farr, 182 S.W.2d 173, 353 Mo. 206.

Mont.—Moser v. Fuller, 86 P.2d 1, 107 Mont. 424.

N.J.—Giehrach v. Rupp, 164 A. 465, 112 N.J.Eq. 296.

N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App. Div. 191.

The rule rests on public policy which requires that there be an end to litigation.

Cal.—Caldwell v. Taylor, 23 P.2d 758, 218 Cal. 471, 88 A.L.R. 1194.

R.I.—Broduer v. Broduer, 167 A. 104, 53 R.I. 450.

35. Ariz.—Schuster v. Schuster, 73 P.2d 1345, 51 Ariz. 1.

Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Traders & General Ins. Co. v. Rhodabarger, Civ. App., 109 S.W.2d 1119, error dismissed.

Exaggeration of injuries

Employer, not demanding physical examination of injured employee, was held not entitled to annulment of judgment awarding damages on ground of employee's fraud in exaggerating effect of injury by appearing in court on crutches and not rising from chair without assistance.—First Nat. Life Ins. Co. v. Bell, 141 So. 379, 174 La. 692.

36. U.S.—Fiske v. Buder, C.C.A.Mo., 125 F.2d 841.

Wis.—Nehring v. Niemerowicz, 276 N.W. 325, 226 Wis. 285.

34 C.J. p 471 note 64 [a].

Difficulty in applying rule

(1) It has been judicially observed that the line of distinction between extrinsic and intrinsic fraud is some-

In general the fraud must be such as prevented the unsuccessful party from fully and fairly presenting his case or defense;[37] it must be such as prevented the losing party from having an adversary trial of the issue.[38] Where a party to an action had a good case or defense but was prevented from setting it up by the fraud, artifice, deceit, or misrepresentation of the opposite party, without

times indistinct.—Brady v. Beams, C.C.A.Okl., 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L.Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727.

(2) Practical application of the distinction is often difficult.—Eaton v. Koontz, 25 P.2d 351, 138 Kan. 267.

37. U.S.—Toledo Scale Co. v. Computing Scale Co., Ohio, 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719—Brady v. Beams, C.C.A.Okl., 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L.Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727—Fiske v. Buder, C.C.A.Mo., 125 F.2d 841—Continental Nat. Bank of Jackson County, at Kansas City, Mo., v. Holland Banking Co., C.C.A.Mo., 66 F.2d 823—Harrison v. Triplex Gold Mines, C.C.A.Mass., 33 F.2d 667.

Ariz.—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.

Cal.—Neblett v. Pacific Mut. Life Ins. Co. of California, 139 P.2d 934, 22 Cal.2d 393, certiorari denied 64 S.Ct. 428, 320 U.S. 802, 88 L.Ed. 484—Westphal v. Westphal, 126 P.2d 105, 20 Cal.2d 393—Ringwalt v. Bank of America Nat. Trust & Savings Ass'n, 45 P.2d 967, 3 Cal.2d 680—Rogers v. Mulkey, 147 P.2d 62, 63 Cal.App.2d 567—Rosenbaum v. Tobias' Estate, 130 P.2d 215, 55 Cal.App.2d 39—Larrabee v. Tracy, 104 P.2d 61, 39 Cal.App.2d 593—McLaughlin v. Security-First Nat. Bank of Los Angeles, 67 P.2d 726, 20 Cal.App.2d 602.

Fla.—Sommers v. Colourpicture Pub., 8 So.2d 281, 150 Fla. 659.

Ga.—Young v. Young, 2 S.E.2d 622, 188 Ga. 29.

Ky.—Overstreet v. Grinstead's Adm'r, 140 S.W.2d 836, 283 Ky. 73—Mason v. Lacy, 117 S.W.2d 1026, 274 Ky. 21.

Mo.—Winchell v. Gaskill, 190 S.W.2d 266—Bodine v. Farr, 182 S.W.2d 173, 353 Mo. 206—Texier v. Texier, 119 S.W.2d 778, 342 Mo. 1220—Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 338 Mo. 31—State ex rel. Ellsworth v. Fidelity & Deposit Co. of Maryland, 147 S.W.2d 131, 235 Mo.App. 850.

Mont.—Bullard v. Zimmerman, 292 P. 730, 88 Mont. 271.

Nev.—**Corpus Juris cited in** Chamblin v. Chamblin, 27 P.2d 1061, 55 Nev. 146.

Okl.—Stutsman v. Williams, 209 P. 406, 87 Okl. 64.

Or.—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.

Tex.—Hermann Hospital Estate v. Nachant, Com.App., 55 S.W.2d 505—Mills v. Baird, Civ.App., 147 S.W.2d 312, error refused—American Law Book Co. v. Chester, Civ.App., 110 S.W.2d 950, error dismissed—Price v. Smith, Civ.App., 109 S.W.2d 1144—State v. Wright, Civ.App., 56 S.W.2d 950.

Utah.—Wright v. W. E. Callahan Const. Co., 156 P.2d 710.

34 C.J. p 472 note 66 [a]—25 C.J. p 332 note 16 [b].

Lack of interference in search for evidence

The alleged fraud of the owner of a patent in conspiring to monopolize the business of making and selling scales by means of suits brought on a patent which it knew to be invalid because of prior use, and in buying up as many of the anticipating scales as it could secure, was held not to have interfered with defendant in its search for evidence of prior use, so as to justify setting aside a decree.—Toledo Scale Co. v. Computing Scale Co., Ohio, 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719.

38. U.S.—Fiske v. Buder, C.C.A.Mo., 125 F.2d 841—Angle v. Shinholt, C.C.A.Tex., 90 F.2d 294, certiorari denied 58 S.Ct. 40, 302 U.S. 719, 82 L.Ed. 555.

Ariz.—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.

Cal.—Scott v. Dilks, 117 P.2d 700, 47 Cal.2d 207—Ringwalt v. Bank of America Nat. Trust & Savings Ass'n, 45 P.2d 967, 969, 3 Cal.2d 680—Thompson v. Thompson, 101 P.2d 160, 38 Cal.App.2d 377—Godfrey v. Godfrey, 86 P.2d 357, 30 Cal.App.2d 370—Jeffords v. Young, 277 P. 163, 165, 98 Cal.App. 400.

Ga.—Young v. Young, 2 S.E.2d 622, 188 Ga. 29.

Kan.—Eaton v. Koontz, 25 P.2d 351, 138 Kan. 267—Stillie v. Stillie, 249 P. 672, 121 Kan. 591.

Mich.—Fawcett v. Atherton, 299 N.W. 108, 298 Mich. 362.

Minn.—Tankar Gas v. Lumbermen's Mut. Casualty Co., 9 N.W.2d 754, 215 Minn. 265, 146 A.L.R. 1223.

Mont.—Bullard v. Zimmerman, 292 P. 730, 88 Mont. 271.

Nev.—Chamblin v. Chamblin, 27 P.2d 1061, 55 Nev. 146.

N.Y.—In re Gray's Will, 8 N.Y.S.2d 850, 169 Misc. 985.

Okl.—Smith v. Smith, 69 P.2d 392, 180 Okl. 312—Wood v. Wood, 216 P. 936, 92 Okl. 297.

Pa.—In re Culbertson's Estate, 152 A. 540, 301 Pa. 438—Carey v. Carey, 183 A. 371, 121 Pa.Super. 251.

Tex.—Mills v. Baird, Civ.App., 147 S.W.2d 312, error refused.

Wash.—Farley v. Davis, 116 P.2d 263, 10 Wash.2d 62, 135 A.L.R. 1302.

34 C.J. p 472 note 66 [a] (2).

Extrinsic fraud held shown

(1) In general.

U.S.—Park v. Park, C.C.A.Ga., 123 F.2d 370.

Cal.—Young v. Young Holdings Corporation, 80 P.2d 723, 27 Cal.App.2d 129.

(2) Where a court is deceived and misled by a fraudulent concealment of jurisdictional facts, such fraud would necessarily be extraneous.—Jones v. Snyder, 249 P. 313, 121 Okl. 254.

(3) It is always extrinsic fraud for an attorney to fail fully to disclose to his client all material facts in any transaction in which their interests are adverse, resulting in the failure of client to defend against claim of his attorney.—Fiske v. Buder, C.C.A.Mo., 125 F.2d 841.

(4) Where husband who filed annulment proceeding against wife by his words and actions led her to believe after service of process on her that proceeding was abandoned and obtained a default annulment decree, he was guilty of extrinsic fraud.—Bloomquist v. Thomas, 9 N.W.2d 337, 215 Minn. 35.

(5) Where trust deed secured a usurious note, but mortgagees acquired the mortgaged land by fraudulently representing that they would reconvey if mortgagor would not oppose foreclosure, the fraud was extrinsic to the judicial proceedings, so as to authorize attack on the foreclosure judgment.—Smith v. Schlein, 144 F.2d 257, 79 U.S.App.D.C. 166.

Extrinsic fraud held not shown

Cal.—Smith v. Young, 122 P.2d 624, 50 Cal.App.2d 152.

N.Y.—Eldelberg v. Snyder, 44 N.Y.S.2d 60.

Knowledge and wrongful intent

Extrinsic fraud has been defined to be actual fraud, such that there is on the part of the person chargeable with it malus animus, the mala mens, putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him.—Continental Nat. Bank of Jackson County, at Kansas City, Mo., v. Holland Banking Co., C.C.A.Mo., 66 F.2d 823—34 C.J. p 471 note 48 [a], p 472 note 66 [a] (1).

negligence or fault on his own part, and a judgment was thereby obtained against him, a proper case is made out for equitable relief.[39]

Fraud in procurement of judgment. The rule has frequently been laid down that the fraud must have been in the procurement of the judgment,[40] and such fraud is sufficient,[41] since it is regarded as perpetrated on the court as well as on the injured party.[42] This may, for example, consist in deceit and imposition practiced on the court as a means of obtaining a judgment which otherwise would not be rendered,[43] or in the act of the successful party in illegally tampering with the jury,[44] or in wrongfully obtaining a judgment by the surreptitious use of legal process and proceedings.[45] Deception practiced by the successful party in keeping his opponent in

39. U.S.—Fiske v. Buder, C.C.A.Mo., 125 F.2d 841—Mineral Development Co. v. Kentucky Coal Lands Co., D.C.Ky., 285 F. 761, affirmed, C.C.A., 285 F. 1021.
Ala.—Garvey v. Inglenook Const. Co., 104 So. 639, 213 Ala. 267—Hooper v. Peters Mineral Land Co., 98 So. 6, 210 Ala. 346.
Cal.—Rosenbaum v. Tobias' Estate, 130 P.2d 215, 55 Cal.App.2d 39—Crow v. Madsen, App., 111 P.2d 7, rehearing granted 111 P.2d 663.
Ga.—Morris Const. Co. v. Randolph, 135 S.E. 72, 163 Ga. 6.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56—Stade v. Stade, 42 N.E.2d 631, 315 Ill.App. 136.
Ky.—Triplett v. Stanley, 130 S.W.2d 45, 279 Ky. 148—Metropolitan Life Ins. Co. of New York v. Myers, 109 S.W.2d 1194, 270 Ky. 523.
La.—Richardson v. Hells, 189 So. 454, 192 La. 856.
Mass.—McLaughlin v. Feerick, 176 N.E. 779, 276 Mass. 180.
Mo.—**Corpus Juris cited in** Phillips v. Air Reduction Sales Co., 85 S.W.2d 551, 559, 337 Mo. 587.
Mont.—State ex rel. Clark v. District Court of Second Judicial Dist. in and for Silver Bow County, 57 P.2d 809, 102 Mont. 227.
N.D.—Elm Creek School Dist. No. 21, Mercer County, v. Jungers, 205 N.W. 676, 53 N.D. 231.
Or.—Fain v. Amend, 100 P.2d 481, 164 Or. 123—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602—State Bank of Sheridan v. Helder, 9 P.2d 117, 139 Or. 185.
S.D.—Seubert v. Seubert, 7 N.W.2d 301.
Tex.—McAfee v. Jeter & Townsend, Civ.App., 147 S.W.2d 884—Kerby v. Hudson, Civ.App., 13 S.W.2d 724—**Corpus Juris cited in** Marsh v. Tiller, Civ.App., 279 S.W. 283, 284.
34 C.J. p 440 note 77, p 473 note 78.

Representation as to dismissal of suit

Where defendant was prevented from defending action by plaintiff's fraudulent representation before trial that he would have suit dismissed because of settlement between parties, the judgment could be set aside as fraudulently obtained.—Doyal v. Tommey, 127 S.E. 750, 160 Ga. 378.

40. Ala.—Miller v. Miller, 175 So. 284, 234 Ala. 453—Kelen v. Brewer, 129 So. 23, 221 Ala. 445—Eskridge v. Brown, 94 So. 353, 208 Ala. 210.
Ariz.—Schuster v. Schuster, 73 P.2d 1345, 51 Ariz. 1.
Ark.—Gulley v. Budd, 139 S.W.2d 385—Hendrickson v. Farmers' Bank & Trust Co., 73 S.W.2d 725, 189 Ark. 423—American Liberty Mut. Ins. Co. v. Washington, 36 S.W.2d 963, 183 Ark. 497.
Cal.—Borg v. Borg, 76 P.2d 218, 25 Cal.App.2d 25.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56.
Mich.—Fawcett v. Atherton, 299 N.W. 108, 298 Mich. 362—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443.
Mo.—Winchell v. Gaskill, 190 S.W.2d 266—Bodine v. Farr, 182 S.W.2d 173, 353 Mo. 206—Texier v. Texier, 119 S.W.2d 778, 342 Mo. 1220—Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 338 Mo. 31—Crow v. Crow-Humphrey, 73 S.W.2d 807, 335 Mo. 636—Sanders v. Brooks, App., 183 S.W.2d 353—State ex rel. Ellsworth v. Fidelity & Deposit Co. of Maryland, 147 S.W.2d 131, 235 Mo.App. 850—Wuelker v. Maxwell, App., 70 S.W.2d 1100—Gurley v. St. Louis Transit Co. of St. Louis, App., 259 S.W. 895.
N.Y.—Fuhrmann v. Fanroth, 173 N.E. 685, 254 N.Y. 479—Horne v. McGinley, 299 N.Y.S. 1, 252 App.Div. 296—Re v. Diamond, 284 N.Y.S. 405, 246 App.Div. 776, 830—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App.Div. 191—In re Gray's Will, 8 N.Y.S.2d 850, 169 Misc. 985.
N.C.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.
Tex.—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.
W.Va.—Parsons v. Parsons, 135 S.E. 228, 102 W.Va. 394.

The gravamen of the offense of fraud in procuring a judgment is the deceit which is practiced.—Beavers v. Williams, 33 S.E.2d 343, 199 Ga. 113.

41. U.S.—U. S. v. Bischof, C.C.A.N.Y., 48 F.2d 538.
Cal.—Crow v. Madsen, App., 111 P.2d 7, rehearing granted 111 P.2d 663.
Ga.—Phillips v. Phillips, 137 S.E. 561, 163 Ga. 899.
Idaho.—Swinehart v. Turner, 224 P. 74, 38 Idaho 602.
La.—Vinson v. Picolo, App., 15 So.2d 773.
Mich.—**Corpus Juris quoted in** Oliver Iron Mining Co. v. Pneff, 247 N.W. 126, 127, 262 Mich. 116.
Mo.—**Corpus Juris cited in** Phillips v. Air Reduction Sales Co., 85 S.W.2d 551, 559, 337 Mo. 587—Crow v. Crow-Humphrey, 73 S.W.2d 807, 335 Mo. 636.
N.Y.—Scopano v. U. S. Gypsum Co., 3 N.Y.S.2d 300, 166 Misc. 805—Herring-Curtiss Co. v. Curtiss, 200 N.Y.S. 7, 120 Misc. 733, modified on other grounds 227 N.Y.S. 489, 223 App.Div. 101.
Okl.—Roland Union Graded School Dist. No. 1 of Sequoyah County v. Thompson, 124 P.2d 400, 190 Okl. 416—Cone v. Harris, 230 P. 721, 104 Okl. 114.
Or.—Fain v. Amend, 100 P.2d 481, 164 Or. 123.
Tenn.—Coley v. Family Loan Co., 80 S.W.2d 87, 168 Tenn. 631.
Tex.—Mendlovitz v. Samuels Shoe Co., Civ.App., 5 S.W.2d 559.
34 C.J. p 473 note 80.

Extrinsic fraud operates not on the matters pertaining to the judgment itself, but to the manner in which it is procured.
Ga.—Young v. Young, 2 S.E.2d 622, 188 Ga. 29.
Nev.—Chamblin v. Chamblin, 27 P.2d 1061, 55 Nev. 146.
Or.—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.
Tex.—Mills v. Baird, Civ.App., 147 S.W.2d 312, error refused.

42. Mich.—**Corpus Juris quoted in** Oliver Iron Mining Co. v. Pneff, 247 N.W. 126, 127, 262 Mich. 116.
34 C.J. p 473 note 80.

43. Mich.—**Corpus Juris quoted in** Oliver Iron Mining Co. v. Pneff, 247 N.W. 126, 127, 262 Mich. 116.
34 C.J. p 474 note 81.

44. U.S.—Platt v. Threadgill, C.C.Va., 80 F. 192.

Bribery of a jury is fraud sufficient to set aside the verdict of jury and to vacate judgment dependent on that verdict.—Elder v. Byrd-Frost, Inc., Tex.Civ.App., 110 S.W.2d 172.

45. Or.—Kirk v. Mullen, 197 P. 300, 100 Or. 563.
34 C.J. p 474 note 83.

ignorance of the proceeding is extrinsic or collateral fraud.[46] Wrongfully preventing the complaining party or his material witnesses from appearing in court or attending the trial,[47] or inducing his attorney to professional delinquency or infidelity in connection with the case,[48] also constitutes extrinsic or collateral fraud.

Fraud in cause of action or instrument in suit. Although some of the earlier cases support the right of equity to enjoin a judgment on the ground of fraud in the instrument or transaction on which it is founded,[49] for example, a judgment for the price of property sold, where the sale was induced by false representations or concealment of the truth, with regard to quantity, character, or title,[50] it has been generally held that fraud in the cause of action or instrument in suit must be set up in the original action, and furnishes no ground for relief in equity,[51] unless the interposition of the fraud as a defense was prevented by fraud of the opposite party[52] or the judgment was rendered in a court where such defense was not available to him.[53] The fact that allegations set forth in the pleadings of the successful party were false cannot be successfully urged as a ground for equitable interference with the judgment rendered thereon.[54]

46. Cal.—Neblett v. Pacific Mut. Life Ins. Co. of California, 139 P. 2d 934, 22 Cal.2d 393, certiorari denied 64 S.Ct. 428, 320 U.S. 802, 88 L.Ed. 484—Zaremba v. Woods, 61 P.2d 976, 17 Cal.App.2d 309.
Tex.—State v. Wright, Civ.App., 56 S.W.2d 950.

Presenting false affidavit for service by publication is fraud for which judgment will be set aside, where rights of innocent parties have not intervened.—Wells v. Zenz, 256 P. 484, 83 Cal.App. 137.

Fraudulent omission to post copy of summons on the premises in all persons action would constitute extrinsic fraud.—Bernhard v. Waring, 2 P.2d 32, 213 Cal. 175.

Failure to notify heir of probate proceedings
Where proponent and residuary legatee and executor under will, with knowledge of existence of pretermitted heir, failed to disclose her existence in the petition for probate and gave her no notice of the proceeding with result that a decree was made distributing the residue of the estate to him, the fraud was extrinsic so as to authorize relief in equity.—Purinton v. Dyson, 65 P.2d 777, 8 Cal.2d 322, 113 A.L.R. 1330.

47. U.S.—Brady v. Beams, C.C.A. Okl., 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L.Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727.
Cal.—Larrabee v. Tracy, 104 P.2d 61, 39 Cal.App.2d 593—Thompson v. Thompson, 101 P.2d 160, 38 Cal. App.2d 377—Godfrey v. Godfrey, 86 P.2d 357, 30 Cal.App.2d 370.

48. U.S.—Brady v. Beams, C.C.A. Okl., 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L.Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727.

49. U.S.—Trefz v. Knickerbocker Life Ins. Co., C.C.N.J., 8 F. 177.
34 C.J. p 471 note 64.

50. N.C.—Cox v. Jerman, 41 N.C. 526.
34 C.J. p 472 note 65.

51. Cal.—Crow v. Madsen, App., 111 P.2d 7, rehearing granted 111 P.2d 663.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56.
Mich.—Smith v. Pontiac Citizens Loan & Investment Co., 293 N.W. 661, 294 Mich. 312—Bassett v. Trinity Bldg. Co., 236 N.W. 237, 254 Mich. 207.
Mo.—Crow v. Crow-Humphrey, 73 S. W.2d 807, 335 Mo. 636—Crowley v. Bahle, App., 131 S.W.2d 383—National Union Fire Ins. Co. v. Vermillion, App., 19 S.W.2d 776.
Okl.—Stutsman v. Williams, 209 P. 406, 87 Okl. 64.
S.D.—Seubert v. Seubert, 7 N.W.2d 301.
Tex.—Browning - Ferris Machinery Co. v. Thomson, Civ.App., 55 S.W. 2d 168—**Corpus Juris cited in** Bearden v. Texas Co., Civ.App., 41 S. W.2d 447, 462, affirmed, Com.App., 60 S.W.2d 1031.
W.Va.—**Corpus Juris quoted in** Parsons v. Parsons, 135 S.E. 228, 229, 102 W.Va. 394.
34 C.J. p 472 note 67.

Intrinsic fraud includes fraud based on the presentation of forged or fraudulent instruments or other fraudulent matter that was or could have been considered in rendering the judgment against which relief is sought.
U.S.—Brady v. Beams, C.C.A.Okl., 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L.Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727—Angle v. Shinholt, C.C.A.Tex., 90 F.2d 294, certiorari denied 58 S.Ct. 40, 302 U.S. 719, 82 L.Ed. 555.
Cal.—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—Horton v. Horton, 116 P.2d 605, 18 Cal.2d 579—Harvey v. Griffiths, 23 P.2d 532, 133 Cal.App. 17—Julien v. West, 274 P. 421, 96 Cal.App. 558.
Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Mills v. Baird, Civ.App., 147 S.W.2d 312, error refused.—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 109 S.W. 2d 1119—State v. Wright, Civ.App., 56 S.W.2d 950.

Where a party fails to defend an action after being given an opportunity by proper notice, fraud in obtaining the judgment against him is usually held to be intrinsic.—Westphal v. Westphal, 126 P.2d 105, 20 Cal.2d 393—Hosner v. Skelly, App., 164 P.2d 573—Rosenbaum v. Tobias' Estate, 130 P.2d 215, 55 Cal.App.2d 39.

Fraud in the procurement of a note is not ground for equitable relief against a judgment rendered on the note since that circumstance could and should have been urged as a defense in the original action.
Ky.—Ring v. Freeland, 300 S.W. 341, 222 Ky. 147.
W.Va.—McGhee v. Stevens, 3 S.E.2d 615, 121 W.Va. 430.
Wis.—Grady v. Meyer, 236 N.W. 569, 205 Wis. 147.

Creating fictitious cause of action and supporting it by false testimony is intrinsic fraud.—Potts v. West, 262 P. 569, 124 Kan. 815.

Fraudulent assertion of cross action would be intrinsic fraud.—Davis v. Cox, Tex.Civ.App., 4 S.W.2d 1008, error dismissed.

52. Ill.—Mohr v. Messick, 53 N.E. 2d 743, 322 Ill.App. 56.
Mo.—Crow v. Crow-Humphrey, 73 S. W.2d 807, 335 Mo. 636.
W.Va.—**Corpus Juris quoted in** Parsons v. Parsons, 135 S.E. 228, 229, 102 W.Va. 394.
34 C.J. p 473 note 68.

53. N.C.—North Carolina Mutual & Provident Ass'n v. Edwards, 84 S. E. 359, 168 N.C. 378.
W.Va.—**Corpus Juris quoted in** Parsons v. Parsons, 135 S.E. 228, 229, 102 W.Va. 394.

54. Cal.—Horton v. Horton, 116 P. 2d 605, 18 Cal.2d 579.
N.C.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.
Or.—Dixon v. Simpson, 279 P. 939, 130 Or. 211.

Exceptions to the rule prohibiting relief for fraud in the cause of action or instrument sued on have been made,[55] as, for example, in cases where the judgment was based on service by publication and defendant had no actual knowledge of the suit,[56] where the court in which the action was brought and the trial had was without jurisdiction to pass on the question of fraud,[57] or where the transaction on which the judgment was based was against public policy.[58] Under statutes in some states authorizing relief against decrees and judgments obtained by fraud, such as perjured testimony, fraudulent documents, forged instruments, and the like, the jurisdiction of a court of equity has been held limited to the granting of relief on the grounds enumerated.[59]

Strangers to record. The rule that a judgment by a court of competent jurisdiction will be set aside only for fraud which is extrinsic or collateral has been held applicable to strangers as well as to parties to the action.[60] It has also been held, however, that a stranger to the record may, when he has been injured thereby, have a judgment set aside for fraud in the cause of action on which it is founded[61] because he has not had his day in court to plead it sooner.[62]

(3) Concealment or Deceit

Concealment or deceit, at least where there is a legal duty to disclose the facts, is ground for equitable relief against a judgment. In the absence of such a duty, however, mere silence is not fraud justifying such relief.

Relief against an unjust judgment obtained by means of deceit, artifice, or concealment may be had in equity, provided there is no adequate remedy at law.[63] Fraud justifying such relief may consist in the suppression of truth as well as a suggestion of what is false;[64] it may be based on silence when there is a legal duty to disclose the facts, as, for example, in the case of a trust or confidential relation.[65] However, in order that fraudulent concealment shall be ground for any equitable relief, there must be a duty to disclose.[66] In the absence of such a duty, no party is bound to furnish weapons to his adversary or plead himself out of court; and the mere fact that he keeps silent and does not communicate to the court or to the adverse party facts which would defeat his recovery is not such fraud as will justify a court of equity in granting relief against the resulting judgment.[67]

Where fraudulent concealment of a fact is relied on, it must be an intentional concealment of a material and controlling fact, for the purpose of misleading and taking advantage of the opposite

55. Ga.—**Corpus Juris cited in** Elliott v. Marshall, 185 S.E. 831, 182 Ga. 513.

Audit obtained by fraud

N.Y.—Brennan v. New York, 8 Daly 426.

34 C.J. p 473 note 72.

56. Mo.—Irvine v. Leyh, 14 S.W. 715, 16 S.W. 10, 102 Mo. 200.

57. N.Y.—Sanders v. Soutter, 27 N. E. 263, 126 N.Y. 193.

58. Ohio.—Dahms v. Swinburne, 167 N.E. 486, 31 Ohio App. 512.

59. Iowa.—Richards v. Moran, 114 N.W. 1035, 137 Iowa 220.

34 C.J. p 473 note 77.

60. Vt.—Fillmore v. Morgan, 108 A. 840, 93 Vt. 491.

61. Ind.—State v. Holmes, 69 Ind. 577.

62. Ind.—State v. Holmes, supra.

63. U.S.—Ferguson v. Wachs, C.C. A.Ill., 96 F.2d 910.

Fla.—Miller v. Miller, 7 So.2d 9, 149 Fla. 722.

Ill.—Stade v. Stade, 42 N.E.2d 631, 315 Ill.App. 136.

N.J.—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115.

Tex.—Eldridge v. Eldridge, Civ.App., 259 S.W. 209.

34 C.J. p 459 note 9, p 475 note 98.

Judgment against interests of minor

Where agreed judgment in minor's action is against interests of minor and facts making it so are not disclosed to court approving agreement for judgment, minor may, as between parties to judgment, have it set aside by bill of review.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1.

64. N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App.Div. 191.

"It seems to be generally held that the fraudulent concealment of facts, which would have caused the judgment or decree not to have been rendered, will constitute extrinsic fraud sufficient to authorize the court . . . to vacate such judgment or decree."—State v. Vincent, 52 P.2d 203, 205, 152 Or. 205.

65. U.S.—Ferguson v. Wachs, C.C.A. Ill., 96 F.2d 910—Hewitt v. Hewitt, C.C.A.Cal., 17 F.2d 716.

Cal.—Larrabee v. Tracy, 134 P.2d 265, 21 Cal.2d 645, affirmed Salvation Army v. Security-First Nat. Bank of Los Angeles, 134 P.2d 271, 21 Cal.2d 892—Crow v. Madsen, App., 111 P.2d 7, rehearing granted 111 P.2d 663.

D.C.—Earll v. Picken, 113 F.2d 150, 72 App.D.C. 91.

Okl.—Kauffman v. McLaughlin, 114 P.2d 929, 189 Okl. 194.

34 C.J. p 475 note 98 [b].

66. Ala.—Hooper v. Peters Mineral Land Co., 98 So. 6, 210 Ala. 346.

N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App. Div. 191.

Settlement

Where a settlement was pleaded as a defense, plaintiff owed no duty to defendant or the court to prove such defense, and hence fact that plaintiff's attorneys, who testified at the trial were not questioned as to the alleged settlement did not show fraud on part of plaintiff in obtaining judgment.—May v. May, 50 N.E. 2d 790, 72 Ohio App. 82.

67. Okl.—Crockett v. Root, 146 P.2d 555, 194 Okl. 3—**Corpus Juris quoted in** Wright v. Saltmarsh, 50 P. 2d 694, 705, 174 Okl. 226.

34 C.J. p 475 note 99.

Failure to give details of counterclaim

Failure of buyer, sued for price of merchandise, to advise seller in advance of details of counterclaim was not fraud.—Zapon Co. v. Bryant, 286 P. 282, 156 Wash. 161.

Failure to disclose resale price

Failure of vendor, suing for breach of contract to trade property, to disclose resale price of premises under subsequent exchange contract did not constitute fraud warranting vacation of default judgment against first vendee.—Minetti v. Einhorn, 173 N.E. 243, 36 Ohio App. 310.

party.[68] A judgment will not be set aside on the ground that the prevailing party practiced a fraud on the court and the adverse party, by concealing the evidence of his fraud, where the particular fraud, evidence to establish which is alleged to have been concealed, was the issue in trial and there adjudicated.[69]

§ 373. —— Collusion

Collusion or fraudulent conspiracy in the procurement of a judgment, which could not have been interposed as a defense in the action, furnishes ground for equitable relief to an innocent person injured thereby.

Equity may grant relief to an innocent person against a judgment which was unjustly obtained by means of a conspiracy or fraudulent collusion.[70] This rule is applied where the collusive agreement was between plaintiff or his attorney and the judge,[71] between plaintiff or his attorney and defendant's attorney,[72] between plaintiff and one of several defendants, to the prejudice of another defendant,[73] between plaintiff and the officers of a defendant corporation or municipality who are bound to protect its interests,[74] between the parties to the action[75] or between a party and another person[76] to the injury of a third person having an interest in the property in suit, or between plaintiff and an executor or administrator, being defendant, resulting in the establishment of an invalid claim against the estate.[77]

Collusion between codefendants, however gross it may be, will not affect plaintiff.[78] Collusion is no ground for relief in equity if it could have been pleaded in defense to the original action.[79] Ordinarily a court of equity will not grant relief to those who were parties to the collusion;[80] but an exception to this rule exists where a fiduciary relationship existed between the parties and they were not in pari delicto.[81]

§ 374. —— Perjury and Subornation of Perjury

According to the weight of authority, perjury or subornation of perjury, not accompanied by any extrinsic or collateral fraud, ordinarily does not constitute ground for equitable relief against a judgment.

Although some cases sustain the doctrine that equity may grant relief against a judgment obtained by means of false testimony,[82] provided it was procured, concocted, and intentionally produced by the successful party,[83] the weight of authority is to the effect that ordinarily there is no ground for equitable interference with a judgment in the fact that perjury or false swearing was committed by such party or his witnesses at the trial,[84] at least where

68. Ala.—McDonald v. Pearson, 21 So. 534, 114 Ala. 630.
N.Y.—Ward v. Southfield, 6 N.E. 660, 102 N.Y. 287.

69. Ga.—Thomason v. Thompson, 59 S.E. 236, 129 Ga. 440, 26 L.R.A.,N.S. 536.

70. Fla.—State ex rel. Warren v. City of Miami, 15 So.2d 449, 153 Fla. 644—State ex rel. Fulton Bag & Cotton Mills v. Burnside, 15 So. 2d 324, 153 Fla. 599.
Ga.—Branan v. Feldman, 123 S.E. 710, 158 Ga. 377.
Idaho.—**Corpus Juris cited in** Harkness v. Village of McCammon, 293 P. 676, 678, 50 Idaho 569.
Ill.—Meyer v. Meyer, 33 N.E.2d 738, 309 Ill.App. 643, affirmed 39 N.E.2d 311, 379 Ill. 97, 140 A.L.R. 484.
Ind.—**Corpus Juris quoted in** Mercantile Commercial Bank v. Southwestern Indiana Coal Corporation, 169 N.E. 91, 93, 93 Ind.App. 313, rehearing denied 171 N.E. 310, 93 Ind.App. 313.
Mass.—Commonwealth v. Aronson, 44 N.E.2d 679, 312 Mass. 347.
Mo.—Spotts v. Spotts, 55 S.W.2d 984, 331 Mo. 942.
N.Y.—Harvey v. Comby, 280 N.Y.S. 958, 245 App.Div. 318.
Okl.—**Corpus Juris cited in** Hill v. Cole, 137 P.2d 579, 583, 192 Okl. 476.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, Civ.App., 130 S. W.2d 1048, reversed on other grounds 136 S.W.2d 265, 133 Tex. 1.
34 C.J. p 474 note 88.

71. Utah.—McMillan v. Forsythe, 154 P. 959, 47 Utah 571.
34 C.J. p 474 note 89.

72. U.S.—Sanford v. White, C.C.N.Y., 132 F. 531.
34 C.J. p 474 note 90.

73. U.S.—Young v. Sigler, C.C.Iowa, 48 F. 182.
34 C.J. p 474 note 91.

74. Ind.—Mercantile Commercial Bank v. Southwestern Indiana Coal Corporation, 169 N.E. 91, 93 Ind. App. 313, rehearing denied 171 N. E. 310, 93 Ind.App. 313.
34 C.J. p 474 note 92.

Express agreement not necessary
Wis.—Balch v. Beach, 95 N.W. 132, 119 Wis. 77.
11 C.J. p 1221 note 29 [a].

75. Kan.—Leslie v. Proctor & Gamble Mfg. Co., 169 P. 193, 102 Kan. 159.
34 C.J. p 475 note 93.

76. Philippine.—Anuran v. Aquino, 38 Philippine 29.
34 C.J. p 475 note 94.

77. N.Y.—In re Abramowitz' Estate, 9 N.Y.S.2d 846, 170 Misc. 68.
34 C.J. p 475 note 95.

78. Ind.—State v. Holmes, 69 Ind. 577.

79. Mo.—Murphy v. De France, 13 S.W. 756, 101 Mo. 151.

Availability and presentation of evidence
In order to justify setting aside decree on ground of fraudulent collusion, evidence must be presented which not only entitles plaintiff to relief sought, but which was unavailable at time of original suit and which has been presented without undue delay after discovery.—U. S. v. Irving Trust Co., D.C.N.Y., 49 F. Supp. 663.

80. Cal.—Hendricks v. Hendricks, 14 P.2d 83, 216 Cal. 321—Sontag v. Denio, 73 P.2d 248, 23 Cal.App.2d 319.

81. Cal.—Sontag v. Denio, supra.

82. Ky.—**Corpus Juris cited in** Norheimer v. Keiper, 73 S.W.2d 36, 37, 255 Ky. 232.
Wis.—Amberg v. Deaton, 271 N.W. 396, 223 Wis. 653—Schultels v. Trade Press Pub. Co., 210 N.W. 419, 191 Wis. 164.
34 C.J. p 475 note 4.

83. Neb.—Miller v. Miller, 95 N.W. 1010, 69 Neb. 441.
34 C.J. p 475 note 5.

84. Ala.—Hooke v. Hooke, 25 So.2d 33—Wright v. Fannin, 156 So. 849,

the perjurious or false evidence was not accompanied by any extrinsic or collateral fraud, and related to issues or matters which were or could have been considered in the original cause.[85]

On the other hand, it has been held that relief may be granted where the false matter goes to the ground or right of invoking the power or action of the court,[86] or where the perjury is accompanied by any fraud extrinsic or collateral to the matter involved in the original case sufficient to justify the

229 Ala. 278—Ex parte Cade, 127 So. 154, 220 Ala. 666—Bolden v. Sloss-Sheffield Steel & Iron Co., 110 So. 574, 215 Ala. 334, 49 A.L.R. 1206—Sloss-Sheffield Steel & Iron Co. v. Lang, 104 So. 770, 213 Ala. 412.

Ariz.—In re Hannerkam's Estate, 77 P.2d 814, 51 Ariz. 447—Schuster v. Schuster, 73 P.2d 1345, 51 Ariz. 1—Dragoon Marble & Mining Co. v. McNeish, 235 P. 401, 28 Ariz. 96.

Ark.—Rice v. Moore, 109 S.W.2d 148, 194 Ark. 585—Hendrickson v. Farmers' Bank & Trust Co., 73 S.W.2d 725, 189 Ark. 423.

Cal.—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—Crow v. Madsen, App., 111 P.2d 7, rehearing granted 111 P.2d 663—Rudy v. Slotwinsky, 238 P. 783, 73 Cal.App. 459.

Ga.—Hutchings v. Roquemore, 155 S.E. 675, 171 Ga. 359.

Ill.—Hintz v. Moldenhauer, 243 Ill. App. 227.

Iowa.—Hewitt v. Blaise, 211 N.W. 481, 202 Iowa 1114.

Mich.—Graure v. Detroit Lumber Co., 244 N.W. 225, 260 Mich. 47—Columbia Casualty Co. v. Kiettke, 244 N.W. 164, 259 Mich. 564—Bassett v. Trinity Bldg. Co., 236 N.W. 237, 254 Mich. 207.

Minn.—Nichols v. Village of Morristown, 283 N.W. 748, 204 Minn. 212.

Mo.—Winchell v. Gaskill, 190 S.W. 2d 266—Sutter v. Easterly, 189 S.W.2d 284—Neevel v. McDermand, 278 S.W. 818, 220 Mo.App. 812.

Mont.—Khan v. Khan, 105 P.2d 665, 110 Mont. 591.

N.Y.—Jacobowitz v. Metselaar, 197 N.E. 169, 268 N.Y. 130, 99 A.L.R. 1198, reargument denied 198 N.E. 528, 268 N.Y. 630.

N.C.—**Corpus Juris quoted in** Horne v. Edwards, 3 S.E.2d 1, 3, 215 N.C. 622.

S.D.—Seubert v. Seubert, 7 N.W.2d 301.

Tenn.—Sharp v. Kennedy, 13 Tenn. App. 170.

Utah.—Wright v. W. E. Callahan Const. Co., 156 P.2d 710—Anderson v. State, 238 P. 557, 65 Utah 512.

34 C.J. p 475 note 6, p 476 note 8.

Ownership of property

Insurer could not attack judgment for insured on ground that insured made false representation about ownership of insured property and gave false testimony to that effect before court in which judgment was obtained.—American Liberty Mut. Ins. Co. v. Washington, 86 S.W.2d 963, 183 Ark. 497.

Federal rule

(1) The federal courts are in conflict on the subject.—Publicker v. Shallcross, C.C.A.Pa., 106 F.2d 949, 126 A.L.R. 386, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 84 L.Ed. 521.

(2) Some of the decisions in the federal courts adhere to the rule set forth in the text.—Ætna Casualty & Surety Co. v. Abbott, C.C.A.Md., 130 F.2d 40—Angle v. Shinholt, C.C.A. Tex., 90 F.2d 294, certiorari denied 58 S.Ct. 40, 302 U.S. 719, 82 L.Ed. 555—**Corpus Juris cited in** Harrington v. Denny, D.C.Mo., 3 F.Supp. 584, 594—Hughes v. U. S. Borax Co., C. C.A.Cal., 286 F. 24, certiorari denied 43 S.Ct. 699, 262 U.S. 753, 67 L.Ed. 1216.

(3) Others assert that relief may be granted against a judgment on the ground of perjury in its procurement.—Publicker v. Shallcross, C.C. A.Pa., 106 F.2d 949, 126 A.L.R. 386, certiorari denied 60 S.Ct. 379, 308 U. S. 624, 84 L.Ed. 521.

In Texas

(1) It has been held that relief will not be granted on the ground of perjured testimony.—Kelly v. Wright, 188 S.W.2d 983—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Elder v. Byrd-Frost, Inc., Civ.App., 110 S.W.2d 172—State v. Wright, Civ. App., 56 S.W.2d 950.

(2) In other cases, however, it has been asserted that false and perjured testimony, at least if willful, is ground for relief.—Stanley v. Spann, Civ.App., 21 S.W.2d 305, error dismissed—Ellis v. Lamb-McAshan Co., Civ.App., 264 S.W. 241, affirmed Lamb-McAshan Co. v. Ellis, Com. App., 270 S.W. 547—34 C.J. p 475 note 5.

85. U.S.—T. J. Moss Tie Co. v. Wabash Ry. Co., C.C.A.Ill., 71 F.2d 107, certiorari denied American Surety Co. of New York v. Conroy, 55 S.Ct. 90, 293 U.S. 578, 79 L.Ed. 675.

Ark.—H. G. Pugh & Co. v. Ahrens, 19 S.W.2d 1030, 179 Ark. 829.

D.C.—Fidelity Storage Co. v. Urice, 12 F.2d 143, 56 App.D.C. 202.

Iowa.—Hewitt v. Blaise, 211 N.W. 481, 202 Iowa 1114.

Kan.—Brenneisen v. Phillips, 45 P.2d 867, 142 Kan. 98.

Mich.—Hofweber v. Detroit Trust Co., 294 N.W. 108, 295 Mich. 96—Smith v. Pontiac Citizens Loan & Investment Co., 293 N.W. 661, 294 Mich. 312.

Minn.—Bloomquist v. Thomas, 9 N.W.2d 337, 215 Minn. 35—Nichols v. Village of Morristown, 283 N.W. 748, 204 Minn. 212—Saari Bros. v. Puustinen, 201 N.W. 434, 161 Minn. 367—Penniston v. Miller, 194 N.W. 944, 156 Minn. 403.

Mo.—Crane v. Deacon, 253 S.W. 1068—Crowley v. Behle, App., 131 S.W. 2d 383.

Okl.—Nolen v. Nolen, 167 P.2d 68—Lewis v. Couch, 154 P.2d 51, 194 Okl. 632—Calkin v. Wolcott, 77 P. 2d 96, 182 Okl. 273—Reeder v. Mitchell, 32 P.2d 26, 167 Okl. 621—Reynolds v. Grant, 299 P. 870, 149 Okl. 261—Burton v. Swanson, 285 P. 839, 142 Okl. 134—Douglas v. Hoyle, 240 P. 1072, 115 Okl. 7—Hartsog v. Barry, 219 P. 94, 95 Okl. 274—Wood v. Wood, 216 P. 936, 92 Okl. 297—Clinton v. Miller, 216 P. 135, 96 Okl. 71—McBride v. Cowen, 216 P. 104, 90 Okl. 130.

Or.—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602—Dixon v. Simpson, 279 P. 939, 130 Or. 211.

R.I.—Broduer v. Broduer, 167 A. 104, 53 R.I. 450.

Tex.—Elder v. Byrd-Frost, Inc., Civ. App., 110 S.W.2d 172.

Wash.—Zapon Co. v. Bryant, 286 P. 282, 156 Wash. 161—Raisner v. Raisner, 283 P. 704, 155 Wash. 52—Colburn v. Denison, 271 P. 885, 149 Wash. 591.

Extent of personal injuries

False testimony as to the extent of a plaintiff's injuries does not justify equitable interference with a judgment, where the extent of the injuries was a question in issue and defendant was not prevented from making a full defense.

U.S.—International Indemnity Co. v. Peterson, D.C.Minn., 6 F.2d 230.

Tex.—Houston E. & W. T. Ry. Co. v. Chambers, Civ.App., 284 S.W. 1063.

Place of accident

In action for injuries received in fall, defendant was held not entitled to vacation of adverse judgment after expiration of term on ground that plaintiff had falsely testified as to place at which she fell, where petition alleged exact place of fall and surrounding circumstances so that defendant, at time of trial, could have located witnesses who allegedly would have testified to seeing plaintiff fall at different place.—Pinches v. Village of Dickens, 268 N.W. 645, 131 Neb. 573.

86. Ala.—Wright v. Fannin, 156 So. 849, 229 Ala. 278—Ex parte Cade, 127 So. 154, 220 Ala. 666.

conclusion that but for such fraud the result would have been different.[87] There is usually no ground for equitable interference on the ground of perjury even though the opposite party did not know of the real facts,[88] especially where it might have been established at the trial by cross-examination;[89] but in some cases, where it appears that the perjury was not discovered in time to enable the complaining party to avail himself of the knowledge on the original trial, a bill to set aside the judgment has been entertained.[90] It has been held, in applying the rules respecting the granting of equitable relief against a judgment on the ground of perjury, that there is no distinction between introducing false and forged instruments in evidence and swearing falsely as a witness.[91]

In some jurisdictions equity will not grant relief against a judgment obtained in consequence of perjury unless it appears that the perjurer was duly convicted[92] and that the judgment could not have been obtained without the evidence of the perjurer.[93] In any event, before a court of equity will interfere with a judgment on the ground of perjury, it must appear that the injured party has exercised due diligence[94] and that he is clearly entitled to the relief sought.[95]

Perjury as intrinsic or extrinsic fraud. Perjury or false swearing is a species of intrinsic, not extrinsic, fraud,[96] and hence the rule against granting relief for perjury is in accordance with the general rule discussed supra in § 372 b (2) that relief in equity ordinarily cannot be had for intrinsic fraud. However, perjury as to jurisdictional facts, whereby a court is imposed on and induced to assume jurisdiction where in reality none exists, and which never could have been exercised if the truth had

87. Or.—**Corpus Juris quoted in** Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 667, 155 Or. 602.
34 C.J. p 476 note 12.

88. S.D.—Seubert v. Seubert, 7 N.W. 2d 301.
34 C.J. p 476 note 10.

89. Wash.—Robertson v. Freebury, 152 P. 5, 87 Wash. 558, L.R.A. 1916B 883.

90. U.S.—Marshall v. Holmes, La., 12 S.Ct. 62, 141 U.S. 589, 35 L.Ed. 870.
34 C.J. p 476 note 13.

91. Mo.—Lieber v. Lieber, 143 S.W. 458, 239 Mo. 1.
34 C.J. p 476 note 9.

92. Ga.—Stephens v. Pickering, 15 S.E.2d 202, 192 Ga. 199—Bird v. Smith, 197 S.E. 642, 186 Ga. 301—Beavers v. Cassells, 196 S.E. 716, 186 Ga. 98—Elliott v. Marshall, 185 S.E. 831, 182 Ga. 513—Hutchings v. Roquemore, 155 S.E. 675, 171 Ga. 359.

In North Carolina

(1) It has been held that judgment cannot be vacated in equity because shown to have been based on perjured testimony, unless witness has been convicted of perjury.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.

(2) It has also been held that intrinsic fraud consisting of perjured testimony or false evidence is not ground for equitable relief against a judgment regardless of whether perjured witnesses have previously been convicted of perjury, or falsity of evidence established by deed, writing, or unimpeachable record, since public policy demands end of litigation.—Horne v. Edwards, 3 S.E.2d 1, 215 N.C. 622.

93. Ga.—Stephens v. Pickering, 15 S.E.2d 202, 192 Ga. 199—Bird v. Smith, 197 S.E. 642, 186 Ga. 361—Hutchings v. Roquemore, 155 S.E. 675, 171 Ga. 359.
Tex.—Elder v. Byrd-Frost, Inc., Civ. App., 110 S.W.2d 172.

Materiality of testimony

(1) A party is not entitled to have verdict and judgment against him set aside on ground that certain testimony was false, where it appears that allegedly false testimony concerned a subject immaterial to any proper issue before the court.—Stephens v. Pickering, 15 S.E.2d 202, 192 Ga. 199.

(2) Court refused to annul judgment where allegedly false testimony could have been entirely disregarded and same conclusion still have been reached in original action.—Silver Fleet of Memphis v. Hester Truck Lines, La.App., 180 So. 451—Silver Fleet of Memphis, Inc. v. Rogers, La.App., 180 So. 450.

94. Neb.—Gutru v. Johnson, 212 N. W. 622, 115 Neb. 309.
Okl.—Reynolds v. Grant, 299 P. 870, 149 Okl. 261—Miller v. White, 265 P. 646, 129 Okl. 184.
Utah.—Anderson v. State, 238 P. 557, 65 Utah 512.
Wis.—Schulteis v. Trade Press Pub. Co., 210 N.W. 419, 191 Wis. 164.

Employee's earnings after discharge

Bill would not lie by former employer to set aside judgment for damages for wrongful discharge on ground that former employee had fraudulently misstated earnings after discharge, where facts could have been ascertained by diligent investigation before trial.—Realty Acceptance Corporation v. Montgomery, C.C.A.Del., 77 F.2d 762, certiorari denied 56 S.Ct. 103, 296 U.S. 590, 80 L. Ed. 418, rehearing denied 56 S.Ct. 167, 296 U.S. 662, 80 L.Ed. 472.

95. Okl.—Reynolds v. Grant, 299 P. 870, 149 Okl. 261—Miller v. White, 265 P. 646, 129 Okl. 184.

96. U.S.—Brady v. Beams, C.C.A. Okl., 132 F.2d 985, certiorari denied 63 S.Ct. 1032, 319 U.S. 747, 87 L. Ed. 1702, rehearing denied 63 S.Ct. 1315, 319 U.S. 784, 87 L.Ed. 1727—Angle v. Shinholt, C.C.A.Tex., 90 F.2d 294, certiorari denied 58 S.Ct. 40, 302 U.S. 719, 82 L.Ed. 555—Hughes v. U. S. Borax Co., C.C.A. Cal., 286 F. 24, certiorari denied 43 S.Ct. 699, 262 U.S. 753, 67 L.Ed. 1216.
Cal.—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—La Salle v. Peterson, 32 P.2d 612, 220 Cal. 739—Zaremba v. Woods, 61 P.2d 976, 17 Cal.App.2d 309—O. A. Graybeal Co. v. Cook, 60 P.2d 525, 16 Cal.App.2d 231—Harvey v. Griffiths, 23 P.2d 532, 133 Cal.App. 17.
Kan.—Brenneisen v. Phillips, 45 P.2d 867, 142 Kan. 98.
Mich.—Fawcett v. Atherton, 299 N. W. 108, 298 Mich. 362.
Minn.—Bloomquist v. Thomas, 9 N. W.2d 337, 215 Minn. 35.
Mont.—Khan v. Khan, 105 P.2d 665, 110 Mont. 591.
N.Y.—Jacobowitz v. Metselaar, 197 N.E. 169, 268 N.Y. 130, 99 A.L.R. 1198, reargument denied Jacobowitz v. Herson, 198 N.E. 528, 268 N. Y. 630—O'Neil v. Meccia, 8 N.Y.S. 2d 850, 169 Misc. 985.
Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Mills v. Baird, Civ.App., 147 S.W.2d 312, error refused—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 109 S.W. 2d 1119—State v. Wright, Civ.App., 56 S.W.2d 950.

been known, is extrinsic, and relief against a judgment so obtained may be had in equity.[97]

Subornation or conspiracy. It is not a ground for equitable relief that the successful party suborned the witnesses and conspired with them to secure a judgment in his favor.[98] However, it has been held that where a lawyer engages in a conspiracy to commit a fraud on the court by the production of fabricated evidence, and by such means obtains a judgment, a court of equity may grant relief against the judgment.[99]

§ 375. —— Violation of Agreement

A party's violation of an agreement, as, for example, with respect to the time of trial or settlement of the case, whereby his adversary, without negligence, was prevented from presenting his case, has frequently been held to furnish ground for equitable relief against a judgment.

The jurisdiction of equity to relieve against judgments obtained by fraud is exercised very frequently where a party is prevented from presenting his defense, or taking advantage of remedies to which he is entitled, because of the violation by his adversary of some express agreement with him,[1] and it is not necessary that the judgment creditor should have directly threatened to enforce the judgment.[2] Equity will enjoin a judgment taken in violation of an agreement to dismiss or to discontinue a suit,[3] to submit the matter in controversy to arbitration,[4] or to credit a sum paid after the commencement of suit.[5]

The rule permitting equitable relief for violation of an agreement does not apply where complainant has been guilty of negligence,[6] or where there is an adequate legal remedy,[7] as by action at law for the breach.[8] Likewise the breach of an agreement will not constitute a ground for relief where the suit at law was in pursuance of an illegal act participated in by complainant.[9]

It has been held that a consideration for the agreement must be shown, and also that the applicant for relief must have been injured by his reliance on it.[10] However, it has also been considered that the right to relief does not depend on the legal validity of the agreement but rather on the question whether it has been relied on by the one party, and made use of by the other to obtain an unjust judgment.[11] If the agreement relied on is made by the attorney of the adverse party, the violation of it will not constitute a ground for equitable interference, unless it is shown that the attorney had authority to make such agreement, or that it has been ratified.[12]

97. Okl.—Johnson v. Petty, 246 P. 848, 118 Okl. 178.
Pa.—Carey v. Carey, 183 A. 371, 121 Pa.Super. 251.

98. Cal.—La Salle v. Peterson, 32 P. 2d 612, 220 Cal. 739.
N.Y.—Jacobowitz v. Metselaar, 197 N.E. 169, 268 N.Y. 130, 99 A.L.R. 1198, reargument denied Jacobowitz v. Herson, 198 N.E. 528, 268 N.Y. 630.
34 C.J. p 476 note 7.

99. Mo.—Sutter v. Easterly, 189 S.W.2d 284.

1. Tex.—Sloan v. Newton, Civ.App., 134 S.W.2d 697.
34 C.J. p 477 note 14.

Promise to do equity
Equity will relieve against a judgment obtained by inducing defendants thereto to withdraw an equitable plea that they had filed in the case, by the promise of plaintiff that if such plea was withdrawn he would do the equity set up in the plea, and would enter into writing to that effect, all of which he failed to do.—Markham v. Angier, 57 Ga. 43.

Agreement not to enforce judgment
Relief may be granted against a judgment for violation of an agreement, on payment of a certain sum of money, not to enforce a judgment already obtained.—Thompson v. Laughlin, 27 P. 752, 91 Cal. 313.

Personal judgment in ejectment suit
An agreement that plaintiff in the action at law was not to take a personal judgment against defendant in a suit in ejectment will justify equitable relief.
Cal.—Heim v. Butin, 40 P. 39, 5 Cal. Unrep.Cas. 19.
Ind.—Brake v. Payne, 37 N.E. 140, 137 Ind. 479.

Maker's liability on note
(1) Relief has been granted where the maker of a note held a receipt acknowledging payment thereof from the indorsee, who sued on the note, representing to the maker that he did not intend to enforce its collection against him, but against the payee, and judgment was accordingly rendered by default.—Baker v. Redd, 44 Iowa 179.

(2) Where maker of note had never made any payments thereon and had not acknowledged his liability in writing, either before or after running of statute of limitations, action of payee in lulling maker into security by repeated promises that no harm would come to him if he ignored summons which had been served on him constituted fraud.—Pavlik v. Burns, 278 N.W. 149, 134 Neb. 175.

2. Conn.—Chambers v. Robbins, 28 Conn. 552.
34 C.J. p 477 note 15.

3. Ind.—Cory v. Howard, 164 N.E. 639, 88 Ind.App. 503.
Tex.—Sloan v. Newton, Civ.App., 134 S.W.2d 697.
34 C.J. p 477 note 16.

4. Mo.—Bresnahan v. Price, 57 Mo. 422.

5. Tex.—Dickenson v. McDermott, 13 Tex. 248.
34 C.J. p 477 note 19.

6. Tex.—Coleman v. Goyne, 37 Tex. 552.
34 C.J. p 477 note 26.

7. Ala.—J. A. Roebling Sons Co. v. Stevens Electric Co., 9 So. 369, 93 Ala. 39.
34 C.J. p 477 note 27.

8. Iowa.—Lumpkin v. Snook, 19 N.W. 333, 63 Iowa 515.
34 C.J. p 478 note 28.

9. Va.—Barnett v. Barnett, 2 S.E. 733, 83 Va. 504.
34 C.J. p 478 note 29.

10. Cal.—Heim v. Butin, 42 P. 138, 109 Cal. 500, 50 Am.S.R. 54.

11. Wis.—Blakesley v. Johnson, 13 Wis. 530.
34 C.J. p 478 note 30.

12. Tex.—Anderson v. Oldham, 18 S.W. 557, 82 Tex. 228.
34 C.J. p 478 note 31.

Necessity that agreement be written. According to some authorities, violation of an agreement with regard to the suit will furnish no ground for equitable interference unless the agreement is in writing.[13] It has also been held, however, that fraud involving the violation of an agreement may constitute ground for equitable relief notwithstanding the existence of a court rule requiring stipulations and agreements of counsel to be in writing.[14]

Agreement as to time of trial. Equity may grant relief against a judgment obtained in violation of an agreement between counsel respecting the time of trial and notice thereof to counsel for the complaining party,[15] particularly where the agreement had been approved by the trial judge.[16] Violation of an agreement that the cause shall not be called for trial except by consent has been held ground for relief.[17]

Agreement as to compromise or settlement. Where a judgment is fraudulently taken by default in violation of an agreement for a compromise or settlement, the interposition of a defense being thus prevented, its enforcement will be restrained,[18] if defendant is not chargeable with negligence in failing to prevent the entry of judgment when he could have done so,[19] and provided there is no longer an adequate remedy at law.[20]

§ 376. Newly Discovered Evidence

a. In general
b. Character and effect of evidence

a. In General

Some authorities hold that equity will not grant relief against a judgment on the ground of newly discovered evidence, while others permit such relief under certain circumstances. The authorities are agreed that relief on such ground will in no case be granted where the complaining party failed to exercise due diligence in securing the evidence in time to present it in the original action.

In some cases it has been held that equity will not relieve against a judgment on the ground of newly discovered evidence,[21] unless there are also circumstances of fraud, accident, or mistake preventing a defense,[22] on the ground that courts of law now have ample jurisdiction to grant relief, and the reason for the exercise of equity jurisdiction has therefore ceased to exist.[23] Other cases, however, hold that where a defendant was prevented from making good his defense by the lack of evidence to support it, being ignorant of the existence of such evidence and unable to discover it by the exercise of due diligence, equity will relieve him against the judgment, on the subsequent discovery and produc-

13. Ala.—Brunnier v. Hill, 85 So. 691, 204 Ala. 403.
34 C.J. p 478 note 32.

Belief as to existence of agreement
A claim that the complaining party assumed and believed that the parties had tacitly agreed that the trial would remain in abeyance pending disposition of a subsequent suit was held insufficient to show any equitable ground for relief where it did not appear that the opposing parties or counsel were responsible for the belief and were not parties to the subsequent suit, particularly where a court rule required agreements between attorneys or parties to be in writing.—Davis v. Cox, Tex.Civ.App., 4 S.W.2d 1008, error dismissed.

14. Mont.—Bullard v. Zimmerman, 292 P. 730, 88 Mont. 271—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.

15. Ind.—Globe Mining Co. v. Oak Ridge Coal Co., 177 N.E. 868, 204 Ind. 11.
Ky.—Johnson v. Gernert Bros. Lumber Co., 75 S.W.2d 357, 255 Ky. 734.
La.—Schneckenberger v. John Bonura & Co., 130 So. 870, 14 La.App. 692.
Mich.—Skibe v. Johnson, 228 N.W. 716, 249 Mich. 303.
Tex.—Adams v. First Nat. Bank, Civ. App., 294 S.W. 909—Huddleston v. Texas Pipe Line Co., Civ.App., 230 S.W. 350.

Mere misapprehension insufficient
It is not sufficient that the complaining party was under some misapprehension with reference to whether the case would be tried, unless it appears that either the court or the opposite party was in some measure responsible for the false impression.—Davis v. Cox, Tex.Civ.App., 4 S.W.2d 1008, error dismissed.

16. Tex.—Caffarelli v. Reasonover, Civ.App., 54 S.W.2d 170.

17. Tex.—Gulf, C. & S. F. R. Co. v. King, 16 S.W. 641, 80 Tex. 681.

18. Conn.—Gates v. Steele, 20 A. 474, 58 Conn. 316, 18 Am.S.R. 268.
34 C.J. p 478 note 34.

19. Ga.—Lowry v. Sloan, 51 Ga. 633.
34 C.J. p 478 note 35.

Lack of diligence held not shown
Where party suing on note agreed to dismiss suit after settlement agreement was made, fact that defendant therein did not investigate court records to ascertain whether plaintiff had complied with agreement to dismiss case could not be considered lack of diligence precluding the vacating of default judgment.—Sloan v. Newton, Tex.Civ. App., 134 S.W.2d 697.

20. Ala.—J. A. Roebling Sons Co. v. Stevens Electric Light Co., 9 So. 369, 93 Ala. 39.

21. S.D.—Seubert v. Seubert, 7 N.W. 2d 301.
Tex.—Metropolitan Life Ins. Co. v. Pribble, Civ.App., 130 S.W.2d 332, error refused.
34 C.J. p 478 note 37.

22. Tex.—Strickland v. Ward, Civ. App., 185 S.W.2d 736.
34 C.J. p 478 note 38.

Effect of reformed code procedure
Where reformed code procedure was part of the state procedure from the time the constitution was adopted, equity jurisdiction to grant relief from a judgment on ground of newly discovered evidence was not the jurisdiction of the old courts of equity, but the jurisdiction of equity under the reformed code procedure, whereby nothing short of a showing of absolute extrinsic fraud would justify granting a practical extension of relief offered under the code.—Wasem v. Ellens, 4 N.W.2d 850, 68 S.D. 524.

23. Ala.—De Soto Coal Mining & Development Co. v. Hill, 65 So. 988, 188 Ala. 667.

tion of such evidence,[24] unless he had a legal remedy, and failed to avail himself of it,[25] and that statutes authorizing courts of law to grant new trials on the ground of newly discovered evidence do not divest courts of equity of the power to grant a new trial in cases where the facts justify it.[26]

In determining whether, in the particular case, equitable relief against a judgment will be granted on the ground of newly discovered evidence, the same rules govern as the rules prescribing the circumstances under which a new trial will be granted on the ground of newly discovered evidence.[27] It must appear that the judgment is unjust,[28] that relief is necessary to protect a meritorious complainant from a clear miscarriage of justice,[29] and that relief can be granted without mischief to the rights of innocent persons.[30]

Diligence in former proceedings. Equity will not grant relief against a judgment on the ground of newly discovered evidence, where the evidence could have been discovered before, and produced on, the trial by the exercise of care and diligence in searching for it or in interrogating persons cognizant of the facts.[31] The same diligence is required as is required of a litigant who moves for a new trial under statute.[32] Thus, where it appears that the evidence is matter of record, accessible to defendant, and from its nature necessarily within his knowledge,[33] or where the facts might have been established at the trial by cross-examination,[34] no ground for relief is shown. However, the fact that defendant might have obtained evidence by a bill of discovery or otherwise will not affect his right to relief where he had no reason to suspect the existence of such evidence;[35] and even the fact that the existence of the defense was suspected, and that it was unsuccessfully set up at law, will not necessarily preclude relief, where there was no lack of diligence in making the discovery.[36]

b. Character and Effect of Evidence

The additional evidence for which equitable relief against a judgment is sought must in fact be newly discovered; in addition, it must be material and calculated to produce an opposite result, evidence which is merely cumulative being insufficient.

Relief will not be granted against a judgment on additional evidence which is not in fact newly discovered;[37] the evidence must have been discovered too late for use in the original action.[38] Evidence is not newly discovered where the party relying on it knew about it and that it existed, but had forgotten the circumstances or failed to appreciate their significance and value.[39]

To justify a court of equity in enjoining a judgment on the ground of newly discovered evidence, it must appear that such evidence is material and competent[40] and is of such a character and strength that it is reasonably certain that it would have

24. Ill.—Crane Co. v. Parker, 136 N. E. 733, 304 Ill. 331.
Md.—Bailey v. Bailey, 30 A.2d 249, 181 Md. 385.
34 C.J. p 478 note 40.

25. Iowa.—Abell v. Partello, 211 N. W. 868, 202 Iowa 1236.
34 C.J. p 478 note 41.

26. Neb.—Horn v. Queen, 4 Neb. 108.
34 C.J. p 478 note 43.

27. Va.—McCloud v. Virginia Electric & Power Co., 180 S.E. 299, 164 Va. 604.

28. Ill.—Crane Co. v. Parker, 136 N. E. 733, 304 Ill. 331.

29. Tex.—Kelley v. Wright, Civ. App., 184 S.W.2d 649, affirmed, Sup., 188 S.W.2d 983.

30. Tex.—Kelley v. Wright, supra.

31. U.S.—Harrington v. Denny, D.C. Mo., 3 F.Supp. 584.
Ill.—Wackerle v. Nies, 8 N.E.2d 126, 286 Ill.App. 51.
Ky.—Elkhorn Coal Corporation v. Cuzzort, 284 S.W. 1005, 215 Ky. 254.
Tex.—Reed v. Bryant, Civ.App., 291 S.W. 605.
34 C.J. p 479 note 44.

32. Idaho.—Boise Payette Lumber Co. v. Idaho Gold Dredging Corporation, 58 P.2d 786, 56 Idaho 660, certiorari denied 57 S.Ct. 40, 299 U. S. 577, 81 L.Ed. 425.

33. Ill.—Palmer v. Bethard, 66 Ill. 529.
34 C.J. p 479 note 45.

A discharge in bankruptcy which occurred before the rendition of judgment is not "a defense which has arisen or been discovered since the judgment was rendered" within the meaning of a statute providing that a judgment obtained in an action by ordinary proceedings shall not be annulled or modified in equitable proceedings except for such a defense.—Harding v. Quinlan, 229 N. W. 672, 209 Iowa 1190.

34. Wash.—Robertson v. Freebury, 152 P. 5, 87 Wash. 558, L.R.A.1916B 883.

35. N.J.—Cairo & F. R. Co. v. Titus, 32 N.J.Eq. 397.
34 C.J. p 479 note 47.

36. U.S.—Ocean Ins. Co. v. Fields, C.C.Mass., 18 F.Cas.No.10,406, 2 Story 59.
34 C.J. p 479 note 48.

37. U.S.—Harrington v. Denny, D.C. Mo., 3 F.Supp. 584.
Miss.—Miller v. Doxey, 1 Miss. 329.
Wis.—Marsh v. Edgerton, 2 Pinn. 230, 1 Chandl. 198.
Wyo.—**Corpus Juris cited in** School Dist. No. 7 in Weston County v. School Dist. No. 1 in Weston County, 236 P. 1029, 1032, 33 Wyo. 65.

38. Idaho.—Boise Payette Lumber Co. v. Idaho Gold Dredging Corporation, 58 P.2d 786, 56 Idaho 660, certiorari denied 57 S.Ct. 40, 299 U. S. 577, 81 L.Ed. 425.
N.J.—Simon v. Henke, 139 A. 887, 102 N.J.Eq. 115.
N.Y.—Schenck v. Underhill, 199 N.Y. S. 606, 205 App.Div. 162.
Documents passing between parties Documents produced in suit to enjoin enforcement of judgment were held not newly discovered evidence, where bill alleged that documents had passed between parties before trial.—Harrington v. Denny, D.C.Mo., 3 F.Supp. 584.

39. U.S.—Harrington v. Denny, supra.

40. U.S.—Harrington v. Denny, supra.
N.J.—Cairo & F. R. Co. v. Titus, 28 N.J.Eq. 269.
Tex.—Kelley v. Wright, Civ.App., 184 S.W.2d 649, affirmed, Sup., 188 S. W.2d 983.

caused an opposite result if produced at the trial,[41] some cases even going so far as to hold that the new evidence must be incontrovertible and conclusive.[42] Evidence which is uncertain and inconclusive in character and of slight probative value is insufficient.[43] Evidence will not be sufficient to warrant equitable relief if it appears to be merely cumulative or corroborative[44] or merely intended to impeach some of the witnesses at the former trial.[45] The rule in this respect is the same in both courts of equity and at law.[46]

Necessity of writing. Newly discovered evidence need not be in writing to justify equitable relief against a judgment.[47]

C. PROCEDURE

§ 377. Form of Proceedings

Equitable relief against a judgment is generally sought in a separate and independent proceeding, equitable in nature, commenced by bill or complaint.

As a general rule, where application is to be made to a court possessing equitable jurisdiction, for relief against a judgment, it may and should be in the form of a separate and independent proceeding commenced by bill or petition,[48] or, under the code practice, by complaint.[49] Where the adjudication to be impeached is a decree in equity, relief may be sought either by petition in the original action, by bill of review, or by original bill in the nature of a bill of review, according to the circumstances, as discussed in Equity §§ 622-667. Under some statutes, however, a bill of review may also lie as an independent proceeding for the purpose of obtaining equitable relief against a judgment at law,[50] and, while it has been held that such a proceeding is in the nature of, and has the same scope

Wyo.—**Corpus Juris cited in** School Dist. No. 7 in Weston County v. School Dist. No. 1 in Weston County, 236 P. 1029, 1032, 33 Wyo. 65.

41. Ill.—Crane Co. v. Parker, 136 N. E. 733, 304 Ill. 331.
Iowa.—Abell v. Partello, 211 N.W. 868, 202 Iowa 1236.
Tex.—Kelley v. Wright, Civ.App., 184 S.W.2d 649, affirmed, Sup., 188 S. W.2d 983.
34 C.J. p 479 note 51.

42. U.S.—Harrington v. Denny, D.C. Mo., 3 F.Supp. 584.
34 C.J. p 479 note 52.

43. Tex.—Kelley v. Wright, Civ. App., 184 S.W.2d 649, affirmed, Sup., 188 S.W.2d 983.

44. U.S.—Harrington v. Denny, D.C. Mo., 3 F.Supp. 584.
Neb.—Kielian v. Kent & Burke Co., 268 N.W. 79, 131 Neb. 308—Gutru v. Johnson, 212 N.W. 622, 115 Neb. 309—Chicago & N. W. Ry. Co. v. Skaggs, 211 N.W. 1007, 115 Neb. 176.
34 C.J. p 479 note 53.

45. Ill.—Hintz v. Moldenhauer, 243 Ill.App. 227.
34 C.J. p 479 note 54.

46. Ill.—Yates v. Monroe, 13 Ill. 212.
W.Va.—Bloss v. Hull, 27 W.Va. 503.

47. S.C.—Cantey v. Blair, 18 S.C. Eq. 41.

48. Ga.—Mullis v. Bank of Chauncey, 150 S.E. 471, 40 Ga.App. 582.
Ill.—Pedersen v. Logan Square State & Savings Bank, 36 N.E.2d 732, 377 Ill. 408.
Kan.—Johnson v. Schrader, 95 P.2d 273, 150 Kan. 545—In re Hardesty's Adoption, 92 P.2d 49, 150 Kan. 271.
La.—Dickey v. Pollack, App., 183 So. 43.
Mo.—Force v. Margulius, App., 33 S. W.2d 1023.
Okl.—Lewis v. Couch, 154 P.2d 51, 194 Okl. 632—Sawyer v. Sawyer, 77 P.2d 703, 182 Okl. 348—Seekatz v. Brandenburg, 300 P. 678, 150 Okl. 53.
Tex.—McCook v. Amarada Petroleum Corporation, Civ.App., 73 S.W.2d 914.
W.Va.—Williams v. Stratton, 174 S. E. 417, 114 W.Va. 837.
34 C.J. p 479 note 57.

Judgment of dismissal
Petition to vacate judgment was proper proceeding to take following judgment of dismissal.—Smith v. Brown, 184 N.E. 383, 282 Mass. 81.

Original bill or bill of review
(1) A bill to set aside a decree for fraud in its procurement, or for fraud extrinsic and collateral to matter on which the decree rests, and under which a third person has acquired an interest, is an original bill and not a bill of review.—Ostrom v. Ferris, 134 A. 305, 99 N.J.Eq. 551, affirmed 141 A. 920 (two cases), 103 N.J.Eq. 22.

(2) The position of parties who filed petition to set aside decree in equity suit more than two years after entry on ground that court had no jurisdiction over subject matter, if question could be raised by petition rather than by bill of review, was no stronger than it would have been had they raised it by bill of review.—Fooks' Ex'rs v. Ghingher, 192 A. 782, 172 Md. 612, certiorari denied Phillips v. Ghingher, 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 561.

Statutory procedure held inapplicable
Service on defendant by leaving copy of summons and petition at his dwelling with member of family constituted "personal service," so that statutory provisions for vacating judgment by petition for review were inapplicable.—Force v. Margulius, Mo.App., 33 S.W.2d 1023.

Foreclosure
Equitable relief from action for deficiency judgment can be had only when sought by petition to review original foreclosure proceeding and not by bill to restrain the enforcement of the deficiency judgment.—Meranus v. Lawyers' & Homemakers' Building & Loan Ass'n, 180 A. 665, 118 N.J.Eq. 586.

49. Ind.—Vail v. Department of Financial Institutions of Indiana, 17 N.E.2d 854, 106 Ind.App. 39.
N.Y.—People v. Judges of Court of Common Pleas, 3 Abb.Pr. 181.

50. Tex.—Crouch v. McGaw, 138 S. W.2d 94, 134 Tex. 633—Wear v. McCallum, 33 S.W.2d 723, 119 Tex. 473—Gray v. Moore, Civ.App., 172 S.W.2d 746, error refused—American Red Cross v. Longley, Civ. App., 165 S.W.2d 233, error refused—Allen v. Trentman, Civ.App., 115 S.W.2d 1177—Griffith v. Tipps, Civ. App., 69 S.W.2d 346.

Effectuation of relief sought
An equitable bill of review must effectuate the relief sought completely within the particular proceedings.—Cheney v. Norton, Civ.App., 126 S. W.2d 1011, reversed on other grounds Norton v. Cheney, 161 S.W.2d 73, 138 Tex. 622.

Distinction based on service of process
A distinction exists between equitable bill of review as against a previously rendered judgment under

and purpose as, a motion for new trial[51] or writ of error in an action at law,[52] it has also been held that the remedy is distinct from, and not an alternative for, such remedies as a motion for new trial, appeal, or writ of error.[53] In those jurisdictions where legal and equitable powers are vested in the same courts, jurisdiction of equity to grant relief against a judgment may be invoked by means of a motion addressed to the court which rendered the judgment as well as by an independent action in equity,[54] and under some practice a rule to show cause is proper to bring the matter of cancellation of a judgment before a court of equity.[55] A direct attack on a judgment may sometimes be set up by a cross action or cross bill,[56] and it may be permissible for the judgment debtor, when suit is brought on the judgment, to set up in his answer the grounds on which he claims that it should be vacated or enjoined, and demand appropriate relief, whereupon the answer will be treated as equivalent to a bill in equity.[57]

An application to vacate a judgment, made after the expiration of the term at which the judgment was rendered, may be considered an independent proceeding, although it was entitled as a part of the original action and designated as a motion.[58] On the other hand, where a party by mistake brings

process served on defendant, and similar action on judgment rendered when process was by publication, since, in the former, actions are docketed separately from action sought to be reviewed, and are tried out on issues made, while, in latter cases, motions are treated as motions for new trials in original case and are filed in that case and heard as part of it, irrespective of how they are indorsed, styled or docketed. —Smith v. Higginbotham, Tex.Civ. App., 112 S.W.2d 770.

Statute not mandatory

Bill of review is not exclusive method by which new trial may be obtained after judgment on service by publication, statute providing for bill of review not being mandatory. —Dennis v. McCasland, Civ.App., 69 S.W.2d 506, reversed on other grounds 97 S.W.2d 684, 128 Tex. 266.

Proceedings held bill of review

Tex.—Pope v. Powers, 120 S.W.2d 432, 132 Tex. 80—Moon v. Weber, Civ.App., 103 S.W.2d 807, error refused—Texas Employers' Ins. Ass'n v. Shelton, Civ.App., 74 S. W.2d 280.

Proceedings held not bill of review

(1) Generally.—Love v. State Bank & Trust Co. of San Antonio, 90 S.W.2d 819, 126 Tex. 591.

(2) Proceeding to set aside judgment which is in effect only a motion for a new trial.—Bridgman v. Moore, 133 S.W.2d 705, 143 Tex. 250 —Trujillo v. Piarote, 53 S.W.2d 466, 122 Tex. 173—Smith v. Poppe, Civ. App., 102 S.W.2d 1108—Cox, Inc., v. Knight, Civ.App., 50 S.W.2d 915.

(3) A petition to set aside a judgment, filed years after judgment rendered, where complaining party had instituted original suit, tried it, and failed.—Warne v. Jackson, Tex.Civ. App., 273 S.W. 315.

51. Tex.—Cotten v. Stanford, Civ. App., 169 S.W.2d 489—Staples v. Callahan, Civ.App., 138 S.W.2d 206, affirmed Callahan v. Staples, 161 S. W.2d 489, 139 Tex. 8—Dennis v. McCasland, Civ.App., 69 S.W.2d 506, reversed on other grounds 97 S.W.2d 684, 128 Tex. 266.

52. Tex.—Hugh Cooper Co. v. American Nat. Exchange Bank of Dallas, Civ.App., 30 S.W.2d 364.

53. Tex.—Dixon v. McNabb, Civ. App., 173 S.W.2d 228, error refused—Union Bank & Trust Co. of Fort Worth v. Smith, Civ.App., 166 S.W.2d 928—Smith v. Rogers, Civ. App., 129 S.W.2d 776.

Error not apparent on record

Where record would not disclose error complained of in bill of review to set aside judgment, appeal therefrom or writ of error would not be available as remedy precluding resort to such bill.—Pearl Assur. Co. v. Williams, Tex.Civ.App., 167 S.W.2d 808.

54. Cal.—Olivera v. Grace, 122 P.2d 564, 19 Cal.2d 570, 140 A.L.R. 1328.

In Ohio

(1) While relief from judgment or order may be granted in suit in equity, ordinarily a separate suit is not required, but relief may be granted in same proceedings.—In re Vanderlip's Estate, 12 Ohio Supp. 123.

(2) Where other relief from judgment than that obtainable in case wherein judgment was rendered is sought, and impeachment of judgment is only necessary to the further relief sought, original action is proper remedy.—Young v. Guella, 35 N. E.2d 997, 67 Ohio App. 11.

55. N.J.—Manowitz v. Kanov, 154 A. 326, 107 N.J.Law 523, 75 A.L.R. 1464.

56. Va.—Sutherland v. Rasnake, 192 S.E. 695, 169 Va. 257.

Proceeding for bill of discovery

Defendant could file cross action to cancel judgment held by plaintiffs against him in proceeding for bill of discovery to have defendant disclose his assets.—Briggs v. Ladd, Tex.Civ. App., 64 S.W.2d 389.

57. Tex.—Cundiff v. Teague, 46 Tex 475.

Wis.—Brown v. Parker, 28 Wis. 21—Stowell v. Eldred, 26 Wis. 504.

58. Ind.—Globe Min. Co. v. Oak Ridge Coal Co., 134 N.E. 508, 79 Ind.App. 76.

Sufficiency of pleadings generally see infra § 389.

Bill of review

(1) A bill which states substance of proceedings sought to be revised and facts relied on for relief will be considered a "bill of review" if in fact it is an original proceedings to set aside a judgment and shows equitable grounds for relief, although it is denominated a motion.—Custer v. McGough, Tex.Civ.App., 184 S.W.2d 668—City of Eastland v. Owen, Civ.App., 49 S.W.2d 534, reversed on other grounds Owen v. City of Eastland, 78 S.W.2d 178, 124 Tex. 419—Smith v. Kraft, Tex.Civ.App., 9 S.W.2d 472.

(2) Pleading styled motion for new trial, containing essential elements of bill of review, will be regarded as such if motion for new trial could not have been filed.—Box v. Pierce, Tex.Civ.App., 278 S.W. 226.

(3) If pleading possesses essential elements of bill of review, it is immaterial that it was filed under number and style of former suit.—City of Eastland v. Owen, Civ.App., 49 S.W. 2d 534, reversed on other grounds Owen v. City of Eastland, 78 S.W.2d 178, 124 Tex. 419.

(4) However, where essential elements of a bill of review are lacking, motion will not be treated as such a bill.—Lindsey v. Panhandle Const. Co., Civ.App., 46 S.W.2d 339, affirmed Panhandle Const. Co. v. Lindsay, 72 S.W.2d 1068, 123 Tex. 613.

(5) So defendant's motion to dissolve injunction subsequent to expiration of judgment term could not be treated as a statutory petition for review so as to warrant court in acting on it, where it was not claimed that injunction proceeding was irregular, but only that decree entered was erroneous.—State ex rel.

an independent action, when his remedy is by motion in the original cause, the court may, in its discretion, treat the summons and complaint as a motion,[59] although a bill or action to vacate or enjoin a judgment in which the only relief asked is a perpetual injunction,[60] or an action for reformation, in which it is merely alleged that the prior judgment does not constitute a bar to recovery,[61] may not be treated as a motion in the original cause or a petition for a new trial. A cause of action to set aside a judgment or decree has been regarded as a continuation of the original suit in which the judgment or decree was entered.[62]

In Louisiana, if it is claimed that an adjudication is absolutely void for illegality or other cause, resort should be had to an action of nullity, and not an injunction.[63] Such a suit may not be brought by way of intervention or third opposition; it must be brought in the ordinary form, by petition and citation.[64]

An action for equitable relief against a judgment is equitable in nature and is governed by equitable principles.[65]

§ 378. Conditions Precedent

A party seeking equitable relief against a judgment must on his part do whatever equity requires, but leave to sue is usually not required.

A party coming into equity to obtain relief against a judgment at law must on his part do whatever equity requires.[66] In particular, if complainant does not dispute the validity of the judgment with respect to the entire amount of it, he must first pay or offer to pay whatever amount he admits to be due,[67] or show some sufficient excuse for his failure to do so,[68] unless the circumstances are such that no payment or tender is required.[69] However, it is not usual or necessary, before filing a bill for this purpose, to obtain leave of the court whose judgment is to be impeached or of that in which the bill is filed.[70]

Caplow v. Kirkwood, Mo.App., 117 S.W.2d 652.

59. N.C.—Craddock v. Brinkley, 98 S.E. 280, 177 N.C. 125.

60. U.S.—Edmanson v. Best, Ill., 57 F. 531, 6 C.C.A. 471.
N.C.—Foard v. Alexander, 64 N.C. 69.

61. N.C.—Virginia - Carolina Joint Stock Land Bank v. Alexander, 160 S.E. 462, 201 N.C. 453.

62. U.S.—Hanna v. Brictson Mfg. Co., C.C.A.S.D., 62 F.2d 139.

63. La.—Cook v. State, 16 La. 288.
34 C.J. p 480 note 67.

64. La.—Woolfolk v. Woolfolk, 30 La.Ann. 139.

65. Minn.—Bloomquist v. Thomas, 9 N.W.2d 337, 215 Minn. 35.
Tex.—Hubbard v. Tallal, Civ.App., 57 S.W.2d 226, reversed on other grounds and appeal dismissed 92 S.W.2d 1022, 127 Tex. 242.

A bill of review for equitable relief from a judgment is addressed to equitable powers of the court and equity principles and maxims must be observed.—Kelley v. Wright, Tex.Civ.App., 184 S.W.2d 649, affirmed, Sup., 188 S.W.2d 983—Harris v. Elm Oil Co., Tex.Civ.App., 183 S.W.2d 216, error refused—American Red Cross v. Longley, Tex.Civ.App., 165 S.W.2d 233, error refused—Smith v. Rogers, Tex.Civ.App., 129 S.W.2d 776—Donovan v. Young, Tex.Civ.App., 127 S.W.2d 517, error refused—Hacker v. Hacker, Tex.Civ.App., 110 S.W.2d 923—Murry v. Citizens' State Bank of Ranger, Tex.Civ.App., 77 S.W.2d 1104, error dismissed.

Prayer for rule nisi

The equitable character of a petition to set aside a judgment or decree is not affected by the fact that it contains a prayer for a rule nisi in addition to the prayers for equitable relief.—Williamson v. Haddock, 140 S.E. 373, 165 Ga. 168.

66. U.S.—Hazard v. Park, C.C.A. Colo., 294 F. 40.
Fla.—Adams v. Reynolds, 134 So. 45, 101 Fla. 271.
Ga.—Autry v. Southern Ry. Co., 144 S.E. 741, 167 Ga. 136.
34 C.J. p 480 note 69.

Payment or security

It was improper to include, in an order to show cause why a default judgment should not be vacated, a provision restraining plaintiff from collecting the judgment, where there was no compliance with statute requiring payment or security as a condition of the granting of an injunction to stay proceedings on a judgment.—Walton Foundry Co. v. A. D. Granger Co., 196 N.Y.S. 719, 203 App.Div. 226.

67. Ga.—Felker v. Still, 169 S.E. 897, 77 Ga. 160—Autry v. Southern Ry. Co., 144 S.E. 741, 167 Ga. 136.
Ky.—Overstreet v. Grinstead's Adm'r, 140 S.W.2d 836, 283 Ky. 73—Grooms v. National Bank of Kentucky, 292 S.W. 513, 218 Ky. 846.
Tex.—Early Grain & Seed Co. v. McCallum, Civ.App., 128 S.W.2d 469—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Civ.App., 122 S.W.2d 659, error dismissed.
34 C.J. p 480 note 70.

Materialman's lien

Defendants who failed to tender sum covered by materialman's lien on homestead could not have judgment foreclosing lien set aside because rendered for amount in excess of sum secured by lien.—Scott v. Lewis, Tex.Civ.App., 64 S.W.2d 365.

68. Ala.—Zavelo v. Goldstein, 59 So. 618, 178 Ala. 321.

69. Or.—Paulson v. Kenney, 224 P. 634, 110 Or. 688.
Tex.—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, error dismissed.
34 C.J. p 480 note 72.

Money collected by another

In action by minors to set aside a judgment in their favor because of death of father, obtained by fraud, it was not necessary for plaintiffs to tender back the money collected under the judgment, it appearing that the money was paid to a so-called next friend not authorized to receive it, and was spent during minority of plaintiffs and before commencement of suit.—Gurley v. St. Louis Transit Co. of St. Louis, Mo.App., 259 S.W. 895.

70. Ala.—Nichols v. Dill, 132 So. 900, 222 Ala. 455.
N.J.—Ostrom v. Ferris, 134 A. 805, 99 N.J.Eq. 551, affirmed 141 A. 920, two cases, 103 N.J.Eq. 22.
34 C.J. p 481 note 73.

Appellate court

A bill in equity to restrain the enforcement of a judgment at law is not a bill of review, for which leave from the appellate court to file is required.—Mineral Development Co. v. Kentucky Coal Lands Co., D.C.Ky., 285 F. 761, affirmed, C.C.A., 285 F. 1021.

§ 379. Time to Sue and Limitations

In the absence of a statute controlling the time of application to a court of equity for relief against a judgment, no particular lapse of time will be marked off as barring a complainant's right to relief, the question being merely one of laches or diligence.

Ordinarily equitable relief against a judgment may not be sought prior to the time permitted by statute,[71] and, where a statutory remedy for vacation of a judgment is exclusive for a specified period of time, a party may not maintain an action in equity to set aside the judgment prior to the expiration of that period of time.[72]

In the absence of a statute controlling the time of application to a court of equity for relief against a judgment, no particular lapse of time will be marked off as barring complainant's right to relief, the question being merely one of laches or diligence,[73] and statutes authorizing courts of law to vacate or open their own judgments for fraud, mistake, surprise, or other cause, generally do not preclude relief in equity after the time which they fix as a limit.[74] It is generally sufficient and necessary for the party seeking relief to show due diligence and to file suit within a reasonable time,[75] either in term or in vacation,[76] and it is not required that the proceeding be instituted at the term at which the judgment was rendered.[77] A suit in equity may be available to set aside a default judgment on which execution was issued, even after the execution has been returned satisfied.[78]

In many states there are statutes of limitation specifically applicable to proceedings in equity for relief against judgments,[79] and, by analogy, statu-

71. Tex.—Joy v. Young, Civ.App., 194 S.W.2d 159.

72. Wash.—Muller v. Hendry, 17 P. 2d 602, 171 Wash. 9.

73. U.S.—McGinn v. U. S., D.C. Mass., 2 F.R.D. 562.
Ark.—Parker v. Nixon, 44 S.W.2d 1083, 184 Ark. 1085.
Cal.—Cadenasso v. Bank of Italy, 6 P.2d 944, 214 Cal. 562.
Iowa.—Des Moines Coal & Coke Co. v. Marks Inv. Co., 195 N.W. 597, 197 Iowa 589, modified on other grounds 197 N.W. 628, 197 Iowa 589.
34 C.J. p 481 note 74.
Laches see infra § 381.

Time for appeal

A bill in the nature of a bill to impeach a decree for fraud practiced in the procurement of service of process was maintainable notwithstanding the time to appeal had expired.—MacKay v. Bacon, Fla., 20 So.2d 904.

Partition

Mere lapse of time will not prevent equity court from correcting or reversing decrees of partition entered erroneously on testimony plainly incorrect as to location of land.—Crandol v. Garrison, 169 A. 507, 115 N.J.Eq. 11.

Liability created by statute

Limitation statute affecting actions on liability created by statute was inapplicable to equitable action to vacate judgment because of trial judge's disqualification.—Cadenasso v. Bank of Italy, 6 P.2d 944, 214 Cal. 562.

74. Ala.—Quick v. McDonald, 108 So. 529, 214 Ala. 587.
Cal.—Westphal v. Westphal, 126 P.2d 105, 20 Cal.2d 393—Rogers v. Mulkey, 147 P.2d 62, 63 Cal.App.2d 567—Bartell v. Johnson, 140 P.2d 878, 60 Cal.App.2d 432—F. E. Young Co. v. Fernstrom, 79 P.2d 1117, 31 Cal. App.2d Supp. 763.
Ga.—Williamson v. Haddock, 140 S. E. 373, 165 Ga. 168.
Nev.—Lauer v. Eighth Judicial District Court in and for Clark County, 140 P.2d 953, 62 Nev. 78.
Okl.—Caraway v. Overholser, 77 P.2d 688, 182 Okl. 357.
Wash.—Dale v. Cohn, 127 P.2d 412, 14 Wash.2d 214—Fisch v. Marler, 97 P.2d 147, 1 Wash.2d 698.
34 C.J. p 481 note 75.
Time for motion to vacate see supra § 288.

75. Ala.—Cassady v. Davis, 15 So.2d 909, 245 Ala. 93—Quick v. McDonald, 108 So. 529, 214 Ala. 587.
Ill.—Allen v. 220 E. Walton Place Bldg. Corporation, 26 N.E.2d 662, 304 Ill.App. 585.

Suit held not brought in time

Tex.—Eddingston v. Allen, Civ.App., 126 S.W.2d 1008.

76. Ga.—Williamson v. Haddock, 140 S.E. 373, 165 Ga. 168.

77. Ga.—Longshore v. Collier, 140 S.E. 636, 37 Ga.App. 450, followed in Reddy-Waldhauer-Maffett Co. v. Cranman, 153 S.E. 616, 41 Ga.App. 563.
Tex.—Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed—Oldham v. Heatherly, Civ.App., 3 S. W.2d 484—Barton v. Montex Corporation, Civ.App., 295 S.W. 950.
Wyo.—Rock Springs Coal & Mining Co. v. Black Diamond Coal Co., 272 P. 12, 39 Wyo. 379.

78. Cal.—Hallett v. Slaughter, 140 P.2d 3, 22 Cal.2d 552.
Mont.—State ex rel. Redle v. District Court in and for Missoula County, 59 P.2d 58, 102 Mont. 541.

79. Ind.—Globe Mining Co. v. Oak Ridge Coal Co., 177 N.E. 868, 204 Ind. 11.
Minn.—Lenhart v. Lenhart Wagon Co., 298 N.W. 37, 210 Minn. 164, 135 A.L.R. 833, mandate modified on other grounds 2 N.W.2d 421, 211 Minn. 572—Murray v. Calkins, 254 N.W. 605, 191 Minn. 460.
Mo.—Fadler v. Gabbert, 63 S.W.2d 121, 333 Mo. 851.
Ohio.—Baylor v. Killinger, 186 N.E. 513, 44 Ohio App. 523.
Okl.—Caraway v. Overholser, 77 P. 2d 688, 182 Okl. 357—Savoy Oil Co. v. Emery, 277 P. 1029, 137 Okl. 67—Miller v. White, 265 P. 646, 129 Okl. 184.
Pa.—Frantz v. City of Philadelphia, 3 A.2d 917, 333 Pa. 220.
34 C.J. p 481 note 76.

In California

The limitation of six months prescribed by Civ.Code § 473, in suits for relief from a judgment taken against one through his mistake, etc., does not apply to suits for relief because of extrinsic fraud, but applies where the fraud is intrinsic.—Rogers v. Mulkey, 147 P.2d 62, 63 Cal.App.2d 567—Tomb v. Tomb, 7 P. 2d 1104, 120 Cal.App. 438—34 C.J. p 481 note 76 [a].

In Iowa

(1) If party discovers or by reasonable diligence might have discovered fraud in securing judgment within year, he may not sue in equity to vacate judgment after expiration of year.—Gehle v. Hart, 229 N.W. 149, 209 Iowa 736—Swartzendruber v. Polke, 218 N.W. 62, 205 Iowa 382—Haas v. Nielsen, 206 N.W. 253, 200 Iowa 1314.

(2) Judgment will not be vacated after one year on ground that plaintiff committed perjury.—Abell v. Partello, 211 N.W. 868, 202 Iowa 1236.

In Kansas

(1) An action to set aside a judgment for fraud practiced by the successful party in obtaining it must be

tory limitations applicable to proceedings by bill of review[80] or appeal[81] have been held applicable; and in all cases within the terms of such statutes suit may and should be brought within the time limited.[82] It has been held that a statute of limitations does not bar suit where the ground of the application for an injunction did not exist when the judgment was rendered,[83] where the institution of proceedings within the time limited was prevented by the fraud of the adverse party,[84] or where he was a nonresident during the running of the statutory period.[85]

In the case of fraud it is generally provided that

brought within two years, unless plaintiff is under some disability.—Johnson v. Schrader, 95 P.2d 273, 150 Kan. 545—Elfert v. Elfert, 294 P. 921, 132 Kan. 218—Harvey v. Dolan, 176 P. 134, 103 Kan. 717.

(2) Proceedings to open up judgment obtained without other service than publication in newspaper must be brought within three years.—Elfert v. Elfert, supra.

In Louisiana

(1) An action to annul a judgment must be brought within one year from its rendition; if on the ground of fraud, within one year from the discovery of the fraud.—Adkins' Heirs v. Crawford, Jenkins & Booth, 24 So.2d 246—Succession of Raphael, 144 So. 429, 175 La. 715—34 C.J. p 481 note 76 [f].

(2) However, prescription of one year does not apply to action to annul confession of judgment made in violation of law or public policy.—Cilluffa v. Monreale Realty Co., 24 So.2d 606—Phillips v. Bryan, 134 So. 88, 172 La. 269.

(3) A judgment against one who has not been cited and who has not appeared is a nullity so that attack thereon is not barred by two-year prescriptive period relating to suits attacking judgments for mere informalities.—Dickey v. Pollock, App., 183 So. 48.

In South Dakota

The code provisions limiting to one year the trial court's authority to grant new trials for newly discovered evidence or relief from a judgment because of mistake, inadvertence, surprise, or excusable neglect were adopted as a part of the reformed code procedure to the end that there might be a certain finality to judgments, and were made applicable to suits in equity as well as actions at law.—Wasem v. Ellens, 4 N.W.2d 850, 68 S.D. 524.

In Texas

(1) A direct attack in equity on a judgment is subject to the bar of the four-year statute of limitations.—Whitehurst v. Estes, Civ.App., 185 S.W.2d 154, error refused—Litton v. Waters, Civ.App., 161 S.W.2d 1095, error refused—Laird v. Gulf Production Co., Civ.App., 64 S.W.2d 1080, error dismissed—Burge v. Broussard, Civ.App., 258 S.W. 502—34 C.J. p 481 note 76 [i].

(2) Such statute applies to suit to vacate a judgment by default rendered on constructive service by publication.—Snell v. Knowles, Civ.App., 87 S.W.2d 871, error dismissed—Seastrunk v. Kidd, Civ.App., 53 S.W.2d 678.

(3) Where defendant is cited by publication and judgment rendered, he may file within two years a bill of review.—Texas Co. v. Dunlap, Civ.App., 21 S.W.2d 707, affirmed, Com.App., 41 S.W.2d 42, rehearing denied 43 S.W.2d 92.

(4) A petition for bill of review is not a "suit at law" governed by four-year statute of limitations, but is an "equitable proceeding" governed by the rule of equity relating to stale demands and laches.—Garcia v. Jones, Civ.App., 155 S.W.2d 671, error refused.

(5) Statute prohibiting injunction to stay execution, after expiration of one year, is not applicable, where injunction is auxiliary to suit to vacate judgment.—West v. Dugger, Civ.App., 278 S.W. 239.

80. Ill.—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 365 Ill. 588.
Md.—Fooks' Ex'rs v. Ghingher, 192 A. 782, 172 Md. 612, certiorari denied Phillips v. Ghingher, 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 561.

In Alabama

(1) "In a long line of decisions this court has declared bills in equity to enjoin or cancel judgments at law because of mistake, accident, or fraud, are bills in the nature of bills of review, and by analogy, a limitation of three years has been applied; with proviso that one year must be allowed after discovery of the fraud, mistake, etc., upon which the equity of the bill rests."—Hatton v. Moseley, 156 So. 546, 547, 229 Ala. 240.

(2) There are a number of cases which have held in accordance with this statement of the rule.—Swoope v. Darrow, 188 So. 879, 237 Ala. 692—Wynn v. First Nat. Bank, 159 So. 58, 229 Ala. 639—Nichols v. Dill, 132 So. 900, 222 Ala. 455—Quick v. McDonald, 108 So. 529, 214 Ala. 587—34 C.J. p 481 note 76 [a].

(3) A complainant seeking in equity to set aside a judgment at law was not precluded by statute of limitations from maintaining suit, if she had good excuse for delay.—McWilliams v. Martin, 188 So. 677, 237 Ala. 624.

81. Ill.—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 365 Ill. 588.
Md.—Hunter v. Baker, 141 A. 368, 154 Md. 307 certiorari denied 49 S.Ct. 28, 278 U.S. 627, 73 L.Ed. 546.

82. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.
Ala.—Miller v. Miller, 175 So. 284, 234 Ala. 453—Hatton v. Moseley, 156 So. 546, 229 Ala. 240.
Ark.—Berry v. Sims, 112 S.W.2d 25, 195 Ark. 326.
Ga.—Crane v. Stratton, 194 S.E. 182, 185 Ga. 234.
Iowa.—Harding v. Quinlan, 229 N.W. 672, 209 Iowa 1190—Swartzendruber v. Polke, 218 N.W. 62, 205 Iowa 382.
N.M.—Caudill v. Caudill, 44 P.2d 724, 39 N.M. 248.
Ohio.—Baylor v. Killinger, 186 N.E. 512, 44 Ohio App. 523.
S.D.—Wasem v. Ellens, 4 N.W.2d 850, 68 S.D. 524.
Tex.—Jones v. Sun Oil Co., 153 S.W.2d 571, 137 Tex. 353—Whitehurst v. Estes, Civ.App., 185 S.W.2d 154, error refused—Litton v. Waters, Civ.App., 161 S.W.2d 1095, error refused—Snell v. Knowles, Civ.App., 87 S.W.2d 871, error dismissed—First Texas Joint Stock Land Bank of Houston v. Webb, Civ.App., 82 S.W.2d 159, error dismissed.

Proceeding held brought within time

Ga.—Longshore v. Collier, 140 S.E. 636, 37 Ga.App. 450, followed in Reddy-Waldhauer-Maffett Co. v. Cranman, 153 S.E. 616, 41 Ga.App. 563.
Ky.—Metropolitan Life Ins. Co. of New York v. Myers, 109 S.W.2d 1194, 270 Ky. 523.

83. Tex.—Trammell v. Chamberlain, 128 S.W. 429, 60 Tex.Civ.App. 238.
34 C.J. p 481 note 77.

84. Iowa.—Lumpkin v. Snook, 19 N.W. 333, 63 Iowa 515.
Wash.—Denny-Renton Clay & Coal Co. v. Sartori, 151 P. 1088, 87 Wash. 545.

35. Kan.—Hentig v. Sweet, 27 Kan. 172.

limitations do not begin to run until after the discovery of the fraud,[86] and, even in the absence of specific provision, lapse of the statutory period does not bar suit under such circumstances;[87] but suit may[88] and should[89] be brought within a reasonable time after discovery of the fraud. Knowledge of the fraud, with respect to running of the statute of limitations, may be constructive,[90] and may be imputed to a party deriving his claim from one who had knowledge.[91] Under some statutes ignorance of the judgment,[92] or of the alleged mistake, neglect, or omission rendering the judgment voidable,[93] will not extend the running of the statute beyond the statutory period, and, in any case, passage of the twenty-year period of prescription may preclude attack on a judgment regardless of when the alleged fraud was discovered.[94] In case of a person under disability, the limitation begins to run from the removal of the disability.[95]

It is generally held that, where a judgment or decree is utterly void, suit for equitable relief against its enforcement may be brought at any time regardless of the statute of limitations.[96]

§ 380. Defenses

Any ground destructive of the plaintiff's equity may constitute a defense to a bill for equitable relief against a judgment.

A bill for an injunction against a judgment may be defended on any ground destructive of the equity set up by complainant,[97] and his negligence may sometimes preclude the granting of relief.[98] The judgment attacked may not be pleaded as a bar or as res judicata.[99] A transfer of plaintiff's inter-

86. Cal.—Antonsen v. Pacific Container Co., 120 P.2d 148, 48 Cal. App.2d 535.
La.—Hanson v. Haynes, App., 171 So. 146.
34 C.J. p 481 note 80.

When fraud perpetrated

Where note containing confession of judgment was not to be presented for collection until after maker's death, fraud was perpetrated against maker only on institution of suit on note and rendition of executory judgment therein during maker's lifetime, and not from date of execution of note, as regards question of prescription.—Hanson v. Haynes, La. App., 170 So. 257, rehearing denied 171 So. 146.

Disclosure of knowledge

Under Louisiana statute requiring that suit for declaration of nullity of judgment because of fraud be brought within one year from discovery of fraud, suit in federal court to set aside mortgage foreclosure sale on ground of fraud could not be maintained when filed more than a year after suit in state court disclosing full knowledge of the alleged fraud.—McCrory v. Harp, D.C.La., 31 F.Supp. 354.

87. Wash.—Bates v. Glaser, 227 P. 15, 130 Wash. 328.

88. Wash.—Bates v. Glaser, supra.

89. Iowa.—Reppert v. Reppert, 241 N.W. 487, 214 Iowa 17.

90. Okl.—Caraway v. Overholser, 77 P.2d 688, 182 Okl. 357.

91. La.—Jackson v. Florsheim Bros. Dry Goods Co., 131 So. 725, 171 La. 605.

92. Kan.—Irrigation Loan & Trust Co. v. Oswald, 176 P. 134, 103 Kan. 676.

93. Ohio.—Baylor v. Killinger, 186 N.E. 512, 44 Ohio App. 523.

94. Ala.—Bailey v. Bond, 185 So. 411, 237 Ala. 59.

95. Okl.—Miller v. White, 265 P. 646, 129 Okl. 184.
34 C.J. p 481 note 82.

Supervening disability

The disability existing at time decree was entered determines right of party to decree to institute action questioning validity of decree within two years after such disability is removed, and no supervening disability can be tacked onto former disability in computing time within which direct attack can be made on decree.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

96. Md.—Fooks' Ex'rs v. Ghinger, 192 A. 732, 172 Md. 612, certiorari denied Phillips v. Ghinger, 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 561.
Wash.—In re Randall's Estate, 113 P.2d 54, 8 Wash.2d 622.

Lack of service

Statutory limitation on proceedings to set aside judgments was inapplicable, where attack on judgment is based on ground that judgment is void for lack of service.—Strickland v. Willingham, 175 S.E. 605, 49 Ga.App. 355.

97. U.S.—Benjamin Schwarz & Sons v. Kennedy, C.C.Or., 156 F. 316.
Waiver of right to equitable relief against judgment see supra §§ 341, 343.

Matters constituting defense

(1) Generally.
Ohio.—Briggs v. Hutson, 160 N.E. 860, 27 Ohio App. 93, affirmed Hutson v. Briggs, 165 N.E. 534, 120 Ohio St. 58.
Tex.—Smith v. Lockhart, Civ.App., 177 S.W.2d 117.

(2) Order, on motion for new trial, overruling contention that judgment was recovered on perjured testimony, could be pleaded in bar of action to set aside judgment.—Pucek v. Koppa, Tex.Civ.App., 32 S.W.2d 248.

Matters not constituting defense

(1) Generally.
Ark.—Holthoff v. State Bank & Trust Co. of Wellston, Mo., 186 S.W.2d 162, 208 Ark. 307.
Or.—Maywood Inv. Co. v. Blair, 64 P.2d 1333, 155 Or. 696.
34 C.J. p 481 note 83 [a].

(2) Subsequent discharge in bankruptcy of judgment creditor who did not schedule judgment among assets was no defense to bill, filed before judgment creditor received his discharge, to enjoin enforcement of judgment because of fraudulent assignment and bankruptcy proceeding to prevent offset.—Dickey v. Turner, C.C.A.Tenn., 49 F.2d 998.

(3) Heirs joining in petition to be placed in possession of intestate's property were not estopped to sue for reformation of judgment thereon where petition provided that no one should be estopped or bound by proceedings thereon, with certain exceptions.—Succession of Williams, 121 So. 171, 168 La. 1.

98. Wis.—Kiel v. Scott & Williams, 202 N.W. 672, 186 Wis. 415.
Neglect of party or negligence of counsel as excuse for not defending at law see supra §§ 367, 368.
Negligence resulting in loss of remedy at law as affecting right to relief see supra § 343.

99. La.—Couret v. Couret, 18 So.2d 661, 206 La. 85—Haley v. Woods, 113 So. 144, 163 La. 911—Quinn v. Brown, 105 So. 624, 159 La. 570.
34 C.J. p 482 note 84.
Res judicata see infra §§ 592–848.

est, pending a suit to set aside a judgment in partition on the ground of fraud, may not be pleaded in bar of the proceeding.[1]

§ 381. —— Laches

A party seeking equitable relief against a judgment must act with reasonable promptness or his suit may be barred by laches, especially where the rights of other persons have been prejudiced by the delay; but delay due to legal disability, ignorance of the facts, or pursuit of other remedies generally does not constitute laches.

One who desires to invoke the assistance of equity as against a judgment at law must act with reasonable promptness, and relief will not be granted to a complainant who has delayed his application to equity, without adequate excuse, for such a considerable period of time as to be chargeable with laches,[2] especially where the situation of the adverse party has changed to his disadvantage,[3] or where the rights of innocent third persons have intervened,[4] as where the judgment has been collected by execution and title to real estate would be invalidated by the setting aside of the judgment.[5] However, the court has a large discretion as to the

1. Iowa.—Wright v. Meek, 3 Greene 472.

2. U.S.—Chase Nat. Bank v. City of Norwalk, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894—Morse v. Lewis, C.C.A.W.Va., 54 F.2d 1027, certiorari denied 52 S.Ct. 640, 286 U.S. 557, 76 L.Ed. 1291—Hazard v. Park, C.C.A.Colo., 294 F. 40.
Ala.—McWilliams v. Martin, 188 So. 677, 237 Ala. 624.
Fla.—Columbus Hotel Corporation v. Hotel Management Co., 156 So. 893, 116 Fla. 464—Adams v. Reynolds, 134 So. 45, 101 Fla. 271.
Ill.—Hintz v. Moldenhauer, 243 Ill. App. 227.
La.—First Nat. Life Ins. Co. v. Bell, 141 So. 379, 174 La. 692—Roque v. Henry, App., 189 So. 358—Surety Credit Co. v. Bauer, 1 La.App. 285.
Mich.—Barr v. Payne, 298 N.W. 460, 298 Mich. 85.
Minn.—Bloomquist v. Thomas, 9 N.W.2d 337, 215 Minn. 35.
Miss.—Lamar v. Houston, 184 So. 293, 183 Miss. 260—Cratin v. Cratin, 174 So. 255, 178 Miss. 881.
Mo.—Kingshighway Bridge Co. v. Farrell, App., 136 S.W.2d 335.
Neb.—Lindstrom v. Nilsson, 274 N.W. 485, 132 Neb. 184.
N.J.—Cameron v. Penn Mut. Life Ins. Co., 173 A. 344, 116 N.J.Eq. 311—Etz v. Weinmann, 150 A. 436, 106 N.J.Eq. 209—Shields v. Cape May Real Estate Co., 135 A. 669, 5 N.J.Misc. 92, affirmed, Err. & App., Shields v. Cape May Realty Estate Co., 143 A. 919, 105 N.J.Law 247.
Pa.—Bailey v. Bailey, 12 A.2d 577, 338 Pa. 221—Di Trolio v. Parisi, 176 A. 733, 317 Pa. 507.
R.I.—Gilbane v. Union Trust Co., 118 A. 577.
Tex.—Whitehurst v. Estes, Civ.App., 185 S.W.2d 154, error refused—Thomas v. Mullins, Civ.App., 175 S.W.2d 276—Litton v. Waters, Civ. App., 161 S.W.2d 1095, error refused—Garcia v. Jones, Civ.App., 155 S.W.2d 671, error refused—Floyd v. Eggleston, Civ.App., 137 S.W.2d 182, error refused, certiorari denied 61 S.Ct. 314, 311 U.S. 708, 85 L.Ed. 460, rehearing denied 61 S.Ct. 609, 312 U.S. 713, 85 L.Ed. 1143—Dunlap v. Villareal, Civ.App., 91 S.W.2d 1124—Bryan v. Jacoby, Civ.App., 11 S.W.2d 373—Kahl v. Porter, Civ.App., 296 S.W. 324.
Wash.—Fisch v. Marler, 97 P.2d 147, 1 Wash.2d 698.
34 C.J. p 482 note 85—24 C.J. p 888 note 86.
Laches generally see Equity §§ 112–132.
"The question of laches on the part of the petitioner will be determined largely on the question as to whether the parties have changed their position irrevocably or rights of innocent third parties have intervened, and, while laches alone will not necessarily defeat such action, it may under the circumstances of the individual case justify the court in denying relief."—Fernow v. Fernow, 247 P. 106, 107, 114 Okl. 298.

Delay held laches

(1) Fifty years.—Barnes v. Boyd, C.C.A.W.Va., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

(2) Twenty years.—Scully v. Colonial Trust Co., 147 A. 776, 105 N.J. Eq. 309—34 C.J. p 482 note 85 [a] (3).

(3) Fifteen years.—Metzger v. Horn, 143 N.E. 408, 312 Ill. 173.

(4) Eleven years.—Craig v. Black, 229 N.W. 411, 249 Mich. 485.

(5) Ten years.—Swoope v. Darrow, 188 So. 879, 237 Ala. 692—34 C.J. p 482 note 85 [a] (5).

(6) Five years.—Walling v. Lebb, 15 P.2d 370, 140 Or. 691—34 C.J. 482 note 85 [a] (9).

(7) Four years.—Kiel v. Scott & Williams, 202 N.W. 672, 186 Wis. 415.

(8) Three years.
Ark.—Horn v. Hull, 275 S.W. 905, 169 Ark. 468.
Or.—Olsen v. Crow, 290 P. 233, 133 Or. 310.
34 C.J. p 482 note 85 [a] (10).

(9) One year.
Cal.—Rudy v. Slotwinsky, 238 P. 783, 73 Cal.App. 459.
Mont.—St. Paul Fire & Marine Ins. Co. v. Freeman, 260 P. 124, 80 Mont. 266.

(10) Other periods see 34 C.J. p 482 note 85 [a].

Failure to join in previous suits

Suit to set aside judgments was not maintainable where plaintiff, although knowing of previous suits brought for same relief by parties having same interest which, if successful, would have established plaintiff's rights, did not join therein but waited until previous suits were adversely determined.—Barnes v. Boyd, D.C.W.Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

3. Ark.—Thornton v. Commonwealth Federal Savings & Loan Ass'n, 152 S.W.2d 304, 202 Ark. 670.
Ill.—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 599, 298 Ill. App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 601, 298 Ill.App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 602, 298 Ill.App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E. 2d 603, 298 Ill.App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 584, 298 Ill.App. 92.
Mich.—Craig v. Black, 229 N.W. 411, 249 Mich. 485.
Okl.—Fernow v. Fernow, 247 P. 106, 114 Okl. 298.
34 C.J. p 482 note 86.

4. Ind.—Indiana B. & W. R. Co. v. Bird, 18 N.E. 837, 116 Ind. 217, 9 Am.S.R. 842—Dausman v. Dausman, 33 N.E.2d 775, 110 Ind.App. 238.
Miss.—Lamar v. Houston, 184 So. 293, 183 Miss. 260.
Okl.—Fernow v. Fernow, 247 P. 106, 114 Okl. 298.
R.I.—Gilbane v. Union Trust Co., 118 A. 577.

5. Ark.—Jackson v. Becktold Printing & Book Mfg. Co., 112 S.W. 161, 86 Ark. 591, 20 L.R.A.,N.S., 454.
Pa.—Gould v. Randal, 81 A. 809, 232 Pa. 612.

lapse of time which will show laches,[6] and a suit will not be barred for mere delay, in the absence of other elements of laches,[7] as where it is not shown that other persons were prejudiced by such delay.[8] Accordingly, where plaintiff acts within a reasonable time, considering the circumstances of the case, he will not be barred by laches from seeking relief.[9] Ordinarily laches is not imputable to a complainant who takes all the time which the statute allows him,[10] but under certain circumstances laches may operate to bar suit prior to the running of the statutory period,[11] as where the delay has been such as to justify the presumption that defendant may have been prejudiced thereby.[12]

However great the lapse of time since the rendition of the judgment, applicant is not to be charged with laches where he was ignorant of its existence, or of his defenses against it, and acts promptly after discovering the facts;[13] nor is laches imputable to a party who, during the interval, has been contesting the validity of the judgment in the courts of law or attempting to obtain relief against it in other proceedings.[14] One against whom a void judgment has been rendered will not be estopped by laches to seek relief from such judgment at any time;[15] and, with respect to laches in seeking correction of a decree in partition, one in peaceable possession of realty under a claim of right may rest in security until his title or possession is attacked.[16]

Person under legal disability. As a rule laches is not imputable to a person while he is under legal disability,[17] but in some circumstances the laches of a parent or guardian may be imputable to a minor.[18]

6. Tex.—Wright v. Wright, Civ. App., 55 S.W.2d 578.

7. N.J.—Metropolitan Life Ins. Co. v. Tarnowski, 20 A.2d 421, 130 N.J.Eq. 1.
Tex.—Ramsey v. McKamey, 152 S.W. 2d 322, 137 Tex. 91.

Ordinary rules as to diligence in moving for new trial and appealing from judgment have been held not to apply to statutory bill of review.—Stillwell v. Standard Savings & Loan Ass'n, Tex.Civ.App., 30 S.W.2d 690, error dismissed.

8. Cal.—Hallett v. Slaughter, 140 P.2d 3, 22 Cal.2d 552.
Fla.—MacKay v. Bacon, 20 So.2d 904, 155 Fla. 577.

Twenty-three years
The fact that mutual mistake concerning size of tract partitioned was not discovered for twenty-three years after entry of judgment in partition proceeding did not preclude the granting of repartition of the land in order to correct the mistake, in absence of intervening rights of third persons.—Ramsey v. McKamey, 152 S.W.2d 322, 137 Tex. 91.

9. Ark.—Kersh Lake Drainage Dist. v. Johnson, 157 S.W.2d 39, 203 Ark. 315, certiorari denied Johnson v. Kersh Lake Drainage Dist., 62 S. Ct. 1044, 316 U.S. 673, 86 L.Ed. 1748.
Ga.—Turner v. Koske, 160 S.E. 398, 173 Ga. 390.
Minn.—Bloomquist v. Thomas, 9 N. W.2d 337, 215 Minn. 35.
N.J.—Di Paola v. Trust Co. of Orange, 156 A. 439, 109 N.J.Eq. 80.
Okl.—Wheeler v. Bigheart, 43 P.2d 1028, 172 Okl. 262—Fernow v. Fernow, 247 P. 106, 114 Okl. 298.
Wis.—Nehring v. Niemerowicz, 276 N.W. 325, 226 Wis. 285.

State cannot be barred of right of action by laches.—Application of Title & Guaranty Co. of Bridgeport to Change Name to Bankers' Security Trust Co., 145 A. 151, 109 Conn. 45.

10. Iowa.—Independent School Dist. v. Schreiner, 46 Iowa 172.

Equitable defense
In absence of statutory duty to interpose an equitable defense in an action at law, it is not necessarily "laches" for a defendant having such a defense to wait deliberately until judgment at law has been rendered against him and then bring a suit to restrain enforcement of judgment.—Liberty Mut. Ins. Co. v. Hathaway Baking Co., 28 N.E.2d 425, 306 Mass. 428.

Other remedy
One against whom judgment is rendered may proceed, under statute or in equity, for rehearing on ground of want of notice or knowledge of pendency of suit, or fraud preventing defense, and is not guilty of laches in filing bill, without having sought to avail herself of such statute.—Alabama Chemical Co. v. Hall, 101 So. 456, 212 Ala. 8.

11. Tex.—Williams v. Coleman-Fulton Pasture Co., Civ.App., 157 S. W.2d 995, error refused.

12. Cal.—Ex-Mission Land & Water Co. v. Flash, 32 P. 600, 97 Cal. 610.
Miss.—Lamar v. Houston, 184 So. 293, 183 Miss. 260.

13. Cal.—Antonsen v. Pacific Container Co., 120 P.2d 148, 48 Cal. App.2d 535.
Ill.—Reisman v. Central Mfg. Dist. Bank, 15 N.E.2d 903, 296 Ill.App. 61.
34 C.J. p 482 note 91.

14. Ark.—Parker v. Nixon, 44 S.W. 2d 1088, 184 Ark. 1085.
Cal.—Cadenasso v. Bank of Italy, 6 P.2d 944, 214 Cal. 562.
34 C.J. p 482 note 93.

15. Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.
Iowa.—Cooley v. Barker, 98 N.W. 289, 122 Iowa 440, 101 Am.S.R. 276.
La.—Franek v. Turner, 114 So. 148, 164 La. 532—Frank v. Currie, App., 172 So. 843.
Pa.—In re Galli's Estate, 17 A.2d 899, 340 Pa. 561.

Judgment rendered without service
Mere knowledge of pendency of suit placed no duty to act on defendant who could rely on statute providing that no judgment shall be rendered against defendant without service, as respects laches barring suit to vacate default judgment against defendant.—Panhandle Const. Co. v. Casey, Tex.Civ.App., 66 S.W. 2d 705, error refused.

16. N.J.—Crandol v. Garrison, 169 A. 507, 115 N.J.Eq. 11.

17. Tex.—Garza v. Kenedy, Com. App., 299 S.W. 231, rehearing denied 5 S.W.2d xx.
34 C.J. p 482 note 92.

An insane person is not guilty of laches.
Ala.—Edmondson v. Jones, 85 So. 799, 204 Ala. 133.
Mo.—Crow v. Crow-Humphrey, 73 S. W.2d 807, 335 Mo. 636.

18. U.S.—Morse v. Lewis, C.C.A.W. Va., 54 F.2d 1027, certiorari denied 52 S.Ct. 640, 286 U.S. 557, 76 L. Ed. 1291.

Claim derived from parent
One suing to set aside judgments confirming arbitrators' award of land was chargeable with her mother's laches, although plaintiff was nonresident infant at time of arbitration and knew nothing thereof until shortly before bringing suit, where plaintiff's claim was derived from her mother.—Morse v. Lewis, supra.

Suit by person not a party to judgment. Generally the rule that an action for equitable relief against a judgment must be diligently pursued within a reasonable time after rendition of a judgment does not apply where relief is sought by one not a party or privy to the judgment involved,[19] but one deriving his claim of right from a party to the judgment who was guilty of laches may be barred thereby from seeking relief.[20]

§ 382. Jurisdiction of Particular Courts

Equitable relief against a judgment may be sought only in a court having the requisite power and authority, and, while usually it is proper to sue in the court which rendered the judgment, suit in another court of concurrent or equal jurisdiction is permitted in some states; and a federal court may in a suit within its jurisdiction grant relief against a void judgment of a state court.

As a general rule, equitable relief against a judgment may be sought only in a court having the power and authority to consider such an application,[21] and ordinarily, if the court which rendered the judgment has equitable powers, it is proper to bring suit in that court to enjoin or set aside the judgment.[22]

In some states it is generally the rule that any court of equitable powers, having jurisdiction of the parties and the subject matter, may enjoin the enforcement of a judgment, although it was rendered by a court of concurrent or equal jurisdiction,[23] and, where this rule prevails, a court of chancery jurisdiction may enjoin a judgment obtained in another chancery court,[24] or in the supreme court of the state,[25] or even in a court in another state.[26] In other jurisdictions, either by statute or settled practice, a suit to enjoin a judgment must be brought in the same court which rendered it, and will not be entertained by another court of coördinate jurisdiction,[27] unless such judg-

19. U.S.—Chase Nat. Bank v. City of Norwalk, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894.

20. U.S.—Barnes v. Boyd, D.C.W. Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

21. La.—McClelland v. District Household of Ruth, App., 151 So. 246.
N.M.—Vermejo Club v. French, 85 P. 2d 90, 43 N.M. 45.
N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App.Div. 191.
Or.—McLean v. Sanders, 23 P.2d 321, 143 Or. 524, followed in Conrad v. Sanders, 23 P.2d 323, 143 Or. 531.
Tex.—Petroleum Corporation v. Rodden, Civ.App., 139 S.W.2d 218.
Jurisdiction:
Generally see supra § 342.
Of courts of particular states generally see Courts §§ 249–297.

Court held to have jurisdiction
Ill.—Louis E. Bower, Inc., v. Silverstein, 18 N.E.2d 385, 298 Ill.App. 145.
Mich.—McFarlane v. McFarlane, 293 N.W. 895, 294 Mich. 648.
Ohio.—Young v. Guella, 35 N.E.2d 997, 67 Ohio App. 11.

Judgment made final by statute
The county court was without jurisdiction to issue injunction restraining enforcement of county court's final judgment in forcible detainer proceeding which was instituted in justice court and appealed to county court, notwithstanding notice of appeal was not given as required by statute, where county court's judgment on appeal from forcible detainer proceeding instituted in justice court was made final by statute.—Urbanec v. Jezik, Tex.Civ.App., 138 S.W.2d 1098.

22. U.S.—Torquay Corporation v. Radio Corporation of America, D.C. N.Y., 2 F.Supp. 841.
Cal.—Cadenasso v. Bank of Italy, 6 P.2d 944, 214 Cal. 562—Tomb v. Tomb, 7 P.2d 1104, 120 Cal.App. 438.
La.—Pullen v. Pullen, 109 So. 400, 161 La. 721.
N.D.—Lamb v. Northern Imp. Co., 3 N.W.2d 77, 71 N.D. 481.
Tex.—Texas Employers' Ass'n v. Cashion, Civ.App., 130 S.W.2d 1112, error refused—Elder v. Byrd-Frost, Inc., Civ.App., 110 S.W.2d 172—Shipman v. Wright, Civ.App., 288 S.W. 281—Home Ben. Ass'n of Henderson County v. Boswell, Civ. App., 268 S.W. 979.

Municipal courts have the same jurisdiction as equity courts to set aside judgments on ground of fraud.—Louis E. Bower, Inc., v. Silverstein, 18 N.E.2d 385, 298 Ill.App. 145.

Transfer of cause
Where suit to vacate district court judgment was properly filed in that court and legally transferred to another district court, such other district court had jurisdiction to try issues.—Snell v. Knowles, Tex.Civ. App., 87 S.W.2d 871, error dismissed—Brox v. Kelly, Tex.Civ.App., 87 S.W.2d 753, error dismissed agreement.

23. Miss.—Rockett v. Finley, 184 So. 78, 183 Miss. 308.
Ohio.—Young v. Guella, 35 N.E.2d 997, 67 Ohio App. 11.
34 C.J. p 483 note 96.

In Montana
(1) It has been held that the fact that a fraudulent judgment was obtained in one court does not deprive other courts of general and equal jurisdiction from exercising their equity powers to annul it.—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.

(2) It has also been said, however, that one court is without power to interfere with the judgments of another court of concurrent jurisdiction unless the court in which the suit is pending cannot for lack of jurisdiction grant the relief desired.—Beck v. Fransham, 53 P. 96, 21 Mont. 117.

24. Tenn.—Douglass v. Joyner, 1 Baxt. 32.

25. Ga.—Wade v. Watson, 66 S.E. 922, 133 Ga. 608.
34 C.J. p 483 note 98.

26. N.Y.—Davis v. Cornue, 45 N.E. 449, 151 N.Y. 172.
34 C.J. p 483 note 99.

27. Ill.—Simmons v. Hefter, 139 N. E. 404, 308 Ill. 292—American Ry. Express Co. v. Murphy, 234 Ill. App. 346.
Ky.—Davis v. Caudill, 92 S.W.2d 62, 263 Ky. 214—Davis v. Davis, 10 Bush 274.
Mass.—Town of Hopkinton v. B. F. Sturtevant Co., 189 N.E. 107, 285 Mass. 272.
Tex.—Waples Platter Co. v. Miller, Civ.App., 139 S.W.2d 833—Duncan Coffee Co. v. Wilson, Civ.App., 139 S.W.2d 327, error dismissed—Texas Employers' Ass'n v. Cashion, Civ.App., 130 S.W.2d 1112, error refused—Brox v. Kelly, Civ.App., 87 S.W.2d 753, error dismissed agreement—Landa v. Bogle, Civ. App., 62 S.W.2d 579, set aside on other grounds Bogle v. Landa, 94 S.W.2d 154, 127 Tex. 317—Halbrook v. Quinn, Civ.App., 286 S.W. 954, certified questions dismissed Quinn

ment is void and its invalidity is apparent on the face of the record,[28] or the enforcement of the judgment is sought to be restrained for some purpose collateral to the subsequent suit,[29] or it appears that the court rendering the judgment is unable by reason of its limited jurisdiction to afford the relief sought.[30] It has been held that the rule is the same whether the second action is brought by a party or a stranger to the first,[31] but there is also authority to the contrary.[32] The consent of the parties cannot change the rule requiring suit in the court which rendered the judgment, or relax its binding force in any particular case.[33]

The federal courts are prohibited by statute from granting injunctions to stay proceedings in the state courts,[34] but such statute does not prevent a federal court in a suit within its jurisdiction, by reason of diversity of citizenship and the amount involved, from granting relief against a judgment of a state court on the ground that it was procured by fraud or was void for want of jurisdiction,[35] where such relief could be granted if the judgment was that of a federal court.[36] Conversely, state courts have no power or jurisdiction to enjoin the enforcement of a judgment rendered by a court of the United States[37] unless such judgment was procured by fraud.[38]

§ 383. Venue

A suit for equitable relief against a judgment generally should be brought in the county or other judicial district in which the judgment was rendered, but the proper venue may sometimes be elsewhere.

A bill in equity for relief against a judgment should as a general rule be brought in the county or other judicial district in which the judgment was rendered,[39] unless an objection on this ground is waived,[40] or a change of venue is granted for due

v. Halbrook, 285 S.W. 1079, 115 Tex. 513—Borders v. Highsmith, Civ.App., 252 S.W. 270.
34 C.J. p 483 note 1.

Sale

Where a judgment itself orders the sale of specific property, such sale cannot be restrained by another court on the application of a party to the judgment.—Carey v. Looney, 251 S.W. 1040, 113 Tex. 93.

In Connecticut

(1) Under a statute so providing, all actions for equitable relief against judgments rendered in the superior court must be brought in that court exclusively.—Smith v. Hall, 42 A. 86, 71 Conn. 427.

(2) However, the superior court has power in its equitable jurisdiction to afford relief against decrees of court of probate.—Folwell v. Howell, 169 A. 199, 117 Conn. 565.

In Iowa

Under a statute so providing, when proceedings on a judgment are sought to be enjoined, the suit must be brought in the county and court in which the judgment was obtained.—Ferris v. Grimes, 215 N.W. 646, 204 Iowa 587—34 C.J. p 483 note 1 [b].

In Louisiana

(1) As a general rule, suit to set aside a judgment is properly instituted in the court which rendered judgment.—Trichel v. Bordelon, 9 Rob. 191—Clark v. Christine, 12 La. 394—Dickey v. Pollock, App., 183 So. 48.

(2) The action of nullity of judgment must usually be brought before the court which rendered the judgment, and it may not be brought in another court unless the judgment is absolutely void on its face.—Abraham Land & Mineral Co. v. Marble Sav. Bank, D.C.La., 35 F.Supp. 500.

(3) However, a judgment on appeal rendered by a court without jurisdiction ratione materiæ may be attacked before the court in which the judgment appealed from was rendered.—Hibernia Nat. Bank v. Standard Guano & Chemical Mfg. Co., 26 So. 274, 51 La.Ann. 1321.

28. U.S.—Abraham Land & Mineral Co. v. Marble Sav. Bank, D.C.La., 35 F.Supp. 500.
Tex.—Carey v. Looney, 251 S.W. 1040, 113 Tex. 93—Allen v. Jones, Civ.App., 192 S.W.2d 298, error refused, no reversible error.
34 C.J. p 483 note 2.

29. Tex.—Carey v. Looney, 251 S.W. 1040, 113 Tex. 93.
34 C.J. p 483 note 3.

30. La.—Trichel v. Bordelon, 9 Rob. 191—Clark v. Christine, 12 La. 394.
34 C.J. p 483 note 4.

31. Wis.—Stein v. Benedict, 53 N.W. 891, 83 Wis. 603.
34 C.J. p 483 note 5.

32. Tex.—Carey v. Looney, 251 S. W. 1040, 113 Tex. 93.

33. Cal.—Crowley v. Davis, 37 Cal. 268.

34. U.S.—National Surety Co. v. Humboldt State Bank, Neb., 120 F. 593, 56 C.C.A. 657, 61 L.R.A. 394.
34 C.J. p 483 note 7.
Jurisdiction of federal courts to enjoin proceedings in federal courts generally see Courts § 543.

35. U.S.—Simon v. Southern R. Co., La., 35 S.Ct. 255, 236 U.S. 115, 59 L.Ed. 492.
34 C.J. p 483 note 8.

36. U.S.—Lehman v. Graham, Fla., 135 F. 39, 67 C.C.A. 513.

37. U.S.—Central Nat. Bank v. Stevens, N.Y., 18 S.Ct. 403, 169 U.S. 432, 42 L.Ed. 807.
34 C.J. p 483 note 10.
Jurisdiction of state courts to enjoin proceedings in state courts generally see Courts § 542.

38. Mo.—Wonderly v. Lafayette County, 51 S.W. 745, 150 Mo. 635, 73 Am.S.R. 474, 45 L.R.A. 386.
Tenn.—Keith v. Alger, 85 S.W. 71, 114 Tenn. 1.

39. Iowa.—Ferris v. Grimes, 215 N. W. 646, 204 Iowa 587.
Wyo.—**Corpus Juris quoted in** Rush v. Rush, 133 P.2d 366, 372, 58 Wyo. 406.
34 C.J. p 484 note 12.

Situs of judgment

For the purpose of a proceeding on petition and service of summons to vacate a judgment after expiration of term at which it was rendered, on ground that it was obtained by fraud, situs of judgment was in county in which judgment was rendered.—Parker v. Board of Com'rs of Okmulgee County, 102 P. 2d 880, 187 Okl. 308, followed in Parker v. Board of Com'rs of Okmulgee County, 102 P.2d 883, 187 Okl. 311.

Statutory rule of venue that suit to enjoin execution of judgment must be brought in county in which judgment was rendered does not control fundamental jurisdiction of courts.—Burris v. Myers, Tex.Civ. App., 49 S.W.2d 931.

40. Ala.—Shrader v. Walker, 8 Ala. 244.
Colo.—Smith v. Morrill, 55 P. 824, 12 Colo.App. 233.

Special pleading

Objection to venue in suit to enjoin execution of judgment as not brought in county in which judgment was rendered must be specially

cause,[41] or unless the judgment is void, in which case it may be attacked in any court having equitable jurisdiction.[42] It has been held, however, that the suit may be brought in any county, subject to defendant's right to have the case transferred.[43] In some cases the proper venue of the action has been held to be the place where defendant resides, although it is other than the place of the rendition of the judgment,[44] and in others that, when the judgment is sought to be enforced against specific property, an action to restrain such enforcement may be maintained at the place where the property is situated.[45]

§ 384. Parties

a. In general

b. Plaintiffs

c. Defendants

a. In General

Generally all the parties to the original action or their representatives, and any other persons whose rights are involved, are proper and necessary parties to an action for equitable relief against a judgment, but persons having no interest in the controversy need not be joined as parties.

To a bill in equity to set aside, vacate, or enjoin the enforcement of, a judgment recovered at law, all the parties to the original action,[46] or their representatives[47] or privies,[48] and also any other persons whose rights would or might be affected by the grant of the relief asked,[49] may and should be made parties. On the other hand, persons not parties to the original suit and having no interest in the controversy are not proper[50] or necessary[51]

pleaded under oath.—Burris v. Myers, Tex.Civ.App., 49 S.W.2d 931.

41. Mo.—State v. Price, 38 Mo. 382.

42. Tex.—Automobile Finance Co. v. Bryan, Civ.App., 3 S.W.2d 835.
34 C.J. p 484 note 15.

Fraud

Action for relief against judgment on the ground of fraud in its procurement may be brought before court of equitable jurisdiction in any county, and it is not essential that the action be brought in the county in which the judgment was rendered.—Young v. Young Holdings Corporation, 80 P.2d 723, 27 Cal.App.2d 129.

43. Mont.—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.

44. Ala.—**Corpus Juris cited in** Fox v. Fox, 179 So. 237, 238, 235 Ala. 338.
Ga.—Whiteley v. Downs, 164 S.E. 318, 174 Ga. 839.
Kan.—Heston v. Finley, 236 P. 841, 118 Kan. 717.
34 C.J. p 484 note 16.

45. Kan.—Busenbark v. Busenbark, 7 P. 245, 33 Kan. 572.
34 C.J. p 484 note 17.

46. U.S.—Continental Inv. Co. v. Toelle, C.C.A.Kan., 5 F.2d 907.
Ark.—Parker v. Nixon, 44 S.W.2d 1088, 184 Ark. 1085.
Ga.—Sewell v. Anderson, 30 S.E.2d 102, 197 Ga. 623.
Ill.—Gaumer v. Snedeker, 162 N.E. 137, 330 Ill. 511.
Okl.—Fidelity Building & Loan Ass'n v. Newell, 55 P.2d 131, 176 Okl. 184.
Tex.—Wells v. Stonerock, 37 S.W.2d 712, 120 Tex. 287—Nymon v. Eggert, Civ.App., 154 S.W.2d 157—Mills v. Baird, Civ.App., 147 S.W.2d 312, error refused—Avant v. Broun, Civ.App., 91 S.W.2d 426, error dismissed—Brox v. Kelly, Civ.App., 87 S.W.2d 753, error dismissed agreement—Glenn v. Connell, Civ.App., 74 S.W.2d 451, followed in 74 S.W.2d 455—Panhandle Const. Co. v. Casey, Civ.App., 66 S.W.2d 705, error refused—Dial v. Martin, Civ.App., 8 S.W.2d 241, error dismissed—Christensen v. Foster, Civ.App., 297 S.W. 657—Rone v. Marti, Civ.App., 244 S.W. 639.
34 C.J. p 484 note 18.

Favorable or unfavorable effect

In suit to annul a judgment, all parties to previous suit from which the judgment resulted must be made parties, irrespective of whether they were affected favorably or unfavorably by the judgment.—O'Sullivan v. Knop, 195 So. 366, reheard 198 So. 191.

Severable interest

A bill of review attacking a judgment in trespass to try title in so far as it awarded an interest in land to one of several defendants, where interest of the defendant was severable from that of other parties whose rights were not challenged, was not defective for failure to make all parties to judgment parties to the bill.—Lamb v. Isley, Tex.Civ.App., 114 S.W.2d 673, rehearing denied 115 S.W.2d 1036.

Suit to annul partition judgment

La.—Cornish v. Chaney, 147 So. 363, 177 La. 10.
47 C.J. p 432 note 66.

47. Tex.—In re Supples' Estate, Civ.App., 131 S.W.2d 13.
34 C.J. p 484 note 19.

48. Tex.—Nymon v. Eggert, Civ.App., 154 S.W.2d 157—Brox v. Kelly, Civ.App., 87 S.W.2d 753, error dismissed agreement.

49. U.S.—Maryland Casualty Co. v. Waldrep, C.C.A.Okl., 126 F.2d 555.
Ill.—Gaumer v. Snedeker, 162 N.E. 137, 330 Ill. 511.
Neb.—Howard v. Spragins, 200 N.W. 799, 112 Neb. 641.
Tex.—Sedgwick v. Kirby Lumber Co., 107 S.W.2d 358, 130 Tex. 163—Pure Oil Co. v. Reece, 78 S.W.2d 932, 124 Tex. 476—Dallas County Bois D'Arc Island Levee Dist. v. Glenn, Com.App., 288 S.W. 165—Bragdon v. Wright, Civ.App., 142 S.W.2d 703, error dismissed—Johnson v. Ortiz Oil Co., Civ.App., 104 S.W.2d 543—Moore v. Evans, Civ.App., 103 S.W.2d 850—Reed v. Harlan, Civ.App., 103 S.W.2d 236, error refused—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, error dismissed—Rone v. Marti, Civ.App., 244 S.W. 639.
34 C.J. p 484 note 20.
Persons against whom relief may be had see supra § 345.

Parties interested in maintenance of judgment

Tex.—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, error dismissed.

Marital relation

The state is an "interested party" in cases brought under statute providing that any judgment obtained by means of perjury or any fraudulent act, practice, or representation of prevailing party may be set aside, where marital relation is involved, but, where death intervenes and there are no children but only property rights involved, the state has no concern and equitable principles should govern.—Bloomquist v. Thomas, 9 N.W.2d 337, 215 Minn. 35.

50. La.—Succession of Moore, App., 193 So. 222.

51. U.S.—Hanna v. Brictson Mfg. Co., C.C.A.S.D., 62 F.2d 139.
Tex.—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed.

Loan deed

Order arresting and setting aside void decree canceling loan deed to

parties, and parties to the former suit sometimes may not be necessary parties where they will not be affected by the relief sought.[52] Under proper circumstances a third person may be allowed to intervene.[53]

b. Plaintiffs

All persons interested in the relief sought may join as parties plaintiff but persons whose interests are hostile to those of the plaintiff, or against whom no relief is sought, and who cannot be adversely affected by the decree entered in the action are not necessary parties.

All persons interested in the relief sought may join as parties plaintiff to a suit to enjoin or set aside a judgment.[54] Where a judgment is recovered against two or more as joint defendants, all should join as plaintiffs in an action to enjoin its enforcement,[55] or be joined as defendants, in accordance with the general rule in equity.[56] The rule is the same where the judgment was recovered jointly against a principal and surety.[57] This rule, however, is one of convenience, and must yield where its rigid enforcement would be attended with inconvenience,[58] and persons whose interests are hostile to those of plaintiff, or against whom no relief is sought, and who cannot be adversely affected by any decree entered therein, are not necessary parties.[59] So, where one of several joint judgment debtors sues to restrain the enforcement of the judgment against himself alone, he need not join the others as parties plaintiff.[60] Tenants in common may sue jointly to enjoin the enforcement of a judgment in ejectment, although they were not all made defendants in the ejectment.[61] A judgment debtor and his grantee may properly join as complainants in a suit to restrain an execution sale and to cancel the judgment,[62] but it has been held that a grantor disclaiming any interest in realty against which a judgment foreclosed a lien, and who was not a party to the prior suit, may not be properly joined as a plaintiff with his grantee.[63]

c. Defendants

In an action for equitable relief against a judgment, all persons really and beneficially interested in the judgment, or whose rights are likely to be affected by the injunction, including necessary or proper parties who refuse to join as plaintiffs, should be joined as defendants.

A bill in equity for relief against a judgment may and should join as defendants all persons really and beneficially interested in the judgment, or whose rights are likely to be affected by the injunction,[64]

premises purchased under warranty deed duly recorded after entry of decree was not erroneous because of failure to make purchaser party to proceeding to arrest decree or to give him notice of pendency thereof, it being sufficient that opposite party in controversy wherein decree was obtained was given notice.—Land Development Corporation v. Union Trust Co. of Maryland, 180 S.E. 836, 180 Ga. 785.

52. Idaho.—Welch v. Morris, 291 P. 1048, 49 Idaho 781.
Tex.—Bonner v. Pearson, Civ.App., 7 S.W.2d 930.

Apparent rights
In suit to annul judgment on ground that judgment, valid on its face, was void as to those seeking its annulment because they were not parties to suit in which judgment was rendered, only those parties who have apparent rights under judgment need be joined.—Willson v. Kuhn, Tex.Civ.App., 96 S.W.2d 236.

53. Fla.—Eyles v. Southern Ohio Sav. Bank & Trust Co., 19 So.2d 105, 154 Fla. 782.
34 C.J. p 484 note 21.

Claim in equity
A person need not be a judgment creditor in order to intervene in suit to enjoin enforcement of judgment, but claim in equity is equally as good a basis to support such right.—Eyles v. Southern Ohio Sav. Bank & Trust Co., supra.

Creditor of successful defendant, holding security deed which would lose priority by setting aside of decree, could intervene in suit to set aside decree.—Williamson v. Haddock, 140 S.E. 373, 165 Ga. 168.

54. Mo.—Fadler v. Gabbert, 63 S.W. 2d 121, 333 Mo. 851.

Rights invaded
Plaintiff in such action must be one whose rights have been directly invaded.—Arcuri v. Arcuri, 193 N.E. 174, 265 N.Y. 358.

55. Tex.—**Corpus Juris quoted in** Panhandle Const. Co. v. Casey, Civ.App., 66 S.W.2d 705, 708, error refused.
34 C.J. p 485 note 22.
Persons entitled to sue in general see supra § 344.

A judgment in trespass to try title against four defendants cannot be revised by a suit in the nature of a bill of review brought by one of such defendants who had purchased interest of two of other defendants, in which no mention is made of fourth defendant and no excuse pleaded for not making him a party.—Sedgwick v. Kirby Lumber Co., 107 S.W.2d 358, 130 Tex. 163.

56. Tex.—**Corpus Juris quoted in** Panhandle Const. Co. v. Casey, Civ.App., 66 S.W.2d 705, 708, error refused.
Naming as defendants parties who refuse to join as plaintiffs see infra subdivision c of this section.

57. Ky.—Love v. Cofer, 1 J.J.Marsh. 327.
34 C.J. p 485 note 25.

58. Md.—Michael v. Rigler, 120 A. 382, 142 Md. 125.

59. Ark.—North Arkansas Highway Improvement Dist. No. 2 v. Home Telephone Co., 3 S.W.2d 307, 176 Ark. 553.
Md.—Michael v. Rigler, 120 A. 382, 142 Md. 125.

60. Cal.—Merriman v. Walton, 38 P. 1108, 105 Cal. 403, 45 Am.S.R. 50, 30 L.R.A. 786.
34 C.J. p 485 note 28.

61. Mo.—Russell v. Defrance, 39 Mo. 506.

62. Ala.—May v. Granger, 139 So. 569, 224 Ala. 208.

63. Tex.—Citizens' Bank v. Brandau, Civ.App., 1 S.W.2d 466, error refused.

64. Ga.—Beacham v. Beacham, 22 S.E.2d 787, 195 Ga. 9.
Ill.—Gaumer v. Snedeker, 162 N.E. 137, 330 Ill. 511.
Mo.—Terminal Railroad Ass'n of St. Louis v. Schmidt, 182 S.W.2d 79, 353 Mo. 79.
N.C.—Pegram v. Wachovia Bank & Trust Co., 13 S.E.2d 249, 219 N.C. 224.
Tex.—Garza v. Kenedy, Com.App., 299 S.W. 231, rehearing denied 5 S.W.2d xx—**Corpus Juris quoted in** Panhandle Const. Co. v. Casey, Civ. App., 66 S.W.2d 705, 708, error re-

including plaintiff or joint plaintiffs in whose name the judgment stands,[65] the party for whose use the action was really brought, although he is not the nominal plaintiff,[66] persons claiming or acquiring interests in the property specifically affected by the judgment,[67] and any persons who participated in an alleged fraud, charged as the means whereby the judgment was obtained, although they were not parties to the original action.[68] Necessary or proper parties who refuse to join as plaintiffs should be made defendants.[69] On the other hand, persons against whom no relief is sought and who have no interest in the controversy adverse to plaintiff are not necessary parties.[70]

Where the owner of a judgment has assigned it to a third person, both the assignor[71] and the assignee[72] are proper and necessary parties, unless the latter is the only one having an interest in the judgment.[73] However, the assignor of a cause of action which is afterward merged in a judgment is not a necessary party to an action to enjoin the enforcement of the judgment by the assignee.[74] Where plaintiff sues to enjoin enforcement of two judgments, rendered in favor of different parties, such parties, who are not jointly affected by the two judgments, may not be joined as defendants.[75]

If the action is brought against the sheriff or other officer holding process under the judgment to restrain him from proceeding for its collection, the judgment plaintiff may be joined as a defendant,[76] and sometimes is required to be joined as a party;[77] but where the suit is against the judgment creditor it is neither necessary nor proper to make the sheriff a party[78] unless a statute so provides[79] or the sheriff has joined with the creditor in the commission of the fraud of which complaint is made.[80] Where the judgment is in the name of the sheriff, he is properly made a party to a bill to set it aside, although he may have no personal interest.[81]

The judge who rendered the judgment,[82] the clerk

fused—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, error dismissed.
Utah.—Logan City v. Utah Power & Light Co., 16 P.2d 1097, 86 Utah 340, adhered to 44 P.2d 698, 86 Utah 354.
34 C.J. p 485 note 30.

Partition

In suit to set aside judgment of partition, parties to partition suit who had conveyed their lands were necessary parties, notwithstanding their grantees had been made parties, where they might be liable on warranties and their rights would be adversely affected by a new partition.—Davis v. Caudill, 92 S.W.2d 62, 263 Ky. 214.

65. D.C.—Ray v. Carr, 107 F.2d 238, 71 App.D.C. 37.
Ill.—Gaumer v. Snedeker, 162 N.E. 137, 330 Ill. 511.
Neb.—Howard v. Spragins, 200 N.W. 799, 112 Neb. 641.
Tex.—Glenn v. Connell, Civ.App., 74 S.W.2d 451, followed in 74 S.W.2d 455.
34 C.J. p 485 note 31.

In direct attack on personal judgment, regular on face, plaintiff in original action is necessary party.—Bonougli v. Guerra, Tex.Civ.App., 286 S.W. 344.

66. Ky.—Triplett v. Vandegrift, 8 B.Mon. 420—Turner v. Cox, 5 Litt, 175.

67. Ala.—Nichols v. Dill, 132 So. 900, 222 Ala. 455.
Tex.—Garza v. Kenedy, Com.App., 299 S.W. 231, rehearing denied 5 S.W.2d xx—**Corpus Juris quoted in** Panhandle Const. Co. v. Casey, Civ. App., 66 S.W.2d 705, 708, error refused.
34 C.J. p 485 note 33.

Bonds

Money judgment against town, duly issuing bonds for funding thereof under appropriate statute, cannot be set aside by court without having bondholders before it as parties to action.—Denver & R. G. W. R. Co. v. Town of Castle Rock, 62 P. 2d 1164, 99 Colo. 340.

68. Ala.—Nichols v. Dill, 132 So. 900, 222 Ala. 455.
La.—Green v. Barnett, 120 So. 666, 10 La.App. 212.
34 C.J. p 485 note 34—47 C.J. p 438 note 67.

69. W.Va.—Wyatt v. Wyatt, 92 S.E. 117, 79 W.Va. 708.
34 C.J. p 486 note 49.

70. Ind.—Pattison v. Grant Trust & Savings Co., 144 N.E. 26, 195 Ind. 313.

71. Ill.—Gaumer v. Snedeker, 162 N.E. 137, 330 Ill. 511.
34 C.J. p 485 note 35.

72. Ga.—Winn v. Armour & Co., 193 S.E. 447, 184 Ga. 769.
Ill.—Gaumer v. Snedeker, 162 N.E. 137, 330 Ill. 511—Mumford v. Sprague, 11 Paige 438.

73. Tex.—Ellis v. Kerr, Civ.App., 23 S.W. 1050.

74. Va.—Drake v. Lyons, 9 Gratt. 54, 50 Va. 54.
34 C.J. p 485 note 38.

75. Cal.—Miller v. Curry, 53 Cal. 665.

76. Cal.—East Riverside Irr. Dist. v. Holcomb, 58 P. 817, 126 Cal. 315.

77. Tex.—Glenn v. Connell, Civ. App., 74 S.W.2d 451, followed in 74 S.W.2d 455.

78. Tex.—Gulf, C. & S. F. R. Co. v. Blankenbeckler, 35 S.W. 331, 13 Tex.Civ.App. 249.
34 C.J. p 485 note 41.

Expired execution

Where sheriff was made party to proceedings to set aside default judgment solely so that it would be possible to enjoin him from enforcing the judgment by levying outstanding execution, and the execution expired while case was pending and it then became apparent that judgment would be set aside, sheriff was no longer a necessary party.—Kulikowski v. North American Mfg. Co., 54 N.E.2d 411, 322 Ill.App. 202.

79. Ohio.—Howard v. Levering, 8 Ohio Cir.Ct. 614, 4 Ohio Cir.Dec. 236—Adams v. Boynton, 4 Ohio Dec., Reprint, 348, 1 Clev.L.Rep. 352.
34 C.J. p 485 note 42.

80. Ohio.—Allen v. Medill, 14 Ohio 445.

81. N.Y.—Campbell v. Western, 3 Paige 124.

82. Tex.—Gulf, C. & S. F. R. Co. v. Blankenbeckler, 35 S.W. 331, 13 Tex.Civ.App. 249.
34 C.J. p 486 note 45.

Improper joinder

In proceedings to expunge different judgments and orders, various clerks of court and groups of judges from common pleas courts and courts of appeal could not be joined.—State v. Marsh, 165 N.E. 843, 120 Ohio St. 222.

of court,[83] or other officers of the law[84] usually are not proper parties to a suit of this kind; and in any case they may not be sued alone without joining the real parties in interest.[85] Officials interested in the proceeds of a judgment levying a fine, and not the state, are necessary parties defendant.[86]

Persons not formally named. Where persons are not formally named as defendants, but employ an attorney to represent them, who appears in court and conducts a defense in their name, they are parties to the suit authorizing the court to adjudicate issues involving their interests.[87]

§ 385. Process and Appearance

In a suit for equitable relief against a judgment, jurisdiction of the person generally must be acquired by proper service or by appearance, but the decisions are in disagreement as to whether service by publication is sufficient.

As a general rule, in a suit in equity to enjoin or set aside a judgment, jurisdiction of the person must be acquired either by proper service[88] or by appearance,[89] but such a suit has also been regarded as a continuation of the original suit in which the judgment or decree was entered so that service of subpœna within the state on parties to the original suit was unnecessary.[90] According to some decisions service by publication will not give jurisdiction[91] since the action is one in personam requiring personal service,[92] but according to other decisions such a suit is in the nature of one in rem in which constructive service is authorized,[93] and service by publication is proper where the case is such as to come within the statute authorizing such service.[94] Where the statute requires service of process of the party himself, service may not be made on the attorney of record for plaintiff in the original action,[95] but service on the attorney may be proper where plaintiff in the original action is a nonresident or out of the jurisdiction of the court[96] unless some other mode of service, such as by publication, is provided for in such cases.[97]

§ 386. Release of Errors

Although a bill for equitable relief against a judgment does not of itself constitute a release of errors, some statutes require such a release, or make the injunction operate as one, in the case of attack on judgments at law which are not void; such a release applies only to errors in the legal proceeding which might be taken advantage of in the appellate court.

A bill in equity to enjoin a judgment at law is not of itself a release of errors.[98] By statute, however,

83. N.C.—Edney v. King, 39 N.C. 465.
34 C.J. p 486 note 46.

84. N.C.—McLane v. Manning, 60 N. C. 608.
34 C.J. p 486 note 47.
Sheriff was not necessary party in suit to set aside default judgment based on his alleged false return.—Gross v. Kellner, 219 N.W. 620, 242 Mich. 656.

85. D.C.—Ray v. Carr, 107 F.2d 238, 71 App.D.C. 37.
Neb.—Howard v. Spragins, 200 N.W. 799, 112 Neb. 641.

86. Ky.—Harris v. Beaven, 11 Bush 254.
Tex.—Smith v. State, 9 S.W. 274, 26 Tex.App. 49.
34 C.J. p 486 note 48.

87. Tex.—Bragdon v. Wright, Civ. App., 142 S.W.2d 703, error dismissed.

88. Ga.—Ingram & Le Grand Lumber Co. v. Burgin Lumber Co., 13 S.E.2d 370, 191 Ga. 584.
Ind.—Vail v. Department of Financial Institutions of Indiana, 17 N. E.2d 854, 106 Ind.App. 39.
Kan.—Johnson v. Schrader, 95 P.2d 273, 150 Kan. 545.
Neb.—State v. Westover, 186 N.W. 998, 107 Neb. 593.
Tex.—Green v. Green, Com.App., 288 S.W. 406.
In equity cases generally see Equity §§ 171–178.
In injunction cases generally see Injunctions §§ 179, 180.
Dissolution of temporary injunction against collection of probate judgment against sureties on guardian's bond, on guardian and ward giving refunding bond, was harmless and not error, although guardian, who had moved beyond court's jurisdiction, had not been brought into court, complainants being bound to take necessary steps to bring her into court.—Scott v. Boyd, 101 So. 424, 211 Ala. 623.
In bill of review, only original parties need be given notice.—Texas Co. v. Dunlap, Tex.Civ.App., 21 S.W. 2d 707, affirmed, Com.App., 41 S.W. 2d 42, rehearing denied 43 S.W.2d 92.

89. Ind.—Vail v. Department of Financial Institutions of Indiana, 17 N.E.2d 854, 106 Ind.App. 39.
Neb.—State v. Westover, 186 N.W. 998, 107 Neb. 593.
Tex.—Green v. Green, Com.App., 288 S.W. 406.

90. U.S.—Hanna v. Brictson Mfg. Co., C.C.A.S.D., 62 F.2d 139.

91. Mo.—Fisher v. Evans, 25 Mo. App. 582.

92. D.C.—Indemnity Ins. Co. of North America v. Smoot, 152 F.2d 667, certiorari denied 66 S.Ct. 981.
Judgment in favor of nonresident
In equity suit in Illinois court to set aside a judgment in favor of a nonresident who had no property in Illinois, Illinois court acquired no jurisdiction by publication of notice to the nonresident and decree of Illinois court declaring the judgment void did not vitiate money judgment rendered by United States district court for District of Columbia on the Illinois judgment.—Indemnity Ins. Co. of North America v. Smoot, supra.

93. Fla.—Reybine v. Kruse, 174 So. 720, 128 Fla. 278.

94. Fla.—Reybine v. Kruse, supra.
N.J.—Englander v. Jacoby, 28 A.2d 292, 132 N.J.Eq. 336.
Okl.—Parker v. Board of Com'rs of Okmulgee County, 102 P.2d 880, 187 Okl. 308, followed in Parker v. Board of Com'rs of Okmulgee County, 102 P.2d 883, 187 Okl. 311.
34 C.J. p 486 note 54.

95. Wyo.—Boulter v. Cook, 236 P. 245, 32 Wyo. 461.

96. U.S.—Oglesby v. Attrill, C.C.La., 12 F. 227—Doe v. Johnston, C.C. Ohio, 7 F.Cas.No.3,958, 2 McLean 323.

97. Iowa.—Death v. Pittsburg Bank, 1 Iowa 382.

98. Ohio.—Gano v. White, 3 Ohio 20.
Waiver of right to equitable relief

it is frequently provided that complainant in a bill in equity for relief against a judgment at law shall file or indorse on his bill a release of errors,[99] if required to do so by the court,[1] or that the injunction, when granted, shall operate as such a release.[2] In order that the granting of an injunction shall operate as a release of errors, there must be an injunction of a judgment at law.[3] The statutes do not apply where the relief asked does not amount to a stay of proceedings on the judgment,[4] or where it is sought to stay proceedings prior[5] or subsequent[6] to the judgment, and not to affect the judgment itself; nor do they apply to proceedings in chancery or those in their nature equitable,[7] or where the judgment is not merely erroneous but is void,[8] or where it is sought to enjoin proceedings in violation of law.[9]

A release of errors applies only to errors in the legal proceedings of which advantage might be taken in the appellate court.[10] It does not prevent the correction of clerical errors,[11] or preclude the party from assailing the judgment for matters dehors the record,[12] as that the judgment was obtained by fraud,[13] or affect the remedy of the party in equity.[14] The omission of a release is ground for dissolving the injunction,[15] but not for dismissing the bill.[16] A subsequent dismissal of the injunction will not affect the release.[17]

§ 387. Preliminary or Temporary Injunction

a. In general
b. Continuance or dissolution

a. In General

In a proper case, a preliminary or temporary injunction may be granted in a suit for equitable relief against a judgment, provided there has been compliance with requirements as to notice of application and furnishing of security.

In a suit in equity for relief against a judgment at law, a preliminary or temporary injunction may be granted in a proper case to await the determination of the validity of the judgment where it appears that the judgment was obtained by fraud, mistake, or surprise,[18] or to await the determination of issues on which the rights of the parties depend.[19] However, this action will ordinarily be taken only where plaintiff's equity is clear, or at least is supported by a strong prima facie case,[20] and not where the judgment appears to rest on a good and valuable consideration,[21] pending an appeal from the judgment,[22] where the judgment has already been enforced by execution before the filing of the bill,[23] or where it is not shown that the refusal of the injunction will cause serious injury to complainant.[24]

Proceedings to obtain. Where a temporary injunction against a judgment is asked, notice of the

against judgment see supra §§ 341, 343.

99. Va.—Branch v. Burnley, 1 Call. 147, 153, 5 Va. 147, 153.
34 C.J. p 486 note 58.

1. Ind.—Dickerson v. Ripley County, 6 Ind. 128, 63 Am.D. 373.

2. Ill.—McConnel v. Ayres, 4 Ill. 210.
34 C.J. p 486 note 60.

3. Ill.—St. Louis, A. & T. H. R. Co. v. Todd, 40 Ill. 89—McConnel v. Ayres, 4 Ill. 210.

4. Iowa.—Burge v. Burns, Morr. 287.
Miss.—Sevier v. Ross, Freem. 519.
34 C.J. p 486 note 62.

5. Ill.—McConnel v. Ayres, 4 Ill. 210.

6. Ill.—St. Louis, A. & T. H. R. Co. v. Todd, 40 Ill. 89.

7. Colo.—San Juan & St. Louis Mining & Smelting Co. v. Finch, 6 Colo. 214.
Ill.—McConnel v. Ayres, 4 Ill. 210.

8. Minn.—Hirsch Bros. & Co. v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 88 A.L.R. 1.
34 C.J. p 486 note 66.

Jurisdictional defects are not cured by a statute providing that an injunction staying execution shall operate as a release of all errors.—Hirsch Bros. & Co. v. R. E. Kennington Co., supra.

9. Iowa.—Burge v. Burns, Morr. p 287.

10. Miss.—Hirsch Bros. & Co. v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 88 A.L.R. 1.
34 C.J. p 486 note 68.

11. Tenn.—Blake v. Dunn, 5 Humphr. 578.

12. Miss.—Bass v. Nelms, 56 Miss. 502.

13. Miss.—Bass v. Nelms, supra.

14. Tenn.—Patterson v. Gordon, 3 Tenn.Ch. 18.

15. Ala.—Paulding v. Watson, 21 Ala. 279.
Ky.—Bradley v. Lamb, Hard. 537.

16. Ala.—Paulding v. Watson, 21 Ala. 279.
Ky.—Vance v. Cummins, Ky.Dec. 247.

17. Tenn.—Henly v. Robertson, 4 Yerg. 172.

18. Ga.—Pratt v. Rosa Jarmulowsky Co., 170 S.E. 365, 177 Ga. 522.
34 C.J. p 487 note 77.

19. La.—Hursey Transp. Co. v. Koss Const. Co., 131 So. 43, 171 La. 347.
34 C.J. p 487 note 78.

Settlement of cause of action

A petition, alleging parties' agreement to settle cause of action carried into judgment for stated sum, payable in monthly installments, and performance of agreement except for payment of small balance and costs tendered into court, sufficiently alleged grounds for temporary injunction, restraining enforcement of judgment pending final determination of issue involved.—Coffman v. Meeks, Tex.Civ.App., 119 S.W.2d 96.

20. U.S.—Foley v. Guarantee Trust Co., Minn., 74 F. 759, 21 C.C.A. 78.
34 C.J. p 487 note 79.

21. U.S.—Sohier v. Merrill, C.C.Me., 22 F.Cas.No.13,158, 3 Woodb. & M. 179.

22. Ill.—Andrews v. Rumsey, 75 Ill. 598.
34 C.J. p 487 note 81.

23. U.S.—Kamm v. Stark, C.C.Ark., 14 F.Cas.No.7,604, 1 Sawy. 547.

24. U.S.—Pierce v. National Bank of Commerce, C.C.A.Mo., 268 F. 487.
N.Y.—Ingalls v. Merchants' Nat Bank, 64 N.Y.S. 911, 51 App.Div. 305.

application must be served on defendant,[25] unless it appears that injury will be likely to occur before a hearing can be had, in which case the facts as to injury must be set forth either in the bill or by an affidavit accompanying it.[26] As a further condition, complainant is usually required to furnish security, at least in cases provided for by statute.[27] In some states the ordinary injunction bond is considered sufficient for this purpose, and complainant is not required to bring into court the amount of the judgment, unless under extraordinary circumstances.[28] In others, sometimes under statute, it is necessary to pay the amount of the judgment and costs into court, and give security for damages which may be sustained, or, as an alternative within the discretion of the court, to give a bond conditioned to pay the amount of the judgment, damages, and costs.[29] A statute requiring the giving of a bond must be strictly complied with; the court has no discretion to fix the condition or penalty of the bond variant from that directed thereby.[30] Where there is no statutory provision on the subject, the matter is left to the discretion of the court.[31] Where an injunction is obtained without complying with such statutes, defendant is entitled to summary relief, and is not put on his motion to dissolve.[32] A bond given to obtain an injunction will not operate as a supersedeas, if it describes a judgment different from that sought to be enjoined.[33]

b. Continuance or Dissolution

In a proper case, a temporary injunction may be continued until the hearing and determination, but the injunction will be dissolved on the furnishing of a refunding bond where it appears that the complainant is not entitled to relief against the judgment, or where the respondent's answer sufficiently denies the equity of the bill.

Whether a temporary injunction will be continued or dissolved is generally a matter within the discretion of the court in which equitable relief is sought.[34] Where the rights of the parties depend on unsettled issues of fact,[35] or it appears that dissolution might work irreparable mischief to complainant,[36] the preliminary injunction ordinarily will be continued until the hearing and determination. On the other hand, it may be dissolved if the court becomes satisfied that complainant is not entitled to relief against the judgment[37] and that the injunction ought never to have been granted,[38] or where relief must be denied for want of a release of errors[39] or for want of prosecution of the suit,[40] or where the amount proposed to be set off against the judgment, for which purpose the injunction was sued out, bears an insignificant proportion to the amount of the judgment.[41]

The injunction should not be dissolved for a mere defect of parties[42] or for amendable defects in the bill or petition.[43] Where the judgment was recovered by a vendor of land for the purchase money, and was enjoined on the ground of a defect or failure of title, it should be dissolved on his exhibiting a good title or tendering a good and sufficient deed, as the case may be,[44] but time to procure a good title will not be allowed.[45] Where an injunction against a judgment at law is dissolved, it should also be dissolved as to costs.[46]

25. Iowa.—Burlington v. Cox, 8 N. W. 360, 55 Iowa 752.
34 C.J. p 487 note 84.

Misnomer of party

Granting interlocutory injunction against enforcement of default judgment was not error, where suit therefor was brought against identical parties who procured judgment, notwithstanding judgment creditor was not made party defendant under allegedly correct name.—Pratt v. Rosa Jarmulowsky Co., 170 S.E. 365, 177 Ga. 522.

26. Ill.—Ebann v. Brown, 139 Ill. App. 213.

27. Mich.—Gross v. Kellner, 219 N. W. 620, 242 Mich. 656.

Except where suit is brought for actual fraud, plaintiff suing to set aside a default judgment is required to give a bond as a condition to obtaining a stay, under a statute so providing.—McFarlane v. McFarlane, 293 N.W. 895, 294 Mich. 648—Gross v. Kellner, 219 N.W. 620, 242 Mich. 656.

28. Tenn.—Chester v. Apperson, 4 Heisk. 639.
34 C.J. p 487 note 88.

29. N.J.—Phillips v. Pullen, 16 A. 915, 45 N.J.Eq. 157.
34 C.J. p 487 note 89.

30. Ill.—Ebann v. Brown, 139 Ill. App. 213.
34 C.J. p 487 note 90.

31. Md.—Wagner v. Shank, 59 Md. 313.

32. N.J.—Marlatt v. Perrine, 17 N. J.Eq. 49.
34 C.J. p 487 note 92.

33. Ala.—Wiswell v. Munroe, 4 Ala. 9.

34. Tex.—Reilly v. Delmore Corporation, Civ.App., 11 S.W.2d 327.

35. Tex.—Lott v. Lofton, Civ.App., 280 S.W. 312.
34 C.J. p 487 note 94.

36. Del.—Kersey v. Rash, 3 Del.Ch. 321.

37. Ala.—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.

38. Tex.—Lewright v. Reese, Civ. App., 223 S.W. 270.
34 C.J. p 487 note 96.

39. Ky.—Bradley v. Lamb, Hard. 527.
Necessity of release of errors see supra § 386.

40. W.Va.—McCoy v. McCoy, 2 S. E. 809, 29 W.Va. 794.
34 C.J. p 488 note 98.

41. La.—Barrow v. Robichaux, 15 La.Ann. 70.
34 C.J. p 488 note 99.

42. Fla.—Scarlett v. Hicks, 13 Fla. 314.
34 C.J. p 488 note 1.

43. Ala.—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.

44. Va.—Young v. McClung, 9 Gratt. 336, 50 Va. 336.
34 C.J. p 488 note 2.

45. Ky.—Hays v. Tribble, 3 B.Mon. 106.

46. Ky.—Burrows v. Miller, 3 Bibb 77.

On answer. When respondent's answer denies the equity of complainant's bill, and fully and explicitly negatives all its essential allegations, the preliminary injunction should in general be dissolved,[47] but this will not be done where the denials of the answer are vague, general, or lacking in particularity,[48] or where the answer admits the substantial rights of complainant,[49] or where there appears to be some good reason for retaining it.[50] If the answer shows that complainant is entitled to some equitable relief, but not to the extent claimed by the bill, the injunction may be dissolved in part, or continued on such terms as will insure the ultimate ends of justice between the parties.[51] If it appears that a part of a judgment at law only should be enjoined, the injunction may be perpetuated as to such part, and dissolved as to the residue.[52]

Refunding bond. When the preliminary injunction is dissolved on the answer, it is proper to require of respondent a bond conditioned to refund the amount he may collect on the judgment in case the equity proceedings should finally be determined against him.[53]

§ 388. Pleading

Pleadings are required in proceedings for equitable relief against a judgment.

In accordance with the rules as to equity pleadings generally, discussed in Equity §§ 179–198, pleadings are required in proceedings for equitable relief against a judgment, and the court may not assume jurisdiction on its own motion to modify a judgment in the absence of proper pleadings.[54] The rules of pleading must be strictly observed in such proceedings.[55]

§ 389. —— Bill or Complaint

a. In general
b. Specific grounds for relief
c. Allegations as to specific matters

a. In General

In a suit for equitable relief against a judgment, jurisdiction of the court is invoked by the filing of a properly verified bill or complaint, and such pleading must state a good cause of action.

The jurisdiction of a court to entertain a suit for equitable relief against a judgment is ordinarily invoked by the filing of a bill, petition,[56] complaint, or motion in writing.[57] In accordance with the general rules as to equity pleading, discussed in Equity §§ 217–232, the bill, petition, or complaint must show good and sufficient equitable reason why the judgment complained of should be enjoined or set aside, or, in other words, it must state a good cause of action for equitable relief.[58] Thus there must be proper and sufficient allegations setting

Attorney's fees

Where a judgment debtor procured an injunction restraining sheriff from taking and holding him under a capias ad satisfaciendum, but injunction did not enjoin payment of judgment, judgment creditor was not entitled to attorneys' fees incurred in having debtor's complaint in injunction suit dismissed under statute requiring debtor to pay damages on dissolution of an injunction, since injunction did not prevent the issuance of an execution and levy on any property belonging to debtor.—Bransky v. Lebow, 14 N.E.2d 509, 295 Ill.App. 31.

47. Ala.—Rice v. Tobias, 3 So. 670, 83 Ala. 348.
34 C.J. p 488 note 5.

48. Iowa.—Gates v. Ballou, 6 N.W. 701, 54 Iowa 485.
34 C.J. p 488 note 6.

49. N.C.—Myers v. Daniels, 59 N. C. 1.
34 C.J. p 488 note 7.

50. Ala.—Collier v. Falk, 61 Ala. 105.

51. Ala.—Maulden v. Armistead, 18 Ala. 500.
34 C.J. p 488 note 9.

52. Ala.—Maulden v. Armistead, supra.

53. Ala.—Jackson v. Elliott, 13 So. 690, 100 Ala. 669.
34 C.J. p 488 note 11.

54. Tex.—Hardy v. McCulloch, Civ. App., 286 S.W. 629.

55. U.S.—U. S. v. Korner, D.C.Cal., 56 F.Supp. 242.
Pa.—Keystone Nat. Bank to Use of Balmer v. Deamer, Com.Pl., 32 Berks Co. 124, affirmed Keystone Nat. Bank of Manheim, now to Use of Balmer v. Deamer, 18 A. 2d 540, 144 Pa.Super. 52.

56. Kan.—Johnson v. Schrader, 95 P.2d 273, 150 Kan. 545.

Exceptions not treated as petition

In suit to obtain sale of realty in which plaintiff claimed an interest under deed from his father which widow asserted was void because father was of unsound mind when deed was executed and because of fraud and undue influence, widow's exceptions to judgment and master commissioner's report of sale could not be treated as petition to vacate or modify judgment within statute, where widow advanced claim to homestead in property in answer and counterclaim and participated in trial of the case.—Pugh v. Pugh, 130 S.W.2d 40, 279 Ky. 170.

57. Ind.—Vail v. Department of Financial Institutions of Indiana, 17 N.E.2d 854, 106 Ind.App. 39.

58. Cal.—Machado v. Machado, 152 P.2d 457, 66 Cal.App.2d 401.
Ga.—Hanleiter v. Spearman, 36 S.E. 2d 780—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864.
Iowa.—Shaw v. Addison, 18 N.W.2d 796.
Ky.—McKim v. Smith, 172 S.W.2d 634, 294 Ky. 835—Ohio Valley Fire & Marine Ins. Co.'s Receiver v. Newman, 13 S.W.2d 771, 227 Ky. 554.
Or.—Marsters v. Ashton, 107 P.2d 981, 165 Or. 507—Dixon v. Simpson, 279 P. 939, 130 Or. 211.
Tex.—Smith v. Ferrell, Com.App., 44 S.W.2d 962—Kelley v. Wright, Civ.App., 184 S.W.2d 649, affirmed, Sup., 188 S.W.2d 983—Qualls v. Siler, Civ.App., 183 S.W.2d 750—Dorsey v. Cutbirth, Civ.App., 178 S.W.2d 749, error refused—American Red Cross v. Longley, Civ. App., 165 S.W.2d 233, error refused—Fidelity Trust Co. of Houston v. Highland Farms Corporation, Civ. App., 109 S.W.2d 1014, error dismissed—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed—Moon v. Weber, Civ.App., 103 S.W.2d 807, error refused—Pope v. Powers, Civ.App., 91 S.W.2d 873, reversed

forth the judgment in question,[59] the court in which it was rendered, who the parties were, what issues

on other grounds 120 S.W.2d 432, 132 Tex. 80—Sedgwick v. Kirby Lumber Co., Civ.App., 78 S.W.2d 1107, affirmed 107 S.W.2d 358, 130 Tex. 163—Stillwell v. Standard Savings & Loan Ass'n, Civ.App., 30 S.W.2d 690, error dismissed—Slider v. House, Civ.App., 271 S. W. 644—Phœnix Oil Co. v. Illinois Torpedo Co., Civ.App., 261 S.W. 487—Cooper v. Cooper, Civ.App., 260 S.W. 679.

Wis.—Nichols v. Galpin, 202 N.W. 153, 186 Wis. 485.

47 C.J. p 438 notes 69–71.

Fraud

Where a petitioner for the review of a default judgment has complied with the statutory provisions, the petition need not allege that the judgment was procured by fraud in order to secure a review of such judgment.—Dillbeck v. Johnson, 129 S.W.2d 885, 344 Mo. 845.

Restrictions of equitable practice

In proceeding to review probate court orders, petition need not conform to rules and is not limited to restrictions of equitable practice applicable to bill of review, as such proceeding is not strictly speaking a "bill of review" but in nature of such a bill in equity.—Union Bank & Trust Co. of Fort Worth v. Smith, Tex.Civ.App., 166 S.W.2d 928.

Bill or petition held sufficient

(1) Generally.

U.S.—Dickey v. Turner, C.C.A.Tenn., 49 F.2d 998.

Ala.—Timmerman v. Martin, 176 So. 198, 234 Ala. 622—Hanover Fire Ins. Co. v. Street, 154 So. 816, 228 Ala. 677—Alabama Chemical Co. v. Hall, 101 So. 456, 212 Ala. 8.

Cal.—Bartell v. Johnson, 140 P.2d 878, 60 Cal.App.2d 432—Johnson v. Home Owners' Loan Corporation, 116 P.2d 167, 46 Cal.App.2d 546.

Fla.—Allison v. Handy Andy Community Stores, 156 So. 521, 116 Fla. 574—Willard v. Barry, 152 So. 411, 113 Fla. 402.

Ga.—Ward v. Master Loan Service, 33 S.E.2d 313, 199 Ga. 108—Rogers v. MacDougald, 165 S.E. 619, 175 Ga. 642—Martin v. Peacock, 155 S.E. 182, 171 Ga. 219.

Ill.—Louis E. Bower, Inc., v. Silverstein, 18 N.E.2d 385, 298 Ill.App. 145—Myers v. American Nat. Bank & Trust Co. of Chicago, 277 Ill. App. 378—Hudson v. Hooper, 265 Ill.App. 325.

Iowa.—Martin Bros. Box Co. v. Fritz, 292 N.W. 143, 228 Iowa 482.

Ky.—Thacker v. Thacker, 75 S.W.2d 3, 255 Ky. 523—Parsons v. Arnold, 31 S.W.2d 928, 235 Ky. 600—Combs v. Deaton, 251 S.W. 638, 199 Ky. 477.

La.—Succession of Williams, 121 So. 171, 168 La. 1—Sandfield Oil & Gas Co. v. Paul, App., 7 So.2d 725—Hanson v. Haynes, App., 170 So. 257, rehearing denied 171 So. 146—Smith v. Williams, 2 La.App. 24.

Mo.—Cherry v. Wertheim, App., 25 S.W.2d 118.

N.J.—Di Paola v. Trust Co. of Orange, 156 A. 439, 109 N.J.Eq. 80.

N.Y.—Hammond v. Citizens Nat. Bank of Potsdam, 22 N.Y.S.2d 656, 260 App.Div. 374, motion denied 23 N.Y.S.2d 559, 260 App.Div. 894.

Ohio.—Hamilton v. Ohio State Bank & Trust Co., 152 N.E. 731, 20 Ohio App. 493.

Tex.—Hubbard v. Tallal, 92 S.W.2d 1022, 127 Tex. 242—McAfee v. Jeter & Townsend, Civ.App., 147 S. W.2d 884—Peaslee-Gaulbert Corporation v. Hughes, Civ.App., 79 S.W. 2d 149, error refused—Ritch v. Jarvis, Civ.App., 64 S.W.2d 831, error dismissed—Karr v. Brooks, Civ.App., 50 S.W.2d 1103—Campbell v. Wm. Cameron & Co., Civ.App., 38 S.W.2d 865, error dismissed—Cook v. Panhandle Refining Co., Civ.App., 267 S.W. 1070.

Utah.—Kramer v. Pixton, 268 P. 1029, 72 Utah 1.

(2) Petition, in suit to enjoin collection of judgment, demonstrating that judgment was utterly unintelligible on its face, was good as against general demurrer.—Wells v. Stonerock, 37 S.W.2d 712, 120 Tex. 287.

Bill or petition held insufficient

(1) Generally.

Ark.—Wardlow v. McGhee, 63 S.W. 2d 332, 187 Ark. 955.

Cal.—Vincent v. Security-First Nat. Bank of Los Angeles, 155 P.2d 63, 67 Cal.App.2d 602.

Ga.—Stowers v. Harris, 22 S.E.2d 405, 194 Ga. 636—Green v. Spires, 7 S.E.2d 246, 189 Ga. 719—Shepard v. Veal, 173 S.E. 644, 178 Ga. 535—Watters v. Southern Brighton Mills, 147 S.E. 87, 168 Ga. 15—Walker v. Mizell, 121 S.E. 816, 157 Ga. 518—Haskins v. Clements, 116 S.E. 594, 155 Ga. 283.

Ill.—Nicoloff v. Schnipper, 233 Ill. App. 591.

La.—Salter v. Walsworth, App., 167 So. 494.

Mass.—Bartholomew v. Stobbs, 182 N.E. 846, 280 Mass. 559.

Miss.—Armistead v. Barber, 35 So. 199, 82 Miss. 788.

N.D.—Tibbs v. Hancock, 255 N.W. 572, 64 N.D. 647.

Okl.—Metzger v. Turner, 158 P.2d 701, 195 Okl. 406—Lewis v. Couch, 154 P.2d 51, 194 Okl. 632.

Or.—Dixon v. Simpson, 279 P. 939, 130 Or. 211.

Pa.—Cesare v. Caputo, 100 Pa.Super. 188.

Tex.—Kelly v. Wright, 188 S.W.2d 983—Sedgwick v. Kirby Lumber Co., 107 S.W.2d 358, 130 Tex. 163—Wear v. McCallum, 33 S.W.2d 723, 119 Tex. 473—Smith v. Ferrell, Com.App., 44 S.W.2d 962—Whitehurst v. Estes, Civ.App., 185 S.W.2d 154, error refused—Loomis v. Balch, Civ.App., 181 S.W.2d 849—Dixon v. McNabb, Civ.App., 173 S.W.2d 228, error refused—Gray v. Moore, Civ.App., 172 S.W. 2d 746—Smith v. City of Dallas, Civ.App., 163 S.W.2d 681, error refused—Ridge v. Wood, Civ.App., 140 S.W.2d 536, error dismissed, judgment correct—Miller v. Texas Life Ins. Co., Civ.App., 123 S.W.2d 756, error refused—Bailey v. American Casualty Co., Civ.App., 119 S.W.2d 697—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed—Willard v. Phillips, Civ.App., 43 S.W.2d 170—Dunn v. Redfield, Civ. App., 293 S.W. 338—Box v. Pierce, Civ.App., 278 S.W. 226—Slider v. House, Civ.App., 271 S.W. 644.

(2) In action to set aside judgment on note, petition alleging that plaintiffs had not been served with process and were not before court in action on the note, but containing allegations from which it might be inferred that plaintiffs took part in proceedings, especially subsequent to entry of judgment, failed to state a cause of action.—Hibbard v. Clay County, 186 S.W.2d 423, 299 Ky. 560.

(3) A bill of review presents no cause of action where gravamen of complaint is merely that counsel failed to present his client's cause or defense.—Whitehurst v. Estes, Tex. Civ.App., 185 S.W.2d 154, error refused.

(4) Disclosure of garnishee in amended petition to set aside judgment was too late when delay increased hazard in overcoming adverse claims.—Ellis v. Lamb-McAshan Co., Tex.Civ.App., 278 S.W. 858.

59. U.S.—U. S. v. Kusche, D.C.Cal., 56 F.Supp. 201.

Pa.—Rocks v. Santella, 38 A.2d 718, 155 Pa.Super. 473.

34 C.J. p 488 note 14 [b].

Incorporation of record

(1) Compliance with text rule was shown where plaintiffs, who were defendants in prior action, made record in prior action a part of their petition as though incorporated therein.—Triplett v. Stanley, 130 S. W.2d 45, 279 Ky. 148.

(2) However, rules of pleading do not require that record in former suit be completely exhibited by petition seeking bill of review.—Sloan v. Newton, Tex.Civ.App., 134 S.W.2d 697.

(3) Necessity of incorporating transcript of record as an exhibit see infra § 390.

were made, how they were finally determined,[60] and for what reason the judgment is void.[61] The necessity of allegations as to the existence of a meritorious defense, plaintiff's diligence and lack of fault, injury or injustice to complainant resulting from enforcement of the judgment, and lack or loss of remedy at law are considered infra subdivision c of this section.

The allegations of the bill or complaint must be positive, explicit, and certain.[62] The bill must set forth facts, and not mere conclusions of law,[63] and, if conclusions are used, they must be supported by allegations of fact.[64] However, mere informality of statement in the petition will not prevent it from being considered on its merits,[65] and the fact that it contains inconsequential misstatements of fact is not fatal where defendant was not harmed thereby.[66] The improper designation of a pleading is immaterial where it alleges the elements required of a bill or complaint for equitable relief against a judgment.[67] A petition substantially following the statute authorizing the proceeding is sufficient.[68]

In a proper case, a defective pleading may be amended.[69]

Verification. In accordance with the general rules as to verification of equity pleadings generally, discussed in Equity §§ 183–190, a bill for an injunction against a judgment,[70] or a petition to set aside a judgment,[71] must be verified by complainant in person, unless there is some sufficient reason for its verification by his attorney.[72]

60. Ga.—Hanleiter v. Spearman, 36 S.E.2d 780.
Tex.—Kelley v. Wright, Civ.App., 184 S.W.2d 649, affirmed, Sup., 188 S.W.2d 983.

Pleadings and result

(1) A bill of review must clearly recite pleadings and result of original suit, so as to enable court to determine with reasonable certainty the issues involved.—Bevill v. Rosenfield, Tex.Civ.App., 113 S.W.2d 340, error dismissed—Griffith v. Tipps, Tex.Civ.App., 69 S.W.2d 846—Winn v. Houston Building & Loan Ass'n, Tex.Civ.App., 45 S.W.2d 631, error refused.

(2) Any fact averred in bill of review inconsistent with, or contradictory of, pleadings or judgment in main case will be given no effect in determining legal sufficiency of bill.—Bevill v. Rosenfield, supra.

History of proceedings

A bill of review to set aside probate court order appointing defendant as attorney to represent interests of plaintiff in an estate was sufficient where bill set forth history of probate proceedings and circumstances under which appointment was made.—Bevill v. Rosenfield, supra.

61. Ala.—Copeland v. Copeland, 7 So.2d 87, 242 Ala. 507.
Ga.—Hanleiter v. Spearman, 36 S.E. 2d 780.
Ky.—Triplett v. Stanley, 130 S.W.2d 45, 279 Ky. 148.

Invalidity on face

In a direct attack on a judgment, it is not necessary to allege that the judgment showed its invalidity on its face.—Garza v. Kenedy, Tex. Com.App., 299 S.W. 231, rehearing denied 5 S.W.2d xx.

62. Ala.—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854, 244 Ala. 98.
Ga.—Felker v. Still, 169 S.E. 351, 177 Ga. 30.
Tex.—Dunlap v. Villareal, Civ.App., 91 S.W.2d 1124.
34 C.J. p 488 note 14.

Mere inference insufficient

A pleading to set aside a judgment should be definite, and the nonexistence of facts which invalidate the judgment should not be evaded, and mere inference is insufficient to show the invalidity of the judgment when the question is raised by proper demurrer.—Roy v. Abraham, 96 So. 883, 209 Ala. 691.

Allegations on information and belief

(1) Chancery will not restrain the collection of a judgment at law on a bill in which all the material facts are charged on information and belief only, without any allegation as to whence the information was derived or any affidavit connected with the bill.—McGraw v. Walsh, W.Va., 232 F. 122, 146 C.C.A. 314—34 C.J. p 488 note 14 [c].

(2) However, in an action to have a judgment declared void and to have it expunged from the record on the theory that no personal service was ever effected on plaintiff, it was proper for plaintiff to allege facts leading to entry of judgment on information and belief, since, presumably, plaintiff had no personal knowledge of the service on a person other than himself or of the facts concerning the lack of service.—Hammond v. Citizens Nat. Bank of Potsdam, 22 N.Y.S.2d 656, 260 App.Div. 374, motion denied 23 N.Y.S. 2d 559, 260 App.Div. 894.

63. Ala.—Copeland v. Copeland, 7 So.2d 87, 242 Ala. 507.
Ga.—Whiteside v. Croker, 142 S.E. 139, 165 Ga. 765.
Tex.—Gray v. Moore, Civ.App., 172 S.W.2d 746, error refused.
34 C.J. p 489 note 15.

Irregularities and omissions

In action to set aside a judgment, it is not sufficient, with reference to the stating of a cause of action, to make general allegations of irregularities and omissions, but plaintiff must clearly set forth definite facts from which there can be drawn the conclusion that a reconsideration or the conducting of further proceedings will result in a different decree.—Termini v. McCormick, 23 So.2d 52, 208 La. 221.

64. Ill.—Reed v. New York Nat. Exch. Bank, 82 N.E. 341, 230 Ill. 50.

65. Mass.—Smith v. Brown, 184 N. E. 383, 282 Mass. 81.

66. Mass.—Smith v. Brown, supra.

67. Ark.—Brookfield v. Harrahan Viaduct Improvement Dist., 54 S. W.2d 689, 186 Ark. 599.
Tex.—Turman Oil Co. v. Roberts, Civ.App., 96 S.W.2d 724, error refused.
Pleading considered as independent proceeding for equitable relief notwithstanding designation as "motion" see supra § 377.

68. Ala.—Garvey v. Inglenook Const. Co., 104 So. 639, 213 Ala. 267.

Matter not discretionary

If a petition for review of a default judgment follows the statutory provisions, the court is without discretion in the matter and must hold the petition sufficient.—Dillbeck v. Johnson, 129 S.W.2d 885, 344 Mo. 845.

69. Okl.—Cook v. Bruss, 30 P.2d 686, 167 Okl. 466.

70. Ind.—Ross v. Crews, 33 Ind. 120.
Mo.—Karicofe v. Schwaner, 196 S.W. 46, 196 Mo.App. 565.

71. Tex.—Warne v. Jackson, Civ. App., 273 S.W. 315—Patrucio v. Selkirk, Civ.App., 160 S.W. 635.

72. Ala.—Smothers v. Meridian Fertilizer Factory, 33 So. 898, 137 Ala. 166.

Filing. Where a party has performed every act required to place his case before the only court which may entertain his bill, the omission of the clerk of court to make a proper indorsement in filing the bill does not prejudice the rights of the complaining party.[73]

b. Specific Grounds for Relief

(1) In general
(2) Fraud or perjury

(1) In General

The existence of the specific ground for relief against the judgment must be shown by specific averments setting forth in detail the particular facts constituting the ground alleged.

Whatever the specific ground on which equity is asked to interfere—whether fraud, accident, mistake, want of jurisdiction, or excusable neglect—the bill or complaint must sufficiently show the existence of such ground by specific averments, setting forth in detail the particular facts constituting the ground alleged.[74] In order to show the invalidity of the judgment on the ground of want of jurisdiction, the bill must set out in detail facts from which it is apparent that under no circumstances could the law court have had jurisdiction to render it.[75]

Newly discovered evidence. A bill for relief in equity against a judgment at law on the ground of newly discovered evidence must set forth such evidence in detail, so that the court may judge of its nature, materiality, and weight.[76] It must also aver that complainant was ignorant of such evidence at the time of the trial at law,[77] that it could not have been discovered by due diligence, before judgment was rendered,[78] what efforts he made for that purpose and what degree of diligence he employed,[79] that the evidence was discovered after judgment,

La.—Boykin v. Holden, 6 La.Ann. 120.

73. Tex.—Texas Employers' Ass'n v. Cashion, Civ.App., 130 S.W.2d 1112, error refused.

74. Ala.—Copeland v. Copeland, 7 So.2d 87, 242 Ala. 507.
Ark.—Better Way Life Ins. Co. v. Linder, 181 S.W.2d 467, 207 Ark. 533.
Ga.—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864.
Ill.—Mohr v. Messick, 53 N.E.2d 743, 322 Ill.App. 56.
Ind.—Wohadlo v. Fary, 46 N.E.2d 489, 221 Ind. 219—Bedron v. Baran, 155 N.E. 611, 85 Ind.App. 649.
Ky.—Board of Education of Pulaski County v. Nelson, 88 S.W.2d 17, 261 Ky. 466.
La.—Sonnier v. Sonnier, 140 So. 49, 19 La.App. 234.
Okl.—Oklahoma Ry. Co. v. Holt, 17 P.2d 955, 161 Okl. 165.
Tenn.—Corpus Juris cited in Hartman v. Spivey, 123 S.W.2d 1110, 22 Tenn.App. 435.
Tex.—Sedgwick v. Kirby Lumber Co., 107 S.W.2d 358, 130 Tex. 163—Texas Employers' Ins. Ass'n v. Arnold, 88 S.W.2d 473, 126 Tex. 466—Union Bank & Trust Co. of Fort Worth v. Smith, Civ.App., 166 S.W.2d 928—Stone v. Stone, Civ.App., 101 S.W.2d 638—Dunlap v. Villareal, Civ.App., 91 S.W.2d 1124—Bray v. First Nat. Bank, Civ.App., 10 S.W.2d 235, error dismissed—Citizens' Bank v. Brandau, Civ.App., 1 S.W.2d 466, error refused—Cook v. Panhandle Refining Co., Civ.App., 267 S.W. 1070.
34 C.J. p 491 note 31.

Allegation consistent with recitation

Allegation of bill to review judgment that complainant had no notice of setting of case wherein judgment was rendered was not inconsistent with recitation in judgment that cause came on for trial at regular setting and in its due order.—Peaslee-Gaulbert Corporation v. Hughes, Tex.Civ.App., 79 S.W.2d 149, error refused.

Averments held sufficient

(1) Generally.
Ark.—North Arkansas Highway Improvement Dist. No. 2 v. Home Telephone Co., 3 S.W.2d 307, 176 Ark. 553.
Fla.—Moore v. Avriett, 125 So. 351, 98 Fla. 554.
Tex.—Ramsey v. McKamey, 152 S.W.2d 322, 137 Tex. 91—Perez v. E. P. Lipscomb & Co., Civ.App., 267 S.W. 748.
34 C.J. p 491 note 31 [a].

(2) Averment that judgment creditor does not have assets sufficient to meet indebtedness to judgment debtor is sufficient averment of insolvency, in suit to enjoin collection of judgment on ground of set-off.—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala. 10.

Averments held insufficient

(1) Generally.
Ala.—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.
Cal.—O. A. Graybeal Co. v. Cook, 60 P.2d 525, 16 Cal.App.2d 231.
Ga.—Green v. Spires, 7 S.E.2d 246, 189 Ga. 719—Block v. Information Buying Co., 153 S.E. 182, 170 Ga. 466, followed in Wallace v. Jackson, 153 S.E. 523, 170 Ga. 549.
Tex.—Browning-Ferris Machinery Co. v. Thomson, Civ.App., 55 S.W.2d 168.
34 C.J. p 491 note 31 [b].

(2) Petition to set aside judgment for fraud in subjecting land to execution did not entitle claimants to set aside judgment for mistake.—Bryant v. Bush, 140 S.E. 366, 165 Ga. 252.

(3) Bill was held not to show that proceeding was void on its face.—Keenum v. Dodson, 102 So. 230, 212 Ala. 146.

75. Ind.—Gum-Elastic Roofing Co. v. Mexico Pub. Co., 39 N.E. 443, 140 Ind. 158, 30 L.R.A. 700.
34 C.J. p 491 note 32.

Complaint held sufficient

Or.—Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 150 Or. 395.

76. N.Y.—Crouse v. McVickar, 100 N.E. 697, 207 N.Y. 213, 45 L.R.A., N.S., 1159.
34 C.J. p 492 note 42.

77. Va.—McCloud v. Virginia Electric & Power Co., 180 S.E. 299, 164 Va. 604.
34 C.J. p 492 note 43.

78. Ill.—Wood v. First Nat. Bank of Woodlawn, 50 N.E.2d 830, 383 Ill. 515, certiorari denied 64 S.Ct. 521, 321 U.S. 765, 88 L.Ed. 1061.
Ky.—Campbell v. Chriswell, 144 S.W.2d 802, 284 Ky. 328.
N.M.—Ringle Development Corp. v. Town of Tome Land Grant, 160 P.2d 441, 49 N.M. 192.
Or.—Dixon v. Simpson, 279 P. 939, 130 Or. 211.
Va.—McCloud v. Virginia Electric & Power Co., 180 S.E. 299, 164 Va. 604.
34 C.J. p 492 note 44.

79. Or.—Dixon v. Simpson, 279 P. 939, 130 Or. 211.
Tenn.—Levan v. Patton, 2 Heisk. 108.

and too late to take any action in the law case,[80] and that it is now within his control, and that he will be able to produce it on another trial.[81] It must also appear why no motion for a new trial was made in the trial court before the lapse of the term,[82] that the complaint was filed without delay after the discovery was made,[83] and that the evidence will produce a different result if a new trial is granted.[84]

(2) Fraud or Perjury

Where a judgment is attacked for fraud or perjury, the bill or petition must state a cause of action for relief on this ground and set forth particularly the specific facts constituting the alleged fraud or perjury.

Where the aid of equity in relieving against a judgment is sought for fraud, the bill or complaint must state a cause of action for relief on this ground,[85] by establishing extrinsic fraud,[86] rather

80. Cal.—Mulford v. Cohn, 18 Cal. 42.
34 C.J. p 492 note 46.
81. Cal.—Mulford v. Cohn, 18 Cal. 42.
Ga.—Hill v. Harris, 42 Ga. 412.
82. Cal.—Mulford v. Cohn, 18 Cal. 42.
83. Ind.—State v. Holmes, 69 Ind. 577.
84. Va.—McCloud v. Virginia Electric & Power Co., 180 S.E. 299, 164 Va. 604.
85. U.S.—U. S. v. Kusche, D.C.Cal., 56 F.Supp. 201.
Ala.—Copeland v. Copeland, 7 So. 2d 87, 242 Ala. 507—Quick v. McDonald, 108 So. 529, 214 Ala. 587.
Cal.—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—See v. Joughin, 64 P.2d 149, 18 Cal.App.2d 414.
Fla.—State ex rel. Lorenz v. Lorenz, 6 So.2d 620, 149 Fla. 625.
Ga.—Elliott v. Elliott, 191 S.E. 465, 184 Ga. 417—Dorsey v. Griffin, 161 S.E. 601, 173 Ga. 802.
Ill.—Barzowski v. Highland Park State Bank, 21 N.E.2d 294, 371 Ill. 412.
Mo.—Wm. H. Johnson Timber & Realty Co. v. Belt, 46 S.W.2d 153, 329 Mo. 515.
N.M.—Bowers v. Brazell, 244 P. 893, 31 N.M. 316.
N.Y.—Boylan v. Vogel, 264 N.Y.S. 209, 147 Misc. 554, reversed on other grounds 265 N.Y.S. 990, 240 App. Div. 756.
Okl.—Metzger v. Turner, 158 P.2d 701, 195 Okl. 406.
Tex.—Johnston v. Stephens, Civ.App., 300 S.W. 225, reversed on other grounds 49 S.W.2d 431, 121 Tex. 374.
34 C.J. p 491 note 33—47 C.J. p 438 note 72.

Bill or complaint held sufficient

U.S.—Hanna v. Brictson Mfg. Co., C.C.A.S.D., 62 F.2d 139.
Ala.—Bolden v. Sloss-Sheffield Steel & Iron Co., 110 So. 574, 215 Ala. 334, 49 A.L.R. 1206—Keenum v. Dodson, 102 So. 230, 212 Ala. 146.
Ark.—Martin v. Street Improvement Dist. No. 349, 11 S.W.2d 469, 178 Ark. 588.
Cal.—Bernhard v. Waring, 2 P.2d 32, 213 Cal. 175—Newport v. Hatton, 231 P. 987, 195 Cal. 132.
Fla.—Reybine v. Kruse, 190 So. 711, 139 Fla. 577.
Ga.—White v. Roper, 167 S.E. 177, 176 Ga. 180—Croom v. Bennett, 147 S.E. 560, 168 Ga. 178—Branan v. Feldman, 123 S.E. 710, 158 Ga. 377—Mullis v. Bank of Chauncey, 150 S.E. 471, 40 Ga.App. 582.
Kan.—Laidler v. Peterson, 92 P.2d 18, 150 Kan. 306.
Ky.—Jarvis v. Baughman, 137 S.W. 2d 1076, 282 Ky. 115—Stewart v. Carter County, 36 S.W.2d 7, 237 Ky. 600.
La.—Terry v. Womack, 20 So.2d 365, 206 La. 1069—McHenry v. Wall, App., 157 So. 632.
Minn.—Lenhart v. Lenhart Wagon Co., 298 N.W. 37, 210 Minn. 164, 135 A.L.R. 833, mandate modified on other grounds 2 N.W.2d 421, 211 Minn. 572.
N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App. Div. 191.
N.C.—McCoy v. Justice, 146 S.E. 214, 196 N.C. 553.
Okl.—Federal Tax Co. v. Board of Com'rs of Okmulgee County, 102 P.2d 148, 187 Okl. 223.
Or.—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.
Tex.—Mauldin v. American Liberty Pipe Line Co., Civ.App., 185 S.W.2d 158, ref.w.m—Early v. Burns, Civ. App., 142 S.W.2d 260, error refused—Lamb v. Isley, Civ.App., 114 S.W. 2d 673, rehearing denied 115 S.W. 2d 1036—Sedgwick v. Kirby Lumber Co., Civ.App., 78 S.W.2d 1107, affirmed 107 S.W.2d 358, 130 Tex. 163—Ritch v. Jarvis, Civ.App., 64 S.W.2d 831, error dismissed—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, error dismissed.
Wash.—Rennebohm v. Rennebohm, 279 P. 402, 153 Wash. 102.
Wis.—Amberg v. Deaton, 271 N.W. 396, 223 Wis. 653.

Bill or complaint held insufficient

U.S.—Toledo Scale Co. v. Computing Scale Co., Ohio, 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719—Morse v. Lewis, C.C.A.W.Va., 54 F.2d 1027, certiorari denied 52 S.Ct. 640, 286 U.S. 557, 76 L.Ed. 1291.
Ala.—Prestwood v. Bagley, 149 So. 817, 227 Ala. 316—Kelen v. Brewer, 129 So. 23, 221 Ala. 445—Quick v. McDonald, 108 So. 529, 214 Ala. 587.
Ga.—Abercrombie v. Hair, 196 S.E. 447, 185 Ga. 723—Walker v. Hall, 166 S.E. 757, 176 Ga. 12—Ellis v. Ellis, 163 S.E. 155, 174 Ga. 559.
Ky.—Board of Education of Pulaski County v. Nelson, 88 S.W.2d 17, 261 Ky. 466.
Mich.—Hofweber v. Detroit Trust Co., 294 N.W. 108, 295 Mich. 96.
N.M.—Bowers v. Brazell, 244 P. 893, 31 N.M. 316.
N.Y.—Joelson v. Mayers, 4 N.Y.S.2d 232, 254 App.Div. 749, appeal dismissed 18 N.E.2d 312, 279 N.Y. 681, appeal dismissed 18 N.E.2d 868, 279 N.Y. 785.
N.C.—Stevens v. Cecil, 199 S.E. 163, 214 N.C. 273.
Ohio.—May v. May, 50 N.E.2d 790, 72 Ohio App. 82.
Okl.—Clinton v. Miller, 216 P. 135, 96 Okl. 71.
Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664.
Tex.—Crouch v. McGaw, 138 S.W.2d 94, 134 Tex. 633—Kelley v. Wright, Civ.App., 184 S.W.2d 649, affirmed, Sup., 188 S.W.2d 983—Sedgwick v. Kirby Lumber Co., Civ.App., 78 S.W.2d 1107, affirmed 107 S.W.2d 358, 130 Tex. 163.
Utah.—Wright v. W. E. Callahan Const. Co., 156 P.2d 710.
Wash.—Zapon Co. v. Bryant, 286 P. 282, 156 Wash. 161.

Facts not warranting conclusion

A general allegation that a judgment was procured by fraud is no stronger than recital of facts from which the general conclusion is drawn, and, if such facts do not warrant the conclusion the petition is insufficient.—Oglesby v. Oglesby, 32 S.E.2d 906, 198 Ga. 864.

Plea of prescription against petition to annul judgment will not be sustained, if petition is sufficient to prove date of discovery of fraud.—Smith v. Williams, 2 La.App. 24.

Particular allegations construed

Ga.—Bird v. Smith, 197 S.E. 642, 186 Ga. 301.

86. U.S.—Montgomery v. Gilbert, C.C.A.Mont., 77 F.2d 39.
Ariz.—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.
Ark.—Ready v. Ozan Inv. Co., 79 S.W.2d 433, 190 Ark. 606.
Fla.—Hamilton v. Flowers, 183 So. 811, 134 Fla. 328.

Procurement of decree

In order to sustain bill to vacate

than intrinsic fraud,[87] and by showing that the judgment is wrong.[88] It is not sufficient to incorporate in the bill a general allegation of fraud, deceit, or concealment, but the specific facts constituting the alleged fraud must be set forth particularly.[89] On the other hand, if the facts constituting fraud are so set forth, the bill is sufficient, although it lacks a specific allegation of fraud,[90] unless any reliance on fraud as a ground for relief is specifically abandoned by statement to the court.[91] Where the fraud charged consists of acts of third persons, it must appear from the bill that the judgment creditor was a party to it.[92]

Perjury. Where a judgment is attacked on the ground of perjury, the bill or complaint must contain all necessary allegations warranting the relief sought.[93] The bill should name the witnesses, and wherein they swore falsely,[94] and set forth facts tending to show that their testimony was false,[95] to the knowledge of the judgment creditor,[96] and that complainant has witnesses to prove such facts,[97] giving their names and addresses.[98] Plaintiff must also allege the means by which the perjury

decree for fraud, bill must allege facts showing that fraud was in concoction or procurement of decree.—Jones v. Henderson, 153 So. 214, 228 Ala. 273.

Extrinsic fraud sufficiently alleged

Cal.—Stenderup v. Broadway State Bank of Los Angeles, 28 P.2d 14, 219 Cal. 593—Caldwell v. Taylor, 23 P.2d 758, 218 Cal. 471, 88 A.L.R. 1194—Larrabee v. Tracy, 104 P.2d 61, 39 Cal.App.2d 593—Bogardus v. O'Dea, 287 P. 149, 105 Cal.App. 189.

Mo.—Fadler v. Gabbert, 63 S.W.2d 121, 333 Mo. 851.

Mont.—Bullard v. Zimmerman, 268 P. 512, 82 Mont. 434.

87. U.S.—U. S. v. Kusche, D.C.Cal., 56 F.Supp. 201.

Cal.—La Salle v. Peterson, 32 P.2d 612, 220 Cal. 739—O. A. Graybeal Co. v. Cook, 60 P.2d 525, 16 Cal. App.2d 231.

Kan.—Bitsko v. Bitsko, 122 P.2d 753, 155 Kan. 80.

Mont.—Moser v. Fuller, 86 P.2d 1, 107 Mont. 424.

Okl.—Metzger v. Turner, 158 P.2d 701, 195 Okl. 406.

88. Cal.—Machado v. Machado, 152 P.2d 457, 66 Cal.App.2d 401.

89. U.S.—Kithcart v. Metropolitan Life Ins. Co., C.C.A.Mo., 88 F.2d 407—Barnes v. Boyd, D.C.W.Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F. 2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

Ala.—Hooke v. Hooke, 25 So.2d 33—Copeland v. Copeland, 7 So.2d 87, 242 Ala. 507—Quick v. McDonald, 108 So. 529, 214 Ala. 587.

Cal.—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—O. A. Graybeal Co. v. Cook, 60 P.2d 525, 16 Cal. App.2d 231.

Ga.—Stanton v. Gailey, 33 S.E.2d 747, 72 Ga.App. 428.

Idaho.—Inman v. Round Valley Irr. Co., 238 P. 1018, 41 Idaho 482.

Ill.—Woodworth v. Sandin, 20 N.E.2d 603, 371 Ill. 302.

Iowa.—Shaw v. Addison, 18 N.W.2d 796.

Ky.—Board of Education of Pulaski County v. Nelson, 88 S.W.2d 17, 261 Ky. 466—Hargis Commercial Bank & Trust Co.'s Liquidating Agent v. Eversole, 74 S.W.2d 193, 255 Ky. 377.

Minn.—Murray v. Calkins, 242 N.W. 706, 186 Minn. 192—Hawley v. Knott, 216 N.W. 800, 173 Minn. 149.

Mo.—Dorman v. Hall, 101 S.W. 161, 124 Mo.App. 5.

N.C.—Horne v. Edwards, 3 S.E.2d 1, 215 N.C. 622—Oates v. Texas Co., 166 S.E. 317, 203 N.C. 474.

Okl.—Southwick v. Jones, 60 P.2d 774, 177 Okl. 409—Finley v. Riley, 215 P. 950, 91 Okl. 58.

Tenn.—**Corpus Juris cited in** Hartman v. Spivey, 123 S.W.2d 1110, 1114, 22 Tenn.App. 435.

Tex.—Petty v. Mitchell, Civ.App., 187 S.W.2d 138, error refused.

34 C.J. p 491 note 33.

Averments held sufficient

Ark.—Brookfield v. Harrahan Viaduct Improvement Dist., 54 S.W.2d 689, 186 Ark. 599.

Ga.—Mullis v. Bank of Chauncey, 150 S.E. 471, 40 Ga.App. 582.

Kan.—Laidler v. Peterson, 92 P.2d 18, 150 Kan. 306.

Okl.—Parker v. Board of Com'rs of Okmulgee County, 102 P.2d 880, 187 Okl. 308—Parker v. Board of Com'rs of Okmulgee County, 102 P. 2d 883, 187 Okl. 311.

Or.—Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 155 Or. 602.

Tex.—Reitz v. Mitchell, Civ.App., 256 S.W. 697.

34 C.J. p 491 note 33 [a].

Averments held insufficient

U.S.—Morse v. Lewis, C.C.A.W.Va., 54 F.2d 1027, certiorari denied 52 S.Ct. 640, 286 U.S. 557, 76 L.Ed. 1291.

Cal.—O. A. Graybeal Co. v. Cook, 60 P.2d 525, 16 Cal.App.2d 231.

N.C.—Hawkins v. Federal Land Bank of Columbia, S.C., 18 S.E.2d 823, 221 N.C. 73.

The alleged fraudulent statements of the petition on which jurisdiction of the court was invoked to render the decree complained of must be set forth.—Copeland v. Copeland, 7 So.2d 87, 242 Ala. 507.

Admissions

A petition to vacate judgment for fraud, based on admissions made after trial by plaintiff's attorney, was not demurrable on ground of inadmissibility of such admissions, in absence of allegation that such admissions were in some way part of an offer to compromise.—Laidler v. Peterson, 92 P.2d 18, 150 Kan. 306.

90. Ga.—Sylvania Ins. Co. v. Johnson, 160 S.E. 788, 173 Ga. 679.

34 C.J. p 492 note 34.

91. Tex.—Sedgwick v. Kirby Lumber Co., 107 S.W.2d 358, 130 Tex. 163.

92. Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664.

34 C.J. p 492 note 35.

93. Okl.—Lewis v. Couch, 154 P.2d 51, 194 Okl. 632.

S.D.—Seubert v. Seubert, 7 N.W.2d 301.

Averments held sufficient

La.—Adkins' Heirs v. Crawford, Jenkins & Booth, 8 So.2d 539, 200 La. 561.

Neb.—Krause v. Long, 192 N.W. 729, 109 Neb. 846.

94. Del.—Kersey v. Rash, 3 Del.Ch. 321.

Tex.—Stringer v. Robertson, Civ. App., 140 S.W. 502.

95. Ill.—Nicoloff v. Schnipper, 233 Ill.App. 591.

34 C.J. p 492 note 37.

Conviction

Judgment would not be set aside on ground that certain testimony was false, where there was no allegation that the witness giving the allegedly false testimony had been found guilty of perjury.—Stephens v. Pickering, 15 S.E.2d 202, 192 Ga. 199—Bird v. Smith, 197 S.E. 642, 186 Ga. 301—Foster v. Cotton States Electric Co., 157 S.E. 636, 172 Ga. 231.

96. N.C.—Burgess v. Lovengood, 55 N.C. 457.

34 C.J. p 492 note 38.

97. Ill.—Ames v. Snider, 55 Ill. 498.

98. Iowa.—Dixon v. Graham, 16 Iowa 310.

was discovered,[99] and that such discovery could not have been made in time to have been available as a defense in the law action.[1]

c. Allegations as to Specific Matters

Where such a showing is a prerequisite to relief, the bill must contain proper and sufficient allegations as to the existence of a meritorious defense, the plaintiff's diligence and lack of fault, injury or injustice resulting from the enforcement of the judgment, and lack or loss of remedy at law.

Where the existence of a meritorious cause of action or defense is a prerequisite to relief, as discussed supra § 349, the bill must allege and show that complainant has a good and meritorious claim or defense to the action at law,[2] that he is able to present to the court the evidence constituting such defense,[3] and that a different judgment would ensue if the judgment at law were set aside and the action tried anew.[4] Ordinarily, a general allegation that complainant has a meritorious defense to

99. Idaho.—Boise Payette Lumber Co. v. Idaho Gold Dredging Corporation, 58 P.2d 786, 56 Idaho 660, certiorari denied 57 S.Ct. 40, 299 U.S. 577, 81 L.Ed. 425.

1. Idaho.—Boise Payette Lumber Co. v. Idaho Gold Dredging Corporation, supra.

2. U.S.—Matheson v. National Surety Co., C.C.A.Alaska, 69 F.2d 914.
Ala.—Murphree v. International Shoe Co., 20 So.2d 782, 246 Ala. 384—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854, 244 Ala. 98—Hanover Fire Ins. Co. v. Street, 176 So. 350, 234 Ala. 537—Hatton v. Moseley, 156 So. 546, 229 Ala. 240—Ikard v. Walker, 104 So. 129, 213 Ala. 13—King v. Dent, 93 So. 823, 208 Ala. 78.
Ark.—Holthoff v. State Bank & Trust Co. of Wellston, Mo., 186 S.W.2d 162, 208 Ark. 307—Baskins v. Mosaic Templars of America, 4 S.W.2d 932, 176 Ark. 940.
D.C.—Ray v. Carr, 107 F.2d 238, 71 App.D.C. 37.
Ga.—Huson Ice & Coal Co. v. City of Covington, 172 S.E. 56, 178 Ga. 6.
Ill.—Nasti v. Cook County, 180 N.E. 847, 348 Ill. 342.
Kan.—Fitzhugh v. Central Trust Co., 72 P.2d 959, 146 Kan. 585.
Ky.—Workingmen's Perpetual Bldg. & Loan Ass'n v. Stephens, 184 S.W.2d 575, 299 Ky. 177—Curtis v. Reed, 176 S.W.2d 385, 296 Ky. 221—McKim v. Smith, 172 S.W.2d 634, 294 Ky. 835—Ohio Valley Fire & Marine Ins. Co.'s Receiver v. Newman, 13 S.W.2d 771, 227 Ky. 554—Collins' Ex'rs v. Bonner, 294 S.W. 1027, 220 Ky. 212—Holt v. Mahoney, 270 S.W. 795, 208 Ky. 330.
Miss.—Strickland v. Webb, 120 So. 168, 152 Miss. 421.
Mo.—**Corpus Juris cited in** Hockenberry v. Cooper County State Bank, 88 S.W.2d 1031, 1037, 338 Mo. 31.
Mont.—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58.
Ohio.—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871.
Okl.—Honeycutt v. Severin, 98 P.2d 1093, 186 Okl. 509—Oklahoma Ry. Co. v. Holt, 17 P.2d 955, 161 Okl. 165.
Or.—Dixon v. Simpson, 279 P. 939, 130 Or. 211.
Tex.—Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498—Brown v. Clippenger, 256 S.W. 254, 113 Tex. 364—Winters Mut. Aid Ass'n, Circle No. 2 v. Reddin, Com.App., 49 S.W.2d 1095—Smith v. Ferrell, Com.App., 44 S.W.2d 962—Dorsey v. Cutbirth, Civ.App., 178 S.W.2d 749, error refused—Union Bank & Trust Co. of Fort Worth v. Smith, Civ.App., 166 S.W.2d 928—Goldapp v. Jones Lumber Co., Civ.App., 163 S.W.2d 229, error refused—Barrow, Wade, Guthrie & Co. v. Stroud, Civ.App., 125 S.W.2d 365—Allen v. Trentman, Civ.App., 115 S.W.2d 1177—Fort Worth & Denver City Ry. Co. v. Reid, Civ.App., 115 S.W.2d 1156—Universal Credit Co. v. Cunningham, Civ.App., 109 S.W.2d 507, error dismissed—Stone v. Stone, Civ.App., 101 S.W.2d 638—Murry v. Citizens' State Bank of Ranger, Civ.App., 77 S.W.2d 1104, error dismissed—Texas Employers' Ins. Ass'n v. Shelton, Civ.App., 74 S.W.2d 280—Smith v. Dunnam, Civ.App., 57 S.W.2d 873, error refused—Settles v. Milano Furniture Co., Civ.App., 51 S.W.2d 655, error refused—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, error dismissed—Scott v. McGlothlin, Civ.App., 30 S.W.2d 511, affirmed McGothlin v. Scott, Com.App., 48 S.W.2d 610—R. A. Toombs Sash & Door Co. v. Jamison, Civ.App., 271 S.W. 253—Crutcher v. Wolfe, Civ.App., 269 S.W. 841—Cooper v. Cooper, Civ.App., 260 S.W. 679—Bergeron v. Security Nat. Bank, Civ.App., 252 S.W. 856—Cole v. Varner, Civ.App., 246 S.W. 410—Taylor v. Hustead & Tucker, Civ.App., 243 S.W. 766, reversed on other grounds, Com.App., 257 S.W. 232.
Utah.—Taylor v. Guaranty Mortg. Co., 220 P. 1067, 62 Utah 520.
34 C.J. p 489 note 18.

Prima facie showing of meritorious defense in plaintiff's petition is sufficient in suit to cancel judgment.—Adams v. First Nat. Bank, Tex.Civ.App., 294 S.W. 909.

Averments held sufficient
Colo.—Ferrier v. Morris, 122 P.2d 880, 109 Colo. 154.
Del.—Battaglino v. Industrial Trust Co., 175 A. 50, 20 Del.Ch. 344.
Idaho.—Inman v. Round Valley Irr. Co., 238 P. 1018, 41 Idaho 482.
Ill.—Adams & Pigott Co. v. Allen, 141 N.E. 386, 310 Ill. 119.
Ky.—Holcomb v. Creech, 56 S.W.2d 998, 247 Ky. 199.
Mo.—Cherry v. Wertheim, App., 25 S.W.2d 118.
Or.—State Bank of Sheridan v. Heider, 9 P.2d 117, 139 Or. 185.
Tex.—Farmers' State Bank of Burkburnett v. Jameson, Com.App., 11 S.W.2d 299, rehearing denied Farmers' State Bank of Burkburnett v. Jameson, Com.App., 16 S.W.2d 526—McAfee v. Jeter & Townsend, Civ.App., 147 S.W.2d 884.

Averments held insufficient
Ark.—Pullen v. Smith, 139 S.W.2d 245, 200 Ark. 420.
Ill.—Adams & Pigott Co. v. Allen, 228 Ill.App. 230, affirmed 141 N.E. 386, 310 Ill. 119.
Mont.—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58.
Ohio.—Mosher v. Mutual Home & Savings Ass'n, App., 41 N.E.2d 871.

Allegations of original bill
Failure to allege good and meritorious defense against defendants' supplemental answer and cross bill, on which defendants obtained decree pro confesso, was supplied by averment of plaintiff's original bill that plaintiff had recovered judgment for enforcement of which he was then invoking aid of chancery jurisdiction of court, which judgment had been recorded as provided by statute, and that judgment was valid.—McCarty v. Yarbrough, 128 So. 786, 221 Ala. 330.

3. Ala.—Murphree v. International Shoe Co., 20 So.2d 782, 246 Ala. 384.
Idaho.—Inman v. Round Valley Irr. Co., 238 P. 1018, 41 Idaho 482.
34 C.J. p 489 note 19.

4. U.S.—Kithcart v. Metropolitan Life Ins. Co., C.C.A.Mo., 119 F.2d 497, certiorari denied U. S. ex rel. Kithcart v. Gardner, 62 S.Ct. 793, 315 U.S. 808, 86 L.Ed. 1207.
Cal.—Wilson v. Wilson, 130 P.2d 782, 55 Cal.App.2d 421.
Tex.—Allen v. Trentman, Civ.App., 115 S.W.2d 1177.

the original suit is not sufficient, and the facts which constitute such defense must be pleaded,[5] but it has been held that a pleading in general terms may be sufficient in the absence of special exception thereto.[6] It is not enough for complainant to aver that he has stated the facts to his attorney and that he is advised by him that he has a good defense.[7]

The rule that a meritorious defense must be pleaded does not apply where the judgment is attacked as void, rather than voidable,[8] as where the judgment was rendered without obtaining jurisdiction over the person of defendant,[9] and it has been held that this is the case whether the invalidity of the judgment appears on its face or must be shown by evidence dehors the record.[10] A complaint to set aside a judgment rendered through mistake or the like need not show a meritorious defense where the defense has already been made.[11]

Diligence and lack of fault. As a general rule, complainant in a suit in equity for relief against a judgment at law must exonerate himself from blame for the situation in which he finds himself, that is, his bill must contain proper averments to show that the judgment against him was not attributable to his own negligence or fault, and that he has been diligent in seeking to make his defense, and he must set forth the facts which he relies on as showing such diligence,[12] or, where it appears that the judgment was obtained as a result of his neglect, he

5. Ala.—Murphree v. International Shoe Co., 20 So.2d 782, 246 Ala. 384—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854, 244 Ala. 98—**Corpus Juris cited in** Little v. Peevy, 189 So. 720, 725, 238 Ala. 106.
Cal.—Brozey v. Alesen, 8 P.2d 68, 116 Cal.App. 641.
N.C.—Hinton v. Whitehurst, 198 S.E. 579, 214 N.C. 99.
Tex.—Poland v. Risher, Civ.App., 88 S.W.2d 1106, affirmed Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498—Winn v. Houston Building & Loan Ass'n, Civ.App., 45 S.W.2d 631, error refused.
Va.—Lockard v. Whitenack, 144 S.E. 606, 151 Va. 143.
34 C.J. p 489 note 20.

6. Tex.—Edwards v. Riverside Royalties Corporation, Civ.App., 99 S.W.2d 418. Error dismissed.

7. U.S.—Christy v. Atchison, T. & S. F. R. Co., D.C.Colo., 214 F. 1016.
Cal.—Eldred v. White, 36 P. 944, 102 Cal. 600.

8. Cal.—Cadenasso v. Bank of Italy, 6 P.2d 944, 214 Cal. 562.
Idaho.—Johnson v. J. A. Barrett Auto Co., 4 P.2d 344, 51 Idaho 95.
Or.—Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 150 Or. 395.

9. Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.

10. Wash.—John Hancock Mut. Life Ins. Co. v. Gooley, supra.

11. Ind.—Globe Mining Co. v. Oak Ridge Coal Co., 177 N.E. 868, 204 Ind. 11.

12. U.S.—Barnes v. Boyd, D.C.W. Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.
Ala.—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854, 244 Ala. 98—Farrell v. Farrell, 10 So.2d 153, 243 Ala. 389—McWilliams v. Martin, 188 So. 677, 237 Ala. 624—Leath v. Lister, 173 So. 59, 233 Ala. 595—Hatton v. Moseley, 156 So. 546, 229 Ala. 240—Florence Gin Co. v. City of Florence, 147 So. 417, 226 Ala. 478, followed in 147 So. 420, three cases, 226 Ala. 482, 147 So. 421, 226 Ala. 482, and 147 So. 421, 226 Ala. 483—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala. 10—Quick v. McDonald, 108 So. 529, 214 Ala. 587.
Ark.—Holthoff v. State Bank & Trust Co. of Wellston, Mo., 186 S.W.2d 162, 208 Ark. 307—Smith v. Thomas, 78 S.W.2d 380, 190 Ark. 261—Farmers' Mut. Fire Ins. Co. v. Defries, 1 S.W.2d 19, 175 Ark. 548.
Cal.—Hammell v. Britton, 119 P.2d 333, 19 Cal.2d 72—Fisher v. George, 216 P. 974, 62 Cal.App. 399—Hogan v. Horsfall, 266 P. 1002, 91 Cal. App. 37, followed in 266 P. 1005, 91 Cal.App. 797.
Del.—Di Luchio v. Otis Oil Burner Corporation, 135 A. 482, 15 Del.Ch. 229.
Ga.—Scarborough v. Information Buying Co., 154 S.E. 350, 170 Ga. 872—Brown v. Verekas, 139 S.E. 344, 164 Ga. 733.
Idaho.—Boise Payette Lumber Co. v. Idaho Gold Dredging Corporation, 58 P.2d 786, 56 Idaho 660, certiorari denied 57 S.Ct. 40, 299 U.S. 577, 81 L.Ed. 425.
Ind.—Cooper v. Farmers' Trust Co., 146 N.E. 336, 82 Ind.App. 442.
Kan.—Bitsko v. Bitsko, 122 P.2d 753, 155 Kan. 80.
Ky.—Campbell v. Chriswell, 144 S.W. 2d 802, 284 Ky. 328—Chriswell v. Campbell, 127 S.W.2d 872, 278 Ky. 30—Smith v. Patterson, 280 S.W. 930, 213 Ky. 142.
Neb.—Kielian v. Kent & Burke Co., 268 N.W. 79, 131 Neb. 308.
N.Y.—Harvey v. Comby, 280 N.Y.S. 958, 245 App.Div. 318.
Okl.—**Corpus Juris cited in** Metzger v. Turner, 158 P.2d 701, 704, 195 Okl. 406—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572.
Or.—Dixon v. Simpson, 279 P. 939, 130 Or. 211.
Tex.—Kelly v. Wright, Sup., 188 S.W.2d 983—Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498—Winters Mut. Aid Ass'n, Circle No. 2, v. Reddin, Com.App., 49 S.W.2d 1095—Smith v. Ferrell, Com.App., 44 S.W.2d 962—Grayson v. Johnson, Civ.App., 181 S.W.2d 312—Dixon v. McNabb, Civ.App., 173 S.W.2d 228, error refused—Ramsey v. McKamey, Civ.App., 138 S.W.2d 167, reversed on other grounds 152 S.W. 2d 322, 137 Tex. 91—Barrow, Wade, Guthrie & Co. v. Stroud, Civ.App., 125 S.W.2d 365—Allen v. Trentman, Civ.App., 115 S.W.2d 1177—Fort Worth & Denver City Ry. Co. v. Reid, Civ.App., 115 S.W.2d 1156—Stone v. Stone, Civ.App., 101 S.W.2d 638—Finlayson v. McDowell, Civ.App., 94 S.W.2d 1234, error dismissed—Dunlap v. Villareal, Civ. App., 91 S.W.2d 1124—Mercer v. Campbell, Civ.App., 86 S.W.2d 811—Smith v. Dunnam, Civ.App., 57 S.W.2d 873, error refused—Staley v. Vaughn, Civ.App., 50 S.W.2d 907, error refused—Honey v. Wood, Civ.App., 46 S.W.2d 334—Whittinghill v. Oliver, Civ.App., 38 S.W.2d 896, error dismissed—Maytag Southwestern Co. v. Thornton, Civ. App., 20 S.W.2d 383, error dismissed—Davis v. Cox, Civ.App., 4 S.W. 2d 1008, error dismissed—Wakefield v. Burchers, Civ.App., 4 S.W.2d 218—Citizens' Bank v. Brandau, Civ.App., 1 S.W.2d 466, error refused—Crutcher v. Wolfe, Civ.App., 269 S.W. 841—Home Ben. Ass'n of Henderson County v. Boswell, Civ.App., 268 S.W. 979—Cook v. Panhandle Refining Co., Civ.App., 267 S.W. 1070—Cole v. Varner, Civ.App., 246 S.W. 410—Taylor v. Hustead & Tucker, Civ. App., 243 S.W. 766, reversed on

must sufficiently allege that such neglect was excusable.[13] Plaintiff must also allege a sufficient excuse for delay in instituting suit,[14] and for his failure to move for a new trial during the term of the court at which the judgment was rendered,[15] or to seek relief from the judgment by appeal to a higher court.[16] However, where the ground relied on could not have been set up as a defense at law, no excuse for failure to prevent the judgment need be alleged.[17] So, where the facts make out a case from which it appears doubtful whether there is any remedy at law, or show an existing remedy to be inadequate to do complete justice, failure to make defense at law, or failure to defend successfully, need not be excused.[18] A party filing a petition under a statute authorizing equitable relief against a judgment is not required to acquit himself of negligence in failing to apply to the court of law for relief before going into equity to obtain the same relief.[19]

Injury or injustice to complainant. The bill must allege that it would be against conscience to allow the enforcement of the judgment, or that it would work injury or injustice to complainant in some specific manner.[20] Facts must be alleged; a general allegation of injury is not sufficient.[21]

Lack or loss of remedy at law. Where the nonexistence or inadequacy of a remedy at law is a condition to the granting of equitable relief against a judgment, as discussed supra § 343, complainant must sufficiently allege that he has no adequate remedy at law against the judgment, or if the case is so, that he has unavailingly exhausted his legal remedies,[22] and an averment of the insolvency of respondent may be a necessary part of this allegation.[23] However, a bill to enjoin the execution of a fraudulent judgment need not aver that plaintiff in such judgment is insolvent.[24]

other grounds, Com.App., 257 S. W. 232.
34 C.J. p 490 note 23.

Lack of notice of judgment

(1) A bill seeking to set aside a judgment at law must allege want of notice of judgment.—Murphree v. International Shoe Co., 20 So.2d 782, 246 Ala. 384.

(2) Petition alleging that plaintiff had no notice of filing of suit or rendition of judgment until several months after rendition of judgment was demurrable in failing clearly to allege that he had no knowledge of rendition of judgment during six months within which remedy of appeal by writ of error was available. —Avant v. Broun, Tex.Civ.App., 91 S. W.2d 426, error dism.

(3) Complaint in action to set aside default judgment, which did not allege that judgment was taken by surprise, inadvertence, or excusable neglect, was demurrable, notwithstanding allegation that plaintiff's attorney withdrew his appearance without plaintiff's knowledge.—Sweetman v. Peru Building & Loan Ass'n, 200 N.E. 82, 101 Ind.App. 505.

Averments held sufficient

Ala.—Garvey v. Inglenook Const. Co., 104 So. 639, 213 Ala. 267.
Mont.—Stocking v. Charles Beard Co., 55 P.2d 949, 102 Mont. 65.
Tex.—Lamb v. Isley, Civ.App., 114 S. W.2d 673, rehearing denied 115 S. W.2d 1036—Stanley v. Spann, Civ. App., 21 S.W.2d 305, error dismissed—Cook v. Panhandle Refining Co., Civ.App., 267 S.W. 1070.

Averments held insufficient

Tex.—Whittinghill v. Oliver, Civ. App., 38 S.W.2d 896, error dismissed.

13. Or.—Marsters v. Ashton, 107 P. 2d 981, 165 Or. 507.
Tex.—Padalecki v. Dreibrodt, Civ. App., 129 S.W.2d 481, error dismissed, judgment correct—McCauley v. Northern Texas Traction Co., Civ.App., 21 S.W.2d 309, error dismissed—Davis v. Cox, Civ. App., 4 S.W.2d 1008, error dismissed.

14. Ala.—Wynn v. First Nat. Bank, 159 So. 58, 229 Ala. 639.
Neb.—Hoeppner v. Bruckman, 261 N.W. 572, 129 Neb. 390.
Tex.—Garcia v. Jones, Civ.App., 155 S.W.2d 671, error refused—Ramsey v. McKamey, Civ.App., 138 S.W.2d 167, reversed on other grounds 152 S.W.2d 322, 137 Tex. 91.
34 C.J. p 490 note 24.

15. Tex.—Gehret v. Hetkes, Com. App., 36 S.W.2d 700—Lamb v. Isley, Civ.App., 114 S.W.2d 673, rehearing denied 115 S.W.2d 1036—Finlayson v. McDowell, Civ.App., 94 S.W.2d 1234, error dismissed—Whittinghill v. Oliver, Civ.App., 38 S.W.2d 896, error dismissed—Cole v. Varner, Civ.App., 246 S.W. 410—Republic Supply Co. v. Weaver, Civ.App., 235 S.W. 684.

16. Tex.—Scott v. McGlothlin, Civ. App., 30 S.W.2d 511, affirmed McGothlin v. Scott, Com.App., 48 S. W.2d 610—Republic Supply Co. v. Weaver, Civ.App., 235 S.W. 684.

17. Ala.—Stevens v. Hertzler, 22 So. 121, 114 Ala. 563.
34 C.J. p 400 note 27.

18. Ala.—Graham v. Gray, 6 So. 87, 87 Ala. 446.
Conn.—Carrington v. Holabird, 17 Conn. 531—Carrington v. Holabird, 19 Conn. 84.

19. Ala.—Garvey v. Inglenook Const. Co., 104 So. 639, 213 Ala. 267.

20. U.S.—Matheson v. National Surety Co., C.C.A.Alaska, 69 F.2d 914—David A. Manville & Co. v. Francis Oil & Refining Co., C.C.A. Okl., 20 F.2d 473.
Cal.—Machado v. Machado, 152 P.2d 457, 66 Cal.App. 401.
Tex.—Stone v. Stone, Civ.App., 101 S.W.2d 638—Citizens' Bank v. Brandau, Civ.App., 1 S.W.2d 466, error refused—Crutcher v. Wolfe, Civ.App., 269 S.W. 841—Cole v. Varner, Civ.App., 246 S.W. 410.
Utah.—Taylor v. Guaranty Mortg. Co., 220 P. 1067, 62 Utah 520.
34 C.J. p 490 note 29.
Necessity of injury to afford right to relief see supra §§ 341, 350.

Where a judgment is procured by fraud, the complaint must show not only the commission of the fraud, but also damages resulting therefrom to plaintiff.—Machado v. Machado, 152 P.2d 457, 66 Cal.App.2d 401—34 C.J. p 490 note 29 [a].

21. Ark.—Lawson v. Bettison, 12 Ark. 401.
Cal.—Machado v. Machado, 152 P.2d 457, 66 Cal.App.2d 401.

22. Mont.—Housing Authority of City of Butte v. Murtha, 144 P.2d 183, 115 Mont. 405.
N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App. Div. 191.
Okl.—Dardenne v. Daniels, 225 P. 152, 101 Okl. 201.
Tex.—Reynolds v. Volunteer State Life Ins. Co., Civ.App., 80 S.W.2d 1087, error refused.
34 C.J. p 492 note 50.

23. Ga.—McLendon v. Hooks, 15 Ga. 533.
34 C.J. p 493 note 51.

24. U.S.—Smith v. Schwed, C.C.Mo., 6 F. 455, 2 McCrary 441.
34 C.J. p 493 note 52.

What judgment should be rendered. Where the cause is one in which the court of equity may fully determine the rights of the parties and enter a final decree, as discussed infra § 397, the bill must not only plead sufficient facts to show that a judgment different from that under attack should have been rendered, but also what that different judgment should be.[25] The facts pleaded must be sufficient to authorize the court to determine the issues presented in the former suit and to render such judgment as will be an effective substitute for the one set aside.[26]

Prayer for relief. Under a prayer for general relief, there may be awarded the appropriate relief to which, on the allegations and proof, plaintiff may appear to be entitled.[27] A petition is not defective for failure to include, in addition to the general prayer for relief, a request for a new trial.[28] It has been held that, where a judgment or decree has been executed, the proper prayer for a bill to review such determination is that it be reversed, and that plaintiff be restored to his former condition or status as though the judgment or decree had not been rendered.[29]

§ 390. —— Exhibits

The bill should incorporate such exhibits as are necessary to enable the court to determine the validity of the judgment and the right to relief.

As a general rule, where relief is sought in equity against the enforcement of a judgment, complainant should incorporate in his bill or file as an exhibit a transcript of the record,[30] including the judgment,[31] pleadings,[32] and the substance of the evidence,[33] when necessary to enable the court to determine the validity of the judgment and the right to relief, and also any other documents which may be necessary to present the case fully and clearly to the mind of the court.[34] However, where the reason thus stated for the production of exhibits does not exist, the rule is not applied,[35] and it may be sufficient merely to make specific reference to the judgment or decree sought to be vacated.[36]

§ 391. —— Answer, Motion to Dismiss, and Demurrer

The defendant is entitled to file an answer to a petition for equitable relief against a judgment, or he may take objection to defects in the petition, in a proper case, by motion to dismiss or demurrer. A cross bill may sometimes be maintained.

In a proceeding for equitable relief against a judgment, defendant is entitled to file an answer.[37] Such answer should be responsive to the charges of the bill,[38] and should answer its allegations specifically and in detail,[39] and negative every hypothesis on which complainant's equity could be founded.[40] If want of jurisdiction in the equity court appears

25. Tex.—Moon v. Weber, Civ.App., 103 S.W.2d 807, error refused.

26. Tex.—Murry v. Citizens' State Bank of Ranger, Civ.App., 77 S.W.2d 1104, error dismissed—Texas Employers' Ins. Ass'n v. Shelton, Civ.App., 74 S.W.2d 280.

27. Tex.—Texas & P. R. Co. v. Miller, Civ.App., 171 S.W. 1069.
Relief afforded see infra § 397.

28. Ky.—Triplett v. Stanley, 130 S.W.2d 45, 279 Ky. 148.

29. Ill.—Wood v. First Nat. Bank of Woodlawn, 50 N.E.2d 830, 383 Ill. 515, certiorari denied 64 S.Ct. 521, 321 U.S. 765, 88 L.Ed. 1061.

30. Ky.—Curtis v. Reed, 176 S.W.2d 385, 296 Ky. 221—Harding v. Board of Drainage Com'rs of McCracken County, 13 S.W.2d 1011, 227 Ky. 661.
34 C.J. p 493 note 59.

31. Mo.—Parsons v. Wilkerson, 10 Mo. 713.
N.C.—Neville v. Pope, 95 N.C. 346.

32. Ala.—Wiggins v. Steiner, 16 So. 8, 103 Ala. 655.
34 C.J. p 493 note 61.

33. Ark.—Whitehill v. Butler, 11 S.W. 477, 51 Ark. 341.
34 C.J. p 493 note 62.

34. Md.—Michael v. Rigler, 120 A. 382, 142 Md. 125.
34 C.J. p 493 note 63.
Sufficient exhibits held filed
Md.—Michael v. Rigler, supra.

35. Ark.—Baskin v. Ætna Life Ins. Co., 79 S.W.2d 724, 190 Ark. 448.
34 C.J. p 493 note 64.
Brief of evidence
Petition to set aside judgment for fraud is not defective because of failure to file brief of evidence.—Sylvania Ins. Co. v. Johnson, 160 S.E. 788, 173 Ga. 679.

36. Ark.—Baskin v. Ætna Life Ins. Co., 79 S.W.2d 724, 190 Ark. 448.

37. Ill.—Burton v. Cahill, 34 N.E. 2d 127, 310 Ill.App. 393.
Pa.—Keystone Nat. Bank to Use of Balmer v. Deamer, Com.Pl., 32 Berks Co.L.J. 124, affirmed Keystone Nat. Bank of Manheim, now to use of Balmor v. Deamer, 18 A. 2d 540, 144 Pa.Super. 52.
Wash.—Harju v. Anderson, 234 P. 15, 133 Wash. 506, 44 A.L.R. 450.
34 C.J. p 493 note 66.
Denomination of pleas
In a suit to annul a judgment, the fact that pleas presenting whether parties were bound by consent judgment on compromise of controversy were denominated a plea of estoppel as well as an exception of no cause or right of action was immaterial.—Couret v. Couret, 18 So. 2d 661, 206 La. 85.

38. N.J.—Hazelhurst v. Sea Isle City Hotel Co., Ch., 25 A. 201.
34 C.J. p 493 note 67.
Special defense
In suit to set aside a judgment, the fact that judgment must be alleged in complaint does not preclude defendant from asserting res judicata as a special defense or claiming that other facts and issues were adjudicated which do not appear on face of complaint.—U. S. v. Kusche, D.C.Cal., 56 F.Supp. 201.

39. U.S.—Mound City Co. v. Castleman, C.C.Mo., 177 F. 510, affirming 187 F. 921, 110 C.C.A. 55.
34 C.J. p 493 note 68.

40. Mich.—Blehm v. Hanzek, 262 N.W. 403, 272 Mich. 541.
34 C.J. p 493 note 69.
Answer held to state a defense
(1) Generally.—Willard v. Barry, 152 So. 411, 113 Fla. 402.
(2) Answer pleading fully facts constituting plaintiffs' negligence was sufficient pleading of laches.—Olsen v. Crow, 290 P. 233, 133 Or. 310.

on the face of the bill, the objection may be taken by motion to dismiss,[41] or, if the bill appears to lack equity, and fails to state sufficient facts to warrant the relief prayed, respondent may demur,[42] in which case the court may determine the suit on such demurrer,[43] but the demurrer or other exception should be overruled if the petition sufficiently states grounds for the relief sought.[44] Where the bill fails to show circumstances warranting equitable relief against the judgment, it must be dismissed for want of jurisdiction, even though no demurrer is filed.[45] On exceptions to plaintiff's pleadings, the facts alleged therein must be considered as true.[46]

Cross bill. In a proper case, defendant may file a cross bill for such relief as he may be entitled to,[47] but it has been held that a cross bill which states purely a cause of action at law, without any independent equity, may not be maintained.[48]

§ 392. —— Issues, Proof, and Variance

In a suit for equitable relief against a judgment, the hearing and the proof will be restricted to the issues raised by the pleadings; plaintiff must prove all material allegations of his bill which are not admitted.

In order to enable the court to act on an application for relief against a judgment, it is necessary that the parties should frame and present distinct issues as to the matters they mean to contest,[49] and the hearing will be restricted to the issues thus raised and presented.[50] Ordinarily, if the judgment is assailed on the ground of fraud or want of jurisdiction, the court will not enter on an inquiry as to the validity of the obligation sued on or the merits of the original action,[51] further than to require complainant to offer enough proof of his alleged defense to show that, if given a trial on the merits, he could at least make a prima facie case.[52] According to some authority, however, the proof should be suf-

Matters to be specially pleaded

(1) In judgment debtor's suit against third person to set aside judgment and sale thereunder for fundamental jurisdictional defect, regularity of judgment and good faith of purchaser are defensive matters to be specially pleaded.—Morris v. Soble, Tex.Civ.App., 61 S.W.2d 139.

(2) A defense that plaintiff had an adequate remedy at law should be affirmatively pleaded.—Blehm v. Hanzek, 262 N.W. 403, 272 Mich. 541.

41. Tenn.—Shaw v. Patterson, 2 Tenn.Ch. 171.

42. Okl.—Sawyer v. Sawyer, 77 P.2d 703, 182 Okl. 348—Stout v. Derr, 42 P.2d 136, 171 Okl. 132—Burton v. Swanson, 285 P. 839, 142 Okl. 134.

34 C.J. p 493 note 71.

Demurrer held too general

A demurrer alleging that the petition failed to set forth facts constituting fraud is too general to raise any question as to whether or not the petition should have alleged fraud with greater particularity.—Mullis v. Bank of Chauncey, 150 S.E. 471, 40 Ga.App. 582.

Effect of judgment must be considered when determining whether complaint states a cause of action on a demurrer or on a motion to dismiss.—U. S. v. Kusche, D.C.Cal., 56 F.Supp. 201.

43. Ga.—Huson Ice & Coal Co. v. City of Covington, 172 S.E. 56, 178 Ga. 6.

Prior knowledge

Trial court which tried case and entered judgment from which relief was sought by bill of review could employ knowledge of issues involved in original suit in passing on demurrers to petition for review.—Dixon v. McNabb, Tex.Civ.App., 173 S.W.2d 228, error refused.

Bill held properly dismissed on demurrer

Tex.—Fort Worth & Denver City Ry. Co. v. Reid, Civ.App., 115 S.W.2d 1156—Sedgwick v. Kirby Lumber Co., Civ.App., 78 S.W.2d 1107, affirmed 107 S.W.2d 358, 130 Tex. 163—Griffith v. Tipps, Civ.App., 69 S.W.2d 846—Whittinghill v. Oliver, Civ.App., 38 S.W.2d 896, error dismissed.

44. Okl.—Arnold v. Arnold, 153 P.2d 224, 194 Okl. 571.

Tex.—Pearl Assur. Co. v. Williams, Civ.App., 167 S.W.2d 808—Sloan v. Newton, Civ.App., 134 S.W.2d 697—Dallas Development Co. v. Reagan, Civ.App., 25 S.W.2d 240.

45. Va.—McCloud v. Virginia Electric & Power Co., 180 S.E. 299, 164 Va. 604.

46. Tex.—Pearl Assur. Co. v. Williams, Civ.App., 167 S.W.2d 808.

On general demurrer to application to set aside default judgment entered at prior term of court, allegations must be accepted as true except that court may consider record in original cause, and any fact averred in application that is inconsistent with record will be given no effect.—Barrow, Wade, Guthrie & Co. v. Stroud, Tex.Civ.App., 125 S.W.2d 365.

Conclusions not admitted

A demurrer to bill for injunction did not admit allegations of bill as to irregularity of former proceeding and as to invalidity of judgment, enforcement of which was sought to be enjoined, since such allegations were mere "conclusions of law."—Viator v. Edwins, 14 So.2d 212, 195 Miss. 220, certiorari denied 64 S.Ct. 518, 321 U.S. 744, 88 L.Ed. 1047, rehearing denied 64 S.Ct. 779, 321 U.S. 804, 88 L.Ed. 1090.

47. Miss.—Prudential Ins. Co. v. Gleason, 187 So. 229, 185 Miss. 243.

Interest in partitioned property

In suit to set aside void partition proceeding, allegations and prayer of cross bill which averred that proceedings were valid, or if not, that it had been ratified, or if not ratified that cross complainant was owner of an undivided interest in entire property, or was entitled to general relief, was sufficient to require action by court on alternate contention of cross complainant as to manner in which its interest should be adjusted.—Prudential Ins. Co. v. Gleason, supra.

48. Ala.—Leath v. Lister, 173 So. 59, 233 Ala. 595.

49. Ind.—Dobbins v. McNamara, 14 N.E. 887, 113 Ind. 54, 3 Am.S.R. 626.

34 C.J. p 493 note 73.

50. Ky.—Elkhorn Coal Corporation v. Cuzzort, 284 S.W. 1005, 215 Ky. 254.

La.—National Park Bank v. Concordia Land & Timber Co., 97 So. 272, 154 La. 31.

Pa.—Miller v. Mastrocola, 2 A.2d 550, 133 Pa.Super. 210—Teutonic Building & Loan Ass'n v. Stein, 190 A. 189, 125 Pa. Super. 589.

34 C.J. p 493 note 74.

Issue of lack of jurisdiction held raised

W.Va.—Perkins v. Hall, 17 S.E.2d 795, 123 W.Va. 707.

51. Ky.—Green v. Blankenship, 91 S.W.2d 996, 263 Ky. 29.

La.—National Park Bank v. Concordia Land & Timber Co., 97 So. 272, 154 La. 31.

34 C.J. p 494 note 75.

52. Mo.—Hess v. Fox, 124 S.W. 83, 140 Mo.App. 437.

ficient to enable the court to retry the issue of defendant's liability and to render such judgment as should be entered in lieu of the one attempted to be set aside.[53]

The testimony must be limited to the points made by the pleadings;[54] and as far as it goes to support any point not in issue, it is irrelevant, and will be rejected.[55] The pleadings and the proof must correspond.[56] Plaintiff must prove all the material allegations of his bill[57] which are not admitted.[58]

§ 393. Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

With some exceptions, in a proceeding to obtain equitable relief against a judgment, presumptions will be indulged in favor of the jurisdiction of the court in which the judgment complained of was rendered, the regularity of its proceedings, and the validity of the judgment. The burden is on the party seeking relief to sufficiently establish all the facts on which he relies as the basis of his application.

As a general rule, on a bill in equity for relief against a judgment at law, presumptions will be indulged in favor of the jurisdiction of the court, the regularity of its proceedings, and the validity of the judgment,[59] at least where the judgment appears valid on its face.[60] So it will be presumed that an appearance entered for a party by an attorney was

Neb.—Bankers' Life Ins. Co. v. Robbins, 73 N.W. 269, 53 Neb. 44.

53. Tex.—Fort Worth & Denver City Ry. Co. v. Reid, Civ.App., 115 S.W.2d 1156.

54. Ky.—Cowan v. Price, 1 Bibb 173, 4 Am.D. 627.

Proof held admissible under pleadings

La.—Smith v. Williams, 2 La.App. 24.

N.Y.—Boston & M. R. R. v. Delaware & H. Co., 264 N.Y.S. 470, 238 App. Div. 191.

55. Ky.—Cowan v. Price, 1 Bibb 173, 4 Am.D. 627.

34 C.J. p 494 note 78.

56. Tenn.—Banks v. Kentucky Live Stock Ins. Co., 7 Tenn.Civ.App. 419.

34 C.J. p 494 note 79.

57. Ala.—King v. Dent, 93 So. 823, 208 Ala. 78.

Cal.—Wilson v. Wilson, 130 P.2d 782, 55 Cal.App.2d 421.

Ill.—Mohr v. Messick, 53 N.E.2d 748, 322 Ill.App. 56.

Okl.—Honeycutt v. Severin, 98 P.2d 1093, 186 Okl. 509—Oklahoma Ry. Co. v. Holt, 17 P.2d 955, 161 Okl. 165.

Or.—Marsters v. Ashton, 107 P.2d 981, 165 Or. 507.

Tex.—Sedgwick v. Kirby Lumber Co., 107 S.W.2d 358, 130 Tex. 163—Texas Employers' Ins. Ass'n v. Arnold, 88 S.W.2d 473, 126 Tex. 466—Reynolds v. Volunteer State Life Ins. Co., Civ.App., 80 S.W.2d 1087, error refused.

34 C.J. p 494 note 80.

Particular matters

(1) Fraud.

Ill.—Carroll, Schendorf & Boenicke v. Hastings, 259 Ill.App. 564.

Ky.—Hargis Commercial Bank & Trust Co.'s Liquidating Agent v. Eversole, 74 S.W.2d 193, 255 Ky. 377.

Okl.—Southwick v. Jones, 60 P.2d 774, 177 Okl. 409.

(2) Meritorious defense.

Ala.—Hanover Fire Ins. Co. v. Street, 176 So. 350, 234 Ala. 537.

Mont.—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58.

(3) Diligence and lack of fault.

Ala.—Farrell v. Farrell, 10 So.2d 153, 243 Ala. 389.

Neb.—Kielian v. Kent & Burke Co., 268 N.W. 79, 131 Neb. 308.

Okl.—Weimer v. Augustana Pension and Aid Fund, 67 P.2d 436, 179 Okl. 572.

Tex.—Goldapp v. Jones Lumber Co., Civ.App., 163 S.W.2d 229, error refused.

Judgment rendered

In suit to restrain filing of abstract of void judgment in another county, plaintiff should have introduced judgment rendered.—Scruggs v. Gribble, Tex.Civ.App., 17 S.W.2d 153.

Evidence adduced at former trial

On petition to vacate judgment because of fraud and perjury, petitioner must introduce evidence adduced at former trial which constitutes basis of complaint.—Weber v. Allen, 238 N.W. 740, 121 Neb. 833.

58. Ill.—Nicoloff v. Schnipper, 238 Ill.App. 591.

Va.—Page v. Winston, 2 Munf. 298, 16 Va. 298.

34 C.J. p 494 note 81.

59. Ga.—Watters v. Southern Brighton Mills, 147 S.E. 87, 168 Ga. 15.

Ill.—Himmel v. Straus, 6 N.E.2d 494, 288 Ill.App. 566.

Mo.—Hidden v. Edwards, 285 S.W. 462, 313 Mo. 642.

Or.—Sturm v. Cooper, 28 P.2d 231, 145 Or. 583.

Tex.—Jackson v. Wallace, Com.App., 252 S.W. 745—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed.

34 C.J. p 494 note 82.

Regularity of service

Presumption arising from judgment is in favor of regularity of service of summons on judgment debtor.

Cal.—Christie v. Superior Court in and for City and County of San Francisco, 23 P.2d 757, 218 Cal. 423.

Tex.—Smith v. Dunnam, Civ.App., 57 S.W.2d 873, error refused.

Recital

(1) Where judgment recited that matters of law and fact were heard at term at which it was rendered, and court which rendered judgment had jurisdiction of the parties and subject matter, court determining suit to set aside judgment was required to presume that such recital was true.—Gann v. Putman, Tex.Civ.App., 159 S.W.2d 931, error refused.

(2) Where decree recites cause was heard on process duly issued, served, and returned, presumption is court had process before it.—Stepp v. State Road Commission, 151 S.E. 180, 108 W.Va. 346.

Incompetent testimony

Trial court, which had admitted incompetent testimony in prior action, would presumably have excluded that testimony, if objection had been urged thereto, based on statute rendering the testimony incompetent.—Blackman v. Blackman, Tex.Civ.App., 128 S.W.2d 433, error dismissed, judgment correct.

Presumption held not successfully rebutted

W.Va.—Stepp v. State Road Commission, 151 S.E. 180, 108 W.Va. 346.

60. Tex.—Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451.

Matters of record

Verity of judgment in all matters of which it contains record will be presumed in absence of contradicting evidence.—Starkweather v. Min-

duly authorized[61] and that the judgment is based on evidence supporting it.[62] It has been held, on the other hand, that where a judgment is directly attacked as void there is no presumption as to its validity[63] with respect to the particular in which it is attacked.[64] It has been held that fraud in procuring the judgment will neither be presumed nor inferred from circumstances which are not inconsistent with good faith,[65] but there is also authority holding that fraud will be presumed where the parties stand in a relationship of trust and confidence, and there is no evidence of fair dealing.[66] The propriety of other particular presumptions has been adjudicated.[67]

Burden of proof. In general the burden of proof is on the party demanding relief against the judgment to establish by sufficient evidence all the facts on which he relies as the basis of his application.[68] Thus the party seeking relief has the burden of showing want of jurisdiction,[69] want of valid service of process,[70] or fraud or duress in the procure-

arets Mining Co., 43 P.2d 321, 5 Cal.App.2d 501.

61. Or.—Handley v. Jackson, 50 P. 915, 31 Or. 552, 65 Am.S.R. 839.
34 C.J. p 494 note 83.

62. U.S.—Moffett v. Robbins, D.C. Kan., 14 F.Supp. 602, affirmed, C. C.A., 81 F.2d 431, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L. Ed. 1397—Harrington v. Denny, D. C.Mo., 3 F.Supp. 584.
Ky.—Karr's Adm'r v. Harmon, 116 S.W.2d 947, 273 Ky. 394.
34 C.J. p 494 note 82 [a].

In absence of contrary averments
Tex.—Slider v. House, Civ.App., 271 S.W. 644—Barton v. Pochyla, Civ. App., 243 S.W. 785.

Fraud in procurement
However, the rule that, in an appeal from a judgment rendered by trial court without a jury, presumption will be indulged that trial judge based his judgment on competent evidence found in record and sufficient to support the judgment, to exclusion of improper evidence admitted, was not applicable on a direct attack by bill of review on a former judgment, for fraud in its procurement.—Blackman v. Blackman, Tex.Civ.App., 128 S.W.2d 433, error dismissed, judgment correct.

63. Ky.—Wilburn v. Wilburn, 178 S.W.2d 585, 296 Ky. 781—Ramsey's Ex'r v. Ramsey, 26 S.W.2d 37, 233 Ky. 507.

Facts essential to jurisdiction
In direct attack on judgment for plaintiff, no fact essential to court's jurisdiction over defendant is presumed.—Starkweather v. Minarets Mining Co., 43 P.2d 321, 5 Cal.App. 2d 501.

64. Tex.—First State Bank of Loraine v. Jackson, Civ.App., 13 S.W. 2d 979.

65. Cal.—Otis v. Zeiss, 165 P. 524, 175 Cal. 192.
34 C.J. p 494 note 84.

66. Cal.—Young v. Young Holdings Corporation, 80 P.2d 723, 27 Cal. App.2d 129.

67. Tex.—Snell v. Knowles, Civ. App., 87 S.W.2d 871, error dismissed.

Particular presumptions indulged
(1) That matter was still pending in probate court.—Larrabee v. Tracy, 104 P.2d 61, 39 Cal.App.2d 593.

(2) That a party was legally cited by publication as recited in the judgment.—Ward v. Hinkle, Civ. App., 252 S.W. 236, reversed on other grounds 8 S.W.2d 641, 117 Tex. 566.

Retention of knowledge of defendant's residence was not presumed. —Snell v. Knowles, Tex.Civ.App., 87 S.W.2d 871, error dismissed.

68. Ala.—Wise v. Merritt, 134 So. 468, 223 Ala. 54, certiorari denied Wise v. Miller, 52 S.Ct. 30, 284 U. S. 650, 76 L.Ed. 552.
Ill.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.
Ind.—Julien v. Lane, 157 N.E. 114, second case, 95 Ind.App. 139.
Iowa.—Thoreson v. Central States Electric Co., 283 N.W. 253, 225 Iowa 1406—Sloan v. Jepson, 252 N. W. 535, 217 Iowa 1082.
La.—Succession of St. Ange, 109 So. 909, 161 La. 1085.
Miss.—Walton v. Gregory Funeral Home, 154 So. 717, 170 Miss. 129 —Hirsch Bros. & Co. v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 88 A.L.R. 1.
Ohio.—Washington v. Levinson, 35 N.E.2d 161, 66 Ohio App. 461.
Okl.—McBride v. Cowen, 216 P. 104, 90 Okl. 130.
Or.—Davidhizar v. Gaulke, 280 P. 499, 130 Or. 492.
Pa.—Sears v. Birbeck, 184 A. 6, 321 Pa. 375.
Tex.—Pennington v. Bevering, Com. App., 17 S.W.2d 772—Kelley v. Wright, Civ.App., 184 S.W.2d 649, affirmed, Sup., 188 S.W.2d 983—Loomis v. Balch, Civ.App., 181 S. W.2d 849—Panther Oil & Grease Mfg. Co. v. Crews, Civ.App., 124 S. W.2d 436—Williams v. Tooke, Civ. App., 116 S.W.2d 1114, error dismissed—Snell v. Knowles, Civ. App., 87 S.W.2d 871, error dismissed—Baldwin v. Stamford State Bank, Civ.App., 82 S.W.2d 701, error refused—Ritch v. Jarvis, Civ. App., 64 S.W.2d 831, error dismissed—Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W. 2d 418, reversed on other grounds Greathouse v. Fort Worth & Denver City Ry. Co., Com.App., 65 S. W.2d 762.
Utah.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.
34 C.J. p 446 note 65, p 494 note 85.

Issue of execution
However, plaintiff was relieved of burden to prove no execution issued, where defendant pleaded as execution order of sale which was insufficient.—Carlton v. Hoff, Tex.Civ.App., 292 S.W. 642.

Judgment valid on record
Where judgment attacked, when record was consulted, was shown to be a valid judgment, burden rested on judgment debtor seeking to set aside the judgment to show the contrary.—Johnson v. Cole, Tex.Civ.App., 138 S.W.2d 910, error refused.

Release or satisfaction
Burden of showing release or equitable satisfaction of judgment was on judgment debtor, suing to enjoin collection.—Davidhizar v. Gaulke, 280 P. 499, 130 Or. 492.

69. Cal.—Del Campo v. Camarillo, 98 P. 1049, 154 Cal. 647.
34 C.J. p 494 note 86.

70. Ark.—Davis v. Ferguson, 261 S.W. 905, 164 Ark. 340.
Cal.—Christie v. Superior Court in and for City and County of San Francisco, 23 P.2d 757, 218 Cal. 423.
Ill.—Michalowski v. Stefanowski, 58 N.E.2d 264, 324 Ill.App. 363—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E. 2d 582, 303 Ill.App. 516.
Ky.—Billingsly v. Pearcy, 65 S.W. 2d 699, 251 Ky. 546.
Mich.—Gross v. Kellner, 219 N.W. 620, 242 Mich. 656.
Tex.—Citizens Mut. Life & Accident Ass'n of Texas v. Gillespie, Civ. App., 93 S.W.2d 200—Winter v. Davis, Civ.App., 10 S.W.2d 181, error refused.
W.Va.—Brinegar v. Bank of Wyoming, 130 S.E. 151, 100 W.Va. 64.
34 C.J. p 494 note 87.

Notice to manager
However, where, in a suit to set aside a judgment on the ground that no notice of suit was served on

ment of the judgment,[71] and also, in a proper case, that he had a meritorious defense to the former suit[72] which he was prevented from urging by fraud, accident, or the act of the other party[73] without fault or negligence on his part,[74] that he has not been negligent in failing to seek his remedy at law[75] or in delaying institution of the present suit,[76] and that enforcement of the judgment would result in injury or injustice to him.[77]

On the other hand, it has been held that, where the complaint alleged sufficient facts to show prima facie the invalidity of the judgment, the burden is on defendant to establish its validity,[78] and that, where the parties stand in a relationship of trust and confidence to each other, defendant may have the burden of establishing his fair dealing in obtaining judgment.[79] Where the complainant has established a right in equity to set aside the judgment on some recognized ground and shows the existence of a substantial controversy, which is predicated on a plea denying the allegations of the complaint by which the burden would be on plaintiff in the action at law, the same burden should be the rule in the trial of that issue in the equity suit.[80]

b. Admissibility

In proceedings for equitable relief against a judgment, only legal evidence tending to establish or disprove the facts in issue is admissible.

In proceedings to set aside a judgment, or to enjoin the enforcement thereof, evidence is admissible on the part of defendant as well as on the part of complainant.[81] The record of the case in which the judgment was rendered is ordinarily admissible in evidence,[82] including a transcript of the evidence,

plaintiff company, the officer's return on the original notice purported to show service on two of plaintiff's officers, and such officers denied having been served, no burden of proof rested on plaintiff to show they notified the manager of the company.—Des Moines Coal & Coke Co. v. Marks Inv. Co., 195 N.W. 597, 197 Iowa 589, modified on other grounds on rehearing 197 N.W. 628, 197 Iowa 589.

71. Cal.—Church v. Church, 105 P. 2d 643, 40 Cal.App.2d 701.
Ill.—Woodworth v. Sandin, 20 N.E. 2d 603, 371 Ill. 302.
Ind.—Postal v. Postal, 136 N.E. 570, 192 Ind. 376.
Ky.—Hargis v. Hargis, 66 S.W.2d 59, 252 Ky. 198.
Me.—In re Baker's Estate, 195 A. 202, 135 Me. 377.
Mich.—Karasek v. People's State Trust & Savings Bank of Pontiac, 247 N.W. 765, 262 Mich. 636.
Mo.—Wuelker v. Maxwell, App., 70 S.W.2d 1100.
N.J.—Mittenbuhler v. Kessler Trucking Co., 181 A. 163, 119 N.J.Eq. 100.
Or.—Sturm v. Cooper, 28 P.2d 231, 145 Or. 583.
Tenn.—**Corpus Juris cited in** Hartman v. Spivey, 123 S.W.2d 1110, 1114, 22 Tenn.App. 435.
34 C.J. p 494 note 88.

72. U.S.—Wheiles v. Ætna Life Ins. Co., C.C.A.Tex., 68 F.2d 99.
Ala.—Wise v. Merritt, 134 So. 468, 223 Ala. 54, certiorari denied Wise v. Miller, 52 S.Ct. 30, 284 U.S. 650, 76 L.Ed. 552.
Miss.—Walton v. Gregory Funeral Home, 154 So. 717, 170 Miss. 129.
Ohio.—Washington v. Levinson, 35 N.E.2d 161, 66 Ohio App. 461.
Okl.—McBride v. Cowen, 216 P. 104, 90 Okl. 130.
Pa.—Miller v. Mastrocola, 2 A.2d 550, 133 Pa.Super. 210.
Tex.—Stewart v. Byrne, Com.App., 42 S.W.2d 234—Hicks v. Wallis Lumber Co., Civ.App., 137 S.W.2d 93—Citizens Mut. Life & Accident Ass'n of Texas v. Gillespie, Civ. App., 93 S.W.2d 200—Baldwin v. Stamford State Bank, Civ.App., 82 S.W.2d 701, error refused.
34 C.J. p 495 note 89.

Prima facie showing
In suit to set aside judgment, burden is on plaintiff to offer proof sufficient to make a prima facie showing of meritorious action and something more than mere allegations are necessary.—Thoreson v. Central States Electric Co., 283 N.W. 253, 225 Iowa 1406.

73. U.S.—Wheiles v. Ætna Life Ins. Co., C.C.A.Tex., 68 F.2d 99.
Tex.—Hicks v. Wallis Lumber Co., Civ.App., 137 S.W.2d 93.
34 C.J. p 495 note 90.

74. U.S.—Wheiles v. Ætna Life Ins. Co., C.C.A.Tex., 68 F.2d 99.
La.—Mercantile Adjustment Co. v. Powers, 5 La.App. 534.
Neb.—Martindale v. Panter, 289 N. W. 869, 137 Neb. 522.
Okl.—McBride v. Cowen, 216 P. 104, 90 Okl. 130.
Tex.—Hicks v. Wallis Lumber Co., Civ.App., 137 S.W.2d 93.
34 C.J. p 495 note 91.

Rebuttal of presumption
Petitioner seeking to set aside judgment must rebut presumption of negligence in not objecting when court rendered judgment.—Scarborough v. Information Buying Co., 154 S.E. 350, 170 Ga. 872.

75. Neb.—Martindale v. Panter, 289 N.W. 869, 137 Neb. 522.
Tex.—Stewart v. Byrne, Com.App., 42 S.W.2d 234—Petty v. Mitchell, Civ. App., 187 S.W.2d 138, error refused—Citizens Mut. Life & Accident Ass'n of Texas v. Gillespie, Civ. App., 93 S.W.2d 200.
34 C.J. p 495 note 92.

76. Ala.—Fletcher v. First Nat. Bank of Opelika, 11 So.2d 854, 244 Ala. 98.

77. Utah.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.

78. Colo.—Ferrier v. Morris, 122 P. 2d 880, 109 Colo. 154.

79. Cal.—Young v. Young Holdings Corporation, 80 P.2d 723, 27 Cal. App.2d 129.

80. Ala.—Hanover Fire Ins. Co. v. Street, 176 So. 350, 234 Ala. 537.

Existence of verbal contract
Where only matter as to which bill in equity to set aside a judgment against complainant showed a controversy was the existence of verbal contract sued on in law action, burden was on defendants, as plaintiffs in law action, to establish the contract after complainant established a right to set aside judgment, while all other matters set up as a meritorious defense were by way of confession and avoidance and burden was on complainant to establish them.—Hanover Fire Ins. Co. v. Street, supra.

81. Okl.—Travis v. Aaronson, 228 P. 958, 102 Okl. 210.
34 C.J. p 495 note 98.

Absence of fraud
In action to set aside judgment for fraud, any evidence tending to prove no fraud is admissible, whether under general denial or specific allegations of answer.—Travis v. Aaronson, 228 P. 958, 102 Okl. 210.

82. W.Va.—Stewart v. Tennant, 44 S.E. 223, 52 W.Va. 559.
34 C.J. p 495 note 93.

Petition and judgment
In suit to set aside decree removing minor's disabilities, court might use petition and judgment in former suit to determine whether or not that court had jurisdiction.—Hobbs v. Boyd, Tex.Civ.App., 292 S.W. 947.

if properly authenticated,[83] and also the record of another judgment bearing on the facts in controversy,[84] as well as any collateral memorandum or agreement between the parties[85] or other legal evidence tending to establish the facts in issue.[86] On the other hand, evidence which is not competent or relevant to the issues in controversy is not admissible.[87] Independent transactions, not in any way connected with the transaction between the parties to the suit, are not admissible in evidence.[88]

Parol evidence is admissible to prove such facts as naturally rest in pais,[89] such as lack of negligence[90] or complainant's knowledge of the pendency of the action against him,[91] but not to modify or explain away the purport or terms of the judgment,[92] except where the judgment is attacked on the ground of fraud or mistake.[93]

c. Weight and Sufficiency

(1) In general

(2) Fraud, perjury, collusion, or other misconduct

(1) In General

In order to warrant equitable relief against a judgment, the complainant's case must be supported by clear, satisfactory, and convincing evidence, preponderating distinctly in his favor.

In order to justify a court of equity in setting aside or enjoining the enforcement of a judgment, the complainant's case, including alike the specific grounds on which he asks equitable relief, his excuse for not making his defense in the original action, and the showing that he himself is free from fault or negligence, must be supported by clear, satisfactory, and convincing evidence, preponderating distinctly in his favor,[94] and this rule has been

Docket entries

In action in nature of bill of review to set aside judgment, docket entries made in suit wherein judgment was rendered were competent on issue whether or not defendants in that suit were negligent in failing to appear and defend suit.—Hill v. Lester, Tex.Civ.App., 91 S.W.2d 1152, error dismissed.

83. Ill.—Brown v. Luehrs, 79 Ill. 575.

84. Tex.—Watson v. Rainey, 6 S.W. 840, 69 Tex. 319—Bilger v. Buchanan, 6 S.W. 408.

85. Ky.—Mason v. Holmes, 4 Bibb. 263.
N.J.—Sanders v. Wagner, 32 N.J.Eq. 506.

86. Ill.—Marnik v. Cusack, 148 N.E. 42, 317 Ill. 362—Myers v. American Nat. Bank & Trust Co. of Chicago, 277 Ill.App. 378.
Ind.—Dearing v. Speedway Realty Co., 40 N.E.2d 414, 111 Ind.App. 585.
Ky.—Turner v. Gambill, 121 S.W.2d 705, 275 Ky. 330.
Mass.—Town of Hopkinton v. B. F. Sturtevant Co., 139 N.E. 107, 285 Mass. 272.
Miss.—Hirsch Bros. & Co. v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 38 A.L.R. 1.
Wis.—Federal Life Ins. Co. v. Thayer, 269 N.W. 547, 222 Wis. 658.
34 C.J. p 495 note 97—47 C.J. p 438 note 74 [a].

Extrinsic evidence

Where attack on judgment is direct or of such nature as to be governed by rules relating to direct attacks, extrinsic evidence is admissible to establish any facts which will furnish basis for decree vacating judgment in equitable action for such purpose.
Cal.—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318.
Utah.—Boston Acme Mines Development Co. v. Clawson, 240 P. 165, 66 Utah 103.

87. Ga.—Continental Casualty Co. v. White, 173 S.E. 117, 178 Ga. 287—Brannan v. Mobley, 150 S.E. 76, 169 Ga. 243.
Ill.—Marnik v. Cusack, 148 N.E. 42, 317 Ill. 362.
La.—Davis v. Southland Inv. Co., App., 149 So. 303.
Mo.—Winchell v. Gaskill, 190 S.W.2d 266—National Union Fire Ins. Co. v. Vermillion, App., 19 S.W.2d 776—State ex rel. Woolman v. Guinotte, 282 S.W. 68, 221 Mo.App. 466.
N.C.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.
Tex.—Panhandle Const. Co. v. Casey, Civ.App., 66 S.W.2d 705, error refused.
34 C.J. p 495 note 97 [b], [c].

Particular evidence held inadmissible

(1) Record in action in which judgment sought to be set aside for fraud was obtained would be inadmissible, where tendered to show intrinsic fraud rather than extrinsic fraud.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.

(2) Plaintiffs' testimony, in spouses' suit to set aside judgment on their confession of judgment note, that they never read instrument before signing it and were not informed that it contained homestead waiver, was inadmissible to support their allegations of fraud and error in connection with signing thereof.—Jeffcoat v. Hammons, La.App., 160 So. 182.

Ex parte affidavits

In equity suit to vacate judgment, ex parte affidavits are not competent evidence to establish allegations of meritorious defense to original action.—Honeycutt v. Severin, 98 P.2d 1093, 186 Okl. 509.

88. Tex.—Lyon-Taylor Co. v. Johnson, Civ.App., 195 S.W. 875.
34 C.J. p 495 note 99.

89. Miss.—Keanum v. Southern Ry. Co., 119 So. 301, 151 Miss. 784.
34 C.J. p 495 note 1.

Evidence held inadmissible to modify terms of will

Cal.—Vincent v. Security-First Nat. Bank of Los Angeles, 155 P.2d 63, 67 Cal.App.2d 602.

90. Tex.—Dalhart Real Est. Agency v. Le Master, 132 S.W. 860, 62 Tex.Civ.App. 579.

91. Conn.—Blakeslee v. Murphy, 44 Conn. 188.

92. Ark.—Fowler v. Williams, 20 Ark. 641.
34 C.J. p 495 note 4.

93. Mo.—Engler v. Knoblaugh, 110 S.W. 16, 131 Mo.App. 481.
Tex.—Weir v. Carter, Civ.App., 169 S.W. 1113.

94. Ga.—Jones v. Jones, 184 S.E. 271, 181 Ga. 747.
Ky.—Walker v. Perkins, 76 S.W.2d 251, 256 Ky. 442.
Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.
Neb.—Messing v. Dwelling House Mut. Ins. Co., 226 N.W. 914, 119 Neb. 36.
Pa.—Stoner, now for Use of Dinch, v. Wise, 200 A. 320, 331 Pa. 446—Miller v. Mastrocola, 2 A.2d 550, 133 Pa.Super. 210—Mook v. Larsen, Com.Pl., 23 Erie Co. 320—Simcoe v. Szukegs, Com.Pl., 27 North.Co. 182—Williams Valley Sav. Fund v. Daub, Com.Pl., 8 Sch.Reg. 104—Nauyalis v. White, Com.Pl., 7 Sch. Reg. 166—Sugarman v. Baldini, Com.Pl., 28 West.Co.L.J. 99.

applied in determining the sufficiency of evidence in suits for relief against a judgment because of unavoidable casualty, mistake, inadvertence, or excusable neglect.[95] An injunction restraining the

Tex.—Ansley v. Moody, Civ.App., 146 S.W.2d 243, error refused—Mendlovitz v. Samuels Shoe Co., Civ.App., 5 S.W.2d 559.
34 C.J. p 495 note 6.

Measure of proof

Same measure of proof as in proceeding to reform instrument was not necessarily required in suit to open judgment on note to interpose defense of payment, where maker admitted note's validity.—Nescopeck Nat. Bank v. Smith, 165 A. 526, 108 Pa.Super. 553.

Records good on face

In proceeding to vacate previous decree, wherein complaint alleged that decree was rendered without notice and obtained by fraud, and brought decree and records previously made into issue, such records were good on their face until properly impeached.—Berry v. Sims, 112 S.W.2d 25, 195 Ark. 326.

Evidence held sufficient

(1) To establish no negligence of plaintiff in failing to discover default judgment within time allowed for vacation of judgment by default.—Stocking v. Charles Beard Co., 55 P.2d 949, 102 Mont. 65.

(2) To show that defendant was not negligent in failing to answer.—Hanson v. Pratt, Tex.Civ.App., 51 S.W.2d 629, error dismissed.

(3) To support finding that answer and copy thereof were mailed so as to permit setting aside of default judgment.—Hallett v. Slaughter, 140 P.2d 3, 22 Cal.2d 552.

(4) To support finding that former judgment was erroneous.—Rivers v. Griffin, Tex.Civ.App., 16 S.W.2d 874.

(5) To warrant denial of relief.
Fla.—Miami Bank & Trust Co. v. Frank T. Budge Co., 145 So. 192, 107 Fla. 581.
La.—Love v. Woodard, 190 So. 396, 193 La. 251—Saucier v. McLean, 125 So. 163, 12 La.App. 158.
Mass.—Oliver v. Brazil, 192 N.E. 486, 288 Mass. 252.
Mich.—Racho v. Woeste, 9 N.W.2d 827, 305 Mich. 522.
Tex.—Fowler v. Roden, 105 S.W.2d 187, 129 Tex. 599—Richardson v. Kelly, Civ.App., 179 S.W.2d 991, affirmed, Sup., 191 S.W.2d 857—Stevenson v. Thomas, Civ.App., 56 S.W.2d 1095, error dismissed—Shaw v. Etheridge, Civ.App., 15 S.W.2d 722.

(6) To warrant setting aside of judgment.
Ind.—Globe Mining Co. v. Oak Ridge Coal Co., 177 N.E. 868, 204 Ind. 11.
Ky.—Harris v. Sparks, 1 S.W.2d 772, 222 Ky. 472.
La.—National Park Bank v. Concordia Land & Timber Co., 97 So. 272, 154 La. 31—Engeran v. Consolidated Companies, App., 147 So. 743.
Mo.—Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 338 Mo. 31.
Mont.—Stocking v. Charles Beard Co., 55 P.2d 949, 102 Mont. 65.
N.J.—Crandol v. Garrison, 169 A. 507, 115 N.J.Eq. 11.
Pa.—Price v. Shultz, 85 Pa.Super. 78.
Tex.—McAfee v. Jeter & Townsend, Civ.App., 147 S.W.2d 884—Hanson v. Pratt, Civ.App., 51 S.W.2d 629, error dismissed—Hadad v. Ellison, Civ.App., 283 S.W. 193.
47 C.J. p 438 note 77.

(7) As to other particular matters.
Cal.—Kupfer v. MacDonald, 122 P.2d 271, 19 Cal.2d 566—Kupfer v. Brawner, 122 P.2d 268, 19 Cal.2d 562.
Ill.—Francis v. Legris, 17 N.E.2d 359, 297 Ill.App. 164—Goelitz v. Lathrop, 3 N.E.2d 305, 286 Ill.App. 248.
Mont.—Stocking v. Charles Beard Co., 55 P.2d 949, 102 Mont. 65.
Tex.—Early v. Burns, Civ.App., 142 S.W.2d 260, error refused—Clarkson v. Ruiz, Civ.App., 140 S.W.2d 206, error dismissed, judgment correct—Johnson v. Cole, Civ.App., 138 S.W.2d 910, error refused—Snell v. Knowles, Civ.App., 87 S.W.2d 871, error dismissed.
Va.—Lockard v. Whitenack, 144 S.E. 606, 151 Va. 143—Fitchette v. Cape Charles Bank, 132 S.E. 688, 146 Va. 715, affirmed 133 S.E. 492, 146 Va. 715.
Wash.—Puett v. Bernhard, 71 P.2d 406, 191 Wash. 557.
34 C.J. p 495 note 6 [d] (1)—47 C.J. p 438 note 74 [d].

Evidence held insufficient

(1) To establish agreement of defendant to buy judgment against plaintiff at discount for plaintiff's benefit.—Davidhizar v. Gaulke, 280 P. 499, 130 Or. 492.

(2) To warrant recovery for complainant.
Ala.—Greer v. Altoona Warehouse Co., 20 So.2d 513, 246 Ala. 297.
Ill.—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 365 Ill. 588—Crane Co. v. Parker, 136 N.E. 733, 304 Ill. 331—Ryan v. Wilson, 23 N.E.2d 366, 302 Ill.App. 18—Calbreath v. Beckwith, 260 Ill.App. 7.
Iowa.—Snyder v. Federal Land Bank of Omaha, 284 N.W. 157, 226 Iowa 341—Galvin v. Taylor, 212 N.W. 709, 203 Iowa 1139.
Ky.—Nicholson v. Ausmus, 132 S.W. 2d 748, 280 Ky. 99—Frederick v. Rowe, 93 S.W.2d 349, 263 Ky. 706.
La.—Whitbeck v. Hughes, 134 So. 255, 172 La. 380—Henderson v. C. M. Thibodeaux Co., App., 177 So. 414.
N.J.—Wolf v. Federal Deposit Ins. Corporation, 28 A.2d 219, 132 N.J. Eq. 389.
Okl.—Oklahoma Ry. Co. v. Holt, 17 P.2d 955, 161 Okl. 165.
Pa.—Stoner, now for Use of Dinch. v. Wise, 200 A. 320, 331 Pa. 446.
Tex.—Richardson v. Kelly, 191 S.W. 2d 857—Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451—Panther Oil & Grease Mfg. Co. v. Crews, Civ.App., 124 S.W.2d 436—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed—Reasonover v. Reasonover, Civ. App., 43 S.W.2d 174, error dismissed—Crutcher v. Wolfe, Civ. App., 269 S.W. 841.
Utah.—Anderson v. State, 238 P. 557, 65 Utah 512.
Va.—Lockard v. Whitenack, 144 S.E. 606, 151 Va. 143.
W.Va.—Lyons v. Steele, 169 S.E. 481, 113 W.Va. 652.

(3) As to other particular matters.
Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.
Ky.—Sowards v. Sowards, 61 S.W. 2d 609, 249 Ky. 742.
La.—Green v. Barnett, 120 So. 666, 10 La.App. 212.
34 C.J. p 495 note 6 [e].

Joint complaint

Where complaint for new trial after default was joint, evidence must warrant granting of new trial as to both applicants.—Julien v. Lane, 157 N.E. 114 (second case), 95 Ind.App. 139.

95. Wis.—Kiel v. Scott & Williams, 202 N.W. 672, 186 Wis. 415.

Proof beyond reasonable doubt

"Sufficient evidence," within rule that action in equity to set aside default judgment entered because of mistake of officer of court in failing to record filing of answer must be based on sufficient and substantial evidence, is that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt.—State ex rel. Sterling v. Shain, 129 S.W.2d 1048, 344 Mo. 891.

Authority of counsel

In proceeding to be relieved from judgment on ground that it was entered through defendant's mistake, inadvertence, and excusable neglect, the appearance of counsel for defendant in action wherein judgment was rendered was prima facie evidence of counsel's authority to appear for defendant.—Vail v. Department of Financial Institutions of Indiana, 17 N.E.2d 854, 106 Ind.App. 39.

collection of a judgment will not be granted if there is reasonable doubt of the existence of the facts on which the application is founded.[96] Where the rights of innocent third persons have become involved, the courts will be more exacting as to the quantum of proof required.[97]

Where, as discussed supra § 349, a meritorious defense to the cause of action is required to be shown, such defense must be fully set forth and clearly proved.[98] It is, however, sufficient to make a prima facie showing of the truth or existence of the defense.[99] The same certainty of proof is not required to establish an excuse for not making a defense at law that would be required to establish the existence of that defense;[1] but if the excuse is not proved it avails nothing to prove the defense.[2]

Lack of proper citation or notice of proceedings. Where it is sought to set aside a judgment for lack of proper citation or notice of the proceedings, the proof must be clear and convincing to entitle complainant to relief.[3] While the recital in a judg-

Evidence held sufficient
Ark.—Halliday v. Fenton, 260 S.W. 961, 164 Ark. 11.
Ga.—Thomas v. Fred W. Amend Co., 26 S.E.2d 415, 196 Ga. 455.
Iowa.—Thoreson v. Central States Electric Co., 283 N.W. 253, 225 Iowa 1406—Clarke v. Smith, 192 N.W. 136, 195 Iowa 1299.
Ky.—Ohio Valley Fire & Marine Ins. Co.'s Receiver v. Newman, 13 S.W.2d 771, 227 Ky. 554—Collins' Ex'rs v. Bonner, 294 S.W. 1027, 220 Ky. 212.

Evidence held insufficient
Ark.—Beth v. Harris, 188 S.W.2d 119, 208 Ark. 903—Farmers' Mut. Fire Ins. Co. v. Defries, 1 S.W.2d 19, 175 Ark. 548.
Ga.—Gladden v. Mobley, 159 S.E. 569, 173 Ga. 48.
Ind.—Vail v. Department of Financial Institutions of Indiana, 17 N.E.2d 854, 106 Ind.App. 39—Julien v. Lane, 157 N.E. 114 (second case), 95 Ind.App. 139.
Ky.—Overstreet v. Grinstead's Adm'r, 140 S.W.2d 836, 283 Ky. 73—McCommas v. McCawley, 14 S.W.2d 1057, 228 Ky. 263.
Mo.—Millikin v. Anderson, App., 269 S.W. 675.

96. U.S.—Nelson v. First Nat. Bank of Killingley, C.C.Minn., 70 F. 526.

97. Tex.—Pierce v. Pierce, Civ.App., 218 S.W. 144—Pierce v. Southern Baptist Convention Foreign Mission Bd., Civ.App., 218 S.W. 140.

98. Tex.—Humphrey v. Harrell, Com.App., 29 S.W.2d 963.
34 C.J. p 496 note 10.

Evidence held sufficient
(1) To show meritorious defense.
Ark.—McClintock v. Lankford, 224 S.W. 488, 145 Ark. 254.
Mo.—Crown Drug Co. v. Raymond, App., 51 S.W.2d 215.
Tex.—Hadad v. Ellison, Civ.App., 283 S.W. 193.

(2) To support finding of insufficient defense.—National Hardware & Stove Co. v. Walters, Tex.Civ.App., 58 S.W.2d 146, error refused—Walker v. Chatterton, Tex.Civ.App., 192 S.W. 1085.

Evidence held insufficient
Iowa.—Thoreson v. Central States Electric Co., 283 N.W. 253, 225 Iowa 1406.
Tex.—First State Bank of Loraine v. Jackson, Civ.App., 13 S.W.2d 979.

99. Iowa.—Clarke v. Smith, 192 N.W. 136, 195 Iowa 1299.
Ohio.—Minetti v. Elnhorn, 173 N.E. 243, 36 Ohio App. 310.
34 C.J. p 496 note 11.

1. Tenn.—Rice v. Railroad Bank, 7 Humphr. 39.

2. Va.—Turner v. Davis, 7 Leigh 227, 34 Va. 227, 30 Am.D. 502.

3. Ala.—Bastian - Blessing Co. v. Gewin, 117 So. 197, 217 Ala. 592.
Cal.—Petersen v. Vane, 134 P.2d 6, 57 Cal.App.2d 58—De Tray v. Chambers, 297 P. 575, 112 Cal.App. 697.
Ill.—Nikola v. Campus Towers Apartment Bldg. Corporation, 25 N.E.2d 582, 303 Ill.App. 516.
Ky.—McGuire v. Cope, 9 S.W.2d 528, 225 Ky. 521.
Mich.—Garey v. Morley Bros., 209 N.W. 116, 234 Mich. 675.
Miss.—Hirsch Bros. & Co. v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 88 A.L.R. 1.
S.C.—Laurens Trust Co. v. Copeland, 151 S.E. 617, 154 S.C. 390.
Tex.—Panhandle Const. Co. v. Casey, Civ.App., 66 S.W.2d 705, error refused.
34 C.J. p 495 note 6 [b], [c].

Evidence held sufficient
(1) To sustain judgment for complainant generally.
Ark.—Collier v. Mississippi Beneficial Life Ins. Co., 261 S.W. 39, 164 Ark. 54.
Ill.—Kulikowski v. North American Mfg. Co., 54 N.E.2d 411, 322 Ill. App. 202.
Ky.—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818.
La.—Dickey v. Pollock, App., 183 So. 48—Model Cleaners & Dyers v. Falcone, 123 So. 483, 11 La.App. 218.

(2) To sustain judgment for defendant generally.
Ala.—Wright v. Fannin, 156 So. 849, 229 Ala. 278.
Ky.—Miller v. National Bank of London, 116 S.W.2d 320, 273 Ky. 243.
Tex.—Murry v. Citizens' State Bank of Ranger, Civ.App., 77 S.W.2d 1104, error dismissed.

(3) To show service of process.
Ark.—Horn v. Hull, 275 S.W. 905, 169 Ark. 463.
Cal.—Christie v. Superior Court in and for City and County of San Francisco, 23 P.2d 757, 218 Cal. 423.
Iowa.—Sloan v. Jepson, 252 N.W. 535, 217 Iowa 1082.
Ky.—Billingsly v. Pearcy, 65 S.W.2d 699, 251 Ky. 546.
Mich.—Schlussel v. Ruhf, 229 N.W. 514, 249 Mich. 647.
W.Va.—Stepp v. State Road Commission, 151 S.E. 180, 108 W.Va. 346.
34 C.J. p 495 note 6 [d] (3).

(4) To show want of service of process.
Ark.—Brookfield v. Harrahan Viaduct Improvement Dist., 54 S.W.2d 689, 186 Ark. 599.
Kan.—Gibson v. Enright, 9 P.2d 971, 135 Kan. 181.
La.—Nolan v. Schultze, 126 So. 513, 169 La. 1022.
Mich.—Argo Oil Corporation v. R. D. Mitchell, Inc., 257 N.W. 852, 269 Mich. 418—Reves v. Hillmer, 239 N.W. 328, 256 Mich. 239.
Tex.—Panhandle Const. Co. v. Casey, Civ.App., 66 S.W.2d 705, error refused—Laurenson v. Carrell, Civ. App., 289 S.W. 1024.
34 C.J. p 495 note 6 [d] (4).

(5) To support findings favorable to plaintiff on question of plaintiff's knowledge or notice of commencement or pendency of action wherein judgment was entered.—Husar v. Husar, 119 P.2d 798, 48 Cal.App.2d 326.

(6) To sustain finding that plaintiff was properly served as a fictitious defendant.—Petersen v. Vane, 134 P.2d 6, 57 Cal.App.2d 58.

Evidence held insufficient
(1) To warrant judgment for plaintiff.—First Nat. Bank v. Dalsheimer, 248 S.W. 575, 157 Ark. 464.

(2) To show service of process.
Cal.—Noble v. Blanchard, 8 P.2d 523, 120 Cal.App. 664.
La.—Polk v. Saunders, 133 So. 777, 16 La.App. 174.

ment that process was served is not conclusive,[4] the falsity of the recital must be shown by clear and convincing testimony and not merely by a preponderance of the evidence.[5] It has been held that the officer's return showing service may not be impeached by the testimony of one witness unless it is strongly corroborated by other evidence.[6]

(2) Fraud, Perjury, Collusion, or Other Misconduct

To warrant equitable relief against a judgment on the ground of fraud, collusion, or other misconduct, the proof in support of the allegations must be clear, distinct, and certain, and an especially high degree of proof is required in the case of a charge of perjury.

To entitle a complainant to relief in equity against a judgment on the ground of fraud, collusion, or other misconduct, the proof in support of the allegations must be clear, distinct, and certain,[7] and, according to some decisions, so cogent and

(3) To show want of service of process.

Ark.—Davis v. Ferguson, 261 S.W. 905, 164 Ark. 340.

Ky.—Nicholson v. Thomas, 127 S.W.2d 155, 277 Ky. 760.

La.—Roque v. Henry, App., 189 So. 358.

Tex.—Wedgeworth v. Pope, Civ.App., 12 S.W.2d 1045, error refused—Joseph v. Kiber, Civ.App., 260 S.W. 269.

34 C.J. p 495 note 6 [e] (2).

(4) To overcome verity of return filed.

Tex.—Winter v. Davis, Civ.App., 10 S.W.2d 181, error refused.

Wash.—Thompson v. Short, 106 P.2d 720, 6 Wash.2d 71.

(5) To excuse default.—Cornelius v. Early, Civ.App., 24 S.W.2d 757, affirmed Early v. Cornelius, 39 S.W.2d 6, 120 Tex. 335.

4. Ky.—Walker v. Perkins, 76 S.W.2d 251, 256 Ky. 442.

5. Ark.—Federal Land Bank of St. Louis v. Cottrell, 126 S.W.2d 279, 197 Ark. 783.

6. Okl.—Canard v. Ryan, 45 P.2d 122, 172 Okl. 339.

Tex.—Panhandle Const. Co. v. Casey, Civ.App., 66 S.W.2d 705, error refused—Joseph v. Kiber, Civ.App., 260 S.W. 269.

Nature of evidence required

In suit to vacate default judgment, corroborating evidence to impeach officer's return on citation showing service in original suit against plaintiff may consist of facts and circumstances showing that direct evidence is worthy of credit, but need not be direct and positive; corroborating evidence must come from other sources than witness whose testimony requires corroboration.—Panhandle Const. Co. v. Casey, Tex.Civ.App., 66 S.W.2d 705, error refused—Joseph v. Kiber, Tex.Civ.App., 260 S.W. 269.

7. U.S.—Continental Nat. Bank of Jackson County, at Kansas City, Mo., v. Holland Banking Co., C.C.A.Mo., 66 F.2d 823—Jack v. Hood, D.C.Okl., 28 F.2d 118, affirmed, C.C.A., 39 F.2d 594.

Ala.—Quick v. McDonald, 108 So. 529, 214 Ala. 587.

Cal.—Frost v. Hanscome, 246 P. 53, 198 Cal. 500—Gundelfinger v. Mariposa Commercial & Min. Co., App., 165 P.2d 57.

Mich.—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443.

Mo.—Wright v. Wright, 165 S.W.2d 870, 350 Mo. 325—Elliott v. McCormick, 19 S.W.2d 654, 323 Mo. 263.

Neb.—Selleck v. Miller, 264 N.W. 754, 130 Neb. 306.

N.Y.—Boston & M. R. R. v. Delaware & H. Co., 260 N.Y.S. 817, 146 Misc. 221, reversed on other grounds 264 N.Y.S. 470, 238 App.Div. 191.

Or.—Mattoon v. Cole, 143 P.2d 679, 172 Or. 664.

Pa.—Miller v. Mastrocola, 2 A.2d 550, 133 Pa.Super. 210—Teutonic Building & Loan Ass'n v. Stein, 190 A. 189, 125 Pa.Super. 389—Ohl v. Zimmerman, Com.Pl., 7 Sch.Reg. 169.

Tex.—Smith v. Ferrell, Civ.App., 30 S.W.2d 371, reversed on other grounds, Com.App., 44 S.W.2d 962.

Wis.—Federal Life Ins. Co. v. Thayer, 269 N.W. 547, 222 Wis. 658.

34 C.J. p 496 note 14.

Evidence held sufficient

(1) To show fraud, collusion, or other misconduct.

Ark.—Brick v. Sovereign Grand Lodge of Accepted Free Masons of Arkansas, 117 S.W.2d 1060, 196 Ark. 372.

Iowa.—Foote v. State Sav. Bank, Missouri Valley, Iowa, 206 N.W. 819, 201 Iowa 174.

Ky.—Webb v. Niceley, 151 S.W.2d 768, 286 Ky. 632—Triplett v. Stanley, 130 S.W.2d 45, 279 Ky. 148—Metropolitan Life Ins. Co. of New York v. Myers, 109 S.W.2d 1194, 270 Ky. 523—Johnson v. Gernert Bros. Lumber Co., 75 S.W.2d 357, 255 Ky. 734—Rouse v. Rouse, 262 S.W. 596, 203 Ky. 415.

Mo.—Shepard v. Shepard, 186 S.W.2d 472, 353 Mo. 1057—Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 338 Mo. 31—Gurley v. St. Louis Transit Co. of St. Louis, App., 259 S.W. 895.

N.J.—Metropolitan Life Ins. Co. v. Tarnowski, 20 A.2d 421, 130 N.J.Eq. 1.

Ohio.—Northern Ohio Power & Light Co. v. Smith, 186 N.E. 712, 126 Ohio St. 601.

Tex.—Early v. Burns, Civ.App., 142 S.W.2d 260, error refused—Blackman v. Blackman, Civ.App., 128 S.W.2d 433, error dismissed, judgment correct—Dockery v. Hanan, Civ.App., 54 S.W.2d 1017, error refused—Rivers v. Griffin, Civ.App., 16 S.W.2d 874—Chapman v. Clark, Civ.App., 262 S.W. 161, affirmed, Com.App., 276 S.W. 197.

34 C.J. p 496 note 14 [a] (1), (2).

(2) To show absence of fraud or other misconduct.

Cal.—Voinich v. Rolleri, 264 P. 240, 203 Cal. 379—Rogers v. Mulkey, 147 P.2d 62, 63 Cal.App.2d 567—Church v. Church, 105 P.2d 643, 40 Cal.App.2d 701—De Tray v. Chambers, 297 P. 575, 113 Cal.App. 697.

Fla.—Gamble v. Gamble Holding Corporation, 162 So. 886, 120 Fla. 340.

Ill.—Allen v. Kahn, 26 N.E.2d 152, 304 Ill.App. 256.

Mich.—Racho v. Woeste, 9 N.W.2d 827, 305 Mich. 522.

Mo.—Winchell v. Gaskill, 190 S.W.2d 266—Terminal R. R. Ass'n of St. Louis v. Schmidt, 163 S.W.2d 772, 349 Mo. 890.

N.Y.—Penski v. Jacobs, 6 N.Y.S.2d 861, 255 App.Div. 745.

Pa.—Miller v. Mastrocola, 2 A.2d 550, 133 Pa.Super. 210—Teutonic Building & Loan Ass'n v. Stein, 190 A. 189, 125 Pa.Super. 589.

Tex.—Hoelscher v. Ehlinger, Civ.App., 57 S.W.2d 283.

34 C.J. p 496 note 14 [a] (3).

(3) To present issue requiring finding as to fraud.—Ellis v. Gordon, 231 N.W. 535, 202 Wis. 134.

(4) To show conclusively that complainant did not believe, and was not misled by alleged fraudulent representations of defendant's attorney.—Moore v. Moore, Tex.Civ.App., 259 S.W. 322.

Evidence held insufficient

(1) To show fraud, collusion, or other misconduct.

U.S.—Continental Nat. Bank of Jackson County, at Kansas City, Mo., v. Holland Banking Co., C.C.A.Mo., 66 F.2d 823—Grimes v. Grimes, D.C.Nev., 52 F.2d 171.

strong as to leave no reasonable doubt.[8] The evidence may be circumstantial,[9] but it must be unequivocal,[10] persuasive,[11] and something more than a suspicion.[12] It has been held that the judgment or decree will not be set aside on affidavits without the examination and cross-examination of witnesses, particularly where the affidavits are contradictory with respect to important issues.[13] The proof must be especially clear to induce the court to enjoin a judgment at the instance of strangers to the suit, although incidentally affected by the decision of the question involved.[14]

Perjury. It is established by all the authorities that a very high degree of proof is required, where relief is sought on the ground of perjury,[15] the cases generally holding that it must be established either by a conviction for the alleged perjury[16] or by documentary evidence.[17] A voluntary admission of perjury may be sufficient proof,[18] but the affidavit of a former witness impeaching his prior testimony may be insufficient where a charge of perjury could not well be predicated on it.[19]

§ 394. —— Pleadings as Evidence

Although the complainant's verified bill, if not con-

Ark.—Parker v. Sims, 51 S.W.2d 517, 185 Ark. 1111—Childs v. Linton, 252 S.W. 21, 159 Ark. 529.

Cal.—Gundelfinger v. Mariposa Commercial & Min. Co., App., 165 P.2d 57.

Ill.—Carroll, Schendorf & Boenicke v. Hastings, 259 Ill.App. 564.

Ky.—Overstreet v. Grinstead's Adm'r, 140 S.W.2d 836, 283 Ky. 73—Hoover v. Dudley, 14 S.W.2d 410, 228 Ky. 110—Commonwealth v. Harkness' Adm'r, 246 S.W. 803, 197 Ky. 198.

La.—First Nat. Life Ins. Co. v. Bell, 141 So. 379, 174 La. 692—Whitbeck v. Hughes, 134 So. 255, 172 La. 380—Herold v. Jefferson, 134 So. 104, 172 La. 315—Reinecke v. Pelham, App., 199 So. 521—Treichlingrova v. Layne, 139 So. 659, 19 La.App. 71—Young v. Glynn, 126 So. 559, 14 La.App. 619, affirmed 131 So. 51, 171 La. 371—Rowe v. Crichton Co., 123 So. 442, 38 La.App. 454.

Mo.—Elliott v. McCormick, 19 S.W. 2d 654, 323 Mo. 263—First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W.2d 842, 322 Mo. 654—McFadin v. Simms, 273 S.W. 1050, 309 Mo. 312—Nieman v. Nieman, App., 127 S.W.2d 34—Wuelker v. Maxwell, App., 70 S.W.2d 1100—National Union Fire Ins. Co. v. Vermillion, App., 19 S.W.2d 776—Neevel v. McDermand, 278 S.W. 818, 220 Mo.App. 812—Bullivant v. Greer, 264 S.W. 95, 216 Mo.App. 324.

N.J.—Mittenbuhler v. Kessler Trucking Co., 181 A. 163, 119 N.J.Eq. 100.

N.Y.—Fuhrmann v. Fanroth, 173 N. E. 685, 254 N.Y. 479.

Ohio.—Shriner v. Price, 59 N.E.2d 152, 74 Ohio App. 373.

Tex.—Graves v. Slater, Civ.App., 83 S.W.2d 1041, error dismissed.

Va.—Deeds v. Gilmer, 174 S.E. 37, 162 Va. 157.

34 C.J. p 496 note 14 [b] (1)—47 C.J. p 438 note 74 [b].

(2) To show that judgment would have been otherwise but for the fraud.—Anderson v. State, 238 P. 557, 65 Utah 512.

(3) To establish duress.

Kan.—Johnson v. Schrader, 95 P.2d 273, 150 Kan. 545.

Md.—Pearce v. Arnold, 13 A.2d 549, 178 Md. 356.

Collusion to secure lease

The fact that plaintiffs colluded to secure execution of lease to give them equitable right to file bill does not show fraud in procuring decree by falsely alleging jurisdictional facts.—Jones v. Henderson, 153 So. 214, 228 Ala. 273.

Evidence accepted as true

With respect to whether or not judgment on note in favor of attorney was void for fraud, evidence of attorney's employment by judgment debtor who promised to compensate attorney would be accepted as true where there was no contradiction of testimony and no ground on which it could be rejected.—Marcus v. Hudgins, 176 A. 271, 168 Md. 79.

8. Mo.—Terminal R. R. Ass'n of St. Louis v. Schmidt, 163 S.W.2d 772, 349 Mo. 890—Elliott v. McCormick, 19 S.W.2d 654, 323 Mo. 263—Reger v. Reger, 293 S.W. 414, 316 Mo. 1310—McFadin v. Simms, 273 S.W. 1050, 309 Mo. 312—Sutter v. Cavalier, App., 185 S.W.2d 304—Nieman v. Nieman, App., 127 S.W.2d 34—Neevel v. McDermand, 278 S.W. 818, 220 Mo.App. 812—Bullivant v. Greer, 264 S.W. 95, 216 Mo.App. 324.

34 C.J. p 496 note 15.

9. U.S.—Holton v. Davis, Mont., 108 F. 138, 47 C.C.A. 246.

10. Minn.—Wann v. Northwestern Trust Co., 139 N.W. 1061, 120 Minn. 493.

34 C.J. p 496 note 17.

11. U.S.—Holton v. Davis, Mont., 108 F. 138, 47 C.C.A. 246.

Pa.—Teutonic Building & Loan Ass'n v. Stein, 190 A. 189, 125 Pa.Super. 389.

12. Mo.—McFadin v. Simms, 273 S. W. 1050, 309 Mo. 312.

34 C.J. p 496 note 19.

13. U.S.—Sorenson v. Sutherland, 109 F.2d 714, affirmed Jackson v. Irving Trust Co., 61 S.Ct. 326, 311 U.S. 494, 85 L.Ed. 297.

14. Mo.—W. E. Bowen Impr. Co. v. Van Hafften, 238 S.W. 147, 209 Mo. App. 629.

15. Okl.—McBride v. Cowen, 216 P. 104, 90 Okl. 130.

34 C.J. p 497 note 21.

Perjury as ground for relief see supra § 374.

Proof required of criminal acts

Perjury must be established by the same degree of proof as generally required in proof of criminal acts in civil cases.—Amberg v. Deaton, 271 N.W. 396, 223 Wis. 653.

Parol testimony

A judgment will not be vacated on parol testimony alone, even in default cases where the judgment is alleged to have been obtained through perjury of plaintiff on intrinsic issues, but in such case the alleged perjury must be clearly and conclusively established by actual physical facts which render the question of perjury unmistakable.—McBride v. Cowen, 216 P. 104, 90 Okl. 130.

Evidence held sufficient to warrant relief

Mo.—Sutter v. Easterly, 189 S.W.2d 284.

Neb.—Krause v. Long, 192 N.W. 729, 109 Neb. 846.

Evidence held insufficient to warrant relief

La.—Jackson v. Dixon, 8 La.App. 761.

Neb.—Gutru v. Johnson, 212 N.W. 622, 115 Neb. 309.

16. N.C.—Moore v. Gulley, 56 S.E. 681, 144 N.C. 81, 10 L.R.A.,N.S., 242.

34 C.J. p 497 note 22.

17. N.C.—Kinsland v. Adams, 90 S. E. 899, 172 N.C. 765.

34 C.J. p 497 note 23.

18. Ill.—Seward v. Cease, 50 Ill. 228.

N.H.—Craft v. Thompson, 51 N.H. 536.

19. Mich.—Cleveland Iron Min. Co. v. Husby, 40 N.W. 168, 72 Mich. 61.

tradicted, may be sufficient to justify a decree in his favor, the interposition of an answer denying the charges of the bill requires the complainant to furnish corroborative evidence.

According to some authority, complainant's verified bill, if not contradicted, may be sufficient to justify a decree in his favor;[20] but it has also been held that the mere introduction of pleadings alleging facts warranting the setting aside of the judgment does not meet the requirement of proof,[21] and that the answer of the respondent, if denying positively the charges of the bill, will be so far evidence in his favor that the bill must be dismissed unless complainant sustains his case by corroborative evidence.[22] The answer of one defendant cannot be considered as evidence against another.[23]

§ 395. Trial or Hearing

An action to enjoin or vacate a judgment proceeds to trial in accordance with the rules and principles of equity, and the court may and should determine the issues involved, and, in its discretion, may grant or deny relief.

An action to enjoin or vacate a judgment proceeds to trial in accordance with the rules and principles of equity.[24] The proceeding is tried on the allegations of the new petition and the answer of the other party.[25] Generally, the court may and should determine the issues involved,[26] and, in its discretion, may grant or deny the requested relief.[27] The trial and hearing should be confined to the question of the judgment against which relief is sought,[28] and, ordinarily, the court should not enter on a trial of complainant's defense to the original action once he makes a prima facie showing of a meritorious defense;[29] but, if the proceeding is one in which the court is authorized to grant full relief to the parties in the one action, as discussed infra § 397, it may try and determine all questions involving the merits of the controversy.[30]

In determining whether the judgment from which relief is sought should be opened, the court may and should consider the evidence and the credibility of the witnesses, and give due effect to writings,[31] but, where the facts are undisputed and only questions of law are raised, the cause may be determined without the introduction of evidence or the intervention of a jury.[32] If there are disputed questions of fact involved, or the evidence appears to be conflicting or contradictory, it is in the discretion of the court to send the issues to a master or commissioner for determination,[33] or to a jury on interrogatories or under proper limitations as to the questions they are to consider in accordance with the rules discussed in the C.J.S. title Juries § 37, also 33 C.J. p 497 notes 31, 32; 35 C.J. p 173 notes 90–94, and in this case the court should make its decree in accordance with the facts as found by the jury,[34] unless manifest error has intervened during the course of the trial.[35] Issues should not be submitted to a jury where the evidence is insufficient to warrant such submission,[36] but direct-

20. Ala.—Givens v. Tidmore, 8 Ala. 745.

21. Okl.—Honeycutt v. Severin, 98 P.2d 1093, 186 Okl. 509.
Tex.—Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451.

22. Tex.—Scales v. Gulf, C. & S. F. R. Co., Civ.App., 35 S.W. 205.
34 C.J. p 497 note 27.

23. Ky.—Timberlake v. Cobbs, 2 J. J.Marsh. 136.

24. Minn.—Geisberg v. O'Laughlin, 93 N.W. 310, 88 Minn. 431—Spooner v. Spooner, 1 N.W. 838, 26 Minn. 137.
Hearing and submission of issues to jury in equity generally see Equity §§ 480–512.

25. Tex.—Owen v. City of Eastland, Civ.App., 37 S.W.2d 1053.

Failure to file written pleadings
Where defendant, on plaintiff's appeal from a judgment of a justice's court, had not filed written pleadings until after judgment adverse to plaintiff was rendered in county court, the case was treated in a suit to enjoin enforcement of such judgment as though defendant had filed no written pleadings.—Allen v. Jones, Tex.Civ.App., 192 S.W.2d 298, error refused no reversible error.

26. Tex.—Adams v. First Nat. Bank, Civ.App., 294 S.W. 909.

Sufficiency of excuse for absence at former trial
Tex.—Adams v. First Nat. Bank, supra.

27. U.S.—W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, C. C.A.N.Y., 155 F.2d 321.
Pa.—Barnes v. Silveus, 173 A. 837, 114 Pa.Super. 214—Simcoe v. Szukegs, Com.Pl., 27 North.Co. 182.
Tex.—McMillan v. McMillan, Civ. App., 72 S.W.2d 611.

Extent of discretion
The court does not have discretion to set aside a judgment on the ground that, if it had been sitting in the trial of the case, it would have granted a new trial on the ground of newly discovered evidence. —Anderson v. State, 238 P. 557, 65 Utah 512.

28. Tenn.—Tallent v. Sherrell, 184 S.W.2d 561, 27 Tenn.App. 683.

29. Tex.—Adams v. First Nat. Bank, Civ.App., 294 S.W. 909.

30. Tex.—Hubbard v. Tallal, 92 S. W.2d 1022, 127 Tex. 242.

Title
In suit to set aside judgment adjudicating title and to quiet title, retrial of question of title was authorized.—Bonner v. Pearson, Tex.Civ. App., 7 S.W.2d 930.

31. Pa.—Barnes v. Silveus, 173 A. 837, 114 Pa.Super. 214—Sugarman v. Baldini, Com.Pl., 28 West.Co. 99.
Tex.—Griffin v. Burrus, Civ.App., 24 S.W.2d 805, affirmed, Com.App., 24 S.W.2d 810.
Wis.—Federal Life Ins. Co. v. Thayer, 269 N.W. 547, 222 Wis. 658.

32. Ga.—Swift & Co. v. First Nat. Bank, 132 S.E. 99, 161 Ga. 543.

33. Va.—Rust v. Ware, 6 Gratt. 50, 47 Va. 50, 52 Am.D. 100.
Reference of issues in equity see Equity §§ 513–562.

34. Mont.—Daly v. Milen, 35 P. 227, 14 Mont. 20.
34 C.J. p 497 note 33.
Effect of verdict in equity cases generally see Equity § 510.

35. Pa.—Quick v. Van Auken, 3 Pennyp. 476.

36. Ga.—Adams v. Higginbotham, 21 S.E.2d 616, 194 Ga. 292.

ing a verdict for plaintiff[37] or defendant[38] is error when the evidence would have authorized a verdict for the other party. After enjoining a judgment and directing issues to be tried by a jury, the court may afterward, although no verdict has been certified, set aside the order and dissolve the injunction if it becomes satisfied that a new trial ought not to be had.[39]

§ 396. Dismissal

A bill for equitable relief against a judgment may be dismissed for failure to follow up the application, or to establish the allegations of the bill, or to comply with a statutory condition precedent to the issuance of an injunction; but a dismissal on the merits without a hearing is usually erroneous.

The bill or petition for equitable relief from a judgment may be dismissed for failure of complainant to appear and follow up his application,[40] for want of necessary parties,[41] for failure to establish the allegations of his bill[42] or to comply with a statutory condition precedent to the issuance of an injunction,[43] or where it appears from the pleadings and the proof that complainant is not entitled to the relief requested.[44] When an injunction is the sole object of the suit, and it is dissolved because of the want of equity in the petition, the case should be dismissed, if plaintiff declines to amend.[45]

On the other hand, where a bill sets forth a ground for equitable relief, ordinarily it is error to dismiss it without a hearing on the merits,[46] so that, where an injunction is dissolved on an answer containing an unqualified denial of the charges of the bill, the court should not dismiss the bill, if there is sufficient equity on its face to give the court jurisdiction, since complainant has a right after his injunction is dissolved to prove his bill.[47] In such a case it is error to dismiss the bill, although plaintiff makes no request for trial of the case on its merits.[48] It is error to dismiss a suit on the merits on trial of a rule for a preliminary injunction, since the only question presented is whether preliminary injunction should be granted.[49]

§ 397. Judgment or Decree, and Relief Awarded

a. In general
b. Relief awarded

a. In General

The form of the judgment or decree in an equitable proceeding to secure relief against a judgment must be justified by the frame of the bill.

The decree, as far as form is concerned, must be justified by the frame of the bill.[50] As far as relief is concerned, it should not go beyond the prayer of the petition, as discussed infra subdivision b of this section. A decree perpetuating an injunction is irregular where no injunction was granted because of failure to execute a bond.[51] It is error to render a final judgment on overruling defendant's motion to dissolve the injunction; he should be allowed to answer.[52] Where a new trial is necessary, it is error at once to set aside the judgment; the decree should await the result of the new trial, the judgment meanwhile standing as security for what may be found to be justly due.[53]

37. Ga.—Adams v. Higginbotham, supra.

38. Ga.—Rogers v. MacDougald, 165 S.E. 619, 175 Ga. 642.

39. Va.—Vass v. Magee, 1 Hen. & M. 2, 11 Va. 2.

40. Ala.—Smothers v. Meridian Fertilizer Factory, 33 So. 898, 137 Ala. 166.
Pa.—Williams Valley Sav. Fund v. Daub, Com.Pl., 8 Sch.Reg. 104—Nauyalis v. White, Com.Pl., 7 Sch. Reg. 166.

41. Tex.—In re Supples' Estate, Civ. App., 131 S.W.2d 13.
Administration of estate
While bill of review must be dismissed in so far as it affects administration of an estate where necessary parties are not brought in, it may not be dismissed as to another estate as to which all parties are present.—In re Supples' Estate, supra.

42. Cal.—Frost v. Hanscome, 246 P. 53, 198 Cal. 500.
Ga.—Durden v. Durden, 142 S.E. 151, 165 Ga. 813.
34 C.J. p 497 note 37.
Dismissal held improper
Ga.—White v. Roper, 167 S.E. 177, 176 Ga. 180.

43. Tex.—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Civ. App., 122 S.W.2d 659, error dismissed.

44. Tex.—Arenstein v. Jencks, Civ. App., 179 S.W.2d 831, error dismissed—Dixon v. McNabb, Civ. App., 173 S.W.2d 228, error refused.
Disposal of all rights
Where all possible rights were disposed of under the pleadings of the parties in the suit from which relief is sought, a judgment dismissing with prejudice an action to stay the proceedings is proper.—Ballard v. Cox, 75 P.2d 126, 193 Wash. 299.
Judgment entered on dismissal held final
Iowa.—Swartzendruber v. Polke, 218 N.W. 62, 205 Iowa 382.

45. Tex.—Avocato v. Dell'Ara, Civ. App., 84 S.W. 443.

46. Ill.—Nicoloff v. Schnipper, 233 Ill.App. 591.
Tex.—Mauldin v. American Liberty Pipe Line Co., Civ.App., 185 S.W. 2d 158, refused for want of mandate.

47. Tex.—Avocato v. Dell'Ara, Civ. App., 84 S.W. 443.
34 C.J. p 497 note 39.

48. Tex.—Love v. Powell, 2 S.W. 456, 67 Tex. 15—Avocato v. Dell-'Ara, Civ.App., 84 S.W. 443.

49. La.—Terry v. Womack, 20 So.2d 365, 206 La. 1069.

50. Mass.—Brooks v. Twitchell, 65 N.E. 843, 182 Mass. 443, 94 Am.S. R. 662.

51. Ky.—Pilcher v. Higgins, 2 J.J. Marsh. 16.

52. La.—Knox v. Coroner, 13 La. Ann. 88.

53. W.Va.—Grafton & G. R. Co. v. Davisson, 29 S.E. 1028, 45 W.Va. 12, 72 Am.S.R. 799.

On voluntary dismissal of a bill, defendant is entitled to judgment by motion against plaintiff and the sureties on his injunction bond for the amount of the judgment and interest.[54]

b. Relief Awarded

On a properly framed bill for an injunction or other equitable relief against a judgment at law, the court has authority to grant the parties any and all relief to which they may appear entitled, and to impose conditions on the granting of such relief so as equitably to adjust the rights of the parties.

On a bill for an injunction or other equitable relief against a judgment at law, properly framed, the court has authority to grant the parties any and all relief to which they may appear to be entitled,[55] although the decree should not go beyond the prayer of the petition or bill,[56] and relief should be denied if it appears that complainant is not entitled thereto.[57] It is within the authority of a court of equity to enjoin the enforcement of a judgment at law, whenever sufficient equitable grounds are shown,[58] and ordinarily this is the proper method of granting relief; but in so doing the equity court does not undertake to interfere with the judgment itself, but lays its prohibition on the party otherwise entitled to enforce it.[59] So, if the judgment is attacked on the ground of fraud, want of notice, or other like cause, a decree restraining its enforcement and putting the parties in statu quo will generally be proper,[60] or the court may ingraft a trust on the property in the hands of the beneficiary of the fraud, and leave the judgment undisturbed.[61] Complainant may sometimes be entitled to the restitution of money already collected on the judgment,[62] or damages for the attempted or successful enforcement of the judgment by execution;[63] but restitution will not be ordered where the court, on consideration of all the evidence, feels that complainant is not entitled to such relief.[64]

In a proper case, the relief awarded may include the vacation or annulment of the judgment,[65]

Allowing judgment to stand as security see supra § 303.

54. Tenn.—Ashby v. Lyles-Black Co., 1 Tenn.Civ.A. 160.

55. Ala.—Hanover Fire Ins. Co. v. Street, 176 So. 350, 234 Ala. 537.
Cal.—Walsh v. Majors, 49 P.2d 598, 4 Cal.2d 384.
Ky.—Taylor v. Webber, 83 S.W. 567, 26 Ky.L. 1199.
Minn.—Bloomquist v. Thomas, 9 N.W.2d 337, 215 Minn. 35.
Mo.—National Union Fire Ins. Co. v. Vermillion, App., 19 S.W.2d 776.
Tex.—Peters v. Pursley, Civ.App., 278 S.W. 229.
34 C.J. p 498 note 47.
Amendment and correction in trial court see supra §§ 236–264.

Adjudication of legality of service

Where judgment on its face showed that legal service was had, and sheriff testified that he had served all parties, but did not return writ into court, having failed to sign it at all, the court was empowered at a subsequent term, in action to set aside such judgment and with all interested parties before it, to adjudge that legal service had originally been made, and to correct its records accordingly.—O'Quinn v. Harrison, Tex.Civ.App., 271 S.W. 137.

Claim for betterments

Grantee under unregistered deed is not entitled to assert claim for betterments, in suit for injunction against enforcement of judgment obtained against claimant's grantor.—Eaton v. Doub, 128 S.E. 494, 190 N.C. 14, 40 A.L.R. 273.

Continuing trespasses

In suit to enjoin enforcement of judgment, equity had jurisdiction to enjoin continuing trespasses.—Elliott v. Adams, 160 S.E. 336, 173 Ga. 312.

Damages for fraud

In an equitable action to set aside judgment allegedly obtained by fraud, plaintiff may plead a claim for damages because of the alleged fraud.—Scopano v. U. S. Gypsum Co., 3 N.Y.S.2d 300, 166 Misc. 805.

Impounding proceeds of judgment

Where it was apparent that there existed a financial obligation which was asserted as an equitable set-off to a judgment, but court in which relief was sought did not have jurisdiction to determine amount thereof, and delay in the proceeding to enable tribunal having jurisdiction to determine the liability would be impracticable, court could make such reasonable orders as might be necessary to avoid any inequity either by staying enforcement of judgment or by permitting collection of the judgment and impounding of the proceeds thereof.—Southern Surety Co. of New York v. Maney, 121 P.2d 295, 190 Okl. 129.

56. La.—Leverich v. Adams, 11 La. Ann. 510.
34 C.J. p 498 note 48.
Limitation to relief sought by pleadings generally see supra § 49.
Relief in equity generally as limited by prayer of petition see Equity § 607.

57. Tex.—American Red Cross v. Longley, Civ.App., 165 S.W.2d 233, error refused—Jones v. Lockhart, Civ.App., 144 S.W.2d 426, error dismissed, judgment correct.

58. Ala.—Timmerman v. Martin, 176 So. 198, 234 Ala. 622.
Ga.—Campbell v. Gormley, 192 S.E. 430, 184 Ga. 647.
Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 60 Idaho 127.
34 C.J. p 498 notes 50, 56.

A bond is not required of judgment debtor on quashing execution and enjoining collection of judgment, since injunction is part of final judgment.—Sandy Hook Bank's Trustee v. Bear, 61 S.W.2d 1045, 250 Ky. 177.

Enjoining garnishment

In suit to cancel void judgment, plaintiff may obtain additional equitable relief, such as injunction against prosecution of garnishment proceedings based on judgment canceled.—Henry & Co. v. Johnson, 173 S.E. 659, 178 Ga. 541.

59. Ala.—Timmerman v. Martin, 176 So. 198, 234 Ala. 622.
34 C.J. p 498 note 57.

60. Iowa.—Brown v. Byam, 12 N.W. 770, 59 Iowa 52.
34 C.J. p 499 note 58.

61. Cal.—Purinton v. Dyson, 65 P.2d 777, 8 Cal.2d 322, 113 A.L.R. 1230—Walsh v. Majors, 49 P.2d 598, 4 Cal.2d 384.
Tex.—Johnston v. Stephens, Civ.App., 300 S.W. 225, reversed on other grounds 49 S.W.2d 431, 121 Tex. 374.

62. Minn.—Geisberg v. O'Laughlin, 93 N.W. 310, 88 Minn. 431.
34 C.J. p 498 note 51.

63. Minn.—Baker v. Sheehan, 12 N.W. 704, 29 Minn. 235.

64. N.D.—Abdellah v. Hodge, 213 N.W. 495, 55 N.D. 392.

65. Tex.—Sloan v. Newton, Civ.App., 134 S.W.2d 697.
34 C.J. p 498 note 49.

but it has been held that a court of equity has no power in a strict sense of the term to set aside a judgment at law,[66] or peremptorily to order a new trial in the law action,[67] and that the usual and proper course is not to award a new trial in express terms, but to decree that, unless the party consents to have the judgment set aside and a new trial had, he shall be perpetually enjoined from collecting his judgment.[68] Under some practice, however, the court of equity may decree a new trial and reinstatement of the cause on the docket of the law court.[69] It has been held that, if a new trial is proper, the court should order an issue to be tried as other issues out of chancery are tried.[70] If the grounds of action or defense are purely legal, it has been held that the parties may be sent back to the law court for this purpose;[71] but, if they are suitable for the cognizance of equity, the chancellor will generally try the merits of the cause and close the controversy by a final decree.[72] Relief may be granted as to one of two or more complainants, and denied as to the rest.[73] Where it appears that any part of the judgment is justly due, the injunction may be so framed as to permit the collection of that part, while forbidding proceedings to enforce it as to the residue.[74] However, where there is no means of ascertaining how far it is correct or justly due, but only that it is unconscionable to some extent, it will be set aside in toto.[75] Relief will generally be granted to the extent of credits, or unjust amounts, admitted by the judgment creditor, although the bill makes out no case for equitable relief.[76] In setting aside a compromise judgment in favor of plaintiff and awarding him a larger recovery, defendant is entitled to credits for payments made under the vacated judgment.[77] In denying relief in a suit to enjoin enforcement of judgment, the court may not enjoin enforcement of a stipulation whereby securities were deposited for payment of judgment.[78]

Decree against complainant. In refusing to grant relief against a judgment a court of equity may not

66. N.J.—C. & D. Building Corporation v. Griffithes, 157 A. 137, 109 N.J.Eq. 319.
34 C.J. p 498 note 53.

Relief against consequences

Court of chancery is without power to set aside judgment at law, but merely grants equitable relief against consequences of judgment.—C. & D. Building Corporation v. Griffithes, supra.

67. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 60 Idaho 127.
34 C.J. p 498 note 54.

68. Ala.—Timmerman v. Martin, 176 So. 198, 234 Ala. 622.
34 C.J. p 498 note 55.

69. Mo.—Sutter v. Easterly, 189 S.W.2d 284.

70. Ala.—**Corpus Juris cited in** Hanover Fire Ins. Co. v. Street, 176 So. 350, 353, 34 Ala. 537.
34 C.J. p 499 note 59.
Trial issues out of chancery generally see Equity §§ 503–508.

71. Ala.—**Corpus Juris cited in** Hanover Fire Ins. Co. v. Street, 176 So. 350, 353, 34 Ala. 537.
Tenn.—Peoples Tel. & Tel. Co. v. Prye, 10 Tenn.App. 160.
34 C.J. p 499 note 60.

Jurisdiction of court of law

If a court of equity orders a judgment at law to be set aside and a new trial awarded, a court of law has jurisdiction, after the lapse of the judgment term, to set aside the judgment in question, redocket the case, and subsequently to dismiss the action for want of prosecution.—Brown v. Ebann, 165 Ill.App. 218.

72. Ala.—**Corpus Juris cited in** Hanover Fire Ins. Co. v. Street, 176 So. 350, 353, 34 Ala. 537.
34 C.J. p 499 note 61.

Complete relief in one proceeding

(1) Where an equitable suit is brought to set aside judgment, it is not contemplated that there shall be two trials, the one in which judgment is rendered setting aside former judgment, and other on trial of the merits, but every issue arising on the merits may and should be disposed of and only one judgment rendered.—Texas Employers' Ins. Ass'n v. Arnold, 88 S.W.2d 473, 126 Tex. 466—Humphrey v. Harrell, Tex.Com.App., 29 S.W.2d 963—Garza v. Kenedy, Tex.Com.App., 299 S.W. 231, rehearing denied 5 S.W.2d xx—Fort Worth & Denver City Ry. Co. v. Reid, Tex.Civ.App., 115 S.W.2d 1156—Stone v. Stone, Tex.Civ.App., 101 S.W.2d 638—Corbett v. Rankin Independent School Dist., Tex.Civ.App., 100 S.W.2d 113—Shaw v. Etheridge, Tex.Civ.App., 15 S.W.2d 722—Wise v. Lewis, Tex.Civ.App., 11 S.W.2d 329, affirmed, Com.App., 23 S.W.2d 299—Squyres v. Rasmussen, Tex.Civ.App., 296 S.W. 977—Peters v. Pursley, Tex.Civ.App., 278 S.W. 229—Cooper v. Cooper, Tex.Civ.App., 260 S.W. 679.

(2) Judgment setting aside judgment without adjudicating original action on its merits is not "final."—Dallas Coffee & Tea Co. v. Williams, Tex.Civ.App., 45 S.W.2d 724, error dismissed.

(3) Where judgment adjudicating title was obtained by perjured testimony without notice to plaintiffs, and where defendant asserting adverse possession paid rent, decree setting aside judgment and quieting title in plaintiffs was proper.—Bonner v. Pearson, Tex.Civ.App., 7 S.W.2d 930.

73. Tex.—Automobile Finance Co. v. Bryan, Civ.App., 3 S.W.2d 835.
34 C.J. p 499 note 62.

74. Ill.—Printers Corporation v. Hamilton Inv. Co., 14 N.E.2d 517, 295 Ill.App. 34.
N.Y.—Leemor Realty Corporation v. Tonkin, 150 N.E. 549, 241 N.Y. 546, motion denied 152 N.E. 416, 242 N.Y. 535—Allgeier v. Gordon & Co., 9 N.Y.S.2d 848, 170 Misc. 607.
34 C.J. p 499 notes 63, 64 [a].

Injunction to extent of damages

In action by holder of judgment on past-due purchase-money note for land sold under bond for title, to require vendor to quitclaim land to purchaser for purposes of execution sale under judgment, wherein purchaser intervened and alleged existence of outstanding paramount title to land and vendor's insolvency and asked that damages for defective title "be awarded" and for general relief, purchaser was entitled to injunction against judgment to extent of damages.—Campbell v. Gormley, 192 S.E. 430, 184 Ga. 647.

75. Va.—McRae v. Woods, 2 Wash. 80, 2 Va. 80.

76. Md.—Webster v. Hardisty, 28 Md. 592.
34 C.J. p 499 note 65.

77. Tex.—Dallas Coffee & Tea Co. v. Williams, Civ.App., 45 S.W.2d 724, error dismissed.

78. U.S.—Harrington v. Denny, D.C. Mo., 3 F.Supp. 584.

decree against complainant the amount due on the judgment,[79] unless such relief is permitted by statute.[80]

Conditions on granting relief. He who seeks relief in equity against a judgment must do equity; and it is competent and proper for the court to impose such terms on him, or require him to submit to such orders or conditions as may be necessary to adjust the rights of all parties in entire accordance with equity.[81] So the court may require that the adverse party free from fault be compensated for expenses incurred in securing the judgment.[82] It is also competent for the parties to agree that a judgment may be set aside and enjoined, on condition that it shall not affect the right of plaintiff therein to prosecute a suit on his original cause of action, which formed the basis of the judgment.[83] An order for an injunction against a sale under execution does not become effectual until there has been a compliance with any conditions required by the order, such as the execution of a bond.[84]

§ 398. Review and Costs

General rules relating to appeal and error usually govern the review of decisions granting or denying equitable relief against judgments. Costs are ordinarily allowable to a successful complainant, but generally a judgment debtor who seeks relief on the ground that he has been prevented from making his defense at law is himself chargeable with the costs.

The decision of the court of chancery on a bill for an injunction or other equitable relief against a judgment will not be disturbed on appeal where the evidence was conflicting and the determination of the court was one within its discretion,[85] or for immaterial irregularities in its action,[86] or on objections to the judgment not presented to the equity court.[87] However, a decree for complainant will be reversed where the bill states no cause of action, or its want of equity is apparent on its face.[88] Assignments of error alleged to have been committed on the trial of the former case may not be considered.[89] It has been held that the evidence should be set forth in the record.[90]

Costs. Where a judgment debtor seeks relief in equity, on the ground of his having been prevented from making his defense at law, he is generally chargeable with the costs of the proceeding,[91] especially where he might have obtained the same relief on application to the court of law,[92] or where his injunction is dissolved,[93] but otherwise costs are allowable to a successful complainant.[94] The successful complainant, however, is not entitled to costs in the action in which the judgment, set aside at his suit, was rendered.[95] While it has been held that counsel fees are not properly allowed to plaintiff as damages, in a suit to annul a judgment and enjoin its execution,[96] it has also been held that such fees may be allowed as a beneficial part of the judgment, although not a matter of right, in an action to set aside a former judgment.[97]

§ 399. Operation and Effect of Injunction

An injunction against a judgment operates against the person, and, while it does not necessarily vacate the judgment, it does prevent the maintenance of any action on it.

An injunction against a judgment is strictly in personam to restrain respondent from using the judgment unconscientiously.[98] It does not necessarily negative the authority of the court rendering the judgment or the legality of its action; nor does it, by relation back, make the proceedings at

79. Colo.—San Juan & St. Louis Mining & Smelting Co. v. Finch, 6 Colo. 214.
34 C.J. p 499 note 66.

80. W.Va.—Howell v. Thomason, 12 S.E. 1088, 34 W.Va. 794.
34 C.J. p 499 note 67.

81. N.D.—**Corpus Juris cited in** Abdellah v. Hodge, 213 N.W. 495, 498, 55 N.D. 392.
Okl.—Southern Surety Co. of New York v. Maney, 121 P.2d 295, 190 Okl. 129.
34 C.J. p 499 note 68.

82. Mo.—Crown Drug Co. v. Raymond, App., 51 S.W.2d 215.
N.D.—Abdellah v. Hodge, 213 N.W. 495, 55 N.D. 392.

83. Mo.—Wilson v. St. Louis, I. M. & S. R. Co., 87 Mo. 431.

84. Ky.—Pell v. Lander, 8 B.Mon. 554.

85. Tex.—Turner v. Parker, Civ. App., 14 S.W.2d 931.
34 C.J. p 500 note 71.
Affirmance held proper under pleadings and evidence
Ga.—Bayne v. A. J. Deer Co., 133 S. E. 693, 158 Ga. 401.

86. Ky.—Bradley v. Lamb, Hard. 527.

87. La.—Smith v. Barkemeyer, McG. 139.

88. Cal.—Gregory v. Ford, 14 Cal. 138, 73 Am.D. 639.
S.C.—Henderson v. Mitchell, 8 S.C. Eq. 113, 21 Am.D. 526.

89. Ariz.—MacRitchie v. Stevens, 76 P. 478, 8 Ariz. 410.

90. Neb.—Barr v. Post, 80 N.W. 1041, 59 Neb. 361, 80 Am.S.R. 680.
34 C.J. p 500 note 76.

91. Va.—Degraffenreid v. Donald, 2 Hen. & M. 10, 12 Va. 10.
34 C.J. p 500 note 77.

92. N.Y.—Gridley v. Garrison, 4 Paige 647.

93. Ill.—Fisher v. Tribby, 5 Ill.App. 335.
34 C.J. p 500 note 79.

94. Va.—Reeves v. Dickey, 10 Gratt. 138, 51 Va. 138.

95. Tex.—Marsh v. Tiller, Civ.App., 293 S.W. 223.

96. La.—Flynn v. Rhodes, 12 La. Ann. 239.

97. Kan.—Fadely v. Fadely, 276 P. 826, 128 Kan. 287.

98. Wis.—Kiel v. Scott & Williams, 202 N.W. 672, 186 Wis. 415.
34 C.J. p 500 note 83.
As release of errors see supra § 386.

law irregular,[99] or strip the judgment of its usual incidents and consequences, except with respect to proceedings to enforce it.[1] The injunction will prevent the maintenance of an action on the judgment,[2] either at law or in equity,[3] or even an action against the surety on a bond given in an effort to appeal from that judgment.[4] However, this does not prevent a proceeding to revive the judgment, on the death of a party, by scire facias, although the injunction will operate on the revived judgment as well as on the original.[5] Where a judgment contains a mandamus compelling payment, the dissolution of a subsequent injunction, enjoining payment of such judgment, has been held to restore the mandamus in the judgment and to render issuance of a second mandamus unnecessary.[6] An injunction effective only as to one of the parties to the judgment will not prevent its enforcement against the others.[7] When complainant seeks not only injunctive relief but also vacation of the judgment and a determination of his interest in the subject matter, a decision in his favor may be broad enough to constitute an adjudication of his interest.[8]

§ 400. Damages on Dissolution of Injunction

On the dissolution of an injunction, the statutes usually permit recovery of damages sustained by the interference; in an action on an injunction bond the extent to which the amount collectable on the judgment has been reduced by the injunction is a proper element of damage and costs, interest on the judgment, and counsel fees incurred in its dissolution may also be recovered in a proper case.

On the dissolution of an injunction, the statutes usually permit damages sustained by the interference to be assessed by the court against complainant and his sureties, the amount of which may be fixed at a certain percentage on the amount of the judgment.[9] It is not proper to include in the award of damages the amount of the judgment enjoined, or the whole of the original debt,[10] unless the whole judgment or debt was lost in consequence of the injunction.[11] Such statutes relate only to judgments for money; when the judgment is of a different character, the amount of damages becomes a question of fact which must be determined in an action on the bond.[12] Where the injunction did not extend to the whole judgment, but only stayed the collection of a part of it, damages should be awarded on that part only, when the injunction is dissolved.[13] Where an order of seizure against two joint vendees is enjoined by one of them, damages are allowed only on the amount due by the vendee who enjoined the proceedings.[14] Such damages are allowed only in cases in which the injunction is obtained at the instance of a party to the judgment enjoined,[15] unless the terms of the act are sufficiently broad to cover an injunction sued out by a stranger.[16]

Liability on injunction bond. In an action on an injunction bond given in a suit to restrain enforcement of a judgment, the extent to which the amount collectable on the judgment has been reduced in consequence of the injunction is a proper element of damage.[17] Damages may be allowed for tying up an excessive amount of the judgment.[18] The damages in such an action may also include costs[19] and interest on the judgment.[20] Counsel fees in-

99. Ky.—Young v. Davis, 1 T.B.Mon. 152.

1. Wis.—Kiel v. Scott & Williams, 202 N.W. 672, 186 Wis. 415.
34 C.J. p 500 note 85.
Operation and effect of opening and vacating judgment generally see supra § 306.

2. Or.—**Corpus Juris quoted in** Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 669, 155 Or. 602.
34 C.J. p 500 note 86.

3. Md.—Little v. Price, 1 Md.Ch. 182.
Or.—**Corpus Juris quoted in** Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 669, 155 Or. 602.

4. Ill.—Strong v. Wesley Hospital, 125 Ill.App. 201.
Or.—**Corpus Juris quoted in** Oregon-Washington R. & Nav. Co. v. Reid, 65 P.2d 664, 669, 155 Or. 602.

5. Va.—Richardson v. Prince George Justices, 11 Gratt. 190, 52 Va. 190.

6. Tex.—Donna Irr. Dist., Hidalgo County No. 1 v. Magnolia Petroleum Co., Civ.App., 62 S.W.2d 207, error dismissed.

7. Wyo.—**Corpus Juris cited in** Rock Springs Coal & Mining Co. v. Black Diamond Coal Co., 272 P. 12, 21, 39 Wyo. 379.
34 C.J. p 500 note 90.

8. U.S.—Moore v. Harjo, C.C.A.Okl., 144 F.2d 318.

9. Iowa.—Western Fruit & Candy Co. v. McFarland, 174 N.W. 57, 188 Iowa 204.
34 C.J. p 500 note 92.
Damages arising from issuance of injunction generally see Injunctions §§ 278–316.

10. Tex.—Fernandez v. Casey, 14 S.W. 149, 77 Tex. 452.
34 C.J. p 501 note 93.

11. La.—Hefner v. Hesse, 29 La. Ann. 149.
34 C.J. p 501 note 94.

12. La.—Green v. Reagan, 32 La. Ann. 974.
34 C.J. p 501 note 97.

13. Ky.—Mitcherson v. Dozier, 7 J.J.Marsh. 53, 22 Am.D. 116.
34 C.J. p 501 note 98.

14. La.—Gorham v. Hayden, 6 Rob. 450.

15. Miss.—Armstrong v. Fusz, 16 So. 532.
34 C.J. p 501 note 1.

16. Va.—Claytor v. Anthony, 15 Gratt. 518, 56 Va. 518.

17. Tex.—**Corpus Juris cited in** Green v. Hodge, Civ.App., 102 S.W. 2d 500, 501.
32 C.J. p 481 note 97.

18. Ky.—Bimbas v. Liberty Bank & Trust Co., 25 S.W.2d 1019, 233 Ky. 430.

19. Ala.—Moore v. Harton, 1 Port. 15.
32 C.J. p 471 note 48 [b].

20. Neb.—Harvard First Nat. Bank v. Hackett, 89 N.W. 412, 2 Neb., Unoff., 512.
32 C.J. p 479 note 53.

curred in procuring the dissolution of the injunction and sustaining the judgment are usually recoverable in an action on the bond,[21] but fees for services rendered prior to the execution of the bond are not.[22] Although it has been held that attorneys' fees should not be included if the effect would be to make the damages greater than the statutory limit,[23] it has also been held that it is no objection to an allowance for such counsel fees that the amount of a judgment collected by execution from the judgment debtor exceeds the penalty of a bond given under an injunction against the judgment,[24] and that the right to an allowance is not affected by a statute providing that, on dissolution of the injunction, damages, in lieu of interest at a given per cent, shall be incorporated in the debt.[25] Liability on an injunction bond is not dependent on the form of procedure pursued to procure dissolution of the injunction.[26]

XII. COLLATERAL ATTACK

A. IN GENERAL

§ 401. General Rule

A judgment which is not void is not subject to collateral attack, but a void judgment may be attacked at any time by any person in any proceeding.

A judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect of its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding,[27]

21. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 60 Idaho 127.

22. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., supra.

23. Ill.—Moriarity v. Galt, 17 N.E. 714, 125 Ill. 417.
34 C.J. p 501 note 95.

24. W.Va.—State v. Graham, 69 S.E. 301, 68 W.Va. 1.

25. W.Va.—State v. Graham, supra.
32 C.J. p 473 note 83.

26. Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 90 P.2d 688, 60 Idaho 127.

27. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 125 F.2d 519, certiorari denied Benitez Sampayo v. Bank of Nova Scotia, 62 S.Ct. 1308, 316 U.S. 702, 86 L.Ed. 1770, rehearing denied 63 S.Ct. 24, 317 U.S. 706, 87 L.Ed. 563, certiorari denied 63 S.Ct. 31, 317 U.S. 624, 87 L.Ed. 505, rehearing denied 63 S.Ct. 153, 317 U.S. 708, 87 L.Ed. 565—Guettel v. U. S., C.C.A.Mo., 95 F.2d 229, 118 A.L.R. 1060, certiorari denied 59 S.Ct. 64, 305 U.S. 603, 83 L.Ed. 383—Moffett v. Robbins, D.C.Kan., 14 F.Supp. 602, affirmed, C.C.A., 81 F.2d 431, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397—Cuff v. U. S., C.C.A.Cal., 64 F.2d 624, certiorari denied 54 S.Ct. 96, 290 U.S. 676, 78 L.Ed. 583—Mitchell v. Cunningham, C.C.A.Wash., 8 F.2d 813—Jackson v. Kentucky River Mills, D.C.Ky., 65 F.Supp. 601—Griffith v. Bank of New York, D.C.N.Y., 59 F.Supp. 271—**Corpus Juris cited in** Prichard v. Nelson, D.C.Va., 55 F.Supp. 506, 515, affirmed, C.C.A., 137 F.2d 312—Nicolson v. Citizens & Southern Nat. Bank, D.C.Ga., 50 F.Supp. 92—Gaskins v. Bonfils, D.C.Colo., 4 F.Supp. 547.

Ala.—A. B. C. Truck Lines v. Kenemer, 25 So.2d 511—**Corpus Juris cited in** Bond v. Arondale Baptist Church, 194 So. 833, 835, 239 Ala. 366.

Ariz.—City of Phœnix v. Sanner, 95 P.2d 987, 54 Ariz. 363—Hill v. Favour, 84 P.2d 575, 52 Ariz. 561—**Corpus Juris cited in** Varnes v. White, 12 P.2d 870, 871, 40 Ariz. 427.

Ark.—Allison v. Bush, 144 S.W.2d 1087, 201 Ark. 315—Sailer v. State, 92 S.W.2d 382, 192 Ark. 514—Hobbs v. Lenon, 87 S.W.2d 6, 191 Ark. 509—State v. Wilson, 27 S.W.2d 106, 181 Ark. 683—Stumpff v. Louann Provision Co., 292 S.W. 106, 173 Ark. 192—Power Mfg. Co. v. Arkansas Rice Growers' Co-op. Ass'n, 281 S.W. 379, 170 Ark. 771.

Cal.—Baird v. Smith, 14 P.2d 749, 216 Cal. 408—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal.App.2d 878—Kirkpatrick v. Harvey, 124 P.2d 367, 51 Cal.App.2d 170—Gerini v. Pacific Employees Ins. Co., 80 P.2d 499, 27 Cal.App.2d 52, followed in 80 P.2d 502, 27 Cal.App.2d 767—Fisch & Co. v. Superior Court in and for Los Angeles County, 43 P.2d 855, 6 Cal.App.2d 21—**Corpus Juris cited in** Associated Oil Co. v. Mullin, 294 P. 421, 423, 110 Cal.App. 385.

Colo.—Atchison, T. & S. F. Ry. Co. v. Board of Com'rs of Fremont County, 37 P.2d 761, 95 Colo. 435—Bieser v. Stoddard, 216 P. 707, 73 Colo. 554.

D.C.—Citizens Protective League v. Clark, 155 F.2d 290—Fishel v. Kite, 101 F.2d 685, 69 App.D.C. 360, certiorari denied Kite v. Fishel, 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054.

Fla.—State ex rel. Friedrich v. Howell, 23 So.2d 153—Town of Belleair v. Newberry, 8 So.2d 7, 150 Fla. 511—Adams v. Adams, 180 So. 516, 131 Fla. 777, followed in Adams v. Dommerich, 180 So. 519, 131 Fla. 782—Bemis v. Loftin, 173 So. 683, 127 Fla. 515.

Ga.—Chappell v. Small, 20 S.E.2d 916, 194 Ga. 143—Payne v. McCrary, 1 S.E.2d 742, 187 Ga. 573—Williams v. Maddox, 134 S.E. 299, 162 Ga. 589—Chance v. Chance, 5 S.E.2d 399, 60 Ga.App. 889.

Idaho.—Moyes v. Moyes, 94 P.2d 782, 60 Idaho 601—**Corpus Juris quoted in** Rogers v. National Surety Co., 22 P.2d 141, 142, 53 Idaho 128—Peterson v. Hague, 4 P.2d 350, 51 Idaho 175.

Ill.—Walton v. Albers, 44 N.E.2d 145, 380 Ill. 423—Baker v. Brown, 28 N.E.2d 710, 372 Ill. 336—Gunnell v. Palmer, 18 N.E.2d 202, 370 Ill. 206, 120 A.L.R. 871—Brown v. Jacobs, 12 N.E.2d 10, 367 Ill. 545—Green v. Hutsonville Tp. High School Dist. No. 201, 190 N.E. 267, 356 Ill. 216—Madison & Kedzie State Bank v. Cicero-Chicago Corrugating Co., 184 N.E. 218, 351 Ill. 180—Balzer v. Pyles, 183 N.E. 215, 350 Ill. 344—Healea v. Verne, 175 N.E. 562, 343 Ill. 325—Crane v. Crane, 173 N.E. 352, 341 Ill. 363—Wyman v. Hageman, 148 N.E. 852, 318 Ill. 64—Holt v. Snodgrass, 146 N.E. 562, 315 Ill. 548—Hummel v. Cardwell, 55 N.E.2d 881, 323 Ill.App. 440, affirmed in part and reversed in part on other grounds 62 N.E.2d 433, 390 Ill. 526, certiorari denied 66 S.Ct. 819, three cases, rehearing denied 66 S.Ct. 898, three cases—Molner v. Arendt, 55

except, as discussed infra § 434, for fraud in its | procurement. Even if the judgment is voidable,

N.E.2d 407, 323 Ill.App. 289—Lord v. Board of Sup'rs of Kane County, 41 N.E.2d 106, 314 Ill.App. 161—Schnur v. Bernstein, 32 N.E.2d 675, 309 Ill.App. 90.

Iowa.—**Corpus Juris cited in** New York Life Ins. Co. v. Breen, 289 N. W. 16, 22, 227 Iowa 738.

Kan.—Federal Savings & Loan Ins. Corporation v. Hatton, 135 P.2d 559, 156 Kan. 673—Smith v. Power, 127 P.2d 452, 155 Kan. 612—Brotion v. Luther, 41 P.2d 1017, 141 Kan. 489—**Corpus Juris cited in** Kansas City Power & Light Co. v. City of Elkhart, 31 P.2d 62, 64, 139 Kan. 374.

Ky.—Wells v. Miller, 190 S.W.2d 41, 300 Ky. 680—Wilburn v. Wilburn, 178 S.W.2d 585, 296 Ky. 781—White v. White, 172 S.W.2d 72, 294 Ky. 563—Poynter v. Smith, 160 S.W.2d 380, 290 Ky. 169—Nicholson v. Thomas, 127 S.W.2d 155, 277 Ky. 760—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416—Houston's Guardian (now Luker) v. Luker's Former Guardian, 69 S.W.2d 1014, 253 Ky. 602—Wells' Adm'x v. Heil, 47 S.W.2d 1041, 243 Ky. 282—Mussman v. Pepples, 22 S.W.2d 605, 232 Ky. 254—**Corpus Juris cited in** Parker v. White, 4 S.W.2d 380, 382, 223 Ky. 561—Hoffman v. Shuey, 2 S.W.2d 1049, 223 Ky. 70, 58 A.L.R. 842—Hays v. Adams, 294 S.W. 1039, 220 Ky. 196—Cain v. Hall, 278 S.W. 152, 211 Ky. 817—Woollums v. Fowler, 269 S.W. 721, 207 Ky. 532—Moore v. Carr, 269 S.W. 302, 207 Ky. 388—Logsdon v. Logsdon, 263 S.W. 728, 204 Ky. 104.

La.—Folse v. St. Bernard Parish Police Jury, 10 So.2d 892, 201 La. 1048—Ethridge-Atkins Corporation v. Tilly, App., 178 So. 669—Meyer v. Reid, 8 La.App. 23.

Me.—Leavitt v. Youngstown Pressed Steel Co., 166 A. 505, 132 Me. 76—Crockett v. Borgerson, 152 A. 407, 129 Me. 395.

Md.—Spencer v. Franks, 195 A. 306, 173 Md. 73, 114 A.L.R. 263.

Mass.—Noyes v. Bankers Indemnity Ins. Co., 30 N.E.2d 867, 307 Mass. 567—Sciaraffa v. Debler, 23 N.E.2d 111, 304 Mass. 240—Bennett v. Powell, 187 N.E. 559, 284 Mass. 246—City of Boston v. Jenney, 184 N.E. 464, 282 Mass. 168—Bremner v. Hester, 155 N.E. 454, 258 Mass. 425.

Mich.—Life Ins. Co. of Detroit v. Burton, 10 N.W.2d 315, 306 Mich. 81—Adams v. Adams, 8 N.W.3d 70, 304 Mich. 290—Rudell v. Union Guardian Trust Co., 294 N.W. 132, 295 Mich. 157—Hoadley v. Gafill Oil Co., 216 N.W. 407, 241 Mich. 15—Broadwell v. Broadwell, 209 N. W. 923, 236 Mich. 60.

Minn.—In re Melgaard's Will, 274 N.W. 641, 200 Minn. 493—Hawley v. Knott, 226 N.W. 697, 178 Minn. 225.

Miss.—Neely v. Craig, 139 So. 835, 162 Miss. 712.

Mo.—**Corpus Juris cited in** Spitcaufsky v. Hatten, 182 S.W.2d 86, 100, 353 Mo. 94—Oldham v. Wright, 85 S.W.2d 483, 337 Mo. 170—Jefferson City Bridge & Transit Co. v. Blaser, 300 S.W. 778, 318 Mo. 373—**Corpus Juris cited in** State v. Dorris, App., 168 S.W.2d 167, 168—Davis v. Morgan Foundry Co., 23 S.W.2d 231, 224 Mo.App. 162—Aufderheide v. Aufderheide, App., 18 S.W.2d 119—State ex rel. Woolman v. Guinotte, 282 S.W. 68, 221 Mo.App. 466.

Mont.—Missoula Light & Water Co. v. Hughes, 77 P.2d 1041, 106 Mont. 355—Coburn v. Coburn, 298 P. 349, 89 Mont. 386.

Neb.—Stanton v. Stanton, 18 N.W.2d 654, 146 Neb. 71.

Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County, 167 P.2d 648.

N.H.—Strong v. New Hampshire Box Co., 131 A. 688, 82 N.H. 221.

N.J.—Nitti v. Public Service Ry. Co., 139 A. 62, 104 N.J.Law 67—Lippincott v. Godfrey, 136 A. 174, 103 N.J.Law 407—Stout v. Sutphen, 29 A.2d 724, 132 N.J.Eq. 583—McMahon v. Amoroso, 154 A. 840, 108 N.J.Eq. 263, certiorari denied Diamond v. McMahon, 52 S.Ct. 31, 284 U.S. 652, 76 L.Ed. 553—Kaplan v. Heiles, 152 A. 855, 107 N.J.Eq. 443—Westerhoff v. Citizens Trust Co., 190 A. 84, 15 N.J.Misc. 202, affirmed 190 A. 88, 117 N.J.Law 453—Matawan Bank v. Feldman, 174 A. 442, 12 N.J.Misc. 785—North Hudson Bond & Mortgage Co. v. Luberto, 155 A. 259, 9 N.J. Misc. 637.

N.Y.—Hiser v. Davis, 137 N.E. 596, 234 N.Y. 300—People v. Paterno, 50 N.Y.S.2d 713, 182 Misc. 491—**Corpus Juris cited in** McCarthy v. McCarthy, 39 N.Y.S.2d 922, 925, 179 Misc. 623, affirmed 52 N.Y.S.2d 817, 268 App.Div. 1070—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 163, 131 Misc. 401, affirmed 230 N.Y.S. 910, 224 App. Div. 773—In re Chambers' Will, 7 N.Y.S.2d 250, 169 Misc. 124.

N.C.—Newton v. Chason, 34 S.E.2d 70, 225 N.C. 204—State v. Adams, 195 S.E. 822, 213 N.C. 243—Pate Hotel Co. v. Morris, 171 S.E. 779, 205 N.C. 484—Duffer v. Brunson, 125 S.E. 619, 188 N.C. 789.

N.D.—Rasmusson v. Schmalenberger, 235 N.W. 496, 60 N.D. 527—Lenhart v. Lynn, 194 N.W. 937, 50 N. D. 87.

Ohio.—State v. Le Blond, 140 N.E. 510, 108 Ohio St. 126, certiorari denied and error dismissed State of Ohio ex rel. Hawke v. Le Blond, 44 S.Ct. 134, 263 U.S. 679, 714, 68 L. Ed. 503, and followed in State v. Darby, 144 N.E. 611, 109 Ohio St. 632—Risman v. Krupar, 186 N.E. 830, 45 Ohio App. 29.

Okl.—Collingsworth v. Hutchison, 90 P.2d 416, 185 Okl. 101—Chicago, R. I. & P. Ry. Co. v. Excise Board of Oklahoma County, 33 P.2d 1081, 168 Okl. 428—First Nat. Bank v. Darrough, 19 P.2d 551, 162 Okl. 243—Protest of St. Louis-San Francisco Ry. Co., 19 P.2d 162, 162 Okl. 62—Orth v. Hajek, 259 P. 854, 127 Okl. 59—Lynch v. Collins, 233 P. 709, 106 Okl. 133.

Or.—Linn County v. Rozelle, 162 P.2d 150—Travelers Ins. Co. of Hartford, Conn., v. Staiger, 69 P. 2d 1069, 157 Or. 143—**Corpus Juris quoted in** McLean v. Sanders, 23 P.2d 321, 322, 143 Or. 524—**Corpus Juris quoted in** Glickman v. Solomon, 12 P.2d 1017, 140 Or. 358—Title & Trust Co. v. U. S. Fidelity & Guaranty Co., 7 P.2d 805, 138 Or. 467—**Corpus Juris quoted in** Abel v. Mack, 283 P. 8, 10, 131 Or. 586.

Pa.—Hoff v. Allegheny County, 23 A. 2d 338, 343 Pa. 569—Commonwealth ex rel. Howard v. Howard, 10 A.2d 779, 138 Pa.Super. 505—Mulvihill v. Philadelphia Sav. Fund Soc., 177 A. 487, 117 Pa. Super. 455—Marshall v. Keystone Mut. Casualty Co., Com.Pl., 56 Dauph.Co. 343.

R.I.—**Corpus Juris cited in** McDuff Estate v. Kost, 158 A. 373, 375, 52 R.I. 136.

S.C.—Greenwood County v. Watkins, 12 S.E.2d 545, 196 S.C. 51—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 1 S.E.2d 797, 191 S.C. 384—Piedmont Press Ass'n v. Record Pub. Co., 152 S. E. 721, 156 S.C. 43, followed in Spartanburg Herald-Journal Co. v. La Varre, 152 S.E. 728, 155 S.C. 425.

Tenn.—Fransioli v. Podesta, 134 S.W. 2d 162, 175 Tenn. 340—Green v. Craig, 51 S.W.2d 480, 164 Tenn. 445—Fidelity Phenix Fire Ins. Co. v. Ford & Cantrell, 47 S.W.2d 558, 164 Tenn. 107—Sloan v. Sloan, 295 S.W. 62, 155 Tenn. 422—Brown v. Jarvis, 123 S.W.2d 852, 22 Tenn. App. 394.

Tex.—Producers' Refining Co. v. Missouri, K. & T. R. Co. of Texas, Com.App., 13 S.W.2d 679—Producers' Refining Co. v. Missouri K. & T. Ry. Co. of Texas, Com.App., 13 S.W.2d 680—Galbraith v. Bishop, Com.App., 287 S.W. 1087—Southern Surety Co. v. Texas Oil Clearing House, Com.App., 281 S.W. 1045—Witty v. Rose, Civ.App., 148 S.W. 2d 962, error dismissed—Childers v. Johnson, Civ.App., 143 S.W.2d

that is, so irregular or defective that it would be set aside or annulled on a proper direct application for that purpose, it is well settled as a general rule that it is not subject to collateral impeachment as long as it stands unreversed and in force.[28]

On the other hand, a judgment which is absolutely void is entitled to no authority or respect, and therefore may be impeached at any time, in any proceeding in which it is sought to be enforced or in which its validity is questioned, by anyone with whose rights or interests it conflicts.[29] By the weight of

123—Eakin v. Glenn, Civ.App., 141 S.W.2d 420—Gamble v. Banneyer, Civ.App., 127 S.W.2d 955, affirmed 151 S.W.2d 586, 137 Tex. 7—Allen v. Trentman, Civ.App., 115 S.W.2d 1177—Jones v. Griffith, Civ.App., 109 S.W.2d 565—Longmire v. Taylor, Civ.App., 109 S.W.2d 525—Olton State Bank v. Howell, Civ.App., 105 S.W.2d 287—Southern Ornamental Iron Works v. Morrow, Civ.App., 101 S.W.2d 336—Cruse v. Mann, Civ.App., 74 S.W.2d 545, error dismissed—Barfield v. Miller, Civ.App., 70 S.W.2d 632, error dismissed—**Corpus Juris cited in** Commercial State Bank of Nacogdoches v. Van Dorn, Civ.App., 25 S.W.2d 192, 193—**Corpus Juris cited in** National Surety Co. v. Hemphill, Civ.App., 13 S.W.2d 921, 922, error refused—Mills v. Snyder, Civ.App., 8 S.W.2d 790—Sederholm v. City of Port Arthur, Civ.App., 3 S.W.2d 925, affirmed Tyner v. La Coste, Com.App., 13 S.W.2d 685 and Tyner v. Keith, 13 S.W.2d 687—Burleson v. Moffett, Civ.App., 3 S.W.2d 544—Johnston v. Stephens, Civ.App., 300 S.W. 225, reversed on other grounds 49 S.W.2d 431, 121 Tex. 374.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

Va.—Law v. Commonwealth, 199 S.E. 516, 171 Va. 449—Buchanan v. Buchanan, 197 S.E. 426, 170 Va. 458, 116 A.L.R. 688—Mayes v. Mann, 180 S.E. 425, 164 Va. 584—Cottrell v. Reams, 145 S.E. 317, 151 Va. 773.

Wash.—**Corpus Juris quoted in** Baskin v. Livers, 43 P.2d 42, 43, 181 Wash. 370—Levinson v. Vanderveer, 13 P.2d 448, 169 Wash. 254—**Corpus Juris quoted in** Treosti v. Treosti, 13 P.2d 45, 46, 168 Wash. 672.

W.Va.—Crickmer v. Thomas, 200 S.E. 353, 120 W.Va. 769—Newhart v. Pennybacker, 200 S.E. 350, 120 W.Va. 774, concurring opinion 200 S.E. 754, 120 W.Va. 774—Fink v. Fink, 137 S.E. 703, 103 W.Va. 423.

Wis.—State v. Williams, 245 N.W. 663, 209 Wis. 541—Milwaukee Corrugating Co. v. Flagge, 198 N.W. 394, 184 Wis. 139.

Wyo.—**Corpus Juris cited in** State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 547, 33 Wyo. 281.

34 C.J. p 511 note 46—25 C.J. p 767 note 51.

Unfair methods

Judgment procured by unfair methods, after statutory requirements essential to jurisdiction have been complied with, will not be disturbed to injury of innocent third persons.—Crabb v. Uvalde Paving Co., Tex.Com.App., 23 S.W.2d 300.

28. U.S.—**Corpus Juris cited in** Prichard v. Nelson, C.C.A.W.Va., 137 F.2d 312, 314—Parker Bros. v. Fagan, C.C.A.Fla., 68 F.2d 616, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490.

Ariz.—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.

Ill.—Walton v. Albers, 44 N.E.2d 145, 380 Ill. 423—Lord v. Board of Sup'rs of Kane County, 41 N.E.2d 106, 314 Ill.App. 161—Schnur v. Bernstein, 32 N.E.2d 675, 309 Ill. App. 90.

Ind.—Fidelity & Casualty Co. of New York v. State, 184 N.E. 916, 98 Ind.App. 485.

Iowa.—Educational Film Exchanges of Iowa v. Hansen, 266 N.W. 487, 221 Iowa 1153.

Ky.—Hopkins v. Cox, 174 S.W.2d 418, 295 Ky. 286—May v. Sword, 33 S.W.2d 314, 236 Ky. 412—Grooms v. Grooms, 7 S.W.2d 863, 225 Ky. 228—Cain v. Hall, 278 S.W. 152, 211 Ky. 817—Haddix v. Walter, 266 S.W. 631, 205 Ky. 740—Oliver v. Belcher, 265 S.W. 942, 205 Ky. 417.

Mass.—Sullivan v. Jordan, 36 N.E.2d 387, 310 Mass. 12.

Mich.—Attorney General ex rel. O'Hara v. Montgomery, 267 N.W. 550, 275 Mich. 504.

Mo.—**Corpus Juris cited in** State v. Ragland, 97 S.W.2d 113, 116, 339 Mo. 452.

Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humbolt County, 167 P.2d 648.

N.C.—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.

Ohio.—Steiner v. Rainer, 42 N.E.2d 684, 69 Ohio App. 6.

Okl.—Slemp v. City of Tulsa, 281 P. 280, 139 Okl. 76, appeal dismissed and certiorari denied 50 S.Ct. 407, 281 U.S. 703, 74 L.Ed. 1127.

Or.—**Corpus Juris quoted in** Abel v. Mack, 283 P. 8, 10, 131 Or. 586.

Pa.—In re Limber's Estate, 131 A. 244, 284 Pa. 346—In re Murray's Estate, 45 A.2d 411, 158 Pa.Super. 504.

Tenn.—State ex rel. Hooten v. Hooten, 1 Tenn.App. 154.

Tex.—Gehret v. Hetkes, Com.App., 36 S.W.2d 700—Clark v. Puls, Civ. App., 192 S.W.2d 905, error refused no reversible error—Wilson v. King, Civ.App., 148 S.W.2d 442—Walton v. Stinson, Civ.App., 140 S.W.2d 497, error refused—Darlington v. Allison, Civ.App., 12 S.W.2d 839, error dismissed—State Mortg. Corporation v. Garden, Civ. App., 11 S.W.2d 212—Robins v. Sandford, Civ.App., 1 S.W.2d 520, affirmed, Com.App., 29 S.W.2d 969—Gathings v. Robertson, Civ.App., 264 S.W. 173, reversed on other grounds, Com.App., 276 S.W. 218—Oetting v. Mineral Wells Crushed Stone Co., Civ.App., 262 S.W. 93.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271—**Corpus Juris cited in** Salt Lake City v. Industrial Commission, 22 P.2d 1046, 1048, 82 Utah 179.

Va.—**Corpus Juris cited in** Barnes v. American Fertilizer Co., 130 S.E. 902, 906, 144 Va. 692.

34 C.J. p 513 note 48.

"Good faith, as well as sound public policy demands that erroneous and voidable judgments be set aside or modified in courts in which they are rendered."—Jackson City Bank & Trust Co. v. Fredrick, 260 N.W. 908, 910, 271 Mich. 538.

The distinction between erroneous and void judgments is based on wholesome public policy which facilitates final determination of disputed issues by decreeing that erroneous judgments may be attacked only directly, that is, by appeal or in manner prescribed by statute, and void judgments collaterally only where fact which rendered them void, namely, lack of jurisdiction in court to render them, appears on face of the record.—Commonwealth ex rel. Dummit v. Jefferson County, 189 S.W.2d 604, 300 Ky. 514.

Dormant judgment

A dormant judgment is not void, but only voidable, and an order of sale of execution on dormant judgment is merely voidable, and not subject to collateral attack.—McGlothlin v. Scott, Tex.Civ.App., 6 S.W.2d 129—34 C.J. p 513 note 48 [a].

29. U.S.—State of Missouri ex rel. and to Use of Stormfeltz v. Title Guaranty & Surety Co., C.C.A.Mo., 72 F.2d 595, certiorari denied Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, 55 S.Ct. 404, 294 U.S. 708, 79 L.Ed. 1242—Abraham Land & Mineral Co. v. Marble Sav. Bank, D.C.La., 35 F.Supp. 500—In re American Fidelity Corporation, D.C.Cal., 28 F.Supp. 462.

authority, whether a judgment is void or voidable | is to be determined from an inspection of the rec-

Ala.—Robertson v. State, 104 So. 561, 20 Ala.App. 514.

Ariz.—Hallford v. Industrial Commission, 159 P.2d 305.

Ark.—McClellan v. Stuckey, 120 S.W.2d 155, 196 Ark. 816—Taylor v. O'Kane, 49 S.W.2d 400, 185 Ark. 782—Stahl v. Sibeck, 40 S.W.2d 442, 183 Ark. 1143—Bragg v. Thompson, 9 S.W.2d 24, 177 Ark. 870—Hart v. Wimberly, 296 S.W. 39, 173 Ark. 1083.

Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35—Conlin v. Blanchard, 28 P.2d 12, 219 Cal. 632—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385—Pennell v. Superior Court in and for Los Angeles County, 262 P. 48, 87 Cal.App. 375.

Colo.—Perdew v. Perdew, 64 P.2d 602, 99 Colo. 544.

Fla.—In re Begg's Estate, 12 So.2d 115, 152 Fla. 277—Watkins v. Johnson, 191 So. 2, 139 Fla. 712—**Corpus Juris cited in** Adams v. Adams, 180 So. 516, 519, 131 Fla. 777—Goodrich v. Thompson, 118 So. 60, 96 Fla. 327—Kroier v. Kroier, 116 So. 753, 95 Fla. 865—Malone v. Meres, 109 So. 677, 91 Fla. 709.

Ga.—Montgomery v. Suttles, 13 S.E.2d 781, 191 Ga. 781—Patten v. Miller, 8 S.E.2d 757, 190 Ga. 123—Drake v. Drake, 1 S.E.2d 573, 187 Ga. 423—Jones v. Jones, 184 S.E. 271, 181 Ga. 747—Shotkin v. State, App., 35 S.E.2d 556—Nixon v. L. A. Russell Piano Co., 180 S.E. 743, 51 Ga.App. 399.

Idaho.—Weil v. Defenbach, 208 P. 1025, 36 Idaho 37.

Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—Anderson v. Anderson, 44 N.E.2d 54, 380 Ill. 435—Noorman v. Department of Public Works and Buildings, 8 N.E.2d 637, 366 Ill. 216, dismissed Noorman v. Department of Public Works and Buildings of State of Illinois, 58 S.Ct. 30, 302 U.S. 637, 82 L.Ed. 496—People ex rel. Lange v. Old Portage Park Dist., 190 N.E. 664, 356 Ill. 340—People v. Miller, 171 N.E. 672, 339 Ill. 573—People v. Brewer, 160 N.E. 76, 328 Ill. 472—Meyer v. Meyer, 66 N.E. 2d 457, 328 Ill.App. 408—Industrial Nat. Bank of Chicago v. Altenberg, 64 N.E.2d 219, 327 Ill.App. 337—Walton v. Albers, 40 N.E.2d 99, 313 Ill.App. 304, reversed on other grounds 44 N.E.2d 145, 380 Ill. 423—Schillinger v. O'Connell, 7 N.E. 2d 153, 289 Ill.App. 271—McInness v. Oscar F. Wilson Printing Co., 258 Ill.App. 161—Levin v. Sylvan Metal Products Co., 252 Ill.App. 140—Levy v. Odell, 237 Ill.App. 606.

Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 109, 218 Ind. 468, rehearing denied 33 N.E. 2d 583, 218 Ind. 468.

Iowa.—Brown v. Tank, 297 N.W. 801, 230 Iowa 370—Gohring v. Koonce, 278 N.W. 283, 224 Iowa 1186—Dayton v. Patterson, 250 N.W. 595, 216 Iowa 1382.

Kan.—Starke v. Starke, 125 P.2d 738, second case, 155 Kan. 331—Patterson v. Board of Com'rs of Montgomery County, 66 P.2d 400, 145 Kan. 559—Hoover v. Roberts, 58 P.2d 83, 144 Kan. 58—Franklin v. Jennings, 264 P. 1041, 125 Kan. 553.

Ky.—Morris v. Morris, 185 S.W.2d 244, 299 Ky. 235—Miller v. Hill, 168 S.W.2d 769, 293 Ky. 242—Booth v. Copley, 140 S.W.2d 662, 283 Ky. 23—Commonwealth v. Miniard, 99 S.W.2d 166, 266 Ky. 405—Ewing v. Union Central Bank, 72 S.W.2d 4, 254 Ky. 623—Grooms v. Grooms, 7 S.W.2d 863, 225 Ky. 228—Bowles' Guardian v. Johnson, 291 S.W. 29, 218 Ky. 221.

La.—Nottingham v. Hoss, 141 So. 391, 19 La.App. 643—Jones v. Crescent City Ice Mfg. Co., 3 La.App. 7.

Md.—**Corpus Juris cited in** Fooks' Ex'rs v. Ghingher, 192 A. 732, 785, 172 Md. 612, certiorari denied Phillips v. Ghingher, 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 561.

Mass.—Carroll v. Berger, 150 N.E. 870, 255 Mass. 132.

Mich.—Adams v. Adams, 8 N.W.2d 70, 304 Mich. 290—Attorney General ex rel. O'Hara v. Montgomery, 267 N.W. 550, 275 Mich. 504—Morris v. Barker, 235 N.W. 174, 253 Mich. 334.

Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147—City of Pascagoula v. Krebs, 118 So. 286, 151 Miss. 676.

Mo.—Faris v. City of Caruthersville, 162 S.W.2d 237, 349 Mo. 454—Davison v. Arne, 155 S.W.2d 155, 348 Mo. 790—Rhodus v. Geatley, 147 S.W.2d 631, 347 Mo. 397—Merz v. Tower Grove Bank & Trust Co., 130 S.W.2d 611, 344 Mo. 1150—Truesdale v. St. Louis Public Service Co., 107 S.W.2d 778, 341 Mo. 402, 112 A.L.R. 135—**Corpus Juris cited in** State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061, 1069—Simplex Paper Corporation v. Standard Corrugated Box Co., 97 S.W.2d 862, 231 Mo.App. 764—Drake v. Kansas City Public Service Co., 41 S.W.2d 1066, 226 Mo. App. 365, rehearing denied 54 S.W.2d 427, 226 Mo.App. 365—**Corpus Juris cited in** National Union Fire Ins. Co. v. Vermillion, App., 19 S.W.2d 776, 783.

Mont.—Barnes v. Montana Lumber & Hardware Co., 216 P. 335, 67 Mont. 481.

Neb.—**Corpus Juris cited in** Drainage Dist. No. 1 v. Village of Hershey, 296 N.W. 879, 882, 139 Neb. 205—Garrett v. State, 224 N.W. 860, 118 Neb. 373.

Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County, 167 P.2d 648—**Corpus Juris cited in** State ex rel. Wood v. Haeger, 33 P.2d 753, 754, 55 Nev. 331.

N.J.—**Corpus Juris quoted in** Novograd v. Kayne's, 199 A. 59, 61, 16 N.J.Misc. 283.

N.Y.—In re Rudgers, 294 N.Y.S. 142, 250 App.Div. 359—Cantor v. Killen, 5 N.Y.S.2d 796, 167 Misc. 620—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 163, 131 Misc. 401, affirmed 230 N.Y.S. 910, 224 App.Div. 773.

N.C.—Holden v. Totten, 31 S.E.2d 635, 224 N.C. 547—Butler v. Winston, 27 S.E.2d 124, 223 N.C. 421—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465—Abernethy v. Burns, 188 S.E. 97, 210 N.C. 636—Pridgen v. Pridgen, 166 S.E. 591, 203 N.C. 533—Ellis v. Ellis, 130 S.E. 7, 190 N.C. 418—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.

Ohio.—Steiner v. Rainer, 42 N.E.2d 684, 69 Ohio App. 6—State v. Price, 164 N.E. 765, 30 Ohio App. 218, affirmed Price v. State, 165 N.E. 44, 119 Ohio St. 558.

Okl.—**Corpus Juris cited in** Porter v. Hansen, 124 P.2d 391, 396, 190 Okl. 429—Prudential Ins. Co. of America v. Board of Com'rs of Garvin County, 92 P.2d 359, 185 Okl. 362—Independent Oil & Gas Co. v. Clark, 52 P.2d 789, 175 Okl. 257—Henson v. Oklahoma State Bank, 23 P.2d 709, 165 Okl. 1—Eaton v. St. Louis-San Francisco Ry. Co., 251 P. 1032, 122 Okl. 143.

Or.—**Corpus Juris cited in** Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 911, 150 Or. 395—**Corpus Juris quoted in** Abel v. Mack, 283 P. 8, 10, 131 Or. 586.

Pa.—In re Patterson's Estate, 19 A.2d 165, 341 Pa. 177—In re Limber's Estate, 131 A. 244, 284 Pa. 346—Mamlin v. Tener, 23 A.2d 90, 146 Pa.Super. 593—Commonwealth ex rel. Howard v. Howard, 10 A.2d 779, 138 Pa.Super. 505—Mehalko v. Dauphin County, Quar.Sess., 54 Dauph.Co. 363—Commonwealth v. Boyer, Quar.Sess., 6 Fay.L.J. 233, 11 Som.Leg.J. 385.

Tenn.—Tennessee Marble & Brick Co. v. Young, 163 S.W.2d 71, 179 Tenn. 116—Blumberg v. Abbott, 21 S.W.2d 396, 159 Tenn. 586—West v. Jackson, App., 186 S.W.2d 915—Long v. Alford, 14 Tenn.App. 1.

Tex.—Grant v. Ellis, Com.App., 50 S.W.2d 1093—Switzer v. Smith, Com.App., 300 S.W. 31, 68 A.L.R. 377—Southern Surety Co. v. Texas Oil

ord. If the record discloses the jurisdictional de- | fect, the judgment is void;[30] if it does not, the

Clearing House, Com.App., 281 S. W. 1045—Maury v. Turner, Com. App., 244 S.W. 809—Miller v. State ex rel. Abney, Civ.App., 155 S.W.2d 1012, error refused—Dittmar v. St. Louis Union Trust Co., Civ.App., 155 S.W.2d 388, error refused—Burrage v. Hunt, Civ.App., 147 S. W.2d 532, error dismissed, judgment correct—Lipscomb v. Lofland, Civ.App., 141 S.W.2d 983—Cheney v. Norton, Civ.App., 126 S.W.2d 1011, reversed on other grounds, Norton v. Cheney, 161 S.W.2d 73, 138 Tex. 622—Klier v. Richter, Civ.App., 119 S.W.2d 100, error refused—Longmire v. Taylor, Civ. App., 109 S.W.2d 525, error dismissed—Reynolds v. Volunteer State Life Ins. Co., Civ.App., 80 S. W.2d 1087, error refused—San Lorenzo Title & Improvement Co. v. Caples, Civ.App., 48 S.W.2d 329, affirmed 73 S.W.2d 516, 124 Tex. 33—Frazier v. Hanlon Gasoline Co., Civ.App., 29 S.W.2d 461, error refused—Coffman v. National Motor Products Co., Civ.App., 26 S. W.2d 921, error dismissed—Scruggs v. Gribble, Civ.App., 17 S. W.2d 153—Dyer v. Black, Sivalls & Bryson, Civ.App., 13 S.W.2d 142, error dismissed—White v. Hidalgo County Water Improvement Dist. No. 2, Civ.App., 6 S.W.2d 790—Pumphrey v. Hunter, Civ.App., 270 S.W. 237—Aleman v. Gonzales, Civ. App., 246 S.W. 726—Reed v. State, Cr., 187 S.W.2d 660.

Utah.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.

Va.—Robertson v. Commonwealth, 25 S.E.2d 352, 181 Va. 520, 146 A.L.R. 966—Broyhill v. Dawson, 191 S.E. 779, 163 Va. 321—Powers v. Sutherland, 160 S.E. 57, 157 Va. 336—American Mut. Liability Ins. Co. v. Hamilton, 135 S.E. 21, 145 Va. 391—Hunt v. Kennedy Coal Corporation, 124 S.E. 189, 140 Va. 17.

Wash.—King County v. Rea, 152 P. 2d 310, 21 Wash.2d 593—France v. Freeze, 102 P.2d 687, 4 Wash.2d 120—State v. Bayles, 209 P. 20, 121 Wash. 215.

W.Va.—Pettry v. Hedrick, 19 S.E.2d 583, 124 W.Va. 113.

Wyo.—Boulter v. Cook, 234 P. 1101, 32 Wyo. 461, rehearing denied 236 P. 245, 32 Wyo. 461.

34 C.J. p 514 note 49.

Power of court to dispose of void judgment

A court of general jurisdiction may, by virtue of its inherent powers and without the aid of statutes, clear its records of a void judgment, no matter in what form or in what manner the application to do so is made.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.

Estoppel

(1) Where circumstances are such as might otherwise afford sufficient grounds for successful collateral attack on judgment or decree, the conduct of the attacking party may be such as to estop him from availing himself of those grounds.—Askew v. Rountree, Tex.Civ.App., 120 S.W.2d 117, error dismissed.

(2) A party is not estopped from assailing a void judgment, especially where the prima facie effect of such judgment is to confer on the party a false marital status.—Coast v. Coast, Tex.Civ.App., 135 S.W.2d 790.

(3) In attacking a decree based on an application to have land registered under the Torrens Title Act, and void on its face, petitioner is not required to excuse himself for negligence in not asserting his claim, the fact that he failed to answer the application, in the absence of other facts creating an estoppel, being immaterial.—Petition of Furness, 218 P. 61, 62 Cal.App. 753.

(4) One is not estopped from objecting to a determination made by an administrative body, including industrial commission, or by a court, that body or court had no jurisdiction to make.—Zimmermann v. Scandrett, D.C.Wis., 57 F.Supp. 799.

Laches or limitations no bar

Neither doctrine of laches nor statute of limitations applies to collateral attack on judgment void because of want of jurisdiction, since there is no time limiting collateral attack on void judgment.—Garrison v. Blanchard, 16 P.2d 273, 127 Cal. App. 616.

Statute making judgment absolute not applicable

The statute providing that, if petition for review is not filed within three years after final judgment is rendered, the judgment shall stand absolute applies only to special procedure on petition for review of a valid default judgment, as provided in statute concerning time when final judgment may be vacated, based on grounds set out in statute concerning what must be shown by petition to set aside judgment, and the statute concerning time when judgment shall stand absolute is not applicable to a judgment which is void for lack of jurisdiction to enter it.—Hankins v. Smarr, 137 S.W.2d 499, 345 Mo. 973.

Judgment after dismissal

Judgment of restitution, rendered after suit for possession of premises was dismissed, is subject to collateral attack in suit to set it aside.—Woods v. Wark, 269 N.W. 76, 235 Mich. 90.

In ejectment

The rule which permits a collateral attack on a void judgment whenever it is called to the attention of the court in any proceeding in which it is material to the issue presented is particularly apposite in an ejectment suit in which a party may show that any instrument relied on by his adversary as evidence of title is void.—Powell v. Turpin, 29 S.E.2d 26, 224 N.C. 67.

On appeal

Void decree could be first attacked on appeal.—Powers v. Sutherland, 160 S.E. 57, 157 Va. 336.

30. U.S.—State of Missouri ex rel. and to Use of Stormfeltz v. Title Guaranty & Surety Co., C.C.A.Mo., 72 F.2d 595, certiorari denied Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, 55 S.Ct. 404, 294 U.S. 708, 79 L.Ed. 1242.

Ariz.—Maricopa County v. Bloomer, 78 P.2d 993, 52 Ariz. 28.

Ark.—Lambie v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019.

Cal.—In re Smead's Estate, 82 P.2d 182, 12 Cal.2d 20—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35—Security-First Nat. Bank of Los Angeles v. Superior Court in and for Los Angeles County, 37 P. 2d 69, 1 Cal.2d 749—Scoville v. Keglor, 34 P.2d 212, 29 Cal.App.2d 66—Ex parte Wyatt, 300 P. 132, 114 Cal.App. 557—Petition of Furness, 218 P. 61, 62 Cal.App. 753.

D.C.—U. S. ex rel. Rauch v. Davis, 8 F.2d 907, 56 App.D.C. 46, certiorari denied 46 S.Ct. 352, 270 U.S. 653, 70 L.Ed. 782.

Idaho.—Rogers v. National Surety Co., 22 P.2d 141, 53 Idaho 128.

Ill.—Lord v. Board of Sup'rs of Kane County, 41 N.E.2d 106, 314 Ill.App. 161.

Kan.—**Corpus Juris quoted in** Harder v. Johnson, 76 P.2d 763, 764, 147 Kan. 440—**Corpus Juris quoted in** Skaer v. Capsey, 273 P. 464, 466, 127 Kan. 383.

Miss.—Horne v. Moorehead, 153 So. 668, 169 Miss. 362.

Mo.—State ex rel. Holtkamp v. Hartmann, 51 S.W.2d 22, 330 Mo. 386—**Corpus Juris cited in** State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061, 1069—Citizens' Bank & Trust Co. v. Moore, 263 S.W. 530, 215 Mo.App. 21.

Nev.—Beck v. Curti, 45 P.2d 601, 56 Nev. 72.

N.Y.—**Corpus Juris quoted in** Nervo v. Mealey, 25 N.Y.S.2d 632, 634, 175 Misc. 952.

N.C.—Wyatt v. Berry, 170 S.E. 131, 205 N.C. 118—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.

N.D.—Johnson v. Ranum, 244 N.W. 642, 62 N.D. 607—Zimmerman v. Boynton, 229 N.W. 3, 59 N.D. 112.

judgment is merely voidable.[31] In some jurisdictions, however, as discussed infra § 421, extrinsic

Okl.—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—Crawford v. Le Fevre, 61 P.2d 196, 177 Okl. 508—Sinclair Prairie Pipe Line Co. v. Excise Board of Tulsa County, 49 P.2d 114, 173 Okl. 375—Excise Board of Le Flore County v. Kansas City Southern Ry. Co., 47 P.2d 580, 173 Okl. 238—Moroney v. State ex rel. Southern Surety Co., 31 P.2d 926, 168 Okl. 69—Adams v. Carson, 25 P.2d 653, 165 Okl. 161—State v. Armstrong, 13 P.2d 198, 158 Okl. 290—Protest of Kansas City Southern Ry. Co., 11 P.2d 500, 157 Okl. 246—Excise Board of Carter County v. Chicago, R. I. & P. Ry. Co., 3 P.2d 1037, 152 Okl. 120—Bird v. Palmer, 3 P.2d 890, 152 Okl. 3, followed in 3 P.2d 894, 152 Okl. 7—Jent v. Jent, 291 P. 529, 145 Okl. 74—Rock Island Implement Co. v. Pearsey, 270 P. 846, 133 Okl. 1—Eaton v. St. Louis-San Francisco Ry. Co., 251 P. 1032, 122 Okl. 143.

Or.—**Corpus Juris quoted in** Abel v. Mack, 283 P. 8, 10, 131 Or. 586.

S.C.—Chamberlain v. First Nat. Bank of Greenville, 24 S.E.2d 158, 202 S.C. 115—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 1 S.E.2d 797, 191 S.C. 384—Stone v. Mincey, 185 S.E. 619, 180 S.C. 317—Hood v. Cannon, 182 S.E. 306, 178 S.C. 94.

Tenn.—Lynch v. State ex rel. Killebrew, 166 S.W.2d 397, 179 Tenn. 339—New York Casualty Co. v. Lawson, 24 S.W.2d 881, 160 Tenn. 329.

Tex.—Ringgold v. Graham, Com.App., 13 S.W.2d 355—Gehret v. Hetkes, Com.App., 36 S.W.2d 700—Smith v. Paschal, Com.App., 1 S.W.2d 1086, rehearing denied 5 S.W.2d 135—Hatch v. Kubena, Civ.App., 190 S.W.2d 175, reversed on other grounds, Sup., Kubena v. Hatch, 193 S.W.2d 175—Litton v. Waters, Civ.App., 161 S.W.2d 1095, error refused—Buhrman - Pharr Hardware Co. v. Medford Bros., Civ.App., 118 S.W.2d 345, error refused—Ferguson v. Ferguson, Civ.App., 98 S.W.2d 847—Adams v. Epstein, Civ.App., 77 S.W.2d 545—Simms Oil Co. v. Butcher, Civ.App., 55 S.W.2d 192, error dismissed—Terrell v. Alpha Petroleum Co., Civ.App., 54 S.W.2d 821, affirmed Alpha Petroleum Co. v. Terrell, 59 S.W.2d 364, 122 Tex. 257, amended 59 S.W.2d 372, 122 Tex. 257, and followed in Alpha Petroleum Co. v. Walker, 59 S.W.2d 373, 122 Tex. 246—Edinburg Irr. Co. v. Ledbetter, Civ.App., 247 S.W. 335, modified on other grounds, Com.App., 286 S.W. 185—Aleman v. Gonzales, Civ.App., 246 S.W. 726.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271—Frankey v. Patten, 284 P. 318, 75 Utah 231—Stockyards Nat. Bank of South Omaha v. Bragg, 245 P. 966, 67 Utah 60.

Va.—Wood v. Kane, 129 S.E. 327, 143 Va. 281.

34 C.J. p 514 note 50.

A test in determining whether judgment is void and subject to "collateral attack" is whether, if party attacking it had been a party thereto, a motion in arrest could have been sustained for defects appearing in face of pleadings, which could not have been aided by amendment or cured by verdict.—Deck v. Shields, 25 S.E.2d 514, 195 Ga. 697.

Judgment constituting collateral attack on judgment

Where first final decree of county court in probate proceeding was valid and not subject to collateral attack, orders made in connection with special administration proceedings and second final decree constituted a "collateral attack" on the first final decree, and were void on the face of the judgment roll and subject to collateral attack, and county court properly vacated all orders made in connection therewith.—Porter v. Hansen, 124 P.2d 391, 190 Okl. 429.

31. U.S.—**Corpus Juris cited in** Prichard v. Nelson, C.C.A.W.Va., 137 F.2d 312, 314—State of Missouri ex rel. and to Use of Stormfeltz v. Title Guaranty & Surety Co., C.C.A.Mo., 72 F.2d 595, certiorari denied Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, 55 S.Ct. 404, 294 U.S. 708, 79 L.Ed. 1242.

Ala.—Wise v. Miller, 111 So. 913, 215 Ala. 660.

Ariz.—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.

Cal.—Wells Fargo & Co. v. City and County of San Francisco, 152 P.2d 625—Kaufmann v. California Mining & Dredging Syndicate, 104 P.2d 1038, 16 Cal.2d 90—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35—Hamblin v. Superior Court of Los Angeles County, 233 P. 337, 195 Cal. 364, 43 A.L.R. 1509—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal.App.2d 878—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318—Kirkpatrick v. Harvey, 124 P.2d 367, 51 Cal.App.2d 170—People v. Spivey, 77 P.2d 247, 25 Cal.App.2d 279—Burrows v. Burrows, 52 P.2d 606, 10 Cal.App.2d 749—Ream v. Barr, 291 P. 451, 108 Cal.App. 172.

Ga.—Payne v. McCrary, 1 S.E.2d 742, 187 Ga. 573—Thomas v. Lambert, 1 S.E.2d 443, 187 Ga. 616.

Idaho.—Welch v. Morris, 291 P. 1048, 49 Idaho 781.

Ind.—Cooper v. Morris, 200 N.E. 222, 210 Ind. 162.

Kan.—**Corpus Juris quoted in** Harder v. Johnson, 76 P.2d 763, 764, 147 Kan. 440—**Corpus Juris quoted in** Skaer v. Capsey, 273 P. 464, 466, 127 Kan. 383.

Ky.—Bailey v. Jones, 14 S.W.2d 152, 228 Ky. 42—Collier v. Peninsular Fire Ins. Co. of America, 263 S.W. 353, 204 Ky. 1.

Mont.—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58—Coburn v. Coburn, 298 P. 349, 89 Mont. 386—In re Ft. Shaw Irr. Dist., 261 P. 962, 81 Mont. 170.

N.C.—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.

N.D.—**Corpus Juris cited in** Rasmussen v. Schmalenberger, 235 N.W. 496, 492, 60 N.D. 527.

Okl.—Lee v. Harvey, 156 P.2d 134, 195 Okl. 178—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—Sabin v. Levorsen, 145 P.2d 402, 193 Okl. 320, certiorari denied 64 S.Ct. 205, 320 U.S. 792, 88 L.Ed. 477, rehearing denied 64 S.Ct. 368, 320 U.S. 815, 88 L.Ed. 492—Adams v. Carson, 25 P.2d 653, 165 Okl. 161—Protest of St. Louis-San Francisco Ry. Co., 19 P.2d 162, 162 Okl. 62—Protest of Kansas City Southern Ry. Co., 11 P.2d 500, 157 Okl. 246—Protest of St. Louis-San Francisco Ry. Co., 11 P.2d 139, 157 Okl. 131—Reliance Clay Products Co. v. Rooney, 10 P.2d 414, 157 Okl. 24—Excise Board of Creek County v. Gulf Pipe Line Co. of Oklahoma, 9 P.2d 460, 156 Okl. 103—Bird v. Palmer, 3 P.2d 890, 152 Okl. 3, followed in 3 P.2d 894, 152 Okl. 7.

Or.—**Corpus Juris quoted in** Abel v. Mack, 283 P. 8, 10, 131 Or. 586.

S.C.—Stone v. Mincey, 185 S.E. 619, 180 S.C. 317—Scott v. Newell, 144 S.E. 82, 146 S.C. 385.

Tex.—Gehret v. Hetkes, Com.App., 36 S.W.2d 700—Ringgold v. Graham, Com.App., 13 S.W.2d 355—Williams v. Coleman-Fulton Pasture Co., Civ.App., 157 S.W.2d 995, error refused—Perdue v. Miller, Civ.App., 64 S.W.2d 1002, error refused—Edinburg Irr. Co. v. Ledbetter, Civ.App., 247 S.W. 335, modified on other grounds, Com.App., 286 S.W. 185.

Utah.—**Corpus Juris cited in** Salt Lake City v. Industrial Commission, 22 P.2d 1046, 1048, 82 Utah 179.

Va.—Wood v. Kane, 129 S.E. 327, 143 Va. 281.

Wash.—**Corpus Juris cited in** Thompson v. Short, 106 P.2d 720, 724, 6 Wash.2d 71.

34 C.J. p 514 note 51.

evidence is admissible to show the jurisdictional defect. In order to make a judgment subject to collateral attack it must have been rendered by a court without legal organization;[32] or, as discussed infra §§ 421–427, by a court without jurisdiction. Where an attack is collateral, the ordinary rules governing a direct attack on a judgment have no bearing in determining the contention,[33] and the only question before the court is whether the judgment or decree is void.[34]

§ 402. To What Judgments and Courts Rule Applies

In general the rule against collateral attack applies to all varieties of valid judgments in all kinds of judicial proceedings.

The rule against the collateral impeachment of judgments applies generally to all varieties of judgments, decrees, or orders made by courts of competent jurisdiction, in all kinds of judicial proceedings,[35] such as, among others, contempt proceedings,[36] summary proceedings,[37] tax proceedings,[38] garnishment,[39] judgments against political subdivisions of a state,[40] proceedings against partnerships or partners,[41] judgments in interpleader suits,[42] mortgage foreclosures,[43] or proceedings relating to

32. Tex.—Hill v. Lofton, Civ.App., 165 S.W. 67.
34 C.J. p 514 note 53.

33. Cal.—Kaufmann v. California Mining & Dredging Syndicate, 104 P.2d 1038, 16 Cal.2d 90.

34. Neb.—Douglas County v. Feenan, 18 N.W.2d 740, 146 Neb. 156.

35. Cal.—Lieberman v. Superior Court of California in and for Orange County, 236 P. 570, 72 Cal. App. 18.
Fla.—Kennedy v. Seville Holding Co., 169 So. 860, 125 Fla. 415.
Ill.—Brown v. Jacobs, 12 N.E.2d 10, 367 Ill. 545—Murphy v. Murphy, 175 N.E. 378, 343 Ill. 234—Union Trust Co. v. First Trust & Savings Bank, 252 Ill.App. 337.
Mass.—McKay v. Polep, 42 N.E.2d 538, 311 Mass. 567.
Mo.—State ex rel. and to Use of Conran v. Duncan, 63 S.W.2d 135, 333 Mo. 673.
N.J.—Lane v. Rushmore, 198 A. 872, 123 N.J.Eq. 531, affirmed 4 A.2d 55, 125 N.J.Eq. 310, certiorari denied Rushmore v. Lane, 59 S.Ct. 1033, 307 U.S. 636, 83 L.Ed. 1518.
N.C.—McIver Park, Inc., v. Brinn, 27 S.E.2d 548, 223 N.C. 502.
34 C.J. p 515 notes 58, 59.
Decrees in equity see Equity § 615.
Motions and orders see the C.J.S. title Motions and Orders § 66, also 42 C.J. p 560 note 85 et seq.
Proceedings in rem see infra § 910.

Interlocutory orders

The rule against collateral attack on judgments applies to protect interlocutory orders and proceedings as well as final judgments.—Davenport v. East Texas Refining Co., Tex. Civ.App., 127 S.W.2d 312, error refused—34 C.J. p 515 note 58 [c].

Order directing arbitration is not assailable collaterally, unless void.—Marchant v. Mead-Morrison Mfg. Co., 169 N.E. 386, 252 N.Y. 284, reargument denied 171 N.E. 770, 253 N.Y. 534, appeal dismissed Mead-Morrison Mfg. Co. v. Marchant, 51 S.Ct. 104, 282 U.S. 808, 75 L.Ed. 725.

Extension of time for payment of guaranty

Trial court's orders granting bank deposit guarantors extension of time for payment of guaranty were held "judgments" which could not be collaterally attacked in action on guaranty, by bank's receiver, since there was issue for judicial determination in proceedings before trial court, which issue was whether guarantors were entitled to have time of payment of their guaranty extended and bank's receiver enjoined from selling collateral and bank's realty in meantime, which issue, in nature of things court could not determine without adjudging that guaranty was in force.—Hopkins v. Woodside, 180 S.E. 454, 176 S.C. 463.

36. Pa.—Hoskins v. Somerset Coal Co., 68 A. 343, 219 Pa. 373, 123 Am. S.R. 667.

37. Mich.—Hafner v. A. J. Stuart Land Co., 224 N.W. 630, 246 Mich. 465.
Or.—**Corpus Juris cited in** National Surety Corporation v. Smith, 123 P.2d 203, 218, 168 Or. 265.
34 C.J. p 515 note 63.

38. Wis.—State v. Baker, 286 N.W. 535, 232 Wis. 383, rehearing denied 287 N.W. 690, 232 Wis. 383, certiorari denied Baker v. State of Wisconsin, 60 S.Ct. 582, 309 U.S. 662, 84 L.Ed. 1010.

39. Mich.—Walden v. Crego's Estate, 285 N.W. 457, 288 Mich. 564.
34 C.J. p 515 note 65.

40. Okl.—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—Standish Pipe Line Co. v. Oklahoma County Excise Board, 102 P.2d 606, 187 Okl. 245—Sinclair Prairie Pipe Line Co. v. Excise Board of Tulsa County, 49 P.2d 114, 173 Okl. 375—Excise Board of Le Flore County v. Kansas City Southern Ry. Co., 47 P.2d 580, 173 Okl. 238—Protest of Kansas City Southern Ry. Co., 11 P.2d 500, 157 Okl. 246—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

41. Ga.—Burson v. Shields, 129 S.E. 22, 160 Ga. 723.
47 C.J. p 1015 note 72.

42. Tex.—Texas-Pacific Coal & Oil Co. v. Ames, Com.App., 292 S.W. 191.

43. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551—In re 7000 South Shore Drive Bldg. Corporation, C.C.A.Ill., 86 F.2d 499.
Ark.—Hobbs v. Lenon, 87 S.W.2d 6, 191 Ark. 509—Lambie v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019.
Idaho.—Gerken v. Davidson Grocery Co., 296 P. 192, 50 Idaho 315.
Ill.—Weber v. Kemper, 150 N.E. 339, 320 Ill. 11.
Iowa.—Fremont Joint Stock Land Bank of Fremont, Neb., v. Foster, 247 N.W. 815, 215 Iowa 1209—Lyster v. Brown, 228 N.W. 3, 210 Iowa 317.
Mich.—Detroit Fidelity & Surety Co. v. Donaldson, 237 N.W. 380, 255 Mich. 129.
Minn.—Brown v. Gallinger, 246 N.W. 473, 188 Minn. 22.
Mo.—Owen v. Long, 104 S.W.2d 365, 340 Mo. 539.
Okl.—Pappe v. Law, 35 P.2d 941, 169 Okl. 15, 95 A.L.R. 939.
Tex.—Tanton v. State Nat. Bank of El Paso, Civ.App., 43 S.W.2d 957, affirmed 79 S.W.2d 833, 125 Tex. 16, 97 A.L.R. 1093—Sederholm v. City of Port Arthur, Civ.App., 3 S.W.2d 925, affirmed Tyner v. La Coste, 13 S.W.2d 685 and Tyner v. Keith, Com.App., 13 S.W.2d 687.
Wis.—Mason v. West Park Realty Co., 213 N.W. 286, 193 Wis. 14.

realty,[44] such as suits for partition[45] or water rights.[46] The rule applies to orders or judgments dismissing the cause;[47] vacating, modifying, or setting aside former judgments,[48] allowing amendments;[49] decrees of reformation of instruments,[50] setting aside sales on execution;[51] distributing proceeds of execution sales;[52] distributing assigned estates;[53] settling accounts;[54] or authorizing a receiver to pay claims,[55] to levy an assessment,[56] or to sue debtors.[57] The rule also applies to nunc pro tunc judgments,[58] judgments in actions on foreign judgments subsequently reversed,[59] proceedings to revive a judgment,[60] judgments or orders for costs[61] or fixing attorney's fees,[62] judgments for-

44. Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
Ill.—Wyman v. Hageman, 148 N.E. 852, 318 Ill. 64.
S.C.—Cox v. American Oil Co., 191 S.E. 704, 183 S.C. 519.
Tex.—Forrest v. Coppard, Civ.App., 300 S.W. 959.
34 C.J. p 515 note 69.

Proceedings to quiet title
U.S.—Bruun v. Hanson, C.C.A.Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, mandate conformed to Bruun v. Hanson, 30 F.Supp. 602.
Cal.—Hollyfield v. Geibel, 66 P.2d 755, 20 Cal.App.2d 142—Alameda County Title Ins. Co. v. U. S. Fidelity & Guaranty Co., 8 P.2d 912, 121 Cal.App. 73.
N.J.—Hoffmeyer v. Kieran, 143 A. 425, 103 N.J.Eq. 254.
Collateral attack on decree of registration of land title see the C.J.S. title Registration of Land Titles § 20, also 53 C.J. p 1117 notes 20–22.

45. U.S.—Dunscombe v. Loftin, C.C. A.Fla., 154 F.2d 963.
Ill.—Katz v. Berkos, 45 N.E.2d 566, 316 Ill.App. 569.
Mo.—Miller v. Proctor, 49 S.W.2d 84, 330 Mo. 43.
Tex.—Ferguson v. Ferguson, Civ. App., 181 S.W.2d 601, error refused.
47 C.J. p 438 notes 85, 89.

Confirmation of sale
A judgment confirming partition sale and impounding money share of certain party was final and could not be collaterally attacked, and hence subsequent judgment quieting title in such party and restraining sale of his interest was not res judicata and was ineffective, since title had passed to purchaser at partition sale.—Drake v. Morrow, 299 N.W. 545, 140 Neb. 258.

County court
Under Civ.Code Pract. § 499, the county court is made a court of general jurisdiction for the partition of lands among joint owners, and as such its judgments in partition are immune from collateral attack on jurisdictional grounds as other judgments of courts of general jurisdiction, and are supported by the same presumptions as support the judgments of any other court of general jurisdiction.—Morgan v. Big Woods Lumber Co., 249 S.W. 329, 198 Ky. 88.

Under special statute
It is immaterial that the partition proceedings were had in a court of general jurisdiction under a special statute.—Falkner v. Guild, 10 Wis. 563.

46. Idaho.—McLean v. Row, 57 P.2d 689, 56 Idaho 646.
34 C.J. p 515 note 70.

47. U.S.—Olsen v. Muskegon Piston Ring Co., C.C.A.Mich., 117 F.2d 163—O'Brien v. New York Edison Co., D.C.N.Y., 26 F.Supp. 290.
Ky.—Clark's Adm'x v. Callahan, 288 S.W. 301, 216 Ky. 674.
N.Y.—People v. Townsend, 233 N.Y. S. 632, 133 Misc. 343.
34 C.J. p 515 note 71.

Dismissal on motion
Dismissal of one defendant on motion of plaintiff cannot be collaterally attacked.—Sharp v. Hall, Tex.Civ. App., 49 S.W.2d 523, error refused.

Dismissal on consent
Judgment of dismissal entered in accordance with statute and with consent of intervener was valid and binding on intervener and not subject to collateral attack.—Dollert v. Pratt-Hewit Oil Corporation, Tex. Civ.App., 179 S.W.2d 346, error refused, certiorari denied 65 S.Ct. 713, 324 U.S. 853, 89 L.Ed. 1412, rehearing denied 65 S.Ct. 912, 324 U.S. 889, 89 L.Ed. 1437.

48. U.S.—Mootry v. Grayson, Idaho, 104 F. 613, 44 C.C.A. 83.
34 C.J. p 515 note 72—56 C.J. p 881 note 38.

Decree that default judgment is void
Where the trial court found that an agreed judgment was entered on theory that a default judgment was void, decreed that default judgment was void, and reinstated cause as a pending cause, the decree was a final decree not subject to collateral attack.—Slattery v. Uvalde Rock Asphalt Co., Tex.Civ.App., 140 S.W.2d 987, error refused.

Certiorari
Judgment of the circuit court in certiorari proceedings, quashing record of civil service commission discharging relator, was a legal determination that relator was entitled to be restored to his office, and cannot be collaterally attacked until reversed or set aside.—People v. Thompson, 146 N.E. 473, 316 Ill. 11.

49. Pa.—Maloney v. Simpson, 75 A. 675, 226 Pa. 479.
34 C.J. p 515 note 73.

50. Tex.—Peters v. Allen, Civ.App., 296 S.W. 929.

51. Me.—International Wood Co. v. National Assur. Co., 59 A. 544, 99 Me. 415, 105 Am.S.R. 288.
34 C.J. p 515 note 74.

52. Pa.—Noble v. Cope, 50 Pa. 17—Appeal of Yerke, 8 Watts & S. 224.

53. Ohio.—Hellebush v. Richter, 37 Ohio St. 222.
Pa.—Commonwealth v. Steacy, 100 Pa. 613.

54. U.S.—Mattingly v. Nye, D.C., 8 Wall. 370, 19 L.Ed. 380.

55. N.M.—Union Trust Co. v. Atchison, T. & S. F. R. Co., 42 P. 89, 8 N.M. 159.

56. Md.—Mister v. Thomas, 89 A. 844, 122 Md. 445.
34 C.J. p 516 note 79.

57. Ga.—Graves v. Denny, 84 S.E. 187, 15 Ga.App. 718.
Ill.—Broch v. French, 116 Ill.App. 15.

58. Ind.—Miller v. Muir, 56 N.E.2d 496, 115 Ind.App. 335.
Mo.—Allen v. Bagley, 133 S.W.2d 1027, 234 Mo.App. 891.
Okl.—**Corpus Juris quoted in** In re Cannon's Guardianship, 77 P.2d 64, 66, 182 Okl. 171.
34 C.J. p 516 note 81, p 82 note 14.

59. U.S.—Sanger Lumber Co. v. Western Lumber Exchange, C.C.A. Wash., 11 F.2d 489.

60. Ga.—Helms v. Marshall, 49 S.E. 733, 121 Ga. 769.
34 C.J. p 516 note 82.

61. Ky.—Commonwealth, for Use and Benefit of Bouteiller, v. Ray, 122 S.W.2d 750, 275 Ky. 758.
34 C.J. p 516 note 83.

Confirmation of order of sale
Where circuit court confirmed order of sales made by its master commissioner, which embodied taxation of his costs, without exception being filed thereto, the judgment became "final" and was not subject to collateral attack by means of suit to recover excessive costs allegedly taxed by the master commissioner.—Commonwealth, for Use and Benefit of Bouteiller, v. Ray, supra.

62. Ark.—Western Casualty & Surety Co. v. Independent Ice Co., 80 S.W.2d 626, 190 Ark. 684.
La.—In re Phœnix Building & Homestead Ass'n, 14 So.2d 447, 203 La. 565.
34 C.J. p 516 note 84.

feiting recognizances,[63] or orders of restitution on vacating or reversing judgments.[64] Even conflicting orders made by a court of superior jurisdiction cannot be collaterally attacked in a court of inferior jurisdiction.[65]

§ 403. —— By Confession or on Consent or Offer

The rule against collateral attack applies to judgments on confession or by consent.

The rule against collateral attack applies to judgments entered on confession,[66] either in open court or under warrants of attorney,[67] and also to such as are rendered by consent of parties, as the result of a compromise or settlement.[68] A stipulation for judgment by a trustee in his individual capacity has been held not to prevent his raising a question of error therein in his capacity as trustee.[69]

§ 404. —— By Default

A valid default judgment may not be attacked collaterally.

A judgment entered by default, the court having jurisdiction, is as conclusive against collateral im-

Judgment establishing attorney's lien

Evidence respecting contract between plaintiffs in execution and defendant, and respecting services rendered, was properly rejected as collateral attack on judgment establishing attorneys' lien.—Dyal v. Watson, 162 S.E. 682, 174 Ga. 330.

63. Ind.—Rubush v. State, 13 N.E. 877, 112 Ind. 107.
Ky.—Kelly v. Lank, 7 B.Mon. 220.

64. Ohio.—Hiler v. Hiler, 35 Ohio St. 645.
Pa.—Breading v. Blocher, 29 Pa. 347.

65. Cal.—Galvin v. Palmer, 66 P. 572, 134 Cal. 426.
N.Y.—Hennessey v. Sweeney, 57 N.Y.S. 901, 28 N.Y.Civ.Proc. 332.
34 C.J. p 516 note 87.

66. Ill.—Alton Banking & Trust Co. v. Gray, 259 Ill.App. 20, affirmed 179 N.E. 469, 347 Ill. 99—Stead v. Craine, 256 Ill.App. 445.
N.J.—Fidelity Realty Co. v. Fidelity Corporation of New Jersey, 157 A. 154, 109 N.J.Eq. 331.
Ohio.—State ex rel. Fulton v. Sollars, 7 N.E.2d 818, 54 Ohio App. 450.
Pa.—Scheide v. Home Credit Co., 162 A. 321, 107 Pa.Super. 204—Wayne v. International Shoe Co., 18 Pa. Dist. & Co. 521.
34 C.J. p 516 note 88.

Void judgment

A challenge addressed to the jurisdiction of the court to render judgment may be advanced at any time by any party, including the judgment debtor against whom a judgment by confession has been entered.—American Cities Co. v. Stevenson, 60 N.Y.S.2d 685.

67. Ohio.—McAllister v. Schlemmer & Graber Co., 177 N.E. 841, 39 Ohio App. 434.
34 C.J. p 516 note 89.

Payment before judgment

Since a warrant of attorney to confess judgment is founded on the fact of a present indebtedness, on payment the warrant fails and a judgment entered thereon would be void and subject to collateral attack.

U.S.—First Nat. Bank v. Cunningham, C.C.Ky., 48 F. 510.
Ill.—Rea v. Forrest, 88 Ill. 275.
Wash.—Cowen v. Culp, 166 P. 789, 97 Wash. 480.

68. U.S.—Coggeshall v. U. S., C.C.A.S.C., 95 F.2d 936—Rector v. Suncrest Lumber Co., C.C.A.N.C., 52 F.2d 946.
Ala.—A. B. C. Truck Lines v. Kenemer, 25 So.2d 511.
D.C.—Bloedorn v. Bloedorn, 76 F.2d 812, 64 App.D.C. 199, certiorari denied 55 S.Ct. 658, 295 U.S. 746, 79 L.Ed. 1691.
Ga.—Valdosta Bank & Trust Co. v. Davis, 122 S.E. 187, 157 Ga. 746.
Kan.—Pulley v. Chicago, R. I. & P. Ry. Co., 251 P. 1100, 122 Kan. 269.
Ky.—Haddix v. Walter, 266 S.W. 631, 205 Ky. 740.
La.—Napoleonville Moss Mfg. Co. v. Templet, 139 So. 546, 19 La.App. 61.
Neb.—Warren v. Stanton County, 15 N.W.2d 757, 145 Neb. 220.
N.Y.—People v. Townsend, 233 N.Y.S. 632, 133 Misc. 843.
N.C.—La Londe v. Hubbard, 164 S.E. 359, 202 N.C. 771.
Ohio.—Sponseller v. Sponseller, 144 N.E. 48, 110 Ohio St. 395.
Tex.—Logan v. Mauk, Civ.App., 126 S.W.2d 513, error dismissed—Perdue v. Miller, Civ.App., 64 S.W.2d 1002, error refused—Posey v. Plains Pipe Line Co., Civ.App., 39 S.W.2d 1100, error dismissed.
34 C.J. p 516 note 90.

An agreed judgment fixing boundaries between certain lands was not subject to collateral attack in an action for alleged trespass.—Pierce v. Huff, 143 S.W.2d 183, 283 Ky. 753.

In condemnation proceedings

Where a consent judgment in condemnation suit recited that all parties interested in tract of land had been served with process and that they had agreed on a purchase price and that the United States should hold title to the land free of all claims and judgment was signed by attorney representing landowners, the judgment was valid and not subject to collateral attack by those owning interests in land who were over twenty-one years of age at time consent judgment was entered.—Watson v. U. S., D.C.N.C., 34 F.Supp. 777.

Consent decree, even though of interlocutory nature, within purview of pleadings and scope of issues is valid and binding on all parties consenting, and not open to collateral attack.—Curry v. Curry, 79 F.2d 172, 65 App.D.C. 47.

Injunction decree entered by consent is not subject to impeachment in application to conditions then existing.—U. S. v. Swift & Co., App.D.C., 52 S.Ct. 460, 286 U.S. 106, 76 L.Ed. 999.

Judgment coram non judice

Where a court adjudicates a matter not embraced in issues as made by pleadings, that part of judgment is coram non judice and void, and fact that judgment is by consent of all parties does not affect right of any of them to dispute its validity.—Texas Empire Pipe Line Co. v. Stewart, App., 35 S.W.2d 627, reversed on other grounds 55 S.W.2d 283, 331 Mo. 525—Owens v. McCleary, Mo.App., 273 S.W. 145.

A "judgment in retraxit" can be attacked on grounds of mental incapacity of plaintiff only by motion in the cause.—Steele v. Beaty, 2 S.E.2d 854, 215 N.C. 680—Gibson v. Gordon, 197 S.E. 135, 213 N.C. 666.

The void contractual provisions of an agreed judgment are subject to collateral attack and if judgment entered in state's suit to cancel oil leases of university lands was an agreed judgment and agreements evidenced thereby were unenforceable because of lack of authority of attorney general to bind state thereby, it was immaterial whether attack thereon was direct or collateral.—State v. Reagan County Purchasing Co., Tex.Civ.App., 186 S.W.2d 128, error refused.

69. Conn.—Shaw v. Spelke, 147 A. 675, 110 Conn. 208.

peachment as any other form of judgment.[70] However, a default judgment, rendered by a court not having jurisdiction, like any other void judgment, is subject to collateral attack at any time when it is sought to be made the basis of a right, where the record itself in such case discloses the infirmity.[71]

§ 405. —— In Criminal Cases

As a general rule, the judgment of a court having jurisdiction of an offense and of the party charged with its commission is not open to collateral attack.

As a general rule, the judgment of a court having jurisdiction of an offense and of the party charged with its commission is not open to collateral attack.[72] Where, however, the judgment is void,[73]

70. Ark.—Banks v. Corning Bank & Trust Co., 68 S.W.2d 452, 188 Ark. 341, certiorari denied 54 S.Ct. 863, 292 U.S. 653, 78 L.Ed. 1502.
Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.
Colo.—Smith v. Smith, 230 P. 597, 76 Colo. 119.
Fla.—Ennis v. Giblin, 2 So.2d 382, 147 Fla. 113.
Idaho.—U. S. Building & Loan Ass'n v. Soule, 68 P.2d 40, 57 Idaho 691.
Kan.—Pattison v. Kansas State Bank, 247 P. 643, 121 Kan. 471.
Ky.—Perry Mercantile Co. v. Miller, 25 S.W.2d 35, 233 Ky. 148.
Neb.—Scheumann v. Prudential Ins. Co. of America, 19 N.W.2d 48, 146 Neb. 173.
N.Y.—Pape v. Red Cab Mut. Casualty Co., 219 N.Y.S. 135, 128 Misc. 456.
N.D.—Erker v. Deichert, 222 N.W. 615, 57 N.D. 474.
34 C.J. p 516 note 91.

Default judgment against partners

Where partnership, as maker, and firm members, as accommodation indorsers or sureties, were sued jointly on firm note, indorsed by members, and where some members filed pleas and answers, but none were filed by firm and other accommodation indorsers or sureties, and case was marked in default as to firm and latter sureties, and where verdict and judgment were rendered against members filing no pleas or answers, but no judgment was rendered against firm, judgment against such members was not void, and was not subject to collateral attack by one of defendants thereto, in petition to restrain sheriff and one claiming under purchaser of his land under such judgment from interfering with his possession thereof.—Burson v. Shields, 129 S.E. 22, 160 Ga. 723.

71. U.S.—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352.
34 C.J. p 516 note 92.

Record in default cases

When defendant has defaulted the judgment roll ordinarily includes the complaint, summons, affidavit of service, memorandum of defendant's default indorsed on the complaint, and the judgment.—Petition of Furness, 218 P. 61, 62 Cal.App. 753.

72. U.S.—Bowen v. Johnston, 59 S. Ct. 442, 306 U.S. 19, 83 L.Ed. 455—Lucas v. Sanford, C.C.A.Ga., 145 F.2d 229—Northwestern Oil Co. v. Socony-Vacuum Oil Co., C.C.A.Wis., 138 F.2d 967, certiorari denied 64 S.Ct. 790, 321 U.S. 792, 88 L.Ed. 1081—Price v. Johnston, C.C.A.Cal., 125 F.2d 806, certiorari denied 62 S.Ct. 1106, 316 U.S. 677, 86 L.Ed. 1750, rehearing denied 62 S.Ct. 1289, 316 U.S. 712, 86 L.Ed. 1777—Forthoffer v. Swope, C.C.A.Wash., 103 F.2d 707—In re Tinkoff, C.C.A. Ill., 95 F.2d 651, certiorari denied Ex parte Tinkoff, 58 S.Ct. 1049, 304 U.S. 573, 82 L.Ed. 1538, rehearing denied 59 S.Ct. 249, 305 U.S. 675, 83 L.Ed. 437—Aderhold v. Soileau, C.C.A.Ga., 67 F.2d 259—Bledsoe v. Johnston, D.C.Cal., 58 F.Supp. 129—Barnsdall Refining Corporation v. Birnamwood Oil Co., D.C.Wis., 32 F.Supp. 308.
Ala.—State v. Riddle, 105 So. 259, 213 Ala. 430—Grayson v. State, 182 So. 579, 28 Ala.App. 210—James v. State, 181 So. 709, 28 Ala.App. 225.
Cal.—People v. Titus, 259 P. 465, 85 Cal.App. 413.
Colo.—Smith v. Phelps, 28 P.2d 1004, 94 Colo. 33—Marchi v. People, 224 P. 1053, 75 Colo. 254.
D.C.—Bowles v. Laws, 45 F.2d 669, 59 App.D.C. 399, certiorari denied 51 S.Ct. 488, 283 U.S. 841, 75 L.Ed. 1452.
Ga.—Kinman v. Clark, 195 S.E. 166, 185 Ga. 328—Wells v. Pridgen, 114 S.E. 355, 154 Ga. 397.
Ill.—People ex rel. Kerner v. Hunter, 17 N.E.2d 29, 369 Ill. 427—People v. Allen, 14 N.E.2d 397, 368 Ill. 368, certiorari denied Allen v. People of State of Illinois, 60 S.Ct. 132, 308 U.S. 511, 84 L.Ed. 436—People ex rel. Courtney v. Thompson, 192 N.E. 693, 358 Ill. 81.
Ind.—Kunkel v. Moneyhon, 17 N.E.2d 82, 214 Ind. 606.
Kan.—Brockway v. Wagner, 268 P. 96, 126 Kan. 285.
Mich.—Kougoulas v. Sorlas, 233 N.W. 414, 252 Mich. 557—Turbessi v. Oliver Iron Mining Co., 229 N.W. 454, 250 Mich. 110, 69 A.L.R. 1059.
Okl.—Morgan v. State, 90 P.2d 683, 66 Okl.Cr. 205.
Or.—**Corpus Juris cited in** Capos v. Clatsop County, 25 P.2d 903, 907, 144 Or. 510, 90 A.L.R. 289.
Pa.—In re Moskowitz, 196 A. 493, 329 Pa. 183—Commonwealth v. Cauffiel, 148 A. 311, 298 Pa. 319.
Tex.—Pridemore v. San Angelo Standard, Civ.App., 164 S.W.2d 859, error refused—Litchfield v. State, 179 S.W.2d 507, 147 Tex.Cr. 201—Lutz v. State, 176 S.W.2d 317, 146 Tex.Cr. 503—Ex parte Brown, 165 S.W.2d 718, 145 Tex.Cr. 39—Toone v. State, 161 S.W.2d 90, 144 Tex.Cr. 98—Ex parte Seymour, 128 S.W. 2d 46, 137 Tex.Cr. 103—Ex parte Butler, 31 S.W.2d 827, 116 Tex.Cr. 134.
Va.—Eagle, Star and British Dominions Ins. Co. v. Heller, 140 S.E. 314, 149 Va. 32, 57 A.L.R. 490.
Wash.—State v. Lindsey, 272 P. 72, 150 Wash. 121.
34 C.J. p 517 note 98.
Habeas corpus as collateral attack see Habeas Corpus § 26.

Sentence on record of court controlling

As against a claim of variance between a commitment and the sentence as orally pronounced, the only sentence known to law is the sentence or judgment entered on records of court, and, if entry is inaccurate, there is remedy by motion to correct it, but judgment imports verity when collaterally assailed.—Hill v. U. S. ex rel. Wampler, Pa., 56 S.Ct. 760, 298 U.S. 460, 80 L.Ed. 1283—U. S. v. Rollnick, D.C.Pa., 33 F. Supp. 863.

Nolle prosequi

Record judgment docket in county recorder's court showing a nolle prosequi has been held not impeachable collaterally by parol evidence of defendant's indictment and judge's disposition of case therein on subsequent superior court trial for same offense.—State v. Norris, 173 S.E. 14, 206 N.C. 191.

Suspension of sentence and probation

Where owner of vessel took vessel from lien claimant and on complaint of lien claimant was convicted of grand theft, sentence for which was suspended and probation granted, owner's subsequent action for declaratory relief to determine whether such lien existed was not barred as a "collateral attack" on a judgment which had become final by reason of failure to appeal, since on suspension of sentence and granting of probation there could be no final judgment and an appeal was precluded.—Balestreiri v. Arques, 122 P.2d 277, 49 Cal.App.2d 664.

73. Ill.—People v. Buffo, 149 N.E. 271, 318 Ill. 380.

or rendered under an unconstitutional statute[74] or by a court wholly unauthorized by law,[75] it is a nullity, and as such may be collaterally assailed. A collateral attack may be made in a criminal case when its purpose is to punish a crime committed by means of the decree, judgment, or record collaterally attacked.[76]

§ 406. —— Judgments and Orders in Special Proceedings

Judgments and orders in special proceedings are within the rule prohibiting collateral attack.

The rule against collateral attack applies to orders and judgments made by the courts in special proceedings taken before them, although not in the nature of contested actions, or purely ex parte, provided the matter involves a judicial determination and carries the sanction of the court's authority.[77]

§ 407. —— Judgments of Particular Courts or Tribunals

a. In general
b. Probate courts
c. Coördinate courts
d. Boards and officers acting judicially

a. In General

The rule against collateral attack applies to valid judgments of courts of limited or inferior jurisdiction.

A domestic judgment rendered by a court of inferior jurisdiction is not open to collateral attack when the facts requisite to confer jurisdiction appear affirmatively on the face of the proceeding,[78] but if the facts do not so appear it may be attacked collaterally.[79] These rules apply to judgments rendered by justices of the peace, as discussed in the C.J.S. title Justices of the Peace § 115, also 35 C.J. p 684 note 33–p 687 note 67, or on appeal from,[80] or founded on,[81] judgments of inferior courts. By statute it is often provided that on the filing of a transcript of a judgment of a magistrate or justice of the peace, the judgment shall become a judgment of the higher court, and in such a case it is not open to collateral attack if valid on its face.[82]

Absence of provision for review. Some cases hold that, when no appeal or other form of review is provided for, the judgments of inferior courts may be assailed collaterally;[83] but there is also authority to the contrary.[84]

Pa.—In re Moskowitz, 196 A. 498, 329 Pa. 183.
Tex.—Ex parte Brown, 165 S.W.2d 718, 145 Tex.Cr. 39.
34 C.J. p 517 note 99.

The judgment of a police court convicting a child under sixteen years of age is open to collateral attack for lack of jurisdiction and the absence of jurisdiction may be shown by extrinsic evidence.—Ex parte Swehla, 220 P. 299, 114 Kan. 712.

74. N.J.—Ex parte Rose, 6 A.2d 388, 122 N.J.Law 507, followed in Ex parte Miller, 6 A.2d 389, 122 N.J. Law 511 and Ex parte Sterling, 6 A.2d 390, 122 N.J.Law 510.
34 C.J. p 517 note 1.

75. Fla.—McDonald v. Smith, 66 So. 430, 68 Fla. 77.

76. U.S.—U. S. v. Bradford, C.C.La., 148 F. 413, affirmed 152 F. 616, 81 C.C.A. 606, certiorari denied 27 S. Ct. 795, 206 U.S. 563, 51 L.Ed. 1190.

77. Cal.—**Corpus Juris cited in** Petition of Reader, 89 P.2d 654, 656, 32 Cal.App.2d 309.
34 C.J. p 517 note 4.

Judgments or orders to which rule has been applied
(1) Judgment appointing justice of peace.
Ark.—Adams v. Van Buren County, 139 S.W.2d 9, 200 Ark. 269.
Mo.—State ex rel. General Motors Acceptance Corporation v. Brown, 48 S.W.2d 857, 330 Mo. 220—Bullock v. B. R. Electric Supply Co., 60 S.W.2d 783, 227 Mo.App. 1010.

(2) Judgment in a mandamus case.
Mich.—Brachman v. Hyman, 299 N. W. 101, 298 Mich. 344.
N.Y.—Congregation Anshe Sefard of Keap Street v. Title Guarantee & Trust Co., 50 N.E.2d 534, 291 N.Y. 35, 148 A.L.R. 647, motion denied 51 N.E.2d 939, 291 N.Y. 669.

(3) Other judgments or orders.
Ga.—Bradley v. Simpson, 2 S.E.2d 238, 59 Ga.App. 844, reversed on other grounds Simpson v. Bradley, 5 S.E.2d 893, 189 Ga. 316, mandate conformed to Bradley v. Simpson, 6 S.E.2d 424, 61 Ga.App. 495, certiorari denied 60 S.Ct. 1105, 310 U. S. 643, 84 L.Ed. 1410, rehearing denied 61 S.Ct. 56, 311 U.S. 725, 85 L.Ed. 472.
Ky.—Lippold v. Hagner, 10 S.W.2d 619, 226 Ky. 103.
Mo.—State ex inf. Mansur v. Huffman, 2 S.W.2d 582, 318 Mo. 991.
Pa.—Edwards v. Prutzman, 165 A. 255, 108 Pa.Super. 184.
Tex.—Shaw v. Strong, 96 S.W.2d 276, 128 Tex. 65—Trozzi v. McColl, Civ. App., 276 S.W. 961.
34 C.J. p 517 note 4 [a].

78. Fla.—**Corpus Juris cited in** Crosby v. Burleson, 195 So. 202, 142 Fla. 443.
N.J.—Mangani v. Hydro, Inc., 194 A. 264, 119 N.J.Law 71.
Or.—**Corpus Juris cited in** McLean v. Sanders, 28 P.2d 321, 322, 143 Or. 524.
Va.—Kiser v. W. M. Ritter Lumber Co., 18 S.E.2d 319, 179 Va. 128.
W.Va.—State v. Thompson, 130 S.E. 456, 100 W.Va. 253.
34 C.J. p 517 note 5.

Particular courts within rule
(1) United States district courts.—Sells v. Jones, 9 So.2d 160, 151 Fla. 38.
(2) Land court.
Ky.—Givens v. U. S. Trust Co., 65 S.W.2d 682, 251 Ky. 587.
Mass.—Bell v. Eames, 39 N.E.2d 582, 310 Mass. 642.
Okl.—Pennington Grocery Co. v. Ortwein, 88 P.2d 331, 184 Okl. 501.

79. Colo.—In re Zupancis' Heirship, 111 P.2d 1063, 107 Colo. 323.
Fla.—Krivitsky v. Nye, 19 So.2d 563, 155 Fla. 45—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
34 C.J. p 518 note 6.

80. Cal.—Breeze v. Ayres, 49 Cal. 208.
34 C.J. p 518 note 8.

81. Cal.—Moore v. Martin, 38 Cal. 428.

82. Ill.—Young v. Zacher, 80 N.E. 945, 226 Ill. 327.
S.C.—Love v. Dorman, 74 S.E. 829, 91 S.C. 384.

83. N.Y.—Wilcox v. Supreme Council R. A., 136 N.Y.S. 377, 151 App. Div. 297, affirmed 104 N.E. 624, 210 N.Y. 370, 52 L.R.A.,N.S., 806.
34 C.J. p 518 note 12.

84. Cal.—Lucey v. Municipal Court of City of Los Angeles, 150 P.2d 549, 65 Cal.App.2d 228.
34 C.J. p 518 note 13.

b. Probate Courts

Orders and decrees of courts having probate jurisdiction in any case in which jurisdiction has attached generally are not open to contradiction or reëxamination in any collateral proceeding.

Orders and decrees of courts having probate jurisdiction, in any case in which jurisdiction has attached generally are not open to contradiction or reëxamination in any collateral proceeding,[85] al-

85. U.S.—Harlan v. Sparks, C.C.A. N.M., 125 F.2d 502—Stuart v. Tapp, C.C.A.Okl., 81 F.2d 155—Palmer v. Palmer, D.C.Conn., 31 F.Supp. 861.
Ala.—Cassady v. Davis, 15 So.2d 909, 245 Ala. 93—Venable v. Turner, 183 So. 644, 236 Ala. 483—Albright v. Creel, 182 So. 10, 236 Ala. 286—Montgomery v. Hammond, 153 So. 654, 228 Ala. 449—Ex parte Wilkinson, 126 So. 102, 220 Ala. 529.
Ark.—Reed v. Futrall, 115 S.W.2d 542, 195 Ark. 1044—Levinson v. Treadway, 78 S.W.2d 59, 190 Ark. 201—Branch v. Veterans' Administration, 74 S.W.2d 800, 189 Ark. 662—Sewell v. Reed, 71 S.W.2d 191, 189 Ark. 50—Sullivan v. Times Pub. Co., 24 S.W.2d 865, 181 Ark. 27—Sharum v. Meriwether, 246 S.W. 501, 156 Ark. 331.
Cal.—In re Keet's Estate, 100 P.2d 1045, 15 Cal.2d 328—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal. 2d 35—Wood v. Roach, 14 P.2d 170, 125 Cal.App. 631.
Fla.—**Corpus Juris cited in** Crosby v. Burleson, 195 So. 202, 207, 142 Fla. 443.
Ga.—Beavers v. Williams, 23 S.E.2d 171, 194 Ga. 875—Zeagler v. Zeagler, 15 S.E.2d 478, 192 Ga. 453—Scarborough v. Long, 197 S.E. 796, 186 Ga. 412, certiorari denied 59 S.Ct. 107, 305 U.S. 637, 83 L.Ed. 410—Murphy v. Hunt, App., 37 S.E.2d 823—Davis v. Tyson, 4 S.E.2d 704, 60 Ga.App. 714.
Idaho.—Horn v. Cornwall, 139 P.2d 757, 65 Idaho 115—Penn Mut. Life Ins. Co. v. Beauchamp, 66 P.2d 1020, 57 Idaho 530—Short v. Thompson, 55 P.2d 163, 56 Idaho 361—Knowles v. Kasiska, 268 P. 3, 46 Idaho 379—Larsen v. Larsen, 256 P. 369, 44 Idaho 211.
Ill.—Healea v. Verne, 175 N.E. 562, 343 Ill. 325.
Iowa.—**Corpus Juris cited in** Anderson v. Schwitzer, 20 N.W.2d 67, 71—Atkin v. Westfall, 17 N.W.2d 532, 235 Iowa 618—Gibbs v. Beckett, 295 N.W. 165, 229 Iowa 619—Reidy v. Chicago, B. & Q. Ry. Co., 249 N.W. 347, 216 Iowa 415.
Me.—In re Roukos' Estate, 35 A.2d 861, 140 Me. 183—Neely v. Havana Electric Ry. Co., 10 A.2d 358, 136 Me. 352—Hines v. Ayotte, 189 A. 835, 135 Me. 103—Chaplin v. National Surety Corporation, 185 A. 516, 134 Me. 496—Goodwin v. Boutin, 155 A. 738, 130 Me. 322.
Mass.—Wilbur v. Hallett, 26 N.E.2d 322, 305 Mass. 554—Lee v. Wood, 181 N.E. 229, 279 Mass. 293—Brackett v. Fuller, 180 N.E. 664, 279 Mass. 62—Healy v. Granahan, 175 N.E. 735, 275 Mass. 338—Judge v. National Sec. Bank of Boston, 172 N.E. 76, 272 Mass. 286—Farquhar v. New England Trust Co., 158 N.E. 836, 261 Mass. 209.
Mich.—In re Ives, 23 N.W.2d 131, 314 Mich. 690—Dodge v. Detroit Trust Co., 2 N.W.2d 509, 300 Mich. 575—Heap v. Heap, 242 N.W. 252, 258 Mich. 250—Dudex v. Sterling Brick Co., 212 N.W. 92, 237 Mich. 470.
Minn.—Brotton v. Donovan, 224 N. W. 270, 177 Minn. 34—De Wolf v. Ericson, 220 N.W. 406, 175 Minn. 68—State v. Freeman, 210 N.W. 14, 168 Minn. 374.
Mo.—In re Sheldon's Estate, 189 S. W.2d 235—Linville v. Ripley, 146 S.W.2d 581, 347 Mo. 95—**Corpus Juris cited in** Blattel v. Stallings, 142 S.W.2d 9, 13, 346 Mo. 450—Sheehan v. First Nat. Bank, 140 S.W.2d 1, 346 Mo. 227—Jones v. Peterson, 72 S.W.2d 76, 335 Mo. 242—Hidden v. Edwards, 285 S.W. 462, 313 Mo. 642—Viehmann v. Viehmann, 250 S.W. 565, 298 Mo. 356—Citizens' Bank & Trust Co. v. Moore, 263 S.W. 530, 215 Mo. App. 21.
Neb.—Mead Co. v. Doerfler, 18 N.W. 2d 524, 146 Neb. 2—In re Robinson Heirship, 228 N.W. 852, 119 Neb. 285, followed in In re Clark, 228 N.W. 858, 119 Neb. 306.
N.J.—The Ordinary of New Jersey v. Webb, 170 A. 672, 112 N.J.Law 395—Charles Wiener & Sons v. Fischer, 179 A. 632, 118 N.J.Eq. 387.
N.M.—Ware v. Farmers' Nat. Bank of Danville, 24 P.2d 269, 37 N.M. 415.
N.Y.—Fisher v. Fisher, 170 N.E. 912, 253 N.Y. 260, 69 A.L.R. 918.
Ohio.—State ex rel. Young v. Morrow, 2 N.E.2d 595, 131 Ohio St. 266—Gibbons v. Daykin, App., 37 N.E.2d 389—Reitz v. Smith, 10 N. E.2d 150, 56 Ohio App. 72.
Okl.—Petroleum Auditors Ass'n v. Landis, 77 P.2d 730, 182 Okl. 297—Calkin v. Wolcott, 77 P.2d 96, 182 Okl. 278—Flynn v. Vanderslice, 44 P.2d 967, 172 Okl. 320—Baird v. Patterson, 44 P.2d 90, 172 Okl. 158—Harrison v. Orwig, 299 P. 143, 149 Okl. 54—Stevens v. Dill, 285 P. 845, 142 Okl. 138—Dill v. Stevens, 284 P. 60, 141 Okl. 24—Manuel v. Kidd, 258 P. 732, 126 Okl. 71—Dill v. Anderson, 256 P. 31, 124 Okl. 299—McNaughton v. Lewis, 254 P. 972, 124 Okl. 181—Cummings v. Inman, 247 P. 379, 119 Okl. 9—Johnson v. Petty, 246 P. 848, 118 Okl. 178—O'Neill v. Cunningham, 244 P. 444, 119 Okl. 157—Gallaghar v. Petree, 230 P. 477, 103 Okl. 295—Tiger v. Drumright, 217 P. 453, 95 Okl. 174, certiorari denied 44 S.Ct. 452, 264 U.S. 592, 68 L.Ed. 865, and error dismissed 45 S.Ct. 350, 267 U.S. 578, 69 L.Ed. 797—Bowling v. Merry, 217 P. 404, 91 Okl. 176—In re Green's Estate, 196 P. 128, 80 Okl. 256.
Or.—Wilson v. Hendricks, 102 P.2d 714, 164 Or. 486.
Pa.—In re Tourison's Estate, 184 A. 95, 321 Pa. 299—Swartz v. Crum, 167 A. 414, 110 Pa.Super. 102.
S.D.—Higgins v. Higgins, 20 N.W.2d 523—In re ReQua's Estate, 18 N. W.2d 791.
Tenn.—Shelby County v. Anderson, 10 Tenn.App. 437.
Tex.—Dallas Joint Stock Land Bank of Dallas v. Forsyth, 109 S.W.2d 1046, 130 Tex. 563, rehearing denied 112 S.W.2d 173, 130 Tex. 563—Sloan v. Woods, Com.App., 25 S.W. 2d 309—Hannon v. Henson, Com. App., 15 S.W.2d 579—Moore v. Wooten, Com.App., 280 S.W. 742, rehearing denied 283 S.W. 153—Barker v. Graham, Civ.App., 149 S. W.2d 316—Lipscomb v. Lofland, Civ.App., 141 S.W.2d 983, error dismissed, judgment correct—Loewenstein v. Watts, Civ.App., 119 S. W.2d 176, affirmed 137 S.W.2d 2, 134 Tex. 660, 128 A.L.R. 910—White v. Baker, Civ.App., 118 S.W. 2d 319—McLeod v. Carroll, Civ. App., 109 S.W.2d 316, affirmed Carroll v. McLeod, 130 S.W.2d 277, 133 Tex. 571—Reed v. Harlan, Civ. App., 103 S.W.2d 236, error refused—Rodden v. Smith, Civ.App., 95 S.W.2d 997—Armstrong v. Anderson, Civ.App., 91 S.W.2d 775, reversed on other grounds Anderson v. Armstrong, 120 S.W.2d 444, 132 Tex. 122, rehearing denied 132 S. W.2d 393, 132 Tex. 122—Kreis v. Kreis, Civ.App., 36 S.W.2d 821, error dismissed—Askey v. Power, Civ.App., 58 S.W.2d 1041, affirmed 94 S.W.2d 136, 127 Tex. 335—Mathews v. Myers, Civ.App., 42 S.W.2d 1099—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571—Kreis v. Kreis, Civ.App., 36 S.W.2d 821, error dismissed—Tannery v. Pirtle, Civ.App., 19 S.W.2d 862—Paschal v. Hobby, Civ.App., 296 S.W. 336, reversed in part on other grounds and affirmed in part Smith v. Paschal, Com.App., 1 S.W.2d 1086, rehearing denied 5 S.W.2d 135—McGrady v. Clary, Civ.App., 247 S.W. 1099.

though their decrees have been held, in at least one jurisdiction, not conclusive as to the fact of jurisdiction.[86] The general rule applies, for example, to decrees of partition made by a probate court having jurisdiction for that purpose,[87] to an order of sale,[88] and to judgments determining inheritance taxes.[89] On the other hand, since the jurisdiction of probate courts is confined to particular matters, if it affirmatively appears that the jurisdictional facts did not exist, their decrees are subject to collateral attack.[90] The general principle that decrees of a probate court are not subject to collateral attack should not be stretched to the extent of furnishing a shield to one who, without actual or constructive notice to anyone in interest, fraudulently obtains a decree for the purpose of swindling an estate.[91]

c. Coördinate Courts

Decisions in courts of law may not be collaterally attacked in courts of equity, and vice versa.

A judgment at law may not be impeached collaterally in a court of equity,[92] nor can the validity of a decree rendered by a court of equity be impeached in a collateral action at law.[93] The effect of state judgments in federal courts and that of federal judgments in state courts are discussed infra §§ 900, 901.

d. Boards and Officers Acting Judicially

The rule against collateral attack applies to decisions of state and county or municipal boards and officers acting judicially.

The rule against collateral impeachment of judicial decisions applies to the determinations of state and county officers or boards of officers, who, although not constituting a court, are called on to act judicially in matters of administration,[94] such

Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.

Wash.—Federal Land Bank of Spokane v. Schidleman, 75 P.2d 1010, 193 Wash. 435.

34 C.J. p 518 note 14—15 C.J. p 1021 note 82.

Statutory and limited jurisdiction

Where jurisdiction to set aside exemptions to widow in the absence of administration is statutory and limited, the probate court's judgments and decrees in such a case are unimpeachable only where the court proceeds to final decree in accordance with provisions of statute.—Dake v. Inglis, 194 So. 673, 239 Ala. 241.

Proceedings in rem

Where petition was sufficient to invoke statutory jurisdiction of probate court and proceeding was in rem, no subsequent errors or irregularities are available on collateral attack.—Bedwell v. Dean, 132 So. 20, 222 Ala. 276.

Foreclosure

Probate court having acquired jurisdiction of decedent's estate, parties, and subject matter, its order authorizing executrix to mortgage specified realty for expense of alteration and repair could not be collaterally attacked by decedent's heirs intervening in action to foreclose mortgage, interveners' remedy being by appeal from order, or by motion or other proceeding in probate court to have order set aside.—Walker Bank & Trust Co. v. Steely, 84 P.2d 56, 54 Idaho 591.

In suit for specific performance of agreement to purchase realty, to which plaintiff derived title under residuary clause of will, it was not open to defendant to object that payments of unpaid balance of legacy therein to deceased legatee's heirs, as shown by executors' accounts, allowed without objection by probate court decrees not appealed from or sought to be opened, were not properly made in satisfaction of such legacy.—Mahoney v. Nollman, 35 N.E.2d 265, 309 Mass. 522.

Suit for attorney's fees

Order and judgment of probate court, in which estate was being probated, authorizing employment of attorneys to protect interest of estate could not be collaterally attacked in attorney's suit for fees for services rendered estate, on ground that probate court did not have authority prior to rendering of services to determine whether services were necessary.—Bearden v. McFarlane, Tex.Civ.App., 103 S.W.2d 392, error dismissed.

86. Conn.—Lewis v. Klingberg, 123 A. 4, 100 Conn. 201.

Limited jurisdiction

Probate courts are courts of limited jurisdiction and on application for writ of habeas corpus, regarding custody of a minor, refusing an offer of proof that minor was an illegitimate child, having a living mother, that the decree of the probate court appointing respondent guardian of minor's person was made without notice to the mother and without proceedings to remove the mother as guardian, as required by statute and that it was void for want of jurisdiction, was error, since the decree of the probate court was not conclusive and could be attacked collaterally.—Lewis v. Klingberg, supra.

87. Mich.—Scripps Corp. v. Parkinson, 153 N.W. 29, 186 Mich. 663.

34 C.J. p 519 note 15—47 C.J. p 438 note 88.

88. Mo.—Linville v. Ripley, 146 S.W.2d 581, 347 Mo. 95.

89. Wis.—Beck v. State, 219 N.W. 197, 196 Wis. 242 and Beck v. Milwaukee County, 219 N.W. 205, 196 Wis. 259, certiorari denied Beck v. Milwaukee County, Wis., 49 S.Ct. 34, 278 U.S. 639, 73 L.Ed. 554.

90. Idaho.—Moyes v. Moyes, 94 P. 2d 782, 60 Idaho 601.

Mo.—Viehmann v. Viehmann, 250 S. W. 565, 298 Mo. 356—**Corpus Juris cited in** In re Main's Estate, App., 152 S.W.2d 696, 700.

N.Y.—Jones v. R. Young Bros. Lumber Co., 45 N.Y.S.2d 308, 180 Misc. 565.

Tex.—Buss v. Smith, Civ.App., 125 S. W.2d 712, affirmed Smith v. Buss, 144 S.W.2d 529, 135 Tex. 566—Cline v. Niblo, 286 S.W. 298, reversed on other grounds, Com.App., 292 S.W. 178, modified on other grounds 8 S.W.2d 633, 117 Tex. 474, 66 A.L.R. 916.

Vt.—Probate Court, District of Lamoile, v. American Fidelity Co., 35 A.2d 495, 113 Vt. 418.

34 C.J. p 519 note 16.

91. Mass.—Commonwealth v. Aronson, 44 N.E.2d 679, 312 Mass. 347.

92. N.J.—Delling v. Bill, 108 A. 761, 91 N.J.Eq. 213.

34 C.J. p 519 note 17.

93. U.S.—Bryan v. Kennett, Mo., 5 S.Ct. 407, 113 U.S. 179, 28 L.Ed. 908.

34 C.J. p 519 note 18.

94. Ala.—**Corpus Juris cited in** Grayson v. Schwab, 179 So. 377, 380, 235 Ala. 398.

as statutory boards of claims[95] or civil service commissions.[96] The rule has also been held applicable to the judicial acts of a referee in bankruptcy[97] and to the quasi-judicial acts of an executive officer of the government.[98] The rule does not apply, however, to attack on an administrative act[99] or to a determination which the administrative body had no jurisdiction to make.[1]

§ 408. What Constitutes Direct or Collateral Attack

a. Direct attack
b. Collateral attack

a. Direct Attack

A direct attack on a judgment is an attempt to avoid, correct, vacate, annul, review, cancel, or set aside the judgment in a proceeding or manner provided by law for such purpose.

The terms "direct" and "collateral," as used with reference to attacks on judgments, apply to the purpose of, or method employed in, the attacks and are not descriptive of the attack itself.[2] A direct attack on a judgment is an attempt to avoid or correct it in some manner provided by law,[3] in a

Ariz.—City of Phoenix v. Wright, 150 P.2d 93, 61 Ariz. 458—City of Phœnix v. Sanner, 95 P.2d 987, 54 Ariz. 363.

Minn.—**Corpus Juris cited in** Martin v. Wolfson, 16 N.W. 884, 888, 218 Minn. 557.

Mo.—**Corpus Juris cited in** Jefferson City Bridge & Transit Co. v. Blaser, 300 S.W. 778, 780, 318 Mo. 373.

Tex.—Ashburn Bros. v. Edwards County, Com.App., 58 S.W.2d 71—Coryell County v. Fegette, Civ. App., 68 S.W.2d 1066, error dismissed—Kirby Lumber Co. v. Adams, Civ.App., 62 S.W.2d 366, modified on other grounds 93 S.W. 2d 382, 127 Tex. 376.

Utah.—State Tax Commission of Utah v. Katsis, 62 P.2d 120, 90 Utah 406, 107 A.L.R. 1477—**Corpus Juris cited in** State v. Cragun, 20 P.2d 247, 249, 81 Utah 457.

Wyo.—**Corpus Juris cited in** May v. Penton, 16 P.2d 35, 36, 45 Wyo. 82.

34 C.J. p 519 note 22.

Effect of acts and adjudications of authorities allotting land to Indians see Indians, § 486.

Secretary of interior

Where Indian left will disposing of his property and will was approved by secretary of interior who delivered restricted funds freed of restrictions to testamentary beneficiaries, the legal title, vested in the beneficiaries through administrative action of the secretary, was not open to collateral attack.—Hanson v. Hoffman, C.C.A.Okl., 113 F.2d 780.

Jurisdiction must appear

No presumption of regularity accompanies findings of tribunal of limited jurisdiction, such as workmen's compensation commissioner, in absence of evidence that such tribunal found jurisdictional facts, which cannot, as in case of courts of general jurisdiction, be inferred from mere exercise of jurisdiction.—Hoffman v. New York, N. H. & H. R. Co., C.C.A.N.Y., 74 F.2d 227, certiorari denied New York, N. H. & H. R. Co. v. Hoffman, 55 S.Ct. 513, 294 U.S. 715, 79 L.Ed. 1248, stating Connecticut rule.

95. Pa.—Merchants' Warehouse Co. v. Gelder, 36 A.2d 444, 349 Pa. 1.

96. Ariz.—City of Phœnix v. Sanner, 95 P.2d 987, 54 Ariz. 363.

In action to recover salary due plaintiff as assistant chief of police during certain period, city's offered evidence to effect that plaintiff had never qualified for appointment claimed, and that no qualifying examination had ever been given, was properly excluded as a collateral attack on decisions and certifications of civil service board to effect that plaintiff was assistant chief of police.—City of Phoenix v. Wright, 150 P.2d 93, 61 Ariz. 458.

97. U.S.—In re Fox West Coast Theatres, D.C.Cal., 25 F.Supp. 250, affirmed, C.C.A., 88 F.2d 212, certiorari denied Tally v. Fox Film Corporation, 57 S.Ct. 944, 301 U.S. 710, 81 L.Ed. 1363, rehearing denied 58 S.Ct. 7, 302 U.S. 772, 82 L.Ed. 598.

98. Tex.—Kirby Lumber Co. v. Adams, Civ.App., 62 S.W.2d 366, modified on other grounds 93 S.W. 2d 382, 127 Tex. 376.

99. Minn.—Martin v. Wolfson, 16 N.W.2d 884, 218 Minn. 557.

1. Wis.—Lakelands, Inc., v. Chippewa & Flambeau Improvement Co., 295 N.W. 919, 237 Wis. 326.

2. Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

3. Ala.—Williams v. Overcast, 155 So. 543, 229 Ala. 119.

Fla.—Bemis v. Loftin, 173 So. 683, 127 Fla. 515.

Iowa.—**Corpus Juris quoted in** Anderson v. Schwitzer, 20 N.W.2d 67, 71—**Corpus Juris quoted in** Brown v. Tank, 297 N.W. 801, 803, 230 Iowa 370.

Ky.—White v. White, 172 S.W.2d 72, 294 Ky. 563—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796—Commonwealth v. Miniard, 99 S.W. 2d 166, 266 Ky. 405—Mussman v. Pepples, 22 S.W.2d 605, 232 Ky. 254—Logsdon v. Logsdon, 263 S. W. 728, 204 Ky. 104.

Minn.—In re Melgaard's Will, 274 N. W. 641, 200 Minn. 493.

N.C.—Oliver v. Hood, 183 S.E. 657, 209 N.C. 291.

N.D.—**Corpus Juris quoted in** Olson v. Donnelly, 294 N.W. 666, 669, 70 N.D. 370.

Ohio.—In re Gingery's Estate, 134 N. E. 449, 451, 103 Ohio St. 559.

Okl.—Kauffman v. McLaughlin, 114 P.2d 929, 189 Okl. 194—Seekatz v. Brandenburg, 300 P. 678, 150 Okl. 53—Cochran v. Barkus, 240 P. 321, 112 Okl. 180—Ward v. Thompson, 237 P. 509, 111 Okl. 52—Watkins v. Jester, 229 P. 1085, 103 Okl. 201—Ross v. Breene, 211 P. 417, 88 Okl. 37.

Or.—**Corpus Juris quoted in** In re Armstrong's Estate, 82 P.2d 880, 884, 159 Or. 693.

Tenn.—Myers v. Wolf, 34 S.W.2d 201, 162 Tenn. 42.

Tex.—**Corpus Juris quoted in** Sharp v. Hall, Civ.App., 49 S.W.2d 523, 525—**Corpus Juris quoted in** McGlothlin v. Scott, Civ.App., 6 S. W.2d 129, 131.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

Va.—Broyhill v. Dawson, 191 S.E. 779, 168 Va. 321.

Wash.—**Corpus Juris quoted in** In re Peterson's Estate, 123 P.2d 733, 751, 12 Wash.2d 686.

34 C.J. p 520 note 34.

General principles of law and equity control

While distinctions in forms of pleading have been abolished and equitable and legal relief may be sought in same action, substantive principles of law and equity and general rules of procedure governing such actions, in so far as form and nature of relief are concerned, still exist, and question of whether action is direct proceeding to attack a judgment, or one merely collateral, must be determined by general principles of law and equity.—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.

Nature of relief

One of the primary tests of whether or not a subsequent suit is a "direct attack" on a former judgment is nature of the relief sought.—Ram-

proceeding instituted for that very purpose,[4] in the same action and in the same court;[5] and the fact that other incidental relief is also asked is immaterial.[6] Such is a motion or other proceeding to vacate, annul, cancel, or set aside the judgment;[7]

sey v. McKamey, Civ.App., 138 S.W.2d 167, reversed on other grounds 152 S.W.2d 322, 137 Tex. 91.

4. Ala.—Williams v. Overcast, 155 So. 543, 229 Ala. 119—Knight v. Garden, 71 So. 715, 716, 196 Ala. 516.
Ariz.—Hershey v. Banta, 99 P.2d 81, 55 Ariz. 93, followed in Hershey v. Republic Life Ins. Co., 99 P.2d 85, 55 Ariz. 104.
Ark.—Brooks v. Baker, 187 S.W.2d 169, 208 Ark. 654—Wilder v. Harris, 168 S.W.2d 804, 205 Ark. 341—Sewell v. Reed, 71 S.W.2d 191, 189 Ark. 50.
Ill.—**Corpus Juris cited in** City of Des Plaines v. Boeckenhauer, 50 N.E.2d 483, 486, 383 Ill. 475.
Iowa.—**Corpus Juris quoted in** Anderson v. Schwitzer, 20 N.W.2d 67, 71—**Corpus Juris cited in** In re Hall's Estate, 11 N.W.2d 379, 381, 233 Iowa 1148—**Corpus Juris quoted in** Brown v. Tank, 297 N.W. 801, 803, 230 Iowa 370.
Ky.—Farmers' Bank of Salvisa v. Riley, 272 S.W. 9, 209 Ky. 54.
Mo.—Ray v. Ray, 50 S.W.2d 142, 330 Mo. 530—Reger v. Reger, 293 S.W. 414, 316 Mo. 1310.
Mont.—Hanrahan v. Andersen, 90 P. 2d 494, 108 Mont. 218.
Okl.—**Corpus Juris cited in** Jones v. Snyder, 249 P. 313, 121 Okl. 254—Lucas v. Lucas, 163 P. 943, 65 Okl. 96.
Or.—**Corpus Juris quoted in** In re Armstrong's Estate, 82 P.2d 880, 884, 159 Or. 698.
Tex.—Garza v. Kenedy, Com.App., 299 S.W. 231—Johnson v. Ortiz Oil Co., Civ.App., 104 S.W.2d 543—**Corpus Juris quoted in** Sharp v. Hall, Civ.App., 49 S.W.2d 523, 525—**Corpus Juris quoted in** McGlothlin v. Scott, Civ.App., 6 S.W.2d 129, 131.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
W.Va.—Nelson Transfer & Storage Co. v. Jarrett, 157 S.E. 46, 110 W. Va. 97.
34 C.J. p 520 note 35.

Bankruptcy proceeding

A bankrupt who included in schedule of liability a judgment obtained against him under alleged separation agreement and who was discharged in bankruptcy was not precluded from seeking cancellation of the judgment on theory that by so doing he sought to impeach the judgment collaterally, since inclusion of such judgment in schedule of liabilities is not an attack on such judgment, and, even if it is, such attack is made in a proceeding provided by law for such purpose.—In re Collis, 53 N.Y.S.2d 316, 184 Misc. 717.

Suit to set aside a judgment and to obtain new judgment

Where plaintiff had in a previous action recovered judgment on a note against defendant a "first amended original petition" filed under the same docket number as that assigned to the original action claiming that the original judgment was invalid because of a defect in citation, but that issuance thereof prevented running of limitation statute and that plaintiff was entitled to judgment on the note was the institution of a new suit and an attempted "direct attack" upon the former judgment.—Litton v. Waters, Tex.Civ. App., 161 S.W.2d 1095, error refused.

Defective direct attack

When a suit is brought with a view of directly attacking a judgment and the suit fails for some reason to meet all the requirements of a direct attack, it will be disposed of as a collateral attack.—"56" Petroleum Corporation of Texas v. Rodden, Tex.Civ.App., 98 S.W.2d 269.

Suit to engraft constructive trust on property

Suit by deceased's heirs to engraft constructive trust on legal title to land on ground that executor indirectly and fraudulently acquired title to land was authorized under court's equity powers as distinguished from statutory action of trespass to try title and as relief against extraneous fraud, and was not collateral attack on probate court's orders authorizing and confirming sale.—Dilbeck v. Blackwell, Tex.Civ.App., 126 S.W.2d 760, error refused.

5. Ark.—Wilder v. Harris, 168 S.W. 2d 804, 205 Ark. 341—Turley v. Owen, 69 S.W.2d 882, 188 Ark. 1067—State v. Wilson, 27 S.W.2d 106, 181 Ark. 683.
Cal.—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal.App.2d 878—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318.
Ga.—**Corpus Juris cited in** Hughes v. Cobb, 23 S.E.2d 701, 704, 195 Ga. 213.
Ill.—**Corpus Juris cited in** City of Des Plaines v. Boeckenhauer, 50 N.E.2d 483, 486, 383 Ill. 475.
Iowa.—**Corpus Juris quoted in** Anderson v. Schwitzer, 20 N.W.2d 67, 71—**Corpus Juris quoted in** Brown v. Tank, 297 N.W. 801, 230 Iowa 370.
N.Y.—James Mills Orchard Corporation v. Frank, 244 N.Y.S. 473, 137 Misc. 407.
S.C.—Scott v. Newell, 144 S.E. 82, 146 S.C. 385.
S.D.—Forman v. Hall, 212 N.W. 866, 51 S.D. 144.
Tex.—Livingston v. Stubbs, Civ.App., 151 S.W.2d 285, error dismissed, judgment correct—Gann v. Putman, Civ.App., 141 S.W.2d 758, error dismissed, judgment correct—Duncan Coffee Co. v. Wilson, Civ. App., 139 S.W.2d 327, error dismissed—McLeod v. Carroll, Civ. App., 109 S.W.2d 316, affirmed 130 S.W.2d 277, 133 Tex. 571—**Corpus Juris quoted in** Sharp v. Hall, Civ. App., 49 S.W.2d 523, 525—**Corpus Juris quoted in** McGlothlin v. Scott, Civ.App., 6 S.W.2d 129, 131.
Utah.—State Tax Commission v. Larsen, 110 P.2d 558, 100 Utah 103.
34 C.J. p 520 note 36.

A petition for rule to show cause why order admitting will to probate in common form in Colleton County should not be revoked was not a "collateral attack" on the order, but was a "direct attack," and therefore latent defect that testatrix' residence had been fixed in Charleston County by her commitment therefrom to the state hospital was properly asserted as a ground for the petition.—Reed v. Lemacks, 28 S.E.2d 441, 204 S.C. 26.

Attack regarded as motion in original cause

In creditors' suit by mortgagee bank, where bank attacked judgments foreclosing other mortgages executed by debtor in actions to which bank was not a party, and all parties to such foreclosure actions were parties to creditors' suit, attack on judgments could not be complained of as improper collateral attack, since judge in his discretion could deem the proceeding to be a motion in the original cause.—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 1 S.E.2d 797, 191 S.C. 384.

6. Iowa.—**Corpus Juris quoted in** Anderson v. Schwitzer, 20 N.W.2d 69, 71—**Corpus Juris quoted in** Brown v. Tank, 297 N.W. 801, 230 Iowa 370.
Tex.—**Corpus Juris quoted in** McGlothlin v. Scott, Civ.App., 6 S.W. 2d 129, 131.
34 C.J. p 520 note 37.

Trespass to try title

"Direct attack" does not require sole purpose of suit to be to attack original judgment, but it may be incident to trespass to try title action.—Griggs v. Montgomery, Tex.Civ. App., 22 S.W.2d 688.

7. U.S.—Illinois Printing Co. v. Electric Shovel Coal Corporation, D.C.Ill., 20 F.Supp. 181.
Ala.—Snyder v. Woolf, 166 So. 803, 232 Ala. 87.
Ariz.—Bell v. Bell, 39 P.2d 629, 44 Ariz. 520.

a direct action to impeach and avoid the judgment,[8] or declare it void ab initio,[9] as where it was entered without notice;[10] a motion in arrest of judgment,[11] for a rehearing,[12] or for a new trial;[13] or any

Ark.—Brookfield v. Harrahan Viaduct Improvement Dist., 54 S.W. 2d 689, 186 Ark. 599—Woods v. Quarles, 13 S.W.2d 617, 178 Ark. 1158.

Cal.—Hollywood Garment Corporation v. J. Beckerman, Inc., 143 P. 2d 738, 61 Cal.App.2d 658—Gould v. Richmond School Dist., 136 P.2d 864, 58 Cal.App.2d 497—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App. 2d 318—Potts v. Whitson, 125 P. 2d 947, 52 Cal.App.2d 199—Shelley v. Casa De Oro, Limited, 24 P.2d 900, 133 Cal.App. 720—Reichert v. Rabun, 265 P. 260, 89 Cal.App. 375—In re Dahnke's Estate and Guardianship, 222 P. 381, 64 Cal. App. 555—Sharp v. Eagle Lake Lumber Co., 212 P. 933, 60 Cal. App. 386.

Fla.—Skipper v. Shumacher, 169 So. 58, 124 Fla. 384.

Idaho.—Baldwin v. Anderson, 8 P. 2d 461, 51 Idaho 614.

Kan.—**Corpus Juris cited in** Kansas City Power & Light Co. v. City of Elkhart, 31 P.2d 62, 64, 139 Kan. 374—Board of Com'rs of Crawford County v. Radley, 8 P.2d 386, 134 Kan. 704.

Ky.—Gardner v. Lincoln Bank & Trust Co., 64 S.W.2d 497, 251 Ky. 109—Holcomb v. Creech, 56 S.W. 2d 998, 247 Ky. 199—May v. Pratt, 35 S.W.2d 542, 237 Ky. 369—Joseph v. Bailey, 277 S.W. 466, 211 Ky. 394.

Mo.—State ex rel. Aquamsi Land Co. v. Hostetter, 79 S.W.2d 463, 336 Mo. 391.

N.J.—Hinners v. Banville, 168 A. 618, 114 N.J.Eq. 348.

N.Y.—Conyne v. McGibbon, 37 N.Y. S.2d 590, 179 Misc. 54, transferred, see 39 N.Y.S.2d 609, 265 App.Div. 976, affirmed 41 N.Y.S.2d 189, 266 App.Div. 711.

Okl.—City of Clinton ex rel. Richardson v. Cornell, 132 P.2d 340, 191 Okl. 600—Roland Union Graded School Dist. No. 1 of Sequoyah County v. Thompson, 124 P.2d 400, 190 Okl. 416.

Tex.—Sharp v. Hall, Civ.App., 49 S. W.2d 523, error refused—Bonner v. Pearson, Civ.App., 7 S.W.2d 930—Carlton v. Hoff, Civ.App., 292 S.W. 642—Perez v. E. P. Lipscomb & Co., Civ.App., 267 S.W. 748.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

34 C.J. p 520 note 38.

Parties

(1) Whether a proceeding to vacate or set aside a judgment is a direct or collateral attack depends on whether all the parties to be affected are before the court; if they are not, the attack is collateral.—Hartel v. Dishman, 145 S.W.2d 865, 135 Tex. 600—Pure Oil Co. v. Reece, 78 S.W.2d 932, 124 Tex. 476—Hannon v. Henson, Tex.Com.App., 15 S. W.2d 579—Williams v. Coleman-Fulton Pasture Co., Tex.Civ.App., 157 S.W.2d 995, error refused—Wixom v. Bowers, Tex.Civ.App., 152 S.W.2d 896, error refused—Rhoads v. Daly General Agency, Tex.Civ.App., 152 S.W.2d 461, error refused—Scott v. Fort Worth Nat. Bank, Tex.Civ.App., 125 S.W.2d 356, error dismissed—McLeod v. Carroll, Civ.App., 109 S. W.2d 316, affirmed Carroll v. McLeod, 130 S.W.2d 277, 133 Tex. 571—Moore v. Evans, Tex.Civ.App., 103 S.W.2d 850—Rodden v. Smith, Tex.Civ.App., 95 S.W.2d 997—Avant v. Broun, Tex. Civ.App., 91 S.W.2d 426, error dismissed—Perdue v. Miller, Tex.Civ. App., 64 S.W.2d 1002, error refused—Griggs v. Montgomery, Tex.Civ.App., 22 S.W.2d 688—State Mortg. Corporation v. Garden, Tex.Civ.App., 11 S.W.2d 212—Burton v. McGuire, Tex. Civ.App., 3 S.W.2d 576, affirmed, Com. App., 41 S.W.2d 238—Carlton v. Hoff, Tex.Civ.App., 292 S.W. 642.

(2) Original parties being parties to suit, nature of suit as direct attack on judgment is not altered because others were made parties.—Garza v. Kenedy, Tex.Com.App., 299 S.W. 231.

Seasonable motion

(1) A seasonable motion to vacate judgment is a direct attack on the judgment.—City of Los Angeles v. Glassell, 262 P. 1084, 203 Cal. 44.

(2) An application to vacate a judgment made to court that rendered it within thirty days after its entry is a "direct attack" on the judgment, but if made after expiration of thirty days it is a "collateral attack."—Barnard v. Michael, 63 N.E. 2d 858, 392 Ill. 130, appeal transferred, see 61 N.E.2d 578, 326 Ill.App. 69.

(3) A motion to vacate a judgment, made after the expiration of the period allowed by statute for a motion to set aside default judgment, is governed by the rules applicable to a collateral attack.—Wells Fargo & Co. v. City and County of San Francisco, 152 P.2d 625, 25 Cal. 2d 37—City of Salinas v. Luke Kow Lee, 18 P.2d 335, 217 Cal. 252—People v. Herod, 295 P. 383, 111 Cal.App. 246.

(4) After expiration of time for a direct appeal a motion to quash service of summons by publication must be considered as a collateral attack.—Butler v. McKey, C.C.A.Cal., 138 F.2d 373, certiorari denied 64 S.Ct. 636, 321 U.S. 780, 88 L.Ed. 1073.

(5) Where district court's power over its default judgment had ceased with end of term at which judgment was rendered, a proceeding on defendant's motion at a subsequent term to recall execution issued on judgment and to vacate judgment stood on same footing as a "collateral attack" on a judgment.—Ridley v. McCallum, 163 S.W.2d 833, 139 Tex. 540.

(6) Motion to vacate judgment, entered some twenty months prior thereto, against sureties on forthcoming bond given after levy of execution, and to cancel execution issued on the judgment, was a "collateral attack" and was improperly sustained in absence of fraud or collusion.—State ex rel. Fulton Bag & Cotton Mills v. Burnside, 15 So.2d 324, 153 Fla. 599.

Proceeding to set aside default decree

A proceeding by curator of minors' estate and trustee under trust deed, securing note for money loaned by curator on minor's behalf, to set aside default decree for cross complainant, claiming title to mortgaged land as purchaser at tax sale, in foreclosure suit, on grounds of fraud in obtaining decree, lack of notice to or service on minor cross defendants and valid defense to cross complaint, is not collateral attack on such decree.—Arkansas Trust Co. v. Sims, 133 S.W.2d 854, 198 Ark. 1143.

Dissolution or setting aside of attachment execution judgment against garnishee after discharge of original judgment on which attachment proceeding is based would not constitute "collateral attack" on attachment judgment or deprive original judgment creditor of "vested right" in attached property.—Sophia Wilkes Building & Loan Ass'n, to Use of Wiehe, v. Rudloff, 35 A.2d 278, 348 Pa. 477.

8. Mo.—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S. W.2d 865.
34 C.J. p 520 note 39.

9. Ark.—Brick v. Sovereign Grand Lodge of Accepted Free Masons of Arkansas, 117 S.W.2d 1060, 196 Ark. 372—Morgan v. Leon, 12 S.W. 2d 404, 178 Ark. 768.

10. Ark.—Brick v. Sovereign Grand Lodge of Accepted Free Masons of Arkansas, 117 S.W.2d 1060, 196 Ark. 372.

11. Mo.—Robinson v. Robinson, 129 S.W. 725, 149 Mo. 733.

12. Tex.—Crawford v. McDonald, 33 S.W. 325, 88 Tex. 626.
34 C.J. p 520 note 41.

13. Tex.—Goodman v. Mayer, Civ. App., 105 S.W.2d 281, reversed on other grounds 128 S.W.2d 1156, 133 Tex. 319.
34 C.J. p 520 note 42.

proceeding to review it in an appellate court, whether by appeal, error, or certiorari,[14] action to review,[15] bill of review,[16] writ of review,[17] or, in general, any statutory method for avoiding or correcting a judgment.[18]

Under some circumstances, an action to quiet title is a direct attack on the judgment;[19] under others it is considered a collateral attack;[20] but a suit to quiet title, which attacks proceedings subsequent to the judgment has been held to be neither a

Timely filing essential

Where no motion for a new trial was filed before expiration of a specified number of days from date of judgment, a motion made after such period to set aside judgment and for judgment non obstante veredicto was a collateral attack on judgment and court was unauthorized to set it aside unless it was void.—Bridgman v. Moore, 183 S.W.2d 705, 143 Tex. 250.

14. Ark.—Krumpen v. Taylor, 40 S.W.2d 775, 183 Ark. 1046.
Cal.—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318.
Fla.—Skipper v. Schumacher, 169 So. 58, 124 Fla. 384.
Mo.—State ex rel. Lane v. Corneli, 171 S.W.2d 687, 351 Mo. 1—State ex rel. Aquamsi Land Co. v. Hostetter, 79 S.W.2d 463, 336 Mo. 391.
N.J.—Coffey v. Coffey, 14 A.2d 485, 125 N.J.Law 205.
Tex.—Stewart Oil Co. v. Lee, Civ. App., 173 S.W.2d 791, error refused—McKinley v. Salter, Civ. App., 136 S.W.2d 615, error dismissed, judgment correct, appeal dismissed 61 S.Ct. 734, 312 U.S. 659, 85 L.Ed. 1106.
34 C.J. p 520 note 43.

By bringing error in suits on judgments based on judgment taken by default, plaintiff in error attacked default judgment directly, not collaterally.—Cheshire v. Palmer, Tex. Civ.App., 44 S.W.2d 438.

Appeal from ruling on motion

Plaintiff's appeal to circuit court from grant of defendants' motion to require plaintiff to satisfy common pleas court judgment for plaintiff held not collateral attack on common pleas court judgment.—McCarty v. Cook, 71 S.W.2d 1053, 189 Ark. 309.

Appeal from order allowing claims under statute providing that on levy of attachment, garnishment, or execution, not founded on claim for labor, any person who has performed work for defendant within ninety days prior to levy may file claim, not exceeding two hundred dollars, constituted a "direct attack," on the order.—Driver v. International Air Race Ass'n of America, 129 P.2d 771, 54 Cal.App.2d 614.

Certiorari to review contempt conviction

A certiorari proceeding to review relator's conviction for contempt in violating temporary injunction was a "collateral attack" on injunction which would fail unless injunction was shown to be a nullity so that, under statute prohibiting issuance of injunction in suit involving labor dispute except after "findings of fact," where temporary injunction was issued without "findings of fact" whether court erred in determining that suit involved no labor dispute could not be determined on certiorari to review conviction of contempt for violation of injunction.—Reid v. Independent Union of All Workers, 275 N.W. 300, 200 Minn. 599, 120 A.L.R. 297.

15. Ind.—Deputy v. Dollarhide, 86 N.E. 344, 42 Ind.App. 554.

16. Ala.—Johnson v. Pugh, 193 So. 317, 239 Ala. 12—Midgley v. Ralls, 176 So. 799, 234 Ala. 685—**Corpus Juris cited in** Snyder v. Woolf, 166 So. 803, 804, 232 Ala. 87.
Tex.—Texas Employers' Ins. Ass'n v. Cashion, Civ.App., 130 S.W.2d 1112—Johnson v. Ortiz Oil Co., Civ. App., 104 S.W.2d 543—City of Tyler v. First Nat. Bank of Beaumont, Civ.App., 46 S.W.2d 454, error refused.
34 C.J. p 521 note 45.
Bill of review in equity as collateral attack see Equity § 635.

Filing in same court or action essential

(1) A bill of review not filed in the same court where the judgment or order under attack was made is a collateral attack.—Whitehurst v. Estes, Tex.Civ.App., 185 S.W.2d 154, error refused—Cheney v. Norton, Tex.Civ.App., 181 S.W.2d 835, error refused.

(2) Statutory bill of review is not available to interested person to nullify orders of probate court, such as appointing a guardian authorizing sale of land or approving report of such sale, so as to create an estoppel against purchasers in other actions against them in the district court to try title to land, where the land has actually been conveyed to persons having no interest in such orders save as they constitute links in their chain of title, since such orders are voidable only on a direct attack and under the circumstances the bill of review is not a direct attack.—Johnson v. Ortiz Oil Co., Tex.Civ.App., 104 S.W.2d 543.

17. Mont.—State ex rel. Haynes v. District Court, Sixteenth Judicial District, Custer County, 81 P.2d 422, 106 Mont. 578.
34 C.J. p 521 note 46.

18. Tenn.—Clements v. Holmes, App., 120 S.W.2d 988, 22 Tenn.App. 230.

Action of nullity

Suit on same subject matter, by same parties, not containing averment that former judgment is null, is not action of nullity under statute.—Smith v. Salmen Brick & Lumber Co., 8 La.App. 75.

19. Ark.—Grayling Lumber Co. v. Tillar, 258 S.W. 132, 162 Ark. 221.
Mo.—Shepard v. Shepard, 186 S.W. 2d 472, 353 Mo. 1057.
34 C.J. p 521 note 47.

20. Ala.—**Corpus Juris cited in** Penton v. Brown-Crummer Inv. Co., 131 So. 14, 19, 222 Ala. 155.
Cal.—Swartfager v. Wells, 128 P.2d 128, 53 Cal.App.2d 522.
Ill.—Murch v. Epley, 52 N.E.2d 125, 385 Ill. 138—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 365 Ill. 588.
Mo.—Linville v. Ripley, 146 S.W.2d 581, 347 Mo. 95—Baker v. Lamar, 140 S.W.2d 31.
Mont.—Sanborn v. Lewis and Clark County, 120 P.2d 567, 113 Mont. 1—E. J. Lander & Co. v. Brown, 99 P.2d 216, 110 Mont. 128—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58—Price v. Skylstead, 222 P. 1059, 69 Mont. 453.
Okl.—Porter v. Hansen, 124 P.2d 391, 190 Okl. 429—Collingsworth v. Hutchison, 90 P.2d 416, 185 Okl. 101.
Or.—Morrill v. Morrill, 25 P. 362, 20 Or. 96, 23 Am.S.R. 95, 11 L.R.A. 155.
Tex.—Carroll v. McLeod, Com.App., 130 S.W.2d 277, 133 Tex. 571.
Wash.—Zintheo v. B. F. Goodrich Rubber Co., 239 P. 391, 136 Wash. 196.
34 C.J. p 521 note 48.

Declaratory judgment action to quiet title

Where adopted son, as only heir at law of deceased to whom land was allegedly conveyed for life with remainder to his heirs, brought declaratory judgment action to have title to such land quieted in him against parties who were adjudged owners in fee simple thereof in action to settle estate of deceased because of conveyance to them by deceased, and adopted son was made party to such action, and such judgment was not void, declaratory judgment action constituted a "collateral attack" on prior judgment and would not lie.—Eversole v. Smith, 178 S.W. 2d 970, 297 Ky. 53.

direct nor a collateral attack on the judgment.[21]

Where the element of fraud or mistake is involved in the issue it is a general rule that the attack is direct.[22]

Where a judgment is pleaded as a defense to an action, plaintiff has a right to challenge and have the court pass on the validity of the judgment and the proceedings under which it was obtained.[23]

b. Collateral Attack

A collateral attack is an attempt to avoid, defeat, or evade a judgment, or to deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.

A collateral attack is an attempt to impeach the judgment by matters dehors the record,[24] before a court other than the one in which it was rendered,[25] in an action other than that in which it was rendered;[26] an attempt to avoid, defeat, or

Impeachment for fraud

(1) Under a bill to quiet title, any attempted impeachment of probate decree allotting homestead exemption to widow, on ground that it was infected with fraud, is a mere collateral attack and unavailable.—Cogburn v. Callier, 104 So. 328, 213 Ala. 38.

(2) Where, in bill to quiet title, respondents set up a homestead exemption decree as their muniment of title, and thereupon complainants amended their original bill, and alleged fraud in procurement of such decree, and prayed that it be set aside, such amendment constituted a direct attack on decree, giving court jurisdiction, and placing burden of proof on complainants, and final decree thereon is conclusive.—Cogburn v. Callier, 104 So. 330, 213 Ala. 46—Cogburn v. Callier, 104 So. 328, 213 Ala. 38.

(3) Complainants' averments of fraud in procuring homestead allotment decree, which were made in answer to respondents' cross bill, and not in their bill of complaint, constituted but a collateral attack on such decree, and is not available for its impeachment.—Cogburn v. Callier, 104 So. 330, 213 Ala. 46.

21. Ky.—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818.

22. Cal.—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318—Borg v. Borg, 76 P.2d 318, 25 Cal.App.2d 25.
Okl.—Roland Union Graded School Dist. No. 1 of Sequoyah County v. Thompson, 124 P.2d 400, 190 Okl. 416—Parker v. Board of Com'rs of Okmulgee County, 102 P.2d 880, 187 Okl. 308, followed in Parker v. Board of Com'rs of Okmulgee County, 102 P.2d 883, 187 Okl. 311.
Tenn.—**Corpus Juris cited in** Kates v. Anderson, Dulin, Varnell Co., 9 Tenn.App. 396, 401.
Tex.—Moyers v. Carter, Civ.App., 61 S.W.2d 1027, error refused.
Wyo.—**Corpus Juris quoted in** Rock Springs & Mining Co. v. Black Diamond Coal Co., 272 P. 12, 39 Wyo. 379.
34 C.J. p 529 note 49.

Application to vacate Enoch Arden decree

An application of second husband to vacate decree procured by his present wife against her former husband in a so-called Enoch Arden proceeding for dissolution of marriage on ground of former husband's absence for five years on charge that wife procured decree through fraud was a "direct attack" and not a "collateral attack" on the decree, and therefore could be maintained, but application would be denied where it appeared that former husband was living and had received no notice of motion, since former husband was a "party" to proceedings within contemplation of the law.—Application of Neiman, 28 N.Y.S.2d 109, 176 Misc. 552.

Action to cancel deed

In action to cancel for fraud a deed to property registered under Torrens Law, evidence that defendant had purchased land and paid consideration held not collateral attack on judgment.—Whitham v. Whitham, 15 P.3d 1105, 127 Cal.App. 481.

23. Okl.—St. Louis-San Francisco Ry. Co. v. Bayne, 40 P.2d 1104, 170 Okl. 542—Southern Pine Lumber Co. v. Ward, 85 P. 459, 16 Okl. 131.

24. U.S.—**Corpus Juris quoted in** Trustees of Somerset Academy v. Picher, C.C.A.Me., 90 F.2d 741, 744.
Cal.—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318—Kirkpatrick v. Harvey, 124 P.2d 367, 51 Cal.App.2d 170—Hollyfield v. Geibel, 66 P.2d 755, 20 Cal.App.2d 142—Nielsen v. Emerson, 6 P.2d 281, 119 Cal.App. 214.
Ga.—Hadden v. Fuqua, 22 S.E.2d 377, 194 Ga. 621.
Ind.—Clark v. Clark, 172 N.E. 124, 202 Ind. 104.
Iowa.—**Corpus Juris quoted in** Anderson v. Schwitzer, 20 N.W.2d 67, 71—**Corpus Juris quoted in** Brown v. Tank, 297 N.W. 801, 803, 230 Iowa 370.
Kan.—**Corpus Juris quoted in** Board of Commissioners of Crawford County v. Radley, 8 P.2d 386, 388, 134 Kan. 704.
Ky.—Collier v. Peninsular Fire Ins. Co. of America, 263 S.W. 353, 204 Ky. 1.
N.Y.—**Corpus Juris quoted in** In re Collis, 53 N.Y.S.2d 316, 318, 184 Misc. 717—James Mills Orchards Corporation v. Frank, 244 N.Y.S. 473, 137 Misc. 407.
N.C.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.
S.C.—Tolbert v. Roark, 119 S.E. 571, 126 S.C. 207.
Tex.—Agey v. Barnard, Civ.App., 123 S.W.2d 484, error dismissed, judgment correct—Smith v. Burns, Civ.App., 107 S.W.2d 397—**Corpus Juris quoted in** Sharp v. Hall, Civ.App., 49 S.W.2d 523, 525—Lipscomb v. Japhet, Civ.App., 18 S.W.2d 786, error dismissed—**Corpus Juris cited in** Reeves v. Fuqua, Civ.App., 277 S.W. 418, 423.
Wash.—**Corpus Juris quoted in** In re Peterson's Estate, 123 P.2d 733, 12 Wash.2d 686—**Corpus Juris quoted in** Thompson v. Short, 106 P.2d 720, 6 Wash.2d 71—**Corpus Juris cited in** Hanna v. Allen, 279 P. 1098, 1101, 153 Wash. 485.
34 C.J. p 521 note 50.

25. Tex.—McLeod v. Carroll, Civ.App., 109 S.W.2d 316, affirmed Carroll v. McLeod, 130 S.W.2d 277, 133 Tex. 571—Perdue v. Miller, Civ.App., 64 S.W.2d 1002, error refused—Reeves v. Fuqua, Civ.App., 277 S.W. 418.

Creation of new judicial district

Statute creating judicial district was held not to supersede rule that suit to vacate judgment must be brought and tried in court which rendered judgment, as against contention that attack in 124th district court of Gregg County on judgment rendered by 71st district court could not be deemed collateral attack.—Snell v. Knowles, Tex.Civ.App., 87 S.W.2d 871, error dismissed.

26. U.S.—Warmsprings Irr. Dist. v. May, C.C.A.Or., 117 F.2d 802—**Corpus Juris quoted in** Trustees of Somerset Academy v. Picher, C.C.A.Me., 90 F.2d 741, 744.
Ariz.—Metcalf v. Phœnix Title & Trust Co., 274 P. 632, 35 Ariz. 73.
Cal.—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal.App.2d 878—Bank of America Nat. Trust & Savings Ass'n v. Hill, 71 P.2d 258, 9 Cal.2d 495—See v. Joughin, 64 P.2d 149, 18 Cal.App.2d 414.

evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it;[27] any proceeding which is not instituted for the express purpose of

Ill.—City of Des Plaines v. Boeckenhauer, 50 N.E.2d 483, 383 Ill. 475—Beckman v. Alberts, 178 N.E. 367, 346 Ill. 74.

Iowa.—**Corpus Juris quoted in** Anderson v. Schwitzer, 20 N.W.2d 69, 71—**Corpus Juris quoted in** Brown v. Tank, 297 N.W. 801, 803, 230 Iowa 370.

Kan.—Goodman v. Cretcher, 294 P. 868, 132 Kan. 142.

Ky.—May v. Sword, 33 S.W.2d 314, 236 Ky. 412.

La.—Federal Securities Co. v. Swayze, 125 So. 518, 14 La.App. 418.

Mont.—E. J. Lander & Co. v. Brown, 99 P.2d 216, 110 Mont. 128.

N.Y.—James Mills Orchards Corporation v. Frank, 244 N.Y.S. 473, 137 Misc. 407.

N.D.—Erker v. Deichert, 222 N.W. 615, 57 N.D. 474.

S.C.—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 1 S.E.2d 797, 191 S.C. 384—Tolbert v. Roark, 119 S.E. 571, 126 S.C. 207.

Tenn.—Esch v. Wilcox, 178 S.W.2d 770, 181 Tenn. 165.

Tex.—Security Trust Co. of Austin v. Lipscomb County, 180 S.W.2d 151, 142 Tex. 572—**Corpus Juris cited in** Empire Gas & Fuel Co. v. Albright, 87 S.W.2d 1092, 126 Tex. 485—**Corpus Juris quoted in** Sharp v. Hall, Civ.App., 49 S.W.2d 523, 525—**Corpus Juris cited in** Reeves v. Fuqua, Civ.App., 277 S.W. 418, 423.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

Wash.—**Corpus Juris cited in** Hanna v. Allen, 279 P. 1098, 1101, 153 Wash. 485.

Wis.—In re Cawker's Estate, 290 N. W. 281, 233 Wis. 648.

34 C.J. p 521 note 51—11 C.J. p 960 note 21.

Any attack in interpleader action on an order made in a prior action, was a "collateral attack" on the order and was governed by the rules pertaining to such attack.—Driver v. International Air Race Ass'n of America, 129 P.2d 771, 54 Cal.App.2d 614.

In receivership suit, attack made on orders entered in prior receivership suit in same court involving same corporations was a collateral attack, requiring proof of want of jurisdiction, where objections went only to particular judge sitting at hearing and to particular receivers, and consolidation of the two pending receivership suits in same court did not render attack in subsequent suit, on orders entered in prior suit, direct attack, which would reach mere errors.—Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.

Consolidated actions which were in effect one action attempting to set aside former judgment in order that plaintiff might attack a judgment rendered in another and distinct action constituted a "collateral attack" on judgment in former action, and hence could be maintained only if former judgment was void on its face.—Hershey v. Banta, 99 P.2d 81, 55 Ariz. 93, followed in Hershey v. Republic Life Ins. Co., 99 P.2d 85, 55 Ariz. 104.

Escheat proceedings

A decree determining that named nationals and residents of Germany were the only heirs of deceased was conclusive, and could not be collaterally attacked in escheat proceedings subsequently brought by the state.—In re Giebler's Estate, Mont., 162 P.2d 368.

Defense as collateral attack

(1) In mortgage foreclosure action, affirmative defense that mortgagee agreed to transfer exclusive patent license to mortgagor, and that, by judgment in a prior action, it was adjudged that mortgagor had acquired exclusive license, and averring that mortgagor had since ascertained existence of prior transfers of licenses to third persons, was held properly stricken out as collateral attack on a final judgment.—Bank of America Nat. Trust & Savings Ass'n v. Harriscolor Films, 31 P.2d 189, 220 Cal. 383.

(2) In suit for fees which sheriff, pursuant to judgments, collected for attorney whom court appointed for nonresidents in tax suits, plea that attorney was not licensed attorney was held objectionable as collateral attack on judgments.—Turner v. Willacy County, Tex.Com.App., 58 S.W. 2d 12.

(3) Defense that trustee for bondholders bid in property in name of dummy at owner's direction, and that no cash was received, was held not objectionable as collateral attack on foreclosure record showing cash sale, in action by owner of bonds to recover from trustee proceeds of foreclosure sale.—White v. Central Trust Co. of Illinois, 259 Ill.App. 68.

Cross complaint

Where defendant filed a cross complaint to foreclose his lien, claim by plaintiff that defendant's lien was obtained by subrogation in action to cancel deed for fraud, which court had no right to do, was a collateral attack on a judgment of court of competent jurisdiction, which could not be set up.—Rooker v. Leary, 149 N.E. 358, 84 Ind.App. 77.

27. U.S.—Corpus Juris quoted in Trustees of Somerset Academy v. Picher, C.C.A.Me., 90 F.2d 741, 744.

Ala.—Williams v. Overcast, 155 So. 543, 229 Ala. 119—Florence Gin Co. v. City of Florence, 147 So. 417, 226 Ala. 473, followed in 147 So. 420, three cases, 226 Ala. 482, 147 So. 421, 226 Ala. 482, and 147 So. 421, 226 Ala. 483—**Corpus Juris cited in** Warren v. Southall, 141 So. 632, 224 Ala. 653—Penton v. Brown-Crummer Inv. Co., 131 So. 14, 222 Ala. 155—Hill v. Hooper, 110 So. 323, 21 Ala.App. 584.

Ark.—Wilder v. Harris, 168 S.W.2d 804, 205 Ark. 341—Brick v. Sovereign Grand Lodge of Accepted Free Masons of Arkansas, 117 S. W.2d 1060, 196 Ark. 372—Sewell v. Reed, 71 S.W.2d 191, 189 Ark. 50—Turley v. Owen, 69 S.W.2d 882, 188 Ark. 1067—State v. Wilson, 27 S. W.2d 106, 181 Ark. 683.

D.C.—Edward Thompson Co. v. Thomas, 49 F.2d 500, 60 App.D.C. 118.

Fla.—Bemis v. Loftin, 173 So. 683, 127 Fla. 515—Skipper v. Schumacher, 169 So. 58, 124 Fla. 384.

Iowa.—**Corpus Juris quoted in** Anderson v. Schwitzer, 20 N.W.2d 69, 71—**Corpus Juris quoted in** Brown v. Tank, 297 N.W. 801, 803, 230 Iowa 370.

Ky.—Furlong v. Finneran, 4 S.W.2d 378, 223 Ky. 558—Woollums v. Fowler, 269 S.W. 721, 207 Ky. 532.

Minn.—Brotton v. Donovan, 224 N. W. 270, 177 Minn. 34.

Mo.—Sheehan v. First Nat. Bank, 140 S.W.2d 1, 346 Mo. 227—Reger v. Reger, 293 S.W. 414, 316 Mo. 1310.

Mont.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.

Neb.—Douglas County v. Feenan, 18 N.W.2d 740, 146 Neb. 156—In re Warner's Estate, 288 N.W. 39, 137 Neb. 25.

Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County, 167 P.2d 648.

N.J.—Sikora v. Smuc, 28 A.2d 211, 132 N.J.Eq. 396.

Ohio.—State v. Marsh, 165 N.E. 843, 120 Ohio St. 222—Starr v. Weir, 172 N.E. 537, 35 Ohio App. 374, error dismissed Guaranty Trust Co. of New York v. Starr, 172 N.E. 381, 121 Ohio St. 626.

Okl.—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—Shefts v. Oklahoma Co., 137 P.2d 589, 192 Okl. 483—**Corpus Juris cited in** Porter v. Hansen, 124 P.2d 391, 190 Okl. 429—Kauffman v. McLaughlin, 114 P.2d 929, 189 Okl. 194—May v. Casker, 110 P.2d 287, 188 Okl. 448

annulling, correcting, or modifying such decree;[28] an objection, incidentally raised in the course of the proceeding, which presents an issue collateral to the issues made by the pleadings.[29]

In other words, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack on the judgment is collateral.[30] This is the case where the proceeding is

—Robison v. Hamm, 64 P.2d 894, 179 Okl. 79—Wright v. Saltmarsh, 50 P.2d 694, 174 Okl. 226—Powers v. Brown, 252 P. 27, 122 Okl. 40—Ward v. Thompson, 237 P. 569, 111 Okl. 52—Watkins v. Jester, 229 P. 1085, 103 Okl. 201—Tidal Refining Co. v. Tivis, 217 P. 163, 164, 91 Okl. 189—Ross v. Breene, 211 P. 417, 88 Okl. 37.

Tex.—Lipscomb v. Lofland, Civ.App., 141 S.W.2d 783, error dismissed, judgment correct—Smith v. Burns, Civ.App., 107 S.W.2d 397—Johnson v. Ortiz Oil Co., Civ.App., 104 S.W.2d 543—Foster v. Christensen, Civ.App., 42 S.W.2d 460, reversed on other grounds, Com.App., 67 S.W.2d 246.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

Wash.—Globe Const. Co. v. Yost, 13 P.2d 433, 169 Wash. 319—**Corpus Juris cited in** Hanna v. Allen, 279 P. 1098, 1101, 153 Wash. 485.

W.Va.—Nelson Transfer & Storage Co. v. Jarrett, 157 S.E. 46, 110 W.Va. 97—Lough v. Taylor, 124 S.E. 585, 97 W.Va. 180.

34 C.J. p 521 note 52.

A motion to quash service of summons after judgment and after term on ground that service was not duly made was properly dismissed as being an indirect attack on judgment beyond authority of court to entertain.—Hinman v. Executive Committee of Communistic Party of U. S. A., 47 N.E.2d 820, 71 Ohio App. 76.

Proceeding before court of tax review, wherein validity of judgment against city rendered by state district court is questioned constitutes "collateral attack" on judgment which must fail unless shown to be void by judgment roll.—Protest of St. Louis-San Francisco Ry. Co., 42 P.2d 537, 171 Okl. 180—Protest of Gulf Pipe Line Co. of Oklahoma, 32 P.2d 42, 168 Okl. 136.

Attack by supplemental petition held collateral attack.—Duke v. Gilbreath, Tex.Civ.App., 2 S.W.2d 324, error dismissed—Cockrell v. Steffens, Tex.Civ.App., 284 S.W. 608—Texas Pacific Coal & Oil Co. v. Ames, Tex.Civ.App., 284 S.W. 315, reversed on other grounds, Com.App., 292 S.W. 191.

Appeal or motion after term

"Collateral proceeding," within rule that party may not deny validity of judgment rendered at his instance, is proceeding other than appeal or motion during the term.—Poston v. Delfelder, 273 P. 176, 39 Wyo. 163.

Suit on insurance policy was held collateral attack on conviction for burning identical property with intent to injure insurer.—Eagle, Star and British Dominions Ins. Co. v. Heller, 140 S.E. 314, 149 Va. 82, 57 A.L.R. 490.

A proceeding to set aside two mortgages executed by an administratrix pursuant to authority granted by the probate court was in the nature of a collateral attack on the judgment of the probate court, and complainant could not prevail unless the judgments were void on the face of the record, or unless the court lacked jurisdiction of the subject matter.—Reed v. Futrall, 115 S.W.2d 542, 195 Ark. 1044.

28. U.S.—**Corpus Juris quoted in** Trustees of Somerset Academy v. Picher, C.C.A.Me., 90 F.2d 741, 744.

Alaska.—Lynch v. Collings, 7 Alaska 84.

Ark.—Turley v. Owen, 69 S.W.2d 882, 188 Ark. 1067.

Or.—Gatt v. Hurlburt, 284 P. 172, 131 Or. 554, rehearing denied 286 P. 151, 132 Or. 415.

Tex.—Burton v. McGuire, Civ.App., 3 S.W.2d 576, affirmed, Com.App., 41 S.W.2d 238.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

Wash.—**Corpus Juris cited in** Hanna v. Allen, 279 P. 1098, 1101, 153 Wash. 485.

34 C.J. p 521 note 53.

29. U.S.—**Corpus Juris quoted in** Trustees of Somerset Academy v. Picher, C.C.A.Me., 90 F.2d 741, 744.

34 C.J. p 521 note 54.

Objection by way of evidence

In action against corporate directors as statutory trustees on judgment obtained against corporation before forfeiture of its charter, evidence tending to show that indebtedness for which judgment against corporation had been entered had been paid prior to its entry was properly excluded as a "collateral attack" on original judgment.—Caxton Printers v. Ulen, 86 P.2d 468, 59 Idaho 688.

30. U.S.—**Corpus Juris quoted in** Trustees of Somerset Academy v. Picher, C.C.A.Me., 90 F.2d 741, 744—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A.Wyo., 74 F.2d 827—Watts v. Alexander, Morrison & Co., D.C.N.Y., 34 F.2d 66, affirmed, C.C.A., Watts v. Vanderbilt, 45 F.2d 968.

Ariz.—Hershey v. Banta, 99 P.2d 81, 55 Ariz. 93, followed in Hershey v. Republic Life Ins. Co., 99 P.2d 85, 55 Ariz. 104—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434.

Ark.—**Corpus Juris cited in** Brooks v. Baker, 187 S.W.2d 169, 208 Ark. 654—Person v. Miller Levee Dist. No. 2, 150 S.W.2d 950, 202 Ark. 173—Endsley v. Arkansas Power & Light Co., 115 S.W.2d 1070, 196 Ark. 94—State Life Ins. Co. v. Graue, 79 S.W.2d 268, 190 Ark. 460.

Cal.—Kaufmann v. California Mining & Dredging Syndicate, 104 P.2d 1038, 16 Cal.2d 90.

Ga.—Marshall v. Marthin, 15 S.E.2d 861, 192 Ga. 613—**Corpus Juris cited in** Thomas v. Lambert, 1 S.E.2d 443, 444, 187 Ga. 616—Rosenberg v. Phelps, 126 S.E. 788, 159 Ga. 607.

Idaho.—Moyes v. Moyes, 94 P.2d 782, 60 Idaho 601—Welch v. Morris, 291 P. 1048, 49 Idaho 781—Simonton v. Simonton, 236 P. 863, 40 Idaho 751, 42 A.L.R. 1363.

Iowa.—**Corpus Juris quoted in** Anderson v. Schwitzer, 20 N.W.2d 69, 71—**Corpus Juris quoted in** Brown v. Tank, 297 N.W. 801, 803, 230 Iowa 370—**Corpus Juris quoted in** Newcomber v. Newcomber, 201 N.W. 579, 580, 199 Iowa 290.

Ky.—White v. White, 172 S.W.2d 72, 294 Ky. 563—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818—Haas v. Kentucky Title Trust Co., 98 S.W.2d 494, 266 Ky. 215—McFarland v. Hudson, 89 S.W.2d 877, 262 Ky. 183—Hays v. Adams, 294 S.W. 1039, 220 Ky. 196.

Minn.—In re Melgaard's Will, 274 N.W. 641, 200 Minn. 493.

Mo.—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S.W.2d 865.

Neb.—In re Ramp's Estate, 201 N.W. 676, 113 Neb. 3.

N.Y.—Conyne v. McGibbon, 87 N.Y.S.2d 590, 179 Misc. 54, transferred, see 39 N.Y.S.2d 609, 265 App.Div. 976, affirmed 41 N.Y.S.2d 189, 266 App.Div. 711.

Okl.—Fidelity & Deposit Co. of Maryland v. Clanton, 28 P.2d 566, 167 Okl. 106—Moffer v. Jones, 169 P. 652, 656, 67 Okl. 171.

S.D.—Adamson v. Minnehaha County, 293 N.W. 542, 67 S.D. 423.

Tex.—Griggs v. Montgomery, Civ.App., 22 S.W.2d 688—Reitz v. Mitchell, Civ.App., 256 S.W. 697.

founded directly on the judgment in question, or on any of its incidents or consequences as a judgment,[31] or where the judgment forms a part of plaintiff's title or of the evidence by which his claim is supported.[32] Where no relief is sought against a judgment,[33] as, for instance, where the proceed-

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
34 C.J. p 522 note 55.

In action to foreclose mortgage, executed by heir of deceased owner of mortgaged land as security for note given administrator of decedent's estate for money borrowed by mortgagor, separate answer of mortgagor's grantee, alleging that such instruments were void because of administrator's acts in causing unlawful claims to be filed against estate, paying them without allowance thereof by probate court, and procuring probate judge's indorsement thereof as allowed in furtherance of scheme to induce mortgagor to borrow money on land, was not direct proceeding in equity to set aside probate court's judgment, but collateral proceeding, wherein question of fraud invalidating such claims could not be raised.—Nelson v. Gossage, 107 P.2d 682, 152 Kan. 805.

31. Proceedings founded on judgment or incidents or consequences thereof

(1) Where, pursuant to decree reforming statutory appeal bond and determining amount due thereunder, execution was levied on realty and sheriff's sale was held pursuant to writ of execution, motion to set aside levy and sheriff's sale was in effect a collateral attack on decree reforming surety bond and was improper where court had jurisdiction of parties and authority to reform bond.—Life Ins. Co. of Detroit v. Burton, 10 N.W.2d 315, 306 Mich. 81.

(2) Other instances see 34 C.J. p 522 note 56 [a].

32. Ky.—Wells' Adm'x v. Heil, 47 S.W.2d 1041, 243 Ky. 282—Louisville & N. R. Co. v. Bays' Adm'x, 295 S.W. 452, 220 Ky. 453—Tarter v. Wilson, 269 S.W. 715, 207 Ky. 535—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.
Neb.—In re Warner's Estate, 288 N. W. 39, 137 Neb. 25.
N.C.—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.
34 C.J. p 522 note 57.

Trespass to try title

(1) In this action any attack on a judgment which forms the basis of the title of one of the parties, or enters into his title, will be considered a collateral impeachment of such judgment.—Gamble v. Banneyer, 151 S.W.2d 586, 137 Tex. 7—Permian Oil Co. v. Smith, 107 S.W.2d 564, 129 Tex. 413, 111 A.L.R. 1152—Stewart Oil Co. v. Lee, Tex.Civ.App., 173 S.W.2d 791, error refused—Donaldson v. Cleveland, Tex.Civ.App., 157 S.W.2d 689, error refused—Smoot v. Chambers, Tex.Civ.App., 156 S.W.2d 314, error refused—Dittmar v. St. Louis Union Trust Co., Tex.Civ.App., 155 S.W.2d 388, error refused—Clayton v. Reamer, Tex.Civ.App., 153 S.W.2d 1020, error refused—Livingston v. Stubbs, Tex.Civ.App., 151 S.W.2d 285, error dismissed, judgment correct—Gann v. Putman, Tex.Civ.App., 141 S.W.2d 758, error dismissed, judgment correct—Mercer v. Rubey, Tex.Civ.App., 108 S.W.2d 677, error refused—Waitz v. Uvalde Rock Asphalt Co., Tex.Civ.App., 58 S.W.2d 884—Burton v. McGuire, Tex.Civ. App., 3 S.W.2d 576, affirmed, Com. App., 41 S.W.2d 238—Bonougli v. Guerra, Tex.Civ.App., 286 S.W. 344—34 C.J. p 522 note 56 [a].

(2) In suit to quiet title, where complaint did not mention foreclosure decree through which defendant deraigned title and defendant counterclaimed to quiet title without referring to decree, answer to counterclaim alleging that decree was entered in foreclosure proceeding wherein service was by publication without any sufficient affidavit of jurisdictional facts authorizing such service constituted collateral attack on foreclosure decree and did not authorize introduction of evidence dehors record, such as the affidavit, to show invalidity of decree.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

(3) Amended petition in trespass to try title, alleging that property had been sold under judgment on trust deed which had been executed to secure judgment against property, that property was homestead of judgment debtor and not subject to debt and lien asserted, and that property was sold for inadequate consideration, was held not subject to special exception as collateral attack on judgment.—Milliken v. Coker, Civ. App., 90 S.W.2d 902, modified on other grounds 115 S.W.2d 620, 132 Tex. 23.

(4) In trespass to try title to realty which had been purchased with money which heir had enabled purchaser to borrow under agreement with heir that purchaser would purchase realty for heir's benefit and then convey realty to the heir, testimony showing lack of consideration received by heir for sale of realty was not inadmissible on ground that it amounted to a collateral attack on orders of probate court confirming sale to purchaser where purchaser held realty in trust for benefit of the heir and evidence showing trust relation did not amount to collateral attack on order of probate court.—Berry v. Chadwick, Tex.Civ.App., 137 S.W.2d 859, error dismissed, judgment correct.

Garnishment

(1) The validity of a judgment cannot be questioned in garnishment proceedings based thereon.—Aach v. Pippart, Mo.App., 261 S.W. 929—34 C.J. p 522 note 57 [b].

(2) In garnishment proceedings against bank having deposits for benefit of several classes of claims against mutual benefit society, mere showing of nature of claim on which judgment against society was rendered was held not collateral attack on judgment.—Spain v. First State Bank of Stamford, Tex.Civ.App., 39 S.W.2d 184, error dismissed.

33. U.S.—Strates v. Dimotsis, C.C.A. Tex., 110 F.2d 374, certiorari denied 61 S.Ct. 24, 311 U.S. 666, 85 L.Ed. 427—Pueblo De Taos v. Archuleta, C.C.A.N.M., 64 F.2d 807.
Ark.—Newton v. Stewart, 148 S.W. 2d 1072, 202 Ark. 62—Wyatt v. Beard, 15 S.W.2d 990, 179 Ark. 305—Hicks v. Norsworthy, 4 S.W.2d 897, 176 Ark. 786.
Ill.—Leviton v. Board of Education of City of Chicago, 53 N.E.2d 596, 385 Ill. 599.
Kan.—Kirwin v. McIntosh, 98 P.2d 160, 151 Kan. 289—Farmers' State Bank of Cunningham v. Crow, 267 P. 1100, 126 Kan. 395.
Ky.—Ballew v. Denny, 177 S.W.2d 152, 296 Ky. 368, 150 A.L.R. 770—Sell v. Pierce, 140 S.W.2d 1027, 283 Ky. 143—Maryland Casualty Co. v. Huffaker's Adm'r, 13 S.W.2d 260, 227 Ky. 358.
Mass.—Mahoney v. Nollman, 35 N. E.2d 265, 309 Mass. 522—City of Boston v. Santosuosso, 30 N.E.2d 278, 307 Mass. 302.
Mo.—Boatmen's Nat. Bank of St. Louis v. Cantwell, App., 161 S.W. 2d 431.
Mont.—**Corpus Juris quoted in** Cascade County v. Weaver, 90 P.2d 164, 169, 108 Mont. 1.
Nev.—Butzbach v. Siri, 5 P.2d 533, 53 Nev. 453.
N.J.—Ash v. Cohn, 194 A. 174, 119 N. J.Law 54.
N.C.—Johnson v. Futrell Bros. Lumber Co., 35 S.E.2d 889, 225 N.C. 595—North Carolina Joint Stock Land Bank of Durham v. Kerr, 175 S.E. 102, 206 N.C. 610.
Ohio.—Petitt v. Morton, 176 N.E. 494, 38 Ohio App. 348, affirmed Morton v. Petitt, 177 N.E. 591, 124 Ohio St. 241—Poehl v. Cincinnati Traction Co., 151 N.E. 806, 20 Ohio App. 148.
Okl.—Gragg v. Pruitt, 65 P.2d 994, 179 Okl. 369.
S.D.—Salem Independent School

ing is for the purpose of construing the judgment,[34] or determining its scope and effect[35] or its nature,[36] there is no infraction of the rule against collateral attack.

The introduction of evidence to show the actual owner of a judgment has been held not a collateral attack on the judgment.[37] Inquiry into the circumstances under which a judgment was obtained is not necessarily a collateral attack.[38]

§ 409. —— Proceedings to Enforce Judgment

A proceeding to enforce a judgment is collateral to the judgment, and therefore no inquiry into its regularity or validity can be permitted in such a proceeding.

A proceeding to enforce a judgment is collateral to the judgment, and therefore no inquiry into its regularity or validity can be permitted in such a proceeding, whether it is a direct action on the judgment[39] or on a note given in satisfaction of the judgment,[40] or a proceeding to revive the judgment,[41] or proceedings supplementary to execution,[42] or a bill in equity in aid of execution or to enforce the lien of the judgment,[43] or a rule to show cause why a writ of possession should not issue,[44] or an action or suit to set aside a conveyance and subject property to satisfaction of a judgment.[45] The rule also applies whether the proceeding is for an injunction to protect rights acquired by a judgment,[46] or presentation of the

Dist. No. 17 of McCook County v. Circuit Court of McCook County in Second Judicial Circuit, 244 N.W. 373, 60 S.D. 341.
Tex.—Jagoe Const. Co. v. U. S. Fidelity & Guaranty Co., Civ.App., 58 S.W.2d 503—Smith v. Gaines, Civ.App., 243 S.W. 665—Chappel v. State, 126 S.W.2d 984, 136 Tex.Cr. 528.
34 C.J. p 522 note 58.

34. Mont.—**Corpus Juris quoted in** Cascade County v. Weaver, 90 P. 2d 164, 169, 108 Mont. 1.
34 C.J. p 522 note 59.

35. Ind.—Ault v. Clark, 112 N.E. 843, 846, 62 Ind.App. 55.
Tex.—State v. Reagan County Purchasing Co., Civ.App., 186 S.W.2d 128, error refused.

Admission of parol evidence to explain justice's judgment entered on docket for amount beyond his jurisdiction, so as to show judgment for amount within his jurisdiction, does not constitute collateral attack on judgment, as purpose of such evidence is not to destroy, but to vivify, an imperfect judgment.—Fleming v. Kemp, Tenn.App., 178 S.W.2d 397.

36. Mont.—**Corpus Juris quoted in** Cascade County v. Weaver, 90 P. 2d 164, 169, 108 Mont. 1.
34 C.J. p 522 note 60.

Adjudication of nature
Decision holding judgment on bank stockholder's statutory liability unenforceable by assignee was held not collateral attack on judgment, but adjudication of its nature.—Roe v. King, 251 N.W. 81, 217 Iowa 213.

37. Md.—Green v. Green, 35 A.2d 238, 182 Md. 571.

38. Mass.—Harvey v. Waitt, 44 N.E. 2d 629, 312 Mass. 333.

39. U.S.—**Corpus Juris quoted in** City of Wheeling v. John F. Casey Co., 89 F.2d 308, 310.
Ala.—Naftel Dry Goods Co. v. Mitchell, 101 So. 653, 212 Ala. 32.
Mich.—**Corpus Juris cited in** Boehmer v. Herling, 227 N.W. 755, 756, 248 Mich. 380—**Corpus Juris cited in** Cook v. Casualty Ass'n of America, 224 N.W. 341, 342, 246 Mich. 278.
Miss.—**Corpus Juris cited in** Rawlings v. American Oil Co., 161 So. 851, 853, 173 Miss. 683.
N.J.—Henderson v. Weber, 28 A.2d 90, 129 N.J.Law 59.
N.Y.—Greenwich Sav. Bank v. Samotas, 17 N.Y.S.2d 772.
Or.—**Corpus Juris cited in** Travelers Ins. Co. of Hartford, Conn., v. Staiger, 69 P.2d 1069, 1071, 157 Or. 143.
Pa.—Secretary of Banking v. Miller, Com.Pl., 40 Lack.Jur. 17.
Tenn.—Robertson v. Johnson, 177 S.W.2d 860, 27 Tenn.App. 59—**Corpus Juris quoted in** Clements v. Holmes, 120 S.W.2d 988, 991, 22 Tenn.App. 230.
Tex.—Hunt Production Co. v. Burrage, Civ.App., 104 S.W.2d 84, error dismissed—Newman v. City of El Paso, Civ.App., 77 S.W.2d 721, error dismissed.
Wash.—Petition of City of Seattle, 138 P.2d 667, 18 Wash.2d 167.
34 C.J. p 523 note 61.

Defenses
In an action on a judgment the rule forbidding contradiction of judgment is not to be avoided by calling the contradiction an equitable defense.—Bremner v. Hester, 155 N.E. 454, 258 Mass. 425.

40. Ind.—Citizens Loan & Trust Co. v. Boyles, 1 N.E.2d 292, 102 Ind. App. 157.
Tenn.—**Corpus Juris quoted in** Clements v. Holmes, 120 S.W.2d 988, 991, 22 Tenn.App. 230.
34 C.J. p 523 note 62.

41. Idaho.—Tingwall v. King Hill Irr. Dist., 155 P.2d 605.
La.—Henry v. Roque, App., 18 So.2d 917.
Mo.—Coombs v. Benz, 114 S.W.2d 713, 232 Mo.App. 1011.
Tenn.—**Corpus Juris quoted in** Clements v. Holmes, 120 S.W.2d 988, 991, 22 Tenn.App. 230.
34 C.J. p 523 note 63.

42. Ind.—Draper v. Zebec, 37 N.E. 2d 952, 219 Ind. 362, rehearing denied 38 N.E.2d 995, 219 Ind. 362.
Mo.—Row v. Cape Girardeau Foundry Co., App., 141 S.W.2d 113.
Tenn.—**Corpus Juris quoted in** Clements v. Holmes, 120 S.W.2d 988, 991, 22 Tenn.App. 230.
34 C.J. p 523 note 64.

43. Tenn.—Clements v. Holmes, 120 S.W.2d 988, 22 Tenn.App. 230.
Tex.—McGehee v. Brookins, Civ. App., 140 S.W.2d 963, error dismissed, judgment correct.
W.Va.—Lough v. Taylor, 124 S.E. 585, 97 W.Va. 180.
34 C.J. p 523 note 65.

44. La.—Maloney v. Wilkinson, 129 So. 374, 170 La. 868.

Default judgment
Where default judgment had been rendered determining that plaintiff was entitled to peaceable and undisturbed possession of land which was in defendant's possession, on rule to show cause why plaintiff's assignee should not be put into possession of land, refusal to allow defendant to seek to nullify the default judgment was not error where defendant failed to set up in her answer any legal ground for annulling the judgment rendered against her more than five years before the rule was issued.—Bodcaw Lumber Co. of Louisiana v. Wallette, La.App., 19 So. 2d 663.

45. Ky.—Hopkins v. Cox, 174 S.W. 2d 418, 295 Ky. 286.
N.Y.—Collins v. Burr, 204 N.Y.S. 357, 209 App.Div. 116.
W.Va.—Crickmer v. Thomas, 200 S.E. 353, 120 W.Va. 769.

46. Mont.—Missoula Light & Water Co. v. Hughes, 77 P.2d 1041, 106 Mont. 355.

judgment to the probate court for classification as a demand against the judgment debtor's estate,[47] or an action of ejectment,[48] or a proceeding by mandamus to compel the payment of a judgment[49] or award,[50] or to compel the levy and collection of a tax to provide funds for the payment of the judgment, the debtor being a municipal corporation,[51] or an action to enjoin the collection of a tax levied to pay a judgment against a municipal corporation.[52] In a proceeding of this kind, it may be shown that the judgment is absolutely void for want of jurisdiction.[53] In a suit on a judgment, a contention that the judgment was not final is not a collateral attack.[54] In garnishment proceedings on a judgment, a motion to dismiss which raises the point that on the face of the proceeding there is no judgment in existence and that it is conclusively presumed to have been paid is not a collateral attack on the judgment.[55]

Reversal of judgment. A final judgment reversing a judgment can not be collaterally attacked by mandamus proceedings to compel the clerk of court to issue execution on the reversed judgment.[56]

§ 410. —— Proceedings to Prevent Enforcement of Judgment

Proceedings to prevent the enforcement of a judgment are direct or collateral attacks depending on the circumstances of the case and the nature of the proceeding.

It has been broadly stated that a proceeding for equitable relief from the effect of a judgment, order, or decree is not a collateral attack.[57] According to some decisions, and under some circumstances, a suit in equity to enjoin or set aside a judgment constitutes a direct attack on it;[58] according to others, or under other circumstances, such a pro-

47. Mo.—Gunby v. Cooper, 164 S. W. 152, 177 Mo.App. 354.

48. Ala.—Rosebrook v. Martin, 76 So. 950, 200 Ala. 592.
34 C.J. p 523 note 67.

49. U.S.—**Corpus Juris quoted in** City of Wheeling v. John F. Casey Co., C.C.A.W.Va., 89 F.2d 308, 310, certiorari denied 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538.
Cal.—Johnson v. Fontana County Fire Protection Dist., 101 P.2d 1092, 15 Cal.2d 380.
Ill.—People ex rel. Baird & Warner v. Lindheimer, 19 N.E.2d 336, 370 Ill. 424—Wille v. Hodes, 1 N.E.2d 1015, 285 Ill.App. 331.
W.Va.—State v. Hall, 119 S.E. 166, 94 W.Va. 400.
34 C.J. p 523 note 68.

Where judgment not assailed

In mandamus proceedings to compel city to pay balance on condemnation judgment awards after relator and city had entered into a binding stipulation requiring relator to remove relator's buildings from condemned land at relator's expense, admitting the stipulation in evidence did not constitute a collateral attack on condemnation judgment, and holding relator to performance of its undertaking to remove buildings did not modify or contradict judgment either as to its amount or finality.—People ex rel. Moody Bible Institute of Chicago v. City of Chicago, 37 N.E.2d 895, 312 Ill.App. 126, error dismissed 46 N.E.2d 918, 382 Ill. 70, certiorari denied Moody Bible Institute of Chicago v. City of Chicago, 64 S.Ct. 37, 320 U.S. 705, 88 L.Ed. 413.

50. Mich.—Detroit Trust Co. v. Van Wagoner, 295 N.W. 222, 295 Mich. 449, followed in Judson Bradway Co. v. Van Wagoner, 295 N.W. 224, 295 Mich. 455.

51. U.S.—City of Mohall v. First Nat. Bank, C.C.A.N.D., 105 F.2d 315, certiorari denied City of Mohall, North Dakota v. First Nat. Bank, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491—**Corpus Juris quoted in** City of Wheeling v. John F. Casey Co., C.C.A.W.Va., 89 F.2d 308, certiorari denied 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538.
Alaska.—Dickinson v. Town of Petersburg, 6 Alaska 488.
Fla.—Campbell v. State ex rel. Garrett, 168 So. 33, 124 Fla. 244.
Ill.—Moore v. Town of Browning, 27 N.E.2d 533, 373 Ill. 583.
Wis.—Siama v. Young, 225 N.W. 830, 199 Wis. 82.
34 C.J. p 523 note 69.

52. Wyo.—Grand Island & N. W. R. Co. v. Baker, 45 P. 494, 6 Wyo. 369, 71 Am.S.R. 926, 34 L.R.A. 835.

53. Ill.—Chambers v. City of Chicago, 270 Ill.App. 217.
Miss.—Schwartz Bros. & Co. v. Stafford, 148 So. 794, 166 Miss. 397.
Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County, 167 P.2d 648.
N.Y.—Finkelstein v. William H. Block Co., 208 N.Y.S. 401, 124 Misc. 610.
N.D.—**Corpus Juris cited in** Lyons v. Otter Tail Power Co., 280 N.W. 192, 195, 68 N.D. 403.
34 C.J. p 523 note 71.

Want of service of process

(1) Where property after foreclosure of trust deed was sold to purchaser who refused to comply with his bid, answer by purchaser in proceeding by commissioner to compel purchaser to comply with bid that decree of foreclosure was void on ground that minor defendants had never been served or represented constituted a permissible direct attack and not a collateral attack, notwithstanding it was not made until after expiration of the term at which the decree was entered, where chancellor had specifically retained control of proceedings.—Fisher v. Wilkerson, 139 S.W.2d 689, 199 Ark. 31.

(2) In suit by mortgagee's assignee to quiet title under sheriff's deed procured on foreclosure wherein mortgagor filed cross complaint attacking default foreclosure decree as void on ground that no process had been served on mortgagor and wife, cross complaint and answer constituted a "direct attack" on the foreclosure decree.—John Hancock Mut. Life Ins. Co. v. Gooley, 83 P.2d 221, 196 Wash. 357, 118 A.L.R. 1484.

Pleading and proof

Parties purportedly making direct attack on judgment in another case were required to plead and prove such facts as would show direct attack thereon.—O'Quinn v. Tate, Tex. Civ.App., 187 S.W.2d 241.

Proceeding to revive judgment

Where jurisdictional defects are apparent on face of record, judgment may be attacked collaterally in scire facias proceeding, regardless of purpose for which scire facias is issued.—Woods v. Spoturno, 183 A. 319, 7 W.W.Harr., Del., 295, reversed on other grounds Spoturno v. Woods, 192 A. 689, 8 W.W.Harr. 378.

54. Tex.—Gathings v. Robertson, Com.App., 276 S.W. 218.

55. Ala.—Second Nat. Bank v. Allgood, 176 So. 363, 234 Ala. 654.

56. Mo.—State ex rel. McGrew Coal Co. v. Ragland, 97 S.W.2d 113, 339 Mo. 452.

57. Cal.—Caldwell v. Taylor, 23 P. 2d 758, 218 Cal. 471, 88 A.L.R. 1194.

58. U.S.—Seay v. Hawkins, C.C.A. Okl., 17 F.2d 710.

ceeding is collateral[59] unless fraud is alleged;[60] still others hold that a suit to set aside a judgment is neither the one nor the other,[61] but is properly designated an indirect attack.[62]

Ala.—Martin v. State, 13 So.2d 206, 244 Ala. 323—Fowler v. Fowler, 122 So. 440, 219 Ala. 453.

Ark.—Brick v. Sovereign Grand Lodge of Accepted Free Masons of Arkansas, 117 S.W.2d 1060, 196 Ark. 372.

Cal.—Rico v. Nasser Bros. Realty Co., 137 P.2d 761, 58 Cal.App.2d 878—Wilson v. Wilson, 130 P.2d 732, 55 Cal.App.2d 421—Hammell v. Britton, 119 P.2d 333, 19 Cal. App.2d 72.

Ky.—Hill v. Walker, 180 S.W.2d 93, 297 Ky. 257, 154 A.L.R. 814—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818.

Mich.—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443.

Mo.—Jefferson City Bridge & Transit Co. v. Blaser, 300 S.W. 778, 318 Mo. 373.

N.J.—Giehrach v. Rupp, 164 A. 465, 112 N.J.Eq. 296.

N.Y.—Citizen's Bank of White Plains v. Oglesby, 39 N.Y.S.2d 500, 265 App.Div. 1062, appeal denied 41 N. Y.S.2d 219, 266 App.Div. 682.

Okl.—Seekatz v. Brandenburg, 300 P. 678, 150 Okl. 53.

Or.—Dixie Meadows Independence Mines Co. v. Kight, 45 P.2d 909, 150 Or. 395—State Bank of Sheridan v. Heider, 9 P.2d 117, 139 Or. 185.

Tenn.—Wood v. Elam, 4 Baxt. 341—Kates v. Anderson, Dulin, Varnell Co., 9 Tenn.App. 396.

Wash.—McElroy v. Puget Sound Nat. Bank, 288 P. 241, 157 Wash. 43.

34 C.J. p 523 note 72.

Satisfaction of judgment

A suit to enjoin the enforcement of a judgment on the ground that it has been satisfied has been held not to be a collateral attack.—Smith v. Morrill, 55 P. 824, 12 Colo.App. 233.

Guardian's suit to enjoin enforcement of alimony judgment against insane ward for fraud in procuring it was held not barred as collateral attack on judgment granting defendant divorce.—Crow v. Crow-Humphrey, 73 S.W.2d 807, 335 Mo. 636.

Injunction to restrain trespass on land condemned

Where a county court condemned land for highway purposes and disallowed landowners' claims for compensation because of insufficient funds from which to pay claims, a subsequent injunction issued by a chancery court of county wherein land was located restraining persons from trespassing upon land was not a collateral attack on county court's judgment.—Arkansas State Highway Commission v. Hammock, 148 S.W.2d 324, 201 Ark. 927.

In Texas

(1) Generally an action to enjoin enforcement of a judgment, rendered by the court in which the action is brought, is considered a direct attack, not a collateral attack, on the judgment.—Switzer v. Smith, Com. App., 300 S.W. 31, 68 A.L.R. 377—Willbanks v. Montgomery, Civ.App., 189 S.W.2d 337—Bragdon v. Wright, Civ.App., 142 S.W.2d 703, error dismissed—Settles v. Milano Furniture Co., Civ.App., 51 S.W.2d 655, error refused—Citizens' Bank v. Brandau, Civ.App., 1 S.W.2d 466, error refused —Carlton v. Hoff, Civ.App., 292 S. W. 642.

(2) If brought in a court other than the one in which the judgment was rendered it is collateral.—Stewart v. Adams, Civ.App., 171 S.W.2d 180—Oetting v. Mineral Wells Crushed Stone Co., Civ.App., 262 S. W. 93.

(3) Even though injunction suit to restrain the enforcement of a judgment constituted a collateral attack, such suit was proper where the judgment was void.—Lewis v. Terrell, Civ.App., 154 S.W.2d 151, error refused.

(4) A suit to enjoin judgment creditors and sheriff from selling realty under execution to satisfy judgment, which was rendered against plaintiff by court in which suit was brought and grew out of same case under same docket number, constituted direct attack, rather than collateral attack, on judgment. —Willbanks v. Montgomery, Civ. App., 189 S.W.2d 337.

(5) Judgment rendered by court without jurisdiction may be set aside on direct attack by suit instituted for such purpose.—Ezell v. Texas Employers' Ins. Ass'n, Civ.App., 5 S.W.2d 594, reversed on other grounds Texas Employers' Ins. Ass'n v. Ezell, Com.App., 14 S.W.2d 1018, rehearing denied 16 S.W.2d 523.

(6) Suit to set aside judgment, brought by one who was served and defaulted, on ground that all necessary parties were not joined, involves collateral attack on voidable judgment.—State Mortg. Corporation v. Garden, Civ.App., 11 S.W.2d 212.

(7) Judgment in judgment debtor's proceeding to set aside judgment could not be collaterally attacked in suit to enjoin execution sale under judgment.—Simmons v. Sikes, Civ. App., 56 S.W.2d 193, error dismissed.

Fla.—Richart v. Roper, 25 So.2d 80 —Bemis v. Loftin, 173 So. 683, 127 Fla. 515.

Iowa.—Hawkeye Life Ins. Co. v. Valley-Des Moines Co., 260 N.W. 669, 220 Iowa 556, 105 A.L.R. 1018.

Ky.—Breeding v. Commonwealth, 264 S.W. 1050, 204 Ky. 433.

Mich.—Sablain v. National Refining Co., 286 N.W. 611, 289 Mich. 269.

N.D.—Olson v. Donnelly, 294 N.W. 666, 70 N.D. 370.

34 C.J. p 523 note 73.

As against innocent purchasers

A suit to set aside judgment foreclosing vendor's liens in which there was an admission that the owners and holders of interests in the land were innocent purchasers for value without notice except the notice reflected by the record in the action, the judgment of which was sought to be set aside, constituted a collateral attack on the judgment, and could be maintained only if the judgment was void on its face or circumstances surrounding its entry would cause a prudent person to make inquiry which, if pursued with reasonable diligence, would reveal the vice of the judgment.—Williams v. Tooke, Tex.Civ.App., 116 S.W.2d 1114, error dismissed.

Extraordinary equitable remedy

A collateral attack on a judgment of a court having jurisdiction of parties and subject matter is an "extraordinary equitable remedy" and is closely circumscribed.—In re Gray's Will, 8 N.Y.S.2d 850, 169 Misc. 985.

Motion to set aside

In suit in equity to establish and enforce a lien, a tenant's motion to set aside order for writ of possession to put landlord in possession of tenant's house, purchased by landlord under decree for sale thereof to enforce landlord's statutory lien, was collateral attack on such decree.—Chandler v. Price, 15 So.2d 462, 244 Ala. 667.

59. Ark.—Lambie v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019.

60. Ind.—Frankel v. Garrard, 66 N. E. 687, 160 Ind. 209—Graham v. Loh, 69 N.E. 474, 32 Ind.App. 133—Greensburg v. Zoller, 60 N.E. 1007, 28 Ind.App. 126.

61. Tex.—Bray v. First Nat. Bank, Civ.App., 10 S.W.2d 235, error dismissed.

34 C.J. p 524 note 75.

62. Cal.—Le Mesnager v. Variel, 77 P. 988, 144 Cal. 463, 103 Am.S.R. 91.

34 C.J. p 524 note 76.

In some jurisdictions a distinction is made between a suit to enjoin, and a suit to set aside, a judgment. If an injunction only is sought, the suit has been held to be a collateral attack,[63] but if plaintiff seeks also to have the judgment set aside and the case retried on the merits it has been held to be a direct attack.[64] It has also been held that a suit to prevent an inequitable advantage being taken of a judgment, by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party, is a direct attack,[65] but conceding that the attack is collateral it is no objection to the maintenance of a suit for that purpose that it involves a collateral impeachment of the judgment, provided the demand for relief is based on want of jurisdiction, fraud, or some other distinctive ground of equitable interference, although it is not permissible in such an action to review mere errors or overthrow the judgment for mere irregularities.[66] An injunction to restrain enforcement of an administrative order of a court has been held not objectionable as a collateral attack on a judgment.[67]

An application for a writ of prohibition to forbid the court to enforce its judgment is generally regarded as a collateral attack.[68]

A cross complaint[69] *or cross bill*[70] seeking affirmative relief against a judgment is a direct, not a collateral, attack on the judgment. Where injunction to stay enforcement of a judgment must be in the court rendering the judgment, a cross action in a suit to foreclose a judgment lien brought in another court is a collateral attack.[71]

Motion to vacate. Where the action may properly be regarded as a motion to vacate the judgment it has been held not to be a collateral attack on the judgment.[72]

A motion to annul a judgment of conviction in a criminal case is a collateral attack.[73]

A writ of mandamus, as far as it seeks to avoid the effect of a judgment or order of a court, is a collateral attack.[74]

§ 411. —— Separate Action against Party or Officer

The validity or correctness of a judgment may not be impeached in a subsequent action by the unsuccessful party against the successful party involving the same issues or seeking to avoid the effects of the judgment.

The validity or correctness of a judgment cannot be impeached in a subsequent action brought by the unsuccessful party against the successful party, involving the same issues,[75] or in an action to recover back the money paid under the judgment,[76] or for damages in obtaining a judgment because of no proper service,[77] or for fraud and conspiracy in obtaining the judgment.[78] Also a judgment may not

63. Cal.—Gray v. Bybee, 141 P.2d 32, 60 Cal.App.2d 564.
34 C.J. p 524 note 77.

64. Tex.—Rowland v. Klepper, Com. App., 227 S.W. 1096.
34 C.J. p 524 note 78.

65. Cal.—Campbell - Kawannanakoa v. Campbell, 92 P. 184, 152 Cal. 201.

66. Idaho.—Swinehart v. Turner, 224 P. 74, 38 Idaho 602.
Okl.—Kauffman v. McLaughlin, 114 P.2d 929, 189 Okl. 194.
34 C.J. p 524 note 80.

67. U.S.—Roth v. Hood, C.C.A.Ohio, 106 F.2d 616.

68. Cal.—Tulare Irr. Dist. v. Superior Court of California in and for Tulare County, 242 P. 725, 197 Cal. 649—McAllister v. Superior Court In and For Alameda County, 82 P. 2d 462, 28 Cal.App.2d 160—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704—Lieberman v. Superior Court of California in and for Orange County, 236 P. 570, 72 Cal.App. 18.
Ind.—State ex rel. Allman v. Superior Court for Grant County, 19 N.E. 2d 467, 215 Ind. 249.
Mo.—State ex rel. Compagnie Générale Transatlantique v. Falkenhainer, 274 S.W. 758, 309 Mo. 224.
W.Va.—Newhart v. Pennybacker, 200 S.E. 350, 120 W.Va. 774, concurring opinion 200 S.E. 754—Nelson Transfer & Storage Co. v. Jarrett, 157 S.E. 46, 110 W.Va. 97.
34 C.J. p 524 note 81.

Guardianship

Prohibition to prevent judge from taking further cognizance of guardianship matter is direct proceeding attacking judgment appointing guardian.—Davidson v. Hough, 65 S. W. 731, 165 Mo. 561—State ex rel. Woolman v. Guinotte, 282 S.W. 68, 221 Mo.App. 466.

69. Cal.—Conlin v. Blanchard, 28 P. 2d 12, 219 Cal. 632.
Wash.—City of Tacoma v. Nyman, 281 P. 484, 154 Wash. 154—Rennebohm v. Rennebohm, 279 P. 402, 153 Wash. 102.
34 C.J. p 524 note 82.

70. Tex.—Chapman v. Clark, Civ. App., 262 S.W. 161, affirmed, Com. App., 276 S.W. 197.
Va.—Sutherland v. Rasnake, 192 S. E. 695, 169 Va. 257.
34 C.J. p 524 note 83.

71. Tex.—Switzer v. Smith, Com. App., 300 S.W. 31, 68 A.L.R. 377.

72. U.S.—Burke v. Morphy, C.C.A. Vt., 109 F.2d 572, certiorari denied Morphy v. Burke, 60 S.Ct. 1078, 310 U.S. 635, 84 L.Ed. 1404.

73. Cal.—People v. Spivey, 77 P.2d 247, 25 Cal.App.2d 279.

74. Cal.—Grivi v. Superior Court in and for Los Angeles County, 45 P. 2d 181, 3 Cal.2d 463.

75. Ohio.—**Corpus Juris quoted in** Risman v. Krupar, 186 N.E. 830, 831, 4 Ohio App. 29.
Wash.—**Corpus Juris cited in** Hanna v. Allen, 279 P. 1098, 1101, 153 Wash. 485.
34 C.J. p 524 note 86.

76. Ohio.—**Corpus Juris quoted in** Risman v. Krupar, 186 N.E. 830, 831, 4 Ohio App. 29.
Wash.—**Corpus Juris cited in** Hanna v. Allen, 279 P. 1098, 1101, 153 Wash. 485.
34 C.J. p 524 note 87.

77. Wash.—Hanna v. Allen, 279 P. 1098, 153 Wash. 485.

78. Cal.—Gerini v. Pacific Employees Ins. Co., 80 P.2d 499, 27 Cal.App.2d 52, followed in 80 P.2d 502, 27 Cal.App.2d 767.
Fla.—Kessler v. Townsley, 182 So. 232, 132 Fla. 744.

be impeached in an action of replevin or trespass,[79] or trover,[80] or a suit against the officers concerned in the entry of the judgment or its execution.[81]

§ 412. Parties Affected by Rule against Collateral Attack

The persons or parties affected by the rule against collateral attack on a judgment or order are discussed infra §§ 413–415.

Examine Pocket Parts for later cases.

§ 413. —— Parties and Privies

The rules against collateral attack apply to all parties to the proceeding in which the judgment was rendered and to their privies.

The rule forbidding the collateral impeachment of judgments applies to all persons who were parties to the action in which the judgment was rendered[82] and to all those who are in privity with them.[83] On the other hand, jurisdictional defects which appear on the face of the proceedings may be

Ind.—Hermon v. Jobes, 198 N.E. 316, 209 Ind. 196.

Ohio.—**Corpus Juris quoted in** Risman v. Krupar, 186 N.E. 830, 831, 4 Ohio App. 29.

34 C.J. p 524 note 88.

79. Kan.—Westenberger v. Wheaton, 8 Kan. 169.

34 C.J. p 524 note 89.

80. Ill.—Gilmore v. Bidwell, 191 Ill. App. 152.

81. Miss.—Vicksburg Grocery Co. v. Brennan, 20 So. 845.

34 C.J. p 525 note 91.

82. U.S.—Cohen v. Randall, C.C.A. N.Y., 137 F.2d 441, certiorari denied 64 S.Ct. 263, 320 U.S. 796, 88 L.Ed. 480—Prichard v. Nelson, C.C. A.Va., 137 F.2d 312—Schodde v. U. S., C.C.A.Idaho, 69 F.2d 866.

Ala.—Bond v. Avondale Baptist Church, 194 So. 833, 239 Ala. 366—**Corpus Juris cited in** Cobbs v. Norville, 151 So. 576, 579, 227 Ala. 621—Harbin v. Burrow, 172 So. 910, 27 Ala.App. 381.

Cal.—Mitchell v. Automobile Owners Indemnity Underwriters, 118 P.2d 815, 19 Cal.2d 1, 137 A.L.R. 923—Driver v. International Air Race Ass'n of America, 129 P.2d 771, 54 Cal.App.2d 614—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.

D.C.—Peckham v. Union Finance Co., 48 F.2d 1016, 60 App.D.C. 104.

Ill.—Sippel v. Wolff, 164 N.E. 678, 333 Ill. 284.

Ind.—Clark v. Clark, 172 N.E. 124, 202 Ind. 104.

Kan.—Poss v. Steiner, 236 P. 640, 118 Kan. 595.

Me.—Graney's Case, 124 A. 204, 123 Me. 571.

Mass.—Long v. George, 195 N.E. 377, 290 Mass. 316.

Mo.—Kaufmann v. Annuity Realty Co., 256 S.W. 792, 301 Mo. 638—**Corpus Juris cited in** State v. Holtkamp, 51 S.W.2d 13, 17, 330 Mo. 608—Sisk v. Wilkinson, 265 S.W. 536, 305 Mo. 328—Hoken v. Allstate Ins. Co., 147 S.W.2d 182, 235 Mo. App. 991.

N.J.—In re Leupp, 153 A. 842, 108 N. J.Eq. 49.

N.Y.—Krause v. Krause, 26 N.E.2d 290, 282 N.Y. 355—Brown v. Brown, 272 N.Y.S. 877, 242 App.Div. 33, affirmed 195 N.E. 186, 266 N.Y. 532—Metropolitan Life Ins. Co. v. Stephen Realty Co., 33 N.Y.S.2d 146, 178 Misc. 53—In re Martin's Adoption, 56 N.Y.S.2d 95—Mirsky v. Mirsky, 35 N.Y.S.2d 858—Hunter v. Hunter, 24 N.Y.S.2d 76—Blume v. Blume, 6 N.Y.S.2d 516.

N.D.—Lamb v. King, 296 N.W. 185, 70 N.D. 469.

Okl.—**Corpus Juris cited in** Wilson-Harris v. Southwest Telephone Co., 141 P.2d 986, 990, 193 Okl. 194—Hill v. Cole, 137 P.2d 579, 192 Okl. 476.

Pa.—Gordon v. Hartford Sterling Co., 38 A.2d 229, 350 Pa. 277.

S.C.—Chamberlain v. First Nat. Bank of Greenville, 24 S.E.2d 158, 202 S.C. 115.

Tex.—Levy v. Roper, 256 S.W. 251, 113 Tex. 356—Ramsey v. McKamey, Civ.App., 138 S.W.2d 167, reversed on other grounds 152 S.W. 2d 322, 137 Tex. 91—Hertzka v. Van Rosen, Civ.App., 51 S.W.2d 1111—Kreis v. Kreis, Civ.App., 36 S.W.2d 821, error dismissed—Frazier v. Hanlon Gasoline Co., Civ. App., 29 S.W.2d 461, error refused.

Va.—Maryland Casualty Co. v. Cole, 158 S.E. 873, 156 Va. 707.

Wash.—France v. Freeze, 102 P.2d 687, 4 Wash.2d 120.

34 C.J. p 525 note 93.

Stakeholder

Corporation having paid to husband dividends declared on stock registered in the name of wife was sufficiently connected with controversy as to ownership of stock and right to dividends thereon as to be bound by the same rule relative to collateral attack on judgment determining ownership of stock as that applicable to parties to action in which such judgment was entered, and hence would have no greater right than husband collaterally to attack judgment in action between husband and wife on ground that it was based on wife's perjured testimony.—Perkins v. Benguet Consol. Mining Co., 132 P.2d 70, 55 Cal.App. 2d 720, certiorari denied Benguet Consol. Mining Co. v. Perkins, 63 S. Ct. 1435, 319 U.S. 774, 87 L.Ed. 1721, rehearing denied 64 S.Ct. 429, 320 U.S. 803, 815, 88 L.Ed. 485, reheard 141 P.2d 19, 60 Cal.App.2d 845, certiorari denied 64 S.Ct. 429, 320 U. S. 803, 815, 88 L.Ed. 485.

Posthumous child

Judgment in death action for benefit of unborn child, being binding on him, was held not subject to collateral attack in action by child.—Brantley v. Boone, Tex.Civ.App., 34 S.W.2d 409.

In partition proceedings

(1) Following the general rules, a decree or judgment for partition is not subject to collateral attack as being erroneous by any of the parties to it.—State v. Rogers, 31 N. E. 199, 131 Ind. 458—47 C.J. p 438 note 91.

(2) However, where judgment was null as to one defendant in partition suit, any of other parties to suit could avail themselves of such nullity, although only interest such defendant had in property was through estate of mother which was still under executorship.—Kelly v. Kelleher, 171 So. 569, 186 La. 51.

Priority of lien

An adjudication that a person's lien was subordinate to lien of another may not be questioned by him collaterally.—Pagano v. Arnstein, 55 N.E.2d 181, 292 N.Y. 326.

83. Ala.—Bond v. Avondale Baptist Church, 194 So. 833, 239 Ala. 366—**Corpus Juris cited in** Cobbs v. Norville, 151 So. 576, 227 Ala. 621.

Ill.—Sippel v. Wolff, 164 N.E. 678, 333 Ill. 284.

Ind.—Niven v. Crawfordsville Trust Co., 26 N.E.2d 58, 108 Ind.App. 272.

Mo.—**Corpus Juris cited in** State v. Holtkamp, 51 S.W.2d 13, 17, 330 Mo. 608—Kaufmann v. Annuity Realty Co., 256 S.W. 792, 301 Mo. 638—Hocken v. Allstate Ins. Co., 147 S.W.2d 182, 235 Mo.App. 991.

N.J.—In re Leupp, 153 A. 842, 108 N.J.Eq. 49.

N.D.—Lamb v. King, 296 N.W. 185, 70 N.D. 469.

Okl.—**Corpus Juris cited in** Wilson-Harris v. Southwest Telephone Co., 141 P.2d 986, 990, 193 Okl. 302—Hill v. Cole, 137 P.2d 579, 192 Okl. 476.

Pa.—Gordon v. Hartford Sterling Co., 38 A.2d 229, 350 Pa. 277.

S.D.—Deming v. Nelson, 210 N.W. 726, 50 S.D. 484.

raised at any time between the parties, even in a collateral proceeding.[84] The term "parties," in the sense of those concluded by a judgment, includes all those who had the right to control or defend the proceedings and appeal,[85] while "privies" are those who succeeded to the rights or property of parties to the judgment.[86] If the judgment is void on its face the right of parties or their privies to attack it collaterally does not depend on any showing of prejudice to their interests.[87]

§ 414. —— Third Persons in General

A stranger to the record may impeach a judgment in a collateral proceeding where he has rights, claims, or interests which would be prejudiced or adversely affected by its enforcement, and which accrued prior to its rendition.

A stranger to the record, who was not a party to the action in which the judgment was rendered or in privity with a party is not prohibited from impeaching the validity of the judgment in a collateral proceeding;[88] but in order to do so he must show that he has rights, claims, or interests which would be prejudiced or injuriously affected by the enforcement of the judgment,[89] and which accrued

Tex.—Ramsey v. McKamey, Civ.App., 138 S.W.2d 167, reversed on other grounds 152 S.W.2d 322, 137 Tex. 91.

Wash.—France v. Freeze, 102 P.2d 687, 4 Wash.2d 120.

34 C.J. p 525 note 94.

A grantee of plaintiff in whose favor a judgment had been rendered in prior quiet title action could defend a subsequent action commenced by a defendant against whom the first judgment was rendered and alleging the invalidity of the first judgment on the ground that the second action constituted an unauthorized collateral attack on the judgment in the first action.—Warren v. Stansbury, 126 P.2d 251, 190 Okl. 554.

Insurer

Party issuing motor vehicle liability policy pursuant to statute is a party privy to judgment recovered against insured, and may only attack judgment for fraud by direct proceeding to vacate the judgment and not collaterally in suit by party recovering the judgment to recover the amount from the insurer.—Bosse v. Wolverine Ins. Co., 190 A. 715, 88 N.H. 440.

Policy holders of mutual insurance company

A decree or order of circuit court liquidating insolvent mutual insurance corporation, formed under specified statutes, under direction of insurance commissioner and forming basis of obligation of policy holders, was final and binding on policy holders and not subject to collateral attack.—In re Whitman, 201 N.W. 812, 186 Wis. 434.

Stockholder

Default judgment recovered by bank against corporation could not be collaterally attacked in subsequent suit by bankruptcy trustee of sole stockholder against certain claimants, mortgagees, and pledgees, on theory that debt on which judgment was based was that of sole stockholder and not of corporation.—Salmon v. Fitts, C.C.A.Ala., 67 F.2d 681.

84. Mich.—In re Phillips, 122 N.W. 554, 158 Mich. 155.
34 C.J. p 526 note 95.

85. Tex.—Ferrell-Michael Abstract & Title Co. v. McCormac, Civ.App., 184 S.W. 1081.

86. Tex.—Ferrell-Michael Abstract & Title Co. v. McCormac, supra.
34 C.J. p 526 note 97.

One claiming interest in land through party to former action cannot impeach former decree collaterally where no defects were disclosed by face of that record and proceeding rendering such decree void.—Cobbs v. Norville, 151 So. 576, 227 Ala. 621.

87. Cal.—In re Hampton's Estate, 131 P.2d 565, 55 Cal.App.2d 543.

88. U.S.—Stubbs v. U. S., D.C.N.C., 21 F.Supp. 1007.
Ala.—Brasher v. First Nat. Bank, 168 So. 42, 232 Ala. 340.
Alaska.—Bowersox v. B. M. Behrends Bank, 7 Alaska 476.
Cal.—**Corpus Juris quoted in** Consolidated Rock Products Co. v. Higgins, 129 P.2d 929, 930, 54 Cal. App.2d 779.
Colo.—**Corpus Juris cited in** Atchison, T. & S. F. Ry. Co. v. Board of County Com'rs of Fremont, 37 P.2d 761, 769, 95 Colo. 435.
La.—Rosenthal Sloan Millinery Co. v. Picone, App., 141 So. 494—Exchange Nat. Bank v. Palace Car Co., 1 La.App. 307.
Mo.—Hocken v. Allstate Ins. Co., 147 S.W.2d 182, 235 Mo.App. 991—**Corpus Juris quoted in** McEwen v. Sterling State Bank, 5 S.W.2d 702, 707, 222 Mo.App. 660.
N.J.—Oswald v. Seidler, 47 A.2d 437.
N.C.—Downing v. White, 188 S.E. 815, 211 N.C. 40.
Tex.—Urban v. Bagby, Com.App., 291 S.W. 537—Edens v. Grogan Cochran Lumber Co., Civ.App., 172 S.W.2d 730, error refused—Thomas v. Farris, Civ.App., 132 S.W.2d 435, error dismissed, judgment correct —**Corpus Juris quoted in** National Loan & Investment Co. v. L. W. Pelphrey & Co., Civ.App., 39 S.W. 2d 926, 928—Cavers v. Sioux Oil & Refining Co., Civ.App., 23 S.W.2d 421, reversed on other grounds, Com.App., 39 S.W.2d 862, rehearing denied 43 S.W.2d 578.
Wash.—France v. Freeze, 102 P.2d 687, 4 Wash.2d 120—Baskin v. Livers, 43 P.2d 42, 181 Wash. 370.
34 C.J. p 526 note 98.

Foreign judgment

Where, in partition suit in one state, complainant was denied right to litigate her claim of equitable ownership of interest in the land, and brought action in another state against one of parties to partition suit, claiming his share of proceeds, such suit was held not a collateral attack on decree of first court distributing proceeds of sale.—Horst v. Barret, 104 So. 530, 213 Ala. 173.

Grantee in trust deed to secure a loan, not party to suits foreclosing paving liens, could question unreasonableness of attorney's fees in collateral proceeding, on ground that foreclosure could have been accomplished by one suit.—National Loan & Investment Co. v. L. W. Pelphrey & Co., Tex.Civ.App., 39 S.W.2d 926.

89. U.S.—Meyer v. Meyer, C.C.A.S. D., 79 F.2d 55—The W. Talbot Dodge, D.C.N.Y., 15 F.2d 459.
Cal.—Mitchell v. Automobile Owners Indemnity Underwriters, 118 P.2d 815, 19 Cal.2d 1, 137 A.L.R. 923—In re Hampton's Estate, 131 P.2d 565, 55 Cal.App.2d 543—**Corpus Juris quoted in** Consolidated Rock Products Co. v. Higgins, 129 P.2d 929, 930, 54 Cal.App.2d 779.
Fla.—Tallentire v. Burkhart, 14 So. 2d 395, 153 Fla. 278—Beaty v. Inlet Beach, 9 So.2d 735, 151 Fla. 495, motion denied and opinion modified on other grounds 10 So. 2d 807, 152 Fla. 276.
Ill.—Espadron v. Davis, 43 N.E.2d 962, 380 Ill. 199—Grove v. Kerr, 149 N.E. 517, 318 Ill. 591.
Ky.—Middleton v. Commonwealth, 254 S.W. 754, 200 Ky. 237.
Mich.—Allen v. Merrill, Lynch & Co., 194 N.W. 131, 223 Mich. 467.
Minn.—Hurr v. Davis, 193 N.W. 943,

prior to its rendition,[90] unless the judgment is absolutely void.[91] Thus situated he may attack the judgment on the ground of want of jurisdiction,[92] or for fraud[93] or collusion;[94] but he cannot object to it because of mere errors or irregularities[95] or for any matters which might have been set up in defense to the original action.[96]

155 Minn. 456, rehearing denied 194 N.W. 379, 155 Minn. 456, certiorari denied 44 S.Ct. 36, 263 U. S. 709, 68 L.Ed. 518, error dismissed 45 S.Ct. 227, 267 U.S. 572, 69 L.Ed. 794.

Mo.—Hocken v. Allstate Ins. Co., 147 S.W.2d 182, 235 Mo.App. 991—**Corpus Juris quoted in** McEwen v. Sterling State Bank, 5 S.W.2d 702, 707, 222 Mo.App. 660.

Nev.—In re Manse Spring and Its Tributaries, Nye County, 108 P. 2d 311, 60 Nev. 280.

Okl.—Cook v. First Nat. Bank, 236 P. 883, 110 Okl. 111.

Tenn.—**Corpus Juris cited in** Magevney v. Karsch, 65 S.W.2d 562, 568, 167 Tenn. 32, 92 A.L.R. 343.

Tex.—State Mortg. Corporation v. Traylor, 36 S.W.2d 440, 120 Tex. 148—Texas Soap Mfg. Corporation v. McQueary, Civ.App., 172 S.W.2d 177—**Corpus Juris quoted in** National Loan & Investment Co. v. L. W. Pelphrey & Co., Civ.App., 39 S.W.2d 926, 928—Weber v. Page, Civ.App., 38 S.W.2d 833—Sciraffa v. Flores, Civ.App., 274 S.W. 260.

Wash.—France v. Freeze, 102 P.2d 687, 4 Wash.2d 120—Shoemaker v. White-Dulaney Co., 230 P. 162, 131 Wash. 347, affirmed 232 P. 695, 131 Wash. 347, 132 Wash. 699.

34 C.J. p 526 note 99.

Judgment in partition

(1) A judgment in partition cannot be attacked by a stranger who shows no title to the property.—Lair v. Hunsicker, 28 Pa. 115.

(2) Also it cannot be attacked collaterally for fraud by a stranger to it.—Grassmeyer v. Beeson, 18 Tex. 753, 70 Am.D. 309.

(3) Nor may it be attacked by one who subsequently acquired from the person defrauded a mere naked, equitable, and uncertain interest.—Brace v. Reid, 3 Greene, Iowa, 422.

(4) Persons whose only title is that derived from a partition proceeding may not attack collaterally the validity of that proceeding on the ground that the court had no power to lay out or establish a road on the land partitioned.—Turpin v. Dennis, 28 N.E. 1065, 139 Ill. 274.

90. Cal.—**Corpus Juris quoted in** Consolidated Rock Products Co. v. Higgins, 129 P.2d 929, 930, 54 Cal. App.2d 779.

Mo.—**Corpus Juris quoted in** McEwen v. Sterling State Bank, 5 S.W.2d 702, 707, 222 Mo.App. 660.

Tenn.—Davis v. Mitchell, 178 S.W. 2d 889, 27 Tenn.App. 182.

Tex.—**Corpus Juris quoted in** National Loan & Investment Co. v. L. W. Pelphrey & Co., Civ.App., 39 S.W.2d 926, 928.

Wyo.—May v. Penton, 16 P.2d 35, 45 Wyo. 82.

34 C.J. p 526 note 1.

Successors to title by unrecorded deed before suit against grantor may collaterally attack validity of judgment rendered therein.—Urban v. Bagby, Tex.Com.App., 291 S.W. 537.

91. Cal.—**Corpus Juris quoted in** Consolidated Rock Products Co. v. Higgins, 129 P.2d 929, 930, 54 Cal.App.2d 779.

La.—Burt v. Watson Oil & Gas Co., App., 150 So. 425.

Mo.—**Corpus Juris quoted in** McEwen v. Sterling State Bank, 5 S.W. 2d 702, 707, 222 Mo.App. 660.

Tex.—**Corpus Juris quoted in** National Loan & Investment Co. v. L. W. Pelphrey & Co., Civ.App., 39 S.W. 2d 926, 928.

34 C.J. p 526 note 2.

92. Cal.—**Corpus Juris quoted in** Consolidated Rock Products Co. v. Higgins, 129 P.2d 929, 930, 54 Cal. App.2d 779.

Mo.—**Corpus Juris quoted in** McEwen v. Sterling State Bank, 5 S.W. 2d 702, 707, 222 Mo.App. 660.

34 C.J. p 526 note 3.

93. Cal.—**Corpus Juris quoted in** Consolidated Rock Products Co. v. Higgins, 129 P.2d 929, 930, 54 Cal. App.2d 779—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.

Fla.—Crosby v. Burleson, 195 So. 202, 142 Fla. 443.

Ga.—Ingram & Le Grand Lumber Co. v. Burgin Lumber Co., 18 S.E.2d 774, 193 Ga. 404.

Ill.—Bernero v. Bernero, 2 N.E.2d 317, 363 Ill. 328—Green v. Hutsonville Tp. High School Dist. No. 201, 190 N.E. 267, 356 Ill. 216.

La.—Intercity Express Lines v. Litchfield, App., 174 So. 149.

Mo.—**Corpus Juris quoted in** McEwen v. Sterling State Bank, 5 S.W. 2d 702, 707, 222 Mo.App. 660.

Pa.—In re Vetter's Estate, 162 A. 303, 308 Pa. 447.

Tex.—Urban v. Bagby, Civ.App., 286 S.W. 519, affirmed, Com.App., 291 S. W. 537.

34 C.J. p 527 note 4.

Partition suit by stranger to record

Suit in partition by heirs not parties to probate proceedings against other heirs who secured estate by representing themselves only heirs was held neither direct nor collateral attack on judgment, being equity proceeding based on extrinsic fraud.—Beatty v. Beatty, 242 P. 766, 114 Okl. 5.

94. Cal.—**Corpus Juris quoted in** Consolidated Rock Products Co. v. Higgins, 129 P.2d 929, 930, 54 Cal. App.2d 779—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.

Ill.—Bernero v. Bernero, 2 N.E.2d 317, 363 Ill. 328—Green v. Hutson Tp. High School Dist. No. 201, 190 N.E. 267, 356 Ill. 216.

Mo.—**Corpus Juris quoted in** McEwen v. Sterling State Bank, 5 S.W. 2d 702, 707, 222 Mo.App. 660.

34 C.J. p 527 note 5.

Judgment held not collusive

Judgment reciting that court heard testimony, on which judgment for plaintiff as father and guardian of injured minor was rendered, was held not void as collusive so as to entitle minor's divorced mother to recover proceeds of judgment from defendant in father's suit.—Swindle v. Rogers, 66 S.W.2d 630, 188 Ark. 503.

95. Cal.—**Corpus Juris quoted in** Consolidated Rock Products Co. v. Higgins, 129 P.2d 929, 930, 54 Cal. App.2d 779.

Ill.—Hoit v. Snodgrass, 146 N.E. 562, 315 Ill. 548.

Mo.—**Corpus Juris quoted in** McEwen v. Sterling State Bank, 5 S.W. 2d 702, 707, 222 Mo.App. 660.

Pa.—Home Sav. Fund v. King, 173 A. 891, 113 Pa.Super. 400.

Tex.—Davis v. West, Civ.App., 5 S. W.2d 870, error refused.

34 C.J. p 527 note 6.

96. Cal.—Salter v. Ulrich, 138 P.2d 7, 22 Cal.2d 263, 146 A.L.R. 1344—**Corpus Juris quoted in** Consolidated Rock Products Co. v. Higgins, 129 P.2d 929, 930, 54 Cal.App. 2d 779.

Fla.—Lyle v. Hunter, 136 So. 633, 102 Fla. 972.

La.—Burt v. Watson Oil & Gas Co., App., 150 So. 425.

Mo.—**Corpus Juris quoted in** McEwen v. Sterling State Bank, 5 S.W. 2d 702, 707, 222 Mo.App. 660.

34 C.J. p 527 note 7.

Where right to intervention lost

Judgment, in action for accounting determining owners of, and their respective interests in, corporation's entire production, was held conclusive on claimants not parties thereto, absent fraud; hence orders purporting to modify judgment were void.—Selby v. Allen, 6 P.2d 285, 119 Cal.App. 257.

§ 415. —— Creditors

A creditor whose rights or claims would be injuriously affected by enforcement of a judgment against his debtor may impeach it for fraud in a proper case..

It is always open to creditors, whose rights or claims would be injuriously affected by the enforcement of a judgment against their debtor, to impeach its validity on the ground that it is fraudulent as against them,[97] but as the law favors the stability and finality of judgments, a stranger who seeks in a collateral action to impeach a judgment as a fraud on his rights must show the fraud by clear and satisfactory proof.[98] The fraud which will justify such an attack must be fraud designed to injure the attacking creditor, or at least such as directly affects his interests; fraud practiced on the debtor is not sufficient.[99] The privilege can be claimed only by a party having rights which had vested or accrued at the time the judgment was rendered, and which would be impaired or prejudiced if it was allowed full effect as against them.[1] Subsequent creditors generally cannot assail a prior judgment,[2] but the rule is otherwise where such an attack is permitted by statute.[3] An attack is to be regarded as collateral where the petitioner, as a stranger to the record, merely claims to have become incidentally interested in the judgment after a termination of the case.[4] Where the objecting party should have intervened and objected in the proceeding in which the order or decree was rendered he is thereafter barred from collaterally attacking it.[5]

B. GROUNDS

§ 416. Invalidity of Judgment Generally

A judgment or decree has been held not subject to collateral attack merely because it is invalid, as where it is based on an unconstitutional statute.

A judgment or decree has been held not subject to collateral attack merely because it is invalid,[6] as where it is based on an unconstitutional statute.[7] However, it has been held that inquiry may be made as to the validity of a warrant of attorney to enter a judgment by confession.[8]

As a general rule a judgment may be collaterally attacked only where it is void because of fraud in obtaining it, as discussed infra § 434, or because of lack of jurisdiction on the part of the court in rendering the judgment, infra §§ 421–427.

§ 417. —— Insufficient or Illegal Cause of Action

A judgment is not subject to collateral attack because of illegality or insufficiency in the cause of action on which it is based.

A judgment cannot be impeached collaterally because of any illegality or insufficiency in the cause of action on which it is founded, this not being a jurisdictional defect or sufficient to render the judgment void.[9] Under this rule it is not permissible

97. U.S.—Botz v. Helvering, C.C.A., 134 F.2d 538.
Fla.—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.
S.C.—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 1 S.E.2d 797, 191 S.C. 384.
34 C.J. p 527 note 8.

98. U.S.—American Nat. Bank of Denver v. Supplee, Pa., 115 F. 657, 52 C.C.A. 293.
34 C.J. p 528 note 9.

99. U.S.—Safe-Deposit & Trust Co. of Pittsburg v. Wright, Pa., 105 F. 155, 44 C.C.A. 421.
34 C.J. p 528 note 10.
Participation by debtor
It has been stated that fraud which will authorize creditor to impeach judgment must be fraud against such creditor participated in by the debtor.—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109.

1. Ga.—Burkhalter v. Virginia-Carolina Chemical Co., 156 S.E. 272, 42 Ga.App. 312.
34 C.J. p 528 note 11.

2. Pa.—Zug v. Searight, 24 A. 746, 150 Pa. 506.
34 C.J. p 528 note 13.

3. Ind.—Feaster v. Woodfill, 23 Ind. 493.

4. Ga.—Martocello v. Martocello, 30 S.E.2d 108, 197 Ga. 629.

5. U.S.—Johnson v. Manhattan Ry. Co., C.C.A.N.Y., 61 F.2d 934, affirmed in part 53 S.Ct. 721, 289 U. S. 479, 77 L.Ed. 1331.

6. Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.
La.—Hawthorne v. Jackson Parish School Board, 5 La.App. 508.
Erroneous judgment where court has jurisdiction see infra § 421 et seq.
Judgment based on invalid judgment
A judgment, valid on its face and affirmed on appeal, which decreed realty was subject to lien in favor of plaintiffs for payment of a judgment in a tort action, could not be collaterally attacked by administrator of judgment debtor's estate by showing some infirmity in judgment obtained in tort action.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.

7. Wis.—Beck v. State, 219 N.W. 197, 196 Wis. 242, followed in Beck v. Milwaukee County, 219 N.W. 205, 196 Wis. 259, certiorari denied Beck v. Milwaukee County, Wis., 49 S.Ct. 34, 278 U.S. 639, 73 L.Ed. 554.
Chancery decree, based on unconstitutional statute, is not open to collateral attack, since chancery court's power to decide case includes judicial power to decide that statute involved therein is valid.—In re Newkirk, 154 So. 323, 114 Fla. 552.

8. U.S.—Bower v. Casanave, D.C.N.Y., 44 F.Supp. 501.

9. Cal.—In re Keet's Estate, 100 P. 2d 1045, 15 Cal.2d 328—Miller v. Turner, 8 P.2d 1057, 121 Cal.App. 365.
La.—Harding v. Monjure, App., 1 So. 2d 116.
Mo.—Coombs v. Benz, 114 S.W.2d 713, 232 Mo.App. 1011.
Okl.—Warren v. Stansbury, 126 P.2d 251, 190 Okl. 554—Campbell v. Wood, 278 P. 281, 137 Okl. 90.
Tex.—**Corpus Juris cited in** Tanton v. State Nat. Bank of El Paso,

to collaterally attack the judgment on the ground that the claim in suit had been paid or satisfied,[10] or was not supported by a consideration,[11] or was not justly due,[12] or was not yet due at the time the action was brought,[13] or on the grounds that the creditor, proceeding by attachment, had no such demand as would entitle him to use that process,[14] or on the ground that the cause of action was based on a gambling transaction,[15] or was in violation of the Sunday laws,[16] or was otherwise tainted with illegality.[17]

§ 418. —— Legal Disability of Parties

A judgment against a party under a legal disability is generally not open to collateral attack.

A judgment against a party who is under a legal disability is generally not subject to a collateral attack for that reason,[18] as where the judgment is against a person under the disability of coverture, discussed in Husband and Wife § 456, infancy, discussed in Infants § 122 a, or of insanity, discussed in Insane Persons § 151 d.

§ 419. —— Death of Party before Judgment

A judgment rendered for or against a party after his death generally is not subject to a collateral attack, except where the action was commenced after the party had died.

Ordinarily, where jurisdiction of the parties to an action has duly attached, the fact that one of them died before the rendition of the judgment for or against him does not make the judgment absolutely void, as discussed supra § 29, and therefore it is not open to impeachment in a collateral proceeding.[19] According to some decisions, however, a judgment rendered under such circumstances is absolutely void, as discussed supra § 29, and therefore is subject to collateral attack.[20] Even where the party was dead before the institution of the suit, it has been held that this does not make the judgment a mere nullity, within the meaning of the rule against collateral impeachment,[21] but it generally has been held that a judgment rendered in an action begun after the death of defendant therein is null and void and may be attacked collaterally.[22]

§ 420. —— Disqualification of Judge

A judgment rendered by a disqualified judge is subject to collateral attack only where it is regarded as void.

Where a judgment rendered by one who is disqualified to sit as judge in the case is regarded as void, in accordance with the principles discussed supra § 17, it may be collaterally attacked.[23] Where, however, such judgments are held to be

Civ.App., 43 S.W.2d 957, 959—**Corpus Juris quoted in** Sederholm v. City of Port Arthur, Civ.App., 3 S.W.2d 925, 927, affirmed Tyner v. La Coste, Com.App., 13 S.W.2d 685 and Tyner v. Keith, 13 S.W.2d 687.
34 C.J. p 554 note 53.
Defective statement of cause of action in pleadings see infra § 439.
Failure to state cause of action as not rendering judgment void see supra § 40.

Defective execution of mortgage
Where judgment is entered on a mortgage, it will conclusively establish the due execution of the mortgage, although the latter may have been in fact void; the mortgage is merged in the judgment, which cannot be collaterally impeached unless for fraud.—**Corpus Juris quoted in** Sederholm v. City of Port Arthur, Tex.Civ.App., 3 S.W.2d 925, 928, affirmed Tyner v. La Coste, Com.App., 13 S.W.2d 685 and Tyner v. Keith, 13 S.W.2d 687—34 C.J. p 554 note 53 [b].

10. Tenn.—Hyder v. Smith, Ch.App., 52 S.W. 884.
34 C.J. p 554 note 54.

11. Ind.—Watson v. Camper, 21 N.E. 323, 119 Ind. 60.
34 C.J. p 554 note 55.

12. N.Y.—Revere Copper Co. v. Dimock, 90 N.Y. 33, affirmed 6 S.Ct. 573, 117 U.S. 559, 29 L.Ed. 994.

13. Fla.—Lord v. F. M. Dowling Co., 42 So. 585, 52 Fla. 313.
La.—Harding v. Monjure, App., 1 So.2d 116.
34 C.J. p 554 note 57.

14. N.J.—Brantingham v. Brantingham, 12 N.J.Eq. 160.
N.C.—Harrison v. Pender, 44 N.C. 78, 57 Am.D. 573.

15. Ill.—Chicago Driving Park v. West, 35 Ill.App. 496, reversed on other grounds 21 N.E. 782, 129 Ill. 249.
34 C.J. p 554 note 59.
Validity of judgment based on gambling transaction generally see Gaming § 23.

16. N.H.—Jenness v. Berry, 17 N.H. 549.

17. Ky.—Roberts v. Yancey, 21 S.W. 1047, 94 Ky. 243, 15 Ky.L. 10, 42 Am.S.R. 357.
34 C.J. p 554 note 61.

18. Ark.—Kindrick v. Capps, 121 S.W.2d 515, 196 Ark. 1169.
Collateral attack on judgment against dissolved corporation see Corporations § 1780.

19. U.S.—Streeter v. Chicago Title & Trust Co., D.C.Ill., 14 F.2d 331.
Ark.—Black v. Burrell, 1 S.W.2d 805, 175 Ark. 1138.
Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.
Colo.—Parsons v. Parsons, 198 P. 156, 70 Colo. 154.
Mass.—Noyes v. Bankers Indemnity Ins. Co., 30 N.E.2d 867, 307 Mass. 567.
34 C.J. p 555 note 67—33 C.J. p 1107 note 68.

20. Kan.—Kager v. Vickery, 59 P. 628, 61 Kan. 342, 49 L.R.A. 153.
La.—Edwards v. Whited, 29 La.Ann. 647.
33 C.J. p 1107 notes 66, 67.

21. Ky.—Fuqua v. Mullen, 13 Bush 467.
W.Va.—McMillan v. Hickman, 14 S.E. 227, 35 W.Va. 705.

22. Cal.—Garrison v. Blanchard, 16 P.2d 273, 127 Cal.App. 616.
Conn.—**Corpus Juris cited in** O'Leary v. Waterbury Title Co., 166 A. 673, 676, 117 Conn. 39.
34 C.J. p 555 note 70.

23. Mich.—Bliss v. Caille Co., 113 N.W. 317, 149 Mich. 601, 12 Ann. Cas. 513.
Tex.—Woodland v. State, 178 S.W.2d 528, 147 Tex.Cr. 84.
34 C.J. p 555 note 73.
Disqualification of judges see Judges §§ 72–97.

merely voidable, they are not liable to collateral attack.[24] The fact, however, that the regular judge has improperly disqualified himself is not ground for collaterally attacking a judgment entered by a judge ad litem,[25] particularly where the appointment of the latter judge was agreed to by counsel.[26]

§ 421. Jurisdictional Defects.

A judgment or decree which is void for want of jurisdiction is open to contradiction or impeachment in a collateral, as well as a direct, proceeding. In order to be collaterally attacked the want of jurisdiction must affirmatively appear on the face of the record, and the facts showing the want of jurisdiction must be alleged.

A judgment or decree void for want of jurisdiction is open to contradiction or impeachment in a collateral proceeding,[27] or it may be attacked directly.[28] Moreover, in the absence of fraud, a judgment may be collaterally attacked only where

24. Kan.—In re Hewes, 62 P. 673, 62 Kan. 288.
34 C.J. p 555 note 74.

25. Fla.—U. S. Fidelity & Guaranty Co. v. Tucker, 159 So. 787, 118 Fla. 430.

26. U.S.—U. S. Fidelity & Guaranty Co. v. Tucker, supra.

27. U.S.—Nardi v. Poinsatte, D.C. Ind., 46 F.2d 347—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F.Supp. 188, cause remanded on other grounds, C.C.A., 146 F.2d 680—Petition of Taffel, D. C.N.Y., 49 F.Supp. 109—In re Ostlind Mfg. Co., D.C.Or., 19 F.Supp. 836.
Ala.—Boyd v. Garrison, 19 So.2d 385, 246 Ala. 132—Avery Freight Lines v. White, 18 So.2d 394, 245 Ala. 618, 154 A.L.R. 732—**Corpus Juris cited in** T. S. Faulk & Co. v. Boutwell, 7 So.2d 490, 492, 242 Ala. 546—Dawkins v. Hutto, 131 So. 228, 222 Ala. 132.
Ariz.—**Corpus Juris cited in** Varnes v. White, 12 P.2d 870, 871, 40 Ariz. 427.
Cal.—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal.App.2d 878—Stewart v. Stewart, 89 P.2d 404, 32 Cal.App.2d 148.
Colo.—Atchison, T. & S. F. Ry. Co. v. Board of Com'rs of Fremont County, 37 P.2d 761, 95 Colo. 435.
Fla.—Krivitsky v. Nye, 19 So.2d 563, 155 Fla. 45—Beaty v. Inlet Beach, 9 So.2d 735, 151 Fla. 495, motion denied and modified on other grounds 10 So.2d 807, 152 Fla. 276.
Ga.—Montgomery v. Suttles, 13 S.E. 2d 781, 191 Ga. 781—Patten v. Miller, 8 S.E.2d 757, 190 Ga. 123—Drake v. Drake, 1 S.E.2d 573, 187 Ga. 423.
Ill.—Anderson v. Anderson, 44 N.E. 2d 54, 380 Ill. 435—People ex rel. Lange v. Old Portage Park Dist., 190 N.E. 664, 356 Ill. 340—Chicago Title & Trust Co. v. Mack, 180 N.E. 412, 347 Ill. 480—People v. Miller, 171 N.E. 672, 339 Ill. 573—Monahan v. City of Wilmington, 159 N.E. 199, 328 Ill. 242—Howard v. Howard, 26 N.E.2d 421, 304 Ill.App. 637—McInness v. Oscar F. Wilson Printing Co., 258 Ill. App. 161—Eddy v. Dodson, 242 Ill. App. 508.
Kan.—Starke v. Starke, 125 P.2d 738, second case, 155 Kan. 331—Hoover v. Roberts, 58 P.2d 83, 144 Kan. 58.
Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 278 Ky. 695—Grooms v. Grooms, 7 S.W.2d 863, 225 Ky. 228.
Mich.—Attorney General ex rel. O'Hara v. Montgomery, 267 N.W. 550, 275 Mich. 504.
Mo.—Hankins v. Smarr, 137 S.W.2d 499, 345 Mo. 973—**Corpus Juris cited in** Kristanik v. Chevrolet Motor Co., 70 S.W.2d 890, 894, 335 Mo. 60—Simplex Paper Corporation v. Standard Corrugated Box Co., 97 S.W.2d 862, 231 Mo.App. 764.
Mont.—Scilley v. Red Lodge-Rosebud Irr. Dist., 272 P. 543, 83 Mont. 282.
N.J.—Riddle v. Cella, 15 A.2d 59, 128 N.J.Eq. 4.
N.Y.—Shea v. Shea, 60 N.Y.S.2d 823, 270 App.Div. 527, reversed on other grounds 63 N.E.2d 113, 294 N.Y. 909—MacAffer v. Boston & M. R. R., 273 N.Y.S. 679, 242 App.Div. 140, affirmed 197 N.E. 328, 268 N. Y. 400—Copperfretti v. Shephard, 271 N.Y.S. 284, 241 App.Div. 872—Canton v. Killen, 5 N.Y.S.2d 796, 167 Misc. 620—Morris v. Morris, 289 N.Y.S. 636, 160 Misc. 59—Kozba v. Kozba, 289 N.Y.S. 632, 160 Misc. 56.
Okl.—Tulsa Terminal, Storage & Transfer Co. v. Thomas, 18 P.2d 891, 162 Okl. 5.
Pa.—Bricker v. Brougher, 14 Pa.Dist. & Co. 530—Commonwealth v. Phelps, Quar.Sess., 44 Lack.Jur. 85, 5 Monroe L.R. 40, 11 Som.Co. 264, affirmed Commonwealth ex rel. Phelps v. Phelps, 35 A.2d 530, 154 Pa.Super. 270.
Tex.—Employers' Indemnity Corporation v. Woods, Com.App., 243 S. W. 1085—Ferguson v. Ferguson, Civ.App., 127 S.W.2d 1018, error dismissed—Williams v. Tooke, Civ. App., 116 S.W.2d 1114, error dismissed—Hicks v. Sias, Civ.App., 102 S.W.2d 460, error refused—Texas Gas Utilities Co. v. City of Uvalde, Civ.App., 77 S.W.2d 750—Salamy v. Bruce, Civ.App., 21 S. W.2d 380—Taylor v. Masterson, Civ.App., 259 S.W. 629—Reed v. State, Cr., 187 S.W.2d 660.
Va.—Barnes v. American Fertilizer Co., 130 S.E. 902, 144 Va. 692.
Wash.—France v. Freeze, 102 P.2d 687, 4 Wash.2d 120.
34 C.J. p 528 note 14.

In personam or in rem
"If court in fact had no jurisdiction of the subject matter, whether the case be in rem or in personam, or, in cases in personam, of the parties, and there is no finding of court that it had jurisdiction of the parties, any judgment or order which may be rendered, however regular it may be in matter of form, is a mere nullity, and may be so treated in a collateral as well as in a direct attack."—Wehrle v. Wehrle, 39 Ohio St. 365, 366—Terry v. Claypool, 65 N.E.2d 883, 887, 77 Ohio App. 77.

Court's lack of jurisdiction to issue a foreign attachment where defendant is not a nonresident can be attacked collaterally.—Powers, to Use of Finn, v. Slattery, 3 A.2d 780, 333 Pa. 54.

A mortgage foreclosure judgment or decree is subject to collateral attack for jurisdictional defects.
Colo.—Paul v. Citizens' State Bank, 223 P. 758, 75 Colo. 14.
Ill.—Schnur v. Bernstein, 32 N.E. 2d 675, 309 Ill.App. 90.
42 C.J. p 172 note 56.

A judgment or decree for partition, which is void for want of jurisdiction, may be attacked in a collateral proceeding.—Gray v. Clement, 227 S.W. 111, 286 Mo. 100—34 C.J. p 531 note 20 [a]—47 C.J. p 438 note 99.

28. Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.
Colo.—Atchison, T. & S. F. Ry. Co. v. Board of Com'rs of Fremont County, 37 P.2d 761, 95 Colo. 435.
Fla.—Malone v. Meres, 109 So. 677, 91 Fla. 709.
Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—Eddy v. Dodson, 242 Ill.App. 508.
Miss.—Paepcke-Leicht Lumber Co. v. Savage, 101 So. 709, 137 Miss. 11.
N.Y.—Shea v. Shea, 60 N.Y.S.2d 823, 270 App.Div. 527, reversed on other grounds 63 N.E.2d 113, 294 N.Y. 909—Battalico v. Knickerbocker Fireproofing Co., 294 N.Y.S. 481, 250 App.Div. 258—MacAffer v. Boston & M. R. R., 273 N.Y.S. 679, 242 App.Div. 140, affirmed 197 N. E. 328, 268 N.Y. 400—Canton v. Killen, 5 N.Y.S.2d 796, 167 Misc. 620—Morris v. Morris, 289 N.Y.S. 636, 160 Misc. 59—Kozba v. Kozba, 289 N.Y.S. 632, 160 Misc. 56.
Okl.—Tulsa Terminal, Storage &

it is void because of jurisdictional defects,[29] and accordingly the inquiry on a collateral attack is generally confined to jurisdictional infirmities or defects.[30]

By the weight of authority, in order that a judgment may be collaterally attacked, such want of jurisdiction must affirmatively appear on the face of the record,[31] and generally cannot be established

Transfer Co. v. Thomas, 18 P.2d 891, 162 Okl. 5.
Tex.—Lewis v. Terrell, Civ.App., 154 S.W.2d 151, error refused.
Va.—Barnes v. American Fertilizer Co., 130 S.E. 902, 144 Va. 692.
Wash.—King County v. Rea, 152 P. 2d 310, 21 Wash.2d 593.
W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W.Va. 395.
Appeal from judgment for want of jurisdiction see Appeal and Error § 110.
Equitable relief against judgment see supra §§ 341–400.
Opening and vacating judgment see supra §§ 265–310.

29. U.S.—Iselin v. Lacoste, D.C.La., 55 F.Supp. 977, affirmed, C.C.A., 147 F.2d 791.
Ala.—Fife v. Pioneer Lumber Co., 185 So. 759, 237 Ala. 92.
Ariz.—Lisitzky v. Brady, 300 P. 177, 38 Ariz. 337.
Cal.—Kirkpatrick v. Harvey, 124 P. 2d 367, 51 Cal.App.2d 170.
Idaho.—Harkness v. Utah Power & Light Co., 291 P. 1051, 49 Idaho 756.
Ill.—Beckman v. Alberts, 178 N.E. 367, 346 Ill. 74.
Neb.—Selleck v. Miller, 264 N.W. 754, 130 Neb. 306—Billiter v. Parriott, 258 N.W. 395, 128 Neb. 238.
N.J.—Moran v. Joyce, 11 A.2d 420, 124 N.J.Law 255.
Tex.—Stewart Oil Co. v. Lee, Civ. App., 173 S.W.2d 791, error refused —Williams v. Borcher, Civ.App., 244 S.W. 1053.
Wyo.—Whitaker v. First Nat. Bank, 231 P. 691, 32 Wyo. 288.
34 C.J. p 514 note 54.
Fraud as ground for collateral attack generally see infra § 434.

30. Fla.—Norwich Union Indemnity Co. v. Willis, 168 So. 418, 124 Fla. 137, 127 Fla. 238—Fisher v. Guidy, 142 So. 813, 106 Fla. 94—Fiehe v. R. E. Householder Co., 125 So. 2, 98 Fla. 627.
Ill.—City of Des Plaines v. Boeckenhauer, 50 N.E.2d 483, 383 Ill. 475.
Ky.—Lowe v. Taylor, 29 S.W.2d 598, 235 Ky. 21.
Or.—Northwestern Clearance Co. v. Jennings, 210 P. 884, 106 Or. 291.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

31. U.S.—Jelliffe v. Thaw, C.C.A.N.Y., 67 F.2d 880—Campbell v. Aderhold, C.C.A.Ga., 67 F.2d 246—Lane v. Brown, D.C.Mich., 63 F.Supp. 684.
Ala.—A. B. C. Truck Lines v. Kenemer, 25 So.2d 511—Fife v. Pioneer Lumber Co., 185 So. 759, 237 Ala. 92—Florence Gin Co. v. City of Florence, 147 So. 417, 226 Ala. 478, followed in 147 So. 420, three cases, 226 Ala. 482, 147 So. 421, 226 Ala. 482, and 147 So. 421, 226 Ala. 483—Ex parte Kelly, 128 So. 443, 221 Ala. 389—Wise v. Miller, 111 So. 913, 215 Ala. 660.
Alaska.—Lynch v. Collings, 7 Alaska 84.
Ariz.—Latham v. McClenny, 285 P. 684, 36 Ariz. 337.
Ark.—Weeks v. Arkansas Club, 145 S.W.2d 738, 201 Ark. 423—Reed v. Futrall, 115 S.W.2d 542, 195 Ark. 1044—Black v. Burrell, 1 S.W.2d 805, 175 Ark. 1138.
Cal.—Salter v. Ulrich, 138 P.2d 7, 22 Cal.2d 263—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal. App.2d 878—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318—Kirkpatrick v. Harvey, 124 P.2d 367, 51 Cal.App.2d 170—Olson v. Maryland Casualty Co., 44 P.2d 412, 6 Cal.App.2d 421—Johnson v. Superior Court in and for Fresno County, 17 P.2d 1055, 128 Cal.App. 784—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385—Petition of Furness, 218 P. 61, 62 Cal.App. 753.
Colo.—In re Zupancis' Heirship, 111 P.2d 1063, 107 Colo. 323—LaFitte v. Salisbury, 126 P.2d 1104, 22 Colo.App. 641.
D.C.—**Corpus Juris cited in** Bowles v. Laws, 45 F.2d 669, 672, 59 App. D.C. 399, certiorari denied 51 S. Ct. 488, 283 U.S. 841, 75 L.Ed. 1452.
Ill.—Herb v. Pitcairn, 51 N.E.2d 277, 384 Ill. 237, reversed on other grounds 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L.Ed. 2005, and opinion supplemented 64 N.E.2d 318, 392 Ill. 151.
Ky.—Commonwealth ex rel. Dummit v. Jefferson County, 189 S.W.2d 604, 300 Ky. 514—Davis v. Tuggle's Adm'r, 178 S.W.2d 979, 297 Ky. 376—White v. White, 172 S. W.2d 72, 294 Ky. 563—Warfield Natural Gas Co. v. Ward, 149 S. W.2d 705, 286 Ky. 73—Mussman v. Pepples, 22 S.W.2d 605, 232 Ky. 254—Dye Bros. v. Butler, 272 S.W. 426, 209 Ky. 199.
Mich.—Life Ins. Co. of Detroit v. Burton, 10 N.W.2d 315, 306 Mich. 81.
Minn.—Martin v. Wolfson, 16 N.W.2d 884, 218 Minn. 557—Miller v. Ahneman, 235 N.W. 622, 183 Minn. 12—In re Sutton's Estate, 201 N.W. 925, 161 Minn. 426.
Mo.—**Corpus Juris cited in** Kristanik v. Chevrolet Motor Co., 70 S.W.2d 890, 894, 335 Mo. 60—Leahy v. Mercantile Trust Co., 247 S.W. 396, 296 Mo. 561—Williams v. Luecke, App., 152 S.W.2d 991—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S.W.2d 865—Hemphill Lumber Co. v. Arcadia Timber Co., App., 52 S.W.2d 750—Weil v. Richardson, 24 S.W.2d 175, 224 Mo. App. 990.
Nev.—**Corpus Juris cited in** Beck v. Curti, 45 P.2d 601, 603, 56 Nev. 72.
N.J.—Weiner v. Wittman, 27 A.2d 866, 129 N.J.Law 35.
N.D.—**Corpus Juris cited in** Rasmusson v. Schmalenberger, 235 N. W. 496, 499, 60 N.D. 527.
Okl.—Sabin v. Levorsen, 145 P.2d 402, 193 Okl. 320, certiorari denied 64 S.Ct. 205, 320 U.S. 792, 88 L.Ed. 477, rehearing denied 64 S.Ct. 368, 320 U.S. 815, 88 L.Ed. 492—Reliance Clay Products Co. v. Rooney, 10 P.2d 414, 157 Okl. 24—Samuels v. Granite Sav. Bank & Trust Co., 1 P.2d 145, 150 Okl. 174.
Or.—Laughlin v. Hughes, 89 P.2d 568, 161 Or. 295.
Pa.—Mamlin v. Tener, 23 A.2d 90, 146 Pa.Super. 593—Kimple v. Standard Life Ins. Co., 53 Pa.Dist. & Co. 174, 3 Lawrence L.J. 126.
S.C.—Chamberlain v. First Nat. Bank of Greenville, 24 S.E.2d 158, 202 S.C. 115.
Tex.—Security Trust Co. of Austin v. Lipscomb County, 180 S.W.2d 151, 142 Tex. 572—White v. White, 179 S.W.2d 503, 142 Tex. 499—Lewis v. Terrell, Civ.App., 154 S. W.2d 151—Walton v. Stinson, Civ. App., 140 S.W.2d 497, error refused —Williams v. Tooke, Civ.App., 116 S.W.2d 1114—Salamy v. Bruce, Civ. App., 21 S.W.2d 380—Texas Pacific Coal & Oil Co. v. Ames, Civ. App., 284 S.W. 315, reversed on other grounds, Com.App., 292 S.W. 191.
Utah.—**Corpus Juris cited in** Salt Lake City v. Industrial Commission, 22 P.2d 1046, 1048, 82 Utah 179.
W.Va.—Bell v. Brown, 182 S.E. 579, 116 W.Va. 484.
34 C.J. p 530 note 15.

What record includes

(1) The term "record" or "record proper" or "complete record," as variously used within this rule, generally includes the pleading, process, verdict and judgment.
Ill.—Cullen v. Stevens, 58 N.E.2d 456, 389 Ill. 35.
Tex.—Lipscomb County v. Security Trust Co., Civ.App., 175 S.W.2d 723, reversed on other grounds Security Trust Co. of Austin v. Lipscomb County, 180 S.W.2d 151, 142

by extrinsic evidence,[32] although there are decisions to the contrary,[33] and extrinsic evidence has been held admissible to contradict the record in this respect, as considered infra § 426 b. Even though a judgment is valid on its face, if the parties admit facts which show that it is void, or if such facts are established without objection, the case is similar to one wherein the judgment is void on its face and is subject to collateral attack.[34]

A judgment is subject to collateral attack where the want of jurisdiction is with respect to the subject matter,[35] or where, although the court has ju-

Tex. 572—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.

(2) It does not include bill of exceptions or certificate of evidence, particularly in view of failure of Practice Act to require that a certificate of evidence be filed in support of decree.—Cullen v. Stevens, 58 N.E.2d 456, 389 Ill. 35.

Judgment roll has been held the only record that may be considered. Cal.—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318—Burrows v. Burrows, 52 P.2d 606, 10 Cal.App.2d 749—Fletcher v. Superior Court of Sacramento County, 250 P. 195, 79 Cal.App. 468—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704.

Mont.—State ex rel. Enochs v. District Court of Fourth Judicial Dist. in and for Missoula County, 123 P.2d 971, 113 Mont. 227—Holt v. Sather, 264 P. 108, 81 Mont. 442.

Okl.—Fitzsimmons v. Oklahoma City, 135 P.2d 340, 192 Okl. 248.

Judgment of conviction is always subject to collateral attack where want of jurisdiction is apparent on face of judgment roll.—Lesser v. Collins, 36 P.2d 411, 1 Cal.App.2d 161.

A judgment of foreclosure of a mortgage generally may be collaterally attacked only where the want of jurisdiction is apparent on the face of the record.—Bryan v. McCaskill, Mo., 175 S.W. 961—42 C.J. p 172 note 57.

32. Cal.—Stevens v. Kelley, 134 P.2d 56, 57 Cal.App.2d 318.

Ky.—Davis v. Tuggle's Adm'r, 178 S.W.2d 979, 297 Ky. 376—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73.

Mo.—Leichty v. Kansas City Bridge Co., 190 S.W.2d 201, certiorari denied Kansas City Bridge Co. v. Leichty, 66 S.Ct. 682.

Invalidity of prior judgment quieting title cannot be established, on collateral attack, by extrinsic evidence.—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73.

33. U.S.—Campbell v. Aderhold, C.C.A.Ga., 67 F.2d 246.

N.Y.—O'Donoghue v. Boles, 53 N.E. 537, 159 N.Y. 87—Stevens v. Breen, 16 N.Y.S.2d 909, 258 App.Div. 423, affirmed 27 N.E.2d 987, 283 N.Y. 196—Battalico v. Knickerbocker Fireproofing Co., 294 N.Y.S. 481, 250 App.Div. 258.

Clear and strong evidence

Where want of jurisdiction does not appear on face of record, it may be shown by evidence dehors the record, provided the evidence is clear and strong and the rights of third persons have not intervened.—Espadron v. Davis, 43 N.E.2d 962, 380 Ill. 199.

Extraneous matter may be examined for the purpose of determining whether the court had jurisdiction of the person or of the subject matter of the suit, and, where this is found, other questions affecting the validity of the judgment must be determined from the judgment record. —State v. Wilson, 27 S.W.2d 106, 181 Ark. 683.

34. Cal.—Salter v. Ulrich, 138 P.2d 7, 22 Cal.2d 263, 146 A.L.R. 1344 —Akley v. Bassett, 209 P. 576, 189 Cal. 625—San Francisco Unified School Dist. v. City and County of San Francisco, 128 P.2d 696, 54 Cal.App.2d 105—Jones v. Walker, 118 P.2d 299, 47 Cal.App.2d 566.

Idaho.—Welch v. Morris, 291 P. 1048, 49 Idaho 781.

Tex.—Texas Pacific Coal & Oil Co. v. Ames, Civ.App., 284 S.W. 315, reversed on other grounds, Com.App., 292 S.W. 191.

If the party in favor of whom the judgment runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, it is court's duty to declare the judgment void on collateral attack.—Marlenee v. Brown, 134 P.2d 770, 21 Cal.2d 668—San Francisco Unified School Dist. v. City and County of San Francisco, 128 P.2d 696, 54 Cal.App.2d 105.

Lack of service of process

(1) The rule that judgment may be declared void on collateral attack for admitted lack of jurisdiction of party, although otherwise valid on its face, presupposes that party resisting attack admits facts showing that constructive or personal service of summons was not made on party attacking judgment and allows introduction of evidence of such fact without objection.—Security-First Nat. Bank of Los Angeles v. Superior Court in and for Los Angeles County, 37 P.2d 69, 1 Cal.2d 749.

(2) If lack of service is stipulated to, the judgment must be read as though that fact appeared on the face of the judgment, in which event the judgment is then void on its face and subject to collateral attack. —Lake v. Bonynge, 118 P. 535, 540, 161 Cal. 120—In re Ivory's Estate, 98 P.2d 761, 37 Cal.App.2d 22.

35. U.S.—Tooley v. Commissioner of Internal Revenue, C.C.A., 121 F.2d 350—Warmsprings Irr. Dist. v. May, C.C.A.Or., 117 F.2d 802—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352—Zimmermann v. Scandrett, D.C.Wis., 57 F. Supp. 799—Iselin v. Lacoste, D.C. La., 55 F.Supp. 977, affirmed, C.C. A., 147 F.2d 791.

Ariz.—Hallford v. Industrial Commission, 159 P.2d 305—Hershey v. Banta, 99 P.2d 81, 55 Ariz. 93—Hershey v. Republic Life Ins. Co., 99 P.2d 85, 55 Ariz. 104—Collins v. Superior Court in and for Maricopa County, 62 P.2d 131, 48 Ariz. 381.

Ark.—Reed v. Futrall, 115 S.W.2d 542, 195 Ark. 1044.

Cal.—Ex parte Cohen, 290 P. 512, 107 Cal.App. 288.

Fla.—Horn v. City of Miami Beach, 194 So. 620, 142 Fla. 178—Malone v. Meres, 109 So. 677, 91 Fla. 709.

Ga.—Thompson v. Continental Gin Co., App., 37 S.E.2d 819.

Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—Martin v. Schillo, 60 N.E.2d 392, 389 Ill. 607, certiorari denied 65 S.Ct. 1572, 325 U.S. 880, 89 L.Ed. 1996—Herb v. Pitcairn, 51 N.E.2d 277, 384 Ill. 237, reversed on other grounds 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L.Ed. 2005, and opinion supplemented 64 N.E.2d 318, 392 Ill. 151—Wood v. First Nat. Bank of Woodlawn, 50 N.E.2d 830, 383 Ill. 515, certiorari denied 64 S. Ct. 521, 321 U.S. 765, 88 L.Ed. 1061 —Meyer v. Meyer, 66 N.E.2d 457, 328 Ill.App. 408.

Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 109, 218 Ind. 468, rehearing denied 33 N.E. 2d 583, 218 Ind. 468.

Ky.—Rollins v. Board of Drainage Com'rs of McCracken County for Mayfield Drainage Dist. No. 1, 136 S.W.2d 1094, 281 Ky. 771—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 278 Ky. 695—Dean v. Brown, 88 S.W.2d 298, 261 Ky. 593—Dye Bros. v. Butler, 272 S.W. 426, 209 Ky. 199.

risdiction of the parties and subject matter, the judgment is void for want of jurisdiction with respect to the power of the court to render the particular judgment or decree,[36] as where the court, in entertaining jurisdiction and rendering judgment in a particular case, exceeds the powers conferred on it by constitutional or statutory provisions[37] or violates a provision which prohibits it from doing a particular act or taking jurisdiction over particular matters,[38] or where the judicial determination is

Md.—**Corpus Juris quoted in** Fooks' Ex'rs v. Ghingher, 192 A. 782, 786, 172 Md. 612, certiorari denied Phillips v. Ghingher, 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 561.

Mich.—Life Ins. Co. of Detroit v. Burton, 10 N.W.2d 315, 306 Mich. 81—Adams v. Adams, 8 N.W.2d 70, 304 Mich. 290—Jackson City Bank & Trust Co. v. Fredrick, 260 N.W. 908, 271 Mich. 538.

Mo.—United Cemeteries Co. v. Strother, 119 S.W.2d 762, 342 Mo. 1155.

Mont.—Ex parte Lockhart, 232 P. 183, 72 Mont. 136.

N.J.—Coffey v. Coffey, 14 A.2d 485, 125 N.J.Law 205.

N.Y.—Universal Credit Co. v. Blinderman, 288 N.Y.S. 79, 158 Misc. 917—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 163, 131 Misc. 401, affirmed 230 N.Y.S. 910, 224 App.Div. 773.

Ohio.—Terry v. Claypool, 65 N.E.2d 883, 77 Ohio App. 77.

Pa.—In re Patterson's Estate, 19 A.2d 165, 341 Pa. 177—Mamlin v. Tener, 23 A.2d 90, 146 Pa.Super. 593—Commonwealth ex rel. Howard v. Howard, 10 A.2d 779, 138 Pa.Super. 505.

Tenn.—Lynch v. State ex rel. Killebrew, 166 S.W.2d 397, 179 Tenn. 339.

Tex.—Easterline v. Bean, 49 S.W.2d 427, 121 Tex. 327—Employers' Indemnity Corporation v. Woods, Com.App., 243 S.W. 1085—Burrage v. Hunt, Civ.App., 147 S.W.2d 532—Walton v. Stinson, Civ.App., 140 S.W.2d 497—Harrison v. Barngrover, Civ.App., 72 S.W.2d 971, error refused, certiorari denied 55 S.Ct. 639, 294 U.S. 731, 79 L.Ed. 1260—Wilkinson v. Owens, Civ.App., 72 S.W.2d 330—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.

Wash.—King County v. Rea, 152 P. 2d 310, 21 Wash.2d 593.

34 C.J. p 531 note 19.

36. U.S.—Tooley v. Commissioner of Internal Revenue, C.C.A., 121 F.2d 350—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F. Supp. 188, cause remanded on other grounds, C.C.A., 146 F.2d 680—Shields v. Shields, D.C.Mo., 26 F.Supp. 211.

Ariz.—Hallford v. Industrial Commission, 159 P.2d 305—Vargas v. Greer, 131 P.2d 818, 60 Ariz. 110—Hershey v. Banta, 99 P.2d 81, 55 Ariz. 93, followed in Hershey v. Republic Life Ins. Co., 99 P.2d 85, 55 Ariz. 104—Hill v. Favour, 84 P. 2d 575, 52 Ariz. 561—Collins v. Superior Court in and for Maricopa County, 62 P.2d 131, 48 Ariz. 381.

Cal.—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal.App.2d 878.

D.C.—Rapeer v. Colpoys, 85 F.2d 715, 66 App.D.C. 216—Scholl v. Tibbs, Mun.App., 36 A.2d 352.

Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—McInness v. Oscar F. Wilson Printing Co., 258 Ill. App. 161.

Ky.—Wells v. Miller, 190 S.W.2d 41, 300 Ky. 680.

Md.—**Corpus Juris quoted in** Fooks' Ex'rs v. Ghingher, 192 A. 782, 786, 172 Md. 612, certiorari denied Phillips v. Ghingher, 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 561.

Mo.—In re Main's Estate, 152 S.W. 2d 696, 236 Mo.App. 88.

Mont.—Ex parte Lockhart, 232 P. 183, 72 Mont. 136.

N.J.—Maguire v. Van Meter, 1 A.2d 445, 121 N.J.Law 150—Ex parte Hall, 118 A. 347, 94 N.J.Eq. 108.

N.Y.—In re Chase Nat. Bank of City of New York, 28 N.E.2d 868, 283 N.Y. 350—Nervo v. Mealey, 25 N.Y. S.2d 632, 175 Misc. 952—Sullivan v. McFetridge, 55 N.Y.S.2d 511.

N.C.—Abernethy v. Burns, 188 S.E. 97, 210 N.C. 636.

Ohio.—Binns v. Isabel, 12 Ohio Supp. 113, affirmed 51 N.E.2d 501, 72 Ohio App. 222.

Okl.—Prudential Ins. Co. of America v. Board of Com'rs of Garvin County, 92 P.2d 359, 185 Okl. 362—Cochran v. Norris, 51 P.2d 736, 175 Okl. 126—Protest of Kansas City Southern Ry. Co., 11 P.2d 500, 157 Okl. 246—Glover v. Warner, 274 P. 867, 135 Okl. 177—Lynch v. Collins, 233 P. 709, 106 Okl. 133—Roth v. Union Nat. Bank, 160 P. 505, 58 Okl. 604.

Pa.—Kimple v. Standard Life Ins. Co., 53 Pa.Dist. & Co. 174, 3 Lawrence L.J. 126.

Tenn.—Lynch v. State ex rel. Killebrew, 166 S.W.2d 397, 179 Tenn. 339—Magevney v. Karsch, 65 S.W.2d 562, 167 Tenn. 32, 92 A.L.R. 343.

Tex.—White v. White, 179 S.W.2d 503, 142 Tex. 499—Farmers' Nat. Bank of Stephensville v. Daggett, Com.App., 2 S.W.2d 834—Smith v. Paschal, Com.App., 1 S.W.2d 1086, rehearing denied 5 S.W.2d 135—Walton v. Stinson, Civ.App., 140 S.W.2d 497—Harrison v. Barngrover, Civ.App., 72 S.W.2d 971, error refused, certiorari denied 55 S.Ct. 639, 294 U.S. 731, 79 L.Ed. 1260—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031—L. E. Whitham & Co. v. Hendrick, Civ.App., 1 S.W.2d 907, error refused—Richardson v. Bean, Civ.App., 246 S.W. 1096.

Wash.—Lally v. Anderson, 78 P.2d 603, 194 Wash. 536.

Wyo.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.

34 C.J. p 531 note 20.

"Jurisdiction" in its fullest sense is not restricted to the subject matter and the parties, but if the court lacks jurisdiction to render or exceeds its jurisdiction in rendering the particular judgment in particular case the judgment is subject to collateral attack even though the court had jurisdiction of the parties and of the subject matter.—Nervo v. Mealey, 25 N.Y.S.2d 632, 175 Misc. 952.

Exceeding jurisdictional amount

N.J.—Novograd v. Kayne's, 199 A. 59, 16 N.J.Misc. 283.

34 C.J. p 531 note 20 [b].

37. U.S.—**Corpus Juris quoted in** McLellan v. Automobile Ins. Co. of Hartford, Conn., C.C.A.Ariz., 80 F.2d 344, 346—Robinson v. Edler, C.C.A.Nev., 78 F.2d 817.

Ill.—McInness v. Oscar F. Wilson Printing Co., 258 Ill.App. 161.

Mass.—Carroll v. Berger, 150 N.E. 870, 255 Mass. 132.

N.Y.—Lynbrook Gardens v. Ullmann, 36 N.Y.S.2d 888, 179 Misc. 132, affirmed 37 N.Y.S.2d 671, 265 App. Div. 859, reversed on other grounds 53 N.E.2d 353, 291 N.Y. 472, 152 A. L.R. 959, certiorari denied 64 S.Ct. 1144, 322 U.S. 742, 88 L.Ed. 1575.

Okl.—**Corpus Juris cited in** Fitzsimmons v. City of Oklahoma, 135 P. 2d 340, 343, 192 Okl. 248—Whitehead v. Bunch, 272 P. 878, 134 Okl. 63—Dawkins v. People's Bank & Trust Co., 245 P. 594, 117 Okl. 181.

Tex.—Nacogdoches County v. Jinkins, Civ.App., 140 S.W.2d 901, error refused—Commander v. Bryan, Civ.App., 123 S.W.2d 1008.

Wyo.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.

34 C.J. p 531 note 22.

38. Mo.—Smith v. Black, 132 S.W. 1129, 231 Mo. 681.

Tex.—**Corpus Juris quoted in** Grant v. Ellis, Com.App., 50 S.W.2d 1093, 1094—Cline v. Niblo, Civ.App., 286 S.W. 298, reversed on other grounds, Com.App., 292 S.W. 178, modified on other grounds 8 S.W.

not within the issues presented by the pleadings and evidence.[39] On the other hand, if the court has obtained jurisdiction of both the parties and the subject matter, and has power to enter the judgment, unless the record shows that such jurisdiction was thereafter lost,[40] the judgment is not subject to collateral attack because it is not in the form required by statute[41] or is contrary to the limitations of such a statute,[42] or resulted from an erroneous interpretation thereof[43] or an erroneous ruling as to the operative force of one of two statutes, apparently conflicting;[44] or because it is otherwise defective or erroneous.[45]

A distinction is to be noted between those facts which involve the jurisdiction of the court over the parties and subject matter and those quasi-jurisdictional facts without allegation of which the court cannot properly proceed, and without proof of which a decree should not be made, or, as otherwise stated, between want of jurisdiction and error in the exercise of jurisdiction; a judgment being void and assailable collaterally in the former case, but not in the latter case.[46]

2d 633, 117 Tex. 474, 66 A.L.R. 916.

39. Ind.—Waugh v. Board of Com'rs of Montgomery County, 115 N.E. 356, 64 Ind.App. 123.
Md.—**Corpus Juris quoted in** Fooks' Ex'rs v. Ghingher, 192 A. 732, 786, 172 Md. 612, certiorari denied Phillips v. Ghingher, 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 561.
Mo.—Garrison v. Garrison, 188 S.W. 2d 644—Raymond v. Love, 180 S. W. 1054, 192 Mo.App. 396.
N.J.—Riddle v. Cella, 15 A.2d 59, 128 N.J.Eq. 4.
N.D.—Schmidt v. First Nat. Bank, 232 N.W. 314, 60 N.D. 19.
34 C.J. p 531 note 21.
Court cannot consider evidence to ascertain whether order or judgment was supported thereby.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.

40. Cal.—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704.

41. Cal.—Seaver v. Fitzgerald, 23 Cal. 85.

42. Mo.—Mississippi and Fox River Drainage Dist. of Clark County v. Ruddick, 64 S.W.2d 306, 228 Mo. App. 1143.
34 C.J. p 532 note 25.

43. Ill.—Lord v. Board of Sup'rs of Kane County, 41 N.E.2d 106, 314 Ill.App. 161.
34 C.J. p 532 note 26.

44. Cal.—Ex parte Henshaw, 15 P. 110, 73 Cal. 486.

45. U.S.—Cole v. Blankenship, C.C. A.W.Va., 30 F.2d 211—Fuller v. Vanwagoner, D.C.Mich., 49 F.Supp. 281—Fleming v. Miller, D.C.Minn., 47 F.Supp. 1004, modified on other grounds, C.C.A., Walling v. Miller, 138 F.2d 629, certiorari denied Miller v. Walling, 64 S.Ct. 781, 321 U.S. 784, 88 L.Ed. 733—Fisher v. Jordan, D.C.Tex., 32 F.Supp. 608, reversed on other grounds, C.C.A., 116 F.2d 183, certiorari denied Jordan v. Fisher, 61 S.Ct. 734, 312 U. S. 697, 85 L.Ed. 1132—In re American Fidelity Corporation, D.C.Cal., 28 F.Supp. 462—In re Ostlind Mfg. Co., D.C.Or., 19 F.Supp. 836.
Alaska.—Lynch v. Collings, 7 Alaska 84.
Ariz.—Brecht v. Hammons, 278 P. 381, 35 Ariz. 383.
Cal.—Shaw v. Palmer, 224 P. 106, 65 Cal.App. 441.
Ill.—Anderson v. Anderson, 44 N.E. 2d 54, 380 Ill. 435—Moore v. Town of Browning, 27 N.E.2d 533, 373 Ill. 583—Baker v. Brown, 23 N.E. 2d 710, 372 Ill. 336.
Iowa.—Watt v. Dunn, 17 N.W.2d 811.
Ky.—Commonwealth v. Miniard, 99 S.W.2d 166, 266 Ky. 405—Swift Coal & Timber Co. v. Cornett, 61 S.W.2d 625, 249 Ky. 760—Mitchell Machine & Electric Co. v. Sabin, 291 S.W. 381, 218 Ky. 289.
Mich.—Adams v. Adams, 8 N.W.2d 70, 304 Mich. 290—Walden v. Crego's Estate, 285 N.W. 457, 288 Mich. 564—Attorney General ex rel. O'Hara v. Montgomery, 267 N. W. 550, 275 Mich. 504.
Mo.—Farrell v. Kingshighway Bridge Co., App., 117 S.W.2d 693.
N.Y.—In re Albroza, 19 N.Y.S.2d 329, 173 Misc. 385.
Or.—Ulrich v. Lincoln Realty Co., 153 P.2d 255, 175 Or. 296—State v. Young, 257 P. 806, 122 Or. 257.
Tex.—Laney v. Cline, Civ.App., 150 S.W.2d 176, error dismissed, judgment correct—Commander v. Bryan, Civ.App., 123 S.W.2d 1008—Southern Ornamental Iron Works v. Morrow, Civ.App., 101 S.W.2d 336—Gathings v. Robertson, Civ. App., 264 S.W. 173, reversed on other grounds, Com.App., 276 S.W. 218—Houston Nat. Exch. Bank v. Chapman, Civ.App., 263 S.W. 929.
Wash.—Dare v. Hall, 250 P. 106, 141 Wash. 389.
Uncertainty
Although a judgment may be so uncertain and incomplete as to be void on its face and incapable of execution, that does not go to the jurisdiction of the court, and is not cause for avoiding it on that ground in a collateral proceeding.—Wood v. City of Mobile, C.C.Ala., 99 F. 615, affirmed 107 F. 846, 47 C.C.A. 9.

46. U.S.—Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331—National Exchange Bank of Tiffin v. Wiley, Neb., 25 S.Ct. 40, 195 U.S. 257, 49 L.Ed. 184—Thompson v. Whitman, N.Y., 18 Wall. 457, 21 L.Ed. 897—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F.Supp. 188, cause remanded on other grounds, C.C.A., 146 F.2d 680—U. S. v. U. S. Fidelity & Guaranty Co., D.C.Okl., 24 F.Supp. 961, modified on other grounds, C.C.A., 106 F.2d 804, reversed on other grounds 60 S.Ct. 653, 309 U.S. 506, 84 L.Ed. 894.
Ark.—Monks v. Duffie, 259 S.W. 735, 163 Ark. 118.
Cal.—Behrens v. Superior Court in and for Yuba County, 23 P.2d 428, 132 Cal.App. 704.
Colo.—Gamewell v. Strumpler, 271 P. 180, 84 Colo. 459.
D.C.—National Ben. Life Ins. Co. v. Shaw-Walker Co., 111 F.2d 497, 71 App.D.C. 276, certiorari denied Shaw-Walker Co. v. National Ben. Life Ins. Co., 61 S.Ct. 35, 311 U.S. 673, 85 L.Ed. 432.
Fla.—Quigley v. Cremin, 113 So. 892, 194 Fla. 104.
Ill.—Gunnell v. Palmer, 18 N.E.2d 202, 370 Ill. 206, 120 A.L.R. 871.
Ind.—Pattison v. Hogston, 157 N.E. 450, 90 Ind.App. 59, rehearing denied 158 N.E. 516, 90 Ind.App. 59.
Mich.—Rudell v. Union Guardian Trust Co., 294 N.W. 132, 295 Mich. 157.
Miss.—**Corpus Juris cited in** Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 516, 180 Miss. 147.
N.Y.—Jones v. R. Young Bros. Lumber Co., 45 N.Y.S.2d 308, 180 Misc. 565.
Okl.—Noel v. Edwards, 260 P. 58, 127 Okl. 163—Kehlier v. Smith, 240 P. 708, 112 Okl. 183—Abraham v. Homer, 226 P. 45, 102 Okl. 12.
Or.—Ulrich v. Lincoln Realty Co., 153 P.2d 255, 175 Or. 296.
S.D.—Steuerwald v. Steuerwald, 218 N.W. 597, 52 S.D. 448.
Tex.—Commander v. Bryan, Civ. App., 123 S.W.2d 1008—Sederholm v. City of Port Arthur, Civ.App., 3 S.W.2d 925, affirmed Tyner v. La

Want of jurisdiction of person. Where the court undertaking to try an action and render judgment never acquired jurisdiction of the person of defendant, a judgment against him is entirely void, and may be so held in a collateral proceeding,[47] unless defendant, by appearance in the action, has waived the original want of jurisdiction.[48] This want of jurisdiction may be shown to establish the invalidity of the judgment, even though the court has jurisdiction of the subject matter.[49]

Pleading and proof of want of jurisdiction. Where a collateral attack is made on a judgment of a court of general jurisdiction, facts must be alleged which show a want of jurisdiction[50] and

Coste, Com.App., 13 S.W.2d 685 and Tyner v. Keith, 13 S.W.2d 687.
34 C.J. p 532 note 28—33 C.J. p 1079 note 82.

Errors in the exercise of jurisdiction, no matter how gross, cannot be urged in a collateral proceeding to impeach a court's judgment or decree.
U.S.—Commonwealth of Pennsylvania v. Williams, Pa., 55 S.Ct. 380, 294 U.S. 176, 79 L.Ed. 841, 96 A.L.R. 1166—Iselin v. La Coste, C.C.A.La., 147 F.2d 791—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A.Wyo., 74 F.2d 827.
Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.
D.C.—Suydam v. Ameli, Mun.App., 46 A.2d 763.
Mich.—Jackson City Bank & Trust Co. v. Fredrick, 260 N.W. 908, 271 Mich. 538.
34 C.J. p 555 note 75 [a].

Scope of inquiry

(1) On collateral attack on judgment of court of record in the absence of fraud, the court cannot inquire into existence, in original action, of "quasi jurisdictional facts" or facts constituting cause of action, even though it appears on the face of the judgment itself that the court had erred both in fact and in law as to existence of such facts and the right of the parties to the relief granted.—Noel v. Edwards, 260 P. 58, 127 Okl. 163—Nolan v. Jackson, 231 P. 525, 107 Okl. 163—Abraham v. Homer, 226 P. 45, 102 Okl. 12.

(2) The court may decide as against a collateral attack both questions of law as well as of fact that may arise in the particular case, unless the rendition of the judgment clearly violates one of the rules for the determination of jurisdictional defects.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.

"Jurisdiction," as regards collateral attack on a judgment, is but the power to hear and determine, and does not depend on the correctness of the decision made.—Mueller v. Elba Oil Co., 130 P.2d 961, 21 Cal.2d 188—Gray v. Hall, 265 P. 246, 203 Cal. 306.

Failure to allege quasi-jurisdictional facts, without which court cannot properly proceed, does not render judgment void or assailable collaterally.—Malone v. Meres, 109 So. 677, 91 Fla. 709.

Jurisdiction of appellate court judge serving in district other than his residence cannot be challenged for irregularity in procedure designating judge by collateral attack on judgment rendered.—State v. Marsh, 168 N.E. 473, 121 Ohio St. 321, demurrer sustained 169 N.E. 564, 121 Ohio St. 477.

Whether a judgment is correct on facts or based on a valid complaint is a question of exercise of jurisdiction, not of lack of jurisdiction.—Schuster v. Schuster, 73 P.2d 1345, 51 Ariz. 1.

47. U.S.—Warmsprings Irr. Dist. v. May, C.C.A.Or., 117 F.2d 802—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352—Wyman v. Newhouse, C.C.A.N.Y., 93 F.2d 313, 115 A.L.R. 460, certiorari denied 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.
Ala.—**Corpus Juris cited in** Bond v. Avondale Baptist Church, 194 So. 833, 835, 239 Ala. 366.
Ariz.—Hallford v. Industrial Commission, 159 P.2d 305—Hershey v. Banta, 99 P.2d 81, 55 Ariz. 93, followed in Hershey v. Republic Life Ins. Co., 99 P.2d 85, 55 Ariz. 104—Collins v. Superior Court in and for Maricopa County, 62 P.2d 131, 48 Ariz. 381.
Cal.—Ex parte Cohen, 290 P. 512, 107 Cal.App. 288.
Fla.—Horn v. City of Miami Beach, 194 So. 620, 142 Fla. 178—Malone v. Meres, 109 So. 677, 91 Fla. 709.
Ga.—Thompson v. Continental Gin Co., App., 37 S.E.2d 819.
Ill.—Barnard v. Michael, 63 N.E.2d 858, 392 Ill. 130—Wood v. First Nat. Bank of Woodlawn, 50 N.E.2d 830, 383 Ill. 515, certiorari denied 64 S.Ct. 531, 321 U.S. 765, 88 L.Ed. 1061.
Ind.—Calumet Teaming & Trucking Co. v. Young, 33 N.E.2d 109, 218 Ind. 468, rehearing denied 33 N.E. 2d 583, 218 Ind. 468.
Ky.—Rollins v. Board of Drainage Com'rs of McCracken County for Mayfield Drainage Dist. No. 1, 136 S.W.2d 1094, 281 Ky. 771—Covington Trust Co. of Covington, v. Owens, 129 S.W.2d 186, 278 Ky. 695—Dean v. Brown, 88 S.W.2d 298, 261 Ky. 593.
Md.—Fooks' Ex'rs v. Ghingher, 192 A. 782, 786, 172 Md. 612, certiorari denied Phillips v. Ghingher, 58 S. Ct. 47, 302 U.S. 726, 82 L.Ed. 561.
Mich.—Life Ins. Co. of Detroit v. Burton, 10 N.W.2d 315, 306 Mich. 81—Adams v. Adams, 8 N.W.2d 70, 304 Mich. 290—Jackson City Bank & Trust Co. v. Fredrick, 260 N.W. 908, 271 Mich. 538.
Mont.—Ex parte Lockhart, 232 P. 133, 72 Mont. 136.
N.J.—Weiner v. Wittman, 27 A.2d 866, 129 N.J.Law 35.
N.Y.—In re Rudgers, 294 N.Y.S. 142, 250 App.Div. 359—Universal Credit Co. v. Blinderman, 288 N.Y.S. 79, 158 Misc. 917.
Ohio.—Terry v. Claypool, 65 N.E.2d 883, 887, 77 Ohio App. 77.
Pa.—Mamlin v. Tener, 23 A.2d 90, 146 Pa.Super. 593—Commonwealth ex rel. Howard v. Howard, 10 A. 2d 779, 138 Pa.Super. 505—Kimple v. Standard Life Ins. Co., Com.Pl., 53 Pa.Dist. & Co. 174, 3 Lawrence L.J. 126.
Tenn.—Lynch v. State ex rel. Killebrew, 166 S.W.2d 397, 179 Tenn. 339.
Tex.—Burrage v. Hunt, Civ.App., 147 S.W.2d 532—Walton v. Stinson, Civ.App., 140 S.W.2d 497, error refused—Harrison v. Barngrover, Civ.App., 72 S.W.2d 971, error refused, certiorari denied 55 S.Ct. 639, 294 U.S. 731, 79 L.Ed. 1260—Wilkinson v. Owens, Civ.App., 72 S.W.2d 330—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.
34 C.J. p 532 note 35.
Necessity of jurisdiction of person see supra § 19.

48. U.S.—First Nat. Bank v. Cunningham, C.C.Ky., 48 F. 510.
Okl.—Welch v. Ladd, 116 P. 573, 29 Okl. 93.
Appearance conferring jurisdiction see supra § 26.

Withdrawing motion to vacate fraudulent judgment obtained in the absence of defendant does not constitute "appearance," and judgment is impeachable collaterally.—Dyer v. Johnson, Tex.Civ.App., 19 S.W.2d 421, error dismissed.

49. Va.—Moore v. Smith, 15 S.E.2d 48, 177 Va. 621—Raub v. Otterback, 16 S.E. 933, 89 Va. 645.

50. Colo.—Lafitte v. Salisbury, 126 P. 1104, 22 Colo.App. 641.
Okl.—In re Protest of St. Louis-San

which will justify the trial court in determining the matter.[51] Any question as to jurisdiction or as to the validity of the judgment which does not show on the face of the record must be raised and brought to the attention of the court by appropriate pleadings.[52] In jurisdictions in which the want of jurisdiction must appear on the face of the record, it is not sufficient merely to allege and prove the absence of jurisdictional facts, but it must be alleged and proved that the record affirmatively shows the absence of such facts.[53]

Orders and decisions of administrative boards and tribunals acting in a judicial or quasi-judicial capacity, with respect to which a direct or indirect means of judicial review is available, cannot be collaterally attacked except for jurisdictional defects appearing on the face of the record.[54]

§ 422. —— Want of or Defects in Process or Service

a. Want of process or service
b. Defects in process or service
c. Substituted or constructive service

a. Want of Process or Service

A failure to issue process or to make service thereof on defendant is ground for collateral attack, unless such service is waived by a voluntary appearance or otherwise.

In a personal action the issuance of process and the service thereof on defendant is necessary to confer jurisdiction on the court, as discussed supra § 23, and if no process is issued,[55] or if service is not made on defendant,[56] the judgment will be subject to collateral attack unless service is waived by voluntary appearance or otherwise.[57] However, a judgment rendered in accordance with the requirements of statute, although without actual notice to defendant of the pendency of the action, has been held conclusive on the parties until set aside by some direct proceeding for that purpose.[58] A judgment will not be set aside, on collateral attack, because of the want of service of a certified copy of the complaint or bill, such service not being neces-

Francisco Ry. Co., 11 P.2d 189, 157 Okl. 131—Wilson v. Hornecker, 249 P. 317, 119 Okl. 120.
34 C.J. p 532 note 31.

A judgment of a probate court can be impeached on jurisdictional grounds only where party attacking it alleges definite reasons why it is void, a mere qualified general denial of jurisdiction being insufficient.—Winter v. Klein-Schultz, 76 P.2d 1051, 182 Okl. 231.

51. Fla.—Beaty v. Inlet Beach, 9 So. 2d 735, 151 Fla. 495, motion denied and modified on other grounds 10 So.2d 807, 152 Fla. 266.

52. Utah.—Intermill v. Nash, 75 P. 2d 157, 94 Utah 271.

Jurisdiction not lost by factual revelations

Where diversity of citizenship existed and both parties in action involving title to realty submitted to jurisdiction of federal court in Mississippi and were in accord with view that land was in Mississippi rather than in Louisiana, and no factual revelations in contrariety with jurisdictional averments in complaint were developed, federal court in Mississippi retained jurisdiction and resulting judgment was not void on its face and could not be collaterally attacked in subsequent proceeding in federal court in Louisiana involving identical land.—Iselin v. La Coste, C.C.A.La., 147 F.2d 791.

53. Fla.—**Corpus Juris cited in** White v. Crandall, 143 So. 871, 880, 105 Fla. 70.
Ky.—White v. White, 172 S.W.2d 72, 294 Ky. 563—May v. Sword, 33 S. W.2d 314, 236 Ky. 412—Mussman v. Pepples, 22 S.W.2d 605, 232 Ky. 254.
Okl.—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—Protest of Stanolind Pipe Line Co., 32 P.2d 869, 168 Okl. 281—Protest of Gulf Pipe Line Co. of Oklahoma, 32 P. 2d 42, 168 Okl. 136.
34 C.J. p 532 note 32.

Want of notice

To impeach judgment collaterally for want of notice to parties, complaint must allege what record of judgment discloses on subject of notice.—Clark v. Clark, 172 N.E. 124, 202 Ind. 104.

54. Minn.—Martin v. Wolfson, 16 N. W.2d 884, 218 Minn. 557.
Tex.—Nacogdoches County v. Jinkins, Civ.App., 140 S.W.2d 901.
Orders and decisions of administrative boards as subject to collateral attack see supra § 407.

55. Ala.—Guy v. Pridgen & Holman, 118 So. 229, 22 Ala.App. 595.
La.—Key v. Jones, App., 181 So. 631.
Miss.—Schwartz Bros. & Co. v. Stafford, 148 So. 794, 166 Miss. 397.
34 C.J. p 533 note 38.

56. Cal.—Regoli v. Fancher, 34 P. 2d 477, 1 Cal.2d 276—Gray v. Hall, 265 P. 246, 203 Cal. 306—McAllister v. Superior Court In and For Alameda County, 82 P.2d 462, 28 Cal. App.2d 160.
Ky.—Ely v. U. S. Coal & Coke Co., 49 S.W.2d 1021, 243 Ky. 725.
La.—Key v. Jones, App., 181 So. 631.
Miss.—Paepcke-Leicht Lumber Co. v. Savage, 101 So. 709, 137 Miss. 11.
Pa.—In re Komara's Estate, 166 A. 577, 311 Pa. 135.
Tex.—Lipscomb v. Japhet, Civ.App., 18 S.W.2d 786, error dismissed—Cauble v. Cauble, Civ.App., 283 S. W. 914.
W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W.Va. 395.
34 C.J. p 533 note 39.

A partition judgment or decree, entered without service of process, is subject to collateral attack.
La.—Spears v. Spears, 136 So. 614, 173 La. 294.
N.Y.—Stevens v. Breen, 16 N.Y.S.2d 909, 258 App.Div. 423, affirmed 27 N.E.2d 987, 283 N.Y. 196.

57. Fla.—Baptist v. Baptist, 178 So. 846, 130 Fla. 702.
Ind.—Sonken v. Gemmill, 151 N.E. 355, 94 Ind.App. 114.
La.—Key v. Jones, App., 181 So. 631.
Okl.—Miller v. Madigan, 215 P. 742, 90 Okl. 17.
W.Va.—Hayhurst v. J. Kenny Transfer Co., 158 S.E. 506, 110 W.Va. 395.
34 C.J. p 533 note 40.

Presumption

It will be presumed that, by waiving service of process and entry of appearance, defendant consented to confer jurisdiction on court rendering judgment, precluding collateral attack.—Grand Lodge, Colored K. P., v. Kidd, Tex.Civ.App., 10 S.W.2d 420.

58. Conn.—Hurlbut v. Thomas, 10 A. 556, 55 Conn. 181, 3 Am.S.R. 43.
Pa.—Ferguson v. Yard, 30 A. 517, 164 Pa. 586.

sary to confer jurisdiction.[59] A judgment correcting a former entry by a nunc pro tunc order cannot be attacked collaterally by showing that notice was not given.[60]

b. Defects in Process or Service

A defect in the form of the process, or in the manner of service thereof, is ground for a collateral attack only where the defect is such that the process amounts to no process at all or the service does not constitute a legal service.

A defect in the form or matter of the summons or other process not absolutely destructive of its validity,[61] or an irregularity or defect in the service of the process on defendant which, although material and available on a direct attack, is sufficient to give notice of the proceedings,[62] does not deprive the court of jurisdiction and therefore does not expose the judgment to collateral impeachment, particularly where the defect or irregularity is amendable, and is cured by a failure to object thereto in time.[63] Where, however, the defect in the process is so radical that it amounts to no process at all,[64] as where it wholly fails to give the party the information it is expected to convey,[65] or where the attempted service is so faulty that it does not constitute a legal service on defendant or amounts to no service at all,[66] there is a want of jurisdiction and the judgment will be impeachable collaterally.

59. Ariz.—Jeter v. Sapp, 55 P.2d 812, 47 Ariz. 325.
Wash.—Munch v. McLaren, 38 P. 205, 9 Wash. 676.
34 C.J. p 534 note 44 [d].

In action against several defendants, failure to deliver copy of petition to defendant first served as required by statute, does not subject the judgment to collateral attack.—Burkard v. Hahne, Mo.App., 17 S.W. 2d 636.

60. Ark.—Hall v. Castleberry, 161 S. W.2d 948, 204 Ark. 200—Miller Land & Lumber Co. v. Gurley, 208 S.W. 426, 137 Ark. 146—King v. Clay, 34 Ark. 291.

61. Mo.—**Corpus Juris quoted in** Zorn v. Farrel, 142 S.W.2d 879, 883, 235 Mo.App. 118—**Corpus Juris quoted in** Burkard v. Hahne, App., 17 S.W.2d 636.
34 C.J. p 534 note 43.

Unsigned writ
A writ commencing suit, if not signed by court clerk, is voidable only, and decree or proceeding based thereon is not subject to collateral attack.—Nicholas Land Co. v. Crowder, W.Va., 32 S.E.2d 563—34 C.J. p 534 note 43 [e].

Omission of seal
Tex.—Rhoads v. Daly General Agency, Civ.App., 152 S.W.2d 461, error refused.
34 C.J. p 534 note 43 [f].

62. Fla.—State ex rel. Gore v. Chillingworth, 171 So. 649, 126 Fla. 645.
Ky.—Furlong v. Finneran, 4 S.W.2d 378, 223 Ky. 558.
Mo.—**Corpus Juris quoted in** Zorn v. Farrel, 142 S.W.2d 879, 883, 235 Mo. App. 118—**Corpus Juris cited in** Burkard v. Hahne, App., 17 S.W.2d 636.
N.C.—Nall v. McConnell, 190 S.E. 210, 211 N.C. 258.
Tex.—Weaver v. Garrietty, Civ.App., 84 S.W.2d 878—Carlton v. Hoff, Civ.App., 292 S.W. 642—Cockrell v. Steffens, Civ.App., 284 S.W. 608.
Va.—Wood v. Kane, 129 S.E. 327, 143 Va. 281—American Ry. Express Co. v. F. S. Royster Guano Co., 126 S. E. 678, 141 Va. 602, affirmed 47 S. Ct. 355, 273 U.S. 274, 71 L.Ed. 642.
Wash.—Peha's University Food Shop v. Stimpson Corporation, 31 P.2d 1023, 177 Wash. 406.
Wyo.—Whitaker v. First Nat. Bank, 231 P. 691, 32 Wyo. 238.
34 C.J. p 534 note 44.

Alias summons
Default judgment may not be collaterally attacked merely because alias summons was served on defendant after plaintiff's death and before revivor.—Adams v. Carson, 25 P.2d 653, 165 Okl. 161.

Service by an unauthorized or disqualified person has been held a mere irregularity which does not expose the judgment to collateral attack.—Burke v. Interstate Savings & Loan Ass'n, 64 P. 379, 25 Mont. 315—34 C. J. p 534 note 44 [b].

Service on officer or agent of corporation held mere irregularity
Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.
34 C.J. p 534 note 44 [c].

Service on nominal defendant
In a personal action, the service of summons on a nominal defendant in county where action is brought does not authorize the issuance of summons to another county for real defendant but such issue must be raised directly where subject matter of action is within jurisdiction of court and is not available in a collateral action.—Wistrom v. Forsling, 14 N.W.2d 217, 144 Neb. 638.

Defect in acceptance of service
The omission of the statement of the place of acceptance of service of summons in mortgage foreclosure action in the written record of the acceptance does not render the foreclosure decree subject to collateral attack by the mortgagor in proceedings by him on a fire policy, wherein he seeks to establish an insurable interest in the property by proof that the mortgage foreclosure proceeding was invalid.—Abraham v. New York Underwriters Ins. Co., 196 S.E. 531, 187 S.C. 70.

63. Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.
Tex.—Smith v. Switzer, Civ.App., 293 S.W. 850, affirmed Switzer v. Smith, Com.App., 300 S.W. 31, 68 A.L.R. 377.
34 C.J. p 535 note 48.

64. W.Va.—New Eagle Gas Coal Co. v. Burgess, 111 S.E. 508, 90 W. Va. 541.
34 C.J. p 535 note 45.

Warning order
In action against nonresident infants, warning order attorney's letter addressed to infants' father did not satisfy statutory requirements for notice, and therefore judgment could be collaterally attacked.—Ely v. U. S. Coal & Coke Co., 49 S.W.2d 1021, 243 Ky. 725.

65. Mo.—Howell v. Sherwood, 112 S. W. 50, 213 Mo. 565.
34 C.J. p 535 note 46.

66. Cal.—Gray v. Hall, 265 P. 246, 203 Cal. 306.
Mo.—Liechty v. Kansas City Bridge Co., 162 S.W.2d 275.
Okl.—Lynch v. Collins, 233 P. 709, 106 Okl. 133.
Pa.—Wood v. Kuhn, Com.Pl., 22 Erie Co. 236.
34 C.J. p 535 note 47.

Service of process on an agent of a corporation who was beneficially interested in suit as an adversary against corporation, was void, and was subject to collateral attack in case where it appeared from face of record that such service was not made in compliance with statute.—Boston Acme Mines Development Co. v. Clawson, 240 P. 165, 66 Utah 103.

Personal service out of state on a nonresident defendant in a personal

c. Substituted or Constructive Service

A defect in substituted or constructive service is ground for collateral attack where it constitutes a failure to comply with the statutory requirements in some essential particular.

A judgment rendered on constructive service of process, the requirements of the statute having been complied with, is as much protected against collateral impeachment as any other judgment,[67] and it cannot be shown collaterally that defendant was not in fact a nonresident as alleged,[68] that he had no property subject to the jurisdiction of the court,[69] or that the published notice did not in fact come to the knowledge of defendant.[70] A judgment against a resident, however, is subject to collateral attack where it is based on notice given in conformity with a statutory provision for service on a nonresident only by publication,[71] unless an appearance is made by or for the resident.[72]

Failure to comply strictly with the provisions of the statute in some essential and vital particular will deprive the court of jurisdiction, and so expose the judgment to collateral impeachment,[73] as where the published notice is wholly insufficient to warn defendant of the action or to give him the information he is entitled to expect from it,[74] but a mere defect or irregularity in making service by publication will not have this effect;[75] nor will the judgment be collaterally assailable although the affidavit on which the order of publication was based was defective or insufficient,[76] or false in fact,[77] and this is especially true where the court has judicially considered or adjudicated its sufficiency.[78] Where, however, the affidavit fails in any jurisdictional particular, the judgment is void and subject to collateral attack.[79]

§ 423. —— Defects in Return or Proof of Service

Mere defects, irregularities, or informalities in the return or proof of service of process do not constitute grounds for collateral impeachment of the judgment.

A judgment cannot be impeached in a collateral proceeding on the ground that the return or proof of service of process was defective, irregular, or informal;[80] nor, as has been held, can it be so im-

action for a money judgment, or to bar the right of a beneficiary to collect insurance policy, is void and subject to collateral attack.—Royal Neighbors of America v. Fletcher, 227 P. 426, 99 Okl. 297.

67. Ala.—**Corpus Juris quoted in** Bond v. Avondale Baptist Church, 194 So. 833, 835, 239 Ala. 366.
Fla.—Cone Bros. Const. Co. v. Moore, 193 So. 288, 141 Fla. 420.
Kan.—**Corpus Juris quoted in** Barrett v. Hurd, 18 P.2d 184, 185, 136 Kan. 799.
Neb.—**Corpus Juris quoted in** Douglas County v. Feenan, 18 N.W.2d 740, 743, 146 Neb. 156.
Tex.—Wilson v. Beck, Civ.App., 286 S.W. 315.
34 C.J. p 535 note 50.
Sufficiency of substituted or constructive service generally see supra § 24.

68. Neb.—**Corpus Juris quoted in** Douglas County v. Feenan, 18 N.W. 2d 740, 743, 146 Neb. 156.
34 C.J. p 535 note 51.

69. Minn.—Stone v. Myers, 9 Minn. 303, 86 Am.D. 104.
S.D.—Bunker v. Taylor, 83 N.W. 555, 13 S.D. 433.

70. Colo.—Brown v. Whetstone, 138 P. 61, 25 Colo.App. 371.
Kan.—**Corpus Juris quoted in** Barrett v. Hurd, 18 P.2d 184, 185, 136 Kan. 799.

71. Neb.—Coffin v. Maitland, 20 N. W.2d 310, 146 Neb. 477.
34 C.J. p 535 note 54.

72. Neb.—Coffin v. Maitland, 20 N. W.2d 310, 146 Neb. 477.

73. Mo.—Dent v. Investors' Sec. Ass'n, 254 S.W. 1080, 300 Mo. 552—Haake v. Union Bank & Trust Co., App., 54 S.W.2d 459.
N.Y.—Copperfretti v. Shephard, 271 N.Y.S. 284, 241 App.Div. 872.
34 C.J. p 535 note 55.

74. Ind.—Schissel v. Dickson, 28 N. E. 540, 129 Ind. 139.
34 C.J. p 535 note 56.

75. Ariz.—Noonan v. Montgomery, 209 P. 302, 24 Ariz. 311, 25 A.L.R. 1251.
Iowa.—State v. Smith, 188 N.W. 659.
Mo.—Williams v. Luecke, App., 152 S.W.2d 991.
34 C.J. p 535 note 57.

76. U.S.—Butler v. McKey, C.C.A. Cal., 138 F.2d 373, certiorari denied 64 S.Ct. 636, 321 U.S. 780, 88 L.Ed. 1073—Fisher v. Jordan, C.C.A.Tex., 116 F.2d 183, certiorari denied Jordan v. Fisher, 61 S.Ct. 734, 312 U. S. 697, 85 L.Ed. 1132.
Ariz.—Hershey v. Banta, 99 P.2d 81, 55 Ariz. 93, followed in Hershey v. Republic Life Ins. Co., 99 P.2d 85, 55 Ariz. 104—Noonan v. Montgomery, 209 P. 302, 24 Ariz. 311, 25 A. L.R. 1251.
Kan.—Scott v. Linn, 268 P. 84, 126 Kan. 195.
Okl.—Robins v. Lincoln Terrace Christian Church, 75 P.2d 874, 181 Okl. 615.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
34 C.J. p 536 note 58.
Construction in support of judgment
Idaho.—Harpold v. Doyle, 102 P. 153, 16 Idaho 671, 694.

77. Kan.—Marler v. Stewart Farm Mortg. Co., 207 P. 823, 111 Kan. 488.
34 C.J. p 536 note 59.

78. Or.—George v. Nowlan, 64 P. 1, 38 Or. 537.
34 C.J. p 536 note 60.
Decision of court as to its own jurisdiction generally see infra § 427.

79. Okl.—Chaplin v. First Bank of Hitchcock, 181 P. 497, 72 Okl. 293.
34 C.J. p 536 note 61.
Affidavit for warning order in verified petition, alleging that defendant was nonresident and giving postoffice address, but not alleging belief that he was then absent from state, did not warrant issuance of warning order, and judgment rendered thereon was subject to collateral attack.—Leonard v. Williams, 265 S.W. 618, 205 Ky. 218.

80. Ariz.—Noonan v. Montgomery, 209 P. 302, 24 Ariz. 311, 25 A.L.R. 1251.
Cal.—City of Salinas v. Luke Kow Lee, 18 P.2d 335, 217 Cal. 252.
Idaho.—Blandy v. Modern Box Mfg. Co., 232 P. 1095, 40 Idaho 356.
Mo.—McEwen v. Sterling State Bank, 5 S.W.2d 702, 222 Mo.App. 660.
Tex.—Carlton v. Hoff, Civ.App., 292 S.W. 642.
Va.—Wood v. Kane, 129 S.E. 327, 143 Va. 231.
34 C.J. p 536 note 63.
Conclusiveness of return generally see the C.J.S. title Process § 100, also 50 C.J. p 574 note 94–p 577 note 17.

peached on the ground that the return showing service was false,[81] particularly after the lapse of a long period of time.[82] A judgment, however, may be collaterally impeached on the ground that there was no return,[83] that the return was made by the wrong person,[84] or that the return or proof wholly failed to show the facts necessary to give the court jurisdiction.[85]

§ 424. —— Unauthorized Appearance

By the weight of authority, an attorney's unauthorized appearance for a party against whom a judgment is rendered is no ground for collaterally attacking the judgment. This rule has been held not to apply in case of a judgment against a nonresident.

By the weight of authority, it is not permissible, in any collateral proceeding, for a party to contest the validity of a domestic judgment against him on the ground that an attorney who appeared for him in the action had no authority to do so.[86] In some states, however, the rule obtains that the authority of the attorney may be controverted in such a case.[87]

Nonresidents. In an action on a domestic judgment against nonresidents, it has been held that it may be shown that such judgment was rendered on an unauthorized appearance for defendant, and without service of process.[88]

§ 425. —— Presumptions as to Jurisdiction

a. Courts of general or superior jurisdiction
b. Courts or tribunals of inferior or limited jurisdiction
c. Federal courts
d. Probate courts

a. Courts of General or Superior Jurisdiction

(1) In general
(2) Process and service
(3) Exercise of special statutory powers

(1) In General

In case of a collateral attack on a domestic judgment of a court of general jurisdiction, every reasonable presumption will be indulged in support of the regularity and validity of the judgment; and, unless the contrary affirmatively appears from the face of the record, it generally will be presumed that the court had jurisdiction of the subject matter and of the parties, and that facts existed which were necessary to give the court jurisdiction or power to render the particular judgment.

As a general rule, a judgment rendered by a court of competent jurisdiction is presumed to be regular and valid until it is shown to be invalid by allegations and proof in a direct action or proceeding instituted for that purpose.[89] Accordingly, in case

81. Ala.—Smith v. Gaines, 97 So. 739, 210 Ala. 245.
N.J.—Fidelity Union Trust Co. v. Gerber Bros. Realty Co., 199 A. 7, 123 N.J.Eq. 511—C. & D. Bldg. Corporation v. Griffithes, 157 A. 137, 109 N.J.Eq. 319.

82. W.Va.—Hatfield v. U. S. Coal & Coke Co., 161 S.E. 572, 111 W.Va. 289.

83. Colo.—Munson v. Pawnee Cattle Co., 126 P. 275, 53 Colo. 337.

84. Mo.—Stuckert v. Thompson, 164 S.W. 692, 181 Mo.App. 518.
34 C.J. p 537 note 65.

85. Cal.—Regoli v. Fancher, 34 P.2d 477, 1 Cal.2d 276.
34 C.J. p 537 note 66.

Proof held insufficient

Where a judgment is silent as to notice, evidence of an application for, and issuance of, citation to be served by publication on a nonresident of the state does not constitute such proof as is required to show that the judgment was rendered on notice by publication alone, in the absence of the sheriff's return on such citation, or of any evidence as to what else the record may show respecting service thereof.—McCarthy v. Burtis, 22 S.W. 422, 3 Tex.Civ.App. 439.

86. Ala.—Zorn v. Lowery, 181 So. 249, 236 Ala. 62.
Ind.—Hollinger v. Reeme, 36 N.E. 1114, 138 Ind. 363, 46 Am.S.R. 402, 24 L.R.A. 46—Wiley v. Pratt, 23 Ind. 628—Sherrard v. Nevius, 2 Ind. 241, 52 Am.D. 508—Hunter v. Harrell, 163 N.E. 295, 88 Ind.App. 68.
Mass.—Long v. MacDougall, 173 N.E. 507, 273 Mass. 386.
Mo.—Johnson v. Baumhoff, 18 S.W. 2d 13, 322 Mo. 1017—Stuart v. Dickinson, 235 S.W. 446, 290 Mo. 516—Hemphill Lumber Co. v. Arcadia Timber Co., App., 52 S.W.2d 750.
34 C.J. p 537 note 68.
Impeachment of foreign judgment for unauthorized appearance see infra § 893.

Statute not applicable

A statute providing that court may at any stage of proceedings relieve party for whom attorney has assumed to act without authority from consequences of attorney's acts applies only where party challenges attorney's authority during progress of suit, and does not apply to collateral attack four years after adverse decree was rendered.—Louth v. Woodard, 236 P. 480, 114 Or. 603.

87. Ill.—Weber v. Powers, 72 N.E. 1070, 213 Ill. 370, 68 L.R.A. 610.
34 C.J. p 537 note 69.
Unauthorized appearance as fraud as ground for collateral attack see infra § 434.

88. N.Y.—Vilas v. Plattsburgh & M. R. Co., 25 N.E. 941, 123 N.Y. 440, 20 Am.S.R. 771, 9 L.R.A. 844.
34 C.J. p 537 note 70.

89. Ala.—Hurt v. Knox, 126 So. 110, 220 Ala. 448.
Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
Ga.—Coclin v. Taylor, 137 S.E. 852, 36 Ga.App. 577.
La.—Navarrette v. Joseph Laughlin, Inc., App., 20 So.2d 313, reversed on other grounds Navarrette v. Laughlin, 24 So.2d 672, 209 La. 417—Bell v. Canal Bank & Trust Co., App., 184 So. 382, reheard 187 So. 295, affirmed 190 So. 359, 193 La. 142.
Miss.—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604.
Mo.—Lewis v. Lewis, App., 176 S.W. 2d 556.
N.J.—Henderson v. Weber, 28 A.2d 90, 129 N.J.Law 59.
N.D.—Olson v. Donnelly, 294 N.W. 666, 70 N.D. 370.
Okl.—Drum v. Ætna Casualty & Surety Co., 116 P.2d 715, 189 Okl. 307.
Pa.—Moeller v. Washington County, 44 A.2d 252, 352 Pa. 640.

of a collateral attack on a judgment of a domestic court of general or superior jurisdiction, by a party thereto, the judgment imports verity, and every reasonable presumption will be indulged in support of its regularity and validity,[90] and the burden is on a party collaterally attacking a judgment to over-

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

In proceeding for equitable relief see supra § 393.

In proceeding to vacate or set aside see supra § 297.

The chief distinction between "collateral" and "direct attacks" on a judgment is that in the former the record alone may be inspected, and is conclusively presumed to be correct, while in the latter the facts may be shown, and thus the judgment itself on appeal may be reversed or modified.

Ala.—A. B. C. Truck Lines v. Kenemer, 25 So.2d 511—Wise v. Miller, 111 So. 913, 215 Ala. 660.

Cal.—Gray v. Hall, 265 P. 246, 254, 203 Cal. 306—People ex rel. Pollock v. Bogart, 133 P.2d 360, 58 Cal.App.2d 831—Application of Behymer, 19 P.2d 829, 130 Cal.App. 200.

90. U.S.—Kalb v. Feuerstein, Wis., 60 S.Ct. 343, 308 U.S. 433, 84 L.Ed. 370, mandate conformed to 291 N. W. 840, 234 Wis. 507—Kalb v. Luce, 60 S.Ct. 343, 308 U.S. 433, 84 L.Ed. 370, mandate conformed to 291 N.W. 841, 234 Wis. 509—Johnson v. Zerbst, Ga., 58 S.Ct. 1019, 304 U.S. 458, 82 L.Ed. 1461—Michener v. Johnston, C.C.A.Cal., 141 F. 2d 171—Pen-Ken Gas & Oil Co. v. Warfield Natural Gas Co., C.C.A. Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L. Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 303, 88 L.Ed. 1089—Mothershead v. King, C.C.A.Mo., 112 F.2d 1004—Franzeen v. Johnston, C.C.A.Cal., 111 F.2d 817—Thompson v. King, C.C.A.Mo., 107 F.2d 307—In re Maier Brewing Co., D.C.Cal., 38 F.Supp. 806—Erwin v. Sanford, D.C.Ga., 27 F.Supp. 892—U. S. v. U. S. Fidelity & Guaranty Co., D.C.Okl., 24 F.Supp. 961, modified on other grounds 106 F.2d 804, reversed on other grounds 60 S.Ct. 653, 309 U.S. 506, 84 L.Ed. 894.

Ala.—Anthony v. Anthony, 128 So. 440, 221 Ala. 221—Hurt v. Knox, 126 So. 110, 220 Ala. 448.

Ark.—Adams v. Van Buren County, 139 S.W.2d 9, 200 Ark. 269—Rice v. Moore, 109 S.W.2d 148, 194 Ark. 585—Brown v. Arkebauer, 31 S.W. 2d 530, 182 Ark. 354—Hicks v. Norsworthy, 4 S.W.2d 897, 176 Ark. 786—Stumpff v. Louann Provision Co., 292 S.W. 106, 173 Ark. 192—Road Improvement Dist. No. 4 of Saline County v. Ball, 281 S.W. 5, 170 Ark. 522.

Cal.—Wells Fargo & Co. v. City and County of San Francisco, 152 P.2d 625, 25 Cal.2d 37—Ex parte Bell, 122 P.2d 22, 9 Cal.2d 488—City of Salinas v. Luke Kow Lee, 13 P.2d 335, 217 Cal. 252—Hamblin v. Superior Court of Los Angeles County, 233 P. 337, 195 Cal. 364, 43 A. L.R. 1509—Hosner v. Skelly, App., 164 P.2d 573—Rico v. Nasser Bros. Realty Co., 137 P.2d 861, 58 Cal. App.2d 878—Marvin v. Marvin, 116 P.2d 151, 46 Cal.App.2d 551—McAllister v. Superior Court In and For Alameda County, 82 P.2d 462, 28 Cal.App.2d 160—Greenwood v. Greenwood, 297 P. 589, 112 Cal. App. 691—Fletcher v. Superior Court of Sacramento County, 250 P. 195, 79 Cal.App. 468—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704.

Conn.—Doris v. McFarland, 156 A. 52, 113 Conn. 594.

Fla.—Horn v. City of Miami Beach, 194 So. 620, 142 Fla. 178—Sawyer v. State, 113 So. 736, 94 Fla. 60, followed in Dwyer v. State, 116 So. 726, 95 Fla. 846.

Ga.—Chance v. Chance, 5 S.E.2d 399, 60 Ga.App. 389—Georgia Creosoting Co. v. Moody, 154 S.E. 294, 41 Ga.App. 701.

Idaho.—State v. Mundell, 158 P.2d 818—State v. Miller, 10 P.2d 955, 52 Idaho 33—Karlson v. National Park Lumber Co., 269 P. 591, 46 Idaho 595—Blandy v. Modern Box Mfg. Co., 232 P. 1095, 40 Idaho 356.

Ill.—People ex rel. Warner v. Lindheimer, 19 N.E.2d 336, 370 Ill. 424—People v. Brewer, 160 N.E. 76, 328 Ill. 472.

Ind.—Clark v. Clark, 172 N.E. 124, 202 Ind. 104—Berry-Enright Lumber Co. v. Gardner, 7 N.E.2d 523, 104 Ind.App. 9.

Iowa.—In re Haga's Estate, 294 N.W. 589, 229 Iowa 380.

Kan.—**Corpus Juris quoted in** John Hancock Mut. Life Ins. Co. v. Vandeventer, 44 P.2d 251, 254, 141 Kan. 767.

Ky.—Skidmore v. Napier, 166 S.W.2d 439, 292 Ky. 311—**Corpus Juris quoted in** Goosling v. Varney's Trustee, 105 S.W.2d 178, 182, 268 Ky. 394—McFarland v. Hudson, 89 S.W.2d 877, 262 Ky. 183—Dean v. Brown, 88 S.W.2d 298, 261 Ky. 593—Hall v. Bates, 77 S.W.2d 403, 257 Ky. 61—Houston's Guardian (now Luker) v. Luker's Former Guardian, 69 S.W.2d 1014, 253 Ky. 602—Well's Adm'x v. Heil, 47 S.W.2d 1041, 243 Ky. 282—Ramsey's Ex'r v. Ramsey, 26 S.W.2d 37, 233 Ky. 507—Wolverton v. Baynham, 10 S. W.2d 837, 226 Ky. 214—Mitchell Mill Remnant Corporation v. Long, 3 S.W.2d 639, 223 Ky. 242—Dye Bros. v. Butler, 272 S.W. 426, 209 Ky. 199.

Me.—Bisbee v. Knight, 26 A.2d 637, 139 Me. 1.

Mich.—Life Ins. Co. of Detroit v. Burton, 10 N.W.2d 315, 306 Mich. 81.

Mo.—State ex rel. Lane v. Cornell, 171 S.W.2d 687, 351 Mo. 1—Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 333 Mo. 437—Ray v. Ray, 50 S.W.2d 142, 330 Mo. 530—Van Emelen v. Van Emelen, App., 166 S.W.2d 802—Colorado Milling & Elevator Co. v. Rolla Wholesale Grocery Co., App., 102 S.W.2d 681.

Mont.—**Corpus Juris quoted in** West v. Capital Trust & Savings Bank, 124 P.2d 572, 575, 113 Mont. 130—State ex rel. Enochs v. District Court of Fourth Judicial Dist. in and for Missoula County, 123 P.2d 971, 113 Mont. 227—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.

Nev.—State Bar of Nevada v. McCluskey, 71 P.2d 1046, 58 Nev. 114—Pease v. Pease, 217 P. 239, 47 Nev. 124.

N.J.—Henderson v. Weber, 28 A.2d 90, 129 N.J.Law 59—McMahon v. Amoroso, 154 A. 840, 108 N.J.Eq. 263, certiorari denied Diamond v. McMahon, 52 S.Ct. 31, 284 U.S. 652, 76 L.Ed. 553.

N.Y.—In re Wade's Will, 61 N.Y.S.2d 16, 270 App.Div. 712, appeal granted 62 N.Y.S.2d 850, 270 App.Div. 982.

N.D.—Olson v. Donnelly, 294 N.W. 666, 70 N.D. 370—Tuttle v. Tuttle, 181 N.W. 898, 48 N.D. 10.

Ohio.—Central Hyde Park Sav. & Loan Co. v. Feck, 67 N.E.2d 44, 77 Ohio App. 343—F. A. Requarth Co. v. Holland, App., 66 N.E.2d 329—Michigan State Industries v. Fischer Hardware Co., 197 N.E. 785, 50 Ohio App. 153.

Okl.—Fernow v. Gubser, 162 P.2d 529—Lee v. Harvey, 156 P.2d 134, 195 Okl. 178—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—In re Crouch's Estate, 126 P.2d 994, 191 Okl. 74—**Corpus Juris cited in** Warren v. Stansbury, 126 P.2d 251, 253, 190 Okl. 554—Town of Watonga v. Crane Co., 114 P.2d 941, 189 Okl. 184—Myers v. Carr, 47 P.2d 156, 173 Okl. 335—Protest of St. Louis-San Francisco Ry. Co., 19 P.2d 162, 162 Okl. 62—Protest of St. Louis-San Francisco Ry. Co., 11 P.2d 189, 157 Okl. 131—Reliance Clay Products Co. v. Rooney, 10 P.2d 414, 157 Okl. 24—Harris v. Spurrier Lumber Co., 265 P. 637,

come such presumption and establish the invalidity | of the judgment[91] by competent and convincing

130 Okl. 99—Thomason v. Thompson. 253 P. 99, 123 Okl. 218.

Or.—American Cent. Ins. Co. v. Weller. 212 P. 803, 106 Or. 494.

Pa.—Commonwealth ex rel. McGlinn v. Smith. 24 A.2d 1, 344 Pa. 41—Commonwealth ex rel. McClenachan v. Reading. 6 A.2d 776, 336 Pa. 165.

Tenn.—Page v. Turcott, 167 S.W.2d 350, 179 Tenn. 491—Redmond v. Wardrep, 257 S.W. 394, 149 Tenn. 35.

Tex.—White v. White, 179 S.W.2d 503, 142 Tex. 499—Burton v. McGuire, Com.App., 41 S.W.2d 238—**Corpus Juris quoted in** Jackson v. Slaughter, Civ.App., 185 S.W.2d 759, 761—Burgess v. City and County of Dallas Levee Imp. Dist., Civ.App., 155 S.W.2d 402, error refused—Clark v. Pecos County State Bank, Civ.App., 147 S.W.2d 917—Hudson v. Norwood, Civ.App., 147 S.W.2d 826, error dismissed, judgment correct—Gamble v. Banneyer, Civ.App., 127 S.W.2d 955, affirmed 151 S.W.2d 586, 137 Tex. 7—Straus v. Shamblin, Civ.App., 120 S.W.2d 598, error dismissed—Askew v. Rountree, Civ.App., 120 S.W.2d 117—Williams v. Tooke, Civ.App., 116 S.W.2d 1114—Huselby v. Allison, Civ.App., 25 S.W.2d 1108—State Mortg. Corporation v. Garden, Civ.App., 11 S.W.2d 212—Bendy v. W. T. Carter & Bro., Civ. App., 5 S.W.2d 579, affirmed, Com. App., 14 S.W.2d 813—Cockrell v. Steffens, Civ.App., 284 S.W. 608.

Utah.—Salt Lake City v. Industrial Commission, 22 P.2d 1046, 1048, 82 Utah 179.

Vt.—Town of Manchester v. Town of Townshend, 2 A.2d 207, 110 Vt. 136.

Va.—Cole v. Farrier, 22 S.E.2d 18, 180 Va. 231—Mack v. Commonwealth, 15 S.E.2d 62, 177 Va. 921—Beck v. Semones' Adm'r, 134 S.E. 677, 145 Va. 429.

34 C.J. p 537 note 72.

Presumption of regularity and validity of judicial proceedings in general see Evidence § 145.

"The presumption in favor of the validity of a judgment arises from the fact that the judgment was rendered, and legal evidence of its rendition has been preserved."—Hannon v. Henson, Tex.Civ.App., 7 S.W.2d 613, 619, affirmed, Com.App., 15 S.W. 2d 579.

Courts within rule

(1) Circuit court.

Ky.—Goodman v. Board of Drainage Com'rs of McCracken County, Mayfield Creek Drainage Dist. No. 1, 16 S.W.2d 1036, 229 Ky. 189.

Mo.—Ray v. Ray, 50 S.W.2d 142, 330 Mo. 530—Van Emelen v. Van Emelen, App., 166 S.W.2d 802.

(2) County court.

Ark.—Fisher v. Cowan, 170 S.W.2d 603, 205 Ark. 722.

Ill.—People ex rel. Baird & Warner v. Lindheimer, 19 N.E.2d 336, 370 Ill. 424.

Okl.—Vinson v. Cook, 184 P. 97, 76 Okl. 46.

(3) Superior Court.—Clark v. Clark, 172 N.E. 124, 202 Ind. 104.

(4) Other courts within rule see 34 C.J. p 537 note 72 [b].

Collateral attack on judgment of justice's court see Justices Of The Peace § 115.

Particular judgments within rule

(1) A deficiency decree on foreclosure.—Roebke v. Love, 191 So. 122, 186 Miss. 609.

(2) A judgment foreclosing a land contract and awarding plaintiff vendor one fourth of the grain crops.—Sukut v. Sukut, 12 N.W.2d 536, 78 N.D. 154.

(3) A judgment forfeiting a land patent for failure to list it for taxation.—Flinn v. Blakeman, 71 S.W. 2d 961, 254 Ky. 416.

(4) A judgment or decree in partition.

Ky.—Morgan v. Big Woods Lumber Co., 249 S.W. 329, 198 Ky. 38.

Tex.—Smoot v. Chambers, Civ.App., 156 S.W.2d 314.

47 C.J. p 439 note 1.

(5) A mortgage foreclosure judgment.

Ark.—Carnes v. De Witt Bank & Trust Co., 147 S.W.2d 1002, 201 Ark. 1037.

N.Y.—Lauder v. Meserole, 133 N.Y.S. 340, 148 App.Div. 739.

Tex.—Flack v. Braman, 101 S.W. 537, 45 Tex.Civ.App. 473.

42 C.J. p 172 note 53.

Presumption for and not against validity

(1) "Any condition of facts consistent with its validity, and not affirmatively contradicted by the judgment roll, will be presumed to have existed rather than one which will defeat it."—Wells Fargo & Co. v. City and County of San Francisco, 152 P.2d 625, 25 Cal.2d 37—Borenstein v. Borenstein, 125 P.2d 465, 466, 20 Cal.2d 379—City of Salinas v. Luke Kow Lee, 18 P.2d 335, 217 Cal. 252.

(2) Facts to avoid judgment will not be imported by way of inference, unless invalidating inference is obvious and reasonably inescapable.—Scott County v. Dubois, 130 So. 106, 158 Miss. 245.

Resolving doubts

A court in considering whether a decree of a court of coördinate jurisdiction is void should resolve every doubt in favor of the validity of the decree and of the authority of the court otherwise having jurisdiction to enter it.—St. Louis Amusement Co. v. Paramount Pictures, D.C.Mo., 61 F.Supp. 854, appeal dismissed, C.C.A., St. Louis Amusement Co. v. Paramount Film Distributing Corp., 156 F.2d 400.

91. U.S.—Hentschel v. Fidelity & Deposit Co. of Maryland, C.C.A. Mo., 87 F.2d 833.

Iowa.—Yungclas v. Yungclas, 239 N. W. 22, 213 Iowa 413.

Kan.—John Hancock Mut. Life Ins. Co. v. Vandeventer, 44 P.2d 251, 254, 141 Kan. 767.

Ky.—Davis v. Tuggle's Adm'r, 178 S. W.2d 979, 297 Ky. 376—Skidmore v. Napier, 166 S.W.2d 439, 292 Ky. 311—Goosling v. Varney's Trustee, 105 S.W.2d 178, 268 Ky. 394.

Mo.—Blattel v. Stallings, 142 S.W.2d 9, 346 Mo. 450—Colorado Milling & Elevator Co. v. Rolla Wholesale Grocery Co., App., 102 S.W.2d 681.

Mont.—**Corpus Juris quoted in** West v. Capital Trust & Savings Bank, 124 P.2d 572, 575, 113 Mont. 130.

Neb.—Salistean v. State, 215 N.W. 107, 115 Neb. 838, 53 A.L.R. 1057.

N.Y.—Nankivel v. Omsk All Russian Government, 197 N.Y.S. 467, 203 App.Div. 740, reversed on other grounds 142 N.E. 569, 237 N.Y. 150—Hope v. Seaman, 119 N.Y.S. 713, modified on other grounds Hope v. Shevill, 122 N.Y.S. 127, 137 App. Div. 86, affirmed Hope v. Seaman, 97 N.E. 1106, 204 N.Y. 563.

Pa.—Commonwealth ex rel. McClenachan v. Reading, 6 A.2d 776. 336 Pa. 165.

Tex.—**Corpus Juris quoted in** Jackson v. Slaughter, Civ.App., 185 S. W.2d 759, 761, refused for want of merit—Williams v. Tooke, Civ. App., 116 S.W.2d 1114—Pennebaker v. Thrash, Civ.App., 84 S.W.2d 1081, error dismissed—Tanton v. State Nat. Bank of El Paso, Civ. App., 43 S.W.2d 957, affirmed 79 S.W.2d 833, 125 Tex. 16, 97 A.L.R. 1093—Bendy v. W. T. Carter & Bro., Civ.App., 5 S.W.2d 579, affirmed, Com.App., 14 S.W.2d 813.

Utah.—**Corpus Juris cited in** Salt Lake City v. Industrial Commission, 22 P.2d 1046, 1048, 82 Utah 179.

Va.—Howe v. Howe, 18 S.E.2d 294, 179 Va. 111.

34 C.J. p 538 note 73.

Where parties attacking judgment introduced no evidence, the presumption attaching to judgment regular on its face stands.—Yungclas v. Yungclas, 239 N.W. 22, 213 Iowa 413.

proof.[92]

It will be presumed, as against a collateral attack, that the court had jurisdiction of the subject matter and of the persons or parties,[93] and that all the facts necessary to give the court jurisdiction or power to render the particular judgment existed, and were duly proved and found,[94] unless the fact of want of jurisdiction, and consequent invalidity

92. Ky.—Goosling v. Varney's Trustee, 105 S.W.2d 178, 268 Ky. 394.
La.—Key v. Jones, App., 181 So. 631.
N.Y.—Nankivel v. Omsk All Russian Government, 197 N.Y.S. 467, 203 App.Div. 740, reversed on other grounds 142 N.E. 569, 237 N.Y. 150—Hope v. Seaman, 119 N.Y.S. 713, modified on other grounds Hope v. Shevill, 122 N.Y.S. 127, 137 App. Div. 86, affirmed Hope v. Seaman, 97 N.E. 1106, 204 N.Y. 563.
Tex.—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed.
Contradicting recitals see infra § 426.

Mortgage foreclosure judgment is within this rule.—Reedy v. Canfield, 42 N.E. 833, 159 Ill. 254—42 C.J. p 172 note 58.

Clear, satisfactory, and convincing evidence, to the exclusion of every fact that would support the judgment, has been held necessary.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

93. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551—Montgomery v. Equitable Life Assur Soc. of U. S., C.C.A.Ill., 83 F. 2d 758.
Cal.—Godfrey v. Godfrey, 86 P.2d 357, 30 Cal.App.2d 370—Fletcher v. Superior Court of Sacramento County, 250 P. 195, 79 Cal.App. 463—Lieberman v. Superior Court of California in and for Orange County, 236 P. 570, 72 Cal.App. 18.
D.C.—Fishel v. Kite, 101 F.2d 685, 69 App.D.C. 360, certiorari denied 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054.
Fla.—Horn v. City of Miami Beach, 194 So. 620, 142 Fla. 178—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212—Seaboard All-Florida Ry. v. Leavitt, 141 So. 886, 105 Fla. 600.
Ill.—People v. Miller, 171 N.E. 672, 339 Ill. 573—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.
Kan.—John Hancock Mut. Life Ins. Co. v. Vandeventer, 44 P.2d 251, 254, 141 Kan. 767.
Ky.—**Corpus Juris quoted in** Goosling v. Varney's Trustee, 105 S.W. 2d 178, 182, 268 Ky. 394.
Me.—**Corpus Juris quoted in** Bisbee v. Knight, 26 A.2d 637, 638, 139 Me. 1.
Mo.—Hemphill Lumber Co. v. Arcadia Timber Co., App., 52 S.W.2d 750.
Mont.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 575, 113 Mont. 130—E. J. Lander & Co. v. Brown, 99 P.2d 216, 110 Mont. 128—Hanrahan v. Andersen, 90 P.2d 494, 108 Mont. 218—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58—Price v. Skylstead, 222 P. 1059, 69 Mont. 453.
N.Y.—In re Fine's Estate, 44 N.Y.S. 2d 62, 181 Misc. 261—Standish v. Standish, 40 N.Y.S.2d 538, 179 Misc. 564.
N.C.—**Corpus Juris cited in** State v. Adams, 195 S.E. 822, 823, 213 N.C. 243.
Tenn.—**Corpus Juris quoted in** Kirk v. Sumner County Bank & Trust Co., 153 S.W. 139, 142, 25 Tenn.App. 150.
Tex.—**Corpus Juris quoted in** Jackson v. Slaughter, Civ.App., 185 S. W.2d 759, 761—Smoot v. Chambers, Civ.App., 156 S.W.2d 314, error refused.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
Wis.—Duel v. Ramar Baking Co., 18 N.W.2d 345, 246 Wis. 604.
34 C.J. p 438 note 74.
Presumptions as to jurisdiction of:
Courts generally see Courts §§ 96–100.
Federal courts see Federal Courts § 8.

Jurisdiction of parties

Where a court of general jurisdiction has jurisdiction of the subject matter of an action in which judgment is pronounced, jurisdiction of the parties will be presumed.
Mo.—Lewis v. Lewis, App., 176 S. W.2d 556.
Tex.—Henry v. Beauchamp, Civ.App., 39 S.W.2d 642, followed in Henry v. Carter, 39 S.W.2d 645.
34 C.J. p 538 note 74 [a].

Objection to court's jurisdiction of parties, even if made on trial, is not available on collateral attack on judgment.—Road Improvement Dist. No. 4 of Saline County v. Ball, 281 S.W. 5, 170 Ark. 522.

94. U.S.—Warmsprings Irr. Dist. v. May, C.C.A.Or., 117 F.2d 802.
Ark.—Carnes v. De Witt Bank & Trust Co., 147 S.W.2d 1002, 201 Ark. 1037—Sargent v. Citizens Bank, 139 S.W.2d 44, 200 Ark. 121—Dowell v. Slaughter, 50 S.W.2d 572, 185 Ark. 918—Lamble v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019—Winfrey v. People's Sav. Bank, 5 S.W.2d 360, 176 Ark. 941.
Cal.—Hosner v. Skelly, App., 164 P. 2d 573—People v. Herod, 295 P. 383, 111 Cal.App. 246.
Ga.—Kaiser v. Kaiser, 173 S.E. 688, 178 Ga. 355—Chance v. Chance, 5 S.E.2d 399, 60 Ga.App. 889.
Ill.—Oulvey v. Little, 233 Ill.App. 553.
Ind.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind. 672—State ex rel. Allman v. Superior Court for Grant County, 19 N.E.2d 467, 215 Ind. 249—Bowser v. Tobin, 18 N.E.2d 773, 215 Ind. 99.
Iowa.—Watt v. Dunn, 17 N.W.2d 811.
Kan.—John Hancock Mut. Life Ins. Co. v. Vandeventer, 44 P.2d 251, 254, 141 Kan. 767.
Ky.—Goosling v. Varney's Trustee, 105 S.W.2d 178, 268 Ky. 394.
Me.—Bisbee v. Knight, 26 A.2d 637, 139 Me. 1.
Mass.—Jones v. Swift, 15 N.E.2d 274, 300 Mass. 177—Durfee v. Durfee, 200 N.E. 395, 293 Mass. 472.
Miss.—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604—Whitely v. Towle, 141 So. 571, 163 Miss. 418—Federal Reserve Bank of St. Louis v. Wall, 103 So. 5, 138 Miss. 204.
Mo.—Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 333 Mo. 437—State ex rel. Townsend v. Mueller, 51 S.W.2d 8, 330 Mo. 641—First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W.2d 842, 322 Mo. 654—Lewis v. Lewis, App., 176 S.W.2d 556.
Mont.—**Corpus Juris quoted in** West v. Capital Trust & Savings Bank, 124 P.2d 572, 113 Mont. 130—Thomson v. Nygaard, 41 P.2d 1, 98 Mont. 529—State v. District Court of Fourth Judicial Dist. in and for Missoula County, Department No. 2, 282 P. 1042, 86 Mont. 193—State v. District Court of Tenth Judicial Dist. in and for Judith Basin County, 227 P. 579, 71 Mont. 89.
N.J.—Mangani v. Hydro, Inc., 194 A. 264, 119 N.J.Law 71.
N.Y.—People v. Harmor, 57 N.Y.S.2d 402, 185 Misc. 596.
Okl.—Lee v. Harvey, 156 P.2d 134, 195 Okl. 178—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—In re Crouch's Estate, 126 P. 2d 994, 191 Okl. 74—Town of Wa-

of the judgment, affirmatively appears on the face of the judgment, or of the judgment roll or record,[95] or is made to appear in some other permissible manner.[96] However, it has been held that,

tonga v. Crane Co., 114 P.2d 941, 189 Okl. 184—Protest of St. Louis-San Francisco Ry. Co., 42 P.2d 537, 171 Okl. 180—Protest of Standard Pipe Line Co., 32 P.2d 869, 168 Okl. 231—Protest of Gulf Pipe Line Co. of Oklahoma, 32 P.2d 42, 168 Okl. 136—Protest of St. Louis-San Francisco Ry. Co., 19 P.2d 162, 162 Okl. 62—Protest of St. Louis-San Francisco Ry. Co., 11 P.2d 189, 157 Okl. 131—Hawkins v. Bryan, 261 P. 167, 128 Okl. 27—Orth v. Hajek, 259 P. 854, 127 Okl. 59—Miller v. Madigan, 215 P. 742, 90 Okl. 17.

Tenn.—Bass v. Southern Surety Co., 12 S.W.2d 714, 158 Tenn. 233—**Corpus Juris quoted in** Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139, 142, 25 Tenn.App. 150.

Tex.—White v. White, 179 S.W.2d 503, 142 Tex. 499—Smoot v. Chambers, Civ.App., 156 S.W.2d 314—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed—McLeod v. Carroll, Civ.App., 109 S.W.2d 316, affirmed Carroll v. McLeod, 130 S.W.2d 277, 133 Tex. 571—Jackson v. Slaughter, Civ.App., 185 S.W.2d 759—Griggs v. Jefferson Bank & Trust Co., Civ.App., 57 S.W.2d 390, error dismissed.

Wash.—Thompson v. Short, 106 P.2d 720, 6 Wash.2d 71.

Wyo.—State v. Underwood, 86 P.2d 707, 54 Wyo. 1.

34 C.J. p 539 note 75.

It is not essential that every jurisdictional fact appear on the face of the record, and, if the petition sets out facts sufficient to show a cause of action within the general jurisdiction of the court, and no facts appear on the face of the record establishing that no jurisdiction exists, all presumptions are resolved in favor of the power of the court to act.—In re Warner's Estate, 288 N.W. 39, 137 Neb. 25—Brandeen v. Lau, 201 N.W. 605, 113 Neb. 686.

Particular facts presumed

(1) That the cause of action had accrued at the time the suit was brought.—Austin v. Austin, 43 Ill. App. 488.

(2) That the parties were living when the action was commenced, and when the judgment was rendered.—Hillyard v. Banchor, 118 P. 67, 85 Kan. 516.

(3) That an attorney was authorized to compromise the suit.—Hartford Fire Ins. Co. v. King, 73 S.W. 71, 31 Tex.Civ.App. 636.

(4) That attorney was authorized to stipulate for a change of venue.—Hall v. Dickinson, 170 N.W. 646, 204 Mich. 545.

(5) That the necessary conditions existed for holding an adjourned term of court.—Haughton v. Order of United Commercial Travelers, 93 S.E. 393, 108 S.C. 73.

95. U.S.—Hall v. Johnston, C.C.A. Cal., 86 F.2d 820—Chase v. Hiatt, D.C.Pa., 54 F.Supp. 270.

Ark.—Person v. Miller Levee Dist. No. 2, 150 S.W.2d 950, 202 Ark. 173—Ladd v. Stubblefield, 111 S.W.2d 555, 195 Ark. 261—Moffett v. Texarkana Forest Park Paving, Sewer, and Water Dist. No. 2, 26 S.W.2d 589, 181 Ark. 474—Road Improvement Dist. No. 4 of Saline County v. Ball, 281 S.W. 5, 170 Ark. 522.

Cal.—Godfrey v. Godfrey, 86 P.2d 357, 30 Cal.App.2d 370—McMurray v. Sivertsen, 83 P.2d 48, 28 Cal.App.2d 541—McAllister v. Superior Court In and For Alameda County, 82 P.2d 462, 28 Cal.App.2d 160—Fletcher v. Superior Court of Sacramento County, 250 P. 195, 79 Cal.App. 468—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704—Lieberman v. Superior Court of California in and for Orange County, 236 P. 570, 72 Cal.App. 18.

D.C.—Fishel v. Kite, 101 F.2d 685, 69 App.D.C. 360, certiorari denied Kite v. Fishel, 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054.

Fla.—Horn v. City of Miami Beach, 194 So. 620, 142 Fla. 178—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212—Seaboard All-Florida Ry. v. Leavitt, 141 So. 886, 105 Fla. 600.

Idaho.—State v. Mundell, 158 P.2d 818—State v. Miller, 10 P.2d 955, 52 Idaho 33.

Ill.—People ex rel. Baird & Warner v. Lindheimer, 19 N.E.2d 336, 370 Ill. 424—People v. Miller, 171 N.E. 672, 339 Ill. 573—People v. Brewer, 160 N.E. 76, 328 Ill. 472.

Kan.—**Corpus Juris quoted in** John Hancock Mut. Life Ins. Co. v. Vandeventer, 44 P.2d 251, 254, 141 Kan. 767.

Ky.—Newsome v. Hall, 161 S.W.2d 629, 290 Ky. 486, 140 A.L.R. 818—Goosling v. Varney's Trustee, 105 S.W.2d 178, 268 Ky. 394—McFarland v. Hudson, 89 S.W.2d 877, 262 Ky. 183—Dean v. Brown, 88 S.W.2d 298, 261 Ky. 593—Wells' Adm'x v. Heil, 47 S.W.2d 1041, 243 Ky. 282—May v. Sword, 33 S.W.2d 314, 236 Ky. 412.

Me.—**Corpus Juris quoted in** Bisbee v. Knight, 26 A.2d 637, 638, 139 Me. 1.

Miss.—Prudential Ins. Co. v. Gleason, 187 So. 229, 185 Miss. 243—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604.

Mo.—Row v. Cape Girardeau Foundry Co., App., 141 S.W.2d 113—Sanders v. Savage, 129 S.W.2d 1061, 234 Mo.App. 9—Rubber Tire Supply Co. v. American Utilities Co., App., 279 S.W. 751.

Mont.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 113 Mont. 130—State ex rel. Enochs v. District Court of Fourth Judicial Dist. in and for Missoula County, 123 P.2d 971, 113 Mont. 227.

Neb.—Salistean v. State, 215 N.W. 107, 115 Neb. 838, 53 A.L.R. 1057.

N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.

Okl.—Shefts v. Oklahoma Co., 137 P.2d 589, 192 Okl. 483—Petroleum Auditors Ass'n v. Landis, 77 P.2d 730, 182 Okl. 297—First Nat. Bank v. Darrough, 19 P.2d 551, 162 Okl. 243—Hawkins v. Bryan, 261 P. 167, 128 Okl. 27—Bowling v. Merry, 217 P. 404, 91 Okl. 176.

Or.—Capos v. Clatsop County, 25 P.2d 903, 144 Or. 510, 90 A.L.R. 289.

Tenn.—Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139, 25 Tenn.App. 150.

Tex.—State Mortg. Corporation v. Ludwig, 48 S.W.2d 950, 121 Tex. 268—Jackson v. Slaughter, Civ. App., 185 S.W.2d 759, refused for want of merit—Williams v. Tooke, Civ.App., 116 S.W.2d 1114, error dismissed—Huselby v. Allison, Civ. App., 25 S.W.2d 1108.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.

Va.—Mack v. Commonwealth, 15 S.E.2d 62, 177 Va. 921.

Wash.—Thompson v. Short, 106 P.2d 720, 6 Wash.2d 71—Peha's University Food Shop v. Stimpson Corporation, 31 P.2d 1023, 177 Wash. 406.

Wyo.—State v. Underwood, 86 P.2d 707, 54 Wyo. 1.

34 C.J. p 540 note 76.

No presumption against record see infra § 426.

Only manner of overcoming presumption

Presumption of jurisdiction as against collateral attack may be overcome only by record affirmatively showing want of jurisdiction.—First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W.2d 842, 322 Mo. 654.

If the record in the former case is not presented, the judgment or decree therein cannot be held void, on collateral attack, for want of jurisdiction.—Fisher v. Guidy, 142 So. 818, 106 Fla. 94.

96. Ill.—Dickinson v. Belden, 108 N.E. 1011, 268 Ill. 105.

Ky.—Potter v. Webb, 216 S.W. 66, 186 Ky. 25.

where the record purports to show what was done for the purpose of acquiring jurisdiction, it will not be presumed in aid of the court's action that anything different or additional was done.[97] In the absence of any affirmative showing to the contrary on the face of the record, the presumption of jurisdiction will generally be regarded as conclusive,[98] except where evidence aliunde may be introduced, as discussed infra § 426.

These presumptions of regularity and validity, and those as to jurisdiction, will be indulged where the record, although failing to show jurisdiction affirmatively, does not distinctly show a want of jurisdiction,[99] as where the record of a judgment of a court of general jurisdiction is silent as to the facts conferring jurisdiction,[1] or is defective in consequence of the omission of proper recitals,[2] or the loss or absence of parts of the record,[3] as where

Wash.—Jorgenson v. Winter, 125 P. 957, 69 Wash. 573.
34 C.J. p 540 note 76.

If the decree refers to the evidence on which it is based, and an examination of such evidence discloses that it is not sufficient to give the court jurisdiction, the presumption that the court had jurisdiction is overcome.—Oulvey v. Little, 233 Ill. App. 553.

Express allegation and claim to contrary
Wis.—Duel v. Ramar Baking Co., 18 N.W.2d 345, 246 Wis. 604.

97. Cal.—Lieberman v. Superior Court of California in and for Orange County, 236 P. 570, 72 Cal. App. 18.

98. Ky.—Wolverton v. Baynham, 10 S.W.2d 837, 226 Ky. 214.
Miss.—Whitley v. Towle, 141 So. 571, 163 Miss. 418—Federal Reserve Bank of St. Louis v. Wall, 103 So. 5, 138 Miss. 204.
Mont.—E. J. Lander & Co. v. Brown, 99 P.2d 216, 110 Mont. 128—Hanrahan v. Andersen, 90 P.2d 494, 108 Mont. 213—Frisbee v. Coburn, 52 P.2d 882, 101 Mont. 58—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131—Price v. Skylstead, 222 P. 1059, 69 Mont. 453.
Tex.—Security Trust Co. of Austin v. Lipscomb County, 180 S.W.2d 151, 142 Tex. 592.

If record does not negative existence of facts authorizing court to render judgment, law conclusively presumes that such facts were established before court when such judgment was rendered, and evidence dehors the record to the contrary will not be received.—White v. White, 179 S.W.2d 503, 142 Tex. 499.

99. Ga.—Chance v. Chance, 5 S.E. 2d 399, 60 Ga.App. 889.
Ky.—**Corpus Juris quoted in** Goosling v. Varney's Trustee, 105 S.W. 2d 178, 182, 268 Ky. 394—Mussman v. Pepples, 22 S.W.2d 605, 232 Ky. 254—Tarter v. Wilson, 269 S.W. 715, 207 Ky. 535.
Tenn.—**Corpus Juris quoted in** Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139, 142, 25 Tenn. App. 150.
34 C.J. p 540 note 77.

1. U.S.—In re Williams Supply Co., C.C.A.N.Y., 77 F.2d 909, certiorari denied Witt v. Berman, 56 S.Ct. 131, 296 U.S. 612, 80 L.Ed. 434—Campbell v. Aderhold, C.C.A.Ga., 67 F.2d 246.
Ark.—Fisher v. Cowan, 170 S.W.2d 603, 205 Ark. 722.
Ga.—Thomas v. Lambert, 1 S.E.2d 443, 187 Ga. 616.
Idaho.—Baldwin v. Anderson, 13 P. 2d 650, 52 Idaho 243—Knowles v. Kasiska, 268 P. 3, 46 Idaho 379.
Ind.—Bowser v. Tobin, 18 N.E.2d 773, 215 Ind. 99.
Ky.—Goosling v. Varney's Trustee, 105 S.W.2d 178, 268 Ky. 394—**Corpus Juris cited in** Dye Bros. v. Butler, 272 S.W. 426, 427, 209 Ky. 199.
Miss.—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604—Federal Reserve Bank of St. Louis v. Wall, 103 So. 5, 138 Miss. 204.
Mo.—Lewis v. Lewis, App., 176 S.W. 2d 556.
Mont.—**Corpus Juris cited in** West v. Capital Trust & Savings Bank, 124 P.2d 572, 575, 113 Mont. 130.
Neb.—In re Warner's Estate, 288 N. W. 39, 137 Neb. 25—Brandeen v. Lau, 201 N.W. 665, 113 Neb. 34.
N.J.—Mangani v. Hydro, Inc., 194 A. 264, 119 N.J.Law 71—Stout v. Sutphen, 29 A.2d 724, 132 N.J.Eq. 583.
Okl.—Lee v. Harvey, Okl., 156 P.2d 134, 195 Okl. 178—In re Crouch's Estate, 126 P.2d 994, 191 Okl. 74—Warren v. Stansbury, 126 P.2d 251, 190 Okl. 554—Town of Watonga v. Crane Co., 114 P.2d 941, 189 Okl. 184—Dill v. Anderson, 256 P. 31, 124 Okl. 299—Cummings v. Inman, 247 P. 379, 119 Okl. 9—Bowling v. Merry, 217 P. 404, 91 Okl. 176.
Pa.—Commonwealth ex rel. McClenachan v. Reading, 6 A.2d 776, 336 Pa. 165.
Tenn.—New York Casualty Co. v. Lawson, 24 S.W.2d 881, 160 Tenn. 329—Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139, 142, 25 Tenn.App. 150.
Tex.—White v. White, 179 S.W.2d 503, 142 Tex. 499—Williams v. Tooke, Civ.App., 116 S.W.2d 1114.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
34 C.J. p 540 note 78.

Every fact not negatived by record is presumed in support of a judgment of a court of general jurisdiction, in absence of fraud extrinsic to record.—Warren v. Stansbury, 126 P.2d 251, 190 Okl. 554—Petroleum Auditors Ass'n v. Landis, 77 P.2d 730, 182 Okl. 297—Yahola Oil Co. v. Causey, 72 P.2d 817, 181 Okl. 129—First Nat. Bank v. Darrough, 19 P. 2d 551, 162 Okl. 243—Samuels v. Granite Sav. Bank & Trust Co., 1 P. 2d 145, 150 Okl. 174—Hawkins v. Bryan, 261 P. 167, 128 Okl. 27—Orth v. Hajek, 259 P. 854, 127 Okl. 59—Manuel v. Kidd, 258 P. 732, 126 Okl. 71—Bowling v. Merry, 217 P. 404, 91 Okl. 176.

2. Idaho.—Baldwin v. Anderson, 13 P.2d 650, 52 Idaho 243.
Mont.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 113 Mont. 130.
Neb.—In re Warner's Estate, 288 N. W. 39, 137 Neb. 25.
Tenn.—**Corpus Juris quoted in** Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139, 142, 25 Tenn. App. 150.
Tex.—Southern Ornamental Iron Works v. Morrow, Civ.App., 101 S. W.2d 336.
34 C.J. p 540 note 79.

The omission in record of every step in proceeding does not overcome presumption of regularity.—Hall v. Johnston, C.C.A.Cal., 86 F.2d 820.

Omission cured by proof
The omission of an allegation of a jurisdictional fact, in a judgment of a court of record, is cured by proof of the existence of such fact. —In re Warner's Estate, 288 N.W. 39, 137 Neb. 25—Brandeen v. Lau, 201 N.W. 665, 113 Neb. 34.

3. Mont.—**Corpus Juris quoted in** West v. Capital Trust & Savings Bank, 124 P.2d 572, 575, 113 Mont. 130.
Tenn.—Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139, 25 Tenn.App. 150.
34 C.J. p 541 note 80.

Absence from record of papers which ought to have been included within judgment roll is not enough to make it appear affirmatively that court had no jurisdiction.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.

The misplacement of papers in a case cannot affect integrity of the judgment and other entries in trial

the judgment roll is defective or incomplete.[4] Jurisdiction also will be presumed where the bill collaterally attacking the judgment or decree contains no disclosure as to whether the court had jurisdiction of the subject matter and parties, or as to whether there was fraud affecting the jurisdiction.[5]

Long lapses of time greatly strengthen the presumptions in favor of the validity of judgments.[6]

Particular presumptions. It will be presumed, in consonance with the presumptions of regularity and validity, that plaintiff was entitled to maintain the action;[7] that all the proceedings were regular,[8] and all jurisdictional steps were taken;[9] that all necessary parties were represented;[10] that an appearance by an attorney was authorized;[11] that the judgment was supported by the pleadings and proof;[12] that all matters covered by the judgment

court's records, since pleadings and exhibits become only evidential after judgment is entered and are presumed to support the record.—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73—Wolverton v. Baynham, 10 S.W.2d 837, 226 Ky. 214.

4. Cal.—Eccleston v. Roseberg, 199 P. 859, 53 Cal.App. 14.
34 C.J. p 541 note 80 [b].

Missing papers

The fact that papers which ought to have been included in the judgment roll are missing therefrom is not enough to make it affirmatively appear that the court had no jurisdiction.—Williams v. Tooke, Tex.Civ. App., 116 S.W.2d 1114, error dismissed.

5. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551.

Pleading absence of jurisdictional fact generally, see supra § 421.

6. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089—**Corpus Juris cited in** Drummond v. Lynch, C.C.A.Tex., 82 F.2d 806, 809.

Ark.—**Corpus Juris quoted in** Cannon v. Price, 150 S.W.2d 755, 757, 202 Ark. 464—**Corpus Juris quoted in** Parsley v. Ussery, 132 S.W.2d 1, 4, 198 Ark. 910.

Cal.—**Corpus Juris quoted in** In re Wiechers' Estate, 250 P. 397, 398, 199 Cal. 523, certiorari denied Wiechers v. Wiechers, 47 S.Ct. 476, 273 U.S. 762, 71 L.Ed. 879.

Ky.—Davis v. Tuggle's Adm'r, 178 S.W.2d 979, 297 Ky. 376—Steel v. Stearns Coal & Lumber Co., 146 S.W. 721, 148 Ky. 429.

La.—Key v. Jones, App., 181 So. 631.

Tenn.—Wilcox v. Cannon, 1 Coldw. 369.

34 C.J. p 541 note 96.

Partition

(1) This rule applies to a partition judgment on a collateral attack.

Ala.—Baker v. Prewitt, 64 Ala. 551.

Ill.—Lane v. Bommelmann, 17 Ill. 95.

(2) After the acquiescence and occupation under a partition by a court of probate for a period of twenty years, the proceedings must be held to have been regular and conclusive on the question of notice.—Campbell v. Wallace, 12 N.H. 362, 37 Am.D. 219.

If the record is ancient and does not affirmatively show all that was done, presumption is that things not shown to have been done that should have been done were done, and on collateral attack omissions will be treated as erroneous but not void.

U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Ky.—Baker v. Baker, Eccles & Co., 173 S.W. 109, 162 Ky. 683.

Clear and convincing evidence to contrary

Attack on judicial proceedings regular on records, first made many years after party to them was notified by suit of claim of his liability, requires clear and convincing evidence to sustain it.—August v. Collins, 251 N.W. 565, 265 Mich. 389.

Where titles have passed and valuable improvements have been made on the strength of a proceeding had more than thirty years before, such proceedings ought not to be upset in partition proceeding except for compelling reasons.—Perry v. Bassenger, 15 S.E.2d 365, 219 N.C. 838.

7. Me.—Bisbee v. Knight, 26 A.2d 637, 639, 139 Me. 1.

Mo.—Glidden-Felt Mfg. Co v. Robinson, 143 S.W. 1111, 163 Mo.App. 488.

34 C.J. p 541 note 83.

8. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Cal.—People v. Bayne, 28 P.2d 1068, 136 Cal.App. 341.

Fla.—Dwyer v. State, 116 So. 726, 95 Fla. 846—Sawyer v. State, 113 So. 736, 94 Fla. 60.

Ky.—Leonard v. Williams, 265 S.W. 618, 205 Ky. 218.

Compliance with statute

Trial court's compliance with statutory provisions will be conclusively presumed as against collateral attack on judgment.—Pennington v. Commonwealth, 21 S.W.2d 808, 231 Ky. 494.

9. Mo.—Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 333 Mo. 437—First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W.2d 842, 322 Mo. 654.

10. Tex.—Burton v. McGuire, Civ. App., 3 S.W.2d 576, affirmed, Com. App., 41 S.W.2d 238.

11. Nev.—Deegan v. Deegan, 37 P. 360, 22 Nev. 185, 58 Am.R. 742.

Tenn.—Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139, 142, 25 Tenn.App. 150.

34 C.J. p 541 note 85.

12. Cal.—Hise v. Superior Court of Los Angeles County, 134 P.2d 748, 21 Cal.2d 614—Hosner v. Skelly, App., 164 P.2d 573.

Ill.—People ex rel. Baird & Warner v. Lindheimer, 19 N.E.2d 336, 370 Ill. 424.

Ky.—Morgan v. Big Woods Lumber Co., 249 S.W. 329, 198 Ky. 88.

Me.—Bisbee v. Knight, 26 A.2d 637, 139 Me. 1.

N.Y.—Holmes v. City of New York, 42 N.Y.S.2d 359, 180 Misc. 864.

Ohio.—Central Hyde Park Sav. & Loan Co. v. Feck, 67 N.E.2d 44, 77 Ohio App. 343.

Okl.—McIntosh v. V. & L. Inv. Co., 162 P.2d 176—Lee v. Harv[illegible], 156 P.2d 134, 195 Okl. 178—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—Warren v. Stansbury, 126 P.2d 251, 190 Okl. 554—Town of Watonga v. Crane Co., 114 P.2d 941, 189 Okl. 184—Protest of St. Louis-San Francisco Ry. Co., 42 P.2d 537, 171 Okl. 180—Protest of Stanolind Pipe Line Co., 32 P.2d 869, 168 Okl. 281—Protest of Gulf Pipe Line Co. of Oklahoma, 32 P.2d 42, 168 Okl. 136—Protest of St. Louis-San Francisco Ry. Co., 19 P.2d 162, 162 Okl. 62—Protest of St. Louis-San Francisco Ry. Co., 11 P.2d 189, 157 Okl. 131.

were in fact litigated by the parties;[13] that some disposition was made of every defendant in the case;[14] and that the judgment was rendered at a regular term of the court;[15] and that the land, when land is the subject of the suit, was situated within the territorial limits of the jurisdiction of the court.[16]

Presumptions not applicable. A presumption of jurisdiction will not be indulged where there is a direct admission, in the collateral proceeding, that it did not exist in the original action;[17] nor will such presumptions be indulged in favor of a judgment entered by the clerk as attend a judgment entered in pursuance of judicial action by the court.[18] Moreover, jurisdiction of the person of a defendant is presumed in support of the judgment only when he is within the territorial limits of the court, and, if he is not within such limits, the record must show service on him.[19] A presumption of jurisdiction as to one defendant will not attach to a judgment on a new cause of action included in another defendant's counterclaim;[20] and, where the judgment or decree attacked contains an affirmative recital that defendants were summoned before the cross complaint was filed, a presumption of jurisdiction under the cross complaint does not arise.[21] It has been held that the presumption of regularity and validity does not apply to a collateral attack by a stranger, who may make such attack on the judgment on any ground which could be urged against it on direct attack;[22] but that he cannot attack on the ground that he was not a party to the action in which the judgment was rendered, since the court, not having required his presence, would be presumed to have had jurisdiction without him.[23]

(2) Process and Service

Generally, unless the contrary affirmatively appears from the record, it will be presumed, in support of a judgment, that legal and proper process was issued and duly and regularly served and return made.

In support of the judgment of a court of general jurisdiction, as against a collateral attack, it will be presumed, unless expressly contrary to what

Tenn.—Sloan v. Sloan, 295 S.W. 62, 155 Tenn. 422.
Tex.—Dallas Joint Stock Land Bank of Dallas v. Street, Civ.App., 76 S.W.2d 780, error refused. Followed Street v. Dallas Joint Stock Land Bank of Dallas, 84 S.W.2d 1119.
34 C.J. p 541 note 88.

A recital that cause came on to be heard on petition therefor, and that petition was considered, is conclusive that petition was filed prior to rendition of decree.—Eastman-Gardner Co. v. Leverett, 106 So. 106, 141 Miss. 96.

In determining whether jurisdictional averments have been made, on collateral attack that construction will be adopted that will support the judgment, guarding against the supplying thereby of omitted essentials.—Boyd v. Garrison, 19 So.2d 385, 246 Ala. 122—Sams v. Sams, 5 So.2d 774, 242 Ala. 240—Martin v. Martin, 55 So. 633, 173 Ala. 106.

Nunc pro tunc order
In absence of evidence to contrary, presumption obtained that nunc pro tunc orders correcting judgment were based on satisfactory evidence or personal recollections of chancellor as to court proceedings in the foreclosure suit.—Hall v. Castleberry, 161 S.W.2d 948, 204 Ark. 200.

Where the judgment is beyond the pleading and issues, the presumptions do not apply.
Cal.—Morrow v. Morrow, 105 P.2d 129, 40 Cal.App.2d 474—Petition of Furness, 218 P. 61, 62 Cal.App. 753.
Minn.—Sache v. Gillette, 112 N.W. 386, 101 Minn. 169, 118 Am.S.R. 612, 11 L.R.A.,N.S., 803, 11 Ann. Cas. 348.

13. U.S.—U. S. v. Sommers, Mo., 171 F. 57, 96 C.C.A. 299.
Ark.—Adams v. Van Buren County, 139 S.W.2d 9, 200 Ark. 269.
N.D.—Sukut v. Sukut, 12 N.W.2d 536, 73 N.D. 154.
Ohio.—Bennett v. Bennett, 15 Ohio Supp. 16.
Tenn.—Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139, 25 Tenn.App. 150.

14. Tex.—Conner v. McAfee, Civ. App., 214 S.W. 646—Dunn v. Taylor, 93 S.W. 347, 42 Tex.Civ.App. 241.

15. Tex.—Baldridge v. Penland, 4 S. W. 565, 68 Tex. 441.

16. U.S.—Foster v. Givens, Ky., 67 F. 684, 14 C.C.A. 625.

Land outside territorial jurisdiction
The general rule is that a judgment of a court purporting to adjudicate the title to land outside the limits of its territorial jurisdiction is void for lack of jurisdiction and will be treated as a nullity wherever encountered.—Ferguson v. Babcock Lumber & Land Co., N.C., 252 F. 705, 164 C.C.A. 545, certiorari denied 39 S.Ct. 10, 248 U.S. 570, 63 L.Ed. 426, and appeal dismissed 39 S.Ct. 132, 248 U.S. 540, 63 L.Ed. 411.

17. Ind.—Doe v. Anderson, 5 Ind. 33.

18. Cal.—Shirran v. Dallas, 132 P. 454, 462, 21 Cal.App. 405.

19. U.S.—Galpin v. Page, 18 Wall. 350, 21 L.Ed. 959.
34 C.J. p 541 note 97.
Presumptions as to process and service see infra subdivision a (2) of this section.

20. Mont.—Hanrahan v. Andersen, 90 P.2d 494, 108 Mont. 218.

As to nonanswering defendant
Where judgment affirmatively showed that it was entered after examination of the issues only as between plaintiff and answering defendant, and that nonanswering defendant was not even considered an interested or necessary party for purposes of counterclaim filed by one of defendants, no presumption could be indulged that court had jurisdiction of nonanswering defendant as to issue raised by counterclaim.—Hanrahan v. Andersen, supra.

The presumption of jurisdiction of a plaintiff against whom a defendant's counterclaim was directed cannot be accompanied by a further presumption of jurisdiction over another defendant whose interests were affected and who was, therefore, a necessary party to a valid adjudication of the counterclaim, but against whom it was not directed.—Hanrahan v. Andersen, supra.

21. Ark.—Taylor v. Harris, 54 S.W. 2d 701, 186 Ark. 580.

22. Tex.—Turner v. Maury, Civ. App., 224 S.W. 255.
Collateral attack by strangers see supra §§ 414, 415.

23. U.S.—Fidelity & Casualty Co. of New York v. Genova, C.C.A.Ohio, 90 F.2d 874.

is affirmatively shown by the record,[24] that all parties to the action or proceeding were properly served with notice or process;[25] that legal and proper process was issued in the action and that it was duly and regularly served on defendant or defendants[26] or was waived;[27] and that return or proof of service, when necessary, was regularly and properly made and filed.[28] If the record is silent as to service, the record of the cause may be examined as to the validity of the presumed service,[29] but extrinsic evidence may not be considered for this purpose.[30] The burden of proving lack of service of process ordinarily is on the party alleging the invalidity of the judgment on that ground;[31] but where the record shows service of the complaint, and not service of the summons, the burden is on one seeking to sustain the judgment as against a collateral attack to prove actual service thereof.[32]

Generally it will be presumed that constructive

24. Ark.—Parsley v. Ussery, 132 S.W.2d 1, 198 Ark. 910—Union Inv. Co. v. Hunt, 59 S.W.2d 1039, 187 Ark. 357.
Cal.—Westphal v. Westphal, 126 P.2d 105, 20 Cal.2d 393.
Ind.—Clark v. Clark, 172 N.E. 134, 202 Ind. 104.
Ky.—Davis v. Tuggle's Adm'r, 178 S.W.2d 979, 297 Ky. 376—Hall v. Bates, 77 S.W.2d 403, 257 Ky. 61.
La.—Spears v. Spears, 136 So. 614, 173 La. 294.
Ohio.—In re Frankenberg's Estate, 47 N.E.2d 239, 70 Ohio App. 495.
Tex.—Weaver v. Garrietty, Civ.App., 84 S.W.2d 878, error refused—Mariposa Mining Co. v. Waters, Civ.App., 279 S.W. 576.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
Recitals showing want of jurisdiction generally see infra § 426.

25. Ark.—McLeod v. Mabry, 177 S.W.2d 46, 206 Ark. 618—Dicus v. Bright, 94 S.W. 925, 79 Ark. 16.
Cal.—Westphal v. Westphal, 126 P.2d 105, 20 Cal.2d 393.
Ky.—Davis v. Tuggle's Adm'r, 178 S.W.2d 979, 297 Ky. 376.
S.C.—Clark v. Neves, 57 S.E. 614, 76 S.C. 484, 12 L.R.A.,N.S., 298.
Tenn.—Kirk v. Sumner County Bank & Trust Co., 153 S.W.2d 139, 25 Tenn.App. 150.

Partition

Where a court of general jurisdiction has rendered a judgment of partition, jurisdiction of the parties is presumed in collateral proceedings, although the record of the court is silent as to service.
Ga.—Mayer v. Hover, 7 S.E. 562, 81 Ga. 308.
Ill.—Nickrans v. Wilk, 43 N.E. 741, 161 Ill. 76.
Ind.—Crane v. Kimmer, 77 Ind. 215.

26. U.S.—Montgomery v. Equitable Life Assur. Soc. of U. S., C.C.A. Ill., 83 F.2d 758.
Ala.—Cox v. Thomas, 113 So. 261, 216 Ala. 382.
Fla.—Bemis v. Loftin, 173 So. 683, 127 Fla. 515.
Ind.—Grantham Realty Corporation v. Bowers, 22 N.E.2d 882, 215 Ind. 672.
Iowa.—Voll v. Zelch, 201 N.W. 33, 198 Iowa 1333.
Ky.—Dye Bros. v. Butler, 272 S.W. 426, 209 Ky. 199.
La.—**Corpus Juris quoted in** Logwood v. Logwood, 168 So. 310, 185 La. 1—Breazeale v. Peters, 6 La. App. 676.
Mont.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.
Okl.—Shefts v. Oklahoma Co., 137 P.2d 589, 192 Okl. 483—Myers v. Carr, 47 P.2d 156, 173 Okl. 335.
S.C.—Coogler v. Crosby, 72 S.E. 149, 89 S.C. 508.
Tex.—Bendy v. W. T. Carter & Bro., Com.App., 14 S.W.2d 813—Weaver v. Garrietty, Civ.App., 84 S.W.2d 878—Dallas Joint Stock Land Bank of Dallas v. Street, Civ.App., 76 S.W.2d 780, error refused, followed Street v. Dallas Joint Stock Land Bank of Dallas, 84 S.W.2d 1119.
34 C.J. p 542 note 98.

Rule not confined to ancient records

Ky.—Dye Bros. v. Butler, 272 S.W. 426, 209 Ky. 199.

Service of copy of petition presumed

Mo.—McEwen v. Sterling State Bank, 5 S.W.2d 702, 222 Mo.App. 660.

27. Tex.—Radford v. Radford, Civ. App., 42 S.W.2d 1060.

Where judgment contained recital that defendant waived service of citation as required by law, presumption existed that court duly acquired jurisdiction of defendant by waiver of citation.—Radford v. Radford, supra.

28. Va.—Wood v. Kane, 129 S.E. 327, 143 Va. 281.
34 C.J. p 540 note 78 [a].
Necessity of return and proof of service see the C.J.S. title Process § 90, also 50 C.J. p 562 notes 92–97.

Clerk's testimony from memory and dehors the record is incompetent to show that there was no return of service.—Dye Bros. v. Butler, 272 S.W. 426, 209 Ky. 199.

Fact that return of service of process is missing from record is insufficient to warrant setting aside decree on collateral attack.—Whitley v. Towle, 141 So. 571, 163 Miss. 418.

Where a return of service has not been filed with the clerk, but the judgment recites that service was duly made, giving the date, it will be presumed that the return was exhibited in court.—Rhyne v. Missouri State Life Ins. Co., Tex.Com. App., 291 S.W. 845.

29. Tex.—Stockyards Nat. Bank v. Presnall, 194 S.W. 384, 109 Tex. 32—Cockrell v. Steffens, Civ.App., 284 S.W. 608.

Original summons is evidentiary and conclusive unless it bears an affirmative showing of no service on party attacking judgment or unless showing of service has been destroyed by direct attack.—Davis v. Tuggle's Adm'r, 178 S.W.2d 979, 297 Ky. 376.

Absence of original summons

In absence of original summons from record, it is conclusively presumed that there was proper service thereof on party attacking judgment for want of jurisdiction and indorsement on petition that summons was issued is of value as secondary evidence and entitled to more weight than parol testimony to contrary, although absolute verity is not to be imported to such entry; and, in absence of clear and convincing evidence of error or fraud, a docket entry showing service of process on litigant is conclusive.—Davis v. Tuggle's Adm'r, supra.

30. Fla.—Bemis v. Loftin, 173 So. 683, 127 Fla. 515.
Extrinsic evidence in contradiction of recitals see infra § 426.

31. Okl.—Carr v. Cobble, 282 P. 108, 107 Okl. 225.

Extent of burden

A defendant, attacking judgment by court of general jurisdiction as void for want of service, must not only show affirmatively that he has not been served, but that he has not waived service by appearance, pleading, or otherwise, unless there is a recital in judgment showing affirmatively that return of service made by sheriff was the only basis of jurisdiction of court over person of defendant.—Green v. Spires, 7 S.E.2d 246, 189 Ga. 719.

32. Minn.—Brown v. Reinke, 199 N.W. 235, 139 Minn. 458, 35 A.L.R. 413.

service of process, such as by publication, was duly and regularly made[33] and that an affidavit for such service was regularly and properly made and filed.[34] Some of the decisions, however, are to the contrary in the case of constructive service by leaving a copy of the writ, or by publication, or other form of substituted service.[35]

Where the judgment is against a nonresident defendant, and jurisdiction was acquired by publication of notice, some cases hold that the judgment is not impeachable collaterally merely because the record does not show compliance with all the requirements of the statute authorizing that manner of citation, as a full compliance will be presumed.[36] Other cases, however, hold that a presumption of jurisdiction does not arise in such a case, and that to sustain a judgment the record must itself disclose facts affirmatively indicating the several steps by which jurisdiction has been acquired.[37] If defendant was a nonresident at the institution of the action, but returned to the state a considerable period of time before the entry of final judgment, it will be presumed that he was served with notice.[38]

(3) Exercise of Special Statutory Powers

Where special statutory powers are exercised by the court, a presumption of jurisdiction will be indulged in support of its judgment where it is rendered in the usual course of common-law or chancery practice.

Where special statutory powers are to be exercised by the usual common-law or chancery practice, the proceedings and judgments will have all the characteristics of the proceedings and judgments in other cases, including the presumption of jurisdiction,[39] and this rule has been held to apply to a judgment rendered in vacation by a judge acting under constitutional authority.[40] The rule has likewise been held to apply in attachment proceedings,[41] but there is also authority to the contrary.[42]

Proceedings not according to course of common law. Where a court of general jurisdiction proceeds in the exercise of special powers, wholly derived from statute, and not exercised according to the course of the common law, or not pertaining to its general jurisdiction, its jurisdiction must appear in the record, and cannot be presumed in a collateral proceeding,[43] although the court proceeds in accordance with the course of the common law as far as applicable to the proceedings.[44] This rule

33. Ark.—Hobbs v. Lenon, 87 S.W. 2d 6, 191 Ark. 509.
Ga.—De Lay v. Latimer, 117 S.E. 446, 155 Ga. 463.
Miss.—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
34 C.J. p 542 note 99.

34. Okl.—Core v. Smith, 102 P. 114, 23 Okl. 909.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
34 C.J. p 542 note 99 [a].

35. U.S.—Hartley v. Boynton, C.C. Iowa, 17 F. 873, 5 McCrary, 453.
Fla.—Myakka Co. v. Edwards, 67 So. 217, 68 Fla. 372, Ann.Cas.1917B 201.
Iowa.—Hawk v. Day, 126 N.W. 955, 148 Iowa 47.
Neb.—Vandervort v. Finnell, 148 N. W. 332, 96 Neb. 515.
34 C.J. p 542 note 1.

36. Ill.—Figge v. Rowlen, 57 N.E. 195, 185 Ill. 234.
34 C.J. p 542 note 2.

37. Or.—Furgeson v. Jones, 20 P. 842, 17 Or. 204, 11 Am.S.R. 808, 3 L.R.A. 620.
34 C.J. p 542 note 3.

38. Tex.—Bendy v. W. T. Carter & Bro., Civ.App., 5 S.W.2d 579, affirmed, Com.App., 14 S.W.2d 813.

39. Or.—Laughlin v. Hughes, 89 P. 2d 568, 161 Or. 295.
34 C.J. p 543 note 4.

40. Ga.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S. E.2d 753, 192 Ga. 817.

Under constitutional amendment declaring that the judges of superior court may, on reasonable notice to the parties, at any time in vacation, at chambers, hear and determine by interlocutory or final judgment any matter or issue where a jury verdict is not required or may be waived a judge in vacation will act as a court of general jurisdiction where previously his authority or jurisdiction may have been limited, or conditional, and a necessary corollary is that any judgment authorized by the amendment may be attended by a presumption of regularity, which could not be indulged where the jurisdiction is special or limited.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, supra.

41. Colo.—Burris v. Craig, 82 P. 944, 34 Colo. 383.
34 C.J. p 543 note 5 [b] (2).

Attack permissible
In ejectment action, wherein plaintiff offered sheriff's deed based on judgment in attachment proceedings, the rule respecting integrity of judgments did not prevent attack by defendant on the judgment and attachment proceeding on ground that notice of attachment was returnable sixty-five days from the first publication.—Johnson v. Clark, 198 So. 842, 145 Fla. 258.

42. Ill.—Star Brewery v. Otto, 63 Ill.App. 40.
34 C.J. p 543 note 5 [b] (1).

43. Ill.—Ashlock v. Ashlock, 195 N. E. 657, 360 Ill. 115—Keal v. Rhyderck, 148 N.E. 53, 317 Ill. 231—Payson v. People, 51 N.E. 588, 175 Ill. 267.
Me.—Bisbee v. Knight, 26 A.2d 637, 139 Me. 1.
Or.—Laughlin v. Hughes, 89 P.2d 568, 161 Or. 295—Fishburn v. Londershausen, 92 P. 1060, 50 Or. 363, 14 L.R.A.,N.S., 1234, 15 Ann.Cas. 975.
Wash.—**Corpus Juris quoted in** Junkin v. Anderson, 123 P.2d 759, 12 Wash.2d 58.
34 C.J. p 543 note 5.

Where it appears on the face of the proceedings that the court has active jurisdiction in a matter in which it is exercising limited and special statutory authority, the court's action cannot be collaterally attacked for error not appearing on the face of the proceedings.—Farant Inv. Corporation v. Francis, 122 S. E. 141, 138 Va. 417.

Finding of evidentiary facts
On collateral attack of a judgment rendered by court of general jurisdiction pursuant to authority conferred by statute, every reasonable presumption will be indulged that court in prior proceedings found evidentiary facts after conferment of jurisdiction, but not that court found facts giving jurisdiction.—Bisbee v. Knight, 26 A.2d 637, 139 Me. 1.

44. Mo.—Cooper v. Gunter, 114 S. W. 943, 215 Mo. 558.

has been held to apply to a judgment rendered in a summary proceeding.[45]

"Judicial" and "ministerial" acts distinguished. Where a court of general jurisdiction has conferred on it special powers by special statutes, which are exercised only ministerially and not judicially, no presumption of jurisdiction will attend its judgments, and the facts essential to the exercise of special jurisdiction must appear on the face of the record.[46]

b. Courts or Tribunals of Inferior or Limited Jurisdiction

As a general rule, nothing is presumed in favor of the validity of the judgment of a court of inferior or limited jurisdiction; but the usual presumptions apply in a case in which such court or tribunal has exclusive or general jurisdiction.

Nothing is presumed in favor of the judgment of a court of inferior or limited jurisdiction, as against a collateral attack; but the jurisdictional facts must affirmatively appear either on the face of the record,[47] or, according to some authorities, by evidence aliunde, except as to facts required to be spread on the record,[48] and, as a corollary to this rule, it has been held that it is not necessary for defendant to appear in such court and object to its jurisdiction as a prerequisite to challenging such jurisdiction in a subsequent suit.[49] This rule, however, applies only to questions of jurisdiction as to the subject matter, for where the jurisdiction has once vested as to such matter, the rules which govern its exercise as to the person, with respect to process, evidence, etc., are generally the same as those applicable to courts of general jurisdiction.[50] Although the court may be a limited or inferior tribunal, yet if it has general or exclusive jurisdiction of any one subject, its proceedings and judgments with respect to that subject will be sustained, against collateral attack by the same presumptions which obtain in the case of superior courts.[51]

Where the records of inferior courts and tribunals show either affirmatively or by necessary implication that the court or tribunal had jurisdiction of the parties and the subject matter, such jurisdiction cannot be avoided by adverse inferences from the judgment or order rendered,[52] and the same presumptions will then be indulged as to the regularity of the proceedings as are indulged in proceedings of courts of general jurisdiction.[53] A pleading, in order to be sufficient to show such a judgment subject to collateral attack, must set out enough of the record to show that the court did not, in fact, have jurisdiction.[54]

Administrative tribunal. The judgment or award of an administrative tribunal purports jurisdiction, as against collateral attack, unless the judgment or award shows on its face that the tribunal did not have jurisdiction.[55]

Wash.—Junkin v. Anderson, 123 P. 2d 759, 760, 12 Wash.2d 58.

45. Tenn.—Hamilton v. Burum, 3 Yerg. 355.
34 C.J. p 543 note 5 [a].

46. Va.—Bryan v. Nash, 66 S.E. 69, 110 Va. 329.
34 C.J. p 543 note 7.

47. U.S.—Warmsprings Irr. Dist. v. May, C.C.A.Or., 117 F.2d 802.
Ala.—**Corpus Juris cited in** Chandler v. Price, 15 So.2d 462, 463, 244 Ala. 667.
Fla.—Krivitsky v. Nye, 19 So.2d 563, 155 Fla. 45—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516.
Mo.—State ex rel. Lane v. Cornell, 171 S.W.2d 687, 351 Mo. 1.
N.J.—Mangani v. Hydro, Inc., 194 A. 264, 119 N.J.Law 71—Crawford v. Lees, 93 A. 201, 84 N.J.Eq. 324.
Tenn.—New York Casualty Co. v. Lawson, 24 S.W.2d 881, 160 Tenn. 329.
34 C.J. p 544 note 8.
Judgment of justice see the C.J.S. title Justices of the Peace, § 115, also 35 C.J. p 686 note 48–p 687 note 57.

Verity and validity
A judgment of an inferior court of limited jurisdiction is not open to the presumption of verity and validity accorded to judgments of superior courts of general jurisdiction.—Ex parte Swehla, 220 P. 299, 114 Kan. 712.

Pleading
When court is exercising special or limited jurisdiction and complaint does not allege jurisdictional matter, judgment for plaintiff is void on collateral attack.—Chandler v. Price, 15 So.2d 462, 244 Ala. 667.

48. Ark.—Albie v. Jones, 102 S.W. 222, 82 Ark. 414, 12 Ann.Cas. 433.
Va.—Moore v. Smith, 15 S.E.2d 48, 177 Va. 621.
34 C.J. p 545 note 9.

49. Cal.—Lowe v. Alexander, 15 Cal. 296—Schuler-Knox Co. v. Smith, 144 P.2d 47, 62 Cal.App.2d 86.

50. Cal.—In re Sutro, 77 P. 402, 143 Cal. 487.
34 C.J. p 545 note 10.

51. Ill.—Moore v. Sievers, 168 N. E. 259, 336 Ill. 316.
Ky.—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.
N.Y.—Daley v. Dennis, 242 N.Y.S. 408, 137 Misc. 1.
Wyo.—**Corpus Juris quoted in** Campbell v. Wyoming Development Co., 100 P.2d 124, 134, 55 Wyo. 347.
34 C.J. p 545 note 11.

Mayor's judgment convicting defendant for speeding is presumed valid until annulled by appeal to circuit court, notwithstanding mayor has pecuniary interest.—Brooks v. Town of Potomac, 141 S.E. 249, 149 Va. 427.

52. Miss.—Scott County v. Dubois, 130 So. 106, 158 Miss. 245.

53. Ala.—Ex parte Griffith, 95 So. 551, 209 Ala. 158—Bowden v. State, 97 So. 467, 19 Ala.App. 377.
Ark.—Austin Western Road Machinery Co. v. Blair, 82 S.W.2d 528, 190 Ark. 996.
Va.—Kiser v. W. M. Ritter Lumber Co., 18 S.E.2d 319, 179 Va. 128.
34 C.J. p 545 note 12.

Recitals in the decree of such a court, of the requisite jurisdictional facts are sufficient to show jurisdiction at least prima facie when offered as evidence in a collateral proceeding.—Miller v. Thompson, 96 So. 481, 209 Ala. 469—Ex parte Griffith, 95 So. 551, 209 Ala. 158.

54. Ind.—Larimer v. Krau, 103 N.E. 1102, 57 Ind.App. 33, reheard 105 N. E. 936, 57 Ind.App. 33.

55. Utah.—State Tax Commission v. J. & W. Auto Service, 66 P.2d 141, 92 Utah 123.

c. Federal Courts

A judgment or decree of a federal court will be presumed regular and valid on a collateral attack.

Courts of the United States, although of statutory and limited jurisdiction, are regarded, within their limitations as to subject matter, as courts of general, rather than inferior, jurisdiction, as discussed in Federal Courts § 6, and therefore their judgments and decrees stand on the same footing as those of state courts of general jurisdiction, when collaterally attacked, and, unless want of jurisdiction affirmatively appears from the record,[56] the authority and jurisdiction of the court to render the judgment or decree will be presumed,[57] although the facts conferring jurisdiction do not appear in the record.[58] Accordingly, when a judgment rendered by a federal court is collaterally attacked in a state tribunal, the latter tribunal will presume that the federal court had jurisdiction, unless the contrary appears on the face of the record.[59] The rule applies to a judgment of a federal court sitting in another state.[60] The rule that, unless the contrary appears from the record, a cause is deemed to be without the jurisdiction of a federal court, as discussed in Federal Courts § 8, does not apply where the judgment of such a court is collaterally attacked.[61]

d. Probate Courts

The judgment of a probate court within the limits of its jurisdiction ordinarily is entitled to the same favorable presumptions, as against collateral attack, as are accorded the judgments of other courts of general jurisdiction.

Generally, although courts of probate are limited in their sphere to matters pertaining to the settlement of decedents' estates, their jurisdiction is not special or inferior, but, with respect to matters to which their powers extend, are usually regarded as courts of general jurisdiction, as discussed in Courts § 298, and therefore the judgment of such a court is entitled to the same presumptions as to jurisdiction, regularity, and validity, as against collateral attack, as are accorded the judgments of other courts of general jurisdiction,[62] unless it affirmatively appears from the record that the court had no jurisdiction in the matter;[63] and the recitals in the

56. U.S.—Hatten v. Hudspeth, C.C. A.Kan., 99 F.2d 501—Archer v. Heath, C.C.A.Wash., 30 F.2d 932—In re Ostlind Mfg. Co., D.C.Or., 19 F.Supp. 836.

57. U.S.—Hatten v. Hudspeth, C.C. A.Kan., 99 F.2d 501—Archer v. Heath, C.C.A.Wash., 30 F.2d 932.
N.Y.—New York Institution for Instruction of Deaf and Dumb v. Crockett, 102 N.Y.S. 412, 117 App. Div. 269.
34 C.J. p 545 note 14.

Power to vacate judgment of conviction
In absence of anything to show that federal district court was without power to vacate judgment of conviction against deputy sheriff, it will be assumed, in proceeding to oust deputy from office because of conviction, that court had proceeded within general scope of its powers and that order vacating judgment was given with authority.—Commonwealth ex rel. McClenachan v. Reading, 6 A.2d 776, 336 Pa. 165.

58. U.S.—Jenner v. Murray, C.C.A. Fla., 32 F.2d 625.
34 C.J. p 545 note 14.

59. N.Y.—Chemung Canal Bank v. Judson, 8 N.Y. 254, Seld. p 49.
25 C.J. p 692 note 66.

60. Tex.—New Orleans Southern Ins. Co. v. Woverton Hardware Co., 19 S.W. 615.

61. U.S.—Hatten v. Hudspeth, C.C. A.Kan., 99 F.2d 501.

62. Cal.—In re Keet's Estate, 100 P. 2d 1045, 15 Cal.2d 328—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal. 2d 35—Security-First Nat. Bank of Los Angeles v. Superior Court in and for Los Angeles County, 37 P. 2d 69, 1 Cal.2d 749—Wood v. Roach, 14 P.2d 170, 125 Cal.App. 631.
Ga.—Morris v. Nicholson, 31 S.E.2d 786, 198 Ga. 450—Jones v. Smith, 48 S.E. 134, 120 Ga. 642—Campbell v. Atlanta Coach Co., 200 S. E. 203, 58 Ga.App. 824.
Idaho.—Knowles v. Kasiska, 268 P. 3, 46 Idaho 379.
Iowa.—**Corpus Juris cited in** Anderson v. Schwitzer, 20 N.W.2d 67, 71.
Mo.—Ross v. Pitcairn, 179 S.W.2d 35, 153 A.L.R. 215—Linville v. Ripley, 146 S.W.2d 581, 347 Mo. 95—Blattel v. Stallings, 142 S.W. 2d 9, 346 Mo. 50—Crohn v. Modern Woodmen of America, 129 S.W. 1069, 145 Mo.App. 158—Hamilton v. Henderson, 117 S.W.2d 379, 232 Mo.App. 1234.
N.J.—Assets Development Co. v. Wall, 119 A. 10, 97 N.J.Law 468.
Okl.—Porter v. Hansen, 124 P.2d 391, 190 Okl. 429—Dill v. Anderson, 256 P. 31, 124 Okl. 299—Powers v. Brown, 252 P. 27, 122 Okl. 40—Cummings v. Inman, 247 P. 379, 119 Okl. 9—Adams v. Tidal Oil Co., 237 P. 443, 113 Okl. 15—Jones v. Snyder, 233 P. 744, superseded 249 P. 313, 121 Okl. 254—Gallaghar v. Petree, 230 P. 477, 103 Okl. 295—Bowling v. Merry, 217 P. 404, 91 Okl. 176.
Tex.—Dallas Joint Stock Land Bank of Dallas v. Forsyth, 109 S.W.2d 1046, 130 Tex. 563—Goolsby v. Bush, Civ.App., 172 S.W.2d 758—Burton v. McGuire, Civ.App., 3 S.W.2d 576, affirmed, Com.App., 41 S.W.2d 238—Tucker v. Imperial Oil & Development Co., Civ.App., 233 S.W. 339.
34 C.J. p 545 note 15.

Existence of necessary facts
Where record is silent as to the existence of any fact necessary to the validity of a county court's judgment in probate matters, it will be presumed on collateral attack that the court inquired into and found the existence of such fact.
Mo.—Hidden v. Edwards, 285 S.W. 462, 313 Mo. 642.
Okl.—Porter v. Hansen, 124 P.2d 391, 190 Okl. 429.

Date of entry
As against collateral attack, it will be presumed that order entered on probate minutes was entered on its date.—Burton v. McGuire, Tex.Civ. App., 3 S.W.2d 576, affirmed, Com. App., 41 S.W.2d 238.

Service of process will be presumed when record of probate court showing adjudication is silent.—Hannon v. Henson, Tex.Civ.App., 7 S.W. 2d 613, affirmed, Com.App., 15 S.W.2d 579.

63. Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35.
Ga.—Campbell v. Atlanta Coach Co., 200 S.E. 203, 58 Ga.App. 824.
Mo.—Linville v. Ripley, 146 S.W.2d 581, 347 Mo. 95.

record as to jurisdiction may not be contradicted by evidence of facts different from those appearing on the record.[64] There are some authorities, however, which hold that probate courts are courts of special or limited jurisdiction, and that their orders or decrees do not raise any presumption of jurisdiction unless the jurisdictional facts appear on the face of the proceeding.[65]

Special proceedings in probate court. With regard to matters not within the ordinary probate jurisdiction, but involving the exercise of special statutory powers, it has been held that the presumption of jurisdiction does not obtain, but the court, as concerns such matters, is a court of special jurisdiction; and the rule is the same as where a court of general jurisdiction exercises special statutory powers.[66]

§ 426. —— Recitals of Jurisdictional Facts

a. In general

b. Contradicting recitals

c. Recitals showing want of jurisdiction

a. In General

Recitals as to jurisdictional facts, contained in a judgment or judgment roll or record, are deemed to import absolute verity, and are generally conclusive as against a collateral attack unless they are contradicted by other portions of the record or unless there is an averment and proof of fraud.

In accordance with the rule that the judgment roll, or record proper, is of such uncontrollable credit and verity as to admit of no averment, plea, or proof to the contrary, as discussed supra § 132, where a judgment, or judgment roll or record, of a domestic court of general jurisdiction contains recitals as to the jurisdictional facts, such recitals generally are deemed to import absolute verity and to be conclusive as against a collateral attack[67] unless they are contradicted by other portions of the

Tex.—Goolsby v. Bush, Civ.App., 172 S.W.2d 758.
34 C.J. p 546 note 16.

64. Cal.—Marlenee v. Brown, 134 P. 2d 770, 21 Cal.2d 668.
Contradicting recitals generally see infra § 426.

65. Alaska.—Sylvester v. Willson, 2 Alaska 325.
34 C.J. p 546 note 17.

66. Ala.—Howell v. Hughes, 53 So. 105, 168 Ala. 460.
34 C.J. p 546 note 18.
Rule in case of exercise of special statutory powers see supra subdivision a (3) of this section.

67. U.S.—Merrell v. U. S., C.C.A. Okl., 140 F.2d 602.
Ala.—Ex parte Tanner, 121 So. 423, 219 Ala. 7, answer to certified question conformed to Tanner v. State, 121 So. 424, 23 Ala.App. 61, certiorari denied 121 So. 427, 219 Ala. 139.
Ark.—Kindrick v. Capps, 121 S.W.2d 515, 196 Ark. 1169—Union Inv. Co. v. Hunt, 59 S.W.2d 1039, 187 Ark. 357—Holt v. Manuel, 54 S.W.2d 66, 186 Ark. 435—State v. Wilson, 27 S.W.2d 106, 181 Ark. 683—Avery v. Avery, 255 S.W. 18, 160 Ark. 375.
Fla.—Newport v. Culbreath, 162 So. 340, 120 Fla. 152—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.
Idaho.—Weil v. Defenbach, 208 P. 1025, 36 Idaho 37.
Ill.—People ex rel. Baird & Warner v. Lindheimer, 19 N.E.2d 336, 370 Ill. 424.
Ky.—Wolverton v. Baynham, 10 S. W.2d 837, 226 Ky. 214.
La.—Scovell v. Levy, 30 So. 322, 106 La. 118.
Mich.—Burger v. Beste, 57 N.W. 99, 98 Mich. 156.
Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546—Vicksburg Grocery Co. v. Brennan, 20 So. 845.
Mo.—State ex rel. and to Use of Bair v. Producers Gravel Co., 111 S.W.2d 521, 341 Mo. 1106—State ex rel. Spratley v. Maries County, 98 S.W.2d 623, 339 Mo. 577—Aufderheide v. Aufderheide, App., 18 S.W.2d 119.
N.D.—Zimmerman v. Boynton, 229 N. W. 3, 59 N.D. 112.
Okl.—Protest of Stanolind Pipe Line Co., 32 P.2d 869, 168 Okl. 281—Protest of Gulf Pipe Line Co. of Oklahoma, 32 P.2d 42, 168 Okl. 136—Adams v. Carson, 25 P.2d 653, 165 Okl. 161—Protest of St. Louis-San Francisco Ry. Co., 19 P.2d 162, 162 Okl. 62—Protest of St. Louis-San Francisco Ry. Co., 11 P.2d 189, 157 Okl. 131—Foster v. Wooley, 220 P. 938, 93 Okl. 53.
Tenn.—Page v. Turcott, 167 S.W.2d 350, 179 Tenn. 491—Green v. Craig, 51 S.W.2d 480, 164 Tenn. 445.
Tex.—Empire Gas & Fuel Co. v. Albright, 87 S.W.2d 1092, 126 Tex. 485—Brown v. Clippenger, 256 S. W. 254, 113 Tex. 364—Levy v. Roper, 256 S.W. 251, 113 Tex. 356—Robins v. Sandford, Com.App., 29 S.W.2d 969—Bemis v. Bayou Development Co., Civ.App., 184 S.W. 2d 645, error refused; certiorari denied Bemis v. Humble Oil & Refining Co., 66 S.Ct. 43—Stewart Oil Co. v. Lee, Civ.App., 173 S.W. 2d 791, error refused—Wixom v. Bowers, Civ.App., 152 S.W.2d 896—Kveton v. Farmers Royalty Holding Co., Civ.App., 149 S.W.2d 998—Gann v. Putman, Civ.App., 141 S.W.2d 758, error dismissed, judgment correct—Askew v. Rountree, Civ.App., 120 S.W.2d 117, error dismissed—Longmire v. Taylor, Civ.App., 109 S.W.2d 525, error dismissed—Mercer v. Rubey, Civ.App., 108 S.W.2d 677, error refused—Henry v. Beauchamp, Civ.App., 39 S.W.2d 642, followed in Henry v. Carter, 39 S.W.2d 645—Bonougli v. Guerra, Civ.App., 286 S.W. 344.
Utah.—Pincock v. Kimball, 228 P. 221, 64 Utah 4.
Va.—Cole v. Farrier, 22 S.E.2d 18, 180 Va. 281.
Wash.—Ex parte Gordon, 144 P.2d 238, 19 Wash.2d 714—Peha's University Food Shop v. Stimpson Corporation, 31 P.2d 1023, 177 Wash. 406.
34 C.J. p 547 note 19.
Judgment by court having jurisdiction of parties and subject matter as not open to collateral attack generally see supra § 401.
Jurisdiction and power distinguished
Where question of validity of judgment arises collaterally, recitation therein of jurisdictional facts imports absolute verity, while recitation of power to execute deed which is an ancient instrument imports prima facie verity.—Loving County v. Higginbotham, Tex.Civ.App., 115 S.W.2d 1110, error dismissed.
Diversity of citizenship
Where record in district court foreclosure action affirmatively disclosed diversity of citizenship of parties, validity of title acquired by purchaser at foreclosure sale could not be challenged by collateral attack on jurisdiction of district court in such foreclosure action.—Bostwick v. Baldwin Drainage Dist., C.C.A.Fla., 133 F.2d 1, certiorari de-

record[68] or, according to some authorities, by extrinsic evidence, as discussed infra subdivision b of this section, or unless there is an averment and proof of fraud.[69]

Where a judgment or decree of a domestic court recites that proper notice of the action was given, that process was duly served, or that the parties were duly summoned or cited, such recital generally is conclusive on collateral attack,[70] even though there may have been defects in some of the documents constituting part of the judgment roll and relating to the service of process;[71] but it has been

nied 63 S.Ct. 1030, 319 U.S. 742, 87 L.Ed. 1699.

Judgment by agreement

Where judgment recited that it was by agreement of the parties, it was presumed that all the parties were present in open court and entered into the agreement, and the contention of any party that he did not in fact agree to the judgment must be made in a direct attack on the judgment; it could not be collaterally attacked in an action to remove clouds from title to realty on the ground that all parties to prior cause had not in fact agreed to the judgment.—Brennan v. Greene, Tex. Civ.App., 154 S.W.2d 523, error refused.

Partition

When the recitals in the record of a statutory partition show the jurisdiction of the court and its compliance with the statute, the order appointing commissioners to make partition is an adjudication of the sufficiency of the application, which cannot be questioned collaterally.—Hall v. Law, Ind., 102 U.S. 461, 26 L.Ed. 217.

Recitals as to trial at certain term

Tex.—Gann v. Putman, Civ.App., 141 S.W.2d 758, error dismissed, judgment correct.

68. U.S.—Merrell v. U. S., C.C.A. Okl., 140 F.2d 602.
Ala.—Ex parte Tanner, 121 So. 423, 219 Ala. 7, answer to certified question conformed to Tanner v. State, 121 So. 424, 23 Ala.App. 61, certiorari denied 121 So. 427, 219 Ala. 139.
Ark.—Holt v. Manuel, 54 S.W.2d 66, 186 Ark. 435.
Fla.—Newport v. Culbreath, 162 So. 340, 120 Fla. 152.
Idaho.—Weil v. Defenbach, 208 P. 1025, 36 Idaho 37.
N.D.—Zimmerman v. Boynton, 229 N.W. 3, 59 N.D. 112.
34 C.J. p 547 note 20.
Recitals showing want of jurisdiction see infra subdivision c of this section.

69. Ky.—Siler v. Carpenter, 160 S.W. 186, 155 Ky. 640.
W.Va.—Plant v. Humphries, 66 S.E. 94, 66 W.Va. 88, 26 L.R.A.,N.S., 558.
Fraud as ground for collateral attack see infra § 434.

70. Cal.—Kaufmann v. California Mining & Dredging Syndicate, 104 P.2d 1038, 16 Cal.2d 90—Sheehan v. All Persons, etc., 252 P. 337, 80 Cal.App. 393.
Ind.—Grantham Realty Corporation v. Bowers, 18 N.E.2d 929, affirmed 22 N.E.2d 832, 215 Ind. 672.
Ky.—Newhall v. Mahan, 54 S.W.2d 26, 245 Ky. 626.
N.J.—In re Leupp, 153 A. 842, 108 N.J.Eq. 49.
N.C.—Powell v. Turpin, 29 S.E.2d 26, 224 N.C. 67.
N.D.—Baird v. City of Williston, 226 N.W. 608, 58 N.D. 478.
Ohio.—Hinman v. Executive Committee of Communistic Party of U. S. A., 47 N.E.2d 820, 71 Ohio App. 76—Zingale v. Integrity Mortg. Co., 163 N.E. 214, 30 Ohio App. 94—Union Ice Corporation v. City of Niles, 13 Ohio Supp. 115.
Okl.—Jones v. Snyder, 233 P. 744, superseded 249 P. 313, 121 Okl. 254.
Tex.—Switzer v. Smith, Com.App., 300 S.W. 31, 68 A.L.R. 377—Bemis v. Bayou Development Co., Civ. App., 184 S.W.2d 645, error refused; certiorari denied Bemis v. Humble Oil & Refining Co., 66 S.Ct. 43—Edens v. Grogan Cochran Lumber Co., Civ.App., 172 S.W.2d 730, error refused—Stewart v. Adams, Civ.App., 171 S.W.2d 180—Litton v. Waters, Civ.App., 161 S.W.2d 1095, error refused—Wixom v. Bowers, Civ.App., 152 S.W.2d 896, error refused—Jordan v. Texas Pac. Coal & Oil Co., Civ.App., 152 S.W.2d 875—Laney v. Cline, Civ.App., 150 S.W.2d 176—Henry v. Beauchamp, Civ.App., 39 S.W.2d 642, followed in Henry v. Carter, 39 S.W.2d 645—Murchison Oil Co. v. Hampton, Civ.App., 21 S.W.2d 59, error refused—Barton v. Montex Corporation, Civ.App., 295 S.W. 950—Reitz v. Mitchell, Civ.App., 256 S.W. 697—Landa Cotton Oil Co. v. Watkins, Civ.App., 255 S.W. 775—Borders v. Highsmith, Civ.App., 252 S.W. 270.
34 C.J. p 547 note 23.

Particular service recited in judgment and found in record will, according to its sufficiency or insufficiency, determine validity of judgment.—Henry v. Beauchamp, Tex. Civ.App., 39 S.W.2d 642, followed in Henry v. Carter, 39 S.W.2d 645.

Partition

(1) A recital in the record of partition proceedings that the parties were duly cited is conclusive as against collateral attack.
Mo.—Brawley v. Ranney, 67 Mo. 280.
Pa.—Vensel's Appeal, 77 Pa. 71.
Tex.—Bassett v. Sherrod, 35 S.W. 312, 13 Tex.Civ.App. 327.

(2) This rule applies where unknown heirs were made parties.—Bassett v. Sherrod, supra—Gillon v. Wear, 28 S.W. 1014, 9 Tex.Civ.App. 44.

(3) Where the recitals in the record show the jurisdiction of the court and its compliance with the statute, the order appointing commissioners to make partition is an adjudication of the sufficiency of the notice, which cannot be questioned collaterally.—Hall v. Law, Ind., 102 U.S. 461, 26 L.Ed. 217.

Recital in mortgage foreclosure decree that cause came on regularly to be heard on complaint taken as confessed by defendant on whom due and regular service of summons and complaint was made must on collateral attack be accepted as true, particularly if judgment roll does not affirmatively show that recital is false.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 113 Mont. 130.

Recitals held insufficient

A recital in a judgment that more than a specified number of days had elapsed since the service of the summons and complaint falls short of a finding that the summons and complaint were served on defendant.—Illinois Trust & Savings Bank v. Town of Roscoe, 194 N.W. 649, 46 S.W. 477.

Prima facie proof

A recital that all parties to suit had notice of hearing is prima facie proof of that fact, not to be overthrown except by substantial evidence.—Maryland Casualty Co. v. Cox, C.C.A.Tenn., 104 F.2d 354.

71. Cal.—Kaufmann v. California Mining & Dredging Syndicate, 104 P.2d 1038, 16 Cal.2d 90.
Ohio.—Aldrich v. Friedman, 18 Ohio App. 302.
Defects or omissions in record as affecting presumptions generally see supra § 425.

Service on wrong spouse

Fact that process intended for husband was served on wife, and that directed to wife was served on husband, did not render default judgment, reciting fact of due service, subject to collateral attack as void.

held that where the recital is a general one, of due service of process, it is limited to process actually found in the record, and the validity of the judgment depends on the sufficiency of such process and service.[72] A similar presumption arises from a recital that the defendant or parties appeared,[73] although it has been held that the recital of an appearance is never conclusive, and, where the expression is general, it is confined to those parties who have been served with process.[74]

An ambiguous or imperfect recital in the judgment will be so construed, if possible, as to make it show jurisdiction.[75] If however, the recital is meaningless, it is void and affords no presumption in favor of service.[76]

Service by publication. In the case of a judgment against a nonresident defendant on service by publication of the summons, if the judgment recites that publication was "duly made," or was "in all respects regular and according to law," or that defendant was "duly notified," this is sufficient to sustain the validity of the judgment on collateral attack[77] unless such recital conflicts with the record proper, which shows a failure to comply with the statutory requirements.[78] The same effect has been given a recital that a default judgment was regu-

—Switzer v. Smith, Tex.Com.App. 300 S.W. 31, 68 A.L.R. 377.

Judgment reciting personal service, not contradicted by record, when in reality there was no such service, is not subject to collateral attack, not being void.—Oetting v. Mineral Wells Crushed Stone Co., Tex.Civ. App., 262 S.W. 93.

72. Okl.—Johnson v. Hood, 46 P.2d 533, 173 Okl. 108—Seal v. Banes, 35 P.2d 704, 168 Okl. 550.

73. Ala.—Ex parte Fidelity & Deposit Co. of Maryland, 134 So. 861, 223 Ala. 98.
Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.
Fla.—Bemis v. Loftin, 173 So. 683, 127 Fla. 515.
Ky.—Newhall v. Mahan, 54 S.W.2d 26, 245 Ky. 626.
Tex.—Henry v. Beauchamp, Civ.App., 39 S.W.2d 642, followed in Henry v. Carter, 39 S.W.2d 645.
34 C.J. p 548 note 25.

"Come the parties"

(1) A recital that "now, at this day, come the said parties, by their respective attorneys," without any further showing that the court acquired jurisdiction against one of defendants. has been held insufficient to support the judgment against him in collateral attack.—Bell v. Brinkmann, 27 S.W. 374, 123 Mo. 270, 275.

(2) Such a recital, however, has been held prima facie sufficient to render the judgment or decree valid as against a collateral attack.—Hunt v. Allison, 32 Ala. 173—34 C.J. p 548 note 25 [a].

Filing answer

Where judgment recited that an answer was filed, presumption arose that answer was properly filed, as respects whether sufficiency of defendant's appearance could be questioned in a collateral proceeding.—State ex rel. and to Use of Bair v. Producers Gravel Co., 111 S.W.2d 521, 341 Mo. 1106.

Failure to appear

A judgment on a petition which stated a valid cause of action for personal judgment against one defendant with foreclosure of asserted lien, and which recited on its face that the defendants, although duly cited, failed to appear, was not void and could not be collaterally attacked.—Livingston v. Stubbs, Tex.Civ. App., 151 S.W.2d 285, error dismissed, judgment correct.

Prima facie true

The recital in proceedings for partition, and in the decree rendered therein, that the heirs appeared and consented thereto, is prima facie true.—Millican v. Millican, 24 Tex. 426.

Waiver

Where judgments recited that defendants entered their appearance and filed answers, question as to whether a defendant was in court because of alleged insufficiency of waiver of process and entry of appearance could not be raised in a collateral attack on the judgment by motion to quash execution and stay sale.—State ex rel. and to Use of Bair v. Producers Gravel Co., supra.

74. Cal.—Chester v. Miller, 13 Cal. 558.
Mo.—Bell v. Brinkman, 27 S.W. 374, 123 Mo. 270.

75. Ala.—Stephens v. International Harvester Co., 80 So. 686, 16 Ala. App. 612.
34 C.J. p 548 note 27.

76. Tex.—Perry v. Whiting, 121 S. W. 903, 56 Tex.Civ.App. 550.
34 C.J. p 548 note 28.

77. Okl.—Smith v. Head, 134 P.2d 973, 192 Okl. 216—Washburn v. Culbertson, 75 P.2d 190, 181 Okl. 476.
Tex.—State v. Humble Oil & Refining Co., Civ.App., 187 S.W.2d 93, opinion supplemented on other grounds 194 S.W.2d 811—Smith v. Walker, Civ.App., 163 S.W.2d 857, error refused—Underwood v. Pigman, Civ.App., 21 S.W.2d 703, reversed on other grounds, Com.App., 32 S. W.2d 1102, modified on other grounds 36 S.W.2d 1114—Mariposa Mining Co. v. Waters, Civ.App., 279 S.W. 576.
34 C.J. p 548 note 30.

The record must be treated as a whole and as including affidavit for citation by publication, in determining court's statutory jurisdiction to render judgment against nonresident on citation by publication.—Fisher v. Jordan, D.C.Tex., 32 F.Supp. 608, reversed on other grounds, C.C.A., 116 F.2d 183, certiorari denied Jordan v. Fisher, 61 S.Ct. 734, 312 U.S. 697, 85 L.Ed. 1132.

Recitals held insufficient

(1) Recital in a judgment that an attorney was appointed to represent defendant on the suggestion of plaintiff's attorney that he had been cited by publication as required by law was not such a recital of due service as would preclude defendant from collaterally attacking the judgment on the ground that he was not served as required by law.—Shipley v. Pershing, Tex.Civ.App., 5 S.W.2d 799, error dismissed.

(2) Recitals that defendant had been cited to appear and answer by a citation published in a newspaper more than the time required by law before the first day of the term was not equivalent to a recital of due service on a nonresident, precluding attack on the judgment.—Reitz v. Mitchell, Tex.Civ.App., 256 S.W. 697.

78. Fla.—Johnson v. Clark, 198 So. 842, 145 Fla. 258.
Okl.—Smith v. Head, 134 P.2d 973, 192 Okl. 216.
34 C.J. p 548 note 30.

Notice of attachment

Where default judgment was based on attachment proceedings, but record showed that notice of attachment was returnable a specified number of days from the first publication so that court obtained no jurisdiction over defendant's person, the judgment was not immunized from collateral attack by a recital of due service of summons, such recital being a mere conclusion which conflicted with the record proper.—John-

larly entered according to law.[79] In some jurisdictions, however, statutes relating to constructive service are strictly construed, and in order to sustain the jurisdiction of a court based on such service, the record must affirmatively show that the statute has been complied with, and a formal recital that service has been had does not change this principle.[80]

b. Contradicting Recitals

Recitals of jurisdictional facts in a judgment may be contradicted by other parts of the record; but generally they cannot be contradicted or disproved by extrinsic evidence, except for fraud.

In the case of a judgment of a domestic court of general jurisdiction, the great majority of the decisions sustain the rule that its recitals concerning the service of process or the other facts on which its jurisdiction is founded import absolute verity, and that such recitals cannot be contradicted or disproved, in a collateral proceeding, by any evidence outside the record,[81] except for fraud in procuring

son v. Clark, 198 So. 842, 145 Fla. 258.

A warning order which states that it was issued on verified petition, but not alleging belief that nonresident defendant was then absent from state, cannot be presumed on collateral attack to have been made on proper affidavit.—Leonard v. Williams, 265 S.W. 618, 205 Ky. 218.

79. Cal.—Sacramento Bank v. Montgomery, 81 P. 138, 146 Cal. 745.

80. Neb.—Vandervort v. Finnell, 148 N.W. 332, 96 Neb. 515—Duval v. Johnson, 133 N.W. 1125, 90 Neb. 503, Ann.Cas.1913B 26.
34 C.J. p 549 note 32.
Presumptions as to process and service see supra § 425.

81. U.S.—Bennett v. Hunter, C.C.A. Kan., 155 F.2d 223—Thomas v. Hunter, C.C.A.Kan., 153 F.2d 834—Shields v. Shields, D.C.Mo., 26 F.Supp. 211.
Ala.—Watson v. Mobile & O. R. Co., 173 So. 43, 233 Ala. 690.
Cal.—Marlenee v. Brown, 134 P.2d 770, 21 Cal.2d 668—Burrows v. Burrows, 52 P.2d 606, 10 Cal.App. 2d 749—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704.
Fla.—Bemis v. Loftin, 173 So. 683, 127 Fla. 515.
Ga.—Hodges v. Stuart Lumber Co., 79 S.E. 462, 140 Ga. 569.
Ill.—People ex rel. Baird & Warner v. Lindheimer, 19 N.E.2d 336, 370 Ill. 424—People ex rel. Com'rs of North Fork Outlet Drainage Dist. v. Schwartz, 244 Ill.App. 137.
Ky.—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73—Ohio Oil Co. v. West, 145 S.W.2d 1035, 284 Ky. 796.
Mo.—Sisk v. Wilkinson, 265 S.W. 536, 305 Mo. 328—Row v. Cape Girardeau Foundry Co., App., 141 S.W. 2d 113—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S.W.2d 865—State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo. App. 1—Mississippi and Fox River Drainage Dist. of Clark County v. Ruddick, 64 S.W.2d 306, 228 Mo. App. 1143.
Mont.—State ex rel. Enochs v. District Court of Fourth Judicial Dist. in and for Missoula County, 123 P. 2d 971, 113 Mont. 227.
Neb.—Exchange Elevator Co. v. Marshall, 22 N.W.2d 403.
Tex.—Wixom v. Bowers, Civ.App., 152 S.W.2d 896, error refused—Jordan v. Texas Pac. Coal & Oil Co., Civ.App., 152 S.W.2d 875, error refused—Laney v. Cline, Civ.App., 150 S.W.2d 176—Childers v. Johnson, Civ.App., 143 S.W.2d 123—Harvey v. Wichita Nat. Bank, Civ.App., 113 S.W.2d 1022—Dallas Joint Stock Land Bank of Dallas v. Street, Civ.App., 76 S.W.2d 780, error refused, followed Street v. Dallas Joint Stock Land Bank of Dallas, 84 S.W.2d 1119—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031—Duke v. Gilbreath, Civ.App., 2 S.W.2d 324, error dismissed—Cockrell v. Steffens, Civ.App., 284 S.W. 608—Texas Pacific Coal & Oil Co. v. Ames, Civ.App., 284 S.W. 315, reversed on other grounds, Com.App., 292 S.W. 191.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
Wash.—Thompson v. Short, 106 P. 2d 720, 6 Wash.2d 71—Globe Const. Co. v. Yost, 13 P.2d 433, 169 Wash. 319.
Va.—Broyhill v. Dawson, 191 S.E. 779, 168 Va. 321.
34 C.J. p 549 note 33.
Rules excluding extrinsic evidence to impeach or contradict judicial record in general see Evidence §§ 865–875.

Evidence without pleading and without substance is unavailing to prove that docket entries showing service on litigant of process in a prior proceeding were irregular or fraudulent so as to relieve litigant of binding effect of former judgment.—Davis v. Tuggle's Adm'r, 178 S.W. 2d 979, 297 Ky. 376.

Judgment in favor of employee for damages sustained during employment cannot be collaterally attacked on ground of lack of court's jurisdiction by extraneous evidence, even though such evidence might conceivably have shown an injury compensable under workmen's compensation law.—Row v. Cape Girardeau Foundry Co., Mo.App., 141 S.W.2d 113.

Nonresident

Where judgment foreclosing an equitable lien against defendant's interest in land recited that defendant was personally served with nonresident notice as prescribed by statute, that the sheriff's return on the order of sale had been duly made, and that a notice of such sale had been mailed to defendant, defendant could not go behind recitals in judgment by attempting to prove in subsequent trespass to try title suit that he was a nonresident at time of rendition of judgment or that he was not physically in the state on that date or that the service specified in the judgment was not legal.—Bemis v. Bayou Development Co., Tex.Civ.App., 184 S.W.2d 645, error refused. Certiorari denied Bemis v. Humble Oil & Refining Co., 66 S.Ct. 43.

Personal judgment against nonresident

Rule that, in collateral proceeding, inquiry cannot be made into facts dehors the record for purpose of showing invalidity of judgment has been held not operative to support personal judgment against nonresident of state which was rendered without personal service within the state.—Hicks v. Sias, Tex.Civ.App., 102 S.W.2d 460, error refused.

Pleading and evidence

A judgment record which showed that a matter was submitted to court on pleadings and evidence could not be impeached in a collateral proceeding to enforce the judgment by parol evidence that judgment was taken without proof being offered.—Exchange Elevator Co. v. Marshall, Neb., 22 N.W.2d 403.

Entry on appearance docket

The presumption arising from a recital in a decree that defendant had been duly served with notice, where supported only by an entry on the appearance docket, no return of service being found in the files, is overcome by defendant's positive testimony that no notice was served on him and the testimony of the sheriff by whom the service was supposed to have been made that he had no recollection of making it.—Shehan v. Stuart, 90 N.W. 614, 117 Iowa 207.

it.[82] Under this rule evidence aliunde is not admissible for the purpose of showing lack of proper service of process on defendant[83] or as to any fact on which the court must have passed in rendering the judgment.[84] By some decisions, however, it has been held that a record does not import uncontrollable verity when want of jurisdiction is alleged, and that it is permissible in a collateral proceeding to controvert the recitals of the record on this point by evidence aliunde,[85] except where jurisdiction depends on a litigated fact adjudged in favor of the party averring jurisdiction.[86]

Contradiction by record. In accordance with the rule precluding the consideration of extrinsic evidence, the judgment itself together with other parts of the record which affirmatively show want of jurisdiction are ordinarily the only matters of evidence that may be considered to collaterally contradict and impeach the judgment,[87] and the collateral attack will not be sustained where the only part of the record offered in evidence shows nothing to indicate the invalidity of the judgment.[88] It is open to a party to contest the alleged jurisdiction by producing other parts of the record or judgment roll, which contradict the recitals of service of process or of other jurisdictional facts in the judgment,[89] as, by producing the original writ or the return on it, which in case of conflict will control the recitals of the judgment,[90] although the endeavor will always be made to reconcile apparent

82. U.S.—Bennett v. Hunter, C.C.A. Kan., 155 F.2d 223—Thomas v. Hunter, C.C.A.Kan., 153 F.2d 834.
Mo.—Mississippi and Fox River Drainage Dist. of Clark County v. Ruddick, 64 S.W.2d 306, 228 Mo. App. 1143—**Corpus Juris cited in** Aufderheide v. Aufderheide, App., 18 S.W.2d 119, 120.
W.Va.—Central District & Printing Telegraph Co. v. Parkersburg & O. V. E. R. Co., 85 S.E. 65, 76 W. Va. 120.
Fraud as ground for collateral attack generally see infra § 434.

83. Ark.—Weeks v. Arkansas Club, 145 S.W.2d 738, 201 Ark. 423.
Cal.—Feig v. Bank of Italy Nat. Trust & Savings Ass'n, 21 P.2d 421, 218 Cal. 54.
Ky.—Hall v. Bates, 77 S.W.2d 403, 257 Ky. 61.
Mich.—Garey v. Morley Bros., 209 N.W. 116, 234 Mich. 675.
Minn.—Miller v. Ahneman, 235 N.W. 622, 183 Minn. 12.
Tex.—Rhoads v. Daly General Agency, Civ.App., 152 S.W.2d 461, error refused—Childers v. Johnson, Civ. App., 143 S.W.2d 123—Simms Oil Co. v. Butcher, Civ.App., 55 S.W.2d 192, error dismissed—Bonougli v. Guerra, Civ.App., 286 S.W. 344.
W.Va.—Williams v. Monico, 132 S.E. 652, 101 W.Va. 304.
34 C.J. p 549 note 33.

Citation not admissible

Where judgment recited that defendant was personally served in terms of law with citation commanding him to appear and answer, but that he neither appeared nor filed an answer, and wholly defaulted, recitation of service of citation could not be impeached in subsequent proceedings by the introduction of citation in evidence.—Williams v. Coleman-Fulton Pasture Co., Tex.Civ. App., 157 S.W.2d 995, error refused.

84. Tex.—Crowley v. Redmond, 41 S. W.2d 274, 123 Tex. 315—Stewart Oil Co. v. Lee, Civ.App., 173 S.W. 2d 791, error refused—Simms Oil Co. v. Butcher, Civ.App., 55 S.W.2d 192, error dismissed—Kreis v. Kreis, Civ.App., 36 S.W.2d 821, error dismissed.

Rule not applicable

In suit to enforce judgment against apparent surety on supersedeas bond, judgment could be collaterally attacked on ground that apparent surety's signature to bond was forged, and fact of forgery established by evidence aliunde record, since no inquiry was made as to the genuineness of the signature, and the matter of jurisdiction was not adjudicated.—Simms Oil Co. v. Butcher, Tex.Civ.App., 55 S.W.2d 192, error dismissed.

85. N.Y.—Shea v. Shea, 60 N.Y.S.2d 823, 270 App.Div. 527, appeal granted 62 N.Y.S.2d 618, 270 App. Div. 906—MacAffer v. Boston & M. R. R., 273 N.Y.S. 679, 242 App.Div. 140, affirmed 197 N.E. 328, 268 N.Y. 400—Standish v. Standish, 40 N.Y.S.2d 538, 179 Misc. 564—Finkelstein v. William H. Block Co., 208 N.Y.S. 401, 124 Misc. 610.
34 C.J. p 547 note 21, p 550 note 35.

86. N.Y.—O'Donoghue v. Boies, 53 N.E. 537, 159 N.Y. 87—Shea v. Shea, 60 N.Y.S.2d 823, 270 App. Div. 527, appeal granted 62 N.Y.S. 2d 618, 270 App.Div. 906—MacAffer v. Boston & M. R. R., 273 N.Y.S. 679, 242 App.Div. 140, affirmed 197 N.E. 328, 268 N.Y. 400.
Conclusiveness of decision of court as to its own jurisdiction generally see infra § 427.

87. Cal.—Burrows v. Burrows, 52 P. 2d 606, 10 Cal.App.2d 749.
Mo.—Linville v. Ripley, 146 S.W.2d 581, 347 Mo. 95—Sisk v. Wilkinson, 265 S.W. 536, 305 Mo. 328—Row v. Cape Girardeau Foundry Co., App., 141 S.W.2d 113—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S.W.2d 865.
Necessity of want of jurisdiction affirmatively appearing on face of record generally see supra § 425 a (1).

88. Utah.—Intermill v. Nash, 75 P. 2d 157, 94 Utah 291.

Entire record considered

In determining whether court had jurisdiction, the whole record must be inspected, and, if the judgment itself recites service but the return found shows no service or a service which is insufficient or unauthorized by law, the judgment is void. Such a recital in the judgment is deemed to refer to the kind of service shown in other parts of the record, and must be read in connection with that part of the record which sets forth the proof of service; and it is presumed that the service found in the record is the same and the only service referred to in the general recital in the judgment, and that the court acted on the service appearing in the record.—Powell v. Turpin, 29 S.E.2d 26, 224 N.C. 67.

89. Mo.—Linville v. Ripley, 146 S. W.2d 581, 347 Mo. 95—Sisk v. Wilkinson, 265 S.W. 536, 305 Mo. 328—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S.W.2d 865—General Motors Acceptance Corporation v. Lyman, 78 S.W.2d 109, 229 Mo.App. 455.
N.Y.—Shea v. Shea, 60 N.Y.S.2d 823, 270 App.Div. 527, appeal granted 62 N.Y.S.2d 618, 270 App.Div. 906—Standish v. Standish, 40 N.Y.S. 2d 538, 179 Misc. 564.
N.C.—Powell v. Turpin, 29 S.E.2d 26, 224 N.C. 67.
Ohio.—Hinman v. Executive Committee of Communistic Party of U. S. A., 47 N.E.2d 820, 71 Ohio App. 76—In re Frankenberg's Estate, 47 N.E.2d 239, 70 Ohio App. 495.
34 C.J. p 550 note 36.

90. Colo.—Ernst v. Colburn, 268 P. 576, 84 Colo. 170.
Ill.—Town of Hutton v. Ingram, 255 Ill.App. 97—People ex rel. Com'rs

inconsistencies by construction, or by the aid of presumptions.[91] It has been held, however, that if the judgment contains satisfactory recitals of jurisdictional facts such recitals are controlling on the question of jurisdiction and the remainder of the record may not be considered,[92] and that it is only when the judgment is silent or ambiguous as to jurisdictional facts that other parts of the record may be considered in determining whether the judgment is void for want of jurisdiction.[93]

c. Recitals Showing Want of Jurisdiction

Where the facts recited in the record, on which the court assumes jurisdiction, are not such as would in law confer jurisdiction, the presumption of regularity and validity does not apply and the judgment may be collaterally impeached.

Where the facts on which a court assumes jurisdiction are recited in the record, and appear by it to have been such as would not in law confer jurisdiction, the judgment may be impeached collaterally, for in such a case there can be no presumption, in aid of the regularity and validity of the judgment, that the recitals of the record are incorrect or incomplete,[94] or that something was done which the record does not show to have been done,[95] the whole record being taken together for this purpose.[96] This rule applies where the record affirmatively shows the absence of conditions necessary to give the court jurisdiction[97] or that

of North Fork Outlet Drainage Dist. v. Schwartz, 244 Ill.App. 137.
34 C.J. p 550 note 37.

91. W.Va.—Point Pleasant v. Greenlee, 60 S.E. 601, 63 W.Va. 207, 212, 129 Am.S.R. 971.
34 C.J. p 551 note 38.

92. Tex.—Watson v. Rochmill, 155 S.W.2d 783, 137 Tex. 565, 137 A.L.R. 1032—Martin v. Burns, 16 S.W. 1072, 80 Tex. 676—Chapman v. Kellogg, Com.App., 252 S.W. 151—Smith v. Walker, Civ.App., 163 S.W.2d 857, error refused—Litton v. Waters, Civ.App., 161 S.W.2d 1095, error refused—Williams v. Coleman-Fulton Pasture Co., Civ. App., 157 S.W.2d 995, error refused—Laney v. Cline, Civ.App., 150 S.W.2d 176, error dismissed, judgment correct—Watson v. Rochmill, Civ.App., 134 S.W.2d 710, modified on other grounds 155 S.W.2d 783, 137 Tex. 565, 137 A.L.R. 1032—Smith v. Burns, Civ.App., 107 S.W. 2d 397—Henry v. Beauchamp, Civ. App., 39 S.W.2d 642.

Resort may be had to former pleadings only when a judgment collaterally attacked is ambiguous and not complete within itself.—Stewart Oil Co. v. Lee, Tex.Civ.App., 173 S.W.2d 791, error refused.

93. Tex.—Litton v. Waters, Civ. App., 161 S.W.2d 1095, error refused—Pumphrey v. Hunter, Civ. App., 270 S.W. 237.

The "record" in such a case includes the pleadings of the parties and the processes by which defendant was brought into court.—Scruggs v. Gribble, Tex.Civ.App., 41 S.W.2d 643.

94. U.S.—Butler v. McKey, C.C.A. Cal., 138 F.2d 373, certiorari denied 64 S.Ct. 636, 321 U.S. 780, 88 L.Ed. 1073.
Ariz.—Brecht v. Hammons, 278 P. 381, 35 Ariz. 383.
Cal.—Rogers v. Cady, 38 P. 81, 104 Cal. 288, 43 Am.S.R. 100—In re Frowenfeld, 40 P.2d 552, 3 Cal.App. 2d 576.
Colo.—In re Zupancis' Heirship, 111 P.2d 1063, 107 Colo. 323—Kavanagh v. Hamilton, 125 P. 512, 53 Colo. 157, Ann.Cas.1914B 76.
Fla.—Fisher v. Guidy, 142 So. 818, 106 Fla. 94.
Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.
Miss.—**Corpus Juris cited in** Prudential Ins. Co. v. Gleason, 187 So. 229, 233.
Mo.—Ray v. Ray, 50 S.W.2d 142, 330 Mo. 530.
Mont.—**Corpus Juris quoted in** West v. Capital Trust & Savings Bank, 124 P.2d 572, 575, 113 Mont. 130.
N.D.—Zimmerman v. Boynton, 229 N.W. 3, 59 N.D. 112.
Ohio.—Terry v. Claypool, 65 N.E.2d 883, 77 Ohio App. 77—Wainscott v. Young, 59 N.E.2d 609, 74 Ohio App. 463—Union Ice Corporation v. City of Niles, 13 Ohio Supp. 115.
S.C.—**Corpus Juris quoted in** Cannon v. Haverty Furniture Co., 183 S.E. 469, 477, 179 S.C. 1.
Tex.—Bragdon v. Wright, Civ.App., 142 S.W.2d 703, error dismissed—Tire Finance Corporation v. Iliff, Civ.App., 129 S.W.2d 1208—Scruggs v. Gribble, Civ.App., 41 S.W.2d 643—State Mortg. Corporation v. Affleck, Civ.App., 27 S.W.2d 548, reversed on other grounds, Com.App., 51 S.W.2d 274—Scruggs v. Gribble, Civ.App., 17 S.W.2d 153—Pumphrey v. Hunter, Civ.App., 270 S.W. 237.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271.
34 C.J. p 551 note 39.

Not showing or negativing jurisdiction

Where a judgment, undertaking to recite process or facts on which jurisdiction of court is based, does not show jurisdiction or negative it, judgment is void on its face.—Pumphrey v. Hunter, Tex.Civ.App., 270 S.W. 237.

As tantamount to proving judgment

Where the recitals in a judgment and the record proper show a judgment to be defective, showing the judgment to be defective by introducing the judgment and the record proper, this is tantamount only to proving what the judgment itself shows, and is not prohibited as a "collateral attack."—State ex rel. National Lead Co. v. Smith, Mo.App., 134 S.W.2d 1061.

Objection to record

If it affirmatively appears from record of probate court itself, either that court did not have jurisdiction of subject matter or of person, in case where such is required, or that jurisdiction did not attach in a particular case, jurisdictional question can be raised on objection to the record when offered in evidence in another proceeding, and no affirmative proceeding need be prosecuted to vacate judgment.—Buss v. Smith, Civ.App., 125 S.W.2d 712, affirmed Smith v. Buss, 144 S.W.2d 529, 135 Tex. 566.

95. Mont.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 575, 113 Mont. 130.
Okl.—Gallaghar v. Petree, 230 P. 477, 103 Okl. 295.
S.C.—**Corpus Juris quoted in** Cannon v. Haverty Furniture Co., 183 S.E. 469, 477, 179 S.C. 1.
34 C.J. p 551 note 40.

96. Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.
Mont.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 575, 113 Mont. 130.
S.C.—Cannon v. Haverty Furniture Co., 183 S.E. 469, 477, 179 S.C. 1.
Tex.—Henry v. Beauchamp, Civ.App., 39 S.W.2d 642, followed in Henry v. Carter, 39 S.W.2d 645.
34 C.J. p 551 note 41.

Petition, bill, answer, and decree included in record

Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.

97. Ohio.—Wainscott v. Young, 59 N.E.2d 609, 74 Ohio App. 463.

the court did not have authority to grant the particular judgment.[98] Although the judgment recites that defendant was duly served with process, if the record shows that no service was made,[99] or shows a service which is insufficient and unauthorized by law,[1] the judgment may be collaterally impeached.

§ 427. —— Decision of Court as to Its Own Jurisdiction

The decision of a court, of either general or limited jurisdiction, as to the fact of its jurisdiction of a case generally is not subject to collateral attack unless it is in irreconcilable conflict with facts otherwise disclosed by the record of the proceedings.

Where a court of general jurisdiction judicially considers and adjudicates the question of its jurisdiction, and decides that the facts exist which are necessary to give it jurisdiction of the case, the finding is conclusive, as discussed in Courts § 115, and generally cannot be controverted in a collateral proceeding,[2] even though the decision or finding as to jurisdiction was erroneous,[3] and although the

98. Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061.
Okl.—Sims v. Billings, 18 P.2d 1084, 162 Okl. 51—Appeal of Sims' Estate, 18 P.2d 1077, 162 Okl. 35—Cummings v. Inman, 247 P. 379, 119 Okl. 9—Dill v. Anderson, 256 P. 31, 124 Okl. 299.
Tex.—Milner v. Gatlin, Com.App., 261 S.W. 1003.

99. Ala.—Guy v. Pridgen & Holman, 118 So. 229, 22 Ala.App. 595.
Ark.—Union Inv. Co. v. Hunt, 59 S.W.2d 1039, 187 Ark. 357.
Mont.—West v. Capital Trust & Savings Bank, 124 P.2d 572, 575, 113 Mont. 130.
N.C.—Dunn v. Wilson, 187 S.E. 802, 210 N.C. 493.
S.C.—Cannon v. Haverty Furniture Co., 183 S.E. 469, 179 S.C. 1.
Wash.—Columbia Basin Land Co. v. Peters C. Chalmers Co., 218 P. 217, 126 Wash. 307.
34 C.J. p 552 note 42.

Record in case of failure of judgment to recite service must constitute sole evidence, if any, of want of service and consequent invalidity of judgment.—Henry v. Beauchamp, Tex.Civ.App., 39 S.W.2d 642, followed in Henry v. Carter, 39 S.W.2d 645.

Copy of affidavit

Failure to serve on defendant copy of plaintiff's controverting affidavit to plea of privilege rendered judgment void without reference to recitals in judgment.—Scruggs v. Gribble, Tex.Civ.App., 41 S.W.2d 643.

1. Cal.—Steuri v. Junkin, 82 P.2d 34, 27 Cal.App.2d 758.
Ill.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.
S.C.—Cannon v. Haverty Furniture Co., 183 S.E. 469, 477, 179 S.C. 1.
S.D.—Illinois Trust & Savings Bank v. Town of Roscoe, 194 N.W. 649, 46 S.D. 477.
34 C.J. p 552 note 43.

2. U.S.—Stoll v. Gottlieb, Ill., 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437—Baldwin v. Iowa State Traveling Men's Ass'n, Iowa, 51 S.Ct. 517, 283 U.S. 522, 75 L.Ed. 1244—Davis v. Johnston, C.C.A.Cal., 144 F.2d 862, certiorari denied 65 S.Ct. 311, 323 U.S. 789, 89 L.Ed. 629, rehearing denied 65 S.Ct. 558, 323 U.S. 819, 89 L.Ed. 650—Walling v. Miller, C.C.A.Minn., 138 F.2d 629, certiorari denied 64 S.Ct. 781, 321 U.S. 784, 88 L.Ed. 1076—Burgess v. Nail, C.C.A.Ill., 103 F.2d 37—Russell v. U. S., C.C.A.Minn., 86 F.2d 389—Greene v. Uniacke, C.C.A.Fla., 46 F.2d 916, certiorari denied 51 S.Ct. 493, 283 U.S. 847, 75 L.Ed. 1455—**Corpus Juris quoted in** McCombs v. West, D.C.Fla., 63 F. Supp. 469, affirmed, C.C.A., 155 F. 2d 601—Nicolson v. Citizens & Southern Nat. Bank, D.C.Ga., 50 F. Supp. 92.
Ariz.—Brecht v. Hammons, 278 P. 381, 35 Ariz. 383.
Cal.—Ex parte Tassey, 253 P. 948, 81 Cal.App. 287.
Ga.—Thomas v. Lambert, 1 S.E.2d 443, 187 Ga. 616.
Iowa.—Watt v. Dunn, 17 N.W.2d 811.
Ky.—**Corpus Juris quoted in** Pendleton County Board of Education v. Simpson, 91 S.W.2d 557, 560, 262 Ky. 844.
Miss.—**Corpus Juris cited in** Prudential Ins. Co. v. Gleason, 187 So. 229, 233.
Mo.—State, on inf. Gentry, v. Toliver, 287 S.W. 312, 315 Mo. 737—State ex rel. Compagnie Generale Transatlantique v. Falkenhainer, 274 S.W. 758, 309 Mo. 224.
N.Y.—Battalico v. Knickerbocker Fireproofing Co., 294 N.Y.S. 481, 250 App.Div. 258—Nankivel v. Omsk All Russian Government, 197 N.Y.S. 467, 203 App.Div. 740, reversed on other grounds 142 N.E. 569, 237 N.Y. 150—Keating v. Equitable Surety Co. of New York, 235 N.Y.S. 281, 134 Misc. 491—People ex rel. Davis v. Jennings, 232 N.Y.S. 603, 133 Misc. 538—Finkelstein v. William H. Block Co., 208 N.Y.S. 401, 124 Misc. 610—Eastman Kodak Co. v. Richards, 204 N.Y.S. 246, 123 Misc. 83—People v. Harmor, 57 N.Y.S.2d 402.
Ohio.—Busse & Borgmann Co. v. Upchurch, 21 N.E.2d 349, 60 Ohio App. 349.
Okl.—**Corpus Juris cited in** Fitzsimmons v. Oklahoma City, 135 P.2d 340, 342, 192 Okl. 248—Winter v. Klein-Schultz, 76 P.2d 1051, 182 Okl. 231—Foshee v. Craig, 237 P. 78, 110 Okl. 189.
Pa.—Askew v. S. C. Loveland Co., 9 Pa.Dist. & Co. 635.
Tex.—Highland Farms Corporation v. Fidelity Trust Co., of Houston, 82 S.W.2d 627, 125 Tex. 474—Manry v. McCall, Civ.App., 22 S.W.2d 348.
Va.—Kiser v. W. M. Ritter Lumber Co., 18 S.E.2d 319, 179 Va. 128.
W.Va.—**Corpus Juris quoted in** Bell v. Brown, 182 S.E. 579, 580, 116 W. Va. 484.
34 C.J. p 552 note 44.

Judgment against municipality within rule

Okl.—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40.

Consent to judgment

Judge's finding set out in judgment, that consent was given to enter judgment out of term and out of district, is binding in absence of fraud.—Killian v. Maiden Chair Co., 161 S.E. 546, 202 N.C. 23.

Jurisdiction over subject matter

Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, parties cannot collaterally attack judgment on ground that court did not have jurisdiction over subject matter.—Peri v. Groves, 50 N.Y.S.2d 300, 183 Misc. 579.

Where record shows evidence on which court acted in determining jurisdiction, no presumption of jurisdiction as to prior judgment can be considered.—Sharp v. Sharp, 164 N. E. 685, 333 Ill. 267.

3. U.S.—Nye v. U. S., C.C.A.N.C., 137 F.2d 73, certiorari denied 64 S.Ct. 62, 320 U.S. 755, 88 L.Ed. 449—National Park Bank v. McKibben & Co., D.C.Ga., 43 F.2d 254.
N.Y.—People v. Harmor, 57 N.Y.S. 2d 402.
Tex.—Farmers' Nat. Bank of Stephensville v. Daggett, Com.App., 2 S.W.2d 834.
Va.—Kiser v. W. M. Ritter Lumber Co., 18 S.E.2d 319, 179 Va. 128.

ground on which the decision was rested has subsequently been overruled.[4] A judgment is not subject to collateral attack, where it is rendered under a decision of the court that it has jurisdiction, based on a special as well as a general appearance,[5] or on a writ or notice which, although defective, or the service of which was irregular or informal, has been adjudged sufficient,[6] or on service of process by publication.[7] However, a collateral attack may be made on such decision where it is in irreconcilable conflict with facts otherwise disclosed by the record of the proceedings,[8] or where the facts are admitted in the pleadings, or agreed on, and the court's determination is based on an error of law arising out of such state of facts.[9]

Where general jurisdiction over a particular class of cases is conferred on a certain tribunal, its decision on the facts essential to its jurisdiction in a case belonging to that class is generally not subject to a collateral attack,[10] as in the case of courts of the United States[11] and probate courts.[12]

Court or tribunal of inferior or limited jurisdiction. The rule is not confined to courts of general jurisdiction, but it has been held that if an inferior court or one of limited jurisdiction is charged with the ascertainment of a jurisdictional fact, and its proceedings show that the fact was ascertained, the finding cannot be collaterally attacked[13] unless want of jurisdiction is apparent on the face of the record.[14]

Error in exercise of jurisdiction see supra § 19.

Error in determination of questions of law or fact on which the court's jurisdiction in particular case depends, the court having general jurisdiction of the cause and of the person, is "error in exercise of jurisdiction" and affords no ground for collateral attack.—Burgess v. Nail, C.C.A.Okl., 103 F.2d 37.

4. U.S.—Ripperger v. A. C. Allyn & Co., C.C.A.N.Y., 113 F.2d 332, certiorari denied 61 S.Ct. 136, 311 U.S. 695, 85 L.Ed. 450.

5. N.Y.—Peri v. Groves, 50 N.Y.S. 2d 300, 183 Misc. 579.

6. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871.
Iowa.—Giberson v. Henness, 258 N. W. 708, 219 Iowa 359.
N.Y.—Keating v. Equitable Surety Co. of New York, 235 N.Y.S. 281, 134 Misc. 491.
34 C.J. p 553 note 46.

Admissibility of evidence

Where a judgment determining that court had jurisdiction of person of foreign corporation is not subject to collateral attack, evidence impeaching sheriff's return and contradicting recitals in record is inadmissible.—Ellis v. Starr Piano Co., 49 S.W.2d 1073, 226 Mo.App. 1209.

7. Fla.—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212.
34 C.J. p 553 note 50.

8. U.S.—**Corpus Juris quoted in** McCombs v. West, D.C.Fla., 63 F. Supp. 469, 471, affirmed, C.C.A., 155 F.2d 601.
Va.—Beck v. Semones' Adm'r, 134 S. E. 677, 145 Va. 429.
W.Va.—**Corpus Juris quoted in** Bell v. Brown, 182 S.E. 579, 580, 116 W. Va. 484.
Wyo.—Boulter v. Cook, 236 P. 245, 32 Wyo. 461.
34 C.J. p 553 note 45.

Lack of necessary steps to confer jurisdiction affirmatively shown by record.—Quigley v. Cremin, 109 So. 312, reheard 113 So. 892, 194 Fla. 104.

9. Ariz.—Brecht v. Hammons, 278 P. 381, 35 Ariz. 383.
Mo.—State ex rel. Compagnie Générale Transatlantique v. Falkenhainer, 274 S.W. 758, 309 Mo. 224.
Tex.—Highland Farms Corporation v. Fidelity Trust Co., of Houston, 82 S.W.2d 627, 125 Tex. 474.

10. Ind.—Delphi v. Startzman, 3 N. E. 937, 104 Ind. 343.
34 C.J. p 553 note 47.

11. U.S.—Young Realty Co. v. Darling Stores Corporation, C.C.A.N. Y., 123 F.2d 556—Sorenson v. Sutherland, C.C.A.N.Y., 109 F.2d 714, affirmed Jackson v. Irving Trust Co., 61 S.Ct. 326, 311 U.S. 494, 85 L.Ed. 297.
34 C.J. p 553 note 48.
Determination of jurisdiction by federal court see Federal Courts § 83 d.

The determinations of lower federal courts regarding whether they have jurisdiction to entertain cause cannot be assailed collaterally.—Chicot County Drainage Dist. v. Baxter State Bank, Ark., 60 S.Ct. 317, 308 U.S. 371, 84 L.Ed. 329, rehearing denied 60 S.Ct. 581, 309 U.S. 695, 84 L.Ed. 1035.

A collateral attack on district court foreclosure judgment cannot be sustained unless the record on its face shows that requisite diversity of citizenship to sustain federal jurisdiction did not and could not exist and that court did not find and adjudicate that it had jurisdiction.—Bostwick v. Baldwin Drainage Dist., C.C.A.Fla., 133 F.2d 1, certiorari denied 63 S.Ct. 1030, 319 U.S. 742, 87 L. Ed. 1699.

12. Ala.—Grayson v. Schwab, 179 So. 377, 380, 235 Ala. 398.
Mo.—Baker v. Smith's Estate, 18 S. W.2d 147, 223 Mo.App. 1234, 226 Mo.App. 510.
N.Y.—Lapiedra v. American Surety Co., 159 N.E. 710, 247 App.Div. 25.
34 C.J. p 553 note 49.
Determination of jurisdiction by probate court see Courts § 305.

13. U.S.—Noble v. Union River Logging Co., D.C., 13 S.Ct. 271, 147 U. S. 165, 37 L.Ed. 123.
Ala.—**Corpus Juris cited in** Grayson v. Schwab, 179 So. 377, 380, 235 Ala. 398.
Fla.—State ex rel. Everette v. Petteway, 179 So. 666, 131 Fla. 516—**Corpus Juris quoted in** Fiehe v. R. E. Householder Co., 125 So. 2, 11, 98 Fla. 627.
Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467—Delphi v. Startzman, 3 N.E. 937, 104 Ind. 343.
Ky.—**Corpus Juris quoted in** Pendleton County Board of Education v. Simpson, 91 S.W.2d 557, 560, 262 Ky. 844.
Miss.—**Corpus Juris cited in** Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 516, 180 Miss. 147.
Mo.—State ex rel. Dew v. Trimble, 269 S.W. 617, 306 Mo. 657.
N.Y.—People v. Harmor, 57 N.Y.S. 2d 402.
W.Va.—**Corpus Juris quoted in** Ohio Savings Bank & Trust Co. v. Ballard, 161 S.E. 445, 111 W.Va. 235—Shank v. Town of Ravenswood, 27 S.E. 223, 43 W.Va. 242.
34 C.J. p 553 note 51.

An executive officer, respecting rule against collateral attack, acts in "quasi judicial capacity" when required to pass on facts and determine his action thereby.—Kirby Lumber Co. v. Adams, Tex.Civ.App., 62 S.W.2d 366, modified on other grounds 93 S.W.2d 382, 127 Tex. 376.

14. Fla.—**Corpus Juris quoted in** Fiehe v. R. E. Householder Co., 125 So. 2, 11, 98 Fla. 627.
Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467—Baltimore & O. R. Co. v. Freeze, 82 N.E. 761, 169 Ind. 370.

§ 428. Errors and Irregularities

A judgment is not subject to collateral attack for errors and irregularities which do not render the judgment void.

When jurisdiction has once attached, the court has a right to decide every question arising in the case, and errors of judgment or irregularities, however gross, which do not render the judgment absolutely void, are not available on collateral attack,[15] and, moreover, this rule as to the nonavail-

N.Y.—People v. Harmor, 57 N.Y.S. 2d 402.

S.C.—State v. Scott, 17 S.C.L. 294.

W.Va.—Ohio Savings Bank & Trust Co. v. Ballard, 161 S.E. 445, 111 W. Va. 235—Shank v. Town of Ravenswood, 27 S.E. 223, 43 W.Va. 242.

15. U.S.—Iselin v. La Coste, C.C.A. La., 147 F.2d 791—Kelling Nut Co. v. National Nut Co. of Cal., C.C. A., 145 F.2d 418, certiorari denied 65 S.Ct. 562, 323 U.S. 802, 89 L.Ed. 640—Walling v. Miller, C.C.A. Minn., 138 F.2d 629, certiorari denied 64 S.Ct. 781, 321 U.S. 784, 88 L.Ed. 1076—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F. 2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, second case, 311 U.S. 612, 85 L.Ed. 388, and 61 S.Ct. 1089, 313 U.S. 599, 85 L.Ed. 1551—Mudge v. New York Trust Co., C.C.A.Ill., 103 F.2d 625—**Corpus Juris cited in** Holley v. General American Life Ins. Co., C.C.A.Mo., 101 F.2d 172, 174—In re 7000 South Shore Drive Bldg. Corporation, C.C.A.Ill., 86 F.2d 499—Seaboard Surety Co. v. U. S., for Use and Benefit of Marshall-Wells Co., C.C.A.Idaho, 84 F.2d 348—State of Missouri ex rel. and to Use of Stormfeltz v. Title Guaranty & Surety Co., C.C.A.Mo., 72 F.2d 595, certiorari denied Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, 55 S.Ct. 404, 294 U.S. 708, 79 L.Ed. 1242—Schodde v. U. S., C.C. A.Idaho, 69 F.2d 866—Johnson v. Manhattan Ry. Co., C.C.A.N.Y., 61 F.2d 934, affirmed in part 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331—Owens v. Battenfield, C.C.A.Okl., 33 F.2d 753, certiorari denied 50 S.Ct. 88, 280 U.S. 605, 74 L.Ed. 649—Lolita Holding Co. v. Aronson & Co., C.C.A.Cal., 28 F.2d 869, certiorari denied 49 S.Ct. 482, 279 U.S. 868, 73 L.Ed. 1005—Prichard v. Nelson, D.C.Va., 55 F.Supp. 506—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F.Supp. 188, cause remanded, C.C.A., 146 F. 2d 680—U. S. v. U. S. Fidelity & Guaranty Co., D.C.Okl., 24 F.Supp. 961, modified on other grounds, C. C.A., 106 F.2d 804, reversed on other grounds 60 S.Ct. 653, 309 U.S. 506, 84 L.Ed. 894.

Ala.—**Corpus Juris cited in** Cobbs v. Norville, 151 So. 576, 577, 227 Ala. 621—Hill v. Hooper, 110 So. 323, 21 Ala.App. 584.

Ariz.—Wahl v. Round Valley Bank, 300 P. 955, 38 Ariz. 411—**Corpus Juris cited in** Western Land & Cattle Co. v. National Bank of Arizona at Phœnix, 239 P. 299, 300, 29 Ariz. 51.

Ark.—Person v. Miller Levee Dist., No. 2, 150 S.W.2d 950, 202 Ark. 173—Allison v. Bush, 144 S.W.2d 1087, 201 Ark. 315—Ex parte O'Neal, 87 S.W.2d 401, 191 Ark. 696.

Cal.—Wells Fargo & Co. v. City and County of San Francisco, 152 P.2d 625, 25 Cal.2d 37—San Diego Trust & Savings Bank v. Young, 119 P.2d 133, 19 Cal.2d 98—In re Keet's Estate, 100 P.2d 1045, 15 Cal.2d 328—Gray v. Hall, 265 P. 246, 203 Cal. 306—Marvin v. Marvin, 116 P.2d 151, 46 Cal.App.2d 551—People v. Spivey, 77 P.2d 247, 25 Cal.App.2d 279—Christy v. Drapeau, 71 P.2d 940, 22 Cal.App.2d 582—Ex parte Sargen, 27 P.2d 407, 135 Cal.App. 402—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.

D.C.—Hodge v. Huff, 140 F.2d 686, 78 U.S.App.D.C. 329, certiorari denied 64 S.Ct. 946, 322 U.S. 733, 88 L.Ed. 1567—Fishel v. Kite, 101 F. 2d 685, 69 App.D.C. 360, certiorari denied Kite v. Fishel, 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054—Scholl v. Tibbs, Mun.App., 36 A.2d 352.

Fla.—Skipper v. Schumacher, 169 So. 58, 124 Fla. 384, appeal dismissed and certiorari denied 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376—Ryan's Furniture Exchange v. McNair, 162 So. 483, 120 Fla. 109—Palm Beach Estates v. Croker, 152 So. 416, 111 Fla. 671—Fidelity & Deposit Co. of Maryland v. Hogan, 135 So. 825, 102 Fla. 196—Cragin v. Ocean & Lake Realty Co., 133 So. 569, 101 Fla. 1324, followed in Mabson v. Christ, 134 So. 43, rehearing denied 140 So. 671, 104 Fla. 606, and affirmed Cragin v. Ocean & Lake Realty Co., 135 So. 795, 101 Fla. 1324, appeal dismissed Girard Trust Co. v. Ocean & Lake Realty Co., 52 S.Ct. 494, 286 U.S. 523, 76 L.Ed. 1267—Merchants' & Mechanics' Bank v. Sample, 125 So. 1, 98 Fla. 759.

Ga.—Gray v. Riley, 170 S.E. 537, 47 Ga.App. 348.

Idaho.—U. S. Building & Loan Ass'n v. Soule, 68 P.2d 40, 57 Idaho 691—Peterson v. Hague, 4 P.2d 350, 51 Idaho 175.

Ill.—Walton v. Albers, 44 N.E.2d 145, 380 Ill. 423—People ex rel. Courtney v. Fardy, 39 N.E.2d 7, 378 Ill. 501—Baker v. Brown, 23 N.E.2d 710, 372 Ill. 336—People ex rel. Anderson v. Village of Bradley, 11 N.E.2d 415, 367 Ill. 301—Knaus v. Chicago Title & Trust Co., 7 N.E. 2d 298, 365 Ill. 588—Woodward v. Ruel, 188 N.E. 911, 355 Ill. 163—Chicago Title & Trust Co. v. Mack, 180 N.E. 412, 347 Ill. 480—Genslinger v. New Illinois Athletic Club of Chicago, 163 N.E. 707, 332 Ill. 316, transferred, see, 252 Ill.App. 298, reversed on other grounds 171 N.E. 514, 339 Ill. 426—Eich v. Czervonko, 161 N.E. 864, 330 Ill. 455, certiorari denied 49 S.Ct. 37, 278 U.S. 642, 73 L.Ed. 557—Grove v. Kerr, 149 N.E. 517, 318 Ill. 591—Wyman v. Hageman, 148 N.E. 852, 318 Ill. 64—East St. Louis Lumber Co. v. Schnipper, 141 N.E. 542, 310 Ill. 150—Finlen v. Skelly, 141 N.E. 388, 310 Ill. 170—Lemmons v. Sims, 61 N.E.2d 764, 326 Ill.App. 460—Davis v. Oliver, 25 N. E.2d 905, 304 Ill.App. 71, transferred, see, 20 N.E.2d 582, 371 Ill. 287—Roy v. Upton, 234 Ill.App. 53—People v. Mortenson, 224 Ill.App. 221.

Ind.—Olds v. Hitzemann, 42 N.E.2d 35, 220 Ind. 300—Grantham Realty Corporation v. Bowers, 22 N.E.2d 832, 215 Ind. 672—State ex rel. Unemployment Compensation Board of Unemployment Compensation Division v. Burton, 44 N.E.2d 506, 112 Ind.App. 268—Niven v. Crawfordsville Trust Co., 26 N.E.2d 58, 108 Ind.App. 272—Fidelity & Casualty Co. of New York v. State, 184 N.E. 916, 98 Ind.App. 485—Agness v. Board of Com'rs of Grant County, 166 N.E. 30, 89 Ind.App. 537.

Iowa.—Mahaffa v. Mahaffa, 298 N.W. 916, 230 Iowa 679—In re Haga's Estate, 294 N.W. 589, 229 Iowa 380—Reinsurance Life Co. of America v. Houser, 227 N.W. 116, 208 Iowa 1226.

Kan.—Brockway v. Wagner, 268 P. 96, 126 Kan. 285.

Ky.—Commonwealth ex rel. Dummit v. Jefferson County, 189 S.W.2d 604, 300 Ky. 514—Eversole v. Smith, 178 S.W.2d 970, 297 Ky. 53—Wolff v. Employers Fire Ins. Co., 140 S.W.2d 640, 282 Ky. 824, 130 A.L.R. 682—Commonwealth v. Miniard, 99 S.W.2d 166, 266 Ky. 405—**Corpus Juris quoted in** Pendleton County Board of Education v. Simpson, 91 S.W.2d 557, 560, 262 Ky. 844—Thompson v. Board of Drainage Com'rs of Muhlenberg County, 79 S.W.2d 381, 258 Ky. 68—Bell County Board of Education v. Taylor, 71 S.W.2d 1005, 254 Ky. 447—Redwine v. Dorman, 70 S.W. 2d 933, 254 Ky. 348—Brooks v. Stu-

ability on collateral attack has been held to be applicable even where such errors or irregularities appear on the face of the record.[16] This rule applies to the orders and judgments of probate courts.[17] A judgment cannot be collaterally impeached merely because it was based on a mistake of fact[18] or a mistake of law.[19]

art, 37 S.W.2d 56, 238 Ky. 235—Lowe v. Taylor, 29 S.W.2d 598, 235 Ky. 21—Perry Mercantile Co. v. Miller, 25 S.W.2d 35, 233 Ky. 148—Furlong v. Finneran, 4 S.W.2d 378, 223 Ky. 558—National Surety Co. v. Taylor's Guardian, 255 S.W. 542, 200 Ky. 728.

La.—Gumbel v. New Orleans Terminal Co., 183 So. 212, 190 La. 904, certiorari denied 59 S.Ct. 249, 305 U.S. 654, 83 L.Ed. 423—Howell v. Kretz, 131 So. 204, 15 La.App. 454—Milliken & Farwell v. Taft Mercantile Co., 7 La.App. 150.

Me.—Harvey v. Roberts, 122 A. 409, 123 Me. 174.

Md.—Rowan v. State, to Use of Grove, 191 A. 244, 172 Md. 190.

Mass.—Elfman v. Glaser, 47 N.E.2d 925, 313 Mass. 370—Long v. MacDougall, 173 N.E. 507, 273 Mass. 386.

Miss.—Willisford v. Meyer-Kiser Corporation, 104 So. 293, 139 Miss. 387.

Mo.—Troost Ave. Cemetery Co. v. Kansas City, 154 S.W.2d 90, 348 Mo. 561—Row v. Cape Girardeau Foundry Co., App., 141 S.W.2d 113—Mississippi and Fox River Drainage Dist. of Clark County v. Ruddick, 64 S.W.2d 306, 228 Mo. App. 1143—Burns v. Ames Realty Co., App., 31 S.W.2d 274.

Mont.—Coburn v. Coburn, 298 P. 349, 89 Mont. 386—Scilley v. Red Lodge-Rosebud Irr. Dist., 272 P. 543, 83 Mont. 282.

Neb.—McCormack v. Murray, 274 N.W. 383, 133 Neb. 125—School Dist. D. of Dawes County v. School Dist. No. 80 of Dawes County, 201 N.W. 964, 112 Neb. 867.

Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County, 167 P.2d 648.

N.J.—Ex parte Hall, 118 A. 347, 94 N.J.Eq. 108.

N.Y.—In re Chase Nat. Bank of City of New York, 28 N.E.2d 868, 283 N.Y. 350—Salerno v. Holden, 15 N.Y.S.2d 549, 258 App.Div. 50, affirmed 31 N.E.2d 513, 284 N.Y. 759.

N.C.—Simms v. Sampson, 20 S.E.2d 554, 221 N.C. 379—King v. North Carolina R. Co., 115 S.E. 172, 184 N.C. 442.

N.D.—Kelsch v. Dickson, 1 N.W.2d 347, 71 N.D. 430.

Ohio.—Huffer v. Prindle, 153 N.E. 527, 22 Ohio App. 241.

Okl.—Lee v. Harvey, 156 P.2d 134, 195 Okl. 178—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—Protest of Kansas City Southern Ry. Co., 11 P.2d 500, 157 Okl. 246—Matthews v. Morgan, 259 P. 867, 127 Okl. 74, followed in Matthews v. Morgan, 259 P. 868, 869, 127 Okl. 76—Miller v. Madigan, 215 P. 742, 90 Okl. 17.

Or.—Booth v. Herberlie, 2 P.2d 1103, 137 Or. 354—Hills v. Pierce, 231 P. 652, 113 Or. 386.

Pa.—In re Levi's Estate, 38 Pa.Dist. & Co. 251, 56 Montg.Co. 148.

S.C.—Gladden v. Chapman, 91 S.E. 796, 106 S.C. 486.

S.D.—In re ReQua's Estate, 18 N.W.2d 791—Hall v. Carlson, 215 N.W. 494, 51 S.D. 513.

Tenn.—Myers v. Wolf, 34 S.W.2d 201, 162 Tenn. 42—Covington v. Bullefin, 1 Tenn.App. 603.

Tex.—Farmers' Nat. Bank of Stephensville v. Daggett, Com.App., 2 S.W.2d 834—Dittmar v. St. Louis Union Trust Co., Civ.App., 155 S.W.2d 388, error refused—Sugg v. Sugg, Civ.App., 152 S.W.2d 446, error dismissed—Wilson v. King, Civ.App., 148 S.W.2d 442—Walton v. Stinson, Civ.App., 140 S.W.2d 497, error refused—Klier v. Richter, Civ.App., 119 S.W.2d 100, error refused—Witt v. Universal Automobile Ins. Co., Civ.App., 116 S.W.2d 1095, error dismissed—Mercer v. Rubey, Civ.App., 108 S.W.2d 677, error refused—Henderson v. Stone, Civ.App., 95 S.W.2d 772, error dismissed—Snell v. Knowles, Civ.App., 87 S.W.2d 871, error dismissed—Grant v. Ellis, Civ.App., 35 S.W.2d 460, reversed on other grounds, Com.App., 50 S.W.2d 1093—Coffman v. National Motor Products Co., Civ.App., 26 S.W.2d 921, error dismissed—Star Cash Grocery Co. v. Retailers' Fire Ins. Co., Civ.App., 12 S.W.2d 608—Sederholm v. City of Port Arthur, Civ.App., 3 S.W.2d 925, affirmed Tyner v. La Coste, Com.App., 13 S.W.2d 685 and Tyner v. Keith, Com.App., 13 S.W.2d 687—King v. King, Civ.App., 291 S.W. 645—Garza v. Kenedy, Civ.App., 291 S.W. 615, reversed on other grounds, Com.App., 299 S.W. 231—Wright v. Shipman, Civ.App., 279 S.W. 296.

Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271—Salt Lake City v. Industrial Commission, 22 P.2d 1046, 82 Utah 179—Tracey v. Blood, 3 P.2d 263, 78 Utah 385.

W.Va.—Bailey v. Firemen's Ins. Co., 150 S.E. 365, 108 W.Va. 75.

33 C.J. p 1079 note 82—34 C.J. p 555 note 75—42 C.J. p 172 note 59—47 C.J. p 439 notes 15, 17.

Error in exercise of jurisdiction see supra § 421.

Validity of erroneous and irregular judgments see infra § 449.

16. U.S.—Iselin v. La Coste, C.C.A. La., 147 F.2d 791.

Cal.—Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, 113 P.2d 689, 18 Cal.2d 92—Gray v. Hall, 265 P. 246, 203 Cal. 306—Union Oil Co. of California v. Reconstruction Oil Co., 135 P.2d 621, 58 Cal.App.2d 30.

Ky.—Collier v. Peninsular Fire Ins. Co. of America, 263 S.W. 353, 204 Ky. 1.

Mo.—Central Paving & Construction Co. v. Eighth & Morgan Garage & Filling Station, 159 S.W.2d 660—Abernathy v. Missouri Pac. R. Co., 228 S.W. 486, 287 Mo. 30.

N.C.—King v. North Carolina R. Co., 115 S.E. 172, 184 N.C. 442.

Okl.—Lee v. Harvey, 156 P.2d 134, 195 Okl. 178—Johnston v. Guy, 25 P.2d 625, 165 Okl. 156.

17. Ark.—Sewell v. Reed, 71 S.W.2d 191, 189 Ark. 50.

34 C.J. p 558 note 77—47 C.J. p 439 note 16.

18. Tex.—Jeff Davis County v. Davis, Civ.App., 192 S.W. 291.

19. U.S.—Baltimore S. S. Co. v. Phillips, N.Y., 47 S.Ct. 600, 274 U.S. 316, 71 L.Ed. 1069—Montgomery v. Equitable Life Assur. Soc. of U.S., C.C.A.Ill., 83 F.2d 758—U. S. v. U. S. Fidelity & Guaranty Co., D.C.Okl., 24 F.Supp. 961, modified on other grounds, C.C.A., 106 F.2d 804, reversed on other grounds 60 S.Ct. 653, 309 U.S. 506, 84 L.Ed. 894.

Ariz.—Varnes v. White, 12 P.2d 870, 40 Ariz. 427.

Cal.—Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, 113 P.2d 689, 18 Cal.2d 92—Gray v. Hall, 265 P. 246, 203 Cal. 306—Union Oil Co. of California v. Reconstruction Oil Co., 135 P.2d 621, 58 Cal.App.2d 30.

D.C.—Fishel v. Kite, 101 F.2d 685, 69 App.D.C. 360, certiorari denied Kite v. Fishel, 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054—Edward Thompson Co. v. Thomas, 49 F.2d 500, 60 App.D.C. 118.

La.—Gumbel v. New Orleans Terminal Co., 183 So. 212, 190 La. 904, certiorari denied 59 S.Ct. 249, 305 U.S. 654, 83 L.Ed. 423.

Mo.—Freedy v. Trimble-Compton Produce Co., 46 S.W.2d 822, 329 Mo. 879.

N.Y.—In re McCollough's Estate, 2 N.Y.S.2d 777, 166 Misc. 576.

Okl.—Lee v. Harvey, 156 P.2d 134, 195 Okl. 178—Strange v. Armstrong, 252 P. 1099, 123 Okl. 216—Chicago, R. I. & P. Ry. Co. v. Cooperative Pub. Co., 247 P. 974, 119 Okl. 76—Chicago, R. I. & P. Ry.

Where a judgment is void, and not merely irregular and erroneous, because the court exceeded its jurisdiction and rendered a particular judgment which it was wholly unauthorized to render under any circumstances, as considered supra § 19, the rule against collateral attack does not apply.[20]

Special and statutory proceedings. The rule against collateral attack on the ground of mere error or irregularity applies not only in the case of formal suits at law or in equity, but also to the judicial determinations of the courts in special proceedings, out of the course of the common law, or founded wholly on statutes.[21]

Judgments of inferior courts. Although the validity of a judgment rendered by an inferior court is not sustained by any presumptions as to jurisdiction, when it is established that such a court had jurisdiction of the parties and the subject matter, it will be presumed to have proceeded in due order, and its judgment cannot be attacked in any collateral proceeding for mere error or irregularity.[22]

§ 429. —— Defects and Objections as to Parties

A judgment cannot be impeached in a collateral proceeding for some defects and objections as to parties, such as an alleged misjoinder or nonjoinder of parties.

A judgment may not be impeached collaterally for some defects and objections as to parties,[23] such as an alleged misjoinder or nonjoinder of parties,[24] or a misnomer,[25] or for objections to an amendment adding new parties.[26] In addition, the judgment may not be collaterally impeached for any technical objection to plaintiff's capacity to sue,[27] or because the judgment may be irregular or voidable as against another person who was a joint plaintiff or

Co. v. Oklahoma State Bank of Atoka, 247 P. 21, 118 Okl. 129.
Tex.—Frazier v. Hanlon Gasoline Co., Civ.App., 29 S.W.2d 461, error refused.
Va.—Robertson v. Commonwealth, 25 S.E.2d 352, 181 Va. 520, 146 A.L.R. 966.
34 C.J. p 558 note 79.

20. U.S.—Rheinberger v. Security Life Ins. Co. of America, C.C.A. Ill., 146 F.2d 680.
Cal.—Baar v. Smith, 255 P. 827, 201 Cal. 87—Tonningsen v. Odd Fellows' Cemetery Ass'n, 213 P. 710, 60 Cal.App. 568.
Colo.—People v. Burke, 212 P. 887, 72 Colo. 486, 30 A.L.R. 1085.
Hawaii.—Wong Kwai Tong v. Choy Yin, 31 Hawaii 603.
Mo.—Gray v. Clement, 246 S.W. 940, 296 Mo. 497—Burns v. Ames Realty Co., App., 31 S.W.2d 274.
S.D.—Reddin v. Frick, 223 N.W. 50, 54 S.D. 277.
Va.—Buchanan v. Buchanan, 197 S.E. 426, 170 Va. 458, 116 A.L.R. 688.
Wyo.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.
34 C.J. p 558 note 82.
Judgment beyond pleadings and issues see infra § 433.

21. U.S.—Briscoe v. Rudolph, D.C., 31 S.Ct. 679, 221 U.S. 547, 55 L.Ed. 848.
34 C.J. p 559 note 83.

22. Fla.—Fiehe v. R. E. Householder Co., 125 So. 2, 98 Fla. 627.
Me.—Harvey v. Roberts, 122 A. 409, 123 Me. 174.
34 C.J. p 559 note 85.

23. U.S.—Schodde v. U. S., C.C.A. Idaho, 69 F.2d 866.

24. U.S.—Bruun v. Hanson, C.C.A. Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, mandate conformed to, D.C., Bruun v. Hanson, 30 F.Supp. 602—**Corpus Juris quoted in** Schodde v. U. S., C.C.A.Idaho, 69 F.2d 866, 871—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F. Supp. 188, cause remanded, C.C.A., 146 F.2d 680.
Cal.—Sanderson v. Niemann, 110 P. 2d 1025, 17 Cal.2d 563, prior opinion 100 P.2d 508.
Ind.—**Corpus Juris cited in** Miller v. Muir, 56 N.E.2d 496, 504.
Mo.—**Corpus Juris cited in** Brady v. Kirby, 22 S.W.2d 52, 56, 224 Mo. App. 184, certiorari quashed State ex rel. Kirby v. Trimble, 23 S.W.2d 569, 326 Mo. 675.
N.M.—Costilla Estates Development Co. v. Mascarenas, 267 P. 74, 33 N.M. 356.
Okl.—**Corpus Juris cited in** Moody v. Branson, 136 P.2d 925, 928, 192 Okl. 327.
Tex.—Williams v. Howard, 31 S.W. 835, 10 Tex.Civ.App. 527—Grayson v. Johnson, Civ.App., 181 S.W.2d 312—Gathings v. Robertson, Civ. App., 264 S.W. 173, reversed on other grounds, Com.App., 276 S.W. 218.
W.Va.—Commonwealth Trust Co. of Pittsburgh v. Citizens' Nat. Bank of Connellsville, 128 S.E. 104, 99 W.Va. 166.
34 C.J. p 559 note 86—47 C.J. p 439 note 19.

Indispensable parties
Judgment of probate court authorizing trustee to exchange stock in national bank for stock in state bank rendered in proceeding to which beneficiaries of trust, some of whom were minors and some of whom were residents of state, were not made parties was subject to collateral attack in proceeding to recover stockholder's liability for debts of insolvent state bank.—Hood v. Cannon, 182 S.E. 306, 178 S.C. 94.

As to one not a party to the suit in which a judgment is rendered the judgment is, in a sense, "void" and subject to collateral attack.—Texas Soap Mfg. Corporation v. McQueary, Tex.Civ.App., 172 S.W.2d 177.

Judgment rendered against person voluntarily appearing in action as defendant is not collaterally assailable, although his name was not inserted in complaint.—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal. App. 385.

Death
Record held to sustain finding heirs not mentioned were dead at time of judgment in partition.—Burton v. McGuire, Tex.Com.App., 41 S.W.2d 238.

25. Tenn.—Magevney v. Karsch, 65 S.W.2d 562, 167 Tenn. 32, 92 A.L.R. 343.
Tex.—**Corpus Juris cited in** Ottenhouse v. Abernathy, Civ.App., 110 S.W.2d 968, 970.
34 C.J. p 559 note 87.

26. Miss.—Alabama & V. R. Co. v. Thomas, 38 So. 770, 86 Miss. 27.

27. Okl.—**Corpus Juris cited in** Warren v. Stanbury, 126 P.2d 251, 253, 190 Okl. 554.
34 C.J. p 559 note 89.
Legal disability of parties see supra § 418.

Real party in interest
It is no ground for collateral impeachment of a judgment that plaintiff was not the real party in interest.—Hentschel v. Fidelity & Deposit Co. of Maryland, C.C.A.Mo., 87 F.2d 833—34 C.J. p 559 note 89 [f].

defendant,[28] or because the judgment was rendered against a defendant personally instead of in the representative capacity in which he was sued,[29] or because minors or incompetents were not properly represented in the action.[30]

§ 430. —— Defects and Objections as to Pleadings

A judgment may not be collaterally attacked because of defects in the pleadings which are amendable, even though such pleadings are bad on general demurrer.

A judgment may not be impeached collaterally because of any defects in the pleadings[31] which are amendable,[32] even though such pleadings are bad on general demurrer.[33] Thus the validity of a judgment cannot be impugned by showing that a wrong form of action was chosen,[34] or that the complaint did not state facts sufficient to constitute a cause of action[35] or stated the cause of action

28. Ky.—Capper v. Short, 11 S.W.2d 717, 226 Ky. 689.
34 C.J. p 560 note 90.

29. Ky.—McConnell v. Raive, 1 S. W. 582, 8 Ky.L. 343.
Miss.—Barringer v. Boyd, 27 Miss. 473.

30. Mo.—Spitcaufsky v. Hatten, 182 S.W.2d 86.
34 C.J. p 560 note 92.
Minors held sufficiently represented
Ark.—Thomas v. McCollum, 144 S.W. 2d 467, 201 Ark. 320.

31. Ariz.—**Corpus Juris cited in** Long v. Stratton, 72 P.2d 939, 941, 50 Ariz. 427—**Corpus Juris cited in** Lisitzsky v. Brady, 300 P. 177, 179, 38 Ariz. 337.
Cal.—Kelsey v. Miller, 263 P. 200, 203 Cal. 61.
Ill.—Holt v. Snodgrass, 146 N.E. 562, 315 Ill. 548—Harris v. Chicago House-Wrecking Co., 145 N.E. 666, 314 Ill. 500—Molner v. Arendt, 55 N.E.2d 407, 323 Ill.App. 289.
Ind.—Bowser v. Tobin, 18 N.E.2d 773, 215 Ind. 99.
Mo.—Dusenberg v. Rudolph, 30 S.W. 2d 94, 325 Mo. 881.
Okl.—Thompson v. General Outdoor Advertising Co., 151 P.2d 379, 194 Okl. 300—**Corpus Juris cited in** State v. Douglas, 89 P.2d 298, 299, 185 Okl. 3.
Tex.—Hartel v. Dishman, 145 S.W.2d 865, 135 Tex. 600—**Corpus Juris quoted in** Permian Oil Co. v. Smith, 73 S.W.2d 490, 501, 129 Tex. 413, 111 A.L.R. 1152, rehearing denied 107 S.W.2d 564, 129 Tex. 413, 111 A.L.R. 1152—Jackson v. Slaughter, Civ.App., 185 S.W.2d 759, refused for want of merit—Cheney v. Norton, Civ.App., 168 S.W.2d 697—**Corpus Juris quoted in** Benson v. Mangum, Civ.App., 117 S. W.2d 169, 172, error refused—Reagan County Purchasing Co. v. State, Civ.App., 65 S.W.2d 353—Sederholm v. City of Port Arthur, Civ.App., 3 S.W.2d 925, affirmed Tyner v. La Coste, Com.App., 13 S.W.2d 685 and Tyner v. Keith, 13 S.W.2d 687.
W.Va.—Noder v. Alexander, 172 S.E. 613, 114 W.Va. 563.
34 C.J. p 560 note 94.
Court will give complaint such construction as will uphold judgment should the complaint be ambiguous.—Boyd v. Garrison, 19 So.2d 385, 246 Ala. 122.
Residence of parties
(1) Judgment defective only for failure to allege residence of parties giving jurisdiction must be attacked in original cause or for fraud.—Cole v. Blankenship, C.C.A.W.Va., 30 F. 2d 211.

(2) Failure of petition to set forth residences of parties did not subject judgment to collateral attack where such parties voluntarily appeared.—Morgan v. Farned, 3 So. 798, 83 Ala. 367.
Allowance of substituted declaration without notice was held not to justify collateral attack on judgment.—Savage v. Walshe, 140 N.E. 787, 246 Mass. 170.

32. Ariz.—Long v. Stratton, 72 P.2d 939, 50 Ariz. 427.
Utah.—**Corpus Juris cited in** State v. Cragun, 20 P.2d 247, 249, 81 Utah 457.
34 C.J. p 560 note 95—47 C.J. p 439 note 24.

33. Idaho.—U. S. Nat. Bank of Portland v. Humphrey, 288 P. 416, 49 Idaho 363.
Ill.—Holt v. Snodgrass, 146 N.E. 562, 315 Ill. 548.
Tex.—Benson v. Mangum, Civ.App., 117 S.W.2d 169, error refused—**Corpus Juris quoted in** Sederholm v. City of Port Arthur, Civ.App., 3 S.W.2d 925, 928, affirmed Tyner v. La Coste, Com.App., 13 S.W.2d 685 and Tyner v. Keith, 13 S.W.2d 687—Hart v. Hunter, 114 S.W. 882, 52 Tex.Civ.App. 75.
Unless deficiency is one which affects or deprives court of jurisdiction, fact that petition is subject to general demurrer does not subject judgment to collateral impeachment. —Tanton v. State Nat. Bank of El Paso, Civ.App., 43 S.W.2d 957, affirmed 79 S.W.2d 833, 125 Tex. 16, 97 A.L.R. 1093.

34. Tex.—**Corpus Juris quoted in** Benson v. Mangum, Civ.App., 117 S.W.2d 169, 172, error refused.
34 C.J. p 560 note 97.

35. Ariz.—**Corpus Juris quoted in** Hawkins v. Leake, 22 P.2d 833, 835, 42 Ariz. 121.
Cal.—In re Keet's Estate, 100 P.2d 1045, 15 Cal.2d 328—Moran v. Superior Court in and for Sacramento County, 96 P.2d 193, 35 Cal.App. 2d 629—Ex parte Sargen, 27 P.2d 407, 135 Cal.App. 402.
Mo.—Dusenberg v. Rudolph, 30 S. W.2d 94, 325 Mo. 881.
Mont.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.
Neb.—Wistrom v. Forsling, 14 N.W. 2d 217, 144 Neb. 638.
N.J.—**Corpus Juris cited in** Epstein v. Bendersky, 21 A.2d 815, 818, 130 N.J.Eq. 180.
N.M.—In re Field's Estate, 60 P.2d 945, 40 N.M. 423.
Okl.—Chicago, R. I. & P. Ry. Co. v. Excise Board of Oklahoma County, 33 P.2d 1081, 168 Okl. 423—Foster v. Focht, 229 P. 444, 102 Okl. 261.
Tenn.—Southern Ry. Co. v. Baskette, 133 S.W.2d 498, 175 Tenn. 253.
Tex.—Rhoads v. Daly General Agency, Civ.App., 152 S.W.2d 461, error refused—Benson v. Mangum, Civ. App., 117 S.W.2d 169, error refused —Lutz v. State, 176 S.W.2d 317, 146 Tex.Cr. 503.
Wyo.—Rock Springs Coal & Mining Co. v. Black Diamond Coal Co., 272 P. 12, 39 Wyo. 379.
34 C.J. p 560 note 98.
Insufficient or illegal cause of action as ground for attack in general see supra § 417.

Unless it affirmatively appears from petition that no valid cause of action could be stated, judgment of court having jurisdiction of subject matter and of parties is not subject to collateral attack on ground that petition failed to state, or defectively stated, cause of action.—Schmid v. Farris, 37 P.2d 596, 169 Okl. 445.

Default judgment is not void on collateral attack, even though petition on which it was rendered did not state a cause of action.
Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.
Kan.—Brunbaugh v. Wilson, 107 P. 792, 82 Kan. 53.
Sufficiency on direct attack
Fact that complaint would be insufficient to support judgment when attacked directly does not necessarily make complaint vulnerable to

defectively,[36] if the complaint contained sufficient matter to challenge the attention of the court as to its merits.[37] Even the absence of pleadings has been held not to render a judgment void and subject to collateral attack,[38] but there is authority for holding that the judgment will be void and impeachable collaterally if not supported by any pleadings.[39]

It is not ground for collateral attack that the complaint was not verified,[40] or was defectively verified,[41] that there was a misjoinder of causes of action[42] or a splitting of a cause of action,[43] or that the action appeared from the face of the papers to have been barred by the statute of limitations.[44]

§ 431. —— Irregularities in Procedure

Where the jurisdiction of the court has attached, the judgment rendered ordinarily is not subject to collateral attack for irregularities in procedure.

Where it is made to appear that the jurisdiction of the court has attached, and that the court has proceeded in the exercise of that jurisdiction, no irregularity in the subsequent proceedings can avail to avoid or annul the decree rendered on collateral attack,[45] especially if it would be subject to amend-

collateral attack.—State v. Cragun, 20 P.2d 247, 81 Utah 457.

Fact that court of record errs in holding petition sufficient, if it has jurisdiction, does not render judgment subject to collateral attack.—Wistrom v. Forsling, 14 N.W.2d 217, 144 Neb. 638—In re Warner's Estate, 288 N.W. 39, 137 Neb. 25—Brandeen v. Lau, 201 N.W. 665, 113 Neb. 34.

Judgment on cross petition

Okl.—Fowler v. Marguret Pillsbury General Hospital, 229 P. 442, 102 Okl. 203—Horstman v. Bowermaster, 217 P. 167, 90 Okl. 262.

Tex.—Collins v. Jones, Civ.App., 79 S.W.2d 175, error refused.

Cause of action held stated

Ala.—Chandler v. Price, 15 So.2d 462, 244 Ala. 667.

Mo.—Bullock v. Peoples Bank of Holcomb, 173 S.W.2d 753, 351 Mo. 587.

36. Ill.—Baker v. Brown, 23 N.E.2d 710, 372 Ill. 336.

Okl.—Chicago, R. I. & P. Ry. Co. v. Excise Board of Oklahoma County, 33 P.2d 1081, 168 Okl. 428—Kansas City Southern Ry. Co. v. Excise Board of Le Flore County, 33 P.2d 493, 168 Okl. 408—Protest of Stanolind Pipe Line Co., 32 P.2d 869, 168 Okl. 281—Lindeberg v. Messman, 218 P. 644, 95 Okl. 64.

37. Cal.—Associated Oil Co. v. Mullin, 294 P. 421, 110 Cal.App. 385.

Kan.—Eberhardt Lumber Co. v. Lecuyer, 110 P.2d 757, 153 Kan. 386—Pattison v. Kansas State Bank, 247 P. 643, 121 Kan. 471.

Okl.—Ciesler v. Simpson, 105 P.2d 227, 187 Okl. 641, followed in Ciesler v. Sykes, 105 P.2d 229, 187 Okl. 643—Spence v. Yell, 71 P.2d 701, 180 Okl. 475—Goldsmith v. Owens, 68 P.2d 849, 180 Okl. 268—Horstman v. Bowermaster, 217 P. 167, 90 Okl. 262.

Tex.—Benson v. Mangum, Civ.App., 117 S.W.2d 169, error refused.

Wyo.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.

34 C.J. p 561 note 99.

If initial pleading is so wanting in substance as not to be colorable or amendable, or to justify relief, order or judgment is subject to collateral attack.

Mo.—Guhman v. Grothe, 142 S.W.2d 1, 346 Mo. 427—Coombs v. Benz, 114 S.W.2d 713, 232 Mo.App. 1011.

Mont.—Hanrahan v. Andersen, 90 P. 2d 494, 108 Mont. 218.

Utah.—State v. Cragun, 20 P.2d 247, 81 Utah 457.

Default judgment, resting solely on allegations of complaint, so deficient in substance as conclusively to negative cause of action at time of its rendition may be successfully assailed collaterally.

Mont.—State ex rel. Delmoe v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131.

Wash.—Roche v. McDonald, 239 P. 1015, 136 Wash. 322, 44 A.L.R. 444, reversed on other grounds 48 S. Ct. 142, 275 U.S. 449, 72 L.Ed. 365, 53 A.L.R. 1141.

38. N.Y.—Sutherland v. St. Lawrence County, 85 N.Y.S. 696, 42 Misc. 38, reversed on other grounds 91 N.Y.S. 962, 101 App.Div. 299.

34 C.J. p 561 note 6.

Necessity of pleadings to support judgment see supra § 40.

Parties may by consent dispense with written pleadings entirely at least to extent that they cannot attack a judgment rendered in such a case collaterally on ground of lack of written pleadings.—State v. Underwood, 86 P.2d 707, 54 Wyo. 1.

39. Tex.—Tanton v. State Nat. Bank of El Paso, Civ.App., 43 S. W.2d 957, affirmed 79 S.W.2d 833, 125 Tex. 16, 97 A.L.R. 1093.

34 C.J. p 561 note 7.

Partnership sued as corporation

Default judgment in action, wherein partnership was sued as corporation, and in which neither partner appeared or made defense, was subject to collateral attack by partners. —McGeorge v. Danforth, Mo.App., 39 S.W.2d 565.

40. Mo.—Gilkeson v. Knight, 71 Mo. 403.

Wash.T.—McCoy v. Ayres, 3 P. 273, 2 Wash.T. 203.

41. Fla.—Beverette v. Graham, 135 So. 847, 101 Fla. 566.

34 C.J. p 561 note 2.

42. N.M.—Costilla Estates Development Co. v. Mascarenas, 267 P. 74, 33 N.M. 356.

Okl.—Thompson v. General Outdoor Advertising Co., 151 P.2d 379.

34 C.J. p 561 note 3.

43. Okl.—Hardwicke-Etter Co. v. Durant, 187 P. 484, 77 Okl. 202.

44. U.S.—Herron v. Dater, Pa., 7 S. Ct. 620, 120 U.S. 464, 30 L.Ed. 748.

34 C.J. p 561 note 5.

45. U.S.—Iselin v. La Coste, C.C.A. La., 147 F.2d 791—Read v. Elliott, C.C.A.S.C., 94 F.2d 55—Bohenik v. Delaware & H. Co., C.C.A.N.Y., 49 F.2d 722, certiorari denied 52 S.Ct. 23, 284 U.S. 643, 76 L.Ed. 546—Prichard v. Nelson, D.C.Va., 55 F. Supp. 506.

Ark.—Lambie v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019.

Cal.—Bank of America Nat. Trust & Savings Ass'n v. Hill, 71 P.2d 258, 9 Cal.2d 495.

Fla.—Polk v. Chase Nat. Co., 162 So. 521, 120 Fla. 243—Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212—Malone v. Meres, 109 So. 677, 91 Fla. 709.

Ga.—Campbell v. Atlanta Coach Co., 200 S.E. 203, 58 Ga.App. 824.

Ind.—Shedd v. Northern Indiana Public Service Co., 182 N.W. 278, 98 Ind.App. 42.

Kan.—Eberhardt Lumber Co. v. Lecuyer, 110 P.2d 757, 153 Kan. 386.

Mich.—Richardson v. Richardson, 15 N.W.2d 660, 309 Mich. 336, certiorari denied 65 S.Ct. 912, 324 U.S. 864, 89 L.Ed. 1420—Walden v. Crego's Estate, 285 N.W. 457, 288 Mich. 564.

Ohio.—Binns v. Isabel, 51 N.E.2d 501, 72 Ohio App. 222.

Okl.—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40—Strange v. Armstrong, 252 P. 1099, 123 Okl.

ment.[46] Thus it is no ground of collateral objection that the action was tried by the court alone, where it was properly triable by a jury, or vice versa,[47] and the same rule applies to erroneous or irregular action with regard to continuances or adjournments,[48] dismissal,[49] consolidation,[50] amendments,[51] references,[52] change of venue,[53] security for costs,[54] or rulings on motions[55] or on a demurrer.[56]

It has been stated, however, that the mode of procedure, after jurisdiction of the person is obtained, must be in accordance with law, and a clear violation thereof, if fundamental, vitiates the judgment, and subjects it to collateral attack, where the violation is apparent on the face of the record proper.[57]

§ 432. —— Objections to Evidence

A judgment may not be collaterally attacked on the ground that it was based on illegal, inadmissible, or insufficient evidence.

A judgment of a court having jurisdiction cannot be impeached collaterally by showing that the evidence on which it was based was illegal,[58] inadmissible,[59] or insufficient to sustain the judgment.[60] Indeed, the courts have gone so far as to state that a judgment entered in the absence of any evidence is not subject to collateral attack.[61]

A judgment cannot be collaterally impeached because of the erroneous exclusion of evidence.[62]

216—Schulte v. Board of Com'rs of Pontotoc County, 250 P. 123, 119 Okl. 261.
Tenn.—Covington v. Bullefin, 1 Tenn. App. 603.
Tex.—Fitzgerald v. Le Grande, Civ. App., 187 S.W.2d 155—Lipscomb v. Lofland, Civ.App., 141 S.W.2d 983, error dismissed, judgment correct.
Utah.—Redfield v. First Nat. Bank, 244 P. 210, 66 Utah 459.
34 C.J. p 561 note 8.

Judgment in partition
Mo.—Virgin v. Kennedy, 32 S.W.2d 91, 326 Mo. 400.
34 C.J. p 561 note 8 [d].

Where supreme court had jurisdiction of appeal, its judgment was not subject to collateral attack for errors committed by court in course of proceedings, regardless of how irregular proceedings might have been.—State ex rel. McGrew Coal Co. v. Ragland, 97 S.W.2d 113, 339 Mo. 452.

Particular irregularities
(1) Court's appointment of receiver contrary to statute.—Spence v. State Nat. Bank of El Paso, Tex. Com.App., 5 S.W.2d 754.

(2) Failure of court to comply with statute directing court not to try a person for a crime while that person is in a state of insanity.—State ex rel. Novak v. Utecht, 281 N.W. 775, 203 Minn. 448.

(3) Inadequate presentation of case at hearing.—Coughlin v. Coughlin, 45 N.E.2d 388, 312 Mass. 452.

(4) Lack of arraignment and plea.—Brackeen v. State, 154 N.E. 10, 198 Ind. 480—Pritchard v. State, 127 N.E. 545, 190 Ind. 49.

(5) Lack of petition and order appointing minor's next friend.—Nitti v. Public Service Ry. Co., 139 A. 62, 104 N.J.Law 67.

(6) Violation of court rules as to division of business among judges.—Johnson v. Manhattan Ry. Co., C.C.A.N.Y., 61 F.2d 934, affirmed in part 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.

(7) Other irregularities.
S.D.—Michels v. Kirfel, 6 N.W.2d 162.
Tex.—Livingston v. Stubbs, Civ.App., 151 S.W.2d 285, error dismissed, judgment correct—Wilson v. Beck, Civ.App., 286 S.W. 315.
34 C.J. p 561 note 8 [b].

Irregularities in proceeding occurring between decree and sale thereunder are cured by confirmation order, and decree may not be collaterally attacked where court had jurisdiction.
Ark.—Lambie v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019.
Or.—Skinner v. Silver, 75 P.2d 21, 158 Or. 81.

46. Ga.—Chapman v. Taliaferro, 58 S.E. 128, 1 Ga.App. 235.

47. Conn.—**Corpus Juris cited in** Halligan v. Carlson, 135 A. 39, 40, 105 Conn. 245.
Ill.—Wickiser v. Powers, 57 N.E.2d 522, 324 Ill.App. 130.
Mich.—Peters v. Sturmer, 248 N.W. 875, 263 Mich. 494.
Tex.—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.
34 C.J. p 562 note 10.

48. Neb.—Staben v. Mehrens, 241 N.W. 108, 122 Neb. 683.
34 C.J. p 562 note 11.

49. Va.—Pocahontas Wholesale Grocery Co. v. Gillespie, 60 S.E. 597, 63 W.Va. 578.
34 C.J. p 562 note 12.

50. Nev.—Daly v. Lahontan Mines Co., 151 P. 514, 39 Nev. 14, reheard 158 P. 285, 39 Nev. 14.

51. U.S.—Goodman v. Ft. Collins, Colo., 164 F. 970, 91 C.C.A. 98.
Ohio.—Paulin v. Sparrow, 110 N.E. 528, 91 Ohio St. 279.

52. Tex.—Youngstown Bridge Co. v. North Galveston, H. & K. C. R. Co., Civ.App., 31 S.W. 420.

53. Mo.—Bank of Kennett v. Cotton Exchange Bank, 72 S.W.2d 842, 228 Mo.App. 859.
34 C.J. p 562 note 16.

54. W.Va.—State v. Fidelity & Deposit Co., 112 S.E. 319, 91 W.Va. 191.

55. Okl.—Equitable Surety Co. v. Oil Field Supply Co., 202 P. 293, 84 Okl. 31.

56. N.C.—Brown v. Harding, 89 S.E. 222, 171 N.C. 686, retaxation of costs denied 90 S.E. 3, 172 N.C. 835.

57. Wyo.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.

58. N.Y.—Herring v. New York, L. E. & W. R. Co., 12 N.E. 763, 105 N.Y. 340, 19 Abb.N.Cas. 340, 27 N.Y.Wkly.Dig. 45.
Tex.—Odle v. Frost, 59 Tex. 684.

59. Mich.—Springett v. Circuit Court Com'r for Jackson County, 283 N.W. 857, 287 Mich. 271.
34 C.J. p 562 note 21.

60. Ky.—Starbird v. Blair, 12 S.W.2d 693, 227 Ky. 258.
Mich.—Heap v. Heap, 242 N.W. 252, 258 Mich. 250.
34 C.J. p 562 note 22.

Existence or nonexistence of facts authorizing judgment does not justify collateral attack.—Shaveland v. Shaveland, 228 P. 1090, 112 Or. 173.

61. N.Y.—Grieshaber v. Knoepfel, 198 N.Y.S. 302, 119 Misc. 827.
Tenn.—Globe & Republic Ins. Co. of America v. Shields, 96 S.W.2d 947, 170 Tenn. 485.
34 C.J. p 563 note 23—42 C.J. p 172 note 59 [a].

Allowance of claims without proof other than the agreement as to the amounts does not affect a decree on collateral attack.—Missouri Pac. R. Co. v. Sears, 265 S.W. 653, 166 Ark. 104.

62. Wis.—Beck v. State, 219 N.W. 197, 196 Wis. 242, and Beck v.

§ 433. —— Defects in Entry or Contents of Judgment

Mere irregularities in the rendition or entry of judgments, including judgments by confession or consent, are not grounds for collateral attack.

A decree rendered in advance of the period at which the court may lawfully acquire jurisdiction over defendant is subject to collateral attack.[63] However, where no question of jurisdiction is raised, a judgment or decree cannot be collaterally impeached because it was prematurely rendered,[64] or not rendered within the time required by statute,[65] or entered in vacation without consent of the parties,[66] or because it was based on defective findings by the court, or given without any findings at all[67] or is inconsistent with the findings or conclusions of law.[68]

Also a judgment may not be attacked collaterally because it appears from the record or the opinion of the court that there was a mistake, and that the judgment should have been different from that actually rendered,[69] or because of any irregularity in the entry, record, or docketing of the judgment,[70] or for any informality or incompleteness in the judgment itself, provided its defects or omissions are not such as to render it absolutely unintelligible and therefore void for uncertainty;[71] neither can it be urged against a judgment collaterally that it was changed by way of amendment or correction after its entry or after the expiration of the term.[72]

Judgment beyond pleadings and issues. Where the court goes beyond and outside the pleadings and issues and assumes to adjudicate a matter not within the issues made up in the pleadings, and the judgment is to that extent void, as considered supra §§ 49, 50, the judgment may be attacked collat-

Milwaukee County, 219 N.W. 205, 196 Wis. 259, certiorari denied Beck v. Milwaukee County, Wis., 49 S.Ct. 34, 278 U.S. 639, 73 L. Ed. 554.

63. D.C.—Morse v. U. S., 29 App.D. C. 433.
Form, contents, rendition, entry, record, and docketing of judgment see supra §§ 62–86, 100–133.

64. Colo.—Netland v. Baughman, 162 P.2d 601, 114 Colo. 148.
Ind.—Agness v. Board of Com'rs of Grant County, 166 N.E. 30, 89 Ind.App. 537.
Ky.—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416.
Mont.—State v. District Court of Fourth Judicial Dist. in and for Missoula County Department No. 2, 282 P. 1042, 86 Mont. 193.
N.M.—Field v. Otero, 290 P. 1015, 35 N.M. 68.
Or.—Booth v. Herberlie, 2 P.2d 1108, 137 Or. 354.
Tenn.—Davis v. Mitchell, 178 S.W. 2d 889, 27 Tenn.App. 182.
Wash.—Merchants' Collection Co. v. Sherburne, 290 P. 991, 158 Wash. 426.
34 C.J. p 563 note 26.

65. S.D.—Harker v. Cowie, 173 N.W. 722, 42 S.D. 159.

66. Mo.—Bracken v. Milner, 73 S. W. 225, 99 Mo.App. 187.

67. Ark.—**Corpus Juris cited in** Brooks v. Baker, 187 S.W.2d 169, 172, 208 Ark. 654.
Neb.—Cizek v. Cizek, 99 N.W. 28, 69 Neb. 797, 5 Ann.Cas. 464—State v. Duncan, 56 N.W. 214, 37 Neb. 631.
N.Y.—Shaul v. Fidelity & Deposit Co. of Maryland, 227 N.Y.S. 163, 131 Misc. 401, affirmed 230 N.Y.S. 910, 224 App.Div. 773.
Or.—Glickman v. Solomon, 12 P.2d 1017, 140 Or. 358, followed in Solomon v. Glickman, 12 P.2d 1018, 140 Or. 364.
34 C.J. p 563 note 29.

Findings of fact cannot be used for purpose of showing erroneous judgment.—Permian Oil Co. v. Smith, 73 S.W.2d 490, 129 Tex. 413, 111 A.L. R. 1152, rehearing denied 107 S.W.2d 564, 129 Tex. 413, 111 A.L.R. 1152.

Collateral attack on finding
Where court had jurisdiction in foreclosure suit, its finding as to land covered by mortgage might not be collaterally attacked.—Sederholm v. City of Port Arthur, Tex.Civ.App., 3 S.W.2d 925, affirmed Tyner v. La Coste, Com.App., 13 S.W.2d 685, followed in Tyner v. Keith, 13 S.W.2d 687.

68. Ark.—Brooks v. Baker, 187 S.W. 2d 169, 208 Ark. 654.
Cal.—Tulare Irr. Dist. v. Superior Court of California in and for Tulare County, 242 P. 725, 197 Cal. 649—Wellborn v. Wellborn, 131 P.2d 48, 55 Cal.App.2d 516.
Tex.—Permian Oil Co. v. Smith, 73 S.W.2d 490, 129 Tex. 413, 111 A.L. R. 1152, rehearing denied 107 S. W.2d 564, 129 Tex. 413, 111 A.L.R. 1152.

69. U.S.—Iselin v. La Coste, C.C.A. La., 147 F.2d 791.
Cal.—McAllister v. Superior Court In and For Alameda County, 82 P.2d 462, 28 Cal.App.2d 160.
Miss.—McIntosh v. Munson Road Machinery Co., 145 So. 731, 167 Miss. 546.
34 C.J. p 563 note 30.

Whether decision is sound or unsound is immaterial on collateral attack.—Eagle, Star and British Dominions Ins. Co. v. Heller, 140 S.E. 314, 149 Va. 82, 57 A.L.R. 490.

Judgment held correct
Evidence established that decree of state court as entered approving compromise and settlement of proceeding correctly reflected the judgment of the court.—Butler v. Denton, D.C.Okl., 57 F.Supp. 656, affirmed, C. C.A., 150 F.2d 687.

70. Fla.—**Corpus Juris cited in** State ex rel. McGuire v. Mayo, 175 So. 732, 733, 128 Fla. 699—Fiehe v. R. E. Householder Co., 125 So. 2, 98 Fla. 627.
Neb.—School Dist. D. of Dawes County v. School Dist. No. 80 of Dawes County, 201 N.W. 964, 112 Neb. 867.
Tenn.—Whitson v. Johnson, 123 S.W. 2d 1104, 22 Tenn.App. 427.
Utah.—Intermill v. Nash, 75 P.2d 157, 94 Utah 271—Farmers' & Merchants' Sav. Bank v. Hudson, 218 P. 93, 62 Utah 131.
34 C.J. p 563 note 31.

71. U.S.—Prichard v. Nelson, C.C.A. Va., 137 F.2d 312.
Fla.—State ex rel. Warren v. City of Miami, 15 So.2d 449, 153 Fla. 644—State ex rel. Fulton Bag & Cotton Mills v. Burnside, 15 So.2d 324, 153 Fla. 599—Crosby v. Burleson, 195 So. 202, 142 Fla. 443—**Corpus Juris cited in** State v. Mayo, 175 So. 732, 733, 128 Fla. 699.
La.—Gumbel v. New Orleans Terminal Co., 183 So. 212, 190 La. 904, certiorari denied 59 S.Ct. 249, 305 U.S. 654, 83 L.Ed. 423.
Tex.—Bridgman v. Moore, 183 S.W. 2d 705, 143 Tex. 250.
34 C.J. p 564 note 32.

72. U.S.—Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co., C.C. Ark., 126 F. 552, affirmed 136 F. 27, 68 C.C.A. 577.
34 C.J. p 564 note 33.

erally,[73] at least in default cases.[74] However, it has been held that a judgment or order is not subject to collateral impeachment because it was not warranted by the allegations of the pleadings.[75] A judgment relating to the subject of a proceeding, as stated in the pleadings, is not subject to collateral attack because the pleader has asked for other relief than that which may properly be awarded.[76]

Excessive recovery or relief. Where a judgment is merely erroneous, as considered supra § 54, because it is excessive,[77] either as being greater than the amount demanded,[78] greater than the facts or the evidence would justify,[79] or as improperly including interest,[80] penalties,[81] costs,[82] or counsel fees,[83] or as allowing excessive interest[84] or costs,[85] it may not be impeached in a collateral proceeding.

Judgments by confession or consent. The rule prohibiting the collateral impeachment of judgments for mere errors or irregularities in their entry or rendition applies equally to judgments by confession as to any others,[86] and to judgments entered on consent or agreement.[87] On the other hand, a judgment by confession may be attacked collaterally where the attorney exceeded his authority,[88] where defendant was not bound by the warrant of attorney,[89] where the statement on which it is entered is so essentially defective that the court acquired no jurisdiction or authority to enter the judgment,[90] or where the required affidavit of the execution of the power of attorney is lacking.[91]

73. Cal.—Baar v. Smith, 255 P. 827, 201 Cal. 87—Petition of Furness, 218 P. 61, 62 Cal.App. 753.
Mo.—Weatherford v. Spiritual Christian Union Church, 163 S.W.2d 916—Brandt v. Farmers Bank of Chariton County, App., 177 S.W. 2d 667, reversed on other grounds 182 S.W.2d 281, 353 Mo. 259—Dickey v. Dickey, App., 132 S.W.2d 1026—Burns v. Ames Realty Co., App., 31 S.W.2d 274—Raney v. Home Ins. Co., 246 S.W. 57, 213 Mo.App. 1.
Neb.—Branz v. Hylton, 265 N.W. 16, 130 Neb. 385.
N.Y.—Coles v. Carroll, 6 N.E.2d 107, 273 N.Y. 86.
Ohio.—Binns v. Isabel, 12 Ohio Supp. 113, affirmed 51 N.E.2d 501, 72 Ohio App. 222.
Tex.—Edinburg Irr. Co. v. Ledbetter, Civ.App., 247 S.W. 335, modified on other grounds, Com.App., 286 S.W. 185.
33 C.J. p 1152 note 22, p 1168 note 33.

Presumption that judgment collaterally attacked was supported by pleadings should not be indulged, where complaint is before court.—State v. District Court of Eighth Judicial Dist., 284 P. 128, 86 Mont. 387.

74. Wyo.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.

75. Mont.—State v. District Court of Tenth Judicial Dist. in and for Judith Basin County, 227 P. 579, 71 Mont. 89.
33 C.J. p 1153 note 24, p 1169 note 34.

76. Cal.—Luckey v. Superior Court in and for Los Angeles County, 287 P. 450, 209 Cal. 360.

77. Or.—Linn County v. Rozelle, 162 P.2d 150.

78. Cal.—Wallace v. Wallace, 295 P. 1061, 111 Cal.App. 500.
Ga.—**Corpus Juris cited in** Hardin v. Dodd, 167 S.E. 277, 279, 176 Ga. 119.
Mo.—Meierhoffer v. Kennedy, 263 S. W. 416, 304 Mo. 261.
Or.—**Corpus Juris quoted in** Linn County v. Rozelle, 162 P.2d 150, 165—**Corpus Juris cited in** Travelers Ins. Co. of Hartford, Conn., v. Staiger, 69 P.2d 1069, 1071, 157 Or. 143.
34 C.J. p 564 note 35.

Default judgment for larger amount than demanded in summons and complaint cannot be attacked collaterally.—Munson v. Bensel, 211 N.W. 838, 169 Minn. 434.

79. Ill.—People ex rel. Anderson v. Village of Bradley, 11 N.E.2d 415, 367 Ill. 301.
Mich.—**Corpus Juris cited in** Morris v. Barker, 235 N.W. 174, 175, 253 Mich. 334.
Or.—Linn County v. Rozelle, 162 P.2d 150.
R.I.—McDuff Estate v. Kost, 158 A. 373, 52 R.I. 136.
34 C.J. p 564 note 36.

Failure to credit debtor with sums paid
Mass.—Thompson v. Horgan, 157 N. E. 599, 260 Mass. 589.

80. U.S.—Huddleston v. Dwyer, C.C. A.Okl., 145 F.2d 311.
Cal.—Wells Fargo & Co. v. City and County of San Francisco, 152 P. 2d 625, 25 Cal.2d 37.
34 C.J. p 564 note 37.

81. U.S.—Huddleston v. Dwyer, C. C.A.Okl., 145 F.2d 311.

82. Cal.—Wells Fargo & Co. v. City and County of San Francisco, 152 P.2d 625, 25 Cal.2d 37.
Mont.—Thompson v. Chicago, B. & Q. R. Co., 253 P. 313, 78 Mont. 170.
Or.—Linn County v. Rozelle, 162 P.2d 150.
34 C.J. p 564 note 38.

83. Ga.—Van Dyke v. Van Dyke, 54 S.E. 537, 125 Ga. 491.
Utah.—Mary Jane Stevens Co. v. Foley, 248 P. 815, 67 Utah 578.

84. Kan.—Dickson v. Patterson, 189 P. 912, 106 Kan. 794.
34 C.J. p 564 note 40.

85. Or.—**Corpus Juris cited in** National Surety Corporation v. Smith, 123 P.2d 203, 221, 168 Or. 265.
34 C.J. p 564 note 41.

86. Fla.—Wilds v. State, 84 So. 664, 79 Fla. 575.
34 C.J. p 129 note 60, p 564 note 42.

87. Cal.—Nielsen v. Emerson, 6 P. 2d 281, 119 Cal.App. 214.
34 C.J. p 564 note 43.

Judgment for plaintiffs in amount agreed on with defendant was not subject to impeachment, qualification, or modification by testimony, in subsequent action against joint tort-feasor, as to stipulation that satisfaction of judgment would but partially satisfy claim and reservation of right to pursue joint tort-feasor for further satisfaction.—Hunt v. Ziegler, Tex.Civ.App., 271 S.W. 936, affirmed Ziegler v. Hunt, Com.App., 280 S.W. 546.

Judgment not in accordance with agreement
Cal.—Nielsen v. Emerson, 6 P.2d 281, 119 Cal.App. 214.
34 C.J. p 564 note 43 [a].

88. Ill.—Hughes v. First Acceptance Corporation, 260 Ill.App. 176.
N.Y.—Hubbard v. Spencer, 15 Johns. 244.
Unauthorized appearance as ground for collateral attack see supra § 424.

89. Colo.—Sproul v. Monteith, 185 P. 270, 66 Colo. 541.

90. N.Y.—Dunham v. Waterman, 17 N.Y. 9, 72 Am.D. 406.

91. Ill.—Gardner v. Bunn, 23 N.E. 1072, 132 Ill. 403, 7 L.R.A. 729.
N.J.—Cliver v. Applegate, 5 N.J.Law 479.

§ 434. Fraud, Collusion, or Perjury

a. Fraud and duress
b. Collusion
c. False testimony or perjury

a. Fraud and Duress

A judgment may be collaterally attacked on the ground of fraud where the fraud goes to the jurisdiction of the court.

Where the fraud alleged was inherent in the cause of action, or in the character or procurement of the instrument sued on, it does not furnish a legitimate ground for impeaching the judgment in a collateral proceeding;[92] and there are many decisions stating the broad general rule that, where the court has jurisdiction, it is not permissible for a party or privy to attack a judgment in a collateral proceeding because of fraud,[93] such a judgment being voidable only, and not void.[94]

A judgment obtained by fraud may, however, be void under some circumstances, and subject to collateral attack,[95] as where such fraud appears on

92. U.S.—Phœnix Finance Corporation v. Iowa-Wisconsin Bridge Co., C.C.A.Iowa, 115 F.2d 1, 139 A.L.R. 1490, reversed on other grounds 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100, 137 A.L.R. 967.
Ariz.—Kendall v. Silver King of Arizona Mining Co., 226 P. 540, 26 Ariz. 456.
Cal.—Mason v. Drug, Inc., 88 P.2d 929, 31 Cal.App.2d 697—Godfrey v. Godfrey, 86 P.2d 357, 30 Cal.App.2d 370—Sontag v. Denio, 73 P.2d 248, 23 Cal.App.2d 319—Harvey v. Griffiths, 23 P.2d 532, 133 Cal.App. 17—Clavey v. Loney, 251 P. 232, 80 Cal.App. 20.
N.J.—Goodman v. Goodman, 194 A. 866, 15 N.J.Misc. 716.
34 C.J. p 565 note 49, p 567 note 67 [a] (3)—42 C.J. p 173 notes 61, 62.
Equitable relief against judgments on ground of fraud generally see supra §§ 372–374.
Jurisdiction of federal courts with respect to state court judgments see Courts § 538.
Opening or vacating judgment for fraud see supra § 269.

At least to the parties themselves or their privies fraud inhering in proceeding itself is not ordinarily available as ground for collateral attack.—Abbott v. Ætna Casualty & Surety Co., D.C.Md., 42 F.Supp. 793, affirmed, C.C.A., Ætna Casualty & Surety Co. v. Abbott, 130 F.2d 40.

Fraud must be extrinsic
U.S.—Moffett v. Robbins, D.C.Kan., 14 F.Supp. 602, affirmed, C.C.A., 81 F.2d 431, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397.
Ark.—Fawcett v. Rhyne, 63 S.W.2d 349, 187 Ark. 940.
Idaho.—Tingwall v. King Hill Irr. Dist., 155 P.2d 605.
N.Y.—Arcuri v. Arcuri, 193 N.E. 174, 265 N.Y. 358.
Okl.—Steil v. Leverett, 272 P. 412, 133 Okl. 300.
Wash.—Ryan v. Plath, 140 P.2d 968, 18 Wash.2d 839.

93. U.S.—Iselin v. La Coste, C.C.A. La., 147 F.2d 791—Montgomery v. Equitable Life Assur. Soc. of U. S., C.C.A.Ill., 83 F.2d 758—Johnson v. Mississippi Power Co., C.C.A. Miss., 68 F.2d 545.
Ariz.—Schuster v. Schuster, 73 P.2d 1345, 51 Ariz. 1—Berman v. Thomas, 19 P.2d 685, 41 Ariz. 457.
Ark.—Swindle v. Rogers, 66 S.W.2d 630, 188 Ark. 503—Lambie v. W. T. Rawleigh Co., 14 S.W.2d 245, 178 Ark. 1019.
Cal.—Nielsen v. Emerson, 6 P.2d 281, 119 Cal.App. 214.
Colo.—Atchison, T. & S. F. Ry. Co. v. Board of Com'rs of Fremont County, 37 P.2d 761, 95 Colo. 435.
Fla.—Dr. P. Phillips Co. v. Billo, 147 So. 579, 109 Fla. 316.
Ga.—Wood v. Wood, 38 S.E.2d 545—Marshall v. Marthin, 15 S.E.2d 861, 192 Ga. 613—Tuff v. Loh, 144 S.E. 670, 38 Ga.App. 526, followed in Tuff v. Continental Trust Co., 144 S.E. 671, 38 Ga.App. 529.
Hawaii.—**Corpus Juris cited in** Springer v. Rose, 31 Hawaii 443, 445.
Iowa.—Reidy v. Chicago, B. & Q. Ry. Co., 249 N.W. 347, 216 Iowa 415.
La.—Caldwell v. Caldwell, 114 So. 96, 164 La. 458.
Minn.—Geo. Benz & Sons v. Hassie, 293 N.W. 133, 208 Minn. 118.
Neb.—Warren v. Stanton County, 15 N.W.2d 757, 145 Neb. 220.
N.Y.—People v. Townsend, 233 N.Y. S. 632, 133 Misc. 843.
N.D.—Olson v. Donnelly, 294 N.W. 666, 70 N.D. 370.
Pa.—Greiner v. Brubaker, 30 A.2d 621, 151 Pa.Super. 515, certiorari denied 64 S.Ct. 42, 320 U.S. 742, 88 L.Ed. 440, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491, rehearing denied 64 S.Ct. 434, 320 U.S. 816, 88 L.Ed. 493.
S.C.—Stone v. Mincey, 185 S.E. 619, 180 S.C. 317—Bailey v. Cooley, 150 S.E. 473, 153 S.C. 78.
Tex.—Bragdon v. Wright, Civ.App., 142 S.W.2d 703, error dismissed.
34 C.J. p 565 note 50—47 C.J. p 439 note 12.
Right of third persons and creditors to assert fraud see supra §§ 414, 415.

Fraud not going to the jurisdiction is not ground for collateral attack on domestic judgment by parties or privies.—Hill v. Cole, 137 P.2d 579, 192 Okl. 476.

94. Colo.—Atchison, T. & S. F. Ry. Co. v. Board of Com'rs of Fremont County, 37 P.2d 761, 95 Colo. 435.
Ga.—Tuff v. Loh, 144 S.E. 670, 38 Ga.App. 526, followed in Tuff v. Continental Trust Co., 144 S.E. 671, 38 Ga.App. 529.
Iowa.—Swartzendruber v. Polke, 218 N.W. 62, 205 Iowa 382—Montagne v. Cherokee County, 205 N.W. 228, 200 Iowa 534—Newcomer v. Newcomer, 201 N.W. 579, 199 Iowa 290.
Minn.—In re Melgaard's Will, 274 N. W. 641, 200 Minn. 493.
Tex.—Johnston v. Stephens, Civ.App., 300 S.W. 225, reversed on other grounds 49 S.W.2d 431, 121 Tex. 374—Uvalde Paving Co. v. Crabb, Civ.App., 7 S.W.2d 678, reversed on other grounds Crabb v. Uvalde Paving Co., Com.App., 23 S.W.2d 300—Urban v. Bagby, Civ.App., 286 S.W. 519, affirmed, Com.App., 291 S.W. 537.
34 C.J. p 565 note 50, p 566 note 51.

95. U.S.—Bruun v. Hanson, C.C.A. Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, mandate conformed to Bruun v. Hanson, 30 F.Supp. 602—New York Life Ins. Co. v. Gay, C.C.A.Ky., 36 F.2d 634—Standard Steel Car Co. v. U. S., 60 Ct.Cl. 726.
Cal.—Crow v. Madsen, App., 111 P. 2d 7, rehearing granted 111 P.2d 663.
Fla.—State ex rel. Warren v. City of Miami, 15 So.2d 449, 153 Fla. 644—State ex rel. Fulton Bag & Cotton Mills v. Burnside, 15 So.2d 324, 153 Fla. 599.
Ga.—Ingram & Le Grand Lumber Co. v. Burgin Lumber Co., 18 S.E. 2d 774, 193 Ga. 404.
Idaho.—Harkness v. Utah Power & Light Co., 291 P. 1051, 49 Idaho 756.
Ill.—Meyer v. Meyer, 39 N.E.2d 311, 379 Ill. 97, 140 A.L.R. 484—Moore v. Sievers, 168 N.E. 259, 336 Ill. 316—Reisman v. Central Mfg. Dist. Bank, 15 N.E.2d 903, 296 Ill.App. 61.
Ind.—Town of Woodruff Place v. Gorman, 100 N.E. 296, 179 Ind. 1—Guydon v. Taylor, 60 N.E.2d 750, 115 Ind.App. 685.

the face of the record[96] or goes to the method of acquiring jurisdiction.[97] Likewise, the judgment may be attacked collaterally where fraud has been practiced in the very act of obtaining the judgment,[98] or on the party against whom the judgment was rendered, so as to prevent him from hav-

Ky.—Houston's Guardian (now Luker) v. Luker's Former Guardian, 69 S.W.2d 1014, 253 Ky. 602.
La.—Miller v. Miller, 100 So. 45, 156 La. 46.
Neb.—Mead Co. v. Doerfler, 18 N.W. 2d 524, 146 Neb. 2.
N.Y.—Fisher v. Fisher, 237 N.Y.S. 162, 227 App.Div. 160, reversed on other grounds 170 N.E. 912, 253 N.Y. 260, 69 A.L.R. 918—Oberlander v. Oberlander, 39 N.Y.S.2d 139, 179 Misc. 459.
Ohio.—Dahms v. Swinburne, 167 N.E. 486, 31 Ohio App. 512.
Okl.—Cochran v. Barkus, 240 P. 321, 112 Okl. 180.
Or.—May v. Roberts, 286 P. 546, 133 Or. 643.
Pa.—In re Stetson's Estate, 155 A. 856, 305 Pa. 62—Biddle v. Tomlinson, 8 A. 774, 115 Pa. 299, 20 Wkly. N.C. 74, 44 Leg.Int. 318—Moyer v. Meray, 25 A.2d 612, 148 Pa.Super. 284.
S.C.—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 1 S.E.2d 797, 191 S.C. 384.
Tex.—Benson v. Mangum, Civ.App., 117 S.W.2d 169, error refused—Urban v. Bagby, Civ.App., 286 S.W. 519, affirmed, Com.App., 291 S.W. 537.
34 C.J. p 566 note 52.

There are two kinds of fraud to be considered: First, the kind of fraud which prevents the court from acquiring jurisdiction or which merely gives it colorable jurisdiction; second, that kind of fraud which occurred in the proceedings of the court after jurisdiction had been obtained, such as perjury, concealment, and other chicanery. The first variety of fraud will invalidate the judgment, while the second class has no such legal effect.—Wood v. First Nat. Bank of Woodlawn, 50 N.E.2d 830, 383 Ill. 515, certiorari denied 64 S.Ct. 521, 321 U.S. 765, 88 L.Ed. 1061—People v. Sterling, 192 N.E. 229, 357 Ill. 354—Beck v. Lash, 136 N.E. 475, 303 Ill. 549—In re Goldberg's Estate, 5 N.E.2d 863, 288 Ill.App. 203, certiorari denied Goldberg v. Goldberg, 58 S.Ct. 12, 302 U.S. 693, 82 L.Ed. 535.

Extrinsic fraud

(1) Judgments obtained by extrinsic fraud may be attacked collaterally.
U.S.—Griffith v. Bank of N. Y., C.C.A. N.Y., 147 F.2d 899, certiorari denied Bank of New York v. Griffith, 147 F.2d 899.
Okl.—Dill v. Stevens, 284 P. 60, 141 Okl. 24—Stevens v. Dill, 285 P. 845, 142 Okl. 138—Schulte v. Board of Com'rs of Pontotoc County, 250 P. 123, 119 Okl. 261.

(2) Extrinsic fraud such as will render judgment subject to collateral attack is fraud which, rather than going to merits of judgment, has prevented cause from being fully considered on its merits, as by preventing party from attending hearing or from presenting his case fully.
Cal.—Howard v. Howard, 163 P.2d 439—McLaughlin v. Security-First Nat. Bank of Los Angeles, 67 P.2d 726, 20 Cal.App.2d 602.
N.J.—Wolff v. Wolff, 34 A.2d 150, 134 N.J.Eq. 8.

(3) When a judgment is assailed for fraud extraneous to the issues, it is immaterial whether it is denominated a "direct attack" or a "collateral attack."—Gray v. McKnight, 183 P. 489, 75 Okl. 268—Griffin v. Culp, 174 P. 495, 68 Okl. 310.

Where fraud is regarded as having been perpetrated on the court as well as on the injured party, the judgment is a mere nullity and may be attacked and defeated because of the fraud in any collateral proceeding in the same court in which it was rendered.—State ex rel. Hussey v. Hemmert, Ohio App., 37 N.E.2d 668.

Judgment may be collaterally attacked at subsequent term in court rendering it.—Horne v. Moorehead, 153 So. 668, 169 Miss. 362, overruling suggestion of error 152 So. 495, 169 Miss. 362.

By statute in some states any judicial record may be impeached on ground of fraud in party offering it.—Stewart v. Stewart, 89 P.2d 404, 32 Cal.App.2d 148.

96. Ariz.—Hershey v. Banta, 99 P. 2d 81, 55 Ariz. 93, followed in Hershey v. Republic Life Ins. Co., 99 P.2d 85, 55 Ariz. 104—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 45 Ariz. 434—Grand International Brotherhood of Locomotive Engineers v. Mills, 31 P.2d 971, 43 Ariz. 379—Berman v. Thomas, 19 P.2d 685, 41 Ariz. 457.
Idaho.—Tingwall v. King Hill Irr. Dist., 155 P.2d 605.
34 C.J. p 566 note 53.

Where fraud does not appear on face of record, collateral attack has been held not available.
Ky.—Collier v. Peninsular Fire Ins. Co. of America, 263 S.W. 353, 204 Ky. 1.
Wash.—Thompson v. Short, 106 P.2d 720, 6 Wash.2d 71.

97. Ariz.—Grand International Brotherhood of Locomotive Engineers v. Mills, 31 P.2d 971, 43 Ariz. 379.
Colo.—Wilson v. Birt, 235 P. 563, 77 Colo. 206.
Ind.—McKinney v. Bassett, 61 N.E. 2d 79, 115 Ind.App. 614.
Iowa.—Watt v. Dunn, 17 N.W.2d 811.
Miss.—Lamar v. Houston, 184 So. 293, 183 Miss. 260.
Okl.—Oklahoma Stockyards Nat. Bank v. Pierce, 243 P. 144, 114 Okl. 25.
Tex.—Dyer v. Johnson, Civ.App., 19 S.W.2d 421, error dismissed.
34 C.J. p 566 note 54—42 C.J. p 173 note 60.

98. U.S.—Nardi v. Poinsatte, D.C. Ind., 46 F.2d 347—McMurray v. Chase Nat. Bank of City of New York, D.C.Wyo., 10 F.Supp. 960—Stephens Fuel Co. v. Bay Parkway Nat. Bank of Brooklyn, D.C.N.Y., 10 F.Supp. 395.
Ariz.—Grand International Brotherhood of Locomotive Engineers v. Mills, 31 P.2d 971, 43 Ariz. 379.
Ark.—Featherston v. Lamb, 178 S.W.2d 492, 206 Ark. 1078—Levinson v. Treadway, 78 S.W.2d 59, 190 Ark. 201.
Cal.—Slater v. Shell Oil Co., 103 P. 2d 1043, 39 Cal.App.2d 535.
Ill.—Hughes v. First Acceptance Corporation, 260 Ill.App. 176.
Ky.—Houston's Guardian (now Luker) v. Luker's Former Guardian, 69 S.W.2d 1014, 253 Ky. 602—Commonwealth v. Smith, 46 S.W.2d 474, 242 Ky. 365.
Miss.—Carr v. Miller, 139 So. 851, 162 Miss. 760.
Neb.—Warren v. Stanton County, 15 N.W.2d 757, 145 Neb. 220.
Okl.—Cochran v. Barkus, 240 P. 321, 112 Okl. 180.
Pa.—Gribben v. Carpenter, 185 A. 712, 323 Pa. 243.
34 C.J. p 566 note 55—42 C.J. p 173 note 60.

Allegation that assignment of note and mortgage by bank was illegal in that bank was insolvent at the time did not allege such fraud in procurement of judgment on note and mortgage in favor of assignee as would afford basis for a collateral attack on such judgment.—Hadley v. Mooresville Bldg. Savings & Loan Ass'n, 47 N.E.2d 156, 113 Ind. App. 143.

Attorney who makes one a party complainant to suit without his knowledge or consent, and who, by means of such unauthorized act, causes judgment against such party, commits a legal fraud, and judgment may be enjoined or canceled in equity where there is no element of estoppel or acquiescence after notice of such judgment.—Hirsch Bros. & Co. v. R. E. Kennington Co., 124

ing a fair opportunity to present his case,[99] or where it gives an undue advantage to the prevailing party,[1] or where the judgment was obtained through corruption of the judge, induced by the opposite party,[2] notwithstanding the court had jurisdiction of the proceedings resulting in the judgment.[3]

Duress and coercion. Judgments obtained through duress and coercion are not necessarily, and in all cases, void and, as such, subject to collateral attack.[4]

b. Collusion

A judgment ordinarily may not be impeached collaterally by a party or privy to the judgment on the ground that it was obtained by means of collusion between the other parties to the action or the attorneys.

A party or privy to a judgment ordinarily is not permitted to impeach it collaterally on the ground that it was obtained by means of collusion between the other parties to the action or the attorneys in the case,[5] although, as considered supra § 414, this may be done by a stranger to the proceeding, when his rights or interests in a subsequent litigation are threatened by the judgment. A judgment procured through the collusion of plaintiff and the city and its agents is subject to collateral attack by a taxpayer whenever it comes into conflict with his rights as a taxpayer,[6] notwithstanding the rule that the taxpayer is in privity with the city.[7]

When the only collusion is a union of the adverse interests, and the facts are fully disclosed to the court having full and complete jurisdiction, there is no fraud and the judgment is binding on collateral attack.[8]

c. False Testimony or Perjury

False testimony or perjury ordinarily is not ground for a collateral attack on the judgment unless the falsity goes to the jurisdiction of the court.

It is no ground for impeaching a judgment collaterally that the testimony on which it was based was false or perjured[9] unless the fraud goes to the

So. 344, 155 Miss. 242, 88 A.L.R. 1—Weems v. Vowell, 84 So. 249, 122 Miss. 342.

Insufficiency of proof to sustain decree did not constitute "fraud in the procurement of the decree" which would authorize collateral attack.—Bond v. Avondale Baptist Church, 194 So. 833, 239 Ala. 366.

Evidence held insufficient
To show fraud.
U.S.—Bruun v. Hanson, C.C.A.Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, mandate conformed to, D.C., Bruun v. Hanson, 30 F.Supp. 602.
Ark.—Turley v. Owen, 69 S.W.2d 882, 188 Ark. 1067.
Cal.—McLaughlin v. Security-First Nat. Bank of Los Angeles, 67 P.2d 726, 20 Cal.App.2d 602.
Ill.—Indiana Harbor Belt R. Co. v. Calumet City, 63 N.E.2d 369—Walton v. Albers, 44 N.E.2d 145, 380 Ill. 423.
Mich.—Rarden v. R. D. Baker Co., 271 N.W. 712, 279 Mich. 145, certiorari denied R. D. Baker Co. v. Rarden, 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538.
Okl.—Warren v. Stansbury, 126 P. 2d 251, 190 Okl. 554—Jackson v. Sadler, 44 P.2d 838, 172 Okl. 56.
Tex.—Hughes v. Wright, Civ.App., 127 S.W.2d 215.
Wash.—Petition of City of Seattle, 138 P.2d 667, 18 Wash.2d 167.
34 C.J. p 566 note 55 [b].

99. Cal.—McLaughlin v. Security-First Nat. Bank of Los Angeles, 67 P.2d 726, 20 Cal.App.2d 602.
N.J.—Wolff v. Wolff, 34 A.2d 150, 134 N.J.Eq. 8.
Okl.—Cochran v. Barkus, 240 P. 321, 112 Okl. 180.
34 C.J. p 566 note 56.

Public administrator's failure to appear and defend on behalf of estate in action to quiet title wherein plaintiff's case rested on foreclosure decree against testator and known to be void by plaintiff and administrator was fraud on heirs against whom decree rendered was of no effect.—Conlin v. Blanchard, 28 P.2d 12, 219 Cal. 632.

Where party has been given proper notice of action and has not been prevented from full participation therein and has had opportunity to protect himself from any fraud, fraud perpetrated is intrinsic even though unsuccessful party does not avail himself of opportunity to appear before court, and he cannot attack judgment once time has elapsed for appeal or other direct attack.—Howard v. Howard, Cal., 163 P.2d 439.

1. Mo.—Einstein v. Strother, App., 182 S.W. 122.

2. Ga.—Lockett v. Gress Mfg. Co., 70 S.E. 255, 8 Ga.App. 772.

3. Okl.—Sockey v. Winstock, 144 P. 372, 43 Okl. 758.

4. N.Y.—Finan v. Finan, 47 N.Y.S. 2d 429.

5. Neb.—Warren v. Stanton County, 15 N.W.2d 757, 145 Neb. 220.
34 C.J. p 566 note 60.

Rights of third persons
A judgment which has been entered by collusion between the parties will be disregarded as respects rights and liens held by third persons.—Krug v. John E. Yoakum Co., 80 P.2d 492, 27 Cal.App.2d 91.

6. Okl.—In re Gypsy Oil Co., 285 P. 67, 141 Okl. 291.

7. Ill.—Indiana Harbor Belt R. Co. v. Calumet City, 63 N.E.2d 369.

8. U.S.—Schmertz Wire Glass Co. v. Western Glass Co., C.C.Ill., 178 F. 973.
34 C.J. p 566 note 62.

9. Ariz.—**Corpus Juris cited in** Grand International Brotherhood of Locomotive Engineers v. Mills, 31 P.2d 971, 987, 43 Ariz. 379.
Cal.—Perkins v. Benguet Consol. Mining Co., 132 P.2d 70, 55 Cal.App. 2d 720, certiorari denied Benquet Consol. Mining Co. v. Perkins, 63 S.Ct. 1435, 319 U.S. 774, 87 L.Ed. 1721, rehearing denied 64 S.Ct. 429, 320 U.S. 803, 815, 88 L.Ed. 485—Godfrey v. Godfrey, 86 P.2d 357, 30 Cal.App.2d 370.
D.C.—Hodge v. Huff, 140 F.2d 686, 78 U.S.App.D.C. 329, certiorari denied 64 S.Ct. 946, 322 U.S. 733, 88 L.Ed. 1567—Fidelity Storage Co. v. Urice, 12 F.2d 143, 56 App.D.C. 202.
Idaho.—Moyes v. Moyes, 94 P.2d 782, 60 Idaho 601.
Mass.—Coughlin v. Coughlin, 45 N.E. 2d 388, 312 Mass. 452.
Mich.—Moebius v. McCracken, 246 N.W. 163, 261 Mich. 409.
Mont.—Friedrichsen v. Cobb, 275 P. 267, 84 Mont. 238.
N.J.—Kantor v. Kessler, 40 A.2d 607, 132 N.J.Law 336.
N.Y.—Arcuri v. Arcuri, 193 N.E. 174, 265 N.Y. 358.
Or.—Masterson v. Pacific Live Stock Co., 24 P.2d 1046, 144 Or. 396.
Pa.—Greiner v. Brubaker, 30 A.2d 621, 151 Pa.Super. 515, certiorari

jurisdiction of the court.[10]

§ 435. Defenses Available in Original Action

A judgment may not be attacked collaterally by setting up any matter which was, or might have been, raised as a defense in the original action.

A judgment cannot be impeached collaterally by setting up any matter which was or might have been raised as a defense in the original action[11] or on appeal.[12] Thus, when proceedings in mandamus are instituted to compel the levy and collection of a tax to pay a judgment against a municipal corporation, the judgment is conclusive as to the existence and validity of the debt, and cannot be controverted as to those facts.[13]

XIII. CONSTRUCTION AND OPERATION OF JUDGMENT

A. CONSTRUCTION

§ 436. In General

a. General rules of construction
b. Aids to construction

a. General Rules of Construction

An ambiguous judgment should be construed as a whole so as, if possible, to give effect to all parts thereof and to effectuate the intent and purpose of the court.

The legal operation and effect of a judgment must be ascertained by a construction and interpretation of its terms,[14] and this presents a question

denied 64 S.Ct. 42, 320 U.S. 742, 88 L.Ed. 440, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491, rehearing denied 64 S.Ct. 484, 320 U.S. 816, 88 L.Ed. 493.
Tex.—Glenn v. Dallas County Bois D'Arc Island Levee Dist., 268 S.W. 452, 114 Tex. 325, answer to certified questions conformed to, Civ.App., 275 S.W. 137, in which judgment is reversed on rehearing 282 S.W. 339, which was reversed Dallas County Bois D'Arc Island Levee Dist. v. Glenn, Com.App., 288 S.W. 165.
34 C.J. p 566 note 63.
Civil action against witness for perjury see the C.J.S. title Perjury §§ 92–94, also 48 C.J. p 918 note 42 et seq.

10. Ariz.—Grand International Brotherhood of Locomotive Engineers v. Mills, 31 P.2d 971, 43 Ariz. 379.
34 C.J. p 567 note 64.

11. U.S.—Iselin v. La Coste, C.C.A.La., 147 F.2d 791—Rheinberger v. Security Life Ins. Co. of America, D.C.Ill., 51 F.Supp. 188, cause remanded, C.C.A., 146 F.2d 680.
Ala.—Cobbs v. Norville, 151 So. 576, 227 Ala. 621.
Ark.—Carnes v. De Witt Bank & Trust Co., 147 S.W.2d 1002, 201 Ark. 1037.
Cal.—Salter v. Ulrich, 138 P.2d 7, 22 Cal.2d 263, 146 A.L.R. 1344.
Conn.—Lehrman v. Prague, 162 A. 15, 115 Conn. 484.
Ill.—Mutual Ben. Life Ins. Co. v. Lyons, 20 N.E.2d 784, 371 Ill. 341—Lord v. Board of Sup'rs of Kane County, 41 N.E.2d 106, 314 Ill.App. 161.
Ky.—Oliver v. Belcher, 265 S.W. 942, 205 Ky. 417.
Mass.—Bremmer v. Hester, 155 N.E. 454, 258 Mass. 425.
Mich.—Cook v. Casualty Ass'n of America, 224 N.W. 341, 246 Mich. 278.
Minn.—Weber v. Arend, 222 N.W. 646, 176 Minn. 120.
Miss.—Schwartz Bros. & Co. v. Stafford, 148 So. 794, 166 Miss. 397.
Mo.—Crary v. Standard Inv. Co., 285 S.W. 459, 313 Mo. 448.
Neb.—Clayton v. Evans, 290 N.W. 447, 137 Neb. 574.
N.Y.—Haacke v. Marx, 205 N.Y.S. 487, 210 App.Div. 248, affirmed 148 N.E. 708, 240 N.Y. 568—Collins v. Burr, 204 N.Y.S. 357, 209 App. Div. 116.
N.D.—Sukut v. Sukut, 12 N.W.2d 536, 73 N.D. 154.
Okl.—Campbell v. Wood, 278 P. 281, 137 Okl. 90.
Pa.—Graham Roller Bearing Corporation v. Stone, 126 A. 235, 281 Pa. 229—Sholtz v. Drane, Com.Pl., 33 Del.Co. 551.
S.C.—Stone v. Mincey, 185 S.E. 619, 180 S.C. 317.
Tex.—Texas-Pacific Coal & Oil Co. v. Ames, Com.App., 292 S.W. 191—Gathings v. Robertson, Civ.App., 264 S.W. 173, reversed on other grounds, Com.App., 276 S.W. 218.
Wash.—Baskin v. Livers, 43 P.2d 42, 181 Wash. 370.
W.Va.—G. W. C. Land Co. v. Gebhardt, 35 S.E.2d 725.
34 C.J. p 567 note 67.
Matters concluded by judgment see infra §§ 712–736.

Particular defenses

(1) Discharge in bankruptcy.—Reining v. Nevison, 213 N.W. 609, 203 Iowa 995.

(2) Intrinsic fraud or collusion.—Kendall v. Silver King of Arizona Mining Co., 226 P. 540, 26 Ariz. 456—34 C.J. p 567 note 67 [a] (3).

(3) Paramount or adverse title.
Ill.—Sielbeck v. Grothman, 94 N.E. 67, 248 Ill. 435, 21 Ann.Cas. 229.
Okl.—Ciesler v. Simpson, 105 P.2d 227, 187 Okl. 641, followed in Ciesler v. Sykes, 105 P.2d 229, 187 Okl. 643.

(4) Res judicata.—Commonwealth ex rel. Esenwein v. Esenwein, 33 A.2d 675, 153 Pa.Super. 69, affirmed 35 A.2d 335, 348 Pa. 455, affirmed 65 S.Ct. 1118, 157 A.L.R. 1396.

(5) Usury.—Dallas Trust & Savings Bank v. Brashear, Tex.Civ.App., 39 S.W.2d 148, modified on other grounds, Com.App., 65 S.W.2d 288.

(6) Other defenses.
Okl.—Davidson v. Whitfield, 99 P.2d 156, 186 Okl. 536.
S.C.—Stone v. Mincey, 185 S.E. 619, 180 S.C. 317.
34 C.J. p 567 note 67 [a].

12. N.D.—Fischer v. Dolwig, 166 N.W. 793, 39 N.D. 161.

13. U.S.—State of Louisiana v. Police Jury of the Parish of St. Martin, La., 4 S.Ct. 648, 111 U.S. 716, 28 L.Ed. 574.
34 C.J. p 567 note 70.

14. Idaho.—Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.
Ky.—Ratliff v. Sinberg, 79 S.W.2d 717, 258 Ky. 203—**Corpus Juris cited in** Turner v. Begley, 39 S.W.2d 504, 506, 239 Ky. 281.
Mont.—**Corpus Juris cited in** Gans & Klein Inv. Co. v. Sanford, 8 P.2d 808, 811, 91 Mont. 512.
Nev.—**Corpus Juris quoted in** Aseltine v. Second Judicial Dist. Court in and for Washoe County, Department No. 1, 62 P.2d 701, 702, 57 Nev. 269.
N.Y.—Inglehart v. Slauson, 292 N.Y.S. 325, 249 App.Div. 793.
Ohio.—**Corpus Juris quoted in** Hofer v. Hofer, App., 42 N.E.2d 165.
Tex.—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing de-

of law for the court.[15] If the language used in a judgment is ambiguous there is room for construction,[16] but if the language employed is plain and unambiguous there is no room for construction or interpretation,[17] and the effect thereof must be declared in the light of the literal meaning of the language used.[18] A court will not construe a judgment or decree in the absence of the assertion of some claim or right to be litigated in a proceeding which the court has jurisdiction to determine, and in which the questioned meaning bears on the question to be determined.[19]

The general rules of construction of written instruments have been held to apply to the construction of judgments.[20] The intention of the court must be determined[21] from all parts of the instrument,[22] and words and clauses thereof should be construed according to their natural and legal import.[23] The judgment must be read in its entirety,[24] and it must be construed as a whole[25] so as to

nied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.

Challenge to validity is not involved in the mere interpretation of a judgment.—Ballew v. Denny, 177 S.W.2d 152, 296 Ky. 368, 150 A.L.R. 770.

Judgment in evidence

A judgment which has been admitted as evidence in another case must be construed by the court the same as other documents in evidence.—Grasso v. Frattolillo, 149 A. 838, 111 Conn. 209.

15. Mo.—Charles v. St. Louis, M. & S. E. R. Co., 101 S.W. 680, 124 Mo. App. 293.
Nev.—**Corpus Juris quoted in** Aseltine v. Second Judicial Dist. Court in and for Washoe County, Department No. 1, 62 P.2d 701, 702, 57 Nev. 269.
Ohio.—**Corpus Juris quoted in** Hofer v. Hofer, App., 42 N.E.2d 165, 167.
Tex.—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.

Court's construction of own judgment

(1) A court has the right to construe and clarify its own judgment.—Hofer v. Hofer, Ohio App., 42 N.E.2d 165.

(2) Construction of own judgment by trial court held conclusive on appeal.—Farmers' L. & T. Co. v. Bankers, etc., Tel. Co., 28 N.E. 173, 119 N.Y. 15—Hubbell v. Buhler, 21 N.E. 176, 113 N.Y. 653.

16. Tex.—General Exchange Ins. Corporation v. Appling, Civ.App., 144 S.W.2d 699.

17. Tex.—Magnolia Petroleum Co. v. Caswell, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U. S. 640, 73 L.Ed. 555—General Exchange Ins. Corporation v. Appling, Civ.App., 144 S.W.2d 699.

18. Tex.—General Exchange Ins. Corporation v. Appling, supra.

Order following words, "It is by the court ordered, adjudged and decreed," is final and controlling portion of judgment, and, if clear and unambiguous, will be given effect.—Imo Oil & Gas Co. v. Charles E. Knox Oil Co., 250 P. 117, 120 Okl. 13.

19. N.M.—Village of Springer v. Springer Ditch Co., 144 P.2d 165, 47 N.M. 456.

20. Idaho.—Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.
Iowa.—Whittier v. Whittier, 23 N.W. 2d 435.
Ky.—Toms v. Holmes, 171 S.W.2d 245, 294 Ky. 233—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.
Me.—Milo Water Co. v. Inhabitants of Town of Milo, 7 A.2d 895, 136 Me. 228.
Miss.—Rayl v. Thurman, 125 So. 912, 156 Miss. 8.
Tex.—Permian Oil Co. v. Smith, 107 S.W.2d 564, 129 Tex. 413, 111 A.L. R. 1152—Larrison v. Walker, Civ. App., 149 S.W.2d 172, error refused—In re Supples' Estate, Civ. App., 131 S.W.2d 13—Austin v. Conaway, Civ.App., 283 S.W. 189.

Character of instrument

(1) Decrees are usually to be interpreted in accordance with their true character without much regard to their title.—Hays v. The Georgian, Inc., 181 N.E. 765, 280 Mass. 10, 85 A.L.R. 1251.

(2) Character of decree is determined by particular facts of case and equitable rights of parties.—Sanders v. Sheets, Mo.App., 287 S. W. 1069.

(3) The character of a particular judgment has been determined by construction of the judgment.—Mills Novelty Co. v. Spurdis, Tex.Civ.App., 29 S.W.2d 893, error dismissed.

Ejusdem generis

(1) In construction of judgment, rule of "ejusdem generis" is applicable where enumeration of specific things is followed by some general word or phrase in which case such general word or phrase is held to refer to things of the same kind.—Stevenson v. Record Pub. Co., Tex. Civ.App., 107 S.W.2d 462, error dismissed.

(2) The rule is inapplicable where general words or phrase precedes specific words and when language of judgment wholly fails to indicate intention to limit or qualify general descriptive language.—Stevenson v. Record Pub. Co., supra.

Meaning of undefined terms may be ascertained.—Anderson v. Palladine, 237 P. 758, 72 Cal.App. 433.

Relative terms, including word "said," generally refer to next preceding antecedent, unless it is clear from the context that a different one was intended.—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.

21. Iowa.—Whittier v. Whittier, 23 N.W.2d 435—Rank v. Kuhn, 20 N.W.2d 72—Weir & Russell Lumber Co. v. Kempf, 12 N.W.2d 857, 234 Iowa 450—Sutton v. Schnack, 275 N.W. 870, 224 Iowa 251.

Purpose of construction is to determine intention and meaning of author of the judgment.—Cundy v. Weber, 300 N.W. 17, 68 S.D. 214.

22. Iowa.—Whittier v. Whittier, 23 N.W.2d 435—Rank v. Kuhn, 20 N. W.2d 72—Weir & Russell Lumber Co. v. Kempf, 12 N.W.2d 857, 234 Iowa 450.

Intention as expressed in judgment

(1) Intention as expressed in judgment governs.—Gila Valley Irr. Dist. v. U. S., C.C.A.Ariz., 118 F.2d 507.

(2) The controlling intention of court's judgment is that expressed on its face and not an intention that may be deduced from evidence that court had before it.—Harrison v. Manvel Oil Co., 180 S.W.2d 909, 142 Tex. 669.

23. Neb.—Whaley v. Matthews, 287 N.W. 205, 136 Neb. 767.

24. U.S.—National Surety Corporation v. Williams, C.C.A.Ark., 110 F. 2d 873, certiorari denied Williams v. National Surety Corporation, 61 S.Ct. 40, 311 U.S. 674, 85 L.Ed. 433.
Conn.—Christiano v. Christiano, 41 A.2d 779, 131 Conn. 589.
Tex.—Campbell v. Schrock, Com. App., 50 S.W.2d 788—Texas Employers' Ins. Ass'n v. Ezell, Com. App., 16 S.W.2d 523—Cook v. Smith, Civ.App., 96 S.W.2d 318, error dismissed—Shawver v. Masterson, Civ.App., 81 S.W.2d 236, error refused.

25. U.S.—**Corpus Juris cited in**

bring all of its parts into harmony as far as this can be done by fair and reasonable interpretation[26] and so as to give effect to every word and part, if possible,[27] and to effectuate the obvious intention[28] and purpose[29] of the court, consistent with the provisions of the organic law.[30]

Judgments should be liberally construed[31] so as to make them serviceable instead of useless.[32] Necessary legal implications are included although not expressed in terms.[33] In construing a judgment, however, the adjudication should not extend be-

Boundary County, Idaho, v. Woldson, C.C.A.Idaho, 144 F.2d 17, 20, certiorari denied 65 S.Ct. 678, 324 U.S. 843, 89 L.Ed. ——.
Ala.—Floyd v. Jackson, 164 So. 121, 26 Ala.App. 575.
Ark.—Young v. City of Gurdon, 275 S.W. 890, 169 Ark. 399.
Cal.—Ex parte Carr, 151 P.2d 164, 65 Cal.App.2d 681.
Ind.—Pottenger v. Bond, 142 N.E. 616, 81 Ind.App. 107.
Iowa.—Sutton v. Schnack, 275 N. W. 870, 224 Iowa 251.
Ky.—Deboe v. Brown, 22 S.W.2d 111, 231 Ky. 682.
Mass.—Dondis v. Lash, 186 N.E. 549, 283 Mass. 353.
Miss.—Rayl v. Thurman, 125 So. 912, 156 Miss. 8.
Mo.—**Corpus Juris cited in** State ex rel. Anderson Motor Service Co. v. Public Service Commission, 134 S.W.2d 1069, 1075, 234 Mo.App. 470, transferred and opinion adopted 154 S.W.2d 777, 348 Mo. 613.
Neb.—Whaley v. Matthews, 287 N. W. 205, 136 Neb. 767.
Ohio.—**Corpus Juris quoted in** Hofer v. Hofer, App., 42 N.E.2d 165, 167.
Tex.—Larrison v. Walker, Civ.App., 149 S.W.2d 172, error refused—General Exchange Ins. Corporation v. Appling, Civ.App., 144 S. W.2d 699—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.
Utah.—Salt Lake City v. Telluride Power Co., 17 P.2d 281, 82 Utah 607, rehearing denied 26 P.2d 822, 82 Utah 622.
34 C.J. p 501 note 6.

Every phrase must be read in connection with the whole instrument. —Milo Water Co. v. Inhabitants of Town of Milo, 7 A.2d 895, 136 Me. 228.

26. Neb.—Whaley v. Matthews, 287 N.W. 205, 136 Neb. 767.
N.C.—Lamb v. Major & Loomis Co., 60 S.E. 425, 146 N.C. 531.
Tex.—Larrison v. Walker, Civ.App., 149 S.W.2d 172, error refused.

27. U.S.—**Corpus Juris cited in** Boundary County, Idaho v. Woldson, C.C.A.Idaho, 144 F.2d 17, 20, certiorari denied 65 S.Ct. 678, 324 U.S. 843, 89 L.Ed. 1405.
Iowa.—**Corpus Juris cited in** Weir & Russell Lumber Co. v. Kempf, 12 N.W.2d 857, 860, 234 Iowa 450.
Kan.—McHenry v. Smith, 119 P.2d 493, 154 Kan. 528.
Ky.—Toms v. Holmes, 171 S.W.2d 245, 294 Ky. 233.
La.—In re Clover Ridge Planting & Manufacturing Co., 193 So. 468, 194 La. 77.
Miss.—Rayl v. Thurman, 125 So. 912, 156 Miss. 8.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis & Clark County, 233 P. 957, 72 Mont. 374.
Neb.—Whaley v. Matthews, 287 N.W. 205, 136 Neb. 767—Burke v. Unique Printing Co., 88 N.W. 488, 63 Neb. 264.
Ohio.—**Corpus Juris quoted in** Hofer v. Hofer, App., 42 N.E.2d 165, 167.
Okl.—Pfile v. Sarkeys, 80 P.2d 647, 183 Okl. 201—Gade v. Loffler, 42 P.2d 815, 171 Okl. 313—McNeal v. Baker, 274 P. 655, 135 Okl. 159.
Tex.—Larrison v. Walker, Civ.App., 149 S.W.2d 172, error refused—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ. App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S. W.2d 597, rehearing denied 7 S.W. 2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S. Ct. 34, 278 U.S. 640, 73 L.Ed. 555 —Austin v. Conaway, Civ.App., 283 S.W. 189.
Utah.—Salt Lake City v. Telluride Power Co., 17 P.2d 281, 82 Utah 607, rehearing denied 26 P.2d 822, 82 Utah 622.
34 C.J. p 501 note 7.

"No particular part or clause in the judgment is to be seized upon and given the power to destroy the remainder if such effect can be avoided."—Larrison v. Walker, Tex. Civ.App., 149 S.W.2d 172, 178, error refused.

Meaning of words

In determining meaning of words, courts must take into consideration their conjunction with other words and the purpose of their use.—Spiller v. St. Louis & S. F. R. Co., C.C. A.Mo., 14 F.2d 284, affirmed in part and reversed in part on other grounds St. Louis & S. F. R. Co. v. Spiller, 274 U.S. 304, 47 S.Ct. 635, 71 L.Ed. 1060, motion denied 48 S. Ct. 96, 275 U.S. 156, 72 L.Ed. 214.

28. Cal.—Lazar v. Superior Court in and for City and County of San Francisco, 107 P.2d 249, 16 Cal.2d 617—Ex parte Carr, 151 P.2d 164, 65 Cal.App.2d 681—Rinaldo v. Board of Medical Examiners of California, 12 P.2d 32, 123 Cal. App. 712.
Fla.—City of Winter Haven v. A. M. Klemm & Son, 181 So. 153, 132 Fla. 334, rehearing denied 182 So. 841, 133 Fla. 525.
Ky.—Clark v. McGrann, 117 S.W.2d 1021, 274 Ky. 1—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.
Miss.—Rayl v. Thurman, 125 So. 912, 156 Miss. 8.

29. Ky.—Stearns Coal & Lumber Co. v. Duncan, 113 S.W.2d 436, 271 Ky. 800.

30. Fla.—City of Winter Haven v. A. M. Klemm & Son, 181 So. 153, 132 Fla. 334, rehearing denied 182 So. 841, 133 Fla. 525.

31. Mo.—Sanders v. Sheets, App., 287 S.W. 1069.
Tex.—Lindsey v. Hart, Com.App., 276 S.W. 199—Middlebrook v. Texas Indemnity Ins. Co., Civ.App., 112 S.W.2d 311, error dismissed Texas Indemnity Ins. Co. v. Middlebrook, 114 S.W.2d 226, 131 Tex. 163.

Intention of parties

A judgment which was ambiguous in certain respects due to some oversight or inadvertence either on part of court or counsel in drawing the judgment was to be liberally construed with a view to giving effect to real intention of parties.—Bank of America Nat. Trust & Savings Ass'n v. Hill, 71 P.2d 258, 9 Cal.2d 495.

32. Tex.—Lindsey v. Hart, Com. App., 276 S.W. 199—Middlebrook v. Texas Indemnity Ins. Co., Civ.App., 112 S.W.2d 311, error dismissed Texas Indemnity Ins. Co. v. Middlebrook, 114 S.W.2d 226, 131 Tex. 163.

Literal construction

Tex.—In re Supples' Estate, Civ.App., 131 S.W.2d 13.

33. Iowa.—Whittier v. Whittier, 23 N.W.2d 435—Rank v. Kuhn, 20 N. W.2d 72—**Corpus Juris cited in** Weir & Russell Lumber Co. v. Kempf, 12 N.W.2d 857, 860, 234 Iowa 450.
Ky.—Toms v. Holmes, 171 S.W.2d 245, 294 Ky. 233.
La.—In re Clover Ridge Planting & Manufacturing Co., 193 So. 468, 194 La. 77.
Mont.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 233 P. 957, 72 Mont. 374.
Neb.—Whaley v. Matthews, 287 N. W. 205, 136 Neb. 767.
Nev.—**Corpus Juris quoted in** Asel-

yond that which the language used fairly warrants,[34] since the purpose and function of construction is to give effect to that which is already latent in the judgment,[35] and the court may not by construction add new provisions to a judgment which were omitted or withheld in the first instance.[36] In construing judgments the legal effect, rather than the mere language used, governs.[37]

Doubtful or ambiguous judgments are to have a reasonable intendment[38] to do justice and avoid wrong.[39] Where a judgment is susceptible of two interpretations, that one will be adopted which renders it the more reasonable, effective, and conclusive[40] and which makes the judgment harmonize with the facts and law of the case and be such as

tine v. Second Judicial Dist. Court in and for Washoe County, Department No. 1, 62 P.2d 701, 702, 57 Nev. 269.

Ohio.—Kosinski v. Rochowiak, 178 N.E. 591, 40 Ohio App. 299.

Okl.—Pfile v. Sarkeys, 80 P.2d 647, 183 Okl. 201—Gade v. Loffler, 42 P.2d 815, 171 Okl. 313—McNeal v. Baker, 274 P. 655, 135 Okl. 159.

Tex.—Lindsey v. Hart, Com.App., 276 S.W. 199—Middlebrook v. Texas Indemnity Ins. Co., Civ.App., 112 S.W.2d 311, error dismissed Texas Indemnity Ins. Co. v. Middlebrook, 114 S.W.2d 226, 131 Tex. 163—**Corpus Juris cited in** Keton v. Clark, Civ.App., 67 S.W.2d 437, 439—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.

34 C.J. p 502 note 9.

Judgment of dismissal

A judgment dismissing a complaint or cross complaint is in effect a judgment against the pleader on the claim presented by his pleading.

Cal.—Peterson v. Gibbs, 81 P. 131, 147 Cal. 1, 109 Am.S.R. 107.

Ind.—Dickerson v. Dickerson, 10 N.E.2d 424, 104 Ind.App. 686, affirmed on rehearing 11 N.E.2d 514, 104 Ind.App. 686—Smith v. Linton Trust Co., 121 N.E. 92, 68 Ind.App. 691.

Silence

(1) Generally all claims not expressly disposed of are by implication disallowed by a judgment against the party asserting such interests or claims.

La.—Perot's Estate v. Perot, 148 So. 903, 177 La. 640—McMichael v. Thomas, 113 So. 828, 164 La. 233—Williams v. Ralph R. Miller Shows, App., 15 So.2d 249, adhered to 17 So.2d 67, amended 17 So.2d 389—Rains v. Thomason & Champion, 135 So. 92, 17 La.App. 120.

Tex.—Texas Employers Ins. Ass'n v. Shackelford, Civ.App., 158 S.W.2d 572, reversed on other grounds 164 S.W.2d 657, 139 Tex. 653.

34 C.J. p 502 note 9 [a] (1).

(2) If two causes of action are alleged and put in issue, and judgment awards recovery on one but is silent as to the other, judgment is prima facie an adjudication that plaintiff was not entitled to recover on the other cause.—Keystone Copper Min. Co. v. Miller, Ariz., 164 P.2d 603—34 C.J. p 502 note 9 [a] (6).

(3) Failure of judgment to allow full amount of claim constitutes rejection of balance of claim, as much as though decree expressly so provided.—Merrill v. Louisiana Materials Co., 174 So. 349, 187 La. 259.

(4) Where judgment, in suit against owners of realty for judgment for amount advanced and paid for taxes by plaintiff and for lien and privilege on realty resulting from alleged tax subrogations, was for plaintiff for amount advanced, without any recognition being given to lien and privilege, demands with respect to the lien and privilege must be deemed to have been rejected.—Lacaze v. Hardee, La.App., 7 So.2d 719.

(5) However, judgment for debt without mention of lien does not constitute denial of fact that debt is secured by lien, where no demand was made for recognition of lien.—Perot's Estate v. Perot, 148 So. 903, 177 La. 640.

Time of payment

Where final decree did not fix time for payment, the implication was that payment was to be made forthwith.—Boyer v. Bowles, 54 N.E.2d 925, 316 Mass. 90.

34. La.—Schultz v. Texas & P. Ry. Co., 186 So. 49, 191 La. 624.

Pa.—Nether Providence Tp. v. Young, Com.Pl., 33 Del.Co. 213.

34 C.J. p 502 note 10.

Absence of ambiguity

Where language of judgment was in the present tense and adjudged that plaintiff's inheritable interest in land "is found to be" an undivided interest, judgment was a determination as to plaintiff's present interest and not merely a determination that at some past time plaintiff inherited an interest therein.—Moore v. Harjo, C.C.A.Okl., 144 F.2d 318.

35. U.S.—Butler v. Denton, C.C.A. Okl., 150 F.2d 687.

36. U.S.—Butler v. Denton, supra.

37. Mo.—**Corpus Juris cited in** State ex rel. Anderson Motor Service Co. v. Public Service Commission, 134 S.W.2d 1069, 1076, 234 Mo. App. 470, transferred and opinion adopted 154 S.W.2d 777, 348 Mo. 613.

Mont.—**Corpus Juris cited in** Gans & Klein Inv. Co. v. Sanford, 8 P.2d 808, 811, 91 Mont. 512.

Ohio.—**Corpus Juris quoted in** Hofer v. Hofer, App., 42 N.E.2d 165, 167.

Tex.—**Corpus Juris cited in** Keton v. Clark, Civ.App., 67 S.W.2d 437, 439, error refused—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.

34 C.J. p 502 note 11.

38. Cal.—**Corpus Juris cited in** Treece v. Treece, 14 P.2d 95, 125 Cal.App. 726.

Ga.—**Corpus Juris quoted in** Jordan v. Russell, 172 S.E. 469, 470, 48 Ga.App. 200.

Iowa.—**Corpus Juris cited in** Weir & Russell Lumber Co. v. Kempf, 12 N.W.2d 857, 860, 234 Iowa 450.

Mo.—**Corpus Juris cited in** State ex rel. Anderson Motor Service Co. v. Public Service Commission, 134 S.W.2d 1069, 1079, 234 Mo.App. 470, transferred and opinion adopted 154 S.W.2d 777, 348 Mo. 613.

Mont.—**Corpus Juris cited in** Gans & Klein Inv. Co. v. Sanford, 8 P.2d 808, 811, 91 Mont. 512.

Tex.—Wink v. Wink, Civ.App., 169 S.W.2d 721—In re Supples' Estate, Civ.App., 131 S.W.2d 13—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 48 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.

34 C.J. p 502 note 13.

Common-sense construction will be put on language as a whole.—In re Supples' Estate, Tex.Civ.App., 131 S.W.2d 13—Cook v. Smith, Tex.Civ.App., 96 S.W.2d 318, error dismissed.

39. U.S.—Rothschild & Co. v. Marshall, D.C.Wash., 47 F.2d 919, reversed on other grounds, C.C.A., 51 F.2d 897.

Mont.—Gans & Klein Inv. Co. v. Sanford, 8 P.2d 808, 91 Mont. 512.

40. U.S.—Hendrie v. Lowmaster, C.C.A.Mich., 152 F.2d 83—Pen-Ken Gas & Oil Corporation v. Warfield

ought to have been rendered.[41] If possible, that construction will be adopted which will support the judgment, rather than one which will destroy it.[42] All presumptions are in support of the judgment; nothing will be presumed against it.[43]

Natural Gas Co., C.C.A.Ky., 137 F. 2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

Ga.—**Corpus Juris quoted in** Jordan v. Russell, 172 S.E. 469, 470, 48 Ga. App. 200.

Idaho.—**Corpus Juris cited in** Evans v. City of American Falls, 11 P. 2d 363, 368, 52 Idaho 7.

Kan.—McHenry v. Smith, 119 P.2d 493, 154 Kan. 528.

Ky.—Toms v. Holmes, 171 S.W.2d 245, 294 Ky. 233.

La.—Harrison v. Godbold, McG. p 178.

Mont.—**Corpus Juris cited in** Gans & Klein Inv. Co. v. Sanford, 8 P.2d 808, 811, 91 Mont. 512.

N.C.—Seip v. Wright, 91 S.E. 359, 173 N.C. 14.

Tex.—Agey v. Barnard, Civ.App., 123 S.W.2d 484, error dismissed, judgment correct—**Corpus Juris cited in** Keton v. Clark, Civ.App., 67 S.W.2d 437, 439, error refused—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.

W.Va.—**Corpus Juris quoted in** Farmers of Greenbrier County v. Greenbrier County Court, 143 S.E. 347, 105 W.Va. 567.

41. U.S.—Hendrie v. Lowmaster, C.C.A.Mich., 152 F.2d 83—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F. 2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089—**Corpus Juris cited in** Burton v. Equitable Life Assur. Soc. of U. S., D.C. Okl., 21 F.Supp. 62, 65.

Cal.—Treece v. Treece, 14 P.2d 95, 125 Cal.App. 726—McAlister v. Dungan, 291 P. 419, 108 Cal.App. 185—Boyer v. Crichton, 279 P. 677, 100 Cal.App. 24.

Ga.—**Corpus Juris quoted in** Jordan v. Russell, 172 S.E. 469, 470, 48 Ga.App. 200.

Idaho.—**Corpus Juris cited in** Evans v. City of American Falls, 11 P.2d 363, 368, 52 Idaho 7.

Minn.—Parten v. First Nat. Bank & Trust Co., 283 N.W. 408, 204 Minn. 200, 120 A.L.R. 962.

Mo.—State ex rel. Wilkerson v. Kelly, 142 S.W.2d 27, 346 Mo. 416.

Mont.—Quigley v. McIntosh, 103 P. 2d 1067, 110 Mont. 495—**Corpus Juris cited in** Gans & Klein Inv. Co. v. Sanford, 8 P.2d 808, 811, 91 Mont. 512.

Nev.—**Corpus Juris quoted in** Aseltine v. Second Judicial Dist. Court in and for Washoe County, Department No. 1, 62 P.2d 701, 702, 57 Nev. 269.

N.C.—Berrier v. Board of Com'rs of Davidson County, 120 S.E. 328, 186 N.C. 564.

Tex.—In re Supples' Estate, Civ.App., 131 S.W.2d 13—Cook v. Smith, Civ. App., 96 S.W.2d 318, error dismissed—**Corpus Juris cited in** Keton v. Clark, Civ.App., 67 S.W.2d 437, 439, error refused—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555—Austin v. Conaway, Civ.App., 283 S.W. 189.

W.Va.—**Corpus Juris quoted in** Farmers of Greenbrier County v. Greenbrier County Court, 143 S.E. 347, 105 W.Va. 567.

34 C.J. p 502 note 15.

42. U.S.—**Corpus Juris cited in** Burton v. Equitable Life Assur. Soc. of U. S., D.C.Okl., 21 F.Supp. 62, 65.

Cal.—Williams v. Williams, 56 P.2d 1253, 13 Cal.App.2d 433.

Ga.—Byrd v. Goodman, 25 S.E.2d 34, 195 Ga. 621—**Corpus Juris cited in** Chappell v. Small, 20 S.E.2d 916, 920, 194 Ga. 143.

Ky.—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.

Tex.—Jackson v. Slaughter, Civ.App., 185 S.W.2d 759, refused for want of merit—**Corpus Juris cited in** Keton v. Clark, Civ.App., 67 S.W. 2d 437, 439, error refused—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U. S. 640, 73 L.Ed. 555—Austin v. Conaway, Civ.App., 283 S.W. 189.

W.Va.—McClung v. Sewell Valley R. Co., 159 S.E. 521, 110 W.Va. 621, amended on other grounds State v. Sharp, 160 S.E. 302, 111 W.Va. 39.

Wis.—In re Corse's Will, 217 N.W. 726, 195 Wis. 88.

34 C.J. p 502 note 16.

Conformity to pleadings

If decree is susceptible of more than one construction, it must be interpreted to conform to pleadings and proceedings as evidenced by record.—Tilton v. Horton, 137 So. 801, 103 Fla. 497, rehearing denied 139 So. 142, 103 Fla. 497.

Correct application of law to facts

When language of decree is susceptible of two constructions, from one of which it follows that law has been correctly applied to facts and from other that law has been incorrectly applied, that construction should be adopted which correctly applies the law.

Ind.—In re Summers, 137 N.E. 291, 79 Ind.App. 108.

Tex.—Davis v. First Nat. Bank of Waco, Civ.App., 145 S.W.2d 707, affirmed 161 S.W.2d 467, 139 Tex. 36, 144 A.L.R. 1—Robinson v. Hays, Civ.App., 62 S.W.2d 1007.

"Ut res magis valeat quam pereat"

In construing a judgment the maxim, "Ut res magis valeat quam pereat," has been employed.—Texas Co. v. Marlin, C.C.A.Tex., 109 F.2d 305.

"Ut res magis valeat quam pereat" defined see 66 C.J. p 381 note 79.

43. Okl.—**Corpus Juris quoted in** Fagras v. Marks, 43 P.2d 108, 109, 171 Okl. 413.

Tex.—Jackson v. Slaughter, Civ.App., 185 S.W.2d 759, refused for want of merit—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com. App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L. Ed. 555.

34 C.J. p 503 note 19.

Grounds for judgment

Where a general judgment may have been based on two or more grounds, one of which would be erroneous, and the others proper, it is presumed that the judgment was based on the proper ground.—Western Paving Co. v. Board of Com'rs of Lincoln County, 81 P.2d 652, 183 Okl. 281.

Judgments of other courts

(1) In construing the judgment of another court of equal rank in the same system, it will be presumed, in the absence of clear expressions to the contrary, that such other court holds the same view of the law on which the judgment is based as that held by the construing court.—Adoue v. Wettermark, 68 S.W. 553, 28 Tex.Civ.App. 593.

(2) Courts in construing final judgments of other courts of competent jurisdiction will not go behind them or question the wisdom thereof.—Burton v. Equitable Life Assur. Soc. of U. S., D.C.Okl., 21 F.Supp. 62.

A judgment must be construed in light of the situation of the court,[44] what was before it,[45] and the accompanying circumstances.[46] In cases of ambiguity or doubt the meaning of the judgment must be determined by that which preceded it and that which it was intended to execute.[47]

A construction adopted or acquiesced in by the parties will not be changed without strong reason.[48]

Abbreviations. In construing a judgment the court may ascertain the meaning of abbreviations used therein.[49]

Party preparing decree. Where a decree is agreed on in open court, the fact that one of the parties prepared the decree does not require it to be construed more strongly against such party.[50]

b. Aids to Construction

In case of doubt or ambiguity a judgment may be construed in the light of the entire judgment roll or record.

As a general rule, the meaning, effect, and legal consequences of a judgment must be ascertained from its own provisions and language, if possible.[51] If, however, the judgment is ambiguous or obscure, or a satisfactory interpretation cannot be determined from the judgment itself,[52] the entire judg-

(3) They must presume that court rendering judgment would render proper judgment within limitations of statute fixing its jurisdiction.—Burton v. Equitable Life Assur. Soc. of U. S., supra.

(4) Where effect of a judgment of another court is questioned and in absence of clarity of such judgment, a court should look to source of jurisdiction from which power to render judgment is derived.—Burton v. Equitable Life Assur. Soc. of U. S., supra.

44. Cal.—Rinaldo v. Board of Medical Examiners of California, 12 P.2d 32, 123 Cal.App. 712.

45. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L. Ed. 1089.
Cal.—Newport v. Superior Court of Stanislaus County, 230 P. 168, 192 Cal. 92.
Ky.—Toms v. Holmes, 171 S.W.2d 245, 294 Ky. 233—Hays v. Madison County, 118 S.W.2d 197, 274 Ky. 116.

46. Cal.—Rinaldo v. Board of Medical Examiners of California, 12 P.2d 32, 123 Cal.App. 712.
Conn.—Christiano v. Christiano, 41 A.2d 779, 131 Conn. 589.
Idaho.—Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.
Iowa.—Hargrave v. City of Keokuk, 223 N.W. 274, 208 Iowa 559.
Tex.—In re Supples' Estate, Civ.App., 131 S.W.2d 13—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.
34 C.J. p 506 note 58.

47. U.S.—Union Pacific R. Co. v. Mason City & Fort Dodge R. Co., Neb., 32 S.Ct. 86, 227 U.S. 237, 56 L.Ed. 180—Hendrie v. Lowmaster, C.C.A.Mich., 152 F.2d 83.
Ohio.—Silver v. McKnight, App., 49 N.E.2d 89.
Pa.—Catanzaritti v. Bianco, 198 A. 806, 131 Pa.Super. 207.
Tex.—Royal Indemnity Co. v. Goodbar & Page, Civ.App., 48 S.W.2d 1021—Prince v. Frost-Johnson Lumber Co., Civ.App., 250 S.W. 785.

Purport and intent of action
When the wording of a judgment is not clear, it should be construed so as to carry out the evident purport and intent of the action, rather than defeat it.—Gade v. Loffler, 42 P. 2d 815, 171 Okl. 313—McNeal v. Baker, 274 P. 655, 135 Okl. 159.

The situation to which the judgment was to be applied and the purpose sought to be accomplished must be considered.
Okl.—Gade v. Loffler, 42 P.2d 815, 171 Okl. 313.
Tenn.—Southwestern Presbyterian University v. City of Clarksville, 259 S.W. 550, 149 Tenn. 256.

48. Minn.—Parten v. First Nat. Bank & Trust Co., 283 N.W. 408, 204 Minn. 200, 120 A.L.R. 962.
Mont.—**Corpus Juris cited in** Wallace v. Goldberg, 231 P. 56, 58, 72 Mont. 234.
N.M.—**Corpus Juris quoted in** La Luz Community Ditch Co. v. Town of Alamogordo, 279 P. 72, 77, 34 N.M. 127.
Tex.—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ. App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S. W.2d 597, rehearing denied 7 S.W. 2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.
34 C.J. p 503 note 20.

49. **"Fr."**
In suit on Swiss judgment, court's finding that abbreviation "fr." indicated franc was held not error.—Indian Refining Co. v. Valvoline Oil Co., C.C.A.Ill., 75 F.2d 797.

50. Ark.—Gregory v. Rubel, 41 S.W. 2d 771, 184 Ark. 55.

Reason for rule
Who prepared the decree is immaterial because it would have to be prepared in accordance with the finding of the court.—Gregory v. Rubel, supra.

51. N.J.—Parmly v. Parmly, 1 A.2d 646, 16 N.J.Misc. 447, affirmed 5 A. 2d 789, 125 N.J.Eq. 545.
Tex.—Agey v. Barnard, Civ.App., 123 S.W.2d 484, error dismissed, judgment correct.

Reference to extraneous factors
(1) Judgment which is plain and unambiguous may not be interpreted in light of subsequent or prior statements or acts of court evincing judicial intention when judgment was rendered, nor can judgment be sustained or explained by reference to understanding of parties, even though entered pursuant to stipulation.—Cook v. Smith, Tex.Civ.App., 96 S.W.2d 318, error dismissed.

(2) Judgment may not be explained by understanding of parties although entered by stipulation nor by prior or subsequent statements of the court.—Austin v. Conaway, Tex Civ.App., 283 S.W. 189.

Language of judgment
(1) Legal effect of judgment as written must prevail, regardless of what trial court had in mind.—Schrock v. Campbell, Tex.Civ.App., 34 S.W.2d 324, modified on other grounds Campbell v. Schrock, 50 S. W.2d 788.

(2) Judgment that plaintiff is owner of undivided one-fourth interest in property is not adjudication of partnership.—James v. Hall, 264 P. 516, 88 Cal.App. 528.

52. U.S.—Moore v. Harjo, C.C.A.Okl., 144 F.2d 318—Mueller v. Mueller, C.C.A.Ark., 124 F.2d 544, certiorari dismissed 62 S.Ct. 1288, 316 U.S. 649, 86 L.Ed. 1732—Louisiana Land & Exploration Co. v. Parish of Jefferson, La., D.C.La., 59 F.Supp. 260.

ment roll or record may be looked to, examined, and considered for the purpose of interpreting the judgment[53] and determining its operation and effect.[54]

A judgment, plain and unambiguous in its terms, may not be modified, enlarged, restricted, or diminished by reference to the opinion or decision of the court;[55] but it is generally held that the opinion

Ala.—Taunton v. Dobbs, 199 So. 9, 240 Ala. 287.
Cal.—Vasiljevich v. Radanovich, 31 P.2d 802, 138 Cal.App. 97—Minehan v. Silveria, 21 P.2d 617, 131 Cal.App. 317—Boyer v. Crichton, 279 P. 677, 100 Cal.App. 24.
Fla.—McGregor v. Provident Trust Co. of Philadelphia, 162 So. 323, 119 Fla. 718.
Ind.—State ex rel. Booth v. Beck Jewelry Enterprises, Inc., 41 N.E. 2d 622, 220 Ind. 276, 141 A.L.R. 876.
Iowa.—Sutton v. Schnack, 275 N.W. 870, 224 Iowa 251.
Kan.—Shelley v. Sentinel Life Ins. Co., 69 P.2d 737, 146 Kan. 227.
Ky.—Culton v. Couch, 20 S.W.2d 451, 230 Ky. 586.
Me.—Milo Water Co. v. Inhabitants of Town of Milo, 7 A.2d 895, 136 Me. 228.
Minn.—Parten v. First Nat. Bank & Trust Co., 283 N.W. 408, 204 Minn. 200, 120 A.L.R. 962.
Mo.—**Corpus Juris cited in** State ex rel. Anderson Motor Service Co. v. Public Service Commission, 134 S.W.2d 1069, 234 Mo.App. 470, transferred and opinion adopted 154 S.W.2d 777, 348 Mo. 613.
Mont.—Quigley v. McIntosh, 103 P. 2d 1067, 110 Mont. 495.
Nev.—**Corpus Juris quoted in** Aseltine v. Second Judicial Dist. Court in and for Washoe County, Department No. 1, 62 P.2d 701, 702, 57 Nev. 269.
N.M.—**Corpus Juris cited in** La Luz Community Ditch Co. v. Town of Alamogordo, 279 P. 72, 77, 34 N.M. 127.
N.Y.—People v. Shoemaker, 239 N.Y.S. 71, 228 App.Div. 314—In re Cullen's Estate, 297 N.Y.S. 280, 163 Misc. 410.
Ohio.—**Corpus Juris quoted in** Hofer v. Hofer, App., 42 N.E.2d 165, 167.
Tenn.—Fleming v. Kemp, 178 S.W. 2d 397, 27 Tenn.App. 150.
Tex.—Campbell v. Schrock, Com. App., 50 S.W.2d 788—Walston v. Price, Civ.App., 159 S.W.2d 548—General Exchange Ins. Corporation v. Appling, Civ.App., 144 S.W.2d 699—Agey v. Barnard, Civ.App., 123 S.W.2d 484, error dismissed, judgment correct—Shawver v. Masterson, Civ.App., 81 S.W.2d 236, error refused—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com. App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555—Banister v. Eades, Civ.App., 282 S.W. 351—Prince v. Frost-Johnson Lumber Co., Civ. App., 250 S.W. 785.
Wash.—**Corpus Juris cited in** Tacoma Savings & Loan Ass'n v. Nadham, 128 P.2d 982, 990, 14 Wash.2d 576—George v. Jenks, 85 P.2d 1083, 197 Wash. 551—Gollehon v. Gollehon, 34 P.2d 1113, 178 Wash. 372.
Wis.—In re Kehl's Estate, 254 N.W. 639, 215 Wis. 353.
34 C.J. p 502 note 12.

Matters considered

(1) In construing ambiguous judgment, court may look to entire record, including such matters as the citation, the pleadings, issues made, testimony offered in support of pleadings, trial court's charge to jury, facts found by such court, and other proceedings leading up to judgment.—Lipsitz v. First Nat. Bank, Tex.Civ.App., 293 S.W. 563, modified on other grounds, Com.App., 296 S.W. 490—Wagner v. Hogan, Tex. Civ.App., 161 S.W.2d 849—In re Supples' Estate, Tex.Civ.App., 131 S.W. 2d 13—Dagley v. Leeth, Tex.Civ.App., 106 S.W.2d 730—Dearing v. City of Port Neches, Tex.Civ.App., 65 S.W.2d 1105, error refused.

(2) The full scope and meaning of a judgment is often determined by an examination of the pleadings, verdict, or findings.—Miller v. Madigan, 215 P. 742, 90 Okl. 17.

(3) In determining validity of judgment, resort may be had to judgment roll, or record, which includes the pleadings, and one is not restricted to face of judgment alone.
Okl.—Kansas City Southern Ry. Co. v. City of Heavener, 54 P.2d 165, 175 Okl. 517.
Tex.—Jackson v. Slaughter, Civ.App., 185 S.W.2d 759, refused for want of merit.

(4) Matters outside the judgment roll cannot be considered.—Kansas City Southern Ry. Co. v. City of Heavener, supra.

(5) A person whom it is sought to bind by a judgment is not required to seek beyond the judgment roll or to indulge in surmise.—People v. Rio Nido Co., 85 P.2d 461, 29 Cal.App.2d 486.

53. U.S.—S(c)holtz for Use of Barnett Nat. Bank of Jacksonville v. Hartford Accident & Indemnity Co., C.C.A.Fla., 88 F.2d 184.
La.—Snyder v. Davidson, 129 So. 185, 15 La.App. 695, reheard Snyder v. Davison, 131 So. 64, 15 La.App. 695, affirmed 134 So. 89, 172 La. 274.
Neb.—Whaley v. Matthews, 287 N.W. 205, 136 Neb. 767.
Tex.—Glasscock v. Bryant, Civ.App., 185 S.W.2d 595, refused for want of merit—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L. Ed. 555.
34 C.J. p 502 note 8.

54. U.S.—Ferd Brenner Lumber Co. v. Davis, D.C.La., 9 F.2d 960.
Cal.—Downs v. Kroeger, 254 P. 1101, 200 Cal. 743.
Ind.—State ex rel. Booth v. Beck Jewelry Enterprises, Inc., 41 N.E. 2d 622, 220 Ind. 276, 141 A.L.R. 876.
Mont.—Brennan v. Jones, 55 P.2d 697, 101 Mont. 550—Wallace v. Goldberg, 231 P. 56, 72 Mont. 234.

55. U.S.—Rothschild & Co. v. Marshall, C.C.A.Wash., 44 F.2d 546—Wo Kee & Co. v. U. S., 28 C.C. P.A. 272—U. S. v. Penn Commercial Corporation of America, 15 Ct. Cust.App. 206—Roessler & Hosslocher Chemical Co. v. U. S., 13 Ct.Cust.App. 451, Treas.Dec. 41347.
Cal.—Bank of America Nat. Trust & Savings Ass'n v. Hill, 71 P.2d 258, 9 Cal.2d 495—Martin v. Board of Trustees of Leland Stanford, Jr. University, 99 P.2d 684, 37 Cal.App.2d 481—Magarian v. Moser, 42 P.2d 385, 5 Cal.App.2d 208.
Colo.—City of Alamosa v. Holbert, 262 P. 87, 82 Colo. 582.
Ky.—Mason v. Thomas W. Briggs & Co., 297 S.W. 1106, 221 Ky. 127.
Md.—Greif v. Teas, 144 A. 231, 156 Md. 284.
N.J.—J. J. Hockenjos Co. v. Lurie, 173 A. 913, 12 N.J.Misc. 545.
Wash.—North River Transp. Co. v. Denney, 271 P. 589, 149 Wash. 489.
34 C.J. p 503 note 17.
Effect of conflict between judgment and opinion see supra § 22.

Courts speak through judgment and decrees, not opinions.—Boyle v. Berg, 218 N.W. 757, 242 Mich. 225.

Scope of judgment cannot be determined by opinion rendered.—Doyle v. Hamilton Fish Corp., N.Y., 234 F. 47, 148 C.C.A. 63, certiorari denied 37 S.Ct. 476, 243 U.S. 649, 61 L.Ed. 946.

Technical terms of a judgment cannot be limited or controlled by the opinion of the court.
Mo.—**Corpus Juris cited in** State ex rel. Anderson Motor Service Co. v. Public Service Commission, 134 S.W.2d 1069, 1079, 234 Mo.App. 470,

may be considered on the question of the construction and effect of the judgment,[56] and the judgment may be construed in the light of the opinion,[57] although its intent and effect are not to be determined from isolated passages in the opinion.[58]

Statutes affecting a judgment at the time of its issuance or entry become a part of such judgment and must be read into it as though express provision to that effect were inserted therein.[59]

§ 437. Recitals

Unless contradicted by the record, recitals in a judgment are presumed to be true. An express adjudication, however, prevails over recitals.

Recitals in a judgment are presumed to be true and correct[60] unless contradicted by other parts of the record.[61] Unambiguous recitals have even been held to be conclusive and controlling as to matters which must appear in the judgment entry.[62] Recitals will be construed according to the legal import of the terms used, considering the judgment as a whole,[63] but will not be extended by interpretation beyond that which is expressed or follows by

transferred and opinion adopted 154 S.W.2d 777, 348 Mo. 613.

Okl.—**Corpus Juris quoted in** Fagras v. Marks, 43 P.2d 108, 109, 171 Okl. 413.

Tex.—**Corpus Juris cited in** Harrison v. Manvel Oil Co., 180 S.W.2d 909, 917, 142 Tex. 669.

34 C.J. p 503 note 17.

Status of judgment

Opinion of trial judge and of counsel as to status of judgment may not change legal effect.—Security-First Nat. Bank v. Superior Court of California in and for San Diego County, 23 P.2d 1055, 132 Cal.App. 683, remittitur recalled Security-First Nat. Bank of Los Angeles v. Superior Court in and for San Diego County, 25 P.2d 234, 134 Cal.App. 195.

Formal judgment as decision

Where a formal judgment is signed by the judge, it, rather than a statement in an opinion or a docket entry, is prima facie the decision or judgment.—Bowles v. Rice, C.C.A. Ky., 152 F.2d 543.

Further hearing not authorized

Opinion enjoining enforcement of award and directing deputy commissioner to proceed accordingly did not warrant taking further testimony, in absence of authority in decree.—Rothschild & Co. v. Marshall, C.C.A.Wash., 44 F.2d 546.

56. Okl.—**Corpus Juris quoted in** Fagras v. Marks, 43 P.2d 108, 109, 171 Okl. 413.

Tex.—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com. App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555—Austin v. Conway, Civ.App., 283 S.W. 189.

33 C.J. p 1105 note 42—34 C.J. p 503 note 18.

Reasons for judgment as part thereof see supra § 22.

Judgment as final or interlocutory

Opinion of trial judge and statements of counsel as to status of judgment may be considered in determining whether judgment is interlocutory or final.—Security-First Nat. Bank v. Superior Court of California in and for San Diego County, 23 P.2d 1055, 132 Cal.App. 683, remittitur recalled, Security-First Nat. Bank of Los Angeles v. Superior Court in and for San Diego County, 25 P.2d 234, 134 Cal.App. 195.

57. U.S.—Great Lakes Dredge & Dock Co. v. Huffman, La., 63 S.Ct. 1070, 319 U.S. 293, 87 L.Ed. 1407—Fagin v. Quinn, C.C.A.Tex., 24 F.2d 42, certiorari denied 48 S.Ct. 602, 277 U.S. 606, 72 L.Ed. 1012.

Md.—Greif v. Teas, 144 A. 231, 156 Md. 284.

Or.—Emerick v. Emerick, 135 P.2d 802, 171 Or. 276.

58. U.S.—State of Oklahoma v. State of Texas, 47 S.Ct. 9, 272 U.S. 21, 71 L.Ed. 145—United Shoe Machinery Corporation v. U. S., Mo., 42 S.Ct. 363, 258 U.S. 451, 66 L.Ed. 708, rehearing denied 42 S.Ct. 585, 259 U.S. 575, 66 L.Ed. 1071—Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, C.C.A.Ill., 114 F.2d 859.

59. U.S.—Blair v. Durham, C.C.A. Tenn., 139 F.2d 260.

Statute in aid of judgment

(1) Ambiguity in judgment based on statutory right is curable by reading statute into judgment.—State v. Wright, 145 So. 598, 107 Fla. 178.

(2) In statutory proceeding where judgment is ambiguous, the statute may be examined in aid of the judgment.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089.

60. Ariz.—Mosher v. Dye, 39 P.2d 639, 44 Ariz. 555.

Cal.—Woods v. Hyde, 222 P. 168, 64 Cal.App. 433.

Fla.—**Corpus Juris cited in** Phillips v. Phillips, 1 So.2d 186, 188, 146 Fla. 311—**Corpus Juris cited in** Beale, Inc. v. Hawley, 156 So. 529, 116 Fla. 445.

Ga.—Nolan v. Southland, 169 S.E. 370, 177 Ga. 59.

Iowa.—Martin Bros. Box Co. v. Fritz, 292 N.W. 148, 228 Iowa 482.

Okl.—**Corpus Juris cited in** Schuman's Inc. v. Missy Dress Co., 44 P.2d 862, 863, 172 Okl. 211.

34 C.J. p 503 note 22.

Recitals as part of judgment see supra § 71.

Judgment of court of general jurisdiction

Ala.—Robertson v. State, 181 So. 705, 28 Ala.App. 95, certiorari denied 181 So. 706, 236 Ala. 217.

61. Ala.—Robertson v. State, supra.

Fla.—**Corpus Juris cited in** Phillips v. Phillips, 1 So.2d 186, 188, 146 Fla. 311—**Corpus Juris cited in** Beale, Inc. v. Hawley, 156 So. 529, 116 Fla. 445.

Mont.—**Corpus Juris cited in** State ex rel. Regis v. District Court of Second Judicial Dist., Silver Bow County, 55 P.2d 1295, 1300, 102 Mont. 74.

Okl.—**Corpus Juris cited in** Schuman's, Inc., v. Missy Dress Co., 44 P.2d 862, 863, 172 Okl. 211.

Effect of conflict in record see infra § 443.

62. Ala.—State Tax Commission v. Commercial Realty Co., 182 So. 31, 236 Ala. 358.

Verity and conclusiveness of record see supra § 132.

Recital as to hearing

Recital in judgment that on certain day when case came on to be heard court sustained defendant's general demurrer to amended petition is conclusive.—Starnes v. Western Union Telegraph Co., Tex.Civ. App., 27 S.W.2d 561.

63. Okl.—**Corpus Juris cited in** Washburn v. Culbertson, 75 P.2d 190, 192, 181 Okl. 476.

34 C.J. p 503 note 24.

An ambiguous or imperfect recital concerning jurisdictional matters will be construed, if possible, to make it show jurisdiction.—Washburn v. Culbertson, 75 P.2d 190, 191 Okl. 476.

necessary implication from the language employed.[64] Since, as is discussed supra § 71, a judgment rests on the mandatory parts thereof rather than on the recitals therein, express adjudication controls mere recitals.[65]

§ 438. Pleadings

In case of doubt or ambiguity the judgment may be construed in the light of the pleadings.

Where the language of a judgment is ambiguous or its meaning doubtful, reference may be had to the pleadings in the case, and the judgment interpreted in the light which they throw on it.[66] On the other hand, if the meaning of the judgment is clear and plain on its face, it cannot be changed,

Construction in light of pleadings

Ala.—State Tax Commission v. Commercial Realty Co., 181 So. 31, 236 Ala. 358.

Particular recitals construed

(1) Judgment, sending legatees into possession of decedent's estate and declaring it was rendered with inheritance tax collector's approval, showed inheritance taxes were paid. —Tridico v. Merenda, 120 So. 857, 167 La. 1063.

(2) A recital in a state court judgment dismissing action on note in accordance with stipulation referring to stipulation of specified date was merely descriptive of stipulation and not an adjudication of the date when it became effective.—Bair v. Bank of America Nat. Trust & Savings Ass'n, C.C.A.Mont., 106 F.2d 794.

64. Okl.—**Corpus Juris cited in** City of Wagoner v. Block, 97 P.2d 11, 21, 186 Okl. 249.
34 C.J. p 503 note 25.

Suit at law or in equity

Recitals cannot convert a suit in equity to an action or proceeding at law.—State Tax Commission v. Commercial Realty Co., 182 So. 31, 236 Ala. 358.

65. Miss.—First Nat. Bank v. Bianca, 158 So. 478, 171 Miss. 866.
Tex.—Magnolia Petroleum Co. v. Caswell, Civ.App., 1 S.W.2d 597, rehearing denied, Com.App., 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.
34 C.J. p 503 note 26.

Legal effect of judgment is determined from its substance, not recitals therein.—Jacobs v. Norwich Union Fire Ins. Soc., 40 P.2d 899, 4 Cal.App.2d 1.

Issues adjudicated

Since recitals of facts in judgment are merely foundational so that error with respect thereto will not vitiate judgment, issues which have been adjudicated must be determined from mandatory portion of judgment, and not recitals of fact.—Blaser v. Clinton Irr. Dist., 53 P.2d 1141, 100 Mont. 459.

Recital as to evidence and law

Where the judgment declares the evidence and law to be in favor of plaintiff, but the decree favors defendant, the decree controls making the judgment one for defendant.—Misita v. Inter-City Express Lines, La.App., 143 So. 677.

Recital as to findings

If a finding recited in the judgment is inconsistent with the judgment proper or the decretal part thereof the latter must control.—Lackender v. Morrison, 2 N.W.2d 286, 231 Iowa 899—Leach v. State Sav. Bank of Logan, 209 N.W. 422, 202 Iowa 265.

66. Okl.—Moore v. Harjo, C.C.A.Okl., 144 F.2d 318—Gila Valley Irr. Dist. v. U. S., C.C.A.Ariz., 118 F.2d 507—Louisiana Land & Exploration Co. v. Parish of Jefferson, D.C. La., 59 F.Supp. 260.
Ala.—Taunton v. Dobbs, 199 So. 9, 240 Ala. 287—State Tax Commission v. Commercial Realty Co., 182 So. 31, 236 Ala. 353—Floyd v. Jackson, 164 So. 121, 26 Ala.App. 575.
Cal.—People v. Rio Nido Co., 85 P.2d 461, 29 Cal.App.2d 486.
Ga.—Bentley v. Still, 32 S.E.2d 814, 198 Ga. 743—Chappell v. Small, 20 S.E.2d 916, 194 Ga. 143—Stanfield v. Downing Co., 199 S.E. 113, 186 Ga. 568.
Idaho.—**Corpus Juris cited in** Evans v. City of American Falls, 11 P.2d 363, 367, 52 Idaho 7.
Ind.—Trook v. Crouch, 137 N.E. 773, 82 Ind.App. 309.
Iowa.—Sutton v. Schuack, 275 N.W. 870, 224 Iowa 251.
Ky.—Toms v. Holmes, 171 S.W.2d 245, 294 Ky. 233—Sell v. Pierce, 140 S.W.2d 1027, 283 Ky. 143—Oglesby v. Prudential Ins. Co. of America, 82 S.W.2d 824, 259 Ky. 620—Ratliff v. Linberg, 79 S.W.2d 717, 258 Ky. 203—**Corpus Juris cited in** Turner v. Begley, 39 S.W.2d 504, 506, 239 Ky. 281—Reed v. Runyan, 10 S.W.2d 824, 226 Ky. 261.
La.—In re Clover Ridge Planting & Manufacturing Co., 193 So. 468, 194 La. 77—Davis v. McCain, 132 So. 758, 171 La. 1011—Williams v. Williams, App., 17 So.2d 641—Blunson v. Brocato, App., 172 So. 180, affirmed 175 So. 441, 187 La. 637—Snyder v. Davidson, 129 So. 185, 15 La.App. 695, reheard Snyder v. Davison, 131 So. 64, 15 La.App. 695, affirmed 134 So. 89, 172 La. 274.
Mo.—Sanders v. Sheets, App., 287 S.W. 1069—Raney v. Home Ins. Co., 246 S.W. 57, 213 Mo.App. 1.
Mont.—Quigley v. McIntosh, 103 P.2d 1067, 110 Mont. 495.
S.C.—Jackson v. Johnson, 195 S.E. 239, 186 S.C. 155.
Tenn.—Southwestern Presbyterian University v. City of Clarksville, 259 S.W. 550, 149 Tenn. 256.
Tex.—Sharp v. Womack, 125 S.W.2d 270, 132 Tex. 507—Lipsitz v. First Nat. Bank, Com.App., 293 S.W. 563, reheard 296 S.W. 490—Wagner v. Hogan, Civ.App., 161 S.W.2d 849—Walston v. Price, Civ.App., 159 S.W.2d 548—In re Supples' Estate, Civ.App., 131 S.W.2d 13—Agey v. Barnard, Civ.App., 123 S.W.2d 484, error dismissed, judgment correct—Fidelity & Deposit Co. of Maryland v. Citizens Nat. Bank of Lubbock, Civ.App., 120 S.W.2d 113, error dismissed—Dagley v. Leeth, Civ.App., 106 S.W.2d 730—Snell v. Knowles, Civ.App., 87 S.W.2d 871, error dismissed—Angelo v. Stedman Co., Civ.App., 77 S.W.2d 926—Dearing v. City of Port Neches, Civ.App., 65 S.W.2d 1105, error refused—Royal Indemnity Co. v. Goodbar & Page, Civ.App., 48 S.W.2d 1021—**Corpus Juris quoted in** Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 656, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555—Prince v. Frost-Johnson Lumber Co., Civ.App., 250 S.W. 785.
Utah.—**Corpus Juris cited in** Salt Lake City v. Telluride Power Co., 17 P.2d 281, 283, 82 Utah 607, rehearing denied 26 P.2d 822, 82 Utah 622.
Wash.—George v. Jenks, 85 P.2d 1083, 197 Wash. 551—Reed v. National Grocery Co., 238 P. 990, 136 Wash. 7.
Wis.—In re Kahl's Estate, 254 N.W. 639, 215 Wis. 353.
34 C.J. p 503 note 28.
Conformity to pleadings see supra §§ 47–54.

In determining validity of judgment

Tex.—Jackson v. Slaughter, Civ. App., 185 S.W.2d 759, refused for want of merit.

Pleadings as limiting judgment

On direct attack, judgments other than judgments by agreement are limited and controlled by the pleadings, irrespective of the nature or contents of the judgments.—Downey v. Downey, Tex.Civ.App., 117 S.W.2d 830.

extended, or restricted by anything contained in the pleadings.[67]

§ 439. Verdict or Findings

The judgment should be construed in the light of the verdict of the jury or the findings of the court.

Although it has been held that findings and conclusions of law in a case which are not carried into the judgment therein may not serve to limit the judgment in effect,[68] as a general rule, a judgment should be interpreted with reference to, and in the light of, the verdict of the jury[69] or the findings of fact and conclusions of law of the court or referee,[70] and, if possible, so as to harmonize them.[71] If the judgment is ambiguous or obscure, and fails to express the final determination of the court with clarity and accuracy, reference may be had to the verdict and findings for the purpose of ascertaining what was determined.[72]

The requirement that a judgment conform to the verdict or findings in the case is considered supra §§ 55–58.

§ 440. Parties

a. In general
b. Joint or several liability
c. Operation as between codefendants

a. In General

A judgment which is ambiguous or uncertain with respect to the parties will be construed in the light of the entire judgment roll or record.

If there is ambiguity or uncertainty in a judgment with respect to the party for or against whom it is rendered, or the capacity in which he recovers or is held liable, the judgment will be read in the light of the entire judgment roll or record.[73] Thus, where there are two or more defendants in the action, the pleadings, findings, and other parts of the judgment roll or record may be considered, in case of ambiguity or uncertainty, in determining against which defendant the judgment is rendered.[74] A plural designation will be read as singular, and vice versa, if necessary to make the judgment agree with the facts and law of the case.[75] Where a judgment provides for the payment of money to a particular person, it means to such person or to

67. La.—Avery v. Iberville Police Jury, 15 La.Ann. 323.
34 C.J. p 504 note 29.

Reference to pleading unnecessary
U.S.—Louisiana Land & Exploration Co. v. Parish of Jefferson, La., D. C.La., 59 F.Supp. 260.

68. Cal.—Martin v. Board of Trustees of Leland Stanford Jr. University, 99 P.2d 684, 37 Cal.App.2d 481.

Conclusions are not part of judgment where not carried into the judgment.—Neilsen v. Neilsen, 13 P. 2d 715, 216 Cal. 150.

69. Okl.—Miller v. Madigan, 215 P. 742, 90 Okl. 17.
Tex.—Dearing v. City of Port Neches, Civ.App., 65 S.W.2d 1105, error refused.
34 C.J. p 504 note 31.

Form and language used in a verdict assist in determination of scope of judgment.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

70. U.S.—Great Lakes Dredge & Dock Co. v. Huffman, La., 63 S.Ct. 1070, 319 U.S. 293, 87 L.Ed. 1407—Armstrong v. De Forest Radio Telephone & Telegraph Co., C.C.A. N.Y., 10 F.2d 727, certiorari denied De Forest Radio Telephone & Telegraph Co. v. Armstrong, 46 S.Ct. 471, 270 U.S. 663, 70 L.Ed. 787.
Cal.—Ampuero v. Luce, 157 P.2d 899, 68 Cal.App.2d 811.
Tex.—**Corpus Juris cited in** Permian Oil Co. v. Smith, 117 S.W.2d 564, 578, 129 Tex. 413, 111 A.L.R. 1152—Lipsitz v. First Nat. Bank, Com. App., 293 S.W. 563, reheard 296 S. W. 490—In re Supples' Estate, Civ. App., 131 S.W.2d 13—Durden v. Roland, Civ.App., 269 S.W. 274—Barnes v. Hobson, Civ.App., 250 S.W. 238.
Utah.—Huber v. Newman, 145 P.2d 780, 106 Utah 363.
Wash.—George v. Jenks, 85 P.2d 1083, 197 Wash. 551.
34 C.J. p 504 note 33.

Findings construed
In prior suit against lessor and lessees, finding that lease had been executed in bad faith did not effect annulment, but lease remained valid.—Bennett v. Casavant, 150 A. 319, 129 Me. 123.

71. Kan.—Armel v. Layton, 29 Kan. 576.

72. U.S.—Moore v. Harjo, C.C.A. Okl., 144 F.2d 318.
Cal.—Ramacciotti v. Ramacciotti, 20 P.2d 961, 131 Cal.App. 191.
Tex.—Wagner v. Hogan, Civ.App., 161 S.W.2d 849—In re Supples' Estate, Civ.App., 131 S.W.2d 13.

Judgment and findings read together
N.Y.—People v. Reinforced Paper Bottle Corporation, 26 N.Y.S.2d 251, 176 Misc. 464.

73. Ala.—**Corpus Juris cited in** Griffin v. Proctor, 14 So.2d 116, 120, 244 Ala. 537.
La.—Glen Falls Indemnity Co. v. Manning, App., 168 So. 787.
Tex.—State Mortg. Corporation v. Traylor, 36 S.W.2d 440, 120 Tex. 148—Bendy v. W. T. Carter & Bro., Com.App., 14 S.W.2d 813—Greene v. Elerding, Civ.App., 291 S.W. 271.
Wash.—**Corpus Juris quoted in** Gollehon v. Gollehon, 34 P.2d 1113, 1114, 178 Wash. 372.
33 C.J. p 1198 note 81—34 C.J. p 504 note 37.
Requisites and sufficiency of designation of parties in judgment see supra § 75.

Capacity in which party recovers or is liable
The whole record may be considered in determining whether the judgment is for or against a party in his individual or representative capacity or both.
Ill.—Schmidt v. Kellner, 138 N.E. 604, 307 Ill. 331.
Tex.—Banister v. Eades, Civ.App., 282 S.W. 351.
33 C.J. p 1199 note 92.

Joint judgment for three plaintiffs on its face entitled each plaintiff to one third of sum due.—State ex rel. Bromschwig v. Hartman, 300 S.W. 1054, 221 Mo.App. 215.

74. Cal.—Minehan v. Silveria, 21 P. 2d 617, 131 Cal.App. 317—Bradley v. McDonald, 169 P. 427, 36 Cal. App. 807.
34 C.J. p 504 note 40.

Judgment caption, not referred to, cannot be considered in clarifying uncertainty as to judgment debtors. —Minehan v. Silveria, 21 P.2d 617, 131 Cal.App. 317.

75. Mich.—Barnes v. Michigan Air Line R. Co., 20 N.W. 36, 54 Mich. 243.
34 C.J. p 504 note 38.

anyone whom he may legally and properly authorize to act for him.[76]

In case of several defendants who are jointly and severally liable, a judgment in favor of plaintiff without indication of which defendant it is intended to run against will be construed as being an award against all the defendants.[77] Also a judgment against a named defendant "et al." or "et als." includes all defendants in the action.[78]

A judgment will in general bind a party only in the capacity in which he appears in the action and is designated in the judgment,[79] and even though he is not described in the judgment in that capacity.[80] However, a judgment against a named person, administrator of a named deceased, is an individual judgment against the former, where it does not appear that the judgment is to be satisfied out of the estate of deceased.[81] In a suit by an attorney in fact, a judgment for defendant is a judgment against the attorney in fact.[82]

Persons not parties are not affected by the judgment.[83]

b. Joint or Several Liability

In the absence of express directions to the contrary, a judgment entered against two or more defendants jointly is a joint and several obligation, available against either of the judgment debtors separately.

In the absence of express directions to the contrary, a judgment entered against two or more defendants jointly is a joint and several obligation, available against either of the judgment debtors separately.[84] However, there is also authority that in the absence of a contrary indication each of the defendants is liable only for his proportionate share of the judgment obligation.[85] If a separate judgment is rendered against each of the defendants for a different amount, the judgments cannot be regarded as imposing a joint and several liability.[86]

c. Operation as between Codefendants

As a general rule a judgment against two or more defendants decides nothing as to their rights or liabilities inter sese.

As a general rule a judgment against two or more defendants decides nothing as to their rights or liabilities inter sese, but only their liability to plaintiff.[87]

Relief between codefendants is considered supra § 37.

§ 441. Issues

A judgment is to be construed in the light of the issues raised in the case.

A judgment should be construed with reference to the issues raised in the case[88] and which are in-

76. N.Y.—Lythgoe v. Smith, 35 N.E. 646, 140 N.Y. 442.

77. U.S.—Oklahoma Natural Gas Corporation v. Municipal Gas Co. of Muskogee, C.C.A.Okl., 113 F.2d 303.
Tex.—International & G. N. Ry. Co. v. Dawson, Civ.App., 193 S.W.2d 1145.

78. La.—Glen Falls Indemnity Co. v. Manning, App., 168 So. 787.
Tenn.—Williams v. Williams, 156 S. W.2d 363, 25 Tenn.App. 290.

79. S.D.—Green v. Mahoney, 13 N. W.2d 806.
Effect of addition of designation descriptio personæ to party's name see supra § 75.
Judgment against association
Judgment for loss on fire policy, against unincorporated fire insurance association paying losses by assessments was held one against the association as such, and not against the officials named as defendants individually.—Marsden v. Williams, App., 282 S.W. 478, certiorari quashed State ex rel. Williams v. Daues, 292 S.W. 58.

80. N.Y.—Graham v. Lawyers' Title Ins. Co., 46 N.Y.S. 1055, 20 App. Div. 440, 4 N.Y.Ann.Cas. 379.
34 C.J. p 504 note 41.
Death of party pending proceedings
Where an administrator ad litem was appointed for cross complainant on the latter's death before final decree, a final decree, reciting that complainant and cross complainant, naming decedent, should be separately and severally denied the relief prayed for in their bill and cross bill, should be construed as denying the relief to the administrator ad litem.—Griffin v. Proctor, 14 So.2d 116, 244 Ala. 537.

81. W.Va.—Thomson v. Mann, 44 S. E. 246, 53 W.Va. 432.

82. Ky.—Herndon v. Bartlett, 7 T.B. Mon. 449.

83. Mo.—State v. Johnson, 239 S.W. 344, 293 Mo. 302.
Propriety of judgment for or against one not a party see supra § 28.
Recital in execution issued on judgment cannot extend scope of judgment to parties not named therein.—Blenkiron v. Birkhauser, 282 P. 984, 102 Cal.App. 172.

84. Kan.—Richardson v. Painter, 102 P. 1099, 80 Kan. 574.
33 C.J. p 1126 note 20—34 C.J. p 505 note 44.
Requisites and sufficiency of joint or several judgments see supra § 36.
Judgment against makers of note bound each to payment of whole thereof, with respect to judgment creditor.—Biggs v. Davis, 43 S.W.2d 724, 184 Ark. 834.

85. Philippine.—De Leon v. Nepomuceno, 37 Philippine 180.
In Louisiana
(1) It has been held that, unless bound in solido by covenant or operation of law, judgment defendants are jointly bound and liable each for proportionate share.—Barlow v. Fife, 133 So. 436, 172 La. 176—U. S. v. Hawkins' Heirs, 4 Mart.,N.S., 317.
(2) It has also been held that a judgment against more than one defendant, not jointly and severally, is a several judgment.—Pemberton v. Gross, 1 La. 30.

86. Tex.—Missouri, K. & T. R. Co. v. Lawson, 119 S.W. 921, 55 Tex. Civ.App. 388.

87. N.C.—Gregg v. Wilmington, 70 S.E. 1070, 155 N.C. 18.
34 C.J. p 505 note 45.

88. Ark.—Fawcett v. Rhyne, 63 S. W.2d 349, 187 Ark. 940—Nakdimen v. Brazil, 208 S.W. 431, 137 Ark. 188.
Ky.—Toms v. Holmes, 171 S.W.2d 245, 294 Ky. 233.
Mo.—Savings Trust Co. of St. Louis v. Beck, App., 73 S.W.2d 282.
Or.—Barnes v. Anderson, 217 P. 836, 108 Or. 503.

tended to be decided,[89] and the scope of the judgment is not to be extended beyond the issues raised in the case, or the state of facts and situation of the parties existing at the time of the action.[90] If there is ambiguity in the judgment, the entire record may be examined to determine the issues decided.[91]

A judgment is to be construed as disposing of all the issues and controversies raised in the case,[92] unless questions are reserved or leave given to the parties to take further proceedings, in which case the unadjudicated matters are left entirely open, except in so far as their determination in a particular way would be inconsistent with the general tenor of the original judgment.[93]

§ 442. Recovery and Relief

A judgment which is ambiguous with respect to the amount of the recovery or the relief granted may be construed in the light of the other parts of the record, but it should not be construed as granting more than prayed for in the complaint.

If the judgment is ambiguous or silent as to the amount of the recovery or the relief granted, reference may be had to the pleadings, the verdict, findings, and other parts of the record, and the judgment will be presumed to be in accordance with what they show to be due.[94] It has been held, how-

Tex.—Lipsitz v. First Nat. Bank, Com.App., 293 S.W. 563, reheard 296 S.W. 490—Wagner v. Hogan, Civ.App., 161 S.W.2d 849—In re Supples' Estate, Civ.App., 131 S.W.2d 13.

89. U.S.—State of Oklahoma v. State of Texas, 47 S.Ct. 9, 272 U.S. 21, 71 L.Ed. 145—United Shoe Machinery Corporation v. U. S., Mo., 42 S.Ct. 363, 258 U.S. 451, 66 L.Ed. 708, rehearing denied 42 S.Ct. 585, 259 U.S. 575, 66 L.Ed. 1071—City of Vicksburg v. Henson, Miss., 34 S.Ct. 95, 231 U.S. 259, 58 L.Ed. 209—Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, C.C.A.Ill., 114 F.2d 859—Great Northern Ry. Co. v. General Ry. Signal Co., C.C.A.Minn., 57 F.2d 457—Graham v. Hollister, D.C. Mich., 13 F.2d 394.
Ill.—Aloe v. Lowe, 131 N.E. 612, 298 Ill. 404—Yedor v. Chicago City Bank & Trust Co., 54 N.E.2d 728, 323 Ill.App. 42.
Tex.—In re Supples' Estate, Civ.App., 131 S.W.2d 13.

Intent of adjudication must be determined, not from isolated parts of court's opinion, but from consideration of all issues submitted and intended to be disposed of, that is, from what decree is really designed to accomplish.—Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, C.C.A.Ill., 114 F.2d 859.

90. Ill.—Yedor v. Chicago City Bank & Trust Co., 54 N.E.2d 728, 323 Ill.App. 42.
La.—Continental Land & Fur Co. v. Lacoste, 188 So. 700, 192 La. 561.
Pa.—Rosenheck v. Stape, 3 A.2d 678, 332 Pa. 287.
34 C.J. p 505 note 52.

Counterclaim

A judgment of no cause of action in favor of defendant filing a counterclaim determined only that plaintiff failed to establish his own case, where counterclaim was invalid.—Central New York Coach Lines v. Syracuse Herald Co., 13 N.E.2d 598, 277 N.Y. 110.

Limitation to issues

If language of judgment is broader than is required, it will be limited by construction so that its effect will be such only as is needed for purposes of case which has been made and issues which have been decided.—Aloe v. Lowe, 131 N.E. 612, 298 Ill. 404—Yedor v. Chicago City Bank & Trust Co., 54 N.E.2d 728, 323 Ill.App. 42.

One of several issues

Judgment for plaintiff on only one of several dependent causes of action does not determine other causes adversely to him.—Miller-Vidor Lumber Co. v. Adams, Tex.Civ.App., 16 S.W.2d 312, error dismissed.

91. Or.—Barnes v. Anderson, 217 P. 836, 108 Or. 503.

92. Wis.—Bakula v. Schwab, 168 N.W. 378, 167 Wis. 546.
34 C.J. p 505 note 50.

General judgment

(1) Judgment for one party generally involves finding in his favor on all issues.—In re Evans' Estate, 291 N.W. 460, 228 Iowa 908.

(2) Recital that issues are found for plaintiff or defendant implies, in absence of evidence to contrary, that all issues are so found.—Sessa v. Barney, 37 A.2d 233, 130 Conn. 718.

Issues raised by complaint

In the absence of proof, it will be assumed that a litigation involved everything alleged in the complaint and that an adjudication covered the whole ground of the complaint.—In re Straut, 27 N.E. 259, 126 N.Y. 201—Jacob v. Oyster Bay, 96 N.Y.S. 626, 109 App.Div. 626.

Plea in abatement

A judgment in favor of plaintiff in a case tried on the merits was held to overrule a plea in abatement which was by agreement heard with the trial of the case on the merits.—U. S. Fire Ins. Co. v. Adams, Tex. Civ.App., 115 S.W.2d 788.

93. Minn.—Hollingsworth v. Campbell, 8 N.W. 873, 28 Minn. 18.
Va.—Paup v. Mingo, 4 Leigh 163, 31 Va. 163.

94. Ky.—Sell v. Pierce, 140 S.W.2d 1027, 283 Ky. 143—Coffey v. Clark, 43 S.W.2d 1002, 241 Ky. 336.
N.Y.—People v. Reinforced Paper Bottle Corporation, 26 N.Y.S.2d 251, 176 Misc. 464.
Tex.—Fidelity & Deposit Co. of Maryland v. Citizens Nat. Bank of Lubbock, Civ.App., 120 S.W.2d 113, error dismissed—Kasprowicz v. Tate, Civ.App., 66 S.W.2d 435.
34 C.J. p 505 note 53.
Effect of silence as to particular demands see supra § 436.

Determination of amount

In suit by remaindermen to assert right in land sold for taxes, judgment for rents and certain other amount for improvements, taxes, and interest will be construed to require rents to be deducted from the other item to determine amount due from plaintiffs.—Jones v. Fowler, 285 S.W. 363, 171 Ark. 594.

Judgment general in form

Where first count of petition was based on breach of contract and second count on quantum meruit for services rendered, and plaintiff abandoned first count and submitted case to jury on second count, judgment for plaintiff, although general in form, was deemed to have been based on second count.—Pemberton v. Ladue Realty & Construction Co., 180 S.W.2d 766, 237 Mo.App. 971.

Defendant's demands

(1) A judgment that cross complainants take nothing by their cross action was held not limited by a further provision in the disjunctive that they take nothing for reconvention for damages.—Ware v. Jones, Tex. Com.App., 250 S.W. 663.

(2) Where a set-off is pleaded as a defense to an action, a judgment for defendant is in effect a judgment for the amount of the set-off.—Shriver v. Bowen, 57 Ind. 266.

ever, that, in order to determine the extent of the relief awarded by a judgment, the judgment only may be looked to, aided by other instruments to which it refers,[95] and that the final judgment or decree itself is the only measure of the obligation of the defendants thereunder.[96]

The judgment should be construed, if possible, as not awarding more or other relief than was prayed for in the complaint,[97] or as granting relief beyond the power of the court to award.[98] A decree directing the sale of premises unless a specified sum is paid within a limited time is not to be construed as a personal decree for the payment of the money, but as in the alternative.[99] Where a judgment provides for periodical payments in the future, as long as a given relation or state of affairs continues, the amounts due from time to time may be fixed by successive applications to the court.[1]

§ 443. Conflict in Record

In general a conflict in the judgment record will be resolved in favor of the validity of the judgment. Provisions of the judgment itself usually prevail over other parts of the record.

It has been broadly stated that any doubt or ambiguity in the record should be resolved in favor of the validity of the judgment or decree.[2] In other words, where there is a conflict or inconsistency between statements in different parts of a judgment record, that one will govern which will sustain the validity and correctness of the judgment, when it is apparent from the face of the record that the other statement is a clerical error.[3] In case of conflict between provisions of a judgment, the first part thereof will be construed in the light of subsequent provisions.[4] Where there is a variance between an express provision of a judgment and the prayer for judgment brought into the judgment by reference, the former prevails.[5]

As between the judgment and other parts of the record, the terms of the judgment prevail over entries made by the clerk;[6] a formal judgment enrolled in the minutes of the court prevails over bench notes[7] or the judge's trial docket;[8] and jurisdictional recitals[9] and other declarations in the judgment[10] prevail over file marks on papers in the case. Jurisdictional recitals also prevail over a de-

Judgments construed together

(1) In order to determine what has been decided in a cause, all of the orders and judgments entered therein must be construed together. —Wilson v. Foster Creek Lumber & Mfg. Co., 99 So. 437, 134 Miss. 880.

(2) In determining whether probate court construed testator's will, both homestead order and decree of distribution, entered on same day as the homestead order, would be required to be considered, since both decrees were made at the same session of the court, regarding the same general subject matter and were intended to and did operate to make disposition of the estate as far as could be done at any time prior to the death of the testator's widow who was bequeathed the income from the testator's estate for life.—In re Taylor's Estate, 2 A.2d 317, 110 Vt. 80.

(3) Decree in taxpayer's suit enjoining town from levying taxes or expending moneys because of paving contract or lien certificates and decree in consolidated suit by town whereby chancellor refused to enjoin assignee of paving contract from suing thereon at law were required to be construed together and to confine such assignee to suing at law for reasonable worth of paving.—Town of Boca Raton v. Moore, 165 So. 279, 122 Fla. 350.

95. Tex.—Burrage v. Hunt Production Co., Civ.App., 114 S.W.2d 1228, error dismissed.

96. Mass.—Boyer v. Bowles, 54 N.E. 2d 925, 316 Mass. 900.

97. Ky.—Ratliff v. Sinberg, 79 S.W. 2d 717, 258 Ky. 203.

Limitation of judgment to relief sought by pleadings see supra § 49.

98. U.S.—Texas Co. v. Marlin, C.C. A.Tex., 109 F.2d 305.

Construction to uphold judgment see supra § 336 a.

99. Ill.—Arentz v. Reilly, 67 Ill.App. 307.

1. La.—Smith v. Barkemeyer, McG. 139.

2. Ala.—Falkner v. Christian, 51 Ala. 495.

Kan.—State v. Frishman, 144 P. 994, 93 Kan. 595.

34 C.J. p 506 note 62.

Construction to uphold judgment see supra § 436.

Effect of conflict between judgment and opinion see supra § 22.

Verity and conclusiveness of record see supra § 132.

3. Ala.—King v. Martin, 67 Ala. 177.

Ark.—Thorn v. Delany, 6 Ark. 219.

34 C.J. p 506 note 63.

4. Tex.—In re Supples' Estate, Civ. App., 131 S.W.2d 13.

5. S.C.—In re Wilson, 139 S.E. 171, 141 S.C. 60.

6. Ariz.—Funk v. Fillman, 36 P.2d 574, 44 Ariz. 263.

Nev.—**Corpus Juris cited in** Mortimer v. Pacific States Savings & Loan Co., 145 P.2d 733, 736, 62 Nev. 147.

Wash.—Hanley v. Most, 115 P.2d 951, 9 Wash.2d 474, opinion adhered to 118 P.2d 946, 9 Wash.2d 474.

34 C.J. p 506 note 64.

Unambiguous order

A formal written order allowing fees to a receiver's attorney and reserving to trial court the right to consider any additional allowance was not ambiguous so as to be governed by minute order allowing fees for the calendar year and reserving to trial court the right to fix future fees for future services.—Mortimer v. Pacific States Savings & Loan Co., 145 P.2d 733, 62 Nev. 147.

7. Ala.—Lockwood v. Thompson, 73 So. 504, 198 Ala. 295.

Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Johnson, 93 N.E. 683, 49 Ind. App. 126, rehearing denied 95 N.E. 610, 49 Ind.App. 126.

Merger

Minute orders of judge preceding judgment are merged in, and controlled by, judgment.—Prothero v. Superior Court of Orange County, 238 P. 357, 196 Cal. 439.

8. Tex.—Stark v. Hardy, Com.App., 29 S.W.2d 967—Daniel v. Sharpe, Civ.App., 69 S.W.2d 508.

9. Nev.—Blasdel v. Kean, 8 Nev 305.

34 C.J. p 507 note 66.

10. Tex.—Sanger v. First Nat. Bank, Civ.App., 170 S.W. 1087—Western Union Tel. Co. v. Jackson, 46 S.W. 279, 19 Tex.Civ.App. 273.

Date of rendition

Where no minute entry appeared

fective proof of service filed with the judgment roll,[11] although a mere recital that the court has jurisdiction contrary to what is shown by the record is insufficient to confer jurisdiction.[12] It has also been held that, where a recital or statement in a judgment constituting a mere conclusion directly conflicts with the record proper, the latter prevails.[13] Accordingly a judgment reciting that defendant admitted allegations in the complaint to be true,[14] or reciting the granting of a motion for judgment on the pleadings,[15] or purporting to have been entered on the verdict of a jury,[16] does not prevail over a record which discloses that such was not the case.

A recital in a judgment overruling a demurrer that the demurrer came on regularly to be heard has been held not to nullify an entry in the record showing that the demurrer was not filed until several terms after the pleading was opened to demurrer, the recital being considered as not in conflict with the record entry.[17] Similarly a recital in a judgment that defendant filed his demurrer to the complaint and that "said demurrers be and they are hereby dismissed" has been held not to change the fact shown by the record that the demurrer was addressed to each count in the complaint separately, and not to the complaint as a whole.[18] There is no inconsistency between a formal judgment dismissing a cause with prejudice and a minute entry reciting that the motion to dismiss is granted.[19]

Where the record contains two judgments, the last in point of time must be treated as the true and final judgment, and the other disregarded,[20] although there is authority to the effect that, where a judgment is entered and signed as of a certain date, a second judgment entry will be vacated, leaving the record of the case as originally authenticated to stand.[21]

As between different entries, an entry in the record book[22] or an entry in an appearance docket[23] has been held to prevail over an entry in the judgment docket. As between an entry in an order book and an original petition which is on file, the entry in the order book is controlling.[24]

Matters not properly a part of the record do not overthrow a judgment entry.[25]

B. OPERATION AND EFFECT

§ 444. In General

The operation and effect of a judgment are purely matters of law, and as a general rule a judgment does not directly affect the title to property.

The operation and effect of a judgment are purely matters of law[26] and are not affected by an un-

in record showing when judgment was rendered, statement in written judgment, signed by trial judge, that he rendered judgment on a specified date is accepted as true, notwithstanding filing mark showed that written judgment was not filed until a later date.—Mosher v. Dye, 39 P.2d 639, 44 Ariz. 555.

11. N.Y.—Maples v. Mackey, 89 N.Y. 146.
34 C.J. p 507 note 68.

12. Ill.—Sherman & Ellis v. Journal of Commerce and Commercial Bulletin, 259 Ill.App. 453.

Recital of appearance

Mere recital in judgment that defendant appeared is insufficient to sustain judgment against defendant not served with summons.—American Cotton Oil Co. v. House, 118 So. 722, 153 Miss. 170, 68 A.L.R. 380.

13. **Recital as to service of process**
Fla.—Johnson v. Clark, 198 So. 342, 145 Fla. 258.
Or.—In re Stewart's Estate, 223 P. 727, 110 Or. 408.

14. Tex.—Tackett v. Middleton, Com.App., 280 S.W. 563, 44 A.L.R. 1143, motion overruled 281 S.W. 1047.

15. N.Y.—Levey v. Allien, 25 N.Y.S. 352, 72 Hun 321.

16. U.S.—Moss v. City of Pittsburg, Pa., 184 F. 325, 106 C.C.A. 348.

17. Ga.—Smith v. Aultman, 118 S.E. 459, 30 Ga.App. 507.

18. Ala.—Birmingham Ry., Light & Power Co. v. Weathers, 51 So. 303, 164 Ala. 23.

19. Ariz.—Tootle - Campbell Dry Goods Co. v. Knott, 29 P.2d 1056, 43 Ariz. 210.

Reason for rule

Since a dismissal after a hearing on the merits is presumed to be with prejudice in the absence of an express statement to the contrary, the legal effect of each was the same. —Tootle-Campbell Dry Goods Co. v. Knott, supra.

20. Tex.—Witty v. Rose, Civ.App., 148 S.W.2d 962, error dismissed.
Vt.—**Corpus Juris cited in** Cootey v. Remington, 189 A. 151, 153, 108 Vt. 441.
34 C.J. p 507 note 71.
Operation and effect of conflicting judgments see infra § 445.

21. Mich.—Wulff v. Bossler, 165 N.W. 1048, 199 Mich. 70.

22. Iowa.—Case v. Plato, 6 N.W. 128, 54 Iowa 64.
Me.—Willard v. Whitney, 49 Me. 235.
34 C.J. p 507 note 73.

23. Pa.—Appeal of Hance, 1 Pa. 408 —Appeal of Nicholson, 11 A. 562, 8 Pa.Cas. 396.
34 C.J. p 507 note 74.

24. Ind.—Doe v. Smith, 1 Ind. 451.

25. Mo.—Missouri, K. & E. R. Co. v. Holschlag, 45 S.W. 1101, 144 Mo. 253, 66 Am.S.R. 417.

26. N.H.—Burleigh v. Wong Sung Leon, 139 A. 184, 83 N.H. 115.

A judgment cannot be a mere recommendation

U.S.—U. S. v. Carrollo, D.C.Mo., 30 F.Supp. 3.

Final judgment

(1) Use of term "judgment" ordinarily implies a "final judgment." —Hazzard v. Alexander, 178 A. 873, 6 W.W.Harr.,Del., 512.

(2) Final and interlocutory judgments distinguished see supra § 8.

"Adversary proceeding"

Proceeding instituted by order of supreme court for purpose of enabling court to inform itself on questions arising under statute providing for integration of state bar was not

derstanding of the court or parties.[27] Although a judgment may in certain circumstances operate to create a title to property, or to transfer the title,[28] as a general rule judgments do not directly affect the title to property.[29] A money judgment does not give the judgment creditor an estate or interest in the judgment debtor's land,[30] although it may give him the right to have the land appropriated to the satisfaction of the judgment.[31] Every unsatisfied judgment is necessarily a liability.[32]

The doctrine of res judicata is discussed infra §§ 592–848.

§ 445. Conflicting Judgments

It is generally held that, of two conflicting judgments on the same rights of the parties, the one which is later in time will prevail.

Where there have been two former actions in which the claim or demand, fact or matter sought to be religated has been decided contrarily, the rule that, where there is an estoppel against an estoppel, it "setteth the matter at large" has been applied by some authorities, and in such case both parties may assert their claims anew.[33] Other authorities have held that, of two conflicting judgments on the same rights of the same parties, the one which is later in time will prevail,[34] although it has also been held that the judgment prior in time will prevail.[35] It has been held that a decision of a court of last resort is binding on the parties, although afterward, in another cause, a different principle was declared.[36]

"Contradictory judgment." In Louisiana this term is used to designate a judgment given after the parties have been heard, either in support of their claims or in their defense, as distinguished from a judgment by default.[37]

§ 446. Time of Taking Effect

A judgment generally takes effect on the rights and titles of the parties to the action as they exist at the time of the rendition of the judgment.

With respect to the rights and titles of the parties to an action, it is generally held that a judgment

an "adversary proceeding," and effect of judgment is limited by nature of proceeding.—Integration of the Bar Case, 12 N.W.2d 699, 244 Wis. 8, 151 A.L.R. 586.

Statutory judgments

It has been held that judgments are statutory creations and that their effect is to be determined by the statute creating them.—Sullivan State Bank v. First Nat. Bank, 146 N.E. 403, 82 Ind.App. 419.

27. N.H.—Burleigh v. Wong Sung Leon, 139 A. 184, 83 N.H. 115.

28. U.S.—McDaniel Nat. Bank v. Bridwell, C.C.A.Mo., 65 F.2d 423.
34 C.J. p 507 note 84.
Operation and effect of judgment in:
Rem see infra § 910.
Trover and conversion see the C.J.S. title Trover and Conversion § 160, also 65 C.J. p 129 note 69–p 130 note 77.

Fixtures

Buildings and other articles affixed to, or used in connection with, realty so as to constitute appurtenances or fixtures pass as a matter of course by the deed, devise, or decree passing the title to the realty, in the absence of a reservation therein.—Pickrell v. Pickrell, Tex.Civ.App., 134 S.W.2d 740.

29. N.Y.—Thurst v. West, 31 N.Y. 210.
34 C.J. p 507 note 86.

30. N.C.—Farrow v. American Eagle Fire Ins. Co. of New York, 134 S.E. 427, 192 N.C. 148.
34 C.J. p 507 note 88—21 C.J. p 916 note 59.

31. N.Y.—White's Bank v. Farthing, 4 N.E. 734, 101 N.Y. 344, 9 N.Y. Civ.Proc. 64.
N.C.—Farrow v. American Eagle Fire Ins. Co. of New York, 134 S.E. 427, 192 N.C. 148.
Lien of judgment see infra §§ 454–511.

32. Cal.—Woehrle v. Canclini, 109 P. 888, 158 Cal. 107.

33. U.S.—Kahl v. Chicago Title & Trust Co., D.C.Ill., 299 F. 793.
34 C.J. p 749 note 7.
Merger of judgments see infra § 599.
Time of commencement of action as affecting application of doctrine of res judicata see infra § 602.
Waiver of estoppel or bar of res judicata see infra § 597.

34. U.S.—Donald v. J. J. White Lumber Co., C.C.A.Miss., 68 F.2d 441.
Cal.—Maloney v. Massachusetts Bonding & Insurance Co., 123 P.2d 449, 20 Cal.2d 1—Standard Oil Co. of California v. John P. Mills Organization, 43 P.2d 797, 3 Cal.2d 128—California Bank v. Traeger, 10 P.2d 51, 215 Cal. 346—Nicholls v. Anders, 56 P.2d 1289, 13 Cal.App.2d 440—Wood v. Pendola, 35 P.2d 526, 1 Cal.App.2d 435.
Colo.—In re Water Rights in Water Dist. No. 17, 277 P. 763, 85 Colo. 555.
Iowa.—Mornyer v. Cooper, 35 Iowa 257.
Ky.—Sipple v. Catron, 265 S.W. 491, 205 Ky. 81.
Mont.—Gans & Klein Inv. Co. v. Sanford, 8 P.2d 808, 91 Mont. 512.
Ohio.—State ex rel. Young v. Morrow, 2 N.E.2d 595, 131 Ohio St. 266—Clark v. Baranowski, 145 N.E. 760, 111 Ohio St. 436.
Vt.—Cootey v. Remington, 189 A. 151, 108 Vt. 441.
Wash.—Watkins v. Siler Logging Co., 116 P.2d 315, 9 Wash.2d 703—State v. Barnes, 291 P. 710, 158 Wash. 648.
34 C.J. p 508 note 91, p 749 note 8.
Conflict in record see supra § 443.

Presumption of merger or vacation

Where two judgments of the same purport are rendered in the same case at the same term of court, it will be presumed that the first judgment merged in the second or was constructively vacated by it, and in such case the first judgment will not sustain a plea of res judicata.—Johnson v. Hesser, 35 N.W. 894, 61 Neb. 631.

35. Tex.—Witty v. Rose, Civ.App., 148 S.W.2d 962, error dismissed.

Conflict between final and interlocutory judgment

Order made on exceptions, if inconsistent with judgment on merits, must give way thereto.—Wells v. Stonerock, Tex.Civ.App., 1 S.W.2d 425, reversed on other grounds, Com. App., 12 S.W.2d 961.

New trial

Where a record showed two inconsistent verdicts and judgments in the same case, a new trial having been had without setting aside the first verdict and judgment, it was held that the proceedings subsequent to the entry thereof should be reversed on error.—Conrad v. Commercial Mut. Ins. Co., 81* Pa. 66.

36. S.C.—Frost v. Frost, 21 S.C. 501.

37. Black L.D.

takes effect on them as they exist at the time of the rendition thereof, and not as they existed at the commencement of the suit or before that time.[38] It has been variously held that a judgment becomes operative and effective when it is entered,[39] or when it is announced[40] or signed,[41] even though the judgment is not entered until a later date.[42] It has been held that a judgment does not become final until the end of the term during which it is rendered.[43]

The presumption, discussed supra § 113, that a judgment rendered during a term is presumed to have been rendered on the first day of the term will not be applied so as to cut off intervening rights acquired in good faith[44] or where it will not promote the ends of justice,[45] and it is not to be allowed to prevail over the substantial equities of third persons.[46]

§ 447. Conditions and Alternative Provisions

The party claiming the benefit of a judgment must comply with any terms and conditions which it may impose on him.

The party who claims the benefit of a judgment rendered in his favor must comply with any terms or conditions which it may impose on him, and failure to do so will destroy the effect of the adjudication.[47] Where the judgment is in the alternative, granting defendant an option to do a specified act or suffer judgment for a designated sum, his election eliminates the alternative, and is binding on both parties.[48]

38. Ala.—Autrey v. Latta, 176 So. 457, 234 Ala. 662—Ex parte Lacy, 168 So. 554, 232 Ala. 525—**Corpus Juris cited in** Wilson v. Coffey, 3 P.2d 62, 64, 116 Cal.App. 635.
Ill.—Snook v. Shaw, 43 N.E.2d 417, 315 Ill.App. 594.
Iowa.—Andrew v. Winegarden, 219 N.W. 326, 205 Iowa 1180.
N.Y.—Langrick v. Rowe, 212 N.Y.S. 240, 126 Misc. 256.
Ohio.—Friedman v. Brown, 172 N.E. 565, 35 Ohio App. 450.
Tex.—Cleburne Nat. Bank v. Bowers, Civ.App., 113 S.W.2d 578—Amason v. Harrigan, Civ.App., 288 S.W. 566.
34 C.J. p 508 note 93.
Operation and effect of nunc pro tunc judgment see supra § 121.
Time of rendition and entry of judgments generally see supra §§ 113–116.
When equity decree takes effect see Equity § 614.

Evidence of debt

Judgment speaks from its date and is not evidence of existence of the debt prior thereto, and, in absence of proof, debt must be considered contracted as of date of judgment.—Wiggins v. Stewart Bros., 109 So. 101, 215 Ala. 9.

Presumption is judgment is payable immediately, unless contrary appears.—Barber v. Warland, 247 N.Y.S. 455, 139 Misc. 398.

Time for rehearing

(1) Generally judgments and decrees are effective from date of entry thereof for most purposes, but such rule is inapplicable to judgments and decrees of supreme court of appeals during thirty-day period within which petitions for rehearing may be filed, particularly where order or decree is self-executing in its nature.—Shields v. Romine, 14 S.E.2d 777, 123 W.Va. 212.

(2) Under judgment ordering lumber company to remove defective house from homestead within thirty days, thirty-day period did not start running until after fifteen-day rehearing period following affirmance on appeal.—Davis v. Sloan Lumber Co., Tex.Civ.App., 37 S.W.2d 225.

39. Cal.—Barstow-San Antonio Oil Co. v. Whitney, 271 P. 477, 205 Cal. 420, certiorari denied 49 S.Ct. 345, 279 U.S. 848, 73 L.Ed. 992—Wilson v. Coffey, 3 P.2d 62, 116 Cal.App. 635.

A judgment speaks as of the time of its entry

Ohio.—Magnolia Bldg. & Inv. Co. v. Sulzman, 14 N.E.2d 623, 57 Ohio App. 431—Steigert v. Steigert, 13 N.E.2d 583, 57 Ohio App. 255.

Statutory change between dates of announcement and entry

In action to review order of state department of social security denying applicant his claim for old age assistance where trial court on Febr. 21, 1939, orally announced its decision in favor of claimant but did not sign and enter judgment until March 24, 1939, and existing old age assistance law was amended on Febr. 25, 1939, the amending act became effective prior to entry of judgment and hence was controlling of method and amount of assistance.—Adams v. Ernst, 95 P.2d 799, 1 Wash.2d 254.

Judgment is "entered" when it is signed by the court and delivered to the clerk for filing, and clerk's failure to perform the ministerial act of entering the filing of the judgment on the appearance docket or spreading the judgment on the journal would not affect the validity of the judgment or invalidate sale thereunder.—Cinebar Coal & Coke Co. v. Robinson, 97 P.2d 128, 1 Wash.2d 620.

40. U.S.—Humphrey v. Bankers Mortg. Co. of Topeka, C.C.A.Kan., 79 F.2d 345.
Ill.—People ex rel. McDonough v. Jarecki, 185 N.E. 570, 352 Ill. 207—Wickiser v. Powers, 57 N.E.2d 522, 324 Ill.App. 130.
Tex.—Cleburne Nat. Bank v. Bowers, Civ.App., 113 S.W.2d 578.

Date announced, not date signed, is the effective date of a judgment.—First Nat. Bank v. Fallon, 26 P.2d 232, 55 Nev. 102.

41. N.Y.—Langrick v. Rowe, 212 N.Y.S. 240, 126 Misc. 256.

Either in open court or in chambers

U.S.—Humphrey v. Bankers Mortg. Co. of Topeka, C.C.A.Kan., 79 F.2d 345.

42. U.S.—Humphrey v. Bankers Mortg. Co. of Topeka, supra.
Ill.—People ex rel. McDonough v. Jarecki, 185 N.E. 570, 352 Ill. 207—Wickiser v. Powers, 57 N.E.2d 522, 324 Ill.App. 130.
N.Y.—Langrick v. Rowe, 212 N.Y.S. 240, 126 Misc. 256.
Tex.—Cleburne Nat. Bank v. Bowers, Civ.App., 113 S.W.2d 578.

43. Va.—Carney v. Poindexter, 196 S.E. 639, 170 Va. 233.

44. Ala.—Pope v. Brandon, 2 Stew. 401, 20 Am.D. 49.
Iowa.—Campbell v. Williams, 39 Iowa 646.

45. U.S.—Newhall v. Sanger, Cal., 92 U.S. 761, 23 L.Ed. 769.

46. Ala.—Powe v. McLeod, 76 Ala. 418.

47. Iowa.—Blankenhorn v. Edgar, 186 N.W. 893, 193 Iowa 184.
Tex.—Giraud v. Reserve Realty Co., Civ.App., 94 S.W.2d 198, error refused.
34 C.J. p 508 note 94.

48. Utah.—Parish v. McConkie, 35 P.2d 1001, 84 Utah 396.
Wash.—State v. Smith, 167 P. 91, 98 Wash. 100, modified on other grounds and petition denied 169 P. 468, 98 Wash. 100.
34 C.J. p 508 note 95.
Alternative judgments generally see supra § 74.

§ 448. Extraterritorial Operation

A judgment does not have extraterritorial effect.

Judgments of courts of a sister state or of a foreign country may be entitled to recognition by a domestic court, but they have no extraterritorial operation or effect as judgments.[49] No court may enforce its process beyond the limits of the sovereignty which ordained and established such court.[50]

§ 449. Void and Voidable Judgments

A void judgment is a nullity, but a voidable judgment is as operative as a valid judgment until properly set aside.

A void judgment is one that has merely the semblance of a judgment without some essential element or elements on which its validity as such depends.[51] It is only jurisdictional defects which render a judgment void; mere irregularities or errors in the exercise of jurisdiction may or may not render the judgment reversibly erroneous, or voidable, but they do not render it void.[52] A judgment is void on its face when that fact appears affirmatively from inspection of the judgment roll,[53] and it has been held that a judgment is void only where the invalidity appears on the face of the record.[54]

A judgment which is void, as distinguished from one which is merely voidable, or liable to be vacated

Accounting by plaintiff

Under judgment which provided that on defendant's failure to pay a certain sum within ninety days plaintiff would be entitled to decree, and which required an accounting by plaintiff as trustee, plaintiff was not entitled to decree on ground that defendant had not made an unconditional deposit to credit of plaintiff, where plaintiff was not ready to account and where in accordance with suggestion of plaintiff's attorney defendant deposited amount required in escrow and attorney was advised of such deposit.—Adams v. Bloom, 142 P.2d 775, 61 Cal.App.2d 94.

49. U.S.—**Corpus Juris cited in** Carpenter v. Wabash Ry. Co., C.C.A. Mo., 103 F.2d 996, 1000, vacated on other grounds 60 S.Ct. 416, 309 U.S. 23, 84 L.Ed. 558, rehearing denied 60 S.Ct. 585, 309 U.S. 695, 84 L.Ed. 1035.

Mich.—Henkel v. Henkel, 276 N.W. 522, 282 Mich. 473.

N.Y.—Hutchison v. Ross, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.

34 C.J. p 508 note 98.

Foreign judgments generally see infra §§ 888–906.

50. U.S.—Baskin v. Montedonico, C.C.A.Tenn., 115 F.2d 837.

N.J.—Elizabethtown Sav. Inst. v. Gerber, 34 N.J.Eq. 130, affirmed 35 N.J.Eq. 153.

Enforcement of judgments generally see infra §§ 585–591.

51. U.S.—**Corpus Juris cited in** In re Dixie Splint Coal Co., D.C.Va., 31 F.Supp. 290, 295, reversed on other grounds, C.C.A., Litton v. Pepper, 100 F.2d 830 reversed on other grounds 60 S.Ct. 238, 306 U.S. 295, 84 L.Ed. 281.

Kan.—**Corpus Juris cited in** Board of Com'rs of Crawford County v. Radley, 8 P.2d 386, 387, 134 Kan. 704.

Neb.—**Corpus Juris quoted in** Drainage Dist. No. 1 v. Village of Hershey, 296 N.W. 879, 882, 139 Neb. 205.

N.C.—City of Monroe v. Niven, 20 S.E.2d 311, 221 N.C. 362.

34 C.J. p 509 note 12.

52. Ala.—Ex parte Harper, 112 So. 96, 22 Ala.App. 60.

Ark.—Axley v. Hammock, 50 S.W.2d 608, 185 Ark. 939.

Fla.—Malone v. Meres, 109 So. 677, 91 Fla. 709.

Ill.—Herb v. Pitcairn, 51 N.E.2d 277, 384 Ill. 237, reversed on other grounds 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L.Ed. 2005, opinion supplemented 64 N.E.2d 318, 392 Ill. 151.

N.C.—Hinton v. Whitehurst, 198 S.E. 579, 214 N.C. 99.

Tex.—Grayson v. Johnson, Civ.App., 181 S.W.2d 312—Livingston v. Stubbs, Civ.App., 151 S.W.2d 285, error dismissed, judgment correct—Sing v. Somer, Civ.App., 129 S.W.2d 501, error dismissed, judgment correct—Askew v. Rountree, Civ.App., 120 S.W.2d 117, error dismissed—**Corpus Juris quoted in** Dearing v. City of Port Neches, Civ.App., 65 S.W.2d 1105, error refused.

34 C.J. p 509 note 13.

Essentials of validity of judgment see supra §§ 13–22.

Curable defects

Mere irregularity is amendable and is cured by judgment, and anything which, if objected to, could have been amended does not render judgment void.—Gray v. Riley, 170 S.E. 537, 47 Ga.App. 348.

Judgment based on unconstitutional statute

Where the unconstitutionality of a statute goes only to the merits of the cause of action and not to the jurisdiction of the court, a judgment in a civil suit based thereon is not a "void judgment" but merely an "erroneous judgment" and remains effective until regularly set aside or reversed.—Commonwealth of Massachusetts v. Davis, 168 S.W.2d 216, 140 Tex. 398, certiorari denied Davis v. Commonwealth of Massachusetts, 63 S.Ct. 1447, 320 U.S. 210, 87 L.Ed. 1848, rehearing denied 64 S.Ct. 31, 320 U.S. 811, 88 L.Ed. 490.

Judgment violative of statute or constitution

Where a judgment or any part thereof clearly violates the plain provisions of the constitution or statutes, such judgment or the part thereof that is in direct conflict with the constitution or statutes is to that extent void and cannot be enforced.—City of Norman v. Van Camp, 209 P. 925, 87 Okl. 182.

53. Ill.—Herb v. Pitcairn, 51 N.E.2d 277, 384 Ill. 237, reversed on other grounds 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L.Ed. 2005, opinion supplemented 64 N.E. 2d 318, 392 Ill. 151.

Okl.—Bradshaw v. Tinker, 264 P. 162, 129 Okl. 244.

34 C.J. p 510 note 23.

Recital of service of process

Where citation was served on defendant in original suit, judgment was not void on its face because it did not recite service of process and purported only to be judgment by confession of attorney and petition was not verified and no power of attorney to confess judgment was filed or its contents recited in judgment, where record showed that citation to defendant was duly issued and properly returned showing service, and officer's return was not successfully impeached.—Johnson v. Cole, Tex. Civ.App., 138 S.W.2d 910, error refused.

54. Okl.—Fernow v. Gubser, 162 P. 2d 529—Harjo v. Johnston, 104 P. 2d 985, 187 Okl. 561—Bradshaw v. Tinker, 264 P. 162, 129 Okl. 244—Smith v. Page, 246 P. 217, 117 Okl. 223.

Tenn.—Clemmons v. Haynes, 3 Tenn. App. 20.

Tex.—O'Quinn v. Harrison, Civ.App., 271 S.W. 137—A. B. Richards Medicine Co. v. Reeves, Civ.App., 266 S.W. 594.

or set aside for irregularity or other cause, or reversed for error, is a mere nullity[55] and has no force or effect.[56] It is not binding on anyone;[57] it raises no lien[58] or estoppel;[59] and it does not impair or affect the rights of anyone.[60] It confers no rights on the party in whose favor it is given, and affords no protection to persons acting under it;[61] and it does not even operate as a discontinu-

55. U.S.—**Corpus Juris cited in** Kelleam v. Maryland Casualty Co. of Baltimore, C.C.A.Okl., 112 F.2d 940, 944, reversed on other grounds 61 S.Ct. 595, 312 U.S. 377, 85 L.Ed. 899—**Corpus Juris cited in** In re Dixie Splint Coal Co., D.C.Va., 31 F.Supp. 290, 295, reversed on other grounds, C.C.A., Litton v. Pepper, 100 F.2d 830, reversed on other grounds 60 S.Ct. 238, 306 U.S. 295, 84 L.Ed. 281—In re American Fidelity Corporation, D.C.Cal., 28 F. Supp. 462.

Ark.—Taylor v. Bay St. Francis Drainage Dist., 284 S.W. 770, 171 Ark. 285—Axley v. Hammock, 50 S.W.2d 608, 185 Ark. 939.

Cal.—**Corpus Juris cited in** Casner v. San Diego Trust & Savings Bank, 94 P.2d 65, 76, 34 Cal.App.2d 524.

Idaho.—**Corpus Juris cited in** Union Central Life Ins. Co. v. Albrethsen, 294 P. 842, 846, 50 Idaho 196.

Ill.—Herb v. Pitcairn, 51 N.E.2d 277, 384 Ill. 237, reversed on other grounds 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L.Ed. 2005, opinion supplemented 64 N. E.2d 318, 392 Ill. 151.

Iowa.—Stier v. Iowa State Traveling Men's Ass'n, 201 N.W. 328, 199 Iowa 118, 59 A.L.R. 1384.

Ky.—Hill v. Hill, 185 S.W.2d 245, 299 Ky. 351—Hill v. Walker, 180 S.W. 2d 93, 297 Ky. 257, 154 A.L.R. 814—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658.

La.—Ludeau v. Jacob, 185 So. 458, 191 La. 427.

Mo.—Coombs v. Benz, 114 S.W.2d 713, 232 Mo.App. 1011.

Neb.—Sedlak v. Duda, 13 N.W.2d 892, 144 Neb. 567, 154 A.L.R. 490—Hassett v. Durbin, 271 N.W. 867, 132 Neb. 315.

N.C.—Moore v. Moore, 31 S.E.2d 690, 224 N.C. 552—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.

N.D.—State v. Board of Com'rs of City of Fargo, 246 N.W. 243, 63 N. D. 85.

Okl.—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247.

Tex.—Dollert v. Pratt-Hewit Oil Corporation, Civ.App., 179 S.W.2d 346, error refused, certiorari denied 65 S.Ct. 713, 324 U.S. 853, 89 L.Ed. 1412, rehearing denied 65 S.Ct. 912, 324 U.S. 889, 89 L.Ed. 1437—Commander v. Bryan, Civ.App., 123 S. W.2d 1008.

Utah.—**Corpus Juris quoted in** State v. Lee Lim, 7 P.2d 825, 827, 79 Utah 68.

34 C.J. p 509 note 14.

At all times

Judgment which is absolutely void is at all times a nullity.—Fowler v. Fowler, 130 S.E. 315, 190 N.C. 536.

For all purposes

A void judgment is a nullity for all purposes.—Texas Pacific Coal & Oil Co. v. Ames, Tex.Civ.App., 284 S. W. 315, reversed on other grounds, Com.App., 292 S.W. 191.

A void judgment of an appellate court has no more validity than a void judgment of any other court.—Faris v. City of Caruthersville, 162 S.W.2d 237, 349 Mo. 454—Ralph v. Annuity Realty Co., 28 S.W.2d 662, 325 Mo. 410.

56. Ark.—Taylor v. Bay St. Francis Drainage Dist., 284 S.W. 770, 171 Ark. 285.

Tex.—Commander v. Bryan, Civ.App., 123 S.W.2d 1008.

34 C.J. p 509 note 14.

As though no judgment entered

A void judgment leaves the parties in the same position as though no judgment had been entered.—Hill v. Hill, 185 S.W.2d 245, 299 Ky. 351.

Basis or evidence of right

An absolutely void judgment is a nullity, can be neither a basis for, nor evidence of, any right whatever, and may be attacked anywhere, directly or collaterally, by parties or strangers.—In re American Fidelity Corporation, D.C.Cal., 28 F.Supp. 462.

57. Ark.—Axley v. Hammock, 50 S. W.2d 608, 185 Ark. 939.

Idaho.—**Corpus Juris cited in** Union Central Life Ins. Co. v. Albrethsen, 294 P. 842, 846, 50 Idaho 196.

Neb.—Sedlak v. Duda, 13 N.W.2d 892, 144 Neb. 567, 154 A.L.R. 490—Hassett v. Durbin, 271 N.W. 867, 132 Neb. 315.

Tex.—Commander v. Bryan, Civ.App., 123 S.W.2d 1008.

34 C.J. p 509 note 14.

Only by proceedings which directly bind a judicial tribunal or judge thereof may the parties to a controversy pending before such tribunal or judge become bound.—Newport v. Culbreath, 162 So. 340, 120 Fla. 152.

58. Neb.—Sedlak v. Duda, 13 N.W.2d 892, 144 Neb. 567, 154 A.L.R. 490. 34 C.J. p 509 note 14.

59. Idaho.—**Corpus Juris cited in** Union Central Life Ins. Co. v. Albrethsen, 294 P. 842, 846, 50 Idaho 196.

Neb.—Sedlak v. Duda, 13 N.W.2d 892, 144 Neb. 567, 154 A.L.R. 490. 34 C.J. p 509 note 14.

60. Idaho.—**Corpus Juris cited in** Union Central Life Ins. Co. v. Albrethsen, 294 P. 842, 846, 50 Idaho 196.

Mo.—Coombs v. Benz, 114 S.W.2d 713, 232 Mo.App. 1011.

Neb.—Sedlak v. Duda, 13 N.W.2d 892, 144 Neb. 567, 154 A.L.R. 490.

Tex.—Dollert v. Pratt-Hewit Oil Corporation, Civ.App., 179 S.W.2d 346, error refused, certiorari denied 65 S.Ct. 713, 324 U.S. 853, 89 L.Ed. 1412, rehearing denied 65 S.Ct. 912, 324 U.S. 889, 89 L.Ed. 1437.

34 C.J. p 509 note 14.

61. U.S.—**Corpus Juris cited in** Kelleam v. Maryland Casualty Co. of Baltimore, C.C.A.Okl., 112 F.2d 940, 944, reversed on other grounds 61 S.Ct. 595, 312 U.S. 377, 85 L.Ed. 899.

Ky.—Hill v. Walker, 180 S.W.2d 93, 297 Ky. 257, 154 A.L.R. 814.

Mo.—Coombs v. Benz, 114 S.W.2d 713, 232 Mo.App. 1011.

Neb.—Sedlak v. Duda, 13 N.W.2d 892, 144 Neb. 567, 154 A.L.R. 567.

N.Y.—Mirsky v. Mirsky, 35 N.Y.S.2d 858.

N.C.—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465.

Tex.—Dollert v. Pratt-Hewit Oil Corporation, Civ.App., 179 S.W.2d 346, error refused, certiorari denied 65 S.Ct. 713, 324 U.S. 853, 89 L.Ed. 1412, rehearing denied 65 S.Ct. 912, 324 U.S. 889, 89 L.Ed. 1437—Commander v. Bryan, Civ.App., 123 S. W.2d 1008.

34 C.J. p 510 note 16.

Trespassers

Parties attempting to enforce a void judgment are trespassers.—Le Clair v. Calls Him, 233 P. 1087, 106 Okl. 247.

Title of one claiming through void judgment fails with failing of such judgment.—San Lorenzo Title & Improvement Co. v. City Mortg. Co., Civ.App., 48 S.W.2d 310, affirmed 73 S.W.2d 513, 124 Tex. 513, followed in San Lorenzo Title & Improvement Co. v. Clardy, 73 S.W.2d 516, 124 Tex. 31, and San Lorenzo Title & Improvement Co. v. Caples, 73 S.W.2d 516, 124 Tex. 33.

Collateral or subsequent proceeding dependent on validity of a void judgment may be vacated on proper motion by person affected thereby.—Hinkle v. Jones, 66 P.2d 1073, 180 Okl. 17.

ance of the action.[62] Such a judgment may be attacked at any time by anyone,[63] including the party in whose favor it is given,[64] and may be impeached in any action, direct or collateral.[65] It is not necessary to take any steps to vacate or avoid a void judgment; it may simply be ignored.[66] A valid judgment may be entered subsequently in disregard of the void judgment.[67]

Voidable judgments. As discussed supra § 191, where the court has jurisdiction of the parties, of the subject matter or cause of action, and of the question determined or relief granted, that is, where the court has jurisdiction to render the particular judgment, mere errors or irregularities in the exercise of the jurisdiction, although sufficient to render the judgment erroneous, and subject to be reversed or set aside in a proper proceeding for that purpose, do not render the judgment void, and until so set aside it is valid and binding for all purposes.[68] Until set aside in a proper proceeding for that purpose, a voidable judgment has the same force and effect as though no error had been committed;[69] it will support proceedings taken under

62. Tex.—Isbill v. Stovall, Civ.App., 92 S.W.2d 1067.
Utah.—**Corpus Juris quoted in** State v. Lee Lim, 7 P.2d 825, 827, 79 Utah 68.
34 C.J. p 510 note 17.
Decision under advisement
Where a trial judge takes a case under advisement and thereafter purports to render a judgment which is void, the status of the cause remains as one continuing to be held under advisement and not yet decided or determined.—City of Clinton ex rel. Richardson v. Keen, 138 P.2d 104, 192 Okl. 382.

63. La.—Ludeau v. Jacob, 185 So. 458, 191 La. 427.
N.C.—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465.
Okl.—Lehman v. Tucker, 55 P.2d 62, 176 Okl. 286.
Tex.—Cheney v. Norton, Civ.App., 126 S.W.2d 1011, reversed on other grounds Norton v. Cheney, 161 S.W.2d 73, 138 Tex. 622.
Enforcement of void judgment may be enjoined
U.S.—North Pacific S. S. Co. v. Industrial Accident Commission, D. C.Cal., 23 F.2d 109.

64. La.—May v. Ball, 12 La.Ann. 416.
Utah.—**Corpus Juris quoted in** State v. Lee Lim, 7 P.2d 825, 827, 79 Utah 68.

65. Neb.—Drainage Dist. No. 1 v. Village of Hershey, 296 N.W. 879, 139 Neb. 205—Hassett v. Durbin, 271 N.W. 867, 132 Neb. 815.
N.C.—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465.
Tex.—Cheney v. Norton, Civ.App., 126 S.W.2d 1011, reversed on other grounds Norton v. Cheney, 161 S.W.2d 73, 138 Tex. 622.
Collateral attack see supra § 401 et seq.
Opening or vacating judgment see supra § 267.

66. Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County, 167 P.2d 648.
N.C.—Casey v. Barker, 14 S.E.2d 429, 219 N.C. 465.
Tex.—Cheney v. Norton, Civ.App., 126 S.W.2d 1011, reversed on other grounds Norton v. Cheney, 161 S.W.2d 73, 138 Tex. 622.
34 C.J. p 510 note 19.
Defendant need not take advantage of any particular legal remedy at risk of being precluded from attacking void judgment in habeas corpus proceeding.—State v. Branaman, 183 N.E. 653, 204 Ind. 238.

67. Utah.—First Nat. Bank v. Boley, 61 P.2d 621, 90 Utah 341, followed in Boley v. District Court of Second Judicial Dist. in and for Morgan County, 61 P.2d 624, 90 Utah 347—**Corpus Juris quoted in** State v. Lee Lim, 7 P.2d 825, 827, 79 Utah 68.
Wash.—Morrison v. Berlin, 79 P. 1114, 37 Wash. 600.

68. U.S.—Spencer v. Gypsy Oil Co., C.C.A.Okl., .142 F.2d 935, certiorari denied 65 S.Ct. 439, 323 U.S. 798, 89 L.Ed. 636—McIntosh v. Wiggins, C.C.A.Mo., 123 F.2d 316, certiorari denied 62 S.Ct. 800, 315 U.S. 815, 86 L.Ed. 1213, rehearing denied 62 S.Ct. 914, 315 U.S. 831, 86 L.Ed. 1224.
Ala.—Farrell v. Farrell, 10 So.2d 153, 243 Ala. 389.
Ark.—Kirchoff v. Wilcox, 36 S.W.2d 667, 183 Ark. 460.
Cal.—Wells Fargo & Co. v. City and County of San Francisco, 152 P. 2d 625, 25 Cal.2d 37—Gray v. Hall, 265 P. 246, 203 Cal. 306—Hogan v. Horsfall, 266 P. 1002, 91 Cal.App. 37, followed in 266 P. 1005, 91 Cal. App. 797.
D.C.—Swofford v. International Mercantile Marine Co., 113 F.2d 179, 72 App.D.C. 225.
Fla.—State ex rel. Fulton Bag & Cotton Mills v. Burnside, 15 So.2d 324, 153 Fla. 599—Malone v. Meres, 109 So. 677, 91 Fla. 709.
Ga.—Pope v. Shipp, 144 S.E. 345, 38 Ga.App. 483.
Ill.—Chicago Title & Trust Co. v. Mack, 180 N.E. 412, 347 Ill. 480—Petition of Volpe, 66 N.E.2d 146, 328 Ill.App. 311—Hampton v. Grissom, 4 N.E.2d 895, 287 Ill.App. 294.
Iowa.—Hansen v. McCoy & McCoy, 266 N.W. 1, 221 Iowa 523—Harris v. Randolph, 236 N.W. 51, 213 Iowa 772.
Ky.—Pruett v. Pruett's Adm'x, 192 S. W.2d 722, 301 Ky. 568.
Me.—Mitchell v. Mitchell, 11 A.2d 898, 136 Me. 406.
Miss.—Todd v. Todd, 20 So.2d 827, 197 Miss. 819.
Mo.—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 328 Mo. 782, 78 A.L.R. 930—Dickey v. Dickey, App., 132 S.W. 2d 1026.
N.M.—In re Field's Estate, 60 P.2d 945, 40 N.M. 423.
Okl.—Mid-Continent Pipe Line Co. v. Seminole County Excise Board, 146 P.2d 996, 194 Okl. 40.
S.C.—Cathcart v. Jennings, 135 S.E. 558, 137 S.C. 450.
Tex.—Easterline v. Bean, 49 S.W.2d 427, 121 Tex. 327—Bearden v. Texas Co., Com.App., 60 S.W.2d 1031—Stewart Oil Co. v. Lee, Civ.App., 173 S.W.2d 791, error refused—Wright v. Shipman, Civ.App., 279 S.W. 296.
Utah.—Plutus Mining Co. v. Orme, 289 P. 132, 76 Utah 286.
Vt.—Santerre v. Sylvester, 189 A. 159, 108 Vt. 435.
Va.—Mayes v. Mann, 180 S.E. 425, 164 Va. 584.
Wash.—Thomas v. Phelan, 289 P. 51, 157 Wash. 471.
34 C.J. p 508 note 7.
A court may misconstrue, misapply, or disobey the law, in pronouncing judgment; yet so long as its judgment remains unreversed, it unalterably binds the parties.—Epstein v. Bendersky, 21 A.2d 815, 130 N. J.Eq. 180.
Judgments of courts of general jurisdiction are never mere nullities.—Malone v. Meres, 109 So. 677, 91 Fla. 709.

69. U.S.—Liken v. Shaffer, D.C.Iowa, 64 F.Supp. 432.
Miss.—Todd v. Todd, 20 So.2d 827, 197 Miss. 819.
N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.
N.C.—Ex parte Steele, 18 S.E.2d 132, 220 N.C. 685, certiorari denied Steele v. State of North Carolina, 62 S.Ct. 1275, 316 U.S. 686, 86 L.Ed. 1758.

it,[70] and, as discussed supra §§ 428–433, it is not subject to collateral attack.

§ 450. —— Partial Invalidity

A judgment is wholly void where it is void in part and the part which is void is not separable, but it is generally held that the fact that a judgment is void in part will not invalidate a separable remainder of the judgment.

A judgment is wholly void where it is void in part and the part which is void is not separable and divisible from the balance.[71] It has been said that a judgment must be either valid or void as a whole,[72] and that a judgment cannot be bad in part and good in part, but is wholly void if void in part.[73] On the other hand, it has generally been held that a judgment may be valid in part and void in part[74] where the parts which are valid and void are separable;[75] the fact that part of the judgment is void does not necessarily invalidate the entire judgment,[76] nor does the fact that part of the judgment is valid validate the portion of the judgment that is void.[77] The court may treat the void part of the judgment as erroneous surplusage which may be disregarded, leaving the remainder of the judgment standing.[78] Where a judgment declares a personal liability, and also determines rights in property, the judgment may be good as a personal judgment, although bad in so far as it affects the property,[79] or it may be good as to the property involved and void as a personal judgment.[80] As to jurisdiction of the subject matter, it seems that, al-

Ohio.—Frankenstein v. Behrendt, 21 N.E.2d 678, 60 Ohio App. 403.
34 C.J. p 509 note 8.

70. U.S.—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, 102 A. L.R. 688, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001.
Okl.—Griggs v. Brandon, 269 P. 1052, 132 Okl. 180.
34 C.J. p 509 note 9.

71. Cal.—Capital Bond & Investment Co. v. Hood, 24 P.2d 765, 218 Cal. 729—Reichert v. Rabun, 265 P. 260, 89 Cal.App. 375.
Okl.—Central Nat. Oil Co. v. Continental Supply Co., 249 P. 347, 119 Okl. 190.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1—Taylor v. Dinsmore, Civ.App., 114 S.W.2d 269, error dismissed.

72. Me.—Consolidated Rendering Co. v. Martin, 145 A. 896, 128 Me. 96, 64 A.L.R. 790.
34 C.J. p 510 note 24.
Entirety of judgments see supra § 3.

73. Me.—Consolidated Rendering Co. v. Martin, supra.
33 C.J. p 1051 note 26.

74. U.S.—In re Denney, 47 F.Supp. 36, affirmed, C.C.A., 135 F.2d 184, certiorari denied Denney v. Fort Recovery Banking Co., 64 S.Ct. 50, 320 U.S. 747, 88 L.Ed. 444, rehearing denied 64 S.Ct. 155, 320 U.S. 812, 88 L.Ed. 491.
Colo.—French v. Commercial Credit Co., 64 P.2d 127, 99 Colo. 447.
Kan.—Hoover v. Roberts, 74 P.2d 152, 146 Kan. 785, 115 A.L.R. 182.
Md.—**Corpus Juris cited in** Spencer v. Franks, 195 A. 306, 173 Md. 73, 114 A.L.R. 263.
Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County, 167 P.2d 648.
N.C.—Lane v. Becton, 35 S.E.2d 334, 225 N.C. 457.
Tex.—Bevill v. Young, Civ.App., 167 S.W.2d 573, error refused—Johnson v. Stalcup, Civ.App., 74 S.W. 2d 751—Patton v. Mitchell, Civ. App., 13 S.W.2d 146—Automobile Finance Co. v. Bryan, Civ.App., 3 S.W.2d 835.
33 C.J. p 1052 note 27.

75. Idaho.—Angel v. Mellen, 285 P. 461, 48 Idaho 750.
Ill.—**Corpus Juris cited in** People v. Skarbaro, 54 N.E.2d 559, 563, 386 Ill. 581.
Md.—**Corpus Juris cited in** Spencer v. Franks, 195 A. 306, 309, 173 Md. 73, 114 A.L.R. 263.
Tex.—Kubena v. Hatch, 193 S.W.2d 175—Missouri-Kansas-Texas R. Co. of Texas v. Pluto, 156 S.W.2d 265, 138 Tex. 1—Taylor v. Dinsmore, Civ.App., 114 S.W.2d 269, error refused.
33 C.J. p 1052 note 28.

Independent and separable questions or matters

A judgment or decree including a decision of an independent and separable subject matter or question within, and an independent and separable subject matter or question beyond, court's jurisdiction, is not void in toto, but is valid as to decision of matter within court's jurisdiction, and a mere nullity as to other matter.—Joseph v. Coffey, 85 P.2d 425, 184 Okl. 143—Askin v. Taylor-Skinner Pub. Co., 56 P.2d 379, 176 Okl. 438—In re Jackson's Estate, 245 P. 874, 117 Okl. 115.

76. Ariz.—Western Land & Cattle Co. v. National Bank of Arizona at Phœnix, 239 P. 399, 29 Ariz. 51.
Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.
Okl.—In re Jackson's Estate, 245 P. 874, 117 Okl. 151.
Va.—Barnes v. American Fertilizer Co., 130 S.E. 902, 144 Va. 692.
Wis.—State ex rel. Long v. Civil Court of Milwaukee County, 280 N.W. 347, 228 Wis. 411.

77. Colo.—French v. Commercial Credit Co., 64 P.2d 127, 99 Colo. 447.

Affirmative action required

"Where a part of a judgment is valid, it will stand unless proper steps have been taken by objection, duly presented to the trial court, to secure a modification or amendment by amending or rejecting the part which is wrong."—Fisher v. Rosander, 151 N.E. 12, 13, 84 Ind.App. 694.

Part of judgment that is beyond court's jurisdiction is void.
Mo.—State ex rel. Riggs v. Seehorn, 125 S.W.2d 851, 344 Mo. 186.
Wis.—State ex rel. Lang v. Civil Court of Milwaukee County, 280 N.W. 347, 228 Wis. 411.

The invalid divisible part may be treated as a nullity.—Lane v. Becton, 35 S.E.2d 334, 225 N.C. 457.

78. Colo.—French v. Commercial Credit Co., 64 P.2d 127, 99 Colo. 447.
Kan.—First Colored Baptist Church v. Caldwell, 30 P.2d 144, 139 Kan. 45.
N.C.—Keen v. Parker, 8 S.E.2d 209, 217 N.C. 378.
33 C.J. p 1052 note 31.

Adoption decree

The invalidity of provision in adoption decree giving leave to natural parents occasionally to see child did not invalidate rest of decree.—Spencer v. Franks, 195 A. 306, 173 Md. 73, 114 A.L.R. 263.

79. Tex.—Seguin v. Maverick, 24 Tex. 526, 76 Am.D. 117.
33 C.J. p 1052 note 29.

80. Ga.—Chastain v. Alford, 20 S.E. 2d 150, 67 Ga.App. 316.
Tex.—Reitz v. Mitchell, Civ.App., 258 S.W. 697.
33 C.J. p 1052 note 30.

though the judgment may go beyond the issues and grant relief not asked for, or not within the competence of the court, yet it may be good for as much as the court had power and authority to include in it.[81] It has been held that a judgment in excess of the relief authorized is void only as to the excess.[82] The validity of a judgment which is void as to some of the parties is discussed supra §§ 31, 33.

§ 451. —— Validating Void Judgment

Generally, a void judgment cannot be validated and made operative, even by legislative or judicial action.

It has been held that the validity of a judgment is to be determined as of the date of its rendition, and, if void then, it remains so forever;[83] it is not validated and made operative by the lapse of time,[84] by subsequent proceedings based on the judgment,[85] by afterward supplying the elements which were lacking to its validity,[86] or by resulting equities in favor of third persons.[87] A void judgment cannot be made valid and operative by judicial action,[88] such as its subsequent approval by the judge,[89] by his approval of a sale on execution held under it,[90] by a subsequent proceeding instituted for that purpose,[91] by citing the party against whom it was entered to show cause why it should not be declared valid,[92] by a revival of the judgment,[93] or

81. Cal.—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.

Idaho.—**Corpus Juris quoted in** Bean v. State, 79 P.2d 540, 542, 58 Idaho 797.

Ky.—**Corpus Juris cited in** Wayman v. North Kentucky Fair, 162 S.W. 2d 226, 229, 290 Ky. 652.

Neb.—State ex rel. Nebraska State Bar Ass'n v. Merten, 7 N.W.2d 874, 142 Neb. 780.

Okl.—**Corpus Juris quoted in** Fluke v. Douglas, 13 P.2d 210, 213, 158 Okl. 300—Arnold v. Willis, 232 P. 15, 105 Okl. 172.

34 C.J. p 510 note 27.

Construction and reformation of will

Portion of judgment which construed will was valid, although portion which reformed will was void as beyond court's jurisdiction.—Hoover v. Roberts, 74 P.2d 152, 146 Kan. 785, 115 A.L.R. 182.

Receivership

The court having jurisdiction to appoint a receiver for a corporation and place its assets in his hands and order sale thereof by him, as was done, such part of the proceedings were not invalidated by any invalidity in the part of the judgment dissolving the corporation, as being beyond the court's power under the pleadings and facts.—Yount v. Fagin, Tex.Civ.App., 244 S.W. 1036, motion denied 289 S.W. 187.

Personal judgment

As much of a judgment of separation against a nonresident served by publication as decrees that, on personal notice to defendant or on such notice as the court shall direct, plaintiff may apply for her alimony and expenses payable out of his real and personal property within the state, must be reversed where no jurisdiction of the property was obtained by seizure before judgment and the portion of the decree appointing a receiver of such property and giving directions to him falls with it.—Matthews v. Matthews, 159 N.E. 713, 247 N.Y. 32.

82. Tenn.—Gaylor v. Miller, 59 S.W. 2d 502, 166 Tenn. 45.

Tex.—State Mortg. Corporation v. Ludwig, 48 S.W.2d 950, 121 Tex. 268.

Attorney's fees

Judgment on note separately stating amounts for principal, interest, and attorney's fees was not rendered entirely void by improper inclusion of fees.—Fowler v. Bank of Commerce, 143 S.E. 512, 38 Ga.App. 226—Henderson v. Ellarbee, 131 S.E. 524, 35 Ga.App. 5.

Costs

Where cost bill was not filed in time, inclusion in judgment of amount claimed in bill rendered judgment to that extent contrary to law.—Openshaw v. Openshaw, 12 P. 2d 364, 80 Utah 9.

Interest

The entry of judgment by confession in the amount confessed, plus interest from date of note set forth in statement, was unauthorized, but invalidated judgment only to the extent of the amount of interest included.—Keller v. Greenstone, 2 N. Y.S.2d 977, 253 App.Div. 573.

Rescission

Judgment granting rescission and other relief entered on vendor's petition seeking rescission of conveyance is not void as to rescission because petition does not support other relief granted.—Albright v. Collins, Civ.App., 64 S.W.2d 1096, reversed on other grounds Empire Gas & Fuel Co. v. Albright, 87 S.W. 2d 1092, 126 Tex. 485.

83. Vt.—In re Hanrahan's Will, 194 A. 471, 109 Vt. 108.

84. Ala.—Anthony v. Anthony, 128 So. 440, 221 Ala. 221.

Nev.—State ex rel. Smith v. Sixth Judicial Dist. Court, Humboldt County, 167 P.2d 648.

N.C.—City of Monroe v. Niven, 20 S.E.2d 311, 221 N.C. 362.

N.D.—Baird v. Ellison, 293 N.W. 794, 70 N.D. 261.

Pa.—Clineff v. Rubash, 190 A. 543, 126 Pa.Super. 82.

Tex.—Commander v. Bryan, Civ.App., 123 S.W.2d 1008.

85. Ga.—Langston v. Nash, 15 S.E. 2d 481, 192 Ga. 427.

The issuance of execution on void judgment will not give vitality to such judgment.—Winn v. Armour & Co., 193 S.E. 447, 184 Ga. 769.

Sale

Personal judgment wanting in jurisdiction cannot be validated by fact that there has been sale under it.—Wise v. Miller, 111 So. 913, 215 Ala. 660.

86. Iowa.—Hodson v. Tibbetts, 16 Iowa 97.

Mo.—Robinson v. Rinehart, App., 297 S.W. 439.

87. Mont.—Scilley v. Red Lodge-Rosebud Irr. Dist., 272 P. 543, 83 Mont. 282.

88. Ind.—Zaring v. Zaring, 39 N.E. 2d 734, 219 Ind. 514.

Tex.—Commander v. Bryan, Civ.App., 123 S.W.2d 1008.

A judgment based on a void judgment is valueless.—Walton v. Albers, 40 N.E.2d 99, 313 Ill.App. 304, reversed on other grounds 44 N.E.2d 145, 380 Ill. 423.

89. Iowa.—Townsley v. Morehead, 9 Iowa 565.

90. Or.—Willamette Real Estate Co. v. Hendrix, 42 P. 514, 28 Or. 485, 52 Am.S.R. 800.

91. Idaho.—Ray v. Ray, 1 Idaho 566.

Ky.—Hill v. Hill, 185 S.W.2d 245, 298 Ky. 351.

92. Minn.—Jewett v. Iowa Land Co., 67 N.W. 639, 64 Minn. 531, 58 Am. S.R. 555.

93. S.C.—Woods v. Bryan, 19 S.E. 218, 41 S.C. 74, 44 Am.S.R. 688.

34 C.J. p 510 note 33.

by the taking of an appeal from it, or even by an affirmance on appeal.[94] A void judgment cannot be cured and validated by a subsequent legislative enactment.[95]

§ 452. —— Ratification and Estoppel

While a void judgment cannot be validated by consent, ratification, waiver, or estoppel, one may, by his conduct, bar or estop himself from attacking the judgment.

Generally, a void judgment cannot be made valid by ratification, waiver, consent, or estoppel.[96] However, one may by his conduct bar or estop himself from attacking a void judgment,[97] and, as discussed infra § 453, one who accepts or shares in the benefits of a void judgment may be estopped from attacking it. One is estopped to attack as void a judgment which he has set up as a bar or defense to a subsequent action.[98] He is also estopped by a compromise and satisfaction of his liability under the judgment.[99] It has been held that one who makes payments on a judgment with knowledge of its defects cannot attack the judgment.[1]

It has generally been held that one who with full knowledge of the facts and after legal notice fails to interpose timely objection to the rendition of a judgment affecting his rights adversely will be held to have acquiesced therein and to have waived any right to object thereto unless the judgment is void or the circumstances show fraud, mistake, duress, or coercion.[2] Mere acquiescence in a judgment does not necessarily constitute a ratification thereof,[3] and still less can this result follow where the party affected moves to set it aside or moves for a new trial.[4]

Where a judgment is entered by mutual consent,

94. Okl.—O. C. Whitaker, Inc., v. Dillingham, 152 P.2d 371, 194 Okl. 421.
34 C.J. p 510 note 34.

Judgment of affirmance is void where judgment appealed from is void.
Mo.—State ex rel. Aquamsi Land Co. v. Hostetter, 79 S.W.2d 463, 336 Mo. 391.
Tex.—"56" Petroleum Corporation v. Rodden, Civ.App., 139 S.W.2d 218.

95. Mont.—Sciley v. Red Lodge-Rosebud Irr. Dist., 272 P. 543, 83 Mont. 282.
Tex.—Engelman v. Anderson, Civ. App., 244 S.W. 650.
34 C.J. p 510 note 36.

Although there is no "vested right" in procedure, neither can a procedural change operate to confer jurisdiction as of time of commencement of an action where cause of action has ripened into a judgment. —Prey v. Allard, 300 N.W. 13, 239 Wis. 151.

96. Del.—City Loan System of Delaware v. Nordquist, 165 A. 341, 5 W.W.Harr. 371.
Ill.—Herb v. Pitcairn, 51 N.E.2d 277, 384 Ill. 237, reversed on other grounds 65 S.Ct. 954, 325 U.S. 77, 89 L.Ed. 1483, rehearing denied 65 S.Ct. 1188, 325 U.S. 893, 89 L. Ed. 2005, opinion supplemented 64 N.E.2d 318, 392 Ill. 151.
Kan.—Taylor v. Focks Drilling & Manufacturing Corporation, 62 P.2d 903, 144 Kan. 626.
Tex.—Easterline v. Bean, 49 S.W.2d 427, 121 Tex. 327—Commander v. Bryan, Civ.App., 123 S.W.2d 1008.
Va.—Beck v. Semones' Adm'r, 134 S.E. 677, 145 Va. 429—Staunton Perpetual Building & Loan Co. v. Haden, 23 S.E. 285, 92 Va. 201.
34 C.J. p 510 note 38.

Appearance as curing lack of process
(1) A general appearance to move to vacate a void judgment does not validate a judgment rendered without service of process.—City of Monroe v. Niven, 20 S.E.2d 311, 221 N. C. 362.

(2) Nonresident judgment debtors' ratification of levy and sale of their personalty to satisfy judgment cured jurisdictional defect in judgment arising out of lack of personal service of summons on debtors in the state or their personal appearance, and rendered valid the lien on the personalty created by the levy.—McDougald v. Swift & Co., 194 S.E. 899, 185 S.C. 537.

Negligence
Parties cannot by any acts, however negligent, lose right to assail void judgment.—White v. Hidalgo County Water Improvement Dist. No. 2, Tex.Civ.App., 6 S.W.2d 790.

Ratification of unauthorized appearance
Although an unauthorized appearance will not confer jurisdiction over a nonresident defendant so as to make the judgment of the court binding on him, the unauthorized act may be affirmed and ratified so as to validate that which would otherwise be a void judgment.—Lafetra v. Beveridge, 1 A.2d 68, 124 N.J.Eq. 184.

97. Del.—City Loan System of Delaware v. Nordquist, 165 A. 341, 5 W.W.Harr. 371.
Miss.—Peeler v. Peeler, 24 So.2d 338.
Vt.—In re Hanrahan's Will, 194 A. 471, 109 Vt. 108.
Va.—Eubank & Caldwell v. Fuller, 158 S.E. 884, 156 Va. 635.
34 C.J. p 510 note 39.

Compliance with order
Supervisor of permits failing to appeal from order directing temporary permit and complying with order by issuing permit could not thereafter question jurisdiction to make order.—Wynne v. Superior Mfg Co., C.C.A.N.J., 54 F.2d 270.

Delay in attacking judgment
Where no application for reargument or review of water appropriation rights decree had been made within two years, and no suit to set aside decree had been brought within four years after rendition, subsequent collateral attack even on jurisdictional grounds will not be considered except for fraud.—Hinderlider v. Town of Berthoud, 238 P. 64, 77 Colo. 504.

98. Mo.—Kennedy v. Bambrick, 20 Mo.App. 630.
34 C.J. p 511 note 41.

Where the judgment is voidable, defendant's right to attack it is waived by pleading it in bar of an action on the original demand.—Henderson v. Staniford, 105 Mass. 504, 7 Am.R. 551.

99. Ala.—Standifer v. McWhorter, 1 Stew. 532.
Or.—Handley v. Jackson, 50 P. 915, 31 Or. 552, 65 Am.S.R. 839.

1. La.—Fullilove v. Central State Bank, 107 So. 590, 160 La. 831.

2. Md.—Moss v. Annapolis Sav. Inst., 8 A.2d 881, 177 Md. 135.

3. Tex.—Sneed v. Townsend, 2 Tex. Unrep.Cas. 350.
34 C.J. p 511 note 44.

4. Minn.—Roberts v. Chicago, St. P., M. & O. R. Co., 51 N.W. 478, 48 Minn. 521.
Tex.—Martin v. Cobb, 14 S.W. 162, 77 Tex. 544.

it may have validity as a contract, even though it is void as a judgment.[5]

§ 453. Acceptance by Prevailing Party of Part of Judgment

One may not attack a judgment as void where he has accepted the benefits of the judgment.

It has been held that a party is barred or estopped from attacking a judgment as void where he accepts or shares in the fruits or benefits of the judgment.[6] A party who successfully opposes an objection made by the adverse party that the court has no jurisdiction cannot question the jurisdiction after an adverse decision on appeal.[7]

XIV. LIEN OF JUDGMENT

§ 454. In General

A judgment lien on real property does not exist at common law and is a creature of statute.

At common law, in accordance with the policy of the feudal law introduced into England after the conquest,[8] the lands of a debtor were not liable to the satisfaction of a judgment against him, except for debts due the king,[9] and consequently no lien thereon is acquired under a judgment.[10] In England this common-law rule continued in force until the passage in 1285 of the Statute of Westminster II (13 Edward I), by which, in the interest of trade and commerce, the writ of elegit was for the first time provided for,[11] and by construction of the courts it was held under this act that the judgment was a lien on such lands from the date of its rendition on the first day of the term of the court at which it was rendered.[12] As a result of this act,[13] and also in some states as a result of the act of parliament of 5 George II c 7, subjecting lands in the colonies to execution as chattels in favor of British merchants,[14] the modern judgment lien has been developed, the Statute of Westminster having been substantially adopted in several jurisdictions in the United States at an early date.[15]

The judgment lien as it exists to-day is a creature of statutes which in express terms or by necessary implication give judgments such effect,[16]

5. Ga.—Bedenbaugh v. Burgin, 28 S.E.2d 652, 197 Ga. 175.
34 C.J. p 510 note 15.

6. U.S.—Wilson v. Union Electric Light & Power Co., C.C.A.Mo., 59 F.2d 580.
Cal.—People v. Rio Nido Co., 85 P. 2d 461, 29 Cal.App.2d 486.
Colo.—Fort v. Bietsch, 274 P. 812, 85 Colo. 176.
Okl.—**Corpus Juris quoted in** Harden v. Harden, 77 P.2d 721, 728, 182 Okl. 384.
Tex.—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.
34 C.J. p 510 note 40.

Exercise of functions of judge under void judgment
In an action by removed county judge against a county judge on defendant's appointment to, and plaintiff's removal from, such office by a judgment of district court, subsequently reversed, defendant was estopped to deny validity of the judgment of district court, although the latter was without jurisdiction of the subject-matter, where that judgment was the source of authority under which defendant county judge executed the duties and enjoyed the benefits of that office.—Lowe v. Johnson, Tex.Civ.App., 259 S.W. 1004.

7. N.Y.—Griggs v. Brooks, 29 N.Y. S. 794, 79 Hun 394.

8. Mont.—McMillan v. Davenport, 118 P. 756, 44 Mont. 23, Ann.Cas. 1912D 984.
34 C.J. p 567 note 73.

9. Fla.—Protective Holding Corporation v. Cornwall Co., 173 So. 804, 127 Fla. 252.
34 C.J. p 568 note 74.

10. U.S.—U. S. v. Harpootlian, C.C.A.N.Y., 24 F.2d 646—In re Schuneman, C.C.A.Ill., 290 F. 200.
Cal.—Helvey v. Bank of America Nat. Trust & Savings Ass'n, 111 P.2d 390, 43 Cal.App.2d 532.
Fla.—Protective Holding Corporation v. Cornwall Co., 173 So. 804, 127 Fla. 252.
Idaho.—**Corpus Juris cited in** Platts v. Pacific Federal Savings & Loan Ass'n of Tacoma, 111 P.2d 1093, 1095, 62 Idaho 340.
Ill.—Johnson v. Zahn, 44 N.E.2d 15, 380 Ill. 320—Smith v. Toman, 14 N.E.2d 478, 368 Ill. 414, 118 A.L.R. 924—Holmes v. Fanyo, 63 N.E. 2d 627, 327 Ill.App. 1—Haugens v. Holmes, 41 N.E.2d 109, 314 Ill.App. 166.
N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234—Kaseman v. Mapel, 195 P. 799, 26 N.M. 639.
N.Y.—Grygorewiez v. Domestic and Foreign Discount Corporation, 40 N.Y.S.2d 676, 179 Misc. 1017—Niemi Bros. v. Rosenbluh, 263 N.Y.S. 445, 147 Misc. 159.
Okl.—Long Bell Lumber Co. v. Etter, 251 P. 997, 123 Okl. 54.
Tenn.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 30 S.W.2d 253, 161 Tenn. 298.
34 C.J. p 568 note 75.

11. N.Y.—Hulbert v. Hulbert, 111 N.E. 70, 216 N.Y. 430, L.R.A.1916D 661, Ann.Cas.1917D 180.
34 C.J. p 568 note 76.

12. Tenn.—Stahlman v. Watson, Ch. A., 39 S.W. 1055.
Commencement of lien of judgment in general see infra § 466.

13. Puerto Rico.—Hernández v. Medina, 19 Puerto Rico 84.

14. U.S.—Taylor v. Thomson's Lessee, D.C., 5 Pet. 358, 8 L.Ed. 154.
34 C.J. p 568 note 79.

15. U.S.—Burton v. Smith, Va., 13 Pet. 464, 10 L.Ed. 248.
34 C.J. p 568 note 80.

16. U.S.—**Corpus Juris cited in** Von Segerlund v. Dysart, C.C.A. Cal., 137 F.2d 755, 757—In re Michael, D.C.Pa., 31 F.Supp. 41, applying law of Ohio—In re Staples, D. C.Okl., 1 F.Supp. 620—In re Schuneman, C.C.A.Ill., 290 F. 200.
Ariz.—Tway v. Payne, 101 P.2d 455, 55 Ariz. 343.
Cal.—Evans v. Superior Court of Los Angeles County, 124 P.2d 820, 20 Cal.App.2d 186—Helvey v. Bank of America Nat. Trust & Savings Ass'n, 111 P.2d 390, 43 Cal.App.2d 532.
D.C.—Fidelity & Deposit Co. of Maryland v. McQuade, 123 F.2d 337, 74 App.D.C. 333.
Fla.—Protective Holding Corporation v. Cornwall Co., 173 So. 804, 127 Fla. 252—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
Idaho.—**Corpus Juris cited in** Platts v. Pacific First Federal Savings

and, in the absence of such a statute, a lien does not arise as the result of a judgment before an execution has been delivered to an officer authorized to execute it.[17] Accordingly, the terms and legal effect of the statute are controlling with respect to the existence of a judgment lien[18] and with respect to the rights of the judgment creditor under such a lien.[19] Generally speaking, a statute making provision for a judgment lien is construed strictly.[20]

§ 455. Nature of Lien

The lien of a judgment does not constitute or create an estate, interest, or right of property in real property subject to the lien; usually the lien is not a lien on specific real property of the judgment debtor, but is a general lien on all his real property.

It has been stated broadly that a judgment lien, which is a matter of public record, has always been regarded as the highest form of security to a creditor.[21] Usually, however, the lien of a judgment does not constitute or create an estate, interest, or right of property in the lands which may be bound for its satisfaction; it gives merely a right to levy on such lands to the exclusion of adverse interests subsequent to the judgment;[22] and the rule applies even where the judgment is declared a specific lien on a particular piece of property.[23] In the absence of statutory provision to the contrary, until the real property subject to the lien is actually seized,[24] or, in some jurisdictions, until sale under execution and execution of the deed pursuant thereto,[25] the judgment debtor may continue in undisturbed possession, with full power to use such real property, and he may sell or otherwise dispose of it.[26] The lien is not a conveyance within the meaning of the

& Loan Ass'n of Tacoma, 111 P.2d 1093, 1095, 62 Idaho 340.

Ill.—Johnson v. Zahn, 44 N.E.2d 15, 380 Ill. 320—Smith v. Toman, 14 N.E.2d 478, 368 Ill. 414, 118 A.L.R. 924—Holmes v. Fanyo, 63 N.E.2d 627, 327 Ill.App. 1—Haugens v. Holmes, 41 N.E.2d 109, 314 Ill. App. 166.

Ind.—Petrovitch v. Witholm, 152 N.E. 849, 85 Ind.App. 144.

Mo.—**Corpus Juris cited in** Hagemann v. Pinska, 37 S.W.2d 463, 465, 225 Mo.App. 521.

N.J.—McLaughlin v. Whaland, 13 A.2d 573, 127 N.J.Eq. 393.

N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234—Kaseman v. Maple, 195 P. 799, 26 N.M. 639.

N.Y.—H. R. & C. Co. v. Smith, 151 N.E. 448, 242 N.Y. 267, 45 A.L.R. 554—Grygorewicz v. Domestic and Foreign Discount Corporation, 40 N.Y.S.2d 676, 179 Misc. 1017.

N.D.—Groth v. Ness, 260 N.W. 700, 65 N.D. 580.

Ohio.—Waldock v. Bedell, 18 N.E.2d 828, 59 Ohio App. 520.

Okl.—Long Bell Lumber Co. v. Etter, 251 P. 997, 123 Okl. 54.

Puerto Rico.—Fernandez v. Esmoris, 1 Puerto Rico Fed. 483.

Tenn.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 30 S.W.2d 253, 161 Tenn. 298.

Tex.—McGlothlin v. Coody, Com. App., 59 S.W.2d 819—Askey v. Power, Com.App., 36 S.W.2d 446—Womack v. Paris Grocer Co., Civ.App., 166 S.W.2d 366, error refused 168 S.W.2d 645, 140 Tex. 423—Cheatham v. Mann, Civ.App., 133 S.W.2d 264, error refused—Fordyce-Crossett Sales Co. v. Erwin, Civ.App., 121 S.W.2d 491—Chamlee v. Chamlee, Civ.App., 113 S.W.2d 290.

W.Va.—Robertson v. Campbell, 186 S.E. 310, 117 W.Va. 576.

34 C.J. p 568 note 81, p 569 notes 82, 84.

Lien of judgment of federal court in general see Federal Courts § 144 1.

17. U.S.—**Corpus Juris cited in** Von Segerlund v. Dysart, C.C.A. Cal., 137 F.2d 755, 757.

N.M.—**Corpus Juris cited in** Otero v. Dietz, 37 P.2d 1110, 1112, 39 N.M. 1.

34 C.J. p 569 note 83.

Lien of execution in general see Executions §§ 123–164.

Necessity of issue of execution to render lien operative in general see infra § 468.

18. U.S.—In re Schuneman, C.C.A. Ill., 290 F. 200.

Ariz.—Tway v. Payne, 101 P.2d 455, 55 Ariz. 343.

Fla.—Protective Holding Corporation v. Cornwall Co., 173 So. 804, 127 Fla. 252.

19. Ind.—Petrovich v. Witholm, 152 N.E. 849, 85 Ind.App. 144.

Md.—O'Neill & Co. v. Schulze, 7 A.2d 263, 177 Md. 64—Caltrider v. Caples, 153 A. 445, 160 Md. 392, 87 A.L.R. 1500.

20. Tenn.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 30 S.W.2d 253, 161 Tenn. 298.

21. Cal.—Corporation of America v. Marks, 73 P.2d 1215, 10 Cal.2d 218, 114 A.L.R. 1162—Morton v. Adams, 56 P. 1038, 124 Cal. 229, 71 Am. S.R. 53.

22. Ala.—Hargett v. Hovater, 15 So. 2d 276, 244 Ala. 646.

Fla.—**Corpus Juris cited in** Smith v. Pattishall, 176 So. 568, 574, 127 Fla. 474, 129 Fla. 498—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.

Ill.—Bednarczyk v. Kudla, 18 N.E. 2d 449, 370 Ill. 204, transferred, see 23 N.E.2d 199, 301 Ill.App. 610—Quell v. Jachino, 17 N.E.2d 256, 297 Ill.App. 650.

Md.—Lee v. Keech, 133 A. 835, 151 Md. 34, 46 A.L.R. 1488.

N.C.—Byrd v. Pilot Fire Ins. Co., 160 S.E. 458, 201 N.C. 407—Farrow v. American Eagle Fire Ins. Co. of New York, 134 S.E. 427, 192 N.C. 148—Eaton v. Doub, 128 S.E. 494, 190 N.C. 14, 40 A.L.R. 273.

Va.—**Corpus Juris quoted in** Jones v. Hall, 15 S.E.2d 108, 111, 177 Va. 658.

Wis.—**Corpus Juris quoted in** Musa v. Segelke & Kohlhaus Co., 272 N.W. 657, 658, 224 Wis. 432, 111 A.L.R. 168.

34 C.J. p 569 note 92.

Lands held jointly or as tenants in common

A person entitled to the benefit of a judgment lien does not acquire an estate in, or become a joint owner of, lands held by the judgment debtor and a third person as joint owners or tenants in common. —Hargett v. Hovater, 15 So.2d 276, 244 Ala. 646.

Rights of some description

Rights of some sort vest in judgment creditor when his judgment lien attaches to realty, legal title to which is in judgment debtor, since prima facie legal title is evidence of beneficial interest also until contrary is established.—Smith v. Pattishall, 176 So. 568, 127 Fla. 474, 129 Fla. 498.

23. N.C.—Farrow v. American Eagle Fire Ins. Co. of New York, 134 S.E. 427, 192 N.C. 148.

24. Va.—James v. Hall, 15 S.E.2d 108, 177 Va. 658.

25. U.S.—Newberry v. Davison Chemical Co., C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, 290 U.S. 660, 78 L.Ed. 571.

26. U.S.—Conard v. Atlantic Ins. Co., Pa., 1 Pet. 386, 7 L.Ed. 189.

recording acts,[27] but it is an encumbrance for certain purposes.[28]

A judgment lien ordinarily is not a specific lien on any specific real property of the judgment debtor, but it is a general lien on all his real property,[29] although it has been held that, where mortgaged premises have been sold under a judgment junior to the mortgage and the time for redemption has not expired, the general lien of the judgment is turned into a specific lien on the premises, to the extent of the amount of the bid at the sheriff's sale and the interest thereon.[30] It has also been held that in a scire facias against the heir and a terre-tenant, on a judgment against the ancestor, a judgment entered generally, without specifying the lands which it is to affect, binds only the lands of the ancestor in the hands of such heir or terre-tenant,[31] and, if a judgment against executors for a legacy charged on land is entered against the land of certain only of the devisees, and the land of another devisee is sold on execution issued on such judgment, it will not pass by such sale.[32]

The lien of a judgment is merely an incident of the judgment,[33] and may not exist independently of the judgment;[34] nor does the loss of the lien necessarily impair the validity of the judgment as a personal security.[35] The lien of a judgment creditor on real property is a legal lien,[36] and is a right as distinguished from a remedy.[37]

The lien of a judgment is usually regarded as arising from the right to sell property thereunder,[38] and in general there is no lien where the right to sell may not be exercised.[39] In some jurisdictions, however, a judgment lien stands by itself and is not necessarily coextensive with the remedy by execution in the sense that it lies whenever execution may issue.[40] A judgment lien on land attached in the suit in which the judgment was rendered is not regarded as a mere continuance of the attachment.[41] The lien created by a mortgage or deed of trust has been distinguished from a judgment lien in that the former is confined to the specific land described in the mortgage or deed of trust, whereas a judgment lien covers every piece or parcel of land owned by the judgment debtor,[42] and the fact that a judgment lien is merely incidental to the judgment has been regarded as important in distinguishing such a lien from the lien of a mortgage.[43] The term "judicial mortgage" is, however, sometimes applied to a final or definite judgment, when duly recorded.[44]

Lien of verdict. Under a statute providing that a verdict may constitute a lien on real property and directing the verdict to be entered in the judgment docket, the lien of a verdict partakes of the nature of a judgment lien.[45]

Va.—James v. Hall, 15 S.E.2d 108, 177 Va. 658.
34 C.J. p 570 note 93.
Transfer of property subject to judgment lien see infra § 488.

27. Cal.—Wilcoxson v. Miller, 49 Cal. 193.

28. N.Y.—Fuller v. Scribner, 76 N. Y. 190.
S.D.—Willsie v. Rapid Valley Horse-Ranch Co., 63 N.W. 546, 7 S.D. 114.

29. Cal.—Finch v. Finch, 228 P. 553, 68 Cal.App. 72.
Ga.—Bostwick v. Felder, App., 35 S. E.2d 783.
Iowa.—Burns v. Burns, 11 N.W.2d 461, 233 Iowa 1092, 150 A.L.R. 306—Stiles v. Bailey, 219 N.W. 537, 205 Iowa 1385.
Md.—Messinger v. Eckenrode, 158 A. 357, 162 Md. 63—Lee v. Keech, 133 A. 835, 151 Md. 34, 46 A.L.R. 1488.
Va.—Kidwell v. Henderson, 143 S. E. 336, 150 Va. 329.
34 C.J. p 570 note 96.
A lien of judgment on bond accompanying mortgage, given to secure purchase price of business, was not required to be limited to realty mentioned in agreement of sale, where bond was unrestricted, and there was no evidence that restriction was omitted from bond by fraud, accident, or mistake.—Arrighi to Use of First Nat. Bank v. Renwick, 192 A. 655, 326 Pa. 508.
Effect of adjudication of want of interest
Decree holding that judgment creditor has no right or interest in certain property of judgment debtor is not inconsistent with existence of judgment lien thereon, as judgment lien is not specific interest in the property.—Crim v. Thompson, 229 P. 916, 112 Or. 399.

30. N.Y.—Snyder v. Stafford, 11 Paige 71.

31. Pa.—Coyle v. Reynolds, 7 Serg. & R. 328.

32. Pa.—Lapsley v. Lapsley, 9 Pa. 130.

33. Fla.—Gilpen v. Bower, 12 So.2d 884, 152 Fla. 733.
Iowa.—Beatty v. Cook, 185 N.W. 360, 192 Iowa 542.

34. Fla.—Gilpen v. Bower, 12 So.2d 884, 152 Fla. 733.

35. Pa.—Appeal of Esterly, 109 Pa. 222.

36. Va.—Savings & Loan Corporation v. Bear, 154 S.E. 587, 155 Va. 312, 75 A.L.R. 980—Flanary v. Kane, 46 S.E. 312, 102 Va. 547, rehearing denied 46 S.E. 681, 102 Va. 547.

37. N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234.

38. Ill.—Lehman v. Cottrell, 19 N. E.2d 111, 298 Ill.App. 434.

39. Ill.—Lehman v. Cottrell, supra.
Md.—Caltrider v. Caples, 153 A. 445, 160 Md. 392, 87 A.L.R. 1500.

40. Conn.—City Nat. Bank v. Stoeckel, 132 A. 20, 103 Conn. 732.
It is the judgment itself and not the execution that constitutes a lien on realty.—City of St. Louis v. Wall, 124 S.W.2d 616, 235 Mo.App. 9.
Issuance of execution as condition precedent to attachment of judgment lien see infra § 468.

41. Conn.—Beardsley v. Beecher, 47 Conn. 408.

42. Fla.—Gilpen v. Bower, 12 So.2d 884, 152 Fla. 733.
Va.—Boggs v. Fatherly, 13 S.E.2d 298, 177 Va. 259.

43. Fla.—Gilpen v. Bower, 12 So.2d 884, 152 Fla. 733.

44. La.—Chaffe v. Walker, 1 So. 290, 39 La.Ann. 35.
34 C.J. p 1182 note 20.

45. Pa.—Fuellhart v. Blood, 21 Pa. Co. 601.

§ 456. Control of Lien

Judgment liens, as creatures of statutes, are subject to the control of the legislature, but generally speaking are not subject to control or regulation by the courts.

Since the lien of a judgment is entirely the creature of statute, as shown supra § 454, it may be withheld or divested by the legislature at any time before rights have become vested thereunder,[46] and its character and extent, the nature or identity of the property to which it attaches, the steps necessary to secure it, and the means of enforcement are under the control of the legislature[47] and usually cannot be prescribed or regulated by the court pronouncing or rendering the judgment,[48] or by the court which is called on to enforce the lien.[49] So, also, as a general rule, the nature or extent of the lien or the property which shall be subject thereto may not be regulated or prescribed by the agreement of parties;[50] but it seems that the general lien of a judgment may by agreement be limited to specific lands.[51]

§ 457. Amount of Lien

In general a judgment lien is for a definite amount, unaffected by contingencies, or by changes in the value of the property subject to the lien.

A judgment lien is for a definite amount, and is not dependent on any contingency, or affected by changes in the value of the property to which it attaches.[52] As a general rule, a judgment may operate as a lien to the extent of the amount recovered in the judgment,[53] but not for a greater amount.[54] The interest accruing on a judgment recovered, in the absence of a statute authorizing it to be collected on execution, has been held not to become a lien on land until it is included in a fresh judgment;[55] but under statutes in some jurisdictions it has been held that the lien of a judgment covers the interest which may accrue on the judgment as well as on the principal debt.[56]

Costs. In some jurisdictions it has been held that the costs of the proceedings are included in the judgment lien.[57]

§ 458. What Judgments Create Lien

As a general rule, in order to create a judgment lien, there must be a judgment which is final, valid, and subsisting, rendered by a duly constituted court for the payment of a definite and certain amount of money which may be collected by execution on property of the judgment debtor.

It is essential to the creation of a judgment lien that there shall be a judgment[58] and it is essential,

46. Cal.—Evans v. Superior Court of Los Angeles County, 124 P.2d 820, 20 Cal.2d 186.
Ind.—Snyder v. Thieme & Wagner Brewing Co., App., 87 N.E. 155, reversed on other grounds 90 N. E. 814, 173 Ind. 659.

After lien attached

Lien created by statute providing for automatic imposition of lien on docketing of judgment was held inseparably connected with judgment and not subject to impairment by legislature.—Jones v. Union Oil Co. of California, 25 P.2d 5, 218 Cal. 775.
Constitutional restrictions on power of legislature see Constitutional Law §§ 233, 408.

47. Mont.—McMillan v. Davenport, 118 P. 756, 44 Mont. 23, Ann.Cas. 1912D 984.
34 C.J. p 569 note 87.

48. Cal.—Finch v. Finch, 228 P. 553, 68 Cal.App. 72.
N.D.—Groth v. Ness, 260 N.W. 700, 65 N.D. 580.
Va.—Kidwell v. Henderson, 143 S.E. 336, 150 Va. 829.
34 C.J. p 569 note 88.

Specific property

(1) A court cannot render a judgment which would be a special lien or charge on specific property not described in the pleadings or judgment.—Coombs v. Benz, 114 S.W.2d 713, 232 Mo.App. 1011.

(2) Court was not authorized to render decree that judgment for damages should be an equitable lien on specific property and direct its sale under execution to enforce such lien.—Westervelt v. McCullough, 228 P. 734, 68 Cal.App. 198.

Creation by court

(1) A court cannot create a judgment lien, that being a prerogative of the legislature.—Sullivan State Bank v. First Nat. Bank, 146 N.E. 403, 82 Ind.App. 419.

(2) The fact that a judgment for plaintiff in an action against a railroad company for personal injuries contained a provision for a lien on defendant's property did not invalidate the judgment, where statutes justified the lien.—Missouri Pac. R. Co. v. Hancock, 114 S.W.2d 1076, 195 Ark. 911.
Imposition of lien by court of equity see infra § 459.

49. Va.—Kidwell v. Henderson, 143 S.E. 336, 150 Va. 829.

50. Ind.—Wells v. Benton, 8 N.E. 444, 108 Ind. 585, rehearing denied 9 N.E. 601, 108 Ind. 585.
34 C.J. p 569 note 89.

51. Pa.—Stanton v. White, 32 Pa. 358.
34 C.J. p 569 note 90.

52. U.S.—Kelly v. Minor, Va., 252 F. 115, 164 C.C.A. 227.

53. W.Va.—Bensimer v. Fell, 12 S. E. 1078, 35 W.Va. 15, 29 Am.S.R. 774.

54. W.Va.—Bensimer v. Fell, 12 S.E. 1078, 35 W.Va. 15, 29 Am.S.R. 774.
Wis.—Fischbeck v. Mieleny, 154 N. W. 701, 162 Wis. 12.
34 C.J. p 570 note 7.

55. N.Y.—De La Vergne v. Evertson, 1 Paige 181, 19 Am.D. 411.
34 C.J. p 570 note 8.

56. Ohio.—Loomis v. Second German Bldg. Ass'n, 37 Ohio St. 392.
34 C.J. p 570 note 9.

57. N.J.—Edmunds v. Smith, 27 A. 827, 52 N.J.Eq. 212.
34 C.J. p 570 note 10.

58. Cal.—Gordon v. Vucinich, 142 P. 2d 71, 61 Cal.App.2d 78.
Mo.—Corpus Juris quoted in Hagemann v. Pinska, 37 S.W.2d 463, 465, 225 Mo.App. 521.
Okl.—Harriss v. Parks, 187 P. 470, 77 Okl. 197.
34 C.J. p 571 note 11.

Sufficiency

(1) An abstract of judgment which named G W A as defendant created a lien against land belonging to G M A, when identity of parties was fully established.—Mullins v. Albertson, Tex.Civ.App., 136 S.W.2d 263, error refused.

(2) A judgment against J Mc is not a lien against property held in name of J J Mc.—Union Trust Co. v. McCarthy, 10 Pa.Dist. & Co. 243, 76 Pittsb.Leg.J. 262, 15 West.Co. 92.

(3) Judgment merely reciting jury's findings that plaintiff was en-

under the authorities, that the judgment be final,[59] valid and subsisting,[60] and rendered by a lawfully and validly constituted court,[61] for the payment of a definite and certain sum of money,[62] capable of collection by execution against the debtor's property.[63] Where these conditions have been met, the lien may arise from a judgment by confession or consent as well as one rendered adversely,[64] or from a final judgment by default.[65]

The lien of a judgment against an executor or administrator is discussed in Executors and Administrators § 804, and the lien of a judgment against an insane person in Insane Persons § 151 e.

Judgment for costs. A final judgment of a court of record may be a lien on the debtor's land, even though the money judgment is for costs only.[66]

§ 459. —— Decrees in Equity

A decree in equity may create a lien on lands.

A decree in chancery may create a lien on lands equally with a judgment at law,[67] where it is for the payment of a definite and liquidated sum of money.[68] A decree merely setting aside a fraudulent conveyance of land without more does not give rise to a lien,[69] and a decree of foreclosure of a mortgage does not, like an ordinary judgment at law, create a general lien on the lands of the mortgagor, as discussed in the C.J.S. title Mortgages § 701, also 42 C.J. p 164 note 2.

While, in some jurisdictions, the court of chancery may not, in the absence of fraud or imposition, directly or indirectly impose the debt involved in a general judgment as a lien on the real property involved,[70] according to some cases, equity may create a lien directly by decree for that purpose[71] on personalty as well as on realty,[72] and all persons having notice of such a lien are bound thereby.[73] A decree providing that, if defendant does not in a given time pay plaintiff a designated sum of money, certain real and personal property of defendant, on which plaintiff has a specific lien, shall be sold is not a judgment which creates a lien on other real estate of defendant.[74]

titled to described personalty and damages for its detention and directing execution created no lien thereon, in view of the fact that actually there was no judgment against any party or parties, in favor of any party or parties.—Reed v. Bank of Mulberry, 149 So. 609, 111 Fla. 577.

(4) Order approving borrowing by administrator for benefit of decedent's estate did not operate as a judgment lien against which statute of limitations would run, but simply determined amount due to lender, as step in the orderly administration of the estate pending final settlement and closing thereof.—In re Marsh's Estate, 139 P.2d 284, 18 Wash.2d 308.

Judgments or decrees specifically creating liens

Statute providing that judgments and decrees of courts of record shall be liens on real property does not apply to judgments and decrees which specifically create liens on real property, but only to judgments in personam.—Rosensweig v. Ferguson, 158 S.W.2d 124, 348 Mo. 1144.

59. Mo.—**Corpus Juris quoted in** Hagemann v. Pinska, 37 S.W.2d 463, 465, 225 Mo.App. 521.
34 C.J. p 571 note 12.

60. Mo.—**Corpus Juris quoted in** Hagemann v. Pinska, 37 S.W.2d 463, 465, 225 Mo.App. 521.
Tex.—Urban v. Bagby, Civ.App., 286 S.W. 519, affirmed, Com.App., 291 S.W. 537.
34 C.J. p 571 note 13.

A dormant judgment is not a lien on real estate.—Compagna v. Home Owners' Loan Corporation, 3 N.W. 2d 750, 141 Neb. 429.

61. Mo.—**Corpus Juris quoted in** Hagemann v. Pinska, 37 S.W.2d 463, 465, 225 Mo.App. 521.
Okl.—Harriss v. Parks, 187 P. 470, 77 Okl. 197.
34 C.J. p 571 note 14.

62. Fla.—Dickenson v. Sharpe, 113 So. 638, 94 Fla. 25.
Mo.—**Corpus Juris cited in** Kelly v. City of Cape Girardeau, 89 S.W.2d 693, 698, 230 Mo.App. 137—**Corpus Juris quoted in** Hagemann v. Pinska, 37 S.W.2d 463, 465, 225 Mo. App. 521.
34 C.J. p 571 note 15.

Installment payments for indefinite period

Judgment for periodic installments for an indefinite time was not a lien on real property in the absence of a provision in judgment for a lien. —Yager v. Yager, 60 P.2d 422, 7 Cal. 2d 213, 106 A.L.R. 664—Bird v. Murphy, 256 P. 258, 82 Cal.App. 691, certiorari denied Murphy v. Bird, 48 S.Ct. 38, 275 U.S. 487, 72 L. Ed. 387, and motion denied 53 S.Ct. 114.

A mistake in the amount of a judgment does not render the lien ineffective, and a correction does not destroy the lien.—First State Bank v. Jones, Civ.App., 171 S.W. 1057, reversed on other grounds 183 S.W. 874, 107 Tex. 623.

63. Mo.—**Corpus Juris cited in** Kelly v. City of Cape Girardeau, 89 S. W.2d 693, 698, 230 Mo.App. 137—**Corpus Juris quoted in** Hagemann v. Pinska, 37 S.W.2d 463, 465, 225 Mo.App. 521.
34 C.J. p 571 note 16.

64. N.C.—Keel v. Bailey, 198 S.E. 654, 214 N.C. 159—Farmers' Bank of Clayton v. McCullers, 160 S.E. 494, 201 N.C. 440.
34 C.J. p 571 note 17.

65. Pa.—Sellers v. Burk, 47 Pa. 344.
34 C.J. p 571 note 18.

66. Ala.—Forrest v. Camp, 16 Ala. 642.
34 C.J. p 571 note 19.

67. Mont.—Raymond v. Blancgrass, 93 P. 648, 38 Mont. 449, 15 L.R.A., N.S., 976.
34 C.J. p 572 note 21.

68. Fla.—Dickenson v. Sharpe, 113 So. 638, 94 Fla. 25.
34 C.J. p 572 note 21.

69. Neb.—State v. Chamberlain Banking House, 100 N.W. 205, 72 Neb. 201.
N.Y.—New York Life Ins. Co. v. Mayer, 14 Daly 318, affirmed 15 N.E. 444, 108 N.Y. 655.

70. N.J.—McKibbin v. Pekarsky, 143 A. 553, 103 N.J.Eq. 450—Cutter v. Kline, 35 N.J.Eq. 534.

71. S.C.—Carmichael v. Abrahams, 1 S.C.Eq. 114.

72. Iowa.—Kithcart v. Kithcart, 124 N.W. 305, 145 Iowa 549, 30 L.R.A., N.S., 1062.

73. Iowa.—Kithcart v. Kithcart, supra.
34 C.J. p 572 note 26.

74. W.Va.—Linn v. Patton, 10 W. Va. 187.

§ 460. —— Organization and Character of Court

Judgments of a court of record may create a lien, whether or not the court is one of original jurisdiction.

The incident of a lien commonly attaches to the judgments of all courts of record,[75] whether or not the particular court is one of original jurisdiction.[76] Judgments of inferior courts do not in the first instance create liens under some statutes,[77] but provision is frequently made by statute for the transfer of such judgments by transcript to superior courts for the purpose of constituting such judgments liens, as discussed infra § 462, and under some statutes judgments of inferior courts operate as liens.[78]

§ 461. Statutory Requirements in General

There must be due compliance with statutory requirements in order to create a judgment lien.

Since judgment liens are the creatures of statutes, as discussed supra § 454, they can be obtained only by complying with the requirements of the statutes by which they are created.[79] While in general such statutes must be construed strictly,[80] they must be given full meaning that the language employed reasonably imports,[81] and it has been held necessary and sufficient to comply substantially with the provisions of the statutes.[82]

§ 462. Transcript or Abstract

a. In general
b. Judgments of inferior courts
c. Fixing lien on property in another county
d. Sufficiency

a. In General

Under some statutes a judgment lien does not attach unless a certified transcript, abstract, or certificate of the judgment is recorded or filed in a designated office.

Under some statutes the lien of a judgment does not attach to any real property unless a transcript, abstract, or certificate of the judgment or a transcript of the docket has been recorded[83] or has been

75. Ala.—Ætna Auto Finance, Inc., v. Kirby, 198 So. 356, 240 Ala. 228.
34 C.J. p 572 note 32.
Lien of judgments of federal courts see Federal Courts § 144 i.

76. Ill.—Durham v. Heaton, 28 Ill. 264, 81 Am.D. 275.
34 C.J. p 572 note 32.

77. N.C.—Ledbetter v. Osborne, 66 N.C. 379.
34 C.J. p 572 note 34 [a] (2), [b].
Judgment of justice of peace see the C.J.S. title Justices of the Peace § 118, also 35 C.J. p 687 note 69-p 688 note 75.

78. Ill.—Kirk v. Vonberg, 34 Ill. 440.
34 C.J. p 572 note 34 [a] (1).

79. U.S.—In re Schuneman, C.C.A. Ill., 290 F. 200—In re Staples, D. C.Okl., 1 F.Supp. 620.
Neb.—Citizens' Bank v. Young, 110 N.W. 1003, 78 Neb. 312.
N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234—Breece v. Gregg, 13 P. 2d 421, 36 N.M. 246.
N.Y.—H. R. & C. Co. v. Smith, 151 N.E. 448, 242 N.Y. 267, 45 A.L.R. 554—Niemi Bros. v. Rosenbluh, 263 N.Y.S. 445, 147 Misc. 159.
N.D.—Groth v. Ness, 260 N.W. 700, 65 N.D. 580.
Tex.—Barron v. Thompson, 45 Tex. 235—McGlothlin v. Coody, Com. App., 59 S.W.2d 819—Cheatham v. Mann, Civ.App., 133 S.W.2d 264, error refused—Barton v. Parks, Civ.App., 127 S.W.2d 376, error refused—Hampton v. C. D. Shamburger Lumber Co., Civ.App., 127 S.W.2d 245, error dismissed, judgment correct—Chamlee v. Chamlee, Civ.App., 113 S.W.2d 290—Traweek v. Simmons, Civ.App., 72 S.W.2d 349—Burton Lingo Co. v. Warren, Civ.App., 45 S.W.2d 750, error refused.

Indexing writ of scire facias

(1) Under a statute regulating scire facias to extend the lien of a judgment to after-acquired real property and providing that all such writs shall be properly indexed in the judgment docket, it was held that the writ was not effective to extend the lien to after-acquired property where the writ was not indexed.—Philadelphia Plumbing Supply Co. v. D'Appollo, 20 Pa.Dist. & Co. 21.

(2) Where the scire facias was duly indexed, it was held that the lien was extended to after-acquired real property which was conveyed to a third person by the judgment debtor after the commencement of the scire facias proceedings and before judgment in such proceedings.—Calhoon v. Newlon, 40 Pa. Dist. & Co. 123.

80. Tenn.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 30 S.W.2d 253, 161 Tenn. 298.
Tex.—Kingman Texas Impl. Co. v. Borders, Civ.App., 156 S.W. 614.

81. Tex.—Kingman Texas Impl. Co. v. Borders, supra.

82. N.M.—Breece v. Gregg, 13 P.2d 421, 36 N.M. 246.
Okl.—Richards v. Tynes, 300 P. 297, 149 Okl. 235—Long Bell Lumber Co. v. Etter, 251 P. 997, 123 Okl. 54.
Tex.—Askey v. Power, Com.App., 36 S.W.2d 446—Womack v. Paris Grocer Co., Civ.App., 166 S.W.2d 366, error refused 168 S.W.2d 645, 140 Tex. 423—Fordyce-Crossett Sales Co. v. Erwin, Civ.App., 121 S.W.2d 491.
34 C.J. p 572 note 39.

83. U.S.—In re B. P. Lientz Mfg. Co., D.C.Mo., 32 F.Supp. 233.
Tex.—Cheatham v. Mann, Civ.App., 133 S.W.2d 264, error refused—Hampton v. C. D. Shamburger Lumber Co., Civ.App., 127 S.W.2d 245, error dismissed, judgment correct.
34 C.J. p 572 note 40, p 576 notes 68, 69.
Recording and docketing judgment see infra §§ 463-465.

Purpose and effect of statute

(1) The purpose of statutes providing for the creation of a lien on real estate by recording a certified transcript of a judgment or decree is to establish and attach liens under judgments or decrees in cases in which no specific statutory or contract lien is the basis of the judgment or decree, and not to abrogate or destroy a lien which has become merged in a judgment or decree.—Nassau Realty Co. v. City of Jacksonville, 198 So. 581, 144 Fla. 754.

(2) The requirement of such statute with respect to recording the transcript does not apply to judgments enforcing liens theretofore existing as against specific property, such as decrees in foreclosure of statutory or contract liens.—Nassau Realty Co. v. City of Jacksonville, supra.

filed[84] in the proper office, after being certified by the clerk of the court wherein the judgment was rendered,[85] and some statutes require that the recorded abstract shall be indexed in order to create a lien.[86] On due compliance with statutory provisions of this type, the lien attaches[87] to property in the county in which it is filed.[88] The clerk's certificate authenticating an abstract need not be recorded where the statute does not so require.[89] It has been held that a certificate of a judgment lien is not invalid because it includes two distinct judgments.[90]

Filing transcripts of judgments in other courts in general is discussed supra § 129.

b. Judgments of Inferior Courts

Some statutes require the filing or recording in a superior court of a transcript or abstract of a judgment of an inferior court in order to render such judgment effective as a lien.

The filing, or filing and recording, in a superior court of transcripts or abstracts of judgments rendered by inferior courts are generally required in order to render such judgments effective as liens.[91] Where there has been due compliance with the stat-

(3) It has also been stated that the object of the statutory proceeding for abstract of judgment and recordation thereof is to put subsequent purchasers or encumbrancers of property sought to be charged on notice of lien thereby created.—Citizens State Bank of Clarinda, Iowa v. Del-Tex Inv. Co., Tex.Civ.App., 123 S.W.2d 450, error dismissed, judgment correct.

Mere decision or opinion

Recording of a certified copy of mere decision or opinion directing entry of order allowing attorney's fees against estate was held not to create lien against realty.—Zagoren v. Hall, 10 P.2d 202, 122 Cal.App. 460.

Proper county

Registry of mortgagee's judgment against mortgagor in mortgage book of another parish than that in which land was situated according to boundary line commonly recognized for many years must be denied effect and title from mortgagor, as subsequently recorded in proper parish, given effect.—Commercial Bank v. Meaux, La.App., 158 So. 688.

84. Ala.—Reuf v. Fulks, 122 So. 14, 219 Ala. 252.
N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234.
34 C.J. p 573 note 41, p 572 note 21 [c].

In probate court

Such a statute was held not to authorize the filing and recording of judgments in the probate court, but authorizes a certificate of the clerk or register of the court by which the judgment was rendered to be filed and registered in the office of the judge of probate.—Saenger Theatres Corporation v. McDermott, 196 So. 265, 239 Ala. 629.

85. Tex.—Traweek v. Simmons, Civ. App., 72 S.W.2d 349—Herring v. Walker, 22 S.W. 819, 8 Tex.Civ. App. 614.

County clerk

Until statutory change of constitutional designation, transcript of judgment may properly be certified by county clerk as clerk of district court.—Cannon v. First Nat. Bank, 291 P. 924, 35 N.M. 193.

Certification by clerk of superior court

Pa.—Commonwealth, ex rel. v. Thurkins, Com.Pl., 23 West.Co. 104.

Erroneous certification

The filing and recording of abstract of judgment erroneously certifying that a judgment had been entered in guardianship proceeding against one ward in favor of another, although it created a cloud on first mentioned ward's interest in guardianship realty, did not create a lien thereon.—Gordon v. Vucinich, 142 P.2d 71, 61 Cal.App.2d 78.

86. Neb.—Metz v. Brownville State Bank, 7 Neb. 165.
Tex.—McGlothlin v. Coody, Com. App., 59 S.W.2d 819—Cheatham v. Mann, Civ.App., 133 S.W.2d 264, error refused—Barton v. Parks, Civ.App., 127 S.W.2d 376, error refused—Moore v. Ray, Civ.App., 282 S.W. 671—Security Nat. Bank of Wichita Falls v. Allen, Civ.App., 261 S.W. 1057—Whitaker v. Hill, Civ.App., 179 S.W. 539.
34 C.J. p 577 note 88.
Indexing record of judgment see infra §§ 463–465.

Purpose and effect of statute

(1) The object of statute requiring that names of plaintiff and defendant in judgment be indexed in their alphabetical order is that persons searching the record to determine the existence of judgment liens may have the means of ascertaining, with promptness and certainty, whether such liens exist, without having to search the entire record.—Womack v. Paris Grocer Co., Civ.App., 166 S.W.2d 366, error refused 168 S.W.2d 645, 140 Tex. 423.

(2) Recording and indexing abstract of judgment, as required by some statutes, do not merely give notice of preëxisting lien, but are statutory means by which previously nonexistent lien comes into being.—Spence v. Brown, 25 S.W. 413, 86 Tex. 430—Burton Lingo Co. v. Warren, Tex.Civ.App., 45 S.W.2d 750, error refused—McGlothlin v. Coody, Tex.Civ.App., 39 S.W.2d 33, affirmed Com.App., 59 S.W.2d 819—Wicker v. Jenkins, 108 S.W. 188, 49 Tex.Civ. App. 366.

Actual notice will not take the place of the index.—Glasscock v. Stringer, Tex.Civ.App., 32 S.W. 920—34 C.J. p 578 note 89.

87. Tex.—Simmons v. Sikes, Civ. App., 56 S.W.2d 193, error dismissed.

Recording abstract pending appeal

Appellant's creation of lien on respondent's realty by recording abstract of judgment appealed from provided security for enforcement of judgment if it should become final on appeal.—Menges v. Robinson, 23 P.2d 526, 132 Cal.App. 647.

Several liens in same county

Under some statutes of the type here considered, more than one lien to secure same judgment may exist in same county.—Burton Lingo Co. v. Warren, Tex.Civ.App., 45 S.W.2d 750, error refused.

88. Ala.—Ætna Auto Finance, Inc., v. Kirby, 198 So. 356, 240 Ala. 228—Second Nat. Bank v. Allgood, 176 So. 363, 234 Ala. 654—Reuf v. Fulks, 122 So. 14, 219 Ala. 252—Morris v. Waldrop, 105 So. 172, 213 Ala. 435—Birmingham News Co. v. Barron G. Collier, Inc., 103 So. 839, 212 Ala. 655—Robinson v. Shearer, 99 So. 179, 211 Ala. 16.

89. Tex.—Spence v. Brown, 25 S. W. 413, 86 Tex. 430—Wicker v. Jenkins, 108 S.W. 188, 49 Tex.Civ. App. 366.

Failure of record to show seal

A clerk's certificate to abstract of judgment need not be recorded, and hence failure of the record to show seal by clerk is immaterial as respects validity of the lien created thereby.—Texas Building & Mortgage Co. v. Morris, Tex.Civ.App., 123 S.W.2d 365, error dismissed.

90. Conn.—Parmalee v. Bethlehem, 18 A. 94, 57 Conn. 270.

91. Del.—Weintraub v. Rudnick, 143 A. 456, 4 W.W.Harr. 111.

utory requirements in this regard, the lien contemplated by the statute attaches to the property of the judgment debtor.[92] This requirement applies in some jurisdictions to judgments of probate courts,[93] but in other jurisdictions, in which probate courts are courts of record, their judgments may constitute liens as in the case of any other court of record.[94]

Under some statutes, where the transcript of the judgment of the inferior court has been duly filed in the proper superior court, the judgment becomes substantially a judgment of such superior court for purposes of a lien.[95] Only such judgments or decrees as are contemplated by the statute may constitute the basis for filing the transcript and imposing the lien,[96] and an invalid judgment of an inferior court is not sufficient to support a lien, notwithstanding the transcript or abstract is filed in the superior court.[97] The transcript must be certified and authenticated in accordance with the directions of the statute,[98] and under some statutes an execution must have been issued and returned nulla bona before the transcript may be made and filed.[99] Delay in filing the transcript until after the judgment has become dormant defeats the right to acquire a lien under some statutes.[1]

c. Fixing Lien on Property in Another County

Statutes frequently authorize the fixing of the lien of a judgment on real property of the judgment debtor in a county other than the county in which judgment is rendered by recording, docketing, or filing a transcript or abstract of the judgment in such other county.

Various statutes authorize a transcript or abstract of a judgment recovered in one county to be recorded, docketed, or filed in another, for the purpose of binding real property of the judgment debtor situated in the latter county,[2] and, in order to impose a lien on such real property, there must be due compliance with the statutory requirements.[3]

Fla.—Ferrell v. Reed, 53 So. 935, 60 Fla. 62.
Mo.—Bank of Clever v. Cook, 24 S. W.2d 698, 223 Mo.App. 1092.
Or.—Yeaton v. Barnhart, 150 P. 742, 78 Or. 249, modified on other grounds 152 P. 192, 78 Or. 249.
34 C.J. p 574 note 50.

92. Minn.—Keys v. Schultz, 2 N.W. 549, 212 Minn. 109.
Pa.—Commonwealth v. Thurkins, Com.Pl., 23 West.Co. 104.
Tex.—Horton v. Gibson, Civ.App., 274 S.W. 292.
34 C.J. p 574 note 50.

93. Pa.—Catanzaritti v. Bianco, 198 A. 806, 131 Pa.Super. 207.
34 C.J. p 574 note 51.

94. Mo.—Haeussler v. Scheilin, 9 Mo.App. 303.
34 C.J. p 574 note 53.

95. Del.—McCoy v. Hickman, 15 A. 2d 427, 1 Terry 587.
Minn.—Keys v. Schultz, 2 N.W.2d 549, 212 Minn. 109—Clark v. Butts, 76 N.W. 199, 73 Minn. 361.
Mo.—Mahen v. Tavern Rock, 37 S. W.2d 562, 327 Mo. 391.

96. Pa.—Catanzaritti v. Bianco, 198 A. 806, 131 Pa.Super. 207—Williamson v. Hanmer, Com.Pl., 85 Pittsb.Leg.J. 751.

Adjudication of orphan's court

The court of common pleas may properly enter a judgment on a transcript of proceedings in an orphans' court only on a transcript or extract showing the amount appearing to be due from or in the hands of any fiduciary on the settlement of his accounts in the orphans' court or by virtue of a decree of the court.—Catanzaritti v. Bianco, 198 A. 806, 131 Pa.Super. 207.

97. Del.—McCoy v. Hickman, 15 A. 2d 427, 1 Terry 587—Weintraub v. Rudnick, 143 A. 456, 4 W.W.Harr. 111.
Mont.—Novack v. Pericich, 300 P. 240, 90 Mont. 91.

Judgment not void

Pa.—Davies v. Lewis, 91 Pa.Super. 172.

98. Mo.—Bank of Clever v. Cook, 24 S.W.2d 698, 223 Mo.App. 1092.

99. Ill.—Brockway v. Trinity M. E. Church, 68 N.E. 749, 205 Ill. 238.
34 C.J. p 574 note 56.

1. N.C.—Lowdermilk v. Butler, 109 S.E. 571, 182 N.C. 502.

2. U.S.—Reconstruction Finance Corporation v. Maley, C.C.A.Ill., 125 F.2d 131.
Ill.—Haugens v. Holmes, 41 N.E.2d 109, 314 Ill.App. 166.
Ind.—Echelbarger v. First Nat. Bank, 5 N.E.2d 966, 211 Ind. 199.
Neb.—Talich v. Marvel, 212 N.W. 543, 115 Neb. 246, followed in 212 N.W. 544, 115 Neb. 250.
N.M.—Scheer v. Stolz, 72 P.2d 606, 41 N.M. 585.
Tex.—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S.W.2d 365, error dismissed—Hicks v. Price, Civ.App., 81 S.W.2d 116.
34 C.J. p 573 note 45, p 574 note 53 [b], p 586 note 9.

Transcript of original docket or record

(1) Where judgment roll is filed and judgment docketed in district court clerk's office, judgment becomes lien on judgment debtor's property in any county wherein transcript of docket is filed.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.

(2) The judgment of a court of common pleas may be transferred from the county in which it is entered to any other county of the commonwealth by filing of record in the prothonotary's office of such other county a certified copy of the whole record in the case and docketing it therein.—Shotts & Co. v. Agnew & Barnett, 81 Pa.Super. 458.

Filing of copy of judgment roll unnecessary

Where a judgment is transcripted and docketed in a county other than the one in which judgment was rendered, it is not necessary to file a copy of the judgment roll in such other county, in order to create a lien on real property in such other county.—Brown v. Harding, 89 S.E. 222, 171 N.C. 686.

Necessity for creation of deficiency judgment

Abstracting in another county a judgment foreclosing a lien on property described in such judgment creates a lien on property in the other county, irrespective of whether the property, lien on which was foreclosed, has been sold and deficiency judgment created.—Texas Building & Mortgage Co. v. Morris, Tex.Civ.App., 123 S.W.2d 365, error dismissed.

Real property of married woman

Foreign judgment at law rendered in proceedings ex contractu against married woman cannot be made effectual as lien on lands of such married woman outside county in which judgment was rendered by mere filing and recording of certified transcript of judgment in county where her land lies.—Protective Holding Corporation v. Cornwall Co., 173 So. 804, 127 Fla. 252.

3. Ind.—Sullivan State Bank v. First Nat. Bank, 146 N.E. 403, 82 Ind.App. 419.

Under some statutes filing in another county of a certificate of a judgment which has become dormant does not create a lien on real property of the judgment debtor in such other county,[4] but, under other statutes, a judgment may be transferred to another county for the purpose of creating a lien on real property in such other county, even though it is not a lien on real property at the time of transfer,[5] or is not at that time immediately enforceable by execution,[6] or even though at the time of transfer the statutory period for the duration of judgment liens has elapsed.[7] Under the construction given some statutes, the transfer of a judgment to another county creates a new lien,[8] but, under other statutes, the docketing of a transcript in another county does not create a new lien, but at most constitutes a transfer of the lien.[9]

Inferior court judgments. With respect to judgments of inferior courts, under some statutes the transcript must be filed in the proper court of the county where the judgment was recovered, and cannot in the first instance be filed in the court of another county for the purpose of creating a lien on real property in such other county.[10]

d. Sufficiency

(1) In general
(2) Recording and filing
(3) Indexing

(1) In General

There must be at least substantial compliance with statutory requirements for the creation of liens by recording or filing transcripts or abstracts of judgments.

In general there must be at least substantial compliance with statutory requirements for the creation of a lien by the recording or filing of a transcript or abstract of the judgment.[11] The transcript, abstract, or certificate must satisfy the requirements of the statute governing the creation of a lien,[12] and should contain all the essential particulars of the judgment, so as to give reasonably certain and definite information to subsequent purchasers or lienors.[13] While the rule has been announced that a statute prescribing the contents of a certificate of judgment is mandatory[14] and that there must be strict compliance with such statute in order to create a lien,[15] the provisions of some statutes prescribing the contents of a transcript or certificate have been regarded as directory rather than mandatory so that compliance therewith is not

Iowa.—Harrington v. Clark, 202 N.W. 84, 199 Iowa 340.
34 C.J. p 573 note 45, p 586 note 9.

Recording of transcript required
Neb.—Rathbone Co. v. Kimball, 220 N.W. 244, 117 Neb. 229, certiorari denied Kimball v. Rathbone Co., 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564.

4. Ohio.—Kline v. Falbo, 56 N.E.2d 701, 73 Ohio App. 417.

5. Pa.—Shotts & Co. v. Agnew & Barnett, 81 Pa.Super. 458.

6. Pa.—Shotts & Co. v. Agnew & Barnett, supra.

7. Pa.—Shotts & Co. v. Agnew & Barnett, supra.

8. Pa.—Shotts & Co. v. Agnew & Barnett, supra.
34 C.J. p 574 note 47.

Force and effect of lien
The new lien has the same force and effect as though judgment had originally been entered in the county to which it was transferred.—Shotts & Co. v. Agnew & Barnett, supra.

Independent liens
Each abstract of same judgment recorded in different counties creates independent lien.—Burton Lingo Co. v. Warren, Tex.Civ.App., 45 S.W.2d 750, error refused.

9. Ind.—Bradfield v. Newby, 28 N.E. 619, 130 Ind. 59.

10. Ark.—Winkler v. Baxter, 170 S.W. 94, 114 Ark. 422.
34 C.J. p 574 note 57.

Lien held to attach
Mo.—Mahen v. Tavern Rock, 37 S.W.2d 562, 327 Mo. 391.

11. Mo.—Bank of Clever v. Cook, 24 S.W.2d 698, 223 Mo.App. 1092.

12. Tex.—Barton v. Parks, Civ.App., 127 S.W.2d 376, error refused—Hampton v. C. D. Shamburger Lumber Co., Civ.App., 127 S.W.2d 245, error dismissed, judgment correct—Chamlee v. Chamlee, Civ. App., 113 S.W.2d 290—Gordon-Sewall & Co. v. Walker, Civ.App., 258 S.W. 233.
34 C.J. p 575 notes 60, 61, p 578 note 92, p 579 note 8.

Strict compliance
In order to create a lien by filing for registration a certificate of judgment, the existence of a certificate issued and registered in strict compliance with the statute is essential, since the provisions are in derogation of the common law.—Hargett v. Hovater, 15 So.2d 276, 244 Ala. 646—Morris v. Waldrop, 105 So. 172, 213 Ala. 435.

Transcript of docket
Under a statute requiring the docketing of the judgment and making the existence of a lien dependent on the filing in a particular office of a transcript of the docket of the judgment, merely filing an abstract of the judgment without docketing the judgment is not sufficient.—Breece v. Gregg, 13 P.2d 421, 36 N.M. 246.

Jurisdiction of court rendering judgment
The transcript of a judgment of a justice's court filed in a superior court must show the jurisdiction of the justice's court with respect to the residence of the parties.—Weintraub v. Rudnick, 143 A. 456, 4 W.W. Harr.,Del., 111.

Transcript or abstract sufficient
Ind.—Chadwick v. Louisville Joint Stock Land Bank, 6 N.E.2d 741, 103 Ind.App. 224.
Tex.—Guaranty State Bank of Donna v. Marion County Nat. Bank, Civ. App., 293 S.W. 348—Fikes v. Buckholts State Bank, Civ.App., 273 S.W. 957.

13. Tex.—Traweek v. Simmons, Civ. App., 72 S.W.2d 349.
34 C.J. p 575 note 61.

14. Ala.—Duncan v. Autauga Banking & Trust Co., 136 So. 733, 223 Ala. 434.

15. Ala.—Duncan v. Autauga Banking & Trust Co., supra—Roney v. Dothan Produce Co., 117 So. 36, 217 Ala. 475.

an essential element of the validity of the transcript or certificate.[16] A certificate or abstract is sufficient if it can be rendered certain by the construction of its own terms and if within its terms it supplies the information required by law without looking elsewhere.[17] An immaterial defect in the clerk's certificate authenticating a transcript of a judgment docket has been held not to nullify the effect of such transcript where there has otherwise been due compliance with statutory requirements.[18] According to some cases the requirement of an authenticated abstract of a judgment is fulfilled by presenting an attested copy of the judgment in lieu of an abstract,[19] or by presenting an authenticated instrument which contains a copy of the judgment and also all matters of substance required by the statute.[20] Mere surplusage does not invalidate an abstract or certificate.[21]

Parties. There must be due compliance with a statutory requirement that the transcript, abstract, or certificate shall show the name of the parties, in order to create a lien,[22] and an error in the name of a party to the judgment may prevent the creation of a lien,[23] but a slight and immaterial error in describing a party does not necessarily prevent the creation of a lien.[24]

Amount, interest, and costs. Some statutes require a statement of the amount for which judgment was rendered,[25] and the balance or amount due,[26] and the rate of interest specified in the

16. N.M.—Cannon v. First Nat. Bank, 291 P. 924, 35 N.M. 193.
Ohio.—Hower Corp. v. Vance, 59 N.E. 2d 377, 144 Ohio St. 443.

17. Ala.—Gunter v. Belser, 45 So. 582, 154 Ala. 489.
Tex.—Kingman Texas Impl. Co. v. Borders, Civ.App., 156 S.W. 614.
34 C.J. p 575 note 62.

Matters not rendering abstract void or insufficient

Use of abbreviations which were in common use and easily understandable.—Weadon v. Shahen, 123 P.2d 88, 50 Cal.App.2d 254.

18. Or.—Budd v. Gallier, 89 P. 638, 50 Or. 42.
34 C.J. p 575 note 64 [a] (1).

19. W.Va.—Calwell v. Prindle, 19 W.Va. 604.
34 C.J. p 575 note 63.

20. Cal.—Robbins Inv. Co. v. Robbins, 122 P.2d 91, 49 Cal.App.2d 446.

21. Ala.—Reuf v. Fulks, 122 So. 14, 219 Ala. 252.
Cal.—Robbins Inv. Co. v. Robbins, 122 P.2d 91, 49 Cal.App.2d 446.

22. Ala.—Booth v. Bates, 112 So. 209, 215 Ala. 632.
Tex.—McGlothlin v. Coody, Com.App., 59 S.W.2d 819—Cheatham v. Mann, Civ.App., 133 S.W.2d 264, error refused—Barton v. Parks, Civ.App., 127 S.W.2d 376, error refused.
34 C.J. p 575 note 60 [a], [b], [d], p 580 note 24 [a].

Parties to judgment

Some statutes refer to a statement of the names of the parties to the judgment or decree and not necessarily to a statement of the names of the parties to the cause.
Ala.—Reuf v. Fulks, 122 So. 14, 219 Ala. 252—Ladd v. Smith, 95 So. 280, 209 Ala. 114.
Tex.—Womack v. Paris Grocer Co., Civ.App., 166 S.W.2d 366, error refused 168 S.W.2d 645, 140 Tex. 423.

Names of all defendants

Where abstract did not contain names of all defendants, it was not sufficient, even though plaintiffs recovered no judgment for debt against defendants whose names were so omitted, but were allowed costs against one of such defendants, and another of such defendants was allowed costs against plaintiffs.—Shirey v. Trust Co. of Texas, Tex. Civ.App., 98 S.W.2d 243—Shirey v. Trust Co. of Texas, Tex.Civ.App., 69 S.W.2d 835, error refused.

Partnership as party

(1) Under a statute requiring the certificate of judgment to show the names of all parties to the judgment, a certificate which showed merely a firm name of a partnership as the name of a party was held insufficient.—Duncan v. Autauga Banking & Trust Co., 136 So. 733, 223 Ala. 434—Ladd v. Smith, 95 So. 280, 209 Ala. 114—Conn v. Sellers, 73 So. 961, 198 Ala. 606.

(2) Where, however, a partnership may be sued in the firm name, failure to state, in a certificate of judgment against defendant partnership, the names of the individual partners or whether defendant was a partnership or corporation was held not to render the certificate insufficient under such statute.—Reuf v. Fulks, 122 So. 14, 219 Ala. 252.

Abstract or certificate held sufficient

Tex.—Womack v. Paris Grocer Co., Civ.App., 166 S.W.2d 366, error refused 168 S.W.2d 645, 140 Tex. 423.
34 C.J. p 575 note 62 [a] (3).

23. Tex.—Traweek v. Simmons, Civ. App., 72 S.W.2d 349.

Middle initial

An error in the middle initial of a party to the judgment may render the abstract or certificate insufficient.—Lature v. Little, 60 So. 474, 6 Ala.App. 278—34 C.J. p 581 note 34.

24. Ala.—Reuf v. Fulks, 122 So. 14, 219 Ala. 252.

25. Tex.—Lemons v. Epley Hardware Co., Civ.App., 197 S.W. 1118—Glasscock v. Stringer, Civ.App., 32 S.W. 920.
34 C.J. p 575 note 60 [a].

Statute construed strictly

Tex.—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S.W. 2d 365, error dismissed.

Omission of dollar mark

(1) Such omission from statement of amount of judgment is not necessarily a fatal defect.
Cal.—Weadon v. Shahen, 123 P.2d 88, 50 Cal.App.2d 254.
Tex.—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S.W.2d 365, error dismissed.
34 C.J. p 575 note 60 [c].

(2) However, the use of mere numerals in an abstract of judgment without any indication that they represent dollars or other denominations of money has been held not sufficient, and an omission in this particular cannot be supplied by reference to the record of the judgment.—Bush v. Farris, Tex., 71 F. 770, 18 C.C.A. 315.

Abstract held sufficient

Tex.—Willis v. Somerville, 22 S.W. 781, 3 Tex.Civ.App. 509—First Nat. Bank v. Cloud, 21 S.W. 770, 2 Tex. Civ.App. 627.
34 C.J. p 575 notes 60 [a], 62 [a].

26. Tex.—Cheatham v. Mann, Civ. App., 133 S.W.2d 264, error refused.
34 C.J. p 575 note 60 [a].

Statute strictly construed

Tex.—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S.W.2d 365, error dismissed.

Showing credits

(1) Under the statute described in the text, failure to show credits on the judgment may render the abstract insufficient.—Evans v. Frisbie, 19 S.W. 510, 84 Tex. 341—34 C.J. p 582 note 52

judgment.[27]

In some jurisdictions a certificate of judgment is insufficient if it fails to show the amount of costs as required by statute,[28] but failure of a transcript to show the amount of costs was held not to prevent the creation of a lien where the transcript shows that costs were awarded and it was not possible to determine the amount of costs at the time of filing the transcript,[29] and the only effect of failure to state the amount of costs, as required by some statutes, is to defeat the lien to the extent of the costs.[30]

(2) Recording and Filing

The transcript, abstract, or certificate of judgment must be properly recorded or filed in order to create a lien under some statutes.

In order to create a lien under some statutes, the transcript, abstract, or certificate of judgment must be properly recorded or filed,[31] and a substantial error on the part of the clerk in recording will prevent the creation of a lien,[32] even though the abstract itself is correct.[33] It has been stated broadly, however, that the true object of the statute is served if the record is such as to charge third persons with notice of the lien or to excite inquiry which, if reasonably or diligently pursued, would disclose the existence of the lien,[34] and that slight irregularities with respect to filing an abstract do not necessarily prevent the creation of a lien.[35]

(3) Indexing

A recorded transcript or abstract of judgment must be properly indexed in order to create a lien under some statutes.

In order to create a lien under some statutes, there must be due compliance with statutory requirements regarding the indexing of a recorded transcript or abstract of judgment.[36] Slight irreg-

(2) Where, however, a judgment was rendered for a certain amount, with interest, together with foreclosure of a lien on certain property, given to secure payment of the judgment debt, and the judgment creditor purchased the property at foreclosure sale, failure to show in the abstract a credit for the amount bid by the judgment creditor at such sale did not render the abstract insufficient in view of the fact that the sale was incomplete when the abstract was filed.—Texas Building & Mortgage Co. v. Morris, Tex.Civ.App., 123 S.W.2d 365, error dismissed.

27. Tex.—Lemons v. Epley Hardware Co., Civ.App., 197 S.W. 1118. 34 C.J. p 575 note 60 [a].

Erroneous inclusion of interest

Where judgment did not bear interest, no lien was created by filing in another county an abstract of judgment reciting that judgment bore ten per cent interest and that balance due thereon included interest.—Midland County v. Tolivar's Estate, 155 S.W.2d 921, 137 Tex. 600.

Abstract held sufficient

Omission from an abstract of judgment in another county of recital that interest was to be calculated from the date of the judgment, on the amount of the judgment, did not invalidate the abstract, since interest was fixed by law.—Texas Building & Mortgage Co. v. Morris, Tex.Civ.App., 123 S.W.2d 365, error dismissed—Willis v. Somerville, 22 S.W. 781, 3 Tex.Civ.App. 509—First Nat. Bank v. Cloud, 21 S.W. 770, 21 Tex.Civ.App. 627.

28. Ala.—Morris v. Waldrop, 105 So. 172, 213 Ala. 435.

29. Ind.—Chadwick v. Louisville Joint Stock Land Bank, 6 N.E.2d 741, 103 Ind.App. 224.

30. Wash.—Lamey v. Coffman, 39 P. 682, 11 Wash. 301.

31. Ind.—Sullivan State Bank v. First Nat. Bank, 146 N.E. 403, 82 Ind.App. 419.
Tex.—Askey v. Power, Com.App., 36 S.W.2d 446—Cheatham v. Mann, Civ.App., 133 S.W.2d 264, error refused.
34 C.J. p 572 note 40, p 573 notes 41, 45 [a], p 575 note 60 [a] (10), p 577 note 88 [c], p 578 note 92, p 579 notes 97 [b], 8, p 580 note 15.

Recording held sufficient

Hawaii.—Nichols v. Wah Chong Sun, 28 Hawaii 395.

32. Tex.—Noble v. Barner, 55 S.W. 382, 22 Tex.Civ.App. 357.

Entry as to credits

(1) In view of a statutory requirement that the abstract shall show the amount or balance due on the judgment, the record of an abstract was insufficient to create a lien where the record erroneously stated the date of a credit thereon, so that a proper calculation of the interest due on the judgment as recorded would not show the amount actually due.—Noble v. Barner, supra.

(2) Where clerk, in recording abstract of judgment, placed amounts totaling within eighteen cents of amount of judgment in credit column through mistake, which amounts apparently should have been entered in the column for rate of interest, the record was insufficient to establish judgment lien.—Askey v. Power, Tex.Com.App., 36 S.W.2d 446.

Error in name of party

The record of an abstract, in which the surname of plaintiff who recovered judgment was misspelled, was held insufficient to create lien.—Anthony v. Taylor, 4 S.W. 531, 63 Tex. 403.

33. Tex.—Noble v. Barner, 55 S.W. 382, 22 Tex.Civ.App. 357.

34. Tex.—Citizens State Bank of Clarinda, Iowa, v. Del-Tex Inv. Co., Civ.App., 123 S.W.2d 450, error dismissed, judgment correct.

Misnomer of court

Record showing name of court by which judgment was rendered as "92d District Court of Hidalgo County" was sufficient to render lien operative against subsequent purchasers or encumbrancers where the statute was otherwise complied with, notwithstanding the judgment was actually rendered by the ninety-third district court of such county and that fact was shown by the abstract.—Citizens State Bank of Clarinda, Iowa v. Del-Tex Inv. Co., supra.

35. Tex.—First State Bank of Mobeetie v. Goodner, Civ.App., 168 S.W.2d 941.

36. Neb.—Metz v. Brownville State Bank, 7 Neb. 165.
Tex.—McGlothlin v. Coody, Com.App., 59 S.W.2d 819—Askey v. Power, Com.App., 36 S.W.2d 446—Cheatham v. Mann, Civ.App., 133 S.W.2d 264, error refused—Barton v. Parks, Civ.App., 127 S.W.2d 376, error refused—Fordyce - Crossett Sales Co. v. Erwin, Civ.App., 121 S.W.2d 491—Chamlee v. Chamlee, Civ.App., 113 S.W.2d 290—McDaniel v. Milner, Civ.App., 19 S.W.2d 426, affirmed Milner v. McDaniel, 36 S.W.2d 992, 120 Tex. 160—Moore v. Ray, Civ.App., 287 S.W. 671—Security Nat. Bank of Wichita

ularities with respect to indexing do not, however, necessarily prevent the creation of a lien.[37] It is the intent of some statutes that the index should indicate merely the source from which full information may be obtained,[38] and it is not necessary to include complete information concerning the abstract.[39]

Parties. Under some statutes it is essential that the index shall show the names of the parties to the judgment,[40] and that the designation of the parties shall be accurate.[41] The index should be both direct and reverse, or, as sometimes stated, there should be a cross index, with respect to the names of the parties,[42] and it is essential that the index shall list the names of the parties in alphabetical order.[43] It has been laid down broadly, however, that a statute requiring the indexing of the names of parties should not be construed so technically as to impose unnecessary difficulties on a judgment creditor seeking to secure a lien,[44] and that an entry which is substantially correct, should be regarded as sufficient.[45]

Under some statutes, where there are several parties plaintiff or parties defendant to the judgment, the names of all parties to the judgment must duly be indexed in order to create a lien,[46] and a

Falls v. Allen, Civ.App., 261 S.W. 1057.

34 C.J. p 575 note 60 [a] (10), p 577 note 88, p 579 notes 97 [c], 2, 8.

Number of page of record

(1) Under some statutes the index must show the number of the page of the book on which the abstract is recorded.—J. M. Radford Grocery Co. v. Speck, Tex.Civ.App., 152 S.W.2d 787, error refused—34 C.J. p 579 note 2.

(2) Where the index refers to the wrong page, no lien is created.—Fordyce-Crossett Sales Co. v. Erwin, Tex.Civ.App., 121 S.W.2d 491—Askey v. Power, Tex.Civ.App., 21 S.W.2d 326, reversed on other grounds, Com. App., 36 S.W.2d 446.

37. Tex.—First State Bank of Mobeetie v. Goodner, Civ.App., 168 S. W.2d 941.

38. Tex.—Womack v. Paris Grocer Co., Civ.App., 166 S.W.2d 366, error refused 168 S.W.2d 645, 140 Tex. 423—Carver v. Gray, Civ.App., 140 S.W.2d 227, error dismissed, judgment correct.

39. Tex.—Womack v. Paris Grocer Co., Civ.App., 166 S.W.2d 366, error refused 168 S.W.2d 645, 140 Tex. 423—Carver v. Gray, Civ.App., 140 S.W.2d 227, error dismissed, judgment correct.

40. Tex.—McGlothlin v. Coody, Com.App., 59 S.W.2d 819.

34 C.J. p 579 note 8.

41. Tex.—McLarry v. Studebaker Bros. Co., Civ.App., 146 S.W. 676.

34 C.J. p 579 note 8, p 580 notes 15, 17, p 581 note 36.

Capacity

In indexing recorded abstract of judgment obtained against party in capacity as executor of will, statute does not require index to show such capacity.—Willis v. Smith, 17 S.W. 247, 66 Tex. 31—Moseley v. Evangelical Theological College, Tex.Civ.App., 34 S.W.2d 638.

42. **In Texas**

(1) The rule stated in the text has been announced.—McGlothlin v. Coody, Com.App., 59 S.W.2d 819—J. M. Radford Grocery Co. v. Speck, Civ.App., 152 S.W.2d 787, error refused—San Antonio Loan & Trust Co. v. Davis, Civ.App., 235 S.W. 612—Central Coal & Coke Co. v. Southern Nat. Bank, 34 S.W. 383, 12 Tex.Civ. App. 334.

(2) In some earlier cases, however, a contrary view was taken.—Semple v. Eubanks, 35 S.W. 509, 13 Tex.Civ.App. 418—Von Stein v. Trexler, 23 S.W. 1047, 5 Tex.Civ.App. 299.

43. Tex.—J. M. Radford Grocery Co. v. Speck, Civ.App., 152 S.W.2d 787, error refused—Barton v. Parks, Civ.App., 127 S.W.2d 376, error refused—McGlothlin v. Coody, Civ. App., 39 S.W.2d 133, affirmed, Com. App., 59 S.W.2d 819—Guaranty State Bank of Donna v. Marion County Nat. Bank, Civ.App., 293 S.W. 248.

34 C.J. p 579 note 8, p 581 note 45.

Surname controlling

The entry should be placed under the letter which begins the surname of a party to the judgment.—Avery v. Texas Loan Agency, Tex.Civ.App., 62 S.W. 793—34 C.J. p 580 note 19.

Names of both plaintiff and defendant

(1) The abstract must be indexed alphabetically in the names both of plaintiff and defendant.—Guaranty State Bank of Donna v. Marion County Nat. Bank, Tex.Civ.App., 293 S. W. 248—34 C.J. p 579 note 8.

(2) Where an abstract of a judgment was indexed in the name of each defendant against whom judgment was taken but was not indexed alphabetically in the name of any plaintiff, no lien was created.—Guaranty State Bank of Donna v. Marion County Nat. Bank, supra.

(3) In a comparatively early case, however, the view was taken that the index was sufficient to fix a lien on defendant's property if his name is correctly stated under the proper letter, even though plaintiff's name is indexed under a wrong letter.—Franke v. Lone Star Brewing Co., 42 S.W. 861, 17 Tex.Civ.App. 9.

Insufficient space under correct letter

Even where the name of a party is entered under the wrong letter in the index because of want of space under the correct letter, a lien is not created.—Cocke v. Conquest, Civ.App., 2 S. W.2d 992, affirmed, Com.App., 13 S.W. 2d 348, affirmed 35 S.W.2d 673, 120 Tex. 43—Fairmont Creamery Co. v. Minter, Tex.Civ.App., 274 S.W. 281.

Index held sufficient

Tex.—Womack v. Paris Grocer Co., Civ.App., 166 S.W.2d 366, error refused 168 S.W.2d 645, 140 Tex. 423—Carver v. Gray, Civ.App., 140 S. W.2d 227, error dismissed, judgment correct—McDermott v. Steck Co., Civ.App., 138 S.W.2d 1106, error refused.

34 C.J. p 579 note 8.

44. Tex.—Bradley v. Janssen, Civ. App., 93 S.W. 506—Burnett v. Cockshatt, 21 S.W. 950, 2 Tex.Civ.App. 304.

45. Tex.—Bradley v. Janssen, Civ. App., 93 S.W. 506.

46. Tex.—McGlothlin v. Coody, Com. App., 59 S.W.2d 819—Cheatham v. Mann, Civ.App., 133 S.W.2d 264, error refused—Barton v. Parks, Civ. App., 127 S.W.2d 376, error refused.

34 C.J. p 581 note 36.

Separate listing of coparties

The statute requiring entry of abstract of judgment on alphabetical index showing the name of each plaintiff and each defendant does not require that, in indexing under the letter proper to one defendant, other defendant's name be shown.—Texas Building & Mortgage Co. v. Morris, Tex.Civ.App., 123 S.W.2d 365, error dismissed.

Index held insufficient

(1) Where abstract of judgment did not contain names of all defendants and when recorded in another county was indexed only in names appearing in abstract, no lien was created, notwithstanding plaintiffs recovered no judgment for debt against defendants whose names were so omitted, but were allowed

lien is not imposed on the property of a party whose name has duly been indexed where the name of a coparty in the judgment has not been indexed.[47] Where, however, the statute requires the indexing of the parties in the judgment, it is not necessary to index the name of a person who was made a coparty to the action, where he is not a party to the judgment.[48]

Where a partnership is a party to the judgment, under a statutory provision for an alphabetical index showing the name of each plaintiff and of each defendant, indexing in the firm name may be sufficient if the firm name consists of the full name of each of the partners,[49] but the rule is otherwise where the index does not show the names of the individual partners in the case either of a judgment in favor of a partnership,[50] or against a partnership.[51] Where the individual names of the partners are duly indexed, the index is not rendered insufficient by the fact that the firm name is omitted or is stated incorrectly.[52]

Where a corporation is a party to the judgment, the index of the recorded abstract should show the complete name of the corporation.[53] If a corporate name is composed of a surname preceded by initials, the name should be indexed under the first letter of the surname,[54] and, where the first word of the corporate name is the article "The," the name is properly indexed under the first letter of another word which actually identifies the corporation.[55] Indexing in the name of a company, which is actually a corporation, as judgment creditor, is not fatally defective because the index fails to show whether the judgment creditor is a corporation, joint stock company, or a partnership.[56] Where a judgment is recovered by the receiver of a corporation, it has been held not essential that the index contain the name of the corporation.[57]

§ 463. Recording, Docketing, and Indexing Judgment

Under various statutory provisions, it is generally held that the docketing or recording of a judgment creates a lien on the property of the judgment debtor, and that in the absence of due compliance with such statutory provisions there is no lien.

While at common law a judgment did not create a lien, as is discussed supra § 454, under many statutes a judgment which is recorded or docketed becomes a lien on the judgment debtor's realty.[58] On the other hand, unless the statutory requirement

costs against one of such defendants, and another of such defendants was allowed costs against plaintiffs. —Shirey v. Trust Co. of Texas, Tex. Civ.App., 98 S.W.2d 243—Shirey v. Trust Co. of Texas, Tex.Civ.App., 69 S.W.2d 835, error refused.

(2) Where plaintiff recovered personal judgment against defendant landowner and judgment for foreclosure of a vendor's lien against defendant and codefendant, and where, on defendant's cross action against codefendant, latter recovered judgment for costs against defendant, failure to index judgment in codefendant's name prevented lien from arising in plaintiff's favor on defendant's land, notwithstanding the indexing complied with the statute in other respects.—McGlothlin v. Coody, Tex.Com.App., 59 S.W.2d 819.

47. **In Texas**

(1) The rule stated in the text has been applied or recognized.—Barton v. Parks, Civ.App., 137 S.W.2d 376, error refused—McGlothlin v. Coody, Civ.App., 39 S.W.2d 133, affirmed, Com.App., 59 S.W.2d 819.

(2) In an earlier case, however, in which a similar statute was involved, there were expressions apparently contrary to the rule stated in the text.—Blum v. Keyser, 28 S.W. 561, 8 Tex.Civ.App. 675.

48. Tex.—Womack v. Paris Grocer Co., Civ.App., 166 S.W.2d 366, error refused 168 S.W.2d 645, 140 Tex. 423.

49. Tex.—Oppenheimer v. Robinson, 27 S.W. 95, 87 Tex. 174.
34 C.J. p 581 note 40 [a].

50. **In Texas**

(1) The rule stated in the text has been recognized or applied.—Pierce v. Wimberly, 14 S.W. 454, 78 Tex. 187 —34 C.J. p 581 note 40.

(2) In a case, however, in which the applicability of the same Texas statute was assumed, a contrary view apparently was taken.—Cooke v. Avery, Tex., 13 S.Ct. 340, 147 U.S. 375, 37 L.Ed. 209.

51. Tex.—Gullett Gin Co. v. Oliver, 14 S.W. 451, 78 Tex. 182.
34 C.J. p 581 note 40.

52. Tex.—Willis v. Downes, Civ. App., 46 S.W. 920—Semple v. Eubanks, 35 S.W. 509, 13 Civ.App. 418.

53. Tex.—McLarry v. Studebaker Bros. Co., Civ.App., 146 S.W. 676.
34 C.J. p 581 notes 42, 45 [a] (1).

Index held sufficient

Tex.—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S.W.2d 365, error dismissed.

54. Tex.—B. F. Avery & Sons v. Texas Loan Agency, Civ.App., 62 S.W. 793.
34 C.J. p 581 note 43.

55. Tex.—McDermott v. Steck Co., Civ.App., 138 S.W.2d 1106, error refused.
34 C.J. p 581 note 43.

56. Tex.—Bradley v. Janssen, Civ. App., 93 S.W. 506.

57. Tex.—Carver v. Gray, Civ.App., 140 S.W.2d 227, error dismissed, judgment correct.

58. U.S.—Newberry v. Davison Chemical Co., C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, two cases, 290 U.S. 660, 78 L.Ed. 571—Bortman v. Urban Motion Picture Industries, C.C.A.N.Y., 4 F.2d 913.
Ill.—Haugens v. Holmes, 41 N.E.2d 109, 314 Ill.App. 166.
La.—Escat v. Kraus, App., 141 So. 94.
N.Y.—Bartol v. Bennett, 56 N.Y.S.2d 314.
N.C.—Moore v. Jones, 36 S.E.2d 920 —Jones v. Currie, 129 S.E. 605, 190 N.C. 260.
N.D.—Finch, Van Slyck & McConville v. Jackson, 220 N.W. 130, 57 N.D. 17.
19 C.J. p 381 note 77.
Docketing or recording transcript of judgment see supra § 462.

Object of docketing

(1) The object of docketing is to create a judgment lien on realty.
N.Y.—Rosenthal v. Graves, 6 N.Y.S. 2d 766, 168 Misc. 845.
Or.—State ex rel. Tolls v. Tolls, 85 P.2d 366, 160 Or. 317, 119 A.L.R. 1370.

(2) The true purpose of statutes providing that where a judgment of a specified inferior court is docketed

of recording and docketing is complied with, the judgment will not attach as a lien,[59] at least as against third persons acting in good faith and without actual notice,[60] such as subsequent purchasers[61] and subsequent attaching creditors,[62] although it may be otherwise as between the original parties,[63] and under some provisions protection is afforded only to purchasers but not to creditors.[64]

Under some statutes it is the duty of the judgment creditor to see to it that his judgment is rightly and properly recorded or docketed, under penalty of losing his lien,[65] although the failure properly to record or to docket the judgment is wholly the fault of the clerk,[66] the only remedy of the judgment creditor in such cases being against the clerk for any loss suffered.[67] Under other statutes, the lien of a judgment is not lost by the failure of the clerk to docket the judgment,[68] or by his delay in docketing it,[69] but he will be liable in damages to any person injured by reason of his default.[70]

Where subsequent purchasers or encumbrancers have actual notice of the judgment, they will be bound thereby, this being equivalent to the constructive notice required to be given by entry on the judgment docket.[71] The docketing of a judgment is constructive but conclusive notice to all the world of the lien of such judgment,[72] and has been said substantially to effect a seizure of the judgment debtor's land and to deposit it in custodia legis,[73] although it has been held that the docketing does not in itself sequestrate any property.[74] Where a court of equity decrees a lien on specified land, such lien exists independently of statutes providing for the docketing of money judgments,[75] and such a lien is no more dependent on such statute than a mechanic's lien or the lien created by a mortgage.[76]

Judgments affirmed on appeal. Where a judgment has been affirmed on appeal, it must be redocketed in order to make it a lien for the damages and costs in the appellate court,[77] although without such redocketing it remains a lien on real estate, by virtue of the original docketing, for the amount of the original judgment and accumulated interest.[78]

Cancellation of docket. The clerk is generally authorized by statute to cancel and discharge the docket of a judgment, on the filing with him of an acknowledgment of satisfaction, signed by the party in whose favor the judgment is obtained, and authenticated in the prescribed manner; without such acknowledgment the act of the clerk in canceling the docket is without jurisdiction, and is void as to the parties whose rights are affected by it.[79]

Place of docketing. A judgment has been held

in a specified superior court, it shall become a judgment of the latter is to provide for making the judgment a lien on real estate.—Paley v. Solomon, D.C.D.C., 59 F.Supp. 887.

59. U.S.—In re Flushing Queensboro Laundry, C.C.A.N.Y., 90 F.2d 601.
Ga.—Tanner v. Wilson, 192 S.E. 425, 184 Ga. 628.
Miss.—Johnson v. Cole Mfg. Co., 110 So. 428, 144 Miss. 482.
Neb.—Pontiac Improvement Co. v. Leisy, 14 N.W.2d 384, 144 Neb. 705.
N.M.—Corpus Juris cited in Breece v. Gregg, 13 P.2d 421, 422, 36 N.M. 246.
N.C.—Jones v. Currie, 129 S.E. 605, 190 N.C. 260.
S.C.—Powers v. Fidelity & Deposit Co. of Maryland, 186 S.E. 523, 180 S.C. 501.
34 C.J. p 576 note 68.

60. Ga.—Roberson v. Roberson, 34 S.E.2d 836, 199 Ga. 627.
La.—Robin v. Harris Realty Co., 152 So. 573, 178 La. 946.

61. Okl.—Wilson v. First Nat. Bank, 88 P.2d 628, 184 Okl. 518—Richards v. Tynes, 300 P. 297, 149 Okl. 235.
34 C.J. p 576 note 69.

Title passing before enrollment

It is the enrollment of the judgment which creates the lien, and title passing from judgment debtor to third person for consideration before enrollment of judgment is not affected thereby.—Johnson v. Cole Mfg. Co., 110 So. 428, 144 Miss. 482.

62. Mont.—Sklower v. Abbott, 47 P. 901, 19 Mont. 228.
N.Y.—Buchan v. Sumner, 2 Barb.Ch. 165, 47 Am.D. 305.

63. W.Va.—Richardson v. White, 127 S.E. 636, 99 W.Va. 31.
34 C.J. p 577 note 71.

64. Va.—American Bank & Trust Co. v. National Bank of Suffolk, 196 S.E. 693, 170 Va. 169.

65. Pa.—Jaczyszyn v. Paslawski, 24 A.2d 116, 147 Pa.Super. 97.
34 C.J. p 577 note 72.

66. Miss.—Planters' Bank v. Conger, 20 Miss. 527.

67. N.C.—Holman v. Miller, 9 S.E. 429, 103 N.C. 118.
34 C.J. p 577 note 74.

68. Ind.—Johnson v. Schloesser, 45 N.E. 702, 146 Ind. 509, 58 Am.S.R. 367, 36 L.R.A. 59.

69. Or.—Budd v. Gallier, 89 P. 638, 50 Or. 42.

70. Ind.—Johnson v. Schloesser, 45 N.E. 702, 146 Ind. 509, 58 Am.S.R. 367, 36 L.R.A. 59.

71. Pa.—Appeal of York Bank, 36 Pa. 458.
34 C.J. p 577 note 78.

Duty to inquire

While a purchaser may ordinarily assume from an entry of satisfaction in the judgment index that the lien formerly existing has been discharged, nevertheless, where record discloses circumstance in addition to entry of satisfaction of judgment calculated to put purchaser on inquiry, he must make inquiry.—First Nat. Bank v. Walker, 145 A. 804, 296 Pa. 192.

72. Pa.—Coral Gables v. Kerl, 6 A. 2d 275, 334 Pa. 441, 122 A.L.R. 903.
Va.—Citizens Nat. Bank v. Manoni, 76 Va. 802.

73. N.Y.—In re Guarneri's Will, 268 N.Y.S. 244, 149 Misc. 759.

74. N.Y.—Koudelka v. Koudelka, 12 N.Y.S.2d 148, 171 Misc. 519.

75. Minn.—Pye v. Magnuson, 227 N. W. 895, 178 Minn. 531.

76. Minn.—Pye v. Magnuson, supra.

77. Cal.—Chapin v. Broder, 16 Cal. 403.
34 C.J. p 577 note 80.

78. Minn.—Daniels v. Winslow, 4 Minn. 313.

79. N.Y.—Booth v. Farmers' & Me-

not a lien on real estate unless it is docketed in the county in which the land is situated.[80] Where the judgment does not affirmatively provide that it shall be a lien on real property, it is essential under some statutes that it be docketed in the county where it was rendered in order to become a lien on realty,[81] and that the judgment be docketed first in the county where it was rendered before it may be docketed in another county.[82]

§ 464. —— Indexing

The purpose of a judgment index is to afford constructive notice of the judgment to interested third persons, and under some statutes absence of such an index of the judgment precludes its attaching as a lien as far as concerns the rights of third persons lacking actual notice of the judgment.

The object of a judgment index is to furnish notice to purchasers, subsequent encumbrancers, and other interested parties of the existence of the judgment,[83] and due indexing serves as constructive notice of a judgment lien on the property involved.[84] Under the statutes of many states judgments will not operate as liens, except as against persons with actual notice,[85] unless they are not only docketed or recorded as discussed supra § 463, but are also indexed.[86] However, under a statute requiring merely that the judgment must be "docketed" before it can be binding as against a purchaser for valuable consideration without notice, indexing is not necessary even as against such a purchaser.[87] Under some statutes the judgment must be properly cross-indexed.[88]

§ 465. —— Sufficiency to Create Lien

a. In general
b. Names and descriptions of parties

a. In General

The record and index of a judgment should be sufficiently accurate and complete to afford due notice to the searcher of all essential facts, although minor inaccuracies may not be fatal to the lien. Ordinarily the entry should show the court in which the judgment was rendered, the date of docketing, and the amount of the judgment.

For the purposes of a lien, the record or docket of a judgment, and the index, should be sufficiently full, accurate, and explicit to inform intending purchasers or mortgagees of the facts which it is essential for them to know, and such that a reasonably careful search in the proper quarters will not fail to disclose the judgment;[89] and since the lien of a judgment is the creation of statute, it is necessary to its existence that statutes requiring certain formalities of docketing and indexing should be followed in all substantial particulars.[90] The judg-

chanics' Nat. Bank, 4 Lans. 301, reversed on other grounds 50 N.Y. 396.

80. Ind.—Pfeiffer Hardware Co. v. Auburn State Bank of Auburn, Ind., 8 N.E.2d 398, 104 Ind.App. 472.
Tex.—Kinsey v. Dutton, Civ.App., 100 S.W.2d 1025, error dismissed.
34 C.J. p 577 note 82.
Territorial extent of lien of federal court judgments see Federal Courts § 144 i.

Strict compliance with statute
Statutory requirement that a judgment must be docketed in county where realty is situated must be strictly complied with for a lien to be obtained on realty.—Southern Dairies v. Banks, C.C.A.N.C., 92 F.2d 282, certiorari denied Banks v. Southern Dairies, 58 S.Ct. 368, 302 U.S. 761, 82 L.Ed. 590.

81. Or.—Mason v. Mason, 34 P.2d 328, 148 Or. 34.

82. N.C.—Essex Inv. Co. v. Pickelsimer, 187 S.E. 813, 210 N.C. 541.

83. Pa.—Coral Gables v. Kerl, 6 A. 2d 275, 334 Pa. 441, 122 A.L.R. 903.
Indexing transcript of judgment see supra § 462.

84. Pa.—Lambert v. K-Y Transp. Co., 172 A. 180, 113 Pa.Super. 82.

85. Iowa.—State Savings Bank v. Shinn, 109 N.W. 921, 130 Iowa 365, 114 Am.S.R. 424.
34 C.J. p 577 note 86.

86. Ind.—Sullivan State Bank v. First Nat. Bank, 146 N.E. 403, 82 Ind.App. 419.
N.J.—Englese v. Hyde, 166 A. 468, 111 N.J.Law 1.
Okl.—Wilson v. First Nat. Bank, 88 P.2d 628, 184 Okl. 518—Long Bell Lumber Co. v. Etter, 251 P. 997, 123 Okl. 54.
Pa.—Houser v. Childs, 196 A. 547, 129 Pa.Super. 565—In re Tourison's Estate, 22 Pa.Dist. & Co. 704, reversed on other grounds 184 A. 95, 321 Pa. 299.
34 C.J. p 577 note 88.

87. Va.—Old Dominion Granite Co. v. Clarke, 28 Gratt. 617, 69 Va. 617.
W.Va.—Calwell v. Prindle, 19 W.Va. 604.

88. N.C.—Jones v. Currie, 129 S.E. 605, 190 N.C. 260.
34 C.J. p 578 note 91.

89. Pa.—Coral Gables v. Kerl, 6 A. 2d 275, 334 Pa. 441, 122 A.L.R. 903.
34 C.J. p 578 note 92.

Degree of accuracy required
(1) "The law places a burden upon one who would establish a lien to docket and index his judgment with a degree of accuracy sufficient to lead a reasonably careful searcher to conclude that the lien is against the object of his search, or to suggest to the searcher the necessity of inquiry to ascertain the fact."—Tioga Trust Co. v. Home Owners' Loan Corp., 42 Pa.Dist. & Co. 165, 167.

(2) The law merely requires an index that will naturally lead the investigator to a discovery of the judgment and the identity of defendant, and, if the index meets such requirement, it has served its legal purpose.—Coral Gables v. Kerl, 6 A. 2d 275, 334 Pa. 441, 122 A.L.R. 903.

Duty of inquiry
(1) Where indexing and docketing of judgment contains sufficient information to put an ordinarily prudent person upon guard, inquiry becomes a duty, and, if an investigation, reasonably pursued, would disclose identity of judgment debtor, subsequent lienor is bound by notice of previous judgments, even though inaccurately recorded.—Coral Gables v. Kerl, supra.

(2) A purchaser of land is affected with such notice as the judgment docket and index entries afford, and is under a duty to make such investigation as the entries would suggest to a prudent man.—Henry v. Sanders, 193 S.E. 15, 212 N.C. 239.

90. Or.—Western Loan & Savings

ment should be entered in the proper book,[91] and in the proper county or district,[92] and the record should show, among other things, the court in which the judgment was rendered,[93] the date of docketing,[94] and the name of the judgment creditor or owner of the judgment, and that of the debtor, as discussed infra subdivision b of this section. Requirements that the judgment docket show the nature of the case, and the name of the attorney for the creditor, have been held to be directory only.[95]

Immaterial inaccuracies are not fatal to the lien.[96] If a judgment was by mistake rendered and enrolled against the wrong party, it cannot be corrected except as between the real parties to the judgment, and before the rights of bona fide purchasers intervene.[97] The recording of the judgment or order of the court, and not of its mere opinion or direction to enter an order, is required to create a lien on real property.[98]

Amount of judgment. The entry should show the amount of the judgment debt.[99] This requirement involves the necessity of showing the kind of money in which it is payable,[1] and the amount or rate of interest.[2] Failure of the record of the judgment to include the amount of the costs will defeat the lien only to the extent of the costs.[3] The use of numerals without a dollar sign or other indication that the figures represent dollars in stating the amount of the judgment is not fatal where the omission is supplied by an accompanying entry, which is properly a descriptive part of the judgment, showing that the figures refer to dollars;[4] and it has been held that such an omission is not fatal if the columns of figures are separated by a vertical line marking off the cents from the dollars according to the practice of bookkeepers.[5]

b. Names and Descriptions of Parties

Generally, the docket and index should name and describe the parties to the judgment with a degree of accuracy sufficient to afford constructive notice of the judgment, and the surname and Christian name of the party should be given with substantial correctness, although initials may sometimes be used for first and middle names.

As between the judgment creditor and judgment debtor a judgment may afford a valid lien despite inaccuracies or omissions in the docket or index in respect of the names or descriptions of the parties.[6] In order to make the lien of a judgment effective as against third persons, however, it is ordinarily necessary that the docket and index should disclose the names of both parties, plaintiff as well as defendant, and designate them with such a degree of accuracy as to charge persons searching such records with notice of the judgment or to put them on inquiry.[7] An entry substantially correct is sufficient especially as against a person who has not been misled thereby.[8] Generally speaking, the question

Co. v. Currey, 65 P. 360, 39 Or. 407, 87 Am.S.R. 660.
34 C.J. p 578 note 93.

91. Fla.—Curry v. Lehman, 49 So. 673, 57 Fla. 385.
34 C.J. p 579 note 94.

92. N.Y.—Lanning v. Carpenter, 48 N.Y. 408.
34 C.J. p 579 note 95.
Place of recording generally see supra § 463.

93. Or.—Western Loan & Savings Co. v. Currey, 65 P. 360, 39 Or. 407, 87 Am.S.R. 660.
34 C.J. p 579 note 96.

94. Pa.—Home Sav. Fund v. King, 173 A. 891, 113 Pa.Super. 400.
34 C.J. p 579 note 97.
Failure to enter hour not fatal
Pa.—Home Sav. Fund v. King, supra.

95. N.M.—Cannon v. First Nat. Bank, 291 P. 924, 35 N.M. 193.

96. N.Y.—Sears v. Mack, 2 Bradf. Surr. 394, affirmed 17 N.Y. 445.
34 C.J. p 579 note 3.

97. Miss.—Allen West Commn. Co. v. Millstead, 46 So. 256, 92 Miss. 837, 131 Am.S.R. 556.
Judgment or amendment nunc pro tunc see infra § 469.

98. Cal.—Zagoren v. Hall, 10 P.2d 202, 122 Cal.App. 460.

99. La.—Lirette v. Carrane, 27 La. Ann. 298.
34 C.J. p 582 note 49.

1. U.S.—In re Boyd, C.C.Or., 3 F. Cas.No.1,746, 4 Sawy. 262.
34 C.J. p 582 note 50.

2. U.S.—In re Boyd, supra.
34 C.J. p 582 note 51.

3. Mo.—Green v. Meyers, 72 S.W. 128, 98 Mo.App. 438.
Wash.—Lamey v. Coffman, 39 P. 682, 11 Wash. 301.

4. U.S.—In re Boyd, C.C.Or., 3 F. Cas.No.1,746, 4 Sawy. 262.

5. Cal.—Dyke v. Orange Bank, 27 P. 304, 90 Cal. 397.

6. U.S.—In re MacNulty, D.C.Pa., 4 F.Supp. 93.

7. N.C.—Jones v. Currie, 129 S.E. 605, 190 N.C. 260.
Pa.—Houser v. Childs, 196 A. 547, 129 Pa.Super. 565.
34 C.J. p 579 note 8.
Appearance in transcript insufficient
Where name of judgment creditor did not appear in judgment entered on docket of superior court of county in which debtor's realty was situated, or in cross index of such docket, judgment was not valid lien on such land, although judgment creditor's name appeared in caption and body of transcript from county in which judgment was rendered.—Jones v. Currie, 129 S.E. 605, 190 N.C. 260.
Same name in which asset registered
If a judgment creditor desires to bind a particular asset of the debtor as against a future purchaser or a mortgagee, the burden is on him to see that his judgment is recorded and indexed in the same name as that in which the asset is registered.—Tioga Trust Co., to Use of v. Home Owners' Loan Corporation, 42 Pa. Dist. & Co. 165.
Basis of judgment
Where a judgment is correctly indexed in the name of the judgment debtor, the indexing constitutes legal notice of the lien of the judgment, even though the latter was rendered on a note signed by the judgment debtor by an undecipherable, although genuine, signature.—Adelson v. Kocher, 36 A.2d 737, 154 Pa.Super. 548.

8. Ind.—Day v. Worland, 92 Ind. 75.

whether an error, omission, or variance in the docket or index in respect of the names of the parties is of such material or substantial character as to render it ineffective as constructive notice of the judgment is one on which it is difficult, if not impossible, to formulate a rule;[9] each case is dependent on its peculiar facts, and the question whether the name found in the index is such as to put the searcher on inquiry is, as a rule, one of fact and not of law.[10]

Alphabetical order. It has been held that a judgment will not be deemed to have been indexed if the names are not listed in alphabetical order;[11] there is, however, authority to the contrary.[12] The surname should precede the Christian name and it determines the alphabetical order.[13]

Joint plaintiffs or defendants; firm name. Where there are several plaintiffs or defendants, the names of all the parties should be indexed correctly,[14] although, if the names of all the defendants are not indexed, the judgment has been held to operate as a lien on the property of defendant against whom the index is made.[15] Where the judgment is against a firm, the names of the individual partners must be set out.[16]

Surnames. A misspelling of the surname has been held to defeat the lien,[17] although in other cases such a misspelling may be immaterial because of the application of the rule of idem sonans, where the names would be pronounced alike,[18] and the variance to the eye is not substantial.[19] While the term "junior" or "senior" may be a means of distinguishing between a father and son who bear the same name, it has been held no part of either's name, and hence not required to be included in the docket entry of a judgment against either, although the other bearing the same name resides in the same county.[20] There is, however, authority to the effect that, if such term is used, it becomes matter of material description and will operate to postpone the lien of a judgment so entered and indexed to judgments subsequently entered and indexed without such suffix.[21]

Christian names. Although there is some authority to the contrary,[22] it is the general rule that the index and docket must show the correct first or Christian name[23] or the first initial thereof.[24] This

9. Iowa.—Gilbert v. Berry, 180 N. W. 148, 190 Iowa 170.

10. Iowa.—Gilbert v. Berry, supra.

11. Okl.—Wilson v. First Nat. Bank, 88 P.2d 628, 184 Okl. 518—Long Bell Lumber Co. v. Etter, 251 P. 997, 123 Okl. 54.
34 C.J. p 581 note 45.

12. Cal.—Hibberd v. Smith, 50 Cal. 511.

13. Cal.—Hibberd v. Smith, supra.

14. Va.—Richardson v. Gardner, 105 S.E. 225, 128 Va. 676.
34 C.J. p 581 note 36.

No lien as against omitted defendant
Where a judgment was obtained against five defendants, but was entered in judgment dockets only once, and was not repeated under name of each defendant in alphabetical order, as required by statute, the judgment not indexed under judgment debtor's name did not become a lien on his real estate located in such county.—Sullivan State Bank v. First Nat. Bank, 146 N.E. 403, 82 Ind.App. 419.

15. Minn.—Whitacre v. Martin, 53 N.W. 806, 51 Minn. 421.
Tex.—Blum v. Keyser, 28 S.W. 561, 8 Tex.Civ.App. 675.

16. Miss.—Hughes v. Lacock, 63 Miss. 112.
34 C.J. p 581 note 40.

17. Iowa.—Ætna Life Ins. Co. v. Hesser, 42 N.W. 325, 77 Iowa 381, 14 Am.S.R. 297, 4 L.R.A. 122.
34 C.J. p 580 note 15.

Creditor's duty
A judgment creditor must see that the docket of the judgment is in debtor's correct name.—Berkowitz v. Dam, 202 N.Y.S. 584, 122 Misc. 143, affirmed 207 N.Y.S. 811, 212 App.Div. 836.

Particular names misspelled
(1) Judgment recovered against "Max Soicher," but docketed against "Max Sorcher."—Berkowitz v. Dam, supra.

(2) Judgment docketed against "Weisner" was not lien on premises purchased from "Wiesner."—Stark v. Wiesner, 214 N.Y.S. 292, 126 Misc. 620.

18. Pa.—Myer v. Fegaly, 39 Pa. 429, 80 Am.D. 534.
34 C.J. p 580 note 17.
Idem sonans see the C.J.S. title Names § 14, also 45 C.J. p 383 note 10–p 390 note 42.

19. Pa.—Appeal of Bergman, 88 Pa. 123.
34 C.J. p 580 note 18.

20. Minn.—Bidwell v. Coleman, 11 Minn. 78.

21. Pa.—Rusterholtz v. Brown, 10 Pa.Dist. 21.

22. Cal.—Hibberd v. Smith, 50 Cal. 511.
34 C.J. p 580 note 22.

23. N.J.—Englese v. Hyde, 166 A. 468, 111 N.J.Law 1.
34 C.J. p 580 note 23.

Omission from docket
If the first, or Christian, name of a defendant is not entered on judgment docket, the judgment, although valid as between the parties, will not affect subsequent purchasers or judgment creditors.—Coral Gables v. Kerl, 6 A.2d 275, 334 Pa. 441, 122 A.L.R. 903.

Incorrect Christian name
(1) A judgment recorded and indexed in the name of "Mikola Borys" did not constitute "constructive notice" of a judgment against "Nikolai Borys."—Jaczyszyn v. Paslawski, 24 A.2d 116, 147 Pa.Super. 97.

(2) The indexing of a judgment against "Lucy" Christopher is not constructive notice of a judgment against "Lucille" Christopher so as to afford a lien against the land of the latter.—Troffo v. Camione, 16 Pa. Dist. & Co. 92, 79 Pittsb.Leg.J. 51, 21 Del.Co. 234, 45 York Leg.Rec. 83, 13 Erie Co. 25.

24. Pa.—Coral Gables v. Kerl, 6 A. 2d 275, 334 Pa. 441, 122 A.L.R. 903.
34 C.J. p 580 note 24.

Sufficiency of initial
A judgment indexed and docketed against the judgment debtor's correct surname and initial of Christian name is sufficient to constitute constructive notice to subsequent encumbrancers, at least where debtor is well known by the shortened designation, but, if initials are employed instead of Christian names, errors therein are as fatal as in the names themselves.—Coral Gables v. Kerl, supra.

rule, however, must have a reasonable construction.[25] While the indexing of the Christian name by which defendant is generally known is not, as a general rule, sufficient,[26] it is generally known that certain first or Christian names are interchangeably used, and the initial and dominant letters of each are identical, indicating to the eye that they are the same and giving the same sound and substance to each, and the judgment index must be searched for each;[27] and it has been suggested that, where two Christian names are in original derivation the same, and are taken to be the same in common use, although they differ in sound or spelling, a judgment entered under one is notice of a lien against property held under the other.[28] Where the judgment debtor has ceased to use the first of his two Christian names, a judgment docketed against him by the second of such names only has been held insufficient, even though the judgment itself was rendered in that form;[29] but it has been held otherwise where it appeared that the person attacking the lien knew that the judgment debtor's name was used in several forms and it also appeared that he had not been prejudiced by the fact that only the second of the debtor's names was used in docketing.[30]

Middle initial. The erroneous omission or introduction of a middle initial in defendant's name, or a mistake in such middle initial, has been held to prevent the judgment from having effect as a lien,[31] although such an error or omission may be immaterial where the circumstances are such that the identification is sufficient,[32] and some decisions follow the view that middle initials are generally unimportant.[33]

Married women. If defendant is a married woman, the docket and index must show her own Christian name, the use of that of her husband being insufficient,[34] except as against a person who knows her identity.[35] A subsequent innocent purchaser from a judgment debtor, conveying by her married name property acquired under such married name, takes title freed from the lien of a judgment docketed against the debtor by her maiden name,[36] and it has been held that this is the rule, even though the purchaser knew of her maiden name,[37] but it has also been held that such knowledge permits the judgment to operate as a lien.[38] The rule requiring use of a party's middle initial to render the judgment effective as a lien has been applied to invalidate a claimed judgment lien against property held by husband and wife as tenants by the entirety where the husband's name was correctly indexed in the judgment docket but the wife's middle initial was omitted.[39]

25. Pa.—Burns v. Ross, 64 A. 526, 215 Pa. 293, 7 L.R.A.,N.S., 415, 114 Am.S.R. 963.

Letter perfect

In order to constitute constructive notice, it is not necessary that the name of the judgment debtor as docketed and indexed be letter perfect.—Coral Gables v. Kerl, 6 A.2d 275, 334 Pa. 441, 122 A.L.R. 903.

26. Pa.—Burns v. Ross, 64 A. 526, 215 Pa. 293, 114 Am.S.R. 963, 7 L. R.A.,N.S., 415.
34 C.J. p 580 note 26.

27. Pa.—Burns v. Ross, supra.
34 C.J. p 580 note 27.

A common variant of the first name in indexing and docketing a judgment is unobjectionable.—Coral Gables v. Kerl, 6 A.2d 275, 334 Pa. 441, 122 A.L.R. 903.

28. N.Y.—H. R. & C. Co. v. Smith, 151 N.E. 448, 242 N.Y. 267, 45 A.L. R. 554.

Derivatives and corruptions of names generally see the C.J.S. title Names § 8, also 45 C.J. p 375 note 97—p 376 note 1.

Limitation of decision

The court offering this suggestion was careful to limit its actual decision to a holding that "Bess" and "Elizabeth" were so far the same as to make docketing of a judgment under one, notice of a lien against property listed under the other.—H. R. & C. Co. v. Smith, supra.

29. Ind.—Johnson v. Hess, 25 N.E. 445, 126 Ind. 298, 9 L.R.A. 471.
34 C.J. p 580 note 28.

30. N.J.—Yucker v. Morris, 98 A. 259, 86 N.J.Eq. 131.
34 C.J. p 580 note 29.

31. N.D.—Turk v. Benson, 152 N.W. 354, 30 N.D. 200, L.R.A.1915D 1221. Pa.—Arch St. Building & Loan Ass'n v. Sook, 158 A. 595, 104 Pa.Super. 269.
34 C.J. p 581 note 34.

32. Pa.—Coral Gables v. Kerl, 6 A. 2d 275, 334 Pa. 441, 122 A.L.R. 903.
34 C.J. p 581 note 35.

Unusual name

A judgment docketed and indexed in the name of "Caroline Kerl" constituted constructive notice of a judgment against "Caroline C. Kerl," in view of fact that name was unusual and used by no other person in the county and that debtor was not more generally known by name with initial than without it; and hence judgment creditor owning judgment docketed in name of "Caroline Kerl", was entitled to a prior lien on judgment debtor's real estate as against owner of a subsequently acquired judgment docketed against "Caroline C. Kerl."—Coral Gables v. Kerl, supra.

33. N.Y.—Grygorewicz v. Domestic and Foreign Discount Corporation, 40 N.Y.S.2d 676, 179 Misc. 1017.
34 C.J. p 581 note 35.

34. Va.—Mulford v. Aiken, 39 S.E. 231, 99 Va. 606, 86 Am.S.R. 914.
34 C.J. p 581 note 30.

35. Mont.—Poulos v. Lyman Bros. Co., 208 P. 598, 63 Mont. 561.
34 C.J. p 581 note 31.

36. Cal.—Huff v. Sweetser, 97 P. 705, 8 Cal.App. 689.

37. Cal.—Huff v. Sweetser, supra.

38. N.C.—Henry v. Sanders, 193 S. E. 15, 212 N.C. 239.

Failure to inform title searcher

A judgment entered against an unmarried woman in her name at that time and docketed shortly after her marriage and consequent change of name constituted lien on her after-acquired realty enforceable against purchaser who had actual knowledge of the vendor's name before her marriage, notwithstanding purchaser did not inform his attorney employed to examine title of former name of vendor.—Henry v. Sanders, supra.

39. Pa.—Arch St. Building & Loan Ass'n v. Sook, 158 A. 595, 104 Pa. Super. 269.

§ 466. Commencement of Lien

a. In general
b. Relation back

a. In General

The date when a judgment lien commences is generally fixed by statute, and may attach on rendition, filing, or recording of the judgment. A judgment lien ordinarily attaches to after-acquired property on the date of its acquisition.

Statutes may validly fix the time of commencement of a judgment lien,[40] and, depending on the provisions thereof, the lien of a judgment may commence from the date of its actual rendition or pronouncement,[41] or entry,[42] or from the time of filing the judgment for record,[43] or from the day on which it is recorded, docketed, or registered,[44] or from the date of filing or recording of an abstract of the judgment.[45] Under some practice, where two or more judgments are rendered against the same person at the same term, the liens may be regarded as concurrent and as commencing on the last day of the term.[46] Where two judgments rendered between the same parties at different times are entirely distinct from one another and the lien of the earlier judgment has expired before the recovery of the other, the latter judgment does not become a lien on land subject to the earlier judgment but conveyed prior to the entry of the later judgment.[47]

Fractions of day. Where justice so requires, the law will take account of the fraction of a day in determining when the lien of a judgment took effect.[48]

Judgments against nonresidents. The statutes of some jurisdictions provide that in the case of judgments rendered in a county other than that in which the debtor resides the lien takes effect only from the time when a certified copy of the judgment is registered in the county where he resides or, if he does not reside in the state, in the county where the land lies.[49]

The judgment of an appellate court does not become a judgment of the court appealed from so as to effect a lien in the jurisdiction of the lower court until the judgment is adopted by the lower court and entered on its minutes, the mere filing of the

40. Wash.—Seattle Brewing & Malting Co. v. Donofrio, 109 P. 335, 59 Wash. 98.

Statute construed

Pa.—Calhoon v. Newlon, 40 Pa.Dist. & Co. 123.

41. U.S.—Whitaker & Co. v. Grable, C.C.A.Ark., 109 F.2d 710—In re Levinson, D.C.Wash., 5 F.2d 75.
Ill.—Rawlins v. Launer, 17 N.E.2d 330, 369 Ill. 494—Normal State Bank v. Killian, 48 N.E.2d 212, 318 Ill.App. 637, reversed on other grounds 54 N.E.2d 539, 386 Ill. 449.
Neb.—Guaranty Fund Commission v. Teichmeier, 229 N.W. 121, 119 Neb. 387.
Pa.—Moore v. Schell, 99 Pa.Super. 81—Irwin v. Zahniser, Com.Pl., 21 Erie Co. 120.
Va.—Jones v. Hall, 15 S.E.2d 108, 177 Va. 658.
34 C.J. p 582 note 58.
Date from which judgment lien is computed for purposes of determining its duration see infra §§ 489–491.
Date of lien as affecting priorities see infra §§ 483–485.

Statute held operative

Statute providing that judgments bind defendant's property from date thereof, except as otherwise provided in code, was not repealed by, or did not conflict with, statute providing exception to rule thereof.—Commercial Credit Co. of Georgia v. Jones Motor Co., 167 S.E. 768, 46 Ga. App. 464.

42. Del.—In re Andrews' Estate, 34 A.2d 700, 3 Terry 376.
Md.—Messinger v. Eckenrode, 158 A. 357, 162 Md. 63.
Wash.—Heath v. Dodson, 110 P.2d 845, 7 Wash.2d 667.

43. La.—Godchaux Sugars, Inc. v. Leon Boudreaux & Bros., 96 So. 532, 153 La. 685.

Time of filing rather than of recording

Under statute, judgments are effective against third persons from the time of filing, and not from the date of recording; mere deposit of judgment with clerk to be recorded, without being stamped with clerk's filing mark, is not a "filing" as to time of taking effect, especially when deposit was made in court room, and not in clerk's office.—Godchaux Sugars, Inc., v. Leon Boudreaux & Bros., supra.

44. Cal.—McGrath v. Kaelin, 225 P. 34, 66 Cal.App. 41.
La.—Henry v. Roque, App., 18 So.2d 917.
Minn.—Lowe v. Reierson, 276 N.W. 224, 201 Minn. 280.
N.C.—Jones v. Rhea, 151 S.E. 255, 198 N.C. 190.
Okl.—Walters Motor Co. v. Musgrove, 75 P.2d 471, 181 Okl. 540.
Wis.—R. F. Gehrke Sheet Metal Works v. Mahl, 297 N.W. 373, 237 Wis. 414—C. Hennecke Co. v. Columbia Lodge, No. 11, K. P., 287 N. W. 742, 233 Wis. 24.
34 C.J. p 582 note 59.
Relation back of lien to date of rendition of judgment after due enrollment see infra subdivision b of this section.

Entry in docket rather than journal

Judgment is a lien from time of entry in judgment docket, not journal, "judgment docket" and "journal" being different.—In re Staples, D.C.Okl., 1 F.Supp. 620.

Docketing without entry in county recorder's office

Under statute providing that judgment is lien on realty then owned by judgment debtor or thereafter acquired by him from the time the judgment is docketed, lien of judgment of district court exists from the time of docketing judgment, even though judgment is not carried into records of county recorder.—Gaines v. Van Demark, 74 P.2d 454, 106 Mont. 1.

45. U.S.—In re Levinson, D.C. Wash., 5 F.2d 75.
Tex.—John F. Grant Lumber Co. v. Hunnicutt, Civ.App., 143 S.W.2d 976—Cheatham v. Mann, Civ.App., 133 S.W.2d 264, error refused.

46. Mo.—Bradley v. Hefferman, 57 S.W. 763, 156 Mo. 653.
34 C.J. p 583 note 63 [a], [b].

47. Cal.—Murphy v. Riecks, 180 P. 15, 40 Cal.App. 1.

48. N.J.—Gallagher v. True American Pub. Co., 71 A. 741, 75 N.J.Eq. 171, 138 Am.S.R. 514.
Tenn.—Murfree v. Carmack, 4 Yerg. 270, 26 Am.D. 232.

49. Tenn.—Massachusetts Mut. Life Ins. Co. v. Taylor Implement & Vehicle Co., 195 S.W. 762, 138 Tenn. 28.
34 C.J. p 584 note 79.

mandate to the lower court directing a decree being insufficient.[50] Where an appellate court renders such judgment as the lower court should have rendered, the lien, in some jurisdictions, dates from the filing in the lower court of a special mandate from the appellate court.[51]

Lien on after-acquired lands. Ordinarily, the lien on after-acquired property attaches at the time of the acquisition of the property, not as of the time of docketing of the judgment.[52] The date of docketing the judgment rather than the date of acquiring the property may, however, be considered the date of commencement for purposes of computing the duration of the lien, as discussed infra § 489. The lien of a judgment at law on an equitable interest in land attaches only as of the date of filing a bill in chancery.[53]

b. Relation Back

Under varying local practice, the lien of a judgment may relate back and attach at some time previous to the date of its rendition, entry, or enrollment, as where a judgment rendered during the term becomes a lien as of the first day thereof; but exceptions to the rule of relation back may be made where necessary for the protection of the intervening rights of innocent third persons.

Under some practice, either by deduction from the common-law rule that judgments of a court of record, on whatever day of the term they may in fact be rendered, relate to and are considered as judgments of the first day of the term, or under express statutory enactments, judgment liens relate back to the first day of the term at which they were rendered.[54] Under other practice a judgment may relate back to the date of its rendition on due enrollment within the time limited by statute,[55] but, where a judgment is enrolled after expiration of the time limit, the lien of the judgment does not relate back but dates only from the time of enrollment.[56] It has also been held that as between the parties the effective date of a judgment rendered on one day and entered on another may relate back to the date of rendition by an order nunc pro tunc, as discussed infra § 469, and that, under particular statutes and rules of court, judgment entered five days after rendition is a lien from the date of rendition notwithstanding an order giving plaintiff four days in which to enter judgment.[57] Where at the time of the filing of an abstract of judgment the judgment debtor no longer owns certain property, the filing cannot relate back and make the judgment a lien on the property theretofore owned by the debtor.[58]

While as a rule the lien of a judgment does not relate back to the time of the accrual of the cause of action,[59] it may relate back to the time of a lien obtained under another proceeding or transaction, as in the case where there has been an attachment,[60] likewise as in the case where there has

50. Tenn.—Massachusetts Mut. Life Ins. Co. v. Taylor Implement & Vehicle Co., supra.

51. Neb.—Harvey v. Godding, 109 N. W. 220, 77 Neb. 289, 124 Am.S.R. 841.

52. U.S.—Commercial Credit Co. v. Davidson, C.C.A.Miss., 112 F.2d 54.
Ala.—W. T. Rawleigh Co. v. Patterson, 195 So. 729, 239 Ala. 309.
Cal.—Hertweck v. Fearon, 179 P. 190, 179 Cal. 71.
Fla.—B. A. Lott, Inc., v. Padgett, 14 So.2d 667, 153 Fla. 304.
Ind.—Peet v. Beers, 4 Ind. 46.
Tex.—Baker v. West, 36 S.W.2d 695, 120 Tex. 113.
34 C.J. p 591 note 49.
After-acquired property as subject to judgment lien see infra § 477.

Property acquired by inheritance
A recorded judgment against decedent's daughter attached to daughter's interest in decedent's land eo instante on decedent's death, and coincident with vesting of title to inheritance in daughter.—Coomes v. Finegan, 7 N.W.2d 729, 233 Iowa 448.

An estate by the entireties of a husband and wife in a tract of land ceased on wife's death and tract vested in husband, whereupon lien of judgment confessed by husband in favor of wife prior to her death, and duly docketed by transcript in county where tract was situate, immediately attached and took precedence over lien created by deed of trust executed by husband without joinder of his wife subsequent to confession of the judgment but prior to wife's death.—Keel v. Bailey, 198 S.E. 654, 214 N.C. 159.

Order of rendition immaterial
All judgments which are in existence when the property is acquired attach to it as of that instant, without reference to the order of their rendition.—Hulbert v. Hulbert, 111 N.E. 70, 216 N.Y. 430, L.R.A.1916D 661, Ann.Cas.1917D 180—34 C.J. p 591 note 51.

53. N.J.—McLaughlin v. Whaland, 13 A.2d 573, 127 N.J.Eq. 393.

54. Ohio.—Cleveland Ry. Co. v. Williams, 155 N.E. 133, 115 Ohio St. 584—Casaro v. Humphrey, 162 N.E. 645, 28 Ohio App. 255.
34 C.J. p 583 note 61.

55. Miss.—Kalmia Realty & Insurance Co. v. Hopkins, 141 So. 903, 163 Miss. 556.

56. Miss.—Kalmia Realty & Insurance Co. v. Hopkins, supra.

57. S.C.—Gilfillin v. Rector, 126 S. E. 761, 131 S.C. 84.

58. Tex.—Gamer v. Love, Civ.App., 41 S.W.2d 356, error dismissed.

59. Ill.—Heckmann v. Detlaff, 119 N.E. 639, 283 Ill. 505.
34 C.J. p 583 note 64.

The mere bringing of suit by creditor does not create a lien on real estate.—In re Michael, D.C.Pa., 31 F. Supp. 41.

60. Fla.—McClellan v. Solomon, 2 So. 325, 23 Fla. 437.
34 C.J. p 583 note 65.

Finding for defendant on attachment
If, after an issue on a traverse to plaintiff's affidavit is found for defendant, judgment is obtained on merits, it does not date from time of levy as provided by statute but takes lien on property attached from date of judgment only.—Blakely Milling & Trading Co. v. Thompson, 128 S.E. 683, 34 Ga.App. 129.

Tardy filing
Where statute provides that, if a judgment lien be placed on real estate attached in the suit within four months after such judgment was rendered, it shall hold as a lien from the date of the attachment, filing of a lien based on the judgment is too

been a statutory lien,[61] or mortgage,[62] where a judgment is rendered on a bond payable to the state,[63] on a forfeited writ of error bond,[64] or on a scire facias to revive an original judgment.[65]

Exceptions to the doctrine that a judgment relates back may be made in the case of default judgments,[66] or judgments rendered prior to the statute creating the lien,[67] or where it is held that a judgment could not relate back to the first day of the term because the case was not then in condition for judgment,[68] or because the court was not then in session,[69] and, generally, the doctrine of relation back may be held inapplicable where it is necessary to protect the rights of an intervening purchaser in good faith.[70] A judgment by confession ordinarily becomes a lien from the date of confession,[71] or from the date of the confirmation of the confession,[72] and the rule that a judgment becomes a lien as of the first day of the term at which it was entered has been held inapplicable to a judgment by confession on the theory that the date of signing a confession judgment controls as the date on which the lien attaches.[73]

§ 467. —— Lien of Transferred Judgment

The lien of a transferred judgment ordinarily attaches as of the date of transfer, provided there has been due compliance with statutory requirements.

Where, in order to render the judgment a lien on property in a county other than that in which the judgment was rendered, a statute requires an abstract or transcript of the judgment to be filed, entered, or docketed in such other county, the lien will not commence in such county until the statute is complied with.[74] It has been held that a transferred judgment becomes a lien in the county to which it has been transferred as of the date of transfer,[75] even though the lien in the county where the judgment was entered has expired from lapse of time.[76]

§ 468. —— Necessity of Issue of Execution

Under many statutes a judgment is a lien against the debtor's realty, but not his personalty, irrespective of the issuance of execution, but, where the judgment has not been duly filed or docketed, etc., in compliance with statutory requirements, levy of execution may be essential to subject realty to a lien.

Except in the few jurisdictions where a judgment does not of itself bind land,[77] it has generally been

late to relate back to the date of the attachment where the filing occurs more than four months from the date of the original trial court judgment, even though within four months of its affirmance by an appellate court.—City Nat. Bank v. Stoeckel, 132 A. 20, 103 Conn. 732.

61. Pa.—Moore v. Schell, 99 Pa.Super. 81.
34 C.J. p 583 note 66.

Mechanic's lien

(1) While a fieri facias issued on a special judgment would cover the entire estate which an owner had in lands at the time when building was begun, or which he thereafter acquired, a general judgment cannot relate back to the date of the statutory mechanic's lien or become a lien on the lands of the owner and defendant prior to the date of entering such judgment.—McKibbin v. Pekarsky, 143 A. 553, 103 N.J.Eq. 450.

(2) Where a laborer, mechanic, or material furnisher files notice of claim in the clerk's office, and judgment is subsequently entered in an action by him in his favor, but only as a general creditor, his right to a statutory lien being specifically denied, the lien of such judgment does not relate back to the date when the notice of claim was filed, but the lien attaches only from the date of the judgment.—Francisco v. Pine Cliffe Camp and Country Club, 139 S.E. 443, 194 N.C. 320.

62. Pa.—In re Moore, 3 A.2d 31, 133 Pa.Super. 419—Fisher, for Use of Buck v. McFarland, 167 A. 377, 110 Pa.Super. 184—Moore v. Schell, 99 Pa.Super. 81—Hollenbach v. Kuhns, Com.Pl., 18 Leh.L.J. 418.
34 C.J. p 583 note 67.

63. Ind.—Shane v. Francis, 30 Ind. 92.

64. Tex.—Hickcock v. Bell, 46 Tex. 610—Berry v. Shuler, 25 Tex.Suppl. 140.

65. Pa.—Appeal of Betz, 1 Penr. & W. 271.

66. Del.—Citizens' Loan Ass'n v. Martin, 40 A. 1108, 15 Del. 213.
34 C.J. p 584 note 75.

67. D.C.—Ohio Nat. Bank v. Berlin, 26 App. 218.

68. Va.—Yates v. Robertson, 80 Va. 475.
34 C.J. p 584 note 72.

Cross petition

Lien of judgment given holder of second mortgage in foreclosure suit was held not to date back to first day of term where mortgagee filed cross petition as to indebtedness secured by second mortgage during term at which judgment was rendered.—Exchange Nat. Bank of Osborne v. Warne, 57 P.2d 46, 143 Kan. 797.

69. Neb.—Parrott v. Wolcott, 106 N.W. 607, 75 Neb. 530.
34 C.J. p 584 note 73.

70. N.C.—Fowle v. McLean, 84 S.E. 852, 168 N.C. 537.
34 C.J. p 584 note 77.

71. Va.—American Bank & Trust Co. v. National Bank of Suffolk, 196 S.E. 693, 170 Va. 169.
W.Va.—Hockman v. Hockman, 25 S.E. 534, 93 Va. 455.

72. Miss.—Bass v. Estill, 50 Miss. 300.

73. Ohio.—Riddle v. Bryan, 5 Ohio 48.

74. Neb.—Rathbone Co. v. Kimball, 220 N.W. 244, 117 Neb. 229, certiorari denied Kimball v. Rathbone Co., 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564.
34 C.J. p 584 note 82.

Entry on judgment record

Transcript of judgment of district court filed in another county is not lien on property until entered on latter county's judgment record.—Rathbone Co. v. Kimball, 220 N.W. 244, 117 Neb. 229, certiorari denied Kimball v. Rathbone Co., 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564.

75. Pa.—In re Higgins' Estate, 188 A. 831, 325 Pa. 106—Shotts & Co. v. Agnew & Barnett, 81 Pa.Super. 458.

76. Pa.—In re Higgins' Estate, 188 A. 831, 325 Pa. 106.

77. U.S.—**Corpus Juris quoted in** Von Segerlund v. Dysart, C.C.A. Cal., 137 F.2d 755, 757.
34 C.J. p 584 note 84.

In Georgia

(1) It is provided that a judgment shall not constitute a lien on the property of defendant from the ren-

the rule under the statutes that a judgment attaches as a lien without the use of any process,[78] except as to property which is not usually subject to the lien of a judgment, but can be made so by the levy of an execution, as trust property or personalty,[79] or where the lien is to be extended to the property of a person other than the principal defendant, such as a surety,[80] or, in some jurisdictions, against property in a foreign county.[81] Where, however, there has been a failure to comply with statutory requirements as to docketing or filing the judgment or an abstract thereof, issuance of execution, and in some instances levy thereof, may become essential to creation of a lien even on real property.[82]

As discussed supra § 454, in the absence of statute, no lien results from a judgment before issuance of execution.

§ 469. —— Judgment or Amendment Nunc Pro Tunc

A judgment entered nunc pro tunc may afford a lien as of the earlier date as between the immediate parties; but as respects the intervening rights of third persons the lien will generally be held to run from the later date, and an amendment of judgment will not as a rule affect the rights of such persons.

As between the parties a judgment entered nunc pro tunc has the same force and effect as if entered at the time the judgment was rendered,[83] and the effective date of a judgment rendered one day and entered on a later day may relate back to

dition thereof, as against third parties acting in good faith and without notice, who may have acquired a transfer of the property, unless the execution shall have been entered on the general execution docket of the court within ten days from the time the judgment was rendered.—Bradley v. Booth, 9 S.E.2d 861, 62 Ga.App. 770—34 C.J. p 584 note 84 [a].

(2) Removal of a judgment debtor from county of rendition of judgment will not require entry of an execution issued on such judgment on general execution docket of county to which judgment debtor has removed, but if within ten days from date of judgment execution is entered on docket, in county of rendition, judgment lien attaches to all judgment debtor's property in the state, but, if such entry is postponed beyond ten days, judgment lien attaches from date when entry of execution is actually made.—Bradley v. Booth, supra.

(3) Judgment must be entered on verdict within time required and execution must be duly and properly issued and recorded, since a verdict in itself is not a lien on any property of defendant against whom it is returned.—Tanner v. Wilson, 192 S.E. 425, 184 Ga. 628.

(4) Where judgment was followed by execution duly issued thereon and appropriate entries of nulla bona on execution, each within seven years, which were also entered on execution docket, judgment was a lien from its date on all property owned by judgment debtor or thereafter acquired.—Howell v. Farmers Bank, 196 S.E. 387, 185 Ga. 768.

78. U.S.—**Corpus Juris quoted in** Von Segerlund v. Dysart, C.C.A. Cal., 137 F.2d 755, 757—In re Fell, D.C.Pa., 18 F.Supp. 989.
Hawaii.—Nichols v. Wah Chong Sun, 28 Hawaii 395.
N.J.—Tuttle v. State Mut. Liability Ins. Co., 127 A. 682, 2 N.J.Misc. 973.
34 C.J. p 584 note 85.

79. U.S.—**Corpus Juris quoted in** Von Segerlund v. Dysart, C.C.A. Cal., 137 F.2d 755, 757—Bortman v. Urban Motion Picture Industries, C.C.A.N.Y., 4 F.2d 913—In re Fell, D.C.Pa., 18 F.Supp. 989.
Ind.—Rothchild v. State, 165 N.E. 60, 200 Ind. 501.
Mo.—Brown v. Deal, App., 256 S.W. 114.
Ohio.—Langel v. Moore, 168 N.E. 57, 32 Ohio App. 352, affirmed 164 N.E. 118, 119 Ohio St. 299.
34 C.J. p 585 note 86.

Lien from date of execution
Under some practice the lien on personalty dates not from the obtaining of the judgment, but from the issuance or levy of the execution.
U.S.—Claude D. Reese, Inc., v. U. S. ex rel. Collector of Internal Revenue, C.C.A.Fla., 75 F.2d 9.
Pa.—Rush v. First Nat. Bank, 188 A. 164, 324 Pa. 285.

Rights of purchaser
Where no lien on personalty exists until the levy of an execution, an innocent purchaser's rights are not subject to a prior judgment under which no execution has been issued.—Brown v. Deal, Mo.App., 256 S.W. 114.

Statutes affording lien without execution
Under a statute providing that "where execution shall be stayed on any judgment rendered by a justice of the peace, such judgment shall be a lien on all the personal property subject to execution belonging to the defendant at the time of the rendition of the judgment," on the giving of a stay bond, whether or not execution had issued on the judgment, it becomes a lien, but only for the term of six months, to which the time of stay is limited.—McBride v. Mullinix, C.C.A.Ark., 299 F. 162.

80. Ky.—Johnson v. Catron, 57 S.W. 13, 108 Ky. 568, 22 Ky.L. 275.

81. Ill.—Todd v. Todd, 214 Ill.App. 282—First Nat. Bank v. Wheeling, Lake Erie & Pittsburg Coal Co., 11 Ohio Cir.Ct. 412, 5 Ohio Cir.Dec. 421.

82. U.S.—Southern Dairies v. Banks, C.C.A.N.C., 92 F.2d 282, certiorari denied Banks v. Southern Dairies, 58 S.Ct. 368, 302 U.S. 761, 82 L.Ed. 590.
Necessity of execution to continue lien see infra § 493.

Necessity of levy
(1) The rule that issuance of execution and return thereof unsatisfied create no lien on property in absence of levy applies to realty as well as to personalty, and becomes material in case of realty where no lien has been created by properly docketing judgment.—Southern Dairies v. Banks, C.C.A.N.C., 92 F.2d 282, certiorari denied Banks v. Southern Dairies, 58 S.Ct. 368, 302 U.S. 761, 82 L.Ed. 590.

(2) Generally, a judgment with execution issued thereon, but not levied on any property and not otherwise satisfied and no abstracts of which have been filed for record under statute, does not constitute a "lien" on any property real or personal.—C. I. T. Corporation v. Haynie, Tex.Civ.App., 135 S.W.2d 618.

83. Or.—Davidson v. Richardson, 89 P. 742, 50 Or. 323, 126 Am.S.R. 738, 17 L.R.A.,N.S., 319, reheard 91 P. 1080, 50 Or. 323, 126 Am.S.R. 738, 17 L.R.A.,N.S., 319.
Tenn.—Southern Mortg. Guaranty Corporation v. King, 77 S.W.2d 810, 168 Tenn. 309.

the date of rendition by an order nunc pro tunc.[84] As far, however, as it affects intervening rights of third parties a judgment entered nunc pro tunc does not relate back, for the purpose of a lien, to the day as of which it is entered, but takes effect only from the time of its actual entry.[85] Under a statute providing that a judgment is a lien from the first day of the term at which it is entered, a judgment rendered nunc pro tunc, at a term of court succeeding that at which the record was complete up to and including verdict, is as operative, as between the parties, as if it had been rendered at the previous term, but as to other parties, it is effective, as a lien, only from the first day of the term at which it was actually entered.[86]

The amendment of a judgment will not as a rule affect intervening rights of third parties,[87] and a judgment by confession, invalid for want of a sufficient statement or for other defects, cannot be amended nunc pro tunc so as to make it effective from its original date, as against intervening purchasers or encumbrancers.[88] Where, however, a judgment as originally entered created a lien and, taken together with the record, carried notice of the right to the amended judgment, the amendment may relate back to the date of the original judgment.[89]

§ 470. —— Effect of Stay of Execution

Ordinarily a stay of execution does not postpone or destroy a judgment lien.

Since the lien of a judgment on realty is not ordinarily dependent on the issuance of an execution or other act of the judgment creditor, as discussed supra § 468, the attachment of the lien is not postponed by a stay of execution;[90] nor is the lien of a judgment destroyed by such a stay, as considered infra § 503.

§ 471. Property Affected by Lien

The statutory lien of a judgment attaches only to property against which the judgment can be enforced.

A judgment is a lien on all property of the debtor subject thereto.[91] Accordingly the statutory lien of a judgment attaches only to property not exempt from execution,[92] and, under statutes providing that the judgment shall be a lien on all property of defendant which is subject to levy and sale under execution, the lien applies to and covers only property which is subject to levy and sale under execution.[93]

§ 472. —— Nature of Property

Under statute in some jurisdictions the lien of the judgment attaches to real property, but not to personal property, of the judgment debtor.

Except as provided by statute, a mere judgment is never a lien against the real estate of the judgment debtor.[94] Thus at common law land was not subject to the lien of a judgment,[95] but under the statutes of most jurisdictions the lien attaches to

84. Tenn.—Southern Mortg. Guaranty Corporation v. King, supra.
Relation back of judgment lien generally see supra § 466.

85. Ala.—Conn v. Sellers, 73 So. 961, 198 Ala. 606.
34 C.J. p 585 note 93.

86. N.C.—Pfeifer v. Love's Drug Store, 88 S.E. 342, 171 N.C. 214—Ferrell v. Hales, 25 S.E. 821, 119 N. C. 199.

87. Pa.—Union Trust Co. v. McCarthy, 10 Pa.Dist. & Co. 243, 76 Pittsb.Leg.J. 262, 15 West.Co. 92.
34 C.J. p 585 note 95.

88. Minn.—Auerbach v. Behnke, 41 N.W. 946, 40 Minn. 258.
34 C.J. p 585 note 96.

89. U.S.—Gunn v. Plant, Ga., 94 U. S. 664, 24 L.Ed. 304.
34 C.J. p 585 note 97.

90. Conn.—Hobbs v. Simmonds, 23 A. 962, 61 Conn. 235.
34 C.J. p 585 note 99.

91. Fla.—Gilpen v. Bower, 12 So.2d 834, 152 Fla. 733.
Okl.—Wagoner Oil & Gas Co. v. Marlow, 278 P. 294, 137 Okl. 116.
Va.—Miller v. Kemp, 160 S.E. 203, 157 Va. 178, 84 A.L.R. 980.

Shares of stock

In proceeding to enforce trust as to fifteen thousand two hundred ninety-nine of sixteen thousand shares of stock held by defendants, where state trial court decreed to plaintiff title to seven thousand six hundred forty-nine shares, and state supreme court decreed to plaintiff title to fifteen thousand two hundred ninety-nine shares and directed judgment for dividends collected by defendants, remaining seven hundred one shares and dividends thereon were subject to lien of such directed judgment.—Sunshine Mining Co. v. Treinies, D.C.Idaho, 19 F.Supp. 537, affirmed Treinies v. Sunshine Mining Co., 99 F.2d 651, affirmed 60 S.Ct. 44, 308 U.S. 66, 84 L.Ed. 85, rehearing denied 60 S.Ct. 464, 309 U.S. 693, 84 L.Ed. 1034.

No judgment constitutes a lien on property against which it cannot be enforced.—Hart v. Atwood, 119 So. 116, 96 Fla. 667.

92. Cal.—Evans v. Superior Court of Los Angeles County, 124 P.2d 820, 20 Cal.2d 186.
Iowa.—Starits v. Avery, 218 N.W. 769, 204 Iowa 401.
Neb.—Brownell v. Svoboda, 223 N. W. 641, 118 Neb. 76.

93. Ala.—Hargett v. Hovater, 15 So. 2d 276, 244 Ala. 646—Ex parte Scharnagel, 136 So. 834, 223 Ala. 4, certiorari denied 136 So. 835, 223 Ala. 487—Morris v. Waldrop, 105 So. 172, 213 Ala. 435.

Property subject to lien

Where judgment for a certain sum became money in hands of a stakeholder, such money was property subject to levy, and, when such judgment became leviable property, the lien of a recorded judgment obtained against the judgment creditor fastened itself on such money and subjected it to payment of the judgment.—Huckabee v. Stephens, 195 So. 295, 29 Ala.App. 259.

Property not subject to lien

Mortgage given to judgment debtor.—White v. Gibson, 128 So. 784, 221 Ala. 279.

94. Ill.—East St. Louis Lumber Co. v. Schnipper, 141 N.E. 542, 310 Ill. 150.
N.Y.—H. R. & C. Co. v. Smith, 151 N.E. 448, 242 N.Y. 267, 45 A.L.R. 554.

95. Ill.—East St. Louis Lumber Co.

the land of the judgment debtor,[96] with its incidences and appurtenances,[97] provided it is subject to execution,[98] but not to the rents, issues, and profits of such land,[99] although they may be subjected to the lien in equity.[1]

The lien does not attach to personal property[2]

v. Schnipper, 141 N.E. 542, 310 Ill. 150—Lehman v. Cottrell, 19 N.E. 2d 111, 298 Ill.App. 434.
Md.—Messinger v. Eckenrode, 158 A. 357, 162 Md. 63—Caltrider v. Caples, 153 A. 445, 160 Md. 392, 87 A.L.R. 1500.
Mont.—Gaines v. Van Demark, 74 P.2d 454, 106 Mont. 1.
S.C.—Ex parte Johnson, 145 S.E. 113, 147 S.C. 259.
34 C.J. p 568 note 81.
Judgment lien as creature of statute generally see supra § 454.

96. U.S.—Von Segerlund v. Dysart, C.C.A.Cal., 137 F.2d 755—Ackroyd v. Brady Irr. Co., D.C.Mont., 27 F. Supp. 503, cause reversed and remanded on other grounds, C.C.A., Ackroyd v. Winston Bros. Co., 113 F.2d 657—In re Day, D.C.Md., 22 F.Supp. 946.
Ariz.—Steinfeld v. Copper State Mining Co., 290 P. 155, 37 Ariz. 151.
Cal.—Parsons v. Robinson, 274 P. 528, 206 Cal. 378—Wellborn v. Wellborn, 131 P.2d 48, 55 Cal.App. 2d 516—Helvey v. Bank of America Nat. Trust & Savings Ass'n, 111 P.2d 390, 43 Cal.App.2d 532.
Fla.—First Nat. Bank v. Peel, 145 So. 177, 107 Fla. 413.
Ill.—Logar v. O'Brien, 171 N.E. 629, 339 Ill. 628.
Kan.—Staker v. Gillen, 53 P.2d 821, 143 Kan. 212.
Mont.—Siuru v. Sell, 91 P.2d 411, 108 Mont. 438, 123 A.L.R. 423—Gaines v. Van Demark, 74 P.2d 454, 106 Mont. 1.
N.M.—National Mut. Savings & Loan Ass'n v. Lake, 141 P.2d 188, 47 N. M. 223.
N.C.—City of Durham v. Pollard, 14 S.E.2d 813, 219 N.C. 750—Thompson v. Avery County, 5 S.E.2d 146, 216 N.C. 405.
N.D.—Aberle v. Merkel, 291 N.W. 913, 70 N.D. 89.
S.C.—Ex parte Johnson, 145 S.E. 113, 147 S.C. 259—Weatherly v. Medlin, 139 S.E. 633, 141 S.C. 290.
Tex.—Texas Building and Mortgage Co. v. Morris, Civ.App., 123 S.W.2d 365, error dismissed.
Va.—Jones v. Hall, 15 S.E.2d 108, 177 Va. 658—Boggs v. Fatherly, 13 S.E.2d 293, 177 Va. 259—Miller v. Kemp, 160 S.E. 203, 157 Va. 178, 84 A.L.R. 980—Kidwell v. Henderson, 143 S.E. 336, 150 Va. 329.
W.Va.—McFarland v. Fish, 12 S.E. 548, 34 W.Va. 548.
34 C.J. p 587 note 13.

97. U.S.—La Crosse & M. R. Co. v. James, Wis., 6 Wall. 750, 18 L.Ed. 854.
34 C.J. p 587 note 14.

Timber

(1) Timber located on real estate subject to the lien of a judgment was included within the lien.
La.—Creston Lumber Co. v. Cockerham's Estate, 2 La.App. 29.
Pa.—Havens v. Pearson, 6 A.2d 84, 334 Pa. 570, 122 A.L.R. 512.

(2) Judgment lien on land was a lien on the timber thereon before and after the timber was cut, and, in equity, followed the proceeds of sale thereof.—Stuart v. Pickett, 10 So.2d 207, 193 Miss. 455.

(3) A contract whereby a judgment debtor sold standing timber on land and allowed purchaser twenty years for removal did not create an immediate severance and conversion of the timber such as to withdraw timber from lien of judgment creditor, the standing timber continuing to be realty as to the judgment notwithstanding a sale of personalty was intended as between judgment debtor and purchaser; fiction of immediate severance as between vendor and vendee did not operate to permit judgment debtor to remove standing timber from judgment creditor's lien against land by purported sale to third person.—Havens v. Pearson, 6 A.2d 84, 334 Pa. 570, 122 A.L.R. 512.

Minerals on land

An agreement by which landowners "granted, bargained, sold, let and leased" limestone under land, with right of ingress to mine to remove limestone, in consideration of royalty for limestone mined, was a "sale of limestone in place as land," and landowners retained interest in limestone to which lien of judgment against landowners attached.—Burke v. Kerr, 19 A.2d 332, 341 Pa. 304.

Oil royalty interest

The recording and indexing of judgment against grantor of oil royalty interest, which is realty and which was transferred to grantee by conveyance that was not recorded until after recording of the judgment, caused judgment lien to attach to the royalty interest under statute providing that, when any judgment has been recorded and indexed, it shall, from date of such record and index, operate as a lien on all "realty" of defendant in the county.—Munzesheimer v. Leopold, Tex.Civ.App., 163 S.W.2d 663, error refused.

Judgment on bond accompanying mortgage acquires no higher right against fixtures sold under conditional sales contract than mortgage.—Ridgway Dynamo & Engine Co. v. Werder, 135 A. 216, 287 Pa. 358.

98. Ala.—Robinson v. Shearer, 99 So. 179, 211 Ala. 16.
Fla.—First Nat. Bank v. Peel, 145 So. 177, 107 Fla. 413.
Mont.—Siuru v. Sell, 91 P.2d 411, 108 Mont. 438, 123 A.L.R. 423.
S.C.—Ex parte Johnson, 145 S.E. 113, 147 S.C. 259.
34 C.J. p 587 note 15.
Assignment of homestead as affecting judgment lien see Homesteads § 149 a.
Homesteads as subject to judgment liens see Homesteads § 109.

99. Pa.—Leedon v. Plymouth R. Co., 5 Watts & S. 265.
34 C.J. p 587 note 16.

1. U.S.—U. S. v. Butler, C.C.N.Y., 25 F.Cas.No.14,696, 2 Blatchf. 201.
34 C.J. p 587 note 17.

2. U.S.—**Corpus Juris quoted in** Von Segerlund v. Dysart, C.C.A.Cal., 137 F.2d 755, 757.
Ark.—Industrial Machinery Co. v. Timbrook, 151 S.W.2d 665, 202 Ark. 609.
Kan.—Staker v. Gillen, 53 P.2d 821, 143 Kan. 212—Beren v. Marshall Oil & Gas Corporation, 251 P. 192, 122 Kan. 134.
La.—Hankins v. Sallard, App., 188 So. 411.
N.C.—Moore v. Jones, 36 S.E.2d 920.
34 C.J. p 587 note 22.
Share of stock in corporation as personal property see Corporations § 194 c (2).

Property not subject to lien

(1) Timber when cut and removed.—Creston Lumber Co. v. Cockerham's Estate, 2 La.App. 29.

(2) Vendor's lien notes on realty, and unsatisfied judgment foreclosing lien.—Sugg v. Mozoch, Tex.Civ.App., 293 S.W. 907.

(3) Vendor's and mechanic's lien notes and contractor's lien.—South Texas Lumber Co. v. Nicoletti, Tex. Civ.App., 54 S.W.2d 893, error dismissed.

(4) Other property see 34 C.J. p 587 note 22 [a].

Debt

(1) The lien of an enrolled judgment does not cover the right to receive or recover a debt due to the judgment debtor.—Shuptrine v. Natalbany Lumber Co., 198 So. 24, 189 Miss. 409.

(2) Injured persons' judgments against insured held not lien on insurer's indebtedness under automobile liability policy.—Michel v. American Fire & Casualty Co., C.C.A.Fla., 82 F.2d 583.

except where a statute so provides,[3] as where the statute makes the judgment a lien on all property of the judgment debtor which is subject to levy and sale under execution,[4] although it has been held that a chancery decree may, in terms, establish liens on personalty so as to bind all persons having notice thereof.[5] In jurisdictions where the lien does attach to personal property, such property has been held not subject to the lien unless it is also subject to execution,[6] and therefore that the lien does not attach to choses in action,[7] except as provided by statute.[8] The lien attaches to chattels real in some jurisdictions,[9] although not in others.[10]

Crops. Under some statutes the lien of a judgment attaches to mature crops ready for harvest, but not to growing crops.[11]

§ 473. —— Location of Property

The lien of a judgment extends to property of the judgment debtor located in the county in which the judgment is entered, and under statutes generally in force is ordinarily confined to the limits of the county in which it was rendered and docketed.

The lien of a judgment extends to property of the judgment debtor located in the county in which the judgment is entered or docketed[12] and, although under some statutes the lien may extend to all property of the debtor in the state,[13] under the statutes generally in force the lien of a judgment is confined to the limits of the particular county in which it was rendered and docketed, and does not affect lands of the judgment debtor lying in another county,[14] unless it be a judgment in favor of the state,[15] or unless the land in such other county is seized in execution,[16] or, as considered supra § 462, unless it is transferred to such other county by filing a transcript of the judgment there. Where, however, a judgment lien attaches on lands in a certain county, and afterward a new county is set off, within which these lands or part of them fall, the lien does not cease by reason of such new organization, but, on the contrary, it holds during the full statutory period without any further record.[17] Where a judgment is docketed in two counties it becomes a lien on the land of the judgment debtor in both counties.[18]

Judgment

Under decree allowing solicitor's fee for services in conducting partition suit, solicitor's right was intangible property, and such decree was not subject to lien of judgment against solicitor.—Bank of Monticello v. L. D. Powell Co., 130 So. 292, 159 Miss. 183.

3. U.S.—Corpus Juris quoted in Von Segerlund v. Dysart, C.C.A.Cal., 137 F.2d 755, 757.
Ga.—Bradley v. Booth, 9 S.E.2d 861, 62 Ga.App. 770.
34 C.J. p 588 note 23.

Statute held not to provide for lien on personalty

Statute providing that any money judgment shall be a lien on the debtor's realty from the date of filing a transcript of the docket of such judgment.—Von Segerlund v. Dysart, C.C.A.Cal., 137 F.2d 755.

4. Ala.—Birmingham News Co. v. Barron G. Collier, Inc., 103 So. 839, 212 Ala. 655—Johnston v. Bates, 95 So. 375, 209 Ala. 16.
34 C.J. p 588 note 23.

5. Iowa.—Kithcart v. Kithcart, 124 N.W. 305, 145 Iowa 549, 30 L.R.A., N.S., 1062.

6. Ala.—Gaston v. Marengo Impr. Co., 36 So. 738, 139 Ala. 465.
34 C.J. p 588 note 25.

7. Ga.—Citizens' Bank & Trust Co. v. Pendergrass Banking Co., 138 S.E. 223, 164 Ga. 302—Norris v. Aikens, 117 S.E. 248, 155 Ga. 488.
34 C.J. p 588 note 26.
Share of stock in corporation as chose in action see Corporations § 194 c (4).

8. Corporate stock

Under statutes lien of judgment was held not to attach to shares of corporate stock which are choses in action on rendition of judgment, but only after notice to the corporation as prescribed by law.—Fourth Nat. Bank v. Swift & Co., 127 S.E. 729, 160 Ga. 372.
34 C.J. p 588 note 26 [a] (2).

9. Ind.—Ball v. Barnett, 39 Ind. 53.
N.Y.—Holland v. Grote, 86 N.E. 30, 195 N.Y. 262.
Leasehold interest as subject to judgment lien see infra § 482.

10. Tex.—Bourn v. Robinson, 107 S.W. 873, 49 Tex.Civ.App. 157.

11. Miss.—Harris v. Harris, 116 So. 731, 150 Miss. 729.
34 C.J. p 588 note 23 [a].

12. Md.—Messinger v. Eckenrode, 158 A. 357, 162 Md. 63.
Mo.—Dano v. Sharpe, 152 S.W.2d 693, 236 Mo.App. 113.
Mont.—Siuru v. Sell, 91 P.2d 411, 108 Mont. 438, 123 A.L.R. 423.
N.C.—Moore v. Jones, 36 S.E.2d 920—City of Durham v. Pollard, 14 S.E.2d 818, 219 N.C. 750—Thompson v. Avery County, 5 S.E.2d 146, 216 N.C. 405.
Okl.—White House Lumber Co. v. Howard, 286 P. 327, 142 Okl. 163.
Tex.—John F. Grant Lumber Co. v. Hunnicutt, Civ.App., 143 S.W.2d 976.
34 C.J. p 586 note 7.

A decree entered in United States district court in Dade County, Florida, became a lien on real estate belonging to judgment debtor in that county.—B. A. Lott, Inc., v. Padgett, 14 So.2d 667, 153 Fla. 304.

13. Va.—Gatewood v. Goode, 23 Gratt. 880, 64 Va. 880.
34 C.J. p 586 note 9 [a], [f].

Judgment docketed in county of defendant's residence

Where a statute provides that a judgment obtained and properly docketed in the county of defendant's residence is a lien on all personal property of the judgment debtor in any county in the state, removal of the debtor from the county in which the judgment is so docketed does not affect the lien.—Bradley v. Booth, 9 S.E.2d 861, 62 Ga.App. 770.

14. Ala.—Morris v. Waldrop, 105 So. 172, 213 Ala. 435.
Ill.—Haugens v. Holmes, 41 N.E.2d 109, 314 Ill.App. 166.
Iowa.—Bates v. Nichols, 274 N.W. 32, 223 Iowa 878.
34 C.J. p 586 note 7.
Lien of judgment against railroad see Railroads § 260, also 51 C.J. p 809 notes 40–45.
Transfer of judgment by transcript from one county to another generally see supra § 129.

15. Miss.—Josselyn v. Stone, 28 Miss. 753.

16. Iowa.—Harlington v. Clark, 202 N.W. 84, 199 Iowa 340.
34 C.J. p 586 note 10.
Lien of execution see Executions §§ 123–138.

17. Pa.—Clough v. Welsh, 78 A. 1000, 229 Pa. 386.
34 C.J. p 587 note 11.

18. N.D.—Aberle v. Merkel, 291 N.W. 913, 70 N.D. 89.

Lands in another state or country. A judgment rendered in one state or country does not operate extraterritorially so as to constitute a lien on lands in another state or country.[19]

Purchaser acknowledging lien. Where a judgment debtor sells lands, both he and the purchaser supposing them to be bound by the lien of the judgment, and the purchaser undertaking to pay the judgment as a part of the consideration, the latter cannot afterward refuse to pay the judgment on discovering that it was never recorded in the county where the lands lie.[20]

§ 474. —— Property Previously Transferred

A judgment does not attach as a lien on property which formerly belonged to the judgment debtor but which, before rendition of the judgment, had been sold or aliened in good faith.

A judgment does not attach as a lien on property which before its rendition had been sold or aliened by the owner in good faith,[21] or given away by him under a valid donation,[22] or, except as otherwise provided in the decree for sale,[23] sold at judicial sale,[24] or which had passed under an assignment for the benefit of his creditors,[25] or which had been transferred to liquidating trustees in accordance with a plan of reorganization for the purpose of liquidation,[26] or which had come into the custody or possession of the court in another proceeding;[27] but a deed given as "collateral security" does not divest the grantor of interest in the land so as to prevent a subsequent judgment against him from becoming a lien against it,[28] nor does a void deed to a dissolved corporation have this effect.[29]

Generally the fact that the prior conveyance by the judgment debtor was not recorded before the entry of judgment does not make the judgment a

19. U.S.—**Corpus Juris quoted in** Carpenter v. Wabash Ry. Co., C.C. A.Mo., 103 F.2d 996, 1000, vacated 60 S.Ct. 416, 309 U.S. 23, 84 L.Ed. 558, rehearing denied 60 S.Ct. 585, 309 U.S. 695, 84 L.Ed. 1035.
Mo.—Dano v. Sharpe, 152 S.W.2d 693, 236 Mo.App. 113.
34 C.J. p 586 note 5.
Extraterritorial operation of judgment generally see supra § 448.

20. N.Y.—Haverly v. Becker, 4 N.Y. 169.

21. Ark.—Oliver v. Henry Quellmalz Lumber & Mfg. Co., 232 S.W. 355, 170 Ark. 1029.
Ga.—S. T. & W. A. Dewees Co. v. Paul B. Carter & Co., 8 S.E.2d 376, 190 Ga. 68.
Ill.—Schaeffer v. Potzel, 238 Ill.App. 335.
Iowa.—Nagl v. Hermsen, 257 N.W. 583, 219 Iowa 223.
Ky.—Gilbert v. Watts, Ritter & Co., 60 S.W.2d 142, 249 Ky. 27—Oder v. Jump, 108 S.W. 292, 32 Ky.L. 1276.
N.J.—McLaughlin v. Whaland, 13 A. 2d 573, 127 N.J.Eq. 393.
Pa.—**Corpus Juris quoted in** Davis v. Commonwealth Trust Co., 7 A.2d 3, 6, 335 Pa. 387—Schuler v. Kovatch, 28 Pa.Dist. & Co. 485, 17 Lehigh Co.L.J. 147.
Tex.—Fitzgerald v. Le Grande, Civ. App., 187 S.W.2d 155—Steele v. Harris, Civ.App., 2 S.W.2d 537.
Va.—Jones v. Hall, 15 S.E.2d 108, 177 Va. 658.
34 C.J. p 588 note 29.
Interests of parties to executory contract of sale see infra § 480.
Property fraudulently conveyed see infra § 475.

Subsequent registration of conveyance to judgment debtor

A judgment was not a lien on land which judgment debtor had conveyed by deed duly registered more than five years prior to entry and docketing of judgment, notwithstanding the deed by which judgment debtor acquired the title thus conveyed was not registered until after entry and docketing of judgment and notwithstanding statute making unregistered deed invalid to pass title as against creditors of grantor until registered.—City of Durham v. Pollard, 14 S.E. 2d 818, 219 N.C. 750.

Subcontract

Creditor who obtained judgment against subcontractor after subcontractor assigned subcontract was held not entitled to balance due on subcontract from principal contractor.—Albert Pipe Supply Co. v. Callanan, 283 N.Y.S. 716, 157 Misc. 136, reversed on other grounds 288 N.Y.S. 307, 159 Misc. 547.

Foreclosure of vendor's lien

Filing abstract of judgment after foreclosure of vendor's lien created no lien.—Home Trading Co. v. Hicks, Tex.Civ.App., 296 S.W. 627, reversed on other grounds, Com.App., 11 S.W. 2d 292.

22. Ill.—Snow v. Hogan, 38 N.E.2d 934, 312 Ill.App. 636.
34 C.J. p 588 note 30.

23. U.S.—Mills v. Smith, C.C.A.Ind., 113 F.2d 404, certiorari denied Smith v. Mills, 61 S.Ct. 73, 311 U. S. 692, 85 L.Ed. 447.

24. Del.—In re Republic Engineering Co., 130 A. 498, 3 W.W.Harr. 81.
34 C.J. p 588 note 31.

25. Pa.—**Corpus Juris quoted in** Davis v. Commonwealth Trust Co., 7 A.2d 3, 6, 335 Pa. 387.
34 C.J. p 588 note 32.

26. Pa.—Davis v. Commonwealth Trust Co., 7 A.2d 3, 335 Pa. 387.

27. U.S.—Davis v. Seneca Falls Mfg. Co., D.C.N.Y., 8 F.2d 546, modified on other grounds, C.C.A., 17 F.2d 546.
Tex.—First Nat. Bank of Bowie v. Cone, Civ.App., 170 S.W.2d 782, error refused.
34 C.J. p 595 note 4 [a].

Application pending at time of filing of abstract of judgment

Record of abstract of judgment against corporation was ineffective to secure to judgment creditor preference lien on corporation's land, where corporation was insolvent long before abstract of judgment was filed for record, and at time of filing of abstract application for general receiver of corporation on ground of insolvency was pending and receiver was afterwards appointed and qualified, since appointment of receiver related back to presentation of application.—Baylor University v. Chester Sav. Bank, Tex.Civ.App., 82 S.W.2d 738, error refused.

After order of conversion by chancery court, a judgment creditor cannot acquire a lien on land as such, and, where circuit court in partition proceeding had previously ordered land sold, judgment creditor of party interested in land obtained no lien on the land or proceeds thereof by filing in circuit clerk's office judgment that had been obtained in different county.—P. Crigler & Son v. Gire, 83 S.W.2d 529, 190 Ark. 1107.

28. N.Y.—Graves El. Co. v. Seitz, 104 N.Y.S. 852, 54 Misc. 552.
Attachment of judgment lien to equity of grantor in security deed see infra § 479 b.

29. Or.—Klorfine v. Cole, 254 P. 200, 121 Or. 76.

lien on the land so conveyed,[30] at least where the grantee is in possession, thus affording notice,[31] although the opposite view prevails in some jurisdictions,[32] and the lien has been held to attach where the prior conveyance contained a wrong description of the property so that, at the time of the judgment, the judgment debtor, rather than the vendee, appeared on the record to be the owner.[33] However, if the circumstances were such as to give the judgment creditor notice of the conveyance notwithstanding the misdescription, the judgment is invalid as a lien on the land.[34] If real estate is transferred while a judgment is dormant, the lien of the judgment cannot, on revivor thereof, be asserted against such real estate.[35] Where the lien of a judgment did not originally attach to certain property because it had been conveyed prior to the judgment, revival of the judgment prior to a decree setting aside the conveyance did not make the judgment a lien upon the property.[36]

Effect of nunc pro tunc entry of judgment. A judgment entered nunc pro tunc cannot create a lien on the debtor's lands sold or mortgaged prior to the date of its actual entry.[37]

§ 475. —— Property Fraudulently Conveyed

In some jurisdictions, but not in others, a judgment rendered after a fraudulent transfer becomes a lien on the property that has been fraudulently conveyed.

There is some dispute among the authorities as to whether or not a judgment rendered after a fraudulent transfer becomes a lien on the property that has been fraudulently conveyed.[38] Thus it has been held in some jurisdictions that an after-acquired judgment against the vendor attaches as a lien on property fraudulently conveyed,[39] and this is the rule generally applied where, in accordance with the principles discussed in Fraudulent Conveyances § 56, a conveyance in fraud of creditors is regarded as void.[40] In other jurisdictions, however, it has been held that a judgment is not a lien on lands fraudulently conveyed before rendition of the judgment,[41] particularly where such conveyance is regarded as merely voidable,[42] although this rule does not apply to a case where there is a secret trust and the grantor is still the real owner.[43] If a judgment lien does exist against land held fraudulently it ceases to operate when such land is transferred to a bona fide purchaser.[44]

The lien of a judgment against the fraudulent grantee attaches subject to the rights of the grantor's creditors.[45]

§ 476. —— Lands Instantaneously Seized

Where a person parts with a freehold estate at the same time and as a part of the same act or transaction by which he acquires it, his seizin for an instant does not subject the estates conveyed to him to the lien of a judgment against him.

It results from the doctrine limiting the judgment lien to the actual interest of the judgment debtor, discussed infra § 478, that as a general rule, where

30. N.Y.—Trenton Banking Co. v. Duncan, 86 N.Y. 221.
34 C.J. p 589 note 34.
Purpose of statutes
Tenn.—Jefferson County Bank v. Hale, 280 S.W. 408, 152 Tenn. 648.

31. Tex.—Steele v. Harris, Civ.App., 2 S.W.2d 537.

32. N.J.—Brink v. Flannagan, 101 A. 274, 87 N.J.Eq. 630.
N.C.—Eaton v. Doub, 128 S.E. 494, 190 N.C. 14, 40 A.L.R. 273.
34 C.J. p 589 note 35.

33. La.—Adams v. Smith, 6 La.App. 187.

34. N.J.—Charette v. Fruchtman, 159 A. 318, 110 N.J.Eq. 256.

35. Neb.—Campagna v. Home Owners' Loan Corporation, 3 N.W.2d 750, 141 Neb. 429.

36. Ill.—Snow v. Hogan, 38 N.E.2d 934, 312 Ill.App. 636.

37. N.C.—Ferrell v. Hales, 25 S.E. 821, 119 N.C. 199.
34 C.J. p 589 note 36.
Commencement of lien of judgment entered or amended nunc pro tunc see supra § 469.

38. Wyo.—**Corpus Juris cited in** Snyder v. Ryan, 270 P. 1072, 1075, 39 Wyo. 266, rehearing denied 275 P. 127, 39 Wyo. 266.
34 C.J. p 589 notes 38, 40.

39. Cal.—McGee v. Allen, 60 P.2d 1026, 7 Cal.2d 468—Liuzza v. Bell, 104 P.2d 1095, 40 Cal.App.2d 417.
D.C.—Reilly v. Sabin, 81 F.2d 259, 65 App.D.C. 125.
Mo.—Dano v. Sharpe, 152 S.W.2d 693, 236 Mo.App. 113.
Va.—Matney v. Combs, 198 S.E. 469, 171 Va. 244—Tucker v. Foster, 152 S.E. 376, 154 Va. 182, 69 A.L.R. 220.
W.Va.—Nichols v. Huffman, 5 S.E. 2d 789, 121 W.Va. 615.
34 C.J. p 589 note 38.
Execution against property conveyed before judgment see Fraudulent Conveyances § 308.
Remedies of creditor against fraudulent conveyance see Fraudulent Conveyances §§ 304-465.

40. N.J.—McLaughlin v. Whaland, 13 A.2d 573, 127 N.J.Eq. 393.
Ohio.—Ecker v. Switzer, 17 Ohio App. 90.
34 C.J. p 589 note 38.
Intent known to grantee
Under statute making such conveyance void as to creditors, judgments bind all property conveyed by defendant prior to judgment with intent to defraud creditors, where intent is known to grantee.—Coleman v. Law, 154 S.E. 445, 170 Ga. 906, 74 A.L.R. 684.

41. Ark.—Leonard v. State, 278 S. W. 654, 170 Ark. 41.
Ill.—De Martini v. De Martini, 52 N.E.2d 138, 385 Ill. 128—Cutler v. Hicks, 268 Ill.App. 161.
34 C.J. p 589 note 40.

42. Ill.—De Martini v. De Martini, 52 N.E.2d 138, 385 Ill. 128.
34 C.J. p 589 note 40.

43. Ill.—Pease v. Frank, 105 N.E. 299, 263 Ill. 500.

44. Wyo.—**Corpus Juris cited in** Snyder v. Ryan, 270 P. 1072, 1075, 39 Wyo. 266, rehearing denied 275 P. 127, 39 Wyo. 266.
34 C.J. p 589 note 39.

45. Tex.—York v. Robins, Civ.App., 240 S.W. 603.

a person parts with a freehold estate at the same time and as a part of the same act or transaction by which he acquires it, his seizin for an instant does not subject the estates conveyed to him to the lien of a judgment against him.[46] Thus, where a third person is made a medium for the conveyance by a husband to his wife, a judgment lien against such third person does not attach to the property.[47]

§ 477. —— After-Acquired Property

Although in a few jurisdictions the rule is otherwise, generally the lien of a judgment attaches not only to property owned by the debtor at the time of the judgment, but also to all that he may subsequently acquire during the life of the lien.

In a few jurisdictions a judgment is not a lien on after-acquired property,[48] but under the statutes of most jurisdictions the lien of a judgment attaches, not only to property owned by the debtor at the time of the rendition of the judgment, but also to all that he may subsequently acquire during the life of the lien.[49] The lien of a judgment does not attach to property acquired by the judgment debtor after the lien has ceased to be effective.[50] The lien has been held to attach to after-acquired real estate although the instrument by which the title is acquired is unrecorded,[51] but there is also authority holding that the lien attaches only after the debtor's title is disclosed of record.[52] The lien on after-acquired property is superior to any equity which the grantor could retain by a parol agreement or subsequent recorded conveyance.[53]

Under the rule as to instantaneous seizin, discussed supra § 476, it has been held that if one sells and conveys real estate to which he has no title or an imperfect title at the time of the sale, and subsequently acquires a perfect title, it inures

46. U.S.—Edwards v. Weil, Tenn., 99 F. 822, 40 C.C.A. 105.
Mont.—**Corpus Juris cited in** Johannes v. Dwire, 23 P.2d 971, 972, 94 Mont. 590.
34 C.J. p 590 note 44.
Transitory seizin by judgment debtor in trust for another as not subjecting lands to judgment lien see infra § 481 a.

47. N.Y.—O'Donnell v. Kerr, 50 How.Pr. 334.

48. U.S.—In re Marcus, D.C.Pa., 32 F.2d 719—**Corpus Juris cited in** U. S. v. Taft, D.C.Cal., 44 F.Supp. 564, 567, affirmed, C.C.A., Citizens Nat. Trust & Savings Bank of Los Angeles v. U. S., 135 F.2d 527.
Ariz.—Steinfeld v. Copper State Mining Co., 290 P. 155, 37 Ariz. 151.
Pa.—General Casmir Pulaski Building & Loan Ass'n v. Provident Trust Co. of Philadelphia, 12 A.2d 336, 338 Pa. 198—Calhoon v. Newlon, 40 Pa.Dist. & Co. 123.
34 C.J. p 590 note 45.
Execution lien see Executions § 125.

49. U.S.—Commercial Credit Co. v. Davidson, C.C.A.Miss., 112 F.2d 54—**Corpus Juris cited in** U. S. v. Taft, D.C.Cal., 44 F.Supp. 564, 567, affirmed, C.C.A., Citizens Nat. Trust & Savings Bank of Los Angeles v. U. S., 135 F.2d 527.
Ala.—W. T. Rawleigh Co. v. Patterson, 195 So. 729, 239 Ala. 309.
Cal.—Parsons v. Robinson, 274 P. 528, 206 Cal. 378—Helvey v. Bank of America Nat. Trust & Savings Ass'n, 111 P.2d 390, 43 Cal.App.2d 532.
Fla.—B. A. Lott, Inc. v. Padgett, 14 So.2d 667, 153 Fla. 304—Porter-Mallard Co. v. Dugger, 157 So. 429, 117 Fla. 137.
Ga.—Bostwick v. Felder, App., 35 S.E.2d 783—Bradley v. Booth, 9 S.E.2d 861, 62 Ga.App. 770.
Ind.—Peet v. Beers, 4 Ind. 46.
Md.—Messinger v. Eckenrode, 158 A. 357, 162 Md. 63.
Minn.—Farmers' & Merchants' State Bank of Thief River Falls v. Stageberg, 201 N.W. 612, 161 Minn. 413.
Mont.—Gaines v. Van Demark, 74 P. 2d 454, 106 Mont. 1—**Corpus Juris cited in** Johannes v. Dwire, 23 P. 2d 971, 972, 94 Mont. 590—Isom v. Larson, 255 P. 1049, 78 Mont. 395.
N.C.—City of Durham v. Pollard, 14 S.E.2d 818, 219 N.C. 750—Thompson v. Avery County, 5 S.E.2d 146, 216 N.C. 405—Keel v. Bailey, 198 S.E. 654, 214 N.C. 159.
N.D.—Aberle v. Merkel, 291 N.W. 913, 70 N.D. 89.
Okl.—Miller v. J. I. Case Threshing Mach. Co., 300 P. 399, 149 Okl. 281.
Or.—Duke v. Low, 296 P. 45, 135 Or. 460—Budd v. Gallier, 89 P. 638, 50 Or. 42.
S.D.—Security Nat. Bank of Sioux Falls v. Lowrie, 238 N.W. 304, 59 S.D. 102.
Va.—Jones v. Hall, 15 S.E.2d 108, 177 Va. 658—Miller v. Kemp, 160 S.E. 203, 157 Va. 178, 84 A.L.R. 980.
Wis.—Musa v. Segelke & Kohlhaus Co., 272 N.W. 657, 224 Wis. 432, 111 A.L.R. 168.
34 C.J. p 590 note 47.
Commencement of judgment lien as to after-acquired property see supra § 466.

Property held not "acquired" by debtor on his death

Where, at time of recovery, docketing, and recording of judgment on debtor's separate indebtedness, realty involved was community property of debtor and his wife and debtor died within five years after the docketing of the judgment, the lien of judgment did not attach on debtor's separate interest in the community realty on death of debtor since when debtor passed away his interest in the community which during his lifetime was exempt from the lien of judgment was not "later acquired" by him within statute providing that, after recording, a judgment shall become a lien for period of five years on all real property of the debtor whether the property is then owned by debtor or is "later acquired."—Tway v. Payne, 101 P. 2d 455, 55 Ariz. 343.

Joint tenancy

When a creditor has a judgment lien against interest of one joint tenant he can keep his lien alive and wait until joint tenancy is terminated by death of one of joint tenants, and, if judgment debtor survives, judgment lien immediately attaches to entire property.—Zeigler v. Bonnell, 136 P.2d 118, 52 Cal.App.2d 217.

50. U.S.—In re Schuneman, C.C.A. Ill., 290 F. 200.
Mo.—Woods v. Wilson, 108 S.W.2d 12, 341 Mo. 479.
Duration of lien see infra §§ 489–491.

51. La.—Gallaugher v. Hebrew Cong., 35 La.Ann. 829—Logan v. Herbert, 30 La.Ann. 727.

52. Mont.—Johannes v. Dwire, 23 P.2d 971, 94 Mont. 590—Isom v. Larson, 255 P. 1049, 78 Mont. 395.

Every interest shown by record

Judgment lien reaches every interest of judgment debtor in land which record of title shows he had, either before or after judgment was docketed.—Miller v. Kemp, 160 S.E. 203, 157 Va. 178, 84 A.L.R. 980.

53. N.C.—Colonial Trust Co. v. Sterchie, 85 S.E. 40, 169 N.C. 21.

immediately to the benefit of the grantee, and, if between the date of the conveyance and the acquisition of the perfect title a judgment is rendered against the grantor, the title of the grantee is superior to that of the judgment creditor, since there is no moment of time at which the lien of the judgment could attach;[54] but there is some authority to the contrary.[55]

§ 478. Estate or Interest Affected by Lien

a. In general
b. Curtesy and dower
c. Interests derived from judicial sale
d. Interests of cotenants
e. Lands subject to power of appointment
f. Life estates
g. Property acquired by descent or devise
h. Remainders and reversions

a. In General

Except as modified by registration laws, the lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the property, and only to such interest.

The lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the property, and only to such interest; the lien cannot be made effectual to bind or to convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated,[56] except, according to the decisions on the

54. Mont.—**Corpus Juris cited in** Johannes v. Dwire, 23 P.2d 971, 972, 94 Mont. 590.
34 C.J. p 591 note 53.

55. Kan.—Leslie v. Harrison Nat. Bank, 154 P. 209, 97 Kan. 22—Bliss v. Brown, 96 P. 945, 78 Kan. 467.
34 C.J. p 591 note 54.

56. U.S.—Commercial Credit Co. v. Davidson, C.C.A.Miss., 112 F.2d 54—Wiltshire v. Warburton, C.C.A. Va., 59 F.2d 611—U. S. v. Certain Lands in Borough of Brooklyn, Kings County, N. Y. (Parcel No. 6), D.C.N.Y., 44 F.Supp. 830.
Ala.—First Nat. Bank v. T. J. Perry & Son, 140 So. 616, second case, 224 Ala. 420, certiorari dismissed 140 So. 616, first case, 224 Ala. 13.
Ark.—Snow Bros. Hardware Co. v. Ellis, 21 S.W.2d 162, 180 Ark. 238.
Cal.—In re Bennett's Estate, 90 P. 2d 84, 13 Cal.2d 354, 126 A.L.R. 771—McGee v. Allen, 60 P.2d 1026, 7 Cal.2d 468—Homeland Bldg. Co. v. Reynolds, 121 P.2d 59, 49 Cal. App.2d 176—Spear v. Farwell, 42 P.2d 391, 5 Cal.App.2d 111—Davis v. Perry, 8 P.2d 514, 120 Cal.App. 670—Iknoian v. Winter, 270 P. 999, 94 Cal.App. 223.
Fla.—Arundel Debenture Corporation v. Le Blond, 190 So. 765, 139 Fla. 668—Smith v. Pattishall, 176 So. 568, 127 Fla. 474, 129 Fla. 498—First Nat. Bank v. Peel, 145 So. 177, 107 Fla. 413.
Ga.—Hartsfield Loan & Savings Co. v. Garner, 191 S.E. 119, 184 Ga. 283.
Ill.—Mauricau v. Haugen, 56 N.E.2d 367, 387 Ill. 186—Sturdyvin v. Ward, 168 N.E. 666, 336 Ill. 594—Hooper v. Haas, 164 N.E. 23, 332 Ill. 561, 63 A.L.R. 658—East St. Louis Lumber Co. v. Schnipper, 141 N.E. 542, 310 Ill. 150.
Ind.—Stroup v. Myers, 21 N.E.2d 75, 106 Ind.App. 538.
Iowa.—Johnson v. Smith, 231 N.W. 470, 210 Iowa 591—Stiles v. Bailey, 219 N.W. 537, 205 Iowa 1385—Berg v. Shade, 214 N.W. 513, 203 Iowa 1352—Lefebure v. Henry Lefebure Sons Co., 208 N.W. 853, 202 Iowa 1053.
Md.—Union Trust Co. v. Biggs, 137 A. 509, 153 Md. 50—Kinsey v. Drury, 126 A. 125, 146 Md. 227.
Minn.—Scott v. Marquette Nat. Bank, 217 N.W. 136, 173 Minn. 225.
Miss.—Candler v. Cromwell, 57 So. 554, 101 Miss. 161.
Mont.—**Corpus Juris cited in** Clack v. Clack, 41 P.2d 32, 37, 98 Mont. 552—**Corpus Juris cited in** Johannes v. Dwire, 23 P.2d 971, 972, 94 Mont. 590.
Neb.—Knaak v. Brown, 212 N.W. 431, 115 Neb. 260, 51 A.L.R. 237.
N.M.—**Corpus Juris cited in** Sylvanus v. Pruett, 9 P.2d 142, 146, 36 N.M. 112.
N.Y.—Ptaszynski v. Flack, 31 N.Y.S. 2d 599, 263 App.Div. 831—Newark Fire Ins. Co. v. Brill, 7 N.Y.S.2d 773.
N.C.—Thompson v. Avery County, 5 S.E.2d 146, 216 N.C. 405—Wadford v. Davis, 135 S.E. 353, 192 N.C. 484—Eaton v. Doub, 128 S.E. 494, 190 N.C. 14, 40 A.L.R. 273—Spence v. Foster Pottery Co., 117 S.E. 32, 185 N.C. 218.
Okl.—Harry v. Hertzler, 90 P.2d 656, 185 Okl. 151—Kennedy v. Roff, 61 P.2d 1041, 178 Okl. 71—Oklahoma State Bank of Ada v. Crumley, 293 P. 218, 146 Okl. 12—Oil Well Supply Co. v. Cremin, 287 P. 414, 143 Okl. 57, 68 A.L.R. 1471—White House Lumber Co. v. Howard, 286 P. 327, 142 Okl. 163.
Or.—Duke v. Low, 296 P. 45, 135 Or. 460.
Pa.—Schuler v. Kovatch, 28 Pa.Dist. & Co. 485, 17 Lehigh Co.L.J. 147.
S.C.—Fallaw v. Oswald, 9 S.E.2d 793, 194 S.C. 387.
S.D.—Ruden v. Kirby, 241 N.W. 791, 59 S.D. 631—In re Hornstra's Estate, 226 N.W. 740, 55 S.D. 513.
Tex.—Payne v. Bracken, 115 S.W.2d 903, 131 Tex. 394—Berry v. Chadwick, Civ.App., 137 S.W.2d 859, error dismissed, judgment correct—South Texas Lumber Co. v. Nicoletti, Civ.App., 54 S.W.2d 893, error dismissed—Garrison v. Citizens' Nat. Bank of Hillsboro, Civ. App., 25 S.W.2d 231, error refused—Steele v. Harris, Civ.App., 2 S.W. 2d 537—Sugg v. Mozoch, Civ.App., 293 S.W. 907.
Va.—Miller v. Kemp, 160 S.E. 208, 157 Va. 178, 84 A.L.R. 980—Savings & Loan Corporation v. Bear, 154 S.E. 587, 155 Va. 312, 75 A. L.R. 980—Holland Jones Co. v. Smith, 148 S.E. 581, 152 Va. 707.
Wash.—Heath v. Dodson, 110 P.2d 845, 7 Wash.2d 667—Vandin v. Henry McCleary Timber Co., 289 P. 1016, 157 Wash. 635.
W.Va.—Brown v. Hodgman, 19 S.E. 2d 910, 124 W.Va. 136—Guaranty Co. of Maryland v. Hubbard, 187 S.E. 313, 117 W.Va. 563—Eagle v. McKown, 142 S.E. 65, 105 W.Va. 270.
Wis.—Wenzel v. Roberts, 294 N.W. 871, 236 Wis. 315—**Corpus Juris quoted in** Musa v. Segelke & Kohlhaus Co., 272 N.W. 657, 224 Wis. 432, 111 A.L.R. 168.
34 C.J. p 591 note 55—41 C.J. p 521 notes 42, 43.

Reason for rule
A judgment lien holder is not in the same attitude as an innocent purchaser for value without notice.
Iowa.—Richardson v. Estle, 243 N.W. 611, 214 Iowa 1067.
Minn.—Farmers' & Merchants' State Bank of Thief River Falls v.

question, as modified by registration laws,[57] as where, by reason of the language and construction of the recording acts, a judgment creditor is put substantially on the basis of a bona fide purchaser, if without actual notice, and protected against such unrecorded conveyances, encumbrances, and the like as fall within the operation of the recording acts.[58]

Generally it is immaterial whether or not the judgment debtor's interest appears of record; whatever it is, it is bound by the lien.[59] Under some statutes, however, the judgment debtor's title must appear of record, or the judgment lien will not attach thereto.[60] The interest of a tenant in possession is not bound by the lien of a judgment against the holder of the legal title, because possession is notice of the tenant's rights,[61] but a judgment against the tenant in possession attaches as a lien to his interest, whatever it may be.[62] If the debtor's interest is subject to any infirmity or condition by reason of which it is eliminated or ceases to exist, the lien attaching thereto ceases with it.[63]

After the death of the judgment debtor, the filing of a transcript of a judgment does not render the judgment a lien on land belonging to the estate of such debtor.[64]

Stageberg, 201 N.W. 612, 161 Minn. 413.
34 C.J. p 591 note 55 [a].

Judgment against vendee; legal title in vendor
A vendor by expressly reserving vendor's lien in deed retained legal title to land and, where land was reconveyed to vendor by vendee in consideration of cancellation of purchase money notes and vendor's lien, title was never in vendee so as to make land subject to lien of judgment obtained against vendee.—Mostyn v. Griffith, Tex.Civ.App., 130 S.W.2d 906, error dismissed, judgment correct.

Lands owned by persons not parties to judgment
Judgment can attach only against lands owned by judgment debtor and not in first instance against lands owned by parties who were not parties to judgment.—Oakwood State Bank of Oakwood v. Durham, Tex. Civ.App., 21 S.W.2d 586.

Affiliated corporations
Where one corporation acquired controlling interest in other, judgment against former did not become lien on latter's property.—Steinfeld v. Copper State Mining Co., 290 P. 155, 37 Ariz. 151.

Judgment against administrator did not entitle judgment creditor to equitable lien as against proceeds of insurance on real estate belonging to deceased.—First Carolinas Joint Stock Land Bank of Columbia v. Liverpool & London & Globe Ins. Co., 158 S.E. 273, 160 S.C. 164.

57. Tex.—South Texas Lumber Co. v. Nicoletti, Civ.App., 54 S.W.2d 893, error dismissed—Garrison v. Citizens' Nat. Bank of Hillsboro, Civ.App., 25 S.W.2d 231, error refused—Sugg v. Mozoch, Civ.App., 293 S.W. 907.
34 C.J. p 592 note 56.

Deed wrongfully recorded
Third person extending credit in reliance on borrower's record title to realty and without any notice or knowledge of defect in title occupies position of innocent purchaser for value, and by reducing claim to judgment during borrower's record ownership acquires valid judgment lien thereon. So, where deed executed and deposited by grantor with person of his own choice for delivery to grantee on grantor's death was wrongfully recorded deed was valid and absolute as to subsequent judgment creditor of grantee who extended credit in reliance on grantee's record title to property.—Micklethwait v. Fulton, 196 N.E. 166, 129 Ohio St. 488.

58. Ill.—Thorpe v. Helmer, 113 N. E. 954, 275 Ill. 86.
34 C.J. p 592 note 57.

59. Tex.—Steele v. Harris, Civ.App., 2 S.W.2d 537.
34 C.J. p 593 note 58.

In Minnesota
(1) The text rule has been applied. —**Corpus Juris cited in** Emerson-Brantingham Implement Co. v. Cook, 206 N.W. 170, 171, 165 Minn. 198, 43 A.L.R. 41.

(2) Occasional language used in some cases may suggest that there is no lien unless record title is in the judgment debtor.—Emerson-Brantingham Implement Co. v. Cook, 206 N.W. 170, 165 Minn. 198, 43 A.L.R. 41—34 C.J. p 593 note 59.

(3) Such language, however, must be interpreted with the subject to which it is used in view.—Emerson-Brantingham Implement Co. v. Cook, supra.

60. Mont.—McMillan v. Davenport, 118 P. 756, 44 Mont. 23, Ann.Cas. 1912D 984—Isom v. Larson, 255 P. 1049, 78 Mont. 395—Piccolo v. Tanaka, 253 P. 890, 78 Mont. 445.
Rule applied to after-acquired property see supra § 477.

61. Neb.—Uhl v. May, 5 Neb. 157.
34 C.J. p 593 note 60.

62. N.Y.—Jackson v. Town, 4 Cow. 599, 15 Am.D. 405.

63. Ark.—Snow Bros. Hardware Co. v. Ellis, 21 S.W.2d 162, 180 Ark. 238.
Fla.—Smith v. Pattishall, 176 So. 568, 127 Fla. 474, 129 Fla. 498.
Iowa.—Stiles v. Bailey, 219 N.W. 537, 205 Iowa 1385.
Minn.—Peterson v. Siebrecht, 247 N. W. 6, 188 Minn. 272.
Tex.—Thompson v. Mayhew Lumber Co., Civ.App., 103 S.W.2d 1005.
Wis.—**Corpus Juris quoted in** Musa v. Segelke & Kohlhaus Co., 272 N. W. 657, 658, 224 Wis. 432, 111 A. L.R. 168.
34 C.J. p 593 note 62.

Conveyance to judgment debtor set aside for fraud
Ill.—Waterman v. Hall, 270 Ill.App. 558.
Pa.—Lackawanna Thrift & Loan Corporation v. Sanderson, 30 Pa.Dist. & Co. 242.

Recording statute held inapplicable
Where intervener docketed judgment which became a lien on defendant's equitable title under land contract, and plaintiff as holder of legal title, to enable defendant to obtain a loan wherewith to acquire legal title, made and recorded deed to defendant without consideration whereby intervener's judgment became an apparent lien on legal title in defendant, but the loan failed, recording statute did not apply and intervener was not protected by it as good faith lienor.—Farmers' & Merchants' State Bank of Thief River Falls v. Stageberg, 201 N.W. 612, 161 Minn. 413.

64. N.Y.—Henderson v. Brooks, 3 Thomps. & C. 445.
Tex.—Harms v. Ehlers, Civ.App., 179 S.W.2d 582, error refused—First Nat. Bank of Bowie v. Cone, Civ. App., 170 S.W.2d 782, error refused.

Reason for rule
The title to real property passed immediately on the death of decedent under the terms of the will; therefore the title to such real property was not in decedent at the time the transcript was filed.—In re Wakefield's Estate, 260 N.Y.S. 633, 146 Misc. 58.

Lien on lands. A judgment lien attaches only to an estate in lands, not to a lien on lands.[65]

b. Curtesy and Dower

It has been held that a judgment against a husband is a lien on his life interest in the wife's lands; but an unassigned dower or an inchoate right of dower has been held not subject to the lien of a judgment against a married woman.

A judgment against a husband is a lien on his life interest in the wife's lands, although execution is suspended until her death,[66] but binds only the tenant's actual interest, and therefore is liable to be extinguished by the breach of a condition subsequent which divests the life estate[67] or by the exercise of a power to sell.[68] It has also been held, however, that during the wife's lifetime the husband has no interest in her lands to which the lien of a judgment can attach.[69]

An unassigned dower[70] or an inchoate right of dower[71] has been held not subject to the lien of a judgment against a married woman; and an answer by the holder of an inchoate right of dower, in proceedings to sell realty, waiving assignment of such right by metes and bounds and asking that she be awarded the same in money has been held not to transfer a judgment lien to the purchase money in favor of the judgment creditor.[72]

c. Interests Derived from Judicial Sale

The inchoate or inceptive title of a purchaser at a judicial sale, in advance of its confirmation or before issuance of a deed, is subject to the lien of a judgment against him; but the judgment creditor of one who has caused a sale pursuant to execution against a third person has no lien against the fund so created.

The inchoate or inceptive title of a purchaser at a judicial sale, in advance of its confirmation by the court, or before the issuance of a deed, may be bound by the lien of a judgment against him;[73] but the judgment creditor of one who has caused a sheriff's sale to be held pursuant to execution against a third person has been held to have no legal or equitable lien against the fund so created.[74]

d. Interests of Cotenants

A judgment against a tenant in common is a lien on the interest of the debtor in the land.

A judgment against a tenant in common is a lien on the interest of the debtor in the land,[75] but not on that of the debtor's cotenant,[76] and, in case of partition, the lien will attach to the part allotted to defendant,[77] or, if the land is sold on partition, to his share of the fund,[78] the purchaser under a decree for partition taking the land discharged of the lien.[79] According to some authority, however, the lien does not attach while the debtor's title is undisclosed of record.[80] A voluntary partition made by tenants in common will not prevail against the lien of a judgment rendered against one of the cotenants prior to the partition.[81]

e. Lands Subject to Power of Appointment

Where a person has a general power of appointment, and executes the power, the property appointed is deemed, in equity, part of his assets and subject to the demands of his judgment creditors; but a judgment has been held, in equity, to be subordinate to a power of appointment in a third person.

At common law, a judgment against a party having a power of appointment, with the estate vested in him until and in default of appointment, is defeated by the subsequent execution of the power;[82] but where a person has the general power of appointment, either by deed or will, and executes this power, the property appointed is deemed, in equity, part of his assets, and subject to the demands of his

65. Ark.—Snow Bros. Hardware Co. v. Ellis, 21 S.W.2d 162, 180 Ark. 238.

Vendor's lien

Even though defendant had vendor's lien for balance grantee paid for delivery of escrow deed, plaintiff's judgment lien did not attach, since vendor's lien is not interest in land subject to execution.—Snow Bros. Hardware Co. v. Ellis, supra.

66. Pa.—Lancaster County Bank v. Stauffer, 10 Pa. 398.
34 C.J. p 593 note 66.

67. N.Y.—Moore v. Pitts, 53 N.Y. 85.

68. N.J.—Leggett v. Doremus, 25 N. J.Eq. 122.

69. Va.—Bankers' Loan & Investment Co. v. Blair, 39 S.E. 231, 99 Va. 606, 86 Am.S.R. 914.

70. Ohio.—Good v. Crist, 156 N.E. 146, 23 Ohio App. 484.

71. N.Y.—Crawford v. Woods, 191 N.Y.S. 786, 117 Misc. 150, affirmed 196 N.Y.S. 922, 203 App.Div. 862.
Ohio.—Good v. Crist, 156 N.E. 146, 23 Ohio App. 484.
34 C.J. p 593 note 70.

72. Ohio.—Good v. Crist, supra.

73. Pa.—Holmes' Appeal, 108 Pa. 23.
34 C.J. p 593 note 63.

74. Pa.—McHugh v. Landherr, 52 Pa.Dist. & Co. 481, 46 Lack.Jur. 129.

75. Ala.—Hargett v. Hovater, 15 So. 2d 276, 244 Ala. 646.
Mont.—**Corpus Juris cited in** Isom v. Larson, 255 P. 1049, 1051, 78 Mont. 395.
34 C.J. p 598 note 27.
Property held as estate in entirety as subject to judgment lien see Husband and Wife § 34 e.

76. Okl.—Burke v. Marshall, 83 P. 2d 395, 183 Okl. 505.
Va.—Miller v. Kemp, 160 S.E. 203, 157 Va. 178, 84 A.L.R. 980.

77. Va.—Miller v. Kemp, supra.
34 C.J. p 598 note 28.

78. Fla.—Eldridge v. Post, 20 Fla. 579.
S.C.—Garvin v. Garvin, 1 S.C. 55.

79. Ohio.—Cradlebaugh v. Pritchett, 8 Ohio St. 646, 72 Am.D. 610.
S.C.—Burris v. Gooch, 39 S.C.L. 1.

80. Mont.—Isom v. Larson, 255 P. 1049, 78 Mont. 395.

81. N.J.—Emson v. Polhemus, 28 N. J.Eq. 439.

82. U.S.—Brandies v. Cochrane, Ill., 5 S.Ct. 194, 112 U.S. 344, 28 L. Ed. 760.
34 C.J. p 597 note 19.

judgment creditors in preference to the claims of his voluntary appointees or legatees.[83] A judgment has been held in equity to be subordinate to a power of appointment in a third person, as, for instance, a power of sale vested in executors by will;[84] and the same principle has been applied to a power of appointment resting in the discretion of trustees, qualified only by the necessity of obtaining the consent of the judgment debtor to the exercise of that discretion.[85]

f. Life Estates

A judgment lien attaches on a vested life estate.

A judgment lien attaches on a vested estate for life.[86]

g. Property Acquired by Descent or Devise

The interest of a judgment debtor as heir or devisee and legatee before distribution has been held subject to the lien of the judgment, and, in case of sale of the property before distribution, the right of the judgment creditor is transferred from the property to the proceeds.

Before distribution, a creditor may obtain a judgment lien on the interest of his debtor as heir or devisee and legatee,[87] but where the executor, to pay debts of the testator, or pursuant to a power contained in the will, sells realty devised to a judgment debtor, such sale deprives the devisee of his interest in the land, and also deprives the judgment creditor of any right to proceed against the land itself for satisfaction of the judgment.[88] In the case of sale of land under order of a probate court[89] or under a testamentary power,[90] the lien has been held to be transferred from the land and to attach to the interest of the judgment debtor in the proceeds. Under a statute providing that the surplus of proceeds of such sale over and above the debts of the deceased shall belong to the person owning the premises at the time of the sale, the surplus must

83. U.S.—Brandies v. Cochrane, supra.
N.Y.—Tallmadge v. Sill, 21 Barb. 34.
34 C.J. p 597 note 20.

84. N.J.—Wetmore v. Midmer, 21 N. J.Eq. 242.

85. N.J.—Leggett v. Doremus, 25 N. J.Eq. 122.

86. N.Y.—Verdin v. Slocum, 71 N.Y. 345.
34 C.J. p 593 note 65.

Restriction on use of principal

Where life tenant's use of principal of the estate was restricted to use for her comfortable maintenance, the estate could not be charged with debts incurred for benefit of business conducted by life tenant and her husband and not for life tenant's maintenance and support, and realty which remained unconverted by sale at death of life tenant could not be subjected to lien of confession judgment on such debt.—In re Stannert's Estate, 15 A.2d 360, 339 Pa. 439.

Judgment confessed prior to acquisition of status

Even though mother and daughter as successive life tenants of father's residuary estate had unlimited power to consume principal, where judgment by confession was entered against daughter during mother's lifetime and therefore before daughter had acquired status of life tenant, daughter's confession of judgment could not constitute a consumption of principal by her so as to subject realty contained in residuary estate to judgment lien.—In re Stannert's Estate, supra.

87. Cal.—Noble v. Beach, 130 P.2d 426, 21 Cal.2d 91—McGee v. Allen, 60 P.2d 1026, 7 Cal.2d 468.
Del.—In re Harris' Estate, 44 A.2d 18.
Ill.—Wickiser v. Powers, 57 N.E.2d 522, 324 Ill.App. 130.
Iowa.—In re Duffy's Estate, 292 N. W. 165, 228 Iowa 426, 128 A.L.R. 943—Chader v. Wilkins, 284 N.W. 183, 226 Iowa 417.
Kan.—Caple v. Warburton, 264 P. 47, 125 Kan. 290.
Minn.—Rusch v. Lagerman, 261 N.W. 186, 194 Minn. 469.
Mont.—Gaines v. Van Demark, 74 P. 2d 454, 106 Mont. 1.
Tex.—Hart v. Estelle, Civ.App., 34 S.W.2d 665, affirmed Estelle v. Hart, Com.App., 55 S.W.2d 510—Fikes v. Buckholts State Bank, Civ.App., 273 S.W. 957.
Utah.—In re Miles' Estate, 223 P. 337, 63 Utah 144.
Wis.—Qualley v. Zimmerman, 285 N.W. 735, 231 Wis. 341.
69 C.J. p 1249 notes 46–49.

Interest of debtor in testator's contract to sell

Where vendor under contract for deed had not executed deed at time of death, lien of judgment against devisee was held to attach to extent of share of unpaid purchase money on share of contract devised to devisee by vendor.—Bauermeister v. McDonald, 247 N.W. 424, 124 Neb. 142.

Additional acts necessary

(1) Judgment creditors held to have no specific claim or lien against fund due beneficiary under will prior to establishment of lien by levy or extension of receivership.—In re Kaufman's Estate, 266 N.Y.S. 890, 149 Misc. 287.

(2) Judgment creditors of a devisee acquire no lien on the real estate of the testator until the levy of an execution, and even then, prior to a sale and conveyance, they acquire only a lien and not title.—Thompson's Ex'rs v. Stiltz, 96 S.W. 884, 29 Ky.L. 1075—69 C.J. p 1249 note 59.

(3) The lien of a judgment against an heir to the real estate of an intestate attaches only to that portion of the real estate of the intestate, if any, distributed by the county court to the judgment debtor, and, when any portion of such real estate is so distributed, the lien of the judgment relates back to the time of its entry on the judgment docket.—Oil Well Supply Co. v. Cremin, 287 P. 414, 143 Okl. 57, 68 A.L.R. 1471—White House Lumber Co. v. Howard, 286 P. 327, 142 Okl. 163.

88. Del.—In re Harris' Estate, 44 A. 2d 18—Brennan v. Wilmington Trust Co., 126 A. 42, 2 W.W.Harr. 482.
N.Y.—New York Central R. Co. v. First Nat. Bank, 133 N.E. 908, 232 N.Y. 330.
69 C.J. p 1249 note 51.

The heir has no title superior to that of the administrator whenever it becomes necessary for the administrator to sell the lands in the process of administration, and the lien of a judgment against a legatee does not attach to property passing under a will either in the hands of an executor or of purchasers under him at a valid sale.—Whatley v. Musselwhite, 5 S.E.2d 227, 189 Ga. 91.

89. Del.—In re Harris' Estate, 44 A.2d 18.
Miss.—Stone v. Townsend, 1 So.2d 237, 190 Miss. 547.
34 C.J. p 587 note 18.

90. Ill.—Wickiser v. Powers, 57 N. E.2d 522, 324 Ill.App. 130.
34 C.J. p 587 note 19.

be treated as real estate.[91] Where, however, the doctrine of equitable conversion is held to apply at the instant of the testator's death, the interest passes as personalty and is not subject to a lien against the land,[92] as where a sale of land is directed by the will, expressly or by implication, at a specified time in the future.[93] The title of one heir to realty of the deceased set off to him by the probate court is not subject to the lien of a judgment against another heir.[94]

h. Remainders and Reversions

Vested estates in reversion or remainder are subject to the lien of judgments against the reversioner or remainderman or against the ancestor from whom the estate immediately descended, and in some states this is true of contingent remainders.

Estates in reversion or remainder, if vested, are legal estates subject to the lien of judgments against the reversioner or remainderman[95] or of judgments against the ancestor from whom the estate immediately descended;[96] and in some states this is true of contingent remainders,[97] although elsewhere this is denied.[98]

§ 479. —— Equitable Interests in General

a. In general
b. Equity of redemption

a. In General

The lien of a judgment ordinarily does not attach to an equitable title or interest in real estate held by the judgment debtor, although in some states the rule has been changed by statute or court decision.

The lien of a judgment ordinarily does not attach to or bind an equitable title or interest in real estate held by the judgment debtor,[99] but attaches only to real property in which the judgment debtor has a vested legal interest.[1] In several states, however, this rule has been changed by statute, or by the decisions of the courts assimilating legal and equitable remedies, so that an equitable estate is subject to the lien of a judgment;[2] but in some of such states it is held that a judgment is not a lien on an equitable interest in such a sense as to affect a bona fide purchaser without notice.[3] It has always been held by the courts of chancery that for their purposes such an estate is just as much bound by the judgment as any legal estate, and may be subjected to its satisfaction through the process of equity.[4]

b. Equity of Redemption

In many jurisdictions a judgment debtor's equity of redemption in encumbered property or his right to redeem property from judicial sale or foreclosure of a mortgage is subject to the lien of a judgment against him.

91. Del.—In re Harris' Estate, 44 A.2d 18.

92. Iowa.—Krob v. Rothrock, 119 N.W. 131—Beaver v. Ross, 118 N. W. 287, 140 Iowa 154, 20 L.R.A., N.S., 65, 17 Ann.Cas. 640.

93. Minn.—Greenman v. McVey, 147 N.W. 812, 126 Minn. 21, Ann.Cas. 1915D 430.
69 C.J. p 1249 note 52.

94. Okl.—Oil Well Supply Co. v. Cremin, 287 P. 414, 143 Okl. 57, 68 A.L.R. 1471.

95. Ga.—Pound v. Faulkner, 18 S.E. 2d 749, 193 Ga. 413.
Kan.—Caple v. Warburton, 264 P. 47, 125 Kan. 290.
Neb.—Fisher v. Kellogg, 258 N.W. 404, 128 Neb. 248.
N.J.—**Corpus Juris cited in** Cowan v. Storms, 2 A.2d 183, 185, 121 N. J.Law 336.
Wis.—Qualley v. Zimmerman, 285 N.W. 735, 231 Wis. 341.
34 C.J. p 593 note 72.

96. U.S.—Burton v. Smith, Va., 13 Pet. 464, 10 L.Ed. 248.

97. Ill.—Kenwood Trust & Savings Bank v. Palmer, 209 Ill.App. 370.
Pa.—Ogden v. Knepler, 1 Pearson 145.

98. N.Y.—Jackson v. Middleton, 52 Barb. 9.
34 C.J. p 593 note 75.

99. Cal.—Homeland Bldg. Co. v. Reynolds, 121 P.2d 59, 49 Cal.App. 2d 176—Cook v. Huntley, 112 P.2d 889, 44 Cal.App.2d 635—Helvey v. Bank of America Nat. Trust & Savings Ass'n, 111 P.2d 390, 43 Cal.App.2d 532—**Corpus Juris cited in** Oaks v. Kendall, 73 P.2d 1255, 1257, 23 Cal.App.2d 715—Poindexter v. Los Angeles Stone Co., 214 P. 241, 60 Cal.App. 686.
Fla.—First Nat. Bank v. Peel, 145 So. 177, 107 Fla. 413.
N.J.—Cowan v. Storms, 2 A.2d 183, 121 N.J.Law 336—McLaughlin v. Whaland, 13 A.2d 573, 127 N.J.Eq. 393.
N.M.—**Corpus Juris cited in** Sylvanus v. Pruett, 9 P.2d 142, 146, 36 N.M. 112.
N.D.—Business Service Collection Bureau v. Yegen, 269 N.W. 46, 67 N.D. 51.
Tex.—Adams v. Impey, Civ.App., 131 S.W.2d 288—Gamer v. Love, Civ. App., 41 S.W.2d 356, error dismissed.
34 C.J. p 594 note 79.

Mortgagee in possession
Statutory judgment lien does not attach to interest of mortgagee in possession who has foreclosed and is entitled to sale if owner does not pay.—Sugg v. Mozoch, Tex.Civ.App., 293 S.W. 907.

1. Cal.—Cook v. Huntley, 112 P.2d 889, 44 Cal.App.2d 635—Helvey v. Bank of America Nat. Trust & Savings Ass'n, 111 P.2d 390, 43 Cal.App.2d 532.

2. Ill.—Johnson v. Watson, 33 N.E. 2d 130, 309 Ill.App. 440.
Iowa.—Johnson v. Smith, 231 N.W. 470, 210 Iowa 591—Everist v. Carter, 210 N.W. 559, 202 Iowa 498—Shedenhelm v. Cafferty, 156 N.W. 340, 174 Iowa 195.
Minn.—Rusch v. Lagerman, 261 N.W. 186, 194 Minn. 469—Farmers' & Merchants' State Bank of Thief River Falls v. Stageberg, 201 N.W. 612, 161 Minn. 413.
Pa.—Department of Public Assistance v. Spurio, Com.Pl., 9 Fay.L.J. 18.
S.D.—Fridley v. Munson, 194 N.W. 840, 46 S.D. 532, 30 A.L.R. 501.
34 C.J. p 594 note 80.

Superiority
The legal lien of a judgment against the holder of the beneficial or legal title, as disclosed by the record chain of title, is superior to the equities of third persons.—Miller v. Kemp, 160 S.E. 203, 157 Va. 178, 84 A.L.R. 980.

3. Ill.—Pease v. Frank, 105 N.E. 299, 263 Ill. 500.
34 C.J. p 594 note 81.

4. N.J.—McLaughlin v. Whaland, 13 A.2d 573, 127 N.J.Eq. 393.
Va.—Miller v. Kemp, 160 S.E. 203, 157 Va. 178, 84 A.L.R. 980.
34 C.J. p 595 note 82.

Formerly at common law an equity of redemption, being regarded as a mere equitable interest, was not an interest on which a judgment lien attached,[5] but in many jurisdictions, as a result either of statutes making judgments liens on equitable interests or of departures by statute or otherwise from the common-law view as to the equitable nature of the mortgagor's interest, the mortgagor's interest is subject to the lien of a judgment,[6] and the lien cannot be cut off by a conveyance of the equity to a prior mortgagee.[7] The judgment creditor has, however, no lien on money paid by the mortgagor to the assignee of the mortgage in excess of the amount due on such mortgage,[8] or on the proceeds of the sale of the equity of redemption,[9] although the judgment has been held to be a lien on the proceeds of a judicial sale of the interests of both the mortgagor and mortgagee.[10] A judgment obtained against the owner of an equity of redemption in mortgaged premises, after a decree of foreclosure but before the sale, has an equitable lien on the surplus moneys produced by the sale;[11] it is otherwise where the judgment was recovered after the property had been struck off to the purchaser.[12] Ordinarily, however, where land covered by a judgment lien is sold, the lien remains on the land, and does not attach to the fund received.[13] Even though the equity is not subject to the lien, the land passes under the lien when the title thereto is reinvested in the mortgagor on payment of the mortgage debt.[14]

The lien attaches to the equity where the encumbrance is created by a transaction lacking the essentials of a mortgage at law, but treated in equity as a mortgage,[15] and also, it seems, where it is created by a deed absolute in form, but intended by the parties merely as a security,[16] although the last mentioned transaction does not come within the rule in jurisdictions where such a deed is held to pass the legal title.[17] The interest of a grantor in a deed of trust to secure a debt is subject in some jurisdictions to the lien of a judgment against

5. Miss.—Cantzon v. Dorr, 27 Miss. 251.

6. Ga.—Kidd v. Kidd, 124 S.E. 45, 158 Ga. 546, 36 A.L.R. 798.
Iowa.—Everist v. Carter, 210 N.W. 559, 202 Iowa 498.
N.J.—McLaughlin v. Whaland, 13 A. 2d 573, 127 N.J.Eq. 393—Riverside Building & Loan Ass'n v. Bishop, 131 A. 78, 98 N.J.Eq. 508.
S.D.—American Nat. Bank v. Groft, 229 N.W. 376, 56 S.D. 460.
Va.—Neff's Adm'r v. Newman, 142 S.E. 389, 150 Va. 203.
34 C.J. p 595 note 84.

Sale of debtor's interest
Judgment created no lien on debtor's equity of redemption in cotton for which negotiable warehouse receipts were in pledgee's hands until judgment creditor enjoined negotiation thereof; and creditor's rights in debtor's interest in price of cotton were controlled by debtor's contract to sell cotton, title to which passed to buyers before creditor enjoined negotiation of warehouse receipts, as against contention that value of debtor's interest should be determined by value of cotton when debtor filed exemption claim or amendment thereto, subsequent rise in value being for buyers' benefit. Debtor's interest in price received from buyers of cotton was exempt from payment of creditor's judgment, notwithstanding debtor did not file exemption claim until after creditor began suit to enjoin negotiation of warehouse receipts and to subject cotton to payment of judgment.—Warrick v. Liddon, 160 So. 534, 230 Ala. 253.

7. Ill.—Walters v. Defenbaugh, 90 Ill. 241.

8. Ala.—Raisin Fertilizer Co. v. Bell, 18 So. 168, 107 Ala. 261.

9. Iowa.—Sullivan v. Leckie, 14 N. W. 355, 60 Iowa 326.
34 C.J. p 595 note 87.

10. Md.—Brawner v. Watkins, 28 Md. 217.
N.C.—Edmonds v. Wood, 22 S.E.2d 237, 222 N.C. 118.

11. Mo.—McGuire v. Wilkinson, 72 Mo. 199.
N.Y.—Sweet v. Jacocks, 6 Paige 355, 31 Am.D. 252.

12. N.Y.—Sweet v. Jacocks, supra.

Where the mortgagor's equity of redemption ceases to exist as an interest in the land after the day of sale, a creditor of the mortgagor obtaining judgment after the mortgage foreclosure sale acquires no lien on the mortgagor's interest in the mortgaged land or equity of redemption.—Union Trust Co. v. Biggs, 137 A. 509, 153 Md. 50.

13. Iowa.—Sullivan v. Leckie, 14 N. W. 355, 60 Iowa 326.
S.C.—Columbia Branch Bank v. Black, 7 S.C.Eq. 344.

14. Tenn.—Wamble v. Gant, 79 S.W. 801, 112 Tenn. 327.

15. N.Y.—Bowery Nat. Bank v. Duncan, 12 Hun 405.
Pa.—Kinports v. Boynton, 14 A. 135, 120 Pa. 306, 6 Am.S.R. 706.

16. S.D.—American Nat. Bank v. Groft, 229 N.W. 376, 56 S.D. 460.
34 C.J. p 595 note 91—41 C.J. p 366 notes 64, 65.
Judgment lien as not attaching to property previously transferred see supra § 474.

Lands received in exchange
Where landowner executed deeds, in effect mortgages, his equitable title was subject to lien of subsequent judgments, which attached also to land received in exchange therefor and to proceeds thereof over amount secured by deeds.—Everist v. Carter, 210 N.W. 559, 202 Iowa 498.

In Georgia
(1) A judgment against the vendor in a security deed after its execution in favor of a third person is a lien on his interest in the property thereby conveyed.—Kidd v. Kidd, 124 S.E. 45, 158 Ga. 546, 36 A.L.R. 798—O'Connor v. Georgia R. Bank, 48 S.E. 716, 121 Ga. 88—Shumate v. McLendon, 48 S.E. 10, 120 Ga. 396.

(2) It has been held, however, that, as the grantor divested himself of the legal title, he had no interest in the land which could be seized on execution, and that a judgment rendered against the grantor subsequent to the conveyance could not be enforced while the legal title was outstanding and unredeemed.—Phinzy v. Clark, 62 Ga. 623—Gibson v. Hough, 60 Ga. 588.

17. N.J.—McLaughlin v. Whaland, 13 A.2d 573, 127 N.J.Eq. 393.
34 C.J. p 595 note 92.

him,[18] although not so subject in others,[19] but, in those jurisdictions where the lien of a judgment does not attach to the reversionary or equitable interest of the grantor in such a deed of trust, the judgment creditor, by filing a bill in equity for that purpose, may secure a quasi lien, which will give him an interest in any surplus which may remain from the estate after discharging the trusts and which would result to the grantor's benefit, paramount to that of the latter.[20] Where the transaction is an absolute conveyance with a conditional agreement for reconveyance, the grantor retains no present interest in the realty, and a judgment against him cannot be a lien thereon,[21] although in such case the judgment creditor may acquire a lien by having the amount necessary to pay for the reconveyance determined and paying or properly tendering that amount.[22]

A judgment lien will attach to the debtor's right of redemption from a sale under a prior judgment[23] or execution,[24] or, although some statutes have been construed to require a contrary holding,[25] from a sale of the land for unpaid taxes.[26] A judgment debtor's right of possession and right to redeem after foreclosure of a mechanic's lien has been held not subject to a judgment lien;[27] and a judgment rendered against the mortgagor after the foreclosure sale is not in some states a lien on a statutory right to redeem from such sale,[28] but in other states a contrary rule has been adopted.[29]

§ 480. —— Interests of Parties to Executory Contract of Sale

a. Vendor's legal title

b. Vendee's equitable title

a. Vendor's Legal Title

A judgment recovered against a vendor of land after the execution of a contract for its sale but before the making and delivery of a deed generally is a lien on the legal title remaining in him, and binds the land to the extent of the unpaid purchase money; but, where all the purchase money has been paid at the date of the judgment, the lien does not attach to the mere naked legal title in the vendor.

While in a few jurisdictions when an owner of land has entered into an executory contract of sale no lien is acquired by his judgment creditors against the land,[30] especially where the vendee has entered into possession,[31] the rule generally followed is that a judgment recovered against a vendor of land, after the execution of a contract for its sale, but before the making and delivery of a deed, is a lien on the legal title remaining in him and binds the land to the extent of the unpaid purchase money;[32] and on a sale under such judgment the sheriff's

18. Ga.—Kidd v. Kidd, 124 S.E. 45, 158 Ga. 546, 36 A.L.R. 798.
Iowa.—Everist v. Carter, 210 N.W. 559, 202 Iowa 498.
Minn.—Atwater v. Manchester Sav. Bank, 48 N.W. 187, 45 Minn. 341, 12 L.R.A. 741.
Va.—Neff's Adm'r v. Newman, 142 S.E. 389, 150 Va. 203.
34 C.J. p 595 note 3.
Trust estates and legal titles as affected by judgment lien see infra § 481.

19. U.S.—Freedman's Savings & Trust Co. v. Earle, D.C., 4 S.Ct. 226, 110 U.S. 710, 28 L.Ed. 301.
34 C.J. p 595 note 4.

20. U.S.—Freedman's Savings & Trust Co. v. Earle, D.C., 4 S.Ct. 226, 110 U.S. 710, 28 L.Ed. 301.
34 C.J. p 596 note 5.

21. S.D.—American Nat. Bank v. Groft, 229 N.W. 376, 56 S.D. 460.
Reason for rule
In such a transaction the judgment debtor has merely a contract right which may enable him, on the making of certain payments, to obtain an interest in the realty; and while, perhaps, in a sense, he may be said to have an equitable interest, he stands substantially in the position of the vendee of realty under an executory contract who has no such interest in realty as is subject to the lien of a judgment in favor of his creditors.—American Nat. Bank v. Groft, supra.

22. S.D.—American Nat. Bank v. Groft, supra.

23. Iowa.—Curtis v. Millard, 14 Iowa 128, 81 Am.D. 460.

24. Cal.—Stetson v. Sheehan, 200 P. 387, 52 Cal.App. 353.

25. Cal.—Helvey v. Bank of America Nat. Trust & Savings Ass'n, 111 P.2d 390, 43 Cal.App.2d 532.

26. W.Va.—Shipley v. Browning, 172 S.E. 149, 114 W.Va. 409, 91 A.L.R. 643.
34 C.J. p 595 note 94.
Land forfeited pending creditor's suit
Where land was forfeited to state for delinquent taxes while creditors' suit to subject land to judgment lien was pending, right of redemption of former owner remains before court in creditors' suit.—Early v. Berry, 175 S.E. 331, 115 W.Va. 105.

27. Iowa.—Murray v. Kelroy, 275 N.W. 21, 223 Iowa 1331.

28. Ill.—Commerce Vault Co. v. Barrett, 78 N.E. 47, 222 Ill. 169, 113 Am.S.R. 382, 6 Ann.Cas. 652—People v. Barrett, 165 Ill.App. 94.

29. Or.—Kaston v. Storey, 80 P. 209, 46 Or. 308, 114 Am.S.R. 871.

30. Iowa.—Johnson v. Smith, 231 N.W. 470, 210 Iowa 591—Vanderwilt v. Broerman, 206 N.W. 959, 201 Iowa 1107.
Okl.—City Guaranty Bank of Hobart v. Boxley, 270 P. 69, 132 Okl. 183.
34 C.J. p 598 note 32.
Reason for rule
A vendor's interest in land after execution of unrecorded contract of sale therefor is personal property, and not real estate to which the lien of the judgment will attach.—Cumming v. First Nat. Bank, 202 N.W. 556, 199 Iowa 667.

31. Ark.—State Bank v. Sanders, 170 S.W. 86, 114 Ark. 440.
Ill.—Lynch v. Eifler, 191 Ill.App. 344.
34 C.J. p 598 note 33.

32. Ala.—Robinson v. Shearer, 99 So. 179, 211 Ala. 16.
Colo.—**Corpus Juris cited in** Chain O'Mines v. Williamson, 72 P.2d 265, 267, 101 Colo. 231.
Ga.—Latimer v. Tumlin, 74 Ga. 835.
Minn.—**Corpus Juris cited in** W. T. Bailey Lumber Co. v. Hendrickson, 240 N.W. 666, 667, 185 Minn. 251.
Neb.—Bauermeister v. McDonald, 247 N.W. 424, 124 Neb. 142.
N.D.—Battersby v. Gillespie, 222 N.W. 480, 57 N.D. 426.
Tex.—**Corpus Juris quoted in** Pevehouse v. Oliver Farm Equipment Sales Co., Civ.App., 114 S.W.2d 658, 663.
Wash.—**Corpus Juris cited in** Heath v. Dodson, 110 P.2d 845, 847, 7

vendee stands precisely in the situation of the original vendor, and is entitled to the unpaid purchase money.[33]

The mere docketing of the judgment, however, is not notice of the lien to the purchaser in possession, and payments subsequently made by him to the judgment debtor, pursuant to the contract, without actual notice of the judgment, are valid as against the lien on the land,[34] although the rule has been held to be otherwise where the vendee pays the balance of the purchase money to the vendor with actual notice of the judgment[35] or with full knowledge of the pendency of a suit against the vendor which might result in judgment against him.[36] The equitable right of the vendee to require a conveyance on fulfilling his part of the contract is not cut out or set aside by the attaching of the judgment lien,[37] even though none of the purchase money has been paid.[38] In some states, however, a contract for the sale of lands will not prevail against a subsequent judgment lien unless recorded,[39] although actual possession of the land, on the part of the vendee under a valid contract, will be sufficient to secure his equitable rights as against the lien of the judgment.[40] It is not an unusual practice for courts of equity to control the operation of a judgment obtained against a vendor subsequent to a contract for the sale of lands, and where the unpaid purchase money is brought into court equity may, on a proper showing, restrain proceedings to enforce the judgment by execution sale of the land.[41] Where all the purchase money has been paid at the date of the judgment, there remains nothing but a naked legal title in the vendor, to which the lien does not attach.[42]

Wash.2d 667—Vandin v. Henry McCleary Timber Co., 289 P. 1016, 157 Wash. 635.

34 C.J. p 598 note 34.

Vendor's interest as subject to attachment or execution see the C.J.S. title Vendor and Purchaser §§ 307, 308, also 66 C.J. p 1064 note 66–p 1065 note 99.

33. Minn.—**Corpus Juris cited in** W. T. Bailey Lumber Co. v. Hendrickson, 240 N.W. 666, 667, 185 Minn. 251.

N.C.—Tomlinson v. Blackburn, 37 N.C. 509.

N.D.—Battersby v. Gillespie, 222 N. W. 480, 57 N.D. 426.

Wash.—**Corpus Juris cited in** Heath v. Dodson, 110 P.2d 845, 847, 7 Wash.2d 667.

34 C.J. p 599 note 35.

34. Md.—Caltrider v. Caples, 153 A. 445, 160 Md. 392, 87 A.L.R. 1500.

34 C.J. p 599 note 36.

35. Wash.—Heath v. Dodson, 110 P. 2d 845, 7 Wash.2d 667.

36. Ohio.—Lefferson v. Dallas, 20 Ohio St. 68.

37. Md.—Caltrider v. Caples, 153 A. 445, 160 Md. 392, 87 A.L.R. 1500.

Tex.—Payne v. Bracken, 115 S.W.2d 903, 131 Tex. 394.

Wash.—Vandin v. Henry McCleary Timber Co., 289 P. 1016, 157 Wash. 635.

34 C.J. p 599 note 38.

Rights of vendee not displaced or impaired by judgment lien against vendor generally see infra § 485.

Parol contract

(1) "One who occupies under a parol contract of purchase cannot set up as against the judgment-creditor of the parol vendor a title acquired after the enrollment of the judgment, though made in pursuance of an antedating parol sale. The rights of the creditor are fixed by the condition of affairs as they existed at the time of the inception of his lien, and cannot be varied by any subsequent conveyance which the debtor could not have been coerced by the courts to make."—Niles v. Davis, 60 Miss. 750, 753.

(2) It has been held that a purchaser of land by parol contract, which has been so far executed as to vest in him the right to compel his vendor to execute the contract in a court of equity, has an equitable right in the land which a court of equity will fully protect as against the lien of a subsequent judgment creditor of the vendor.—Farmers' Transp. Co. v. Swaney, 37 S.E. 592, 48 W.Va. 272—Snyder v. Botkin, 16 S.E. 591, 37 W.Va. 355—34 C.J. p 599 note 38 [a] (2).

(3) It has also been held that, where one purchases land by parol and is put in possession, he is not protected to the extent of the purchase money paid as to subsequent judgments against the vendor until he has acquired a perfect equitable title by paying the entire price.—Fulkerson v. Taylor, 46 S.E. 309, 102 Va. 314.

(4) An equitable title held by a bona fide purchaser, although by parol contract, who has paid the entire purchase money and received possession, will be preferred in equity to the liens of judgment creditors subsequently acquired against the vendor, provided the parol contract relied on is certain and definite in its terms, and is sustained by satisfactory proof.—Hurt's Adm'x v. Prillaman, 79 Va. 257—Trout's Adm'r v. Warwick, 77 Va. 731—Floyd v. Harding, 28 Gratt. 401, 69 Va. 401.

Unrecorded agreement

Agreement to convey land need not be recorded to be binding between parties and against judgment acquired after execution of agreement.—Caltrider v. Caples, 153 A. 445, 160 Md. 392, 87 A.L.R. 1500.

Sufficiency of agreement

In absence of fraud, creditor of vendor obtaining judgment after execution of agreement to convey cannot raise question of insufficiency of agreement.—Caltrider v. Caples, supra.

38. Md.—Hampson v. Edelen, 2 Harr. & J. 64, 3 Am.D. 530.

34 C.J. p 599 note 39.

39. Minn.—Ferguson v. Kumler, 11 Minn. 104.

34 C.J. p 599 note 40.

Notice of third party's claim under unrecorded assignment of unrecorded contract for sale was held of no avail after judgment against vendor in whom title appears of record.—Battersby v. Gillespie, 222 N.W. 480, 57 N.D. 426.

40. Minn.—Baker v. Thompson, 31 N.W. 51, 36 Minn. 314.

34 C.J. p 599 note 41.

41. U.S.—Lane v. Ludlow, C.C., 14 F. Cas.No.8,052, 2 Paine 591.

42. Cal.—Iknoian v. Winter, 270 P. 999, 94 Cal.App. 223.

Ind.—Vance v. Workman, 8 Blackf. 306.

Iowa.—Richardson v. Estle, 243 N.W. 611, 214 Iowa 1007.

Kan.—Elwell v. Hitchcock, 21 P. 109, 41 Kan. 130.

Neb.—Uhl v. May, 5 Neb. 157.

N.Y.—Brown v. Grabb, 51 N.E. 806, 156 N.Y. 447.

Pa.—Schuler v. Kovatch, 28 Pa.Dist. & Co. 485, 17 Lehigh Co.L.J. 147.

Wash.—**Corpus Juris cited in** Heath v. Dodson, 110 P.2d 845, 847, 7 Wash.2d 667—Lee v. Wrixon, 79 P. 489, 37 Wash. 47.

34 C.J. p 599 note 43.

Trust estates and legal titles generally see infra § 481.

Notes for balance of purchase price. If a part of the purchase money has been paid, and the purchaser's note given for the balance, the lien of a judgment will still attach to the vendor's interest;[43] but if the note given for such balance of the price is transferred before maturity to a bona fide holder for value without notice, the real estate cannot be subjected to the payment of a judgment rendered against the vendor, retaining the legal title, after such assignment,[44] although it has been held otherwise where the judgment was obtained by the transferee of the notes.[45] Where a deed reserving a vendor's lien for a purchase-money note was recorded, and such lien assigned by an unrecorded instrument, the original deed was notice to the vendor's creditors only until the purchase-money note was outlawed, and liens of judgments against the vendor secured after the note was barred by the statute of limitations are superior to the assignee's rights under the vendor's lien.[46]

b. Vendee's Equitable Title

While it has been held in some jurisdictions that the lien of a judgment will not attach to an interest in land held by the debtor under a contract for its purchase where no deed has been made, the rule is otherwise in jurisdictions where a judgment is a lien on an equitable estate in land.

In pursuance of the common-law rule, stated supra § 479, that equitable estates are not subject to the lien of judgments, it has been held in several jurisdictions that the lien of a judgment cannot attach to an interest in land held by the debtor under a contract for its purchase, where no deed has been made, although part of the purchase money may have been paid, but that the only remedy of the judgment creditor is in equity.[47] In some jurisdictions, however, where by statute or otherwise a judgment is a lien on an equitable estate in lands, it is the rule that a vendee who holds under a contract of purchase, but who has not received a conveyance, acquires an interest on which a judgment will attach as a lien to the extent of such interest as measured by the amount of his payments already made and by his improvements on the premises,[48] and this rule has been applied not only where the whole or a part of the purchase money has been paid,[49] but also where no payment whatever has been made.[50] If the vendee, before completion of the purchase, sells and assigns his interest under his contract to a third person, the land will not be bound in the hands of the latter by a judgment thereafter rendered against the assignor,[51] at least not where the contract of sale or assignment was recorded.[52] The lien created by entry of a judgment against the vendor does not attach to the interest created in the vendee by the prior contract to purchase.[53]

Conditional sale of personalty. Where one makes a conditional sale of personal property, retaining the title in himself to secure the purchase money, a failure to record the contract as required by statute does not render the property subject to a judgment rendered in favor of a third person and against the vendee of the personalty prior to the making of the conditional sale.[54]

§ 481. —— Trust Estates and Legal Titles

a. In general

b. Judgments against cestui que trust

43. Ga.—Bell v. McDuffie, 71 Ga. 264.
34 C.J. p 600 note 44.

44. Ga.—McGregor v. Matthis, 32 Ga. 417.
34 C.J. p 600 note 45.

45. Ga.—Cooper v. Lynes, 111 S.E. 425, 153 Ga. 85.
34 C.J. p 600 note 46.

46. Tex.—Price v. Traders' Nat. Bank, Civ.App., 195 S.W. 934.

47. Cal.—Graves v. Arizona Cent. Bank, 272 P. 1063, 205 Cal. 715—Oaks v. Kendall, 73 P.2d 1255, 23 Cal.App.2d 715.
S.D.—American Nat. Bank v. Groft, 229 N.W. 376, 56 S.D. 460.
34 C.J. p 600 note 49.
Vendee's interest as subject to attachment or execution see the C.J.S. title Vendor and Purchaser § 315, also 66 C.J. p 1083 note 98—p 1085 note 42.

48. Ga.—Sloan v. Loftis, 120 S.E. 781, 157 Ga. 93.
Minn.—Farmers' & Merchants' State Bank of Thief River Falls v. Stageberg, 201 N.W. 612, 161 Minn. 413.
Va.—Mize v. Pennington Gap Bank, 170 S.E. 594, 161 Va. 265.
34 C.J. p 600 note 50.
Vendee in possession under contract had interest subject to judgment lien, and creditor attaching property of purchaser under contract had valid judgment lien enforceable to extent of interest debtor had in premises after acquiring title by deed.—Joseph v. Donovan, 157 A. 638, 114 Conn. 79.
In Pennsylvania
Apart from statute, a judgment against the equitable estate which a vendee holds under articles of agreement for the sale and purchase of land attaches to and binds the legal estate the instant it vests in the vendee, this doctrine being an exception to the general rule established in Pennsylvania that the lien of a judgment does not affect a subsequently acquired interest of the debtor by revival.—Brumbach v. Pearson, 13 Pa.Dist. & Co. 762, 22 Berks Co.L.J. 124, 44 York Leg.Rec. 21, 78 Pittsb.Leg.J. 451—34 C.J. p 600 note 50 [d].

49. Ga.—Ralston v. Field, 32 Ga. 453.
34 C.J. p 601 note 51.

50. Iowa.—Rand v. Garner, 39 N.W. 515, 75 Iowa 311.

51. Ark.—Whittington v. Simmons, 32 Ark. 377.
34 C.J. p 601 note 53.

52. Pa.—Russell's Appeal, 15 Pa. 319.
W.Va.—Damron v. Smith, 16 S.E. 807, 37 W.Va. 580.

53. Wash.—Heath v. Dodson, 110 P.2d 845, 7 Wash.2d 667.
Rights of vendee not displaced or impaired by subsequent accruing of judgment lien against vendor generally see infra § 485.

54. Ga.—Commercial Credit Co. of Georgia v. Jones Motor Co., 167 S.E. 768, 46 Ga.App. 464.

a. In General

As a general rule, the lien of a judgment does not attach to the mere legal title to property existing in the judgment debtor when the equitable and beneficial title is in another, at least in the absence of an estoppel.

The lien of a judgment does not attach to the mere legal title to property existing in the judgment debtor, when the equitable and beneficial title is in another,[55] as where land is conveyed to the judgment debtor by a deed absolute in form, but intended merely as a security, or subject to a parol agreement to reconvey,[56] or where there is a mere transitory seizin of lands by the judgment debtor in trust for another,[57] or where a third person pays the purchase money, but the deed is taken in the name of the judgment debtor,[58] although a judgment lien on lands cannot be defeated by the fact that the purchase money for the lands was paid by a third person subsequent to the vesting of title in the judgment debtor, so that no resulting trust was created.[59]

55. U.S.—U. S. v. Certain Lands in Borough of Brooklyn, Kings County, N. Y. (Parcel No. 6), D.C.N.Y., 44 F.Supp. 830.
Cal.—McGee v. Allen, 60 P.2d 1026, 7 Cal.2d 468—Spear v. Farwell, 42 P.2d 391, 5 Cal.App.2d 111—Davis v. Perry, 8 P.2d 514, 120 Cal.App. 670—Iknoian v. Winter, 270 P. 999, 94 Cal.App. 223.
Fla.—Arundel Debenture Corporation v. Le Blond, 190 So. 765, 139 Fla. 668—Laganke v. Sutter, 187 So. 586, 137 Fla. 71—Little v. Saffer, 148 So. 573, 110 Fla. 230—First Nat. Bank v. Savarese, 134 So. 501, 101 Fla. 480.
Ill.—Mauricau v. Haugen, 56 N.E. 2d 367, 387 Ill. 186—Macaulay v. Dorian, 147 N.E. 793, 317 Ill. 126.
N.Y.—In re O'Brien's Estate, 26 N. Y.S.2d 519.
N.C.—Jackson v. Thompson, 200 S.E. 16, 214 N.C. 539.
Okl.—City Guaranty Bank of Hobart v. Boxley, 270 P. 69, 132 Okl. 183.
Tex.—Berry v. Chadwick, Civ.App., 137 S.W.2d 859, error dismissed, judgment correct—Garrison v. Citizens' Nat. Bank of Hillsboro, Civ. App., 25 S.W.2d 231, error refused.
Va.—Miller v. Kemp, 160 S.E. 203, 157 Va. 178, 84 A.L.R. 980.
Wash.—Heath v. Dodson, 110 P.2d 845, 7 Wash.2d 667.
34 C.J. p 596 note 6.
Interest of grantor in deed of trust to secure a debt as subject to judgment lien see supra § 479 b.

Personal property
Ala.—First Nat. Bank v. T. J. Perry & Son, 140 So. 614, 25 Ala.App. 6, certiorari dismissed 140 So. 616, first case, 224 Ala. 13, and certiorari denied 140 So. 616, second case, 224 Ala. 420.

Registration statutes
(1) An implied or resulting trust is not within the registration statutes.—In re Rosenberg, D.C.Tex., 4 F.2d 581.

(2) Statute relating to the recording of deeds, mortgages, etc., does not require resulting trusts to be recorded to be valid against subsequent judgment creditors.—East St. Louis Lumber Co. v. Schnipper, 141 N.E. 542, 310 Ill. 150.

Beneficial interest in trustee
Where judgment debtor held title to land as trustee, the lien of the judgment against judgment debtor individually attached only to his actual interest as a cestui que trust.—Brown v. Hodgman, 19 S.E.2d 910, 124 W.Va. 136.

Transaction held to vest complete title in debtor
Wife to whom husband voluntarily executed deed to qualify her as surety on bail bond had title to which lien of judgment against her attached, and not mere naked legal title with equitable title remaining in grantor, even though parties intended deed was not to be recorded. —Parsons v. Robinson, 274 P. 528, 206 Cal. 378.

Judgment against superintendent of banking who has sued as receiver of a particular bank would not be lien on any land held by him as receiver of some other bank.—Bates v. Nichols, 274 N.W. 32, 223 Iowa 878.

Land deeded to avoid financial difficulties
Judgment creditors of person to whom land was deeded without consideration and who held entire interest therein as trustee for grantor was not entitled to lien against such land, notwithstanding land was deeded to such person to avoid financial difficulty.—Kennedy v. Roff, 61 P.2d 1041, 178 Okl. 71.

In Pennsylvania
(1) Prior to the act of June 4, 1901, a judgment creditor was not entitled to the protection of a purchaser of the legal title against an equitable owner. Such act changed the law by providing that a resulting trust arising from payment of purchase money by a person other than the one taking the legal title shall be void as to bona fide judgment or other creditors; but such act is not applicable to trusts arising where a conveyance is made without any consideration and it appears that the grantee was not intended to take beneficially.—Loughney v. Page, 182 A. 700, 320 Pa. 508 —34 C.J. p 596 note 6 [j].

(2) The statute has application only to one particular type of trust, that which arises by reason of a payment of the purchase money by one person and the taking of title in the name of another.—Davis v. Commonwealth Trust Co., 7 A.2d 3, 335 Pa. 387—Loughney v. Page, supra—34 C.J. p 596 note 6 [j].

(3) As to real estate to which the debtor holds only the bare record title, the judgment is no lien; and a judgment creditor of a trust company could not secure a lien on realty held by the trust company as trustee for others.—Fortna v. Commonwealth Trust Co., 19 A.2d 57, 341 Pa. 138—Davis v. Commonwealth Trust Co., 7 A.2d 3, 335 Pa. 387.

(4) So, where claim against trust company for unlawful distraint was nothing more than a common or secondary claim against the assets of the trust company in possession of liquidating trustees, the securing of a judgment on such claim could not give the claim a higher status than it primarily had.—Davis v. Commonwealth Trust Co., supra.

(5) Other cases.—Davis v. Commonwealth Trust Co., Com.Pl., 46 Dauph.Co. 297—Gorniak v. Potter Title & Trust Co., Com.Pl., 91 Pittsb. Leg.J. 279.

56. U.S.—U. S. v. Certain Lands in Borough of Brooklyn, Kings County, N. Y. (Parcel No. 6), D.C.N.Y., 44 F.Supp. 830.
Tex.—Garrison v. Citizens' Nat. Bank of Hillsboro, Civ.App., 25 S.W.2d 231, error refused.
34 C.J. p 596 note 7.

57. Minn.—Farmers' & Merchants' State Bank of Thief River Falls v. Stageberg, 201 N.W. 612, 161 Minn. 413.
34 C.J. p 596 note 8.
Lands instantaneously seized as not subject to judgment lien generally see supra § 476.

58. N.C.—Jackson v. Thompson, 200 S.E. 16, 214 N.C. 539.
Tex.—Garrison v. Citizens' Nat. Bank of Hillsboro, Civ.App., 25 S.W.2d 231, error refused.
34 C.J. p 597 note 9.

59. S.C.—Ex parte Trenholm, 19 S.C. 126.
34 C.J. p 597 note 10.

In some jurisdictions, however, it has been held iat the beneficial owner may be estopped to assert tle against the lien of a judgment obtained by one ho extended credit to the holder of the legal title ithout knowledge of the equities.[60] When the ust does not extend to the entire interest in the nd, as where the title is taken in the name of the dgment debtor and part only of the purchase mony is paid out of trust funds in his hands, the judgent against him will be a lien on the land to the xtent of his interest therein.[61] Where a trustee olds the legal title, and that title is of record, a dgment on default entered simply against the rustor does not affect the right or title held by the rustee or the beneficiary for whom the title is so eld.[62]

b. Judgments against Cestui Que Trust

It has been held that a judgment against a cestui ue trust does not attach as a lien on his equitable estate, but under some circumstances such an interest may e subject to a judgment lien.

Under the rule denying to judgments the effect f liens on equitable estates, it has been held that a udgment does not attach as a lien on the interest f a cestui que trust, as, for instance, where land as been purchased with the money of a judgment lebtor, but the title has been taken in the name of . third person;[63] and, in some jurisdictions where judgment is held to be a lien on both legal and quitable estates, the judgment gives no lien on the and so purchased if the transaction was in fraud of creditors.[64] However, a distinction has been made between active and passive trusts, it being held that where the legal title to lands is in trustees for the purpose of serving the requirements of an active trust, a judgment creditor of the cestui que trust has no lien and can acquire none at law,[65] although he may obtain relief in equity, on a bill to subject the beneficiary's interest to the satisfaction of his judgment,[66] but that the equitable estate or interest of a cestui que trust may be subject to the lien of a judgment against him where the trust is merely a dry or passive one.[67]

Termination of trust. Where a trust provides for the collection of income up to a certain time, and then for the division of the property among the beneficiaries, the trustee having no power to sell the trust property, judgments which have been recovered against the beneficiaries will become liens on their interests in the property on the arrival of the time of division.[68]

§ 482. —— Leaseholds

Leasehold interests are bound by judgment liens where such interests are treated as real estate, or where statutes expressly so provide.

At common law a leasehold interest or estate in land for years was regarded as only a chattel interest, and therefore not subject to the lien of a judgment, and this view is still held in some states;[69] but in others leasehold interests are regarded and treated as real estate, and as such bound by judgment liens.[70] Judgments are also liens on

0. Fla.—Arundel Debenture Corporation v. Le Blond, 190 So. 765, 139 Fla. 668—Laganke v. Sutter, 187 So. 586, 137 Fla. 71—Little v. Saffer, 148 So. 573, 110 Fla. 230—First Nat. Bank v. Savarese, 134 So. 501, 101 Fla. 480.
Ga.—First Nat. Bank v. Pounds, 136 S.E. 528, 163 Ga. 551.
Clothing another with apparent title to real property as creating estoppel generally see Estoppel § 105.
Creditor held not entitled to lien
A judgment creditor had no lien against land purchased by judgment debtor with proceeds of land derived to judgment debtor's daughters on ground that judgment creditor had loaned to judgment debtor on strength of his holdings, where there was no recorded deed to judgment debtor which might have gone into an estimate of judgment debtor's solvency; and the judgment creditor could not urge lapse of time and laches of daughters in not bringing their affairs to an earlier settlement and not having accounts filed and approved and proper conveyance of lands made to them, where there was no evidence that judgment debtor denied trust or refused to execute it, and if he had, matter would still be between parties to trust.—Jackson v. Thompson, 200 S.E. 16, 214 N.C. 539.

61. Minn.—Martin v. Baldwin, 16 N.W. 449, 30 Minn. 537.

62. Cal.—Schwartz v. Mead, 3 P.2d 48, 116 Cal.App. 606.

63. Pa.—Loughney v. Page, 23 Pa. Dist. & Co. 534, affirmed 182 A. 700, 320 Pa. 508.
34 C.J. p 597 note 12.

64. N.C.—Dixon v. Dixon, 81 N.C. 323.
34 C.J. p 597 note 13.

65. U.S.—Brandies v. Cochrane, Ill., 5 S.Ct. 194, 112 U.S. 344, 28 L.Ed. 760.
34 C.J. p 597 note 14.

66. U.S.—Freedman's Savings & Trust Co. v. Earle, D.C., 4 S.Ct. 226, 110 U.S. 710, 28 L.Ed. 301.
Va.—Coutts v. Walker, 2 Leigh 268, 29 Va. 268.

67. Del.—Doe v. Lank, 9 Del. 648.
34 C.J. p 597 note 16.

68. Ill.—Moll v. Gardner, 73 N.E. 442, 214 Ill. 248.

69. Cal.—Cook v. Huntley, 112 P.2d 889, 44 Cal.App.2d 635.
Okl.—Pauline Oil & Gas Co. v. Fischer, 130 P.2d 305, 191 Okl. 346—First Nat. Bank v. Dunlap, 254 P. 729, 122 Okl. 288, 52 A.L.R. 126.
Pa.—Sheaffer v. Baeringer, 29 A.2d 697, 346 Pa. 32.
34 C.J. p 593 note 77.
Personal property as subject to judgment liens generally see supra § 472.
Incorporeal hereditament
Statutes making judgment lien on real estate does not apply to ordinary oil and gas lease which is an incorporeal hereditament.—Beren v. Marshall Oil & Gas Corporation, 251 P. 192, 122 Kan. 134.

70. N.Y.—Henderson v. Tomb, 8 N.Y.S.2d 612, 169 Misc. 737.
34 C.J. p 593 note 78.
Real property as subject to judgment liens generally see supra § 472.

leasehold interests where expressly made so by statute.[71]

§ 483. Priority of Liens

A judgment creditor has a right to strengthen his lien against the property of his debtor by purchasing other claims, valid or invalid, which were asserted as superior to the judgment lien.

A judgment creditor has a right to strengthen his lien against the property of his debtor by purchasing other claims, valid or invalid, which were asserted as superior to the judgment lien.[72]

The priority of liens as between judgments generally is considered infra § 484; as between judgments and attachment liens in Attachment § 272; as between judgments and garnishment liens in Garnishment § 183; and as between judgments and other liens or conveyances generally infra § 485.

§ 484. —— Between Judgments

a. In general
b. As against after-acquired property
c. Judgments entered on same day
d. Priority by superior diligence
e. Judgments for future advances
f. Judgments for purchase money

a. In General

In general the liens of different judgments affecting the same property take rank and priority according to the dates when they were respectively entered or docketed.

In some jurisdictions, the docketing of a judgment is necessary in order that the lien may attach as against subsequent judgment creditors;[73] in others, a prior judgment, whether docketed or undocketed, has priority over a subsequent judgment.[74] In the absence of countervailing equities, or the establishment of a different rule by statute, and subject to the rules hereinafter stated, the liens of different judgments affecting the same property take rank and priority according to the dates when they were respectively entered or docketed, the elder being first entitled to satisfaction,[75] without regard to the date of acquisition of the land to which they attach,[76] and the same rule of priority obtains as between a judgment at law and a decree in equity where the law requires both to be docketed or enrolled.[77] In fixing this priority, the relative position of the judgments on the docket, although raising a presumption as to their seniority, is not controlling.[78]

Since the lien of a judgment is dependent on the condition of the record at the time of its entry, it cannot be affected by a subsequent revival of an earlier judgment, giving the holder thereof rights which did not exist at the time of the entry of the junior judgment.[79] If the last of three or more judgment liens in the order of their succession is superior to the first, but inferior to the second, it gains no practical advantage from its superiority, because it could not be preferred to the first without being preferred also to the second, to which it is subsequent.[80] In some jurisdictions it has been held that a subsequent judgment creditor is entitled to priority over an earlier judgment of which the docket gives no notice,[81] as where it fails to dis-

71. U.S.—In re Day, D.C.Md., 22 F. Supp. 946.
34 C.J. p 593 note 78 [e].

72. Mo.—Essey v. Bushakra, 252 S. W. 459, 299 Mo. 147.

73. La.—Robinson v. Cosner, 67 So. 468, 136 La. 595.
N.J.—Merchants' & Mfrs.' Trust Co. v. Rollins, 141 A. 265, 102 N.J.Eq. 460.
34 C.J. p 601 note 55.

74. W.Va.—Amato v. Hall, 174 S.E. 686, 115 W.Va. 79.
34 C.J. p 601 note 56.

75. D.C.—Ginder v. Giuffrida, 62 F. 2d 377, 61 App.D.C. 338.
Ga.—Herndon v. Braddy, 146 S.E. 495, 39 Ga.App. 165.
Iowa.—Paulsen v. Jensen, 228 N.W. 357, 209 Iowa 453.
La.—State ex rel. Wall v. Coverdale, App., 175 So. 492—Flaspoller Co. v. Siess, 6 La.App. 827.
Md.—Messinger v. Eckenrode, 158 A. 357, 162 Md. 63.
Minn.—Lowe v. Reierson, 276 N.W. 224, 201 Minn. 280.
N.C.—Summers Hardware Co. v. Jones, 23 S.E.2d 883, 222 N.C. 530—Dillard v. Walker, 167 S.E. 632, 204 N.C. 67—Sugg v. Pollard, 115 S.E. 153, 184 N.C. 494.
34 C.J. p 601 note 57.

Statutory provisions construed and compared
La.—Lederman v. McCallum, 1 La. App. 552.

Notice of lis pendens
The absence of any filing of a notice of lis pendens cannot be asserted to the benefit of judgments obtained after the original judgment was docketed.—Sugg v. Pollard, 115 S.E. 153, 184 N.C. 494.

Date of entry on judgment docket controls
Pa.—Citizens Nat. Bank & Trust Co. of Lehighton v. First Nat. Bank, 20 Pa.Dist. & Co. 349, 15 Leh.L.J. 302, 6 Som.Co. 368, 47 York Leg. Rec. 167.

76. Md.—Messinger v. Eckenrode, 158 A. 357, 162 Md. 63.

77. Miss.—McKee v. Gayle, 46 Miss. 676—Briggs v. Planters' Bank, Freem. 574.

78. Pa.—Glasgow v. Kann, 32 A. 1095, 171 Pa. 262.
34 C.J. p 602 note 59.

79. Pa.—Young v. Young, 20 Pa.Co. 45.
Tex.—Harrison v. First Nat. Bank, Civ.App., 224 S.W. 269.
34 C.J. p 602 note 60.

80. Pa.—Dowling v. Vallett, 70 Pa. Super. 481.
34 C.J. p 602 note 61.

81. U.S.—In re MacNulty, D.C.Pa., 4 F.Supp. 93.
Pa.—Everett Bank v. Hall, 10 A.2d 115, 138 Pa.Super. 79.

Judgment against married woman
A judgment on a confession entered of record against woman twice married in her first married name, entered several years after her marriage to second husband, did not afford such "constructive notice" in public record as to give judgment priority over a subsequent judgment on a mortgage signed by woman in

close the Christian name of the debtor;[82] but the rule has been held not to apply to a junior judgment holder who fails to search the judgment records and hence was not misled.[83] Actual notice of a defectively entered judgment is as effective to give priority to such judgment over a subsequent judgment as is the constructive notice given by the judgment docket.[84]

Judgments entered at same term. Where the doctrine of relation to the first or last day of the term, as discussed supra § 113, prevails, or where so provided by statute, there is no priority between judgments entered at the same term;[85] but even where this rule has been given statutory form, it has been held not to affect the priorities of transcripts of judgments filed in a county other than that in which the judgments were recovered.[86] Where the doctrine of relation does not apply, and in the absence of statute, the priority of judgments is not affected by the fact that they were rendered at the same term.[87]

b. As against After-Acquired Property

As a general rule there is no priority between judgments as to property acquired by the judgment debtor after the judgments have been entered.

Although there is some authority to the contrary,[88] it has generally been held that, if several judgments are entered against the same debtor at different times, and he afterward acquires the legal title to real estate, the liens of the several judgments attach together on the property at the same instant, and there are therefore no priorities between them;[89] nor can one judgment creditor obtain priority by obtaining execution and sale of such property.[90]

c. Judgments Entered on Same Day

As between judgments entered on the same day, in some jurisdictions there is no priority of lien. In others, priority depends on priority of execution, while in still others, fractional parts of the day may be considered.

In some jurisdictions, courts are bound to look to the fractional parts of a day in order to determine the priority of judgment liens where several are entered, filed, or registered against the same debtor on the same day.[91] In other jurisdictions, the rule in respect of such judgments is that the creditor who first takes out execution will have a preference.[92] In still other jurisdictions, there is no priority of liens between judgments entered on the same day, and, when the fund is insufficient to discharge them all, they are to be paid pro rata,[93] unless some one judgment creditor has a superior equity.[94]

d. Priority by Superior Diligence

Under the statutes and decisions in some jurisdictions, and in a proper case, priority may be gained for a judgment by a creditor exercising superior diligence in obtaining execution.

Where several judgments are of equal rank or date, it has been held, as discussed in Fraudulent Conveyances § 451, that a priority is gained by that creditor who exercises superior activity and diligence, as where one is the first to discover and avoid a fraudulent conveyance of property by the common debtor; or to levy an attachment on the property, as considered in Attachments § 272; and one who by supplementary proceedings discovers

surname of present husband.—South Side Bank & Trust Co. v. Wright, 32 A.2d 918, 153 Pa.Super. 93.

82. U.S.—In re MacNulty, D.C.Pa., 4 F.Supp. 93.

83. Md.—Messinger v. Eckenrode, 158 A. 857, 162 Md. 63.

84. Pa.—Coral Gables v. Kerl, 6 A.2d 275, 334 Pa. 441, 122 A.L.R. 903.

85. Ga.—Eads v. Southern Surety Co., 173 S.E. 163, 178 Ga. 348—Herndon v. Braddy, 146 S.E. 495, 39 Ga.App. 165.
34 C.J. p 602 note 64.

86. S.C.—Farmers' & Merchants' Bank v. Holliday, 93 S.E. 333, 108 S.C. 116.

87. U.S.—Welsh v. Murray, Pa., 4 Dall. 320, 1 L.Ed. 850.
Md.—Anderson v. Tuck, 33 Md. 225.

88. Minn.—Lowe v. Reierson, 276 N.W. 224, 201 Minn. 280.
34 C.J. p 602 note 68.

89. N.C.—Summers Hardware Co. v. Jones, 23 S.E.2d 883, 222 N.C. 530.
N.D.—**Corpus Juris cited in** Zink v. James River Nat. Bank, 224 N.W. 901, 903, 58 N.D. 1, 67 A.L.R. 1294.
34 C.J. p 603 note 69.

90. N.D.—Zink v. James River Nat. Bank, 224 N.W. 901, 58 N.D. 1, 67 A.L.R. 1294.

91. Neb.—Pontiac Improvement Co. v. Leisy, 14 N.W.2d 384, 144 Neb. 705.
N.C.—Hood ex rel. People's Bank of Burnsville v. Wilson, 179 S.E. 425, 208 N.C. 120.
34 C.J. p 603 note 70.
Consent judgments
Statutory provision that liens of all judgments rendered on same Monday shall be of equal priority does not apply to consent judgments rendered on other days, rule, "qui prior est in tempore, prior est in jure," applying to such judgments, in absence of contrary statutory provisions.—Hood ex rel. People's Bank of Burnsville v. Wilson, supra.
Where order of rendering not shown
When it is not shown which of three judgments rendered by default on the same day was first filed by the clerk, they should be treated as filed simultaneously and must rank concurrently in surplus proceeds on foreclosure of mortgage.—Godchaux Sugars, Inc., v. Leon Boudreaux & Bros., 96 So. 532, 153 La. 685—34 C.J. p 603 note 70 [c].

92. Ind.—Hollcraft v. Douglass, 17 N.E. 275, 115 Ind. 139.
34 C.J. p 603 note 71.

93. U.S.—McLean v. Rockey, C.C. Ohio, 16 F.Cas.No.8,891, 3 McLean 235.
34 C.J. p 603 note 72.

94. Pa.—Appeal of Vierheller, 24 Pa. 105, 62 Am.D. 365.
34 C.J. p 603 note 73.

property of the judgment debtor in the hands of third persons has a legal preference enforceable in a court of equity.[95]

Priority by prior levy. In some jurisdictions, particularly where the statutes so provide, priority is given to judgments in the order in which executions are issued thereon,[96] such priority being undisturbed by any subsequent judgment, levy of execution, or sale thereunder.[97] In other jurisdictions, however, the fact that an execution is first issued on a junior judgment does not give the lien of such judgment priority over that of a senior judgment against the same land;[98] but priority for a junior judgment may thus be gained where the land affected was not subject to the lien of either judgment.[99] A statute requiring the recording of executions on the general execution docket, amended to provide that the lien of a judgment shall date only from the time the execution is so recorded, has been held to have no application in a contest between mere judgment liens, it being intended for the protection of third persons.[1]

Although there is authority to the contrary,[2] it has generally been held that, where liens of judgment are equal, one judgment creditor may acquire a priority over another by superior diligence in executing his judgment.[3] Thus, where there is no priority between the liens of judgments in favor of different persons and against the same defendant rendered or recorded on the same day, it has been held that the judgment creditor first issuing execution and levying on the debtor's property acquires a prior right to satisfaction;[4] and the same rule has been applied to judgments rendered at the same term where such judgments are equal liens on the defendant's real estate.[5] So the rule has been applied in a case where two liens on real estate were created by the same decree.[6] Commencement of a suit to partition the property will not prevent the holder of a judgment lien thereon from obtaining priority over another judgment creditor by causing execution to issue and levy to be made after institution of the action, where the other creditor failed to do so.[7]

Priority between judgments as against equitable interests. It has been held that, if several creditors having judgments of different dates resort to a court of equity for satisfaction out of an equitable interest of their debtor in real estate, they are to have satisfaction out of the fund according to the order of their judgments in point of time, the elder being entitled to priority over the younger.[8] On the other hand, it has been held that the judgment creditor who first files his bill to enforce an equitable lien on land obtains a priority in relation to the land named in his bill, and it is not necessary that the action be prosecuted for the benefit of all the creditors.[9]

e. Judgments for Future Advances

In some jurisdictions the lien of a judgment for future advances is superior to liens attaching after the judgment but before the advances; in others, it is superior only as to advances made before the subsequent lien.

Some decisions hold that the lien of a judgment given to secure advances to be made will be good against intervening liens attaching after the judgment but before the advances.[10] Under other de-

95. S.C.—Ex parte Roddey, 172 S.E. 866, 171 S.C. 489, 92 A.L.R. 1430.

96. Fla.—Blackstone Holding Co. v. Lawrence, 192 So. 198, 140 Fla. 703.
N.J.—West Hudson County Trust Co. v. Wichner, 187 A. 579, 121 N.J.Eq. 157—Swift & Co. v. First Nat. Bank, 168 A. 827, 114 N.J.Eq. 417—Riverside Building & Loan Ass'n v. Bishop, 131 A. 78, 98 N.J.Eq. 508.
34 C.J. p 603 note 77.

Property fraudulently conveyed

Where a judgment is a lien on property fraudulently conveyed, it has been intimated that a junior creditor who first takes out an execution on his judgment secures a priority, and this, although a senior creditor had previously filed his bill in equity to remove the fraudulent obstruction to the enforcement of his lien.—Dunham v. Cox, 10 N.J.Eq. 437, 64 Am.D. 460.

97. N.J.—Swift & Co. v. First Nat. Bank, 168 A. 827, 114 N.J.Eq. 417.

98. Ga.—Eads v. Southern Surety Co., 173 S.E. 163, 178 Ga. 348.
Md.—Messinger v. Eckenrode, 158 A. 357, 162 Md. 63.
Minn.—Lowe v. Reierson, 276 N.W. 224, 201 Minn. 280.
34 C.J. p 604 note 78.

99. Iowa.—Kisterson v. Tate, 63 N. W. 350, 94 Iowa 665, 58 Am.S.R. 419.
N.J.—Lovejoy v. Lovejoy, 31 N.J.Eq. 55.

1. Ga.—Corley-Powell Produce Co. v. Allen, 157 S.E. 251, 42 Ga.App. 641.

2. N.Y.—Hulbert v. Hulbert, 111 N. E. 70, 216 N.Y. 430, L.R.A.1916D 661, Ann.Cas.1917D 180.
34 C.J. p 604 note 81.

3. Mo.—City of St. Louis v. Wall, 124 S.W.2d 616, 235 Mo.App. 9.
34 C.J. p 604 note 82.

4. Iowa.—Wilson v. Baker, 3 N.W. 481, 52 Iowa 423.
34 C.J. p 604 note 83.

5. Mo.—Bradley v. Heffernan, 57 S W. 763, 156 Mo. 653.
34 C.J. p 604 note 84.

6. Mo.—Shirley v. Brown, 80 Mo 244.

7. Ohio.—Shafer v. Buckeye State Bldg. & Loan Co., App., 45 N.E.2d 421.

8. Va.—Max Meadows Land & Improvement Co. v. McGavock, 36 S. E. 490, 98 Va. 411—Haleys v. Williams, 1 Leigh 140, 28 Va. 140, 19 Am.D. 743.
34 C.J. p 604 note 86.

9. U.S.—Freedman's Savings & Trust Co. v. Earle, D.C., 4 S.Ct. 226, 110 U.S. 710, 28 L.Ed. 301.
34 C.J. p 604 note 87.

10. Md.—Joseph J. Robinson & Co. v. Consolidated Real Estate & Fire Ins. Co., 55 Md. 105.
34 C.J. p 604 note 88.

cisions, the lien of a judgment to secure advances will be postponed to a subsequent bona fide lien, except for such advances as have been made before the attaching of the subsequent lien,[11] at least where it was optional with the creditor to make the advances or not, and he was not absolutely bound to do so.[12]

f. Judgments for Purchase Money

The mere fact that a judgment is for purchase money does not make it superior to judgments for other debts.

The mere fact that a judgment is for purchase money does not make it superior to judgments for other debts;[13] and a judgment recovered or confessed for the purchase money of land has no priority over older judgments which attached as liens on the same land at the time of its transfer to the debtor,[14] unless the execution and delivery of the deed for the land and the giving of a judgment for the purchase money were inseparably connected as parts of the same continuous transaction.[15] The judgment of a transferee of a bond for title to land, although obtained subsequent to a general judgment against the transferor of the bond, is superior to the latter judgment, and has a superior claim to the fund derived from the sale of the land covered by the bond, where the transfer of the bond antedated the latter judgment.[16] It has, however, an inferior claim to a fund derived from the sale of land of the transferor not covered by the bond for title.[17]

§ 485. —— Between Judgment and Conveyances and Other Liens

a. Prior conveyance or lien generally
b. Subsequent conveyance or lien
c. Contemporaneous judgment and conveyance or lien
d. Judgment for purchase money
e. Purchase-money mortgage
f. Contemporaneous mortgage to secure other debts
g. Contracts of sale and vendor's lien
h. Government claims

a. Prior Conveyance or Lien Generally

(1) In general
(2) Prior conveyance or lien not recorded
(3) Effect of notice

(1) In General

Unless otherwise provided by statute, a judgment lien is subordinate to prior conveyances and encumbrances, and all existing liens and equities in favor of third persons.

Since, as discussed supra § 478, the lien of a judgment attaches only to the actual interest of the debtor in the land, the general rule is that the judgment lien is subordinate to prior conveyances and encumbrances and all existing liens and equities in favor of third persons,[18] except in those cases where, by the terms of a statutory provision, a judg-

11. Pa.—Appeal of Kerr, 92 Pa. 236.
34 C.J. p 604 note 89.

12. Pa.—Ter-Hoven v. Kerns, 2 Pa. 96.
S.C.—Walker v. Arthur, 30 S.C.Eq. 397.

13. Va.—Kidwell v. Henderson, 143 S.E. 336, 150 Va. 829.

14. Ga.—Crafton v. Toombs, 58 Ga. 343.
34 C.J. p 605 note 91.

15. Pa.—Appeal of Snyder, 91 Pa. 477.

16. Ga.—Hardy v. Truitt, 93 S.E. 149, 20 Ga.App. 529.

17. Ga.—Hardy v. Truitt, supra.

18. U.S.—Whitaker & Co. v. Grable, C.C.A.Ark., 109 F.2d 710—North Alabama Assets Co. v. Orman, C.C.A.Ala., 15 F.2d 909—In re Rosenberg, D.C.Tex., 4 F.2d 581—Willcox v. Goess, D.C.N.Y., 16 F.Supp. 350.
Ala.—Warrick v. Liddon, 160 So. 534, 230 Ala. 253.
Ark.—Holloway v. Bank of Atkins, 169 S.W.2d 868, 205 Ark. 598—Carroll v. Evans, 79 S.W.2d 425, 190 Ark. 511—Snow Bros. Hardware Co. v. Ellis, 21 S.W.2d 162, 180 Ark. 238—Stallings v. Galloway-Kennedy Co., 283 S.W. 41, 171 Ark. 24.
Ga.—Herre v. Root Mfg. Co., 159 S.E. 574, 173 Ga. 163—Western Union Telegraph Co. v. Brown & Randolph Co., 114 S.E. 36, 154 Ga. 229.
Ill.—Cutler v. Hicks, 268 Ill.App. 161—Commercial Trust & Savings Bank of Springfield v. Murray, 246 Ill.App. 355.
Iowa.—Johnson v. Smith, 231 N.W. 470, 210 Iowa 591—Everist v. Carter, 210 N.W. 559, 202 Iowa 498—Cumming v. First Nat. Bank, 202 N.W. 556, 199 Iowa 667.
La.—Embry v. Embry, 127 So. 869, 170 La. 363—Aertker v. John W. Ball, Inc., App., 17 So.2d 309—Mitcham v. Mitcham, App., 195 So. 107.
Md.—White v. James Robertson Mfg. Co., 187 A. 831, 170 Md. 691—Caltrider v. Caples, 153 A. 445, 160 Md. 392, 87 A.L.R. 1500.
Miss.—Johnson Hardware Co. v. Ming, 118 So. 189, 147 Miss. 551—Baldwin v. Little, 8 So. 168, 64 Misc. 126.
Mo.—Castorina v. Herrmann, 104 S.W.2d 297, 340 Mo. 1026.
Mont.—Piccolo v. Tanaka, 253 P. 890, 78 Mont. 445.
N.J.—Rutherford Nat. Bank v. H. R. Bogle & Co., 169 A. 180, 114 N.J.Eq. 571.
N.Y.—Moore v. Hushion, 284 N.Y.S. 331, 246 App.Div. 771, 781.
N.C.—Helsabeck v. Vass, 146 S.E. 576, 196 N.C. 603.
N.D.—Business Service Collection Bureau v. Yegen, 269 N.W. 46, 67 N.D. 51—Smith v. Kornkven, 256 N.W. 210, 64 N.D. 789—McKenzie County v. Casady, 214 N.W. 461, 55 N.D. 475.
Ohio.—Fulton v. Stump, 198 N.E. 47, 50 Ohio App. 295—Williams v. Johns, 170 N.E. 530, 34 Ohio App. 230—Miller v. Scott, 154 N.E. 358, 23 Ohio App. 50.
Okl.—Riddle v. Grayson, 105 P.2d 248, 187 Okl. 647.
Pa.—Rubinsky v. Kosh, 145 A. 836, 296 Pa. 285—First Nat. Bank of Ashley v. Reily, Com.Pl., 37 Luz. Leg.Reg. 404—Automobile Finance Co. v. Anderson, Com.Pl., 27 West. Co. 227.
Tex.—Payne v. Bracken, 115 S.W.2d

ment is given priority.[19] Where a lien is general, it must be subordinated to the superior equity of a prior specific lien,[20] although this rule cannot avail against a specific statute to the contrary.[21] The lien of a subsequent judgment has been held to take priority over an alleged mortgage lien claimed by one whose name has been substituted as a grantee without authority of the original grantor for the purpose of defrauding creditors.[22] A mortgagee lending money for construction has been held entitled to priority over subsequent judgment creditors, although the construction was on a lot not covered by the mortgage.[23] Where a deed is to a dissolved corporation, which is incapable of receiving title, a subsequent judgment has a lien prior to the interest of a grantee from the corporation.[24]

Where a mortgage given to secure a note mistakenly secures only a small portion of the amount intended, judgment creditors obtaining judgments after the mortgage is recorded have a lien on the mortgaged land subject to the amount stated in the

903, 131 Tex. 394—First Nat. Bank of Amarillo v. Jones, 133 S.W. 874, 107 Tex. 623—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S.W.2d 365, error dismissed—Lusk v. Parmer, Civ.App., 114 S.W.2d 677, error dismissed—Tinnin v. Wilkirson, Civ.App., 40 S.W.2d 889, affirmed, Com.App., 58 S.W.2d 69—Sugg v. Mozoch, Civ.App., 293 S.W. 907.

Va.—C. I. T. Corporation v. Guy, 195 S.E. 659, 170 Va. 16—Commercial Savings & Loan Corporation v. Kemp, 140 S.E. 113, 149 Va. 68—New York Life Ins. Co. v. Kennedy, 135 S.E. 882, 146 Va. 197.

W.Va.—Springston v. Powell, 169 S.E. 459, 113 W.Va. 638.

Wis.—Lewis v. Wisconsin Banking Corporation, 275 N.W. 429, 225 Wis. 606—Whitney v. Traynor, 42 N.W. 267, 74 Wis. 289.

34 C.J. p 605 note 4—40 C.J. p 286 note 81—41 C.J. p 518 note 26, p 519 note 30, p 520 note 33.

Equitable mortgage

(1) Equitable mortgages generally prevail over liens of subsequent judgments.—Reidy v. Collins, 26 P.2d 712, 134 Cal.App. 713—41 C.J. p 548 note 98.

(2) Instrument assigning and transferring interest in estate, and recorded in county where real property was located, was held equitable mortgage, entitled to priority over judgment lien asserted against realty.—Gamble v. Consolidated Nat. Bank of Tucson, 262 P. 612, 33 Ariz. 117.

(3) Equitable mortgage created by mortgage assignee's promise to execute new mortgage to party, with whom assignee had pledged mortgage as collateral security, if permitted to purchase property at mortgage foreclosure sale, was held superior to lien of assignee's judgment creditor acquired after foreclosure sale, but before recordation of new mortgage.—Rutherford Nat. Bank v. H. R. Bogle & Co., 169 A. 180, 114 N.J.Eq. 571.

Stipulation fixing equitable lien

A judgment confirming a stipulation, in partition suit, fixing equitable lien on proceeds, established existence of lien, although not its priority against judgment lien, but judgment creditor not showing that judgment was docketed before stipulation fixing equitable lien in partition suit, or that stipulation was fraudulently entered into, is not entitled to priority.—Bennis v. Conley, 231 N.Y.S. 635.

A judgment on a note secured by a second mortgage gives the judgment creditor no better rights in respect of the property than the judgment debtor who fails to redeem from foreclosure of the first mortgage, but amounts to merely a general lien on the land of the debtor, subject to prior liens, and gives the judgment creditor the right to levy on land to the exclusion of subsequent adverse interests only.—Stiles v. Bailey, 219 N.W. 537, 205 Iowa 1385.

Transfer in escrow

Judgment lien did not attach to land which defendant had before judgment conveyed under deed in escrow which was delivered on performance of condition, thereby eliminating interest.—Snow Bros. Hardware Co. v. Ellis, 21 S.W.2d 162, 180 Ark. 238.

Oral contract for conveyance

Where parties made valid oral contract for conveyances of real estate in consideration of extinguishment of existing indebtedness, obligations of parties became fixed, and grantors had no interest subject to subsequent judgment lien, regardless of time of delivery of deed.—Richardson v. Estle, 243 N.W. 611, 214 Iowa 1007.

Defectively registered deed

Where notary public signed certificate of acknowledgment on original deed but the signature was omitted by register in recording deed, the deed was entitled to registration and had priority over subsequent judgment and levies of execution against the grantor of the land described in the deed.—Tennessee Barium Corporation v. Williams, 133 S.W.2d 1015, 23 Tenn.App. 398.

Lien for rent

(1) A landlord's lien for rent is ordinarily paramount to the lien of a judgment.—Staber v. Collins, 100 N.W. 527, 124 Iowa 543—36 C.J. p 506 note 9.

(2) Landlord's lien for rent relates back to levy of distress on landlord's recovering judgment and takes precedence over common-law judgment rendered after levy, but before judgment for landlord.—Corley-Powell Produce Co. v. Allen, 157 S.E. 251, 42 Ga.App. 641.

Assessment liens

W.Va.—Horn v. Charleston, 112 S.E. 239, 91 W.Va. 73.

44 C.J. p 806 note 57.

Claims against decedents' estates

Ill.—Hartley v. Hartley, 7 N.E.2d 906, 290 Ill.App. 92.

34 C.J. p 608 note 17 [e].

19. N.D.—Federal Farm Mortg. Corporation v. Berzel, 291 N.W. 550, 69 N.D. 760.

34 C.J. p 605 note 2.

20. Iowa.—Burns v. Burns, 11 N.W.2d 461, 233 Iowa 1092, 150 A.L.R. 306.

Md.—Garner v. Union Trust Co. of Md., 45 A.2d 106—Jackson v. County Trust Co. of Maryland, 6 A.2d 380, 176 Md. 505—Union Trust Co. v. Biggs, 137 A. 509, 153 Md. 50—Lee v. Keech, 133 A. 835, 151 Md. 34, 46 A.L.R. 1488.

41 C.J. p 520 note 41.

Where mortgagee was not made a party to proceeding in which contractor obtained judgment against owner of house and lot with recognition of builder's and materialman's lien and privilege with right to be paid by preference and priority over all other creditors, judgment did not affect mortgagee's rights of preference under the mortgage.—Officer v. Combre, La.App., 194 So. 441.

21. U.S.—In re Shapiro, D.C.Md., 34 F.Supp. 737, affirmed, C.C.A., Schumacher & Seiler v. Sandler, 118 F.2d 348.

22. N.M.—Scheer v. Stolz, 72 P.2d 606, 41 N.M. 585.

23. Ohio.—Union Savings & Loan Co. v. Gyro Const. Co., 163 N.E. 35, 29 Ohio App. 287.

24. Or.—Klorfine v. Cole, 254 P. 290, 121 Or. 76.

mortgage, with interest,[25] but the owner of the note has the right to credit payments made by the makers on the unsecured amount as against the judgment creditors.[26] Where the true owner of land is estopped to assert his title as against the grantee in a deed made by a person having no title, and a creditor of the true owner reduces his debt to judgment, the lien thereof is superior to the equity of a third person having neither lien nor title from the true owner.[27] A judgment in a suit for breach of a covenant in a deed does not relate back to the date of the deed so as to take priority over a mortgage executed subsequent to the deed.[28] A judgment against a partner for an individual debt, since it binds only his interest in the firm property, is subordinate to junior judgment creditors of the partnership;[29] and the same rule applies as to real estate of the firm, the legal title to which is in the name of the partner against whom a judgment is recovered for an individual debt.[30]

Lien for wages. Laborers' liens do not have priority over judgment liens of record at the time of an employer's insolvency, where the statute expressly so provides,[31] or where the statute gives laborers' liens priority over purchasers and creditors with notice,[32] and even where the statute gives the laborer a lien and not merely a preference.[33]

Mechanics' liens. A judgment lien has been held superior to a prior mechanics' lien which, although enforceable under the doctrine of estoppel, is legally defective.[34] Violation of a building ordinance has been held not to affect the validity of a mechanics' lien so as to give a judgment creditor the right to question its priority.[35] Under some statutory provisions the only judgment which can have priority over a mechanics' lien is a judgment founded on a claim based solely on materials furnished, labor performed, or money advanced for improvement of realty.[36]

Mortgages to secure future advances. A mortgage to secure future advances takes priority over a judgment obtained after the advances were made,[37] but, where a mortgagee makes optional advances after notice of a junior judgment lien, his lien for such advances will be postponed to that of the owner of the junior judgment lien.[38] A grantee in a deed intended as a mortgage for future advances has been held entitled to a priority over subsequent judgment creditors of the grantor as to future advances made after rendition of the judgments but without actual notice of the judgments.[39] The filing and entry of a judgment has been held of itself insufficient notice to the judgment debtor's mortgagee holding a mortgage for future advances, as respects the mortgagee's right of priority for advances made after the filing of the judgment,[40] but, where the mortgagee has actual notice of the judgment, the latter will take preference over subsequent advances, where the mortgage, while given for a certain sum, obligated the mortgagor only for money actually advanced by the mortgagee.[41] A mortgagee holding a mortgage for advances on an incompleted building advancing additional money for its completion and taking a second mortgage has been held to have a lien superior to that of a subsequent judgment creditor as against a contention that the advances were made when the debtor was insolvent.[42]

Receivers. A judgment against a receiver which merely fixes the amount of the claim is not entitled to priority over other creditors who have proved their claims;[43] nor is a judgment, obtained after the appointment of a receiver in an action which had been previously instituted, entitled to priority

25. N.C.—Lowery v. Wilson, 200 S.E. 861, 214 N.C. 800.

26. N.C.—Lowery v. Wilson, supra.

27. Ga.—Equitable Loan & Security Co. v. Lewman, 52 S.E. 599, 124 Ga. 190, 3 L.R.A.,N.S., 879.

28. Or.—Guild v. Wallis, 40 P.2d 737, 150 Or. 69, supplemented 41 P.2d 1119, 150 Or. 69, rehearing denied 42 P.2d 916, 150 Or. 69.

29. Cal.—Whelan v. Shain, 47 P. 57, 115 Cal. 326.
47 C.J. p 1013 note 50.

30. Ga.—Westbrook v. Hays, 14 S.E. 879, 89 Ga. 101.
47 C.J. p 1014 note 51.

31. U.S.—Pearsall v. Central Oil & Gas Co. of America, D.C.Pa., 23 F.2d 716.
39 C.J. p 221 note 63.

32. Fla.—First Nat. Bank v. Kirkby, 32 So. 881, 43 Fla. 376.
39 C.J. p 221 note 64.

33. N.J.—Wright v. Wynockie Iron Co., 21 A. 862, 48 N.J.Eq. 29.

34. N.Y.—Feuring v. Siewers, 200 N.Y.S. 440, 120 Misc. 720.

35. Pa.—Kessler v. Mandel, 40 A. 2d 926, 156 Pa.Super. 505.

36. N.Y.—Corbin-Kellogg Agency v. Tasker, 289 N.Y.S. 156, 248 App. Div. 58.

Judgment for premium on workmen's compensation policy which was docketed before liens for labor and materials were filed was held not entitled to priority of payment out of moneys due contractor by owner of dwelling which contractor had remodeled.—Corbin-Kellogg Agency v. Tasker, supra.

Statutory provisions construed
N.Y.—Corbin-Kellogg Agency v. Tasker, supra.

37. Pa.—Batten v. Jurist, 158 A. 557, 306 Pa. 64, 81 A.L.R. 625.

38. Cal.—Reidy v. Collins, 26 P.2d 712, 134 Cal.App. 713.

39. Iowa.—Everist v. Carter, 210 N.W. 559, 202 Iowa 498.

40. N.Y.—In re Harris' Estate, 282 N.Y.S. 571, 156 Misc. 805.

41. N.Y.—In re Harris' Estate, supra.

42. N.J.—Active Mortg. Co. v. Apex Bldg. Co., 146 A. 353, 104 N.J.Eq. 569, affirmed Active Mortg. Co. v. Henry R. Isenberg Co., 151 A. 904, 106 N.J.Eq. 279.

43. S.C.—National Bank of Augusta v. Stillwell, 86 S.E. 21, 101 S.C. 453.
53 C.J. p 250 note 36.

where, the estate being that of an insolvent, the rights of creditors are fixed at the date of the appointment of the receiver.[44] Where liens have attached on commencement of the suit in which assets have been impounded by a proceeding begun before proceedings for a receivership, a judgment obtained in such proceeding after the appointment of the receiver does not, by reason of the receivership, lose its claim to priority.[45]

(2) Prior Conveyance or Lien Not Recorded

In the absence of a statute to the contrary a judgment lien is subordinate to prior conveyances and encumbrances even where these are not recorded; but statutory provisions generally require, expressly or by construction, recording of such conveyances or encumbrances if their priority is to be maintained.

The rule that a judgment lien is subordinate to prior conveyances and encumbrances and all existing liens and equities in favor of third persons applies, in the absence of a statute to the contrary, even though the previous conveyance has not been recorded.[46] Some recording statutes expressly include judgment creditors among the persons as against whom a prior conveyance will be void unless recorded;[47] and, even where the statute is not so specific but merely provides that no conveyance shall be good or effective unless recorded,[48] or unless recorded within a limited time,[49] or that a deed shall be invalid as against subsequent creditors, unless duly recorded,[50] it has generally been held that the lien of a judgment is to be preferred to a conveyance executed before the rendition of the judgment but not recorded until afterward, provided the judgment creditor was without notice of the conveyance, as discussed infra subdivision a (3) of this section. Such rule, however, does not apply where

44. U.S.—E. C. Horn Sons v. Hoffman, C.C.A.Pa., 24 F.2d 162.

45. Mich.—Rickman v. Rickman, 146 N.W. 609, 180 Mich. 224, Ann.Cas. 1915C 1237.
N.J.—Ross v. Titsworth, 37 N.J.Eq. 333.

46. U.S.—U. S. v. Certain Lands in Borough of Brooklyn, Kings County, N. Y., (Parcel No. 6), D.C.N.Y., 44 F.Supp. 830.
Ark.—Carroll v. Evans, 79 S.W.2d 425, 190 Ark. 511.
Cal.—Davis v. Perry, 8 P.2d 514, 120 Cal.App. 670—Bank of Cottonwood v. Henriques, 266 P. 836, 91 Cal.App. 88.
Ga.—Moncrief Furnace Co. v. Northwest Atlanta Bank, 19 S.E.2d 155, 193 Ga. 440.
Okl.—Harry v. Hertzler, 90 P.2d 656, 185 Okl. 151.
34 C.J. p 607 note 12.

47. Ala.—Sutley v. Dothan Oil Mill Co., 179 So. 819, 235 Ala. 475.
Cal.—Sepulveda v. Apablasa, 77 P.2d 530, 25 Cal.App.2d 390.
Colo.—Donahue v. Kohler-McLister Paint Co., 254 P. 989, 81 Colo. 244.
Minn.—In re Juran, 226 N.W. 201, 178 Minn. 55—Ferguson v. Kumler, 11 Minn. 104.
N.D.—Agricultural Credit Corp. v. State, 20 N.W.2d 78—Battersby v. Gillespie, 222 N.W. 480, 57 N.D. 426.
34 C.J. p 607 note 8 [a].

Retroactive effect

(1) Amendment to statute to protect judgment lien creditors against unrecorded deed was held not retroactive.—Fulghum v. Madrid, 265 P. 454, 33 N.M. 303.

(2) An act making unrecorded deeds invalid as against subsequent judgment creditors was required to be construed prospectively since a retrospective construction would deprive holders of unrecorded deeds of vested rights in realty without due process of law, since it did not give holders of deeds theretofore executed a reasonable time to comply with statute, and hence entry of judgment on Febr. 3, 1933, did not give judgment creditor a lien against land conveyed by judgment debtor to third person in 1928, notwithstanding deeds were not recorded until 1934. —Farmers Nat. Bank & Trust Co. of Reading, to Use of Adams v. Berks County Real Estate Co., 5 A.2d 94, 333 Pa. 390, 121 A.L.R. 905.

48. Ohio.—Jackson v. Luce, 14 Ohio 514—Mayham v. Coombs, 14 Ohio 428.

49. U.S.—U. S. v. Devereux, N.C., 90 F. 133, 32 C.C.A. 564.

50. U.S.—Fooshee v. Snavely, D.C. Va., 58 F.2d 772, affirmed, C.C.A., 58 F.2d 774, certiorari denied 53 S.Ct. 85, 287 U.S. 635, 77 L.Ed. 550.
Ill.—Commercial Trust & Savings Bank of Springfield v. Murray, 246 Ill.App. 355.
Miss.—Sack v. Gilmer Dry Goods Co., 115 So. 389, 149 Miss. 296.
N.C.—Eaton v. Doub, 128 S.E. 494, 190 N.C. 14, 40 A.L.R. 273.
Tex.—Estelle v. Hart, Com.App., 55 S.W.2d 510—Henderson v. Odessa Building & Finance Co., Com.App., 24 S.W.2d 393, rehearing denied 27 S.W.2d 144—Howard v. Leonard, Civ.App., 185 S.W.2d 490, refused for want of merit—Segrest v. Hale, Civ.App., 164 S.W.2d 793, error refused—Bova v. Wyatt, Civ. App., 140 S.W.2d 601, error refused —Brinkman v. Tinkler, Civ.App., 117 S.W.2d 139, error refused—Christian v. Sam R. Hill Lumber Co., Civ.App., 113 S.W.2d 616.
Va.—Cox v. Williams, 31 S.E.2d 312, 183 Va. 152.
W.Va.—Harper v. McMillan, 188 S.E. 479, 117 W.Va. 822.
41 C.J. p 547 note 96.

Subsequent creditor

Under a statute requiring recording of a conveyance within a certain time, one who receives a note as a renewal of a note executed prior to the conveyance is not a subsequent creditor.—Little v. Mangum, C.C.A. S.C., 17 F.2d 44.

An equitable title acquired independently of the legal title is not subject to the registration statute so that the superiority of the equitable title may be asserted against the judgment creditor of the holder of the legal title, even though the creditor had no notice thereof at the time of fixing the creditor's lien.—Roeser & Pendleton v. Stanolind Oil & Gas Co., Tex.Civ.App., 133 S.W.2d 250, error refused.

Priority over trust

(1) It has been held that a recording statute does not preclude a cestui que trust from asserting his superior equity to land in the absence of a showing that the trustee has conveyed the legal title to the cestui que trust prior to the time that the creditor fixed his lien.—Roeser & Pendleton v. Stanolind Oil & Gas Co., supra—34 C.J. p 607 note 14 [a] (2).

(2) Even though the legal title has been transferred to the cestui que trust, if the deed is not of record at the time the creditor fixes his lien, the cestui que trust may assert his original equity acquired independently of the lien in a suit against the creditor, as the statute requires that such unrecorded deed shall be treated as void.—Roeser & Pendleton v. Stanolind Oil & Gas Co., supra.

the judgment is obtained against a grantor whose title is not recorded.[51] A subsequent judgment lien does not take priority where the statute merely provides that an unrecorded conveyance shall be void as against "purchasers;"[52] or that it shall be void as against purchasers and encumbrancers who acquire title by an "instrument" duly recorded;[53] or that it shall be void as against persons who in good faith have acquired a transfer or lien binding the property;[54] or, according to some authorities, that it shall be void as against third persons,[55] although other authorities hold that the term "third persons" includes judgment creditors.[56] Under a statute providing that deeds shall not take effect as to creditors and subsequent purchasers until their delivery for record and shall be void as to all creditors and subsequent purchasers whose deeds and other instruments are first recorded, a prior unrecorded deed will take precedence of a judgment lien unless a deed based on the judgment is recorded before such prior deed is recorded.[57] Under other statutes an unrecorded deed or mortgage takes priority as against a subsequent judgment lien if it is recorded before the execution sale, and, if not filed until after such sale, the purchaser at the execution sale acquires title.[58] Where land was sold to obtain money to pay an outstanding mortgage, the deed and mortgage release being executed before, but recorded together after, the vendor's creditors had secured judgments against him, the purchaser's title was held superior to such judgment liens.[59]

The fact that an assignment by a debtor of an equitable estate to an assignee holding legal title was not recorded until after entry of a judgment against the debtor does not result in the lien of the judgment attaching to the title of the assignee where the judgment debtor's interest could have been subjected to the lien of the judgment only by proceedings in the chancery court.[60] A statute providing that all deeds shall take effect on record as to creditors without notice means creditors of the grantor, not of the grantee, and does not give prior judgment creditors of the grantee the rights of bona fide purchasers.[61] Where property has been conveyed to the judgment debtor by an unrecorded deed, and thereafter, when the judgment creditor sought execution on the property, the grantor conveyed the premises to another who was not a bona fide purchaser, the debtor's title under the unrecorded deed was superior to the title of the second grantee as respects the judgment creditor's rights.[62] A statute providing that the unrecorded conveyance of an interest in land is void as against a judgment lien has been held not to apply to the conveyance of equities requiring the aid of a court of equity to establish.[63] Inscription of a judgment after sale of land was filed for record but before the sale was actually inscribed in the conveyance records does not operate as a judicial mortgage so as to give the judgment creditor a claim to the land prior to that of the purchaser.[64]

Defective conveyance. Where the subsequent judgment creditor is not misled or his rights impaired, a defective conveyance prior to the judgment may be corrected thereafter, as where by mistake the land described in the original deed was not that intended to be conveyed,[65] especially where the grantee went into immediate possession of the property he intended to buy,[66] and it has been held that the latter rule should be applied where the grantor corrects the mistake without the intervention of equity.[67]

51. Minn. — Emerson - Brantingham Implement Co. v. Cook, 206 N.W. 170, 165 Minn. 198, 43 A.L.R. 41.
34 C.J. p 608 note 19.

52. U.S.—U. S. v. Certain Lands in Borough of Brooklyn, Kings County, N. Y. (Parcel No. 6), D.C.N.Y., 44 F.Supp. 830—U. S. v. Certain Lands Located in Town of Hempstead, Nassau County, N. Y., Damage Parcel 211, D.C.N.Y., 41 F. Supp. 636.
Iowa.—Brauch v. Freking, 258 N.W. 892, 219 Iowa 556—Grant v. Cherry, 201 N.W. 588, 199 Iowa 164.
Kan.—Bennett v. Christy, 20 P.2d 813, 137 Kan. 376.
N.Y.—Fox v. Sizeland, 9 N.Y.S.2d 350, 170 Misc. 390—Blum v. Krampner, 28 N.Y.S.2d 62, affirmed 27 N.Y.S.2d 1000, 261 App.Div. 939, reargument denied 28 N.Y.S.2d 707, 262 App.Div. 756.
41 C.J. p 521 note 49.

53. Cal.—Wolfe v. Langford, 112 P. 203, 14 Cal.App. 359.
34 C.J. p 608 note 21.

54. U.S.—Webb v. United-American Soda Fountain Co., C.C.A.Ga., 59 F. 2d 329.
34 C.J. p 609 note 22.

55. Okl.—Oklahoma State Bank v. Burnett, 162 P. 1124, 65 Okl. 74.
34 C.J. p 609 note 23.

56. U.S.—McCoy v. Rhodes, La., 11 How. 131, 13 L.Ed. 634.
34 C.J. p 609 note 24.

57. Neb.—Omaha Loan & Bldg. Ass'n v. Turk, 21 N.W.2d 865, 146 Neb. 859.
34 C.J. p 609 note 25.

58. Mo.—Rehm v. Alber, 199 S.W. 170, 272 Mo. 452.
34 C.J. p 609 note 27—41 C.J. p 547 note 96 [f].

59. Tenn.—Anderson v. Robertson, 192 S.W. 917, 137 Tenn. 182.
34 C.J. p 609 note 28.

60. N.J.—McLaughlin v. Whaland, 13 A.2d 573, 127 N.J.Eq. 393.

61. Ill.—Sparrow v. Wilcox, 112 N. E. 296, 272 Ill. 632.

62. R.I.—Sundlun v. Volpe, 9 A.2d 41, 63 R.I. 441.

63. Tex.—Sugg v. Mozoch, Civ.App., 293 S.W. 907.

64. La.—Wood Preserving Corporation v. Mitchell Tie & Lumber Co., App., 167 So. 122.

65. Tex.—Hodges v. Moore, Civ. App., 186 S.W. 415.
34 C.J. p 609 note 30.

66. Tex.—Gauss-Langenberg Hat Co. v. Allums, Civ.App., 184 S.W. 288.

67. Idaho.—Feltham v. Blunck, 198 P. 763, 34 Idaho 1, 9.
34 C.J. p 609 note 32.

Delivery to a stranger, for a third person, of an intended deed, of which delivery such third person is not informed, does not, by relation, when such third person accepts the deed, operate to defeat a right acquired under a judgment lien against the grantor between the time of delivery to the stranger and acceptance by the grantee.[68]

(3) Effect of Notice

A judgment lien ordinarily is subordinate to a prior conveyance or encumbrance of which the judgment creditor has notice, actual or constructive, even though such conveyance or encumbrance has not been recorded.

The rule that a judgment lien is subordinate to prior conveyances and encumbrances and all existing liens and equities in favor of third persons generally applies where the judgment creditor has actual or constructive notice of such prior conveyance, lien, encumbrance, or equity.[69] The judgment creditor is generally regarded as having such notice where there is an actual, open, and notorious possession of the premises on the part of the grantee[70] or his tenant;[71] but the judgment creditor has been held not chargeable with notice where a tenant in possession at the time of the execution of the unrecorded deed has not recognized the grantee as his landlord,[72] or, according to some authorities, even where such tenant in possession has agreed to hold under the grantee.[73] As against a third person in possession the judgment creditor stands in the relation of a subsequent purchaser as far as notice of the rights of such person are concerned,[74] but such possession must be exclusive and unequivocal, and does not constitute notice where the record owner is also in possession.[75]

The judgment creditor will be charged with notice of a previous unrecorded deed if he had knowledge of such fact as would put a reasonable man on inquiry, which, if diligently pursued, would have led to knowledge of the fact that the land did not belong to the judgment debtor.[76] It has been held that if a mortgage is recorded within the time prescribed by law, although not recorded at the time of recovery of a judgment, the lien of the judgment is postponed to the rights of the prior mortgagee, without regard to the question of actual notice of the mortgage.[77]

Although under the provisions of a statute an unrecorded deed may be absolutely void as against a subsequent judgment creditor whether or not he has notice of it,[78] statutes which make the lien of a judgment creditor superior to the interest of a grantee or mortgagee under a prior unrecorded

68. Cal.—Hibberd v. Smith. 4 P. 473, 67 Cal. 547, 56 Am.R. 726, reheard 8 P. 46, 67 Cal. 547, 56 Am. R. 726.

69. Ill.—Union Bank of Chicago v. Gallup, 148 N.E. 2, 317 Ill. 184.
La.—Swan v. Moore, 14 La.Ann. 833.
34 C.J. p 607 note 5.

Escrow agreement

Where mortgagor's escrow deed conveying title to second mortgage holder, and trustee's escrow satisfaction of third mortgage were to become absolute on failure to pay second mortgage by date specified, rights of second mortgage holder under escrow instruments were held superior to judgment lien of assignee of note, originally secured by third mortgage who took with knowledge of facts.—Ruden v. Kirby, 241 N.W. 791, 59 S.D. 631.

Recitals in recorded deeds

(1) Where recorded deeds and mortgage contained general description of land by reference to its adjoining owners and to river which bound land, which description was sufficient to cover entire tract, but contained reference to prior deeds which did not embrace entire tract, subsequent judgment creditor was put on notice that entire tract was intended to be covered and could not levy execution on part of tract not covered by prior deeds referred to.—Phœnix Mut. Life Ins. Co. v. Kingston Bank & Trust Co., 112 S. W.2d 381, 172 Tenn. 335.

(2) Other recitals see 34 C.J. p 607 note 5 [a].

70. Ill.—Mauricau v. Haugen, 56 N. E.2d 367, 387 Ill. 186—Carnes v. Whitfield, 185 N.E. 819, 352 Ill. 384—Doll v. Walter, 27 N.E.2d 231, 305 Ill.App. 188.
N.J.—Majewski v. Greenberg, 136 A. 749, 101 N.J.Eq. 134.
Or.—Thompson v. Hendricks, 245 P. 724, 118 Or. 39.
Tex.—Kelly-Springfield Tire Co. v. Walker, Civ.App., 149 S.W.2d 195, error dismissed, judgment correct —Sinton State Bank of Sinton v. Odem, Civ.App., 75 S.W.2d 895.
Va.—Floyd v. Harding, 28 Gratt. 401, 69 Va. 401.
34 C.J. p 607 note 6, p 610 note 41.

71. Minn.—Wilkins v. Bevier, 45 N. W. 157, 43 Minn. 213, 19 Am.S.R. 238.
34 C.J. p 611 note 42.

72. Minn.—Wilkins v. Bevier, supra.
34 C.J. p 611 note 43.

73. Ala.—Griffin v. Hall 22 So. 156, 115 Ala. 647.
34 C.J. p 611 note 44.

74. Ill.—Union Bank of Chicago v. Gallup, 148 N.E. 2, 317 Ill. 184.

Possession sufficient to require inquiry

Possession under contract of purchase, alleged to be fraudulent as to creditors, was held sufficient to put subsequent judgment creditor of record owner on inquiry as to his rights, even though prior to contract he had been a tenant of record owner, where thereafter his possession was exclusive, it being immaterial whether record owner claimed to own property.—Union Bank of Chicago v. Gallup, supra.

75. Ill.—Union Bank of Chicago v. Gallup, supra.

76. N.J.—Majewski v. Greenberg, 136 A. 749, 101 N.J.Eq. 134.
34 C.J. p 610 note 40.

77. Md.—Knell v. Green St. Bldg. Ass'n, 34 Md. 67.

78. La.—State ex rel. Hebert v. Recorder of Mortgages, 143 So. 15, 175 La. 94.
Tenn.—Washington's Lessee v. Trousdale, Mart. & Y. 385.
34 C.J. p 610 notes 36, 38.

Priority determined by recording

Where third persons purchased judgment debtor's realty Friday afternoon and deed was mailed to recorder's office on Saturday and arrived there Monday morning when it was filed for record, but the judgment was filed for record Saturday morning, purchaser took realty subject to judicial mortgage.—Robin v. Harris Realty Co., 152 So. 573, 178 La. 946.

conveyance usually contain the proviso that, in order to be entitled to priority, the judgment creditor shall be without notice of the unrecorded deed or mortgage,[79] and, even though such statutes do not contain any express provision as to notice, it has been held that the fact of such notice will prevent the judgment creditor from obtaining priority.[80] The burden of proving that the judgment creditor had notice is on the party seeking to assert rights as against him.[81]

Notice must be brought home to the judgment creditor at or before the time the judgment was rendered,[82] or at or before the time his judgment lien attaches, and his rights are not affected by the fact that he acquires knowledge of the prior deed after such time.[83]

Defective deed. Where by statute a judgment creditor's lien is given precedence over an unrecorded deed of which he has no notice, it has been held that the equity of the grantee under a recorded deed to have it reformed so as to include land omitted from the description therein cannot displace the lien of the judgment.[84] The fact that a mortgage of which the judgment creditor has notice is defectively acknowledged has been held not to affect its superiority over a subsequent judgment,[85] but, where the recording of an improperly authenticated mortgage is regarded as no record, such a mortgage is postponed to a judgment lien;[86] and the recording of a mortgage which is not only defective but contrary to law will not make the mortgage a lien superior to that of a subsequent judgment, as against the contention that the subsequent creditor had constructive notice by reason of the recording, and could have learned the true situation by inquiry.[87] It has been held that where a person makes a conveyance of land, which is defective by reason of a wrong description of the premises, the lien of a judgment against the grantor subsequent to the conveyance and prior to the reformation of the deed will not attach to the lands.[88] A judgment creditor seeking to subject to his judgment lands conveyed prior thereto, because of an alleged defect in the deed, is chargeable with such information as was contained in the deeds and furnished by the records at the date when the judgment was obtained.[89] Where a grantor's judgment creditor was not made

79. Colo.—Donahue v. Kohler-McLister Paint Co., 254 P. 989, 81 Colo. 244.
Tex.—Segrest v. Hale, Civ.App., 164 S.W.2d 793, error refused.
34 C.J. p 609 note 34.

Sufficiency of notice

(1) Whatever charges purchaser with notice as to possession of land charges judgment creditor with notice.—Majewski v. Greenberg, 136 A. 749, 101 N.J.Eq. 134—34 C.J. p 609 note 34 [a] (1).

(2) A letter from the judgment debtor to the judgment creditor disclosing the facts was sufficient to give notice of debtor's unrecorded deed, barring priority under recording act.—Myers v. Hayden, 257 P. 351, 82 Colo. 98.

(3) Judgment debtors' recorded deed, conveying tract of land to bank receiver, who conveyed smaller tracts to corporation in satisfaction of its equity in former tract, which receiver took in satisfaction of bank's mortgages on smaller tracts, did not give judgment creditor, subsequently recording judgment, notice of corporation's claim of right of subrogation to such mortgages, record of which was not notice that corporation had contributed to satisfaction thereof.—Sutley v. Dothan Oil Mill Co., 179 So. 819, 235 Ala. 475.

(4) Where a judgment creditor released his judgment to enable the judgment debtor to borrow money on a mortgage, the judgment creditor was chargeable with notice of such mortgage and could not claim priority over it because it was not recorded before entry of his subsequent judgment.—Hutchinson v. Bramhall, 7 A. 873, 42 N.J.Eq. 372.

(5) Other cases see 34 C.J. p 609 note 34 [a].

Notice by reference in other conveyance

A judgment creditor must take notice of what appears on face of deed in chain of title to, or executed by one having record interest in, land on which execution is levied, but is not bound to inquire into collateral circumstances growing out of conveyances of land not claimed by him.—Sutley v. Dothan Oil Mill Co., 179 So. 819, 235 Ala. 475.

Assignee of judgment

Where a judgment creditor assigns a prior judgment lien not having notice of an unrecorded mortgage, his assignee, although having notice of the mortgage, takes priority over it.—McCandless v. Klauber, 155 S.E. 141, 158 S.E. 32.

80. Ark.—Carroll v. Evans, 79 S.W. 2d 425, 190 Ark. 511.
34 C.J. p 610 notes 35, 37.

81. N.J.—Majewski v. Greenberg, 136 A. 749, 101 N.J.Eq. 134.
Tex.—Barnett v. Squyres, 54 S.W. 241, 93 Tex. 193, 77 Am.S.R. 854—Segrest v. Hale, Civ.App., 164 S.W. 2d 793, error refused.
34 C.J. p 610 note 39.

82. Ala.—Sutley v. Dothan Oil Mill Co., 179 So. 819, 235 Ala. 475—Teaford v. Moss, 179 So. 817, 235 Ala. 490.

83. Tex.—Bowles v. Belt, Civ.App., 159 S.W. 885.
34 C.J. p 611 note 45.

84. Minn.—Wilcox v. Leominster Nat. Bank, 45 N.W. 1136, 43 Minn. 541, 19 Am.S.R. 259.
Tex.—Henderson v. Odessa Building & Finance Co., Com.App., 24 S.W. 2d 393, rehearing denied 27 S.W.2d 144.

85. Ark.—First Nat. Bank v. Meriwether Sand & Gravel Co., 67 S. W.2d 599, 188 Ark. 642.

86. U.S.—Webb v. United-American Soda Fountain Co., C.C.A.Ga., 59 F.2d 329.

87. U.S.—In re Shapiro, D.C.Md., 34 F.Supp. 737.

88. Ind.—Wells v. Benton, 8 N.E. 444, 108 Ind. 585, rehearing denied 9 N.E. 601, 108 Ind. 585.
34 C.J. p 607 note 7.

89. Va.—Blair v. Rorer's Adm'r, 116 S.E. 767, 135 Va. 1, motion denied 43 S.Ct. 704, 262 U.S. 234, 67 L.Ed. 1206.

Description of property

Va.—Blair v. Rorer's Adm'r, supra.

Notation on record

Under the statute authorizing and requiring the clerk of the county court to record deeds and contracts for the sale of real estate, a notation on the margin of the record of a deed, signed by the grantor and acknowledged before the clerk, and purporting to correct a mistake in the description, was an instrument

a party to a suit to reform and correct a deed, he is not bound by such proceedings, and a commissioner's deed correcting the mistake will be void as to him when not admitted to record until after the judgment was docketed.[90]

Defective recording. Notice to a subsequent judgment creditor is not imparted by an illegal, unsuccessful, or incomplete attempt to record a prior deed,[91] but a mere irregularity in recording a deed will not affect its priority.[92] Where, in order that an instrument evidencing a lien on real estate shall import constructive notice, it must be recorded in the proper book as required by the recording act, an instrument recorded in the wrong book does not constitute constructive notice as to a subsequent judgment creditor.[93]

Trusts. Judgment creditors have been held not protected against trusts of which they have no notice, or allowed in equity to hold against the cestui que trust.[94] Under a statute providing that resulting trusts of realty shall be void as to bona fide purchasers, mortgagees, or creditors without notice unless a written declaration of trust is recorded or ejectment brought by the real owner, it has been held that the words "without notice" are to be construed with "judgment creditors" and hence the notice contemplated is actual, and not constructive.[95]

b. Subsequent Conveyance or Lien

The lien of a judgment ordinarily is superior to all conveyances of, and liens on, the debtor's property which are made or accrue after the judgment lien has attached.

The lien of a judgment is superior to all conveyances of, and liens on, the debtor's property which are made or accrue after the judgment lien has attached,[96] provided, however, the judgment will not prevail against a subsequent sale or lien on the

entitled to be recorded, whether considered as a part of the deed or as a contract describing the land conveyed by the deed, and constituted constructive notice.—Blair v. Rorer's Adm'r, supra.

Parol evidence held inadmissible to show intent to convey property other than as described in the deed. —Blair v. Rorer's Adm'r, supra.

90. Va.—Blair v. Rorer's Adm'r, supra.

91. Ga.—Andrews v. Mathews, 59 Ga. 466.
Va.—Horsley v. Garth, 2 Gratt. 471, 43 Va. 471, 44 Am.D. 393.
34 C.J. p 611 note 46.

Recording under wrong name

The failure of register of deeds to enter on grantor's side of index the name of "J. Frank Crowell" and instead indexing deed as if it were one from "J. L. Crowell," who was the grantor in more than one hundred conveyances on the same page, did not give notice to grantor's subsequent judgment creditor that title to realty was no longer in him, and, in absence of evidence that creditor had knowledge or notice of transfer of title otherwise than shown by record, deed was not indexed and registered with respect to him.—Dorman v. Goodman, 196 S.E. 352, 213 N.C. 406.

92. Va.—Carper v. McDowell, 5 Gratt. 212, 46 Va. 212.
34 C.J. p 611 note 47.

Omission of recitals

The failure to comply with a statute requiring instruments offered for registration to contain recital designating last registered instrument relating to property embraced in instrument offered for registration and setting forth book and page where appears last registered instrument did not render registration ineffective against subsequent judgment creditor.—Phœnix Mut. Life Ins. Co. v. Kingston Bank & Trust Co., 112 S.W.2d 381, 172 Tenn. 335.

93. N.J.—Hadfield v. Hadfield, 17 A.2d 169, 128 N.J.Eq. 510.

94. Ill.—Leutenmyer v. McMahon, 168 Ill.App. 642.
Pa.—Shryock v. Waggoner, 28 Pa. 430.

95. Pa.—Rochester Trust Co. v. White, 90 A. 127, 243 Pa. 469.

96. U.S.—Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., C.C.A.Ky., 137 F.2d 871, certiorari denied 64 S.Ct. 431, 320 U.S. 800, 88 L.Ed. 483, rehearing denied 64 S.Ct. 634, 321 U.S. 803, 88 L.Ed. 1089—Commercial Credit Co. v. Davidson, C.C.A.Miss., 112 F.2d 54—McAlpine v. Hedges, C.C.Ind., 21 F. 689.
Cal.—Corporation of America v. Marks, 73 P.2d 1215, 10 Cal.2d 218, 114 A.L.R. 1162—Richardson v. Abernathy, 73 P.2d 1252, 23 Cal.App. 2d 629.
Colo.—Zigmond v. Cooper, 8 P.2d 268, 90 Colo. 222.
Del.—C. L. Pierce & Co. v. Security Trust Co., 175 A. 770, 6 W.W.Harr. 348.
Fla.—Giddens v. McFarlan, 10 So.2d 807, 152 Fla. 281—Orr v. Dade Developers, 190 So. 20, 138 Fla. 122.
Ga.—Howell v. Farmers Bank, 196 S.E. 387, 185 Ga. 768.
Hawaii.—Nichols v. Wah Chong Sun, 28 Hawaii 395.
Ill.—Svalina v. Saravana, 173 N.E. 281, 341 Ill. 236, 87 A.L.R. 821.
Iowa.—Chader v. Wilkins, 284 N.W. 133, 226 Iowa 417—Rogers v. Rutherford, 232 N.W. 720, 210 Iowa 1313.
La.—Eg at v. Kraus, App., 141 So. 94.
Mont.—Commercial Bank & Trust Co. v. Jordan, 278 P. 832, 85 Mont. 375, 65 A.L.R. 968—Isom v. Larson, 255 P. 1049, 78 Mont. 395.
N.M.—Sylvanus v. Pruett, 9 P.2d 142, 36 N.M. 112.
N.C.—Keel v. Bailey, 198 S.E. 654, 214 N.C. 159—Byrd v. Pilot Fire Ins. Co., 160 S.E. 458, 201 N.C. 407.
Pa.—Brumbach v. Pearson, 13 Pa. Dist. & Co. 762, 22 Berks Co. 124, 78 Pittsb.Leg.J. 451, 44 York Leg. Rec. 21—First Nat. Bank of Pittston v. McGovern, Com.Pl., 35 Luz. Leg.Reg. 177.
Tex.—Collins v. Davenport, Civ.App., 192 S.W.2d 291—John F. Grant Lumber Co. v. Hunnicutt, Civ.App., 143 S.W.2d 976—Williams v. Hedrick, Civ.App., 131 S.W.2d 187, error dismissed, judgment correct.
Wis.—**Corpus Juris cited in** R. F. Gehrke Sheet Metal Works v. Mahl, 297 N.W. 373, 376, 237 Wis. 414.
34 C.J. p 611 note 48—40 C.J. p 286 note 83—41 C.J. p 518 note 26, p 520 note 33—53 C.J. p 250 note 38.

Lien of defaulting judgment lien claimant was held subordinate to valid liens of other claimants in mechanic's lien foreclosure suit except certain attachment and judgment lien.—Lorenz Co. v. Gray, 298 P. 222, 136 Or. 605, rehearing denied and opinion adhered to Lorenz Co. v. Day & Co., 300 P. 949, 136 Or. 605.

Bill of sale of personalty

A debtor's bill of sale of mules to creditor in consideration of the preexisting debt did not give creditor right to mules which was superior to right of another creditor who obtained judgment against debtor prior to bill of sale, where preëxisting debt was not a "valuable consid-

property unless it has been docketed, filed, registered, or otherwise made a matter of public record, as the local statute may provide,[97] even though the purchaser has actual notice of the undocketed judgment.[98]

An innocent purchaser is protected against a judgment erroneously recorded and indexed,[99] and a judgment docketed under the wrong name does not constitute a lien on the property as against a grantee who is a purchaser in good faith.[1] If the judgment is actually recorded, the fact that a party is ignorant of it is due to his own negligence, against the consequences of which a court of equity cannot relieve him by interfering with the rights of others who are without fault;[2] and under the rule in some jurisdictions the purchaser of realty is bound to ascertain at his peril whether there are judgments against the debtor.[3] It has been held that a judgment, although docketed, will not have a prior lien on a mere equitable interest in lands over a subsequent bona fide purchaser without actual notice from the holder of the legal title.[4]

The fact that no execution was issued, or that no levy was made after an execution was issued, has been held not to affect the priority of the lien of a judgment over subsequent deeds and mortgages,[5] except in so far as failure to issue execution may result in postponement of the lien, as discussed infra § 486; but the rule is otherwise under statutory provisions requiring the entry of execution in order that the judgment shall have a lien attaching to the property,[6] and a partner who, for cash and in good faith, buys and takes a transfer of his partner's entire interest in the firm after a third person has obtained a judgment against the selling partner individually but before garnishment or other collateral proceeding is taken to seize the selling partner's interest has been held not charged with the

eration" for bill of sale and was insufficient to constitute the creditor a "bona fide purchaser," and mules and other personal property conveyed by bill of sale amounted to much more than the preëxisting debt.—Duncan v. Jones, Tex.Civ.App., 153 S.W.2d 214.

A deed to secure borrowed money paid for land is but a parol mortgage, and as such is inferior to a judgment against the purchaser, and a sheriff's sale under the judgment will pass a clear title and any surplus left after satisfying the judgment belongs to the purchaser, and not to the lender.—Fredericks v. Corcoran, 100 Pa. 413.

Judgment prior to sale by receiver

Where grantee obtained decrees rescinding land contracts one week before confirmation of sale of corporate grantor's realty in stockholder's receivership suit, purchaser at receivership sale was held to take with notice of liens of grantee's decrees and subject to grantee's right to levy execution, especially in absence of publication of notice to creditors after liquidation of corporation was determined.—Eppes v. Dade Developers, 170 So. 875, 126 Fla. 353—State ex rel. Eppes v. Lehman, 147 So. 907, 109 Fla. 331.

Judgment prior to assessment lien

Pa.—Oil City Bldg. & Loan Ass'n v. Shanfelter, 29 Pa.Super. 251.

Receivers' certificates

A valid and subsisting judgment lien takes precedence over receivers' certificates issued for money to be borrowed.—Lehman v. Trust Co. of America, 49 So. 502, 57 Fla. 473—53 C.J. p 192 note 73.

Assignee of lease

A judgment creditor's lien is superior to the rights of an assignee of a lease where the assignment was made after the judgment was docketed.—Henderson v. Tomb, 8 N.Y.S.2d 612, 169 Misc. 737.

97. Ohio.—Van Hoose v. French, 62 N.E.2d 259, 75 Ohio App. 342.
Wash.—Choukas v. Carras, 81 P.2d 841, 195 Wash. 659.
Wis.—Wisconsin Mortg. & Sec. Co. v. Kriesel, 211 N.W. 795, 191 Wis. 602.
34 C.J. p 612 note 51—41 C.J. p 547 note 96—42 C.J. p 769 note 62.

Erroneous indexing

Where judgment against landowner was not indexed on judgment docket under his name, rights of bank which subsequently acquired deed to the land without actual knowledge of judgment were superior to lien of judgment.—Wilson v. First Nat. Bank, 88 P.2d 628, 184 Okl. 518.

Transcript held sufficient

Ind.—Chadwick v. Louisville Joint Stock Land Bank, 6 N.E.2d 741, 103 Ind.App. 224.

Filing of transcript held insufficient

In absence of some step beyond mere filing of transcript of judgment, innocent bona fide purchasers from record owner, not party to the judgment, are protected.—Castorina v. Herrmann, 104 S.W.2d 397, 340 Mo. 1026.

Purchaser charged with knowledge

Where judgment is entered in name of judgment debtor, and execution docket shows number of cause and part of judgment debtors, purchaser from judgment debtor is charged with knowledge which inquiry would have disclosed.—Miller v. J. I. Case Threshing Mach. Co., 300 P. 399, 149 Okl. 281.

98. Mont.—Sklower v. Abbott, 47 P. 901, 19 Mont. 228.
34 C.J. p 612 note 52.

99. Pa.—Jaczyszyn v. Paslawski, 24 A.2d 116, 147 Pa.Super. 97.

1. N.Y.—Grygorewicz v. Domestic and Foreign Discount Corporation, 40 N.Y.S.2d 676, 179 Misc. 1017.

A judgment is not docketed against any particular property, but solely against a name, and if that name is incorrectly set forth, the one to suffer should not be a purchaser in good faith but rather judgment creditor, who should see to it that the docketing is in the correct name of the debtor, so that a judgment docketed against Mary A. Pender did not constitute a lien on real property of Alice Mary Pender and it did not constitute constructive "notice" to purchaser, who acted in good faith, in acquiring title from Alice Mary Pender.—Grygorewicz v. Domestic and Foreign Discount Corporation, supra.

2. Mo.—Bunn v. Lindsay, 7 S.W. 473, 95 Mo. 250, 6 Am.S.R. 48.
Pa.—Brumbach v. Pearson, 13 Pa. Dist. & Co. 762, 22 Berks Co. 124, 78 Pittsb.Leg.J. 451, 44 York Leg. Rec. 21.

3. Wis.—R. F. Gehrke Sheet Metal Works v. Mahl, 297 N.W. 373, 237 Wis. 414.

4. Kan.—Kirkwood v. Koester, 11 Kan. 471.
Miss.—Harper v. Bibb, 34 Miss. 472, 69 Am.D. 397.
Va.—Moore v. Sexton, 30 Gratt. 505, 71 Va. 505.

5. N.J.—Vansciver v. Bryan, 13 N.J. Eq. 434.

6. Ga.—Swift v. Dowling, 107 S.E. 49, 151 Ga. 449.

lien of such judgment.[7] A mechanic's lien for work commenced before a judgment was entered has been held entitled to priority even though filed after judgment was rendered.[8] Where the property against which the judgment lien is sought to be enforced did not stand in the name of the judgment debtor, the judgment lien will be subordinate to the rights of a subsequent purchaser under a contract for deed entered into in good faith and for a valuable consideration.[9]

A defect in a mortgage, in failing to name a mortgagee, cannot be availed of by a subsequent judgment creditor of the mortgagor before levy and sale as against one who had contracted to furnish the money for the payment of the mortgage debt in consideration of his being subrogated to the rights of the mortgagee.[10]

Conveyance in trust to secure specified debts. It has been held that, where land is conveyed in trust to secure certain specified debts, the beneficiaries of such trust deed will have a lien on the land so conveyed superior to that of ordinary judgment creditors.[11] Where a deed of trust is executed to secure certain debts, and thereafter a judgment is rendered against the grantor who contracts with a third person to advance the amount secured by the deed of trust and gives him a mortgage as security, on payment of the debts secured by the deed of trust it becomes inoperative and the mortgagee cannot be subrogated to the rights of the cestui que trust so as to gain priority over the judgment.[12]

c. Contemporaneous Judgment and Conveyance or Lien

Where a judgment and a conveyance or encumbrance are entered against the debtor on the same day, the general rule is that priority of right will be determined by priority in time.

Where a conveyance or encumbrance and a judgment against the grantor are entered on the same day, some of the cases hold that the lien of the judgment will begin from the earliest hour of that day, and so override the conveyance;[13] but the generally accepted doctrine is that fractions of the day may be inquired into, and priority of right will be determined by actual priority in time,[14] and that, in order to affect lands in the hands of a purchaser, a judgment must have been not merely simultaneous with, but anterior to, the conveyance.[15] The precise time at which the judgment was entered may be proved, according to some authorities, by evidence dehors the record,[16] although other authorities have refused to adopt this rule.[17]

Where there is no proof of the actual time of rendition or entry of the judgment, it has been held by some authorities that the judgment will have priority over a conveyance on the same day, the presumption being that the judgment was rendered or entered at the earliest hour of the day when an actual rendition or entry of a judgment may be made in the usual course of business,[18] although other authorities hold that under such circumstances the liens are equal.[19] Under the rule that a judgment lien relates back to the first day of the term at which it was rendered, a judgment lien overreaches all conveyances or encumbrances on the debtor's lands executed on or after the first day of the term during which the judgment was rendered.[20] Where a deed is received for recording on a certain day but is not recorded because costs of registration did not accompany it, and on the same day a judgment is docketed, the judgment is entitled to priority.[21]

d. Judgment for Purchase Money

A judgment given or confessed for the purchase money of land will have priority of lien on the land over subsequent mortgages or other encumbrances where the giving of the judgment and the execution and delivery of the deed for the land were simultaneous or parts of the same continuous transaction, but not otherwise.

A judgment given or confessed for the purchase money of land will have priority of lien on the land over subsequent mortgages or other encumbrances

7. Ga.—Ivey v. Gatlin, 20 S.E.2d 592, 194 Ga. 27.

8. Pa.—Knoell v. Carey, 140 A. 522, 291 Pa. 531.

9. Minn.—Roberts v. Friedell, 15 N. W.2d 496, 218 Minn. 88.

10. Iowa.—Watson v. Bowman, 119 N.W. 623, 142 Iowa 528.
41 C.J. p 521 note 44.

11. Tenn.—Buchanan v. Kimes, 2 Baxt. 275.
41 C.J. p 519 note 29.

12. W.Va.—Hoffman v. Ryan, 21 W. Va. 415.

13. Del.—Hollingsworth v. Thompson, 5 Del. 432.
Va.—Hockman v. Hockman, 25 S.E. 534, 93 Va. 455, 57 Am.S.R. 816.
41 C.J. p 548 note 99 [a].

14. U.S.—Fooshee v. Snavely, D.C. Va., 58 F.2d 772, affirmed, C.C.A., 58 F.2d 774, certiorari denied 53 S.Ct. 85, 287 U.S. 635, 77 L.Ed. 550—Cohen v. Schultz, C.C.A.N.J., 43 F.2d 340.
34 C.J. p 612 note 60.

15. Pa.—Mechanics' Bank v. Gorman, 8 Watts & S. 304.

16. N.J.—Hunt v. Swayze, 25 A. 850, 55 N.J.Law 33.
Pa.—Mechanics' Bank v. Gorman, 8 Watts & S. 304.

17. Tenn.—Berry v. Clements, 9 Humphr. 312—Murfree v. Carmack, 4 Yerg. 270, 26 Am.D. 232.

18. Pa.—In re Boyer, 51 Pa. 432, 91 Am.D. 129.
34 C.J. p 613 note 64.

19. Pa.—Home Sav. Fund v. King, 173 A. 891, 113 Pa.Super. 400.
34 C.J. p 613 note 65—41 C.J. p 519 note 28, p 548 note 99 [b], [d].

20. W.Va.—Smith v. Parkersburg Co-Op. Assoc., 37 S.E. 645, 48 W. Va. 232.
34 C.J. p 583 note 62.

21. U.S.—Fooshee v. Snavely, C.C. A.Va., 58 F.2d 774, certiorari denied 53 S.Ct. 85, 287 U.S. 635, 77 L.Ed. 550.

where the giving of the judgment and the execution and delivery of the deed for the land were simultaneous or parts of the same continuous transaction, but not otherwise.[22] However, a judgment for the balance due on the purchase price of realty, on which the judgment was declared to be a specific lien, gives the judgment creditor no lien prior to that of a third person under a mortgage executed before entry of the judgment;[23] and, although the judgment debtor may not be permitted to claim homestead as against a purchase-money judgment, such fact does not affect the rights of a mortgagee acquiring his interest in the property before the entry of the judgment.[24]

e. Purchase-Money Mortgage

A mortgage or trust deed given to secure the purchase price of land and executed simultaneously with the conveyance has priority of lien over judgments obtained before the conveyance.

A mortgage[25] or trust deed given to secure the purchase price of land,[26] and executed simultaneously with the conveyance,[27] has priority of lien over judgments obtained against the purchaser anterior to the conveyance, whether the mortgage is given to the vendor himself or to a third person who advances the purchase money for the vendee,[28] and as well where part of the purchase money is paid, and the mortgage given to secure the balance, as when the mortgage is given for the whole purchase money.[29] Some authorities have held that the mortgage will not be entitled to priority unless it is recorded;[30] others that the mortgage takes priority over a prior judgment, even though it is not recorded immediately,[31] or at all,[32] but that this rule has no application to a subsequent judgment,[33] although even in the latter case some authorities give priority to the unrecorded mortgage.[34] The fact that a portion of a mortgage to secure the purchase price was given to secure the mortgagee against liability on his indorsement of the judgment debtor's note to the judgment creditor does not affect his right to priority over the judgment creditor for the full amount of the mortgage where, in a suit by the judgment creditor to set aside as fraudulent a conveyance by the judgment debtor, no personal judgment was asked against the mortgagee and the mortgagee remained liable on his indorsement.[35]

Mortgage not for purchase money. A mortgage to an attorney, given to secure payment of the amount due for legal services rendered, cannot be considered as a purchase-money mortgage, as against a prior judgment lien,[36] nor can a mortgage given to secure not only the balance of the purchase price but also debts to third persons.[37]

f. Contemporaneous Mortgage to Secure Other Debts

Where a judgment debtor on acquiring property executes a mortgage to secure debts other than for the purchase money of the property, a judgment lien takes precedence over the mortgage.

Where a judgment debtor at the same time he acquires title to land executes a mortgage thereof to a third person, to secure any debt other than for the purchase money of the land, the judgment lien will take precedence of the mortgage,[38] but there is authority to the contrary where such mortgage was given as part of the one continuous transaction by which title was acquired.[39]

g. Contracts of Sale and Vendor's Lien

In general, the rights of a vendee are not affected

22. Pa.—Appeal of Snyder, 91 Pa. 477.
34 C.J. p 613 note 68—40 C.J. p 286 note 85.

23. N.C.—Jarrett v. Holland, 196 S.E. 314, 213 N.C. 428.

24. N.C.—Jarrett v. Holland, supra.

25. Ind.—Peet v. Beers, 4 Ind. 46.
34 C.J. p 613 note 69—41 C.J. p 529 note 41.
Defective purchase-money mortgages have been held superior to judgment recovered before debtor acquired title.—Groh v. Cohen, 149 A. 459, 158 Md. 638.

26. Ga.—Achey v. Coleman, 19 S.E. 710, 92 Ga. 745.
34 C.J. p 613 note 70.

27. Ark.—Western Tie & Timber Co. v. Campbell, 169 S.W. 253, 113 Ark. 570, 575, Ann.Cas.1916C 943.
34 C.J. p 613 note 71.

28. Ark.—Western Tie & Timber Co. v. Campbell, supra.
34 C.J. p 614 note 72.

29. Ga.—Protestant Episcopal Church of Diocese of Georgia v. E. E. Lowe Co., 63 S.E. 136, 131 Ga. 666, 127 Am.S.R. 243.
34 C.J. p 614 note 73.

30. Pa.—Appeal of Foster, 3 Pa. 79.

31. Ga.—Courson v. Walker, 21 S.E. 287, 94 Ga. 175.
La.—Rochereau v. Colomb, 27 La. Ann. 337.

32. Ill.—Roane v. Baker, 11 N.E. 246, 120 Ill. 308.
Tex.—Masterson v. Burnett, 66 S.W. 90, 27 Tex.Civ.App. 370.
34 C.J. p 614 note 76.

33. Ill.—Thorpe v. Helmer, 113 N.E. 954, 275 Ill. 86.
34 C.J. p 614 note 77.

34. Va.—Cowardin v. Anderson, 78 Va. 88.

35. Ky.—Lyon v. Lemaster, 109 S.W.2d 39, 270 Ky. 122.

36. Ind.—Yarlott v. Brown, 149 N.E. 921, 86 Ind.App. 479.

37. Conn.—Joseph v. Donovan, 164 A. 498, 116 Conn. 160.
Ill.—Gorham v. Farson, 10 N.E. 1, 119 Ill. 425.

38. N.C.—Weil v. Casey, 34 S.E. 506, 125 N.C. 356, 74 Am.S.R. 644.
34 C.J. p 613 note 66.
Mortgage for future advances
Lien of prior judgment against vendee takes priority over mortgage to secure future advances, given by vendee when acquiring title.—Fidelity Union Title & Mortgage Guaranty Co. v. Magnifico, 151 A. 499, 106 N.J.Eq. 559.

39. Ill.—Christie v. Hale, 46 Ill. 117.
34 C.J. p 613 note 67.

by a judgment recovered against the vendor subsequent to the execution of the contract of sale, nor are the rights of the vendor affected by a judgment recovered against the vendee.

The rights of the vendee under an executory contract for the sale of land are not displaced or impaired by the subsequent accruing of a judgment lien against the vendor,[40] especially where the vendee is in possession under such contract.[41]

The lien of a judgment creditor of the vendee is inferior to a vendor's lien where a lien is expressly reserved by the vendor in the deed or contract of sale[42] or is reserved under a statute,[43] or where the vendor has retained title until payment of the purchase money,[44] although the instrument reserving the lien is not recorded.[45] It is also the general rule that the vendor's implied lien is superior to that of a judgment creditor,[46] and this rule has been followed by some courts where the judgment creditor had no notice of the vendor's lien.[47] It has been held in some jurisdictions, either in compliance with recording statutes or otherwise, that a vendor's implied lien is inferior to that of a judgment creditor without notice,[48] and is superior to the lien of the judgment creditor only where such creditor has notice of the vendor's lien,[49] and that a vendor's lien is inferior to a judgment lien prior in time and duly recorded.[50]

It has been held that a lien stipulated for in a separate instrument, both the deed of conveyance and the instrument reserving the lien being recorded, will not give preference to the vendor's lien over subsequent judgment creditors of the purchaser.[51] In a jurisdiction where the vendor's implied lien is not recognized until the vendor has filed a bill to fix and enforce his claim on the land, it has been held that any creditor of the purchaser may attach or cause execution to be levied on the land and prevail on the lien thereof over the vendor,[52] and, although the land has been reconveyed to the vendor by the purchaser, the vendor does not stand in the same position as though he had brought an action for the enforcement of his implied lien, and, until the deed of reconveyance is recorded, the right of a judgment creditor of the purchaser levying on the land under an execution will be superior to that of the vendor.[53]

Where a vendor's lien is prior to a judgment lien, a subsequent taking of a deed of trust to secure the vendor's lien notes, and foreclosure of such deed, does not render the vendor's lien a subsequent lien.[54] In a suit to foreclose a vendor's lien, a judgment rendered previously but not recorded until after the suit was commenced cannot be relied on to support rights claimed by the original vendor's wife against plaintiff.[55] The recording of an abstract of judgment against the vendor and vendee of an executory contract of sale of realty does not im-

40. Ga.—Burr v. Toomer, 29 S.E. 692, 103 Ga. 159.
Md.—Caltrider v. Caples, 153 A. 445, 160 Md. 392, 87 A.L.R. 1500—Kinsey v. Drury, 126 A. 125, 146 Md. 227.
Neb.—Wehn v. Fall, 76 N.W. 13, 55 Neb. 547, 70 Am.S.R. 344—Olander v. Tighe, 61 N.W. 633, 43 Neb. 344.
N.J.—Simonds v. Essex Pass. R. Co., 41 A. 682, 57 N.J.Eq. 349.
Okl.—Scott-Baldwin Co. v. McAdams, 141 P. 770, 43 Okl. 161.
Or.—May v. Emerson, 96 P. 454, 52 Or. 262, 16 Ann.Cas. 1129, rehearing denied 96 P. 1065, 52 Or. 262, 16 Ann.Cas. 1129.
S.C.—Adickes v. Lowry, 12 S.C. 97—Massey v. McIlwain, 11 S.C.Eq. 421.
Tenn.—Moore v. Dinning, 13 S.W.2d 798, 158 Tenn. 374.
W.Va.—Donnally v. Parker, 5 W.Va. 301.
34 C.J. p 614 note 79.
Vendee's right to require conveyance on fulfilling contract not defeated by attaching of judgment lien see supra § 480.

Parol contract

Where a parol contract to convey is afterward executed in good faith, the rights of the vendee are not defeated by a judgment against the vendor rendered after the making of the contract but before execution of the conveyance.—Minns v. Morse, 15 Ohio 568, 45 Am.D. 590.

41. N.Y.—Stillwell v. Hart, 57 N.Y.S. 639, 40 App.Div. 112.
34 C.J. p 614 note 80.

42. Ky.—Likens v. Pate, 169 S.W. 734, 160 Ky. 319.
66 C.J. p 1247 note 71.

Vendor's lien reserved on face of conveyance

Pa.—Miller v. Bucks, 92 Pa.Super. 263.
34 C.J. p 613 note 69 [c].

43. Tenn.—Vaughn v. Vaughn, 12 Heisk. 472.

44. Ga.—American Law Book Co. v. Brunswick Cross-Tie & Creosoting Co., 77 S.E. 104, 12 Ga.App. 259.
Ind.—Lagow v. Badollet, 1 Blackf. 416, 12 Am.D. 258.
66 C.J. p 1247 note 73.

45. Va.—Shipe, Cloud & Co. v. Repass, 28 Gratt. 716, 69 Va. 716.

46. N.J.—Thatelbaum v. Neidorf, 135 A. 57, 100 N.J.Eq. 236.
Tex.—McKelvain v. Allen, 58 Tex. 383.
34 C.J. p 614 note 81—66 C.J. p 1247 note 76.

47. Ohio.—Miller v. Albright, 53 N.E. 490, 60 Ohio St. 48.
66 C.J. p 1248 note 77.

48. Iowa.—Spindler v. Iowa & O. S. L. Ry. Co., 155 N.W. 271, 173 Iowa 348.
34 C.J. p 614 note 82—66 C.J. p 1248 note 79.

Simulated purchaser's creditors acquiring and recording judicial mortgages against all his property without actual knowledge of record of simulated sale acquired title as against simulated vendor holding unrecorded counter letter.—State ex rel. Hebert v. Recorder of Mortgages, 143 So. 15, 175 La. 94.

49. Ky.—Morford v. Browning, 11 Ky.Op. 186.

50. Va.—Kidwell v. Henderson, 143 S.E. 336, 150 Va. 329.

51. Pa.—McLanahan v. Reeside, 9 Watts 508, 36 Am.D. 136.

52. Tenn.—Hood v. Hogue, 175 S.W. 531, 131 Tenn. 421, Ann.Cas. 1916D 383.

53. Tenn.—Hood v. Hogue, supra.

54. Tex.—Shaw v. Ball, Com.App., 23 S.W.2d 291.

55. Tex.—Dutton v. Kinsey, Civ. App., 124 S.W.2d 446.

pair the right of a prior holder in due course for valuable consideration before maturity of vendor's lien notes to rescind the vendor's lien contract and recover possession of the property.[56] The lien of a judgment creditor of a purchaser under a land contract has been held subordinate to the title of the grantor to whom the purchaser reconveyed in consideration of cancellation of notes given for the purchase price of the land.[57]

Rescission of the contract, after a judgment against the vendee but before levy, has been held not to affect the lien of the judgment creditor, where the judgment lien has attached before the rescission.[58] A judgment lien attaching to realty after a vendor's lien has been barred by limitations is superior to title acquired by the grantors from a deed reconveying the property[59] and to their title as unsatisfied vendors in possession.[60] A judgment in favor of an original vendor establishing a vendor's lien cuts off the claim of a subsequent mortgagee named in a trust deed so that a purchaser at a sale foreclosing the trust deed acquires no rights in the realty.[61] Where a grantor conveys property by deed providing for revocation of the transfer on breach of a condition subsequent, the rights of the grantor on breach of the condition are superior to the general lien of a judgment against the grantee.[62]

Creditor purchaser at trust sale. It has been held that a vendor's implied lien is inferior to the claim of a creditor of the purchaser who acquired a specific lien on the property under a deed of trust and who purchased the property at trust sale.[63]

h. Government Claims

In the absence of statute; ordinary debts due the government are not entitled to priority over a prior judgment.

Ordinary debts due to a state government have no priority over judgment liens previously attaching.[64] As discussed in Bankruptcy § 453, the statutory priority in favor of claims of the United States in cases of bankruptcy or insolvency does not cause such claims to override judgment liens attaching to the debtor's property before the insolvency or before the institution of bankruptcy proceedings.

§ 486. Postponement of Lien

a. In general
b. Stay of execution; appeal
c. Entry of satisfaction without actual satisfaction
d. Modification of judgment

a. In General

The lien of a judgment may be postponed and made subordinate to later liens by failure to keep the judgment alive as required by statute, or by conduct of the judgment creditor amounting to fraud, waiver or estoppel.

Unless otherwise provided by statute,[65] where a judgment is a senior lien its priority is not lost by mere delay in enforcing it, in the absence of circumstances warranting an inference of fraud,[66] or unless the delay amounts to gross negligence;[67] nor will neglect to satisfy a judgment out of the debtor's personal property subordinate the judgment lien on the debtor's land to that of a junior judgment.[68] However, the postponement of a judgment lien to a junior lien will result from anything which invalidates or destroys the judgment[69] or amounts to a satisfaction of it,[70] or from conduct on the judgment creditor's part which amounts to fraud on the rights or interests of junior lienors[71] or estops him

56. Tex.—Goldenrod Finance Co. v. Ware, Civ.App., 142 S.W.2d 614, error dismissed, judgment correct.

57. Tex.—Thompson v. Mayhew Lumber Co., Civ.App., 103 S.W.2d 1005.

58. Ga.—Stewart v. Berry, 10 S.E. 601, 84 Ga. 177.

59. Tex.—Yates v. Darby, 131 S.W. 2d 95, 133 Tex. 593.

Judgment filed before vendor's lien barred

A judgment lien when filed attached to any interest of judgment debtor in realty, and, when superior vendor's lien became barred of record by limitation, the judgment lien immediately attached and became the prior lien on the realty, notwithstanding vendor's lien was not barred of record at the time abstract of judgment was filed.—Hughes v. Hess, Civ.App., 166 S.W.2d 718, reformed in part 172 S.W.2d 301, 141 Tex. 511.

60. Tex.—Yates v. Darby, 131 S.W. 2d 95, 133 Tex. 593.

61. Tex.—Glasscock v. Travelers Ins. Co., Civ.App., 113 S.W.2d 1005, error refused.

62. Ind.—Royal v. Aultman-Taylor Co., 19 N.E. 202, 116 Ind. 424, 2 L.R.A. 526.

63. Tenn.—Fain v. Inman, 6 Heisk. 5, 19 Am.R. 577.

64. Md.—Hollingsworth v. Patten, 3 Harr. & M. 125.
Mo.—Finley v. Caldwell, 1 Mo. 512.

65. **Failure to issue execution**

Under some statutes where a judgment creditor allows more than a year to elapse without taking out execution on his judgment its lien will become inferior to the liens of other judgments which have been kept alive.—Southern Mortg. Guaranty Corporation v. King, 77 S.W.2d 810, 168 Tenn. 309—34 C.J. p 604 note 80.

66. Miss.—Foute v. Campbell, 8 Miss. 377.

67. Miss.—Robinson v. Green, 7 Miss. 223.

68. Ind.—Leonard v. Broughton, 22 N.E. 731, 120 Ind. 536, 16 Am.S.R. 347.

69. Tenn.—Porter v. Cocke, Peck p 30.

70. Ark.—Trapnall v. Richardson, 13 Ark. 543, 58 Am.D. 338.
Pa.—Moseby's Appeal, 8 A. 165, 3 Pa.Cas. 108.

71. Ga.—Green v. Ingram, 16 Ga. 164.
Pa.—Kimmel's Appeal, 91 Pa. 471.
34 C.J. p 615 note 91.

to assert his priority,[72] or from his voluntary release of his lien or agreement to postpone it,[73] or from conduct constituting a waiver thereof.[74]

Under a statute authorizing a junior judgment lienholder to give a senior judgment lienholder written notice requiring him to execute his judgment, and depriving him of his priority if he fails to do so, failure to give such notice is deemed acquiescence in the delay,[75] but, where such notice is given and execution is sued out and placed in the hands of the proper officer, the senior judgment creditor need not go further and point out property of the debtor subject to the execution in order to preserve his priority,[76] and a junior lienor cannot gain priority by finding and pointing out property subject to execution.[77] Where the purchaser of land fails to sue within the time required by statute for bringing an action for specific performance of the contract, a judgment against the vendor, acquired after the contract was made, takes priority over the rights of the purchaser.[78]

An injunction awarded at the instance of a stranger to prevent the collection of a judgment by sale of the property levied on does not impair the lien of the judgment; on dissolution of the injunction the judgment will be entitled to priority as against judgments whose liens attached during the injunction.[79] One who takes a mortgage on attached property may rely on the failure of the attaching creditor to file his judgment lien within the time required by the statute.[80] The fact that a judgment creditor was not a party to foreclosure proceedings has been held not to render his judgment superior to a previously recorded mortgage.[81] Where, after a judgment is obtained, a mortgage is released of record, the judgment creditor's right to a lien and priority become fixed when the mortgage is released, even though a new mortgage is recorded later.[82]

Where the holder of a trust deed forecloses, purchases at the trustee's sale, and takes a purchase certificate, and in the meanwhile a judgment lien attaches to the property, when the holder surrenders the purchase certificate and accepts a new trust deed the judgment lien becomes entitled to priority since the new deed is not a continuation of the old one.[83] Where a mortgage given to secure valid notes is set aside because of invalidity of the mortgage, this will not invalidate or affect the priority of judgments taken on the notes secured.[84] Where a sale on an execution is set aside for irregularity, and the land is ordered to be resold for the benefit of the purchaser, the lien of the original judgment continues in force as against the lien of any intervening judgment.[85] Where a mechanic does not pursue his remedy by a lien but seeks a personal judgment, such judgment will rank as any other judgment rendered on a personal claim.[86]

Failure to revive. In jurisdictions where, as discussed infra § 494, the lien of a judgment will not continue unless the judgment is periodically revived, the lien of a judgment not revived within the statutory time will be superseded by the lien of junior judgments in full original life or which have been duly revived,[87] even though the senior judgment was for purchase money.[88] Priority may be lost by a revival improperly accomplished.[89]

b. Stay of Execution; Appeal

A stay of execution has been held to have, and also not to have, the effect of postponing a judgment lien. An appeal does not affect a postponement of the judgment to judgments or liens attaching while the appeal is pending.

An extension of time for payment, or a stay of execution on a judgment, whether by agreement of parties, order of court, or injunction, for any time short of the statutory period of limitations, has

72. Neb.—Stannard v. Orleans Flour & Oatmeal Milling Co., 140 N.W. 636, 93 Neb. 389.
34 C.J. p 612 note 50.

73. N.Y.—Bronner v. Loomis, 17 Hun 439.
Pa.—Gardner's Appeal, 7 Watts & S. 295—Quakertown Building & Loan Assoc. v. Sorver, 11 Phila. 532.

74. D.C.—Gottschalk Co. v. Live Oak Distillery Co., 7 App.D.C. 169.
34 C.J. p 615 note 93.

75. U.S.—In re Gulfport Furniture Co., D.C.Miss., 1 F.Supp. 489.

76. Miss.—Scharff v. Zimmerman, 60 Miss. 760.

77. Miss.—Scharff v. Zimmerman, supra.

78. N.J.—Stack v. Sobocinski, 136 A. 333, 100 N.J.Eq. 414.

79. Ala.—Bartlett v. Doe, 6 Ala. 305, 41 Am.D. 52.

80. Conn.—City Nat. Bank v. Stoeckel, 132 A. 20, 103 Conn. 732.

81. Ind.—Hibben, Hollweg & Co. v. Western & Southern Life Ins. Co., 169 N.E. 693, 90 Ind.App. 683.

82. Tenn.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 30 S.W.2d 253, 161 Tenn. 298.

83. Colo.—Home Owners' Loan Corporation v. Meyer, 136 P.2d 282, 110 Colo. 501.

84. U.S.—Lippincott v. Shaw Carriage Co., C.C.Ind., 25 F. 577.

85. Ill.—McHany v. Schenk, 88 Ill. 357.

86. Ga.—Love v. Cox, 68 Ga. 269.

87. Neb.—Glissmann v. Happy Hollow Club, 271 N.W. 431, 132 Neb. 223.
Pa.—Dime Bank of Lansford v. Summit Hill Trust Co., 19 A.2d 738, 341 Pa. 424.
34 C.J. p 615 note 99.

88. Pa.—Ruth's Appeal, 54 Pa. 173.

89. Pa.—First Nat. Bank & Trust Co. v. Miller, 186 A. 87, 322 Pa. 473.
Rights of creditors asserting priority over irregular or ineffective revivals of prior creditors are substantive and do not depend on terre tenant's approval or disapproval, action or inaction.—First Nat. Bank & Trust Co. v. Miller, supra.

been held not to have the effect of postponing the lien of the judgment to other and junior judgment liens,[90] although there is also authority to the contrary.[91]

Appeal. An appeal from a judgment does not discharge its lien, although it may stay its enforcement; hence it does not postpone the judgment to judgments or other liens attaching while the appeal is pending.[92] Where a plaintiff appeals from an award in his favor, and recovers a judgment more favorable to himself, the lien of such judgment does not relate back to the date of the award.[93] A judgment in full force and effect at a time when a subsequent mortgage is executed with constructive and actual notice of the judgment does not lose its priority by reason of a reversal by an intermediate court and the final affirmance of the judgment by a higher court after reversal of the intermediate court.[94]

c. Entry of Satisfaction without Actual Satisfaction

Entry of satisfaction without actual satisfaction may operate to postpone a judgment lien.

A judgment creditor who enters satisfaction of his judgment, or permits it to be done, although without actual satisfaction, authorizes others to consider the property as unencumbered, and will be postponed to their rights or liens.[95] A subsequent cancellation of the entry of satisfaction will restore the judgment to full activity, but it will not restore its priority of lien as against purchasers or encumbrancers whose rights attached after the entry of satisfaction and before its cancellation,[96] although it seems that the priority of the senior judgment may thus be regained as against junior judgment creditors whose judgments were recovered prior to the entry of satisfaction, and who were not in any way misled by such entry.[97]

d. Modification of Judgment

Under statutes so providing, modification of the judgment will not affect the lien existing under it.

A statute which provides that when a judgment is modified all liens under it shall be preserved to the modified judgment applies to judgment liens on personalty as well as to those on real property,[98] even though in form the old judgment was vacated and a new one entered.[99] If, on the revival of a judgment, substantial additions are made thereto the continuity of its lien has been held to be broken in favor of other liens existing at the date of the revival.[1]

§ 487. Proceedings for Determination of Priority

Conflicting claims to priority may be determined in proceedings brought for that purpose, or in various other proceedings in which the question may appropriately be considered.

Conflicting claims to priority as between judgments, mortgages, and other liens may be determined on a bill in equity for the purpose,[2] or in an action or suit for a decree declaring the conflicting liens void[3] or plaintiff's lien superior,[4] or in an action by one claimant against another to fix relative rights,[5] or in a suit to quiet title as against an ad-

90. Ark.—Cook v. Martin, 87 S.W. 625, 1024, 75 Ark. 40, 5 Ann.Cas. 204.
34 C.J. p 615 note 2.

91. U.S.—Winchester-Simmons Co. v. Phillips, C.C.A.Miss., 16 F.2d 109.
34 C.J. p 615 note 3.

92. Ill.—Curtis v. Root, 28 Ill. 367.
34 C.J. p 615 note 4.

93. Pa.—Lentz v. Lamplugh, 12 Pa. 344.

94. Ohio.—Maxwell v. Holmes, 1 Ohio N.P.,N.S., 13.

95. Ala.—Mobile Branch Bank v. Ford, 13 Ala. 431.
Ill.—Page v. Benson, 22 Ill. 484.
Miss.—Parks v. Person, Sm. & M.Ch. 76.

96. Pa.—Beaver Falls Building & Loan Ass'n v. Froimson, 30 Pa. Dist. & Co. 489.
34 C.J. p 616 note 7.

97. Pa.—McCune v. McCune, 30 A. 577, 164 Pa. 611—In re McLane, 1 Pa.Com.Pl. 117.
W.Va.—Renick v. Ludington, 14 W. Va. 367.

98. Wash.—Smith v. De Lanty, 39 P. 638, 11 Wash. 386.

99. Wash.—Smith v. De Lanty, supra.
34 C.J. p 616 note 11.

1. Pa.—Early v. Zeiders, 7 Pa.Co. 569.
34 C.J. p 616 note 13.

2. Miss.—Howard v. Simmons, 43 Miss. 75.
Va.—Irvine v. Randolph Lumber Corp., 69 S.E. 350, 111 Va. 408.
34 C.J. p 616 note 13.
Pleadings held sufficient
Ala.—Johnston v. Bates, 95 So. 375, 209 Ala. 16.
Petition held insufficient
Ga.—Ivey v. Gatlin, 20 S.E.2d 592, 194 Ga. 27.

3. Minn.—Powers v. Bunnell, 140 N. W. 748, 121 Minn. 152.
34 C.J. p 616 note 14.

4. Ind.—Bible v. Voris, 40 N.E. 670, 141 Ind. 569.
34 C.J. p 616 note 15.
Matters to be alleged and proved
Judgment creditor whose judgment lien attached to property after vendor's lien had been barred by limitations held not required to allege and prove right as purchaser for value without notice as against vendors to whom reconveyance was attempted after attachment of judgment lien, in attempt to revive vendor's lien under original note.—Yates v. Darby, Civ.App., 103 S.W.2d 1007, affirmed 131 S.W.2d 95, 133 Tex. 593.

5. Colo.—Larson v. Ross, 50 P. 780, 10 Colo.App. 267.
Trespass to try title
Defendants, in trespass to try title claiming as bona fide purchasers without notice of judgment in favor of plaintiff's predecessor in title, had burden to show that they acquired land for value, and without notice of rendition of such judgment.—Permian Oil Co. v. Smith, 73 S.W.2d 490, 129 Tex. 413, 111 A.L.R. 1152, rehearing denied 107 S.W.2d 564, 129 Tex. 413, 111 A.L.R. 1152.

verse claimant,[6] or on a rule to show cause why the alleged conflicting lien should not be stricken off,[7] or an issue framed between judgment creditors to test the validity and rank of their respective judgments,[8] or in receivership proceedings,[9] or in proceedings to distribute the funds raised by execution sale of the property affected.[10] So a judgment creditor, if made defendant to a mortgage foreclosure suit, may set up the priority of his lien and have it determined.[11] It has been held that a judgment creditor's right to assert priority over a prior judgment can arise only on distribution of the funds from the sale of the land on which the lien is claimed.[12]

As a general rule a question of this kind should be determined from the records, and not left to a jury to decide by extraneous evidence,[13] but where the issue is as to the priority of a judgment on a note entered by confession, the note having authorized any attorney to confess judgment, it has been held proper to permit the attorney who confessed the judgment to testify that he possessed no authority not contained in the note.[14] Third persons asserting title to the property affected by the judgment under a conveyance thereof from the judgment debtor have the burden of showing that they are innocent purchasers without notice.[15] In a suit to establish the priority of a judgment lien over a warranty deed, the burden is on the judgment creditor to prove affirmatively that the deed from the debtor was not delivered before the transcript of judgment was filed,[16] and he must prove his case by a preponderance of the evidence.[17]

§ 488. Transfer of Property Subject to Lien

a. In general
b. Successive or contemporaneous transfers of different tracts
c. Subjection of vendor's remaining property

a. In General

The lien of a judgment is not affected by a transfer of the property by the judgment debtor to a purchaser having actual or constructive notice of the judgment.

According to general principles and apart from any statutory provisions to the contrary, when a judgment lien has once attached to land it remains until legally removed, and a purchaser from the judgment debtor who has actual or constructive notice of the judgment lien will take the estate charged therewith[18] to the extent of the amount of

6. Colo.—Floyd v. Sellers, 44 P. 373, 7 Colo.App. 498.
34 C.J. p 616 note 17.

Sufficiency of evidence
In action to quiet title wherein creditor claimed judgment lien, evidence that party who obtained judgment against landowners was creditor's assignee for collection held not to sustain finding that creditor did not recover judgment against landowners.—Weiner v. Luscombe, 66 P. 2d 151, 19 Cal.App.2d 668.

7. La.—Merrick v. McCausland, 24 La.Ann. 256—Larthet v. Hogan, 1 La.Ann. 330.

8. Pa.—Duffy v. Duffy, 6 Pa.Co. 161—Boyd v. Roberts, 2 Pa.Co. 535.
34 C.J. p 616 note 19.

9. Tex.—Murphy v. Argonaut Oil Co., Com.App., 23 S.W.2d 339.

10. Ga.—Coleman v. Slade, 75 Ga. 61.
S.C.—Blohme v. Lynch, 2 S.E. 136, 26 S.C. 300.
34 C.J. p 616 note 20.

11. Wash.—Book v. Willey, 35 P. 1098, 8 Wash. 267.

12. Pa.—First Nat. Bank & Trust Co. v. Miller, 186 A. 87, 322 Pa. 473.

13. Miss.—Johnson v. Edde, 58 Miss. 664—Burney v. Boyett, 2 Miss. 39.
Pa.—Polhemus' Appeal, 32 Pa. 328—Adams v. Betz, 1 Watts 425, 26 Am.D. 79.

Admissibility of judgment
As against strangers, a judgment is admissible in evidence as showing the fact and time of its rendition, when those facts become material in fixing its rank in competition with other liens.
U.S.—Southern R. Co. v. Bouknight, S.C., 70 F. 442, 17 C.C.A. 181, 30 L.R.A. 823.
N.J.—Naylor v. Mettler, Ch., 11 A. 859.

14. Ind.—Bible v. Voris, 40 N.E. 670, 141 Ind. 569.

15. Ga.—Ray v. Atlanta Trust & Banking Co., 93 S.E. 418, 147 Ga. 265.

16. Iowa.—Richardson v. Estle, 243 N.W. 611, 214 Iowa 1007.

17. Iowa.—Richardson v. Estle, supra.

Evidence held sufficient
To show delivery by deposit of deed in mail before transcript of judgment was filed.—Richardson v. Estle, supra.

18. Ga.—Carlton v. Reeves, 122 S.E. 320, 157 Ga. 602.
Ill.—Erlinger v. Freed, 180 N.E. 400, 347 Ill. 588.
La.—Wunderlich v. Palmisano, App., 177 So. 843—Thompson-Ritchie Grocery Co. v. Cary, 135 So. 707, 17 La.App. 270.
Md.—Wilmer v. Light Street Savings & Building Ass'n of Baltimore City, 122 A. 129, 143 Md. 272.
Miss.—Gerlach-Barklow Co. v. Ellett, 111 So. 92, 145 Miss. 60.
N.Y.—Newark Fire Ins. Co. v. Brill, 7 N.Y.S.2d 773.
N.C.—Osborne v. Board of Education of Guilford County ex rel. State, 177 S.E. 642, 207 N.C. 503—Moses v. Major, 160 S.E. 890, 201 N.C. 613.
Tex.—Baker v. West, 36 S.W.2d 695, 120 Tex. 113.
34 C.J. p 616 note 25.
Priority between judgment and subsequent conveyance see supra § 485 b.

Discharge of lien
Under some statutes any person who has purchased real property, in good faith and for a valuable consideration, and has been in possession of the same for four years, holds it discharged from the lien of any judgment against his grantor.—Reynolds v. Hardin, 200 S.E. 119, 187 Ga. 40—34 C.J. p 616 note 25 [n].

Sufficiency of notice
Generally the purchaser of realty need not look beyond judgment docket for liens thereon, unless it shows something that should reasonably put him on inquiry, which would lead to knowledge of requisite facts; but he is affected with notice of whatever judgment record reasona-

the judgment as recorded at the time of his purchase,[19] although the amount of the judgment is larger than was represented to the purchaser by the judgment debtor at the time of the transfer,[20] unless the judgment creditor will waive or release his lien.[21] However, the lien does not attach to the fund received from the sale.[22]

Where a judgment creditor has made an election to receive part of his debt out of the proceeds from the sale of lands on which his judgment was a prior lien, he cannot afterward enforce the lien against the land,[23] and, where a sale of the debtor's property is effected by order of court, it is competent to direct that it shall be sold free of encumbrances, the liens being then transferred to the fund.[24] A purchaser at a sheriff's sale under the judgment will succeed to the rights of the judgment creditor in these respects.[25] The purchaser of property against which a judgment lien has attached does not become personally liable for the amount of the lien,[26] even though the amount of the lien was considered by him in fixing the price he was willing to pay.[27] However, where the lien attaches to personalty, a purchaser of the personalty who removes it from the county where the lien attached may be liable to the judgment creditor for thereby defeating the lien.[28] It is not within the power of the judgment debtor to defeat or displace the judgment lien by repudiating the title or attorning to a third person,[29] or otherwise transferring his interest, to which the judgment lien has attached.[30] A conveyance expressly subject to the lien of all mortgages, attachments, and judgments of record is subject only to such judgments of record at the time of the transfer which are valid liens.[31]

Land held in trust. Under some statutes a judgment against a debtor attaches to land conveyed by him to another to be held in trust for him and is superior to a mortgage subsequently executed by the debtor.[32]

b. Successive or Contemporaneous Transfers of Different Tracts

Where property subject to the lien of a judgment is sold or encumbered by the debtor at different times to different persons, the general rule is that there is no contribution among the successive purchasers and the property is liable to the satisfaction of the judgment in the inverse order of alienation.

Although there are some decisions to the contrary,[33] where lands subject to the lien of a judgment have been sold or encumbered by the owner at different times to different purchasers, the general rules is that there is no contribution among the successive purchasers, but the various tracts are liable to the satisfaction of the judgment in the inverse order of their alienation or encumbrance, the land last sold being first chargeable,[34] even though the last purchaser secures a conveyance before the first

bly suggests, and notice naturally leading investigator to discovery of judgment and debtor's identity is sufficient.—Lambert v. K-Y Transp. Co., 172 A. 180, 182 Pa.Super. 82.

Assignment of interest in estate

A voluntary assignment by heir to another heir of his interest in an estate, prior to institution of probate proceedings wherein estate was subsequently probated and wherein interest assigned was distributed to assignee, did not exclude judgment lien against interest of assignor in property, obtained prior to assignment.—Walters Motor Co. v. Musgrove, 75 P.2d 471, 181 Okl. 540.

Improvements by purchaser

La.—Glass v. Ives, 126 So. 69, 169 La. 809.

34 C.J. p 616 note 25 [k].

19. N.Y.—Haverly v. Becker, 4 N.Y. 169.
W.Va.—Bensimer v. Fell, 12 S.E. 1078, 35 W.Va. 15, 29 Am.S.R. 774.

20. N.Y.—Haverly v. Becker, 4 N.Y. 169.

21. Colo.—Freeman v. Brockway, 50 P. 32, 24 Colo. 441.
N.Y.—Davis v. Tiffany, 1 Hill 642.
34 C.J. p 617 note 28.

22. Va.—Jones v. Hall, 15 S.E.2d 108, 177 Va. 658.

34 C.J. p 617 note 29.

Sale of timber

Where judgment debtor sold timber which was cut and removed and judgment creditor, although living within about five hundred yards of the timber, took no steps to prevent its removal, and there was no fraud or collusion by judgment debtor and purchaser of the timber, and subsequently judgment debtor's land which was sold by other creditors did not bring sufficient amount to pay judgment creditor, the judgment creditor was not entitled to recover from purchaser amount of proceeds of the sale of timber which had been paid by the purchaser to judgment debtor.—Jones v. Hall, supra.

23. Va.—Effinger v. Kenney, 23 S.E. 742, 92 Va. 245.
34 C.J. p 618 note 30.

24. Minn.—Nelson v. Jenks, 52 N.W. 1081, 51 Minn. 108.
S.C.—Garvin v. Garvin, 1 S.C. 55.

25. S.C.—Hart v. Felder, 4 S.C.Eq. 202.
34 C.J. p 618 note 32.

26. Mo.—Vogelstein v. Athletic Mining Co., App., 192 S.W. 760.
34 C.J. p 618 note 33.

27. Neb.—Lexington Bank v. Salling, 92 N.W. 318, 66 Neb. 180.
34 C.J. p 618 note 34.

28. Ala.—Haynes Mercantile Co. v. Bell, 50 So. 311, 163 Ala. 326.

29. Ind.—Hawkins v. State, 25 N.E. 818, 125 Ind. 570.
34 C.J. p 618 note 36.

30. Ga.—Kidd v. Kidd, 124 S.E. 45, 158 Ga. 546, 36 A.L.R. 798—Foreman v. Pattison, 160 S.E. 662, 43 Ga.App. 819—Ritchie & Wells v. Irvin, 139 S.E. 910, 37 Ga.App. 280.
Wash.—Heath v. Dodson, 110 P.2d 845, 7 Wash.2d 667.

31. Ariz.—Security Trust & Savings Bank v. McClure, 241 P. 515, 29 Ariz. 325.

32. Ind.—Yarlott v. Brown, 149 N.E. 921, 86 Ind.App. 479.

33. Iowa.—Massie v. Wilson, 16 Iowa 390.
34 C.J. p 618 notes 37, 38.

34. Tex.—Nichols v. Cansler, Civ. App., 140 S.W.2d 254, error dismissed, judgment correct.
34 C.J. p 618 note 39.

purchaser,[35] and although the lands conveyed were acquired by the judgment debtor at different times and from different sources,[36] unless the order of liability is affected by the conduct of a purchaser[37] or is broken by a voluntary release by the judgment creditor of one or more of the tracts.[38]

It has been held that the release of the lien on a portion subsequently conveyed will not discharge the lien on a portion previously conveyed, unless the judgment creditor is distinctly notified before the release of the prior conveyance, and cautioned against doing any act by which the rights of the grantee in such prior conveyance will be diminished.[39] A judgment creditor, having released or by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable for the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable.[40] Where the judgment creditor himself becomes the owner of one of the tracts of land liable to the lien of his judgment, the other having been sold to a third person, he cannot release his own tract, with the effect of throwing the entire burden of the judgment upon that held by such third person.[41]

Where the different parcels of land are sold contemporaneously, they must contribute pro rata to the satisfaction of the judgment.[42]

c. Subjection of Vendor's Remaining Property

While the sale of property to which a judgment lien has attached does not divest the lien, ordinarily the judgment creditor must enforce his lien first against property remaining in the hands of the debtor.

Although a judgment lien is not divested by the subsequent sale or encumbrance of the land, where only part of the judgment debtor's land has been sold[43] or mortgaged,[44] the general rule is that equity will require the judgment creditor seeking to enforce his lien to proceed first against that portion remaining unsold or unencumbered, provided this can be done without injustice to him and without involving him in litigation or danger of loss,[45] and the rule extends to a purchaser of the remaining land from the debtor.[46] If there is not sufficient land of the debtor remaining unsold to satisfy the judgment entirely, the creditor is entitled in equity to resort to the land of the purchaser or encumbrancer to the extent only of his debt which may remain unpaid after the estate of the debtor has been exhausted.[47]

Where part of the land has been mortgaged and part aliened in fee, the judgment creditor must first proceed to sell the debtor's equity of redemption in the mortgaged lands before coming on the property conveyed in fee.[48] One who purchases land charged with the lien of a judgment, which is specifically excepted from the covenants of warranty in the deed, cannot insist that his grantor's chattels shall be exhausted before such land is sold for the satisfaction of an execution on the judgment.[49] If a judgment creditor voluntarily releases the debtor's remaining property, of sufficient value to satisfy the

35. N.Y.—Northrup v. Metcalf, 11 Paige 570.
Va.—Rodgers v. M'Cluer, 4 Gratt. 81, 45 Va. 81, 47 Am.D. 715.

36. Tenn.—Meek v. Thompson, 42 S.W. 685, 99 Tenn. 732.

37. Ind.—Jenkins v. Craig, 52 N.E. 423, 22 Ind.App. 192, rehearing denied 53 N.E. 427, 22 Ind.App. 192.
34 C.J. p 619 note 42.

38. N.C.—Brown v. Harding, 83 S.E. 1010, 170 N.C. 253, Ann.Cas. 1917C 548.
Pa.—Snyder v. Crawford, 98 Pa. 414—Davis v. Wood, 1 Del.Co. 382.

39. Pa.—Snyder v. Crawford, 98 Pa. 414.

40. Ill.—Hurd v. Eaton, 28 Ill. 122.
N.Y.—James v. Hubbard, 1 Paige 228.
Va.—Jones v. Myrick, 8 Gratt. 179, 49 Va. 179.

41. N.C.—Wilson v. Beaufort County Lumber Co., 42 S.E. 565, 131 N.C. 163.

42. Ga.—Fleishel v. House, 52 Ga. 60.
Va.—Harman v. Oberdorfer, 33 Gratt. 497, 74 Va. 497.

43. La.—Crichton Co. v. Turner, 111 So. 261, 162 La. 864.
N.C.—Page Trust Co. v. Godwin, 130 S.E. 323, 190 N.C. 512.
34 C.J. p 619 note 49.

Duty of purchaser to protect himself

A judgment creditor owes no duty to a terre-tenant of land bound by his judgment to prosecute his judgment against other lands. The terre-tenant can protect himself either by giving proper notice of demand that the creditor proceed first against other property of the debtor, or by obtaining an assignment of the judgment to himself. If the terre-tenant does nothing to protect himself, he is not in position to object when the creditor proceeds against the lands which he holds.—Ruff v. Barclay-Westmoreland Trust Co., 79 Pa.Super. 370.

44. N.C.—Brown v. Harding, 86 S.E. 1010, 170 N.C. 253, Ann.Cas. 1917C 548.
34 C.J. p 619 note 50.

Conventional mortgage

Law requiring judgment creditor to exhaust debtor's remaining property before reverting to that conveyed is not applicable to conventional mortgages.—Crichton Co. v. Turner, 111 So. 261, 162 La. 864.

45. N.C.—Brown v. Harding, 86 S.E. 1010, 170 N.C. 253, Ann.Cas. 1917C 548—Jackson v. Sloan, 76 N.C. 306.
S.C.—Clark v. Wright, 24 S.C. 526.

46. N.C.—Brown v. Harding, 86 S.E. 1010, 170 N.C. 253, Ann.Cas.1917C 548.

47. Va.—Blakemore v. Wise, 28 S.E. 332, 95 Va. 269, 64 Am.S.R. 781.
34 C.J. p 619 note 53.

48. Va.—McClung v. Beirne, 10 Leigh 394, 37 Va. 394, 34 Am.D. 739.

49. Neb.—Wollam v. Brandt, 76 N.W. 1081, 56 Neb. 527.

judgment, he cannot proceed against the portion previously conveyed.[50]

§ 489. Duration of Lien

a. In general
b. Duration as against judgment debtor

a. In General

A judgment lien ordinarily ceases to exist after the expiration of the time fixed by statute for its continuance.

Where no period of time is provided by statute for the continuance of the lien of a judgment, the lien ceases when the right to sue out execution on the judgment or to revive it by scire facias is barred by the statute of limitations:[51] In most jurisdictions, however, the period during which a judgment continues to be a lien is restricted by express statute to a fixed number of years after the rendition or docketing of the judgment,[52] and, unless the time for the duration of the lien has been extended, as considered infra §§ 492–498, the lien ceases to exist after the lapse of the statutory period,[53] although

50. La.—Crichton Co. v. Turner, 111 So. 261, 162 La. 864.

51. N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234.
Tex.—Oakwood State Bank of Oakwood v. Durham, Civ.App., 21 S.W. 2d 586.
34 C.J. p 620 note 56.
Time:
For revival of judgment see infra § 542.
Within which execution may issue see Executions § 66.

52. U.S.—Spurway v. Dyer, D.C. Fla., 48 F.Supp. 255.
Ala.—McClintock v. McEachin, 20 So. 2d 711, 246 Ala. 412—W. T. Rawleigh Co. v. Patterson, 195 So. 729, 239 Ala. 309—Second Nat. Bank v. Allgood, 176 So. 363, 234 Ala. 654.
Cal.—Long v. Thompson, 113 P.2d 698, 45 Cal.App.2d 161.
Colo.—Davis Bros. Drug Co. v. Counter, 225 P. 245, 75 Colo. 239.
D.C.—Ginder v. Giuffrida, 62 F.2d 877, 61 App.D.C. 338.
Fla.—B. A. Lott, Inc. v. Padgett, 14 So.2d 667, 153 Fla. 304.
Ill.—Normal State Bank v. Killian, 48 N.E.2d 212, 318 Ill.App. 637, reversed on other grounds 54 N.E. 2d 539, 386 Ill. 449—Motel v. Andracki, 19 N.E.2d 832, 299 Ill.App. 166.
Ind.—Town of New Chicago v. First State Bank of Hobart, 169 N.E. 56, 90 Ind.App. 643.
La.—State ex rel. Federal Land Bank of New Orleans v. Bullock, App., 145 So. 380.
Mo.—State ex rel. McGhee v. Baumann, 160 S.W.2d 697, 349 Mo. 232.
N.C.—Sansom v. Johnson, 193 S.E. 272, 212 N.C. 383.
N.D.—Groth v. Ness, 260 N.W. 700, 65 N.D. 580—Lenhart v. Lynn, 194 N.W. 937, 50 N.D. 87.
Pa.—First Nat. Bank & Trust Co. v. Miller, 186 A. 87, 322 Pa. 473—Raub Supply Co. v. Brandt, Com. Pl., 27 Del.Co. 507—First Nat. Bank v. Coll, Com.Pl., 59 York Leg. Rec. 44.
S.D.—McMahon v. Brown, 279 N.W. 538, 66 S.D. 134.
34 C.J. p 620 note 57.
Not ordinary statute of limitations
U.S.—In re Levinson, D.C.Wash., 5 F.2d 75.
Idaho.—Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma, 111 P.2d 1093, 62 Idaho 340.
Ill.—Smith v. Toman, 14 N.E.2d 478, 368 Ill. 414, 118 A.L.R. 924.
Wash.—Roche v. McDonald, 239 P. 1015, 136 Wash. 322, 44 A.L.R. 444.
34 C.J. p 620 note 57 [a], p 624 note 83.
In Georgia
(1) Under Code § 110-511, and similar statutes, where any person has in good faith and for valuable consideration purchased real or personal property, and has been in possession of it for four years, the property shall be discharged from the lien of any judgment against the person from whom he purchased.—Page v. Jones, 198 S.E. 63, 186 Ga. 485—34 C.J. p 620 note 57 [e] (1).
(2) Statute is for benefit of buyer and not vendor.—Calhoun v. Williamson, 18 S.E.2d 479, 193 Ga. 314.
(3) Conveyance in payment and discharge of existing debt is "valuable consideration."—Calhoun v. Williamson, supra.
(4) Personal residence on the purchased realty is not necessary.—Page v. Jones, 198 S.E. 63, 186 Ga. 485.
(5) Possession by defendant in fieri facias as tenant of the purchaser will not per se prevent the possession from being that required by the statute, but is merely a circumstance for the consideration of the jury in determining bona fides of the transaction or the possession.—Page v. Jones, supra—34 C.J. p 620 note 57 [e] (3).
(6) Where defendant in fieri facias was parent of claimant and resided with claimant on premises, whether possession was held jointly by both or severally by either, and, if severally, which of the two had possession and exercised acts of ownership over the property, was for jury.—Page v. Jones, supra.
(7) Possession must be actual, open, notorious, in good faith, and exclusive, and to make possession such as would displace lien of the judgment, some sort of notice of adverse possession should appear, or at least such circumstances as to put the plaintiff in fieri facias on inquiry, such as visible signs of dominion.—Page v. Jones, supra—34 C.J. p 620 note 57 [e] (4).
(8) Facts that defendant in fieri facias exercised acts of ownership over premises, even though with consent of claimant and that actual holding by defendant was at least as much for defendant as for claimant, would not authorize finding of possession required by statute.—Page v. Jones, 198 S.E. 63, 186 Ga. 485.
(9) Lien of judgment was not divested by four years of possession where person in possession during such time did not have title.—Carnes v. American Agr. Chemical Co., 123 S.E. 18, 158 Ga. 188.
(10) Knowledge of existence of judgment against grantor, did not, standing alone, constitute prima facie evidence of mala fides on part of grantee, if transaction was in good faith, but such knowledge was a circumstance which jury should consider along with other evidence bearing on question of good faith; statute places burden of proving good faith on purchaser, but does not encumber purchaser with further burden of making such proof while bearing badge of fraud solely because he purchased with knowledge of existence of lien.—Hardin v. Reynolds, 6 S.E.2d 913, 189 Ga. 589.
(11) Other cases see 34 C.J. p 620 note 57 [e].

53. Ariz.—Serasio v. Sears, 121 P.2d 639, 58 Ariz. 522.
Ark.—Lion Oil Refining Co. v. Rex Oil Co., 115 S.W.2d 556, 195 Ark. 1021.
Fla.—B. A. Lott, Inc., v. Padgett, 14 So.2d 667, 153 Fla. 304.
Md.—O'Neill & Co. v. Schulze, 7 A. 2d 263, 177 Md. 64.

the duration of the lien is fixed at a period much shorter than that barring action on the judgment itself.[54] The time fixed by statute may not be shortened[55] or prolonged[56] by the courts, and, as considered infra § 510, the lien cannot be enforced in equity after it has ceased to be enforceable at law by the expiration of the statutory period.

A statute limiting the life of a judgment lien does not apply to a decree establishing a specific lien on particular property or ordering its sale[57] or to a judgment or decree for the foreclosure of a mortgage.[58]

Application of statute to existing judgments. A statute abridging the time for the duration of judgment liens may constitutionally apply to existing judgments, where a reasonable time is accorded to the holders of such judgments in which to enforce their liens.[59] However, it has been held that such a statute cannot apply to an existing judgment where the whole of the new period of limitation would have run before the passage of the act, so that its lien would instantly be cut off.[60]

Judgments in favor of state. Statutes limiting the time during which a judgment lien shall continue to exist have been held to be applicable to judgments in favor of the state,[61] although there is some contrary authority.[62]

Transfer of judgment to another court or county. Where a judgment is transferred from an inferior to a superior court for purposes of lien, or a transcript of it is filed in another county, it is the rule in some states that the statutory period begins to run against the lien of the judgment from the date of such transfer or filing,[63] but in other jurisdictions the lien runs from the date of the original rendition or docketing of the judgment, nothing being added to its duration by the transfer.[64]

Laches as barring lien. It has been held that the lien cannot be barred by the equitable doctrine of laches.[65]

b. Duration as against Judgment Debtor

Under some statutes the lien of a judgment continues against the judgment debtor although it may have expired as against subsequent purchasers or encumbrancers.

Under some statutes it has been held that, al-

Mo.—Woods v. Wilson, 108 S.W.2d 12, 341 Mo. 479.
Mont.—Marlowe v. Missoula Gas Co., 219 P. 1111, 68 Mont. 372.
Neb.—Rich v. Cooper, 286 N.W. 383, 136 Neb. 463.
N.C.—Cheshire v. Drake, 27 S.E.2d 627, 223 N.C. 577—Lupton v. Edmundson, 16 S.E.2d 840, 220 N.C. 188—Barnes v. Cherry, 130 S.E. 611, 190 N.C. 772.
Okl.—Burton v. Grissom, 238 P. 451, 116 Okl. 46.
Or.—**Corpus Juris quoted in** Delsman v. Wilcox, 237 P. 973, 115 Or. 501.
Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41—Sanner v. Unique Lodge No. 3, Knights of Pythias of Rockwood, 37 A.2d 576, 349 Pa. 523—Lewis v. Puchy, 44 Pa.Dist. & Co. 482, 90 Pittsb.Leg.J. 259, 56 York Leg.Rec. 69—In re Becker's Estate, 43 Pa.Dist. & Co. 132, 58 Montg.Co. 95—Klein v. Anderson, 39 Pa.Dist. & Co. 139—Curtze v. Ostrow, 40 Pa.Dist. & Co. 697, 22 Erie Co. 256—In re Jeffries' Estate, 35 Pa.Dist. & Co. 11, 19 Wash.Co. 32—Citizens Bank of Barnsboro v. Variali, 18 Pa.Dist. & Co. 315—Bytheway v. Hill, Com.Pl., 24 West.Co.L.J. 36—First Nat. Bank v. Coll, Com.Pl., 59 York Leg.Rec. 44.
S.C.—Harvey v. Gibson, 2 S.E.2d 385, 190 S.C. 98.
Tenn.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 30 S.W.2d 253, 161 Tenn. 298.
Tex.—Jackson v. Wallace, Com.App., 252 S.W. 745—Burton Lingo Co. v. Warren, Civ.App., 45 S.W.2d 750, error refused.
W.Va.—Robertson v. Campbell, 186 S.E. 310, 117 W.Va. 576.
34 C.J. p 620 note 57, p 622 note 75.

Date of acquisition of property

Judgment lien attaches when the judgment is docketed and continues for five years from such docketing, and does not continue for five years from the time of subsequently acquiring land, under some statutes.—McGrath v. Kaelin, 225 P. 34, 66 Cal. App. 41.

54. Mont.—Marlowe v. Missoula Gas Co., 219 P. 1111, 68 Mont. 372.

55. Colo.—Davis Bros. Drug Co. v. Counter, 225 P. 245, 75 Colo. 239.

56. Ala.—I. Trager Co. v. Mixon, 157 So. 80, 229 Ala. 371.
Ind.—Petrovitch v. Witholm, 152 N. E. 849, 85 Ind.App. 144.
Or.—**Corpus Juris quoted in** Delsman v. Wilcox, 237 P. 973, 115 Or. 501.
34 C.J. p 621 note 58.

57. Neb.—Stanton v. Stanton, 18 N. W.2d 654, 146 Neb. 71.
34 C.J. p 621 note 62.

Judgment perfecting mechanic's lien

Mo.—Rosenzweig v. Ferguson, 158 S.W.2d 124, 348 Mo. 1144.

58. N.Y.—Wing v. De la Rionda, 25 N.E. 1064, 125 N.Y. 678.

59. S.C.—Henry v. Henry, 9 S.E. 726, 31 S.C. 1.
34 C.J. p 621 note 66.

Lien of judgment as vested right see Constitutional Law § 271 b.

60. Va.—Merchants' Bank v. Ballou, 32 S.E. 481, 98 Va. 112, 81 Am.S.R. 715, 44 L.R.A. 306.
34 C.J. p 622 note 67.
Constitutionality of retrospective laws affecting remedies generally see Constitutional Law §§ 256–273, 413.
Impairment of obligation of contract by laws relating to judgment liens see Constitutional Law § 408.

61. U.S.—U. S. v. Harpootlian, C.C. A.N.Y., 24 F.2d 646.
Ill.—Smith v. Toman, 14 N.E.2d 478, 368 Ill. 414, 118 A.L.R. 924.
34 C.J. p 621 note 65.

62. Pa.—McKeehan v. Commonwealth, 3 Pa. 151—Commonwealth v. Graziadei, Quar.Sess., 92 Pittsb. Leg.J. 35.
34 C.J. p 621 note 64.

63. Iowa.—Rand v. Garner, 39 N.W. 515, 75 Iowa 311.
34 C.J. p 574 note 47, p 622 note 69.

64. Colo.—Davis Bros. Drug Co. v. Counter, 225 P. 245, 75 Colo. 239.
N.J.—Twist v. Woerst, 127 A. 578, 101 N.J.Law 7.
34 C.J. p 574 note 48, p 622 note 70.

65. W.Va.—Cunningham v. Birch River Lumber Co., 109 S.E. 251, 89 W.Va. 326.
Laches in issuing execution see infra § 493.

though the lien of a judgment may have expired as against subsequent purchasers or encumbrancers, by the lapse of the statutory period, it will still continue, the judgment remaining unsatisfied, for the purpose of levying execution against the judgment debtor or his heirs or devisees,[66] or a grantee without valuable consideration.[67] Other statutes confine the execution, under such circumstances, to the personal property of the debtor.[68]

§ 490. —— As against Junior Judgments

When the period of limitations has run against a judgment lien, it yields to junior judgments.

When the period of limitations has run against the lien of a judgment, without its revival, it gives way to junior judgments, which thereupon succeed, in their order, to its priority.[69]

§ 491. —— Death of Judgment Debtor

A judgment lien attaching to the lands of a judgment debtor during his lifetime continues against such lands for the same length of time as though he had remained in life, unless some contrary provision is made by statute.

A judgment lien obtained against a debtor during his lifetime ordinarily continues against his lands in the hands of his heirs or devisees for the same length of time as though he had remained in life.[70] In some jurisdictions, however, statutory provisions have been enacted which extend or restrict the lien after the death of the judgment debtor,[71] such as a provision that no lien on the realty of decedent shall remain for more than a year after his death, unless within such period an action for the recovery of the debt shall be brought against the executor or administrator of decedent and such action shall be indexed, etc.,[72] or a provision that all judgment liens shall continue to bind the real estate of decedent during the term of five years from his death, and after the expiration of five years the judgments shall not continue liens on decedent's realty, unless revived by scire facias, or otherwise,[73] or a provision that, when the judgment creditor is delayed because of the death of defendant either from issuing execution or selling thereon, the time he is so delayed is not to be considered as a part of the statutory period during which the lien continues.[74] To

66. Pa.—Klein v. Anderson, 39 Pa. Dist. & Co. 139.
34 C.J. p 622 notes 71, 72.

67. N.Y.—Mohawk Bank v. Atwater, 2 Paige 54.

68. U.S.—Davis v. Davis, W.Va., 174 F. 786, 98 C.C.A. 494.
Pa.—Miller v. Miller, 23 A. 841, 147 Pa. 545, 548.
Property subject to execution see Executions §§ 18–55.

69. Iowa.—**Corpus Juris quoted in** Johnson v. Keir, 261 N.W. 792, 795, 220 Iowa 69.
34 C.J. p 622 note 77.

Decree canceling judgment operating as judicial mortgage because not timely reinscribed was held too broad, and should have been limited to cancellation as far as judgment operated as judgment on property in which relator held mortgage.—State ex rel. Federal Land Bank of New Orleans v. Bullock, La.App., 145 So. 380.

Expiration of period after filing answer

Where junior judgment creditor filed bill to enforce lien and senior judgment creditor answered the bill prior to expiration of the period of limitations, the subsequent expiration of the limitation period did not subordinate the lien of the senior judgment creditor.—Ginder v. Giuffrida, 62 F.2d 877, 61 App.D.C. 338.

70. Cal.—Corporation of America v. Marks, 73 P.2d 1215, 10 Cal.2d 218, 114 A.L.R. 1162.
Mo.—Grace v. Lee, 57 S.W.2d 1095, 227 Mo.App. 766—King v. Hayes, 9 S.W.2d 538, 223 Mo.App. 138.
Neb.—**Corpus Juris cited in** Rich v. Cooper, 286 N.W. 383, 385, 136 Neb. 463.
34 C.J. p 622 note 78.
Judgment against:
Ancestor as lien on lands in hands of heirs see Descent and Distribution § 125 c.
Executor or administrator as lien see Executors and Administrators § 804.
Presenting claim for allowance of judgment against decedent see Executors and Administrators § 398 c.

71. Fla.—Gilpen v. Bower, 12 So.2d 884, 152 Fla. 733.
Pa.—In re Higgins' Estate, 188 A. 831, 325 Pa. 106.
34 C.J. p 623 note 79.

Scire facias

Rights of a judgment creditor claiming a lien on realty in the hands of a decedent's heirs can be determined on a scire facias against the heirs and such rights cannot be summarily fixed by a proceeding against the administrator.—In re Goeckel's Estate, 198 A. 504, 131 Pa. Super. 36.

Revival of lien in circuit court

Mo.—Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo.App. 137.

72. Pa.—Curtze v. Ostrow, 40 Pa. Dist. & Co. 697, 22 Erie Co. 256—Conwell v. Capuzzi, Com.Pl., 21 West.Co.L.J. 289.
Statutes requiring suit within prescribed time after death of decedent see Executors and Administrators § 732 b.

Where judgments were transferred to county in which decedent owned land, within year after decedent's death, and were entered of record, but decedent's administrator was not substituted as party defendant, scire facias, or other proceeding, was not begun, and judgments were not indexed against administrator, liens expired at termination of one year following decedent's death, and, on subsequent sale of land, judgments occupied same position as claims of general creditors.—In re Higgins' Estate, 188 A. 831, 325 Pa. 106.

Scire facias, entered in judgment index within year after debtor's death in suit by creditor against him during lifetime, warning administrator to become party defendant, retained lien of creditor's claim against land fraudulently conveyed.—American Trust Co. v. Kaufman, 135 A. 210, 287 Pa. 461.

73. Pa.—Kefover v. Hustead, 144 A. 430, 294 Pa. 474—Simmons v. Simmons, 28 A.2d 445, 150 Pa.Super. 393, affirmed 29 A.2d 677, 346 Pa. 52—Raub Supply Co. v. Brandt, Com.Pl., 27 Del.Co. 507.

Revival must be within five years from death of decedent or lien is irretrievably lost.—Shareff, to Use of Olney Bank & Trust Co. v. Wolf, 182 A. 115, 120 Pa.Super. 227.

74. **What constitutes delay**

Judgment creditor, precluded from issuing execution against land by death of judgment debtor for twelve-month period is "delayed," notwithstanding conveyance by debtor before death.—Woods v. Primm, C.C.A.Ill., 13 F.2d 572.

preserve the lien against decedent's estate there must be a compliance with the requirements of the statute.[75]

Death of joint tenant. On the death of a joint tenant the lien of a judgment against his interest is extinguished.[76]

§ 492. Extending Lien

The life of a judgment lien ordinarily may not be extended except for the causes and in the manner prescribed by statute.

In the absence of statutory authority the lien of the judgment ordinarily may not be extended beyond the period of time fixed by statutory regulations.[77] In some jurisdictions the statutes specify the causes for which the life of the judgment lien shall be extended,[78] and such statutes should be strictly construed[79] and the lien ordinarily may not be extended except for the causes and in the manner prescribed by the statute.[80] A statutory provision that execution may be had on real estate after the expiration of the statutory period for which the lien continues by filing a notice, subscribed by the sheriff, describing the judgment, the execution, and the property levied on, does not extend the original lien of the judgment.[81]

Revival of judgment distinguished. The right to revive a judgment is to be distinguished from the right to keep the lien of the judgment in life in that the former is a right of action while the latter is not.[82]

§ 493. —— Issue and Levy of Execution

Unless permitted by statute, a judgment creditor ordinarily cannot extend the lien of a judgment by the issuance and levy of an execution.

In several states the statutes prescribe that after the lapse of a certain time the lien of a judgment shall be lost, unless within that time steps have been taken to enforce it, as by the levy of an execution on property of defendant.[83] Some statutes which prescribe a period for the continuance of the lien also require execution to be taken out within a certain shorter time, as, for instance, within one year after the rendition of the judgment, in order to keep the lien alive during the whole statutory period.[84] Under other statutes, failure to issue an execution within such shorter period does not de-

75. Pa.—In re Higgins' Estate, 188 A. 331, 325 Pa. 106.

76. Cal.—Zeigler v. Bonnell, 126 P. 2d 118, 52 Cal.App.2d 217.
Ill.—People's Trust & Savings Bank v. Haas, 160 N.E. 85, 328 Ill. 468—Spikings v. Ellis, 8 N.E.2d 962, 290 Ill.App. 585.
Wis.—Musa v. Segelke & Kohlhaus Co., 272 N.W. 657, 224 Wis. 432, 111 A.L.R. 168.
Right of survivorship see Joint Tenancy §§ 1–4.

77. Tex.—Burton Lingo Co. v. Warren, Civ.App., 45 S.W.2d 750, error refused.

78. Ind.—Petrovitch v. Witholm, 152 N.E. 849, 85 Ind.App. 144.
N.C.—Lupton v. Edmundson, 16 S.E. 2d 840, 220 N.C. 188.
Tenn.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 30 S.W.2d 253, 161 Tenn. 298.

79. N.C.—Cheshire v. Drake, 27 S.E. 2d 627, 223 N.C. 577.

80. Ariz.—Serasio v. Sears, 121 P.2d 639, 58 Ariz. 522.
Idaho.—Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma, 111 P.2d 1093, 62 Idaho 340.
N.C.—Cheshire v. Drake, 27 S.E.2d 627, 223 N.C. 577—Lupton v. Edmundsen, 16 S.E.2d 840, 220 N.C. 188.
Pa.—Citizens Bank of Barnsboro v. Variali, 18 Pa.Dist. & Co. 315—Merchants Banking Trust Co. now to Use of Federal Deposit Ins. Corp. v. Kaleda, Com.Pl., 41 Sch. L.R. 176, 60 York Leg.Rec. 25.
34 C.J. p 625 note 90.
Courts cannot dispense with requirements essential under statute to continue judgment lien.—Groth v. Ness, 260 N.W. 700, 65 N.D. 580.
Decree in partition
Where interest of judgment lienholder in share of one cotenant was averred in complaint for partition and found in decree, the decree in the partition proceeding tolled the running of the statute affecting the limitation of the judgment lien.—Wollschlaeger v. Erdmann, 61 N.E. 2d 53, 390 Ill. 266.
Where statutes provide for fixing lien by filing abstract of judgment, it was unnecessary for judgment creditor to obtain new judgment on judgment not dormant to obtain new lien after termination of first lien.—Burton Lingo Co. v. Warren, Tex. Civ.App., 45 S.W.2d 750, error refused.

81. N.Y.—Floyd v. Clark, 17 N.Y.S. 848, 16 Daly 528.

82. Ga.—Tift v. Bank of Tifton, 4 S.E.2d 495, 60 Ga.App. 563.
Revival of judgment generally see infra §§ 533–549.

83. Fla.—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
Neb.—Rich v. Cooper, 286 N.W. 383, 136 Neb. 463—Glissmann v. Happy Hollow Club, 271 N.W. 431, 132 Neb. 223.
Okl.—Price v. Sanditen, 38 P.2d 533, 170 Okl. 75.
34 C.J. p 623 note 80.
Necessity of execution to create lien see supra § 468.

84. Ill.—Smith v. Toman, 14 N.E.2d 478, 368 Ill. 414, 118 A.L.R. 924—Svalina v. Saravana, 173 N.E. 281, 341 Ill. 236, 87 A.L.R. 821—Meusel v. Bock, 234 Ill.App. 455.
34 C.J. p 624 note 81, p 574 note 56 [a].
Where judgment transferred
A judgment lien created by filing a transcript of the judgment in county where realty is situated may be extended beyond a year from the time the judgment became a lien only by the issuance of an execution in the county where transcript was filed, and such extension cannot be accomplished by the issuance of an execution from county where judgment was originally entered directed to county where transcript was filed.—Reconstruction Finance Corporation v. Maley, C.C.A.Ill., 125 F.2d 131.
Failure to return execution within ninety days as required by statute was held not to affect a judgment lien on real estate.—Davis Bros. Drug Co. v. Counter, 225 P. 245, 75 Colo. 239.
Pendency of bank's mortgage foreclosure action, filed within year after entry of another bank's judgment against, mortgagor, was sufficient, under "lis pendens doctrine," to create equitable lien on mortgaged real-

stroy the lien but subordinates it to other judgment liens against the same judgment debtor.[85]

In the absence of statutory provision therefor, a judgment creditor generally cannot extend his lien by issuing and levying an execution, even during the continuance of the lien, and if the sale does not take place until after the expiration of the statutory period the priority of lien and title is gone.[86] However, a provision for so extending the life of the lien is to be found in some statutes,[87] and even in the absence of express statute to that effect it has been held that the levy of an execution during the life of the lien has the effect of continuing the lien beyond the statutory period of its existence and until the writ is executed.[88] If the statute requires no more than the issue of an execution, it is satisfied by that act, although the sole purpose of taking out the writ was to preserve the lien, and there was no expectation of collecting the money.[89]

Laches in issuing execution. The creditor may take all the time allowed him, and the lien of a judgment which has not become dormant is not lost or impaired by laches in issuing execution.[90]

§ 494. —— Revival of Judgment

The lien of a judgment may be extended by a revival of the judgment.

Provision is sometimes made by statute for the extension of the statutory period for the continuance of a judgment lien as between the parties to the judgment by a revival of the judgment by scire facias or otherwise.[91] Where such action is taken before the expiration of the statutory period, the lien of the judgment is continuous from the date of its rendition or entry, and its priority, relative to other liens, is preserved;[92] but where a period is

ty as far as judgment creditor was concerned, and such judgment constituted a lien, inferior to mortgage lien, against realty, as against contention that judgment lien was lost by failure to have execution issued within such year.—First Nat. Bank of Marissa v. Heintz, 51 N.E.2d 333, 320 Ill.App. 403.

In Texas

(1) Originally the statute required that execution be issued within twelve months after the date of the judgment, or the judgment would become dormant.—Jackson v. Wallace, Com.App., 252 S.W. 745—Moore v. Ray, Civ.App., 282 S.W. 671—Gordon-Sewall & Co. v. Walker, Civ.App., 258 S.W. 233—34 C.J. p 624 note 81.

(2) Under a later statute, execution may be issued on the judgment at any time within ten years after the date of the judgment.—Christian v. Sam R. Hill Lumber Co., Civ. App., 113 S.W.2d 616.

85. U.S.—Jenkins Petroleum Process Co. v. Credit Alliance Corporation, C.C.A.Okl., 83 F.2d 532.
Ohio.—Waldock v. Bedell, 18 N.E.2d 828, 59 Ohio App. 520—Bantell v. Clark, 187 N.E. 781, 46 Ohio App. 131—Stone v. Equitable Mortg. Co., 158 N.E. 275, 25 Ohio App. 382.
Okl.—Harris v. Southwest Nat. Bank of Dallas, Tex., 271 P. 683, 133 Okl. 152.
34 C.J. p 624 note 82.

Statutes construed together

Ohio.—Waldock v. Bedell, 18 N.E.2d 828, 59 Ohio App. 520.

86. Ariz.—Ingraham v. Forman, 63 P.2d 998, 49 Ariz. 29.
Ill.—Holmes v. Fanyo, 63 N.E.2d 627, 327 Ill.App. 1.
N.C.—Cheshire v. Drake, 27 S.E.2d 627, 223 N.C. 577—Lupton v. Edmundson, 16 S.E.2d 840, 220 N.C. 133—Osborne v. Board of Education of Guilford County ex rel. State, 177 S.E. 642, 207 N.C. 503—Hyman v. Jones, 171 S.E. 103, 205 N.C. 266.
N.D.—Depositors' Holding Co. v. Winschel, 232 N.W. 599, 60 N.D. 71.
34 C.J. p 624 note 86.

87. U.S.—Brockway v. Oswego Tp., C.C.Kan., 40 F. 612.
34 C.J. p 625 note 87.

88. Mo.—Wayland v. Kansas City, 12 S.W.2d 433, 321 Mo. 654.
34 C.J. p 625 note 88.

89. Ala.—McClarin v. Anderson, 16 So. 639, 104 Ala. 291.
Miss.—Murphy v. Klein, 15 So. 658, 71 Miss. 908.

90. Fla.—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
34 C.J. p 624 note 85.

91. Tex.—Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.
34 C.J. p 625 note 92.
Revival of judgments see infra §§ 533–549.

92. Ark.—Waldstein v. Williams, 142 S.W. 834, 101 Ark. 404, 37 L.R.A.,N.S., 1162.
Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41—Kefover v. Hustead, 144 A. 430, 294 Pa. 474—Vaselenak v. Moxham Nat. Bank, 28 Pa.Dist. & Co. 253, 85 Pittsb. Leg.J. 691.
34 C.J. p 625 note 93, p 684 note 60.

Lien continues for additional period of ten years.—Rayborn v. Reid, 138 S.E. 294, 139 S.C. 529.

Commencement of period on recording of deed by terre-tenant

(1) Under some statutes, when a judgment had been regularly revived between the original parties, the period of five years, during which the lien of the judgment continued, commenced to run in favor of the terre-tenant from the time that he had placed his deed on record unless the terre-tenant was in actual possession of the land bound by the judgment, by himself or tenant.—Farmers Nat. Bank & Trust Co. v. Barrett, 184 A. 128, 321 Pa. 273—Kefover v. Hustead, 144 A. 430, 294 Pa. 474—Frank Di Berardino Bldg. & Loan Ass'n v. De Gregoria, 45 A.2d 378, 158 Pa.Super. 516—Ellinger v. Krach, 28 A.2d 453, 150 Pa.Super. 384, affirmed Simmons v. Simmons, 29 A.2d 677, 346 Pa. 52—Petition of Miller, 28 A.2d 257, 149 Pa.Super. 142—First Nat. Bank v. Tomechek, 13 A.2d 126, 140 Pa. Super. 101—Everett Hardwood Lumber Co. v. Calhoun, 133 A. 659, 121 Pa.Super. 451—Miller Bros. v. Boyotz, 96 Pa.Super. 208—Lewis v. Puchy, 44 Pa.Dist. & Co. 482, 90 Pittsb.Leg.J. 259, 56 York Leg.Rec. 69—Klein v. Anderson, 39 Pa.Dist. & Co. 139.

(2) Where land, subject to a valid judgment was conveyed by deed, which was at once recorded, lien of the judgment bound the land in possession of terre-tenant for a period of five years from date of recording of deed, even though judgment was not subsequently revived against judgment debtor by scire facias within five years of entry of judgment.—Simmons v. Simmons, 29 A.2d 677, 346 Pa. 52—Behler v. Loch, 36 A.2d 234, 154 Pa.Super. 399.

(3) A scire facias proceeding to revive a judgment against terre-tenants would be excepted from the operation of the act of 1943 repealing the act of 1849 imposing a limitation of lien against terre-tenants on a revived judgment if the judgment sought to be revived was a lien under the act of 1849 when the scire facias was issued.—Frank Di Berar-

prescribed for the continuance of the judgment lien, and the right to enforce execution exists for a shorter period unless such right is revived by scire facias, the revivor of a judgment by scire facias within the time prescribed for the continuance of the lien will not extend the statutory period as against purchasers or encumbrancers whose rights accrued subsequent to the entry of the original judgment.[93]

Revival after lien has expired. After a judgment lien has expired, the period during which the lien of a revived judgment exists is, it is usually held, to be computed from the date of the judgment or order of revivor, and not from the date of the writ instituting the proceedings for its revival.[94] Ordinarily the lien cannot be revived so as to overreach conveyances or encumbrances subsequent to the entry of the original judgment and prior to its revival,[95] but it has been stated that a purchaser of a judgment debtor's land at a time when the judgment is dormant takes the land subject to the judgment lien on its revival by scire facias.[96] It has been held to be immaterial that the purchase was made or the encumbrance accepted with full knowledge that the judgment remained unpaid,[97] provided the grantee gave valuable consideration[98] and did not collude with the debtor to deprive the judgment creditor of his lien or take with a fraudulent intention toward such creditor.[99] It has been held that a dormant judgment does not, by revivor, become a lien on land acquired by the debtor after its original recovery, unless a levy is made thereon, either before it became dormant or after its revivor.[1]

§ 495. —— Suit to Enforce Lien or to Subject Property; Action on Judgment

The statutory life of a judgment lien generally is not extended by the institution of action to enforce the lien or by a creditor's bill.

Although there are some decisions to the contrary,[2] as a general rule where a statute fixes a definite limitation to the lien of a judgment it is not saved or extended by the bringing of an action to enforce the lien,[3] or by a creditor's bill, where such action or bill remains undetermined when the statutory period expires,[4] especially where the statute expressly prohibits the bringing of a direct action or proceeding for the purpose of prolonging the lien.[5]

Under some statutes an action on a judgment is the only means of extending the judgment lien;[6] other statutes prohibit its extension by such means.[7]

§ 496. —— Absence of Debtor from State

Unless extended by statute, the life of a judgment lien is not prolonged by the absence of the judgment debtor from the state.

In the absence of a statutory provision therefor, the absence of the judgment debtor from the state will not extend the duration of a judgment lien.[8]

dino Bldg & Loan Ass'n v. De Gregoria, 45 A.2d 378, 158 Pa.Super. 516.

(4) Straw man to whom realty was conveyed after debtor paid for and took title to realty in his wife's name held not a "terre-tenant," and scire facias issued to revive judgment creditor's judgment against debtor did not fasten record lien upon realty.—Loughney v. Page, 182 A. 700, 320 Pa. 508.

93. Fla.—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
Iowa.—Denegre v. Haun, 13 Iowa 240.
34 C.J. p 626 note 94.

94. Ga.—Carter v. Martin, 142 S.E. 277, 165 Ga. 890.
Neb.—Glissmann v. Happy Hollow Club, 271 N.W. 431, 132 Neb. 223.
34 C.J. p 585 note 2, p 626 note 95.
New lien arises on revival of judgment.—Motel v. Andracki, 19 N.E.2d 832, 299 Ill.App. 166.

95. Md.—O'Neill & Co. v. Schulze, 7 A.2d 263, 177 Md. 64.
Neb.—Campagna v. Home Owners' Loan Corporation, 8 N.W.2d 750, 141 Neb. 429.
N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234.
Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41—First Nat. Bank & Trust Co. v. Miller, 186 A. 87, 322 Pa. 473—Petition of Miller, 28 A. 2d 257, 149 Pa.Super. 142—Miller Bros. v. Boyotz, 96 Pa.Super. 208.
34 C.J. p 585 note 4, p 626 note 95.

96. Fla.—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.

97. N.Y.—Little v. Harvey, 9 Wend. 157.

98. Del.—Raymond v. Farrell, 93 A. 905, 28 Del. 394.
N.Y.—Mohawk Bank v. Atwater, 2 Paige 54.

99. N.Y.—Pettit v. Shepherd, 5 Paige 493, 28 Am.D. 437.

1. Ohio.—Smith v. Hogg, 40 N.E. 406, 52 Ohio St. 527.

2. U.S.—Ryan v. Kanawha Valley Bank, W.Va., 71 F. 912, 18 C.C.A. 384.
34 C.J. p 626 note 8.

3. Ala.—I. Trager Co. v. Mixon, 157 So. 80, 229 Ala. 371—**Corpus Juris cited in** First Nat. Bank v. Powell, 155 So. 624, 626, 229 Ala. 178.
Neb.—Rich v. Cooper, 286 N.W. 883, 136 Neb. 463.
N.C.—Lupton v. Edmundson, 16 S.E. 2d 840, 220 N.C. 188.
34 C.J. p 626 note 4.
Enforcement of lien after expiration of statutory period see infra § 511.
Any trickery in obtaining continuance of suit to enforce judgment lien did not estop defendants to assert that judgment expired after continuance was obtained.—King v. Hayes, 9 S.W.2d 538, 223 Mo.App. 138.

4. Ind.—McAfee v. Reynolds, 28 N. E. 423, 130 Ind. 33, 30 Am.S.R. 194, 18 L.R.A. 211.
34 C.J. p 626 note 5.
Lien resulting from commencement of creditors' suit see Creditors Suits § 84.

5. Wash.—Meikle v. Cloquet, 87 P. 841, 44 Wash. 513.

6. Miss.—Grace v. Pierce, 90 So. 590, 127 Miss. 331.
34 C.J. p 626 note 8.

7. Wash.—Ball v. Bussell, 205 P. 423, 119 Wash. 206—Meikle v. Cloquet, 87 P. 841, 44 Wash. 513.

8. N.C.—Osborne v. Board of Educa-

Under some statutes, a debtor's departure from, and residence out of, the state after judgment recovered against him will suspend the running of the statute and preserve the lien of the judgment, although its enforcement has not been obstructed thereby and although the wording of the statute is that, if by departing from the state a person shall obstruct the prosecution of a right which had accrued against him, the time of such obstruction shall not be computed as a part of the time within which the said right might or ought to have been prosecuted.[9]

§ 497. —— Agreement of Parties

The life of a judgment lien may not be prolonged by agreement, unless an extension in such manner is authorized by statute.

Except where a statute so provides,[10] a judgment lien cannot be extended beyond the statutory period by an agreement between the judgment creditor and his debtor.[11]

§ 498. —— Matters Preventing Enforcement of Judgment

a. In general
b. Injunction, adverse proceeding, and receivership
c. Effect of appeal

a. In General

A stay of execution or of further proceedings on a judgment ordinarily extends the lien of the judgment.

Although there are decisions which hold that a stay of execution or of further proceedings on a judgment does not suspend the running of the statutes of limitations against it,[12] if at least the stay does not continue beyond the period fixed by the statute,[13] as a general rule such a stay does extend the lien, whether the stay is by order of the court,[14] or by specific provision included in the record entry of the judgment,[15] or by act of the legislature,[16] and whether the time of the stay of execution is less or more than the period fixed by statute for the expiration of the lien of judgments.[17] The latter rule is sometimes expressly adopted by statute.[18]

A state of war has been held not ground for extending the lien of a judgment beyond the time fixed by law,[19] at least where there is no proof that process could not be issued or executed during the war.[20]

b. Injunction, Adverse Proceeding, and Receivership

The lien of a judgment ordinarily is extended by an injunction restraining the issuance of execution, but the appointment of a receiver does not continue the lien.

Although there are decisions to the contrary,[21] as a general rule the fact that the creditor, at the suit of the judgment debtor, is enjoined from issuing execution, has the effect of prolonging the judgment lien beyond the statutory period;[22] and in some jurisdictions it is expressly provided by statute that the time covered by an injunction is to be excluded from the period limited by law for the duration of judgment liens.[23]

tion of Guilford County ex rel. State, 177 S.E. 642, 207 N.C. 503. Wash.—Hemen v. Rinehart, 87 P. 953, 45 Wash. 1.

9. Va.—Lamon v. Gold, 79 S.E. 728, 72 W.Va. 619, 51 L.R.A.,N.S., 883. 34 C.J. p 627 note 13.

10. U.S.—Davis v. Davis, W.Va., 174 F. 786, 98 C.C.A. 494. 34 C.J. p 628 note 29.

Fewer than all the debtors in a judgment have the power to agree by a clear and unambiguous paper to the extension of the lien of the judgment on the property of those consenting.—Second Nat. Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A. 2d 747, 332 Pa. 124.

11. Tenn.—Gardenhire v. King, 37 S. W. 548, 97 Tenn. 585. 34 C.J. p 628 note 30.

Agreement creating new indebtedness with lien as security

The parties may by agreement, supported by a valid consideration, create a new indebtedness in lieu of the judgment debt and preserve the judgment lien for the balance of its statutory life as security for the new debt.—Kandoll v. Penttila, 139 P.2d 616, 18 Wash.2d 434.

12. Mo.—Green v. Dougherty, 55 Mo.App. 217. 34 C.J. p 627 note 14.

13. Ark.—Beloate v. New England Securities Co., 193 S.W. 795, 128 Ark. 215, 220. 34 C.J. p 627 note 15.

14. Minn.—Wakefield v. Brown, 87 N.W. 788, 38 Minn. 361, 8 Am.S.R. 671. 34 C.J. p 627 note 16.

15. U.S.—Mercantile Trust Co. v. St. Louis & S. F. Ry. Co., C.C.Ark., 69 F. 193. 34 C.J. p 627 note 17.

16. Tex.—Hargrove v. De Lisle, 32 Tex. 170. 34 C.J. p 627 note 18.

Allotment of homestead

N.C.—Cleve v. Adams, 22 S.E.2d 567, 222 N.C. 211.

17. U.S.—Mercantile Trust Co. v. St. Louis & S. F. R. Co., C.C.Ark., 69 F. 193.

18. Ind.—Applegate v. Edwards, 45 Ind. 329.

19. Tenn.—Swanson v. Tarkington, 7 Heisk. 612—Smart v. Mason, 2 Heisk. 223.

20. Tenn.—Smart v. Mason, supra.

21. Ohio.—Tucker v. Shade, 25 Ohio St. 355. 34 C.J. p 627 note 23.

22. Wash.—Hensen v. Peter, 164 P. 512, 95 Wash. 628, L.R.A.1918F 682. 34 C.J. p 627 note 24.

23. Ill.—Holmes v. Fanyo, 63 N.E. 2d 249, 326 Ill.App. 624. N.C.—Cheshire v. Drake, 27 S.E.2d 627, 223 N.C. 577—Lupton v. Edmundson, 16 S.E.2d 840, 220 N.C. 188. Tenn.—Sweetwater Bank & Trust Co. v. Howard, 66 S.W.2d 225, 16 Tenn. App. 91. 34 C.J. p 627 note 25.

Where judgment creditor is not restrained by injunction, statute is inapplicable.—Petrovitch v. Witholm, 152 N.E. 849, 85 Ind.App. 144.

Adverse proceeding. In some jurisdictions the life of the judgment lien is extended by an adverse proceeding,[24] provided the proceeding is adverse in the sense of restraining the sale, by analogy to an injunction.[25]

Appointment of receiver. The appointment of a receiver does not continue the lien of the judgment beyond the statutory period,[26] although it has been held that a statute providing that a judgment lien is lost if execution is not taken out within a certain time does not apply where, during such time, the property of the judgment defendant is in the hands of a receiver in another action.[27]

c. Effect of Appeal

An appeal or writ of error with a supersedeas generally extends the life of the judgment lien.

Although there is some authority to the contrary,[28] it has been held, sometimes by virtue of statutory provisions, that an appeal or writ of error with a supersedeas prolongs the judgment lien beyond the statutory period.[29] Where there is no supersedeas an appeal does not of itself prolong the life of the lien;[30] and it has been held that, where a new judgment is rendered, it merges the original judgment, and the lien dates only from such new judgment.[31]

§ 499. Loss, Release, or Extinguishment of Lien

Various matters may destroy or extinguish the lien of a judgment, such as a levy on personalty of the judgment debtor or the merger of the lien, but ordinarily the arrest of the debtor merely suspends the operation of the lien.

As a general rule, a judgment creditor does not lose his lien unless it is by some act of his own, either of omission or of commission.[32] Nevertheless the lien of a judgment may under certain circumstances be subordinated, or entirely lost, by sale under order of court free from liens,[33] by the operation of a statute divesting the lien,[34] by the termination of the estate or interest subject to the lien, as in the case of an estate for life or a leasehold or other limited interest,[35] by a foreclosure of the lien in statutory proceedings for that purpose,[36] by a discharge of the debtor in bankruptcy, as considered in Bankruptcy § 582 b (6) (b), or, where a statute so provides, by the destruction of

24. Tenn.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 30 S.W.2d 253, 161 Tenn. 298.

25. Tenn.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., supra.

Proceedings held not adverse

(1) Facts that judgment debtor subsequently executed mortgage, and, under chancellor's order, mortgaged property was sold to others, disclosed no "adverse proceeding."—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., supra.

(2) Voluntary suit in equity by judgment creditor for enforcement of judgment will not extend lien.—Bridges v. Cooper, 39 S.W. 723, 98 Tenn. 394—Gardenhire v. King, 37 S.W. 548, 97 Tenn. 585.

26. U.S.—Savings & Trust Co. of Cleveland, Ohio v. Bear Valley Irrigation Co., C.C.Cal., 89 F. 32.
Pa.—Scott v. Waynesburg Brewing Co., 100 A. 591, 256 Pa. 158.

27. Tex.—Semple v. Eubanks, 35 S. W. 509, 13 Tex.Civ.App. 418.

28. Mo.—Christy v. Flanagan, 87 Mo. 670.
34 C.J. p 628 note 32.

29. Cal.—Dewey v. Latson, 6 Cal. 130.
34 C.J. p 628 notes 33, 36.
Appeal as release or discharge of lien see infra § 509.

Statutes usually provide that, where the judgment creditor is prevented from enforcing his judgment by execution by the operation of an appeal or writ of error, the term of the pendency of the appeal or writ of error cannot be treated as a part of the statutory period allowed for the continuance of the judgment lien.—Adams v. Guy, 11 S.E. 535, 106 N.C. 275—34 C.J. p 628 note 37.

30. Neb.—Harvey v. Gooding, 109 N. W. 220, 77 Neb. 289, 124 Am.S.R. 841.
34 C.J. p 628 note 34.

31. Iowa.—Swift v. Conboy, 12 Iowa 444.

32. Iowa.—Beatty v. Cook, 185 N.W. 360, 192 Iowa 542.
Miss.—Lucas v. Stewart, 11 Miss. 231.
34 C.J. p 628 note 38.
Effect of division of old county into new county see Counties § 34.

Failure of judgment creditor to join terre-tenant when he issues scire facias does not merge and extinguish lien existing by virtue of original judgment.—First Nat. Bank & Trust Co. v. Miller, 186 A. 87, 322 Pa. 473.

Issuance of general execution

Under a statute prescribing the kinds of executions, and declaring that the execution, if on a judgment to enforce a lien on specific real property, may direct a sale of all the interest which defendant had therein at the time the lien attached, the issuance of a general execution to enforce a judgment does not release the specific lien decreed by the judgment.—Schultz v. Schultz, 113 N.W. 445, 133 Wis. 125, 126 Am.S.R. 934.

33. Or.—Petke v. Pratt, 123 P.2d 797, 168 Or. 425.
34 C.J. p 629 note 40.

34. Ind.—Houston v. Houston, 67 Ind. 276.

Lien held not destroyed by amendment to statute

Cal.—Jones v. Union Oil Co. of California, 25 P.2d 5, 218 Cal. 775.
Ohio.—Cowen v. Wassman, 28 N.E. 2d 201, 64 Ohio App. 84.

35. Ark.—Snow Bros. Hardware Co. v. Ellis, 21 S.W.2d 162, 180 Ark. 238.
Minn.—Farmers' & Merchants' State Bank of Thief River Falls v. Stageberg, 201 N.W. 612, 161 Minn. 413.
34 C.J. p 629 note 43.

Renunciation of right of inheritance

Where recorded judgment against decedent's daughter and her husband was obtained prior to decedent's death, daughter's subsequent renunciation of her right of inheritance did not destroy judgment lien which attached at time of death to her interest in decedent's realty.—Coomes v. Finegan, 7 N.W.2d 729, 233 Iowa 448.

36. Conn.—Ives v. Beecher, 54 A. 207, 75 Conn. 564.
Tex.—Ives v. Culton, Civ.App., 197 S.W. 619.
Enforcement of lien see infra § 511.

the record of the judgment,[37] or, under some statutes, by failure to redeem after redemption by a junior judgment lienholder.[38] The lien of a contingent judgment against the land of a deceased's guarantor of bonds has been held to be discharged where the coguarantors, without the consent of the owners of the land subject to the lien, secure an extension of time for payment of the bonds.[39]

On the other hand, the lien is not destroyed by the execution of a forthcoming bond, or a bond to try the right of property,[40] by the performance of an unnecessary act by another creditor,[41] by the withdrawal from the records of the certificate of the judgment on which the lien was founded,[42] or by any transfer of the property other than a sale free from liens under order of the court.[43]

Arrest of debtor. The taking out of a body execution suspends the lien of the judgment on lands,[44] but does not absolutely extinguish it; for if this process fails to produce satisfaction, under circumstances which permit the creditor to resort to other remedies, the lien of the judgment on lands may then be enforced, as against the judgment debtor himself,[45] although not as against the intervening rights of third persons.[46]

Levy on personalty. As far as the rights of third persons are concerned, a levy on personal property sufficient to satisfy a fieri facias is an extinguishment of the judgment on which it is issued, as considered infra § 573, and the judgment therefore ceases to be a lien on real estate,[47] even where the creditor abandons or releases the levy, fails to make the money, or applies it to other debts,[48] although the rule is otherwise where the levy is insufficient to satisfy the execution.[49]

Merger. It has been held that, where a creditor has obtained a lien on real estate by judgment at law, if he subsequently brings an action of debt on his judgment and recovers a new judgment, he will lose his first lien,[50] but there is also authority to the contrary.[51] The mere fact that the judgment creditor purchases lands on which the judgment is a lien will not merge the judgment lien and thereby prevent it fram attaching to other lands of the judgment debtor;[52] but it has been held that, if a judgment creditor becomes the owner of the land on which the judgment is a lien, the lien as to that specific land in the hands of his grantee becomes extinct in the absence of an agreement or intention to continue it manifested at the time he became owner,[53] although, in equity, if it is for the interest of the parties that the lien shall be kept alive, it will be regarded as still subsisting.[54]

Under a statute providing that if two estates in the same property shall unite in the same person in his individual capacity, the lesser estate shall be merged in the greater, the acceptance by the holder of a judgment lien of a bill of sale from the judgment debtor conveying personalty as security for a loan has been held not to merge the lien of the judgment into the bill of sale.[55]

37. Fla.—Curry v. Lehman, 47 So. 18, 55 Fla. 847.
34 C.J. p 629 note 46.

38. Ind.—Warford v. Sullivan, 46 N. E. 27, 147 Ind. 14.

39. Wis.—In re Libby's Estate, 209 N.W. 593, 190 Wis. 592.

40. Ala.—Campbell v. Spence, 4 Ala. 543, 39 Am.D. 301.
Pa.—Taylor's Appeal, 1 Pa. 390.

41. N.Y.—Hulbert v. Hulbert, 111 N.E. 70, 216 N.Y. 430, L.R.A.1916D 661, Ann.Cas.1917D 180.
Tex.—Powell v. Dallas County Levee Imp. Dist. No. 6, Civ.App., 173 S.W.2d 552, error refused.

42. Ala.—Emrich v. Gilbert Mfg. Co., 35 So. 322, 138 Ala. 316.
34 C.J. p 579 note 5.

43. Or.—Petke v. Pratt, 123 P.2d 797, 168 Or. 425.
Pa.—Matter of Gump, 13 Phila. 495.
Transfer of property subject to lien see supra § 488.
Lien on property conveyed to debtor in exchange
Where, in consummation of an exchange of real estate, a judgment debtor conveyed real estate on which the judgment was a lien under a contract whereby the grantee became the principal debtor and the grantor became surety without the knowledge of the judgment creditor who released, for a valuable consideration, the lien of the judgment but reserved his rights against the judgment debtor, it was held that the lien was not discharged as to land conveyed to the judgment debtor.—Gatton v. Harmon, 275 P. 137, 127 Kan. 825.
Invalid proceeding of executor to sell realty of devisee did not remove lien of judgment on realty in hands of devisee.—In re Syrcher's Estate, 299 N.Y.S. 267, 164 Misc. 102.

44. Pa.—Freeman v. Ruston, 4 Dall. 214, 1 L.Ed. 806.
34 C.J. p 633 note 42.

45. Ohio.—Douglas v. Wallace, 11 Ohio 42.
34 C.J. p 633 note 43.

46. U.S.—Rockhill v. Hanna, Ind., 15 How. 189, 14 L.Ed. 656.

47. N.Y.—Jackson v. Bowen, 7 Cow. 13—Ex parte Lawrence, 4 Cow. 417, 15 Am.D. 386.

48. N.J.—Banta v. McClennan, 14 N.J.Eq. 120.
34 C.J. p 631 note 83.

49. N.Y.—Muir v. Leitch, 7 Barb. 341.

50. Ill.—McDonald v. Culhane, 24 N.E.2d 737, 303 Ill.App. 101.
34 C.J. p 632 note 21.
Extension of lien by action on judgment see supra § 495.
Merger of judgments see infra § 561.

51. N.C.—Springs v. Pharr, 42 S.E. 590, 131 N.C. 191, 92 Am.S.R. 775.
34 C.J. p 632 note 22.

52. Ind.—Caley v. Morgan, 16 N.E. 790, 114 Ind. 350.
34 C.J. p 632 note 24.

53. Pa.—Koons v. Hartman, 7 Watts 20.
34 C.J. p 632 note 25.

54. W.Va.—George v. Crim, 66 S.E. 526, 66 W.Va. 421.

55. Ga.—Bostwick v. Felder, App., 35 S.E.2d 783.

§ 500. —— By Release

The lien of a judgment may be released by the judgment creditor.

The holder of a judgment may release the lien of the judgment,[56] even by a parol release.[57] An agreement to release the lien of a judgment must be of a precise and definite character in which no element of the agreement is left to conjecture or supposition.[58] As between the debtor and creditor a release by the creditor of part of the lands bound by the judgment will not prevent its enforcement against the rest;[59] but the holder of a judgment lien cannot release land of his debtor, taken on execution on a junior judgment, so as to preserve his lien for its full amount against other land of the debtor, where the debtor files a refusal to accept the release.[60]

Where portions of the land have been sold to different purchasers, or encumbered with subsequent mortgages, the creditor cannot release his lien on the lands primarily liable, or release or surrender other securities primarily liable, without releasing at the same time the lands in the hands of such purchasers or encumbrancers, at least in proportion to the value of the portion first liable;[61] but this rule is qualified by the requirement that the judgment creditor shall have had notice of the subsequent sale or mortgage, before making the release, and the recording of a mortgage is not sufficient notice.[62]

A release by an executor of a judgment which is a lien on realty is valid, where it is supported by a sufficient consideration, and no fraud, collusion, or wasting of the assets of the estate is shown.[63]

§ 501. —— Payment or Satisfaction of Judgment

The lien of a judgment ordinarily is discharged by the satisfaction of the judgment.

The lien of the judgment ordinarily is discharged by the satisfaction of the judgment,[64] as by payment of the amount due under it,[65] although not by a mere unaccepted tender[66] or an unperformed promise of payment.[67] While the rule has been laid down that, when once paid, the judgment lien cannot be restored or continued by any mere agreement of the parties,[68] although equity may keep it alive for the benefit of a surety who has made the pay-

56. Ala.—Kaplan v. Potera, 105 So. 177, 213 Ala. 334.
Ill.—Quell v. Jachino, 17 N.E.2d 256, 297 Ill.App. 650.
N.J.—National Union Bank of Dover v. Havens, 156 A. 645, 109 N.J.Eq. 218.
Pa.—Bryn Mawr Trust Co. v. Cole, 159 A. 445, 306 Pa. 274—Harr v. Gerton, 188 A. 629, 124 Pa.Super. 350.
34 C.J. p 629 note 52, p 699 note 18.
Release of judgment see infra §§ 563–565.

Effect of mistake
Where assignee of judgment, constituting prior lien on land, executed release under belief that if release was executed title would be accepted by government and proceeds would be paid over to assignee without delay, but government refused to accept deed and resorted to condemnation because assignor of judgment asserted that cost item had not been assigned, the release did not extinguish the assignee's claim to priority and assignee was entitled to receive payment from proceeds of land.—U. S. v. 168.8 Acres of Land, Scotland County, D.C.N.C., 35 F.Supp. 724.

Release of right of joint judgment debtor
College's inability to pay sum advanced by citizens for its release from judgment and judgment creditor's extension of time for joint judgment debtor to pay balance due thereon was sufficient consideration for joint judgment debtor's release of claim of right to subject land to payment of judgment over against college.—Rutherford v. Watson, Tex.Civ.App., 52 S.W.2d 85, error refused.

57. Iowa.—Dalby v. Cronkhite, 23 Iowa 222.
34 C.J. p 629 note 53.

58. Pa.—Everett Hardwood Lumber Co. v. Calhoun, 183 A. 659, 121 Pa. Super. 451.

59. N.Y.—**Corpus Juris cited in** In re James, 223 N.Y.S. 174, 183, 221 App.Div. 321, reversed on other grounds In re James' Will, 161 N. E. 201, 248 N.Y. 1, reargument denied 162 N.E. 550, 248 N.Y. 623.
34 C.J. p 629 note 54.

60. Pa.—Fisler v. Stewart, 43 A. 396, 191 Pa. 323, 71 Am.S.R. 769.

61. Va.—Jones v. Myrick, 8 Gratt. 179, 49 Va. 179.
34 C.J. p 629 note 55.

62. Pa.—Roebuck's Appeal, 19 A. 310, 133 Pa. 27.
34 C.J. p 630 note 56.

63. Ind.—McCleary v. Chipman, 68 N.E. 320, 32 Ind.App. 489.
Release of liens by executor generally see Executors and Administrators § 181 c.

64. Ala.—Harrison v. Carpenter, 142 So. 772, 225 Ala. 297.
Payment, satisfaction and discharge of judgment see infra §§ 550–584.

Acceptance of mortgage in full satisfaction
Pa.—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480.

Satisfaction by action of governor
In surety's action to enforce judgment lien based on forfeiture of appearance bond, defendant could show satisfaction of judgment by governor's action in setting aside forfeiture.—Harrison v. Carpenter, 142 So. 772, 225 Ala. 297.

65. Ga.—Patterson v. Clark, 23 S.E. 496, 96 Ga. 494.
34 C.J. p 630 note 60.

Notation of partial payment
Judgment creditor did not lose its lien by failing to make due notation on the record of its abstracted judgment of the amount received by it from a sale of collateral under execution, the statutes being intended for the benefit of the judgment debtor.—Gordon-Sewall & Co. v. Walker, Tex.Civ.App., 358 S.W. 232.

66. N.Y.—People v. Beebe, 1 Barb. 379.
34 C.J. p 630 note 61.

Where judgment was not docketed until eight days after the tender of heifers involved in replevin suit, tender could not have discharged lien of judgment.—Levy v. Kurak, 52 N.Y.S.2d 304.

67. Pa.—Krebs v. Heckler, 2 Leg. Rec. 363.
34 C.J. p 630 note 62.

68. La.—Adams v. Daunis, 29 La. Ann. 315.
N.Y.—De la Vergne v. Evertson, 1 Paige 181, 19 Am.D. 411.

ment,[69] it has been held that as between the parties themselves the lien may be kept alive by agreement of the parties for the purpose of securing further advances, provided the rights of third persons are not affected.[70]

When a judgment creditor enters satisfaction of his judgment or causes an execution to be returned satisfied, a third person is justified in treating the real estate of the judgment debtor as released from the lien of the judgment;[71] but a junior judgment creditor will not gain priority over a senior judgment creditor by the fact that there has been an erroneous entry of satisfaction on the judgment of the latter and a subsequent order of the court striking it off, in the absence of evidence that the junior creditor has been misled to his injury.[72] Where an agreement between the judgment debtor and creditor to have execution on the judgment returned satisfied is procured by misrepresentations of the judgment debtor, it will not operate as a release in favor of a purchaser of part of the debtor's land, who had no notice of the return.[73]

Where a transcript of judgment has been filed in a county other than that of its rendition, the lien in the county where the transcript was filed is discharged by satisfaction in the county where it was rendered, and not by the filing of a copy of the docket of the clerk of that county.[74]

§ 502. —— Sale under Execution

The lien of a judgment is discharged by a sale of lands under execution for the full amount of the judgment.

A sale of lands under execution for the full amount of a judgment extinguishes the lien of the judgment on which the execution issued,[75] and although such sale is only in partial satisfaction of the judgment it discharges the lien on the land sold as against the execution purchaser.[76] Where land has been sold in part satisfaction of a judgment and redeemed by the judgment debtor, the balance of the judgment at once attaches as a lien on the property in his hands,[77] but when redemption is made by a lienholder the land does not again become liable for the unsatisfied judgment.[78] If a judgment creditor exhausts all the real property of the debtor by execution sale, and part of the judgment remains unsatisfied, and the debtor afterward acquires other real estate, the unsatisfied part of the judgment attaches thereto as a lien.[79]

§ 503. —— Stay of Execution

A stay of execution ordinarily does not destroy or suspend the lien of the judgment.

The fact that a judgment is rendered with a stay of execution, or that a stay is afterward made by order of court, does not destroy or suspend the lien so as to give priority to intervening creditors or purchasers,[80] and, although there is authority to the contrary,[81] the rule has been applied even though the stay was by the direction or with the consent of the judgment creditor,[82] as well as to a direc-

69. Wis.—German-American Sav. Bank v. Fritz, 32 N.W. 123, 68 Wis. 390.

70. Pa.—Peirce v. Black, 105 Pa. 342, 346.
34 C.J. p 630 note 65.

71. Cal.—City Properties Co. v. Fitzmaurice, 183 P. 267, 42 Cal. App. 16.
34 C.J. p 630 note 68.

72. Pa.—McCune v. McCune, 30 A. 577, 164 Pa. 611.

73. W.Va.—Renick v. Ludington, 14 W.Va. 368, affirmed 20 W.Va. 511.
34 C.J. p 630 note 70.

74. Cal.—City Properties Co. v. Fitzmaurice, 183 P. 267, 42 Cal. App. 16.

75. U.S.—Pan American Life Ins. Co. v. Mayfield, D.C.S.C., 49 F.2d 900, affirmed, C.C.A., Mayfield v. Pan American Life Ins. Co., 49 F. 2d 906.
34 C.J. p 630 note 72.
Effect of execution sale under:
Judgment against mortgaged lands see Executions § 291 b.
Junior judgment see Executions § 291 b.

Judicial sale divests judgment lien
U.S.—In re Westmoreland, D.C.Ga., 4 F.2d 602.
Pa.—Borough of McDonald v. Davidson, 193 A. 472, 128 Pa.Super. 38.

Where execution sale is invalid the lien of the judgment is not affected.
Ill.—Erlinger v. Freed, 180 N.E. 400, 347 Ill. 588.
Ind.—Touhey v. Touhey, 51 N.E. 919, 151 Ind. 460, 68 Am.S.R. 233.

76. N.Y.—Hewson v. Deygert, 8 Johns. 333.

77. Iowa.—Peckenbaugh v. Cook, 16 N.W. 530, 61 Iowa 477.
34 C.J. p 630 note 74.
Lien attaching to after-acquired property generally see supra § 477.

Lien during period of redemption
(1) Under statute if any part of original several judgment remains unsatisfied after first sale of land, unsatisfied portion did not become lien against judgment debtor's interest in premises during period of redemption, and one acquiring title, before expiration of period of redemption, from judgment debtor, by making redemption original sale, took land free from lien of original judgment under which it was sold.—Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.

(2) Unpaid portion of original judgment not being lien against land sold under it during period of redemption, revival of such portion of deficiency as had in interim been improvidently satisfied was not lien.—Evans v. City of American Falls, supra.

78. Iowa.—Hays v. Thode, 18 Iowa 51.

79. Iowa.—Peckenbaugh v. Cook, 16 N.W. 530, 61 Iowa 477.

80. Conn.—Hobbs v. Simmonds, 23 A. 962, 61 Conn. 235.
34 C.J. p 631 note 86.
Effect of stay of execution on commencement of lien see supra § 470.
Operation of stay as extension of lien see supra § 498 a.

81. Miss.—Virden v. Robinson, 59 Miss. 28.
34 C.J. p 631 note 88.

82. Ala.—Decatur Charcoal Chemical Works v. Moses, 7 So. 637, 89 Ala. 538.
34 C.J. p 631 note 87.

tion or agreement to stay execution not entered of record.[83]

§ 504. —— Injunction against Judgment

The lien of a judgment is not destroyed by an injunction restraining the enforcement of the judgment unless the injunction is made perpetual.

An injunction stops an execution, but the lien of the judgment is not lost or suspended during the continuance of the injunction,[84] even though the injunction was granted on the condition of the execution of a bond furnishing the judgment creditor additional security for his debt.[85] A perpetual injunction against the collection of a judgment will destroy its lien,[86] but, where an injunction restraining the collection of a judgment is perpetuated as to a part of it only, the lien of the part not affected continues from the date of the judgment.[87]

§ 505. —— Receivership

The effect of the appointment of a receiver for the judgment debtor on the lien of the judgment is considered in the C.J.S. title Receivers § 135, also 34 Corpus Juris page 631 note 95 and 53 Corpus Juris page 129 note 93.

Examine Pocket Parts for later cases.

§ 506. —— Opening or Vacating Judgment

The vacation of a judgment, absolutely and finally, extinguishes the judgment lien; but the lien is not destroyed by the opening of the judgment to permit a defense.

The setting aside of a judgment and entering of a new one will not destroy the lien of the first when the new judgment is but a modification of the first.[88] Opening a judgment merely to let in a defense does not destroy its lien;[89] and, where the judgment is set aside for irregularity or error, the court may order the lien retained for such amount as plaintiff may ultimately recover, or order the judgment to stand as security.[90]

The lien is extinguished where the judgment is vacated absolutely and finally,[91] or canceled and stricken off the record,[92] or reversed on appeal, as considered infra § 509, and in such cases the court has no power to continue the lien so that it may attach to such judgment as subsequently may be rendered.[93] When an order vacating a judgment is set aside the lien is revived in all its pristine vigor[94] except as to the rights of third persons acquired in the meantime.[95]

§ 507. —— Waiver and Estoppel

The lien of a judgment may be lost by waiver or estoppel.

A judgment creditor may waive, or may be estopped to assert, the lien of his judgment.[96] A judgment creditor may waive or lose the benefit of his lien by failing to comply with the conditions of the judgment,[97] or by such conduct or representa-

83. Ill.—Marshall v. Moore, 36 Ill. 321.
34 C.J. p 631 note 89.

84. Miss.—Smith v. Everly, 5 Miss. 178.
34 C.J. p 631 note 91.
Operation of injunction as extension of lien see supra § 498 b.

85. Tenn.—Overton v. Perkins, Mart. & Y. 367.
34 C.J. p 631 note 92.

86. W.Va.—Grafton & G. R. Co. v. Davisson, 29 S.E. 1028, 45 W.Va. 12, 72 Am.S.R. 799.

87. W.Va.—Grafton & G. R. Co. v. Davisson, supra.

88. Wash.—Smith v. De Lanty, 39 P. 638, 11 Wash. 386.
34 C.J. p 631 note 96.

89. Pa.—Giles v. Ryan, 176 A. 1, 317 Pa. 65—Salus v. Fogel, 153 A. 547, 302 Pa. 268—Markofski v. Yanks, 146 A. 569, 297 Pa. 74.
34 C.J. p 631 note 97.
Default judgment
N.J.—Paterson Stove Repair Co. v. Ritzer, 8 A.2d 133, 123 N.J.Law 145.

90. Iowa.—Bryant v. Williams, 21 Iowa 329.
34 C.J. p 631 note 98.
Allowing judgment to stand as security see supra § 303.

91. U.S.—In re Syleecau Mfg. Co., D.C.S.C., 17 F.2d 503.
N.Y.—Abrams v. Thompson, 167 N.E. 178, 251 N.Y. 79.
Pa.—Giles v. Ryan, 176 A. 1, 317 Pa. 65—Brandt's Appeal, 16 Pa. 343.
34 C.J. p 631 note 99.

92. Iowa.—Polk County v. Nelson, 43 N.W. 80—Polk County v. Nelson, 36 N.W. 911, 75 Iowa 648.

93. Neb.—Farmers' Loan & Trust Co. v. Killinger, 65 N.W. 790, 46 Neb. 677, 41 L.R.A. 222.

94. N.Y.—Halpin v. Coleman, 73 N.Y.S. 233, 66 App.Div. 37.
34 C.J. p 633 note 37.

95. N.Y.—King v. Harris, 34 N.Y. 330—Halpin v. Coleman, 73 N.Y.S. 233, 66 App.Div. 37.

96. Ga.—Law v. Coleman, 159 S.E. 679, 173 Ga. 68.
Minn.—Roberts v. Friedell, 15 N.W. 2d 496, 218 Minn. 88.
Claimant to land levied on may avail himself of waiver or release by plaintiffs in execution of lien fixed by decree on land.—Law v. Coleman, 159 S.E. 679, 173 Ga. 68.

Renunciation of privileges secured by lien waives the lien.—Law v. Coleman, supra.

Matters not constituting waiver or estoppel
(1) Judgment creditor did not waive or release judgment lien on automobile by authorizing sheriff to release first levy of execution.—Gerlach-Barklow Co. v. Ellett, 111 So. 92, 145 Miss. 60.

(2) Defense of waiver of lien of judgment as to personalty covered by bill of sale by acceptance by holder of judgment lien of bill of sale from judgment debtor conveying personalty as security for an independent loan was not available to judgment debtor.—Bostwick v. Felder, Ga.App., 35 S.E.2d 783.

(3) Other matters.—Bankers' Home Building & Loan Ass'n v. Wyatt, Civ.App., 153 S.W.2d 216, reversed on other grounds 162 S.W.2d 694, 139 Tex. 173.

97. Colo.—Drake v. Gilpin Min. Co., 27 P. 708, 16 Colo. 231.

tions to purchasers or subsequent encumbrancers as induce the belief that he has no claim on the land, or has abandoned his claim, so as to make it inequitable that he should thereafter set up his lien in prejudice of their rights.[98]

On the other hand, the lien is not waived or abandoned by the mere failure to enforce or to attempt to enforce it for a period short of the statutory bar,[99] by the taking of a mortgage for the same debt,[1] by the creditor's acceptance of a sum of money paid to him by the clerk of the court to make good a fault or omission of his which was supposed to have invalidated the judgment,[2] by an unsuccessful attempt to obtain payment from another fund,[3] by filing a claim against the estate of a deceased debtor,[4] from the fact that the creditor brings suit in equity to avoid a fraudulent transfer of the debtor's lands,[5] or causes his judgment to be docketed in another county,[6] or because purchasers of the land after judgment was entered have made improvements, where such purchasers were bound to know that such judgment was unsatisfied, and that the tax deed under which they claim was not duly recorded.[7]

§ 508. —— Destruction, Removal, or Concealment of Property

A judgment lien on personal property may be extinguished by the destruction, removal, or concealment of the property.

A judgment lien on personal property may be destroyed, so that it cannot be enforced against the property by the lienholder, by a destruction of the property itself,[8] by removing it from the state,[9] by hiding or concealing it,[10] by removing it to other parts of the same county, city, or state, so that a creditor does not know where it is, although it is not concealed,[11] by selling to a bona fide purchaser,[12] or by any other act of interference with the property to such an extent that the lien on it is lost, destroyed, or impaired, and cannot be enforced.[13]

§ 509. —— Appeal or Writ of Error

Unless contrary provisions are made by statute, the lien of a judgment ordinarily is not discharged by the pendency of an appeal or writ of error.

Except where provisions to the contrary are made by statute,[14] the general rule is that the lien of a judgment is not discharged, but the right to enforce the lien is merely suspended, by the pendency of an appeal or writ of error, and on the affirmance of the judgment the lien is restored with full force so that no priority is acquired by a purchase or encumbrance made while such appeal or writ of error is pending;[15] and by statute in some states the lien remains unimpaired until the judgment is reversed or modified by the appellate court.[16]

Where a judgment is vacated or reversed on appeal, the lien previously acquired is destroyed;[17] but a simple judgment of affirmance does not disturb the lien of the judgment from the time of its entry below.[18] Where a judgment is reversed in part and affirmed as to the residue, the partial reversal will not affect the lien of as much of the judgment as remains unreversed.[19] The subsequent rendition of another judgment in the same cause will not revive the lien of a judgment reversed on

98. La.—Crichton Co. v. Turner, 111 So. 261, 162 La. 864.
Minn.—Roberts v. Friedell, 15 N.W. 2d 496, 218 Minn. 88.
34 C.J. p 632 note 6.
Purchase money
Where judgment creditor, obtaining special lien on debtor's land, sought to subject purchase money due by purchaser from judgment debtor to payment of judgment, creditor thereby waived portion of original decree fixing special and general lien on land.—Law v. Coleman, 159 S.E. 679, 173 Ga. 68.

99. Ala.—Clark v. Johnson, 61 So. 34, 7 Ala.App. 507.
34 C.J. p 632 note 7.
Necessity of execution to preserve lien see supra § 468.
Statutory duration of lien see supra § 489.

1. N.Y.—Muir v. Leitch, 7 Barb. 341.

2. S.C.—Hardin v. Melton, 4 S.E. 805, 9 S.E. 423, 28 S.C. 38.

3. Pa.—Connelly v. Withers, 9 Lanc. Bar 117.

4. Ind.—Green v. Stobo, 20 N.E. 850, 118 Ind. 332.

5. N.Y.—Wilkinson v. Paddock, 27 N.E. 407, 125 N.Y. 748.

6. N.C.—Isler v. Colgrove, 75 N.C. 334—Perry v. Morris, 65 N.C. 221.

7. U.S.—Hill v. Gordon, C.C.Fla., 45 F. 276, appeal dismissed 13 S. Ct. 1047, 149 U.S. 775, 37 L.Ed. 963.

8. Ala.—Clark v. Johnson, 61 So. 34, 7 Ala.App. 507.

9. Ala.—Clark v. Johnson, supra.

10. Ala.—Clark v. Johnson, supra.

11. Ala.—Clark v. Johnson, supra.
34 C.J. p 632 note 18.

12. Ala.—Clark v. Johnson, supra.

13. Ala.—Clark v. Johnson, supra.

14. N.Y.—Wronkow v. Oakley, 31 N. E. 521, 133 N.Y. 505, 28 Am.S.R. 661, 16 L.R.A. 209, 28 Abb.N.Cas. 409.
34 C.J. p 632 note 31.
Operation as extension of lien see supra § 498 c.

15. Cal.—Stetson v. Sheehan, 200 P. 387, 52 Cal.App. 353, hearing denied 200 P. 392, 186 Cal. 334.
Okl.—Funk v. First Nat. Bank, 95 P.2d 589, 185 Okl. 604.
34 C.J. p 633 note 32—3 C.J. p 1262 note 76.

16. N.C.—Black v. Black, 16 S.E. 412, 111 N.C. 300.
3 C.J. p 1262 note 78.

17. N.Y.—Clinton v. South Shore Natural Gas & Fuel Co., 118 N.Y. S. 289, 61 Misc. 339.
34 C.J. p 633 note 33—3 C.J. p 1263 notes 81, 82.

18. Miss.—Montgomery v. McGimpsey, 15 Miss. 557.
34 C.J. p 633 note 34.

19. Va.—Thomson v. Chapman, 2 S. E. 273, 83 Va. 215.
W.Va.—Grafton & G. R. Co. v. Davisson, 29 S.E. 1023, 45 W.Va. 12, 72 Am.S.R. 799.
34 C.J. p 633 note 35.

appeal, so as to make it effective from the date of the original judgment.[20]

Appeal from justice's judgment. It has been held that the lien created by filing or recording the transcript of a justice's judgment is destroyed where an appeal is entered within the time limited by law; the cause then goes to the higher court for new trial and judgment, and the lien of that judgment can date only from its rendition, and does not relate back to the time of entry of the transcript of the justice's judgment;[21] but there is also authority to the contrary.[22]

§ 510. Remedies of Creditor after Termination of Lien

After the lien of a judgment has expired at law it may not be enforced in equity, but the judgment itself, if still operative, may be enforced, as by execution against the property of the judgment debtor.

After the lien of a judgment has expired at law it may not be enforced in equity[23] or made the basis of a creditor's bill or a bill to subject property;[24] nor can the lien be revived or continued by the mere act of issuing an execution.[25] Also such a lien may not be enforced or foreclosed by action,[26] at least as against an inferior lien.[27] It has been held that the lien may not be enforced after its expiration even though the action was begun before its expiration,[28] although there is also authority to the contrary.[29]

Unless by reason of statute the judgment becomes inoperative coincident with the termination of the lien, the judgment continues a valid claim against the debtor,[30] and, although it has no lien, it may be filed as a claim against his estate after his death[31] or collected by means of an execution against property the title to which remains in the judgment debtor;[32] and it will entitle the creditor to redeem from a sale under a junior judgment[33] or to take the money from the junior judgment creditor where the senior lien was not enforceable only because of possession by a bona fide purchaser for value for the statutory period.[34]

Any wrongdoer in the chain of acts by which a judgment lien is destroyed, whether his act results directly or indirectly in the destruction, is responsible to the lienholder.[35] A cause of action for destroying a judgment lien on personalty has been held not to be established by proof of mere conversion.[36]

§ 511. Enforcement of Lien

a. In general
b. Proceedings to enforce lien

a. In General

Where authorized by statute, the lien of a judgment may be enforced by an action for foreclosure, and, in proper cases, the lien may be enforced in equity.

20. Neb.—Oliver v. Lansing, 77 N. W. 802, 57 Neb. 352.
34 C.J. p 633 note 36.

21. Mo.—Earl v. Hart, 1 S.W. 238, 89 Mo. 263.
34 C.J. p 633 note 39.

22. Ill.—Dawson v. Cunning, 50 Ill. App. 286.
N.C.—Dysart v. Brandreth, 23 S.E. 966, 118 N.C. 968.

23. Ind.—Petrovitch v. Witholm, 152 N.E. 849, 85 Ind.App. 144.
34 C.J. p 621 note 59, p 634 note 47.
Foreclosure after expiration of lien see infra § 511 a.

Representation of amount advanced under mortgage subsequent to judgment lien afforded no ground of equitable relief for lienor's failure to enforce lien within statutory period.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 30 S.W.2d 253, 161 Tenn. 298.

Sale of judgment debtor's subsequently mortgaged property to others did not authorize equity to extend judgment lien beyond statutory twelve months.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., supra.

Unfounded doubts regarding rights will not warrant equity's intervention to extend judgment lien contrary to statute.—Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., supra.

24. Mo.—Lakenan v. Robards, 9 Mo. App. 179, affirmed 81 Mo. 445.
34 C.J. p 634 note 48.

25. N.Y.—Roe v. Swart, 5 Cow. 294.
Pa.—Stephen's Appeal, 38 Pa. 9.

26. Ala.—Harrison v. Carpenter, 142 So. 772, 225 Ala. 297.
N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234.
Va.—Blair v. Rorer's Adm'r, 116 S. E. 767, 135 Va. 1, motion for leave to file petition for writ of error denied 43 S.Ct. 704, 262 U.S. 234, 67 L.Ed. 1206.
34 C.J. p 636 note 65.
Remedies of creditor after termination of lien see supra § 510.

27. Ind.—McAfee v. Reynolds, 28 N. E. 423, 130 Ind. 33, 30 Am.S.R. 194, 18 L.R.A. 211.
34 C.J. p 636 note 66.

28. Okl.—McGinnis v. Seibert, 134 P. 396, 37 Okl. 272.
34 C.J. p 636 note 67.
Extension of lien by suit to enforce see supra § 495.

29. Tex.—Boyd v. Ghent, 64 S.W. 929, 95 Tex. 46.
34 C.J. p 636 note 68.

30. Idaho.—Platts v. Pacific First Federal Savings & Loan Ass'n of Tacoma, 111 P.2d 1093, 62 Idaho 340.
N.Y.—Domestic & Foreign Discount Corp. v. Beuerlein, 54 N.Y.S.2d 548.
34 C.J. p 634 note 50.

31. Ind.—Fisher v. Freeman, 65 Ind. 89.

32. Mo.—Steele v. Reid, 223 S.W. 881, 284 Mo. 269.
34 C.J. p 634 note 52.
Time for issuance of execution see Executions § 66.

33. N.Y.—Ex parte Peru Iron Co., 7 Cow. 540.

34. Ga.—Jones v. Wright, 60 Ga. 364,

35. Ala.—Clark v. Johnson, 61 So. 34, 7 Ala.App. 507.
34 C.J. p 634 note 55.
Obstruction of legal remedies as tort generally see the C.J.S. title Torts § 45, also 62 C.J. p 1148 note 1 et seq.

36. Ala.—Clark v. Johnson, supra.
34 C.J. p 634 note 56.
Contra Teat v. Chapman, 56 So. 267, 1 Ala.App 491—34 C.J. p 634 note 57.

In addition to a sale under execution of property bound by the lien of a judgment, as considered in Executions § 33, there exists in some jurisdictions a statutory method for enforcing the lien by an action for foreclosure.[37] Under its jurisdiction to enforce liens, as considered in Equity § 60, and in the C.J.S. title Liens, § 20, also 21 Corpus Juris page 118 note 36 et seq and 37 Corpus Juris page 340 note 39 et seq, equity may in proper cases enforce judgment liens[38] where the judgment creditor has no adequate remedy at law,[39] and statutory jurisdiction to enforce judgment liens has sometimes been conferred on courts of equity.[40] The lien of a judgment may be enforced in equity where it is not possible to issue an execution[41] or, notwithstanding the right to execution, the judgment creditor is impeded from realizing thereon.[42]

Redemption. A debtor who has sold his interest in the realty has no right to redeem from the foreclosure of the judgment lien.[43]

b. Proceedings to Enforce Lien

A suit to enforce a judgment lien against land is not a suit to recover the land or a suit on the judgment.

The suit of a judgment creditor to enforce his judgment lien against the land is not a suit to recover the land itself,[44] nor is it a suit on the judg-

37. Conn.—Merchants' Bank & Trust Co. v. Pettison, 153 A. 789, 112 Conn. 652.

La.—Henry v. Roque, App., 18 So.2d 917.

N.M.—Pugh v. Heating & Plumbing Finance Corp., 161 P.2d 714, 49 N.M. 234.

34 C.J. p 635 note 63.

Absence of ordinary means

Right to statutory foreclosure of lien does not necessarily exist as long as judgment is enforceable by ordinary means.—Pugh v. Heating & Plumbing Finance Corp., supra.

38. Fla.—Smith v. Pattishall, 176 So. 568, 127 Fla. 474, 129 Fla. 498.

Tex.—Baker v. West, 36 S.W.2d 695, 120 Tex. 113—Mullins v. Albertson, Civ.App., 136 S.W.2d 263, error refused—**Corpus Juris cited in** Fikes v. Buckholts State Bank, Civ.App., 273 S.W. 957, 961.

Enforcement of judgments in equity see infra § 587.

Acceleration of lien on default in payment of taxes

Where judgment giving plaintiff a lien on mining claims provided that failure of corporate defendant owner to pay taxes assessed against property before they became delinquent should accelerate lien and make it foreclosable as a mortgage, plaintiff had right, on defendant's default in paying taxes, to foreclose lien, and such foreclosure would not be unconscionable as working a forfeiture in view of defendant's available remedies.—Sparks v. Rowley Mines, 149 P.2d 673, 61 Ariz. 370.

Effect of fraud in inducing execution of another instrument

Where agreed judgment awarded attorney's fee, secured by lien on property of client, who subsequently executed notes therefor, attorney's alleged fraud in inducing execution of trust deed securing notes did not prevent foreclosure of judgment lien by attorney's transferees, including associate counsel aiding in obtaining judgment.—Keels v. First Nat. Bank, Tex.Civ.App., 71 S.W.2d 372.

39. Neb.—Rich v. Cooper, 286 N.W. 383, 136 Neb. 463.

Where judgment creditor has legal lien on land held by equitable title, creditor must seek aid of court of equity to uncover equitable title.—Miller v. Kemp, 160 S.E. 203, 157 Va. 178, 84 A.L.R. 980.

40. Ala.—First Nat. Bank v. Powell, 155 So. 624, 229 Ala. 178.

Va.—Sutherland v. Rasnake, 192 S.E. 695, 169 Va. 257—McClanahan's Adm'r v. Norfolk & W. Ry. Co., 96 S.E. 453, 122 Va. 705.

34 C.J. p 635 note 64, p 634 note 60 [f].

Jurisdiction extends only as far as may be necessary to satisfy lien.—Tackett v. Bolling, 1 S.E.2d 285, 172 Va. 326.

Living debtor

Statute applies to suit brought to subject land of living debtor to lien of judgment thereon, and has no application to suit in equity to subject lands of decedent to payment of his debts.—Morrison v. Morrison, 14 S.E.2d 322, 177 Va. 417.

Effect of death of judgment debtor pending suit

After death of judgment debtor against whom suit for enforcement of judgment lien on his real estate was pending at his death, it is proper and necessary to require a settlement of his estate in such suit, if he left any personal property applicable to the payment of his debts, but such settlement is merely incidental to the accomplishment of the purpose of the suit, and does not alter its character, although it is susceptible of enlargement and extension to a purpose not strictly within its original scope, namely, sale of real estate to satisfy unsecured indebtedness.—First Nat. Bank v. De Berriz, 105 S.E. 900, 87 W.Va. 477.

Statutory remedy merely cumulative

Ala.—Ashley v. Thrasher, 146 So. 807, 226 Ala. 313—Griffith v. First Nat. Bank, 128 So. 595, 221 Ala. 311—Johnston v. Bates, 95 So. 375, 209 Ala. 16—34 C.J. p 635 note 62 [a].

41. Cal.—Wellborn v. Wellborn, 131 P.2d 48, 55 Cal.App.2d 516.

34 C.J. p 634 note 60.

No money judgment

Where judgment expressly created lien on particular property but no money judgment was entered in favor of lienholder, and no requirement made for sale of the property, execution would not lie for enforcement of lien, but an equitable action was required to enforce it.—Wellborn v. Wellborn, supra.

Enforcement in probate court after death

Where judgment debtor conveyed to another all his title in certain land prior to his death, nothing remained in his estate relative to land subject to orders of probate court, and hence judgment creditor seeking to enforce his judgment lien against land did not have to seek relief through probate court.—W. T. Rawleigh Co. v. Childers, Tex.Civ.App., 132 S.W.2d 434.

Where execution may issue, an equitable action is unnecessary.—Corporation of America v. Marks, 73 P.2d 1215, 10 Cal.2d 218, 114 A.L.R. 1162—34 C.J. p 634 note 60.

42. Tex.—Hull v. Naumberg, 20 S.W. 1125, 1 Tex.Civ.App. 132.

34 C.J. p 634 note 61.

Remedies in equity against fraudulent conveyance see Fraudulent Conveyances §§ 319–325.

43. Conn.—Meister v. Gale, 139 A. 700, 107 Conn. 52.

44. Va.—McClanahan's Adm'r v. Norfolk & W. Ry. Co., 96 S.E. 453, 122 Va. 705.

ment.[45] A judgment creditor who comes into a court of equity to enforce his lien on land is not asserting an equitable right or seeking equitable relief; his judgment is a legal lien.[46] After the death of the judgment debtor the lien may be enforced in equity without revival of the judgment.[47] The tender to the senior mortgagee of the amount of the mortgage debt is not a prerequisite to the foreclosure of a junior judgment lien.[48]

The suit must be brought within the time limited by statute;[49] and laches in instituting the suit may bar relief.[50] Such notice must be given to the judgment debtor as is prescribed by statute.[51] Thus, where required by statute, the judgment creditor in advance of suit must give the specified notice that suit will be instituted.[52] In the absence of special statutory regulations, the general rules control as to parties[53] and pleadings.[54] In accordance with

45. Tex.—Nichols v. Causler, Civ. App., 140 S.W.2d 254, error dismissed, judgment correct.

46. Va.—Savings & Loan Corporation v. Bear, 154 S.E. 587, 155 Va. 312, 75 A.L.R. 980—Flanary v. Kane, 46 S.E. 312, 102 Va. 547, rehearing denied 46 S.E. 681, 102 Va. 547.

47. Neb.—**Corpus Juris cited in** Rich v. Cooper, 286 N.W. 383, 385, 136 Neb. 463.
W.Va.—Maxwell v. Leeson, 40 S.E. 420, 50 W.Va. 361, 88 Am.S.R. 875.

48. Tex.—Estelle v. Hart, Com.App., 55 S.W.2d 510.

49. Wash.—Castanier v. Mottet, 128 P.2d 974, 14 Wash.2d 615.

Statute inapplicable
Statute providing that no action shall be brought on any judgment against a defendant within nine years after rendition thereof without leave of court applies to the extension or renewal of a judgment, and not to an action to enforce a lien established thereby.—Lackender v. Morrison, 2 N.W.2d 286, 231 Iowa 899.

Where decree of distribution of decedent's estate created lien in favor of decedent's widow against interests of other distributees, and within six years after entry of the decree a partition suit was instituted wherein, after defining interests of respective parties and confirming widow's lien, all lands were directed to be sold at public auction, partition decree initiated new rights in favor of widow as regards time in which she was required to bring action to enforce her lien, as against contention that partition decree merely constituted a recognition of the subsistence of a lien at such time.—Castanier v. Mottet, 128 P.2d 974, 14 Wash.2d 615.

50. Cal.—Christerson v. Chase, 257 P. 889, 84 Cal.App. 165.

Plaintiff held not guilty of laches
U.S.—Mills v. Smith, C.C.A.Ind., 113 F.2d 404, certiorari denied Smith v. Mills, 61 S.Ct. 73, 311 U.S. 692, 85 L.Ed. 447.
Md.—Wilmer v. Light Street Savings & Building Ass'n of Baltimore City, 122 A. 129, 143 Md. 272.

51. Va.—Sutherland v. Rasnake, 192 S.E. 695, 169 Va. 257.

Serving copy of petition to subject real estate to judgment lien on defendants is material only in determining priority in creditors' rights.—Lawrence v. Stanton, 237 N. W. 512, 212 Iowa 949.

52. Va.—Sutherland v. Rasnake, 192 S.E. 695, 169 Va. 257.

Purpose of statute providing that no bill to enforce lien of judgment not exceeding twenty dollars shall be entertained unless judgment debtor has been given thirty days' notice that suit would be instituted is to spare judgment debtor expense of suit brought to enforce lien of judgment in such a small amount until he shall have been given a final opportunity to pay claim.—Sutherland v. Rasnake, supra.

53. N.C.—Brown v. Harding, 89 S. E. 222, 171 N.C. 686.
34 C.J. p 634 notes 60 [b], 61 [a], p 635 note 62 [b].

Necessary parties
(1) Where land had been conveyed by judgment debtor, the only necessary parties to action for foreclosure of lien were judgment creditor and grantee of judgment debtor.
N.C.—Flynn v. Rumley, 192 S.E. 868, 212 N.C. 25.
Tex.—Citizens' Bank v. Brandau, Civ. App., 1 S.W.2d 466, error refused.

(2) Where judgment, in awarding divorce and certain property to wife, imposed lien thereon to secure attorney's fee, and wife subsequently executed notes therefor secured by trust deed, children, although living with wife on property as homestead, were not necessary parties to suit to foreclose liens.—Keels v. First Nat. Bank, Tex.Civ. App., 71 S.W.2d 372.

(3) Other cases.—White v. Glenn, Tex.Civ.App., 138 S.W.2d 914, error dismissed, judgment correct—34 C. J. p 634 note 61 [a], p 635 notes 62 [b], 64 [b] (3), (5)-(7), (16).

Proper parties
(1) Fact that creditor's bill to subject property to lien of recorded judgment prayed discovery separating debtor's interest from coöwners authorized joining them as defendants.—Griffith v. First Nat. Bank, 128 So. 595, 221 Ala. 311.

(2) Judgment creditor seeking to enforce lien against debtor's undivided interest in land was not entitled to have land sold for division among joint owners, and the joint owners, other than debtor, were not "proper parties" to bill.—Hargett v. Hovater, 15 So.2d 276, 244 Ala. 646.

(3) Other cases.—Decker v. Gilbert, 80 Ind. 107—34 C.J. p 634 note 60 [b], p 635 note 62 [b].

Intervention of interested persons
(1) Persons beneficially interested in judgments, not already parties to actions to enforce them, may come in by leave of court, making themselves parties.—Brown v. Harding, 89 S.E. 222, 171 N.C. 686.

(2) In suit to enforce judgment lien against lands, on behalf of plaintiff and all other lien creditors of defendant who will make themselves parties on the usual terms, one has a right to file his petition, and become a party plaintiff, without maintaining a separate suit to mature his bill, since, having acquired jurisdiction of the cause on equitable grounds, the court may go on to a complete adjudication of the rights of the various parties.—Kane v. Mann, 24 S.E. 938, 93 Va. 239.

Where mortgagor's rights had been cut off by mortgage foreclosure suit, he was not entitled to law day in subsequent action to foreclose prior judgment lien.—Joseph v. Donovan, 164 A. 498, 116 Conn. 160.

54. N.C.—Adams v. Cleve, 10 S.E. 2d 911, 218 N.C. 302.
34 C.J. p 635 note 63 [a] (1).

Petition or complaint
(1) The existence of the lien must be pleaded.—Roney v. Dothan Produce Co., 117 So. 36, 217 Ala. 475.

(2) Allegation that rents and profits will not discharge judgment within five years is not required.—Central Trust Co. v. Feamster, 14 S. E.2d 619, 123 W.Va. 250—Handly v. Sydenstricker, 4 W.Va. 605.

(3) Petition construed as one to enforce existing judgment lien and not to establish lien.—Stephenson v. Lichtenstein, 160 P. 1170, 24 Wyo. 417.

(4) Bill alleging, and seeking enforcement of, paramount lien on property under recorded judgments assigned to complainant was good as bill to enforce judgment liens.—Mc-

the general rules of evidence which usually apply in proceedings to enforce a judgment lien,[55] where a third person claims ownership of the property on which the judgment creditor seeks a foreclosure of the judgment lien, such third person may not show title to the property in a stranger unless he connects himself with such title.[56]

Trial or hearing. General rules ordinarily apply to the trial or hearing of an action or suit to enforce the lien of a judgment.[57] The merits of the cause in which the original judgment was rendered will not be considered;[58] nor may the validity of the original judgment be questioned[59] unless it is void.[60]

Judgment or decree. General rules usually are applicable to the judgment or decree in an action or suit to enforce a judgment lien.[61] A sale of land for the payment of the lien should not be decreed until there has first been an account of all the liens on the land and their relative priorities, if any.[62] A sale may be ordered without reference to a contingent right of dower.[63] Where the statute

Fry v. Stewart, 121 So. 517, 219 Ala. 216.

(5) Abstract of judgment, the judgment, and an assignment thereof were sufficiently described in the petition to inform the court and defendants of the nature of the instruments and to warrant introduction of such instruments in evidence, and abstract of judgment was not required to be attached to the petition. —Carver v. Gray, Tex.Civ.App., 140 S.W.2d 227, error dismissed, judgment correct.

(6) Held insufficient.—Citizens' & Southern Nat. Bank v. Georgia Railroad Bank, 159 S.E. 287, 43 Ga.App. 387.

Demurrer

N.C.—Adams v. Cleve, 10 S.E.2d 911, 218 N.C. 302.

Issues, proof, and variance

(1) Defendant could, under general denial, prove any matter tending to show that plaintiff had no enforceable lien.—Payne v. Bracken, 115 S.W.2d 903, 131 Tex. 394.

(2) In suit to enforce judgment lien against grantor of realty and corporation to which realty was conveyed and its vendee, equities in favor of corporation and its vendee could be established under general denial without pleading facts out of which they arose, notwithstanding equities consisted in part of right to assert estoppel as against grantor, since land was subject to equitable rights of corporation and its vendee. —Payne v. Bracken, supra.

(3) Where defendants pleaded that land was their homestead on and after a specified date, and abstract of judgment had been filed and recorded over a year previously, plea limited the defensive issue and admission of testimony tending to show that the homestead status was fixed and attached to the land prior to and on date of filing of the abstract of judgment was error.—Stevenson v. Wilson, Tex.Civ.App., 163 S.W.2d 1063.

(4) Other cases see 34 C.J. p 634 note 61 [b] (1), (2), p 635 note 63 [a] (2).

55. N.C.—Metcalf v. Ratcliff, 4 S.E. 2d 515, 216 N.C. 216.
Tex.—Estelle v. Hart, Com.App., 55 S.W.2d 510—Carver v. Gray, Civ. App., 140 S.W.2d 227, error dismissed, judgment correct—Dallas Land & Loan Co. v. Sugg, Civ.App., 237 S.W. 955.
34 C.J. p 634 note 60 [d], p 634 note 61 [b] (3)–(8).

Presumptions

(1) It will be presumed that the court properly set aside its dismissal in the original action.—Hallam v. Finch, 195 N.W. 352, 197 Iowa 224.

(2) Any presumption of regularity is not sufficient to dispense with affirmative proof of compliance with statutory requirements as to creation of the lien.—Chamlee v. Chamlee, Tex.Civ.App., 113 S.W.2d 290.

Burden of proof

(1) In general.—Estelle v. Hart, Tex.Com.App., 55 S.W.2d 510—34 C. J. p 635 note 63 [a] (3), (4).

(2) Judgment creditor has burden of showing that lien is a subsisting lien.
Ala.—Roney v. Dothan Produce Co., 117 So. 36, 217 Ala. 475.
Tex.—Nichols v. Cansler, Civ.App., 140 S.W.2d 254, error dismissed, judgment correct.

(3) Burden of proof is on judgment creditor to sustain allegations as to debtor's ownership of property on which lien allegedly existed.—Horton v. Spears, 191 So. 622, 238 Ala. 464.

(4) Where judgment creditor establishes prima facie case of ownership by judgment debtor of property, a third person claimant of the property has the burden of going forward with the evidence to rebut the prima facie case.—Horton v. Spears, supra.

Sufficiency of evidence

(1) Evidence held sufficient.
Ala.—Horton v. Spears, supra.
Tex.—Carver v. Gray, Civ.App., 140 S.W.2d 227, error dismissed, judgment correct.

(2) Evidence held insufficient.—J. M. Radford Grocery Co. v. Speck, Tex.Civ.App., 152 S.W.2d 787, error refused.

56. Ala.—Horton v. Spears, 191 So. 622, 238 Ala. 464.

57. N.C.—Metcalf v. Ratcliff, 4 S.E. 2d 515, 216 N.C. 216.
34 C.J. p 635 note 63 [a] (5), (6).

Questions of law and fact

In action to subject certain land to payment of judgment, evidence that one of defendants was in possession of property and claiming some interest therein presented jury question which defeated motion for nonsuit as to such defendant.—Metcalf v. Ratcliff, 4 S.E.2d 515, 216 N.C. 216.

58. Iowa.—Hallam v. Finch, 195 N. W. 352, 197 Iowa 224.

59. Kan.—Baldwin v. Baldwin, 96 P. 2d 614, 150 Kan. 807.
Tex.—McGehee v. Brookins, Civ. App., 140 S.W.2d 963, error dismissed, judgment correct—Klier v. Richter, Civ.App., 119 S.W.2d 100, error refused.

Variance between pleadings in original suit and judgment

Judgment denying foreclosure of abstract of judgment lien on ground that there was variance between pleadings in original suit where judgment was obtained and terms of judgment that was rendered thereon was error, where pleadings in original suit could not be found either in transcript or statement of facts in action to foreclose lien, and were not before trial court.—John F. Grant Lumber Co. v. Hunnicutt, Tex. Civ.App., 143 S.W.2d 976.

60. Tex.—Klier v. Richter, Civ.App., 119 S.W.2d 100, error refused.
Collateral attack for want of jurisdiction generally see supra §§ 421–427.

Judgment void for want of process

N.C.—Adams v. Cleve, 10 S.E.2d 911, 281 N.C. 302.

61. **Description of land in judgment**
Tex.—White v. Glenn, Civ.App., 138 S.W.2d 914, error dismissed, judgment correct.

62. Va.—Gemmell v. Powers, 195 S. E. 501, 170 Va. 43.

63. Va.—Gemmell v. Powers, supra.

so requires, before ordering the sale of the land to satisfy the judgment, it must appear to the court that the rents and profits of the real estate will not satisfy the judgment within five years;[64] but an inquiry as to rental value is not necessary where the bill charges that the judgment lien cannot be paid within five years from rental proceeds and that charge is not denied.[65]

Where the land is subject to a deed of trust subordinate to the lien of the judgment, the judgment foreclosing the lien and ordering sale should fix the right of the holder of the deed of trust to satisfy the encumbrances and retain the land.[66] Under some statutes where the judgment creditor holds a mortgage on realty as security for the debt that has gone into the judgment, which mortgage is a first charge on the property mortgaged, the court shall order such mortgaged property to be first applied to the debt secured by it and a foreclosure of the judgment lien shall be granted only as to the portion of said judgment that shall remain unsatisfied.[67]

Sale. A sale is not void because of a defective description of the land in the judgment of foreclosure and in the sheriff's deed under the foreclosure sale;[68] nor, in the absence of fraud or irregularity in the conduct of the sale, is the sale void because the price was grossly inadequate.[69] When real estate, divisible in parcels, or owned in severalty, is sold to satisfy a judgment lien, authority to sell additional parcels is exhausted when a sufficient amount has already been realized to satisfy the lien and the costs of the proceeding.[70]

XV. ASSIGNMENT OF JUDGMENTS

a. In General

As a general rule, a judgment is as assignable as any other chose in action. While under the common law a judgment is not assignable so as to pass the legal title to the assignee, such an assignment is permissible by virtue of statute in many jurisdictions.

A judgment has been said to have the assignable quality of a chose in action,[71] deriving its assignability from the fact that it constitutes a debt or property right made of record in favor of the party who obtains the judgment against his adversary.[72] At common law, and in the absence of statute changing the rule, a judgment is not assignable so as to vest the legal title in the assignee;[73] but such an assignment operates to vest an equitable interest in the assignee which the law will protect,[74] if it is made in good faith[75] and, as discussed infra § 517, for a valuable consideration.

While judgments have been spoken of in general language as being assignable, apart from or without

Decree of sale should note the possibilities of a contingent right of dower.—Gemmell v. Powers, supra.

64. Va.—Morris v. Gates, 20 S.E.2d 118, 124 W.Va. 275.
W.Va.—Abney-Barnes Co. v. Davy-Pocahontas Coal Co., 98 S.E. 298, 83 W.Va. 292.
Report of commissioner
Va.—Gemmell v. Powers, 195 S.E. 501, 170 Va. 43.

65. Va.—Gemmell v. Powers, supra.

66. Tex.—Williams v. Hedrick, Civ. App., 131 S.W.2d 187, error dismissed, judgment correct.

67. Conn.—Merchants' Bank & Trust Co. v. Pettison, 153 A. 789, 112 Conn. 652.

68. Tex.—Brinkman v. Tinkler, Civ. App., 117 S.W.2d 139, error refused.

69. Tex.—Brinkman v. Tinkler, supra.

70. Va.—Peatross v. Gray, 27 S.E.2d 203, 181 Va. 847.
Rule not applicable
The rule does not apply when realty involved is not divisible in kind and sale of the whole is necessary to provide sufficient funds.—Tackett v. Bolling, 1 S.E.2d 285, 172 Va. 326.
Questions of subrogation or proportionate liability of owners in severalty of realty against which judicial proceedings have been brought to satisfy lien are to be settled between parties, in absence of an agreement between them or an adjudication by court having jurisdiction over subject matter and parties.—Tackett v. Bolling, supra.

71. Minn.—Brown v. Reinke, 199 N. W. 235, 139 Minn. 458, 35 A.L.R. 413.
Tex.—Blanks v. Radford, Civ.App., 188 S.W.2d 879, error refused—McMillan v. Rutherford, Civ.App., 14 S.W.2d 132.
Assignment as extinguishment of judgment see infra § 562.

72. Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105.

73. U.S.—**Corpus Juris cited in** In re Dodge, D.C.N.Y., 9 F.Supp. 540, 542.
Ill.—Stombaugh v. Morey, 58 N.E.2d 545, 388 Ill. 392, 157 A.L.R. 254.
Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105.
34 C.J. p 636 note 70.

74. U.S.—**Corpus Juris cited in** In re Dodge, D.C.N.Y., 9 F.Supp. 540, 542.
Ky.—Turner v. Gambill, 121 S.W.2d 705, 275 Ky. 330.
Mo.—Boyd v. Sloan, 71 S.W.2d 1065, 335 Mo. 163—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105.
Okl.—Owen v. Interstate Mortg. Trust Co., 211 P. 87, 88 Okl. 10, 30 A.L.R. 816.
34 C.J. p 636 note 71.
"Judgment is . . . a chose in action subject to sale and equitable assignment."—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 271, 231 Ky. 223.

75. **Equity disregards** common-law rule and enforces such assignments if they are made in good faith and for a valuable consideration.—Stombaugh v. Morey, 58 N.E.2d 545, 388 Ill. 392, 157 A.L.R. 254.

reference to any statute,[76] under statutes which are now in force in practically all jurisdictions, a judgment, provided it is final,[77] may be assigned so as to pass the legal title[78] and, as discussed infra § 522, give the assignee the right to enforce it in his own name, although even now the assignment may be such that the assignor remains the equitable owner.[79]

An assignment of a judgment may be made at any time after its entry in the trial court,[80] even pending an appeal,[81] although, as discussed infra § 522, it cannot be enforced, unless and until the appellate procedure is finally terminated in favor of the judgment.

b. Particular Judgments

In the absence of a statute to the contrary, a judgment which does not survive to the personal representative of the beneficial owner, or which does not constitute a debt or right in property capable of being reduced to possession, is not assignable.

In accordance with the general rule discussed in Assignments §§ 5, 30, which sets up as a test of assignability of a chose in action the survivability of the chose in action, in the absence of statutory authority therefor, a judgment which does not survive to the personal representative of the beneficial owner is not assignable.[82] Where a judgment is considered as deriving its assignability from the fact that it constitutes a debt or property right, as discussed supra subdivision a of this section, a decree which in no sense represents a debt or which creates no property right in anything capable of being reduced to possession is not assignable.[83]

A decree in equity, although not assignable at law, may be transferred for a valuable consideration, and the transfer will be supported by a court of chancery.[84]

Satisfied judgments. A judgment once fully paid off and satisfied is not thereafter capable of assignment.[85]

Judgments for torts. While, as discussed in Assignments § 32, a cause of action for a tort, which dies with the party and does not survive to his personal representatives, is generally not capable of passing by assignment, after such cause of action has been merged into a judgment it assumes a different footing, and such judgment, sometimes by reason of express statutory provision, may be assigned,[86] and, according to the decisions on the

76. Fla.—Kahn v. American Surety Co. of New York, 162 So. 335, 120 Fla. 50.
Tenn.—State ex rel. McConnell v. Peoples Bank & Trust Co., 12 Tenn.App. 242.
Judgment is property capable of transfer.—Anglo-California Trust Co. v. Oakland Rys., 225 P. 452, 193 Cal. 451.
Decree in partition suit allowing solicitor's fee for services in conducting proceeding was subject to assignment by solicitor.—Bank of Monticello v. L. D. Powell Co., 130 So. 292, 159 Miss. 183.

77. Mo.—Deck v. Wright, 116 S.W. 31, 135 Mo.App. 536.

78. Mont.—Genzberger v. Adams, 205 P. 658, 62 Mont. 430.
34 C.J. p 636 note 73.
Common-law rule has been repealed with respect to judgments.—Boyd v. Sloan, 71 S.W.2d 1065, 335 Mo. 163.
Judgment for recovery of money
Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105.
Negotiability
(1) Under some statutes judgments are transferable by indorsement or written assignment in same manner as bills of exchange and promissory notes.—Winn v. Armour & Co., 193 S.E. 447, 184 Ga. 769—Franklin v. Mobley, for Use of Patrick, Ga.App., 36 S.E.2d 173.
(2) However, they are not negotiable in a strict commercial sense.—Winn v. Armour & Co., supra.

79. N.J.—Combes v. Hoffman, 99 A. 607, 87 N.J.Eq. 148.

80. Cal.—Bias v. Ohio Farmers Indemnity Co., 81 P.2d 1057, 28 Cal. App.2d 14.

81. N.J.—National Surety Co. v. Mulligan, 146 A. 372, 105 N.J.Law 336.
Tenn.—State ex rel. McConnell v. Peoples Bank & Trust Co., 12 Tenn.App. 242.
Validity of assignment is not affected by pendency of appeal, where enforced after affirmance.—Bias v. Ohio Farmers Indemnity Co., 81 P.2d 1057, 28 Cal.App.2d 14.

82. **Judgment for taxes** due on land would not survive to the personal representative either of the original county collector of revenue or of his successor, and hence is not assignable in absence of statutory authority.—State ex rel. Gilkison v. Andrews, Mo.App., 133 S.W.2d 695.

83. Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105.
Injunction
A decree, enjoining manufacture and sale of frozen suckers, except under license from owner of patents thereon, was of such personal nature as to be incapable of assignment by such owner to assignee of patents.—Popsicle Corporation of U. S. v. Pearlstein, supra.

84. U.S.—Coates v. Muse, C.C.Va., 5 F.Cas.No.2,918, 1 Brock. 551.

85. Miss.—Cook v. Armstrong, 25 Miss. 63.
N.Y.—Conor v. Hernstein, 29 N.Y. Super. 553.
Pa.—Waters v. Largy, 5 Rawle 131.

86. Cal.—Pacific Gas & Electric Co. v. Nakano, 87 P.2d 700, 12 Cal.2d 711, 121 A.L.R. 417—Salter v. Lombardi, 3 P.2d 38, 116 Cal.App. 602.
Mo.—**Corpus Juris cited in** State ex rel. Emerson v. City of Mound City, 73 S.W.2d 1017, 1022, 335 Mo. 702.
34 C.J. p 637 note 79.
Power of state
"The state can, in the absence of constitutional prohibition, continue the common-law bar to the assignment of such personal tort causes of action, and remove the common-law bar against the assignment of judgments recovered therein, and can as a condition of assignment stamp upon the assigned judgment such character as it sees fit, including the character of an ordinary money judgment free of tort characteristics, and as if the judgment had been recovered in an action of debt."—In re Dodge, D.C.N.Y., 9 F.Supp. 540, 544.
Fraud and deceit
U.S.—Hastings v. Osborne, C.C.A. Mich., 131 F.2d 396, certiorari denied Osborne v. Hastings, 63 S.Ct. 982, 318 U.S. 785, 87 L.Ed. 1152.

question, at least in equity,[87] in the same manner as any other judgment, provided the judgment has become final in the sense that the action in which it is recovered is no longer pending or in the sense that it finally determines the rights of the parties to such action.[88]

Statutory prohibition. The legislature, pursuant to a scheme of remedial legislation, may prohibit the assignment of a judgment which is ordinarily assignable.[89]

§ 513. —— Future Judgments

An assignment may be made of a judgment to be recovered in the future if the cause of action itself is assignable. Such an assignment becomes operative when the judgment is recovered.

Where the cause of action is of an assignable character, as in the case of actions ex contractu, a valid assignment may be made before the rendition of the judgment which will become operative as soon as the judgment is recovered.[90] Where, however, the cause of action is in tort, there can be no assignment until the claim has been merged in an actual judgment, even though a verdict has been given for plaintiff, as discussed in Assignments §§ 33, 36, and an interest in a judgment to be recovered in such a case is not assignable,[91] although it has been held in some cases that such assignment before judgment gives to the assignee an interest in the judgment, when perfected, which may be enforced in equity,[92] on the principle that in equity that which is agreed to be done will be considered as done.[93] The assignment of the verdict and judgment to be recovered in a pending action for tort has also been supported as not an assignment of a mere right of action, but of property having a potential existence, that is to come into existence in the future.[94]

§ 514. Persons Who May Assign or Purchase

a. Who may assign
b. Who may take assignment

a. Who May Assign

As a general rule a judgment may be assigned only by the beneficial owner thereof or by his duly authorized agent.

As a general rule, a valid assignment of a judgment can be made only by a person having a beneficial interest in such judgment,[95] or by his duly authorized agent.[96] If regulated by statute, only the person authorized by the statute may make an assignment.[97] Authority to assign a judgment may

Personal injuries
U.S.—American Surety Co. of New York v. Wabash Ry. Co., C.C.A.Mo., 107 F.2d 685, stating Illinois law.
N.J.—Roth v. General Casualty & Surety Co., 146 A. 202, 106 N.J.Law 516.
N.Y.—Richard v. National Transp. Co., 285 N.Y.S. 870, 158 Misc. 324.

87. Mass.—Brazill v. Green, 127 N. E. 535, 236 Mass. 93.

88. Cal.—Pacific Gas & Electric Co. v. Nakano, 87 P.2d 700, 12 Cal.2d 711, 121 A.L.R. 417.
Assignment of judgment to be recovered in tort action see infra § 513.
Effect of pendency of appeal
(1) A judgment in a tort action cannot be assigned during the pendency of an appeal therefrom.—Miller v. Newell, 20 S.C. 123, 47 Am.R. 833.
(2) Such an assignment is invalid, since the judgment, pending appeal, is not "final" in sense that it determines rights of parties to the action. —Pacific Gas & Electric Co. v. Nakano, 87 P.2d 700, 12 Cal.2d 711, 121 A.L.R. 417.

89. Tenn.—Prime v. Dunaway, 50 S. W.2d 223, 164 Tenn. 396.
Assignability of compensation award or judgment see the C.J.S. title Workmen's Compensation Acts § 388, also 71 C.J. p 924 notes 68–80.

90. Mich.—**Corpus Juris cited in** Cook v. Casualty Ass'n of America, 224 N.W. 341, 342, 246 Mich. 278.
34 C.J. p 637 note 81.

91. N.J.—Seaman v. Mann, 168 A. 833, 114 N.J.Eq. 408.
Rights of creditors
Assignment of moneys to become due when assignor's personal injury claim was reduced to judgment was held void, with respect to right of assignor's judgment creditor to levy on such moneys.—Goldfarb v. Reicher, 171 A. 149, 112 N.J.Law 413, affirmed 174 A. 507, 113 N.J.Law 399—
34 C.J. p 637 note 84 [b].

92. N.Y.—Richard v. National Transp. Co., 285 N.Y.S. 870, 158 Misc. 324.
34 C.J. p 637 note 84.

93. Ill.—North Chicago St. R. Co. v. Ackley, 58 Ill.App. 572, reversed on other grounds 49 N.E. 222, 171 Ill. 100, 44 L.R.A. 177.

94. N.Y.—Richard v. National Transp. Co., 285 N.Y.S. 870, 158 Misc. 324.
5 C.J. p 893 note 6.
Agreement to assign
Such an agreement has been enforced as an agreement to assign.—In re Modell, C.C.A.N.Y., 71 F.2d 148.
Public policy is not violated by such an assignment.—Richard v. National Transp. Co., 285 N.Y.S. 870, 158 Misc. 324.

95. Ark.—Brice v. Taylor, 9 S.W. 854, 51 Ark. 75.
34 C.J. p 637 note 86.
Tax collector
A county collector of revenue has no beneficial interest in a judgment for taxes, and cannot make a valid assignment of such judgment.—State ex rel. Gilkison v. Andrews, Mo.App., 133 S.W.2d 695.
Reassignment for purpose of suit
A reassignment of a contract by the assignee to the assignor merely for the purpose of suit thereon, conveying to the assignor no beneficial interest in the proceeds of the litigation, obligates the assignor to reassign to the obligee the judgment recovered.—In re Campbell's Estate, 299 N.Y.S. 442, 164 Misc. 632.

96. Mo.—Emory v. Joice, 70 Mo. 537.
34 C.J. p 637 note 87.

97. **Plaintiff or his assignee**
(1) One who was county collector of revenue at time of rendition of judgment for taxes, in suit brought by the state at his relation, but who had gone out of office at the time of assignment of such judgment to third person, had no control over enforcement or collection of the judgment, and hence was not a "plaintiff" within terms of statute

be conferred by power of attorney,[98] which need not be recorded in order to render the assignment effective as between the parties, the recording of such power being material only where notice to third persons is necessary.[99] Where a contract is made with an agent in his own name for the benefit of his principal, he is the real owner of a judgment recovered thereon in an action brought by him in his own name, and has power to dispose of it for the benefit of his principal.[1]

Subject to the rule as to the necessity of a beneficial interest, any person who is the actual owner of the judgment,[2] or who has the right to enforce and collect it,[3] may make an assignment thereof. Thus an assignment may be made by an administrator or executor,[4] a bank,[5] a corporation[6] or its receiver,[7] or a municipality.[8] A partner may assign in the name of the firm a judgment rendered in favor of the firm,[9] and a joint owner of a judgment may assign his undivided interest therein.[10]

As discussed in Attorney and Client, § 93 c, an attorney at law has no implied authority as such to assign a judgment recovered in favor of his client.

b. Who May Take Assignment

As a general rule any person, natural or artificial, may become the assignee of a judgment.

As a general rule, any person, natural or artificial, may become the assignee of a judgment.[11] While ordinarily the payment of a judgment by one primarily liable on it is an absolute satisfaction, although the judgment is assigned to him,[12] a surety on the debt for which the judgment was recovered may hold the judgment under an assignment, after paying its amount, if his intention not to satisfy the judgment is clear,[13] and the same rule applies to a surety on an obligation given in payment of the judgment.[14]

§ 515. Mode and Sufficiency of Assignment

a. In general

b. Statutory requirements

authorizing assignment by plaintiff or his assignee.—State ex rel. Gilkison v. Andrews, Mo.App., 133 S.W.2d 695.

(2) Likewise, one who was county collector of revenue at time of assignment of tax judgment, but was not such collector when suit resulting in such judgment was instituted, was not a "party" to such suit, and hence could not assign the judgment under such a statute.—State ex rel. Gilkison v. Andrews, supra.

98. Ind.—Caley v. Morgan, 16 N.E. 790, 114 Ind. 350.

99. Ind.—Boos v. Morgan, 30 N.E. 141, 130 Ind. 305, 30 Am.S.R. 237—Caley v. Morgan, 16 N.E. 790, 114 Ind. 350.

1. N.Y.—Seymour v. Smith, 21 N.E. 1042, 114 N.Y. 481, 11 Am.S.R. 688.

2. **Change of name**

Where the judgment creditor has changed its name, an assignment by it in its new name has been sustained.—Leland v. Heiberg, 194 N.W. 93, 156 Minn. 30.

3. Mo.—Garland v. Harrison, 17 Mo. 282.
34 C.J. p 637 note 93.

4. Cal.—Low v. Burrows, 12 Cal. 181.
Me.—Manson v. Peaks, 69 A. 690, 103 Me. 430, 125 Am.S.R. 311.

Joint judgment

Title to judgment and execution in names of executors vested in them jointly, and transfer, without consideration, by one in representative capacity to herself in individual capacity did not divest interest of other joint owner.—Cox v. Staten, 147 S.E. 137, 39 Ga.App. 294.

5. Mont.—Genzberger v. Adams, 205 P. 658, 62 Mont. 430.
34 C.J. p 637 note 97.

Proof of authority

(1) The official character of the persons making the assignment, or the fact that they were authorized to execute it in the name of the bank, must be shown. Merely designating them as officers is not sufficient to establish their official character.—Klemme v. McLay, 26 N.W. 53, 68 Iowa 158.

(2) Purported assignment of judgment to plaintiff as receiver of a bank by individual signing assignment as "president" was incompetent to prove assignment, even if it could be presumed that individual was president of assignor bank and acting as such at time of purported assignment, where there was no proof that individual had authority to make assignment.—Cumberland Bank & Trust Co. v. Buchanan, 164 S.W.2d 473, 291 Ky. 300.

6. Iowa.—Miller v. Cousins, 90 N.W. 814.
34 C.J. p 637 note 95.

Foreign corporation

Foreign corporation having capacity to sue in state and recover valid judgment could assign judgment in such state.—Cook v. Casualty Ass'n of America, 224 N.W. 341, 246 Mich. 278.

7. Ill.—Rogers v. Dimon, 106 Ill. App. 201, reversed on other grounds 67 N.E. 968, 203 Ill. 464.

8. Miss.—Wilkinson v. Hutto, 128 So. 93, 157 Miss. 358.

9. N.Y.—Allen v. Clark, 21 N.Y.S. 338, affirmed 36 N.E. 345, 141 N.Y. 584.

10. Minn.—Hunter v. Mauseau, 97 N.W. 651, 91 Minn. 124.
34 C.J. p 638 note 99.

11. Conn.—Rogers v. Hendrick, 82 A. 586, 85 Conn. 260.
34 C.J. p 638 note 2.
Purchase by attorney as not champertous see Champerty and Maintenance § 14.

Municipal judgment

It is not contrary to public policy for sheriff to purchase execution and judgment in favor of a municipality when motion is made against him for failure to execute it.—Wilkinson v. Hutto, 128 So. 93, 157 Miss. 358.

Relatives

A son's purchase of judgment against his father is not ipso facto fraudulent.—Bell v. Kates, 18 A.2d 556, 126 N.J.Law 90.

12. Ind.—Zimmermann v. Gaumer, 53 N.E. 829, 152 Ind. 552.
34 C.J. p 638 note 3.
Payment by joint debtor see infra § 555.
Satisfaction of judgment by assignment to debtor see infra § 562.

13. Iowa.—Anglo-American Land, Mortgage & Agency Co. v. Bush, 50 N.W. 1063, 84 Iowa 272.
34 C.J. p 638 note 4.
Effect of payment by surety see infra § 555.

14. N.Y.—Harbeck v. Vanderbilt, 20 N.Y. 395.
34 C.J. p 638 note 5.

a. In General

In the absence of a statute to the contrary, no particular mode or form is required to give effect to the assignment of a judgment.

It has been said that a judgment may be assigned by any method competent and sufficient for the assignment of any other chose in action.[15] Accordingly, in the absence of statutory directions as to the mode of assigning a judgment, no particular form of assignment is necessary to give effect to such an assignment,[16] as long as the assignment is definite and absolute.[17]

The assignment may be accomplished by a writing,[18] as by an indorsement on the record,[19] or by a separate written instrument[20] which need not be under seal[21] or, as discussed infra § 518, recorded. The assignment may be executed under a power of attorney.[22] In all such cases, however, there must be a delivery of the instrument of assignment to the assignee or some one authorized by him to accept it,[23] except where an assignment is not denied.[24]

A written assignment will not be vitiated by mistakes in the description of the judgment or in other particulars if it is capable of being made certain,[25] and, if an entry of record is so ambiguous as not to show whether an assignment or a satisfaction was intended, it may be explained by parol.[26]

A judgment may be assigned by parol[27] provided

15. Tex.—Blanks v. Radford, Civ. App., 188 S.W.2d 879, error refused—McMillan v. Rutherford, Civ.App., 14 S.W.2d 132.
Requisites, modes, and validity of assignments generally see Assignments §§ 41–81.

16. **No formal deed of assignment** is necessary.—Owen v. Interstate Mortg. Trust Co., 211 P. 87, 88 Okl. 10, 30 A.L.R. 816.

Transfer of transcript
Where a transcript or certificate of the judgment is filed in a higher court for the purpose of creating a lien on real estate, it is not necessary to transfer such transcript or certificate in order to effect an assignment of the judgment.—Travis v. Rhodes, 37 So. 804, 142 Ala. 189.

17. Ala.—Pike v. Bright, 29 Ala. 332—Bain v. J. A. Lusk & Son, 109 So. 187, 21 Ala.App. 442.

Acknowledgment of indebtedness
Where printing firm executed acknowledgment of indebtedness to corporation's judgment creditor, which allegedly "represented and evidenced" corporation's judgment indebtedness, judgment creditor's assignment of such instrument to his wife and wife's similar assignment thereof to son did not carry with it the corporation's judgment indebtedness or right to collect such indebtedness from estate of corporation's sole stockholder, notwithstanding alleged intent with which assignments were made.—Allen v. National Bank of Commerce & Trust Co. of Providence, 19 A.2d 311, 66 R.I. 373.

18. Okl.—Owen v. Interstate Mortg. Trust Co., 211 P. 87, 88 Okl. 10, 30 A.L.R. 816.

Legal or equitable judgments
Tex.—Blanks v. Radford, Civ.App., 188 S.W.2d 879, error refused.

19. U.S.—Cavender v. Grove, C.C. Ind., 5 F.Cas.No.2,530, 4 Biss. 269.
Pa.—Coon v. Reed, 79 Pa. 240.
34 C.J. p 638 note 7.

20. U.S.—Rufe v. Lynchburg Commercial Bank, Va., 99 F. 650, 40 C. C.A. 27.
34 C.J. p 638 note 8.

Assignment before signing of judgment
Where, after hearing on a contested garnishment and announcement by the court of a finding for plaintiff, plaintiff assigned "the amount recovered by me this day in the case of G. P. v. C. and W., being cause 145480," etc., he intended to and did assign the final judgment and not a chose in action, nothing remaining to be done but to present such judgment for signature, although appeal was thereafter taken.—Premier Wrench Co. v. Pearson, 225 P. 49, 129 Wash. 326.

Judgment as included in sale of property
(1) It is not necessary specifically to include a judgment in bill of sale of a business or all of the assets thereof, where judgment was part of such business or assets.
Colo.—Bright v. Schmitt, 231 P. 159, 76 Colo. 320.
Tex.—Kahn v. Ilitzky, Civ.App., 107 S.W.2d 1015, error refused.

(2) Writing reciting "sale" of realty by one having only a judgment lien thereon to judgment debtor was held sufficient to transfer judgment lien.—Sowards v. Sowards, 61 S.W.2d 609, 249 Ky. 742.

Partial assignment
Kan.—Tharp v. Langford, 222 P. 135, 115 Kan. 135.

Proof of assignment
Where a written assignment, claimed to include both of two judgments recovered by the judgment creditor, refers to but one of them, it was held that the presumption that an instrument correctly expresses parties' intention was sufficient to support implied finding that assignment did not include the other judgment.—Welk v. Conner, 282 P. 963, 102 Cal.App. 286.

21. Me.—Hayes v. Rich, 64 A. 659, 101 Me. 314, 115 Am.S.R. 314.
34 C.J. p 638 note 9.

22. Ind.—Boos v. Morgan, 30 N.E. 141, 130 Ind. 305, 30 Am.S.R. 237.
34 C.J. p 638 note 11.
Authority to assign under power of attorney see supra § 514.

23. Ill.—Williams v. West Chicago St. R. Co., 85 Ill.App. 305.

Presumption as to delivery
Where judgment creditor executed a written assignment of judgment in blank and transmitted it to its attorney to be filled out and delivered on receipt of money, possession of assignment by a third person raised presumption that assignment was properly delivered according to instructions.—Power Mfg. Co. v. Tindall, C.C.A.Ark., 100 F.2d 463.

24. N.Y.—Baker v. Secor, 7 N.Y.S. 803, 4 Silv.Sup. 516.

25. Minn.—Willis v. Jelineck, 6 N. W. 373, 27 Minn. 18.
34 C.J. p 638 note 15.

Judgment sufficiently described
Tex.—Taylor v. American Trust & Savings Bank of El Paso, Civ.App., 265 S.W. 727.

26. Mo.—Emory v. Joice, 70 Mo. 537.

27. La.—Elgutter v. McCarty, App., 167 So. 461.
N.Y.—Manufacturers' Trust Co. v. Rechtman, 268 N.Y.S. 104, 239 App. Div. 517, affirmed 191 N.E. 603, 264 N.Y. 639.
Okl.—Owen v. Interstate Mortg. Trust Co., 211 P. 87, 88 Okl. 10, 30 A.L.R. 816.
34 C.J. p 639 note 18.

Legal or equitable judgments
Tex.—Blanks v. Radford, Civ.App., 188 S.W.2d 879, error refused.

Manual delivery
While a judgment may not be manually delivered, it may be assigned by parol.—Kahn v. Ilitzky, Tex.Civ.App., 107 S.W.2d 1015, error dismissed.

the intention to assign and the terms are clearly shown,[28] unless the statute under which the assignment is made prohibits a parol assignment,[29] or requires the assignment to be in writing.[30] It has been held, however, that a judgment on a written contract must be assigned in writing in order to constitute a valid assignment, so that the judgment, when satisfied by defendant, will operate as a bar to another action on the contract against defendant.[31]

An assignment by delivery merely has been held insufficient to pass even an equitable title,[32] although there is also authority to the contrary,[33] and it has also been held that the delivery of an execution with intent to transfer the debt for a valuable consideration is a sufficient assignment of the judgment.[34]

In order to constitute an assignment there must be enough done or said to indicate an intention to make a present transfer, as distinguished from a mere offer or purpose to do so.[35] An assignment is not constituted by a mere authority to collect the judgment[36] or by an order to pay the amount thereof to a named person.[37]

Acceptance by assignee. The assignment of a judgment is not effective unless accepted by the assignee,[38] although subsequent ratification or affirmance thereof is sufficient where the assignee was ignorant of the assignment at the time it was made.[39]

Notice. In the absence of a statute to the contrary, a valid assignment of a judgment may be made without notice to any party thereto,[40] or to any other person;[41] but it has been held that an assignment without such a notice vests in the assignee the beneficial interest in the judgment, the legal title remaining in the assignor in the nature of a trust for the benefit of the assignee.[42]

Effect of mistake of law. Since, as discussed in Contracts § 145, a mistake of law does not relieve the parties to a contract from their obligations thereunder unless an unconscionable advantage is gained by one party over the other, a mistake by an assignee of a judgment with respect to the prospective action of the court on the judgment in a pending proceeding seeking the enforcement thereof does not invalidate the assignment where the assignor acquired no unconscionable advantage thereby.[43]

Agreements to assign. The operation and effect of an agreement to assign a judgment are governed by the general rules relating to contracts.[44] An executory agreement to assign a judgment for a specified price, which agreement is never performed by either party, does not amount to an assignment,[45] and does not vest any title in the assignee.[46] On breach of an agreement to assign the aggrieved

Performance of contract

An assignment is completed and becomes effective on compliance by the assignee with the terms of the agreement for the assignment and notification of the judgment debtor, notwithstanding the nonexecution of a written assignment.—Elgutter v. McCarty, La.App., 167 So. 461.

28. Ky.—Thomas v. Porter, 3 Bush 177.

29. Ga.—Dugas v. Mathews, 9 Ga. 510, 54 Am.D. 361.
Utah.—Snow v. West, 110 P. 52, 37 Utah 528.

30. Ky.—Fidelity & Deposit Co. v. Sousley, 151 S.W. 353, 151 Ky. 39.

Legal assignment

Ga.—Franklin v. Mobley, for Use of Patrick, App., 36 S.E.2d 173.

31. Okl.—Automobile Ins. Co. of Hartford, Conn., v. Lewis, 220 P. 639, 93 Okl. 280, 35 A.L.R. 1463.

32. Miss.—Parker v. Bacon, 26 Miss. 425.

33. Ga.—Franklin v. Mobley, for Use of Patrick, App., 36 S.E.2d 173.

34. Mass.—Dunn v. Snell, 15 Mass. 481.

35. Ala.—Bain v. J. A. Lusk & Son, 109 So. 187, 188, 21 Ala.App. 442.

"The owner must do or say something which would indicate a transfer of his claim or right to another."—Bain v. J. A. Lusk & Son, supra.

36. Va.—Green v. Ashby, 6 Leigh 135, 33 Va. 135.

37. Ky.—Thomas v. Porter, 3 Bush 177.

38. Ill.—Congregation of Resurrection v. Laibe, 152 Ill.App. 417.
34 C.J. p 638 note 14.

39. N.Y.—Harbeck v. Vanderbilt, 20 N.Y. 395.

40. Ill.—Knight v. Griffey, 43 N.E. 727, 161 Ill. 85.
Okl.—**Corpus Juris cited in** Robbins v. Mid-West Creamery Co., 162 P. 2d 541, 543—Owen v. Interstate Mortg. Trust Co., 211 P. 87, 88 Okl. 10, 30 A.L.R. 816.
Tenn.—**Corpus Juris cited in** Williams v. Cantrell, 124 S.W.2d 29, 22 Tenn.App. 443—State ex rel. McConnell v. Peoples Bank & Trust Co., 12 Tenn.App. 242.
34 C.J. p 645 note 16.

In absence of bad faith the text rule is to be followed.—Ciezynski v. New Britain Transp. Co., 132 A. 661, 121 Conn. 36.

Neither statute nor equity requires notice of assignment of a judgment to be given to any particular person in any particular manner.—Robbins v. Mid-West Creamery Co., Okl., 162 P.2d 541.

41. Okl.—Owen v. Interstate Mortg. Trust Co., 211 P. 87, 88 Okl. 10, 30 A.L.R. 816.

42. Conn.—Ciezynski v. New Britain Transp. Co., 132 A. 661, 121 Conn. 36.
Effect of notice to judgment debtor see infra § 523.

43. Idaho.—Federal Reserve Bank of San Francisco v. Hansborough, 292 P. 222, 49 Idaho 747.

44. La.—Continental Supply Co. v. Browder, 124 So. 580, 11 La.App. 631.
Pa.—Penn Discount Corporation v. Sharp, 189 A. 749, 125 Pa.Super. 171.

45. U.S.—Rufe v. Lynchburg Commercial Bank, Va., 99 F. 650, 40 C.C.A. 27.
34 C.J. p 640 note 40.

46. N.Y.—Ithaca Agricultural Works v. Eggleston, 4 N.Y.S. 933.
34 C.J. p 639 note 24.

party is entitled to recover the resulting damages,[47] provided he has performed, or is ready, willing and able to perform, on his own part.[48] One agreeing to purchase a judgment at a specified sum is not entitled to an assignment if he has defaulted under the agreement.[49] The mere issuance of an execution at request of the judgment creditor,[50] or an execution sale thereunder to one refusing to accept title to the seized property,[51] does not constitute a breach of an agreement to assign a judgment.

What law governs. The validity of an assignment of a judgment is determined by the law of the state in which the judgment is recovered.[52] Hence, an assignment of a judgment made in conformity to the laws of the state where the judgment was rendered is valid everywhere.[53]

b. Statutory Requirements

Where the statute authorizing the assignment of a judgment provides a mode of assignment, its requirements must be followed in order to pass the legal title and secure to the assignee any rights which depend solely on the statute.

Where the statute authorizing the assignment of a judgment provides a mode of assignment, its requirements must be followed in order to pass the legal title and secure to the assignee any rights which depend solely on the statute.[54] Where, however, such a statute does not expressly exclude other modes, it is regarded as cumulative merely, and does not prevent the making of an assignment in any other way which is recognized as sufficient in equity.[55]

§ 516. —— Equitable Assignments

No particular form is necessary to constitute an equitable assignment of a judgment.

In order to constitute an equitable assignment of a judgment, no particular form is necessary,[56] it being sufficient that the assignee has such evidence of title as, although it does not pass a legal title to enforce the judgment in his own name, authorizes him to receive the proceeds thereof, and protects the judgment debtor in making payment to him.[57] Thus, provided the intent to assign is clear and some act is done between the parties amounting to an appropriation, or a constructive delivery,[58] an equitable assignment of a judgment may be made by a writing,[59] or by parol,[60] even though a statute requires a writing to effect a legal assignment of a judgment.[61] Where an attempted assignment of a judgment, made in good faith, fails of its legal effect because of some irregularity or informality, it may be given effect in equity where it amounts to an equitable assignment,[62] and, even where there

47. **Measure of damages**
Judgment creditor who was ready, on payment of consideration, to assign judgment to defendants who had agreed by written instrument to pay fixed sum therefor, was entitled to damages for breach of agreement equal to stipulated contract price, and not excess of contract price over market value at time actual delivery was to be made.—Penn Discount Corporation v. Sharp, 189 A. 749, 125 Pa.Super. 171.

48. Pa.—Penn Discount Corporation v. Sharp, supra.
Tender and refusal are essential.—Continental Supply Co. v. Browder, 124 So. 580, 11 La.App. 631.

49. Pa.—Penn Discount Corporation v. Sharp, 189 A. 749, 125 Pa.Super. 171.

50. La.—Continental Supply Co. v. Browder, 124 So. 580, 11 La.App. 631.

51. La.—Continental Supply Co. v. Browder, supra.

52. Mich.—Cook v. Casualty Ass'n of America, 224 N.W. 341, 246 Mich. 278.

53. Cal.—Tornquist v. Johnson, 13 P.2d 405, 124 Cal.App. 634.
Mich.—**Corpus Juris cited in** Cook v. Casualty Ass'n of America, 224 N.W. 341, 246 Mich. 278.
34 C.J. p 639 note 29.

54. Wis.—Cowie v. Waukesha Nat. Exch. Bank, 132 N.W. 900, 147 Wis. 124.
34 C.J. p 640 note 52.
Rights and liabilities of third persons see infra § 526.
Strict compliance with the statute is essential.—Donham v. Davis, 187 S.W.2d 722, 208 Ark. 824—McKim v. Highway Iron Products Co., 29 S.W.2d 682, 181 Ark. 1121.
Statutes held inapplicable
Pa.—Citizens Nat. Bank of Lehighton v. Kupres, 18 Pa.Dist. & Co. 692, affirmed 161 A. 466, 106 Pa. Super. 164.

55. Ark.—Davis v. Oaks, 60 S.W.2d 922, 187 Ark. 501.
Cal.—**Corpus Juris quoted in** Tornquist v. Johnson, 13 P.2d 405, 124 Cal.App. 634.
Minn.—Brown v. Reinke, 199 N.W. 235, 139 Minn. 458, 35 A.L.R. 413.
Mo.—Popsicle Corporation of U. S. v. Pearlstein, App., 168 S.W.2d 105—Helstein v. Schmidt, 78 S.W.2d 132, 229 Mo.App. 275.
34 C.J. p 641 note 53.
Purpose of statute providing for acknowledgment of assignment of judgment or cause of action and filing and entry thereof with papers of cause is not to create rule of evidence, but one of registration for purposes of notice, and is not intended to prevent acquisition of title to judgment, either legal or equitable, in any other lawful manner.—Hunter v. B. E. Porter, Inc., Tex. Civ.App., 81 S.W.2d 774.
Statutory method held not exclusive
Mo.—Boyd v. Sloan, 71 S.W.2d 1065, 335 Mo. 163.

56. Ark.—Moore v. Robinson, 35 Ark. 293.
34 C.J. p 639 note 30.

57. Miss.—Parker v. Bacon, 26 Miss. 425.
34 C.J. p 639 note 31.

58. N.C.—Winberry v. Koonce, 83 N.C. 351.
34 C.J. p 639 note 33.

59. Ky.—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.

60. Ark.—Davis v. Oaks, 60 S.W.2d 922, 187 Ark. 501.
Ky.—Turner v. Gambill, 121 S.W.2d 705, 275 Ky. 330—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.
34 C.J. p 639 note 32.

61. Ga.—Franklin v. Mobley, for Use of Patrick, App., 36 S.E.2d 173.

62. Minn.—Brown v. Reinke, 199 N.W. 235, 139 Minn. 458, 35 A.L.R. 413.
34 C.J. p 639 note 35.
Noncompliance with statute
(1) An assignment of a judgment

has been no attempt to effect an assignment, equity will sometimes give effect to the transaction as an assignment in order to protect the rights of the assignee.[63] An order from the judgment creditor to his attorney to pay to a third party the money collected on the judgment creates, when delivered to the attorney, an equitable assignment of, and a lien on, the proceeds of the judgment,[64] even though it is not accepted by the attorney.[65] On the other hand, an order on a court clerk to pay to a third person the amount due on a judgment does not amount to an assignment, since such order cannot operate until the judgment has been extinguished by payment.[66]

An assignment may be presumed to have been executed on the day of its date.[67]

Proof of assignment. While no formality is required in an equitable assignment of a judgment, when the fact of the assignment is called in question, sufficient evidence of title must be produced to protect the judgment debtor in making payment to the assignee as against the assignor,[68] and evidence of delivery merely has been held insufficient.[69] The fact that the assignment has been filed of record with the papers will not dispense with the necessity of calling the subscribing witness to prove it.[70]

§ 517. —— Consideration

As a general rule, as between the assignor and the assignee, a valuable consideration is essential to support an assignment of a judgment.

In the absence of a statute to the contrary,[71] as between the assignor and the assignee, or persons claiming under them, a valuable consideration is essential to support an assignment of a judgment.[72] Any consideration sufficient to support a contract will suffice to support such an assignment,[73] and the rights of the assignee to payment, as discussed

in any form passes an equity which the courts will recognize and protect, notwithstanding it fails to comply with statute.—Brown v. Reinke, supra.

(2) An assignment of a judgment without compliance with statute passes the equitable, but not the legal, title.—In re Hutcherson, C.C.A. Ind., 133 F.2d 959.

63. S.C.—Sutton v. Sutton, 1 S.E. 19, 26 S.C. 33.
34 C.J. p 640 note 36.

Compelling assignment

Where purchaser at tax sale recovered judgments against tenant in possession for use and occupation of premises and owner thereafter sold premises to purchaser, crediting him with all he was entitled to under the tax sale, purchaser was not thereafter entitled to hold judgments against tenant and would be directed to assign them to the owner.—Pyle v. Altshul, 4 A.2d 377, 125 N.J.Eq. 143.

On avoidance of execution sale

Where deed under void execution sale is set aside, an equitable assignment of the judgment to purchaser's vendee results.—Jeffreys v. Hocutt, 142 S.E. 226, 195 N.C. 339.

64. Ga.—Stanford v. Connery, 11 S. E. 507, 84 Ga. 731.
N.Y.—Hussey v. Culver, 6 N.Y.S. 466, 3 Silv.Sup. 126.

65. N.Y.—Hussey v. Culver, supra.

66. Ind.—Teetor v. Abden, 2 Ind. 183.

67. Iowa.—Weire v. Davenport, 11 Iowa 49, 77 Am.D. 132.

68. Cal.—Spencer v. California Nat. Bank of Long Beach, 86 P.2d 1073, 1 Cal.2d 681.
34 C.J. p 640 note 42.

69. Miss.—Parker v. Bacon, 26 Miss. 425.

70. Pa.—Himes v. Barnitz, 8 Watts 39.

71. Cal.—Curtin v. Kowalsky, 78 P. 962, 145 Cal. 431.
34 C.J. p 640 note 45 [c].

72. Ala.—Bain v. J. A. Lusk & Son, 109 So. 187, 21 Ala.App. 442.
Okl.—Martin v. North American Car Corporation, 35 P.2d 460, 168 Okl. 599.

Assignment by municipality

Municipality may assign judgment recovered on bail bond for fair and full value.—Wilkinson v. Hutto, 128 So. 93, 157 Miss. 358.

Consideration held insufficient

Transfer of judgment to clerk and sheriff to secure costs in other cases was held void, as without consideration or promise of service not their duty to perform.—Bain v. J. A. Lusk & Son, 109 So. 187, 21 Ala.App. 442.

73. La.—Kentwood Bank v. McClendon, 93 So. 748, 152 La. 489.
34 C.J. p 640 note 45.

Assignment as security or collateral

(1) An assignment given as collateral or security for a loan is based on a sufficient consideration.—State ex rel. McConnell v. Peoples Bank & Trust Co., 12 Tenn.App. 242.

(2) It is a sufficient consideration, even though given to secure a pre-existing debt.—McMillan v. Rutherford, Tex.Civ.App., 14 S.W.2d 132—34 C.J. p 640 note 45 [a] (3).

(3) Because of this it was unnecessary to a valid assignment of judgment to pay notes held by assignee that they be marked paid and delivered to assignor to constitute consideration.—McMillan v. Rutherford, supra.

Executed contract

Landowners' assignment of a proportional interest in judgment recovered in condemnation action as security for payment of plaintiff's services in the condemnation action was an "executed contract" requiring no consideration.—Rowe v. Holmes, 146 P.2d 45, 63 Cal.App.2d 46.

Failure of consideration

Where assignment of judgment was consideration for cancellation of mortgage, reversal of judgment merely for modification, leaving judgment as valuable as before, was not a failure of consideration.—Federal Reserve Bank of San Francisco v. Hansbrough, 292 P. 222, 49 Idaho 747.

Past consideration

Debtor's antecedent obligation to his assignee was held not to constitute a valuable consideration for the assignment of a judgment obtained by debtor.—London & Lancashire Indemnity Co. of America v. Cromwell, 190 S.E. 337, 118 W.Va. 318.

Proof as to consideration

(1) Any evidence which impeaches the bona fides of the assignment puts the assignee to full proof of consideration.—Rettig v. Becker, 11 Pa.Super. 395.

(2) Burden is on assignee to prove payment for assignment.—Power Mfg. Co. v. Tindall, C.C.A.Ark., 100 F.2d 463.

(3) Where judgment creditor executed a written assignment in blank and transmitted it to its attorney with instructions to deliver, on receipt of certain sum, possession of assignment by third party, created

infra § 522, or otherwise, are not affected by the fact that the consideration was less than the face of the judgment.[74]

§ 518. —— Recording

In the absence of a statute to the contrary, as between the assignor and assignee, filing or recording is not essential to the validity of an assignment of a judgment.

In the absence of a statute so requiring,[75] as between the assignor and the assignee, filing or recording is not essential to the validity of an assignment of a judgment.[76] Thus, while it may be desirable that the assignment of a judgment appear of record, an entry thereof on the records of the court rendering it is not usually necessary to complete the assignment,[77] the mere filing thereof among the papers in the case being sufficient,[78] although under some statutes recording is necessary as against third persons.[79] A statute requiring assignments to be recorded refers only to domestic judgments, and does not affect the proof of an assignment of a foreign judgment.[80]

§ 519. Operation and Effect

a. In general
b. Assignment as security or for collection
c. Effect of fraud

a. In General

A valid assignment of a judgment transfers to the assignee all of the rights of the assignor therein, but the assignee stands in no better position than his assignor in relation thereto.

On a valid assignment of a judgment, the assignee succeeds to the ownership of the judgment and all the rights, interests, and authority of his assignor therein,[81] including the debt or claim on which the judgment is based[82] and any security therefor,[83]

presumption that such sum had been paid.—Power Mfg. Co. v. Tindall, supra.

(4) In such a case the assignee's burden of proving payment was sustained by production of assignment in his possession and recital in assignment acknowledging receipt of consideration of one dollar and other good and valuable consideration paid to the judgment creditor by the assignee.—Power Mfg. Co. v. Tindall, supra.

Payment by accommodation indorser

Accommodation indorser of note, who paid judgment entered on note against himself and makers and who took an assignment of judgment from judgment creditor was owner of judgment as an assignee for value.—Cox v. Williams, 31 S.E.2d 312, 183 Va. 152.

74. Minn.—Dalby v. Lauritzen, 107 N.W. 826, 98 Minn. 75.
34 C.J. p 640 note 47.

75. Ark.—St. Louis, I. M. & S. R. Co. v. Hambright, 112 S.W. 876, 87 Ark. 242.

Chattel mortgage recording act

An assignment of an interest in a judgment to secure and pay an indebtedness of a judgment creditor is not a chattel mortgage within meaning of recording statute.—Robbins v. Mid-West Creamery Co., Okl., 162 P. 2d 541.

76. Minn.—Barnes v. Verry, 191 N. W. 589, 154 Minn. 252, 31 A.L.R. 707.
N.C.—In re Wallace, 198 S.E. 819, 212 N.C. 490.

Statute held inapplicable

A statute regulating assignments of causes of action after suit and before judgment did not apply to assignment of judgment terminating cause of action.—Pigford Grocery Co. v. Wilder, 76 So. 745, 116 Miss. 233.

77. Ky.—Fidelity & Deposit Co. v. Sousley, 151 S.W. 353, 151 Ky. 39.
34 C.J. p 640 note 48.

78. Mo.—Tutt v. Couzins, 50 Mo. 152.
34 C.J. p 640 note 49.

Court record

Transfer of a judgment becomes a court record by being filed with the papers in the suit in which it was rendered, and noted on the margin of the proper minutes.—Burge v. Broussard, Tex.Civ.App., 258 S.W. 502.

79. Wash.—Premier Wrench Co. v. Pearson, 225 P. 49, 129 Wash. 326.
34 C.J. p 640 note 50.

80. Mo.—Baker v. Stonebraker, 34 Mo. 172.

81. Cal.—Richey v. Ziegler, 264 P. 293, 89 Cal.App. 35.
Ill.—**Corpus Juris cited in** Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill.App. 208, 246.
Miss.—Humphreys County v. Cashin, 101 So. 571, 136 Miss. 476.
N.C.—Jones v. T. S. Franklin Estate, 183 S.E. 732, 209 N.C. 585.
Pa.—Marsh v. Bowen, 6 A.2d 783, 335 Pa. 314.
S.C.—Watts v. Copeland, 170 S.E. 780, 170 S.C. 449.
Tex.—Casray Oil Corporation v. Royal Indemnity Co., Civ.App., 165 S. W.2d 244, affirmed 169 S.W.2d 955, 141 Tex. 33.
W.Va.—Hines v. Fulton, 140 S.E. 537, 104 W.Va. 561.
34 C.J. p 650 note 87.

Declaration of rights

(1) If the judgment is one which is merely declaratory of a status, the assignee thereof acquires no interest in the property in respect of which the judgment was rendered.—Cucullu v. Bilgery, 20 So. 662, 48 La. Ann. 1245.

(2) Thus an assignment of a judgment which, in addition to awarding a money recovery, declared the status of the assignor's title to certain property which had theretofore passed to him under a will transferred the money judgment, but did not transfer the assignor's title to the property.—Ingram v. Jones, C.C.A. Okl., 47 F.2d 135.

82. Cal.—North v. Evans, 86 P.2d 133, 1 Cal.App.2d 64.
Ill.—**Corpus Juris cited in** Painter v. Merchants & Manufacturers Bank, 277 Ill.App. 208, 246.
Miss.—**Corpus Juris cited in** Humphreys County v. Cashin, 101 So. 571, 573, 136 Miss. 476.
N.Y.—Thomas v. Hubbell, 35 N.Y. 120—Rose v. Baker, 13 Barb. 230.
S.C.—Watts v. Copeland, 170 S.E. 780, 170 S.C. 449.
Tex.—Casray Oil Corporation v. Royal Indemnity Co., Civ.App., 165 S. W.2d 244, affirmed 169 S.W.2d 955, 141 Tex. 33.
34 C.J. p 650 note 88—5 C.J. p 951 note 14.

Effect of vacation of judgment

If an assignment of a judgment assigned the claim on which it rested, notwithstanding subsequent vacation of judgment on appeal, the assignor could not complain of a levy of execution against the claim, since the only person interested under such circumstances would be the owner or assignee.—Johnson v. Dahlquist, 225 P. 817, 130 Wash. 29.

83. N.Y.—Pattison v. Hull, 9 Cow. 747.

provided the claim is assignable.[84] The effect of such an assignment is to divest the assignor of all interest in, and all control over, the judgment,[85] even though the assignment is a fraud on creditors,[86] and the assignor cannot thereafter pass title to it by any subsequent assignment.[87] The death of the assignor does not impair the rights of the assignee.[88] The assignment of a decree will not necessitate making the assignee a party to further proceedings.[89]

An assignment, however, does not confer on the assignee any greater right, interest, or equity than the assignor had,[90] and the assignee stands in no better position that his assignor stood at the time of the assignment.[91] Hence, if the latter has no title to the judgment, he can convey none to the assignee[92] whether or not the assignee had notice.[93] It has been held that, if the judgment is void in the hands of the judgment creditor, it is void and without effect in the hands of an assignee for value.[94] However, it has also been held that, if the judgment is void, the assignment nevertheless transfers the original debt or claim on which the judgment was based.[95]

Caveat emptor. An assignment of a judgment has been held to be subject to the rule of caveat emptor.[96]

As satisfaction of judgment. Irrespective of how often a judgment may be transferred, it does not become functus officio, where the intention of the parties to the transfers is evidently to keep it alive.[97] If, however, as discussed infra § 562, a judgment is assigned to the judgment debtor himself, or to a stranger for his benefit, the judgment is satisfied. It is otherwise where the judgment debtor causes an assignment to be made to a third person who advances the funds necessary to pay the judgment under circumstances showing the absence of any intent to satisfy the judgment.[98]

b. Assignment as Security or for Collection

The assignment of a judgment as security for a debt confers on the assignee the right to control and enforce the judgment and satisfy his claim out of the proceeds. An assignee for collection obtains no vested right in the judgment.

A third person taking an assignment of a judgment as collateral security for a debt acquires the right to control and enforce the judgment,[99] and to satisfy his claims out of the proceeds.[1] However, where a judgment is assigned to secure advances,

84. N.Y.—Pulver v. Harris, 52 N.Y. 73.

85. W.Va.—**Corpus Juris cited in** Hines v. Fulton, 140 S.E. 537, 540, 104 W.Va. 561.
34 C.J. p 641 note 54.
Rights against debtor
Judgment creditor who assigned judgment for value could not attach fund which judgment debtor claimed, on ground that assignee allegedly settled judgment with judgment debtor for sum less than face value of judgment.—Posey v. Cocke, 92 S.W.2d 4, 263 Ky. 177.

86. Tex.—Ford v. Rosenthal, 11 S. W. 28, 74 Tex. 28.

87. Cal.—Curtin v. Kowalsky, 78 P. 962, 145 Cal. 431.
34 C.J. p 641 note 56.
Priorities between assignees see infra § 529.

88. Conn.—Hamilton v. New Haven, 73 A. 1, 82 Conn. 208.

89. Ill.—Bonner v. Illinois Land & Loan Co., 96 Ill. 546.

90. U.S.—Christmas v. City of Asbury Park, D.C.N.J., 53 F.Supp. 64—Turner v. Dickey, D.C.Tenn., 3 F.Supp. 360, affirmed, C.C.A., Dickey v. Turner, 64 F.2d 1012.
Cal.—Parker v. Howe, 299 P. 553, 114 Cal.App. 166—Arp v. Blake, 218 P. 773, 63 Cal.App. 362.
Iowa.—Mutual Surety Co. of Iowa v. Bailey, 3 N.W.2d 627, 231 Iowa 1236—Roe v. King, 251 N.W. 81, 217 Iowa 213.
Tex.—Pegues v. Moss, Civ.App., 140 S.W.2d 461, error dismissed—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Civ.App., 122 S. W.2d 659, error dismissed.
Wash.—Associated Indemnity Corporation v. Wachsmith, 99 P.2d 420, 2 Wash.2d 679, 127 A.L.R. 531.
Judgment to use of third person
Where a judgment is marked to the use of a third person, the use-plaintiff is merely an assignee whose rights are no greater than those of the judgment creditor.—Sophia Wilks Building & Loan Ass'n, to Use of v. Rudloff, 46 Pa.Dist. & Co. 535, affirmed Sophia Wilkes Building & Loan Ass'n, to Use of Wiehe v. Rudloff, 35 A.2d 278, 348 Pa. 477.

91. Cal.—Clark v. Tompkins, 270 P. 946, 205 Cal. 373.
N.J.—**Corpus Juris cited in** Manowitz v. Kanov, 154 A. 326, 327, 107 N.J. Law 523, 75 A.L.R. 1464.
Pa.—Sophia Wilks Building & Loan Ass'n to Use of v. Rudloff, 46 D. & C. 535, affirmed Sophia Wilkes Building & Loan Ass'n, to Use of Wiehe v. Rudloff, 35 A.2d 278, 348 Pa. 477.
34 C.J. p 641 note 58.
Where a judgment has been paid in part before its assignment, the assignment transfers to the assignee the judgment creditor's interest in the amount unpaid.—Cutting v. Mullaney, 181 N.W. 466, 191 Iowa 800.

92. Cal.—Anglo-California Trust Co. v. Oakland Rys. 225 P. 452, 193 Cal. 451.
34 C.J. p 641 note 59.

93. Cal.—Anglo-California Trust Co. v. Oakland Rys., supra.

94. Ga.—Winn v. Armour & Co., 193 S.E. 447, 184 Ga. 769.

95. Cal.—Brown v. Scott, 25 Cal. 189.

96. Cal.—Anglo-California Trust Co. v. Oakland Rys., 225 P. 452, 193 Cal. 451.
Pa.—Berger v. Roberts, Com.Pl., 93 Pittsb.Leg.J. 105.

97. N.Y.—Carpenter v. Andrews, 9 N.Y.St. 427.
Assignment on payment by joint debtor see infra § 555.

98. Kan.—Benson v. Altenburg, 259 P. 791, 124 Kan. 296, modified on other grounds 261 P. 589, 124 Kan. 571.

99. Pa.—Beale v. Mechanics' Bank, 5 Watts 529.
34 C.J. p 642 note 63.
Right of assignee generally to enforce judgment against debtor see infra § 522.

1. U.S.—Varnum v. Milford, C.C. Ind., 28 F.Cas.No.16,891, 4 McLean 93.
34 C.J. p 642 note 64.
Assignment to surety on appeal bond
Appellant's assignment to sureties on his appeal bond, of judgment in his favor in another action authorizing sureties "to collect same

the assignee cannot include within the lien other advances made to the assignor, as to which there was no agreement on making the assignment.[2] The assignee obtains no better rights than his assignor had, and takes the judgment subject to any equities or disabilities effective against it in the latter's hands.[3] If he in turn sells or assigns the judgment, his assignee must hold it subject to the right of the original owner to redeem it on paying the amount for which it was pledged as security.[4] On the payment or release of the debt for which the judgment was pledged, the assignee's rights terminate by operation of law, and the judgment reverts to the original owner without a reassignment.[5]

One taking an assignment of a judgment merely under an authority or as a power to collect it for the assignor has no vested right in it other than as the assignor's agent, in whom the ownership remains.[6] On the other hand, a written assignment giving the assignee full authority to collect and discharge the judgment and binding the assignor not to do so is a valid assignment.[7]

An assignment to an attorney for the purpose of, inter alia, paying his own fees gives him an interest in the judgment.[8]

c. Effect of Fraud

Fraud vitiates an assignment of a judgment as between the parties to the assignment.

As between the parties to it an assignment of a judgment may be vitiated by fraud or bad faith,[9] but the judgment debtor cannot impeach the assignment for fraud unless he can show that he was injured by the fraud.[10]

§ 520. —— Partial Assignments

As a general rule a partial assignment of a judgment, while valid as between the parties, is of no effect against the judgment debtor unless he consents thereto or ratifies it.

While, as between the assignor and the assignee, the assignment of a part of a judgment is valid and binding, even when made without the judgment debtor's consent,[11] as against the debtor a judgment cannot be partially assigned without the debtor's consent,[12] such an assignment without the consent of the debtor having no effect against the debtor,[13] unless it is subsequently ratified by him.[14]

In accordance with the general rule governing partial assignments of choses in action, as discussed in Assignments § 39, a partial assignment will not change the legal title to the judgment[15] and, except

in event said decree be affirmed," entitled sureties to collect judgment in full before expending money as sureties, and to account merely for any excess.—Humphreys County v. Cashin, 101 So. 571, 136 Miss. 476.

2. S.C.—Miller v. Klugh, 7 S.E. 67, 29 S.C. 124.

3. Pa.—Appeal of Datesman, 77 Pa. 243.

4. N.Y.—Gray v. Green, 12 Hun 598, reversed on other grounds 77 N.Y. 615.
Pa.—Poe v. Foster, 4 Watts & S. 351.

5. U.S.—Taggart's Case, 17 Ct.Cl. 322.
Ill.—Hossack v. Underwood, 55 Ill. 123.

6. Ill.—Gallagher v. Schmidt, 144 N. E. 319, 313 Ill. 40.
Neb.—Reed v. Occidental Building & Loan Ass'n, 241 N.W. 769, 122 Neb. 817, certiorari denied 53 S.Ct. 93, 287 U.S. 623, 77 L.Ed. 540.
34 C.J. p 642 note 69.

7. Tex.—McMillan v. Rutherford, Civ.App., 14 S.W.2d 132.

8. U.S.—Rufe v. Lynchburg Commercial Bank, Va., 99 F. 650, 40 C. C.A. 27.
Right of assignor to defeat rights
Landowners who recovered judgment for large amount in eminent domain action, from which appeal was pending for several years, could not, by settling case and stipulating to amount of final judgment, defeat plaintiff's right under landowners' assignment of proportional interest in the judgment as security for payment of plaintiff's fee for services in the condemnation action.—Rowe v. Holmes, 146 P.2d 45, 63 Cal.App.2d 46.

9. Colo.—Empire Land & Canal Co. v. Engley, 33 P. 153, 18 Colo. 388.
N.Y.—Thompson v. Jones, 8 N.Y.S. 373, 55 Hun 268.
34 C.J. p 642 note 71.
Fraud as ground for rescinding or setting aside assignment see infra § 530.
Dual agency
The fact that the attorney who drew the assignment represented both the assignor and the assignee did not vitiate the assignment.—Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill.App. 208.
Evidence held insufficient to show fraud.—Holley v. Shaw, 196 So. 863, 143 Fla. 445.
Purchase on behalf of debtor
Mere failure of a judgment debtor's agent to inform judgment creditor that agent, in purchasing judgment, is acting in behalf of judgment debtor, is not "fraud."—Davis v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, 103 P. 2d 380, 187 Okl. 436.

10. La.—Long v. Klein, 35 La.Ann. 384.
34 C.J. p 642 note 72.

11. Okl.—Holiday Oil Co. v. Fidelity & Deposit Co. of Maryland, 19 P.2d 335, 162 Okl. 192.
34 C.J. p 643 note 83.
Extent of interest
Court presumes that assignment of one half of judgment for damages from wrongful sequestration carried with it one half of every dollar recovered, including one half of portion recovered for exemplary damages.—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Tex. Civ.App., 122 S.W.2d 659, error dismissed.

12. La.—Salter v. Walsworth, App., 167 So. 494.

13. Cal.—Buckeye Refining Co. v. Kelly, 124 P. 536, 163 Cal. 8, Ann. Cas.1913E 840—Ellis v. Superior Court in and for Riverside County, 33 P.2d 60, 138 Cal.App. 552.

14. Cal.—Buckeye Refining Co. v. Kelly, 124 P. 536, 163 Cal. 8, Ann. Cas.1913E 840—Ellis v. Superior Court in and for Riverside County, 33 P.2d 60, 138 Cal.App. 552.

15. Hawaii.—Arnold v. Bell, 27 Hawaii 642.
La.—**Corpus Juris quoted in** Salter v. Walsworth, App., 167 So. 494, 496.

as otherwise provided by statute,[16] cannot be enforced at law unless the judgment debtor consents thereto[17] or unless the assignment is ratified by him.[18] Thus the assignee cannot obtain a separate process to enforce payment of the part assigned,[19] unless the judgment debtor has ratified the assignment, as by voluntarily paying the portion of the judgment retained by the judgment creditor.[20] The fact, however, that a judgment creditor has agreed to pay, or has assigned, part of the judgment to a third person, is no reason why the judgment debtor should not be compelled to pay the judgment;[21] and, if the debtor refuses to consent to the assignment, the judgment creditor may maintain an action at law on the judgment for the full amount thereof.[22]

A partial assignment to which the judgment debtor has assented creates a distinct and separate interest in the assignee, which the debtor is bound to recognize,[23] and which cannot be destroyed by acts of the assignor or debtor, or both;[24] it is not a joint obligation extinguishable by performance rendered to either the assignor or the assignee.[25]

The rule against partial assignments applies where the judgment is in favor of joint plaintiffs[26] or against joint defendants.[27] However, where judgments against two or more defendants are several and not joint, they may be separately assigned[28] where no question of payment by either debtor has arisen.[29]

In equity. It has generally been held that a partial assignment constitutes an equitable assignment pro tanto[30] which conveys to the assignee an equitable interest in the judgment[31] enforceable in equity,[32] although the doctrine has been laid down that the assignment of part of a judgment without consent of the debtor is no more enforceable in equity than at law.[33]

§ 521. Rights and Liabilities of Parties

An assignee's rights with respect to the judgment are governed by any conditions or reservations contained in the assignment.

The rights of the assignee with respect to the judgment are governed and controlled by any conditions or reservations contained in the assignment.[34]

§ 522. —— As to Judgment Debtor in General

a. In general
b. Right to enforce judgment

a. In General

As a general rule the unrestricted assignment of a

Pa.—Allegheny County v. Simon, Com.Pl., 89 Pittsb.Leg.J. 131.
34 C.J. p 642 note 74.

16. **Recording**
(1) In some jurisdictions a partial assignment of a judgment is valid if placed on the record as provided by statute.—Wheaton v. Spooner, 54 N.W. 372, 52 Minn. 417.

(2) Such an assignment is not valid as against creditors levying thereon, unless the assignment is placed on record as provided by statute.—Wheaton v. Spooner, supra.

(3) Necessity for filing or recording assignment of judgment generally see supra § 518.

17. Hawaii.—Arnold v. Bell, 27 Hawaii 642.
La.—**Corpus Juris quoted in** Salter v. Walsworth, App., 167 So. 494, 496.
Pa.—Allegheny County v. Simon, Com.Pl., 89 Pittsb.Leg.J. 131.
34 C.J. p 642 note 75.
Right to split cause of action on partial assignment thereof see Actions § 102 k.

Reason for rule
The judgment debtor should not be obliged and forced to withstand numerous vexations and expensive proceedings brought at various times by different persons under one judgment.

Colo.—McMurray v. Marsh, 54 P. 852, 12 Colo.App. 95.
La.—Salter v. Walsworth, App., 167 So. 494.

18. La.—**Corpus Juris quoted in** Salter v. Walsworth, App., 167 So. 494, 496.
34 C.J. p 642 note 76.

19. Pa.—Hopkins v. Stockdale, 11 A. 368, 117 Pa. 365—Appeal of Dietrich, 107 Pa. 174.
Revival of judgment by assignee see infra § 537.

20. Okl.—Holiday Oil Co. v. Fidelity & Deposit Co. of Maryland, 19 P.2d 335, 336, 162 Okl. 192.

"Judgment debtors, having voluntarily paid that portion of the judgment retained by the assignors . . . cannot be heard to complain of the partial assignment thereof.—Holiday Oil Co. v. Fidelity & Deposit Co. of Maryland, supra.

21. U.S.—Aspen Mining & Smelting Co. v. Wood, Colo., 84 F. 48, 28 C.C.A. 276.

22. Hawaii.—Arnold v. Bell, 27 Hawaii 642.

23. Cal.—McGown v. Dalzell, 236 P. 941, 72 Cal.App. 197.

24. Cal.—McGown v. Dalzell, supra.

25. Cal.—McGown v. Dalzell, supra.

26. Ark.—Hanks v. Harris, 29 Ark. 323.

27. N.Y.—Whittemore v. Judd Linseed & Sperm Oil Co., 27 N.E. 244, 124 N.Y. 565, 21 Am.S.R. 708.

28. N.Y.—Whittemore v. Judd Linseed & Sperm Oil Co., supra.

29. N.Y.—Whittemore v. Judd Linseed & Sperm Oil Co., supra.

30. Ind.—Wood v. Wallace, 24 Ind. 226.
34 C.J. p 643 note 87.

31. Ark.—Gebhardt v. Merchant, 105 S.W. 1036, 84 Ark. 426.
Ohio.—Pittsburg, C., C. & St. L. R. Co. v. Volkert, 50 N.E. 924, 58 Ohio St. 362.

32. Ark.—Gebhart v. Merchant, 105 S.W. 1036, 84 Ark. 426.
34 C.J. p 643 note 89.

33. Mo.—Loomis v. Robinson, 76 Mo. 488.
34 C.J. p 643 note 90.

34. **Provisions as to interest**
Landowners' assignment of proportional interest in judgment recovered in condemnation action as security for payment of plaintiff's fee for services in such action, providing for interest from entry of judgment at same rate finally awarded landowners on their judgment, was not conditioned on receipt of interest by landowners.—Rowe v. Holmes, 146 P.2d 45, 63 Cal.App.2d 46.

Judgment entitles the assignee to demand and receive payment thereof.

As a general rule a judgment debtor is in no position to complain of an assignment of a judgment against him,[35] unless the assignment was taken for his benefit or paid for with funds advanced by him for that purpose,[36] although, as discussed infra § 524, the assignee's rights under the assignment may be subject to equities, defenses, and agreements between the parties to the judgment.

The assignment of a judgment transfers to the assignee the right to demand and receive payment of the judgment,[37] to the exclusion of all other persons,[38] including the assignor,[39] unless the assignment is subject to a reservation.[40] The assignee's right to receive the full amount remaining unpaid on the judgment is not affected by the amount he paid for the assignment,[41] unless he occupies a fiduciary relation to the judgment debtor[42] or has become the assignee at the debtor's request and for his benefit,[43] or purchases a compromised judgment at the amount agreed on in the compromise,[44] in which cases he cannot recover more than the amount paid for the assignment with interest.

Where a surety for the judgment debtor buys the judgment from the judgment creditor and assigns all of his claim against the debtor, his assignee suing as plaintiff in interest is entitled to recover on the judgment all that is still due thereon as between the principal and the surety.[45] The assignee of a judgment which was paid in part before the assignment is entitled to demand and receive payment of the unpaid balance only,[46] since in such a case, as discussed supra § 519, the effect of the assignment is to transfer to the assignee the judgment creditor's interest in the unpaid balance.

b. Right to Enforce Judgment

Although at common law the assignee of a judgment may not enforce the judgment at law in his own name, he may use the name of the judgment creditor for such purpose. An assignee of a judgment is usually permitted by statute to enforce the judgment in his own name.

It has been stated generally that an assignment of a judgment passes to the assignee all rights and remedies for collection of the judgment which the assignor possesses.[47] At common law, since the assignment of a judgment does not pass the legal

35. La.—Kentwood Bank v. McClendon, 93 So. 748, 152 La. 489.

Rights of intermediate assignees

Where judgment recovered by a bank had been transferred from bank to a trustee and assigned by trustee to a second person as trustee for a third person, in action on judgment for renewal thereof defendants could not complain if transfer from bank to second person, as trustee for third person, was invalid, where bank and second person were parties plaintiff. —Bank of Blowing Rock v. McIver, 9 S.E.2d 25, 217 N.C. 623.

36. Mo.—Argeropoulos v. Kansas City R. Co., 212 S.W. 369, 201 Mo. App. 287.

37. Ill.—People ex rel. Farwell v. Kelly, 12 N.E.2d 612, 367 Ill. 616. Pa.—Allegheny County v. Simon, Com.Pl., 89 Pittsb.Leg.J. 131.
34 C.J. p 643 note 91.

Assignee has collectable interest in judgment.—Troendle v. Clinch, Cal.App., 169 P.2d 55.

Protection of debtor

Assignment of judgment to third person cannot embarrass judgment debtor or subject him to hazard of another obligation on account of judgment; he can protect himself by applying to the court in which the judgment was obtained for a discharge on payment of the debt into court.—Jax Ice & Cold Storage Co. v. South Florida Farms Co., 109 So. 212, 91 Fla. 593, 48 A.L.R. 957, followed in Central Farmers' Trust Co. v. Davis, 132 So. 695, 101 Fla. 832.

38. Pa.—Reynolds v. Reynolds Lumber Co., 34 A. 791, 175 Pa. 437.
34 C.J. p 643 note 91.

39. N.C.—Hewett v. Outland, 37 N.C. 438.
34 C.J. p 643 note 92.

40. N.J.—Hudson Mfg. Co. v. Elmendorf, 9 N.J.Eq. 478.
34 C.J. p 643 note 93.

41. Minn.—Dalby v. Lauritzen, 107 N.W. 826, 98 Minn. 75.
34 C.J. p 643 note 94.

Adequacy of consideration cannot be questioned by the judgment debtor.—Johnson v. Bearden Plumbing & Heating Co., 71 P.2d 715, 180 Okl. 586.

42. N.Y.—Peck v. Peck, 17 N.E. 383, 110 N.Y. 64.
34 C.J. p 643 note 95.

43. Ill.—Campion v. Friedberg, 55 Ill.App. 450.
34 C.J. p 643 note 96.

44. S.C.—Sutton v. Sutton, 1 S.E. 19, 26 S.C. 33.

45. N.H.—Stavrelis v. Zacharias, 106 A. 806, 79 N.H. 146.

46. Iowa.—Cutting v. Mullaney, 181 N.W. 466, 191 Iowa 800.

47. Cal.—Michal v. Adair, 152 P.2d 490, 66 Cal.App.2d 382.
Ill.—Stombaugh v. Morey, 58 N.E.2d 545, 388 Ill. 392, 157 A.L.R. 254.
N.J.—Roth v. General Casualty & Surety Co., 146 A. 202, 106 N.J. Law 516.
N.C.—Jones v. T. S. Franklin Estate, 183 S.E. 732, 209 N.C. 585.
Ohio.—Pennsylvania Co. v. West Penn Rys. Co., 144 N.E. 51, 110 Ohio St. 516.

Defenses not available against creditor

A mortgagor was not entitled to raise, as against assignee of deficiency judgment on foreclosure of mortgaged property, the question of inadequacy of price for which property was sold at foreclosure sale, since mortgagee could have enforced deficiency judgment against mortgagor to full extent of deficiency, and there was no reason for denying his assignee the same right.—Marsh v. Bowen, 6 A.2d 783, 235 Pa. 314.

Materialman's lien decree

Surety on building contractor's bond as assignee of materialman's lien decree against property owner was held entitled to enforce decree with like effect as materialman, unless some special equity existed, which was not theretofore capable of being put in issue, and which would entitle property owner to relief by way of equitable set-off or counterclaim against surety's money demand.—Bear v. Standard Accident Ins. Co., 168 So. 18, 124 Fla. 9.

Person secondarily liable

Where decree was rendered against individual defendant primarily and banking company secondarily and trust company, assuming liabilities of banking company, paid judgment and took assignment thereof, the trust company was not precluded

title, the assignee may not sue on the judgment, in his own name and behalf,[48] except in equity,[49] and even in equity it has been held that the assignor in whose name the judgment or decree was recovered must be made a party to the suit.[50] The assignment, nevertheless, generally vests in the assignee the exclusive right to control the judgment and to use the name of the assignor, independently of the latter's consent, for the purpose of enforcing his rights,[51] as in the issuance of process to collect the judgment,[52] or in an original suit thereon.[53] Where the assignee may use the name of the judgment creditor to enforce the judgment, he may also use the name of the creditor's personal representative after the latter's death.[54] It has been held that, if the assignee may sue at law in the name of the judgment creditor, he has an adequate remedy at law which, in the absence of other equitable factors, bars him from proceeding in equity.[55]

An agreement between the assignor and other creditors of the debtor not to enforce the judgment is binding on an assignee of the judgment with notice.[56]

Under statutes. Under statutes of various types the assignee of a judgment is usually permitted to sue on the judgment in his own name,[57] regardless, under some statutes, of whether or not a legal title has passed to the assignee.[58] Under such statutes, after an assignment which transfers the legal title, the assignor may not sue thereon,[59] and the assignor's death does not deprive the assignee of the right to sue in his own name.[60] If the statute makes no exception in case the assignee is an attorney at law, an attorney may sue in his own name as assignee,[61] at least where the assignor was not his client.[62] A statute permitting the assignee to sue in his own name has been held not to preclude him from suing in the name of his assignor, if he so elects,[63] and the rule does not mean that the name of the action shall be changed, but it does mean that the proceedings and pleadings subsequent to the assignment shall be carried on in the name of, or at least by, the real party in interest.[64] Under a statute providing that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, the assignor of a judgment may sue as trustee for the assignee without joining the assignee.[65]

Assignment pending appeal. An assignment of a judgment pending an appeal therefrom may not be enforced unless and until the appeal is finally terminated in favor of the judgment.[66]

from obtaining judgment over against individual defendant on theory that it was a "volunteer."—Williams v. Cantrell, 124 S.W.2d 29, 22 Tenn.App. 443.

48. N.H.—Stavrelis v. Zacharias, 106 A. 306, 79 N.H. 146.
34 C.J. p 643 note 3.
Right to sue out scire facias see infra § 548.

Assignments not in statutory form
(1) Where an assignment of a judgment is not in the form required by a statute permitting the assignee to sue in his own name, he may not be permitted to bring suit on the judgment in his own name.—Gambill v. Greenwood, Ala., 22 So.2d 903.

(2) Under such circumstances an amendment substituting the judgment creditor as plaintiff may be allowed.—Heard v. Turner, 125 N.E. 596, 234 Mass. 526.

49. Ala.—Moorer v. Moorer, 6 So. 289, 87 Ala. 545.
34 C.J. p 644 note 4.

50. Ky.—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.
34 C.J. p 644 note 5.

51. Ga.—Franklin v. Mobley, for Use of Patrick, App., 36 S.E.2d 173.

Substitution of parties
Since substitution of a purchaser of a judgment which passed to him on purchase of decedent's business was unnecessary, notice of motion for substitution was not required, especially as judgment was by default for want of appearance.—Bright v. Schmitt, 231 P. 159, 76 Colo. 329.

52. Tex.—**Corpus Juris cited in** De Zavala v. Scanlan, Com.App., 65 S.W.2d 489, 492.
34 C.J. p 644 note 6.

53. Ala.—Gambill v. Greenwood, 22 So.2d 903.
34 C.J. p 644 note 7.

54. Ala.—Gambill v. Greenwood, supra.

55. Ala.—Gambill v. Greenwood, supra.
Right of assignee of chose in action generally to sue in equity see Assignments § 125 b.

56. La.—Cusachs v. Dugue, 4 La.A. (Orleans) 132.

57. Conn.—Newman v. Gaul, 129 A. 221, 102 Conn. 425.
Ill.—Johnson v. Watson, 33 N.E.2d 130, 309 Ill.App. 440.
Neb.—Exchange Elevator Co. v. Marshall, 22 N.W.2d 403.
34 C.J. p 636 note 73 [c], p 644 note 8.
Right of assignee to issue execution:
Against property see Executions § 14 b.
Against person see Executions § 418.
Right of assignee to revive judgment in his own name see infra § 537.
Right of assignee to sue on foreign judgment see infra § 878.

58. **Right to sue in assignor's name** conferred on assignee by a power of attorney provision in an absolute assignment does not prevent assignee from suing in his own name.—Rogers v. Garde, 264 P. 951, 33 N.M. 245.

59. Okl.—Stein v. Scanlan, 127 P. 483, 34 Okl. 801, 42 L.R.A.,N.S., 895.

60. Conn.—Hamilton v. New Haven, 73 A. 1, 82 Conn. 208.

Substitution as party pendente lite
An attorney who takes an assignment to himself of the judgment in favor of his client may properly be substituted in his client's place after the latter's death.—Potts v. Paxton, 153 P. 957, 171 Cal. 493.

61. Conn.—Rogers v. Hendrick, 82 A. 586, 85 Conn. 260.

62. Conn.—Rogers v. Hendrick, supra.

63. Conn.—Newman v. Gaul, 129 A. 221, 102 Conn. 425.

64. Okl.—Stein v. Scanlan, 127 P. 483, 34 Okl. 801, 42 L.R.A.,N.S., 895.

65. N.C.—Chatham v. Mecklenburg Realty Co. 105 S.E. 329, 180 N.C. 500.

66. N.J.—National Surety Co. v.

§ 523. —— As Affected by Notice to Debtor

a. Necessity for notice
b. Form of notice
c. Effect of notice

a. Necessity for Notice

The judgment debtor is protected by payments he may make on the judgment to the judgment creditor before he has notice of the assignment of the judgment.

Although, as discussed supra § 515, as between the parties thereto notice is not essential to an assignment, notice to the judgment debtor is necessary to effectuate the assignment,[67] and until such notice is given a perfect and indefeasible title to the judgment does not vest in the assignee.[68] Unless and until such notice is given, the judgment debtor is not bound by the assignment,[69] and will be protected, as against the assignee, with respect to any payments he may make to plaintiff in the judgment,[70] or with respect to any release or satisfaction the judgment debtor may procure from the judgment creditor before receiving such notice,[71] irrespective of whether or not the assignment is subsequently filed or recorded.[72] However, a failure to notify the debtor will not subject the assignee to merely equitable claims of the debtor which accrue after the assignment and do not attach to the judgment itself.[73]

Payment to third persons. The protection extended to a judgment debtor who makes payment before notice of the assignment applies only where the payment is made to the judgment creditor; when the debtor voluntarily makes payment to a person other than the holder of the legal title, he must see to it that he pays the one to whom he is really indebted, and payment to a third person will not be valid as against the assignee,[74] even though such third person is in equity entitled to require the judgment creditor to account to him, as his agent, for the proceeds of the judgment.[75]

b. Form of Notice

In the absence of a statute providing how notice of an assignment of a judgment shall be given, notice of such an assignment need not be in any particular form, provided it is sufficient to inform the debtor that the judgment creditor is no longer the owner of the judgment.

Unless a statute provides how notice of the assignment shall be given,[76] the notice need not be in any particular form; it is sufficient if it advises the debtor that the person who recovered the judgment is no longer the owner of it or entitled to collect it,[77] or if the information is given under circumstances and in terms calculated to arrest the attention of the debtor and put him on notice.[78] Direct notice of the assignment is unnecessary if the assignee can bring home to the debtor knowledge of such facts as should have put him on inquiry.[79] Notice may be served on the debtor like ordinary civil process.[80]

The requirement of notice imports notice by some person entitled to give it to some other person entitled to receive it.[81]

Mulligan, 146 A. 372, 105 N.J.Law 336.

67. Tenn.—State ex rel. McConnell v. Peoples Bank & Trust Co., 12 Tenn.App. 242.

68. Mo.—Boyd v. Sloan, 71 S.W.2d 1065, 335 Mo. 163—Overlander v. Withers, App., 148 S.W.2d 88—Price v. Clevenger, 74 S.W. 894, 99 Mo.App. 536.
Tenn.—State ex rel. McConnell v. Peoples Bank & Trust Co., 12 Tenn.App. 242.
Title becomes indefeasible on notice to judgment debtor.—Popsicle Corporation of U. S. v. Pearlstein, Mo.App., 168 S.W.2d 105.
Nonstatutory assignment
Assignee was held to have indefeasible interest in judgment as against the judgment debtor who had notice of the assignment of the judgment, although the assignment was not attested as required by statute.—Boyd v. Sloan, 71 S.W.2d 1065, 335 Mo. 163.

69. Mo.—Helstein v. Schmidt, 78 S.W.2d 132, 229 Mo.App. 275.
Tenn.—State ex rel. McConnell v. Peoples Bank & Trust Co., 12 Tenn.App. 242.
34 C.J. p 646 note 29.

70. Idaho.—Houtz v. Daniels, 211 P. 1088, 36 Idaho 544, 32 A.L.R. 1016.
Mo.—Boyd v. Sloan, 71 S.W.2d 1065, 335 Mo. 163.
W.Va.—**Corpus Juris cited in** Hines v. Fulton, 140 S.E. 537, 542, 104 W.Va. 561.
34 C.J. p 645 note 17.
Presumption is that plaintiff in a judgment is the owner of it and the burden is on the one who alleges the contrary.—McLamb v. Adams, 24 S.E.2d 524, 222 N.C. 714—Brown v. Harding, 86 S.E. 1010, 170 N.C. 253, Ann.Cas.1917C 548.

71. Cal.—Spencer v. California Nat. Bank of Long Beach, 36 P.2d 1073, 1 Cal.2d 681.
34 C.J. p 645 note 18.

72. N.C.—McLamb v. Adams, 24 S.E. 2d 524, 222 N.C. 714.
Or.—Windsor v. Mourer, 147 P. 533, 76 Or. 281, rehearing denied 147 P. 1190, 76 Or. 281.

73. N.J.—Terney v. Wilson, 45 N.J. Law 232.

74. N.Y.—Seymour v. Smith, 17 Abb.N.Cas. 387, affirmed 21 N.E. 1042, 114 N.Y. 481, 11 Am.S.R. 683.
34 C.J. p 646 note 31.
Effect of payment by garnishee without notice of assignment:
Payment before judgment see Garnishment § 297.
Payment after judgment see Garnishment § 294 b.

75. N.Y.—Seymour v. Smith, supra.

76. **Statutory provisions control**
Wash.—Mottet v. Stafford, 162 P. 1001, 94 Wash. 572.

77. La.—Succession of Delassize, 8 Rob. 259.

78. Pa.—Guthrie v. Bashline, 25 Pa. 80.
34 C.J. p 645 note 23.

79. Ohio.—Clark v. Baltimore & O. R. Co., 4 Ohio S. & C.P. 173, 7 Ohio N.P. 647.
34 C.J. p 645 note 24.

80. La.—Aufeukolk v. Montegut, 29 La.Ann. 257—Blondin v. Christophe, 13 La.Ann. 324.

81. Conn.—Ciezynski v. New Britain Transp. Co., 182 A. 661, 121 Conn. 36.

Assignment on record. Although there are jurisdictions in which the rule does not prevail,[82] the general rule is that entering the assignment on the judgment record or appearance docket, or filing it among the papers in the case, is not constructive notice to the debtor, as he is under no obligation to search the records,[83] even though a statute provides that, when an assignment is filed, the clerk shall make a record of the assignment.[84]

c. Effect of Notice

After the judgment debtor has received notice of the assignment, the assignee will be protected in equity against any and all acts of the parties.

After the judgment debtor has received notice of the assignment, the assignee will be protected in equity against any and all acts of the parties.[85] Thus the debtor's liability to the assignee will not be discharged by a subsequent payment made to the judgment creditor,[86] or by a subsequent release given him by the judgment creditor,[87] and the judgment debtor cannot compromise thereafter with the assignor and thus defeat the claim of the assignee,[88] although, where an assignment was made for the convenience and benefit of the assignor, it was held that a subsequent settlement between him and the judgment debtor was valid as against the assignee.[89] If a satisfaction of the judgment has been entered after notice of the assignment, equity will set it aside as fraudulent at the suit of the assignee.[90]

§ 524. —— As Affected by Equities, Defenses, and Agreements between Original Parties

Generally the assignee of a judgment takes subject to equities and defenses existing between the judgment creditor and the judgment debtor at the time of the assignment.

In accordance with the rule governing assignments of choses in action generally, as discussed in Assignments § 114, and in the absence of any estoppel,[91] the assignee of a judgment takes it subject to all the equities, defenses, and agreements existing between the original parties,[92] at the time

Notice by telephone
In order to establish notice by telephone that judgment has been assigned, person relying on such notice must prove identity of person receiving communication and that it reached person sought to be charged.—Ciezynski v. New Britain Transp. Co., supra.

82. Mo.—Helstein v. Schmidt, 78 S. W.2d 132, 229 Mo.App. 275.
34 C.J. p 645 note 26.

Statutory assignment
(1) Statutory assignment of judgment imparts notice when attached to judgment, or on indorsement thereof on margin of record.—Tutt v. Couzins, 50 Mo. 152—Weaver v. Mitchell, Mo.App., 107 S.W.2d 945.

(2) Where filed assignment of an interest in a judgment, notation of which was made on judgment record, merely stated it was "subscribed and sworn to" before county clerk, without a statement that judgment creditor had executed the assignment "for the consideration and purpose therein mentioned" as required by statute, assignment was not properly acknowledged, and did not constitute notice to judgment debtor so as to make it liable to assignee after debtor paid judgment to judgment creditor.—Donham v. Davis, 187 S.W.2d 722, 208 Ark. 824.

83. Idaho.—Houtz v. Daniels, 211 P. 1088, 36 Idaho 544, 32 A.L.R. 1016.
Ill.—Tarjan, for Use of Lefkow v. National Surety Co., 268 Ill.App. 232.
Iowa.—Miller v. Greenfield Sav. Bank, 203 N.W. 236, 199 Iowa 1039.
34 C.J. p 645 note 27.

84. N.Y.—Boyd v. Buffalo Steam Roller Co., 149 N.Y.S. 1050, 87 Misc. 20, affirmed 152 N.Y.S. 1099, 167 App.Div. 959.

85. W.Va.—**Corpus Juris cited in** Hines v. Fulton, 140 S.E. 537, 542, 104 W.Va. 561.
34 C.J. p 646 note 35.

86. Miss.—Moore v. Red, 22 So. 948.
34 C.J. p 646 note 36.

87. Colo.—La Fitte v. Salisbury, 95 P. 1065, 43 Colo. 248.
34 C.J. p 646 note 37.

88. W.Va.—Hines v. Fulton, 140 S. E. 537, 104 W.Va. 561.
34 C.J. p 646 note 38.

89. N.Y.—Baker v. Secor, 7 N.Y.S. 803, 4 Silv.Sup. 516.

90. W.Va.—Hines v. Fulton, 140 S. E. 537, 104 W.Va. 561.

Suit continued for benefit of assignee
Collusive entry of satisfaction of judgment or decree after assignment will be set aside at suit of assignee and suit prosecuted in his name for his benefit, regardless of whether judgment or decree is in rem, in personam, or both.—Hines v. Fulton, supra.

91. N.Y.—Thompson v. Noble, 8 N. Y.S. 373, 55 Hun 268.
34 C.J. p 646 note 41.

Estoppel as affirmative defense
Title by estoppel to judgment, based on ignorance of claim to equitable set-off against judgment, was an affirmative defense required to be proved by assignee sought to be enjoined from executing judgment.—Jegglin v. Orr, 29 S.W.2d 721, 224 Mo.App. 773.

Estoppel by express agreement
Pa.—Appeal of Scott, 16 A. 430, 123 Pa. 155.
34 C.J. p 647 note 48.

Failure to take advantage of defense in due time
Md.—Doub v. Mason, 2 Md. 380.
N.C.—Le Duc v. Slocomb, 32 S.E. 726, 124 N.C. 347.
34 C.J. p 647 note 49.

Fraud in allowing judgment to be obtained
Ohio.—Wright v. Snell, 22 Ohio Cir. Ct. 86, 12 Ohio Cir.Dec. 308.

Laches in permitting judgment to remain of record
Ohio.—Wright v. Snell, supra.

92. U.S.—Turner v. Dickey, D.C. Tenn., 3 F.Supp. 360, affirmed, C. C.A., Dickey v. Turner, 64 F.2d 1012.
Cal.—Parker v. Howe, 299 P. 553, 114 Cal.App. 166.
Fla.—Bear v. Standard Accident Ins. Co., 168 So. 18, 124 Fla. 9.
Ky.—Lemons v. Wilson, 172 S.W.2d 67, 294 Ky. 439.
N.J.—**Corpus Juris cited in** Manowitz v. Kanov, 154 A. 326, 327, 107 N.J. Law 523, 75 A.L.R. 1464.
N.Y.—Kelly v. O'Brien, 196 N.Y.S. 705.
Or.—Parker v. Reid, 273 P. 334, 127 Or. 573.
Tex.—Dallas Joint Stock Land Bank

of the assignment,[93] whether or not he had notice of them,[94] unless they arise from other and independent transactions.[95] Thus, as discussed infra § 568, he takes the judgment subject to any right of set-off which existed in the judgment debtor before the assignment. However, the assignee is not affected by any equities which would not affect his assignor,[96] and issues which became res judicata by rendition of the judgment may not be raised again against the assignee of the judgment.[97]

Assignment as collateral: An exception to the general rule that the assignee takes subject to equities and defenses has been made in the case of an assignee of a judgment taken as collateral security for a promissory note, who has been held to take the judgment free from all defenses except those which might be set up against the promissory note.[98]

§ 525. —— As between Assignor and Assignee

The assignee of a judgment, as a general rule, may hold the assignor liable for subsequently receiving payment or entering satisfaction of the assigned judgment, or for breach of an implied warranty of title or validity.

The rule generally followed is that, except as to defects known to the purchaser,[99] there is an implied warranty on the part of the assignor of a judgment that such judgment is a valid, subsisting obligation against the debtor for the amount specified therein,[1] that the assignor is the owner of it,[2] and that no payments have been made on it other than such as he discloses at the time,[3] although in some jurisdictions the implied warranty does not extend to the validity of the judgment, or its freedom from error or irregularity,[4] especially where it is agreed that the assignor is in no event to be liable on the assignment.[5] No implied warranty arises as to the solvency of the judgment debtor,[6] and, in the absence of fraud or express agreement, the assignee cannot come back on the assignor because of his failure to make the amount on the judgment.[7]

Where the assignment is by the judgment creditor, he cannot, without express agreement, limit his liability on the implied warranty merely by assigning "without recourse."[8] Where, however, an assignee of a judgment, without knowledge of any defect therein or defense thereto, transfers simply his "right, title, and interest, without recourse," he will not be held liable on such implied warranty.[9]

The implied warranty that the judgment assigned is valid is broken by the transfer of a voidable judgment;[10] hence, as discussed infra § 528, where the judgment is afterward reversed, vacated, or set aside, the purchaser may recover back the price paid for the assignment. A bona fide purchaser of

of Dallas v. Lancaster, Civ.App., 122 S.W.2d 659, error dismissed.
34 C.J. p 646 note 42.

Failure to obtain modification
Where party to action took no steps to have modified a judgment finding that codefendant had an interest in property, he as assignee of such judgment cannot impeach it in suit thereon.—McDaniel v. Belt, Tex. Civ.App., 54 S.W.2d 592.

Inchoate rights
Assignee of a judgment does not take subject to mere inchoate rights of contribution and subrogation, which have not become complete by payment before the assignment.—Arp v. Blake, 218 P. 773, 63 Cal.App. 362.

93. N.C.—In re Wallace, 193 S.E. 819, 212 N.C. 490.
Pa.—Marsh v. Bowen, 6 A.2d 783, 335 Pa. 314.

94. N.J.—**Corpus Juris cited in** Manowitz v. Kanov, 154 A. 326, 327, 107 N.J.Law 523, 75 A.L.R. 1464.
34 C.J. p 647 note 43.

95. Iowa.—Isett v. Lucas, 17 Iowa 503, 85 Am.D. 572.
34 C.J. p 647 note 44.

Liability of assignee as surety
Surety on property owner's lien release and supersedeas bonds, sued on by surety on building contractor's bond as assignee of materialman's judgment against owner, could not set up equitable defense based on plaintiff's liability as surety.—Bear v. Duval Lumber Co., for Use and Benefit of Standard Accident Ins. Co., 150 So. 614, 112 Fla. 240.

96. Ill.—Thorpe v. Helmer, 113 N.E. 954, 275 Ill. 86.

97. **General judgment**
When issues on liability of assets of a mutual insurance corporation and those of one group of policyholders for payment of benefits due members of other classes had become res judicata by a general judgment against the company, an assignee of the judgment who had obtained a judgment of revivor on it could look to all assets of the company to liquidate his judgment.—Bailey v. American Casualty Co., Tex. Civ.App., 119 S.W.2d 697.

98. Pa.—Levy v. Gilligan, 90 A. 647, 244 Pa. 272.
34 C.J. p 647 note 47.

99. N.Y.—Furniss v. Ferguson, 34 N.Y. 435—Furniss v. Ferguson, 15 N.Y. 437.
34 C.J. p 647 note 52.

1. La.—Collins v. Jones, App., 152 So. 802.
34 C.J. p 647 note 55.

2. N.Y.—Furniss v. Ferguson, 34 N. Y. 435.
34 C.J. p 647 note 54.

3. N.C.—Camp Mfg. Co. v. Durham Fertilizer Co., 64 S.E. 188, 150 N. C. 417.
34 C.J. p 647 note 55.

4. Ill.—Hinkley v. Champaign Nat. Bank, 75 N.E. 210, 216 Ill. 559.
34 C.J. p 648 note 56.

5. Tenn.—Gore v. Poteet, 50 S.W. 754, 101 Tenn. 608.

6. Ky.—Anderson v. Bradford, 5 J.J.Marsh. 69.
Wash.—Hall v. Mathewson, 74 P.2d 209, 193 Wash. 651.
34 C.J. p 648 note 58.

7. Ky.—Anderson v. Bradford, 5 J.J. Marsh. 69.
Wash.—Hall v. Mathewson, 74 P.2d 209, 192 Wash. 651.
34 C.J. p 648 note 59.

8. Mich.—Lillibridge v. Tregent, 30 Mich. 105.
34 C.J. p 648 note 60.

9. Iowa.—Miller v. Dugan, 36 Iowa 433—Schofield v. Moore, 31 Iowa 241.

10. Mo.—Emerson v. Knapp, 75 Mo. App. 92.
Va.—Arnold v. Hickman, 6 Munf. 15, 20 Va. 15.

a judgment from an assignee takes it subject to any equities between the judgment creditor and his assignee.[11]

The assignor is liable in damages to the assignee if the assignor does not in fact own the judgment, or if it has been extinguished wholly or partially before the assignment,[12] or if he afterward receives payment of the judgment or enters satisfaction of it,[13] or if it is reversed or set aside after the assignment.[14] The rule as to the damages recoverable in case of breach of warranties in the sale of chattels applies to breach of a covenant contained in the assignment of a judgment,[15] and, therefore, the assignee is entitled to recover the difference between the value of the judgment as it was and its value if the covenant had not been broken,[16] or, if the judgment is entirely lost to him, the amount which he paid for it,[17] together with the costs, if any, paid by him in defending the judgment.[18] The assignee of part of a judgment is entitled to recover the amount due to him from the assignor who has received a conveyance of property in satisfaction of the judgment debt.[19]

Instead of suing the assignor for damages because of the reversal or setting aside of the assigned judgment, the assignee may continue the original action to a final decision if, notwithstanding such reversal or vacation, the original action is still pending.[20]

Liability of assignee. A person who takes in form an assignment of a judgment other than the one contemplated between him and the assignor has no right to it, and becomes at once a trustee for the person entitled thereto, and, his trust being a naked one, a court of equity will require him at once to reconvey.[21]

§ 526. —— As to Third Persons

It is generally held that an assignee of a judgment takes it free from latent equities of third persons of which he has no notice at the time of the assignment.

In accordance with the rule supported by the weight of authority with respect to assignments of choses in action generally, discussed in Assignments § 118, many authorities hold that the assignee of a judgment takes it free from latent equities of third persons, not parties to the judgment, of which he has no notice at the time of the assignment.[22] Under this rule an assignee who has no notice that his assignor has notice of an unrecorded conveyance made before the rendition of the judgment is not affected by the notice of his assignor.[23] An assignee is not bound by an agreement of which he has no notice between a stranger to the judgment and the judgment creditor[24] or judgment debtor,[25] and an innocent assignee of a judgment, without notice, actual or constructive, of an injunction not yet served against its assignment, has been held to be entitled to retain the judgment.[26] To protect himself against such equities the assignee must also show that he is a purchaser in good faith and for a valuable consideration[27] and that he paid the purchase money before the adverse equity was asserted.[28]

11. N.Y.—Cutts v. Guild, 57 N.Y. 229.
34 C.J. p 649 note 63.

12. La.—Johnson v. Boice, 4 So. 163, 40 La.Ann. 273, 8 Am.S.R. 528.
Mo.—Emerson v. Knapp, 75 Mo.App. 92.

13. N.Y.—Booth v. Farmers' & Mechanics' Nat. Bank, 50 N.Y. 396—Hochberg v. Montrose Investment & Loan Corporation, 23 N.Y.S.2d 387.
34 C.J. p 649 note 65.

14. Or.—King v. Miller, 97 P. 542, 53 Or. 53, affirmed 32 S.Ct. 243, 223 U.S. 505, 56 L.Ed. 528.
Effect of reversal of judgment after assignment see infra § 528.

15. N.Y.—Bennett v. Buchan, 61 N. Y. 222—Furniss v. Ferguson, 34 N. Y. 485.

16. N.Y.—Bennett v. Buchan, 61 N. Y. 222.
34 C.J. p 649 notes 69, 70 [a].

17. La.—Corcoran v. Riddell, 7 La. Ann. 268.
34 C.J. p 649 note 70.

18. La.—Corcoran v. Riddell, supra.

19. Colo.—Barnum v. Green, 57 P. 757, 13 Colo.App. 254.

20. Or.—King v. Miller, 97 P. 542, 53 Or. 53, affirmed 32 S.Ct. 243, 223 U.S. 505, 56 L.Ed. 528.

21. N.Y.—Cutts v. Guild, 57 N.Y. 229.

22. Ala.—Bain v. J. A. Lusk & Son, 109 So. 187, 21 Ala.App. 442.
Okl.—**Corpus Juris cited in** Bourquin v. Feland, 117 P.2d 789, 791, 189 Okl. 498—**Corpus Juris cited in** State ex rel. Barnett v. Wood, 43 P.2d 136, 138, 171 Okl. 341.
34 C.J. p 649 note 76.

Attorneys' fees

Where city paid into court sum awarded to defendants as attorneys' fees on abandonment of condemnation suit, assignment by defendants to one attorney could operate on balance remaining after distribution without prejudice to rights of other attorneys, who asserted no claim to balance, with respect to validity and fairness of assignment.—City of Los Angeles v. Knapp, 60 P.2d 127, 7 Cal.2d 168.

23. Miss.—Clark v. Duke, 59 Miss. 575.

24. Pa.—Appeal of Hendrickson, 24 Pa. 363.
34 C.J. p 649 note 78.

25. N.J.—Starr v. Haskins, 26 N.J. Eq. 414.

26. S.C.—Robertson v. Segler, 24 S. C. 387.

27. W.Va.—London & Lancashire Indemnity Co. of America v. Cromwell, 190 S.E. 337, 118 W.Va. 318.
34 C.J. p 650 note 84.

Creditors of judgment creditor

As between several creditors of a common debtor, who had obtained a judgment, the proceeds of which were in the hands of a receiver, one creditor, who took an assignment of part of the judgment without notice to the other creditors, and for a pre-existing debt and as mere collateral therefor, acquired no right of priority over the other creditors.—Zane v. Brown, 8 A.2d 367, 126 N.J.Eq. 200.

28. N.Y.—Christie v. Bishop, 1 Barb. Ch. 105.

On the other hand, in some jurisdictions the doctrine of caveat emptor has been applied, and it has been held that the assignee occupies no better position in this respect than his assignor.[29] In any event, the assignee is chargeable with equities of third persons of which he has actual notice,[30] or such constructive notice as may be obtained from an inspection of the record of the judgment.[31]

As affected by statute. Since a statute regulating the assignment of a judgment is in derogation of the common law, it has been held that it must be strictly complied with if the assignee is to obtain protection against third persons subsequently acquiring an interest in the judgment.[32]

Notice to judgment debtor. It has been held that the assignee does not take title as against a creditor of the assignor where the assignee fails to give notice of the assignment to the judgment debtor,[33] and in some jurisdictions there are statutes which require notice to be given to the debtor to make the assignment effective against third persons.[34] Under such a statute the giving of notice to the debtor renders it effective as against a creditor of the assignor notwithstanding the assignee fails to have it recorded or judicially recognized.[35]

§ 527. —— Rights Incidental to Assignment

In general a valid assignment of a judgment carries with it all incidental or collateral rights, remedies, and advantages existing and available to the judgment creditor as such at the time of the assignment.

A bona fide purchaser of a judgment stands in the judgment creditor's shoes.[36] Hence on a valid assignment, in addition to succeeding to the ownership of the judgment and all rights and interest therein, as discussed supra § 519 a, the assignee also succeeds to all incidental or collateral rights, remedies, and advantages existing at the time of the assignment and then available to the judgment creditor,[37] even though the parties to the assignment

29. Minn.—Gill v. Truelsen, 40 N.W. 254, 39 Minn. 373.
34 C.J. p 650 note 81.

30. N.J.—Boice v. Conover, 61 A. 159, 69 N.J.Eq. 580, affirmed 65 A. 191, 71 N.J.Eq. 269.
N.Y.—Johnston v. A. L. Erlanger Realty Corporation, 296 N.Y.S. 89, 162 Misc. 881.
34 C.J. p 650 note 82.

Lien of person furnishing consideration

Evidence in suit involving ownership of judgment was held to sustain court's conclusion that sale and transfer of judgment was to assignee named in assignment thereof, notwithstanding claim that judgment was bought with money furnished by assignee's son, and that assignment to assignee on margin of judgment book was by mistake; hence chancellor properly awarded assignees' son a mere lien on the judgment.—Lemons v. Wilson, 172 S.W.2d 67, 294 Ky. 439.

Prior sale of debtor's realty

Assignee of judgment with notice of sale of debtor's land prior to judgment was not bona fide purchaser with right to enforce judgment against land.—Johnson Hardware Co. v. Ming, 113 So. 189, 147 Miss. 551.

31. Cal.—Hobbs v. Duff, 23 Cal. 596.
34 C.J. p 650 note 83.

32. Ark.—Donham v. Davis, 187 S.W.2d 722, 208 Ark. 824—McKim v. Highway Iron Products Co., 29 S.W.2d 682, 181 Ark. 1121.

33. Tenn.—State ex rel. McConnell v. Peoples Bank & Trust Co., 12 Tenn.App. 242.

34. La.—Folse v. Dale, 2 So.2d 6, 197 La. 511.

35. La.—Folse v. Dale, supra.

36. N.J.—Bell v. Kates, 18 A.2d 556, 126 N.J.Law 90.

37. Cal.—Arp v. Blake, 218 P. 773, 63 Cal.App. 362.
Ill.—Stombaugh v. Morey, 58 N.E.2d 545, 388 Ill. 392, 157 A.L.R. 254—People ex rel. Farwell v. Kelly, 12 N.E.2d 612, 367 Ill. 616—Eagle Indemnity Co. v. Haaker, 33 N.E.2d 154, 309 Ill.App. 406—**Corpus Juris cited in** Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill.App. 208, 246.
Ky.—Lemons v. Wilson, 172 S.W.2d 67, 294 Ky. 439.
Miss.—**Corpus Juris cited in** Humphreys County v. Cashin, 101 So. 571, 573, 136 Miss. 476.
N.J.—Bell v. Kates, 18 A.2d 556, 126 N.J.Law 90—Roth v. General Casualty & Surety Co., 146 A. 202, 106 N.J.Law 516.
N.Y.—People ex rel. Hirsch v. Weissbrod, 33 N.Y.S.2d 580, 178 Misc. 177.
N.C.—Jones v. T. S. Franklin Estate, 183 S.E. 732, 209 N.C. 585.
Ohio.—Pennsylvania Co. v. West Penn Rys. Co., 144 N.E. 51, 110 Ohio St. 516.
Okl.—Gupton v. Western Kennel Club, 145 P.2d 179, 193 Okl. 462.
S.C.—**Corpus Juris quoted in** Watts v. Copeland, 170 S.E. 780, 781, 170 S.C. 449.
Tex.—Casray Oil Corporation v. Royal Indemnity Co., Civ.App., 165 S.W.2d 244, affirmed 169 S.W.2d 955, 141 Tex. 33.
W.Va.—Hines v. Fulton, 140 S.E. 537, 104 W.Va. 561.
34 C.J. p 650 note 90—5 C.J. p 951 note 14.

Right to:
Body execution see Executions § 418
Invoke garnishment see Garnishment § 21 b.
Issue execution:
Generally see Executions § 14 b.
After death of assignor see Executions § 65 a.
Maintain supplementary proceedings see Executions § 347.

Benefit of appeal or supersedeas bond

(1) Right to sue on supersedeas bond passes as incident to assignment of judgment, although no reference is made to bond in assignment.—Cope v. Johnson, 251 P. 985, 123 Okl. 43—34 C.J. p 650 note 90 [a] (1).

(2) This is true although the assignment was made and filed before the appeal was taken and the bond executed.
Fla.—Kahn v. American Surety Co. of New York, 162 So. 335, 120 Fla. 50.
Tex.—De Zavala v. Scanlan, Com. App., 65 S.W.2d 489.
Wash.—Wright v. Seattle Grocery Co., 172 P. 345, 101 Wash. 266.

(3) The filing of supersedeas bond by garnishor, appealing from judgment for garnishee, after garnishee's assignment of portion of judgment awarding it attorneys' fees to one of its attorneys in trust, deprived assignee of right to issue execution on judgment pending appeal, but gave him right to proceed against garnishor and surety on bond, if appeal were not prosecuted with effect.—Casray Oil Corporation v. Royal Indemnity Co., Civ.App., 165 S.W.2d 244, affirmed 169 S.W.2d 955, 141 Tex. 33.

may have agreed otherwise between themselves,[38] including the lien or security of the judgment on specific property,[39] the right of proceeding with an attachment already issued,[40] and the right where the judgment is for money wrongfully appropriated to have the judgment debtor arrested.[41] However, independent and personal rights of the assignor not incidental to his status as judgment creditor in the particular judgment assigned do not so pass unless expressly included by the assignment.[42] Thus it does not confer on the assignee, unless expressly provided for, the additional right to subject to liability on the judgment others who were not parties to the original action, although the assignor might have had a cause of action against them but forebore to pursue it.[43]

The assignee can acquire no other or superior rights than those vested in his assignor;[44] and, if

(4) Right of assignee to sue on appeal bond in his own name see Appeal and Error § 2083 a (2).

Bond to discharge garnishment

The right to bring suit on a bond given to discharge a garnishment which is conditioned that the bondsmen will pay the money judgment rendered in the main action passes as an incident to the assignment of the judgment, although no reference is made to the bond in the assignment.—Conoway v. Carnall, 224 P. 523, 101 Okl. 172.

Decree in rem

Assignment of decree in rem carries with it the money decree therein as well as the assignor's right to the lien created by an attachment sued out and levied on the lands decreed to be sold and the right to enforce this attachment.—Hines v. Fulton, 140 S.E. 537, 104 W.Va. 561.

Indemnity policy

Cal.—Bias v. Ohio Farmers Indemnity Co., 81 P.2d 1057, 28 Cal.App. 2d 14.

Lien release bond

Fla.—Bear v. Duval Lumber Co., for Use and Benefit of Standard Accident Ins. Co., 150 So. 614, 112 Fla. 240.

Rights against attorney for assignor

Where attorney of judgment creditor collects judgment and reduces the fruits of the judgment to his possession, an assignee of the judgment has all rights and remedies as against the attorney that the assignor had, although the relationship of attorney and client is not an assignable incident of a judgment.—Armour & Co. v. Lambdin, 16 So.2d 805, 154 Fla. 86.

Right to set aside fraudulent conveyance by debtor

Cal.—Michal v. Adair, 152 P.2d 490, 66 Cal.App.2d 382.

Stockholder's statutory liability

Assignment of a judgment against a bank gave to assignee a right of action against stockholder to enforce constitutional and statutory liability.—Eagle Indemnity Co. v. Haaker, 33 N.E.2d 154, 309 Ill.App. 406.

38. Wash.—Lewis v. Third St. & S. R. Co., 66 P. 150, 26 Wash. 28.
34 C.J. p 651 note 91.

39. N.C.—Little v. Steele, 199 S.E. 282, 214 N.C. 343.
Tex.—Casray Oil Corporation v. Royal Indemnity Co., Civ.App., 165 S.W.2d 244, affirmed 169 S.W.2d 955, 141 Tex. 33.
34 C.J. p 651 note 92.

Right to enforce or foreclose lien

Conn.—Joseph v. Donovan, 157 A. 638, 114 Conn. 79.
Tex.—Hicks v. Price, Civ.App., 81 S. W.2d 116.

40. U.S.—Nelson v. Century Indemnity Co., C.C.A.Cal., 65 F.2d 765, certiorari denied Century Indemnity Co. v. Nelson, 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588.
W.Va.—Hines v. Fulton, 140 S.E. 537, 104 W.Va. 561.
37 C.J. p 651 note 93.

Rights under attachment bond

(1) Assignee of judgment may enforce bond given to release attached property if property is not redelivered to sheriff for sale to satisfy judgment.—Nelson v. Century Indemnity Co., C.C.A.Cal., 65 F.2d 765, certiorari denied Century Indemnity Co. v. Nelson, 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588—34 C.J. p 651 note 93 [a].

(2) Where property of principal debtor was attached, assignee of judgment in trust for surety on bond given to release attachment by one secondarily liable for debt should resort to principal debtor's property before resorting to property of principal in attachment bond or property of others secondarily liable for original debt, although principal debtor was only a cojudgment debtor on face of judgment.—Nelson v. Century Indemnity Co., C.C.A.Cal., 65 F.2d 765, certiorari denied Century Indemnity Co. v. Nelson, 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588.

Collusive entry of judgment on attachment

Where the claim of the assignor, carried into a decree in rem against the property attached after the assignment, has been thereafter fraudulently compromised between the debtor and creditor for much less than the amount decreed in rem against the property, and the sum agreed on fraudulently paid over to the assignor, the amount to which the assignee is entitled may, in his suit to set aside the collusive decree, be corrected on the record of the original decree in the cause, and decreed accordingly.—Hines v. Fulton, 140 S.E. 537, 104 W.Va. 561.

41. Ill.—Lasher v. Carey, 182 Ill. App. 147.

42. N.C.—Jones v. T. S. Franklin Estate, 183 S.E. 732, 209 N.C. 585.

43. N.C.—Hood ex rel. United Bank & Trust Co. v. Richardson Realty, 191 S.E. 410, 211 N.C. 582—Fidelity Security Co. v. Hight, 189 S.E. 174, 211 N.C. 117—Jones v. T. S. Franklin Estate, 183 S.E. 732, 209 N.C. 585.

Judgment for stockholder's statutory liability

(1) Assignee of judgment against estate for amount of a bank stock assessment could not in a subsequent proceeding bring in as defendants executor of estate in his capacities as an individual and a trustee, even if assignor could have sued them originally, where any rights of assignor as against executor in such capacities were not expressly included in assignment.—Jones v. T. S. Franklin Estate, supra.

(2) The assignment of a judgment against holder of bank stock which was procured under statute creating additional stockholder's liability, as part of assets of insolvent bank transferred to newly organized bank in consideration for discharge of all debts of insolvent bank, did not confer on assignee right to subject another to liability on judgment as alleged real owner of stock.—Hood ex rel. United Bank & Trust Co. v. Richardson Realty, 191 S.E. 410, 211 N.C. 582.

(3) Assignee of judgment for bank stock assessment was held not entitled to reformation of judgment so as to hold defendants liable therefor as real owners of bank stock at time of assessment, in view of enactment of statute after assessment relieving holders of bank stock of their double liability.—Fidelity Security Co. v. Hight, 189 S.E. 174, 211 N.C. 117.

44. Kan.—Corpus Juris cited in Petersime Incubator Co. v. Ferguson 103 P.2d 822, 825, 152 Kan. 259.
N.J.—Corpus Juris cited in Manowitz v. Kanov, 154 A. 326, 327, 107 N.J.Law 523, 75 A.L.R. 1464.

the judgment was fraudulently or wrongfully entered or obtained, he will take nothing under it.[45]

The distinction as to what does and what does not pass as incidental to the assignment is in some instances difficult to draw.[46] Thus it has been held that the mere assignment of a judgment obtained by an indorsee against the maker of a promissory note does not transfer to the assignee of such judgment the cause of action theretofore existing against the indorsers,[47] and it has been held that, in order for a right to pass as an incident, it must in a legal sense constitute a security for the debt,[48] and not be a mere litigious right against a third person to recover damages for an injury which accrued prior to the assignment,[49] although on the last point the contrary view has been upheld,[50] or a right of action for a fraud of the judgment debtor with respect to an agreement in pursuance of which the judgment was entered.[51]

Money previously collected on judgment. While it has been held that the assignment does not pass any interest in money which the sheriff had previously collected on the judgment,[52] it has also been held that if at the time of the assignment the sheriff holds an execution on the judgment, or the proceeds of an execution, the assignee is entitled to receive the proceeds on notifying the sheriff of his rights in the premises.[53] If the assignee permits the attorneys who recovered the judgment to issue and control an execution on it he is bound by the act of the sheriff in paying over to such attorneys the money realized on the execution.[54]

§ 528. Effect of Reversal or Vacation after Assignment

Reversal or vacation of an assigned judgment defeats the assignee's rights therein, and entitles him to a return of the consideration paid for the assignment, unless he has assumed all risks of collection. At least in equity, he becomes entitled to the proceeds of a second judgment entered in the case in favor of the assignor after reversal of the assigned judgment.

The general rule, discussed in Appeal and Error § 1950, that on the reversal or vacation of a judgment the parties to the suit are restored to their original rights and liabilities is not affected by the fact that the judgment is in the hands of an assignee for value.[55] The assignee stands in no better position than the original plaintiff, and the judgment may be reversed, vacated, set aside, or enjoined in the assignee's hands for the same reasons which would justify such action if it remained in the hands of the original plaintiff,[56] and on a reversal or vacation the assignee's interests are defeated,[57] except where they are protected as against the assignor by the peculiar terms of the assignment.[58]

N.Y.—**Corpus Juris cited in** Niagara County Nat. Bank & Trust Co. v. La Port, 251 N.Y.S. 759.

Pa.—Sophia Wilks Building & Loan Ass'n to Use of v. Rudloff, 46 Pa. Dist. & Co. 535, affirmed Sophia Wilkes Building & Loan Ass'n to Use of Wiehe v. Rudloff, 35 A.2d 278, 348 Pa. 477.

S.C.—**Corpus Juris quoted in** Watts v. Copeland, 170 S.E. 780, 782, 170 S.C. 449.

Wash.—Associated Indemnity Corporation v. Wachsmith, 99 P.2d 420, 2 Wash.2d 679, 127 A.L.R. 531.

34 C.J. p 651 note 96.

45. S.C.—**Corpus Juris quoted in** Watts v. Copeland, 170 S.E. 780, 782, 170 S.C. 449.

34 C.J. p 651 note 97.

46. Va.—Commonwealth v. Wampler, 51 S.E. 737, 104 Va. 337, 113 Am.S.R. 1039, 1 L.R.A.,N.S., 149, 7 Ann.Cas. 422.

47. Ind.—Cole v. Matchett, 78 Ind. 601—Kelsey v. McLaughlin, 76 Ind. 379—Ward v. Haggard, 75 Ind. 381.

Effect of judgment on note on its negotiability see Bills and Notes § 20.

48. Va.—Commonwealth v. Wampler, 51 S.E. 737, 104 Va. 337, 113 Am.S.R. 1039, 1 L.R.A.,N.S., 149, 7 Ann.Cas. 422.

Wyo.—Heyer v. Kaufenberg, 277 P. 711, 40 Wyo. 367, 63 A.L.R. 285.

Independent obligation

Where the assignee of a purchase-money note, which is a first lien on the land, who is also the holder of a mechanic's lien judgment which is inferior to the title of the purchaser, assigns such judgment without covenant of warranty, the assignment does not carry with it the legal title represented by the purchase-money note.—Davis v. Hertman, 48 S.W. 50, 19 Tex.Civ.App. 442, error refused.

49. Wyo.—Heyer v. Kaufenberg, 277 P. 711, 40 Wyo. 367, 63 A.L.R. 285.

Va.—Commonwealth v. Wampler, 51 S.E. 737, 104 Va. 337, 113 Am.S.R. 1039, 1 L.R.A.,N.S., 149, 7 Ann.Cas. 422.

34 C.J. p 651 note 2.

Expenses

Judgment creditor's cause of action under injunction bond for expenses incurred in securing dissolution of order restraining execution sale did not pass under subsequent assignment of judgments.—Heyer v. Kaufenberg, 277 P. 711, 40 Wyo. 367, 63 A.L.R. 285.

50. Iowa.—Citizens' Nat. Bank v. Loomis, 69 N.W. 443, 100 Iowa 266, 62 Am.S.R. 571.

34 C.J. p 651 note 3.

51. N.Y.—Borst v. Baldwin, 30 Barb. 180, 8 Abb.Pr. 351, 17 How.Pr. 285.

52. Ga.—Robinson v. Towns, 30 Ga. 818.

53. Ill.—Bryant v. Dana, 8 Ill. 343.

N.Y.—Robinson v. Brennan, 11 Hun 368—Muir v. Leitch, 7 Barb. 341.

54. Minn.—Gill v. Truelsen, 40 N. W. 254, 39 Minn. 373.

55. Conn.—Vila v. Weston, 33 Conn. 42.

34 C.J. p 652 note 7.

Assignment as inoperative

N.Y.—White v. Hardy, 39 N.Y.S.2d 911, 180 Misc. 63, affirmed 41 N.Y.S.2d 210, 266 App.Div. 660.

34 C.J. p 652 note 7 [a].

56. Or.—King v. Miller, 97 P. 542, 53 Or. 53, affirmed 32 S.Ct. 243, 223 U.S. 505, 56 L.Ed. 528.

34 C.J. p 652 note 8.

Right of assignee to prevent opening or vacating of judgment see supra § 285.

57. S.C.—**Corpus Juris quoted in** Watts v. Copeland, 170 S.E. 780, 782, 170 S.C. 449.

34 C.J. p 652 note 9.

Assignment of future judgment

N.Y.—Van der Stegen v. Neuss, Hesslein & Co., 276 N.Y.S. 624, 243 App.Div. 122.

58. S.C.—**Corpus Juris quoted in** Watts v. Copeland, 170 S.E. 780, 782, 170 S.C. 449.

34 C.J. p 652 note 10.

It has been held that the assignee seeking to enforce the judgment is the only necessary party to an action by the judgment debtor to enjoin its collection, the assignor not being a proper or necessary party, as he no longer has an interest in the judgment.[59]

Since, as discussed supra § 519, the assignment of a judgment confers on the assignee all rights of the assignor, including the claim or cause of action on which the judgment was based, the assignee becomes entitled, at least in equity, to the proceeds of a second judgment entered in favor of the assignor after reversal of the assigned judgment.[60]

Recovery of consideration. Where the judgment is reversed or vacated after assignment, the assignee is entitled to recover the price paid therefor on the ground of failure of consideration or breach of implied warranty[61] except where he has undertaken to assume all risks of collection.[62]

§ 529. Priority of Assignments

Priority between successive assignees for value and without notice is, by some authority, determined by the order of the assignments, the first in time being first in right; but other authorities accord priority in the order in which notice of the assignments is given to the judgment debtor.

Where a judgment is regularly assigned for value, the rights of the assignee are paramount to those of a subsequent attachment or execution creditor of the assignor,[63] and the rightful assignee may enjoin the collection of the judgment by one who claims under a simulated assignment.[64]

In so far as notice to the judgment debtor is not necessary to the validity of the assignment, as discussed supra § 515 a, such assignments take priority in the order in which they are made, the first assignee in point of time taking priority in point of right,[65] regardless of the order in which such notice is given or the fact that the prior assignee has failed to give notice while the subsequent assignee has,[66] and notwithstanding the later assignment was first recorded on the judgment docket,[67] unless the first assignment is tainted with fraud.[68] According to some authority, however, priority as between successive bona fide assignees for value of the same judgment is determined by the order in which notice of the assignments is given to the judgment debtor, so that an assignee first giving notice to the debtor may take priority over another assignee whose assignment is first in the point of time.[69] Under this rule, if the subsequent assignee or the creditor has not perfected his right by notice to the debtor, it is a contest between equities and the first assignee must prevail, on the maxim that he who is first in time is first in right.[70]

Priorities as between assignees generally are considered in Assignments § 91.

Partial assignments. As between successive assignees of portions of a judgment, their rights, if conflicting, will depend on priority of assignment, subject to their compliance with the directions of the statute as to making the assignment effectual.[71] Where the proceeds of the property bound by the judgment are insufficient to pay all the assignees, it has been held that they take pro rata and not by priority.[72] An assignment of a judgment which excepts therefrom a specific portion thereof previously assigned to another as security for a debt is not equivalent to an assignment subject to the interest of the first assignee.[73] Where a judgment is assigned as security for an obligation to the assignee,

59. Tex.—Ellis v. Kerr, Civ.App., 23 S.W. 1050.

60. Miss.—Humphreys County v. Cashin, 101 So. 571, 136 Miss. 476.

61. Or.—Cooper v. Sagert, 223 P. 943, 111 Or. 27.
34 C.J. p 648 note 62, p 652 note 12.

62. N.Y.—**Corpus Juris cited in** White v. Hardy, 39 N.Y.S. 911, 915, 180 Misc. 63, affirmed 41 N.Y.S. 2d 210, 266 App.Div. 660.
Tenn.—Gore v. Poteet, 50 S.W. 754, 101 Tenn. 608.

63. N.J.—Bell v. Kates, 18 A.2d 556, 126 N.J.Law 90.
Ohio.—Bailey v. Neale, App., 49 N.E. 2d 103, second case.
34 C.J. p 652 note 15.

As against prior judgment creditor
A son, purchasing and taking assignment of judgment against his father and order for execution against father's wages in son's true name, and informing father's prior judgment creditor of full circumstances and details of purchase, which was made without father's knowledge, is entitled to whatever gain he reaped from bargain as against contention that he was not "bona fide purchaser" because of constructive fraud arising from relationship of father and son.—Bell v. Kates, 18 A.2d 556, 126 N.J.Law 90.

64. La.—Klein v. Dennis, 36 La. Ann. 284.

Fictitious claim of holder of legal title
Ill.—Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill.App. 208.

65. N.Y.—Wappler v. Woodbury Co., 158 N.E. 56, 246 N.Y. 152.
34 C.J. p 652 note 17.

66. N.C.—In re Wallace, 193 S.E. 819, 212 N.C. 490.

67. N.C.—In re Wallace, supra.

68. N.C.—In re Wallace, supra.

69. Cal.—City of Los Angeles v. Knapp, 60 P.2d 127, 7 Cal.2d 168.
Okl.—**Corpus Juris quoted in** Board of Com'rs of Roger Mills County v. King, 294 P. 101, 103, 147 Okl. 34.
Pa.—Allegheny County v. Simon, Com.Pl., 89 Pittsb.Leg.J. 131.
34 C.J. p 652 note 18.

70. Tenn.—Dinsmore v. Boyd, 6 Lea 689.

71. Pa.—Fisher v. Knox, 13 Pa. 622, 53 Am.D. 503.
34 C.J. p 643 note 84.

72. Pa.—In re Barkley, 112 A. 113, 268 Pa. 370—Moore's Appeal, 92 Pa. 309.

73. Neb.—Cahn v. Carpless Co., 85 N.W. 538, 61 Neb. 512.

the assignee may in good faith compromise and settle the judgment for less than the face amount thereof as against a subsequent assignee of the judgment creditor whose assignment provides that the prior assignee is to pay such assignee out of the proceeds of the judgment if the full amount of the judgment is collected.[74]

§ 530. Setting Aside Assignment

The assignment of a judgment may be set aside in an appropriate proceeding if proper grounds therefor appear.

An action will lie to cancel or set aside an assignment of a judgment if proper grounds therefor appear.[75] Such an action will lie where the assignment was made by a person having no right or authority to sell the judgment,[76] or was procured by false and fraudulent representations with respect to the validity of the judgment, the amount due on it, or the property available for its satisfaction, made by either party to the other,[77] or where it was fraudulently procured for an inadequate consideration,[78] or where it was made with a view to defraud creditors of the assignor.[79]

Mere inadequacy of consideration is not alone sufficient to warrant vacating or setting aside the assignment;[80] but the amount of consideration is important in determining whether a purchaser from the original assignee paid value so as to come within the rule in favor of purchasers in good faith for value and without notice,[81] and it is also important on the question of notice and good faith,[82] unless the assignee has waived his right to have the assignment set aside.[83]

Venue. It has been held that an action to set aside an assignment of a judgment to the grantee of land of the judgment debtor, and to reinstate the lien of the judgment, must be brought in the county where the land lies,[84] but, on the other hand, it has been held that an action to set aside a docketed judgment is not one for the recovery of an interest in land, within the meaning of a statute which provides that such an action shall be brought in the county in which the subject matter thereof is situated.[85]

Parties. In accordance with the general rule discussed in Fraudulent Conveyances § 331 a, a mere creditor of the assignor, not an attachment or judgment creditor, has no standing to maintain an action to set aside the assignment as a fraudulent conveyance.[86] The assignee must be made a party to any action[87] or motion[88] to set aside an assignment.

Evidence. As in actions generally, only proper evidence should be admitted in actions or proceedings to cancel or set aside assignments of judgments.[89]

XVI. SUSPENSION AND REVIVAL OF JUDGMENT

A. IN GENERAL

§ 531. Suspension or Stay of Proceedings

a. In general
b. Time for making order

a. In General

In a proper case the enforcement of a judgment may be suspended or stayed.

74. Okl.—Exchange Nat. Bank of Tulsa v. Rogers, 268 P. 293, 131 Okl. 129.

75. N.Y.—Seymour v. Smith, 21 N.E. 1042, 114 N.Y. 481, 11 Am.S.R. 683.
Pa.—Socks v. Socks, 1 Del.Co. 490.

76. Ill.—Padfield v. Green, 85 Ill. 529.
S.C.—Mayer v. Blease, 4 S.C. 10.
34 C.J. p 653 note 21.

An unauthorized assignment by an attorney of a client's judgment for full value is not void, but only voidable at the instance of the client alone.—McFry v. Stewart, 121 So. 517, 219 Ala. 216.

77. Mo.—Gottschalk v. Kircher, 17 S.W. 905, 109 Mo. 170.
34 C.J. p 653 note 22.

Fraud must be proved
Neb.—Krelle v. Bowen, 259 N.W. 48, 128 Neb. 418.

78. U.S.—Baker v. Wood, Colo., 15 S. Ct. 577, 157 U.S. 212, 39 L.Ed. 677—Lee Line Steamers v. Robinson, Tenn., 232 F. 417, 146 C.C.A. 411.

79. Ga.—Taylor v. Jordan, 195 S.E. 186, 185 Ga. 325.

Fraud held lacking
Ga.—Taylor v. Jordan, 195 S.E. 186, 185 Ga. 325.

80. U.S.—Lee Line Steamers v. Robinson, Tenn., 232 F. 417, 146 C.C.A. 411.

81. U.S.—Baker v. Wood, Colo., 15 S. Ct. 577, 157 U.S. 212, 39 L.Ed. 677.

82. U.S.—Baker v. Wood, supra.
34 C.J. p 653 note 26.

83. Tex.—Hume v. John B. Hood Camp Confederate Veterans, Civ. App., 69 S.W. 643.
34 C.J. p 653 note 27.

84. N.Y.—Mahoney v. Mahoney, 23 N.Y.S. 1097, 70 Hun 78.

85. N.C.—Baruch v. Long, 23 S.E. 447, 117 N.C. 509, 511.
34 C.J. p 653 note 29.

86. Mo.—Haynes v. Tyler, App., 123 S.W.2d 609.

Statute inapplicable
The statute relating to actions on assigned accounts did not apply to suit to set aside assignment of judgment against plaintiff on ground that assignment was scheme to prevent plaintiff from crediting judgment on judgment he might obtain against assignor.—Haynes v. Tyler, supra.

87. Ohio.—Mosholder v. Culbertson, 134 N.E. 654, 103 Ohio St. 489.

88. N.Y.—Avery v. Ackart, 46 N.Y. S. 1085, 20 Misc. 631.

89. **Evidence as to matters not in issue** should not be admitted.—Haynes v. Tyler, Mo.App., 123 S.W.2d 609.

In the absence of statutory prohibition[90] the enforcement of a judgment may generally be suspended or stayed by the operation of subsequent proceedings taken in the case,[91] by an agreement with the creditor obtained fairly and in good faith,[92] by the death of plaintiff,[93] or by an order of the court, under statutory authority or in the exercise of its discretionary power, when justified by the circumstances of the particular case and necessary to do justice between the parties.[94]

Where the enforcement of a judgment is suspended or stayed by order of the court, the order may be made conditional or on terms,[95] which must be complied with to render the stay effective.[96] If necessary, the stay may be made final and perpetual, as where the judgment debt has been paid in full.[97] The order of suspension may give leave to apply for a further suspension,[98] and under such circumstances the granting of a second extension does not constitute an amendment of the judgment[99] but serves only to regulate the manner in which the rights fixed by the judgment shall be enforced.[1] Where a judgment is suspended for a definite period with the right to apply to the court for an extension thereof, the court cannot grant the extension unless the application therefor is made before the expiration of the time of the original suspension.[2]

Moratorium. A judgment debtor, granted a moratorium subject to the fulfillment of certain conditions precedent, may not stay the enforcement of the judgment if he refuses to fulfill such conditions.[3]

b. Time for Making Order

In the absence of a statute otherwise providing, a court usually cannot order the suspension of a judgment after the close of the term at which it was rendered unless it expressly reserves the power to do so in the entry of the judgment or retains jurisdiction of the case.

Usually the suspension of a judgment cannot be ordered after the close of the term in which it was rendered[4] unless the power to do so is expressly reserved in the entry of the judgment[5] or unless the court still retains jurisdiction of the case.[6] By virtue of statute, however, a court may be authorized to order the suspension of a judgment at any time within a specified period after the end of the term,[7] and, where the court does so, the order of suspension, entered within such period, has the same force and effect as though it had been entered during the term.[8]

§ 532. Dormant Judgments

a. In general
b. Construction and operation of statutes
c. Issuance of execution
d. Return or entry on execution and record thereof

90. Ark.—Fernwood Min. Co. v. Pluna, 213 S.W. 397, 138 Ark. 459.
34 C.J. p 655 note 55.

91. Ohio.—Commercial Credit Corp. v. Wasson, 63 N.E.2d 560, 76 Ohio App. 181.
34 C.J. p 653 note 35.
Application for new trial as effecting suspension or stay of entry or enforcement of judgment see the C.J.S. title New Trial § 128, also 34 C.J. p 68 note 5, 46 C.J. p 304 notes 5–10.
Stay of:
Execution:
Generally see Executions §§ 139–141.
On judgment in justice's court see the C.J.S. title Justices of the Peace § 123, also 35 C.J. p 702 note 72–p 704 note 92.
Proceedings in actions generally see Actions §§ 131–137.
Supersedeas or stay of proceedings by or pending appeal see Appeal and Error §§ 625–679.

92. U.S.—Milmine v. Bass, C.C.Ind., 29 F. 632, affirmed 10 S.Ct. 1065, 136 U.S. 630, 34 L.Ed. 553.
34 C.J. p 653 note 36.

93. Ky.—Ritchey v. Buricke, 54 S.W. 173, 21 Ky.L. 1120.
34 C.J. p 653 note 37.
Death of party:
As abatement of action see Abatement and Revival § 114 et seq.
As causing dormancy of judgment see infra § 532.
Survival of judgment on see infra § 534.

94. U.S.—Fowler v. Peet, C.C.Pa., 170 F. 620.
34 C.J. p 653 note 38.
Equitable relief against judgment see supra §§ 341–400.

95. N.Y.—Potter v. Rossiter, 95 N.Y.S. 1039, 109 App.Div. 37.
34 C.J. p 654 note 39.

96. N.Y.—State Bank v. Wilchinsky, 119 N.Y.S. 131, 65 Misc. 162.
34 C.J. p 654 note 40.

97. Md.—Kendrick v. Warren Bros. Co., 72 A. 461, 110 Md. 47.
34 C.J. p 654 note 41.

98. N.Y.—Sponenburgh v. Gloversville, 87 N.Y.S. 602, 42 Misc. 563, affirmed 89 N.Y.S. 19, 96 App.Div. 157.
Ohio.—Cincinnati R. Co. v. Cincinnati Inclined Plane R. Co., 47 N.E. 560, 56 Ohio St. 675.

99. N.Y.—Sponenburgh v. Gloversville, 87 N.Y.S. 602, 42 Misc. 563, affirmed 89 N.Y.S. 19, 96 App.Div. 157.

1. N.Y.—Sponenburgh v. Gloversville, supra.

2. Ohio.—Cincinnati R. Co. v. Cincinnati Inclined Plane R. Co., 47 N.E. 560, 56 Ohio St. 675.

3. La.—Italian Strawberry Ass'n v. Rusciano, 169 So. 525, 185 La. 500.

4. Colo.—Nordloh v. Packard, 101 P. 787, 45 Colo. 515.
Ohio.—Cincinnati R. Co. v. Cincinnati Inclined Plane R. Co., 47 N.E. 560, 56 Ohio St. 675.
Amending, correcting, reviewing, opening, and vacating judgment after expiration of term see supra § 230.

5. Ohio.—Cincinnati R. Co. v. Cincinnati Inclined Plane R. Co., supra.

6. Tex.—U. S. & Mexican Trust Co. v. Young, 101 S.W. 1045, 46 Tex. Civ.App. 117.
34 C.J. p 655 note 54.

7. Va.—Ætna Casualty & Surety Co. of Hartford, Conn. v. Board of Sup'rs of Warren County, 168 S.E. 617, 160 Va. 11.

8. Va.—Ætna Casualty & Surety Co. of Hartford, Conn. v. Board of Sup'rs of Warren County, supra.

e. Acknowledgment or agreement between parties
f. Death of party or assignee

a. In General

Although a dormant judgment is temporarily inoperative for purposes of execution, it is a valid obligation of the judgment debtor.

A judgment not satisfied or barred by lapse of time, but temporarily inoperative as far as the right to issue execution is concerned, is usually called a dormant judgment.[9] Such a judgment has validity[10] as a still subsisting debt of the judgment debtor.[11]

b. Construction and Operation of Statutes

Dormant judgment statutes are to be strictly construed and generally they apply only to final judgments for money which are enforceable by execution.

The dormant judgment statutes which exist in the various jurisdictions are to be strictly construed and the courts generally refuse to engraft exceptions to them other than those contained in the statutes themselves.[12] The statutes are to be considered procedural and binding on all judgment creditors.[13] These statutes, however, generally do not impose a limitation on the enforcement of judgments or decrees which are not for the payment of money[14] or which are not enforceable by execution,[15] and they do not apply where a lien exists independent of the judgment and is not created by it.[16]

Such statute will not run against a judgment where the failure to comply with the statute is justified[17] or where collection is prevented without fault,[18] nor will it run against a judgment during any time when it is impossible to enforce it by final process[19] or until the judgment becomes final.[20]

9. Cal.—**Corpus Juris quoted in** Da Araujo v. Rodriques, 123 P.2d 154, 156, 50 Cal.App.2d 425.
Okl.—**Corpus Juris quoted in** Perry v. Lebel, 76 P.2d 261, 263, 182 Okl. 128.
34 C.J. p 655 note 58.
Effect of dormant judgment on rights of intervening lienors see supra § 490.
Issuance of execution on dormant judgment:
Generally see Executions § 7 b.
As justification to sheriff see Executions § 66 b.
Revival of dormant judgment:
As condition precedent to creditors' suits see Creditors' Suits § 46 a.
Mode of see infra §§ 543–548.
Necessity for generally see infra § 533.
Time for, and limitation on, see infra § 542.
Presumption of payment from lapse of time see infra § 559.

10. Neb.—Furer v. Holmes, 102 N. W. 764, 73 Neb. 393.
34 C.J. p 658 note 3.

11. Okl.—**Corpus Juris cited in** Shefts v. Oklahoma Co., 137 P.2d 589, 591, 192 Okl. 483.
34 C.J. p 658 note 4.
Evidence of indebtedness
A dormant judgment is evidence of indebtedness.
Ga.—Groves v. Williams, 68 Ga. 598—James v. Roberts, 191 S.E. 801, 55 Ga.App. 755.
Kan.—Douglass v. Loftus, 119 P. 74, 85 Kan. 720, Ann.Cas.1913A 378, L.R.A.1915B 797.

12. Okl.—Thomas v. Murray, 49 P.2d 1080, 174 Okl. 86, 104 A.L.R. 209.
Construction with other statutes
The statute relating to dormancy of judgment and execution thereon is not in pari materia with statute authorizing revival of a judgment.—Gillam v. Matthews, Tex.Civ.App., 122 S.W.2d 348, error dismissed.

13. Okl.—State ex rel. State Com'rs of Land Office v. Weems, 168 P. 2d 629.

14. Ga.—Brown v. Parks, 9 S.E.2d 897, 190 Ga. 540—Hall v. Findley, 4 S.E.2d 211, 188 Ga. 487.
Neb.—Stanton v. Stanton, 18 N.W.2d 654, 146 Neb. 71.
34 C.J. p 656 note 64.

15. Ga.—Cleveland v. Cleveland, 30 S.E.2d 605, 197 Ga. 746.
34 C.J. p 656 notes 65–68.

16. Ga.—Collier v. Bank of Tupelo, 10 S.E.2d 62, 190 Ga. 598.
Lien created by contract
If a lien is created by contract and no judgment is necessary to make good or establish it, the statute as to dormant judgments does not apply.—Carter-Moss Lumber Co. v. Short, 18 S.E.2d 61, 66 Ga.App. 330.

17. Tex.—Grissom v. F. W. Heitmann Co., Civ.App., 130 S.W.2d 1054, error refused.

18. Ga.—Oliver v. Boynton, 138 S.E. 795, 37 Ga.App. 13.

19. Neb.—State v. Royse, 91 N.W. 559, 3 Neb., Unoff., 262.
34 C.J. p 656 note 72.
An injunction against enforcing a judgment suspends the running of the statute.—Morgan v. Massillon Engine & Thresher Co., Civ.App., 274 S.W. 255, error denied 277 S.W. 78, 115 Tex. 146.

20. Okl.—Price v. Sanditen, 38 P. 2d 533, 170 Okl. 75.
34 C.J. p 656 note 72 [a].
Appeal from judgment or order in separate cause of action
(1) Where only one party appeals from a judgment on separate causes of action, such judgment becomes final as to the parties not appealing, within the rule as to the issuance of execution to prevent a judgment from becoming dormant.—Noble v. Empire Gas & Fuel Co., Tex.Civ.App., 20 S.W.2d 849, affirmed Empire Gas & Fuel Co. v. Noble, Com.App., 36 S. W.2d 451.

(2) Similarly, the statute is not tolled by an appeal from a final order, or judgment rendered subsequent to the principal judgment and on issues ancillary to the issues of the principal judgment.—Hoskins v. Peak, 228 P. 478, 100 Okl. 124.

(3) However, where recovery in a cross action depends on recovery in the main action, the judgment in the cross action does not become dormant by the failure to issue execution until after the disposition of the appeal in the principal action. —Noble v. Empire Gas & Fuel Co., Tex.Civ.App., 20 S.W.2d 849, affirmed Empire Gas & Fuel Co. v. Noble, Com.App., 36 S.W.2d 451.
Motion for new trial
The statute begins to run from the date a motion for a new trial is overruled and not from the date of a judgment entered before the overruling of such motion.—Price v. Sanditen, 38 P.2d 533, 170 Okl. 75.
Grant of writ of error
A judgment does not become final so as to start the statute running, where a writ of error is granted, although the application for such writ is not made within the statutory time allotted therefor and although the lower court renders judgment declaring that such writ was improvidently granted and that the higher court was without jurisdiction to do so.—Long v. Martin, Civ.App., 260 S.W. 327, error dismissed 278 S.W. 1115, 114 Tex. 581.

It has been held, however, that a party by delay in taking out a mandate from an appellate court, when he is entitled to it after the judgment has become final, cannot prevent the judgment from becoming dormant within the statutory period.[21]

c. Issuance of Execution

Under some statutes a judgment becomes dormant when a specified period of time elapses without the issuance of an execution or without the issuance of a subsequent execution when a former execution remains unsatisfied.

While at common law a judgment lost its force as a lien on the judgment debtor's realty, and no execution could be issued thereon when it had lain dormant for a year and a day,[22] under the statutes in many jurisdictions, judgments become "dormant," that is, incapable of execution by ordinary process, if a specified length of time, generally considerably greater than the common-law period, is allowed to elapse without the issuance of an execution, or without the issuance of a subsequent execution when a former execution remains unsatisfied.[23] The proper issuance of an execution or of successive executions is usually sufficient to arrest the running of the statute and to prevent the judgment from becoming dormant[24] and may keep the judgment alive indefinitely[25] or, as discussed infra § 854, until it is barred by the statute of limitations. This is true even though the execution is returned without a levy,[26] or although the sheriff merely makes a levy

21. Tex.—Long v. Martin, supra.

22. Cal.—**Corpus Juris quoted in** Da Araujo v. Rodriques, 123 P.2d 154, 156, 50 Cal.App.2d 425.
Del.—First Nat. Bank v. Crook, 174 A. 369, 6 W.W.Harr. 281.
N.M.—Otero v. Dietz, 37 P.2d 1110, 39 N.M. 1.
Okl.—**Corpus Juris quoted in** Perry v. Lebel, 76 P.2d 261, 263, 182 Okl. 128.
34 C.J. p 655 note 59.

23. Ala.—McClintock v. McEachin, 20 So.2d 711, 246 Ala. 412.
Cal.—**Corpus Juris quoted in** Da Araujo v. Rodriques, 123 P.2d 154, 156, 50 Cal.App.2d 425.
Kan.—Rodgers v. Smith, 58 P.2d 1092, 144 Kan. 212—Butler v. Rumbeck, 56 P.2d 80, 143 Kan. 708.
Neb.—Rich v. Cooper, 286 N.W. 383, 136 Neb. 463—Glissman v. Happy Hollow Club, 271 N.W. 431, 132 Neb. 223.
N.M.—Otero v. Dietz, 37 P.2d 1110, 39 N.M. 1.
Okl.—Bartlett Mortgage Co. v. Morrison, 81 P.2d 318, 183 Okl. 214.
34 C.J. p 655 note 63.

The purpose of the statute is to clear real estate of liens within what has been construed by the legislature as a reasonable time for a judgment to remain a lien on such property, and such statute is not a statute of limitations which must be pleaded before advantage can be taken of it.—Kline v. Falbo, 56 N.E.2d 701, 73 Ohio App. 417.

Under Florida law, a judgment is not "dormant" after three years.—Spurway v. Dyer, D.C.Fla., 48 F.Supp. 255.

In Texas

(1) If no execution is issued within ten years after the rendition of a judgment the judgment becomes dormant, but if the first execution is issued within the ten-year period, the judgment does not become dormant, unless ten years elapse between the issuance of executions thereon and execution may issue at any time within ten years after the issuance of the preceding execution.—Gartin v. Furgeson, Civ.App., 144 S.W.2d 1114.

(2) Under the prior statute, the first execution had to be issued within twelve months after the rendition of the judgment, but the provisions as to the issuance of successive executions thereafter were similar to the present statute.—Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84—Grissom v. F. W. Heitmann Co., Civ.App., 130 S.W.2d 1054, error refused—McClaflin v. Winfield, Civ.App., 279 S.W. 877—Long v. Martin, Civ.App., 260 S.W. 327, error dismissed 278 S.W. 1115, 114 Tex. 581—34 C.J. p 655 note 63 [e].

24. Neb.—Filley v. Mancuso, 20 N.W.2d 318, 146 Neb. 493.
N.M.—Otero v. Dietz, 37 P.2d 1110, 39 N.M. 1.
Okl.—Guarantee Inv. Corporation v. Killian, 67 P.2d 939, 180 Okl. 74—Lowrey v. Bolinger, 9 P.2d 20, 155 Okl. 245—Ashur v. McCreery, 300 P. 767, 150 Okl. 111.
Tex.—Blanks v. Radford, Civ.App., 188 S.W.2d 879, error refused—Gartin v. Furgeson, Civ.App., 144 S.W.2d 1114—Grissom v. F. W. Heitmann Co., Civ.App., 130 S.W.2d 1054, error refused.
34 C.J. p 657 note 80.

A single execution issued against a codefendant has been held to be sufficient to keep a judgment alive as against each judgment debtor where the judgment is predicated on the joint liability of the defendants.—Korber v. Willis, 274 P. 239, 127 Kan. 587.

Inaccuracies in writ

(1) Since mistakes in its recitals will not vitiate a writ of execution, as long as the judgment can be identified, the issuance of execution inaccurately reciting the date of the judgment, without misleading the parties, and the failure of the writ to recite a partial payment on behalf of the judgment debtors, will not render the execution ineffective to keep the judgment alive.—Korber v. Willis, supra.

(2) Recital and description of judgment in execution generally see Executions § 73.

A statute providing a method of reviving a judgment by scire facias does not pertain to a judgment creditor's right of enforcement or the matter of keeping his judgment alive by merely having executions issued as provided by statute.—Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.

Assignee

The issuance of execution or of successive executions on a judgment by one having an interest therein as assignee prevents such judgment from becoming dormant.—Rodgers v. Smith, 58 P.2d 1092, 144 Kan. 212—Tharp v. Langford, 222 P. 135, 115 Kan. 135.

Voidable execution

(1) An execution irregularly issued, which is voidable but not void, is sufficient to prevent the judgment from becoming dormant.—Cabell v. Orient Ins. Co., 55 S.W. 610, 22 Tex. Civ.App. 635.

(2) However, a voidable execution will not, as against a direct attack, prevent a judgment from becoming dormant.—Patton v. Crisp & White, Tex.Civ.App., 11 S.W.2d 826, error dismissed.

Order of sale

Although an order of sale is usually considered an execution within the statute, the force of an execution cannot be attributed to it, if both the judgment and the order of sale provide otherwise.—Carlton v. Hoff, Tex.Civ.App., 292 S.W. 642.

25. Tex.—Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.
34 C.J. p 657 notes 80, 86.

26. Tex.—Riddle v. Bush, 27 Tex. 675.

and advertises,[27] or although the writ is afterward quashed,[28] or although the execution is levied on defendant's homestead.[29] However the mere commencement of garnishment proceedings within the statutory period does not toll the running of the statute, where during the pendency of such proceeding and before service of the writ the statutory period expires.[30] Similarly ancillary proceedings occurring prior to the dormancy of a judgment do not prolong its life, in the absence of the issuance in connection therewith of an execution or some equivalent writ, seeking to enforce the judgment, within the statutory time.[31]

Delivery of writ for enforcement to proper officer. The general rule, discussed in Executions § 67, that the writ of execution must be actually or constructively delivered to the sheriff or other proper officer before it can properly be said to have been issued applies to the issuance of the execution within the meaning of the dormant judgment statutes.[32] Thus, in order to prevent a judgment from becoming dormant, there must be an unconditional delivery of the execution to an officer for enforcement in the manner provided by law,[33] and merely showing that an execution was sent to the sheriff, without showing how it was sent, by whom it was sent, or whether or not it was received by the sheriff, does not prevent the judgment from becoming dormant.[34]

d. Return or Entry on Execution and Record Thereof

Where the statute so requires, entries on the execution must be properly made and recorded within the statutory time to prevent the dormancy of the judgment.

In the absence of a statute so requiring it is not necessary, in order to prevent a judgment from becoming dormant, to have the execution recorded or the return thereof entered.[35] Under some statutes, however, the mere issuance of an execution will not suffice to keep a judgment alive; but it becomes dormant if seven years elapsed from the time of the last entry on the execution by an authorized officer and the recording of such entry on the execution docket.[36] This requires the entry and recording of a sufficient indorsement on the execution at least as often as once in every seven years[37] unless the statute has been arrested by the active conduct of proceedings to vacate or enjoin the judgment.[38] The entry which will avail to keep the judgment in force may be a written and signed statement of the officer that the writ is placed in his hands with orders to collect the money, or a return or other proper indorsement, of a character to show that the creditor is still endeavoring to enforce it,[39] but it must in all cases be made by an officer authorized to levy

27. Tex.—McClaflin v. Winfield, Civ. App., 279 S.W. 877.

28. Miss.—Nye v. Cleveland, 31 Miss. 440.

29. Ala.—McClarin v. Anderson, 16 So. 639, 104 Ala. 201.

30. Ill.—Ring v. Palmer, 32 N.E.2d 956, 309 Ill.App. 333.

31. Kan.—First Nat. Bank of Norton v. Harper, 169 P.2d 844, 161 Kan. 536.

32. Tex.—Parlin & Orendorff Implement Co. v. Chadwick, Civ.App., 4 S.W.2d 133.
34 C.J. p 657 note 79.

Reason for rule
The term "issue," within the meaning of the statute, means more than the mere clerical preparation and attestation of the writ, and requires that it should be delivered to an officer for enforcement.—Schneider v. Dorsey, 74 S.W. 526, 96 Tex. 544—Cotten v. Stanford, Tex.Civ.App., 147 S.W.2d 930.

33. Tex.—Harrison v. Orr, Com. App., 296 S.W. 871, modified on other grounds 10 S.W.2d 381.

Instructions to hold and return writ without levy
(1) The issuance of an execution to the sheriff with instructions to hold and return it without making a levy usually will not prevent the judgment from becoming dormant.—Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84—Harrison v. Orr, Tex.Com.App., 296 S.W. 871, modified on other grounds 10 S.W.2d 381.

(2) However, if the sheriff cannot find any property of defendants subject to the writ, such instructions will not have such effect, and the issuance of the execution will prevent the judgment from becoming dormant.—R. B. Spencer & Co. v. Harris, Tex.Civ.App., 171 S.W.2d 393.

34. Tex.—Cotten v. Stanford, Civ. App., 147 S.W.2d 930.

35. Okl.—Guarantee Inv. Corporation v. Killian, 67 P.2d 939, 180 Okl. 74—Dodson v. Continental Supply Co., 53 P.2d 582, 175 Okl. 587—Miller v. J. I. Case Threshing Machine Co., 300 P. 399, 149 Okl. 281.
23 C.J. p 377 note 92.

36. Ga.—Citizens' Bank of Plains v. Hagerson, 140 S.E. 48, 37 Ga.App. 282—English v. Williams, 116 S.E. 40, 29 Ga.App. 467.
34 C.J. p 657 note 88.

37. Ga.—Booth v. Williams, 2 Ga. 252—English v. Williams, 116 S.E. 40, 29 Ga.App. 467—Neely v. Ward, 107 S.E. 79, 26 Ga.App. 588.

Absence from state
A statute providing that, in certain cases, the time of defendant's absence from the state shall not be counted in his favor does not refer to the period of time in which a judgment becomes dormant when not kept in life in any manner specified by law, since his removal from the state does not prevent a judgment creditor from keeping the judgment in life.—Tift v. Bank of Tifton, 4 S.E.2d 495, 60 Ga.App. 563.

Judgments held dormant
Ga.—A. B. Farquhar Co. v. Myers, 21 S.E.2d 432, 194 Ga. 220—Latham & Sons v. Hester, 181 S.E. 573, 181 Ga. 100—Odum v. Peterson, 153 S. E. 757, 170 Ga. 666—Bryant v. Freeman, 16 S.E.2d 113, 65 Ga. App. 590—James v. Roberts, 191 S. E. 301, 55 Ga.App. 755—Minter v. Felder, 190 S.E. 273, 55 Ga.App. 785.

Judgments held not dormant
Ga.—Pope v. U. S. Fidelity & Guaranty Co., 35 S.E.2d 899—Page v. Jones, 198 S.E. 63, 186 Ga. 485—Franklin v. Mobley, for Use of Patrick, App., 36 S.E.2d 173.

38. Ga.—Eagle & Phenix Mfg. Co. v. Bradford, 59 Ga. 385.

39. Ga.—Prendergast v. Wiseman, 7 S.E. 228, 80 Ga. 419.
34 C.J. p 658 note 91.

and return the execution.[40] Where the entries are regularly made they are sufficient to prevent the judgment from becoming dormant although the execution is voidable but not void,[41] or although the writ is afterward quashed[42] or levied on property not then owned by defendant,[43] or although the levy is dismissed by the court.[44] The time when the record on the execution docket was made by the clerk must appear from an inspection of such docket.[45]

If there is no compliance with the statute as to recording entries on the execution dockets, the recordation of facts on the public dockets of the courts, showing a bona fide public effort to collect the debt, may prevent the judgment from becoming dormant.[46]

e. Acknowledgment or Agreement between Parties

The running of a dormancy statute may be arrested by an acknowledgment of the judgment and promise to pay it, or by an agreement of the parties as to the issuance of execution.

The running of a dormancy statute against a judgment may be arrested by an acknowledgment of the judgment and a promise to pay it, or by an agreement of the parties as to the issuance of execution.[47] In the absence of a statute to the contrary, however, a mere partial payment[48] or a payment of the costs of the action to the clerk[49] will not prevent the statute from running. An agreement to stay execution on a final judgment does not prevent the judgment from becoming dormant if execution is not issued within the statutory period.[50]

f. Death of Party or Assignee

Usually a judgment becomes dormant on the death of a party, although the death of an assignee or of a party acting in a representative capacity does not have this effect.

Usually a judgment becomes dormant on the death of a party thereto,[51] so that ordinarily the death of a judgment creditor will have this effect,[52] even though the deceased creditor is one of two or

40. Ga.—Oliver v. James, 62 S.E. 73, 131 Ga. 182.
34 C.J. p 658 note 92.

41. Ga.—Smith v. Rust, 5 S.E. 250, 79 Ga. 519.

42. Ga.—Westbrook v. Hays, 14 S. E. 879, 89 Ga. 101.

43. Ga.—Long v. Wight, 9 S.E. 535, 82 Ga. 431.

44. Ga.—Banks v. Zellner, 8 S.E. 304, 77 Ga. 424.

45. Ga.—Oliver v. James, 62 S.E. 73, 131 Ga. 182.

46. Ga.—Ryals v. Widencamp, 190 S.E. 353, 184 Ga. 190—Citizens' Bank of Plains v. Hagerson, 140 S.E. 48, 37 Ga.App. 282.

An unrecorded levy and sale do not prevent the dormant judgment act from running, although the funds arising from the sale were retained by the sheriff on another execution against the same party and paid over to the holder of the other execution, if the funds were not so applied by an order of the court appearing on its public dockets.—Citizens' Bank of Plains v. Hagerson, supra.

Effort to enforce execution

(1) If there is a bona fide effort to enforce execution made within the statutory time, the judgment does not become dormant, although such enforcement is prevented by court proceedings.—Pie v. Hardin, 195 S.E. 165, 185 Ga. 331—Ryals v. Widencamp, 190 S.E. 353, 184 Ga. 190—Towers v. City Land Co., 121 S.E. 701, 31 Ga.App. 612.

(2) If the legality of a levy of execution is duly contested and no action in opposition to such contest is taken until the statutory period expires, there is no such bona fide public effort to enforce collection in the court, so as to toll the statute and prevent dormancy.—A. B. Farquhar Co. v. Myers, 21 S.E.2d 432, 194 Ga. 220.

(3) A contest of the legality of a levy of execution as against one party does not prevent the dormancy of the judgment as against those who are not parties to the contest, even though the pendency of the contest may keep the judgment from becoming dormant as against the contesting party.—Rogers v. Jordan, 132 S. E. 233, 35 Ga.App. 131.

(4) The filing of an equity suit in aid of execution does not prevent the statute from running where the suit is abandoned pursuant to a compromise agreement, since the rule that statutes of limitations will not be suspended by the commencement of a suit that is voluntarily abandoned, discontinued, dismissed, or not proceeded with for a considerable period of time, is applicable to such statute.—General Discount Corporation v. Chunn, 3 S.E.2d 65, 188 Ga. 128.

The payment of costs and the issuance of execution to the levying officer after the rendition of judgment, in the absence of anything further, are not bona fide public efforts to enforce execution so as to prevent the judgment from becoming dormant.—U-Driv-It System of Macon v. Lyles, 30 S.E.2d 111, 71 Ga.App. 70, followed in 30 S.E.2d 114, 71 Ga. App. 74.

47. U.S.—Beadles v. Smyser, Okl., 28 S.Ct. 522, 209 U.S. 393, 52 L.Ed. 849.
34 C.J. p 658 note 96.
Amicable scire facias see infra § 548.

48. Ga.—Blue v. Collins, 34 S.E. 598, 109 Ga. 341.
34 C.J. p 658 note 97, p 624 note 83.

49. Ga.—Lewis v. Smith, 27 S.E. 162, 99 Ga. 603.

50. Tex.—Commerce Farm Credit Co. v. Ramp, Civ.App., 116 S.W.2d 1144, affirmed Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.

Reason for rule

An agreement to stay execution on a final judgment for a specified time constitutes an agreement to forego such portion of the statutory period within which execution may issue.—Commerce Farm Credit Co. v. Ramp, Civ.App., 116 S.W.2d 1144, affirmed Commerce Trust Co. v. Ramp, 138 S. W.2d 531, 135 Tex. 84.

51. Kan.—Manley v. Mayer, 75 P. 550, 68 Kan. 377—Ballinger v. Redhead, 40 P. 828, 1 Kan.App. 434.
Okl.—Jersak v. Risen, 152 P.2d 374, 194 Okl. 423.
Death of party as suspending judgment see supra § 531.
Survival of judgment see infra § 534 a.

52. Kan.—Johnsson v. Erickson, 196 P. 435, 108 Kan. 580—Gilmore v. Harpster, 133 P. 726, 90 Kan. 405—Updegraff v. Lucas, 93 P. 630, 76 Kan. 456—Newhouse v. Heilbrun, 86 P. 145, 74 Kan. 282, 10 Ann.Cas. 955.

more judgment creditors under a joint judgment.[53] However, a judgment obtained by a party acting in a representative capacity does not become dormant on his death.[54] Moreover, judgments may be prevented from becoming dormant by the issuance of executions at the instance of one having an interest in them as assignee, even though a judgment creditor dies.[55] Also a judgment debtor's death will usually render the judgment dormant,[56] and, although it has been held that where a judgment debtor, under a joint and several judgment, dies such judgment is not ipso facto dormant,[57] it has been held that such judgment does become dormant on the death of such debtor.[58]

Death of assignee. An assigned judgment will not become dormant on the death of the assignee.[59]

B. REVIVAL OF JUDGMENTS

§ 533. Necessity

When a judgment has become dormant, it cannot be enforced until it has been duly revived.

When a judgment has once become dormant, it cannot be enforced until it has been duly revived, as provided by the statute.[60] Generally speaking, the necessity for reviving a judgment arises only where the judgment creditor seeks to extend the lien of the judgment[61] or to issue execution thereon.[62] As discussed infra § 849, the fact that a judgment has not been revived, and so has become dormant, does not prevent the maintenance of an action on it where plaintiff does not seek to maintain its lien, and is no obstacle to writ of inquiry[63] or to an amendment of the judgment nunc pro tunc.[64]

A judgment which is not dormant needs no revival.[65] Accordingly a revival is unnecessary as long as a judgment is kept from becoming dormant by the timely issuance of executions, as discussed supra § 532, and there has been no change of parties,[66] and the right to enforce the executions is entirely unobstructed.[67]

§ 534. —— Death of Party

a. Survival of judgment
b. Revival of judgment

53. Okl.—Drew v. Thurlwell, 48 P. 2d 1066, 173 Okl. 405, 100 A.L.R. 806—Jones v. Nye, 156 P. 332, 56 Okl. 578.

54. Okl.—Perry v. Lebel, 76 P.2d 261, 182 Okl. 128.

Action for wrongful death

A judgment obtained by deceased's administratrix in favor of the estate in an action for wrongful death does not become dormant on death of the administratrix.—Perry v. Lebel, supra.

55. Kan.—Thorp v. Langford, 223 P. 135, 115 Kan. 135.

56. Tenn.—Anderson v. Stribling, 15 Tenn.App. 267.

57. Okl.—Tucker v. Gautier, 164 P. 2d 613.

58. Kan.—Masheter v. Lanning, 100 P.2d 682, 151 Kan. 604.

59. Okl.—Sanditen v. Williams, 49 P.2d 224, 173 Okl. 330.

60. U.S.—Atlantic Trust Co. v. Dana, C.C.A.Kan., 128 F. 209.
Ala.—Second Nat. Bank v. Allgood, 176 So. 363, 234 Ala. 654.
Ga.—U-Driv-It System of Macon v. Lyles, 30 S.E.2d 111, 71 Ga.App. 70, followed in 30 S.E.2d 114, 71 Ga.App. 74.
Kan.—First Nat. Bank of Norton v. Harper, 169 P.2d 844, 161 Kan. 536.
Pa.—Union Nat. Bank of Jersey Shore v. Budd, 33 Pa.Dist. & Co. 140.
Tex.—Commerce Farm Credit Co. v. Ramp, Civ.App., 116 S.W.2d 1144, affirmed Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.
34 C.J. p 655 note 58 [a] (1), p 658 notes 3 [b], 4 [b] (c), 6.

Writ of attachment sur judgment not being a writ of execution was not within statute authorizing executions on judgments for selling personalty within five years from entry of judgment without reviving it.—Croskey v. Croskey, 160 A. 103, 306 Pa. 423.

61. Ga.—Fowler v. Bank of Americus, 40 S.E. 248, 114 Ga. 417.
Pa.—Sanner v. Unique Lodge No. 3, Knights of Pythias of Rockwood, 37 A.2d 576, 349 Pa. 523—Second Nat. Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A.2d 747, 332 Pa. 124.
Duration of lien see supra §§ 489–498.

62. Ala.—Second Nat. Bank v. Allgood, 176 So. 363, 234 Ala. 654.
Ga.—Palmer v. Inman, 55 S.E. 229, 126 Ga. 519.
Okl.—Shefts v. Oklahoma Co., 137 P. 2d 589, 192 Okl. 483.
Issuance of execution on dormant judgments see Executions § 7.

Revival on judgment debtor's imprisonment

Where a judgment debtor was convicted of murder and confined in the penitentiary, the conviction deprived him of all civil rights, and, before an execution could be issued thereon, the judgment would have to be revived.—Ashmore v. McDonnell, 16 P. 687, reheard 18 P. 821, 39 Kan. 669.

63. Pa.—Cookson v. Turner, 3 Binn. 416.
34 C.J. p 659 note 10.

64. Ala.—Allen v. Bradford, 3 Ala. 281, 37 Am.D. 689.
Ga.—Williams v. Merritt, 34 S.E. 1013, 109 Ga. 217.

65. La.—State ex rel. Brock v. Clancy, 152 So. 331, 178 La. 687, certiorari denied Brock v. Wainer, 54 S.Ct. 773, 292 U.S. 640, 78 L.Ed. 1492—Hassler v. Brinker, App., 142 So. 730.
Mo.—Kelly v. City of Cape Girardeau, 89 S.W.2d 693, 230 Mo.App. 137.
Okl.—Sanditen v. Williams, 49 P.2d 224, 173 Okl. 330.
34 C.J. p 658 note 2.

Judgment in petitory action

Under statute providing that all judgments for money shall be prescribed within ten years from their rendition, but that any person interested may have them revived before they are prescribed, a judgment in a petitory action recognizing and confirming title to land need not be revived and reinscribed.—Roussel v. New Orleans Ry. & Light Co., 93 So. 758, 152 La. 517.

66. Miss.—Locke v. Brady, 30 Miss. 21.
34 C.J. p 659 note 13.

67. Miss.—Locke v. Brady, supra.

a. Survival of Judgment

Generally a judgment does not abate on the death of a party but survives in favor of or against the representatives of the deceased.

While it has been said that at common law a judgment does not survive a defendant against whom it is rendered,[68] it is the general rule, sometimes by virtue of express statutory provision, that a judgment does not abate on the death of a party and that such judgment survives in favor of or against the representatives of the deceased.[69] In the absence of a provision therein to the contrary, a statute providing for survival of a judgment after death of a party applies to all judgments without regard to the character of the action on which they are founded.[70]

b. Revival of Judgment

Revival of a judgment is necessary where it becomes dormant as a result of death of a party, but revival is not required if the judgment does not become dormant.

Ordinarily, where a judgment does not become dormant on the death of a party, no revivor thereof is necessary to render it enforceable.[71] On the other hand, if the judgment becomes dormant by reason of death of one of the parties, it must be revived within the time prescribed in the revivor statutes,[72] and it has been held that a dormant judgment, which is not revived or renewed pursuant to statute, dies,[73] although it has also been held that the statutory method of revivor is not indispensable and that the judgment may be renewed by an action to recover a second judgment thereon commenced within the time in which revivor may be had.[74]

Without reference to whether or not a judgment becomes dormant, it has been held under some statutes that the death of plaintiff after affirmance of judgment on appeal does not make revival necessary.[75] A judgment that has been revived against the personal representative of a deceased defendant need not again be revived on the death of such representative.[76] It has also been held that, where the judgment debtor dies during pendency of a suit to enforce the judgment, it is unnecessary to revive the judgment against the heirs or personal representatives of deceased in order to prosecute the suit.[77] While it is the rule, apart from statute, that execution may not issue after the death of a party to the judgment without first reviving the judgment, as discussed in Executions § 65, the lien of a judgment continues after the death of the judgment debtor, as discussed infra § 491, and may be enforced in equity without revival of the judgment, as considered supra § 511.

Joint parties. The interest and rights of joint plaintiffs are joint and not several, and on the death of one the judgment becomes dormant and cannot be enforced at the instance of the living plaintiff or plaintiffs without a revival of the judgment.[78] Where, however, a judgment is obtained against joint debtors, and one of such debtors dies, it is unnecessary for the judgment creditor to revive the judgment in order to enforce it against the remain-

68. Tenn.—Pickens v. Scarbrough, 46 S.W.2d 58, 164 Tenn. 75.
Effect of death of party on cause of action after final judgment and pending appeal or other proceeding for review see Abatement and Revival §§ 127, 128.

69. Colo.—Ahearn v. Goble, 7 P.2d 409, 90 Colo. 173.
Mo.—Lyon v. Lyon, 12 S.W.2d 768, 223 Mo.App. 452.
Tenn.—Anderson v. Stribling, 15 Tenn.App. 267.
1 C.J. p 169 note 65.

Death pending appeal
La.—Castelluccio v. Cloverland Dairy Products Co., 115 So. 796, 165 La. 606, conformed to 8 La.App. 723—Williams v. Campbell, App., 185 So. 683.
Tex.—Wootton v. Jones, Civ.App., 286 S.W. 680.

Death after affirmance
Mo.—Vitale v. Duerbeck, 92 S.W. 2d 691, 338 Mo. 556.

70. Tenn.—Pickens v. Scarbrough, 46 S.W.2d 58, 164 Tenn. 75.

71. Okl.—Tucker v. Gautier, 164 P. 2d 613.
Death of party as rendering judgment dormant see supra § 532 f.

Judgment obtained by personal representative
Judgment obtained by deceased's administratrix in favor of the estate did not become dormant on death of administratrix and did not have to be revived.—Perry v. Lebel, 76 P.2d 261, 181 Okl. 128.

72. Kan.—Masheter v. Lanning, 100 P.2d 682, 151 Kan. 604.
Okl.—Jersak v. Risen, 152 P.2d 374, 194 Okl. 423—Drew v. Thurlwell, 48 P.2d 1066, 73 Okl. 405, 100 A.L.R. 806—Jones v. Nye, 156 P. 332, 56 Okl. 578.
Death of a party as ground for revival see infra § 536.

Pending appeal
Where judgment is recovered in the lower court and, pending appeal, plaintiff dies, although the judgment does not abate it must be revived within the time prescribed by statute, and unless revived the judgment dies. If the statutory period for revival of a judgment expires, the appeal will be dismissed.—Atchison, T. & S. F. Ry. Co. v. Fenton, 153 P. 1130, 54 Okl. 240.

73. Kan.—Masheter v. Lanning, 100 P.2d 682, 151 Kan. 604.
Okl.—Drew v. Thurlwell, 48 P.2d 1066, 73 Okl. 405, 100 A.L.R. 806—Jones v. Nye, 156 P. 332, 56 Okl. 578.

74. Okl.—Drew v. Thurlwell, 48 P. 2d 1066, 173 Okl. 405, 100 A.L.R. 806—Phillips v. Western Electric Co., 236 P. 425, 108 Okl. 274—Jones v. Nye, 156 P. 332, 56 Okl. 578.

75. Mo.—Vitale v. Duerbeck, 92 S. W.2d 691, 338 Mo. 556.

76. Kan.—Postlethwaite v. Edson, 187 P. 688, 106 Kan. 354.

77. Tenn.—Anderson v. Stribling, 15 Tenn.App. 267.

78. Okl.—Drew v. Thurlwell, 48 P. 2d 1066, 173 Okl. 405, 100 A.L.R. 806.
34 C.J. p 660 note 62 [b].

ing defendant or defendants, since the liability is both joint and several.[79]

§ 535. Right to Revive

In the absence of a statute providing otherwise, a dormant judgment may be revived as a matter of right.

Since, as discussed supra § 532, a dormant judgment is a valid obligation of the judgment debtor, ordinarily it may be revived in a proper case,[80] at least under statutes expressly providing therefor.[81] In the absence of statutory inhibition, a dormant judgment may be renewed as a matter of right[82] by appropriate proceedings, such as scire facias, as discussed infra § 548, or suit, as considered infra §§ 849–887. However, the revival of a judgment so as to prolong its life is sometimes expressly prohibited by statute.[83]

§ 536. —— Grounds for Revival

The general ground for revival of a judgment is that it has become dormant without being satisfied.

The general ground for revival of a judgment is that it has become dormant without being satisfied.[84] It is sufficient ground for proceedings to revive a judgment that there has been a change of parties by death, as discussed supra § 534, that the lien of the judgment has expired or is about to expire,[85] that an execution issued and levied under the judgment failed to produce satisfaction because the property seized did not belong to the judgment debtor, or was not subject to execution, or because the execution purchaser failed to get possession,[86] or that the judgment debtor has wrongfully caused the execution to be returned satisfied.[87]

§ 537. —— Who May Revive

Proceedings for revival of a judgment ordinarily should be brought in the name of the plaintiff in the original judgment, although an assignee may sue in his own name if the statute so permits.

Proceedings to revive a judgment ordinarily should be brought in the name of plaintiff in the original judgment[88] or in the name of the person for whose use the judgment was entered,[89] although even in the latter case it has been held that the proceedings must be in the name of the nominal plaintiff.[90] If the revival is in the name of a nominal plaintiff, the usee may be deemed the real plaintiff and treated as such.[91]

It has been held that the owner of a judgment has the right to invoke the process of revivor.[92] Proceedings for revival may also be maintained by sureties, or a joint defendant, on paying the judgment debt,[93] by the original plaintiff's trustee in bank-

79. Okl.—Harber v. McKeown, 169 P.2d 759.
34 C.J. p 660 note 62.
Revival against joint defendants see infra § 538.

Proceeding against estate
Actions, instituted within statutory time, against deceased judgment debtors' estates on rejected claims, filed with administrators within time given by notice, for amount of joint and several judgment for money only, were proper and not subject to dismissal on ground that one judgment debtor's death rendered judgment dormant and that failure to revive it within year thereafter extinguished judgment and lien thereof.—Tucker v. Gautier, Okl., 164 P.2d 613.

80. Okl.—Aaron v. Morrow, 50 P.2d 674, 174 Okl. 452.
34 C.J. p 658 note 5.

81. Okl.—Aaron v. Morrow, supra.
Tex.—White v. Stewart, Civ.App., 19 S.W.2d 795, error refused.

82. Ga.—Hagins v. Blitch, 65 S.E. 1082, 6 Ga.App. 839.

83. Iowa.—Equitable Life Ins. Co. of Iowa v. Condon, 10 N.W.2d 78, 233 Iowa 567.

Time of operation of statute
(1) Such a statute has been held not to apply to a judgment on a contract made before its enactment.—Kelleher v. Wells, 151 P. 823, 87 Wash. 323—34 C.J. p 659 note 21.

(2) This rule applies even though the judgment is not rendered until after the passage of the statute.—Foley v. Kelleher 158 P. 982, 92 Wash. 314—Fischer v. Kittinger, 81 P. 551, 39 Wash. 174.

84. Okl.—Aaron v. Morrow, 50 P.2d 674, 174 Okl. 452.
Tex.—White v. Stewart, Civ.App., 19 S.W.2d 795, error refused.

85. Tex.—Masterson v. Cundiff, 58 Tex. 472—De Witt v. Jones, 17 Tex. 620.

86. Cal.—Thompson v. Cook, 143 P. 2d 107, 61 Cal.App.2d 485.
34 C.J. p 659 note 30.

87. Mich.—McRoberts v. Lyon, 44 N.W. 160, 79 Mich. 25.

88. Ala.—Casey v. Cooledge, 175 So. 557, 234 Ala. 499.
34 C.J. p 659 notes 35, 36, p 660 notes 42, 43.
Parties plaintiff in particular actions or proceedings see infra §§ 543–548.

Defunct corporate plaintiff
A special statutory proceeding to revive a dormant judgment could be maintained in the name of the original plaintiff, notwithstanding corporate functions of such plaintiff had meantime lapsed, because revivor of judgment in name of defunct corporation would not prejudice judgment debtor.—Foster Screen Co. v. Brigel, Ohio App., 31 N.E.2d 699.

United States having recovered judgment against lessees of public land under lease for benefit of irrigation district was proper party to sue for renewal of judgment, especially where there was no allegation that there were any net profits for distribution to water users.—Schodde v. U. S., C.C.A.Idaho, 69 F.2d 866.

89. Md.—Clark v. Digges, 5 Gill 109.
34 C.J. p 659 note 34.

90. Me.—Calais v. Bradford 51 Me. 414.
34 C.J. p 659 note 35.

91. Mo.—Beattie Mfg. Co. v. Gerardt, 214 S.W. 139.
34 C.J. p 659 note 36.

92. Kan.—Rodgers v. Smith, 58 P.2d 1092, 144 Kan. 212.

Ownership established
Administrator who was also parent and trustee of residuary legatees had sufficient ownership of judgment recovered by administrators to institute revivor proceeding after his discharge as administrator, where all other interested parties assigned their interests to him.—Rodgers v. Smith, supra.

93. Ill.—Bogden v. Milauckas, 40 N.E.2d 91, 313 Ill.App. 311.
34 C.J. p 659 note 37.

ruptcy,[94] or by the personal representatives,[95] heirs, or devisees[96] of a deceased judgment creditor.

In some states a judgment in favor of personal representatives may be revived by their successors in office.[97] A proceeding to revive a judgment entered in favor of a partnership should, after the death of one partner, be brought in the name of the surviving partner alone.[98] Where the judgment was obtained by a surviving partner as such, he alone may revive it.[99] A married woman may revive a judgment against her husband which was entered in her favor before they were married.[1]

Assignees. While equitable title alone may not permit an assignee to procure the revival of a judgment,[2] the subsequent acquisition of legal title may give him such right,[3] but in case of partial assignment of a judgment the assignee may not obtain a separate process to revive the part assigned.[4] As a general rule, proceedings to revive a judgment which has been assigned must be brought in the name of the original plaintiff,[5] except where a statute provides otherwise,[6] as where the statute authorizes such proceedings to be maintained in the name of the real party in interest,[7] in which case it may be revived in the name of the original creditor if living[8] or in the name of the assignee.[9] Even though a statute provides that the revival should be in the name of the original plaintiff suing for the use of the assignee, a judgment obtained by revival in the name of the assignee will not be treated as void where the court rendering it has jurisdiction.[10] It has been held, independently of statutory authorization, that proceedings to revive a judgment may be maintained in the name of the assignee of a judgment creditor where such creditor has gone out of business.[11]

§ 538. —— Against Whom Revival May Be Had

a. In general
b. Joint defendants

a. In General

All parties to the original judgment must be made parties to a proceeding to revive it, and, if the original judgment debtor is dead, the representatives whose property rights will be affected must be joined.

All parties to the original judgment must be made parties to a proceeding to revive it,[12] and, in particular, the original judgment debtor, if living, must be made a defendant.[13] Under statute, it has been held that a dormant judgment may be revived against a defunct corporate defendant.[14] A judgment debtor who has paid a judgment may not revive it against a mortgagee or judgment creditor who had a lien at the time of payment, or prior to the act by which it is sought to affect the lien.[15]

94. U.S.—Brown v. Wygant, App.D. C., 16 S.Ct. 1159, 163 U.S. 618, 41 L.Ed. 284.
Ala.—Casey v. Cooledge, 175 So. 557, 234 Ala. 499.

95. Ala.—Casey v. Cooledge, supra.
Kan.—Bourman v. Bourman, 127 P. 2d 464, 155 Kan. 602.
Okl.—Jersak v. Risen, 152 P.2d 374, 194 Okl. 423.
34 C.J. p 659 notes 39, 40.

96. U.S.—Fordson Coal Co. v. Jackson, C.C.A.Ky., 2 F.2d 466.
"Successor"
Statute authorizing the revival of a judgment by the "successor" of a deceased plaintiff applies only to the enforcement of the judgment for the direct benefit of the estate of the decedent or his devisees.—Fordson Coal Co. v. Jackson, supra.

97. Miss.—Brown v. Bonner, 45 Miss. 10.
24 C.J. p 896 note 78.

98. Ill.—Linn v. Downing, 74 N.E. 729, 216 Ill. 64.
34 C.J. p 660 note 41.

99. Miss.—Copes v. Fultz, 9 Miss. 623.

1. Pa.—Kincade v. Cunningham, 12 A. 410, 118 Pa. 501.

2. Ill.—Central Illinois Co. v. Swanson, 8 N.E.2d 371, 290 Ill.App. 165.

3. Ill.—Central Illinois Co. v. Swanson, supra.
Rights of parties under assignment of judgment see supra §§ 521, 522.

4. Pa.—Hopkins v. Stockdale, 11 A. 368, 117 Pa. 365—Appeal of Dietrich, 107 Pa. 174.

5. Ala.—Myrick v. Womack, 120 So. 300, 23 Ala.App. 32.
Fla.—McCallum v. Gornto, 174 So. 24, 127 Fla. 792.
34 C.J. p 660 note 44.

6. Ala.—Myrick v. Womack, 120 So. 300, 23 Ala.App. 32.
34 C.J. p 644 note 8.
Indorsement of assignment
(1) Under some statutory provisions, a dormant judgment may be revived in the name of an assignee when assignment is in writing, notwithstanding assignment is not indorsed on execution docket or on margin of record of judgment and attested by clerk.—Gambill v. Cassimus, 22 So.2d 909, 247 Ala. 176.
(2) Under other provisions, an assignee may not revive judgment in his name where he has failed to comply with a requirement that, on transfer of judgment, the transfer be indorsed on the execution docket or on margin of the record of the judgment in the court where judgment was rendered or in the office of the probate judge where a certificate of the judgment was recorded.—Myrick v. Womack, 120 So. 300, 23 Ala.App. 32.

7. Ala.—Myrick v. Womack, supra.
34 C.J. p 660 note 46.

8. Neb.—Vogt v. Binder, 107 N.W. 383, 76 Neb. 361.
34 C.J. p 660 note 47.

9. Neb.—Moline Milburn & Stoddart Co. v. Van Boskirk, 111 N.W. 605, 78 Neb. 728.
34 C.J. p 660 note 48.

10. Ga.—Chapman v. Taliaferro, 58 S.E. 128, 1 Ga.App. 235.

11. Tex.—Mayhew Lumber Co. v. Nash, Civ.App., 268 S.W. 1050.

12. Ga.—Funderburk v. Smith, 74 Ga. 515.
34 C.J. p 660 note 51.
Parties defendant in particular actions or proceedings see infra §§ 543–548.

13. Pa.—Righter v. Rittenhouse, 3 Rawle 273.

14. Tex.—Simmons v. Zimmerman Land & Irrigation Co., Civ.App., 292 S.W. 973.

15. N.J.—Stout v. Vankirk, 10 N.J. Eq. 78.

Terre-tenants may and should be joined as defendants.[16]

After death of judgment debtor. As a general rule, on the death of a judgment debtor, the judgment should be revived against the representatives whose property rights will be affected by revivor.[17] If the revivor would affect only personal property, the proceedings should be taken against the deceased debtor's personal representatives,[18] but if the revivor is intended to affect real property which passed, on the death of the judgment debtor, to his heirs or devisees, then it should be revived against such heirs or devisees,[19] even though their estate vested after the lien of the judgment was lost or interrupted.[20] Where the judgment is to affect, or does affect, both personalty and real estate, it should be revived against both the personal representatives and the heirs.[21] A judgment against personal representatives may be revived against their successors in office,[22] but a judgment against an executor or administrator cannot be revived after his death against his own personal representative[23] unless such judgment was binding on him in his individual capacity.[24]

b. Joint Defendants

A judgment may be revived against all the judgment debtors in the original judgment; but there is a conflict of opinion as to whether or not it may be revived against one of several joint debtors without joining the others.

A judgment creditor is entitled to revive his judgment against all the judgment debtors in the original judgment as it appears of record.[25] According to some decisions, where the judgment was recovered against two or more defendants jointly, proceedings for its revival must be against them all, if living.[26] However, on the ground, as discussed supra § 440, that a judgment against joint defendants is the joint and several obligation of each and not merely a joint obligation, it has been held that a judgment may be revived and enforced against one of several judgment debtors without bringing in or giving any attention to the others.[27] Under either rule where one defendant pleads such matter as

16. Ind.—Hill v. Sutton, 47 Ind. 592. Pa.—Fursht v. Overdeer, 3 Watts & S. 470.

Wife as terre-tenant

Where wife's property is acquired before creditor obtains judgment against husband, then wife is not "terre-tenant" under statute.—South Central Building & Loan Ass'n v. Milani, 150 A. 586, 300 Pa. 250.

17. Neb.—Dougherty v. White, 200 N.W. 884, 112 Neb. 675, 36 A.L.R. 425.
34 C.J. p 660 notes 53, 54.

No administrator appointed

Under some statutes, a judgment may be revived against administrator or heirs if there is no administration.—Pickens v. Scarbrough, 46 S.W.2d 58, 164 Tenn. 75.

18. Neb.—Dougherty v. White, 200 N.W. 884, 112 Neb. 675, 36 A.L.R. 425.
34 C.J. p 660 note 53.

Final decree for maintenance or alimony could be revived against the representatives of deceased.—Anglim v. Anglim, 299 N.W. 346, 140 Neb. 133.

No revival against heirs

Under some statutes, a judgment in personam, under which no specific lien on real estate was acquired during the lifetime of the judgment debtor, cannot be revived and enforced against the heirs.—Miller v. Taylor, 29 Ohio St. 257—Jones v. Kampman, 15 Ohio Cir.Ct.,N.S., 395, 34 Ohio Cir.Ct. 569.

19. Neb.—Dougherty v. White, 200 N.W. 884, 112 Neb. 675, 36 A.L.R. 425.
34 C.J. p 660 note 54.

20. Del.—Raymond v. Farrell, 93 A. 905, 28 Del. 394.

21. Neb.—Dougherty v. White, 200 N.W. 884, 112 Neb. 675, 36 A.L.R. 425.

22. Miss.—Brown v. Bonner, 45 Miss. 10.
24 C.J. p 896 note 78.

Invalid appointment

Where an administrator de bonis non was appointed by a court having no jurisdiction to make such appointment, a revivor against such administrator is absolutely void.—Paul v. Butler, 282 P. 732, 129 Kan. 244.

In Alabama

(1) Under statute, decree against personal representative of deceased administratrix for settlement of former administration may be revived against administratrix de bonis non of deceased administratrix.—Cowan v. Perkins, 107 So. 66, 214 Ala. 158.

(2) Prior to enactment of the statute, it was held that a judgment against an administrator could not be revived against the administrator de bonis non, since there was no privity between the two.—Brothers v. Gunnels, 18 So. 3, 110 Ala. 436—Bobo v. Gunnels, 8 So. 797, 92 Ala. 601.

23. Kan.—Mendenhall v. Robinson, 44 P. 610, 56 Kan. 633.

24. U.S.—Coates v. Muse, C.C.Va., 5 F.Cas.No.2,916, 1 Brock 529.
24 C.J. p 896 note 84.

25. Tex.—Gerlach v. Du Bose, Civ. App., 210 S.W. 742.

26. Ill.—Columbia Hardwood Lumber Co. v. E. Kopriwa Co., 62 N.E. 2d 23, 326 Ill.App. 423.
34 C.J. p 660 note 60.

Corporation and individual

In action to revive a joint judgment against corporation and an individual, wherein only the individual defendant was served with process and answered averring that plaintiff did not seek to revive judgment against the corporation and no answer was made to such allegation showing that corporation had been dissolved or other matters that would preclude revival against the corporation, a judgment reviving the judgment against the individual defendant only was erroneous.—Columbia Hardwood Lumber Co. v. E. Kopriwa Co., supra.

27. Kan.—Richardson v. Painter, 102 P. 1099, 80 Kan. 574, 133 Am.S.R. 224.
34 C.J. p 660 note 62.

Judgment in solido

Where assignee of judgment in solido sought to revive the judgment only against one party and not against remaining in solido obligors, mere failure to revive judgment as against the other judgment debtors could not be construed as a conventional or tacit discharge of the judgment debtor sued, since instrument seeking to revive the judgment operated as an express reservation by plaintiff of his rights against such debtor.—Converse v. Victor & Prevost, 22 So.2d 737, 208 La. 47.
34 C.J. p 660 note 62 [c].

constitutes a bar to the action against himself only, and of which his codefendants could not take advantage, such a defendant may be discharged and the judgment revived against the other defendant or defendants.[28]

If one of two or more joint judgment debtors are dead, the judgment may be revived against the surviving judgment debtor or debtors,[29] or against both the surviving debtor and the personal representative of the deceased debtor,[30] or against the personal representative of the deceased debtor without joining the other defendant,[31] although it has been said that at common law it cannot be revived against the personal representative.[32]

§ 539. —— Judgments Which May Be Revived

All judgments within the terms of statutes authorizing revival may be revived, and ordinarily it is required that the judgment be valid, final, and for a definite sum which has not been fully paid or satisfied.

All judgments within the terms of a statute providing for revival may be made the subject of a proceeding for that purpose.[33] Ordinarily, in order to be subject to revival, a judgment must be in the nature of a final judgment[34] for a definite sum,[35] and in some jurisdictions,[36] although not in others,[37] the judgment must originally have been capable of enforcement by execution. It must also be a valid judgment[38] which has not been fully paid or satisfied,[39] or barred by the statute of limitations,[40] or reversed.[41]

Subject to these conditions, there may be a revival of a judgment which is merely erroneous[42] or which has been suspended by injunction,[43] or to review which a writ of error is pending[44] or the lien of which has expired.[45] Also, in a proper case, proceedings may be brought to revive a default judgment,[46] a delivery bond judgment,[47] a stay bond

28. Ill.—Columbia Hardwood Lumber Co. v. E. Kopriwa Co., 62 N.E. 2d 23, 326 Ill.App. 423.
34 C.J. p 661 note 68.

29. Mo.—Gierster v. Stephens, App., 74 S.W.2d 88.
34 C.J. p 661 note 64.
Necessity of revival on death of one of several joint debtors see supra § 534 b.

Estate insolvent or nonexistent
Where one of defendants in dormant judgment is dead, leaving no estate, or his estate is insolvent, judgment may be revived as to surviving defendants only.—Rogers v. Jordan, 132 S.E. 233, 35 Ga.App. 131.

30. Pa.—Dowling v. McGregor, 91 Pa. 410—Stoner v. Stroman, 9 Watts & S. 85.

31. U.S.—U. S. v. Houston, D.C.Kan., 48 F. 207.
34 C.J. p 661 note 66.

32. W.Va.—Greathouse v. Morrison, 70 S.E. 710, 68 W.Va. 714.

33. Ariz.—McBride v. McDonald, 215 P. 166, 25 Ariz. 207.

Judgment of territorial court
Under statute authorizing the renewal by affidavit of any judgment directing the payment of money, which has heretofore, or may hereafter, be duly docketed in the office of the clerk of any superior court of the state, a judgment entered and docketed in the district court of a territory prior to statehood may be so renewed.—McBride v. McDonald, supra.

34. Va.—Series v. Cromer, 13 S.E. 859, 88 Va. 426.
34 C.J. p 661 note 69.

35. Ill.—Chestnut v. Chestnut, 77 Ill. 346.
34 C.J. p 661 note 70.

Judgment payable in installments
The fact that a lump-sum judgment awarded a divorced wife was payable in installments did not take from it the character of finality.
Kan.—Bourman v. Bourman, 127 P. 2d 464, 155 Kan. 602.
Neb.—Anglim v. Anglim, 299 N.W. 346, 140 Neb. 133.

36. Tex.—Farmers' Nat. Bank v. Crumley, Civ.App., 204 S.W. 358.
34 C.J. p 661 note 72.

37. U.S.—Lafayette County v. Wonderly, Mo., 92 F. 313, 34 C.C.A. 360.
34 C.J. p 661 note 71.

38. Mo.—Coombs v. Benz, 114 S.W. 2d 713, 232 Mo.App. 1011.
34 C.J. p 661 note 73.

The repeal of statute permitting recovery of deficiency judgment did not preclude revivor of dormant deficiency judgment regularly obtained many years prior thereto.—McCormack v. Murray, 274 N.W. 383, 133 Neb. 125.

39. N.J.—Schneider v. Schmidt, 136 A. 740, 101 N.J.Eq. 140.
34 C.J. p 661 note 74.

Judgments held not satisfied
(1) Revivor could not be resisted on ground that judgment had been satisfied by a levy where levy yielded payment of only small part of judgment.—Schneider v. Schmidt, supra.

(2) Where, after tort judgment was affirmed, judgment creditor instituted action of debt on the appeal bond against judgment debtor and his surety, and obtained a debt judgment against debtor and his surety, and, after execution was issued on debt judgment, surety paid the debt judgment and obtained assignment of tort judgment, the satisfaction of debt judgment did not extinguish the tort judgment so as to preclude surety as assignee from reviving such judgment on theory that surety received nothing by the assignment.—Bogden v. Milauckas, 40 N.E.2d 91, 313 Ill.App. 311.

40. N.M.—Browne & Manzanares Co. v. Chavez, 54 P. 234, 9 N.M. 316.
Judgment held not barred so as to preclude revivor.—Rayborn v. Reid, 138 S.E. 294, 139 S.C. 529.

41. Ind.—Mills v. Conner, 1 Blackf. 7.

42. Neb.—McCormack v. Murray, 274 N.W. 383, 133 Neb. 125.
34 C.J. p 662 note 78.

43. Va.—Richardson v. Prince George Justices, 11 Gratt. 190, 52 Va. 190.
34 C.J. p 662 note 79.

44. Pa.—Boyer v. Rees, 4 Watts 201.

45. Pa.—Cusano v. Rubolino, 39 A. 2d 906, 351 Pa. 41.
34 C.J. p 662 note 81.

Under validating statute
A statute authorizing the reinstatement of liens and judgments on tax and municipal claims which have lost their lien is in the nature of a "validating statute" and hence must be restricted to claims and judgments which have lost their lien at the date when the statute takes effect, and it cannot be extended to claims and judgments the liens of which are thereafter lost by inaction and neglect.—Petition of Miller, 28 A.2d 257, 149 Pa.Super. 142.

46. S.C.—State Bank v. McRa, 29 S. C.L. 639.

47. Ark.—Eddins v. Graddy, 28 Ark. 500.

judgment,[48] a tort judgment,[49] or a judgment which has been transferred from one county to another county.[50] A judgment or decree in a case of equitable cognizance is deemed to be within a statute authorizing a revivor of judgments.[51] A probate judgment or decree may be revived in some jurisdictions[52] but not in others.[53] It has been held that a judgment of revivor cannot be revived.[54]

§ 540. Defenses or Grounds of Opposition

a. In general

b. Payment, release, satisfaction, discharge, and set-off

c. Existence and validity of judgment

d. Defenses by heirs, executors, administrators, and terre-tenants

a. In General

In proceedings to revive a judgment, no inquiry into the merits is permitted, and defenses are generally limited to matters arising after the entry of the judgment.

As a rule, in a proceeding to revive a judgment, no inquiry into the merits is permitted,[55] and no matter may be pleaded in defense which was,[56] or might have been,[57] set up in defense to the original action, or which might have been interposed as a defense to a prior proceeding to revive the same judgment.[58] In other words, defenses as to matters arising prior to entry of judgment ordinarily are not available in a proceeding for revival.[59]

On the other hand, proper and sufficient matters of defense, arising after the entry of judgment, may be urged,[60] and, as considered infra subdivisions b

48. Neb.—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 137 Neb. 578, 131 A.L.R. 798.

49. Mich.—Nathan v. Rupcic, 6 N.W. 2d 484, 303 Mich. 201.

Statute retroactive

The statute providing that any judgment in tort heretofore or hereafter rendered and of record in any court of record in state may be sued on and renewed within the time and as provided by law applies to judgment recorded prior to its effective date as well as after its effective date.—Nathan v. Rupcic, supra.

50. Pa.—Shotts & Co. v. Agnew & Barnett, 31 Pa.Super. 458.

51. Ky.—Hughes v. Shreve, 3 Metc. 547.

Miss.—McCoy v. Nichols, 5 Miss. 31.

Revivor of decrees in equity generally see Equity § 621.

52. Ala.—Sharp v. Herrin, 32 Ala. 502.

34 C.J. p 662 note 86.

53. Ark.—Rose v. Thompson, 36 Ark. 254.

54. Mo.—Gregory Grocery Co. v. Link, 25 S.W.2d 575, 224 Mo.App. 407.

55. Ala.—Quill v. Carolina Portland Cement Co., 124 So. 305, 220 Ala. 134.

Ga.—McRae v. Boykin, App., 35 S.E. 2d 548, certiorari denied 66 S.Ct. 1024—Fielding v. M. Rich & Bros. Co., 169 S.E. 383, 46 Ga.App. 785.

Neb.—Krause v. Long, 192 N.W. 729, 109 Neb. 846.

Pa.—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, 5 A.2d 139, 333 Pa. 344—Stanton v. Humphreys, Com.Pl., 27 Del.Co. 594—Davis v. Tate, Com.Pl., 26 Erie Co. 141—Jacobson v. McCormick, Com. Pl., 38 Luz.Leg.Reg. 355—Gorniak v. Potter Title & Trust Co., Com. Pl., 91 Pittsb.Leg.J. 279—Com. Dept. of Public Assistance v. Miklish, Com.Pl., 27 West.Co. 237—Uhlinger v. Burin, Com.Pl., 22 West.Co. 146.

34 C.J. p 662 note 89.

Right to execution

Only defenses against scire facias are matters involving right to have judgment executed.—In re Rubin, C. C.A.Ill., 24 F.2d 289, certiorari denied Rubin v. Midlinsky, 49 S.Ct. 13, 278 U.S. 609, 73 L.Ed. 535.

Waiver of objection

After trial conducted throughout by both plaintiff and defendant on theory that merits may be inquired into, it is too late to raise objection that merits cannot be inquired into. —Frick Co. v. Nickler, 23 Pa.Dist. 44.

56. Ariz.—Miller Rubber Co. of New York v. Peggs, 132 P.2d 439, 60 Ariz. 157.

Del.—**Corpus Juris cited in** Woods v. Spoturno, 183 A. 319, 323, 7 W.W. Harr. 295, reversed on other grounds Spoturno v. Woods, 192 A. 689, 8 W.W.Harr. 378.

Pa.—Wilcox v. Du Bree, 8 Pa.Dist. & Co. 591.

34 C.J. p 662 note 89.

57. Del.—**Corpus Juris cited in** Woods v. Spoturno, 183 A. 319, 323, 7 W.W.Harr. 295, reversed on other grounds Spoturno v. Woods, 192 A. 689, 8 W.W.Harr. 378.

Ohio.—McAllister v. Schlemmer & Graber Co., 177 N.E. 841, 39 Ohio App. 434.

Pa.—Jacobson v. McCormick, Com. Pl., 38 Luz.Leg.Reg. 355.

34 C.J. p 662 note 89—24 C.J. p 895 note 69.

Question of jurisdiction cannot be litigated on scire facias to revive judgment.—Ruth v. Durando, 170 A. 532, 166 Md. 83.

Lack of jury trial

Defendant will not be allowed to defend on the ground that a jury trial was not granted in the original action.—Nathan v. Rupcic, 6 N.W.2d 484, 303 Mich. 201.

58. Pa.—Moll v. Lafferty, 153 A. 557, 302 Pa. 354.

Payment

Payment before a previous judgment of revival cannot be shown.—Trader v. Lawrence, 37 A. 812, 182 Pa. 233—Merchants Oil Co. v. Herb, Pa.Com.Pl., 14 Northumb.Leg.J. 295.

59. Pa.—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, 5 A. 2d 139, 333 Pa. 344.

60. Pa.—Cusano v. Rubolino, 39 A. 2d 906, 351 Pa. 41—Smith v. Bald Hill Coal Co., 23 A.2d 466, 343 Pa. 399, 138 A.L.R. 859—Eiffert v. Giessen, 14 A.2d 130, 339 Pa. 60—First Nat. Bank & Trust Co. of Bethlehem v. Laubach, 5 A.2d 139, 333 Pa. 344—Brusko v. Olshefski, 13 A.2d 916, 140 Pa.Super. 485—Miller Bros. v. Keenan, 90 Pa.Super. 470—Bell v. Fitzgerald, Com. Pl., 31 Del.Co. 3—Davis v. Tate, Com.Pl., 26 Erie Co. 141—Jacobson v. McCormick, Com.Pl., 38 Luz. Leg.Reg. 355—Kasperunas v. Kasper, Com.Pl., 34 Luz.Leg.Reg. 303—Krzykwa v. Krzykwa, Com.Pl., 15 Northumb.Leg.J. 117—Merchants Oil Co. v. Herb, Com.Pl., 14 Northumb.L.J. 295—Merchants Oil Co. v. Herb, Com.Pl., 14 Northumb.L.J. 266—Sausage Mfg. Co. v. Rometo, Com.Pl., 86 Pittsb.Leg.J. 105—Leonard v. Rutan, Com.Pl., 18 Wash.Co. 40.

Failure to serve process in revivor proceeding

Ga.—American Nat. Bank v. Hodges, 154 S.E. 653, 41 Ga.App. 717.

On scire facias to revive a revived judgment, the only defenses available are matters arising since its entry. —O'Connor v. Flick, 118 A. 431, 274 Pa. 521.

and c of this section, the nonexistence or invalidity of the judgment sought to be revived, or its payment, release, satisfaction, or discharge may constitute good defenses.

Particular defenses permitted. Defendant may show that his position with respect to the judgment is that of a surety only,[61] or that the proceedings are prematurely brought,[62] and, as discussed infra § 542, the statute of limitations may also be used as a defense. Persons made defendant to a scire facias, founded on a judgment against a corporation, on the allegation that they are stockholders and personally liable for its debts, may show that they are not stockholders, or that the debt on which the judgment was recovered was not of the kind for which stockholders are liable.[63] It is also permissible to plead specially the incapacity of plaintiff to maintain the proceeding.[64]

Particular defenses not available. Numerous particular defenses urged in proceedings for revival of a judgment have been held unavailable.[65] A general denial of each and every allegation of the writ not admitted in the answer is not a form of defense permitted in such a proceeding.[66] It is not permissible to show in defense want of consideration,[67] coverture of defendant,[68] usury,[69] fraud in procuring the original judgment,[70] duress in the procuring of a prior revival of the judgment,[71] or recovery of another judgment on the same debt.[72] Other matters disallowed as defenses include the pendency of an action of debt on the judgment,[73] or of probate court proceedings incidental to a claim based on the judgment,[74] or the pendency of an appeal in a suit to enjoin enforcement of the judgment[75] or of an appeal by plaintiff from judgment in his favor.[76] The assignment of the judgment to a third person,[77] the existence of liens on a judgment,[78] and adverse possession[79] are other unavailable pleas. Where the motion for revival is brought promptly, under all the circumstances of the case, the claim of laches may be disallowed.[80]

Except in some jurisdictions,[81] it is not a valid objection to a proceeding to revive that at the time of its commencement plaintiff could have proceeded by execution.[82] The unauthorized discharge of the judgment debtor from arrest under an execution is not a defense to an action to revive the judgment on which the execution was issued.[83]

b. Payment, Release, Satisfaction, Discharge, and Set-Off

In defense to a proceeding to revive a judgment, it may be shown that the judgment was paid, released, satisfied, or discharged, but, in the absence of a statute to the contrary, it is not proper to interpose a set-off or counterclaim.

Defense rejected

Defendant, obtaining judgment on plea that former judgment against him was res adjudicata, cannot set up second judgment as defense in suit to revive former judgment.—Polk v. S. H. Churchill & Co., Tex.Civ.App., 286 S.W. 900.

61. Ohio.—Nestlerode v. Foster, 8 Ohio Cir.Ct. 70, 4 Ohio Cir.Dec. 385.

62. Wash.—Tacoma Nat. Bank v. Sprague, 74 P. 393, 33 Wash. 285.

63. Pa.—Wilson, McElroy & Co. v. Pittsburgh & Youghiogheny Coal Co., 43 Pa. 424.

64. Mo.—Beattie Mfg. Co. v. Gerardi, 214 S.W. 189.
34 C.J. p 679 note 58.

65. Ga.—McRae v. Boykin, App., 35 S.E.2d 548, certiorari denied 66 S. Ct. 1024.
Pa.—Bank of Wesleyville v. Wagner, Com.Pl., 21 Erie Co. 175.

The unauthorized removal of a child to a foreign country, with the knowledge and consent of the executor of the mother's estate, is not a sufficient ground for refusing the executor's application to revive a divorce judgment awarding alimony and adjusting property rights of the deceased mother.—Chumos v. Chumos, 148 P. 420, 93 Kan. 33.

66. U.S.—Wonderly v. Lafayette County, C.C.Mo., 77 F. 665, affirmed Lafayette County v. Wonderly, 92 F. 313, 34 C.C.A. 360.

67. Pa.—Kincade v. Cunningham, 12 A. 410, 118 Pa. 501—Mulligan v. Devlin, 12 Pa.Co. 465—Krzykwa v. Krzykwa, Com.Pl., 15 Northumb. Leg.J. 117.

68. Pa.—Eiffert v. Giessen, 14 A. 2d 130, 339 Pa. 60—Sausage Mfg. Co. v. Rometo, Com.Pl., 86 Pittsb. Leg.J. 105.
34 C.J. p 662 note 94.

69. Pa.—Lysle v. Williams, 15 Serg. & R. 135—Bickel v. Cleaver, 13 Pa. Co. 314.

70. Neb.—Krause v. Long, 192 N.W. 729, 109 Neb. 846.
34 C.J. p 664 note 25 [a].

71. Pa.—Trader v. Lawrence, 37 A. 812, 182 Pa. 233.

72. N.C.—McLean v. McLean, 90 N. C. 536.

73. U.S.—Lafayette County v. Wonderly, Mo., 92 F. 313, 34 C.C.A. 360.

74. Kan.—Rodgers v. Smith, 58 P.2d 1092, 144 Kan. 212.

75. Wash.—Foley v. Kelleher, 158 P. 982, 92 Wash. 314.

76. La.—Weiller v. Blanks, 1 McG. 296.

77. Ill.—Greene v. Schwing, 187 Ill. App. 635.

Ohio.—Foster Screen Co. v. Brigel, App., 31 N.E.2d 699.
Assignor as proper person to institute revival proceedings see supra § 537.

78. Ohio.—Foster Screen Co. v. Brigel, supra.

79. Ill.—Smith v. Stevens, 24 N.E. 511, 133 Ill. 183.

80. Cal.—Thompson v. Cook, 143 P. 2d 107, 61 Cal.App.2d 485.

81. N.Y.—Harmon v. Dedrick, 3 Barb. 192.
Tex.—White v. Stewart, Civ.App., 19 S.W.2d 795, error refused.

Action similar to revival

Generally, suit on judgment by scire facias proceedings or action of debt will not lie, unless judgment has become dormant because of failure to have execution issued, but action similar to revival may be brought on judgment which is not dormant, when it would give holder of judgment additional advantage to which he is legally entitled under circumstances.—Elliott v. San Benito Bank & Trust Co., Tex.Civ.App., 137 S.W.2d 1070.

82. Md.—Lambson v. Moffett, 61 Md. 426.
34 C.J. p 663 note 4.

83. N.C.—Ballard v. Averitt, 1 N.C. 69.
34 C.J. p 663 note 20.

In defense to a proceeding to revive a judgment, defendant may plead that it has been paid[84] wholly or in part,[85] or he may plead the presumption of payment arising from lapse of time,[86] or both payment and presumption of payment.[87]

Release,[88] such as a voluntary release of the judgment without full payment,[89] discharge,[90] satisfaction,[91] and accord and satisfaction[92] may also be pleaded.

Set-off or counterclaim. Ordinarily, in a proceeding for revival of a judgment, a set-off[93] or a counterclaim[94] is not a proper defense, unless it is proved that the item offered as a set-off was accepted and acknowledged by plaintiff as a credit on the judgment in suit;[95] but under some statutes proceedings to revive a judgment are subject to a counterclaim based on contract.[96]

c. Existence and Validity of Judgment

In defense to a proceeding for revival of a judgment, it is proper to plead nul tiel record or to deny the existence of the judgment or to show that it is absolutely void.

As a general rule, in defense to a proceeding for revival of a judgment, the plea of nul tiel record, or the denial of the existence of the judgment,[97]

84. Ill.—Blakeslee's Storage Warehouses v. City of Chicago, 11 N.E. 2d 42, 292 Ill.App. 288, affirmed 17 N.E.2d 1, 369 Ill. 480, 120 A.L.R. 715—Dulsky v. Lerner, 223 Ill.App. 228.
Md.—O'Neill & Co. v. Schulze, 7 A. 2d 263, 177 Md. 64.
Neb.—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 137 Neb. 578, 131 A.L.R. 798.
Okl.—**Corpus Juris cited in** Shefts v. Oklahoma Co., 137 P.2d 589, 592, 192 Okl. 483.
Or.—**Corpus Juris cited in** Stephens v. Stephens, 132 P.2d 992, 993, 170 Or. 363.
Pa.—Smith v. Bald Hill Coal Co., 23 A.2d 466, 343 Pa. 399, 138 A.L.R. 859—Elfert v. Giessen, 14 A.2d 130, 339 Pa. 60—City Nat. Bank of Wichita Falls, Tex., now for Use of Newhams v. Atkinson, 175 A. 507, 316 Pa. 526—Moll v. Lafferty, 153 A. 557, 302 Pa. 354—Shelinski v. Obrekes, 97 Pa.Super. 340—Taylor v. Tudor, 83 Pa.Super. 459—McMahon v. Pietro, Com.Pl., 42 Lack. Jur. 162—Merchants Oil Co. v. Herb, 14 Northumb.Leg.J. 295—Merchants Oil Co. v. Herb, 14 Northumb.Leg.J. 266—Sausage Mfg. Co. v. Rometo, Com.Pl., 86 Pittsb.Leg.J. 105—Leonard v. Rutan, Com.Pl., 18 Wash.Co. 40.
34 C.J. p 662 note 91, p 663 notes 11, 12.

85. Or.—**Corpus Juris cited in** Stephens v. Stephens, 132 P.2d 992, 993, 170 Or. 363.
S.C.—Anderson v. Gage, 23 S.C.L. 319.

86. Pa.—Camp v. John, 102 A. 285, 259 Pa. 38.
34 C.J. p 663 note 13, p 666 note 49.

87. Del.—De Ford v. Green, 40 A. 1120, 15 Del. 316.

88. Ill.—Albert Pick Co. v. Valos, 64 N.E.2d 319, 327 Ill.App. 404—Blakeslee's Storage Warehouses v. City of Chicago, 11 N.E.2d 42, 292 Ill.App. 288, affirmed 17 N.E.2d 1, 369 Ill. 480, 120 A.L.R. 715—Dulsky v. Lerner, 223 Ill.App. 228.
Md.—O'Neill & Co. v. Schulze, 7 A. 2d 263, 177 Md. 64.
Pa.—Leonard v. Rutan, Com.Pl., 18 Wash.Co. 40.
34 C.J. p 662 note 91.

89. N.C.—Salisbury First Nat. Bank v. Swink, 39 S.E. 962, 129 N.C. 255.
34 C.J. p 663 note 15.

90. Ill.—Bank of Edwardsville v. Raffaelle, 45 N.E.2d 651, 381 Ill. 486, 144 A.L.R. 401—Albert Pick Co. v. Valos, 64 N.E.2d 319, 327 Ill.App. 404—U. S. Brewing Co. of Chicago v. Epp, 247 Ill.App. 315.
Neb.—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 137 Neb. 578, 131 A.L.R. 798.
Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41—Smith v. Bald Hill Coal Co., 23 A.2d 466, 343 Pa. 399, 138 A.L.R. 859—Adelson v. Kocher, 36 A.2d 737, 154 Pa.Super. 548—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480—Shelinski v. Obrekes, 97 Pa.Super. 340—Taylor v. Tudor, 83 Pa.Super. 459—Bell v. Klein, Com.Pl., 35 Luz.Leg.Reg. 72—Merchants Oil Co. v. Herb, Com. Pl., 14 Northumb.Leg.J. 266—Stanton v. Humphreys, Com.Pl., 27 Del. Co. 594.
34 C.J. p 662 note 91.
Effect of discharge in bankruptcy on judgments see Bankruptcy § 563.

91. Ill.—Bank of Edwardsville v. Raffaelle, 45 N.E.2d 651, 381 Ill. 486, 144 A.L.R. 401—Albert Pick Co. v. Valos, 64 N.E.2d 319, 327 Ill. App. 404—U. S. Brewing Co. of Chicago v. Epp, 247 Ill.App. 315.
Okl.—**Corpus Juris cited in** Shefts v. Oklahoma Co., 137 P.2d 589, 592, 192 Okl. 483.
Pa.—Adelson v. Kocher, 36 A.2d 737, 154 Pa.Super. 548—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480—Taylor v. Tudor, 83 Pa.Super. 459—Stanton v. Humphreys, Com.Pl., 27 Del.Co. 594—Bell v. Klein, Com.Pl., 35 Luz.Leg.Reg. 72—Merchants Oil Co. v. Herb, Com.Pl., 14 Northumb.Leg.J. 266.
34 C.J. p 662 note 91.

Failure to complete purchase
With respect to satisfaction of judgment, defendants could not urge, after twenty years, liability against complainants for failure to complete purchase at sheriff's sale of property levied on.—Schneider v. Schmidt, 136 A. 740, 101 N.J.Eq. 140.

92. Ill.—Albert Pick Co. v. Valos, 64 N.E.2d 319, 327 Ill.App. 404—Blakeslee's Storage Warehouses v. City of Chicago, 11 N.E.2d 42, 292 Ill.App. 288, affirmed 17 N.E.2d 1, 369 Ill. 480, 120 A.L.R. 715—Dulsky v. Lerner, 223 Ill.App. 228.
Md.—O'Neill & Co. v. Schulze, 7 A. 2d 263, 177 Md. 64.
34 C.J. p 663 note 17.

93. Neb.—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 137 Neb. 578, 131 A.L.R. 798.
Pa.—Wilcox v. Du Bree, 8 Pa.Dist. & Co. 591.
34 C.J. p 663 note 18.

94. Neb.—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 137 Neb. 578, 131 A.L.R. 798.
34 C.J. p 663 note 18.

Adjudicated claim
Pa.—Moll v. Lafferty, 153 A. 557, 302 Pa. 354.

95. Pa.—Bishop v. Goodhart, 19 A. 1026, 135 Pa. 374—Wilcox v. Du Bree, 8 Pa.Dist. & Co. 591.

Effect of agreement
"Set-off or counterclaim is not a defense to a proceeding to revive a dormant judgment unless there has been an agreement to apply it, in which event it is treated as a payment."—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 451, 137 Neb. 578, 131 A.L.R. 798.

96. N.M.—Bailey v. Great Western Oil Co., 259 P. 614, 32 N.M. 478, 55 A.L.R. 467.

97. Ill.—Bank of Edwardsville v. Raffaelle, 45 N.E.2d 651, 381 Ill. 486, 144 A.L.R. 401—Albert Pick Co. v. Valos, 64 N.E.2d 319, 327 Ill. App. 404—Blakeslee's Storage Warehouses v. City of Chicago, 11 N.E.2d 42, 292 Ill.App. 288, affirmed 17 N.E.2d 1, 369 Ill. 480, 120 A.L.R. 715—U. S. Brewing Co. of

under which defendant may show the judgment's invalidity,[98] is permissible. It is also a good defense that the judgment is absolutely void,[99] as for want of jurisdiction,[1] or because of the invalidity of the statute on which it was based,[2] provided, in some jurisdictions, the judgment record shows affirmatively that it is void,[3] although in other jurisdictions, the record may be impeached in the revival proceedings,[4] at least with respect to the return of an officer to the service of a summons.[5] On the other hand, it is not a good defense that the judgment was irregular[6] or erroneous.[7]

d. Defenses by Heirs, Executors, Administrators, and Terre-Tenants

Generally, any defenses which would have been open to the original defendant may be pleaded by heirs, executors, administrators, or terre-tenants in a proceeding against them to revive a judgment.

As a general rule, heirs, executors, administrators,[8] or terre-tenants[9] may plead any defenses which would have been open to the original defendant. Such defendants may deny the character in which they are sued.[10] Except in some jurisdic-

Chicago v. Epp, 247 Ill.App. 315—Dulsky v. Lerner, 223 Ill.App. 228.
Md.—O'Neill & Co. v. Schulze, 7 A.2d 263, 177 Md. 64.
Neb.—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 137 Neb. 578, 131 A.L.R. 798.
Okl.—**Corpus Juris cited in** Shefts v. Oklahoma Co., 137 P.2d 589, 592, 192 Okl. 483.
Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41—City Nat. Bank of Wichita Falls, Tex., now for Use of Newhams, v. Atkinson, 175 A. 507, 316 Pa. 526—Adelson v. Kocher, 36 A.2d 737, 154 Pa.Super. 548—First Nat. Bank & Trust Co. of Ford City v. Stolar, 197 A. 499, 130 Pa.Super. 480—Shelinski v. Obrekes, 97 Pa.Super. 340—Taylor v. Tudor, 83 Pa.Super. 459—Barnhart v. Herring, Com.Pl., 54 Pa. Dist. & Co. 526—Stanton v. Humphreys, Com.Pl., 27 Del.Co. 594—McMahon v. Pietro, Com.Pl., 42 Lack.Jur. 162—Bell v. Klein, Com. Pl., 35 Luz.Leg.Reg. 72—Merchants Oil Co. v. Herb, Com.Pl., 14 Northumb.Leg.J. 266—Sausage Mfg. Co. v. Rometo, Com.Pl., 86 Pittsb.Leg. J. 105.
34 C.J. p 662 note 91—53 C.J. p 639 note 59 [a].

98. Neb.—Lashmett v. Prall, 120 N. W. 206, 83 Neb. 732.
34 C.J. p 662 note 91.

99. Neb.—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 137 Neb. 578, 131 A.L.R. 798.
34 C.J. p 663 note 21.

Determination of validity

Validity of a judgment, which was attacked by an answer to a scire facias proceeding to revive it, could be settled by such proceeding in court which rendered original judgment.—Carson v. Taylor, Tex.Civ. App., 261 S.W. 824.

1. Wash.—Waterman v. Bash, 89 P. 556, 46 Wash. 212.
33 C.J. p 668 note 21.

Jurisdiction over person

(1) Defendant may defend on ground that he was not served and did not appear in original suit.—McRae v. Boykin, Ga.App., 35 S.E.2d 548, certiorari denied 66 S.Ct. 1024.

(2) Testimony of plaintiff and return of constable were sufficient to sustain judgment of revivor, as against contention that original judgment was void for want of jurisdiction.—Kinyoun v. Reinsh, 289 N.W. 382, 137 Neb. 325.

2. U.S.—Board of Com'rs of Hertford County v. Tome, N.C., 153 F. 81, 82 C.C.A. 215.

3. Okl.—**Corpus Juris cited in** Shefts v. Oklahoma Co., 137 P.2d 589, 592, 192 Okl. 483.
34 C.J. p 664 note 23.

Service of process

Record of return of officer who effected service of process in original suit held not subject to contradiction.
Ill.—Albert Pick Co. v. Valos, 64 N. E.2d 319, 327 Ill.App. 404.
Pa.—Taylor v. Tudor, 83 Pa.Super. 459.

4. Neb.—Johnson v. Carpenter, 108 N.W. 161, 77 Neb. 49.
34 C.J. p 664 note 24.

5. Neb.—Haynes v. Aultman, 54 N. W. 511, 36 Neb. 257.
34 C.J. p 664 note 24 [a].

6. Ariz.—Miller Rubber Co. of New York v. Peggs, 132 P.2d 439, 60 Ariz. 157.
Pa.—Smith v. Bald Hill Coal Co., 23 A.2d 466, 343 Pa. 399, 138 A.L.R. 859—Jacobson v. McCormick, Com. Pl., 38 Luz.Leg.Reg. 355.
34 C.J. p 664 note 25.

Particular irregularities disregarded

(1) Failure to file affidavit, required by rule of court, on entry of original judgment and fact that one of several parties plaintiff was deceased at time of such entry, are not available as defenses in scire facias proceeding.—Smith v. Bald Hill Coal Co., 23 A.2d 466, 343 Pa. 399, 138 A.L.R. 859.

(2) Fact that record of judgment against two defendants referred to judgment against "defendant" was held not to prevent revivor of judgment.—Van Horne v. Harford, 6 N. E.2d 887, 289 Ill.App. 121.

7. Tex.—Ulmer v. Frankland, Civ. App., 27 S.W. 766.
34 C.J. p 664 note 25.

8. U.S.—McKnight v. Craig's Adm'r, D.C., 6 Cranch 183, 3 L.Ed. 193.
34 C.J. p 664 note 27.

Discharge

Since allegation that judgment was destroyed is equivalent to allegation of discharge, if probate proceedings allowing judgment as claimed against estate destroyed judgment, that defense could be interposed in proceeding against heirs to revive judgment.—Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo.App. 137.

Payment

Where estate had no means of paying judgment against it, and one of two executors bought judgment with own money and had it assigned to third person who issued scire facias thereon, naming both executors and also heirs as defendants, plea of payment by the executors did not estop the executor who had bought the judgment from showing that it was in fact paid but that it was intended to be kept alive for his use.—McKerrahan v. Crawford, 59 Pa. 390.

9. Pa.—Roberts v. Williams, 5 Whart. 170, 34 Am.D. 549.
34 C.J. p 664 note 27.

Pleading to merits by terre-tenant in scire facias to revive judgment is not permitted.—South Central Building & Loan Ass'n v. Milani, 150 A. 586, 300 Pa. 250—Bell v. Yontos, 46 Pa.Dist. & Co. 636, 44 Lack.Jur. 83, 57 York Leg.Rec. 53.

Validity of original judgment

(1) In scire facias to revive a judgment, a terre-tenant may make no inquiry, into the validity of the original judgment, as long as the original judgment stands unimpeached.—Smith v. Bald Hill Coal Co., 23 A.2d 466, 343 Pa. 399, 138 A.L.R. 859.

(2) Terre-tenants could set up no defense attacking validity of original judgment which appeared to be regular on its face.—Adelson v. Kocher, 36 A.2d 737, 154 Pa.Super. 548.

10. Ky.—White v. Brown, 1 Dana 104.
Pa.—Miners Nat. Bank of Wilkes-Barre v. Dukas, Com.Pl., 32 Luz. Leg.Reg. 229.
34 C.J. p 664 note 28.

tions,[11] an heir or administrator may plead want of assets or "nothing by descent."[12]

A plene administravit, when supported by the facts, may be sufficient in a proceeding to revive a judgment against a personal representative,[13] but such a plea is bad on demurrer where it appears that there is real estate which might be sold to pay debts, since the administrator is bound to sell such real estate for that purpose.[14] To a scire facias to revive a judgment against a testator, executors may not plead that they have not accounted to the surrogate,[15] although such a plea has been considered good as against a scire facias issued on a judgment against the executors themselves.[16] Personal representatives may not defend on the ground that a note, on which the judgment is based, was signed by deceased as an accommodation maker.[17]

A terre-tenant may plead that the judgment was never a lien on his land,[18] or that the judgment debtor had parted with title to the realty before the entry of the judgment,[19] or that the lien has been extinguished.[20]

§ 541. Jurisdiction and Venue

As a general rule, proceedings to revive a judgment should be brought in the court in which the judgment was rendered.

A proceeding to revive a judgment must be brought in the court[21] and county[22] wherein it was rendered. The rule applies even where, under statutory authority, a transcript of the judgment is filed in a court of another county,[23] or in another court of the same county,[24] or where a transcript of a judgment of a federal court is filed in a state court,[25] unless the statute providing for the transfer authorizes a revivor in the court to which the transfer is made.[26] However, in the case of judgments of inferior courts removed by transcript to a superior court, jurisdiction to revive the judgment has been held to reside in the latter court.[27]

§ 542. Time for Revival

a. In general
b. Computation of period of limitation

a. In General

A judgment may and should be revived within the time limited by law.

As a general rule, a judgment may and should be revived within the time limited by law.[28] As discussed in the C.J.S. title Limitations of Actions § 102, also 34 C.J. p 665 notes 41, 42, the general law as to the limitation of actions does not apply to proceedings to revive a dormant judgment, except in a few jurisdictions. Such proceedings are governed only by the special statutory provisions, if any, applicable to proceedings of that character.[29] Such

11. Miss.—Commercial Bank v. Kendall, 21 Miss. 278.
34 C.J. p 664 note 29.

12. Ga.—Fulcher v. Mandell, 10 S.E. 582, 83 Ga. 715.
34 C.J. p 664 note 30—24 C.J. p 896 note 71.
Application of executor to orphans' court, representing that property of decedent is insufficient to pay debts, will not bar scire facias to revive a judgment entered before application was made.—Howell v. Potts, 20 N.J. Law 1.

13. Tenn.—Cox v. Cox, 2 Yerg. 305.
24 C.J. p 896 note 71 [b].

14. Vt.—Bates v. Kimball, 1 Aik. 95.

15. N.Y.—Clark v. Sexton, 23 Wend. 477.

16. N.Y.—Clark v. Sexton, 23 Wend. 477.

17. Pa.—Eiffert v. Giessen, 14 A.2d 130, 339 Pa. 60.

18. Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41—Bell v. Yontos, 46 Pa.Dist. & Co. 636, 44 Lack.Jur. 83, 57 York Leg.Rec. 53.
34 C.J. p 664 note 32.

19. Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41.

20. Pa.—Cusano v. Rubolino, supra.
34 C.J. p 664 note 32.

21. Ill.—**Corpus Juris cited in** Van Horne v. Harford, 280 Ill.App. 576, 579.
Kan.—**Corpus Juris quoted in** Rodgers v. Smith, 58 P.2d 1092, 1096, 144 Kan. 212.
34 C.J. p 664 note 34.
Action of debt held not within rule.—Koenig v. Marti, Tex.Civ.App., 103 S.W.2d 1023, error dismissed—Burge v. Broussard, Tex.Civ.App., 258 S.W. 502.

22. Neb.—Case Threshing Mach. Co. v. Edmisten, 122 N.W. 891, 85 Neb. 272.

23. Ill.—**Corpus Juris cited in** Van Horne v. Harford, 280 Ill.App. 576, 579.
34 C.J. p 665 note 36.

24. Ill.—Van Horne v. Harford, 280 Ill.App. 576.

25. Neb.—Holmes v. Webster, 152 N.W. 312, 98 Neb. 105.

26. Ill.—**Corpus Juris cited in** Van Horne v. Harford, 280 Ill.App. 576, 579.
34 C.J. p 665 note 38.

27. Neb.—Garrison v. Aultman, 30 N.W. 61, 20 Neb. 311.
34 C.J. p 665 note 39

Revival of judgments in justice of the peace courts see the C.J.S. title Justices of the Peace § 120, also 34 C.J. p 665 note 39; 35 C.J. p 689 note 93 et seq.

28. Ala.—Quill v. Carolina Portland Cement Co., 124 So. 305, 220 Ala. 134.
Cal.—Betty v. Superior Court of Los Angeles County, 116 P.2d 947, 18 Cal.2d 619—Pacific Gas & Electric Co. v. Elks Duck Club, 103 P.2d 1030, 39 Cal.App.2d 562.
Ga.—James v. Roberts, 191 S.E. 301, 55 Ga.App. 755.
La.—Fritz Jahncke, Inc., v. Fidelity Deposit Co. of Maryland, 135 So. 32, 172 La. 704.
Mo.—Excelsior Steel Furnace Co. v. Smith, App., 17 S.W.2d 378.
Pa.—Petition of Miller, 28 A.2d 257, 149 Pa.Super. 142—Lukac v. Morris, Com.Pl., 7 Sch.Reg. 241.
Tex.—Zummo Packing Co. v. Cotham, Civ.App., 135 S.W.2d 177, affirmed 155 S.W.2d 600, 137 Tex. 517—Mingus v. Kadane, Civ.App., 125 S.W.2d 630, error dismissed, judgment correct.
34 C.J. p 663 note 7.

29. U.S.—Spurway v. Dyer, D.C.Fla., 48 F.Supp. 255.
Ala.—Quill v. Carolina Portland Ce-

special statutory provisions are valid[30] and may be given a retrospective operation.[31]

Motions to revive. In some jurisdictions, the statute of limitations applicable to an action or writ of scire facias to revive a judgment will also bar a motion for the same purpose.[32] Where there is a special statute applicable to such motions, the motion must be made within the time limited,[33] but it has been held that, where the motion to revive is under a statute which imposes no restriction as to time, the court has no authority to insert such a restriction.[34]

b. Computation of Period of Limitation

The period of limitation for revival of a judgment ordinarily begins to run from the rendition of the judgment or other time specified by statute, and, in the absence of a provision to the contrary, proceedings must be begun before the last day of the period unless the running of the statute has been tolled.

As a general rule, the limitation of the time of bringing proceedings for the revival of a judgment begins to run from the rendition of the judgment,[35] or other time specified by statute,[36] such as from the time when the judgment first becomes dormant,[37] or an execution might first be issued on

ment Co., 124 So. 305, 220 Ala. 134.
Idaho.—Tingwall v. King Hill Irr. Dist., 155 P.2d 605.
La.—Mulling v. Jones, 114 So. 725, 164 La. 894.
Mich.—Nathan v. Rupcic, 6 N.W.2d 484, 303 Mich. 201.
N.J.—Trustees for Support of Public Schools v. Ott & Brewer Co., 37 A.2d 832, 135 N.J.Eq. 174.
N.C.—Metcalf v. Ratcliff, 1 S.E.2d 565, 215 N.C. 243.
Okl.—Thomas v. Murray, 49 P.2d 1080, 174 Okl. 36, 104 A.L.R. 209.
Pa.—Stanton v. Humphreys, Com.Pl., 27 Del.Co. 594.
34 C.J. p 665 note 43.

Statutes not in pari materia

The statute relating to dormancy of judgment and execution thereon is not in pari materia with statute authorizing revival of a judgment, so that provision that a judgment on which no execution is issued does not become dormant until ten years after its rendition does not render nugatory provision that an action to revive or for debt must be brought on the judgment within ten years after date of rendition and both provisions must be given effect.—Gillam v. Matthews, Tex.Civ.App., 122 S.W. 2d 348, error dismissed.

Type of judgment affected

(1) Generally, statutes relating to revival of judgments have reference to money judgments capable of enforcement by execution, and are not generally regarded as imposing time limitation on enforcement of judgments which are not for payment of money or which are not enforceable by execution.—Kelly v. City of Cape Girardeau, 89 S.W.2d 693, 230 Mo. App. 137.

(2) Judgment in mandamus proceeding to enforce collection of acreage tax for drainage district bonds was a "money judgment" within prescription of ten years.—Perkins v. Clancy, 146 So. 748, 176 La. 787.

Particular limitations held applicable

(1) Generally.—Shareff, to Use of Olney Bank & Trust Co. v. Wolf, 132 A. 115, 120 Pa.Super. 227.

(2) The limitation of one year for revivor of actions has no application to revivor of dormant judgment.—Rich v. Cooper, 286 N.W. 383, 136 Neb. 463.

(3) Suit to revive judgment which gave incorrect middle initial of judgment debtor and to have person named in original judgment and revived judgment decreed to be the same person, was governed by ten-year statute of limitations and not by five-year statute which applies to action to reform an instrument.—Jaubert Bros. v. Landry, La.App., 15 So.2d 158.

The term "issue" of execution in statute of limitations for revival of judgments means more than the mere clerical preparation and attestation of the writ and requires that it should be delivered to an officer for enforcement.—Cotten v. Stanford, Tex.Civ.App., 147 S.W.2d 930.

30. Idaho.—Bashor v. Beloit, 119 P. 55, 20 Idaho 592.

31. Neb.—Atkinson v. Uttley, 154 N. W. 247, 98 Neb. 722.
34 C.J. p 666 note 45.

32. Ohio.—Bartol v. Eckert, 33 N.E. 294, 50 Ohio St. 31.
34 C.J. p 666 note 46.

33. Kan.—Kansas & Texas Coal Co. v. Carey, 70 P. 589, 65 Kan. 639.
34 C.J. p 666 note 47.

34. Neb.—Hunter v. Leahy, 24 N.W. 680, 18 Neb. 80.
34 C.J. p 666 notes 48, 49.

35. U.S.—Yerby v. Kerr, C.C.A.Tex., 143 F.2d 58.
Ark.—Cabler v. Anderson, 16 S.W.2d 179, 179 Ark. 364.
Ill.—Motel v. Andracki, 19 N.E.2d 832, 299 Ill.App. 166.
Iowa.—Lackender v. Morrison, 2 N. W.2d 286, 231 Iowa 899.
La.—Perkins v. Clancy, 146 So. 748, 176 La. 787—Fritz Jahncke, Inc., v. Fidelity Deposit Co. of Maryland, 135 So. 32, 172 La. 704—Bailey v. Louisiana & N. W. R. Co., 105 So. 626, 159 La. 576.
Md.—O'Neill & Co. v. Schulze, 7 A.2d 263, 177 Md. 64.
Mo.—In re Jackman's Estate, 124 S. W.2d 1189, 344 Mo. 49—Kelly v. City of Cape Girardeau, 89 S.W.2d 693, 230 Mo.App. 137—Longlett v. Eisenberg, 70 S.W.2d 317, 222 Mo. App. 805.
Mont.—State v. Hart Refineries, 92 P. 2d 766, 109 Mont. 140, 123 A.L.R. 555.
Pa.—Szusta v. Krawiec, 36 Luz.Leg. Reg. 183.
Tex.—Zummo v. Cotham, 155 S.W.2d 600, 137 Tex. 517—Gillam v. Matthews, Civ.App., 122 S.W.2d 348, error dismissed.
34 C.J. p 666 note 50.

Strict construction of statute

Tex.—Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.

Reversal

Statute prescribing money judgments ten years after rendition runs from date of rendition in trial court, or in appellate court after reversal. —Carlile v. Huckaby, La.App., 154 So. 462.

Signing of judgment

Suit to revive judgment which was commenced more than ten years after judgment was given, but within ten years after judgment was signed, was not prescribed, since signing of judgment constitutes "rendition of the judgment", within statute providing for prescription of judgments by lapse of ten years from rendition thereof.—Viator v. Heintz, 10 So.2d 690, 201 La. 884.

36. Ga.—James v. Roberts, 191 S.E. 301, 55 Ga.App. 755.
Tex.—Mingus v. Kadane, Civ.App., 125 S.W.2d 630, error dismissed, judgment correct.
34 C.J. p 666 note 51.

37. Ga.—James v. Roberts, 191 S.E. 301, 55 Ga.App. 755.
Kan.—Butler v. Rumbeck, 56 P.2d 80, 143 Kan. 703.
Neb.—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 137 Neb. 578, 131 A.L.R. 798.
Okl.—Thomas v. Murray, 49 P.2d 1080, 174 Okl. 36, 104 A.L.R. 209.
Dormant judgments generally see supra § 532.

Effect of appeal

Under a statute which permits revivor within one year after a judg-

the judgment,[38] or from the time of issuance of the last execution on the judgment.[39] Under some statutes, where the judgment has once been revived, the limitation period runs from the date of the revival,[40] but other statutes bar a revival after lapse of the prescribed period commencing from the date of rendition of the judgment notwithstanding the judgment has once been revived within the period.[41] In a case where a terre-tenant is involved, the period of limitations commences from the date of the recording of the terre-tenant's deed[42] or from the time of taking of possession of the land by the terre-tenant.[43]

While the running of the statute of limitations for revival of a judgment may be interrupted by some sufficient cause,[44] in the absence of such interruption, the right to institute the proceeding will expire on the last day of the statutory period,[45] or, if that day is dies non, on the next succeeding business day.[46] Ordinarily, the statute is saved by beginning the proceedings within the limited time,[47] although the judgment of revivor does not follow

ment becomes dormant, where a judgment has been appealed, the limitation on a motion for revivor does not begin to run until the mandate has come down from the appellate to the trial court.—Aaron v. Morrow, 50 P.2d 674, 174 Okl. 452.

38. D.C.—Brown v. Allan E. Walker & Co., 26 F.2d 545, 58 App.D.C. 173.

Docketing judgment in superior court

Where municipal court judgment was docketed in supreme court, period within which revival could be had began with the docketing in the supreme court.—Brown v. Allan E. Walker & Co., supra.

39. Tex.—Gartin v. Furgeson, Civ. App., 144 S.W.2d 1114—Mingus v. Kadane, Civ.App., 125 S.W.2d 630, error dismissed, judgment correct. 34 C.J. p 666 note 51 [b]—24 C.J. p 896 note 78 [e].

Action similar to revival, such as action against decedent's heirs to subject property formerly owned by decedent to payment of judgment against him, is not barred by limitations until lapse of ten years from issuance of last execution on judgment.—Elliott v. San Benito Bank & Trust Co., Tex.Civ.App., 137 S.W. 2d 1070.

40. D.C.—Brown v. Allan E. Walker & Co., 26 F.2d 545, 58 App.D.C. 173.
La.—Interstate Electric Co. v. Smith, App., 180 So. 178, overruling Mitchell v. Brodnax, App., 164 So. 426, and McDaniel v. Smith, 127 So. 108, 13 La.App. 61.
Mo.—Gregory Grocery Co. v. Link, 25 S.W.2d 575, 224 Mo.App. 407.
34 C.J. p 666 note 51 [a].

41. Ala.—Mobile Drug Co. v. McCullough, 112 So. 233, 215 Ala. 682.

42. Pa.—First Nat. Bank & Trust Co. v. Miller, 186 A. 87, 322 Pa. 473—Kefover v. Hustead, 144 A. 430, 294 Pa. 474—Ellinger v. Krach, 28 A.2d 453, 150 Pa.Super. 384, affirmed Simmons v. Simmons, 29 A.2d 677, 346 Pa. 52—Simmons v. Simmons, 28 A.2d 445, 150 Pa.Super. 393, affirmed 29 A.2d 677, 346 Pa. 52—First Nat. Bank v. Tomichek, 18 A.2d 126, 140 Pa.Super. 101—Freeman v. Jones, Com.Pl., 26 West.Co. 195.
Extending lien by revival of judgment see supra § 494.

Failure to name terre-tenant as party

Judgment creditor had five years from time of recording of terre-tenant's deed to revive as against terre-tenant, notwithstanding revival against judgment debtor failed to include terre-tenant whose deed was on record at time of such revival.—Farmers Nat. Bank & Trust Co. of Reading, to Use of Nolan, v. Barrett, 184 A. 128, 321 Pa. 273.

43. Pa.—First Nat. Bank & Trust Co. v. Miller, 186 A. 87, 322 Pa. 473—Everett Hardwood Lumber Co. v. Calhoun, 183 A. 659, 121 Pa. Super. 451.

44. U.S.—Bingham v. Fordson Coal Co., C.C.A.Ky., 26 F.2d 346.
La.—Brock v. Edwards, App., 159 So. 607.
34 C.J. p 666 note 52.

Causes held insufficient

(1) Seizure of property under scire facias did not suspend prescriptive period against judgment, statutory revival being exclusive.—McDaniel v. Smith, 127 So. 108, 13 La.App. 61.

(2) Order of referee in bankruptcy, which could not be construed as adjudication that judgment be paid, did not interrupt running of limitation statute.—Yerby v. Kerr, C.C.A. Tex., 143 F.2d 58.

(3) Fraudulent concealment of property and false representations made to judgment creditor by judgment debtor as to extent of his property, whereby judgment creditor failed to issue executions or to revive judgment, did not toll limitations on judgment, where no proceedings were had in aid of execution.—Thomas v. Murray, 49 P.2d 1080, 174 Okl. 36, 104 A.L.R. 209.

(4) Neither an appeal nor supersedeas bond filed on appeal tolled statute of limitations.—State v. Hart Refineries, 92 P.2d 766, 109 Mont. 140, 123 A.L.R. 555—34 C.J. p 666 note 52 [f].

Injunction

(1) It has been held that issuance of temporary injunction, preventing levy and sale under execution issued on dormant judgment, does not interrupt running of limitations on judgment.—Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.

(2) However, it has also been held that injunction against the enforcement of the judgment stays the running of the statute against it.—Hutsonpiller v. Stover, 12 Gratt. 579, 53 Va. 579—34 C.J. p 666 note 52 [d].

45. Pa.—Appeal of Lutz, 16 A. 858, 124 Pa. 273.
S.C.—Blohme v. Schmancke, 61 S.E. 1060, 81 S.C. 81.

46. Pa.—Appeal of Lutz, 16 A. 858, 124 Pa. 273.

47. Mo.—City of St. Louis v. Miller, App., 155 S.W.2d 565.
34 C.J. p 666 note 56.

Filing petition

(1) Where time limitation within which petition must have been filed had not expired on date of filing of petition but had expired before date of filing of motion made by plaintiff at subsequent term of court to amend writ of scire facias and for order directing perfection of personal service on defendant, court had jurisdiction to amend writ and order service perfected.—Stahle v. Jones, 3 S.E.2d 861, 60 Ga.App. 397.

(2) Where petition for writ of scire facias to revive judgment was filed and court order directing that the writ issue was obtained within limitation period, right to revival of judgment was not barred merely because of clerk's failure to issue writ within period.—City of St. Louis v. Miller, Mo.App., 155 S.W.2d 565—City of St. Louis v. Miller, 145 S. W.2d 504, 235 Mo.App. 987.

Suing out or issuance of writ

Where præcipe was filed with prothonotary who prepared writ and delivered it within five-year period to plaintiff's attorney, to procure service by acceptance, writ was "sued out" or "issued" within statute requiring scire facias to be "sued out" or "issued" within five years, although acceptance of service was

until after the expiration of the statutory period,[48] but in some jurisdictions the statutes expressly limit the time for making or rendering the order or judgment of revivor, as distinguished from the commencement of the proceedings.[49]

Death of party. In some states the death of a judgment defendant starts the running of a new period of limitations, and proceedings to revive the judgment must be brought within a limited time after that event,[50] at least where the revival is without the consent of the representatives of defendant.[51] In other states the death of the judgment defendant does not interrupt the statute, but the revival proceedings must be instituted within the period originally limited after the rendition of the judgment.[52] Under some statutes, the death of a judgment plaintiff introduces a new limitation period within which his representatives may revive a judgment without the consent of the judgment debtor.[53]

§ 543. Mode of Revival

The mode of revival of a judgment is sometimes provided for by statute, and generally revival must be accomplished by means of a judicial proceeding involving notice and an opportunity to be heard.

The mode of reviving a judgment is sometimes provided for by statute,[54] and in some jurisdictions it has been held that the prescribed methods are exclusive,[55] but in other jurisdictions the statutory procedure is merely cumulative and not mandatory or exclusive.[56] Informal methods of revival have

not returned until after five-year period.—Luzerne Nat. Bank v. Gosart, 185 A. 640, 322 Pa. 446.

48. Mo.—In re Jackman's Estate, 124 S.W.2d 1189, 344 Mo. 49.
34 C.J. p 666 note 56.

49. Okl.—Bartlett Mortgage Co. v. Morrison, 81 P.2d 318, 183 Okl. 214—Edward Thompson Co. v. Bristow, 244 P. 429, 116 Okl. 243.
34 C.J. p 666 note 55.

50. Va.—Cox v. Caskie, 82 S.E. 118, 116 Va. 388.
34 C.J. p 666 note 57.

In Pennsylvania

(1) Where judgment debtor, owner in fee of lot, died in 1936, and deed conveying lot was recorded in 1938, scire facias proceeding in 1943 to revive judgment against grantees as terre-tenants, brought more than seven years after death of judgment debtor but within five years of recording of deed, was too late, since, under Fiduciaries Act which was applicable and not act of 1849, lien was lost in 1941 from failure to revive it within five-year period of the debtor's death.—Frank Di Berardino Bldg. & Loan Ass'n v. De Gregoria, 45 A.2d 378, 158 Pa.Super. 516.

(2) Under statute providing that unless revived within five years from death of judgment debtor judgment should not constitute lien against real estate, judgment may be revived after five years from death of judgment debtor, although thereafter it will not constitute lien against real estate.—Shareff, to Use of Olney Bank & Trust Co. v. Wolf, 182 A. 115, 120 Pa.Super. 227.

51. Okl.—Jackson v. Scott, 173 P. 70, 70 Okl. 85.

52. Va.—Barley v. Duncan, 13 S.E.2d 294, 177 Va. 192.
34 C.J. p 667 note 59.

General statute inapplicable

General statute, providing for exclusion of period of one year from death of any party, from computation of time within which proceeding, to preserve any right or remedy, must be commenced, was held not to modify statute of limitations relative to the bringing of scire facias on a judgment.—Barley v. Duncan, 13 S.E.2d 293, 177 Va. 202—Barley v. Duncan, 13 S.E.2d 294, 177 Va. 192.

53. Okl.—Jersak v. Risen, 152 P.2d 374, 194 Okl. 423.

Appointment of executrix

Mere fact that special administrator of deceased plaintiff's estate could have been appointed and obtained revivor of dormant judgment within year after plaintiff's death was insufficient reason for holding invalid the revivor thereof within year after appointment of executrix of plaintiff's will.—Jersak v. Risen, supra.

54. Kan.—Bourman v. Bourman, 127 P.2d 464, 155 Kan. 602.
Okl.—Jersak v. Risen, 152 P.2d 374, 194 Okl. 423.

Reference to procedure

Statute providing that dormant judgments may be revived in same manner as is prescribed for reviving actions before judgment refers to procedure rather than to the substantive right of revivor.—Bourman v. Bourman, 127 P.2d 464, 155 Kan. 602.

Relief provided by common-law writ

Statute requiring revival of original judgment where execution sale is irregular and purchaser fails to obtain possession, judgment so revived to have same effect as would original judgment of date of revival, is intended to afford relief provided for by common-law writ of scire facias pertaining to revival of judgments.—Continental Nat. Bank & Trust Co. of Salt Lake City v. John H. Seely & Sons Co., 77 P.2d 355, 94 Utah 357, 115 A.L.R. 543.

55. Ala.—Gant v. Gilmer, 18 So.2d 542, 245 Ala. 686.
Kan.—Denny v. Ross, 79 P. 502, 70 Kan. 720.
Ohio.—Kline v. Falbo, 56 N.E.2d 701, 73 Ohio App. 417.
S.D.—McMahon v. Brown, 279 N.W. 538, 66 S.D. 134.
Tex.—White v. Stewart, Civ.App., 19 S.W.2d 795, error refused.

Other methods held ineffective

(1) Action for fraud and deceit.—Thomas v. Murray, 49 P.2d 1080, 174 Okl. 36, 104 A.L.R. 209.

(2) Issuing writs of execution.
Ga.—U-Driv-It System of Macon v. Lyles, 30 S.E.2d 111, 71 Ga. App. 70, followed in 30 S.E.2d 114, 71 Ga.App. 74.
La.—Park v. Markley, App., 17 So. 2d 459, rehearing denied 18 So.2d 73.
Tex.—Commerce Farm Credit Co. v. Ramp, Civ.App., 116 S.W.2d 1144, affirmed Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.

(3) Order granting leave to issue execution on judgment.—McMahon v. Brown, 279 N.W. 538, 66 S.D. 134.

(4) Filing judgment in court of another county.—Kline v. Falbo, 56 N.E.2d 701, 73 Ohio App. 417.

(5) Ex parte orders.—Park v. Markley, La.App., 17 So.2d 459, rehearing refused 18 So.2d 73.

(6) Statutory procedure for contesting claim against decedent's estate.—Gant v. Gilmer, 18 So.2d 542, 245 Ala. 686.

(7) Chancery decree declaring law judgments valid and payable by debtor's administrator, and establishing judgments as liens on debtor's estate.—Blair v. Rorer's Adm'r, 116 S.E. 767, 135 Va. 1, motion denied 43 S. Ct. 704, 262 U.S. 234, 67 L.Ed. 1206.

56. Okl.—Tucker v. Gautier, 164 P. 2d 613.

been permitted in some cases without reference to statute.[57]

Generally a revival of a judgment is deemed to be a judicial act, in the sense that it requires the action of the court in some form of proceeding involving notice to the adverse party and an opportunity to contest the application,[58] and a judgment cannot be revived by a mere parol promise to pay it.[59] The revival of a judgment by a written agreement of the parties properly filed and entered of record, as discussed infra § 548, is authorized by some statutes. Where requirements as to notice and opportunity to be heard are complied with, a revival may be brought about in a collateral action;[60] but a judgment will not be kept alive by supplementary proceedings thereon[61] or by the amendment of the judgment nunc pro tunc.[62]

Ordinarily relief by way of revivor may be awarded only on personal service,[63] although, under statute, it has been held that in reviving a judgment against a nonresident defendant the law is satisfied by service by publication,[64] and does not require, nor can the courts insist on, actual notice to local counsel.[65] A judgment of revival may be entered on default.[66]

It has been held that a proceeding to revive a money judgment is not a new suit, but is a part of the original action.[67]

§ 544. —— Action to Revive

In some jurisdictions a judgment may be revived by a formal action brought for that purpose.

In a number of jurisdictions a judgment may be revived by a formal suit or action brought for that purpose,[68] and such an action may be brought even where a summary method of revival has been provided by statute.[69] Some statutes providing a remedy by action of revivor have been held to supersede the remedy of scire facias[70] and to furnish the only permissible means of reviving a judgment.[71]

In an action to revive a judgment, it is sufficient and necessary that the proper persons are made parties,[72] that process is properly served,[73] and that

57. Kan.—Burris v. Reinhardt, 242 P. 142, 120 Kan. 32.

Action similar to revival lies against decedent's heirs to subject property formerly owned by decedent to payment of judgment against him. —Elliott v. San Benito Bank & Trust Co., Tex.Civ.App., 137 S.W.2d 1070.

58. Ill.—Industrial Nat. Bank of Chicago v. Altenberg, 64 N.E.2d 219, 327 Ill.App. 337.
N.M.—Bell v. Kyle, 274 P. 1068, 33 N.M. 656.
Tex.—Schluter v. Sell, Civ.App., 194 S.W.2d 125.
34 C.J. p 667 note 62.
Mode of revival of equity decrees see Equity § 621.

Mortgagee is not entitled to notice of proceedings to revive judgment against mortgagor.—Fox v. Seal, Pa., 22 Wall. 424, 22 L.Ed. 774.

59. Ill.—Ludwig v. Huck, 45 Ill. App., 651.

60. Kan.—Kothman v. Skaggs, 29 Kan. 5.
34 C.J. p 667 note 63.

61. N.D.—Merchants' Nat. Bank v. Braithwaite, 75 N.W. 244, 7 N.D. 358, 66 Am.S.R. 653.

62. Ala.—Allen v. Bradford, 3 Ala. 281, 37 Am.D. 689—State v. Ham, 69 So. 253, 13 Ala.App. 648.
34 C.J. p 667 note 65.

63. Iowa.—Mudge v. Livermore, 123 N.W. 199, 148 Iowa 472.

In rem proceeding
Statutory proceeding to revive dormant judgment is not one "in personam" and hence service of notice of proceeding to revive may be made outside the state.—Shefts v. Oklahoma Co., 137 P.2d 589, 192 Okl. 483.

64. Ohio.—Sears v. Weimer, 55 N.E. 2d 413, 143 Ohio St. 312.
34 C.J. p 667 note 67.

Personal service in original action
Revivor of judgment may be made on service by publication only where personal service originally was made on judgment debtor.—Sears v. Weimer, supra.

65. Kan.—Hartz v. Fitts, 132 P. 1137, 89 Kan. 751.

66. Pa.—Middleton v. Middleton, 106 Pa. 252.

67. La.—Jaubert Bros. v. Landry, App., 15 So.2d 158.

Defunct corporation
Proceeding to revive dormant judgment was not such a "new action" that right to maintain such proceeding would be affected by fact that functions of judgment creditor as a corporation had meantime lapsed. —Foster Screen Co. v. Brigel, Ohio App., 31 N.E.2d 699.

Scope of proceeding
Validity of assignment of dormant judgment could not be adjudicated in proceeding to revive it.—Baker Steel & Machinery Co. v. Ferguson, 290 N.W. 449, 137 Neb. 578, 131 A. L.R. 798.

68. N.M.—Bailey v. Great Western Oil Co., 259 P. 614, 32 N.M. 478, 55 A.L.R. 467.
34 C.J. p 667 note 71.

Nature of action
Action for revivor under statute is not new action, but proceeding in aid of execution on old judgment.—Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.

Cross action could be regarded as an action to revive dormant judgment.—Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84.

69. Neb.—Keith v. Bruder, 109 N. W. 172, 77 Neb. 215—Hayden v. Huff, 87 N.W. 184, 62 Neb. 375.

70. Idaho.—Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.
34 C.J. p 668 note 77.
Scire facias to revive judgments see infra § 548.

71. Idaho.—Tingwall v. King Hill Irr. Dist., 155 P.2d 605.
La.—Park v. Markley, App., 17 So. 2d 459, rehearing refused 18 So.2d 73.

72. Pa.—Szusta v. Krawiec, Com.Pl., 36 Luz.Leg.Reg. 183.
Utah.—Campbell v. Peter, 162 P.2d 754.
34 C.J. p 668 note 72.

Assignee of judgment obtained by assignee of note against maker was "real party in interest" entitled to maintain action to renew judgment, although payee of note testified that any money collected on judgment would belong to him.—Campbell v. Peter, supra.

Several defendants
In action for revivor, whole judgment must be revived in entirety against all the several defendants. —Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.

73. Iowa.—Mudge v. Livermore, 123 N.W. 199, 148 Iowa 472.
34 C.J. p 668 note 73.

the pleadings are sufficient.[74] The general rules concerning evidence in civil actions are to be observed.[75] Revivor in such an action may be based on the consent given in open court by counsel for defendant.[76] The judgment of revival should be in proper form.[77] Costs are not enforceable against defendant as a personal obligation where the judgment revived is one in rem.[78]

§ 545. —— Action of Debt

Revival of a judgment usually may be accomplished by an action of debt on the judgment.

An action of debt on a judgment is usually a proper form of proceeding effectually reviving the judgment,[79] even where a special remedy for the revival of judgments is provided by statute.[80] A judgment in such an action is not rendered void by the joinder[81] or nonjoinder[82] of unnecessary parties.

§ 546. —— Motion to Revive

In some jurisdictions the revival of a judgment may be ordered on motion, application, or affidavit, provided the judgment debtor, or person against whom revival is sought, is given due and sufficient notice of such motion or application and an opportunity to contest it.

In some,[83] but not all,[84] jurisdictions the revival of a judgment may be ordered on motion, application, or affidavit, provided the judgment debtor, or person against whom the revival is sought, is given due and sufficient notice of such a motion or application and an opportunity to contest it.[85] As a general rule this remedy is not a substitute for, but is

74. Ind.—Flynn v. Northam, 89 N.E. 326, 44 Ind.App. 333.
34 C.J. p 668 note 74.

Demurrer to affirmative defense sustained because of absence of material allegations.—Campbell v. Peter, Utah, 162 P.2d 754.

75. La.—Brock v. Edwards, App., 159 So. 607.
34 C.J. p 668 note 75.

Burden of proof
In a suit by assignee to revive dormant judgment, which was defended on ground that plaintiff agreed to pay it as part of consideration for conveyance of land to him, burden was on defendants to prove such defense.—Whitehead v. Weldon, Tex.Civ.App., 264 S.W. 958.

Evidence held admissible
La.—Brock v. Edwards, App., 159 So. 607.

Evidence held sufficient
Ill.—Layne v. Colegrove, 63 N.E.2d 530, 327 Ill.App. 204.

Variance between pleadings and proof held not shown.—Wilson v. Walters, 151 P.2d 685, 66 Cal.App.2d 1.

76. Tex.—Teel v. Brown, Civ.App., 185 S.W. 319.

77. Ill.—Bismarck Hotel Co. v. Tyrrell, 47 N.E.2d 544, 318 Ill.App. 230.

Omission of certain debtors
Where order of revivor contains no decretal language against certain judgment debtor, only inference which can be drawn from omission is that of payment and consequent presumption of discharge and release.—Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.

78. La.—Henry v. Roque, App., 18 So.2d 917.

79. Mo.—Excelsior Steel Furnace Co. v. Smith, App., 17 S.W.2d 378.
Tex.—Austin v. Conaway, Civ.App., 283 S.W. 189—Burge v. Broussard, Civ.App., 258 S.W. 502.
34 C.J. p 655 note 60, p 668 note 80—24 C.J. p 896 note 78 [c] (2).
Actions on judgments generally see infra § 849.

80. Idaho.—Bashor v. Beloit, 119 P. 55, 20 Idaho 592.
34 C.J. p 668 note 80.

81. Tex.—Burge v. Broussard, Civ. App., 258 S.W. 502.

82. Tex.—Burge v. Broussard, supra.

83. Okl.—Shefts v. Oklahoma Co., 137 P.2d 589, 192 Okl. 483.
34 C.J. p 668 note 81.

Partial revival
Where assignee is entitled to revival of unpaid judgment, it should be revived in its entirety.—Orchard & Wilhelm Co. v. Sexson, 229 N.W. 17, 119 Neb. 370, followed in Askew v. Sexson, 229 N.W. 19, 119 Neb. 369.

Remedy for void execution sale
Purpose of statute providing that, under stated circumstances, the court must, on motion, revive a judgment is to restore a creditor, whose judgment has been satisfied of record because of error of law which has deprived him of the property applied to its payment, to the position he occupied before void execution sale.—Betty v. Superior Court of Los Angeles County, 116 P.2d 947, 18 Cal.2d 619.

Simultaneous use of scire facias and motion for revival is unnecessary.—Cabler v. Anderson, 16 S.W.2d 179, 179 Ark. 364.

84. Tenn.—Fogg v. Gibbs, 8 Baxt. 464.
Wis.—Ingraham v. Champion, 54 N.W. 393, 84 Wis. 235.

85. Cal.—Thompson v. Cook, 127 P.2d 909, 20 Cal.2d 564.
Ky.—Baker v. Davis Adm'r, 299 S.W. 172, 221 Ky. 524.
Okl.—Richardson v. Barnhart, 162 P.2d 1021—Dunlap v. Bull Head Oil Co., 29 P.2d 108, 167 Okl. 277.
34 C.J. p 669 note 83.

Affidavit unnecessary
Notice of hearing of motion to revive a dormant judgment, served personally on judgment debtor in another state, was not void on ground that no affidavit to obtain such service was filed as in case of service by publication.—Richardson v. Barnhart, Okl., 162 P.2d 1021—Shefts v. Oklahoma Co., 137 P.2d 589, 192 Okl. 483.

Effect of appearance
A judgment debtor, who received notice of motion to revive dormant judgment two days before hearing, could not complain that he was not given a "reasonable time" where he appeared in person and asked no continuance.—Shefts v. Oklahoma Co., supra.

Form of notice
Notice for revival of judgment is not such "writ" or "process" as is required by constitution and statute to run in name of state.—Dunlap v. Bull Head Oil Co., 29 P.2d 108, 167 Okl. 277.

Irregular issuance of notice
(1) Where notice of application for revivor of judgment was signed and delivered to sheriff by attorney for judgment creditor instead of by a clerk of district court as required by statute, motion to quash service was improperly overruled, and judgment should not have been revived.—Klema v. Neuvert, 135 P.2d 557, 156 Kan. 633.

(2) Quashing of service of application to revive dormant judgment was not error, where notice was not issued by clerk as a summons would be issued and delivered to sheriff and served as prescribed by statute.—Smith v. Henry, 124 P.2d 448, 155 Kan. 283.

in addition to, an action on the judgment[86] or bill of revivor,[87] and has been regarded as a continuation of the original suit.[88] A motion to revive a judgment is to be distinguished from one to obtain leave to issue execution, as stated in Executions § 59 b (2) (a).

General rules of procedure on motions,[89] such as with respect to the determination of the application and issuance of orders thereon,[90] usually apply to motions to revive a judgment.

In a proceeding brought under a statute the statutory procedure should be strictly followed,[91] but minor irregularities will not affect the validity of the proceeding.[92]

Revival after death of debtor or creditor. It has been held that if revival is sought against the heirs of a deceased judgment debtor, plenary proceedings must be brought, and it is not permissible to proceed by motion or rule.[93] Under some statutes, however, on the death of the judgment creditor the judgment may be revived on motion.[94]

§ 547. —— Summons to Show Cause

Under some statutes revivor of judgment may be had by means of a proceeding commenced by a summons to show cause why the judgment should not be revived.

The proceeding prescribed by some statutes for reviving a judgment partakes both of the nature of a formal action and of a scire facias, since it is begun by a summons, but requires defendant to show cause why the judgment should not be revived or enforced, as the case may be.[95]

§ 548. —— Scire Facias

a. In general
b. When remedy lies
c. Necessity for, and requisites of, writ
d. Application and affidavit
e. Service and return
f. Amending and quashing or vacating writ
g. Parties
h. Pleading
i. Evidence
j. Trial
k. Judgment
l. Execution
m. Amicable scire facias

a. In General

In some jurisdictions, although not in others, a judgment may be revived by means of a writ of scire facias which is a judicial writ to aid in the recovery of a judgment debt, and the proceeding is most widely regarded as a continuation of the suit in which the judgment was obtained rather than as an original action.

At common law the remedy by scire facias was confined to judgments recovered in real actions.[96]

86. Mont.—Haupt v. Burton, 55 P. 110, 21 Mont. 572, 69 Am.S.R. 698. 34 C.J. p 669 note 84.

87. Neb.—Keith v. Brudder, 109 N. W. 172, 77 Neb. 215.

88. Tenn.—Williams v. Cantrell, 124 S.W.2d 29, 22 Tenn.App. 443.

89. Idaho.—Evans v. Humphrey, 5 P.2d 545, 51 Idaho 268.
34 C.J. p 668 note 81 [a], [b].

Filing

Failure to file affidavit and motion for revival of judgment was waived, in absence of seasonable objection.—Evans v. Humphrey, 5 P.2d 545, 51 Idaho 268.

90. Idaho.—Evans v. Humphrey, supra.
Okl.—Richardson v. Barnhart, 162 P. 2d 1021.

Evidence

(1) Evidence held admissible.—Casey v. Cooledge, 175 So. 557, 234 Ala. 499.

(2) Evidence held sufficient.—Holiday Oil Co. v. Fidelity & Deposit Co. of Maryland, 19 P.2d 335, 162 Okl. 192.

Appeal from ruling of clerk of court

Where the motion is properly before a judge on appeal from a refusal of clerk of court to revive the judgment, the judge may grant the motion, or may reverse and remand the case with directions.—Martin v. Briscoe, 55 S.E. 782, 143 N.C. 353.

Description of parties

Order of revival of judgment giving name of plaintiff in caption and defendants sufficiently described parties.—Evans v. Humphrey, 5 P.2d 545, 51 Idaho 268.

Service on attorney

Service of notice of revivor of judgment on attorney for party against whom revivor is sought is sufficient to give trial court jurisdiction.—Richardson v. Barnhart, Okl., 162 P.2d 1021.

91. Ariz.—Fay v. Harris, 164 P.2d 860.

Compliance held sufficient

Ariz.—Fay v. Harris, supra—McBride v. McDonald, 215 P. 166, 25 Ariz. 207.

92. Ariz.—Fay v. Harris, 164 P.2d 860.

Erroneous statement of balance due on judgment, easily corrected from data set forth in affidavit, and trifling error in computation of interest did not render affidavit insufficient.—Fay v. Harris, supra.

Failure to verify

An affidavit of renewal, subscribed and sworn to before proper notary, was sufficient, even though not confirmed in a separate affidavit, verified positively by the person making it. —McBride v. McDonald, 215 P. 166, 25 Ariz. 207.

93. Ind.—Faulkner v. Larrabee, 76 Ind. 154.
La.—Reynolds v. Horn, 4 La.Ann. 187.

94. Okl.—Holden v. Barringer, 144 P.2d 964, 193 Okl. 411.
34 C.J. p 668 note 81 [c], p 669 note 93.

Payment of tax on judgment

Motion to revive judgment in name of deceased judgment creditor's sole legatee is merely special statutory proceeding to give life to dormant judgment, and is not an "action or suit for the collection" of judgment within statute requiring prior payment of intangible taxes, and hence order of revivor prior to such payment was proper.—Holden v. Barringer, supra.

95. S.C.—Cheraw & C. R. Co. v. Marshall, 18 S.E. 247, 40 S.C. 59.
34 C.J. p 669 notes 94, 96.

96. Iowa.—Von Puhl v. Rucker, 6 Iowa 187.

The writ of scire facias was first permitted to revive a personal judgment by the Statute of Westminster II,[97] which authorized and required a scire facias in all cases where plaintiff desired to sue out an execution on his judgment after the expiration of a year and a day from its final recovery.[98] In many states the provisions of this statute have been adopted as a part of their common law, or incorporated in their statutes, so that the proper method of obtaining a revival is by a proceeding begun by the issue of a scire facias requiring defendant to show cause why the judgment should not be revived and its lien continued,[99] although, as discussed in Executions § 66, the new acts have generally extended the time within which execution may issue without revival by scire facias.

In some jurisdictions it has been held that scire facias is the only mode of reviving a judgment.[1] In other jurisdictions, however, the writ has been abolished by code or statute, either expressly[2] or impliedly, as by providing for one form of action and not authorizing scire facias.[3]

Nature and scope of proceeding. A scire facias to revive a judgment is a judicial,[4] but not an original,[5] writ. Although it is in the nature of an action because defendant may plead to it,[6] and has been held to come within the meaning of "action" in statutory provisions relating to actions,[7] and in some cases has been classified in substance as a new action,[8] it is more widely held that a proceeding by scire facias to revive a judgment is not an original proceeding, but a mere continuation of the former suit,[9] or, in other words, it is merely a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment.[10] It has been stated that in a scire facias proceeding to revive

Pa.—Stewart v. Peterson, 68 Pa. 230.

Scire facias:
- Nature of writ generally see the C.J.S. title Scire Facias § 3, also 56 C.J. p 867 note 10–p 869 note 33.
- To enforce:
  - Alimony decree see Divorce § 271.
  - Judgments generally see infra § 588.
- To obtain leave to issue execution see Executions § 59 b.

Deceased judgment debtor

At common law judgment became unenforceable by execution on death of judgment debtor, but judgment could be revived by scire facias directed to heirs and enforced against realty owned by judgment debtor at time of his death.—Coats v. Veedersburg State Bank, 38 N.E.2d 243, 219 Ind. 675.

97. U.S.—Spurway v. Dyer, D.C.Fla., 48 F.Supp. 255.
34 C.J. p 655 note 60, p 669 note 99.

98. U.S.—Spurway v. Dyer, supra.
Del.—First Nat. Bank v. Crook, 174 A. 369, 6 W.W.Harr. 281.
34 C.J. p 669 note 1.

99. U.S.—Spurway v. Dyer, D.C.Fla., 48 F.Supp. 255.
Pa.—Wilcox v. Du Bree, 8 Pa.Dist. & Co. 591.
Utah.—Continental Nat. Bank & Trust Co. of Salt Lake City v. John H. Seely & Sons, 77 P.2d 355, 94 Utah 357, 115 A.L.R. 543.
34 C.J. p 669 note 2.

Statute held applicable to judgments on tax and municipal claims

Pa.—Petition of Miller, 28 A.2d 257, 149 Pa.Super. 142.

1. Mo.—Bick v. Dixon, 129 S.W. 254, 148 Mo. 703—Armstrong v. Crooks, 83 Mo.App. 141.

2. Idaho.—Bashor v. Beloit, 119 P. 55, 20 Idaho 592.

3. N.M.—De Baca v. Wilcox, 68 P. 922, 11 N.M. 346.
34 C.J. p 670 note 6.

4. Md.—Brooks v. Preston, 68 A. 294, 106 Md. 693.
34 C.J. p 670 note 7.

5. Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41.
Utah.—Continental Nat. Bank & Trust Co. of Salt Lake City v. John H. Seely & Sons Co., 77 P.2d 355, 94 Utah 357, 115 A.L.R. 543
34 C.J. p 670 note 8.

6. D.C.—McMullen v. Waters, 295 F. 1008, 54 App.D.C. 187.
34 C.J. p 670 note 9.

7. U.S.—Browne v. Chavez, N.M., 21 S.Ct. 514, 181 U.S. 68, 45 L.Ed. 752.
34 C.J. p 670 note 10.

8. Mass.—Perkins v. Bangs, 92 N.E. 623, 206 Mass. 408.
34 C.J. p 670 note 11.

9. Ala.—Quill v. Carolina Portland Cement Co., 124 So. 305, 220 Ala. 134.
Fla.—B. A. Lott, Inc., v. Padgett, 14 So.2d 667, 153 Fla. 304—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
Ga.—Fielding v. M. Rich & Bros. Co., 169 S.E. 333, 46 Ga.App. 785.
Mo.—State ex rel. Buder v. Hughes, 166 S.W.2d 516, 350 Mo. 547—In re Jackman's Estate, 124 S.W.2d 1189, 344 Mo. 49—City of St. Louis v. Miller, 145 S.W.2d 504, 235 Mo. App. 987.
Pa.—Harr v. Deeter, 31 Pa.Dist. & Co. 702, 5 Sch.Reg. 205—Bell v. Borys, Com.Pl., 44 Lack.Jur. 44, 56 York Leg.Rec. 202.
Utah.—Continental Nat. Bank & Trust Co. of Salt Lake City v. John H. Seely & Sons Co., 77 P. 2d 355, 94 Utah 357, 115 A.L.R. 543.
Va.—American Ry. Express Co. v. F. S. Royster Guano Co., 126 S.E. 678, 141 Va. 602, affirmed 47 S.Ct. 355, 273 U.S. 274, 71 L.Ed. 642.
34 C.J. p 670 note 12.

Where scire facias is used after death of defendant in judgment to charge person not party to judgment with payment of it by execution to be issued thereon, scire facias, although it usually partakes of the nature of an action, is continuation of proceeding already begun, and is in nature of rule to show cause why execution should not issue.—First Nat. Bank v. Crook, 174 A. 369, 6 W. W.Harr., Del., 281.

10. Ala.—Quill v. Carolina Portland Cement Co., 124 So. 305, 220 Ala. 134.
Ill.—Bank of Edwardsville v. Raffaelle, 45 N.E.2d 651, 381 Ill. 486, 144 A.L.R. 401.
Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41.
Utah.—Continental Nat. Bank & Trust Co. of Salt Lake City v. John H. Seely & Sons Co., 77 P.2d 355, 94 Utah 357, 115 A.L.R. 543.
34 C.J. p 671 note 13.

Similar statements

(1) Scire facias is a writ for revival of a judgment which has come to enjoy the dignity of a lien on realty so that execution may issue on revived judgment.—Spurway v. Dyer, D.C.Fla., 48 F.Supp. 255.

(2) Scire facias is only a step in the original cause of a remedial nature to effectuate the lien already in existence.—B. A. Lott, Inc., v. Padgett, 14 So.2d 667, 153 Fla. 304.

a judgment the only question to be determined is whether or not plaintiff has a right, as against defendant, to have the judgment executed.[11]

b. When Remedy Lies

The remedy of scire facias lies to revive dormant judgments and may be pursued even though there is a present right to issue execution on the judgment or there is available another means of rendering the judgment effective.

The remedy of scire facias to revive a judgment lies where the judgment has become dormant,[12] as for failure to issue execution within the time specified by statute.[13] The judgment creditor may pursue the remedy, however, even though he has a present and immediate right to issue execution on the judgment,[14] and in some jurisdictions,[15] although not in others,[16] it may be resorted to although an execution has already been issued, provided it has not resulted in full satisfaction of the judgment. When an execution has issued under which property of defendant has been levied on, and there is not sufficient to discharge the debt, a scire facias issued afterward should be special quoad residuum.[17]

A judgment against one who dies subsequent to its rendition may be revived against his personal representative by scire facias,[18] and it has been held that this is the only mode in which the judgment may be enforced against the estate.[19]

The remedy by scire facias is not rendered unavailable by the existence of other remedies or means of making the judgment effective,[20] but may be pursued concurrently with them,[21] although, as discussed supra § 544, some statutes providing for revivor of judgment by action have been held to supersede the proceeding by scire facias. In the few jurisdictions where, as discussed infra subdivision k (1) of this section, a judgment of revival is deemed to be a new judgment, and where, as further discussed infra § 549, such new judgment bars recovery on the original judgment, each successive writ of scire facias must be founded on the judgment which immediately preceded it.[22] In other jurisdictions it has been held that a judgment of revivor cannot be revived by scire facias.[23]

A scire facias has been held not to lie to revive a judgment which has been fully satisfied as to principal, for the purpose of aiding in the collection of interest claimed to be due.[24] A scire facias against the heirs and terre-tenants of the judgment debtor will not reach property never owned by the latter, but inherited by his children after his death from a third person.[25] It has also been held that judgments entered by confession under a warrant of attorney cannot be revived by scire facias.[26]

Consolidation of judgments. In a proceeding by scire facias several judgments may be consolidated, where all of them are for the use of plaintiff, although some of them were obtained in the names of other persons,[27] or where the judgments are all against the same defendant, although one of them is also against another person.[28]

11. Ill.—Smith v. Stevens, 24 N.E. 511, 133 Ill. 183—Blakeslee's Storage Warehouses v. City of Chicago, 11 N.E.2d 42, 292 Ill.App. 288, affirmed 17 N.E.2d 1, 369 Ill. 480, 120 A.L.R. 715.
Pa.—Bell v. Yontos, 46 Pa.Dist. & Co. 636, 44 Lack.Jur. 83, 57 York Leg. Rec. 53—Cameron v. Wallace, 24 Pa.Dist. & Co. 42, 44 Lanc.L.Rev. 597, 49 York Leg.Rec. 78.
Error in classifying judgment in probate court cannot be corrected in proceedings against heirs of judgment debtor to revive judgment.—Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo.App. 137.

12. Fla.—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
Ga.—Fielding v. M. Rich & Bros. Co., 169 S.E. 383, 46 Ga.App. 785.

13. U.S.—Spurway v. Dyer, D.C.Fla., 48 F.Supp. 255.

14. U.S.—Brown v. Chesapeake & Ohio Canal Co., C.C.Md., 4 F. 770, 4 Hughes 584.
34 C.J. p 671 note 14.
Correction of record
Where, from examination of record, plaintiff's right to execution seems to be extinguished, but in fact it is not, plaintiff may, by scire facias, bring defendant before court, and, on proper showing, have entry on record vacated or made to conform to the facts, and obtain execution on original judgment.—Continental Nat. Bank & Trust Co. of Salt Lake City v. John H. Seely & Sons Co., 77 P.2d 355, 94 Utah 357, 115 A.L.R. 543.

15. Ark.—Trapnall v. Richardson, 13 Ark. 543, 58 Am.D. 338.
34 C.J. p 671 note 15.

16. Miss.—Buckner v. Pipes, 56 Miss. 366—Locke v. Brady, 30 Miss. 21.

17. N.J.—Stille v. Wood, 1 N.J.Law 139.

18. Ark.—Brearly v. Peay, 23 Ark. 172.
24 C.J. p 895 note 66.
Personal representative as proper or necessary party see infra subdivision g (2) of this section.

19. Tenn.—Gwin v. Latimer, 4 Yerg. 22.
24 C.J. p 895 note 67.

20. Ill.—First Nat. Bank of Chicago v. Craig, 31 N.E.2d 810, 308 Ill.App. 377.

21. U.S.—Lafayette County v. Wonderly, Mo., 92 F. 313, 34 C.C.A. 360.
34 C.J. p 671 note 19.

22. Pa.—Custer v. Detterer, 3 Watts & S. 28—Collingwood v. Carson, 2 Watts & S. 220—Calhoon v. Newlon, 40 Pa.Dist. & Co. 123.

23. Mo.—Gregory Grocery Co. v. Link, 25 S.W.2d 575, 224 Mo.App. 407.

24. Ill.—Blakeslee's Storage Warehouses v. City of Chicago, 11 N.E. 2d 42, 292 Ill.App. 288, affirmed 17 N.E.2d 1, 369 Ill. 480, 120 A.L.R. 715.

25. Md.—Adams v. Stake, 10 A. 444, 67 Md. 447.

26. Pa.—Jones v. Dillworth, 63 Pa. 447.

27. Pa.—Appeal of Reed, 7 Pa. 65.

28. Pa.—Appeal of Yeager, 18 A. 137, 129 Pa. 268.

c. Necessity for, and Requisites of, Writ

(1) In general

(2) Recital and identification of original judgment

(1) In General

In a scire facias proceeding, it is essential to the revival of the judgment that a writ be issued setting forth all the facts on which the right of revivor depends, and calling on the defendant to show cause why execution should not be issued against him; but irregularities not going to the jurisdiction will be waived if an objection is not seasonably made. An alias or pluries scire facias may issue in a proper case.

In a proceeding by scire facias to revive a judgment the issuance of a writ of scire facias is essential to the validity of the judgment of revival.[29] As discussed infra subdivision h (1) of this section, the writ takes the place and performs the office of a declaration. Although it has been held that the same particularity is not required in the writ as in stating a cause of action in the original complaint,[30] it is well settled that the writ should set forth, at least in substance, any fact on which plaintiff's right to have his judgment revived depends.[31] Accordingly it should show the legal title of plaintiff to have execution on the judgment,[32] and name or correctly describe the parties to be charged,[33] the court from which it issues and to which it is returnable,[34] and, as discussed infra subdivision c (2) of this section, the judgment on which it is founded.

The writ must also state the purpose for which it is issued, or the demand against which defendant is required to show cause,[35] and the amount for which it is issued,[36] and should, in conclusion, call on defendant to show cause why execution should not issue against him.[37] On the other hand, the writ need not aver the performance of all things essential to the validity of the judgment,[38] or negative matters of defense,[39] or allege that execution had not been issued within a year and a day or the statutory period, if any, substituted therefor.[40]

Death of defendant and survivorship. A scire facias against one of the three defendants in a judgment, which does not aver the death of the others and the survivorship of the one pursued, is bad on demurrer.[41] A scire facias against an executor to revive a judgment against the testator should contain a suggestion of the death of the judgment debtor,[42] and also show the appointment of defendant as his executor.[43] A scire facias against the administrator of a joint debtor who survived the other debtors should aver the survivorship.[44]

Where heirs or terre-tenants involved. It has been held that the terre-tenants ought to be named, and, if all are not named in the writ, it may be pleaded in abatement,[45] but it has also been held that a scire facias against terre-tenants may be either general against all the terre-tenants, or against certain named parties as terre-tenants, and although it is necessary that all be summoned, it is not necessary that they be named in the scire facias.[46] It has also been held that a scire facias which issues against the heirs and devisees of one deceased and does not name them, but only describes them, is not bad on that account.[47] In the case of heirs or terre-tenants the writ should specifically describe the lands sought to be charged,[48]

29. Mo.—Longlett v. Eisenberg, 10 S.W.2d 317, 222 Mo.App. 805—Armstrong v. Crooks, 83 Mo.App. 141.
Pa.—Brooks v. Caruthers' Estate, Com.Pl., 23 West.Co. 138.

30. Tex.—Delaune v. Beaumont Irr. Co., Civ.App., 136 S.W. 518.

31. Pa.—Andrews v. Sullenberger, Com.Pl., 25 West.Co. 93.
Va.—American Ry. Express Co. v. F. S. Royster Guano Co., 126 S.E. 678, 141 Va. 602, affirmed 47 S.Ct. 355, 273 U.S. 274, 71 L.Ed. 642—White v. Palmer, 66 S.E. 44, 110 Va. 490.
34 C.J. p 672 note 33.

Nonpayment
Ill.—Jacobs v. Lucas, 270 Ill.App. 123.

32. Ill.—Smith v. Stevens, 24 N.E. 511, 133 Ill. 183.
34 C.J. p 672 note 34.

Capacity of use-plaintiff
Where, on scire facias to revive judgment, it appeared that one of defendants paid judgment and took assignment in name of another, who was use-plaintiff, fact that use-plaintiff did not appear as trustee was immaterial, where it was admitted that he was merely agent or trustee of defendant who paid judgment.—City Nat. Bank of Wichita Falls, Tex., now for Use of Newhams v. Atkinson, 175 A. 507, 316 Pa. 526.

33. Miss.—Pickett v. Pickett, 2 Miss. 267.
Tenn.—Dougherty v. Hurt, 6 Humphr. 430.

34. Ark.—Anthony v. Humphries, 9 Ark. 176.

35. Pa.—In re Cake, 40 A. 568, 186 Pa. 412.
34 C.J. p 672 note 41.

36. Md.—McKnew v. Duvall, 45 Md. 501.
34 C.J. p 672 note 42.

37. Ind.—Davidson v. Alvord, 8 Ind. 1.
34 C.J. p 672 note 43.

38. Miss.—Commercial Bank v. Kendall, 21 Miss. 278.
34 C.J. p 672 note 38.

39. D.C.—Starkweather v. West End Nat. Bank, 21 App.D.C. 281.
34 C.J. p 672 note 39.

40. Ill.—Albin v. People, 46 Ill. 372.
Ohio.—Weaver v. Reese, 6 Ohio 418.

41. Ind.—Graham v. Smith, 1 Blackf. 414.

42. Ind.—Walker v. Hood, 5 Blackf. 266.
34 C.J. p 672 note 45.

43. Ind.—Walker v. Hood, supra.
34 C.J. p 673 note 46.

44. Ind.—Graham v. Smith, 1 Blackf. 414.

45. Md.—Thomas v. Farmers' Bank of Maryland, 46 Md. 43.

46. Miss.—Hughes v. Wilkinson, 28 Miss. 600.

47. Tenn.—Seawell v. Williams, 5 Hayw. 280.
34 C.J. p 673 note 50.

48. Md.—Lang v. Wilmer, 101 A. 706, 131 Md. 215, 2 A.L.R. 1698.
34 C.J. p 673 note 51.

and show when the terre-tenant's title to the land vested[49] or that the heir is in possession of lands of which his ancestor died seized,[50] but it need not allege proceedings taken ineffectually against the personal representatives.[51] Where heirs are only liable jointly with the personal representative, unless the ancestor has been dead a year without the appointment of such representative, a failure to allege that a year has passed without such appointment renders a writ, brought against the heirs alone, fatally defective on demurrer.[52]

Informalities in the writ or irregularities not going to the jurisdiction may be cured by the statute of jeofails,[53] or, in the absence of seasonable objection, will be deemed to be waived.[54] They cannot be taken advantage of by a stranger to the judgment.[55]

Alias and pluries writs. An alias or pluries scire facias may issue where service of the first writ was not effected,[56] where it was served on some of the joint defendants and returned not served as to the others,[57] or where plaintiff desires to proceed against an additional party, such as terre-tenant,[58] executor,[59] or administrator.[60] An alias or pluries scire facias may also issue where plaintiff is nonsuited on the first scire facias.[61]

(2) Recital and Identification of Original Judgment

A writ of scire facias should completely and correctly describe the judgment sought to be revived; but only a material variance in the description will render the writ vulnerable to a plea of nul tiel record.

As a general rule it is necessary that the scire facias shall correctly set forth and describe the original judgment on which it is founded,[62] and this requirement is applicable to an amicable scire facias as well as to other scire facias to revive a judgment.[63] Thus the judgment must be described with respect to the amount of the recovery,[64] the date of the judgment,[65] the parties plaintiff and defendant,[66] and the court in which it was entered;[67] but it is sufficient that the original judgment is substantially described[68] with such certainty that defendant must know what judgment is meant.[69]

A mere immaterial variance or irregularity in the description of the judgment, which does not tend to mislead, will not avoid the scire facias;[70] but where the variance between the original judgment and the writ is material it will be fatal on a plea of nul tiel record[71] and will break the continuity of the lien.[72]

d. Application and Affidavit

Application for a writ of scire facias, although generally unnecessary, is not improper, and may be required after the lapse of a designated period of time from the rendition of the judgment.

While generally the writ of scire facias may issue without any application to the court,[73] it is entirely proper that a petition, motion, præcipe, or other ap-

49. Md.—Warfield v. Brewer, 4 Gill 265.
50. S.C.—Whiting v. Pritchard, 30 S. C.L. 304.
51. Va.—Rogers v. Denham, 2 Gratt. 200, 43 Va. 200.
52. Ky.—Huey v. Redden, 3 Dana 488.
53. Miss.—Locke v. Brady, 30 Miss. 21.
34 C.J. p 673 note 56.
54. Pa.—Pyles v. Bosler, 22 Pa.Dist. & Co. 10.
34 C.J. p 673 note 56.
55. Pa.—In re Dougherty, 9 Watts & S. 189, 42 Am.D. 326.
34 C.J. p 673 note 57.
56. Ga.—Ellis v. McCrary, 183 S.E. 823, 52 Ga.App. 583.
34 C.J. p 674 note 69.
57. U.S.—Baker v. French, D. C., 2 F.Cas.No.767, 2 Cranch C.C. 539.
34 C.J. p 674 note 70.
58. Pa.—Simmons v. Simmons, 28 A.2d 445, 150 Pa.Super. 393, affirmed 29 A.2d 677, 346 Pa. 52.
34 C.J. p 674 note 72.
59. N.C.—Borden v. Thorpe, 35 N.C. 298.
34 C.J. p 674 note 73 [a] (1).
60. Pa.—Eby v. Patton, 18 Pa.Dist. 52.
34 C.J. p 674 note 73 [a] (2).
61. N.C.—Trice v. Turrentine, 35 N. C. 212.
62. Okl.—Noyes v. French, 94 P. 546, 20 Okl. 515.
34 C.J. p 673 note 59.
63. Pa.—Appeal of Worman, 20 A. 415, 110 Pa. 25.
34 C.J. p 673 note 59 [a].
Amicable scire facias generally see infra subdivision m of this section.
64. Pa.—Swank v. Dickson, Com.Pl., 9 Som.Co. 72.
Va.—American Ry. Express Co. v. F. S. Royster Guano Co., 126 S.E. 678, 141 Va. 602, affirmed 47 S.Ct. 355, 273 U.S. 274, 71 L.Ed. 642.
34 C.J. p 673 note 60.
65. Ark.—Bolinger v. Fowler, 14 Ark. 27.
Pa.—Swank v. Dickson, Com.Pl., 9 Som.Co. 72.
Va.—American Ry. Express Co. v. F. S. Royster Guano Co., 126 S.E. 678, 141 Va. 602, affirmed 47 S.Ct. 355, 273 U.S. 274, 71 L.Ed. 642.
66. Pa.—Swank v. Dickson, Com.Pl., 9 Som.Co. 72.
Va.—American Ry. Express Co. v. F. S. Royster Guano Co., 126 S.E. 678, 141 Va. 602, affirmed 47 S.Ct. 355, 273 U.S. 274, 71 L.Ed. 642.
34 C.J. p 673 note 62.
67. Ky.—Coleman v. Edwards, 4 Bibb 347.
34 C.J. p 673 note 63.
68. Pa.—Landon v. Brown, 28 A. 921, 160 Pa. 538.
34 C.J. p 673 note 64.
69. Mo.—Andrews v. Buckbee, 77 Mo. 428.
34 C.J. p 673 note 65.
70. Pa.—Landon v. Brown, 28 A. 921, 160 Pa. 538.
34 C.J. p 673 note 66.
71. Md.—Moore v. Garrettson, 6 Md. 444.
34 C.J. p 674 note 67.
Variance between writ and præcipe
Pa.—Klein v. Anderson, 39 Pa.Dist. & Co. 139.
72. Pa.—In re Dougherty, 9 Watts & S. 189, 42 Am.D. 326.
73. Mo.—City of St. Louis v. Miller, 145 S.W.2d 504, 235 Mo.App. 937—Longett v. Eisenberg, 10 S.W.2d 317, 222 Mo.App. 805.
34 C.J. p 674 note 81.

plication should be filed,[74] and, in some jurisdictions, the writ cannot issue to revive a judgment after the lapse of a designated time from its rendition except on leave of court first obtained on a motion or other application supported by an affidavit that the judgment remains in force and unsatisfied.[75] Where the allegations of the affidavit are sufficient to repel the presumption of payment arising from lapse of time, the scire facias may be ordered as a matter of right,[76] although it has been held that, after the lapse of twenty years, defendant must have notice of the motion and affidavit,[77] and the court may exercise its discretion, and allow or refuse the motion, as may seem proper in the case.[78] Although an affidavit is required, an objection on the ground of its omission[79] or that the affidavit is defective[80] should be made in limine, or it will be held to have been waived.

e. Service and Return

As a general rule, there can be no valid judgment on a scire facias to revive a judgment unless the writ was served on the persons sought to be bound by the revived judgment.

As a general rule there can be no valid judgment on a scire facias to revive a judgment unless the writ was served on defendants[81] and on heirs, terre-tenants, or other persons sought to be bound.[82] If defendant is within the jurisdiction, the service must be personal,[83] and after the manner of serving a writ of summons,[84] but constructive service may be sufficient where defendant cannot be found.[85] Where the judgment to be revived is against two defendants jointly, the scire facias must be served on both.[86] Defendant may waive a defect or failure in the service of process by conduct which indicates submission to the court's jurisdiction.[87]

Service on nonresidents. Where, as discussed supra subdivision a of this section, the proceeding by scire facias for reviving a personal judgment is treated as merely a continuance of the original suit, jurisdiction duly obtained in the original suit over the person of defendant will endure for the revival of the judgment,[88] and if defendant is a nonresident the service may be constructive.[89] If, however, the scire facias to revive a judgment is treated as a new action for debt on the judgment and there is no appearance by the judgment debtor and he resides in another state, service on him in such other state does not give the court jurisdiction to render a judgment of revivor,[90] even though the revival is sought in a court in the state in which the judgment was rendered at a time when the defend-

74. Mo.—City of St. Louis v. Miller, 145 S.W.2d 504, 235 Mo.App. 987.
34 C.J. p 675 note 82.
Applications held sufficient
(1) Generally.
U.S.—Brooks v. Caruthers, D.C.Pa., 25 F.Supp. 413.
Ill.—Hemphill v. Trgovic, 60 N.E.2d 121, 325 Ill.App. 310.
34 C.J. p 675 note 82 [a].
(2) Petition held sufficient despite failure to set out original judgment in hæc verba or to allege date of entry of forfeiture of defunct corporate defendant's right to do business.—Simmons v. Zimmerman Land & Irrigation Co., Tex.Civ.App., 292 S.W. 973.

75. Tenn.—Keith v. Metcalf, 2 Swan 74.
34 C.J. p 675 note 83.

76. Tenn.—Keith v. Metcalf, supra.

77. Tenn.—Keith v. Metcalf, supra.

78. Tenn.—Keith v. Metcalf, supra.

79. Tenn.—Fogg v. Gibbs, 8 Baxt. 464.
34 C.J. p 675 note 87.

80. Ill.—Hemphill v. Trgovic, 60 N.E.2d 121, 325 Ill.App. 310.
34 C.J. p 675 note 87.

81. Ill.—First Nat. Bank of Chicago v. Craig, 31 N.E.2d 810, 308 Ill.App. 377.
Pa.—Szusta v. Krawiec, Com.Pl., 36 Luz.Leg.Reg. 183.
34 C.J. p 675 note 88.
"Defendant," as used in statute, refers to the defendant in the original suit against whom the judgment was rendered.—State ex rel. Buder v. Hughes, 166 S.W.2d 516, 350 Mo. 547.
Time of service
Some statutes prescribe that service of the writ be made a specified number of days prior to the commencement of the term of court during which the writ is returnable.—Fielding v. M. Rich & Bros. Co., 169 S.E. 383, 46 Ga.App. 785.

82. Mo.—State ex rel. Buder v. Hughes, 166 S.W.2d 516, 350 Mo. 547.
Pa.—Klein v. Anderson, 39 Pa.Dist. & Co. 139.
34 C.J. p 675 note 89.
A purchaser of timber rights from judgment debtor was not a terre-tenant and hence was not entitled to service on revival of judgment in scire facias proceeding.—Havens v. Pearson, 6 A.2d 84, 334 Pa. 570, 122 A.L.R. 512.
The purchaser of deed of trust on property against which benefits were assessed in condemnation proceeding was not owner of title to property, and failure to serve purchaser with writ of scire facias to revive judgment assessing benefits did not render service defective.—City of St. Louis v. Koch, Mo.App., 156 S.W.2d 1.

83. Ga.—Stahle v. Jones, 3 S.E.2d 861, 60 Ga.App. 397—Fielding v. M. Rich & Bros. Co., 169 S.E. 383, 46 Ga.App. 785.
Ill.—U. S. Brewing Co. of Chicago v. Epp, 247 Ill.App. 315.
34 C.J. p 675 note 90.
Service held accepted by defendant
Pa.—Luzerne Nat. Bank v. Gosart, 185 A. 640, 322 Pa. 446.

84. Mo.—Andrews v. Buckbee, 77 Mo. 428.
34 C.J. p 675 note 91.

85. Ark.—Waldstein v. Williams, 142 S.W. 834, 101 Ark. 404, 37 L.R.A.,N.S., 1162.
34 C.J. p 675 note 99.

86. D.C.—Lyon v. Ford, 20 D.C. 530.

87. Ill.—Albers v. Martin, 45 N.E.2d 102, 316 Ill.App. 446—U. S. Brewing Co. of Chicago v. Epp, 247 Ill. App. 315.

88. Tex.—Collin County Nat. Bank v. Hughes, 220 S.W. 767, 110 Tex. 362.

89. Ill.—Bank of Edwardsville v. Raffaelle, 45 N.E.2d 651, 381 Ill. 486, 144 A.L.R. 401.
34 C.J. p 675 note 99.

90. Tex.—Collin County Nat. Bank v. Hughes, 220 S.W. 767, 110 Tex. 362.

ant was resident therein,[91] and it is immaterial that the court which rendered the judgment and in which the revival is sought was a federal court.[92] A revival of a judgment for purposes of execution by scire facias without service of the scire facias on, or appearance by, defendant, who was outside the state, cannot operate to remove the statutory bar of the law of another state, in which he resides, and in which the action on the judgment is brought.[93]

Return of service. The officer's return should set forth correctly the facts of the service,[94] but may be aided by reasonable intendments.[95] In a proper case the return may be corrected or amended.[96]

f. Amending and Quashing or Vacating Writ

A writ of scire facias for the purpose of reviving a judgment may be amended for the purpose of correcting irregularities, but amendments which will deprive an adverse party of some substantial right will not be allowed. An insufficient writ may be quashed.

A writ of scire facias for the purpose of reviving a judgment may be amended as in the case of other such writs, and its amendment is governed by similar rules.[97] Amendments are not permitted, however, which prejudice the opposite party or deprive him of some substantial right,[98] such as the defense afforded by a statute of limitations.[99] The writ may be amended with respect to informalities or irregularities[1] or to make it conform to the record of the judgment,[2] but not as against parties not served with the writ.[3] An amendment alleging that a judgment which was not dormant at the time the scire facias was sued out has become dormant pending the scire facias will not prevent the dismissal of the scire facias.[4]

Quashing or vacating writ. The writ of scire facias may be quashed on motion for failure to state a legal cause of action;[5] for want of the supporting affidavit of nonpayment of the judgment,[6] when that is required by law, as discussed supra subdivision d of this section; for disability or defect of parties;[7] or, under statute, where it was issued against a person in military service.[8] While the merits of plaintiff's claim will not be decided on a motion to quash the writ on jurisdictional grounds,[9] if a scire facias has been improperly issued and a judgment rendered thereon, it is still competent for the court to review both on motion.[10]

g. Parties

(1) Parties plaintiff
(2) Parties defendant

(1) Parties Plaintiff

Generally the plaintiff named in the original judgment, or his legal representative or successor, should be the plaintiff in a scire facias proceeding to revive the judgment; but, where statutes authorize assignees or real parties in interest to sue, an assignee of a judgment may institute the proceeding in his own name.

As a general rule, plaintiff in a proceeding by scire facias to revive a judgment should be the same person who was plaintiff in the original judg-

91. Tex.—Collin County Nat. Bank v. Hughes, supra.

92. Tex.—Collin County Nat. Bank v. Hughes, supra.

93. U.S.—Owens v. McCloskey, La., 16 S.Ct. 693, 161 U.S. 642, 40 L.Ed. 837.
Ga.—Frank v. Wolf, 87 S.E. 697, 17 Ga.App. 468.

94. Pa.—Chahoon v. Hollenback, 16 Serg. & R. 425, 16 Am.D. 587.
34 C.J. p 675 note 94.

95. Tex.—Polnac v. State, 80 S.W. 381, 46 Tex.Cr. 70.
All presumptions are in favor of the sheriff's return on the writ of scire facias.—O'Neill & Co. v. Schulze, 7 A.2d 263, 177 Md. 64.

96. U.S.—Mandeville v. McDonald, D.C., 16 F.Cas.No.9,013, 3 Cranch C. C. 631.
Md.—Berry v. Griffith, 2 Harr. & G. 337, 18 Am.D. 309.

97. Pa.—Salberg v. Duffee, 21 Pa. Dist. & Co. 144.
34 C.J. p 674 note 76.
Amendment of scire facias generally see the C.J.S. title Scire Facias § 9, also 56 C.J. p 873 notes 14–31.
Amendment as to time of return
Where it appears that service of the original writ was not perfected, it is amendable in order to make it returnable to a subsequent term.—Stahle v. Jones, 3 S.E.2d 861, 60 Ga.App. 397—Fielding v. M. Rich & Bros. Co., 169 S.E. 383, 46 Ga.App. 785.

98. Pa.—First Nat. Bank v. Tomichek, 13 A.2d 126, 140 Pa.Super. 101.

99. D.C.—Lyon v. Ford, 20 D.C. 530.
Pa.—First Nat. Bank v. Tomichek, 13 A.2d 126, 140 Pa.Super. 101.

1. Md.—Garey v. Sangston, 20 A. 1034, 64 Md. 31.
34 C.J. p 674 note 77.

2. Pa.—Salberg v. Duffee, 21 Pa. Dist. & Co. 144—Miners Nat. Bank v. Butler, Com.Pl., 37 Luz.Leg.Reg. 314.
34 C.J. p 674 note 78.

3. D.C.—Lyon v. Ford, 20 D.C. 530.

4. Ga.—Shepherd v. Ryan, 53 Ga. 563.

5. Va.—Evans v. Freeland, 3 Munf. 119, 17 Va. 119.
34 C.J. p 683 note 43.

6. N.Y.—Lansing v. Lyons, 9 Johns. 84.
N.C.—Hinton v. Oliver, 19 N.C. 519.

7. Pa.—McCabe v. U. S., 4 Watts 325.
34 C.J. p 683 note 46.

8. Pa.—Moyer v. McNulty, 22 Pa.Co. 153.

9. U.S.—Brooks v. Caruthers, D.C. Pa., 25 F.Supp. 413.

10. Miss.—Locke v. Brady, 30 Miss. 21.
34 C.J. p 683 note 48.
Granting appropriate relief
On petition to strike scire facias from record on ground that proceeding had not been commenced within five years from death of judgment debtor, court had inherent power to order that revival should not create lien against real estate although petitioner did not so pray.—Shareff, to Use of Olney Bank & Trust Co. v. Wolf, 182 A. 115, 120 Pa.Super. 227.

ment[11] or his legal representative.[12] Where one of a firm of partners has died after the rendition of a judgment in favor of the firm, scire facias to revive the judgment is properly brought by the surviving partner and not by the surviving partner and the personal representative of the deceased partner.[13] A judgment rendered in favor of a public trustee may be revived by scire facias in the name of his successor when appointed.[14] Where the disability of coverture exists, the husband must join with the wife although she recovered judgment before the marriage.[15]

After assignment of judgment. Where a statute provides that assignees may bring actions in their own names, assignees of a judgment may sue out scire facias for its revival.[16] In those code states where scire facias to revive a judgment is still in use, it seems that the assignee may sue out the writ in his own name under the code provision as to the maintenance of actions by the real party in interest.[17] In the absence of such statutory authorization, scire facias to revive an assigned judgment should be prosecuted in the name of the assignor.[18]

(2) Parties Defendant

(a) In general

(b) Joint defendants

(a) In General

Persons who are not parties to the judgment and who are not beneficially interested in the property involved are not necessary parties to a scire facias to revive the judgment.

Persons who are not parties to the judgment and who are without beneficial interest in the property involved need not be made parties defendant to a scire facias to revive the judgment;[19] but persons whose interests may be adversely affected by the proceedings are necessary parties.[20]

Death of judgment debtor. Where the judgment debtor dies, and it is sought by the proceeding to reach personalty only, it is generally held proper to bring scire facias against the executor or administrator alone, without joining the heirs or devisees.[21] Where real property only is involved, it is proper in some jurisdictions to bring scire facias against the heirs or devisees and terre-tenants alone, without joining the executor or administrator.[22] In other jurisdictions the scire facias is properly brought against the personal representatives alone, notwithstanding the judgment binds only land, and the heirs, devisees and terre-tenants are not necessary parties,[23] although they may be proper parties;[24] but according to some authority, if it is sought to revive a personal judgment against the land of the deceased debtor, the heirs and terre-tenants must be joined with the personal representative.[25] In a few jurisdictions it has been broadly held that it is not

11. Pa.—McKinney v. Mehaffey, 7 Watts & S. 276.
34 C.J. p 676 note 6.
Persons who may revive generally see supra § 537.

12. Ala.—Birmingham Ry., Light & Power Co. v. Cunningham, 37 So. 689, 141 Ala. 470.
34 C.J. p 676 note 7.

13. Ill.—Linn v. Downing, 74 N.E. 729, 216 Ill. 64.

14. Miss.—Mathews v. Mosby, 21 Miss. 422.

15. N.Y.—Johnson v. Parmely, 17 Johns. 271.
34 C.J. p 676 note 10.

16. Mo.—Reyburn v. Handlan, 147 S.W. 846, 165 Mo.App. 412.
34 C.J. p 676 note 11.

Sufficiency of record

Record was sufficient to show that assignee of judgment was actual bona fide owner of judgment when assignee commenced scire facias proceeding to revive the judgment.—Molner v. Arendt, 55 N.E.2d 407, 323 Ill.App. 289.

In Missouri

(1) After the death of an assignor of a judgment a scire facias to revive may not be maintained in his name to the use of the assignee, under the statutes.—Goddard v. Delaney, 80 S.W. 886, 181 Mo. 564.

(2) However, the personal representatives of the assignee suing in the name of the assignor may be deemed the "parties" plaintiff and their capacity to sue and their interest in the subject matter of the action challenged in the same manner as that of other plaintiffs.—Beattie Mfg. Co. v. Gerardi, Mo., 214 S.W. 189.

17. U.S.—Wonderly v. Lafayette County, C.C.Mo., 74 F. 702.
Tex.—Henry v. Red Water Lumber Co., 102 S.W. 749, 46 Tex.Civ.App., 179.

18. W.Va.—Wells v. Graham, 20 S.E. 576, 39 W.Va. 605.
34 C.J. p 643 note 3, p 676 note 13.

19. Mo.—City of St. Louis v. Koch, App., 156 S.W.2d 1.
34 C.J. p 676 note 15.
Persons against whom judgment may be revived generally see supra § 538.

20. D.C.—McMullen v. Waters, 295 F. 1008, 54 App.D.C. 187.

Innocent purchaser

Before real estate, subject to judgment lien, which has passed into ownership and possession of innocent purchaser, can be subjected to execution issued in scire facias proceeding, purchaser must have been made party to that proceeding.—McMullen v. Waters, supra.

21. Mo.—Mobley v. Wade, 178 S.W. 504, 192 Mo.App. 26—Stewart v. Gibson, 71 Mo.App. 232.
Death of one of several joint tenants see infra subdivision g (2) (b) of this section.

22. U.S.—Walden v. Craig, Ky., 14 Pet. 147, 10 L.Ed. 393.
34 C.J. p 677 note 16.

23. Del.—First Nat. Bank v. Crook, 174 A. 389, 6 W.W.Harr. 281.
34 C.J. p 677 note 18.

24. Del.—First Nat. Bank v. Crook, supra.

25. Md.—Lang v. Wilmer, 101 A. 706, 131 Md. 215, 2 A.L.R. 1698.
34 C.J. p 677 note 19.

Under the English practice where a judgment had been entered in a personal action against a single defendant who had died before execution issued, the scire facias was first issued against the executor or administrator of deceased defendant, and, where it was sought to subject

permissible to join personal representatives and heirs as parties defendant to a scire facias to revive a judgment,[26] while in other jurisdictions the personal representative, heirs, and terre-tenants may and should all be joined in the action, where their respective interests are involved.[27]

Terre-tenants. It has frequently been held that, in order to revive the lien of a judgment as against land which is in the possession of a terre-tenant, he must be made a party to the scire facias.[28] According to other decisions, however, where a judgment is revived by scire facias against the original defendant, it is not necessary to include as parties terre-tenants or persons of similar status;[29] but where the original defendant is dead the terre-tenant must be made a party to the scire facias to revive,[30] although it has also been held that he need not be made a party even in the latter case.[31]

Within the meaning of the foregoing rules a terre-tenant is one who has an estate in the land, coupled with the actual possession, which he derived mediately or immediately from the judgment debtor while the land was bound by the lien.[32]

(b) Joint Defendants

A scire facias to revive a joint judgment must be brought against all of the joint defendants who are alive, and, except as otherwise provided by statute, where one joint defendant is dead the writ should be brought against the surviving defendants and the heirs or presonal representatives of the deceased.

A scire facias to revive a judgment against two or more defendants must go against them all, if living,[33] at least where the judgment is joint,[34] although it has been held that, where the judgment is joint and several, plaintiff may elect as to which of the defendants he will have it revived.[35] Except in some jurisdictions,[36] and except where one judgment debtor has been discharged from further liability on the judgment,[37] plaintiff cannot drop one defendant and proceed against the others,[38] and if he discontinues his scire facias as to any of the parties it operates as a discontinuance of the whole proceeding.[39] If plaintiff desires to revive a judgment against one or more defendants without joining all, his remedy is by an action of debt on the judgment, not a scire facias.[40] Where a judgment was rendered against a femme sole who later married, it has been held that the writ of scire facias must be sued out against both husband and wife.[41]

After death of one defendant. The common-law rule that if one joint defendant had died the writ should be against the survivors and the heirs or personal representatives of deceased[42] still prevails in many jurisdictions,[43] but under some statutes scire

lands to execution process, although the scire facias also issued against heirs and terre-tenants of deceased defendant, it could not issue against them until after a return of nihil against personal representative of deceased defendant.—First Nat. Bank v. Crook, 174 A. 369, 6 W.W. Harr., Del., 281.

26. Miss.—Barnes v. McLemore, 20 Miss. 316.
N.Y.—Strong v. Lee, 44 How.Pr. 60, affirmed 2 Thomps. & C. 441.

27. Ill.—Reynolds v. Henderson, 7 Ill. 110.
34 C.J. p 677 note 21.

28. D.C.—McMullen v. Waters, 295 F. 1008, 54 App.D.C. 187.
Pa.—First Nat. Bank & Trust Co. v. Miller, 136 A. 87, 322 Pa. 473—Simmons v. Simmons, 28 A.2d 445, 150 Pa.Super. 393, affirmed 29 A.2d 677, 346 Pa. 52.
34 C.J. p 678 note 39.
Extending lien of judgment by revival generally see supra § 494.

Fraudulent grantee is not necessary party
N.C.—Lee v. Eure, 93 N.C. 5.
Pa.—Lyon v. Cleveland, 33 A. 143, 170 Pa. 611, 50 Am.S.R. 782, 30 L.R.A. 466—Raub Supply Co. v. Brandt, Com.Pl., 27 Del.Co. 507.

29. Fla.—B. A. Lott, Inc., v. Padgett, 14 So.2d 667, 153 Fla. 804.
34 C.J. p 678 note 40.

30. Iowa.—Von Puhl v. Rucker, 6 Iowa 187.
34 C.J. p 679 note 41.

31. Ky.—Griffith v. Wilson, 1 J.J. Marsh. 209.
34 C.J. p 679 note 42.

32. Tenn.—Carney v. Carney, 200 S.W. 517, 138 Tenn. 647.
34 C.J. p 679 note 43—62 C.J. p 737 notes 34, 36–38.
"Terre-tenant" defined generally see Estates § 1 c.

33. Colo.—Allen v. Patterson, 194 P. 934, 69 Colo. 302.
34 C.J. p 677 note 24.

34. D.C.—Lyon v. Ford, 20 D.C. 530.
34 C.J. p 677 note 25.

35. N.C.—Patterson v. Walton, 26 S.E. 43, 119 N.C. 500.

36. Ala.—Hanson v. Jacks, 22 Ala. 549.
Ind.—Davidson v. Alvord, 3 Ind. 1.

37. Mo.—Long v. Thormond, 83 Mo. App. 227.

38. Ark.—Greer v. State Bank, 10 Ark. 455.
34 C.J. p 677 note 30.
Judgment of revival against part of defendants see infra subdivision k (1) of this section.

39. D.C.—Crumbaugh v. Otterback, 20 D.C. 434.
34 C.J. p 678 note 31.

40. Colo.—Allen v. Patterson, 194 P. 934, 69 Colo. 302.
34 C.J. p 678 note 32.

41. Ind.—Campbell v. Baldwin, 6 Blackf. 364.
Mass.—Haines v. Corliss, 4 Mass. 659.

42. U.S.—U. S. v. Houston, D.C.Kan., 48 F. 207.
34 C.J. p 678 note 34.

Revival of realty judgment
Under old English practice, where plaintiff sought to subject decedent's real estate to execution process, scire facias issued against surviving defendant and heirs and terre-tenants of deceased defendant, surviving defendant was required to show cause why his personal property and half of his real estate should not be subjected to execution process, and heirs and terre-tenants were required to show cause why half of deceased's land should not be subjected thereto; but deceased defendant's personal representative was not proper party.—First Nat. Bank v. Crook, 174 A. 369, 6 W.W.Harr. Del., 281.

43. Tex.—Rowland v. Harris, Civ. App., 34 S.W. 295.
34 C.J. p 676 note 35.

facias may be brought against either the surviving judgment debtors or the personal representatives of the deceased judgment debtor alone.[44]

h. Pleading

(1) In general

(2) Issues, proof, and variance

(1) In General

Since a writ of scire facias serves as both summons and declaration, the filing of a petition is unnecessary; the defendant should demur to the writ or plead matters of defense available to him.

A scire facias performs the double function of a summons and a pleading;[45] the writ takes the place and performs the office of a declaration,[46] and therefore it is not necessary for plaintiff to file with it a declaration or petition or rule defendant to plead,[47] although it is entirely proper that a petition should be filed, as is discussed supra subdivision d of this section. A good plea or answer on the part of defendant must be met by a proper replication,[48] but an insufficient answer is vulnerable to plaintiff's demurrer.[49]

Defendant's pleading. As is discussed supra subdivision a of this section, a scire facias to revive a judgment is an action in the sense that defendant may plead to the writ; and he may and should demur[50] or plead all matters of defense that he has,[51] as in an ordinary suit.[52] The plea to a writ of scire facias, sued out to revive a judgment, is to the writ, and not to the petition, if any, filed therewith.[53]

In some states an affidavit of defense is required in a proceeding of this character.[54] Such affidavit should contain a complete statement of material allegations sufficient to constitute a valid defense;[55]

Persons to be joined with survivor

On death of one of two joint defendants in a judgment binding land, scire facias was properly brought against surviving defendant in the judgment and personal representative of deceased defendant, and, while deceased defendant's heir might also have been made a defendant in such proceeding, she was not a necessary party; where executor or administrator of such deceased defendant was sole party defendant, his duty was to notify heirs or devisees or terre-tenants claiming under him of proceedings, and they, on application, should be permitted to appear and defend.—First Nat. Bank v. Crook, 174 A. 369, 6 W.W.Harr. Del., 281.

Insolvency of deceased's estate

In scire facias to revive alleged dormant judgment against all defendants except one, who had died, and whose estate was insolvent, court did not err in overruling demurrer to petition because it did not seek judgment as against all defendants, especially where judgment was not dormant as to deceased defendant.—Rogers v. Jordan, 132 S.E. 233, 35 Ga.App. 131.

Husband and wife

Where judgment was against husband and wife for her antenuptial debt, on death of husband scire facias might be issued against his executor.—Burton v. Rodney, 5 Del. 441.

44. Va.—Greathouse v. Morrison, 70 S.E. 710, 68 W.Va. 714.

45. Ill.—Van Horne v. Harford, 280 Ill.App. 576.
Mo.—City of St. Louis v. Miller, 145 S.W.2d 504, 235 Mo.App. 987.
34 C.J. p 679 notes 44, 45.

46. Mo.—City of St. Louis v. Miller, supra.
34 C.J. p 679 note 45.
Contents of writ see supra subdivision c of this section.

47. Tex.—Simmons v. Zimmerman Land & Irrigation Co., Civ.App., 292 S.W. 973.
34 C.J. p 679 note 46.

48. Ark.—Humphries v. Anthony, 12 Ark. 136.
34 C.J. p 679 note 48.

Replication held properly stricken

Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41.

49. Ga.—McRae v. Boykin, App., 35 S.E.2d 548, certiorari denied 66 S. Ct. 1024.

50. Pa.—Bell v. Borys, 45 Pa.Dist. & Co. 197—Bell v. Borys, Com.Pl., 44 Lack.Jur. 44, 56 York Leg.Rec. 202.
34 C.J. p 679 note 51.
Motion to quash see supra subdivision f of this section.

51. D.C.—McMullen v. Waters, 295 F. 1003, 54 App.D.C. 187.
Pa.—Bell v. Yontos, 46 Pa.Dist. & Co. 636, 44 Lack.Jur. 83, 57 York Leg.Rec. 53—Harr v. Deeter, 31 Pa. Dist. & Co. 702, 5 Sch.Reg. 205—Miners Nat. Bank of Wilkes-Barre v. Dukas, Com.Pl., 32 Luz.Leg.Reg. 229.
34 C.J. p 679 note 52.
Defenses to revival proceedings generally see supra § 540.

Answer held insufficient

(1) Generally.—Marsh v. Bowen, 6 A.2d 783, 335 Pa. 314.

(2) Statement in certificate of original trial judge to bill of exceptions cannot be corrected by way of answer to scire facias proceeding to revive dormant judgment.—McRae v. Boykin, Ga.App., 35 S.E.2d 548, certiorari denied 66 S.Ct. 1024.

52. Ark.—Ward v. Sturdivant, 132 S. W. 204, 96 Ark. 434.

53. Mo.—Glidden-Felt Mfg. Co. v. Robinson, 143 S.W. 1111, 163 Mo. App. 488.

54. Pa.—Cusano v. Rubolino, 39 A. 2d 906, 351 Pa. 41—Stanton v. Humphreys, Com.Pl., 27 Del. 594—First Nat. Bank of Scranton v. Brown, Com.Pl., 45 Lack.Jur. 267—Miners Nat. Bank v. Butler, Com. Pl., 37 Luz.Leg.Reg. 314.
34 C.J. p 679 note 55.

Terre-tenants

(1) In scire facias to revive a judgment, judgment may be entered against terre-tenant as against defendant for want of a sufficient affidavit of defense.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41.

(2) However, some inferior court decisions apparently have held that it is not necessary for a terre-tenant to file an affidavit of defense to prevent judgment being rendered against lands held by him.—Salberg v. Duffee, 21 Pa.Dist. & Co. 144—Bell v. Yontos, 46 Pa.Dist. & Co. 636, 44 Lack.Jur. 83, 57 York Leg.Rec. 53—Harr v. Deeter, 31 Pa.Dist. & Co. 702, 5 Sch.Reg. 205.

(3) Affidavit of defense admitting conveyance to defendants of interest in the real estate of original defendant after date of original judgment showed that defendants were terre-tenants.—Adelson v. Kocher, 36 A.2d 737, 154 Pa.Super. 548.

55. Pa.—O'Connor v. Flick, 118 A. 431, 274 Pa. 521—Howells v. Howells, 26 Pa.Dist. & Co. 423, 34 Pittsb.Leg.J. 170, 35 Sch.L.R. 163, 2 Sch.Reg. 229—Bank of Wesleyville v. Wagner, Com.Pl., 21 Erie Co. 175—First Nat. Bank of Scran-

but the insertion of matter raising only questions of law is erroneous.[56]

As discussed supra § 540, proper forms of the general issue are nul tiel record and payment; and, as considered supra § 542, the statute of limitations may also be pleaded in defense.

(2) Issues, Proof, and Variance

Under the plea of nul tiel record, which questions the existence and validity of the judgment, the only proof permitted is that afforded by an inspection of the record, while the plea of payment confines proof to matters concerning the satisfaction, release, or discharge of the judgment.

While the plea of nul tiel record is said to raise but one question, namely, whether there is such a record of the judgment as that set out in the writ,[57] and this question is to be determined on an inspection and examination of the record[58] without the aid of evidence aliunde,[59] yet it has also been held that under this plea defendant may show the judgment to be void for want of jurisdiction, where this is manifest from an inspection of the record,[60] and may take advantage of a failure to describe the judgment properly, or of a wrong statement as to the court in which it was rendered;[61] but mere errors or irregularities cannot be taken advantage of under this plea.[62]

Where the liability of terre-tenants is involved, under the strict construction given some statutes nothing may be tried except the questions whether the land was bound by the judgment, and, if at one time the land had been bound, whether the lien had been lost;[63] the question of adverse title may not be introduced at the trial.[64]

Plea of payment. Under the plea of payment the evidence must be confined to matters going in satisfaction, release, or discharge of the judgment.[65] Under such a plea defendant may prove any form of satisfaction or release of the judgment,[66] as well as an accord and satisfaction;[67] he may show a prior agreement as to the mode of discharging the judgment,[68] or an agreement to cancel it on an event which has since occurred[69] or to restrict its lien,[70] but not a mere voluntary promise on the part of plaintiff to forbear enforcing the judgment.[71]

i. Evidence

On a scire facias satisfactory proof may and should be offered concerning the existence and validity of the original judgment, and the liability of heirs or terre-tenants; payment or release may be shown by competent evidence.

On a scire facias proof of the original judgment is proper and necessary;[72] but, where this proof is made, the judgment will be sustained, with respect to its regularity and validity, by the ordi-

ton v. Brown, Com.Pl., 45 Lack. Jur. 267.
34 C.J. p 679 note 55 [b].

Affidavits held sufficient
Ill.—Jacobs v. Lucas, 270 Ill.App. 123.
Pa.—Masters v. Masters, Com.Pl., 27 West.Co.L.J. 107.

Affidavits held insufficient
Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41—O'Connor v. Flick, 118 A. 431, 274 Pa. 521—Brusko v. Olshefski, 13 A.2d 916, 140 Pa.Super. 485—Miller Bros. v. Keenan, 90 Pa.Super. 470—Security-Peoples Trust Co. v. Polaszewski, Com.Pl., 27 Erie Co. 20—McMahon v. Pietro, Com.Pl., 42 Lack.Jur. 162—Jacobson v. McCormick, Com.Pl., 38 Luz. Leg.Reg. 355—Miners Nat. Bank of Wilkes-Barre v. Dukas, Com.Pl., 32 Luz.Leg.Reg. 229—Sausage Mfg. Co. v. Rometo, Com.Pl., 86 Pittsb. Leg.J. 105—Uhlinger v. Burin, Com.Pl., 22 West.Co.L.J. 146.

56. Pa.—Cusano v. Rubolino, 39 A. 2d 906, 351 Pa. 41—Meyers v. Stern, 54 Pa.Dist. & Co. 657.

57. Ill.—Waterbury Nat. Bank v. Reed, 83 N.E. 138, 231 Ill. 246.
34 C.J. p 680 note 60.

58. Md.—Hager v. Cochran, 7 A. 462, 66 Md. 253.
34 C.J. p 680 note 61.

Determination by court see infra subdivision j of this section.

Sufficiency of record
Judgment was properly revived, as against plea of nul tiel record, on evidence consisting of excerpts from judge's common-law docket and law record showing existence of judgment, notwithstanding judgment docket contained no record of judgment.—Van Horne v. Harford, 6 N.E. 2d 887, 289 Ill.App. 121.

59. U.S.—King v. Davis, C.C.Va., 137 F. 198, affirmed 157 F. 676, 85 C.C.A. 348.
34 C.J. p 680 note 62.

60. Del.—Frankel v. Satterfield, 19 A. 893, 14 Del. 201.
34 C.J. p 680 note 63.

Joint liability
Under contention in affidavit of merits that original court had no jurisdiction to enter judgment that was several, defendant was permitted to show that power or warrant of attorney under which judgment was confessed was joint, while the judgment entered pursuant to it was several.—Dulsky v. Lerner, 223 Ill.App. 228.

61. Ala.—Barrow v. Pagles, 6 Ala. 462.
34 C.J. p 680 note 64.

62. Pa.—Barber v. Chandler, 17 Pa. 48, 55 Am.D. 533.
34 C.J. p 680 note 65.

63. Pa.—South Central Building & Loan Ass'n v. Milani, 150 A. 586, 300 Pa. 250.

64. Pa.—South Central Building & Loan Ass'n v. Milani, supra.

65. N.J.—Earle v. Earle, 20 N.J.Law 347.
34 C.J. p 680 note 66.

66. Pa.—Smith v. Coray, 46 A. 855, 196 Pa. 602.
34 C.J. p 680 note 67.

67. Md.—McCullough v. Franklin Coal Co., 21 Md. 256.
Pa.—Steltzer v. Steltzer, 10 Pa.Super. 310.

68. Md.—Downey v. Forrester, 35 Md. 117.

69. Pa.—Hartzell v. Reiss, 1 Binn. 289.

70. Pa.—Sankey v. Reed, 12 Pa. 95.

71. Pa.—Codding v. Wood, 3 A. 455, 112 Pa. 371—Ladd v. Church, 6 Phila. 591.

72. Ga.—Hagins v. Blitch, 65 S.E. 1082, 6 Ga.App. 839.
34 C.J. p 680 note 73.

nary presumptions,[73] and the revival ordinarily will be ordered unless good cause to the contrary is shown.[74] However, as against heirs it is error to render judgment without proof that they inherited assets.[75] Also the establishment of the liability of a party as a terre-tenant requires proof of facts outside the record,[76] such as his acquisition of title to the land after the rendition of the judgment and while the judgment was a lien on it,[77] and such a party may show a release or restriction of the lien of the judgment.[78] Payment or release may be shown by any competent evidence,[79] and to disprove a plea of payment a sheriff's return on an execution showing satisfaction in full may be contradicted.[80]

The court will take into consideration a presumption of payment which, in some states, arises merely after the lapse of a certain number of years,[81] and in others after the passage of a period, prescribed by statute, without the issuance of an execution.[82] The judgment creditor has the burden of overcoming such presumption,[83] and the judgment debtor may introduce competent evidence to meet the judgment creditor's attempt to rebut the presumption.[84]

j. Trial

The question raised by a plea of nul tiel record is tried by the court whereas the plea of payment entitles the parties to a jury trial.

The question raised by a plea of nul tiel record is to be determined by the court;[85] and, as considered supra subdivision h (2) of this section, the decision is made on the basis of what is ascertained from an inspection and examination of the record. Defendant is not entitled to a jury trial under his plea of nul tiel record,[86] but the plea of payment raises a question of fact which ordinarily must be submitted to the jury.[87] The court may withhold determination of a motion for judgment for want of a sufficient defense until adjudication of defendant's rule to open the judgment sought to be revived.[88] In a proper case, the court may direct a verdict[89] or set aside a verdict returned by the jury.[90]

k. Judgment

(1) In general
(2) By confession or default
(3) Amending, opening, or vacating judgment

(1) In General

Ordinarily the judgment on scire facias is that the original judgment be revived and that the plaintiff have execution thereof, although in some jurisdictions a new judgment is rendered for the amount due.

Ordinarily, on determining the issues in a scire facias proceeding to revive a judgment, the court may and should enter final judgment,[91] but if the

73. Mo.—Glidden-Felt Mfg. Co. v. Robinson, 143 S.W. 1111, 163 Mo. App. 488.
34 C.J. p 680 note 74.
74. Pa.—In re Miller, 90 A. 77, 243 Pa. 328.
34 C.J. p 680 note 75.
75. Tex.—Schmidtke v. Miller, 8 S. W. 638, 71 Tex. 103.
76. Pa.—Kinports v. Kinports, 1 Pa. Co. 610—Miners Nat. Bank of Wilkes-Barre v. Dukas, Com.Pl., 32 Luz.Leg.Reg. 229.
77. Pa.—Kinports v. Boynton, 14 A. 135, 120 Pa. 306, 6 Am.S.R. 706.
34 C.J. p 680 note 78.
78. Pa.—Silverthorn v. Townsend, 37 Pa. 263—Sankey v. Reed, 12 Pa. 95.
79. Pa.—McKee v. Russell, 112 A. 151, 269 Pa. 45—Barnhardt v. Herring, 54 Pa.Dist. & Co. 526.
34 C.J. p 680 note 80.
80. Mich.—McRoberts v. Lyon, 44 N.W. 160, 79 Mich. 25.
81. Pa.—First Nat. Bank v. Bank of Pittsburg, 99 Pa.Super. 600—Coleman & Stahl v. Weimer, 86 Pa.Super. 303—Coleman & Stahl v. Weimer, 83 Pa.Super. 252.
Presumption of payment of judgments generally see infra § 559.
82. Ala.—Quill v. Carolina Portland Cement Co., 124 So. 305, 220 Ala. 134.
83. Ala.—Quill v. Carolina Portland Cement Co., supra.
Degree of proof for rebuttal
Presumption of payment of judgment unclaimed for twenty years must be overcome by clear and satisfactory proof in scire facias sur judgment to collect it.—First Nat. Bank v. Bank of Pittsburgh, 99 Pa. Super. 600—Coleman & Stahl v. Weimer, 86 Pa.Super. 303—Coleman & Stahl v. Weimer, 83 Pa.Super. 252.
84. Pa.—Coleman & Stahl v. Weimer, 86 Pa.Super. 303.
85. Ill.—Waterbury Nat. Bank v. Reed, 83 N.E. 138, 231 Ill. 246.
34 C.J. p 680 note 82.
86. Ill.—Eau Claire Bank v. Reed, 83 N.E. 820, 232 Ill. 238, 122 Am. S.R. 66.
87. Pa.—Rosenthal v. Crimlisk, 84 Pa.Super. 426—Coleman & Stahl v. Weimer, 83 Pa.Super. 252—Calvey Motor Co. v. Brogan, Com.Pl., 33 Luz.Leg.Reg. 333.
34 C.J. p 680 note 85.
Agreement of parties
Whether rights of judgment creditor depended on alleged oral agreement that judgment should remain of record as security for judgment debtor's obligation or on understanding of parties at time judgment was revived by prior amicable scire facias was for jury.—Security Trust Co. of Pottstown v. Stapp, 1 A.2d 236, 332 Pa. 9.
Evidence sufficient for jury
Pa.—Brady v. Tarr, 21 A.2d 131, 145 Pa.Super. 316.
88. Pa.—Mifflin Motor Co. v. Peffer, 18 Pa.Dist. & Co. 66.
89. Ga.—Rogers v. Jordan, 132 S.E. 233, 35 Ga.App. 131.
90. Pa.—Wilson v. Wilson, 20 A. 644, 137 Pa. 269.
Judgment non obstante veredicto was justified where evidence of agreement to release lien of judgment was so indefinite that it would be pure conjecture to state that an agreement had been reached.—Everett Hardwood Lumber Co. v. Calhoun, 183 A. 659, 121 Pa.Super. 451.
Verdict held supported by evidence
Pa.—Brady v. Tarr, 21 A.2d 131, 145 Pa.Super. 316.
91. Fla.—McCallum v. Gornto, 174 So. 24, 127 Fla. 792.
Pa.—Brooks v. Caruthers' Estate, Com.Pl., 23 West.Co.L.J. 138.

judgment on which the scire facias was issued is a nullity no final judgment may be based thereon and the proceeding should be dismissed.[92]

Since in most jurisdictions a scire facias to revive a judgment is only the continuation of an action, as discussed supra subdivision a of this section, and the object and effect of the judgment on the scire facias are to revive the judgment as it formerly existed and to reinvest it with the same attributes and conditions which originally belonged to it, as considered infra § 549, the proper form of judgment, in such jurisdictions, is that the original judgment be revived[93] and that plaintiff have execution thereof,[94] with costs in both the original action and the proceeding to revive.[95] In many jurisdictions it is improper to render a new judgment for recovery of a specific sum;[96] nor is plaintiff entitled to damages for delay in execution;[97] but, where the judgment contains the proper statements, additional words adding nothing to its effectiveness may be treated as surplusage.[98] In a few states, however, the practice is to enter a new judgment, quod recuperet, for the amount then due, including the principal and accrued interest on the original judgment.[99]

In order to be valid, the judgment on scire facias must closely follow the original judgment,[1] particularly as to the names and descriptions of the parties,[2] unless, by reason of an assignment of the judgment[3] or the death of one of the parties,[4] the parties to the scire facias differ from those to the original judgment, it being necessary that the judgment contain proper restrictions or limitations when given against other persons than the original defendant, as heirs or terre-tenants.[5] The entire judgment, and not merely a part thereof, must be revived.[6]

Where scire facias remains merely a judicial writ, by reason of its not having been converted into an action by appearance and plea of defendant, a fail-

Quashing or vacating writ generally see supra subdivision f of this section.

Objection as to time of entry held waived

Ill.—Albers v. Martin, 45 N.E.2d 102, 316 Ill.App. 446.

92. U.S.—U. S. v. Ewing, D.C.Miss., 19 F.2d 378.

93. Md.—Ruth v. Durendo, 170 A. 582, 166 Md. 83.
34 C.J. p 680 note 90.

94. U.S.—Brown v. Chesapeake & O. Canal Co., C.C.Md., 4 F. 770, 4 Hughes 584.
D.C.—McMullen v. Waters, 295 F. 1008, 54 App.D.C. 187.
Fla.—McCallum v. Gornto, 174 So. 24, 127 Fla. 792—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
34 C.J. p 681 note 91.

95. U.S.—Brown v. Chesapeake & O. Canal Co., C.C.Md., 4 F. 770, 4 Hughes 584.
Fla.—McCallum v. Gornto, 174 So. 24, 127 Fla. 792—Massey v. Pineapple Orange Co., 100 So. 170, 87 Fla. 374.
34 C.J. p 681 note 92.

96. Ill.—Eau Claire Bank v. Reed, 83 N.E. 820, 232 Ill. 238, 122 Am. S.R. 66.
34 C.J. p 681 note 93.

97. Iowa.—Vredenburgh v. Snyder, 6 Iowa 39.

98. Mo.—Gregory Grocery Co. v. Link, 25 S.W.2d 575, 224 Mo.App. 407.
34 C.J. p 681 note 96.

Surplusage in judgments generally see supra § 84.

99. Pa.—Fehr v. Worden, 19 Pa. Dist. & Co. 631, 37 Dauph.Co. 381—Commonwealth Trust Co. of Harrisburg now to Use of Baker v. MacDonald, Com.Pl., 51 Dauph. Co. 22.
34 C.J. p 681 note 97.

Compounding interest

(1) Judgment creditor has right, in entering revival judgment, to charge interest on aggregate amount of principal and interest embodied in previous judgment.—Bailey v. Bailey, 12 A.2d 577, 338 Pa. 221.

(2) On revival, prior to maturity of debt, of judgment confessed on bond calling for payment of interest at time of principal, interest could not be included so as to become part of principal and bear interest.—Moll v. Lafferty, 153 A. 557, 302 Pa. 354.

(3) Compounding interest on judgments generally see Interest § 68.

Joint debtors

On scire facias to revive judgment, judgment must be modified in amount to conform to amount paid by one of original defendants as consideration for assignment of judgment, since original defendant who paid judgment must not be reimbursed in greater amount than he was required to pay.—City Nat. Bank of Wichita Falls, Tex., now for Use of Newhams, v. Atkinson, 175 A. 507, 316 Pa. 526.

In Vermont

(1) Rendition of a new judgment together with interest is provided for by statute.—Slayton v. Smilie, 28 A. 871, 66 Vt. 197—34 C.J. p 681 note 97 [a].

(2) Prior to the statute interest could not be recovered.—Hall v. Hall, 8 Vt. 156—34 C.J. p 681 note 95.

1. Pa.—Worman's Appeal, 20 A. 415, 110 Pa. 25.
34 C.J. p 681 note 98.

Mere errors and irregularities in judgment of revival and in writ of scire facias and supporting motion papers did not affect validity of such judgment.—Cabler v. Anderson, 16 S. W.2d 179, 179 Ark. 364.

2. W.Va.—Zumbro v. Stump, 18 S. E. 443, 38 W.Va. 325.
34 C.J. p 681 note 99.

3. Mo.—Reyburn v. Handlan, 147 S. W. 846, 165 Mo.App. 412.
34 C.J. p 681 note 1 [a].

4. N.C.—Roberson v. Woollard, 28 N.C. 90.
34 C.J. p 681 note 1 [b].

5. Pa.—Baumgardner v. Baumgardner, 9 Pa.Dist. & Co. 243.
24 C.J. p 896 note 76—34 C.J. p 682 note 2.

In rem judgment

Judgment against terre-tenant is not against him personally but merely against realty owned or held by him as terre-tenant.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41—Adelson v. Kocher, 36 A.2d 737, 154 Pa. Super. 548—34 C.J. p 682 note 2 [a] (1).

6. Idaho.—Evans v. City of American Falls, 11 P.2d 363, 52 Idaho 7.
34 C.J. p 677 note 27.

Several defendants

The whole judgment must be revived in its entirety, against all of the several defendants. If a judgment creditor desires to pursue one of several defendants separately, he must do so by suit.—Evans v. City of American Falls, supra.

ure to enter a fiat thereon within a year and a day after its issuance operates as a discontinuance,[7] and an order of fiat cannot be subsequently made except on a new writ,[8] which, as discussed supra § 542, should be sued out within the statutory period after the last renewal of the life of the judgment.

Joint defendants. As discussed supra subdivision e of this section, judgment in a scire facias proceeding is not valid without service on defendant or proper notice to him; and in case of joint defendants, some of whom are not served, it is error to render judgment against all or against those served,[9] or some of those served.[10] It has been held that, on scire facias to revive a judgment against two persons jointly, it is erroneous to enter final judgment against one before plaintiff has matured the case against the other also, so that a joint judgment may be entered against both;[11] but it has also been held that a joint scire facias to revive a judgment does not necessarily require a joint judgment, but that the judgment that plaintiff have execution may be several, against each,[12] and in fact should be so where one is liable individually and the other in a representative character.[13]

(2) By Confession or Default

In a proceeding by scire facias to revive, judgments may be entered against the defendant on his confession or default.

In a proceeding by scire facias to revive, judgment may be entered against defendant on his confession[14] or default.[15] Plaintiff, moreover, has been held entitled to costs, even though he allowed the judgment to become dormant and defendant did not contest the proceeding.[16]

Except in some jurisdictions,[17] the rule, both at common law and under some statutes, is that two returns of nihil to a writ of scire facias are equivalent to a return of scire feci; that is, the court thereupon acquires jurisdiction of defendant, and may proceed to give judgment by default.[18] In such case, however, as well as in the case of other revivals by default, or by confession, the judgment may, on good cause shown, be opened to enable defendant to present his defense, as discussed infra subdivision k (3) of this section. The operation and effect of a revival on two returns of nihil are discussed infra § 549.

(3) Amending, Opening, or Vacating Judgment

A judgment of revival secured in a proceeding by scire facias may, in a proper case, be amended, opened, or vacated.

In a proper case the judgment of revival may be amended,[19] but, except in some jurisdictions,[20] the original judgment cannot be amended or corrected in scire facias proceedings to revive it.[21]

Opening or vacating judgment. A judgment on a scire facias will be opened, vacated, or set aside only where legally sufficient grounds therefor are established.[22] Judgments of revival entered amicably,[23] or by confession[24] or default,[25] may be opened for cause shown to let in a defense, and, under some circumstances, may be stricken from the

7. D.C.—Collins v. McBlair, 29 App. D.C. 354.
Scire facias as judicial writ see supra subdivision a of this section.
8. D.C.—Collins v. McBlair, supra.
9. Va.—Early v. Clarkson, 7 Leigh 83, 34 Va. 83.
34 C.J. p 682 note 4.
10. Md.—Wilkin Mfg. Co. v. Melvin, 81 A. 879, 116 Md. 97.
34 C.J. p 682 note 5.
11. Va.—Early v. Clarkson, 7 Leigh 83, 34 Va. 83.
12. Ky.—Gray v. McDowell, 5 T.B. Mon. 501.
13. Ky.—Gray v. McDowell, supra.
14. Pa.—McPherson v. Cole, 87 A. 708, 240 Pa. 444.
34 C.J. p 682 note 13.
15. Fla.—McCallum v. Gornto, 174 So. 24, 127 Fla. 792.
Pa.—Stanton v. Humphreys, Com. Pl., 27 Del.Co. 594—Nuss v. Kemmerer, Com.Pl., 17 Leh.L.J. 379, 52 York Leg.Rec. 15—Gorniak v. Potter Title & Trust Co., Com.Pl., 91 Pittsb.Leg.J. 279.
Vt.—Raithel v. Hall, 135 A. 3, 100 Vt. 109.
34 C.J. p 682 note 14.
Terre-tenant
Pa.—Cusano v. Rubolino, 39 A.2d 906, 351 Pa. 41.
16. Fla.—McCallum v. Gornto, 174 So. 24, 127 Fla. 792.
17. Tenn.—Boyd v. Armstrong, 1 Yerg. 40.
18. U.S.—Brown v. Wygant, App.D.C., 16 S.Ct. 1159, 163 U.S. 618, 41 L.Ed. 284.
34 C.J. p 682 note 18.
19. Mo.—City of St. Louis v. Koch, App., 156 S.W.2d 1.
34 C.J. p 683 note 25.
Amendment of judgments generally see supra § 236.
Amendment nunc pro tunc
Mo.—City of St. Louis v. Koch, supra.
20. Pa.—Maus v. Maus, 6 Watts 315.
34 C.J. p 683 note 26.
21. Md.—Clark v. Digges, 5 Gill 109.
34 C.J. p 683 note 27.
22. Ill.—Hemphill v. Trgovic, 60 N.E.2d 121, 325 Ill.App. 310.
Pa.—Elffert v. Giessen, 14 A.2d 130, 339 Pa. 60—Greensburg Building & Loan Ass'n v. Dell, Com.Pl., 22 West.Co.L.J. 299.
Opening and vacating judgments generally see supra § 265.
23. Pa.—Corpus Juris quoted in Second National Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A.2d 747, 749, 322 Pa. 124.
34 C.J. p 684 note 52.
Amicable scire facias generally see infra subdivision m of this section.
Insufficient evidence of fraud
Pa.—Keystone Nat. Bank of Manheim, now to Use of Balmer v. Deamer, 18 A.2d 540, 144 Pa.Super. 52.
24. Pa.—McPherson v. Cole, 87 A. 708, 240 Pa. 444.
34 C.J. p 682 note 15.
25. Md.—Jones v. George, 80 A. 635, 80 Md. 294.
34 C.J. p 682 note 15.

record.[26] Where a default judgment may be entered after two returns of nihil to the writ of scire facias, as is considered supra subdivision k (2) of this section, defendant may afterward, by audita querela,[27] or, under the modern practice, by motion,[28] open the judgment and present his defense.[29]

l. Execution

The court may control the issuance of execution on a revived judgment to the extent necessary to do justice to the parties.

The trial court has the power to control the issuance of any execution on a revived judgment to the extent that may be necessary to do justice to the parties.[30] Ordinarily the execution may be levied on the same property bound originally by the judgment,[31] but, where the revival is had against the administrator of a deceased defendant, the execution is leviable on the assets in his hands.[32] A waiver of inquisition given on the original confession of judgment will be available on execution after the revival.[33] Plaintiff's failure to serve one of two defendants with the writ of scire facias cannot be alleged, in an affidavit of illegality interposed to the levy of execution, by the party served.[34]

m. Amicable Scire Facias

An amicable scire facias to revive a judgment is a written agreement, signed by the judgment debtor or person to be bound by the revival, in the nature of a writ of scire facias with a confession of judgment thereon.

Under the practice in at least one state, an amicable scire facias to revive a judgment is a written agreement, signed by the judgment debtor or person to be bound by the revival,[35] in the nature of a writ of scire facias with a confession of judgment thereon, which must be duly docketed,[36] but which requires no judicial action on the part of the court.[37] When such an agreement is duly made and entered, it has all the force and effect of a judgment rendered on an adverse or contested writ of scire facias, as considered infra § 549, although, as discussed supra subdivision k (3) of this section, it may be opened, for cause shown, to permit defendant to enter a defense. Several judgments against the same person, owned by the same creditor, may be consolidated and revived in one amicable action of scire facias.[38] Where a judgment against decedent has ceased to be a lien on his land by reason of lapse of time, it cannot be renewed against the administrator by acquiescence of the latter.[39]

§ 549. Operation and Effect of Revival

A judgment of revival is binding until set aside, and in most jurisdictions is invested with the same force and effect as the original judgment.

A judgment rendered on a scire facias to revive a judgment is binding until properly set aside.[40] It

26. Pa.—Handel & Hayden Building & Loan Assoc. v. Elleford, 101 A. 951, 258 Pa. 143.
34 C.J. p 682 note 16.
Signature to agreement
Where only two of a number of joint judgment debtors signed agreement to revive judgment amicably, and had expected remaining judgment debtors to sign also, but such others did not sign, judgment was properly stricken on petition of one of those who signed.—Second Nat. Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A.2d 747, 332 Pa. 124.

27. Md.—Jones v. George, 30 A. 635, 80 Md. 294.
34 C.J. p 683 note 19.

28. Md.—Jones v. George, supra.
34 C.J. p 683 note 20.

29. Fla.—Barrow v. Bailey, 5 Fla. 9.
Pa.—Maitland v. Landis, 1 Pa.Co. 144.

30. Pa.—Marsh v. Bowen, 6 A.2d 783, 335 Pa. 314.
Revival judgment as basis for writ of execution generally see Executions § 7 e.

31. Ga.—Seals v. Benson, 6 S.E. 182, 81 Ga. 44.
34 C.J. p 683 note 35.
Property subject to execution generally see Executions § 18.
Delay in entering judgment
Where judgment was entered on scire facias nearly nineteen years after issuance of writ, court improperly dissolved attachment sur judgment on ground that delay was contrary to convenience and public policy.—Croskey v. Croskey, 160 A. 103, 306 Pa. 423.

32. Md.—Wilmer v. Trumbo, 88 A. 259, 121 Md. 445.
34 C.J. p 683 note 36.

33. Pa.—Building & Loan Assoc. v. Flanagan, 1 Pa.Com.Pl. 122.

34. Ga.—American Nat. Bank v. Hodges, 154 S.E. 653, 41 Ga.App. 717.
Affidavits of illegality generally see Executions §§ 147–150.

35. Pa.—Corpus Juris quoted in Second Nat. Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A.2d 747, 749, 332 Pa. 124—Schmidt v. Zajkiewicz, Com.Pl., 38 Luz.Leg.Reg. 342—Krzykwa v. Krzykwa, Com. Pl., 15 Northumb.Leg.J. 117.
34 C.J. p 684 note 49.
Revival against terre-tenants
Pa.—Merchants Banking Trust Co. now to Use of Federal Deposit Ins. Corp. v. Kaleda, Com.Pl., 41 Sch. L.R. 176, 60 York Leg.Rec. 25.

36. Pa.—Corpus Juris quoted in Second Nat. Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A.2d 747, 749, 332 Pa. 124.
34 C.J. p 684 note 50.

37. Pa.—Corpus Juris quoted in Second Nat. Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A.2d 747, 749, 332 Pa. 124.
34 C.J. p 684 note 51.

38. Pa.—Corpus Juris quoted in Second Nat. Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A.2d 747, 749, 332 Pa. 124.
34 C.J. p 684 note 53.

39. S.C.—Brantley v. Brittle, 51 S.E. 561, 72 S.C. 179.

40. Pa.—Moll v. Lafferty, 153 A. 557, 302 Pa. 354.
34 C.J. p 684 note 54.

is not subject to collateral attack,[41] except on the ground of lack of jurisdiction,[42] it being a nullity when rendered by a court or judge without jurisdiction.[43] It is conclusive of all matters which were or might have been pleaded in the revival proceedings.[44]

The revival of a judgment by regular proceedings reinvests it with all the effect and conditions which originally belonged to it, and which have been wholly or partly suspended by lapse of time, change of parties, or other cause,[45] and, as considered supra § 494, it continues the lien of the judgment on real property beyond the period when, by statute, without such revival, it would expire. The revival, however, adds nothing whatever to the validity or effect of the judgment,[46] and cannot be invoked as curing any fault or defect which is of such a nature as to render it void,[47] although it cuts off defenses which might have been made to the original judgment before the revival.[48] The judgment on the scire facias to revive is no bar to an action of debt on the original judgment,[49] and a judgment for defendant on an insufficient and defective scire facias is no bar to another for the same cause.[50]

However, in the few jurisdictions where, as considered supra § 548 k (1), a new judgment is rendered on a scire facias to revive a judgment, an effect somewhat different from that given the original judgment is sometimes accorded a judgment of revival.[51] In such jurisdictions it has sometimes been held that the new judgment may be valid and enforceable, even though the original judgment was void;[52] and a recovery on the scire facias is a bar to a subsequent recovery against defendant on the original judgment,[53] except where the original de-

41. Ark.—Cabler v. Anderson, 16 S. W.2d 179, 179 Ark. 364.
Pa.—Kasperunas v. Kasper, Com.Pl., 34 Luz.Leg.Reg. 303.
34 C.J. p 684 note 55.

42. Colo.—Salisbury v. La Fitte, 123 P. 124, 22 Colo.A. 90.
Va.—White v. Palmer, 66 S.E. 44, 110 Va. 490.

43. Ky.—Baker v. Davis' Adm'r, 299 S.W. 172, 221 Ky. 524.
34 C.J. p 684 note 57.

44. Pa.—Quaker City Chocolate & Confectionery Co. v. Warnock Bldg. Ass'n, 32 A.2d 5, 347 Pa. 186.
34 C.J. p 684 note 58.

45. Fla.—Tedder v. Morrow, 131 So. 387, 100 Fla. 1486.
Ill.—Motel v. Andracki, 19 N.E.2d 832, 299 Ill.App. 166.
Pa.—**Corpus Juris quoted in** Second Nat. Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A.2d 747, 749, 332 Pa. 124—**Corpus Juris quoted in** Peoples Nat. Bank of Ellwood City v. Weingartner, 33 A.2d 469, 471, 153 Pa.Super. 40—Miller Bros. v. Boyotz, 96 Pa.Super. 208—Brooks v. Caruthers' Estate, Com. Pl., 23 West.Co.L.J. 133.
34 C.J. p 684 note 59.

Effect of statute

(1) Statute according same force and effect to revival judgment as that of original judgment is to be liberally construed.—Betty v. Superior Court of Los Angeles County, 116 P.2d 947, 18 Cal.2d 619—Hitchcock v. Caruthers, 34 P. 627, 100 Cal. 100—Thompson v. Cook, 143 P.2d 107, 61 Cal.App.2d 485.

(2) Under such a statute, creditor on revival of judgment was entitled to writ of execution within five years thereafter as matter of right.—Betty v. Superior Court of Los Angeles County, supra.

(3) Statute requiring revival of original judgment where execution sale is irregular and purchaser fails to obtain possession contemplates that original judgment shall be rendered operative, rather than that any new judgment shall arise, and that execution shall issue on original judgment.—Continental Nat. Bank & Trust Co. of Salt Lake City v. John H. Seely & Sons Co., 77 P.2d 355, 94 Utah 357.

Death of party

Revivor of judgment becoming dormant on death of party thereto restores judgment to full force and gives it effect for ensuing five years, without execution, to same extent as revivor of judgment which has become dormant for want of execution.—Jersak v. Risen, 152 P.2d 374, 194 Okl. 423.

Objectives and effects of revivor by scire facias and action on judgment are wholly different.—Second Nat. Bank v. Allgood, 176 So. 363, 234 Ala. 654.

Judgment debtor's obligation

If at time of judgment debtor's conveyance, lien of judgment has already expired against him, no revival proceedings on original judgment can operate so as to bind land in hands of purchaser, although personal obligation of judgment debtor remains unimpaired.—Ellinger v. Krach, 28 A.2d 453, 150 Pa.Super. 384, affirmed Simmons v. Simmons, 29 A.2d 677, 346 Pa. 52.

46. Fla.—Tedder v. Morrow, 131 So. 387, 100 Fla. 1486.
Pa.—Davis v. Tate, Com.Pl., 26 Erie Co. 141.
34 C.J. p 685 note 61.

Mere right to execution given
Ala.—Mobile Drug Co. v. McCullough, 112 So. 238, 215 Ala. 682.

In rem judgment cannot be changed into a personal one by revival.—Franek v. Turner, 114 So. 148, 164 La. 532.

Amount

Where a judgment valid in its origin is fraudulently renewed for more than the balance unpaid on it, it will still be valid for the amount actually due.—Arnold v. House, 12 S. C. 600.

47. U.S.—U. S. v. Ewing, D.C.Miss., 19 F.2d 373.
Mo.—Coombs v. Benz, 114 S.W.2d 713, 232 Mo.App. 1011.
Ohio.—Porter v. Toops, App., 62 N.E. 2d 769.
34 C.J. p 685 note 61.

A nullity revived is still a nullity. —Peoples Nat. Bank of Ellwood City v. Weingartner, 33 A.2d 469, 153 Pa. Super. 40.

48. Md.—Doub v. Mason, 2 Md. 380.
Pa.—Stanton v. Humphreys, Com.Pl., 27 Del.Co. 594.
Philippine.—Compania Gen. de Tabacos v. Martinez, 29 Philippine 515.

49. U.S.—Lafayette County v. Wonderly, Mo., 92 F. 313, 34 C.C.A. 360.
34 C.J. p 685 note 64.

50. Ky.—Huey v. Redden, 3 Dana 488.
Philippine.—Compania Gen. de Tabacos v. Martinez, 29 Philippine 515.

51. Pa.—Lyons v. Burns, 20 Phila. 412—In re Sivak's Estate, Orph., 94 Pittsb.Leg.J. 235.
34 C.J. p 685 notes 67–69.

52. Pa.—Mayer Furniture Co. v. Putt, 3 Pa.Dist. & Co. 542.
34 C.J. p 685 note 68.

53. Pa.—Le Bar v. Patterson, 187 A. 278, 123 Pa.Super. 491.
34 C.J. p 685 note 69.

fendant is not a party to the proceeding.[54] It has also been held that a scire facias may issue on the original judgment against a terre-tenant who is not a party to the former judgment of revivor.[55]

An amicable scire facias, duly made and entered, has all the force and effect of a judgment rendered on an adverse or contested writ of scire facias.[56] A revival on two returns of nihil, which, as discussed supra § 548 k (2), is a form of revival by default, does not stop the running of the statute of limitations in another state, where defendant resides, or support a new action against him in another state.[57]

XVII. PAYMENT, SATISFACTION, AND DISCHARGE OF JUDGMENT

§ 550. Persons to Whom Payment May Be Made

As a general rule, payment of a judgment must be made to the plaintiff of record or to his duly authorized agent, and, where there are several judgment creditors, payment may be made to any one of them.

As a general rule, payment of a judgment may and must be made to plaintiff of record,[58] or to his duly authorized agent,[59] or attorney as discussed in Attorney and Client § 99. However, when a judgment is recovered by one person for the use of another, payment may be made to the beneficial owner,[60] and it is in fact the duty of the judgment debtor to make payment to him where the debtor has notice that the judgment belongs to him,[61] although, on the other hand, it has been held that, if the debtor pays it to a third person who he assumes is beneficially entitled to receive it, he acts at his own peril.[62] If the person for whose use the judgment is recovered is a fictitious person, then the debtor is justified in treating the nominal plaintiff as the real owner and proceeding to settle the demand with him.[63] Where the court directs payment of the judgment to plaintiff only on the debtor obtaining indemnification against the claims of others interested in the fund, the debtor is not protected by such payment if he fails to secure such indemnification.[64]

Where the judgment has been assigned to a third person, the debtor, after notice of the assignment, must pay to the assignee;[65] but a judgment debtor who learns that the judgment has been assigned acts at his peril in the payment thereof to any party as assignee without ascertaining the facts,[66] and he cannot rely on the statement of the attorney for the original judgment creditor.[67] Where a judgment is recovered by one not the record owner of realty for injury thereto, the judgment debtor, before payment of the judgment, may demand proper releases from all persons who may have an interest in the realty.[68] Payment of the amount of the judgment to a creditor of the judgment plaintiff, under process of garnishment, will discharge it pro tanto, as discussed in Garnishment § 294.

If there are several judgment creditors, payment may be made to one, with the effect of discharging the whole obligation,[69] unless notice is given the

54. Pa.—Le Bar v. Patterson, supra.

55. Pa.—Zerns v. Watson, 11 Pa. 260.
34 C.J. p 685 note 70.

56. Pa.—Corpus Juris quoted in Second Nat. Bank of Altoona, for Use of Federal Reserve Bank of Philadelphia v. Faber, 2 A.2d 747, 749, 332 Pa. 124—Doran & Ely v. Hohn, 22 Pa.Dist. & Co. 719.
34 C.J. p 684 note 51.
Accord and satisfaction
Fact that judgments entered by confession had been amicably revived did not estop party to revival from seeking to open confessed judgments which had been discharged in fact by accord and satisfaction.—Peoples Nat. Bank of Ellwood City v. Weingartner, 33 A.2d 469, 153 Pa. Super. 40.

57. U.S.—Owens v. McCloskey, La., 16 S.Ct. 693, 161 U.S. 642, 40 L. Ed. 837.
34 C.J. p 683 note 23.

58. Cal.—Hogan v. Superior Court of California in and for City and County of San Francisco, 241 P. 584, 74 Cal.App. 704.
Pa.—Dotterer v. Nothstein, Com.Pl., 20 Leh.L.J. 188.
34 C.J. p 685 note 72.
Payment of judgment where judgment creditor is infant see Infants § 124.
Payment to lienor
Where judgment debtor paid a portion of judgment to one asserting a lien thereon who was entitled to no part of the judgment, judgment creditor could elect to sue either the party to whom payment was improperly made or the judgment debtor.—Schreiber v. American Employers' Ins. Co., 38 N.Y.S.2d 250, 265 App.Div. 167, affirmed 49 N.E.2d 627, 290 N.Y. 673.

59. Idaho.—Vermont Loan & Trust Co. v. McGregor, 53 P. 399, 6 Idaho 134.
34 C.J. p 685 note 74.

60. Ga.—Dyal v. Dyal, 16 S.E.2d 53, 65 Ga.App. 359.
34 C.J. p 686 note 75.

61. Cal.—Weiner v. Luscombe, 66 P. 2d 151, 19 Cal.App.2d 668.
34 C.J. p 686 note 76.

62. Ala.—Mervine v. Parker, 18 Ala. 241.

63. Ala.—McGehee v. Ginidrat, 20 Ala. 95.

64. Tex.—Trujillo v. Piarote, 53 S.W.2d 466, 122 Tex. 173.

65. Miss.—Moore v. Red, 22 So. 948.
34 C.J. p 686 note 79.

66. S.D.—La Penotiere v. Kellar, 137 N.W. 382, 29 S.D. 496.
34 C.J. p 686 note 80.

67. S.D.—La Penotiere v. Kellar, supra.

68. Utah.—Ludlow v. Colorado Animal By-Products Co., 137 P.2d 347, 104 Utah 221.

69. Neb.—American Fire Ins. Co. v.

debtor by one of such creditors not to pay the other more than his proportion of the judgment.[70] One of the creditors may compound or compromise with the debtor his own interest in the judgment without the consent of the others,[71] but cannot accept less than the whole amount in full satisfaction of the judgment.[72] Where two causes of action by different plaintiffs against the same defendant are improperly joined and a verdict for one sum is rendered in favor of both plaintiffs, its payment to the parties jointly or to their attorney of record will discharge defendant from liability to both on account of all matters alleged in the petition.[73]

Payment into court may satisfy the judgment where it is so provided in the judgment itself,[74] or, as discussed infra § 552, where the payment is made at the instance of, or is accepted by, the judgment creditor.

§ 551. —— Clerk of Court or Other Officer

In the absence of special authority, the clerk of the court has no right to receive money from the judgment debtor in satisfaction of a judgment. Where a sheriff or other ministerial officer holds a writ for the collection of a judgment, the amount may be properly paid to such officer.

It is a general rule that the clerk of the court in which a judgment has been rendered has no right to receive money from the judgment debtor in satisfaction of the judgment without special authority,[75] such as authority conferred expressly[76] or impliedly[77] by statute.

Sheriff or other officer. The amount due on a judgment may properly be paid to a sheriff or other ministerial officer who holds a writ for the collection of such judgment,[78] and the judgment debtor will be protected in such payment, even though the money may never come to the hands of his creditor.[79] An effectual payment cannot be made to the sheriff when he has no writ in his hands,[80] or when the return day of the writ has expired,[81] unless such payment is ratified or accepted by the creditor.[82] The resignation and subsequent insolvency of one of the plaintiffs who was a party to a judgment as sheriff furnish no excuse for defendant to withhold payment of the judgment to his successor in office.[83]

§ 552. Mode, Medium, and Sufficiency of Payment

As a general rule, a judgment for the payment of money can be satisfied only in money, unless the judgment provides for, or the owner of the judgment agrees to, some other mode of payment.

Except where a judgment by its own terms provides otherwise,[84] a judgment for the payment of money can be satisfied only in money,[85] unless the

Landfare, 76 N.W. 1068, 56 Neb. 482.
34 C.J. p 686 note 83.

70. Tenn.—Erwin v. Rutherford, 1 Yerg. 169.
34 C.J. p 686 note 84.

71. Ala.—Penn v. Edwards, 50 Ala. 63.

72. Cal.—Haggin v. Clark, 61 Cal. 1.

73. Ga.—Georgia R. & Banking Co. v. Tice, 52 S.E. 916, 124 Ga. 459, 4 Ann.Cas. 200.

74. Mo.—Bucknam v. Bucknam, 151 S.W.2d 1097, 347 Mo. 1039.
34 C.J. p 686 note 88.

75. Ga.—Bank of Georgetown v. Ault, 31 Ga. 359—Wilcher v. Williams, 127 S.E. 795, 33 Ga.App. 797.
Mont.—**Corpus Juris cited in** Paulich v. Republic Coal Co., 33 P.2d 514, 515, 97 Mont. 224.
34 C.J. p 686 note 91.
Powers and duties of clerks of courts with respect to receipt of money generally see Clerks of Courts §§ 40–42.

Unless the clerk of court is made the agent of the judgment creditor to receive money due on the judgment, a payment thereof to the clerk is not a satisfaction of the judgment. —Rushing v. Thomas, Tex.Civ.App., 63 S.W.2d 323—Whitesboro v. Diamond, Tex.Civ.App., 75 S.W. 540.

76. Ala.—Commonwealth Ins. Co. of New York v. Terry, 159 So. 822, 230 Ala. 125—Hayes v. Waldrop, 108 So. 333, 214 Ala. 534.
34 C.J. p 686 note 92.
Statutory agent of judgment creditor
N.C.—Dalton v. Strickland, 179 S.E. 20, 208 N.C. 27.
Court order
Although defendant was held authorized by statute to pay the amount of a judgment into court, an order for payment of money into court in satisfaction of judgment entered during previous term was not without court's jurisdiction as modification of original judgment.—Blake v. Cuneo, 111 P.2d 485, 188 Okl. 533.

77. Neb.—McDonald v. Atkins, 14 N. W. 532, 13 Neb. 568.
34 C.J. p 687 note 93.

78. N.C.—Bailey v. Hester, 8 S.E. 164, 101 N.C. 538.
34 C.J. p 687 note 94.

79. Ind.—Beard v. Millikan, 68 Ind. 231.

80. N.C.—Bailey v. Hester, 8 S.E. 164, 101 N.C. 538.
34 C.J. p 687 note 96.

81. Va.—Chapman v. Harrison, 4 Rand. 336, 25 Va. 336.
34 C.J. p 687 note 97.

82. Ala.—Henderson v. Planters' & Merchants' Bank of Ozark, 59 So. 493, 178 Ala. 420—Chapman v. Cowles, 41 Ala. 103, 91 Am.D. 508.

83. La.—State v. Judge Dist. Ct., 18 La. 542.

84. U.S.—Wheeler v. Taft, C.C.A. La., 279 F. 415.
Alternative judgment
An offer to return logs to their owner while still on his land from which they were cut, and his subsequent treatment of them as his own, were sufficient to satisfy a judgment for recovery of the logs or the value thereof, although no tender with the logs present was shown.—Less v. Grismore-Hyman Co., 251 S. W. 673, 158 Ark. 1.
Delivery of stock
Where defendants made no reasonable effort to obey judgment ordering delivery of stock to plaintiff within ten days, they could not take advantage of plaintiff's effort to secure the stock as excuse for noncompliance, especially where they had withheld the stock from plaintiff for approximately five years.—Haggott v. Plains Iron Works Co., 218 P. 909, 74 Colo. 37.

85. La.—State v. Johnson, 60 So. 702, 132 La. 11.
34 C.J. p 687 note 2.

owner of the judgment chooses to accept property, securities, or some other thing of value,[86] such as real[87] or personal[88] property, a mortgage on the debtor's property,[89] an assignment of the debtor's property in trust,[90] the debtor's bond,[91] a claim on a third person,[92] the performance of certain conditions by the debtor,[93] or the payment by the debtor of other claims or obligations on behalf of plaintiff.[94]

In order that the acceptance of something other than money may operate as a satisfaction, there must be a positive and express agreement to accept the substitute for direct payment of the judgment.[95] The mere fact that the judgment creditor possesses assets of the debtor does not require him to apply them in satisfaction of the judgment,[96] although if he does so apply them the judgment will be extinguished pro tanto.[97] A judgment plaintiff in lawful possession of lands on which his judgment is a lien has not the right to apply the rents and profits therefrom to the satisfaction of his judgment, as against the owner, who is not a judgment defendant.[98]

As a rule, no satisfaction of the judgment arises from the acceptance of collateral security for its payment[99] except where the judgment creditor covenants and agrees never to enforce the judgment.[1] Thus a judgment ordinarily is not satisfied by the giving of a promissory note or other negotiable instrument,[2] or renewal thereof,[3] even though the instrument is that of a third person,[4] unless it is paid[5] or there is an agreement that its acceptance is to operate as absolute payment,[6] or unless the judgment is on an obligation payable in notes.[7]

Where a judgment plaintiff has secured the payment into court of money belonging to defendant sufficient to satisfy the judgment, it is error to require payment into court of further sums owing to

Bank notes

(1) Bank notes are not cash, and cannot be brought into court as such in payment of a judgment, although the bank issuing the notes be the holder of the judgment.—State Bank at Trenton v. Coxe, 8 N.J.Law 172, 14 Am.D. 417.

(2) A statute of one state requiring a bank recovering a judgment to accept its bank notes in payment thereof is inapplicable in another state where execution of the judgment is sought, and the sheriff may refuse to receive such bank notes in payment of the judgment.—Woodson v. Bank of Gallipolis, 4 B.Mon., Ky., 203.

Payment by check was insufficient to constitute "payment" within statute providing for giving of satisfaction piece on payment of judgment.—Altenau v. Masterson, 292 N.Y.S. 299, 161 Misc. 433.

86. Mo.—**Corpus Juris cited in** Osage Land Co. v. Kansas City, 187 S.W.2d 193, 197, 353 Mo. 1196.
34 C.J. p 687 note 3.

87. Cal.—Musser v. Gray, 31 P. 568, 3 Cal.Unrep.Cas. 639.
34 C.J. p 687 note 4.

88. Mo.—Osage Land Co. v. Kansas City, 187 S.W.2d 193, 353 Mo. 1196.
34 C.J. p 687 note 4.

89. Minn.—Walker v. Crosby, 35 N. W. 475, 38 Minn. 34.

Assignment of mortgage

Where payee of notes took an assignment of mortgage and satisfied the notes on its books, the satisfaction of the notes extinguished judgments confessed on the notes as valid obligations and amicable revivals of the judgments did not render them enforceable.—Peoples Nat. Bank of Ellwood City v. Weingartner, 33 A.2d 469, 153 Pa.Super. 40.

90. N.Y.—Hawley v. Mancius, 7 Johns.Ch. 174.

91. Ill.—Cox v. Reed, 27 Ill. 433.
34 C.J. p 687 note 7.

The execution of a replevin bond is not a satisfaction of the judgment.
Ind.—Sheets v. Roe, 2 Blackf. 195.
Ky.—Williams v. Isaacs, 256 S.W. 19, 201 Ky. 158.

92. Ala.—Pharis v. Leachman, 20 Ala. 662.

93. Pa.—Potter v. Hartnett, 23 A. 1007, 148 Pa. 15.
34 C.J. p 687 note 9.

Installment payments

(1) Inasmuch as time is clearly made the essence of a stipulation providing that, if installment payments on a judgment should not be made when due, the creditor should be at liberty to enforce payment of the full amount remaining due, the court is without power to compel him to accept payment of an installment after its due date.—Friedman v. Such, 220 N.Y.S. 855, 219 App.Div. 830.

(2) When defendants breached agreements to make monthly payments to be applied on judgment, plaintiff had right to return security given for agreement and look to judgment alone.—Armstrong v. Van Dyke, 198 N.W. 915, 227 Mich. 308.

94. U.S.—Medford v. Dorsey, C.C. Pa., 16 F.Cas.No.9,390, 2 Wash.C.C. 467.
34 C.J. p 687 note 10.

95. Pa.—Olyphant Bank v. Borys, 36 A.2d 823, 155 Pa.Super. 49.
34 C.J. p 687 note 11.

96. Ala.—Garrett v. Mayfield Woolen Mills, 44 So. 1026, 153 Ala. 602.

97. S.D.—Custer City First Nat. Bank v. Calkins, 81 N.W. 732, 12 S.D. 411.
34 C.J. p 687 note 13.

98. Iowa.—Boggs v. Douglass, 75 N. W. 185, 105 Iowa 344.

99. Mich.—Armstrong v. Van Dyke, 198 N.W. 915, 227 Mich. 308.
34 C.J. p 688 note 15.

1. Ga.—Chambers v. McDowell, 4 Ga. 185.

2. N.Y.—Altenau v. Masterson, 292 N.Y.S. 299, 161 Misc. 433.
Pa.—Olyphant Bank v. Borys, 36 A. 2d 823, 155 Pa.Super. 49.
Va.—Gemmell v. Powers, 195 S.E. 501, 170 Va. 43.
34 C.J. p 688 note 16.

3. Va.—Gemmell v. Powers, supra.
34 C.J. p 688 note 17.

4. W.Va.—Sullivan v. Saunders, 66 S.E. 497, 66 W.Va. 350, 42 L.R.A., N.S., 1010, 19 Ann.Cas. 480.

5. Ind.—Phillips v. East, 16 Ind. 254.
34 C.J. p 688 note 19.

6. W.Va.—Sullivan v. Saunders, 66 S.E. 497, 66 W.Va. 350, 42 L.R.A., N.S., 1010, 19 Ann.Cas. 480.
34 C.J. p 688 note 20.

Note and deed of trust

When holder of judgment based on foreclosure of note and deed of trust accepted new note and deed of trust on the same premises, the judgment was paid and judgment debt was merged into the new note.—Krauss v. West, Tex.Civ.App., 123 S.W.2d 946, error dismissed, judgment correct.

7. La.—Roberts v. Stark, 3 La.Ann. 71.

defendant from third persons;[8] and, where the whole amount of the judgment is paid into court and accepted by the judgment creditor, he cannot afterward return it to the clerk on the ground that there is more due him.[9] A deposit made with plaintiff as a security on which defendant's right of appeal is conditioned under a stipulation for its repayment in case of the appeal going in favor of defendant does not constitute payment of the judgment.[10] An application of payments to a judgment cannot be changed when it will affect the rights and interests of third persons.[11]

Interest and costs. There can be no complete satisfaction of a judgment by payment unless the payment covers interest, if any,[12] and the costs chargeable against defendant,[13] even though the amount of the costs is not inserted in the judgment.[14] Under some statutes, however, it has been held that a judgment creditor's acceptance of payment of a judgment, without protest or reservation as to interest not given, operates as a release thereof.[15]

Payment with borrowed money. Ordinarily, where a judgment debtor borrows money with which to pay off a judgment against him, and uses the money for this purpose, the judgment becomes satisfied,[16] but, except in some jurisdictions,[17] a judgment debtor may agree with one who lends him money for such a purpose that the judgment shall not be satisfied by payment to the holder thereof, but shall be transferred to the lender as security for the loan,[18] and a similar arrangement may be made for the protection of one who, by becoming surety for a debtor, aids the latter in procuring money with which to pay a judgment creditor.[19]

Place of payment. The fact that the payment in satisfaction of a judgment is made in a county other than that in which the judgment was rendered will not alter the effect of the payment.[20]

Payment to attorney or officer. The right to accept anything else as a substitute for money in satisfaction of the judgment is confined to the owner himself, and does not belong to his attorney, as discussed in Attorney and Client § 106, or to the clerk of the court,[21] or to a sheriff or other officer holding process for its collection.[22] The handing of money by a junior judgment creditor to the sheriff for the purpose of purchasing a senior judgment and of preventing a sale thereunder, and not for the purpose of paying the judgment, does not operate as a satisfaction.[23] Where a receiver is appointed in proceedings to collect a judgment, only the amount remaining after deduction of his expenses and fees from the amount received by him is applicable as payment on the judgment.[24]

§ 553. —— Tender

An unaccepted tender of the amount due on a judgment is not of itself a satisfaction of the judgment.

An unaccepted tender of the amount due on a judgment is not of itself a satisfaction of the judgment or a discharge of its lien;[25] but it gives the debtor, on paying the money into court, a right to apply to the court to restrain execution and enter

8. Neb.—Montgomery v. Dresher, 149 N.W. 311, 97 Neb. 104.

9. Or.—Portland Constr. Co. v. O'Neil, 32 P. 764, 24 Or. 54.

10. N.Y.—Persons v. Gardner, 106 N.Y.S. 616, 122 App.Div. 167.

11. Pa.—Chancellor v. Schott, 23 Pa. 68.

12. Ill.—Feldman v. City of Chicago, 2 N.E.2d 102, 363 Ill. 247—**Corpus Juris quoted in** Tracey v. Shanley, 36 N.E.2d 753, 756, 311 Ill.App. 529.
La.—Breeland v. Kenner, App., 174 So. 678.
Mo.—**Corpus Juris cited in** City of St. Louis v. Senter Commission Co., 124 S.W.2d 1180, 1184, 343 Mo. 1075.
34 C.J. p 688 note 30.

13. La.—Breeland v. Kenner, App., 174 So. 678.
Mo.—City of St. Louis v. Senter Commission Co., 124 S.W.2d 1180, 343 Mo. 1075.
31 C.J. p 688 note 31.
Waiver
By discharging judgment of record on payment of principal sum and costs, except fee for execution of writs outstanding, judgment creditor waived payment of that item.—Stebbins v. Friend, Crosby & Co., 241 N.W. 315, 185 Minn. 336.

14. S.D.—Stakke v. Chapman, 63 N.W. 261, 13 S.D. 269.
Costs of appeal
The satisfaction of a judgment entered on a verdict prior to the taxing of costs of appeal granted to abide the event does not deprive plaintiff of the right to recover such costs.—Greenberg v. Strauss, 221 N.Y.S. 629, 220 App.Div. 736.

15. La.—Grennon v. New Orleans Public Service, 136 So. 309, 17 La. App. 700.

16. Ga.—Patterson v. Clark, 23 S.E. 496, 96 Ga. 494.

17. Ohio.—Unger v. Leiter, 32 Ohio St. 210.

18. Ga.—Patterson v. Clark, 23 S.E. 496, 96 Ga. 494.
Wash.—Lachner v. Myers, 203 P. 1095, 121 Wash. 172.

19. Ga.—Patterson v. Clark, 23 S.E. 496, 96 Ga. 494.

20. Ky.—Allen v. Burks, 7 Ky.Op. 444.

21. Ala.—Aicardi v. Robbins, 41 Ala. 541, 94 Am.D. 614.
34 C.J. p 688 note 38.

22. U.S.—McFarland v. Gwin, Miss., 3 How. 717, 11 L.Ed. 799.
34 C.J. p 689 note 39—57 C.J. p 787 notes 60, 61.
Rule applied to bank notes
Ky.—Woodson v. Bank of Gallipolis, 4 B.Mon. 203.
34 C.J. p 689 note 39 [a]—57 C.J. p 787 note 60.

23. Ind.—Strange v. Donohue, 4 Ind. 327.

24. N.Y.—Binswanger v. Hewitt, 140 N.Y.S. 143, 79 Misc. 425.

25. N.Y.—Jackson v. Law, 5 Cow. 248, affirmed 9 Cow. 641.
34 C.J. p 689 note 42.

satisfaction of the judgment.[26] In order that the rules relating to tender may be available, there must be a legal tender[27] of the full amount due.[28] It has been said that an offer to pay a judgment is not an admission of liability and is not a tender except in the limited sense of a step in compelling the satisfaction of a judgment.[29]

§ 554. Payment by Joint Party or Third Person

Whether or not payment by a joint debtor, surety, stranger, or officer operates as a satisfaction and extinguishment of a judgment as to all concerned is discussed infra §§ 555–558.

Examine Pocket Parts for later cases.

§ 555. —— Payment by Joint Debtor

a. In general
b. Assignment of judgment

a. In General

Generally the payment of a judgment by one of two or more joint defendants extinguishes the judgment as to all.

Payment of a judgment by one of two or more joint defendants usually operates as a satisfaction and extinguishment of the judgment as to all,[30] regardless of the intention of the parties to the transaction,[31] and even where the judgment is against joint tort-feasors;[32] and there are authorities holding that the rule applies to judgments on negotiable paper.[33]

26. Okl.—Richardson v. Marrs, 110 P.2d 606, 188 Okl. 451.
34 C.J. p 689 note 43.

27. Cal.—Rauer's Law & Collection Co. v. Sheridan Proctor Co., 181 P. 71, 40 Cal.App. 524.
34 C.J. p 689 note 44.

28. Ill.—Tracey v. Shanley, 36 N.E. 2d 753, 311 Ill.App. 529.
Mo.—**Corpus Juris cited in** City of St. Louis v. Senter Commission Co., 124 S.W.2d 1180, 1184, 343 Mo. 1075.
34 C.J. p 689 note 45.

Full amount not ascertainable
A plaintiff in judgment is not required to accept a certain sum in full payment of judgment and costs when he does not know, and cannot know by the exercise of ordinary care before the sheriff's sale, that the sum is sufficient for full payment.—Parker v. Holstead, Tex.Com. App., 255 S.W. 724.

29. Pa.—Bergen v. Lit Bros., 45 A. 2d 373, 158 Pa.Super. 469, affirmed 47 A.2d 671, 354 Pa. 535.
Tender as admission of liability generally see the C.J.S. title Tender § 51, also 62 C.J. p 684 note 77–p 685 note 90.

30. U.S.—Apple v. Owens, C.C.A. Tex., 48 F.2d 807.
Ga.—Register v. Southern States Phosphate & Fertilizer Co., 122 S. E. 323, 157 Ga. 561, answers to certified questions conformed to 122 S.E. 652, 32 Ga.App. 86.
Mo.—Phelps v. Scott, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290—Schuchman v. Roberts, 133 S.W.2d 1030, 234 Mo.App. 509.
N.C.—Hoft v. Mohn, 2 S.E.2d 23, 215 N.C. 397.
Okl.—Martin v. North American Car Corporation, 35 P.2d 460, 168 Okl. 599.
Tex.—Hadad v. Ellison, Civ.App., 283 S.W. 193.
Va.—Grizzle v. Fletcher, 105 S.E. 457, 127 Va. 663.
W.Va.—Greenbrier Valley Bank v. Holt, 171 S.E. 906, 114 W.Va. 363.
34 C.J. p 689 note 47.
Contribution between joint debtors generally see Contribution § 9.
Payment of debt by joint debtor as affecting his right to collect it from his codebtors by execution see Executions § 11.
Release or discharge of joint debtor on partial payment see infra § 564.
Satisfaction of one of several judgments on same cause of action against different persons see infra § 576.
Subrogation of joint judgment debtors generally see the C.J.S. title Subrogation § 19, also 60 C.J. p 732 note 39–p 733 note 42.

31. Tex.—Walston v. Price, Civ. App., 159 S.W.2d 548—Williams v. Hedrick, Civ.App., 131 S.W.2d 187, error dismissed, judgment correct.
34 C.J. p 689 note 48.

32. Cal.—Carnes v. Pacific Gas & Electric Co., 69 P.2d 993, 21 Cal. App.2d 568, rehearing denied 70 P. 2d 717, 21 Cal.App.2d 568—Salter v. Lombardi, 3 P.2d 38, 116 Cal.App. 602.
N.J.—Manowitz v. Kanov, 154 A. 326, 107 N.J.Law 523, 75 A.L.R. 1464.
N.Y.—Farber v. Demino, 173 N.E. 223, 254 N.Y. 363, followed in G. A. Baker & Co. v. Polygraphic Co. of America, 193 N.E. 265, 265 N.Y. 447, reargument denied 193 N.E. 294, 265 N.Y. 508.
Pa.—Bergen v. Lit Bros., 47 A.2d 671—Anstine v. Pennsylvania R. Co., 43 A.2d 109, 352 Pa. 547—McShea v. McKenna, 95 Pa.Super. 338.
Tex.—Callihan v. White, Civ.App., 139 S.W.2d 129.
Va.—McLaughlin v. Siegel, 185 S.E. 873, 166 Va. 374.
34 C.J. p 689 note 49.
Release of joint tort-feasor as release of others see the C.J.S. title Release § 50, also 53 C.J. p 1255 note 20–p 1266 note 5.
Satisfaction of judgment against one tort-feasor as discharging other joint tort-feasors see infra § 761.

Rule is grounded on principle that for a single injury there can be but one recompense.
U.S.—Eberle v. Sinclair Prairie Oil Co., C.C.A.Okl., 120 F.2d 746, 135 A.L.R. 1494.
Mo.—Hunter Land & Development Co. v. Caruthersville Stave & Heading Co., 9 S.W.2d 531, 223 Mo.App. 132.
N.Y.—Collins v. Smith, 8 N.Y.S.2d 794, 255 App.Div. 665.
Ohio.—Smith v. Fisher, App., 32 N. E.2d 561.

A payment into court, if not collusive, by one of several joint tort feasors, of the amount of the judgment recovered against them, will discharge the remaining tort feasor. —Collins v. Smith, 8 N.Y.S.2d 794, 255 App.Div. 665.

Defendants not in pari delicto
If defendants jointly liable on a tort judgment are not in pari delicto, they are not joint tort-feasors within the rule, so that, if the parties intend to keep the judgment alive, payment by one of them will not extinguish it.—Central Bank & Trust Co. v. Cohn, 264 S.W. 641, 150 Tenn. 375.

33. Tex.—Cauble v. Cauble, Civ. App., 283 S.W. 914.
34 C.J. p 690 note 50.
Payment of:
Judgment on bill or note by indorser see Bills and Notes § 472 e (3).
Note by one joint maker see Bills and Notes § 449 b (2).

b. Assignment of Judgment

Generally, in the absence of a statute to the contrary, a joint defendant on paying the judgment may not take an assignment of it to himself or to a third person for his benefit so as to wield it against his codefendant.

As a general rule, in the absence of a statute to the contrary, it is not competent for one of the joint defendants on paying the judgment to take an assignment of it to himself,[34] or, unless under special circumstances, to a third person for his benefit,[35] so as to wield it against his codefendant, and it is none the less extinguished by the payment, although such an assignment is made,[36] unless, according to some authorities, the payment was not intended to have that effect.[37] This general rule is not, however, applicable to judgments against the maker and indorser of a negotiable instrument, as discussed in Bills and Notes § 472 e (3), or against a principal and surety generally, as discussed in the C.J.S. title Subrogation § 50, also 34 C.J. p 690 note 71–p 691 note 76, and 60 C.J. p 749 notes 63–65.

Notwithstanding the general rule, it has been held that, where a judgment is paid by one of the defendants and is assigned for his benefit, he acquires the right to use the judgment as a security for the payment of the amounts properly due from the other judgment debtors,[38] such right to be exercised only after an affirmative showing to the court and a determination of the indebtedness of the other defendants.[39] The order in which the money was paid and the assignment executed does not control, if they constituted one transaction and the intent was to constitute an assignment;[40] and the mere fact that an attorney for a joint judgment debtor pays the judgment, without the knowledge of his client, and obtains an assignment to a third person, is not proof that satisfaction was intended.[41]

In some jurisdictions the extinguishment of a judgment paid by one joint and several debtor may be prevented by a substantial compliance with a statute providing for an assignment of such judgment to a trustee for such debtor's benefit.[42] In other jurisdictions, by virtue of statute, where a codefendant in a judgment on an obligation on which all are liable as principals pays the judgment in full and takes a written assignment thereof, reciting that he has paid the judgment in full and authorizing the clerk to cancel the judgment of record as to the defendant paying it, the codefendant is not released;[43] but, if a codefendant pays a judgment with the money or funds of both defendants, it is an extinguishment of the judgment as to all, so that, where such codefendant takes an assignment of the judgment to himself, he or any subsequent transferee can be prevented from enforcing it.[44]

34. Mo.—Phelps v. Scott, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290.
N.C.—Hoft v. Mohn, 2 S.E.2d 23, 215 N.C. 397.
Tex.—Hadad v. Ellison, Civ.App., 283 S.W. 193.
34 C.J. p 690 note 54.
Assignment of judgment:
Generally see supra §§ 512–530.
To judgment debtor as effecting satisfaction see infra § 562.
Contribution between joint tort-feasors generally see Contribution § 11.

Reason for rule

A creditor's right to have its debt paid by any or all of those jointly and severally liable, without regard to the equities between them, is merged in the judgment obtained by the creditor and ought not in equity to be acquired by any one or more of the judgment debtors for enforcement against the others.—Hoft v. Mohn, 2 S.E.2d 23, 215 N.C. 397.

35. Okl.—Martin v. North American Car Corporation, 35 P.2d 460, 168 Okl. 599.
34 C.J. p 690 note 55.

36. Mo.—Phelps v. Scott, 30 S.W.2d 71, 325 Mo. 711, 71 A.L.R. 290.
N.Y.—Harvey v. Harvey, 48 N.Y.S.2d 238, 183 Misc. 475.
34 C.J. p 690 notes 54, 55.

37. Neb.—Ohio Nat. Life Ins. Co. v. Baxter, 293 N.W. 530, 139 Neb. 648.
N.J.—Brown v. White, 29 N.J.Law 514.

38. Cal.—National Bank of California v. Los Angeles Iron & Steel Co., 84 P. 466, 468, 2 Cal.App. 659.
Neb.—Exchange Elevator Co. v. Marshall, 22 N.W.2d 403.

Failure to take assignment

Where a joint judgment debtor pays the entire indebtedness, and neither takes an assignment from the creditor, nor proceeds under statute relating to contribution in such a case, the payment constitutes satisfaction not only as to such debtor, but also as between him and his coobligors.—Tucker v. Nicholson, 84 P. 2d 1045, 12 Cal.2d 427.

39. Cal.—National Bank of California v. Los Angeles Iron & Steel Co., 84 P. 466, 468, 2 Cal.App. 659.
34 C.J. p 690 note 60.

40. Cal.—Adams v. White Bus Line, 195 P. 389, 184 Cal. 710.

41. N.Y.—International R. Co. v. Pickarski, 186 N.Y.S. 319, 114 Misc. 349, affirmed 191 N.Y.S. 932, 199 App.Div. 953.

42. N.C.—Scales v. Scales, 11 S.E.2d 569, 218 N.C. 553.

New right and exclusive remedy

The statute providing a method by which a judgment paid by one or more judgment debtors jointly and severally liable may be kept alive creates a new right and provides an exclusive remedy.—Hoft v. Mohn, 2 S.E.2d 23, 215 N.C. 397.

What constitutes substantial compliance

(1) A joint obligor must pay the entire debt or more than a proportionate part before he may demand of the judgment creditor the transfer of the judgment to a trustee.—Jones v. Rhea, 151 S.E. 255, 198 N.C. 190.

(2) However, the fact that the codefendant pays a sum smaller than the amount of the judgment in full satisfaction thereof does not deprive him of the statutory method of keeping the judgment alive as against the nonpaying debtors.—Scales v. Scales, 11 S.E.2d 569, 218 N.C. 553.

(3) An assignment which, in effect, is to the paying codefendant itself, is insufficient to keep the judgment alive.—Hoft v. Mohn, 2 S.E.2d 23, 215 N.C. 397.

43. Ga.—Register v. Southern States Phosphate & Fertilizer Co., 122 S.E. 323, 157 Ga. 561, answers to certified questions conformed to 122 S.E. 652, 32 Ga.App. 86.

44. Ga.—Register v. Southern States Phosphate & Fertilizer Co., supra.

§ 556. —— Payment by Surety

Usually payment of a judgment by a surety extinguishes it at law.

Ordinarily a payment of the judgment by a surety will extinguish it at law,[45] unless the judgment is preserved for his benefit by statute;[46] but if the judgment is rendered against both principal and surety payment by the surety does not necessarily extinguish it.[47]

§ 557. —— Payment by Stranger

Generally a judgment creditor need not accept payment from a stranger not having an interest in the judgment, yet, if he does, the judgment is kept alive for the benefit of the stranger and is not extinguished where there is an understanding to that effect.

Although a judgment creditor is not bound to accept payment from a stranger[48] unless the stranger has an interest in property seized in satisfaction of the judgment,[49] yet, where he does accept such payment, he is precluded from further recovery,[50] and the judgment will be kept alive for the stranger's benefit, rather than extinguished, when,[51] and only when,[52] there is an intention and agreement or understanding to this effect.

It has been held, in this connection, that it is not necessary that this intention and agreement should be evidenced by a formal and valid assignment of the judgment,[53] although there is some authority to the contrary.[54] On the other hand, the taking of an assignment affords unequivocal evidence of an intention not to satisfy the judgment[55] unless it is taken so long after the payment as to evidence the fact that it was only an afterthought.[56] Such an assignment is valid and the judgment remains unextinguished in favor of a person in whose behalf it is obtained, as well where his credit is accepted as the consideration of the assignment as where it is for a payment in cash made by him.[57]

The assignment may be taken in the name of a third person,[58] and where this is done, in the absence of injury the judgment will not be declared paid because of simulation.[59] If the debtor joins with a stranger in paying off the judgment, taking an assignment to his attorney, the assignment will be valid as to the stranger, although void as to the debtor.[60] Where the judgment is against a stranger to a cause of action ex delicto, its satisfaction by such stranger is not an extinguishment of such cause of action.[61]

Who is stranger. A judgment is deemed to be paid by the judgment debtor himself, rather than by a stranger, and hence to be satisfied, rather than kept alive, where it is paid by another person with money furnished by the judgment debtor,[62] or

45. Ark.—Chollar v. Temple, 39 Ark. 238.
Ohio.—Commercial Casualty Ins. Co. v. Knutsen Motor Trucking Co., 173 N.E. 241, 36 Ohio App. 241.
Pa.—Fidelity Deposit Bank of Derry v. Stewart, 48 Pa.Dist. & Co. 618, 25 West.Co.L.J. 143—Grant v. Grant, Com.Pl., 20 Erie Co. 244.
Tex.—Key v. Oates, Civ.App., 280 S.W. 286.
34 C.J. p 690 note 69.
Subrogation of sureties to rights of creditor generally see the C.J.S. title Subrogation §§ 47–56, also 60 C.J. p 740 note 5–p 770 note 98, and 34 C.J. p 690 note 71–p 691 note 76.

Pro tanto satisfaction
Ark.—Carroll v. Swicord, 9 S.W.2d 783, 177 Ark. 1193.
Cal.—Kane v. Mendenhall, 56 P.2d 498, 5 Cal.2d 749.

46. Idaho.—Agren v. Staker, 267 P. 460, 46 Idaho 36.
34 C.J. p 690 note 70.

47. Mo.—Schuchman v. Roberts, 133 S.W.2d 1030, 234 Mo.App. 509.

48. N.C.—James v. Markham, 38 S.E. 917, 128 N.C. 380.
34 C.J. p 691 note 77.

49. Tex.—Holstead v. Parker, Civ. App., 238 S.W. 287.
34 C.J. p 691 note 78.

50. Va.—Forbes v. Wyatt, 129 S.E. 491, 143 Va. 802.

51. Cal.—Salter v. Lombardi, 3 P.2d 38, 116 Cal.App. 602.
Tex.—Williams v. Hedrick, Civ.App., 131 S.W.2d 187, error dismissed, judgment correct.
34 C.J. p 691 note 79.
Right of:
Assignee of judgment to issue execution see Executions § 14.
Stranger to be subrogated to rights of creditor on paying judgment see the C.J.S. title Subrogation § 38, also 34 C.J. p 691 notes 79, 80, and 60 C.J. p 907 note 79–p 820 note 52.

The intention of the payor controls as to whether a judgment is extinguished by payment of the amount of the judgment and costs by a stranger to the action.—Hughes v. McElwee, 185 S.E. 688, 117 W.Va. 410.

52. Okl.—Bobier v. Horn, 222 P. 238, 95 Okl. 8.
Pa.—Seligman & Co. v. Kearns, 81 Pa.Super. 413.
Tex.—Williams v. Hedrick, Civ.App., 131 S.W.2d 187, error dismissed, judgment correct.
34 C.J. p 691 note 80.

53. S.C.—Sutton v. Sutton, 1 S.E. 19, 26 S.C. 33.
34 C.J. p 692 note 81.

54. Mo.—St. Francis Mill Co. v. Sugg, 83 Mo. 476.

55. Cal.—Salter v. Lombardi, 3 P.2d 38, 116 Cal.App. 602.
34 C.J. p 692 note 83.

Written assignment
The purchase of a judgment by a stranger to it does not extinguish it where the purchaser takes a written assignment stating that the judgment should continue in effect and promptly asserts his rights as judgment creditor.—Williams v. Hedrick, Tex.Civ.App., 131 S.W.2d 187, error dismissed, judgment correct.

56. N.Y.—Dowling v. Hastings, 105 N.E. 194, 211 N.Y. 199.
34 C.J. p 692 note 84.

57. N.Y.—Harbeck v. Vanderbilt, 20 N.Y. 395.

58. La.—Hunter v. Chicago Lumber & Coal Co., 100 So. 35, 156 La. 19.

59. La.—Hunter v. Chicago Lumber & Coal Co., supra.

60. N.Y.—Harbeck v. Vanderbilt, 20 N.Y. 395.

61. N.Y.—Atlantic Dock Co. v. New York, 53 N.Y. 64.
34 C.J. p 692 note 87.

62. Ala.—Hogan v. Reynolds, 21 Ala. 56, 56 Am.D. 236.
34 C.J. p 692 note 88.

where the person making the payment is acting as the agent,[63] attorney,[64] or trustee[65] of the judgment debtor, even though the agency is undisclosed and the person making the payment is ostensibly a stranger.[66]

§ 558. —— Payment by Officer

Ordinarily payment of a judgment by an officer without legal compulsion or request by the judgment debtor operates to extinguish it, unless there is an assignment of the judgment to the officer or the debtor waives the benefit of the payment as satisfaction.

Where the amount of a judgment is paid by a sheriff or other officer without any demand or request on the part of the judgment debtor, the judgment is extinguished, and such officer cannot keep it alive for his own reimbursement[67] unless he takes an assignment of the judgment in his own name, or to a third person in trust for himself,[68] or the debtor waives the benefit of the payment as satisfaction.[69] However it has been held that the judgment is not extinguished where the sheriff or other officer is compelled to pay it by legal proceedings,[70] or where he pays a judgment recovered against himself for his failure to enforce the first judgment,[71] unless defendant adopts the payment and insists on it as a satisfaction.[72]

§ 559. Evidence of Payment

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

(1) Presumptions
(2) Burden of proof
(1) Presumptions
(a) In general
(b) From lapse of time

(a) In General

In the absence of other proof it will be presumed that a judgment has not been paid.

It will be presumed that a judgment has not been paid, in the absence of other proof[73] and in the absence of lapse of time sufficient to raise a presumption of payment, as discussed infra subdivision a (1) (b) of this section. However, payment or satisfaction may be presumed from the conduct of the judgment creditor.[74] Where a satisfaction piece was given, the presumption arises that it was given on payment of the judgment.[75] Some statutes providing that a presumption of payment of the judgment shall arise from the fact that the execution has not been returned according to law apply only in a proceeding against the sheriff or his sureties.[76]

(b) From Lapse of Time
aa. In general
bb. Computation of time

aa. In General

In the absence of a statute providing otherwise, it is generally held that, where twenty years have elapsed since the rendition of a judgment, without any acknowledgment of it or attempt to enforce it, a presumption of law arises that the judgment has been paid.

At common law, where twenty years have elapsed since the rendition of a judgment, without any process on it, or any acknowledgment of it or attempt to enforce it, there is a presumption of law that it has been paid.[77] A similar rule has been enacted by

Direct payment by judgment creditor with borrowed money see supra § 552.

63. Tex.—**Corpus Juris cited in** Hart v. Harrell, Civ.App., 17 S.W. 2d 1093, 1094.
34 C.J. p 692 note 89.

64. Mich.—Rogers v. Welte, 28 N. W. 86, 61 Mich. 258.
N.Y.—Gotthelf v. Krulewitch, 138 N. Y.S. 756, 153 App.Div. 746.

65. Pa.—Keller v. Leib, 1 Penr. & W. 220.
Tex.—Williams v. Hedrick, Civ.App., 131 S.W.2d 187, error dismissed, judgment correct.

66. U.S.—Lillie v. Dennert, Mich., 232 F. 104, 146 C.C.A. 296.

67. Tenn.—Lintz v. Thompson, 1 Head 456, 73 Am.D. 182.
34 C.J. p 692 note 93.

68. N.C.—Heilig v. Lemly, 74 N.C. 250, 21 Am.R. 489.
34 C.J. p 692 note 94.

69. Ala.—Mooney v. Parker, 18 Ala. 708.

70. Ind.—Burbank v. Slinkard, 53 Ind. 493.
Mass.—Allen v. Holden, 9 Mass. 133, 6 Am.D. 46.

71. N.H.—Cheever v. Mirrick, 2 N. H. 376.
34 C.J. p 692 note 97.

72. Ala.—Poe v. Dorrah, 20 Ala. 288, 56 Am.D. 196.

73. U.S.—Campbell v. American & Zell Co., 129 F. 491, affirmed 133 F. 531, 71 C.C.A. 55, certiorari denied 26 S.Ct. 747, 199 U.S. 607, 50 L.Ed. 331.
Presumption of payment generally see the C.J.S. title Payment § 98, also 48 C.J. p 687 note 7 et seq.

74. La.—Bethany v. His Creditors, 7 Rob. 61—Abat v. Buisson, 9 La. 417.
The making of an award for damages in receivership proceeding did not raise presumption that award was paid in full.—Mathewson v. Colpitts, 188 N.E. 601, 284 Mass. 581.

75. N.Y.—Booth v. Farmers' & Mechanics' Nat. Bank, 50 N.Y. 396.

76. Va.—Paxton v. Rich, 7 S.E. 531, 85 Va. 378, 1 L.R.A. 639.

77. Pa.—Ott v. Ott, 166 A. 556, 311 Pa. 130—Brady v. Tarr, 21 A.2d 131, 145 Pa.Super. 316—First Nat. Bank v. Bank of Pittsburgh, 99 Pa. Super. 600—Coleman & Stahl v. Weimer, 86 Pa.Super. 303—Krzykwa v. Krzykwa, Com.Pl., 15 Northumb.L.J. 230.
34 C.J. p 692 note 6.
Presumption of payment from lapse of time generally see the C.J.S. title Payment § 101, also 48 C.J. p 690 note 56—p 600 note 65.
Basis of rule
This presumption is based on the common sense theory that the judgment creditor would have normally

statute in several of the states,[78] although, under some of the statutes, the presumption of payment arises after the lapse of only ten years.[79] Such statutes are not retrospective,[80] and, where they so provide they do not apply to judgments other than those of courts of record.[81]

Ordinarily, the presumption of payment applies as well between the parties to the judgment as between plaintiff and subsequent creditors,[82] but it applies only to judgments for the payment of money,[83] including judgments for a contingent liabil-

taken steps to proceed against the debtor for the collection of the judgment before such a period of time had been permitted to elapse; if the judgment has not in fact been paid, it is only reasonable and fair to put the burden of the explanation on him who was entitled to the money. —Roemer now to Use of Kendig v. Lancaster County, 190 A. 347, 126 Pa. Super. 11—34 C.J. p 692 note 6 [a].

Strength of presumption

(1) Presumption of payment after twenty years is very strong and is favored in law as tending to the repose of society and discouragement of stale claims.—In re Lefever's Estate, 122 A. 273, 278 Pa. 196—Krzykwa v. Krzykwa, Pa.Com.Pl., 15 Northumb.L.J. 230.

(2) This presumption is strengthened as time passes on.—In re Lefever's Estate, supra—Krzykwa v. Krzykwa, supra.

(3) Conclusiveness of presumption generally see infra subdivision c of this section.

Presumption not abandoned

Defendant testifying to payment of indebtedness did not abandon presumption of payment by virtue of lapse of over twenty years since entry of judgment.—Ott v. Ott, 166 A. 556, 311 Pa. 130.

78. N.Y.—In re Murray's Estate, 288 N.Y.S. 346, 248 App.Div. 167, reversed on other grounds 5 N.E. 2d 717, 272 N.Y. 228—In re Walton Ave., New York City, 276 N.Y.S. 899, 243 App.Div. 587—Sanchez v. Spitzka, 48 N.Y.S.2d 184, 183 Misc. 413—In re Ballenzweig's Estate, 22 N.Y.S.2d 541, 174 Misc. 1109—Moran Towing & Transp. Co. v. Fleming, 25 N.Y.S.2d 41, affirmed 27 N.Y.S.2d 431, 261 App.Div. 978, affirmed 38 N.E.2d 231, 287 N.Y. 571.

34 C.J. p 693 note 7.

Statute applies to foreign judgments as well as to judgments rendered within state.—Baio v. Mangano, 6 N.Y.S.2d 763, 169 Misc. 155, reversed on other grounds 9 N.Y.S. 2d 276, 256 App.Div. 831, reargument denied 10 N.Y.S.2d 676, 256 App.Div. 930.

City

(1) Statute establishing conclusive presumption of payment of judgment after twenty years was held applicable to a city, in its governmental capacity.—Gewertz v. Berry, 180 N.E. 251, 258 N.Y. 505.

(2) City and its officers could not waive the provisions of the statute —Application of Long Island R. Co. 22 N.Y.S.2d 706, 174 Misc. 1037, affirmed 25 N.Y.S.2d 1005, 261 App.Div 914, reargument denied 27 N.Y.S.2d 441, 261 App.Div. 987.

Subsisting obligation

Notwithstanding statute declaring that every judgment shall be deemed satisfied after the expiration of twenty years, such a judgment, if in fact unsatisfied, is a subsisting obligation.—Pensinger v. Jarecki Mfg. Co., 136 N.E. 641, 78 Ind.App. 569.

79. Mo.—Mayes v. Mayes, 116 S.W. 2d 1, 342 Mo. 401—Kansas City v. Field, 194 S.W. 39, 270 Mo. 500—Hedges v. McKittrick, App., 153 S. W.2d 790—City of St. Louis v. Dietering, App., 27 S.W.2d 711.

In Alabama

(1) A judgment is presumed to be paid after ten years without execution taken thereon, but the presumption does not become conclusive until after twenty years.—Gilmer v. Gant, 24 So.2d 414, 247 Ala. 347—McClintock v. McEachin, 20 So.2d 711, 246 Ala. 412—Hays v. McCarty, 195 So. 241, 239 Ala. 400.

(2) The presumption is a substantial statutory right accorded to debtor in a stale judgment as a shield to defeat recovery, rather than merely an administrative presumption having only the office of shifting burden of proceeding with the evidence.—Gambill v. Cassimus, 22 So. 2d 909, 247 Ala. 176.

(3) Unless the statutory presumption of satisfaction is overcome by proof that payment or satisfaction has not been made the judgment is functus officio.—Gilmer v. Gant, supra.

80. Colo.—Jones v. Stockgrowers' Nat. Bank, 67 P. 177, 17 Colo.App. 79.

34 C.J. p 693 note 8.

81. N.Y.—Dieffenbach v. Roch, 20 N.E. 560, 112 N.Y. 621, 2 L.R.A. 829, 16 N.Y.Civ.Proc. 172.

Judgment of inferior court

The statute does not apply to judgment of inferior court, unless transcripted.—Jennings v. Loucks, 297 N. Y.S. 893, 163 Misc. 791.

82. Pa.—Van Loon v. Smith, 103 Pa. 238.

Third persons

Statutory presumption of payment of judgment from failure to issue execution for ten years from rendition of judgment or date of last execution issued protects third persons even against revived judgment or judgment renewed by action thereon. —Second Nat. Bank v. Allgood, 176 So. 363, 234 Ala. 654.

Only as to third persons

In some jurisdictions during the period of dormancy of a judgment, there is no presumption, in favor of defendant, that the judgment has been paid, but such presumption exists only as to third persons.—Hagins v. Blitch, 65 S.E. 1082, 6 Ga.App. 839—34 C.J. p 658 note 94.

83. Mo.—Mayes v. Mayes, App., 104 S.W.2d 1019, reversed on other grounds 116 S.W.2d 1, 342 Mo. 401.

N.Y.—In re Walton Ave., New York City, 278 N.Y.S. 204, 244 App. 125, affirmed In re Opening of Walton Ave. from East One Hundred and Sixty-Seventh Street to Tremont Ave. in Borough of Bronx, City of New York, 200 N.E. 295, 270 N.Y. 513—Baio v. Mangono, 6 N.Y.S.2d 763, 169 Misc. 155, reversed on other grounds 9 N.Y.S.2d 276, 256 App. Div. 831, reargument denied 10 N. Y.S.2d 676, 256 App.Div. 930.

34 C.J. p 693 note 10.

Orders allowing certain amounts as fees of attorneys who represented trustees in suit for authorization for sale of trust property, and ordering that such amounts be paid from proceeds of sale, were orders for the payment of money with respect to text rule.—Hedges v. McKittrick, Mo.App., 153 S.W.2d 790.

Statutory presumption held inapplicable

(1) To so-called judgment in proceedings commenced by surviving trustees to compel an accounting by a deceased trustee's administratrix for deceased's acts and for a construction of a will.—In re Van Nostrand's Will, 29 N.Y.S.2d 857, 177 Misc. 1.

(2) To final order in habeas corpus proceedings in supreme court, where such final order was not docketed.—Warren v. Garlipp, 216 N.Y.S. 466, 217 App.Div. 55.

(3) To moneys paid by city into court in condemnation proceedings on awards to unknown owners, such moneys being trust funds.—In re Rochester Ave. in City of New York, 268 N.Y.S. 736, 241 App.Div. 614, affirmed 191 N.E. 587, 264 N.Y. 607, re-

ity,[84] and is, therefore, not applicable to judgments in rem,[85] or to judgments awarding the possession of property,[86] foreclosing a mortgage,[87] declaring a vendor's lien on land,[88] or foreclosing a tax lien,[89] without the adjudication of personal liability. Likewise, the presumption is inapplicable to a judgment which by its terms is not collectable,[90] or, it seems, to a judgment allowing a claim by an assignee,[91] or to an order of court, made in proceedings to sell land of an habitual drunkard, which finds that he is indebted to a certain person in a named sum.[92]

As a general rule, the lapse of any number of years fewer than twenty, or other number fixed by the statute, will not raise a presumption of law that the judgment has been paid;[93] but the running of a shorter period of time, when accompanied by corroborative or persuasive circumstances, may be submitted to a jury as ground for a presumption of fact.[94] In some jurisdictions a presumption of payment arises after the time when the judgment has become dormant, even though such time is less than twenty years,[95] and it has also been held, without reference to provisions specifically fixing the time after which the presumption of payment arises, that a rebuttable presumption of payment may take effect when no execution has issued within the period when an execution may issue without leave of court.[96]

bb. Computation of Time

The period after which a judgment is presumed to have been paid begins to run from the time judgment is entered or other time fixed by the statute, and may be extended by various acts tolling the period, such as commencement of proceedings to collect the judgment.

The period after which a judgment is presumed to have been paid begins to run from the time the judgment is entered up,[97] or, under some statutes, from the date of original rendition of the judgment,[98] or from the time when the judgment creditor is first entitled to a mandate to enforce it;[99] but, where a judgment by its terms is not immediately collectable, the period begins to run from the time that it becomes collectable.[1]

Although there is authority to the contrary,[2] it has been held that a statute declaring that a judgment shall be presumed to be paid after the lapse of a certain time is a statute of limitations.[3] In

argument denied 193 N.E. 291, 265 N. Y. 502.

(4) To renewal of note, given by defendant to plaintiff to secure release of defendant from such judgment against him and another.—Night & Day Bank of St. Louis v. Hill, Mo.App., 274 S.W. 491.

84. Mo.—Hedges v. McKittrick, App., 153 S.W.2d 790.
Pa.—Camp v. John, 102 A. 285, 259 Pa. 38.

85. N.Y.—In re Van Nostrand's Will, 29 N.Y.S.2d 857, 177 Misc. 1.

86. N.Y.—Van Rensselaer v. Wright, 25 N.E. 3, 121 N.Y. 626.

87. N.Y.—Barnard v. Onderdonk, 98 N.Y. 158.

88. Ala.—Moore v. Williams, 29 So. 795, 129 Ala. 329.

89. N.Y.—In re Walton Ave., New York City, 278 N.Y.S. 204, 244 App. Div. 125, affirmed In re Opening of Walton Ave. from East One Hundred and Sixty-Seventh St. to Tremont Ave. in Borough of Bronx, City of New York, 200 N.E. 295, 270 N.Y. 513.

90. Pa.—Roemer, now to Use of Kendig v. Lancaster County, 190 A. 347, 126 Pa.Super. 11.

Condemnation award

In action in 1936 to revive 1901 judgment for damages to land from laying out of street not actually opened until 1933, where statute governing condemnation proceedings provided that damages awarded should not be paid until streets were actually opened, rule that judgment is presumed to have been paid after twenty years was inapplicable.—Roemer, now to Use of Kendig v. Lancaster County, supra.

91. Mo.—Elsea v. Pryor, 87 Mo.App. 157.

92. N.Y.—Sheldon v. Mirick, 39 N.E. 647, 144 N.Y. 498.

93. N.Y.—In re Murray's Estate, 5 N.E.2d 717, 272 N.Y. 228.
Pa.—Roemer, now to Use of Kendig, v. Lancaster County, 190 A. 347, 126 Pa.Super. 11.
34 C.J. p 693 notes 19, 21.

94. U.S.—Renwick v. Wheeler, C.C. Iowa, 48 F. 431.
34 C.J. p 693 note 22.

95. Neb.—Wright v. Sweet, 4 N.W. 1043, 10 Neb. 190.
34 C.J. p 693 notes 17, 20.

96. N.Y.—Manger v. Golding, 210 N. Y.S. 703, 214 App.Div. 786—Partridge v. Moynihan, 110 N.Y.S. 539, 59 Misc. 234, 20 N.Y.Ann.Cas. 272.
Leave of court for issuance of execution after lapse of time generally see Executions § 59 a (2).

97. Pa.—Ott v. Ott, 166 A. 556, 311 Pa. 130.
34 C.J. p 694 note 23.

98. Mo.—Mayes v. Mayes, 116 S.W. 2d 1, 342 Mo. 401—Hedges v. McKittrick, App., 153 S.W.2d 790—City of St. Louis v. Dietering, App., 27 S.W.2d 711.

Right to reject terms

Fact that city reserved right to reject terms fixed by condemnation judgment did not stay running of period from date of rendition of judgment.—City of St. Louis v. Dietering, supra.

99. N.Y.—In re Elm St. in City of New York, 146 N.E. 342, 239 N.Y. 220—Application of Long Island R. Co., 22 N.Y.S.2d 706, 174 Misc. 1037, affirmed 25 N.Y.S.2d 1005, 261 App. Div. 914, reargument denied 27 N. Y.S.2d 441, 261 App.Div. 987.
34 C.J. p 694 note 24.

The words "mandate to enforce it," as used in the statute, refer to an execution issued to a sheriff, or a like command to one in a ministerial office.—In re McEnery's Estate, 279 N.Y.S. 187, 155 Misc. 337.

1. Pa.—Roemer, now to Use of Kendig v. Lancaster County, 190 A. 347, 126 Pa.Super. 11.

2. Mo.—Mayes v. Mayes, App., 104 S.W.2d 1019, reversed on other grounds, 116 S.W.2d 1, 342 Mo. 401—Chiles v. Buckner School Dist., 77 S.W. 82, 103 Mo.App. 240.

Mere rule of evidence

Presumption of payment arising from fact that judgment was more than twenty years old does not bar the debt as does the statute of limitations, but it is merely a rule of evidence affecting the burden of proof.—In re Grenet's Estate, 2 A.2d 707, 332 Pa. 111—Brady v. Tarr, 21 A.2d 131, 145 Pa.Super. 316.

3. N.Y.—In re Murray's Estate, 5 N. E.2d 717, 272 N.Y. 228—Baio v.

this view the running of the statute, or of the common-law period of twenty years, may be interrupted by a stay of execution,[4] by an injunction restraining the collection of the judgment,[5] by the disability of the party from infancy,[6] by the institution of special or collateral proceedings to collect the judgment, or uncover property subject to it,[7] by the issuance of scire facias or other process to revive the judgment,[8] or by the judgment debtor's payment on account of the judgment or acknowledgment of the debt.[9]

It has also been held that the running of the period necessary to create the presumption of payment may be tolled by the debtor's absence from the state,[10] although, where the statutory presumption of payment is conclusive, it has been held that the period will not be extended by such absence,[11] notwithstanding another statute which provides that the time limited for the commencement of an action shall not include the time during which such person is absent from the state;[12] and, in any case, the absence of the judgment creditor does not affect the running of the statutory period.[13] The period is not stayed by the mere filing of a claim against the debtor's estate,[14] or by the operation of a statute extending the time for commencement of an action for a certain period after the death of the person against whom the cause of action exists.[15]

(2) Burden of Proof

As a general rule, the burden of proving payment of a judgment rests on the person claiming payment.

As a general rule, the burden of proving payment of a judgment rests on defendant or other person claiming payment,[16] except where a prima facie case of payment has been made,[17] where the judgment is dormant,[18] or where such a period of time has elapsed as to raise a presumption of payment,[19] in which case the burden of proving nonpayment, or of overcoming the presumption of payment, rests on plaintiff or the person seeking to enforce the judgment.

b. Admissibility

(1) In general

(2) To support or rebut presumption of payment

Mangano, 6 N.Y.S.2d 763, 169 Misc. 155, reversed on other grounds 9 N.Y.S.2d 276, 256 App.Div. 831, reargument denied 10 N.Y.S.2d 676, 256 App.Div. 930.
34 C.J. p 694 note 26.

4. S.C.—Kinsler v. Holmes, 2 S.C. 483.

5. Va.—Hutsonpiller v. Stover, 12 Gratt. 579, 53 Va. 579.

6. S.C.—McQueen v. Fletcher, 25 S.C.Eq. 152.

7. N.Y.—In re Murray's Estate, 5 N.E.2d 717, 272 N.Y. 228.
Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Youngman, 171 A. 594, 314 Pa. 277.
34 C.J. p 694 note 30.
Time to sue and limitations in action on judgment generally see infra § 854.

Acquisition of jurisdiction
Recovery on surrogate's decree for costs against decedent was barred by limitations, where twenty years elapsed before surrogate's court acquired jurisdiction in proceedings for enforcement of decree.—In re McEnery's Estate, 279 N.Y.S. 187, 155 Misc. 337.

8. Pa.—Croskey v. Croskey, 160 A. 103, 306 Pa. 423.

9. N.Y.—In re Murray's Estate, 288 N.Y.S. 346, 248 App.Div. 167, reversed on other grounds 5 N.E.2d 717, 272 N.Y. 228—Arizona Fire Ins. Co. v. King, 14 N.Y.S.2d 783, 172 Misc. 165.

Garnishee execution
Where payments were made under garnishee execution out of funds belonging to the debtor on account of creditor's judgment, statutory presumption of payment of judgment by the expiration of twenty years was not applicable.—Moran Towing & Transp. Co. v. Fleming, 25 N.Y.S.2d 41, affirmed 27 N.Y.S.2d 431, 261 App.Div. 978, affirmed 38 N.E.2d 231, 287 N.Y. 571.

10. S.C.—Latimer v. Townbridge, 29 S.E. 634, 52 S.C. 193, 68 Am.S.R. 893.

11. Mo.—Mayes v. Mayes, 116 S.W.2d 1, 342 Mo. 401.

12. N.Y.—Brinkman v. Cram, 161 N.Y.S. 965, 175 App.Div. 372, affirmed 122 N.E. 877, 225 N.Y. 720.

13. Mo.—Mayes v. Mayes, App., 104 S.W.2d 1019, reversed on other grounds 116 S.W.2d 1, 342 Mo. 401.

14. N.Y.—In re Ballenzweig's Estate, 23 N.Y.S.2d 541, 174 Misc. 1109—In re McEnery's Estate, 279 N.Y.S. 187, 155 Misc. 337—In re Amarante's Estate, 266 N.Y.S. 559, 148 Misc. 825.
34 C.J. p 694 note 33 [b].

15. N.Y.—Matter of Hoes, 170 N.Y.S. 543, 183 App.Div. 38.
33 C.J. p 694 note 33.

16. Ala.—Grayson v. Schwab, 179 So. 377, 235 Ala. 398.
La.—State ex rel. Leary v. Hughes, App., 185 So. 69.
Utah.—**Corpus Juris cited in** Marks v. Marks, 100 P.2d 207, 210, 98 Utah 400.
34 C.J. p 694 note 34.
Burden of proof with respect to payments generally see the C.J.S. title Payment § 93, also 48 C.J. p 680 note 20–p 683 note 69.

Within period of twenty years after recovery of judgment, the burden of proving payment is on the debtor after which period the burden rests on the creditor.—Brady v. Tarr, 21 A.2d 131, 145 Pa.Super. 316.

Defendant, claiming payment in personalty, must prove not only delivery to plaintiff, but also the latter's consent to accept it as payment of the judgment.—Bauman-George Piano Co. v. Matthews, 4 La.App. 334.

17. La.—State ex rel. Leary v. Hughes, App., 185 So. 59.

18. Neb.—Hill v. Feeny, 134 N.W. 921, 90 Neb. 791.

19. Ala.—Gilmer v. Gant, 24 So.2d 414, 247 Ala. 347—Gambill v. Cassimus, 22 So.2d 909, 247 Ala. 176—Hays v. McCarty, 195 So. 241, 239 Ala. 400—Second Nat. Bank v. Allgood, 176 So. 363, 234 Ala. 654.
La.—State ex rel. Leary v. Hughes, App., 185 So. 69.
Pa.—In re Lefever's Estate, 122 A. 273, 278 Pa. 196—Gilmore v. Alexander, 112 A. 9, 268 Pa. 415—Brady v. Tarr, 21 A.2d 131, 145 Pa.Super. 316.
34 C.J. p 694 note 36.

(1) In General

Competent and relevant evidence may be received to prove payment of a judgment.

As a general rule, all competent and relevant evidence may be received to prove payment of a judgment.[20] The evidence admissible to prove payment includes parol evidence,[21] a written receipt or other paper passing between the parties,[22] an entry on the records of the court,[23] and the return and receipts on the execution,[24] but not evidence of the acts of the parties prior to the rendition of the judgment,[25] although it has been held that an agreement entered into prior to the date of a judgment, as to the mode of its discharge, but which was not to be executed until afterward, and all payments made in pursuance of such agreement, are admissible in evidence in support of a plea of payment.[26] The fact that a mortgagor was permitted to occupy the premises as a tenant after foreclosure, and that at his death he left considerable property, does not tend to show payment of the deficiency judgment.[27]

Evidence that the judgment has not been paid,[28] including evidence contradicting or explaining a written receipt,[29] ordinarily is admissible, but an account book of a deceased attorney is not of itself competent evidence of the fact that such attorney did not receive a payment on the judgment.[30] In some jurisdictions, however, where through lapse of time a conclusive presumption of payment is created, evidence to prove nonpayment is inadmissible.[31] At least in connection with other circumstances, evidence that no execution was issued,[32] or that one issued was not returned,[33] is admissible on the question of payment.

(2) To Support or Rebut Presumption of Payment

Generally, any competent evidence which tends to support or rebut the presumption of payment of a judgment is admissible on an issue of payment, but in some jurisdictions the evidence admissible for this purpose is prescribed by statute.

In some jurisdictions, the evidence which may be relied on to rebut the presumption of payment arising from lapse of time is prescribed by statute,[34] and, if the presumption is declared by the statute to be conclusive, only its existence may be attacked, and it may not be shown in rebuttal of the presumption that the judgment was not actually paid.[35] On the other hand, where the presumption of payment is not conclusive, it may be rebutted by any competent and satisfactory evidence that there has been no payment in fact.[36]

To repel the presumption of payment there may be shown the pursuit of a continued course of legal proceedings to enforce the judgment,[37] such as the issue and return of an execution unsatisfied within the time limited,[38] the revival of the judgment[39] or

20. Pa.—First Nat. Bank v. Bank of Pittsburgh, 99 Pa.Super. 600.

21. Cal.—Cantrall v. Waterman, 232 P. 997, 70 Cal.App. 184.
Ky.—First Nat. Bank of Jackson v. Reynolds, 143 S.W.2d 721, 283 Ky. 837.
34 C.J. p 694 note 37.
Admissibility of evidence of payments generally see the C.J.S. title Payment §§ 112–119, also 48 C. J. p 717 note 90–p 725 note 41.

22. Tex.—Citizens State Bank of Clarinda, Iowa, v. Del-Tex Inv. Co., Civ.App., 123 S.W.2d 450, error dismissed, judgment correct.
34 C.J. p 694 note 38.

23. Mass.—Cote v. New England Nav. Co., 99 N.E. 972, 213 Mass. 177.
34 C.J. p 694 note 39.
Entry of satisfaction as evidence generally see infra § 583.

24. Iowa.—Singer v. Given, 15 N.W. 858, 61 Iowa 93.
34 C.J. p 695 note 40.
Return on execution as evidence of satisfaction generally see infra § 573.

25. Del.—Lofland v. McDaniel, 41 A. 882, 17 Del. 416.
Me.—Bird v. Smith, 34 Me. 63, 56 Am. D. 635.

26. Md.—Downey v. Forrester, 35 Md. 117.

27. N.Y.—Seaman v. Clarke, 78 N.Y. S. 171, 75 App.Div. 345.

28. Tex.—James v. Midland Grocery & Dry Goods Co., Civ.App., 146 S. W. 1073, error denied, Sup., 147 S. W. xv.
34 C.J. p 695 note 44.

29. Md.—Hughes v. O'Donnell, 2 Harr. & J. 324.
N.J.—Earle v. Earle, 16 N.J.Law 273.

30. Iowa.—Shaffer v. McCrackin, 58 N.W. 910, 90 Iowa 578, 48 Am.S.R. 465.

31. N.Y.—In re Elm St. in City of New York, 146 N.E. 342, 239 N.Y. 220.

32. N.Y.—Jacoby v. Stephenson Silver Min. Co., 6 N.Y.S. 371, 3 Silv. Sup. 130.

33. N.Y.—Gassner v. Sandford, 4 N. Y.Super. 440.

34. Mo.—Hedges v. McKittrick, App., 153 S.W.2d 790.
34 C.J. p 695 note 49.

35. N.Y.—In re Elm St. in City of New York, 146 N.E. 342, 239 N.Y. 220.
Conclusiveness of presumption generally see infra subdivision c of this section.

36. Ala.—Gambill v. Cassimus, 22 So.2d 909, 247 Ala. 176.
Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Youngman, 171 A. 594, 314 Pa. 277—First Nat. Bank v. Bank of Pittsburgh, 99 Pa.Super. 600.
34 C.J. p 695 note 50.

37. Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Youngman, 171 A. 594, 314 Pa. 277.
Service of interrogatories
As regards presumption of payment of judgment entered in 1910, and on which suit was brought in 1931, attachment issued in 1910 must be treated as though issued in 1913, when interrogatories were served, and as having same evidential effect as if existing writ had been discontinued and new writ issued.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Youngman, supra.

38. Tenn.—Black v. Carpenter, 8 Baxt. 350.

39. Ark.—Brearly v. Peay, 23 Ark. 172.
N.Y.—Mower v. Kip, 2 Edw. 165, re-

attempt to revive it[40] by scire facias or other process,[41] and other evidence which satisfactorily accounts for the delay of the creditor in enforcing payment,[42] such as proof of the impossibility of proceeding for its collection by reason of the closing of the courts,[43] the poverty of the judgment debtor,[44] or his absence from the state.[45]

The existence of the presumption of payment may also be attacked by evidence of the making within the twenty years or other statutory period of partial payments[46] or of a distinct acknowledgment of the judgment as an existing debt,[47] made to the creditor,[48] his agent or attorney,[49] or even to a stranger,[50] provided it is intended to be communicated to or to influence the conduct of the creditor,[51] although an admission will not be as readily implied from language casually addressed to a stranger as when addressed to the creditor in reply to a demand for the debt.[52] The acknowledgment or admission need not be accompanied by a promise to pay;[53] nor need it specify the amount or character of the judgment debt,[54] and in some jurisdictions,[55] although not in others,[56] it is of no consequence that it is accompanied by a refusal to pay. Evidence tending to support the presumption of payment, or to explain and contradict evidence given in rebuttal of such presumption, should be admitted.[57]

c. Weight and Sufficiency

The fact of payment or nonpayment of a judgment should be established by a fair preponderance of the evidence, but, where there is a presumption of payment from lapse of time, evidence in rebuttal thereof should be particularly strong and convincing.

Ordinarily a fair preponderance of the evidence is sufficient to establish or disprove, as the case may be, payment of a judgment.[58] The mere fact that

versed on other grounds 6 Paige 88.

Pa.—James v. Jarrett, 17 Pa. 370.

40. Pa.—In re Miller, 90 A. 77, 243 Pa. 328.

41. Pa.—Croskey v. Croskey, 160 A. 103, 306 Pa. 423.

Circumstance to be considered

In scire facias proceeding to revive and continue the lien of a judgment, the issuance of prior writ of scire facias to revive judgment was a circumstance to be considered with other evidence in rebutting presumption of payment arising from fact that judgment was more than twenty years old.—Brady v. Tarr, 21 A.2d 131, 145 Pa.Super. 316.

42. Conn.—Judson v. Phelps, 89 A. 161, 87 Conn. 495, 1 A.L.R. 768.

Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Youngman, 171 A. 594, 314 Pa. 277.

43. Ark.—Woodruff v. Sanders, 15 Ark. 143.

44. N.Y.—Boyd v. Boyd, 29 N.Y.S. 7, 9 Misc. 161.

45. N.Y.—Brinkman v. Cram, 161 N.Y.S. 965, 175 App.Div. 372, affirmed 122 N.E. 877, 225 N.Y. 720.

Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Youngman, 171 A. 594, 314 Pa. 277.

46. N.Y.—In re Murray's Estate, 288 N.Y.S. 346, 248 App.Div. 167, reversed on other grounds, 5 N.E.2d 717, 272 N.Y. 228.

Pa.—Ott v. Ott, 166 A. 556, 311 Pa. 130.

34 C.J. p 695 note 57.

Voluntary or involuntary payment

(1) It has been held that the rule is not restricted to a voluntary payment but includes payments on judgment by virtue of garnishment.—Moran Towing & Transp. Co. v. Fleming, 25 N.Y.S.2d 41, affirmed 27 N.Y.S.2d 431, 261 App.Div. 978, affirmed 38 N.E.2d 231, 287 N.Y. 571.

(2) It has also been held, however, that a payment through legal coercion will not rebut the presumption, although a voluntary payment will do so.—Arizona Fire Ins. Co. v. King, 14 N.Y.S.2d 783, 172 Misc. 165.

47. N.Y.—Arizona Fire Ins. Co. v. King, supra.

34 C.J. p 695 note 58.

Nature of acknowledgment required

Acknowledgment of judgment debt within exception in statute creating presumption of satisfaction of judgment after twenty years is distinguished from that necessary to constitute new or continuing contract under statute of limitations.—Arizona Fire Ins. Co. v. King, supra.

34 C.J. p 695 note 58 [a].

48. Pa.—Gregory v. Commonwealth, 15 A. 452, 121 Pa. 611, 6 Am.S.R. 804—Eby v. Eby, 5 Pa. 435.

49. N.Y.—Arizona Fire Ins. Co. v. King, 14 N.Y.S.2d 783, 172 Misc. 165.

Pa.—Gregory v. Commonwealth, 15 A. 452, 121 Pa. 611, 6 Am.S.R. 804.

50. Pa.—Gregory v. Commonwealth, supra.

51. N.Y.—In re Kendrick, 13 N.E. 762, 107 N.Y. 104.

52. Pa.—Gregory v. Commonwealth, 15 A. 452, 121 Pa. 611, 6 Am.S.R. 804—Appeal of Bentley, 99 Pa. 500.

53. N.Y.—Arizona Fire Ins. Co. v. King, 14 N.Y.S.2d 783, 172 Misc. 165.

34 C.J. p 695 note 64.

54. N.Y.—Arizona Fire Ins. Co. v. King, supra.

55. Pa.—Gregory v. Commonwealth, 15 A. 452, 121 Pa. 611, 6 Am.S.R. 804.

56. S.C.—Stover v. Duren, 34 S.C.L. 448, 51 Am.D. 634—McQueen v. Fletcher, 34 S.C.Eq. 152.

57. N.Y.—Jacoby v. Stephenson Silver Min. Co., 6 N.Y.S. 371, 3 Silv. Sup. 130.

Pa.—Van Loon v. Smith, 103 Pa. 238.

58. La.—Bauman-George Piano Co. v. Matthews, 4 La.App. 334.

Pa.—Coleman & Stahl v. Weimer, 86 Pa.Super. 303—Krzykwa v. Krzykwa, Com.Pl., 15 Northumb.L.J. 230.

34 C.J. p 696 note 68.

Circumstantial or presumptive evidence

The extinguishment of a judgment by payment may be established by presumptive or circumstantial evidence as well as by positive proof.—State ex rel. Leary v. Hughes, La.App., 185 So. 69.

Evidence of payment held sufficient

(1) Generally.

Ala.—Gambill v. Cassimus, 22 So.2d 909, 247 Ala. 176.

Ark.—Less v. Grismore-Hyman Co., 251 S.W. 673, 158 Ark. 1.

Cal.—Cantrall v. Waterman, 232 P. 997, 70 Cal.App. 184.

Ky.—First Nat. Bank of Jackson v. Reynolds, 143 S.W.2d 721, 283 Ky. 837.

Pa.—Coleman & Stahl v. Weimer, 86 Pa.Super. 303.

34 C.J. p 696 note 68 [a], [d].

(2) To establish a prima facie case.—State ex rel. Leary v. Hughes, La.App., 185 So. 69.

(3) To show that part payment was not voluntary.—Sanchez v. Spitzka, 48 N.Y.S.2d 184, 183 Misc. 413—Arizona Fire Ins. Co. v. King, 14 N.Y.S.2d 783, 172 Misc. 165.

Evidence of payment held insufficient

(1) Generally.—Exchange Elevator

a judgment is of record and appears unsatisfied is not conclusive evidence that it is unpaid.[59]

To rebut presumption of payment. In the absence of a statute to the contrary,[60] the presumption of payment of a judgment from the lapse of time, under statute or apart therefrom, is not conclusive,[61] but may be rebutted by any competent and satisfactory evidence, as discussed supra subdivision b (2) of this section. However, the evidence to rebut the presumption must be strong and convincing,[62] particularly after the death of the debtor;[63] and the party alleging nonpayment must bring forward evidence sufficient to produce a reasonable conviction that the judgment has not been paid,[64] or establish facts from which nonpayment may be clearly inferred,[65] although, if such evidence is introduced, it is sufficient to rebut the presumption, even though it would be of no avail against the general statute of limitations.[66] A mere showing of poverty or failure in business on the part of the judgment debtor will not alone rebut the presumption of satisfaction,[67] but proof of his insolvency or entire inability to pay during the whole period is sufficient evidence in rebuttal.[68] At common law, the absence of a judgment debtor from the state in which the judgment was rendered is a circumstance to be weighed with other evidence in determining whether or not the presumption of payment from lapse of time is rebutted,[69] although it is not of itself sufficient to repel the presumption,[70] but such absence will not rebut the presumption where it is not included in the exceptions to a statute raising a conclusive presumption of payment after the lapse of a prescribed period.[71]

§ 560. Payment as Question of Law or Fact

Where there is conflicting evidence on the question of payment of a judgment, the issue is one of fact to be submitted to a jury; but, where sufficient time has elapsed to raise a presumption of payment, the court must determine whether matters relied on to rebut the presumption are of sufficient force to accomplish that purpose if established.

Where there is conflicting evidence on the question of payment of a judgment, the issue is one of fact to be submitted to a jury.[72] However, where

Co. v. Marshall, Neb., 22 N.W.2d 403—34 C.J. p 696 note 68 [b], [e], [f].

(2) To show full satisfaction of judgment debt.

Mass.—Matthewson v. Colpitts, 188 N.E. 601, 284 Mass. 581.

Pa.—Olyphant Bank v. Borys, 36 A.2d 823, 155 Pa.Super. 49.

59. Ind.—Kiefer Drug Co. v. De Lay, 115 N.E. 71, 63 Ind.App. 639.

60. Mo.—Mayes v. Mayes, 116 S.W.2d 1, 342 Mo. 401—Hedges v. McKittrick, App., 153 S.W.2d 790.

N.Y.—Gerwitz v. Berry, 180 N.E. 251, 258 N.Y. 505—In re Elm St. in City of New York, 146 N.E. 342, 239 N.Y. 220—In re Murray's Estate, 288 N.Y.S. 346, 248 App.Div. 167, reversed on other grounds 5 N.E.2d 717, 272 N.Y. 228—In re Matter of Hoes, 170 N.Y.S. 543, 183 App.Div. 38—Sanchez v. Spitzka, 48 N.Y.S.2d 184, 183 Misc. 413—Application of Long Island R. Co., 22 N.Y.S.2d 706, 174 Misc. 1037, affirmed 25 N.Y.S.2d 1005, 261 App.Div. 914, reargument denied 27 N.Y.S.2d 441, 261 App.Div. 987—Moran Towing & Transportation Co. v. Fleming, 25 N.Y.S.2d 41, affirmed 27 N.Y.S.2d 431, 261 App.Div. 978, affirmed 38 N.E.2d 231, 287 N.Y. 571.

34 C.J. p 696 note 69.

In Alabama

Lapse of ten years without issuance of execution on judgment raises rebuttable presumption of payment, but this presumption becomes conclusive after twenty years.—Gambill v. Cassimus, 22 So.2d 909, 247 Ala. 176—Hays v. McCarty, 195 So. 241, 239 Ala. 400—Patterson v. Weaver, 114 So. 301, 216 Ala. 686.

61. Ind.—Pensinger v. Jarecki Mfg. Co., 136 N.E. 641, 78 Ind.App. 569.

Pa.—In re Lefever's Estate, 122 A. 273, 278 Pa. 196.

34 C.J. p 696 note 69 [a], [b].

62. Ala.—**Corpus Juris cited in** Gambill v. Cassimus, 22 So. 909, 910, 247 Ala. 176.

Pa.—Gregory v. Commonwealth, 15 A. 452, 121 Pa. 611, 6 Am.S.R. 804—First Nat. Bank v. Bank of Pittsburgh, 99 Pa.Super. 600—Coleman & Stahl v. Weimer, 86 Pa.Super. 303.

Requisites and sufficiency of proof

(1) Presumption of payment is equivalent to direct proof of payment and prima facie obliterates the debt, and is so strong that it will prevail unless overcome by clear and decisive proof to the contrary.—Gambill v. Cassimus, 22 So.2d 909, 247 Ala. 176.

(2) Presumption of payment is alone sufficient to defeat recovery if no promise to pay or no payment on account has been made within twenty years.—Ott v. Ott, 166 A. 556, 311 Pa. 130.

(3) Presumption may be overcome by affirmative proof that judgment has not been paid.—In re Lefever's Estate, 122 A. 273, 278 Pa. 196—First Nat. Bank v. Bank of Pittsburgh, 99 Pa.Super. 600—34 C.J. p 696 note 71 [a] (3).

(4) Other statements of rule.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Youngman, 171 A. 594, 314 Pa. 277—34 C.J. p 696 note 71 [a].

63. Pa.—First Nat. Bank v. Bank of Pittsburgh, 99 Pa.Super. 600.

64. Ala.—Gambill v. Cassimus, 22 So.2d 909, 247 Ala. 176.

Evidence held insufficient to overcome presumption

Ala.—Gambill v. Cassimus, supra.

Pa.—In re Lefever's Estate, 122 A. 273, 278 Pa. 196.

34 C.J. p 696 note 71 [b]–[d].

65. Ala.—Gambill v. Cassimus, 22 So.2d 909, 247 Ala. 176.

66. Pa.—Gregory v. Commonwealth, 15 A. 452; 121 Pa. 611, 6 Am.S.R. 804.

34 C.J. p 696 note 72.

67. Me.—Jackson v. Nason, 38 Me. 85.

34 C.J. p 696 note 73.

68. Or.—Beekman v. Hamlin, 31 P. 707, 23 Or. 313.

34 C.J. p 696 note 74.

69. Mo.—Cobb v. Houston, 94 S.W. 299, 117 Mo.App. 645.

70. Mo.—Cobb v. Houston, supra.

71. Mo.—Cobb v. Houston, supra.

N.Y.—Brinkman v. Cram, 161 N.Y.S. 965, 175 App.Div. 372, affirmed 122 N.E. 877, 225 N.Y. 720.

72. Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Youngman, 171 A. 594, 314 Pa. 277—Ott v. Ott, 166 A. 556, 311 Pa. 130.

34 C.J. p 696 note 78.

Payment as question of law or fact generally see the C.J.S. title Payment § 125, also 48 C.J. p 729 note 88–p 732 note 39.

sufficient time has elapsed to raise a presumption of payment, as discussed supra § 559 a (1) (b), and there is no proof of circumstances accounting for the delay, the question is not an open one for the jury,[73] it being a preliminary question of law for the court to determine whether matters relied on to rebut the presumption are of sufficient force to accomplish that purpose if established.[74]

§ 561. Merger of Judgments

a. In general
b. Cumulative judgments

a. In General

Under some circumstances, a judgment may be discharged or extinguished by merger of title with the property against which it constitutes a lien, but the interest of the creditor to keep the lien alive may prevent such merger.

Where a judgment debtor buys in the title acquired on an execution sale under the judgment, the judgment is discharged,[75] and a junior judgment will succeed to its priority of lien.[76] Similarly, where the judgment creditor acquires title to property against which the judgment constitutes a lien, the judgment ordinarily is regarded as merged in the title, at least with respect to such property,[77] although since a judgment is a general lien on all the debtor's real estate, as discussed supra § 455, it does not merge when the creditor acquires title to a particular portion of the lands subject to the judgment, but may ordinarily be enforced against the remaining lands.[78] The rule as to merger does not apply, however, where it is to the interest of the creditor to keep the lien alive, and in such case his intention to prevent a merger may be presumed.[79] There is ordinarily no merger of a judgment when additional security for the same debt is given, such as a mortgage,[80] or bill of sale,[81] or where a bond for payment is given on an execution sale.[82] However, where the creditor takes an assignment of property in trust to pay his own debt and those of certain other creditors and enters on the execution of the trust and pays a portion of the debts,[83] or where he accepts a deed of property, not as security, but as a conveyance,[84] he cannot afterward proceed to enforce the judgment.

b. Cumulative Judgments

There is a conflict of opinion whether or not a judgment used as a cause of action for the recovery of another judgment is merged in the subsequent judgment.

When a judgment is used as a cause of action for the recovery of another judgment, the question whether or not the first judgment is merged in the subsequent judgment is one on which it has been acknowledged that there is much conflict of opinion.[85] Some decisions hold that ordinarily merger is effected,[86] but, under some decisions on the

73. Iowa.—Hendricks v. Wallis, 7 Iowa 224.
Pa.—Cope v. Humphreys, 14 Serg. & R. 15.

74. Pa.—In re Lefever's Estate, 122 A. 273, 278 Pa. 196—Krzykwa v. Krzykwa, Com.Pl., 15 Northumb.L. J. 230.
34 C.J. p 697 note 81.
Where the question of credibility is not in issue, whether plaintiff's evidence is sufficient to overcome the presumption that a twenty-year-old judgment has been paid is for the court.—In re Lefever's Estate, 122 A. 273, 278 Pa. 196.

75. Cal.—McCarty v. Christie, 13 Cal. 79.
Effect of execution sale on liens generally see supra § 502.

76. Cal.—McCarty v. Christie, supra.

77. S.C.—Gardner v. Coker, 192 S.E. 151, 184 S.C. 190.
34 C.J. p 697 note 86.
Merger of estates generally see Estates § 123.

78. Ind.—Caley v. Morgan, 16 N.E. 790, 114 Ind. 350.
34 C.J. p 697 note 85.
Extinguishment of liens generally see supra § 499.

79. Ind.—Hancock v. Fleming, 3 N. E. 254, 103 Ind. 533.
34 C.J. p 697 note 87.
Title held in different capacities
Where a partnership buys a judgment against certain real estate, which thereafter is conveyed to the partners as tenants in common, the judgment is not merged in the title so as to release a subsequent indorser on the note, which formed the basis of the judgment, from liability on a judgment against himself, without some evidence that such a merger was intended.—Lazaran v. Semans, 79 Pa.Super. 356.

80. Md.—Johnson v. Hines, 61 Md. 122.
Minn.—Presley v. Lowry, 2 N.W. 61, 26 Minn. 158.
34 C.J. p 697 note 88.
Acceptance of collateral security as payment see supra § 552.

81. Ga.—Bostwick v. Felder, App., 35 S.E.2d 783.

82. Ky.—Green v. Farmers State Bank, 121 S.W.2d 685, 275 Ky. 270.

83. N.Y.—Hawley v. Mancius, 7 Johns.Ch. 174.

84. N.Y.—Matter of Fourth Avenue, 11 Abb.Pr. 189.
Pa.—Fidelity Deposit Bank of Derry v. Stewart, 48 Pa.Dist. & Co. 618, 25 West.Co. 143.

85. Ill.—**Corpus Juris quoted in** McDonald v. Culhane, 24 N.E.2d 737, 738, 303 Ill.App. 101.
Ind.—Gilchrist v. Cotton, 148 N.E. 435, 83 Ind.App. 415, rehearing denied 148 N.E. 928, 83 Ind.App. 415.
Utah.—Adams v. Davies, 156 P.2d 207, 107 Utah 579.
34 C.J. p 697 note 93.
Merger by affirmance of judgment see Appeal and Error § 1857.

86. Ill.—**Corpus Juris quoted in** McDonald v. Culhane, 24 N.E.2d 737, 738, 303 Ill.App. 101.
Tex.—Myers v. Southard, Civ.App., 110 S.W.2d 1185.
34 C.J. p 697 note 94.
Merger of causes of action generally see infra § 599.
Effect of merger
Under the doctrine of "merger of judgment," in a second judgment, the cause of action changes its nature when reduced to judgment, ceases to exist as an independent liability, and is transferred into obligations created by the judgment thereon; the lesser security is absorbed by the greater security and the lesser ceases to exist, but the greater is not in-

question the foregoing rule is not inflexible,[87] and its application depends on the intention of the parties and the circumstances of the particular case.[88] So it has been held that the rule of merger will be applied only where the ends of justice require its application,[89] and where an inferior security or indebtedness passes into one of superior degree,[90] and, even if the judgments are considered as merged, the doctrine will not be allowed to impair the security of judgments as liens.[91]

Other decisions hold that the doctrine of merger does not apply to a judgment on which a new judgment is recovered, and that the first judgment is not extinguished without satisfaction of the second,[92] especially where the judgments are recovered in different states,[93] or where the second judgment is auxiliary or collateral to the first.[94]

Whichever may be the correct rule, as applied by courts of law, judgments will,[95] or will not[96] be treated by a court of equity as merged where this is necessary to protect the rights of the litigants.

Judgment against administrator. The lien of a judgment is not released or divested by the recovery of a judgment against the administrator of the deceased judgment debtor.[97] Where plaintiff recovers a personal judgment against an administrator, and then recovers on such judgment a judgment on his bond, the judgments are not merged.[98]

Forfeiture of forthcoming or delivery bond. In several states, where by statute the forfeiture of a forthcoming bond, or bond for the delivery of property under levy, creates per se a new judgment on

creased.—Adams v. Davies, 156 P.2d 207, 107 Utah 579.

Cause of action as basis for judgment

The rule that one judgment may merge in another is applicable, if at all, to cases in which one judgment is used as a cause of action on which another judgment is obtained.

Ill.—Doerr v. Schmitt, 31 N.E.2d 971, 375 Ill. 470.

Utah.—Adams v. Davies, 156 P.2d 207, 107 Utah 579.

Judgment by confession on note was merged in deficiency judgment subsequently obtained against maker in proceeding to foreclose mortgage securing notes given as collateral for the original note.—McDonald v. Culhane, 24 N.E.2d 737, 303 Ill.App. 101.

Garnishment judgment

Judgment that plaintiff was allowed a stipulated sum in full payment of any claims against association in receivership extinguished a garnishment judgment and any lien incident thereto which plaintiff had theretofore obtained, since judgment previously obtained in main suit against insurance association was merged in judgment of instant suit, and the garnishment judgment was extinguished by payment of the main judgment.—Myers v. Southard, Tex. Civ.App., 110 S.W.2d 1185.

87. Utah.—Adams v. Davies, 156 P. 2d 207, 107 Utah 579.
34 C.J. p 697 note 95.
Judgment as creating new debt or old debt in new form see infra § 600.

Necessity of more than one judgment

Generally, one judgment is sufficient, but courts will not go beyond reason of rule to hold that judgment is merged in subsequent judgment obtained thereon, if more than one is necessary. Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo.App. 137.

88. Utah.—Adams v. Davies, 156 P. 2d 207, 107 Utah 579.

89. Ind.—Gilchrist v. Cotton, 148 N. E. 435, 83 Ind.App. 415, rehearing denied 148 N.E. 928, 83 Ind.App. 415.
Utah.—Adams v. Davies, 156 P.2d 207, 107 Utah 579.

90. Ind.—Gilchrist v. Cotton, 148 N. E. 435, 83 Ind.App. 415, rehearing denied 148 N.E. 928, 83 Ind.App. 415.
Utah.—Adams v. Davies, 156 P.2d 207, 107 Utah 579.

91. Utah.—Adams v. Davies, supra.

92. N.C.—Springs v. Pharr, 42 S.E. 590, 131 N.C. 191, 92 Am.S.R. 775.
34 C.J. p 697 note 96—15 C.J. p 1395 note 52.

93. Cal.—Ballentine v. Superior Court in and for San Mateo County, 158 P.2d 14, 26 Cal.2d 254.
Mass.—Moore v. Justices of Municipal Court of City of Boston, 197 N.E. 487, 291 Mass. 504.
Mo.—Wolford v. Scarbrough, 21 S.W. 2d 777, 224 Mo.App. 137.
34 C.J. p 697 note 97—15 C.J. p 1395 note 53.
Satisfaction of one of several judgments on same cause of action see infra § 575.

94. Mo.—Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo.App. 137.
34 C.J. p 698 note 98.

Probate court judgment allowing judgment as claim against estate was in aid of former judgment and did not destroy its vitality.—Wolford v. Scarbrough, supra.

95. Ill.—McDonald v. Culhane, 24 N. E.2d 737, 303 Ill.App. 101.

Estoppel

One holding judgment by confession on note, who subsequently foreclosed mortgage securing collateral notes given to secure the original note, obtained deficiency judgment against maker, and obtained issuance of execution on such deficiency judgment, was estopped from insisting that the judgment by confession was not merged in the subsequent deficiency judgment.—McDonald v. Culhane, supra.

Where declaratory judgment, establishing husband's obligation and effecting property settlement was adopted by subsequently entered divorce decree as part of the decree, the declaratory judgment became merged in divorce decree, and did not continue as a separate judgment which would support supplementary proceedings for an accounting and enforcement of declaratory judgment.—Turner v. Ewald, 174 S.W.2d 431, 295 Ky. 764.

96. Ill.—**Corpus Juris quoted in** McDonald v. Culhane, 24 N.E.2d 737, 738, 303 Ill.App. 101.
Utah.—Adams v. Davies, 156 P.2d 207, 107 Utah 579.
W.Va.—Batten v. Lowther, 81 S.E. 821, 74 W.Va. 167.
34 C.J. p 698 note 99.

Purpose of second suit

Prior judgment is not merged in subsequent decree based on judgment in suit brought for purpose of collecting judgment.—Wolford v. Scarbrough, 21 S.W.2d 777, 224 Mo. App. 137—34 C.J. p 697 note 95 [b].

97. Cal.—In re Wiley, 71 P. 441, 138 Cal. 301.
Mo.—Wolford v. Scarbrough, 21 S.W. 2d 777, 224 Mo.App. 137.
Operation and effect of judgment against administrator or executor generally see Executors and Administrators § 800.

98. N.Y.—Townsend v. Whitney, 75 N.Y. 425.
N.C.—McLean v. McLean, 90 N.C. 530.

the bond, it has been held that the original judgment is merged in such statutory judgment and thereby satisfied,[99] unless such bond is unauthorized.[1] However, in jurisdictions where the forfeiture of such a bond gives a right to take or enter a new judgment, but does not of itself amount to a judgment, there is no merger of the original judgment on the mere forfeiture of the bond, but only on the entry of the new judgment.[2]

§ 562. Assignment as Extinguishment

As a general rule, a judgment is extinguished by its assignment to the judgment debtor, or to a stranger for his benefit.

As a general rule, a judgment is satisfied by its assignment to the judgment debtor,[3] or to a stranger for his benefit,[4] unless the debtor waives his right to have it canceled,[5] or manifests an intention that the lien of the judgment shall continue for the benefit of another.[6] However, the judgment is not satisfied by an assignment to a person who, although liable for the debt evidenced by the judgment, is not a party to the judgment,[7] or who occupies the position of a surety only,[8] or who is an officer of a corporation which is the judgment debtor.[9] An unperformed agreement to assign a judgment is not a satisfaction thereof.[10]

§ 563. Release or Discharge

a. In general
b. Necessity and sufficiency of consideration

a. In General

A judgment creditor may ordinarily abandon or renounce his judgment, or release and discharge it; but he cannot, by so doing, affect the interest of other judgment creditors without their consent.

A judgment creditor ordinarily may abandon or renounce his judgment,[11] or release and discharge it.[12] The release may be made by the equitable owner of the judgment,[13] or by one of several joint owners, as far as affects his interest;[14] but in the latter case the release does not affect the share or interest of other parties in whose name judgment was recovered,[15] unless they have expressly authorized it.[16]

The release of a judgment may be avoided for fraud or deceit practiced in obtaining it.[17]

99. U.S.—Brown v. Clarke, Miss., 4 How. 4, 11 L.Ed. 850.
34 C.J. p 698 note 4.
Effect of forfeiture of forthcoming or delivery bond generally see Executions § 116 b.

1. Ky.—Tanner v. Grant, 10 Bush 362.
Miss.—Benton v. Crowder, 15 Miss. 185.

2. Va.—Rhea v. Preston, 75 Va. 757.
34 C.J. p 698 note 6.

3. N.Y.—Harvey v. Harvey, 48 N.Y.S.2d 238, 183 Misc. 475.
Pa.—Fidelity Deposit Bank of Derry v. Stewart, 48 Pa.Dist. & Co. 618, 25 West.Co. 143.
Tex.—Huggins v. Johnston, Civ.App., 3 S.W.2d 937, affirmed 35 S.W.2d 688, 120 Tex. 21—Hadad v. Ellison, Civ.App., 283 S.W. 193.
34 C.J. p 698 note 8.
Assignment of judgments:
Generally see supra §§ 512–530.
To persons paying judgments see supra §§ 555–558.

4. S.C.—Owings v. Graham, 113 S.E. 279, 120 S.C. 408.
34 C.J. p 698 note 9.
Assignment as security
Where a tenant in common of land executed a note to bank and tenant at the same time agreed with bank that he would use a portion of the proceeds of the note to procure an assignment to the bank of a judgment which was a lien on the land as collateral security for the note, assignment when so procured operated to satisfy the judgment and no execution could be issued thereon.—Edmonds v. Wood, 22 S.E.2d 237, 222 N.C. 118.

5. Md.—McGraw v. Union Trust & Deposit Co., 104 A. 286, 132 Md. 502.

6. Wash.—Lachner v. Myers, 208 P. 1095, 121 Wash. 172.

7. Ill.—Thomas v. Home Mut. Bldg. Loan Ass'n, 90 N.E. 1081, 243 Ill. 550.
34 C.J. p 698 note 11.

8. W.Va.—O'Keefe v. Eclipse Pocahontas Coal Co., 115 S.E. 579, 92 W.Va. 519.
34 C.J. p 698 note 12.
Effect of payment by surety generally see supra § 556.

9. Ill.—O'Keefe v. Eclipse Pocahontas Coal Co., supra.
34 C.J. p 698 note 13.

10. Colo.—Crotser v. Lamont, 70 P. 695, 18 Colo.App. 167.

11. Ky.—Ramage v. Clements, 4 Bush 161.
34 C.J. p 699 note 16.

12. Cal.—In re McLellan's Estate, 94 P.2d 408, 35 Cal.App.2d 18.
Mo.—City of St. Louis v. Senter Commission Co., 124 S.W.2d 1180, 343 Mo. 1075.
34 C.J. p 699 note 17.
Authority of attorney to satisfy or discharge judgment see Attorney and Client § 99.
Release of judgment lien see supra § 500.
A judgment on a sealed instrument cannot be released except by a sealed instrument.—Shriver v. Carlin & Fulton Co., 141 A. 434, 155 Md. 51, 58 A.L.R. 767.
Attorney's fees
Where judgment was entered in favor of plaintiff's attorneys for attorney's fees as part of costs, although not provided for in note sued on, voluntary release by attorneys satisfied judgment for fees.—Koontz v. Clark Bros., 227 N.W. 584, 209 Iowa 62.
What law governs
A release of a judgment is governed by the law of the state where it is executed and delivered, although the judgment was rendered in another state.—Beam v. Barnum, 21 Conn. 200.

13. Ill.—Pease v. Sanderson, 59 N.E. 425, 188 Ill. 597.
34 C.J. p 699 note 22.

14. Ala.—Penn v. Edwards, 50 Ala. 63.
34 C.J. p 699 note 23.

15. Puerto Rico.—Rivera v. Sun Life Assur. Co., 10 Puerto Rico Fed. 89.

16. Okl.—Gasper v. Mayer, 43 P.2d 467, 171 Okl. 457.

17. Ind.—Wray v. Chandler, 64 Ind. 146.
34 C.J. p 699 note 21.
Legal or constructive fraud is sufficient to avoid a release of a judgment, so that it is unnecessary

Issuance of execution. If an execution is issued for the full amount of the judgment, a levy erroneously made thereunder for a lesser sum does not constitute a release of part of the judgment.[18]

Absolute or conditional release. An instrument cannot properly be construed to be an absolute release where its terms show that the judgment is to be kept alive and in force for certain purposes.[19] Where a judgment debtor obtains possession of a discharge of the judgment, without complying with the conditions on which it was to be delivered, and the discharge is not filed with the clerk, or satisfaction entered on the record, the judgment remains in full force.[20]

Release as condition to payment. A judgment debtor, under a judgment in an action brought by the holders of outstanding unrecorded instruments, is entitled to have such releases from the spouse of a holder,[21] or from the holder of record title,[22] as shall be necessary to prevent payment for a second time, before he is required to pay over the money due under the judgment.

b. Necessity and Sufficiency of Consideration

The release of a judgment must be supported by a consideration. The authorities are not uniform as to whether or not a judgment may be discharged by part payment.

The release of a judgment must be supported by a consideration,[23] and, where there is a valid consideration, the release is binding.[24]

In accordance with the general rule, and the exceptions thereto, as to the effect of partial payment of a debt or demand which is liquidated or certain and which is due, as discussed in Accord and Satisfaction §§ 26–35, it has been held that, in the absence of a statute providing otherwise,[25] a judgment is not discharged by a part payment under a parol agreement that such payment shall be accepted in full satisfaction,[26] or by a part payment and an ordinary written receipt "in full,"[27] and that the release of a judgment for less than the amount due is without consideration as to the balance and should be set aside pro tanto.[28] It has also been held, however, that a judgment is discharged on part payment under a lawful agreement that it shall be accepted in full satisfaction,[29] at least if the agreement is evidenced by a sealed instrument acknowledging satisfaction,[30] or if the partial payment is accompanied by an additional consideration, either in the shape of a thing of value or of some act burdensome or inconvenient to the debtor and possibly beneficial to the creditor.[31] Where the debtor cannot pay the judgment in full and the creditor is unable to enforce collection, the acceptance by the creditor of a sum less than the amount due under the judgment in full settlement thereof has been held to be binding on him.[32] If the part payment

that actual or positive fraud be present.—Purcell v. Robertson, 8 S.E.2d 831, 122 W.Va. 287.

Fraud held not shown

Okl.—Davis v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, 103 P.2d 380, 187 Okl. 436.

18. Cal.—Hogan v. Paddon, 267 P. 392, 91 Cal.App. 606.

What constitutes discharge of judgment whereby execution thereon is rendered nullity see Executions § 11 c (3).

19. Mo.—Hempstead v. Hempstead, 32 Mo. 134.

20. N.Y.—Crosby v. Wood, 6 N.Y. 369.

21. Utah.—Ludlow v. Colorado Animal By-Products Co., 137 P.2d 347, 104 Utah 221.

Release as condition of payment generally

Pa.—Dotterer v. Nothstein, Com.Pl., 20 Leh.L.J. 188.

22. Utah.—Ludlow v. Colorado Animal By-Products Co., 137 P.2d 347, 104 Utah 221.

23. Ind.—Plunkett v. Black, 19 N.E. 537, 117 Ind. 14.

34 C.J. p 699 note 20.

Consideration for agreement to release see infra § 565.

The release of a claim that has no legal value is not consideration for the exoneration of a judgment.—Huntingdon County v. Spyker, 118 A. 501, 274 Pa. 570.

24. U.S.—Eagle Oil Co. v. Sinclair Prairie Oil Co., D.C.Okl., 24 F. Supp. 612, affirmed, C.C.A., 105 F. 2d 710.

Iowa.—Warman v. Hat Creek Ranch Co., 207 N.W. 532, 202 Iowa 198.

Tenn.—Going v. Going, 8 Tenn.App. 690.

An acknowledgment of indebtedness given by a third person to a judgment creditor in consideration of the release of those liable under the judgment binds the assignees of such acknowledgment so that they cannot recover on the judgment.—Allen v. National Bank of Commerce & Trust Co. of Providence, 19 A.2d 311, 66 R.I. 373.

25. N.C.—Boykin v. Buie, 13 S.E. 879, 109 N.C. 501, 503.

34 C.J. p 699 note 29.

26. Mass.—Smith v. Johnson, 112 N. E. 644, 224 Mass. 50.

34 C.J. p 699 note 30.

27. Colo.—Madeley v. White, 31 P. 181, 2 Colo.App. 408.

Me.—Bailey v. Day, 26 Me. 88.

28. Mo.—Kelley v. Kelley, App., 290 S.W. 624.

N.J.—Gillman v. Sorventino, 130 A. 442, 101 N.J.Law 447, affirmed 133 A. 919, 102 N.J.Law 715—Berry Bros. v. Paul, 134 A. 119, 99 N.J. Eq. 558.

Tex.—Oviett v. Warner, Com.App., 288 S.W. 434.

Release by one of joint creditors

Such release given by one of several joint judgment creditors does not constitute a release or satisfaction of the judgment except as to the amount paid therefor.—Rice v. Barkman, 249 Ill.App. 127.

29. Mo.—City of St. Louis v. Senter Commission Co., 124 S.W.2d 1180, 343 Mo. 1075.

30. Pa.—Hendrick v. Thomas, 106 Pa. 327.

34 C.J. p 700 note 32.

31. Iowa.—Stoutenberg v. Huisman, 61 N.W. 917, 93 Iowa 213.

34 C.J. p 700 note 33.

32. La.—Reinecke v. Pelham, App., 199 So. 521.

Finality of judgment

Statutes providing that an agreement to compromise, sell, or cancel a final judgment for less than the amount thereof is void if the parties are unaware that the judgment

is made by a third person,[33] or if it is in pursuance of a compromise of a dispute respecting the effect of the judgment,[34] such payment has been held to discharge the judgment.

§ 564. —— Joint Debtors

At common law a release given to one of several joint judgment debtors on his paying his proportionate share of the judgment or on other consideration releases the judgment as to all.

At common law a release given to one of several joint judgment debtors on his paying his proportionate share of the judgment or on other consideration,[35] or under seal,[36] releases the judgment as to all, unless the other joint debtors consent to such separate release.[37] In some jurisdictions, however, either by force of statute or the settled rulings of the courts, it is competent for the creditor to hold the other defendants liable on the judgment after having released one.[38]

In the absence of a clear indication of a contrary intention such a statute will not be held to be retrospective,[39] and therefore does not apply to judgments rendered before it became effective;[40] but such a statute has been held to apply to judgments rendered subsequent to the statute on obligations incurred prior thereto.[41] Under some statutes, a release or discharge in favor of one of several codebtors in solido discharges the others, unless the creditor expressly reserves his rights against the latter, but, where the creditor does make such reservation, he cannot recover from the remaining debtors more than their proportionate share.[42]

It has been stated that the judgment creditor may release the judgment as to one or all of the judgment debtors, as he sees fit,[43] and that the question whether or not a release of a judgment given to one of several joint debtors will release the judgment as to the others depends on the intention of the parties as shown in the release.[44] Thus, where the instrument shows an intention to limit the release to one or more of the joint judgment debtors and to proceed for the balance against the others,[45] as where the instrument releases one debtor from all liability or liens "so far as he is concerned,"[46] or where the creditor expressly reserves the right to enforce the judgment as to the others,[47] it has been held that the judgment is not released as to the remaining judgment debtors; but according to some authorities such a reservation is without effect.[48]

In some jurisdictions,[49] but not in other jurisdic-

has become final do not invalidate an agreement under which a judgment creditor accepts a sum less than the amount due under the judgment in full settlement thereof, where both parties know that the judgment is final.—Reinecke v. Pelham, supra.

33. Pa.—Fowler v. Smith, 25 A. 744, 153 Pa. 639.
34 C.J. p 700 note 34.

34. Pa.—Hendrick v. Thomas, 106 Pa. 327.
34 C.J. p 700 note 35.

35. U.S.—Barnett v. Conklin, C.C.A. Mo., 268 F. 177.
34 C.J. p 700 note 36.

Where the judgment is not a joint judgment, the rule is inapplicable.—Whaley v. Matthews, 287 N.W. 205, 136 Neb. 767.

36. Mass.—Brooks v. Neal, 112 N.E. 78, 223 Mass. 467.

37. Ga.—Powell v. Davis, 60 Ga. 70.

38. Wash.—**Corpus Juris quoted in** Johnson v. Stewart, 96 P.2d 473, 476, 1 Wash.2d 439.
34 C.J. p 701 note 44.
Agreement to release see infra § 565.

39. Colo.—Ducey v. Patterson, 86 P. 109, 37 Colo. 216, 119 Am.S.R. 284, 9 L.R.A.,N.S., 1066, 11 Ann.Cas. 393.
34 C.J. p 701 note 45.

40. Colo.—Ducey v. Patterson, supra.

41. D.C.—Bunch v. U. S., 40 App.D.C. 156.

42. **Louisiana statute construed**
N.Y.—Moore v. Hanover Nat. Bank, 80 N.Y.S. 448, 80 App.Div. 67.
34 C.J. p 700 note 39 [b].

43. Wash.—Robertson v. Wise, 279 P. 106, 152 Wash. 624.

44. Tex.—Pennington v. Bevering, Civ.App., 9 S.W.2d 401, affirmed, Com.App., 17 S.W.2d 772.

A release of a defendant not a judgment debtor, expressly providing that those defendants who are judgment debtors are not thereby released, does not discharge the latter from all liability, where the amount paid by the former is less than the amount of the judgment, since the intent of the parties must be given effect.—Kirby v. Fitzgerald, 89 S.W.2d 408, 126 Tex. 411.

45. Tex.—Pennington v. Bevering, Com.App., 17 S.W.2d 772—Pegues v. Moss, Civ.App., 140 S.W.2d 461, error dismissed.
Wash.—Johnson v. Stewart, 96 P.2d 473, 1 Wash.2d 439.

Intent shown

A release as to particular defendants, under a joint and several judgment, reciting that the judgment is satisfied and should be discharged as against the named defendants, shows an intention to release only such defendants, without relinquishing the rights and lien as against the other defendants, which intention should be given effect, so that the release should not be extended for the benefit of a third party.—Johnson v. Stewart, supra.

46. Tex.—Pennington v. Bevering, Com.App., 17 S.W.2d 772.

47. Ill.—Van Meter v. Gurney, 251 Ill.App. 184.
Tex.—Warner v. Northwestern Fire & Marine Ins. Co., Civ.App., 281 S.W. 1113, reversed on other grounds Oviett v. Warner, Com. App., 288 S.W. 434.
34 C.J. p 700 note 39.

48. Colo.—Ducey v. Patterson, 86 P. 109, 37 Colo. 216, 109 Am.S.R. 284, 9 L.R.A.,N.S., 1066, 11 Ann. Cas. 393.
34 C.J. p 700 note 40.

49. U.S.—Barnett v. Conklin, C.C.A. Mo., 268 F. 177, certiorari denied 41 S.Ct. 375, 255 U.S. 570, 65 L. Ed. 791.
Colo.—Ducey v. Patterson, 86 P. 109, 37 Colo. 216, 119 Am.S.R. 284, 9 L.R.A.,N.S., 1066, 11 Ann.Cas. 393.

Receipt of sum less than amount of judgment

The satisfaction of a claim against several joint tort-feasors for a sum less than the amount of the judgment thereafter recovered against all has been held not to discharge the remaining tort-feasor under such judgment.—Gillespie v. Brewer, Miss., 10 So.2d 197.

tions,[50] the rule expressed in the foregoing paragraph as to the effect of the release of one joint judgment debtor as a release of all has been held applicable where the judgment was rendered in an action sounding in tort. The release of the other joint judgment debtors also results where one of the debtors is released by operation of law, as in the case of a surety relieved from liability by an unauthorized extension of time to his principal.[51]

§ 565. —— Agreement to Release or Satisfy

A judgment creditor may make a valid and binding agreement to release and satisfy the judgment on terms other than receiving payment of its amount, provided there is consideration. If the contract is executory, the judgment is not released until the contract is performed.

Provided there is consideration,[52] a judgment creditor may make a valid and binding agreement, either at the time the judgment is entered,[53] or subsequently, to release and satisfy it on other terms than receiving payment of its amount, as where he agrees to accept real or personal property, services, the transfer of another debt, or an exchange of securities.[54] If the consideration is already vested, the agreement itself operates in law as a satisfaction of the judgments;[55] but, if the contract is executory, there is no release of the judgment until it is performed,[56] and, while the creditor cannot rescind it without good cause,[57] the debtor is bound to perform its conditions punctually and fully, in default of which the creditor is remitted to his original rights under the judgment,[58] unless punctual performance is waived.[59]

It has further been held that, while an agreement, whereby defendant promises to discontinue the defense of a cause and plaintiff promises to accept a designated amount in full satisfaction of any judgment thereafter to be rendered, is supported by suf-

Tort-feasor's payment as reducing judgment against other

Joint tort-feasor is entitled to have judgment rendered against him reduced by amount paid by cotort-feasor for his own acquittance.—Black v. Martin, 292 P. 577, 88 Mont. 256.

50. Ky.—Brown v. Little, 170 S.W. 168, 160 Ky. 765.

51. Ind.—Gipson v. Ogden, 100 Ind. 20.
Va.—Baird v. Rice, 1 Call. 18, 5 Va. 18, 1 Am.D. 197.

52. Okl.—**Corpus Juris quoted in** Grant v. Reeves, 158 P.2d 479, 481, 195 Okl. 414—**Corpus Juris cited in** Home Owners' Loan Corporation v. Thornburgh, 106 P.2d 511, 512, 187 Okl. 699.
34 C.J. p 701 note 48.
Consideration for release or discharge see supra § 563 b.
Release of judgment on partial payment see supra § 563 b.

An actual forbearance by a judgment debtor to prosecute an unenforceable claim against the judgment creditor is not consideration for the latter's agreement to satisfy the judgment.—Corcanges v. Childress, Tex.Civ.App., 280 S.W. 892.

Consideration held insufficient
Okl.—Home Owners' Loan Corporation v. Thornburgh, 106 P.2d 511, 187 Okl. 699.
Tex.—Corcanges v. Childress, Civ. App., 280 S.W. 892.
34 C.J. p 701 note 48 [b].

53. N.C.—Hardy v. Reynolds, 69 N. C. 5.
Okl.—**Corpus Juris quoted in** Grant v. Reeves, 158 P.2d 479, 481, 195 Okl. 414.

54. Okl.—**Corpus Juris quoted in** Grant v. Reeves, 158 P.2d 479, 481, 195 Okl. 414.
34 C.J. p 701 note 50.
Acceptance of substitute for money as payment see supra § 552.

Federal agricultural conservation payments received by a judgment debtor do not constitute rent within a contract whereby the judgment debtor agrees with his judgment creditor to convey to the latter certain realty and rents due him in consideration of the creditor's undertaking to release and satisfy the judgment, so that the judgment creditor is not entitled to such payments.—Cooke v. Harrington, 287 N.W. 837, 227 Iowa 145.

55. Idaho.—**Corpus Juris quoted in** Woods v. Locke, 289 P. 610, 612, 49 Idaho 486.
Okl.—**Corpus Juris quoted in** Grant v. Reeves, 158 P.2d 479, 481, 195 Okl. 414.
34 C.J. p 701 note 51.

56. Conn.—**Corpus Juris quoted in** Kranke v. American Fabrics Co., 151 A. 312, 314, 112 Conn. 58.
Idaho.—**Corpus Juris quoted in** Woods v. Locke, 289 P. 610, 612, 49 Idaho 486.
Okl.—**Corpus Juris quoted in** Grant v. Reeves, 158 P.2d 479, 481, 195 Okl. 414.
34 C.J. p 701 note 52.

A judgment is an "obligation," within the meaning of a statute defining an executory accord as an agreement embodying a promise to accept at some future time a stipulated performance in satisfaction of any claim, cause of action, contract, or obligation, etc., so that, where a judgment creditor and a judgment debtor enter into such agreement to satisfy the judgment and the debtor performs his part of the contract, the creditor is bound thereby and cannot recover on the judgment.—Kingman Hardware Co. v. Connors, 58 N.Y.S.2d 700, 186 Misc. 90.

Compelling release

The court should compel the judgment creditor to release or satisfy the judgment, including attorney's fees and costs, where the judgment debtor has performed his part of an agreement with such creditor for the release and satisfaction of the judgment.—Cooke v. Harrington, 287 N.W. 837, 227 Iowa 145.

57. Conn.—**Corpus Juris quoted in** Kranke v. American Fabrics Co., 151 A. 312, 314, 112 Conn. 58.
Okl.—**Corpus Juris quoted in** Grant v. Reeves, 158 P.2d 479, 481, 195 Okl. 414.
34 C.J. p 701 note 53.

58. Conn.—**Corpus Juris quoted in** Kranke v. American Fabrics Co., 151 A. 312, 314, 112 Conn. 58.
Idaho.—**Corpus Juris quoted in** Woods v. Locke, 289 P. 610, 612, 49 Idaho 486.
Okl.—**Corpus Juris quoted in** Grant v. Reeves, 158 P.2d 479, 481, 195 Okl. 414.
34 C.J. p 701 note 54.

Payment in installments

(1) A judgment debtor's default under an installment contract compromising the judgment restores the judgment to its original condition as a present obligation less the amount paid.—Kranke v. American Fabrics Co., 151 A. 312, 112 Conn. 58.

(2) Other holdings see 34 C.J. p 701 note 54 [a].

59. Mo.—Schwiete v. Guerre, 158 S.W. 402, 175 Mo.App. 687.
Okl.—**Corpus Juris quoted in** Grant v. Reeves, 158 P.2d 479, 481, 195 Okl. 414.

ficient consideration, if the other elements of accord and satisfaction are present,[60] and is enforceable when fully executed, even though it is made prior to the rendition of judgment,[61] such agreement, while executory, cannot be enforced.[62] The successors of a judgment creditor need not secure the consent of the judgment creditor's attorneys before consummating an agreement for the satisfaction of the judgment, even though they know of the inclusion of the attorney's fees in the judgment.[63]

Joint judgment debtors. A valid agreement between a judgment creditor and one of several joint judgment debtors calling for the satisfaction of the judgment as to all debtors is binding,[64] and a debtor, not a party to the agreement, may rely thereon, although such agreement is a contract under seal;[65] but the minds of the parties must meet as to the release of all the debtors.[66] However, an agreement by one joint judgment debtor to satisfy a judgment, if executory, does not release the remaining debtor until it is fully performed.[67]

§ 566. Set-Off of Judgment against Judgment

a. In general
b. Power of court
c. Discretion of court

a. In General

As a general rule, one judgment may be set off against another.

As a general rule, one judgment may be set off against another,[68] since a party should not be permitted to collect a judgment in his favor leaving unpaid a judgment against him.[69]

b. Power of Court

Courts have inherent power to order the set-off of mutual judgments.

The courts have power to order the set-off of mutual judgments.[70] This power formerly belonged exclusively to courts of equity,[71] and, of course, still continues in them;[72] but it has long been recognized as one which may be exercised equally by courts of law, proceeding on equitable principles.[73] Although in some jurisdictions a set-off of judg-

60. Ala.—Zorn v. Lowery, 181 So. 249, 236 Ala. 62.

61. Ala.—Zorn v. Lowery, supra.

62. Ala.—Zorn v. Lowery, supra.

63. Ind.—Berry v. State Bank of Otterbein, 193 N.E. 922, 99 Ind.App. 655.

64. D.C.—Fowler v. Washington Loan & Trust Co., 289 F. 622, 53 App.D.C. 224.
Release or discharge of joint judgment debtors see supra § 564.

Agreement for settlement construed
An agreement between a judgment creditor and one of several joint judgment debtors, reciting a settlement of the judgment, and containing an agreement by the creditor to have satisfaction entered, shows that the settlement satisfied the judgment as a matter of fact against all defendants, and not only as against the defendant who was a party to the settlement.—Fowler v. Washington Loan & Trust Co., supra.

65. D.C.—Fowler v. Washington Loan & Trust Co., supra.

66. Tex.—Mesa Production Co. v. Saffel, 37 S.W.2d 191.

67. Okl.—Grant v. Reeves, 158 P.2d 479, 195 Okl. 414.

68. Neb.—Vanderlip v. Barnes, 163 N.W. 856, 101 Neb. 573.
N.Y.—Neenan v. Woodside Astoria Transp. Co., 184 N.E. 744, 261 N.Y. 159—D'Aprile v. Turner-Looker Co., 204 N.Y.S. 566, 209 App.Div. 223, reversed on other grounds 147 N.E. 15, 239 N.Y. 427, 38 A.L.R. 1426.
Set-off of judgments in favor of or against executor or administrator see Executors and Administrators § 805.

The doctrine of equitable set-off is recognized as between judgments.—Montalto v. Yeckley, 54 N.E.2d 421, 143 Ohio St. 181.

Offsetting judgments is one mode of satisfaction.—Clancy v. Reid-Ward Motor Co., 170 S.W.2d 161, 237 Mo. App. 1000.

Pro tanto
Where in the same judgment the parties are condemned to pay each other money, the two judgments should be made to offset pro tanto.—Luderbach Plumbing Co. v. Its Creditors, 46 So. 359, 121 La. 371.

69. U.S.—Taylor v. Calmar S. S. Co., D.C.Pa., 35 F.Supp. 335.

70. Mich.—**Corpus Juris quoted in** Franklin Co. v. Buhl Land Co., 250 N.W. 299, 300, 264 Mich. 531.
Mo.—**Corpus Juris cited in** Clancy v. Reid-Ward Motor Co., 170 S.W.2d 161, 164, 237 Mo.App. 1000.
Okl.—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474—State ex rel. Barnett v. Wood, 43 P.2d 136, 171 Okl. 341.
Tex.—Citizens Industrial Bank of Austin v. Oppenheim, Civ.App., 118 S.W.2d 320, error dismissed.
Wis.—Black v. Whitewater Commercial & Savings Bank, 205 N.W. 404, 188 Wis. 24.
34 C.J. p 701 note 57.

71. Ala.—**Corpus Juris quoted in** Ex parte Cooper, 103 So. 474, 212 Ala. 501.
Mich.—**Corpus Juris quoted in** Franklin Co. v. Buhl Land Co., 250 N.W. 299, 300, 264 Mich. 531.
34 C.J. p 702 note 58.

72. U.S.—Shinholt v. Angle, C.C.A. Tex., 90 F.2d 297.
Ala.—**Corpus Juris quoted in** Ex parte Cooper, 103 So. 474, 212 Ala. 501.
Mich.—**Corpus Juris quoted in** Franklin Co. v. Buhl Land Co., 250 N.W. 299, 300, 264 Mich. 531.
Mo.—Helstein v. Schmidt, 78 S.W.2d 132, 229 Mo.App. 275.
Ohio.—Montalto v. Yeckley, 54 N.E. 2d 421, 143 Ohio St. 181.
34 C.J. p 702 note 59.

73. Ala.—**Corpus Juris quoted in** Ex parte Cooper, 103 So. 474, 212 Ala. 501.
Cal.—California Cotton Credit Corporation v. Superior Court in and for Madera County, 15 P.2d 1108, 127 Cal.App. 472.
Mich.—**Corpus Juris quoted in** Franklin Co. v. Buhl Land Co., 250 N.W. 299, 300, 264 Mich. 531.
N.J.—Kristeller v. First Nat. Bank, 197 A. 17, 119 N.J.Law 570.
Pa.—Pierce, to Use of Snipes, v. Kaseman, 192 A. 105, 326 Pa. 280—Keystone Nat. Bank to Use of Balmer v. Deamer, Com.Pl., 32 Berks Co.L.J. 124, affirmed Keystone Nat. Bank of Manheim, now to Use of Balmer v. Deamer, 18 A.2d 540, 144 Pa.Super. 52.
34 C.J. p 702 note 60.

ments is authorized by statute,[74] the power to order it does not fundamentally depend on statutes, but is independent of them;[75] it rests on the general and inherent jurisdiction and control of courts over their judgments, process, and suitors.[76]

The recognized remedy at law by motion is so convenient, speedy, and inexpensive, that the courts have shown no disposition to restrict unnecessarily the exercise of this power.[77] In difficult or complicated cases, however, a court of law will not act, but will remit the parties to equity,[78] the jurisdiction of a court of equity with relation to set-offs being more extensive than that of common-law courts.[79]

Staying proceedings until recovery of judgment. When the party claiming the benefit of a set-off cannot avail himself of the right in the trial of the action, the cause may be continued or execution stayed, if justice so requires, until the claimant obtains judgment, which may then be set off against the other.[80]

c. Discretion of Court

In the absence of a statute providing otherwise, the set-off of mutual judgments is not demandable as of right, but rests in the discretion of the court.

Although it has been said that, while a court of law allows the setting off of judgments ex gratia,[81] a party applying to a court of equity is entitled to it as a matter of right,[82] or that in every proper case a set-off should be granted as of right[83] without regard to any distinction between the powers of courts of law and courts of equity,[84] the rule generally followed is that the set-off of judgment against judgment, unless given by statute as a matter of right,[85] is not demandable as of course, but rests in the discretion of the court,[86] regardless of the procedure adopted by the party seeking the relief.[87]

Such discretion is not an arbitrary one, but is controlled by established principles of equity.[88]

74. Ga.—Odom v. Attaway, 162 S.E. 279, 173 Ga. 883.
Mo.—Helstein v. Schmidt, 78 S.W.2d 132, 229 Mo.App. 275.
Tenn.—Mack v. Hugger Bros. Const. Co., 10 Tenn.App. 402.
34 C.J. p 703 note 61.

75. Mich.—**Corpus Juris quoted in** Franklin Co. v. Buhl Land Co., 250 N.W. 299, 300, 264 Mich. 531.
Mo.—Helstein v. Schmidt, 78 S.W.2d 132, 229 Mo.App. 275.
Tex.—Citizens Industrial Bank of Austin v. Oppenheim, Civ.App., 118 S.W.2d 820, error dismissed.
Wis.—Black v. Whitewater Commercial Savings Bank, 205 N.W. 404, 188 Wis. 24.
34 C.J. p 703 note 62.
"The power of the court to order a set-off of judgments does not rest upon statutes; it rests upon the common law."—Goldman v. Noxon Chemical Products Co., 175 N.E. 67, 68, 274 Mass. 526.

Chancery court
Jurisdiction to set off judgments against each other exists in chancery court independent of statute and is inherent in the court, but the power exists to apply the statutes in proper cases.—Montalto v. Yeckley, 54 N.E. 2d 421, 143 Ohio St. 181, affirming 57 N.E.2d 144, 73 Ohio App. 480.

76. Mich.—**Corpus Juris quoted in** Franklin Co. v. Buhl Land Co., 250 N.W. 299, 300, 264 Mich. 531.
Neb.—Boyer v. Clark, 3 Neb. 161, modified on other grounds 10 N.W. 709, 12 Neb. 215, 41 Am.R. 763.
N.J.—Kristeller v. First Nat. Bank, 197 A. 17, 119 N.J.Law 570.
34 C.J. p 703 note 63.

77. Mich.—**Corpus Juris quoted in** Franklin Co. v. Buhl Land Co., 250 N.W. 299, 300, 264 Mich. 531.
Minn.—Temple v. Scott, 3 Minn. 419.
Procedure to compel set-off see infra § 569.

78. W.Va.—Walker v. Gamble, 82 S. E. 1014, 74 W.Va. 706.
34 C.J. p 704 note 66.

79. Cal.—Hobbs v. Duff, 23 Cal. 596.
34 C.J. p 704 note 67.

80. N.H.—Hovey v. Morrill, 61 N.H. 9, 60 Am.R. 315.
34 C.J. p 704 note 68.

81. Ala.—Scott v. Rivers, 1 Stew. & P. 24, 21 Am.D. 646.
N.Y.—Simson v. Hart, 14 Johns. 63.

82. Cal.—California Cotton Credit Corporation v. Superior Court in and for Madera County, 15 P.2d 1108, 127 Cal.App. 472.
34 C.J. p 704 note 70.

83. Cal.—Haskins v. Jordan, 55 P. 786, 123 Cal. 157.

84. Cal.—Haskins v. Jordan, supra.

85. Ala.—Ex parte Cooper, 103 So. 474, 212 Ala. 501.

86. Kan.—Heston v. Finley, 236 P. 841, 118 Kan. 717.
Mass.—Old Colony Trust Co. v. National Non-Theatrical Motion Picture Bureau, 174 N.E. 723, 274 Mass. 377.
Mo.—Helstein v. Schmidt, 78 S.W. 2d 132, 229 Mo.App. 275.
Neb.—Boyer v. Clark, 3 Neb. 161, modified on other grounds 10 N.W. 709, 12 Neb. 215, 41 Am.R. 763.
N.J.—Needles v. Dougherty, 34 A.2d 396, 124 N.J.Eq. 108.
N.Y.—Neenan v. Woodside Astoria Transp. Co., 184 N.E. 744, 261 N. Y. 159.
Ohio.—Montalto v. Yeckley, 54 N.E.2d 421, 143 Ohio St. 181.
Okl.—Widick v. Phillips Petroleum Co., 70 P.2d 474, 180 Okl. 432—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474—State ex rel. Barnett v. Wood, 43 P.2d 136, 171 Okl. 341.
Pa.—Kisthardt, to Use of Puhak v. Betts, 183 A. 923, 321 Pa. 270.
Wash.—Spokane Sec. Finance Co. v. Bevan, 20 P.2d 31, 172 Wash. 418.
34 C.J. p 704 note 74.

Judicial policy
Judgments are set off as a matter of judicial policy, and not as a matter of right.—Black v. Whitewater Commercial & Savings Bank, 205 N. W. 404, 188 Wis. 24.

No absolute right to set off judgments exists, but is a matter of grace, and whether set-off should be decreed rests in sound discretion of court to which application is made. —Black v. Whitewater Commercial & Savings Bank, supra.

"Relief in equity by setting off one judgment against another is granted, not of right, but in the exercise of discretion."—Beecher v. Peter A. Vogt Mfg. Co., 125 N.E. 831, 833, 227 N.Y. 468—National Chautauqua County Bank of Jamestown v. Reynolds, 299 N.Y.S. 263, 265, 164 Misc. 653, affirmed 4 N.Y.S.2d 176, 254 App. Div. 646.

87. N.Y.—De Camp v. Thomson, 54 N.E. 11, 159 N.Y. 444, 70 Am.S.R. 570.
34 C.J. p 705 note 75.
Procedure to obtain set-off see infra § 569.

88. N.J.—Kristeller v. First Nat. Bank, 197 A. 17, 119 N.J.Law 570 —Needles v. Dougherty, 34 A.2d 396, 134 N.J.Eq. 108.
N.Y.—National Chautauqua County Bank of Jamestown v. Reynolds, 299 N.Y.S. 263, 164 Misc. 653, af-

Therefore a set-off should be allowed only when, in view of all the circumstances, equity and good conscience require it to be made,[89] substantial justice will be promoted thereby,[90] and the rights and interests of third persons will not be infringed.[91] Thus even when the set-off may legally be made, if the court sees that injustice will be done by granting the order of set-off, it will be refused,[92] as where a third person is the equitable owner of the judgment which would be diminished thereby,[93] or where it would infringe on any other right of equal grade,[94] or where it would prejudice the rights of a bona fide assignee of the judgment[95] or of the demand on which one of the judgments was rendered.[96]

§ 567. —— Persons Entitled to

To entitle a person to have one judgment set off against another, he must be the real and beneficial owner of the judgment.

To entitle a person to have one judgment set off against another, he must be the real and beneficial owner of the judgment;[97] it is not enough that it stands in his name, if it is for the use of another.[98] On the other hand, equitable owners of judgments may set them off, although other parties appear as the nominal plaintiffs or defendants.[99]

§ 568. —— Judgments Subject to

a. In general
b. Judgments of different courts
c. Judgments between different parties
d. Judgments for costs
e. Assigned judgments

firmed 4 N.Y.S.2d 176, 254 App.Div. 646.
Okl.—Widick v. Phillips Petroleum Co., 70 P.2d 474, 180 Okl. 432—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474—State ex rel. Barnett v. Wood, 43 P.2d 136, 171 Okl. 341.
Pa.—Kisthardt, to Use of Puhak v. Betts, 183 A. 923, 321 Pa. 270.
34 C.J. p 705 note 76.

Other statements

(1) Setting off of judgments is governed by equitable considerations. —Heston v. Finley, 236 P. 841, 118 Kan. 717.

(2) Power to order set-off of judgments must be exercised in accordance with general principles of justice and equity.—Goldman v. Noxon Chemical Products Co., 175 N.E. 67, 274 Mass. 526.

(3) Court's discretion must be exercised in accordance with sound principles of equity jurisprudence. —Montalto v. Yeckley, 54 N.E.2d 421, 143 Ohio St. 181.

(4) Matter of set-off of mutual judgments is question of equitable remedy addressed to sound discretion of trial court.—Citizens Industrial Bank of Austin v. Oppenheim, Tex.Civ.App., 118 S.W.2d 820, error dismissed.

89. Pa.—Pierce, to Use of Snipes, v. Kaseman, 192 A. 105, 326 Pa. 280—Dahl v. Auberle, 4 Pa.Super. 627, 40 Wkly.N.C. 386.
Tex.—Citizens Industrial Bank of Austin v. Oppenheim, Civ.App., 118 S.W.2d 820, error dismissed.
34 C.J. p 705 note 77.

Effect of constitution or statutes

A set-off should be allowed, when justice requires it, unless the court is compelled to refuse it in obedience to some provision of the constitution or statutes.—Rookard v. Atlanta & C. Air Line R. Co., 71 S.E. 992, 89 S.C. 371.

Equities existing at time of application

Generally countervailing equities to be considered should be equities existing at time application for set-off of judgment is made.—Black v. Whitewater Commercial & Savings Bank, 205 N.W. 404, 188 Wis. 24.

Intention to appeal

It has been held that it is no cause for refusing a set-off that one party intends to appeal from the judgment against him.—Sowles v. Witters, C.C.Vt., 40 F. 413.

90. N.J.—Needles v. Dougherty, 34 A.2d 396, 134 N.J.Eq. 198.
Okl.—Widick v. Phillips Petroleum Co., 70 P.2d 474, 180 Okl. 432.
Pa.—State Mutual Benefit Society v. Jackson, 13 Pa.Dist. & Co. 167, 20 Del.Co. 192, 78 Pittsb.Leg.J. 159.
S.C.—Rookard v. Atlanta & C. Air Line R. Co., 71 S.E. 992, 89 S.C. 371.
34 C.J. p 705 note 78.

91. Kan.—Heston v. Finley, 236 P. 841, 118 Kan. 717.
Tex.—Citizens Industrial Bank of Austin v. Oppenheim, Civ.App., 118 S.W.2d 820, error dismissed.
34 C.J. p 705 note 79.

92. N.J.—Needles v. Dougherty, 34 A.2d 396, 134 N.J.Eq. 108.
Okl.—Widick v. Phillips Petroleum Co., 70 P.2d 474, 180 Okl. 432.
Pa.—State Mutual Benefit Soc. v. Jackson, 13 Pa.Dist. & Co. 167, 20 Del.Co. 192, 78 Pittsb.Leg.J. 159.
S.C.—Rookard v. Atlanta & C. Air Line R. Co., 71 S.E. 992, 89 S.C. 371.
Tex.—Cocke v. Wright, Com.App., 39 S.W.2d 590.
Wis.—Black v. Whitewater Commercial & Savings Bank, 205 N.W. 404, 188 Wis. 24.
34 C.J. p 706 note 80.

External facts

The right of set-off will be denied where facts, external to the judgments themselves, make a set-off inequitable.—Citizens Industrial Bank of Austin v. Oppenheim, Tex.Civ.App., 118 S.W.2d 820, error dismissed —Cocke v. Wright, Tex.Civ.App., 23 S.W.2d 449, affirmed, Com.App., 39 S.W.2d 590.

93. S.C.—Meador v. Rhyne, 45 S.C.L. 631.

94. Okl.—Widick v. Phillips Petroleum Co., 70 P.2d 474, 180 Okl. 432.
Tex.—Citizens Industrial Bank of Austin v. Oppenheim, Civ.App., 118 S.W.2d 820, error dismissed.
34 C.J. p 706 note 82.
Effect of attorney's lien on right to set-off see Attorney and Client § 232.

Judgment against township

Bank's judgment on counterclaim on township's overdue improvement note could not be set off against judgment against bank for amount of township's general deposit account. —Township Committee of Piscataway Tp. v. First Nat. Bank, 168 A. 757, 111 N.J.Law 412, 90 A.L.R. 423.

95. Okl.—State ex rel. Barnett v. Wood, 43 P.2d 136, 171 Okl. 341.
34 C.J. p 706 note 84.

96. Mass.—Makepeace v. Coates, 8 Mass. 451.
S.C.—Meador v. Rhyne, 45 S.C.L. 631.

97. Cal.—Harrison v. Adams, 128 P. 2d 9, 20 Cal.2d 646.
N.J.—Needles v. Dougherty, 34 A.2d 396, 134 N.J.Eq. 108.
34 C.J. p 706 note 93.

98. S.C.—Meador v. Rhyne, 45 S.C.L. 631.

99. Cal.—Harrison v. Adams, 128 P. 2d 9, 20 Cal.2d 646.
Ga.—**Corpus Juris cited in** Sheffield v. Preacher, 165 S.E. 742, 743, 175 Ga. 719, 84 A.L.R. 1159.
34 C.J. p 706 note 95.

a. In General

In order that a judgment may be set off against another judgment, it must be a valid, subsisting, and enforceable judgment, consisting of a final adjudication for the payment of money.

In order that a judgment may be set off against another judgment, it must be a valid,[1] subsisting,[2] and enforceable[3] judgment, consisting of a final adjudication[4] for the payment of money.[5] If the two judgments meet these requirements, the nature of the respective claims on which they were recovered,[6] the question whether such claims could have been set off,[7] and the manner in which the judgments were recovered[8] are immaterial, as is also, except in certain cases,[9] the fact that an execution has been issued on one or both of the judgments.[10]

Judgments in tort. Two judgments recovered in actions of tort may be set off.[11] Also there may be a set-off of a judgment recovered in an action ex contractu and one recovered in an action ex delicto.[12] The set-off may be refused, however, if it is equitable to do so,[13] as where the party asking the set-off is the tort-feasor and the tort, for which judgment was recovered, is of a character which implies an intent to injure,[14] or where the exemption laws would be defeated.[15]

b. Judgments of Different Courts

As a general rule, where the party seeking the set-off moves for it in the court where the judgment against himself subsists, such court has power to order the judgment of another court set off against its own.

As a general rule, where the party seeking the set-off moves for it in the court where the judgment against himself subsists, such court has power to order the judgment of another court set off against its own,[16] even though it was recovered in

1. Utah.—Cox v. Dixie Power Co., 16 P.2d 916, 81 Utah 94.
34 C.J. p 706 note 96.

2. S.D.—Citizens' State Bank of Arlington v. Security Inv. Co., 246 N.W. 652, 61 S.D. 159.
34 C.J. p 707 note 97.

3. Mich.—Franklin Co. v. Buhl Land Co., 250 N.W. 299, 264 Mich. 531.
Wash.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304.
34 C.J. p 707 note 98.

Failure to issue execution

The fact that execution had not been issued within one year on judgments rendered against present defendant as garnishee in former suit did not prevent their allowance as offsets.—Watts v. Gibson, Tex.Civ. App., 33 S.W.2d 777.

4. S.D.—Lee v. Sioux Falls Motor Co., 274 N.W. 614, 65 S.D. 401.
Wash.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304—Spokane Sec. Finance Co. v. Bevan, 20 P.2d 31, 172 Wash. 418.
34 C.J. p 707 note 99.

Time for appeal

A judgment on which execution has been issued, without being stayed, and from which no appeal has been taken, although time therefor has not yet expired, may be set off against another judgment.—Haskins v. Jordan, 55 P. 786, 123 Cal. 157.

5. Mich.—Franklin Co. v. Buhl Land Co., 250 N.W. 299, 264 Mich. 531.
Wash.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304.
34 C.J. p 707 note 1.

6. N.H.—Shapley v. Bellows, 4 N.H. 347.
34 C.J. p 707 note 2.
Set-off of alimony judgment see Divorce § 251 c (2) (f).

7. Mich.—Franklin Co. v. Buhl Land Co., 250 N.W. 299, 264 Mich. 531.
Wash.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304.
34 C.J. p 707 note 3.

8. Ala.—Haskins v. Jordan, 55 P. 786, 123 Cal. 157.
34 C.J. p 707 note 4.

9. R.I.—Hopkins v. Drowne, 41 A. 1010, 21 R.I. 80.
34 C.J. p 707 note 5.

10. Wis.—Yorton v. Milwaukee, L. S. & W. R. Co., 21 N.W. 516, 23 N. W. 401, 62 Wis. 367.
34 C.J. p 707 note 6.

11. N.Y.—Neenan v. Woodside Astoria Transp. Co., 184 N.E. 744, 261 N.Y. 159—Simson v. Hart, 14 Johns. 63.

12. U.S.—Turner v. Dickey, D.C. Tenn., 3 F.Supp. 360, affirmed, C.C. A., Dickey v. Turner, 64 F.2d 1012.
Ill.—State Bank of St. Charles v. Burr, 14 N.E.2d 511, 295 Ill.App. 15.
Mich.—Franklin Co. v. Buhl Land Co., 250 N.W. 299, 264 Mich. 531.
Pa.—Pierce, to Use of Snipes, v. Kaseman, 192 A. 105, 326 Pa. 280.
Wash.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304—Spokane Sec. Finance Co. v. Bevan, 20 P.2d 31, 172 Wash. 418.
Wis.—Black v. Whitewater Commercial & Savings Bank, 205 N.W. 404, 188 Wis. 24.
34 C.J. p 708 note 9.

Judgments arising from same subject matter may be set off, even though one is based on contract and the other on tort.—Dalton State Bank v. Eckert, 282 N.W. 490, 135 Neb. 500.

Particular judgments

(1) Liability on money judgment for criminal conversation and alienation of affections may be set off against liability on judgment for money due under notes.—Turner v. Dickey, D.C.Tenn., 3 F.Supp. 360, affirmed, C.C.A., Dickey v. Turner, 64 F.2d 1012.

(2) Judgment for landlord for rent may be set off against judgment of tenant for conversion of fixtures by landlord.—Franklin Co. v. Buhl Land Co., 250 N.W. 299, 264 Mich. 531.

(3) Set-off of judgment in contract against judgment in tort for negligence not involving willful injury is generally allowed.—Pierce, to Use of Snipes, v. Kaseman, 192 A. 105, 326 Pa. 280.

13. U.S.—Reed v. Smith, C.C.N.J., 158 F. 889, 891.
Wis.—Black v. Whitewater Commercial & Savings Bank, 205 N.W. 404, 188 Wis. 24.

14. Pa.—Leitz v. Hohman, 56 A. 868, 207 Pa. 289, 99 Am.S.R. 791—Ream v. Nickolls, Com.Pl., 85 Pittsb.Leg.J. 813.
34 C.J. p 708 note 11.

15. Cal.—California Cotton Credit Corporation v. Superior Court in and for Madera County, 15 P.2d 1108, 127 Cal.App. 472.
Kan.—Treat v. Wilson, 70 P. 892, 65 Kan. 819.
Tex.—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Civ.App., 122 S.W.2d 659, error dismissed.
34 C.J. p 708 note 12.

Judgment for seizure of exempt property

Judgment based on ordinary debt cannot be set off against judgment obtained for value of exempt personal property wrongfully seized and sold on execution or attachment, since the latter judgment takes the place of the exempt property.—Whiteday v. Roberts, 43 P.2d 422, 171 Okl. 466.

16. Ga.—Piedmont Sav. Co. v. Davis, 190 S.E. 386, 55 Ga.App. 386.

an inferior court[17] or in another state,[18] or even though one judgment is in a state court and the other in a federal court.[19] In some jurisdictions resort to equity is necessary to obtain a set-off of judgments which have been recovered in different courts.[20]

c. Judgments between Different Parties

In order that one judgment may properly be set off against another, it is necessary that there should be mutuality of parties, unless there are circumstances making it equitable to set off judgments in which the parties are not the same.

In order that one judgment may properly be set off against another, it is necessary that there should be mutuality of parties,[21] unless there are peculiar circumstances making it equitable to set off judgments in which the parties are not the same,[22] as when the difference in parties is with respect to the nominal parties, and not the real parties in interest.[23] If there are joint plaintiffs or defendants in one of the judgments, it cannot ordinarily be set off against a judgment in which only one of them is concerned,[24] without the consent of the persons who are parties to only one of the judgments,[25] although some of the authorities permit it where each of the joint defendants is liable for the whole amount of the judgment;[26] and the set-off is proper where one of them is liable only in the character of a surety,[27] or is a nominal or formal party,[28] or where the owner of the judgment held singly is insolvent,[29] or even where one of the owners of the joint judgment is insolvent,[30] provided there is an apportionment of interest between him and the other owner.[31]

Judgments in individual and representative capacities. A judgment against a person in his individual capacity will not, as a general rule, be set off against a judgment in his favor in his representative capacity;[32] but a judgment in favor of the applicant against a cestui que trust has been set off against a judgment recovered by the trustee against such applicant.[33]

d. Judgments for Costs

A judgment for costs may be set off against a judgment recovered by the adverse party.

A judgment for costs may be set off against a judgment recovered by the adverse party,[34] provided the costs are liquidated or taxed at the time,[35] they belong to the party seeking the set-off,[36] he

Pa.—Pierce, to Use of Snipes v. Kaseman, 192 A. 105, 326 Pa. 280.
34 C.J. p 708 note 18.

Judgment transferred from another county

Set-off being merely form of satisfaction, judgment may be set off against judgment transferred from another county, satisfaction of judgments, as distinguished from questions of their validity, being within control of court of county to which judgment was transferred.—Pierce, to Use of Snipes v. Kaseman, supra.

17. N.Y.—Kimball v. Munger, 2 Hill 364.
34 C.J. p 708 note 19.

18. Minn.—Barnes v. Verry, 191 N. W. 589, 154 Minn. 252.
34 C.J. p 708 note 20.

19. U.S.—Reed v. Smith, C.C.N.J., 158 F. 889, 890.
34 C.J. p 709 note 21.

20. Ark.—Weast v. Wickersham, 195 S.W. 685, 136 Ark. 541.
34 C.J. p 709 notes 22, 23.

21. U.S.—U. S. ex rel. Johnson v. Morley Const. Co., C.C.A.N.Y., 98 F.2d 781, certiorari denied Maryland Casualty Co. v. U. S. for Use and Benefit of Harrington, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421.
Ala.—Louisville & N. R. Co. v. Echols, 105 So. 651, 213 Ala. 490.
Kan.—Heston v. Finley, 236 P. 841, 118 Kan. 717.
Neb.—Boyer v. Clark, 3 Neb. 161, modified on other grounds 10 N. W. 709, 12 Neb. 215, 41 Am.R. 763.
N.H.—Rowe v. Langley, 48 N.H. 391.
N.Y.—Hamilton v. Royal Indemnity Co., 209 N.Y.S. 670, 124 Misc. 744—Broadway Bookbindery v. Gulfree Printing Corporation, 199 N.Y.S. 194.
Okl.—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474—Corpus Juris cited in State ex rel. Barnett v. Wood, 43 P.2d 136, 17 Okl. 341.
34 C.J. p 709 note 25.

22. Idaho.—Richards v. Jarvis, 258 P. 370, 44 Idaho 403.
34 C.J. p 709 note 26.

23. Me.—Collins v. Campbell, 53 A. 837, 97 Me. 23, 94 Am.S.R. 458.
34 C.J. p 709 note 27.

24. Mass.—Simmons v. Shaw, 52 N. E. 1087, 172 Mass. 516.
34 C.J. p 709 note 28.

25. Cal.—Corwin v. Ward, 35 Cal. 195, 95 Am.D. 93.
Me.—Collins v. Campbell, 53 A. 837, 97 Me. 23, 94 Am.S.R. 458.

26. S.D.—Sweeney v. Bailey, 64 N. W. 188, 7 S.D. 404.
34 C.J. p 709 note 30.

27. Mich.—Bennett v. Hanley, 51 N. W. 885, 91 Mich. 143.
34 C.J. p 709 note 31.

28. Ohio.—Pike v. Sheve, 11 Ohio Dec. (Reprint) 891, 30 Cinc.L.Bul. 305.
Tenn.—Rutherford v. Crabb, 5 Yerg. 112.

29. Minn.—Hunt v. Conrad, 50 N.W. 614, 47 Minn. 557, 14 L.R.A. 512.
N.Y.—Simson v. Hart, 14 Johns. 63.

30. Mo.—Fulkerson v. Davenport, 70 Mo. 541.

31. Mo.—Fulkerson v. Davenport, supra.

32. Ga.—Daniel v. Bush, 4 S.E. 271, 80 Ga. 218.
34 C.J. p 709 note 36.

33. Cal.—Hobbs v. Duff, 23 Cal. 596.

34. Ark.—Sims v. Miller, 236 S.W. 828, 151 Ark. 377.
Colo.—Wallace Plumbing Co. v. Dillon, 213 P. 130, 73 Colo. 10.
Mich.—Jones v. O'Donnell, 290 N.W. 375, 292 Mich. 189.
N.Y.—Prindle v. Rockland Transit Corporation, 32 N.Y.S.2d 156, 263 App.Div. 873, appeal denied 34 N. Y.S.2d 411, 263 App.Div. 1010—Braum v. Finger, 113 N.Y.S. 573.
Utah.—Morgan v. Fourth Judicial District Court of Wasatch County, 141 P.2d 886, 105 Utah 140.
34 C.J. p 710 note 39.
Set-off of costs generally see Costs §§ 431–434.

35. Ind.—George v. Williams, 37 N. E.2d 21, 109 Ind.App. 623.
34 C.J. p 710 note 40.

36. Ala.—Hamrick v. Town of Albertville, 155 So. 87, 228 Ala. 666.
Ga.—Hollomon v. Humber, 179 S.E. 365, 180 Ga. 470.
34 C.J. p 710 note 41.

appears in the same capacity in the two judgments,[37] the debts are mutual,[38] and the judgment recovered by the adverse party is not exempt from attachment, levy, and sale.[39] A set-off of a judgment for costs against another judgment may be refused where it would be inequitable.[40] A set-off of a judgment for costs has been refused against a judgment obtained in another court and assigned to a third person, in the absence of pleading and proof of equitable grounds for such relief.[41] Where a creditor's bill is dismissed with costs, such costs cannot be set off against the judgment on which the bill was founded.[42]

e. Assigned Judgments

(1) Set-off of assigned judgment

(2) Set-off against assigned judgment

(1) Set-Off of Assigned Judgment

Where a judgment debtor becomes the assignee of a judgment against his creditor, he may have it set off against the judgment against himself, unless such a set-off is inequitable.

Where a judgment debtor becomes the assignee of a judgment against his creditor, he may have it set off against the judgment against himself,[43] unless there are special circumstances in the case rendering the set-off inequitable.[44] A judgment debtor may purchase a judgment against his judgment creditor for the particular purpose of using it as a set-off[45] provided the purchase of judgment

Protection of attorney's lien in case of set-off of judgment for costs see Attorney and Client § 232.

Payment by third person

It has been held that the payment of costs by a third person does not defeat the right to set off a judgment for costs.—Morgan v. Fourth Judicial District Court of Wasatch County, 141 P.2d 886, 105 Utah 140.

37. Ala.—Louisville & N. R. Co. v. Perkins, 56 So. 105, 1 Ala.App. 376.
Md.—Willis v. Jones, 57 Md. 362.

38. Ala.—Louisville & N. R. Co. v. Perkins, 56 So. 105, 1 Ala.App. 376.
Pa.—Melloy v. Burtis, 4 Pa.Co. 613.

39. S.C.—Rookard v. Atlanta & C. Air Line R. Co., 71 S.E. 992, 89 S.C. 371.
34 C.J. p 710 note 44.

40. U.S.—Cornell v. Gulf Oil Corporation, D.C.Pa., 35 F.Supp. 448.

Seaman's judgment for maintenance and cure

Shipowner was not entitled to set off its judgment for costs allowed on appeal to supreme court against seaman's judgment for cure and maintenance.—Taylor v. Calmar S. S. Co., D.C.Pa., 35 F.Supp. 335.

41. Tex.—Missouri, K. & T. R. Co. of Texas v. Cassinoba, 99 S.W. 888, 44 Tex.Civ.App. 625.

42. N.J.—Brisley v. Jones, 5 N.J.Eq. 512.
N.Y.—Mickles v. Brayton, 10 Paige 138.

43. Cal.—Harrison v. Adams, 128 P. 2d 9, 20 Cal.2d 646.
Ga.—Piedmont Sav. Co. v. Davis, 190 S.E. 386, 55 Ga.App. 386.
Ill.—Silverman v. City Engineering & Construction Co., 252 Ill.App. 275, affirmed 170 N.E. 250, 338 Ill. 154—Young v. Young, 32 Ill.App. 109.
N.Y.—National Chautauqua County Bank of Jamestown v. Reynolds, 299 N.Y.S. 263, 164 Misc. 653, affirmed 4 N.Y.S.2d 176, 254 App.Div. 646—Ford v. Stuart, 19 Johns. 342.
Okl.—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474.
Pa.—Pierce, to Use of Snipes v. Kaseman, 192 A. 105, 326 Pa. 280—Welliver v. Fox, 4 Pa.Dist. 197.
S.D.—Lee v. Sioux Falls Motor Co., 274 N.W. 614, 65 S.D. 401.
34 C.J. p 710 note 50.

Sound discretion of court

A judgment obtained by assignee by purchase may be set off against judgment against assignee in sound discretion of court.—Montalto v. Yeckley, 54 N.E.2d 421, 143 Ohio St. 181.

Mutuality

(1) In order for an assignee of a judgment to use it as a set-off against a judgment against him, mutuality is essential, that is, the judgments must be between the same parties in the same right.—Harrison v. Adams, 128 P.2d 9, 20 Cal.2d 646.

(2) In determining whether demand of assignee of a judgment against assignee's creditor, and the creditor's judgment against assignee are "mutual" so that they may be set off against each other, equity will look to the real parties in interest.—Harrison v. Adams, supra.

44. Kan.—Bouchey v. Gillilan, 26 P. 2d 451, 138 Kan. 404.
Tex.—Citizens Industrial Bank of Austin v. Oppenheim, Civ.App., 118 S.W.2d 320, error dismissed.
34 C.J. p 710 note 51.

Lien

The court will not except the amount claimed as a lien on the assigned judgment where the assignee had no notice thereof.—Hill v. Brinkley, 10 Ind. 102.

Particular circumstances

(1) Where judgments were obtained against widow on notes executed by her as accommodation maker for her husband and, after settlement of judgments had been made by husband's estate, husband's heirs obtained assignments of judgments against widow for purpose of defeating widow's claim to unpaid dower, the right to set off such judgments against dower would be denied.—Needles v. Dougherty, 34 A.2d 396, 134 N.J.Eq. 108.

(2) The assignee of a judgment cannot use it as a set-off to defeat the debtor's exemption.—State Mutual Benefit Soc. v. Jackson, 13 Pa.Dist. & Co. 167, 20 Del.Co. 192, 78 Pittsb. Leg.J. 159.

(3) A trustee against which a divorced wife recovered judgment for past-due alimony after trustee had failed to comply with divorce decree ordering alimony to be paid out of income of trust funds payable to husband could not have deficiency judgment against husband and wife, purchased by trustee, set off against wife's judgment, especially where trustee purchased judgment at a time when it knew it was uncollectable, and wife had been compelled for years to be an object of charity, since wife's judgment dedicated a fund for her support, and it was entitled to the same protection as if it had been awarded against husband.—National Chautauqua County Bank of Jamestown v. Reynolds, 299 N.Y.S. 263, 164 Misc. 653, affirmed 4 N.Y.S.2d 176, 254 App.Div. 646.

45. Minn.—Barnes v. Verry, 191 N. W. 589, 154 Minn. 252, 31 A.L.R. 707.
Okl.—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474.
34 C.J. p 711 note 53.

Time of purchase

The fact that judgment against plaintiff was purchased by defendant during pendency of suit in nature of creditor's bill brought by plaintiff as judgment creditor, to enforce collection of his judgment against defendant, did not preclude court in its sound discretion from permitting set-off of judgment pur-

against his judgment creditor is bona fide.[46] The assignee of the judgment to be used as a set-off must, however, be the absolute and beneficial owner of the judgment in order to enable him to use it as a set-off.[47] After a person has assigned a judgment recovered by him, he cannot use such judgment as a set-off against a judgment recovered against him[48] unless his judgment has been reassigned to him.[49]

(2) Set-Off against Assigned Judgment

As a general rule, one judgment may be set off against another although the latter judgment has been assigned to a third person for value, except where the assignee's equities are prior or superior.

On the principle that the assignee of a judgment takes it subject to all equities between the original parties, one judgment may be set off against another, as a general rule, although the latter judgment has been assigned to a third person for value,[50] especially where, because of the insolvency of the assignor at the time of the assignment, the party claiming the right of set-off had no other means of collecting his debt,[51] or where, in anticipation of an application to make the set-off, the assignment was made for the purpose of defeating the right.[52] Although it has been held that the right of set-off against the assignee is not defeated because he took without knowledge of such right,[53] there is no doubt that the position of the party seeking the set-off is much stronger where the assignee has notice of a judgment against his assignor such as may be set off against the assigned judgment[54] or where such person has no notice or knowledge of a prior assignment of the judgment against himself.[55]

The right of set-off must have existed at the time of the assignment;[56] there can be no right of set-off

chased by defendant against plaintiff's judgment against defendant.—Montalto v. Yeckley, 54 N.E.2d 421, 143 Ohio St. 181.

46. N.J.—Needles v. Dougherty, 34 A.2d 396, 134 N.J.Eq. 108.
Ohio.—Montalto v. Yeckley, 54 N.E. 2d 421, 143 Ohio St. 181.
Okl.—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474.

Conditional purchase

(1) It has been held that the judgment cannot be set off, where it was purchased with the sole purpose of being used as a set-off and with an agreement to reassign it if a motion for such set-off should be refused.—Cornell v. Donovan, 13 N.Y.St. 704, affirmed 13 N.Y.St. 741—34 C.J. p 711 note 54.

(2) It has also been held that the fact that payment for the assigned judgment is made conditional on the assignee's ability to set it off does not deprive him of the right to the set-off.—Brown v. Lapp, 89 S.W. 304, 28 Ky.L. 409—McBrayer v. Dean, 33 S.W. 508, 100 Ky. 398, 18 Ky.L. 847.

Consideration

(1) An insolvent debtor cannot object to want of consideration for the assignment of a judgment obtained against him which the assignee has obtained for purposes of set-off.—People v. New York Ct. of C. Pl., 13 Wend., N.Y., 649, 28 Am.D. 495.

(2) The fact that defendant purchased judgment against plaintiff far below its face amount did not preclude court from permitting set-off of such judgment against plaintiff's judgment against defendant, but the low price was a fact which trial court could take into consideration in exercising its discretion.—Montalto v. Yeckley, 54 N.E.2d 421, 143 Ohio St. 181.

47. Cal.—Harrison v. Adams, 128 P. 2d 9, 20 Cal.2d 646.
Kan.—Bouchey v. Gillilan, 26 P.2d 451, 138 Kan. 404.
N.J.—Needles v. Dougherty, 34 A.2d 396, 134 N.J.Eq. 108.
N.Y.—Porter v. Davis, 2 How.Pr. 30.
Ohio.—Montalto v. Yeckley, 54 N.E. 2d 421, 143 Ohio St. 181.
34 C.J. p 711 note 56.
Necessity of beneficial ownership generally see supra § 567.

48. N.Y.—Swift v. Prouty, 64 N.Y. 545.
Vt.—Day v. Abbott, 15 Vt. 632.

Where an interest assigned

Where defendant in action for recovery of possession of realty recovered money judgment against plaintiff under occupying claimants act, and assigned an interest in that judgment to third persons, and plaintiff brought action on supersedeas bond given by defendant to stay execution of judgment for possession, the judgment under the occupying claimants act could be offset by defendant against judgment in favor of plaintiff on supersedeas bond only to extent of defendant's interest in the judgment under the occupying claimants act.—Amberg v. Claussen, 98 P. 2d 927, 186 Okl. 482.

49. Kan.—Turner v. Crawford, 14 Kan. 499.
Pa.—Jacoby v. Guier, 6 Serg. & R. 448.

50. U.S.—Turner v. Dickey, D.C. Tenn., 3 F.Supp. 360, affirmed, C.C. A., Dickey v. Turner, 64 F.2d 1012.
Cal.—Arp v. Blake, 218 P. 773, 63 Cal. App. 362.
Ga.—Sheffield v. Preacher, 165 S.E. 742, 743, 175 Ga. 719, 84 A.L.R. 1159—Odom v. Attaway, 162 S.E. 279, 173 Ga. 883.
Ill.—Silverman v. City Engineering Const. Co., 170 N.E. 250, 338 Ill. 154.
Kan.—Petersime Incubator Co. v. Ferguson, 103 P.2d 822, 152 Kan. 259.
Mass.—Goldman v. Noxon Chemical Products Co., 175 N.E. 67, 274 Mass. 526.
Pa.—Kisthardt, to Use of Pubok v. Betts, 183 A. 923, 321 Pa. 270.
Wash.—Spokane Sec. Finance Co. v. Bevan, 20 P.2d 31, 172 Wash. 418.
34 C.J. p 711 note 60.

Portion of judgment

Portion of judgment for exemplary damages from wrongful sequestration was subject to offset by deficiency judgment while judgment for damages was in mortgagor's hands and remained subject to offset in hands of assignee who purchased the judgment subsequent to rendition of deficiency judgment against mortgagor.—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Tex.Civ.App., 122 S.W.2d 659, error dismissed.

51. Cal.—Arp v. Blake, 218 P. 773, 63 Cal.App. 362.
Ill.—Silverman v. City Engineering & Construction Co., 252 Ill.App. 275, affirmed 170 N.E. 250, 338 Ill. 154.
Neb.—Sherwood v. Salisbury, 299 N. W. 135, 139 Neb. 838.
34 C.J. p 711 note 61.

52. Iowa.—Hurst v. Sheets, 14 Iowa 322.
34 C.J. p 711 note 62.

53. N.J.—Hendrickson v. Brown, 39 N.J.Law 239.

54. Cal.—Coonan v. Loewenthal, 81 P. 527, 147 Cal. 218.
34 C.J. p 711 note 64.

55. Ariz.—Martin v. Wells, 28 P. 958, 3 Ariz. 355.
Mich.—Finn v. Corbitt, 36 Mich. 318.

56. Ga.—Corpus Juris cited in

of the judgments until both exist;[57] and the court will refuse to allow a set-off to the prejudice of an assignee for value and in good faith whose equities are prior or superior to those of the party seeking the set-off.[58] It has been held that an assignment of a demand before the entry of judgment on it gives to the assignee a superior equity to that of a party claiming a right to set off a judgment previously recovered against the assignor, and prevents the right of set-off from accruing,[59] and this has also been held to be true where a judgment was assigned before the recovery by the judgment debtor of a judgment in another action against the former judgment creditor.[60] However, these rules are sometimes relaxed and a set-off allowed where the circumstances render it equitable to do so,[61] as where the assignee took with notice of the existence of the judgment[62] or pendency of the action,[63] as the case may be, or delayed filing his assignment or making himself a party to the record.[64] Where a judgment is rendered in favor of two judgment creditors, and one of them, in good faith and for value assigns his interest to the other, the judgment debtor has no right to set off, as against the assignee, a judgment against the assignor purchased from a third person before the assignment.[65]

The purchase by a judgment creditor of another judgment owned by his debtor and sold on execution on the former judgment does not extinguish both judgments, but makes the purchaser the judgment creditor with respect to the judgment so sold.[66]

Effect of special fund for payment. A party entitled to set-off of judgments against each other, having subject to his control a special fund primarily applicable to the satisfaction of his judgment or decree, will not be permitted to avail himself of his right to set-off against the assignee of the judgment or decree against him until such special fund is exhausted,[67] and then only for any balance of his demand which may remain unsatisfied.[68]

§ 569. —— Proceedings to Obtain

As a general rule, a person seeking a set-off of judgment against judgment should apply to the court in which the judgment against himself was recovered. While the application for a set-off ordinarily may be made by motion, a set-off may also be obtained in an ordinary civil action or suit in equity.

A person seeking a set-off of judgment against judgment should apply to the court[69] in which the judgment against himself was recovered,[70] although it has been held that judgments in cross actions may be set off, when the parties in interest are the same, by the court in which one or both of the actions are pending,[71] and that a court of equity has jurisdiction to set off mutual judgments without regard to the courts in which the judgments were rendered.[72]

The application for a set-off ordinarily may be

Sheffield v. Preacher, 165 S.E. 742, 743, 175 Ga. 719, 84 A.L.R. 1159.
Miss.—Turnage v. Riley, 158 So. 785, 172 Miss. 83.
Mo.—Helstein v. Schmidt, 78 S.W.2d 132, 229 Mo.App. 275.
34 C.J. p 712 note 66.

57. Wash.—**Corpus Juris cited in** Spokane Security Finance Co. v. Bevan, 20 P.2d 31, 32, 172 Wash. 418.
34 C.J. p 712 note 67.

58. Cal.—Murphy v. Davids, 215 P. 1040, 62 Cal.App. 63.
Ga.—Sheffield v. Preacher, 165 S.E. 742, 175 Ga. 719, 84 A.L.R. 1159.
Kan.—Heston v. Finley, 236 P. 841, 118 Kan. 717.
Miss.—Turnage v. Riley, 158 So. 785, 172 Miss. 83.
34 C.J. p 712 note 68.

Assignee without notice
Where assignee acquires judgment for valuable consideration without notice of existence of judgment against assignor, a set-off against judgment held by assignee may be denied.—State ex rel. Barnett v. Wood, 43 P.2d 136, 171 Okl. 341.

59. Miss.—Turnage v. Riley, 158 So. 785, 172 Miss. 83.
Wash.—**Corpus Juris cited in** Spokane Sec. Finance Co. v. Bevan, 20 P.2d 31, 32, 172 Wash. 418.
34 C.J. p 712 note 69.

60. N.Y.—Kelly v. City of Yonkers, 274 N.Y.S. 781, 242 App.Div. 798.
34 C.J. p 712 note 70.

Statute providing that cross judgments may be offset against each other was inapplicable where one of judgments was assigned two years before the other was rendered.—Helstein v. Schmidt, 78 S.W.2d 132, 229 Mo.App. 275.

61. Mo.—Ford v. Stevens Motor Car Co., 232 S.W. 222, 209 Mo.App. 144.
34 C.J. p 712 note 71.

62. Ind.—Lammers v. Goodman, 69 Ind. 76.

63. Mo.—Ford v. Stevens Motor Car Co., 232 S.W. 222, 209 Mo.App. 144.

64. Pa.—Skinner v. Chase, 6 Pa.Super. 279.

65. Iowa.—Schultz v. Sylvester, 169 N.W. 179, 184 Iowa 859.

66. La.—Kentwood Bank v. McClendon, 93 So. 748, 152 La. 489.

67. W.Va.—Payne v. Webb, 2 S.E. 330, 29 W.Va. 627.

68. W.Va.—Payne v. Webb, supra.

69. Tex.—Harris v. Ware, Civ.App., 144 S.W.2d 647.

Intervention of court necessary
A judgment debtor cannot, without intervention of the court, set off the judgment of his creditor with a judgment in debtor's favor against the creditor, such intervention being necessary in order that there may be an adjudication of question of mutual liability and other equitable rights involved.—Harris v. Ware, supra.

Character of proceeding
A proceeding to set off judgments, whether by motion or action, is equitable in character.—Bouchey v. Gilliland, 26 P.2d 451, 138 Kan. 404.

70. Cal.—Harrison v. Adams, 128 P. 2d 9, 20 Cal.2d 646.
Minn.—Barnes v. Verry, 191 N.W. 589, 154 Minn. 252, 31 A.L.R. 707.
N.J.—Kristeller v. First Nat. Bank, 197 A. 17, 119 N.J.Law 570.
34 C.J. p 713 note 79.

71. Me.—Peirce v. Bent, 69 Me. 381.
N.M.—Scholle v. Pino, 54 P. 835, 9 N. M. 393.

72. Mich.—Robinson v. Kunkleman, 75 N.W. 451, 117 Mich. 193.
34 C.J. p 713 note 81.

made by motion,[73] and notice given to the opposite party[74] and all other parties whose rights and interests are affected.[75] On such motion no formal pleadings are necessary.[76] The right to set off one judgment or decree against another on motion or summary application exists only in those cases where the debts on both sides have been finally liquidated by judgment or decree.[77]

In addition to the remedy by motion, a set-off of judgments may also be obtained in an ordinary civil action[78] or suit in equity.[79] A formal action or a bill in equity is proper where the rights of the parties are complicated or not definitely fixed, or where there are intervening equities,[80] and in such a case the court may meanwhile protect the rights of the parties by enjoining the collection of one or both of the judgments or otherwise.[81]

The denial of a motion to set off judgments is not a bar to an action[82] or suit in equity[83] to compel such set-off. In a proceeding to set off judgments the court may not impose conditions affecting the amount of either judgment,[84] although, where a portion of a judgment has been assigned under circumstances giving the assignment precedence over the set-off, the rights of the assignee will be protected.[85]

Time of application. An application to have judgments set off should be made at the earliest practicable opportunity, and, if delayed until the interests of third persons have intervened, the set-off may properly be denied,[86] but it would appear that,

73. Ga.—Odom v. Attaway, 162 S.E. 279, 173 Ga. 883—Piedmont Sav. Co. v. Davis, 190 S.E. 386, 55 Ga.App. 386.
Mo.—**Corpus Juris cited in** Helstein v. Schmidt, 78 S.W.2d 132, 136, 229 Mo.App. 275.
N.Y.—Neenan v. Woodside Astoria Transp. Co., 184 N.E. 744, 261 N.Y. 159.
Okl.—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474.
S.D.—Lee v. Sioux Falls Motor Co., 274 N.W. 614, 65 S.D. 401.
Tenn.—Mack v. Hugger Bros. Const. Co., 10 Tenn.App. 402.
34 C.J. p 713 note 82.

Special motion
Motion for set-off of cross judgments against each other is to be regarded as special motion, and one made in summary proceeding.—Helstein v. Schmidt, 78 S.W.2d 132, 229 Mo.App. 275.

74. Ga.—Odom v. Attaway, 162 S.E. 279, 173 Ga. 883.
Mo.—**Corpus Juris cited in** Helstein v. Schmidt, 78 S.W.2d 132, 136, 229 Mo.App. 275.
S.D.—Lee v. Sioux Falls Motor Co., 274 N.W. 614, 65 S.D. 401.
34 C.J. p 713 note 83.

75. Mo.—Helstein v. Schmidt, 78 S.W.2d 132, 229 Mo.App. 275.

Notice to assignee
It has been held that the fact that one asking set-off of cross judgments against himself and another had no knowledge of assignment of judgment against him by such other or of assignee thereof did not affect right to notice of assignee in absence of estoppel.—Helstein v. Schmidt, supra.

76. Ind.—Quick v. Durham, 16 N.E. 601, 115 Ind. 302.
34 C.J. p 714 note 84.

77. Ohio.—Barbour v. National Exch. Bank, 33 N.E. 542, 50 Ohio St. 90, 20 L.R.A. 192.
34 C.J. p 714 note 85.

78. Minn.—Lindholm v. Itasca Lumber Co., 65 N.W. 931, 64 Minn. 46.
34 C.J. p 714 note 87.

Pleading
Averments in supplementary answer to petition for leave to set off judgment on note against judgment for maker that consideration for note failed, as petitioner knew when he took it from payee, were held not to warrant opening of former judgment, where no testimony was offered in support thereof and they were denied and explained in petitioner's replication.—Pierce, to Use of Snipes v. Kaseman, 192 A. 105, 326 Pa. 280.

79. Okl.—Johnson v. Noble, 65 P.2d 502, 179 Okl. 256, 121 A.L.R. 474.
34 C.J. p 714 note 88.

"The determination of the matter of the set-off of one judgment against another pertains to a court of equity."—Spokane Sec. Finance Co. v. Bevan, 20 P.2d 31, 32, 172 Wash. 418.

A reference to a master to try questions of fact may be made on a bill to set off judgments.—Hackett v. Connett, 2 Edw.,N.Y., 73.

Election to pay court officers
In suit to set off judgment, petitioner's election to pay amount due court officers has been held not to prevent set-off of judgment as against other parties.—Odom v. Attaway, 162 S.E. 279, 173 Ga. 883.

Sufficiency of evidence
(1) Evidence held sufficient.—McIntosh v. McIntosh, 234 N.W. 234, 211 Iowa 750.

(2) Evidence held insufficient.
Ala.—Andrews v. Sessoms Grocery Co., 193 So. 104, 238 Ala. 640.
Ga.—Taylor v. Jordan, 195 S.E. 186, 185 Ga. 325.

80. N.Y.—Neenan v. Woodside Astoria Transp. Co., 184 N.E. 744, 261 N.Y. 159.
34 C.J. p 714 note 89.

81. U.S.—Frye-Bruhn Co. v. Meyer, Alaska, 121 F. 533, 58 C.C.A. 529.
Set-off as ground of equitable relief against judgment generally see supra § 370.
Staying collection of one judgment until recovery of another see supra § 566 b.

82. N.Y.—Pignolet v. Geer, 24 N.Y. Super. 626, 19 Abb.Pr. 264.

83. Ala.—Scott v. Rivers, 1 Stew. & P. 24, 21 Am.D. 646.
34 C.J. p 714 note 92.

84. U.S.—Owens Co. v. Officer, Minn., 244 F. 47, 156 C.C.A. 475.
34 C.J. p 714 note 93.

85. U.S.—Owens Co. v. Officer, supra.
S.C.—Ex parte Wells, 21 S.E. 334, 43 S.C. 477.

86. Kan.—Heston v. Finley, 236 P. 841, 118 Kan. 717.
34 C.J. p 714 note 95.

Delay held not to bar suit
Ill.—Silverman v. City Engineering & Construction Co., 252 Ill.App. 275, affirmed 170 N.E. 250, 338 Ill. 154.

Application prior to judgment
The trial court was authorized to determine defendant's right to set off a judgment at a hearing held after judgment in instant case had been entered, notwithstanding defendant's application for order to show cause pursuant to which the hearing was held, was made prior to judgment, before the right of set-off had accrued under statute.—Lee v. Sioux Falls Motor Co., 274 N.W. 614, 65 S.D. 401.

if no such interests intervene, the application may be granted at any time while the judgments remain valid and enforceable demands.[87] A set-off of a judgment on motion will not be refused merely because the party has neglected an opportunity to set off the subject of the judgment, or the judgment itself, on the trial,[88] although it has been held otherwise where it is attempted to enforce the set-off in equity[89] or by pleading it as such in an action on the other judgment.[90]

Tender or payment of difference. A judgment creditor may have a lesser judgment held by him set off against a larger judgment against him without a tender or payment of the difference.[91]

Intervention is sometimes allowed in a proceeding to set off judgments.[92]

Order or judgment. Adverse judgments between the same parties are extinguished only by an order of the court, by some act of the parties themselves, or some action of the officer having both executions for collection.[93] A set-off judgment may be modified by the court in a proper case.[94]

§ 570. —— Operation and Effect

The allowance of a set-off of judgment against judgment extinguishes them both if they are equal in amount, or satisfies the smaller judgment in full and the larger proportionately.

The allowance of a set-off of judgment against judgment extinguishes them both if they are equal in amount, or satisfies the smaller judgment in full and the larger proportionately.[95] If the set-off is refused, it leaves the rights of the parties as before[96] and does not prejudice the right of one of them to require the sheriff to set off executions in his hands on the two judgments.[97] Where a judgment recovered against a principal is allowed in set-off against a judgment in favor of the surety, it is not thereby extinguished,[98] but the transaction amounts to an assignment of it to the surety.[99]

Remittitur and release. The party holding the larger judgment may be ordered to enter a remittitur on his judgment for the amount of the smaller judgment,[1] and the party moving for the set-off may be required to execute a release.[2]

§ 571. Set-Off of Judgment against Claim

a. In general
b. Assigned judgments and claims

a. In General

Subject to some exceptions, a judgment may be pleaded as a set-off in an action between the same parties on a different claim or demand, provided it is valid, in force, and unsatisfied.

Subject to some exceptions,[3] a judgment may be pleaded as a set-off in an action between the same parties on a different claim or demand,[4] provided it

87. Cal.—Hobbs v. Duff, 23 Cal. 596.
34 C.J. p 714 note 96.

88. Pa.—Kisthardt, to Use of Puhak v. Betts, 183 A. 923, 321 Pa. 270.
34 C.J. p 715 note 97.

89. U.S.—Anglo-American Provision Co. v. Davis Provision Co., C.C.N.Y., 112 F. 574, appeal dismissed 24 S.Ct. 93, 191 U.S. 376, 48 L.Ed. 228.
Tex.—Cocke v. Wright, Com.App., 39 S.W.2d 590.

90. Ind.—Ault v. Zehering, 38 Ind. 429.

91. Cal.—Nash v. Kreling, 69 P. 418, 136 Cal. 627.
Ind.—Shirts v. Irons, 54 Ind. 13.

92. U.S.—Cathay Trust v. Brooks, China, 193 F. 973, 114 C.C.A. 125.
34 C.J. p 715 note 2.

93. Me.—Herrick v. Bean, 20 Me. 51.

94. Ga.—Hollomon v. Humber, 179 S.E. 365, 180 Ga. 470.

95. Me.—Peirce v. Bent, 69 Me. 381.
34 C.J. p 715 note 5.

96. Me.—Gould v. Parlin, 7 Me. 82.

97. Me.—Gould v. Parlin, supra.
Set-off of executions generally see Executions § 335.

98. Me.—Herrick v. Bean, 20 Me. 51.

99. Me.—Herrick v. Bean, supra.

1. Ala.—Scott v. Rivers, 1 Stew. & P. 24, 21 Am.D. 646.

2. N.J.—Schautz v. Kearney, 47 N. J.Law 56.

3. La.—Ferrara v. Polito, App., 167 So. 120.
34 C.J. p 715 note 13.

Suit for wrongful attachment or execution

(1) In mortgagor's suit against mortgagee for damages for wrongful sale of horse and wagon under execution on mortgage which had been paid, mortgagee was held not entitled to set off against such claim amount of judgment previously obtained by mortgagee against mortgagor.—Ferrara v. Polito, supra.

(2) A judgment obtained in a suit other than the attachment suit cannot be set off against damages claimed for a wrongful attachment.—Imperial Roller Milling Co. v. Cleburne First Nat. Bank, 27 S.W. 49, 5 Tex.Civ.App. 686.

Suit by municipality

It has been held that in a suit by a municipality the sureties on the bond of an insolvent defaulting sheriff cannot set off against his indebtedness to a municipality the amount of a judgment held by them against the municipality.—Schmidt v. City of New Orleans, 33 La.Ann. 17.

4. Ark.—Strauss v. Missouri State Life Ins. Co., 66 S.W.2d 999, 188 Ark. 286.
Ill.—State Bank of St. Charles v. Burr, 22 N.E.2d 941, 372 Ill. 114.
Iowa.—Kramer v. Hofman, 257 N.W. 361, 218 Iowa 1269.
Kan.—Read v. Jeffries, 16 Kan. 534.
N.Y.—Jung v. Allison, 276 N.Y.S. 361, 154 Misc. 79—Godfrey-Keeler Co. v. Regent Laundry & Dry Cleaning Corporation, 9 N.Y.S.2d 840.
N.C.—McClure v. Fulbright, 146 S.E. 74, 196 N.C. 450.
Wash.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304.
34 C.J. p 715 note 12.

Claim on contract

A judgment may be set off against a claim on a contract.—Vanderlip v. Barnes, 163 N.W. 856, 101 Neb. 573.

A judgment for costs may be pleaded against a claim.
W.Va.—York v. Meek, 123 S.E. 225, 96 W.Va. 427.
Wis.—Kuchera v. Kuchera, 196 N.W. 828, 182 Wis. 457.

is valid,[5] in force, and unsatisfied.[6] Where a judgment is so pleaded, a recovery by plaintiff will either extinguish the judgment or satisfy it pro tanto according to its amount with relation to plaintiff's claim;[7] but where a party offers a judgment together with certain notes and accounts under a plea of payment, all of which are allowed, and the notes and accounts alone amount to a larger sum than the claim against him, the judgment remains in full force.[8]

Setting up opponent's right to set-off. Regardless of whether or not a party has the right to plead the set-off of his opponent,[9] there is no rule of law prohibiting him from setting up his opponent's judgment and asking that it be credited against his claim.[10]

Judgment between different parties. The set-off of a judgment against a claim cannot be allowed unless there is a substantial identity of the parties.[11] A joint judgment debt cannot be set off against a separate debt,[12] nor can a separate judgment debt be set off against a joint debt;[13] but a judgment against two parties, each of whom is severally liable for it, may be set off against the individual claim of one of them,[14] and a judgment for one party may be set off against a claim against two parties, for which each is severally liable.[15]

b. Assigned Judgments and Claims

The assignee of a judgment may use it by way of set-off in an action brought against him by the debtor in the judgment, provided, in some jurisdictions, he acquired the judgment before the commencement of the action.

The assignee of a judgment may use it by way of set-off in an action brought against him by the debtor in the judgment,[16] provided, in some jurisdictions,[17] but not in others,[18] he acquired the judgment before the commencement of such action, and provided also, in some jurisdictions, the assignment is in writing so that it is a legal, rather than a mere equitable, assignment.[19]

In an action by the assignee of a claim, a judgment recovered by defendant against the assignor after the assignment may not be relied on as a set-off or counterclaim[20] unless there are circumstances

5. Ark.—Strauss v. Missouri State Life Ins. Co., 66 S.W.2d 299, 188 Ark. 286.

Presumption of validity

In action on life policies, where insurer claimed set-off of judgment rendered against beneficiary in federal court in foreclosure suit, such judgment was presumed to be valid under Federal Equity Rule and because court was of superior jurisdiction.—Strauss v. Missouri State Life Ins. Co., supra.

Valid underlying indebtedness

Party invoking judgment regular on its face as set-off against claim need not show valid underlying indebtedness, in absence of clear and satisfactory proof by defendant of fraud.—Yungclas v. Yungclas, 239 N.W. 22, 213 Iowa 413.

6. Ala.—Dempsey, for Use of Steverson v. Gay, 148 So. 438, 227 Ala. 20.

N.Y.—City of Yonkers v. Maryland Casualty Co., 293 N.Y.S. 69, 250 App.Div. 718.

34 C.J. p 715 note 14.

Appeal

(1) A judgment may be a valid counterclaim, although an appeal from it is pending.—Dowdell v. Carpy, 70 P. 167, 137 Cal. 333—34 C.J. p 715 note 14 [a].

(2) It has been held that a judgment from which devolutive appeal has been taken may be pleaded in compensation.—First State Bank & Trust Co. v. Graziano, 120 So. 223, 9 La.App. 726.

Satisfaction of record

The fact that plaintiff refused, after suit was instituted, to satisfy of record judgment which had been paid, has been held not to sustain plea of set-off or recoupment.—Dempsey, for Use of Steverson v. Gay, 148 So. 438, 227 Ala. 20.

7. N.Y.—Compound & Pyrono Door Co. v. Keil, 268 N.Y.S. 154, 240 App. Div. 908.

34 C.J. p 716 note 15.

8. Ohio.—Platt v. St. Clair, 6 Ohio 227.

9. Tex.—Brady-Neely Grocer Co. v. De Foe, Civ.App., 169 S.W. 1135.

34 C.J. p 716 note 17.

10. Tex.—Brady-Neely Grocer Co. v. De Foe, supra.

11. Utah.—Reeve v. Blatchley, 147 P.2d 861.

34 C.J. p 716 note 19.

12. N.Y.—Lush v. Adams, 10 N.Y. Civ.Proc. 60.

13. N.Y.—Lush v. Adams, supra.

14. Kan.—Read v. Jeffries, 15 Kan. 534.

Tex.—Patten v. Hill County, Civ. App., 297 S.W. 918.

34 C.J. p 716 note 22.

Judgment for tort

County not assenting to partnership's assignment of claim against it to one partner has been held entitled to set off judgment for tort against partner and partnership.—Patten v. Hill County, supra.

Lack of personal liability as to some items

In action for breach of agreement to enter into partnership and for damages for conversion of property, plaintiff has been held not entitled to complain of entry of judgment in favor of defendant in sum established by prior judgment as debt owed defendant by plaintiff and another jointly, because such amount contained items for which plaintiff was not personally liable, where plaintiff made no attempt to have jury find sum for which he was personally liable, and had made no effort to modify judgment in prior action.—Sanders v. O'Connor, Tex.Civ. App., 98 S.W.2d 401, error dismissed.

15. Ill.—State Bank of St. Charles v. Burr, 22 N.E.2d 941, 372 Ill. 114.

16. Pa.—Keagy v. Commonwealth, 43 Pa. 70.

34 C.J. p 716 note 23.

17. Neb.—Simpson v. Jennings, 19 N.W. 473, 15 Neb. 671.

34 C.J. p 716 note 24.

18. Tex.—Parrott v. Underwood, 10 Tex. 48.

19. S.C.—Harrel v. Petty, 45 S.C.L. 373.

20. N.Y.—Jacobs v. Tannenbaum, 274 N.Y.S. 772, 242 App.Div. 833, appeal dismissed 198 N.E. 567, 268 N.Y. 705.

34 C.J. p 716 note 27.

Mortgage foreclosure proceeding

Mortgagors have been held not entitled to use their foreign judgment against mortgagee for fraud in exchange of land for mortgaged land as counterclaim in foreclosure proceeding by assignee of mortgage.—

calling for a relaxation of the rule,[21] as where the assignor is insolvent and the judgment was recovered without knowledge of the assignment.[22] Where the assignee of a claim is not the beneficial owner thereof, defendant may set off a judgment against his assignor.[23] In an action by assignees for the benefit of creditors in their own right on an indemnity contract for an employee's defalcation, judgments rendered against the assignor have been held not pleadable as offsets.[24]

§ 572. Set-Off of Claim against Judgment

a. In general
b. Against assigned judgments

a. In General

Subject to some exceptions, in an action or other proceeding to collect a judgment the debtor may set off any legal demands against the plaintiff which he owned at the time of the bringing of the suit, and on which he could have brought a suit in his own name.

Although in some jurisdictions it has been held that, in the absence of an agreement therefor,[25] a claim not reduced to judgment may not be set off against a judgment,[26] it is generally held that, in an action or other proceeding to collect a judgment, the debtor may set off any legal demands against plaintiff which he owned at the time of the bringing of the suit, and on which he could have brought a suit in his own name,[27] unless the claim proposed

Moore v. Southwell, 156 So. 631, 116 Fla. 700.

21. Mich.—Bacon v. Reich, 80 N.W. 278, 121 Mich. 480, 49 L.R.A. 311.

22. Mich.—Bacon v. Reich, supra.

23. Tex.—Koudsi v. Mathiwos, Civ. App., 147 S.W.2d 585.

Vendor's lien notes

In action on vendor's lien notes by assignee who was not beneficial owner thereof, maker was entitled to offset a judgment obtained against maker as surety on supersedeas bond of payee-assignor.—Koudsi v. Mathiwos, supra.

24. Wis.—John v. Maryland Casualty Co., 242 N.W. 201, 207 Wis. 539.

Different liability

Judgments were not pleadable as offsets, since the subject matter of the action brought by plaintiffs was the liability of defendant to plaintiffs by virtue of its indemnity contract issued to plaintiffs, and the liability sought to be set off was that owing by defendant to plaintiffs as successors of their assignor.—John v. Maryland Casualty Co., supra.

25. W.Va.—Lilly v. Cox, 56 S.E. 900, 61 W.Va. 547.

26. Pa.—Keystone Nat. Bank of Manheim, now to Use of Balmer v. Deamer, 18 A.2d 540, 144 Pa.Super. 52—Kramer v. Moss, 90 Pa. Super. 550—Continental Mining & Smelting Corp. v. Duncan, Com.Pl., 9 Fay.L.J. 95—Latrobe Coal & Coke Co. v. Kahley, Com.Pl., 6 Fay.L.J. 242—Dickel v. Tyson, Com.Pl., 50 Lanc.Rev. 163—Heyer - Kemner, Inc., v. Sachs, Com.Pl., 57 Montg. Co. 73—Neff v. Schmier, Com.Pl., 27 North.Co. 131—Sanders v. Krater, Com.Pl., 57 York Leg.Rec. 33—Hubler v. Drescher, Com.Pl., 55 York Leg.Rec. 133.

34 C.J. p 716 note 32.

Ordinarily demand must be reduced to judgment before it can be set off against judgment.—Parker v. Reid, 273 P. 334, 127 Or. 578.

27. U.S.—Coffey v. Lawman, C.C.A. Tenn., 99 F.2d 245—Atlantic Refining Co. v. U. S., Ct.Cl., 42 F.2d 342, certiorari denied 51 S.Ct. 34, 282 U.S. 859, 75 L.Ed. 760.

Ark.—Parker v. Baker, 114 S.W.2d 23, 195 Ark. 761.

Cal.—Harrison v. Adams, 128 P.2d 9, 20 Cal.2d 646—Machado v. Borges, 150 P. 351, 170 Cal. 501.

Ill.—State Bank of St. Charles v. Burr, 22 N.E.2d 941, 372 Ill. 114.

Ind.—Brower v. Nellis, 33 N.E. 672, 6 Ind.App. 323.

Ky.—Congoleum-Nairn, Inc., v. M. Livingston & Co., 78 S.W.2d 781, 257 Ky. 573.

La.—Hart v. Polizzotto, 131 So. 574, 171 La. 493, answers conformed to 136 So. 598, 16 La.App. 444—Meriwether v. Dorrity, 104 So. 187, 158 La. 405—Sliman v. Mahtook, 136 So. 749, 17 La.App. 635.

Miss.—Bettman-Dunlap Co. v. Gertz, 116 So. 299, 149 Miss. 892.

N.M.—Bailey v. Great Western Oil Co., 259 P. 614, 32 N.M. 478, 55 A.L.R. 467.

Tex.—Harris v. Ware, Civ.App., 144 S.W.2d 647.

Va.—Dickenson v. Charles, 4 S.E.2d 351, 173 Va. 393.

34 C.J. p 716 note 33.

Right of judgment debtor to set off claim as ground for injunction against execution of judgment see supra § 370.

Claim changed into judgment

Fact that form of claim filed as set-off changed into judgment during pendency of action did not prevent set-off.—Gill v. Richmond Co-op. Ass'n, 34 N.E.2d 509, 309 Mass. 73.

Community property

Judgment for wife has been held not community property, subject to offset of husband's debts to judgment debtors.—Douglas v. Smith, Tex.Civ. App., 297 S.W. 767.

Discharge in bankruptcy

Where judgment creditor had obtained discharge in bankruptcy, judgment debtor, assignee of judgment creditor's notes, could not set off notes against judgment which had been assigned.—Bacher v. Lord, 296 P. 1109, 88 Colo. 443.

In proceeding in aid of execution, judgment debtor could obtain an equitable set-off of any financial obligation due from judgment creditor arising subsequent to the action and presently capable of ascertainment and judicial determination by the court.—Southern Surety Co. of New York v. Maney, 121 P.2d 295, 190 Okl. 129.

Judgment debtor held not owner of claim asserted as set-off.—Randolph Junior College v. Isaacks, Tex. Civ.App., 140 S.W.2d 459.

Partnership indebtedness not arising from, or connected with, transaction in which note was given cannot be set off against judgment thereon. —Porter v. Kahl, Tex.Civ.App., 12 S.W.2d 674.

Pleading and proof

In action by passenger for injuries, court properly refused to credit judgment against bus company with sum paid on passenger's hospital fees, where pleading and proof were not sufficiently specific.—South Plains Coaches v. Behringer, Tex.Civ.App., 32 S.W.2d 959, error dismissed.

Time of application

An automobile dealer, attempting to defeat finance company's right to apply amount of "dealer's reserve," held by such company as additional security against loss on automobile mortgages taken over by it from dealer, to reduction of dealer's obligations to company, has been held not entitled to application thereof as credit on principal amount of judgment recovered by company in its action against dealer for amount due on such mortgages, before addition of interest or attorney's fees—Franzen v. Universal Credit Co., Tex.Civ. App., 132 S.W.2d 148, error dismissed, judgment correct.

to be set off is unliquidated or disputed,[28] or is a joint claim where the judgment is several or vice versa,[29] or the right of set-off has been concluded by a former judgment,[30] or the effect of the set-off would be to attack and impair a judgment regularly entered in another action,[31] or unless, except under the statutes of some jurisdictions,[32] it could have been pleaded in defense to the action in which the judgment was rendered.[33] The dismissal of a creditor's suit on the ground that the judgment creditor is indebted to the judgment debtor on a note in an amount equal or greater than the amount of the judgment does not satisfy the judgment.[34]

Assigned claim. It has been held that a judgment debtor may set off claims against the creditor which were acquired after assignment of the judgment to a third person but prior to notice to the debtor of the assignment.[35] In order for an assignee of a claim to use it as a set-off against a judgment against him, the assignee must be the beneficial owner of the claim.[36]

Claim of federal government. Under the federal statute, 31 U.S.C.A. § 227, it has been held that the federal government is required to reduce to judgment a claim sought to be set off against a judgment debt due by it whenever the judgment creditor denies the claim or refuses to consent to the set-off.[37]

Claim of municipal corporation. Under some statutes a municipal corporation may compel the set-off of its claim against a judgment creditor as against the judgment debt due by it, where the judgment creditor fails to authorize a set-off.[38]

b. Against Assigned Judgments

As a general rule the assignee of a judgment takes it subject to the right of the defendant to set off against it any valid claims which he has against the assignor, and which would be good as a set-off against the judgment in the assignor's hands.

As a general rule the assignee of a judgment takes it subject to the right of the debtor to set off against it any valid claims which he has against the assignor, and which would be good as a set-off against the judgment in the assignor's hands,[39] although it has been held that the assignee will be protected if he had no notice of the judgment debtor's right to a set-off.[40] According to some cases the judgment debtor can set off only such claims or demands as accrued to him or were acquired by him before receiving notice of the assignment of the judgment,[41] and not those accruing or acquired with

28. La.—Zibilich v. Rouseo, 103 So. 269, 157 La. 936.
Tex.—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Civ.App., 122 S.W.2d 659, error dismissed.
34 C.J. p 716 note 34.

29. U.S.—Cobb v. Haydock, C.C. Conn., 5 F.Cas.No.2,923, Brunn. Coll.Cas. 91, 4 Day 472.

30. Ark.—Turley v. Gorman, 202 S. W. 822, 133 Ark. 473.
Ky.—Campbell v. Mayhugh, 15 B. Mon. 142.

31. Mass.—Carter v. Exchange Trust Co., 108 N.E. 359, 220 Mass. 543.
34 C.J. p 717 note 37.

32. Ky.—Bishop v. Bishop, 173 S.W. 130, 162 Ky. 769.
34 C.J. p 717 note 38.

33. Ill.—Tegtmeyer v. Tegtmeyer, 53 N.E.2d 487, 321 Ill.App. 573.
Or.—Parker v. Reid, 273 P. 334, 127 Or. 578.
Tex.—Porter v. Kahl, Civ.App., 12 S. W.2d 674.
34 C.J. p 717 note 39.

34. Neb.—Lashmett v. Prall, 120 N. W. 206, 83 Neb. 732.

35. Cal.—Harrison v. Adams, 128 P. 2d 9, 20 Cal.2d 646.
Claims against assigned judgments see infra subdivision b of this section.

36. Cal.—Harrison v. Adams, supra.
Claim assigned for collection
Allowing a judgment debtor to set off against judgment creditor's claim, a claim assigned to the judgment debtor for collection would violate rule requiring mutuality of parties in order to authorize set-off.—Harrison v. Adams, supra.

37. D.C.—Hines v. U. S. ex rel. Marsh, 105 F.2d 85, 70 App.D.C. 206.
Insurance judgments
(1) It has been held that statutes giving administrator of veterans' affairs discretionary power to determine questions regarding insurance benefits due veterans does not authorize set-off by administrator against insurance judgments and does not take them out of operation of statute relating to set-off.—Hines v. U. S. ex rel. Marsh, supra.
(2) It has also been held that where comptroller general of the United States had three distinct opportunities to reduce claim against veteran to judgment so as to obtain set-off against insurance judgment in favor of veteran but failed to exercise opportunity, the court would not grant another opportunity to have the court determine the question.—Hines v. U. S. ex rel. Marsh, supra.

38. Pa.—City of Pittsburgh v. Gribbin, 51 Pa.Dist. & Co. 587, 92 Pittsb.Leg.J. 433.
Claim for taxes
A rule by a city to show cause why a judgment awarded as damages for property taken in a street improvement should not be a set-off against a claim for delinquent city taxes and costs was made absolute, where the unpaid taxes included taxes on real estate other than that involved in the viewers' report.—City of Pittsburgh v. Gribbin, supra.

39. Cal.—Harrison v. Adams, 128 P. 2d 9, 20 Cal.2d 646—Arp v. Blake, 248 P. 750, 78 Cal.App. 713.
N.Y.—Keon v. Saxton & Co., 178 N. E. 679, 257 N.Y. 412, reargument denied 180 N.E. 340, 258 N.Y. 578.
34 C.J. p 717 note 41.
Counterclaim against assignee of judgment does not permit of recovery of more than assignee's claim.—Keon v. Saxton & Co., supra.
Unliquidated claim
(1) It has been held, in a suit on a judgment by an assignee, that an unliquidated claim against the assignor for breach of contract was not allowable as a statutory set-off.—Hall v. Wilder Mfg. Co., 293 S.W. 760, 316 Mo. 812, 52 A.L.R. 723.
(2) It was also held, however, that, where a nonresident assignor was real party in interest, defendant might be permitted to show right to equitable set-off for unliquidated claim.—Hall v. Wilder Mfg. Co., supra.

40. Tex.—Porter v. Kahl, Civ.App., 12 S.W.2d 674.
34 C.J. p 717 note 42.

41. Ill.—Himrod v. Baugh, 85 Ill. 435.

knowledge of the assignment.[42] It has also been held, however, that when the judgment creditor is insolvent a court of equity will allow the set-off in cases where, although the right thereto had not actually accrued at the time of the assignment, yet a liability then existed under which a right of set-off against the insolvent subsequently accrued.[43] It has also been held that in an action on a judgment in the name of a judgment creditor, for the benefit of an assignee of the judgment, defendant cannot set off a debt due to him from the assignee.[44]

§ 573. Satisfaction by Execution or Enforcement

a. Levy of execution
b. Sale on execution
c. Payment of execution
d. Return of execution
e. Arrest of defendant on capias or execution

a. Levy of Execution

The levy of an execution on sufficient personal property of the judgment debtor to pay the judgment amounts prima facie, and as long as the levy continues in force, to a satisfaction of the judgment, as between the parties thereto. A levy of execution on real estate, as a general rule, does not amount even prima facie to a satisfaction of the judgment.

The levy of an execution on sufficient personal property of the judgment debtor to pay the judgment amounts prima facie, and as long as the levy continues in force, to a satisfaction of the judgment, as between the parties thereto.[45] If the judgment creditor denies the actual satisfaction of the judgment, the burden is on him to prove that the execution and levy for some sufficient reason failed to result in payment of the judgment.[46] Since a levy of execution on real estate of the judgment debtor does not interfere with the title or possession of the debtor, it does not amount even prima facie to a satisfaction of the judgment.[47] It is otherwise if the creditor takes and retains possession of the land,[48] or if it is set off and delivered to him under an elegit or otherwise.[49]

The presumption of satisfaction of a judgment from levy on personal property is rebutted by proof that defendant was not in fact deprived of his property as the result of the levy;[50] that he tortiously or fraudulently recovered it from the possession of the officer;[51] that it was taken under a senior execution or other prior lien[52] or otherwise removed from the possession of plaintiff or the officer by process of law;[53] that the property levied on did not in fact belong to defendant[54] or was insufficient to satisfy the judgment,[55] or generally that the property could not be made available for the satisfaction of plaintiff's claims,[56] without any fault or negligence on his part,[57] although if it is lost or wasted by the fault or neglect of the sheriff, the rule, except in some jurisdictions,[58] is that the judgment is satisfied.[59] A levy on real property cannot be deemed a satisfaction where its enforcement is prohibited by a decree of court.[60]

Release or surrender of levy. If property levied on under execution is abandoned or surrendered or restored to the judgment debtor, either on his giving collateral security or voluntarily by the creditor, so that the latter derives no benefit from his execution, there is no satisfaction of the judgment,[61]

Tex.—Townsend v. Quinan, 47 Tex. 1.

42. Md.—Berry v. Protestant Episcopal Church Convention, 7 Md. 564.
Mass.—Avery v. Russell, 125 Mass. 571.

43. Cal.—Coonan v. Loewenthal, 81 P. 527, 147 Cal. 218, 109 Am.S.R. 128.
Tex.—Ellis v. Kerr, Civ.App., 23 S. W. 1050.

44. N.Y.—Raymond v. Wheeler, 9 Cow. 295.

45. N.J.—**Corpus Juris cited in** Schneider v. Schmidt, 136 A. 740, 741, 101 N.J.Eq. 140.
34 C.J. p 717 note 48.
Levy as satisfaction of execution see Executions § 336.
"A levy on personal property under an execution is not an absolute satisfaction of the judgment."—Schneider v. Schmidt, 136 A. 740, 741, 101 N. J.Eq. 140.

46. Ga.—Dowdell v. Neal, 10 Ga. 148 —Newsom v. McLendon, 6 Ga. 392.

47. Colo.—New Zealand Ins. Co. v. Maaz, 59 P. 213, 13 Colo.App. 493.
Mich.—Ackerman v. Pfent, 108 N.W. 1084, 145 Mich. 710.
34 C.J. p 718 note 51.

48. Vt.—Moore v. McMillan, 54 Vt. 27.
34 C.J. p 718 note 52.

49. Del.—Hinesly v. Hunn, 5 Del. 236.
N.H.—Thomas v. Platts, 43 N.H. 629.

50. N.J.—Schneider v. Schmidt, 136 A. 740, 101 N.J.Eq. 140.
34 C.J. p 718 note 54.

51. Ill.—Nelson v. Rockwell, 14 Ill. 375.
N.Y.—Mickles v. Haskin, 11 Wend. 125.

52. N.J.—Schneider v. Schmidt, 136 A. 740, 101 N.J.Eq. 140.
34 C.J. p 718 note 56.

53. Ill.—Peoria Savings, Loan & Trust Co. v. Elder, 45 N.E. 1083, 165 Ill. 55.
34 C.J. p 718 note 57.

54. Cal.—Scherr v. Himmelmann, 53 Cal. 312.

55. Ill.—Chandler v. Higgins, 109 Ill. 602.
34 C.J. p 718 note 59.

56. N.H.—Whittemore v. Carkin, 58 N.H. 576.
34 C.J. p 718 note 60.

57. Va.—Saunders v. Prunty, 17 S. E. 231, 89 Va. 921.
34 C.J. p 718 note 61.

58. N.J.—Banta v. McClennan, 14 N. J.Eq. 120.

59. Ill.—Harris v. Evans, 81 Ill. 419.
34 C.J. p 718 note 63.

60. Ind.—Johnson v. State, 80 Ind. 220.

61. N.Y.—Schneider v. Schmidt, 136 A. 740, 101 N.J.Eq. 140.
34 C.J. p 718 note 66.

at least as between the parties, although it is said to be otherwise as against other creditors of the judgment defendant.[62]

Levy on property of person jointly liable. Except in some jurisdictions,[63] a joint judgment against two defendants is prima facie satisfied by levy of execution on the property of one of them;[64] but there is no absolute satisfaction if the levy proves unproductive or the property is released or restored to the debtor,[65] unless the other defendant occupies the position of a mere surety,[66] and not even then, according to some decisions.[67] It has been held that a plaintiff who has recovered separate judgments against joint trespassers and taken out execution on one of them, without obtaining satisfaction, cannot maintain an action on any of the other judgments.[68]

b. Sale on Execution

(1) In general
(2) Void or irregular sale

(1) In General

Ordinarily, where property of the debtor is sold on execution, and the sale stands, the judgment is satisfied to the extent of the net proceeds of the sale.

Ordinarily, where property of the debtor is sold on execution, and the sale stands, the judgment is satisfied to the extent of the net proceeds of the sale.[69] The judgment under which the sale is made, as distinguished from some other judgment,[70] is extinguished by the sale on execution and the payment of the amount bid when sufficient to cover the amount due and costs.[71] It is sufficient for this purpose if the money is actually collected by the sheriff or paid into court.[72] Also the judgment is satisfied where plaintiff receipts the execution, even though as a matter of fact he gives credit and the purchaser does not perform his obligation.[73] Usually, if the judgment creditor himself becomes the purchaser at the sale, the judgment is satisfied in full if he bids the whole amount due him, otherwise pro tanto,[74] provided, in jurisdictions where this is necessary, the sale is reported to, and confirmed by, the court,[75] and the sheriff's deed is executed to the judgment creditor.[76] In the absence of a statute to the contrary,[77] it has been held that the fact that the value of the property purchased by the judgment creditor exceeds the amount of the judgment does not render such purchase a satisfaction of the judgment where the purchase price was less than the amount of the judgment.[78] It has also been held that a redemption from a sheriff's sale under a prior judgment is not a satisfaction of the junior judgment of the redeeming creditor.[79]

Mortgaged property. The facts that plaintiff causes an execution to be levied on defendant's property and at the sale thereunder bids a sum sufficient to pay his judgment and costs do not operate as a payment of his judgment where the property is covered by a mortgage and is subsequently

62. Ga.—Newsom v. McLendon, 6 Ga. 392.
34 C.J. p 719 note 67.

63. Ark.—Walker v. Bradley, 2 Ark. 578.

64. Miss.—Kershaw v. Merchants' Bank, 8 Miss. 386, 40 Am.D. 70.
S.C.—Davis v. Barkley, 17 S.C.L. 140.
34 C.J. p 719 note 69.

65. Pa.—Slater's Appeal, 28 Pa. 169.
Wis.—Hyde v. Rogers, 17 N.W. 127, 59 Wis. 154.

66. Cal.—Mulford v. Estudillo, 23 Cal. 94.
34 C.J. p 719 note 71.

67. Wash.—Murray v. Meade, 32 P. 780, 5 Wash. 693.

68. Mich.—Boardman v. Acer, 13 Mich. 77, 87 Am.D. 736.

69. Ill.—**Corpus Juris quoted in** Benj. Harris & Co. v. Western Smelting & Refining Co., 54 N.E.2d 900, 914, 322 Ill.App. 609.
Ind.—Richmond v. Marston, 15 Ind. 134.
34 C.J. p 719 note 74.

70. Ill.—**Corpus Juris quoted in** Benj. Harris & Co. v. Western Smelting & Refining Co., 54 N.E.2d 900, 914, 322 Ill.App. 609.

Pa.—State Bank v. Winger, 1 Rawle 295, 18 Am.D. 633.

71. Ill.—**Corpus Juris quoted in** Benj. Harris & Co. v. Western Smelting & Refining Co., 54 N.E.2d 900, 914, 322 Ill.App. 609.
34 C.J. p 719 note 76.

72. Ill.—**Corpus Juris quoted in** Benj. Harris & Co. v. Western Smelting & Refining Co., 54 N.E.2d 900, 914, 322 Ill.App. 609.
34 C.J. p 719 notes 77, 78.

73. N.Y.—Briggs v. Simson, 60 N.Y. 641.

74. Ill.—**Corpus Juris quoted in** Benj. Harris & Co. v. Western Smelting & Refining Co., 54 N.E.2d 900, 914, 322 Ill.App. 609.
34 C.J. p 719 note 80.

75. Ala.—McGaugh v. Frankfort Deposit Bank, 38 So. 181, 141 Ala. 434.

76. Mo.—Chaonia State Bank v. Sollars, 176 S.W. 263, 190 Mo.App. 284.
34 C.J. p 719 note 83.

77. Pa.—Union Trust Co. of New Castle v. Tutino, 44 A.2d 556, 353 Pa. 145.

The intent of the legislature in enacting the Deficiency Judgment Act was to protect judgment debtors whose real estate is sold in execution, by requiring plaintiff to give credit for value of property he purchased at his execution and not merely to credit the price at which it was sold.—Union Trust Co. of New Castle v. Tutino, supra.

Redemption statute

Where property is redeemed under redemption statute by judgment creditor and the value of the property exceeds the amount of judgment, and the sum paid for redemption, the judgment on which the right of redemption is based is satisfied and discharged.—Hughes v. Young, 120 P.2d 396, 58 Ariz. 349, 138 A.L.R. 943.

78. Mo.—Sulzer v. Sulzer, 193 S.W. 572.

79. N.Y.—Van Horne v. McLaren, 8 Paige 285, 35 Am.D. 685.
Redemption by judgment creditor as satisfaction of judgment generally see Executions § 263 b.

taken thereunder so that plaintiff realizes nothing on his judgment.[80]

(2) Void or Irregular Sale

If a sale on execution is set aside or held to be invalid by reason of any defects or irregularities, the judgment is not discharged. The authorities are divided on the question as to whether the purchaser's bid is a satisfaction of the judgment to the extent of the sum bid, where the sale was invalid because the debtor had no title to the property sold.

If a sale on execution is set aside or held to be invalid by reason of any defects or irregularities, the judgment is not discharged[81] although the purchaser paid the amount bid[82] and the judgment creditor's attorneys signed a receipt acknowledging that judgment was satisfied.[83] It has been held that, notwithstanding the invalidity of the sale and its failure to satisfy the judgment, the debtor may show that the purchase price was received by agreement in satisfaction of the judgment.[84]

Where the sale was invalid because the debtor had no title to the property sold, the question whether the purchaser's bid is a satisfaction of the judgment to the extent of the sum bid is one on which the authorities are divided.[85] In some jurisdictions the judgment is held to be satisfied,[86] especially where the judgment creditor himself was the purchaser.[87] In other jurisdictions there is no satisfaction of the judgment under such circumstances,[88] and a creditor who has himself purchased the property may obtain relief in a court of equity;[89] but a remedy in equity does not exist when the title acquired is good so far as it goes but does not confer the quantum of estate which the purchaser expected to get under his purchase.[90] The jurisdiction in equity is not taken away by the creation of a remedy by statute.[91] Where a statutory remedy exists[92] it should be liberally construed.[93]

A sale of exempt property is a satisfaction according to some authorities,[94] but not according to other authorities.[95]

c. Payment of Execution

A judgment is satisfied where the sheriff or other officer holding an execution on the judgment and authorized to receive payment receives a sufficient amount of lawful money in payment.

A judgment is satisfied where the sheriff or other officer holding an execution on the judgment,[96] and authorized to receive payment,[97] receives a sufficient amount in lawful money in payment,[98] whether the payment is lent or advanced to him;[99] but where money is paid by a third person to a sheriff who has in his hands an execution, with the expectation and intention that the judgment creditor shall assign to him the judgment on which the execution was issued, which the judgment creditor does, the transaction is a purchase, and not a payment of the judgment.[1]

d. Return of Execution

A satisfaction of a judgment may be shown by an officer's return of execution certified in a manner prescribed by law.

A satisfaction of a judgment may be shown by an officer's return of execution certified in the manner prescribed by law.[2] The return of an execution "satisfied" is presumptive,[3] or, according to some of the cases, conclusive,[4] evidence of the satisfaction of the judgment, except where it recites an irregular or unauthorized act on the part of the

80. Mo.—Schneider v. Johnson, 147 S.W. 538, 164 Mo.App. 639.
81. U.S.—Favour v. Hill, C.C.A.Ariz., 123 F.2d 77, directive order denied 136 F.2d 489.
34 C.J. p 719 note 86.
Void or irregular sale as ground for vacation of entry of satisfaction see infra § 584.
82. U.S.—Favour v. Hill, supra.
83. U.S.—Favour v. Hill, supra.
84. Minn.—Shelley v. Lash, 14 Minn. 498.
85. Ark.—Sturdivant v. Ward, 119 S.W. 247, 90 Ark. 321, 134 Am.S.R. 32.
34 C.J. p 720 note 90.
86. Pa.—Tonge v. Radford, 156 A. 814, 103 Pa.Super. 131.
34 C.J. p 720 note 91.
87. Ala.—Thomas v. Glazener, 8 So. 153, 90 Ala. 537, 24 Am.S.R. 330.
34 C.J. p 720 note 91.
88. Ark.—Sturdivant v. Ward, 119 S. W. 247, 90 Ark. 321, 134 Am.S.R. 32.
34 C.J. p 720 note 92.
89. Ill.—Bressler v. Martin, 24 N.E. 518, 133 Ill. 278.
34 C.J. p 720 note 93.
90. Tenn.—Gonce v. McCoy, 49 S.W. 754, 101 Tenn. 587, 70 Am.S.R. 714.
34 C.J. p 720 note 94.
91. Tenn.—Smith v. Taylor, 11 Lea 738.
34 C.J. p 720 note 95.
92. Cal.—Hitchcock v. Caruthers, 34 P. 627, 100 Cal. 100.
34 C.J. p 720 note 96.
93. Cal.—Hitchcock v. Caruthers, supra—Cross v. Zane, 47 Cal. 602.
94. Ala.—Johnson v. Motlow, 47 So. 568, 157 Ala. 405.
95. Wash.—Calhoun v. Quinlan, 150 P. 1132, 86 Wash. 547.
96. Okl.—Southern Pine Lumber Co. v. Ward, 85 P. 459, 16 Okl. 131, affirmed 28 S.Ct. 239, 208 U.S. 126, 52 L.Ed. 420.
34 C.J. p 720 note 4.
97. Ala.—Chapman v. Cowles, 41 Ala. 103, 91 Am.D. 508.
34 C.J. p 720 note 5.
98. N.C.—Motz v. Stowe, 83 N.C. 434.
34 C.J. p 720 notes 4, 7.
99. Ala.—Thompson v. Wallace, 3 Ala. 132.
34 C.J. p 720 note 8.
1. N.Y.—Smith v. Miller, 25 N.Y. 619.
2. Tex.—Citizens State Bank of Clarinda, Iowa, v. Del-Tex Inv. Co., Civ.App., 123 S.W.2d 450, error dismissed.
3. Md.—Parker v. Sedgwick, 5 Md. 231.
34 C.J. p 720 note 10.
4. N.C.—Walters v. Moore, 90 N.C. 41.
34 C.J. p 720 note 11.

officer.[5] Where the officer actually received satisfaction of the execution, the judgment is discharged, although he makes no return on the execution or makes a false return,[6] but, on the other hand, no satisfaction is shown from the mere fact that an execution was issued and never returned.[7]

e. Arrest of Defendant on Capias or Execution

The arrest and imprisonment of a judgment debtor on an execution or a capias ad satisfaciendum do not work an absolute discharge or extinguishment of the judgment.

In the absence of a statute providing otherwise,[8] the arrest and imprisonment of a judgment debtor on an execution or a capias ad satisfaciendum constitute a satisfaction of the judgment in such sense that, while the imprisonment lasts, no proceedings may be taken against his property,[9] and no inconsistent remedy may be maintained by the judgment creditor against a third person,[10] but they do not work an absolute discharge or extinguishment of the judgment.[11]

Release or escape of debtor. At common law the discharge of defendant from custody under a capias, by the voluntary act of plaintiff, operated as an absolute satisfaction of the judgment,[12] but in a number of jurisdictions this rule has been changed by statutes which preserve the right of the creditor if the debtor is voluntarily discharged.[13] Further proceedings on the judgment are not precluded if defendant regains his liberty by an escape[14] or by operation of the law.[15]

Release of joint debtor. In the absence of a statute providing otherwise,[16] the release or escape of one joint defendant who is imprisoned discharges the judgment as to all defendants.[17]

§ 574. Other Means of Satisfaction

A decree against an administrator may be satisfied by the distribution of the estate according to law.

A decree against an administrator may be satisfied by the distribution of the estate according to law.[18] A sale by a creditor to a debtor of an execution issued on a judgment satisfies the claim of plaintiff.[19]

Purchase by creditor at foreclosure sale. Where plaintiff lent money to defendant, taking a deed to land subject to a contract to convey to a third person on payment by such person of an amount equal to the sum lent defendant, and on default of defendant obtained a judgment against him for such amount and foreclosed the land contract and bought at the sale, bidding an amount equal to the judgment against defendant, the judgment was thereby satisfied, the creditor's position being the same as that of a mortgagee buying at a foreclosure sale.[20]

§ 575. Satisfaction of One of Several Judgments on Same Cause of Action

Where two judgments are recovered on the same

5. Iowa.—Hawkeye Ins. Co. v. Luckow, 39 N.W. 923, 76 Iowa 21.
34 C.J. p 721 note 12.

6. Ind.—State v. Salyers, 19 Ind. 432.
34 C.J. p 721 note 13.

7. N.J.—Runyan v. Weir, 8 N.J.Law 286.

8. Mass.—Crawford-Plummer Co. v. McCarthy, 116 N.E. 575, 227 Mass. 350—Twining v. Foot, 5 Cush. 512.

9. Mich.—Baehr v. Decker, 274 N.W. 339, 280 Mich. 590.
N.Y.—Parascandola v. Auditore, 213 N.Y.S. 463, 215 App.Div. 277, appeal dismissed 152 N.E. 432, 242 N.Y. 571.
34 C.J. p 721 note 16.

10. N.Y.—Beloit Bank v. Beale, 34 N.Y. 473.
34 C.J. p 721 note 17.

11. N.Y.—Parascandola v. Auditore, 213 N.Y.S. 463, 215 App.Div. 277, appeal dismissed 152 N.E. 432, 242 N.Y. 571.
34 C.J. p 721 note 18.

12. Me.—Vesanen v. Pohjola, 36 A. 2d 575, 140 Me. 216.
34 C.J. p 721 note 19.

13. Me.—Vesanen v. Pohjola, supra.
34 C.J. p 721 note 20.

Release on oral direction

It has been held that, where an execution debtor, on his promise to pay weekly installments, was released from imprisonment on the creditor's oral direction to the jailer, the judgment was not satisfied, or the debt discharged, although the statute provides for the debtor's release by written permission.—Vesanen v. Pohjola, supra.

14. S.C.—Saunders v. McCool, 32 S.C.L. 22.
34 C.J. p 721 note 21.

15. Mich.—Baehr v. Decker, 274 N.W. 339, 280 Mich. 590.
34 C.J. p 721 note 22.

Discharge for refusal to pay fees

The discharge of debtor from prison on refusal of creditor to pay prison fees does not discharge judgment.—Baehr v. Decker, supra—34 C.J. p 721 note 22 [d].

Insolvent debtor's act

A judgment against defendant who is in custody under writ of capias ad satisfaciendum is not satisfied by defendant's discharge under insolvent debtor's act.—Baehr v. Decker, supra.

Invalid process

A discharge of defendant by order of the court, because the process under which he was detained is of no validity, does not satisfy the judgment.—Porrett v. Lauer's Estate, 151 N.W. 619, 184 Mich. 497—5 C.J. p 517 note 86.

16. U.S.—Hunter v. U. S., R.I., 5 Pet. 173, 8 L.Ed. 86—U. S. v. Stansbury, Md., 1 Pet. 573, 7 L.Ed. 267.
Mass.—Raymond v. Butterworth, 1 N.E. 126, 139 Mass. 471.

17. Mich.—Seitovitz v. London, 229 N.W. 590, 249 Mich. 567.
34 C.J. p 722 note 24.

Release with plaintiff's consent

At common law, release with plaintiff's consent of joint defendant taken under capias ad satisfaciendum, amounts to satisfaction of judgment.—Seitovitz v. London, supra.

18. Mich.—Brown v. Fletcher's Estate, 109 N.W. 686, 146 Mich. 401, 15 L.R.A.,N.S., 632, 123 Am.S.R. 632, affirmed 28 S.Ct. 702, 210 U.S. 82, 52 L.Ed. 966.

19. Ga.—Walker v. O'Neill Mfg. Co., 58 S.E. 475, 128 Ga. 831.

20. Wash.—Magnoni v. Bono, 180 P. 388, 106 Wash. 600.

cause of action against the same defendant, there can be but one satisfaction, and, therefore, the payment or discharge of either judgment satisfies the other, except as to costs.

Where two judgments are recovered on the same cause of action against the same defendant, there can be but one satisfaction, and, therefore, the payment or discharge of either judgment satisfies the other,[21] except as to costs.[22] Where a judgment is rendered on the judgment of a court of another state, a payment of either judgment discharges the obligation of the other judgment.[23]

Where one of the judgments is for a smaller amount than the other, it has been held that the satisfaction of the smaller does not satisfy the larger in full,[24] although other authorities hold that it does,[25] notwithstanding an agreement between the creditor and the debtor that the payment of the smaller judgment shall be only a pro tanto satisfaction of the larger judgment;[26] but the creditor cannot be deprived of his right to elect to refuse satisfaction of the smaller judgment.[27]

§ 576. —— Against Different Persons

In the absence of a statute to the contrary, where several judgments are rendered against different persons for the same cause of action, payment of one of the judgments is a satisfaction of all, except as to costs.

In the absence of a statute to the contrary,[28] where several judgments are rendered against different persons for the same cause of action, payment of one of the judgments is a satisfaction of all,[29] except as to costs,[30] which may be collected on all the judgments,[31] unless a statute provides otherwise;[32] but where several persons are liable on the same cause of action, and are sued in the same action, and separate judgments are rendered against each, the replevy of one of the judgments is not a merger and satisfaction of the others.[33]

§ 577. Operation and Effect of Satisfaction

The satisfaction of a judgment by one primarily liable thereon operates to extinguish it for all purposes, and also to extinguish the original debt or claim.

The satisfaction of a judgment by one primarily liable thereon operates to extinguish it for all purposes,[34] notwithstanding its assignment to him or to

21. Ky.—Webber v. Commonwealth, 97 S.W.2d 422, 265 Ky. 696.
Neb.—Luikart v. Mains, 267 N.W. 168, 130 Neb. 907.
N.Y.—Rossbach v. Rosenblum, 20 N.Y.S.2d 725, 260 App.Div. 206, affirmed 31 N.E.2d 509, 284 N.Y. 745—In re James, 220 N.Y.S. 177, 128 Misc. 528.
Or.—Smith v. Rose, 265 P. 800, 125 Or. 56—Harju v. Anderson, 225 P. 1100, 111 Or. 414.
Pa.—Grant v. Plotts, 17 Pa.Dist. & Co. 408, 22 Del.Co. 277, 46 York Leg.Rec. 151—Lutz v. Heim, Com. Pl., 5 Sch.Reg. 190.
Tenn.—Schoenlau-Steiner Trunk Top & Veneer Co. v. Hilderbrand, 274 S.W. 544, 152 Tenn. 166.
34 C.J. p 722 note 30.
"Although a person may pursue one or all of his remedies, he can have but one satisfaction."—Davis v. Lawhon, 52 S.W.2d 887, 889, 186 Ark. 51.

Payment of foreign judgment
The rule stated in the text has been applied where the judgment paid was a foreign judgment.—In re James, 220 N.Y.S. 177, 128 Misc. 528.

22. Pa.—Grant v. Plotts, 17 Pa.Dist. & Co. 408, 22 Del.Co. 277, 46 York Leg.Rec. 151.
34 C.J. p 722 note 31.

Payment of one judgment and all costs
Where receiver of insolvent bank recovered judgment in each of three separate actions on different surety bonds of executive officers of bank for identical losses, surety being same on each bond, payment of judgment in one case and payment of costs in all cases satisfied judgments in all.—Luikart v. Mains, 267 N.W. 168, 130 Neb. 907.

23. Cal.—Ballentine v. Superior Court in and for San Mateo County, 158 P.2d 14, 26 Cal.2d 254.

24. U.S.—Jos. Riedel Glass Works v. Keegan, D.C.Me., 43 F.Supp. 153.
Conn.—Burkhardt v. Armour & Co., 161 A. 385, 115 Conn. 249, 90 A.L.R. 1260.
34 C.J. p 722 note 32.

25. Ky.—Thomas v. Maysville St. R. & Transfer Co., 124 S.W. 398, 136 Ky. 446, 136 Am.S.R. 267.
34 C.J. p 722 note 33.

26. Wash.—Larson v. Anderson, 182 P. 957, 108 Wash. 157.

27. Conn.—**Corpus Juris** cited in Burkhardt v. Armour & Co., 161 A. 385, 115 Conn. 249, 90 A.L.R. 1260.
34 C.J. p 722 note 35.

28. N.J.—McKenna v. Corcoran, 61 A. 1026, 70 N.J.Eq. 627, affirmed 71 A. 1134, 71 N.J.Eq. 303.
34 C.J. p 722 note 36.

29. Cal.—Black v. Bringhurst, 46 P. 2d 993, 7 Cal.App.2d 711.
Conn.—**Corpus Juris** cited in Burkhardt v. Armour & Co., 161 A. 385, 388, 115 Conn. 249, 90 A.L.R. 1260.
N.Y.—Sarine v. American Lumbermen's Mut. Casualty Co. of Illinois, 17 N.Y.S.2d 754, 258 App. Div. 653.
Ohio.—Gholson v. Savin, 31 N.E.2d 858, 137 Ohio St. 551, 139 A.L.R. 75—Kuhnell v. Harvie, 27 Ohio N.P.,N.S., 465.
Or.—Cooper v. Sagert, 223 P. 943, 111 Or. 27.
Pa.—McShea v. McKenna, 95 Pa.Super. 338.
W.Va.—Chewning v. Tomlinson, 141 S.E. 532, 105 W.Va. 76.
34 C.J. p 722 note 37.

30. Conn.—Burkhardt v. Armour & Co., 161 A. 385, 115 Conn. 249, 90 A.L.R. 1260.
W.Va.—Chewning v. Tomlinson, 141 S.E. 532, 105 W.Va. 76.
34 C.J. p 723 note 38.

31. Mass.—Ryan v. Annelin, 118 N.E. 257, 228 Mass. 591.
34 C.J. p 723 note 38.

32. Wash.—Larson v. Anderson, 182 P. 957, 108 Wash. 157, 159, 6 A.L.R. 621.
34 C.J. p 723 note 39.

33. Ky.—Monticello Nat. Bank v. Bryant, 13 Bush 419.

34. U.S.—Sandlin v. Gragg, C.C.A. Okl., 133 F.2d 114, certiorari denied 63 S.Ct. 983, 318 U.S. 785, 87 L.Ed. 1153.
Cal.—Salveter v. Salveter, 53 P.2d 381, 11 Cal.App.2d 335.
La.—Sweeney v. Black River Lumber Co., 4 La.App. 244.
Ohio.—State ex rel. Faulkner v. Kreinbihl, 14 Ohio Supp. 49.
Okl.—**Corpus Juris** cited in Martin v. North American Car Corporation, 35 P.2d 460, 462, 168 Okl. 599.
Tex.—Myers v. Southard, Civ.App., 110 S.W.2d 1185.
34 C.J. p 723 note 43.

another for him,[35] although it has been held otherwise where the assignment is to a third person for such person's benefit.[36] Although there is authority to the contrary,[37] a judgment once satisfied cannot afterward be restored or kept alive by the agreement of the parties that it shall stand as security for other debts or liabilities, whether to the same or another plaintiff.[38]

Satisfaction by one primarily liable also extinguishes the original debt or claim,[39] and in an action for the price of goods sold will operate as a transfer of title thereto,[40] but in a second action which is not between the same parties, or does not relate to exactly the same claim or demand, the effect of the satisfaction can extend no further than the issues in fact litigated and determined in the action wherein the judgment was recovered.[41] By accepting payment of a judgment and acknowledging satisfaction thereof, a person has been held to admit only the finality and conclusiveness of the judgment as between the parties thereto.[42]

§ 578. —— Recovery of Payments

The recovery of money paid on a judgment or execution in general is considered in the C.J.S. title Payment § 143, also 48 C.J. p 740 notes 78, 79, p 741 notes 80–84. The restitution of money paid where a judgment is reversed is considered in the title Appeal and Error §§ 1980–1985.

Examine Pocket Parts for later cases.

§ 579. Entry of Satisfaction

According to the usual practice, when a judgment is satisfied, an entry acknowledging or certifying that fact should be made on the record or judgment docket, although it has been held that such entry is not essential to a satisfaction.

According to the usual practice, when a judgment is satisfied, an entry acknowledging or certifying that fact should be made on the record or judgment docket,[43] although it has been held that such entry is not essential to a satisfaction.[44] The entry may be made by the clerk of the court on direction of plaintiff or the owner of the judgment[45] or his attorney of record,[46] or on the return of an execution "satisfied,"[47] or proper evidence of release,[48] or, under statute,[49] but not at common law,[50] on receipt by the clerk of payment. The entry of satisfaction by the clerk is a mere minis-

Effect of payment by joint party or third person see supra §§ 554–558.

"The general principle is well settled that a satisfaction of judgment is the last act and end of the proceeding."—Brochier v. Brochier, 112 P.2d 602, 604, 17 Cal.2d 822.

An executed compromise and satisfaction of judgment through authorized agent of judgment creditor's assignee was binding on assignee.—Sandlin v. Gragg, C.C.A.Okl., 133 F.2d 114, certiorari denied 63 S.Ct. 983, 318 U.S. 785, 87 L.Ed. 1153.

Dormant judgment

Payment or satisfaction destroys integrity of a dormant judgment.—Gilmer v. Gant, 24 So.2d 414, 247 Ala. 347.

Error regarding amount

Any error regarding amount of judgment is cured when it is paid off and satisfied.—Clancy v. Reid-Ward Motor Co., 170 S.W.2d 161, 237 Mo.App., 1000.

Judgment adjudicating title to land

It has been held that the satisfaction of a money judgment can have no effect on another part of the judgment adjudicating title to land.—Johnstone v. Stondall Land & Investment Co., C.C.A.N.D., 298 F. 919.

Payment or valuable benefit

Satisfaction of judgment implies payment or valuable benefit.—In re James, 223 N.Y.S. 174, 221 App.Div. 321, reversed on other grounds In re James' Will, 161 N.E. 201, 248 N.Y. 1, reargument denied 162 N.E. 550, 248 N.Y. 623.

35. Okl.—Martin v. North American Car Corporation, 35 P.2d 460, 168 Okl. 599.
34 C.J. p 724 note 44.

36. Wash.—Lachner v. Myers, 208 P. 1095, 121 Wash. 172.
34 C.J. p 724 note 45.

37. Pa.—Merchants' Nat. Bank v. Mosser, 29 A. 1, 161 Pa. 469.
34 C.J. p 724 note 46.

38. Neb.—Ebel v. Stringer, 102 N.W. 466, 73 Neb. 249.
34 C.J. p 724 note 47.

39. La.—Sweeney v. Black River Lumber Co., 4 La.App. 244.
34 C.J. p 724 note 48.

Notes

The satisfaction of a judgment on a note operates to extinguish the note.—Pappas v. Cappell, 17 N.E.2d 537, 297 Ill.App. 301—34 C.J. p 724 note 48 [a].

Tax debt

Minn.—Walton v. Investment Holding Co., 274 N.W. 239, 200 Minn. 337.

40. N.Y.—Pacific Coast Borax Co. v. Waring, 112 N.Y.S. 458, 128 App. Div. 66.

41. Mass.—Cote v. New England Nav. Co., 99 N.E. 972, 213 Mass. 177.
34 C.J. p 724 note 50.

42. Mo.—Bennett v. General Accident, Fire & Life Assur. Corp., 255 S.W. 1076, 213 Mo.App. 421.

43. N.Y.—Sarine v. American Lumbermen's Mut. Casualty Co. of Illinois, 17 N.Y.S.2d 754, 258 App. Div. 653.
34 C.J. p 724 note 57.

44. U.S.—**Corpus Juris cited in** Sandlin v. Gragg, C.C.A.Okl., 133 F.2d 114, 119, certiorari denied 63 S.Ct. 983, 318 U.S. 785, 87 L.Ed. 1153.
34 C.J. p 725 note 58.

45. Md.—Waters v. Engle, 53 Md. 179.
34 C.J. p 725 note 59.
Entry on order of court see infra § 581.

46. N.Y.—Wood v. New York, 60 N.Y.S. 759, 44 App.Div. 299.
34 C.J. p 725 note 60.

47. N.D.—Milburn-Stoddard Co. v. Stickney, 103 N.W. 752, 14 N.D. 282.
34 C.J. p 725 note 62.

48. Mich.—Beekman v. Sylvester, 66 N.W. 1093, 109 Mich. 183.

49. Ala.—Aicardi v. Robbins, 41 Ala. 541, 94 Am.D. 614.
N.C.—Dalton v. Strickland, 179 S.E. 20, 208 N.C. 27.
Authority of clerk to accept payment see supra § 551.

50. Ill.—Seymour v. Haines, 104 Ill. 557.
N.D.—Milburn-Stoddard Co. v. Stickney, 103 N.W. 752, 14 N.D. 282.

terial act,[51] although where such an entry is relied on as a defense it has been held that strict compliance with the statutory provisions is required.[52]

Payment of costs may be made a condition to entry of satisfaction.[53]

Satisfaction pending appeal. The fact that defendant has taken an appeal is not a ground for objecting to the entry of satisfaction where the judgment is satisfied pending the appeal.[54]

Partial payments on a judgment should be credited of record.[55]

§ 580. —— Satisfaction Piece

A satisfaction piece is a written memorandum acknowledging satisfaction of the judgment and authorizing the clerk to make entry thereof on the roll.

A satisfaction piece is a written memorandum acknowledging satisfaction of the judgment[56] and authorizing the clerk to make entry thereof on the roll.[57] It must identify and describe the judgment,[58] be duly executed by the judgment creditor[59] or his attorney,[60] on the request of the judgment debtor or other person who was liable to pay, and has paid, the judgment,[61] be witnessed or otherwise proved,[62] delivered to the judgment debtor,[63] and entered on the judgment roll.[64] Execution and acknowledgment of a satisfaction are acts of equal deliberation and solemnity with execution of an instrument under seal[65] and discharge the judgment,[66] although the consideration therefor is less than the judgment.[67]

Construction. A written instrument filed pursuant to statute governing satisfaction of judgments ordinarily should not be extended beyond its express terms, unless such a construction is required by some well-recognized rule of law.[68]

§ 581. —— Proceedings to Compel

a. In general
b. Form of proceeding
c. Parties and notice
d. Pleading and evidence
e. Trial or hearing
f. Determination and order
g. Appeal and costs

a. In General

Where a judgment creditor has received actual payment of the judgment or any equivalent thereof, or the obligation of the judgment is otherwise discharged, but he refuses to acknowledge or enter satisfaction, the court having control of the judgment may compel him to satisfy it, or may order satisfaction to be entered officially.

Where a judgment creditor has received actual payment of the judgment or any equivalent therefor, or the obligation of the judgment is otherwise discharged, but he refuses to acknowledge or enter satisfaction, the court having control of the judgment may compel him to satisfy it, or may order satisfaction to be entered officially.[69] Such action

51. U.S.—Cambers v. First Nat. Bank, C.C.Or., 144 F. 717, affirmed 156 F. 432, 84 C.C.A. 292.
34 C.J. p 725 note 68.

52. Md.—Campbell v. Booth, 8 Md. 107.

53. U.S.—Naretti v. Scully, D.C.Pa., 133 F. 828, affirmed, C.C.A., 139 F. 118.

54. Cal.—Buckeye Refining Co. v. Kelly, 124 P. 536, 163 Cal. 8, Ann. Cas.1913E 840.

55. Minn.—Wolford v. Bowen, 59 N. W. 195, 57 Minn. 267.
34 C.J. p 725 note 72.

56. N.Y.—Booth v. Farmers' & Mechanics' Nat. Bank, 50 N.Y. 396.
34 C.J. p 725 note 73.

Receipt

A satisfaction piece is a receipt.—Becker Steel Co. of America v. Cummings, D.C.N.Y., 16 F.Supp. 601.

57. N.Y.—Beers v. Hendrickson, 29 N.Y.Super. 53, modified on other grounds 45 N.Y. 665.

58. N.Y.—Booth v. Farmers' & Mechanics' Nat. Bank, 50 N.Y. 396.

59. N.Y.—Altenau v. Masterson, 292 N.Y.S. 299, 161 Misc. 433.
34 C.J. p 725 note 76.

60. N.Y.—Altenau v. Masterson, supra.
34 C.J. p 725 note 77.

61. N.Y.—Lindenborn v. Vogel, 115 N.Y.S. 962, 131 App.Div. 75.
34 C.J. p 725 note 78.

Preparation and costs

(1) A judgment debtor demanding a satisfaction piece is bound to offer the instrument to be executed to the creditor, and to offer to pay the expense of its execution.—Pettengill v. Mather, 16 Abb.Pr.,N.Y., 399.

(2) Under a statute providing for the execution of a satisfaction piece at the request of the judgment debtor, it has been held that the judgment creditor's attorney cannot be compelled to issue an executed satisfaction of judgment where the judgment debtor did not present a satisfaction piece, pay judgment in money, or pay fees allowed by law for taking acknowledgment.—Altenau v. Masterson, 292 N.Y.S. 299, 161 Misc. 433.

62. N.Y.—Earley v. St. Patrick's Church Soc., 30 N.Y.S. 979, 81 Hun 369.
34 C.J. p 725 note 79.

63. N.Y.—Earley v. St. Patrick's Church Soc., supra.

64. N.Y.—Beers v. Hendrickson, 29 N.Y.Super. 53, modified on other grounds 45 N.Y. 665.
34 C.J. p 725 note 81.

65. N.Y.—People v. Devlin, 118 N. Y.S. 478, 63 Misc. 363.

66. N.Y.—People v. Devlin, supra.

67. N.Y.—People v. Devlin, supra.

68. Wash.—Johnson v. Stewart, 96 P.2d 473, 1 Wash.2d 439.

69. Ala.—Bradley v. Bentley, 167 So. 294, 232 Ala. 114.
Ill.—Louis E. Bower, Inc., v. Silverstein, 18 N.E.2d 385, 298 Ill.App. 145.
Mo.—B. F. Goodrich Rubber Co. v. Bennett, 281 S.W. 75, 222 Mo.App. 510.
Neb.—In re Mathews' Estate, 279 N. W. 301, 134 Neb. 607.
N.J.—Morss v. Allen, 199 A. 414, 120 N.J.Law 203—**Corpus Juris cited in** Luparelli v. U. S. Fire Ins. Co., 188 A. 451, 452, 117 N.J.Law 342, affirmed 194 A. 185, 118 N.J.Law 565.
N.Y.—Haubrich v. Haubrich, 40 N.Y. S.2d 954, 180 Misc. 735, appeal dismissed 46 N.Y.S.2d 506, 267 App.

can be based only on matter arising subsequent to the judgment, not for causes accruing prior to its rendition or which might have been set up in defense to the action[70] or which were litigated and decided on a previous motion or other proceeding,[71] and, on the other hand, a motion to compel satisfaction may not be resisted on any ground which existed at the time the judgment was rendered, and which might have been urged at the trial.[72]

The duty to satisfy of record a judgment or decree, on full performance by the party bound thereby, follows as a necessary incident of the power of the court to enforce its orders[73] and prevent an abuse of its process,[74] and, therefore, in ordering satisfaction on an application therefor, the court acts judicially.[75]

Where the court's power to order a judgment to be marked satisfied is entirely statutory,[76] and the statute conferring it is in derogation of the common law and deprives a party of trial by jury, it must be strictly construed[77] and restricted to cases of actual payment in full,[78] wherein there is no substantial dispute about the facts.[79] Independently of such statute, however, and in all cases where the statute does not apply, the court has power to order an issue to try whether or not the judgment has been paid or discharged, and if the jury find that it has, the court may order a perpetual stay of execution[80] and defendant may then compel plaintiff to enter satisfaction.[81]

Satisfaction as to all. The court should never entertain jurisdiction of a motion to enter satisfaction as to any of the parties to the judgment, unless it is to be a satisfaction entirely and as to all.[82]

Credit of partial payments. The court will order partial payments on a judgment to be credited of record on proper proceedings for that purpose,[83] brought by a person entitled to such relief.[84]

Div. 873—Brinn v. Wooding, 298 N.Y.S. 971, 164 Misc. 850—Broun-Green Co. v. Powell Vocational Corporation, 28 N.Y.S.2d 836.
N.C.—Dalton v. Strickland, 179 S.E. 20, 208 N.C. 27.
Ohio.—Mosher v. Goss, Ohio App., 60 N.E.2d 730.
Okl.—**Corpus Juris quoted in** Gupton v. Western Kennel Club, 145 P.2d 179, 180, 193 Okl. 462.
34 C.J. p 725 note 85.

Under statute

Where petition to have judgment marked satisfied on theory of payment was under statute providing for correction of errors and securing parties against abuse of process, such statute was considered with statute relating to satisfaction of judgment.—Bradley v. Bentley, 167 So. 294, 232 Ala. 114.

70. Cal.—Irvin v. Superior Court in and for Los Angeles County, 35 P. 2d 642, 140 Cal.App. 622.
Ill.—Burket v. Reliance Bank & Trust Co., 29 N.E.2d 297, 306 Ill. App. 563.
34 C.J. p 726 note 86.

71. Ind.—Palmer v. Hays, 13 N.E. 882, 112 Ind. 289.
34 C.J. p 726 note 87.

72. Cal.—Haggin v. Clark, 12 P. 478, 71 Cal. 444.
Ill.—Frankel v. Stern, 50 Ill.App. 54.

73. Okl.—**Corpus Juris quoted in** Gupton v. Western Kennel Club, 145 P.2d 179, 180, 193 Okl. 462.
34 C.J. p 726 note 89.

74. Okl.—**Corpus Juris quoted in** Gupton v. Western Kennel Club, 145 P.2d 179, 180, 193 Okl. 462.
34 C.J. p 726 note 90.

75. Okl.—**Corpus Juris quoted in** Gupton v. Western Kennel Club, 145 P.2d 179, 180, 193 Okl. 462.
Or.—Herrick v. Wallace, 236 P. 471, 114 Or. 520.
34 C.J. p 726 note 91.

76. Pa.—Metropolitan Life Ins. Co. v. Krivitsky, Com.Pl., 46 Pa.Dist. & Co. 641—Bridesburg Bldg. Ass'n v. Bailey, 40 Pa.Dist. & Co. 211—Metropolitan Life Ins. Co. v. Driscoll, Com.Pl., 32 Del.Co. 53—Schantz v. Clemmer, Com.Pl., 21 Leh.L.J. 394.
34 C.J. p 726 note 93.

77. Pa.—Hazleton Thrift & Loan Corporation v. Kepping, 17 Pa. Dist. & Co. 666, 26 Luz.Leg.Reg. 417.
34 C.J. p 726 notes 94, 95.

78. Pa.—Metropolitan Life Ins. Co. v. Krivitsky, 46 Pa.Dist. & Co. 641—American Bankers Finance Co. v. Majeski, 17 Pa.Dist. & Co. 668, 22 Del.Co. 433—Hazleton Thrift & Loan Corporation v. Kepping, 17 Pa.Dist. & Co. 666, 26 Luz.Leg.Reg. 417—Koch, to Use of Witman v. Ernesto, Com.Pl., 34 Berks Co. 13, 55 York Leg.Rec. 141.
34 C.J. p 726 note 96.

Discharge in bankruptcy

It has been held that, where a judgment is automatically discharged in bankruptcy, the judgment will not be marked satisfied, but a rule to mark the judgment discharged will be made absolute.—Claster v. Krauss Bros., 17 Pa.Dist. & Co. 483, 35 Dauph.Co. 362.

79. Pa.—Henry v. Henry, Com.Pl., 28 Erie Co. 149—Aponikas v. Skrypkun, Com.Pl., 5 Sch.Reg. 1.
34 C.J. p 726 note 97.

80. Pa.—Reynolds v. Barnes, 76 Pa. 427.
34 C.J. p 727 note 98.

81. Pa.—Reynolds v. Barnes, 76 Pa. 427—Horner v. Hower, 39 Pa. 126.

82. Cal.—Barnum v. Cochrane, 73 P. 242, 139 Cal. 494.
Miss.—Long v. Shackleford, 25 Miss. 559.

83. Utah.—Cox v. Dixie Power Co., 16 P.2d 916, 81 Utah 94.
34 C.J. p 727 note 1.

Moneys collected on execution

Where plaintiff, after first trial, collected moneys on execution, but new trials were granted, defendant was entitled to credit on judgment finally rendered for amount so collected.—Cox v. Dixie Power Co., supra.

Judgment on mortgage note

Where mortgagee released purchaser of mortgaged realty from all liability by reason of assumption of and agreement to pay mortgage, original mortgagors have been held entitled to credit on judgment taken against them on mortgage note to extent of amount paid by purchaser for such release.—Mosher v. Goss, Ohio App., 60 N.E.2d 730.

An entry of credit on a judgment by order of court, after the court has adjourned, has not the same effect as a remittitur.—Rowan v. People, 18 Ill. 159.

84. Ark.—Whiting v. Beebe, 12 Ark. 421.
34 C.J. p 727 note 2.

b. Form of Proceeding

(1) Motion or rule to show cause
(2) Civil action or bill in equity

(1) Motion or Rule to Show Cause

As a general rule, an application to compel entry of satisfaction of a judgment should be in the form of a motion in the court which rendered the judgment.

As a general rule, an application to the court to compel the entry of satisfaction of a judgment should be in the form of a motion,[85] in the court which rendered the judgment,[86] and entitled as of the original action.[87] Also, sometimes by virtue of statutory provision,[88] a motion is the proper remedy for obtaining credit, or satisfaction pro tanto, of record for partial payments.[89] However, a remedy by motion provided by statute in cases where any payment has been made is not available when defendant has not made any payment,[90] but seeks rather to enforce a parol contract for the sale of land to plaintiff on condition that the judgment should be satisfied as part of the purchase price.[91]

A motion to have satisfaction of a judgment entered of record on the ground of payment since its rendition is merely a motion in a cause still pending, and is neither a special proceeding nor a civil action.[92] While it has been held to be a legal and not an equitable proceeding,[93] it has also been held to be a proceeding equitable in nature.[94]

The motion should be to set aside the execution and enter satisfaction, and not to set aside the execution and cancel the judgment.[95] Sometimes the motion is in the form of a regular complaint;[96] and the fact that it is denominated a "supplemental petition," instead of a motion, is not fatal.[97]

Rule to show cause. Under some statutes the remedy is by application for a rule to show cause why the judgment should not be marked satisfied of record.[98] Also the proper mode of obtaining credit on a judgment for a partial payment has been held to be a rule to show cause.[99]

Audita querela. Formerly relief was granted on audita querela,[1] and perhaps resort may be had to this remedy,[2] notwithstanding the existence of a remedy by motion,[3] but in most jurisdictions the remedy by audita querela has fallen into disuse and is now obsolete, the more convenient and less expensive remedy by motion having taken its place.[4]

(2) Civil Action or Bill in Equity

In some jurisdictions an ordinary civil action may be brought to have a judgment declared satisfied.

In some code states, a judgment may be declared paid and satisfied in an ordinary civil action brought for that purpose, without regard to whether the proceeding is at law or in equity,[5] and such an action and a motion to obtain a satisfaction of record

85. Cal.—Cohn v. Cohn, 59 P.2d 969, 7 Cal.2d 1.
Ill.—Burket v. Reliance Bank & Trust Co., 29 N.E.2d 297, 306 Ill. App. 563—Louis E. Bower, Inc. v. Silverstein, 18 N.E.2d 385, 298 Ill. App. 145—Handel v. Curry, 254 Ill. App. 36.
Neb.—In re Mathews' Estate, 279 N. W. 301, 134 Neb. 607.
N.Y.—Haubrich v. Haubrich, 40 N.Y. S. 954, 180 Misc. 735, appeal dismissed 46 N.Y.S.2d 506, 267 App. Div. 872.
Or.—Herrick v. Wallace, 236 P. 471, 114 Or. 520.
34 C.J. p 727 note 4.
At common law defendant could on motion in court have satisfaction of judgment entered of record.—Commonwealth, for Use and Benefit of Bates, v. Hall, 64 S.W.2d 585, 251 Ky. 280.
Petition or motion
A proceeding under statute to compel satisfaction of a paid judgment may be instituted by petition or motion.—B. F. Goodrich Rubber Co. v. Bennett, 281 S.W. 75, 222 Mo.App. 510.

86. Neb.—In re Mathews' Estate, 279 N.W. 301, 134 Neb. 607.
34 C.J. p 727 note 6.

Time
A motion to cause satisfaction of the judgment to be entered may be made without waiting for execution to be issued.—Childs v. Franklin, 10 Ala. 79.

87. Iowa.—Dunton v. McCook, 94 N.W. 942, 120 Iowa 444.
34 C.J. p 727 note 7.

88. Ind.—Lapping v. Duffy, 65 Ind. 229.
N.C.—Brown v. Hobbs, 70 S.E. 906, 154 N.C. 544.

89. Ala.—Saltmarsh v. Bower, 34 Ala. 613—Mobile Branch Bank v. Coleman, 20 Ala. 140.

90. N.C.—Brown v. Hobbs, 70 S.E. 906, 154 N.C. 544.

91. N.C.—Brown v. Hobbs, supra.

92. Mo.—**Corpus Juris quoted in** B. F. Goodrich Rubber Co. v. Bennett, 281 S.W. 75, 77, 222 Mo.App. 510.
N.C.—Foreman v. Bibb, 65 N.C. 128.

93. Mo.—**Corpus Juris quoted in** B. F. Goodrich Rubber Co. v. Bennett, 281 S.W. 75, 77, 222 Mo.App. 510.
34 C.J. p 727 note 13.

94. Ala.—Tennessee-Hermitage Nat. Bank v. Hagan, 119 So. 4, 218 Ala. 390.

95. Ill.—Dibble v. Briggs, 28 Ill. 48.
34 C.J. p 727 note 14.

96. Ind.—Reeves v. Plough, 46 Ind. 350.

97. Iowa.—Dunton v. McCook, 94 N. W. 942, 120 Iowa 444.

98. Pa.—O'Connor v. Flick, 107 A. 159, 265 Pa. 49.
34 C.J. p 728 note 17.

99. Md.—Gorsuch v. Thomas, 57 Md. 334.
34 C.J. p 728 note 18.

1. Or.—Herrick v. Wallace, 236 P. 471, 114 Or. 520.
34 C.J. p 728 note 20.

2. Mass.—Radclyffe v. Barton, 37 N.E. 373, 161 Mass. 327.
34 C.J. p 728 note 21.

3. Mass.—Lovejoy v. Webber, 10 Mass. 101.
N.Y.—Baker v. Judges Ulster Common Pleas, 4 Johns. 191.

4. Or.—Herrick v. Wallace, 236 P. 471, 114 Or. 520.
34 C.J. p 728 note 23.

5. N.D.—Peterson v. First & Security State Bank of Crosby, 236 N. W. 722, 61 N.D. 1.
Okl.—Thompson v. Lindley, 101 P. 2d 848, 187 Okl. 175.
34 C.J. p 728 note 24.

have been held concurrent remedies;[6] but if the facts are so controverted and the rights of third persons so involved that the court declines to determine the matter on motion an action is the only proper remedy.[7]

Bill in equity. Relief usually is not obtainable on a bill in equity alleging satisfaction, since the parties have a full and complete remedy at law,[8] although in some jurisdictions the remedy by motion and that by bill have been held concurrent,[9] and a bill will lie where equitable relief is also asked which cannot be had on motion in a court of law,[10] or where complicated and difficult questions are involved, in which cases a bill in equity is deemed the most appropriate remedy.[11]

c. Parties and Notice

Either party to the judgment, or a person having some legal or equitable interest in the satisfaction thereof, is entitled to have it satisfied of record. Notice of motion or rule to compel entry of satisfaction should be given plaintiff or the party adversely interested.

Either party to the judgment,[12] or a person having some legal or equitable interest in the satisfaction thereof,[13] is entitled to apply to the court in which it has been recovered to have it satisfied of record. Notice of a motion or rule to compel entry of satisfaction of a judgment should be given plaintiff or the party adversely interested.[14] The court will not order satisfaction of a judgment to be entered unless all the parties interested therein are brought before it and have an opportunity to be heard,[15] and an order made without notice to a party in interest will be void.[16] The person owning the judgment is a necessary party to a proceeding to have satisfaction thereof entered.[17] An action to obtain satisfaction may be brought directly against an assignee,[18] joining the assignor[19] and the sheriff holding an execution[20] as parties defendant; but where the proceeding is by motion or rule, it must be solely between the original parties to the judgment, and no stranger may be brought in or intervene.[21]

d. Pleading and Evidence

General rules as to pleading and evidence are applicable in proceedings to compel satisfaction of judgment.

In an action to have a judgment declared satisfied, the petition or complaint must clearly allege the fact of payment or the other circumstances relied on as discharging the judgment,[22] but it need not allege that the person in whose favor the judgment was obtained was the legal owner thereof at the time of the alleged payment.[23] A reply must not depart from the complaint.[24] In a suit for an accounting on a judgment, it has been held that the judgment creditor could, without pleading it, deny that he received the consideration expressed on the face of a release.[25]

The burden of proving payment is on the party

The statute of limitations has been held not a defense in an action to compel entry of satisfaction.—Wilson v. Brookshire, 25 N.E. 131, 126 Ind. 497, 9 L.R.A. 792—Palmer v. Hayes, 13 N.E. 882, 112 Ind. 289.

6. Neb.—Manker v. Sine, 66 N.W. 340, 47 Neb. 736.

7. Kan.—Mayer v. Sparks, 45 P. 249, 3 Kan.App. 602.

8. Mo.—**Corpus Juris quoted in** B. F. Goodrich Rubber Co. v. Bennett, 281 S.W. 75, 77, 222 Mo.App. 510.
N.Y.—Allgeier v. Gordon & Co., 9 N.Y.S.2d 848, 170 Misc. 607.
34 C.J. p 728 note 28.

9. Ind.—McOuat v. Cathcart, 84 Ind. 567.

10. N.Y.—Allgeier v. Gordon & Co., 9 N.Y.S.2d 848, 170 Misc. 607.
34 C.J. p 729 note 30.
Enjoining collection of paid or satisfied judgment see supra § 355.

11. Fla.—Dr. P. Phillips Co. v. Billo, 147 So. 579, 109 Fla. 316.
Pa.—Banks v. Jackson, Com.Pl., 49 Dauph.Co. 107.
34 C.J. p 729 note 31.

12. Ala.—Childs v. Franklin, 10 Ala. 79.

13. N.Y.—Matter of Beers, 28 N.Y. Super. 643.
34 C.J. p 729 note 35.
Subsequent judgment creditor
It has been held that a subsequent judgment creditor of defendant is not entitled to make application under a statute providing that persons concerned in interest may make application to have judgment satisfied of record.—Heidelbaugh v. Thomas, 10 Wkly.N.C.,Pa., 141.

14. Or.—Herrick v. Wallace, 236 P. 471, 114 Or. 520.
34 C.J. p 729 note 37.

15. N.Y.—Matter of Beers, 28 N.Y. Super. 643.
34 C.J. p 729 note 38.
Assignee of judgment
Where plaintiff, against whom defendant recovered judgment for costs on appeal, paid judgment pursuant to garnishment and moved to have judgment satisfied of record, contention that judgment, having been assigned, could not be ordered satisfied in absence of assignee's being a party to proceeding, could be raised, if at all, only by assignee.—Mutual Building & Loan Ass'n of Long Beach v. Corum, 60 P.2d 316, 16 Cal. App.2d 212.

16. N.Y.—Wheeler v. Emmeluth, 24 N.E. 285, 121 N.Y. 241.
34 C.J. p 729 note 39.

17. Ind.—Nelson v. Brown, 20 Ind. 74.

18. Ind.—Shields v. Moore, 84 Ind. 440.
Okl.—Gupton v. Western Kennel Club, 145 P.2d 179, 193 Okl. 462.

19. Ind.—Shields v. Moore, 84 Ind. 440.

20. Ind.—Shields v. Moore, supra.

21. Del.—Budd v. Union Bank, 6 Del. 455.
34 C.J. p 729 note 44.

22. Ind.—Holliday v. Thomas, 90 Ind. 398.
34 C.J. p 729 note 46.

23. S.C.—Kittles v. Williams, 41 S.E. 975, 64 S.C. 229.
34 C.J. p 730 note 47.

24. Ind.—Palmer v. Hayes, 13 N.E. 882, 112 Ind. 289.
34 C.J. p 730 note 48.

25. Or.—Cockerham v. First Nat. Bank, 297 P. 363, 136 Or. 176.

asserting it;[26] and the burden of proving any ground relied on affirmatively in opposition to the motion falls on the judgment creditor.[27] The court will not compel entry of satisfaction unless the evidence in support of it is entirely clear, certain,[28] and uncontradicted.[29] Likewise a credit of partial payments will not be ordered unless the evidence is clear and satisfactory.[30] Under some statutes the court may order entry of satisfaction without the formal showing necessary to justify the clerk of court in entering satisfaction.[31]

e. Trial or Hearing

A motion to enter satisfaction of a judgment should not be decided in a summary manner if the facts relied on are seriously disputed and controverted.

Since a motion to enter satisfaction of a judgment is a substitute for the ancient writ of audita querela, if the facts relied on are seriously disputed and controverted, the court should not undertake to decide the question in a summary manner, but should direct an issue to be tried by a jury,[32] or order a reference to ascertain the facts,[33] unless the parties, without asking for a jury or reference, submit the issues to the court alone for trial.[34] In some jurisdictions the court may hear and determine the issue on affidavits and counter-affidavits,[35] provided they are not in contradiction of the record.[36]

f. Determination and Order

Where the court is satisfied that the judgment has been fully paid or satisfied, it enters an order directing the clerk to enter satisfaction.

Where the court is satisfied that the judgment has been fully paid or satisfied, it enters an order directing the clerk to enter satisfaction,[37] and such an order and entry are a matter of strict right.[38] Relief not within the scope of the motion or original order to show cause may not be granted.[39] It is not

26. Pa.—Fuhrman v. Fuhrman, 13 Lanc.Bar 123.

27. Cal.—Wood v. Currey, 49 Cal. 359.
34 C.J. p 730 note 54.

28. Pa.—Hazleton Thrift & Loan Corporation v. Kepping, 17 Pa.Dist. & Co. 666, 26 Luz.Leg.Reg. 417.
34 C.J. p 730 note 49.

Full and satisfactory
Court will not order satisfaction of judgment to be entered, unless proof of payment thereof is full and satisfactory.—Megaro v. Cordasco, 161 A. 356, 10 N.J.Misc. 908.

Admissibility
Where surety on bond to stay judgment paid personal injury judgment affirmed on appeal and took satisfaction and assignment of judgment, bond by which surety indemnified defendants against liability for personal injuries was held admissible on motion to compel entry of satisfaction of judgment notwithstanding movant was not party to indemnity bond and surety paid judgment under stay bond.—Smith v. Fall River Joint Union High School Dist., 34 P.2d 994, 1 Cal.2d 331.

Sufficiency
(1) Evidence held sufficient to warrant that judgment be satisfied of record.
Cal.—Mutual Building & Loan Ass'n of Long Beach v. Corum, 60 P.2d 316, 16 Cal.App.2d 212.
Iowa.—Taylor v. Heiny, 232 N.W. 695, 210 Iowa 1320.
La.—Ferris v. L. J. Patenotte & Son, App., 12 So.2d 498.
N.J.—Gillman v. Sorventino, 130 A. 442, 101 N.J.Law 447, affirmed 133 A. 919, 102 N.J.Law 715.
N.Y.—Brinn v. Wooding, 298 N.Y.S. 971, 164 Misc. 850.

(2) Proof of payment held not sufficient to justify entry of satisfaction of judgment.—Megaro v. Cordasco, 161 A. 356, 10 N.J.Misc. 908.

(3) Evidence held sufficient to show particular matters.—Thompson v. Lindley, 101 P.2d 848, 187 Okl. 175.

(4) Evidence held insufficient to show particular matters.—Federal Land Bank v. Heath, 164 P.2d 125, 160 Kan. 645.

29. N.Y.—Barker v. Crawford, 11 N.Y.S. 337.
34 C.J. p 730 note 50.

Uncontradicted affidavit
(1) It has been held that the court may not declare judgment satisfied on uncontradicted affidavit of judgment debtor that judgment was paid.—Welk v. Conner, 282 P. 963, 102 Cal. App. 286.

(2) An uncontradicted affidavit of payment, however, has been held sufficient to justify the relief asked.—Bartikowski v. Lambert, 9 Kulp., Pa., 493—34 C.J. p 730 note 50 [a].

30. Or.—Cockerham v. First Nat. Bank, 297 P. 363, 136 Or. 176.
Pa.—Bishop v. Goodhart, 19 A. 1026, 135 Pa. 374.

In suit for accounting, under evidence, judgment debtor was held not entitled to credit allegedly arising from execution sale and resale to debtor.—Cockerham v. First Nat. Bank, 297 P. 363, 136 Or. 176.

31. Idaho.—Tanner v. Wood, 90 P. 733, 13 Idaho 486.

32. Ill.—Louis E. Bower, Inc. v. Silverstein, 18 N.E.2d 385, 298 Ill. App. 145—Handley v. Moburg, 266 Ill.App. 356—Handel v. Curry, 254 Ill.App. 36.
Pa.—Koch, to Use of Whitman v. Ernesto, Com.Pl., 34 Berks.Co. 13, 55 York Leg.Rec. 141—Henry v. Henry, Com.Pl., 28 Erie Co. 149—Henshaw v. Brown, Com.Pl., 87 Pittsb.Leg.J. 10, 2 Fay.L.J. 50.
34 C.J. p 730 note 56.

33. N.Y.—Haubrich v. Haubrich, 40 N.Y.S.2d 954, 180 Misc. 735, appeal dismissed 46 N.Y.S.2d 506, 267 App. Div. 872.
34 C.J. p 730 note 57.

34. Cal.—Cohn v. Cohn, 59 P.2d 969, 7 Cal.2d 1.
34 C.J. p 730 note 58.

35. Cal.—Cohn v. Cohn, 59 P.2d 969, 7 Cal.2d 1.
Or.—Herrick v. Wallace, 236 P. 471, 114 Or. 520.
34 C.J. p 730 note 59.

Affidavit used to obtain rule to show cause why judgment should not be satisfied of record cannot be used to sustain entry of satisfaction of judgment.—Megaro v. Cordasco, 161 A. 356, 10 N.J.Misc. 908.

36. Cal.—Haggin v. Clark, 12 P. 478, 71 Cal. 444.
34 C.J. p 730 note 60.

37. Ark.—Davis v. Oaks, 60 S.W.2d 922, 187 Ark. 501.
Cal.—Irvin v. Superior Court in and for Los Angeles County, 35 P.2d 642, 140 Cal.App. 622.
N.Y.—Brinn v. Wooding, 298 N.Y.S. 971, 164 Misc. 850.
Pa.—Union Trust Co. of New Castle v. Tutino, 44 A.2d 556, 353 Pa. 145—Sadow v. Brandwene, Com.Pl., 46 Lack.Jur. 285.
34 C.J. p 730 note 61.

38. N.J.—Lawrence v. Dickey, 12 N.J.Law 368.

39. Mo.—Schneider v. Meyer, 56 Mo. 475.
Wash.—Hawks v. Votaw, 23 P. 442, 1 Wash. 70.

proper to cancel or strike off the judgment;[40] but a perpetual stay of proceedings may be granted.[41] An order of court, made on due application and hearing, requiring satisfaction to be entered, is a judicial act, and entitled to all the respect due to a record,[42] although it may be impeached for fraud or collusion.[43] Where there is a serious controversy as to the facts, the motion may be dismissed and the parties remitted to a regular action.[44] Where the court declines to take jurisdiction, its overruling of the motion is not a bar to an application for relief in equity;[45] but where it denies the motion after a hearing the determination is conclusive, as to all matters litigated and adjudicated, in a subsequent proceeding to revive the judgment.[46]

g. Appeal and Costs

An order entered on a motion to compel satisfaction of a judgment is appealable. Costs and expenses of a successful application may be charged to the party who wrongfully refuses to satisfy the judgment.

An order entered on a motion to compel satisfaction of a judgment is appealable,[47] and, at lease in some jurisdictions, may be reviewed by certiorari.[48] An intermediate court will not take jurisdiction of an appeal while an appeal to a higher court is pending.[49] The costs and expenses of a successful application for satisfaction may be charged to the party who wrongfully refuses to satisfy the judgment.[50]

§ 582. —— Actions and Penalties for Failure to Satisfy

Under some statutes an action may be maintained to recover a penalty or damages against a judgment creditor for neglect or refusal to satisfy a judgment of record when it has been paid.

Under some statutes penalties are provided against a judgment creditor who, within a certain period after being requested to do so, neglects or refuses to satisfy a judgment of record when the judgment has been paid.[51] Such a statute is penal and, therefore, according to the familiar rule for the construction of such statutes, is not to be extended beyond its plain terms.[52] To sustain an action on the statute plaintiff must be a party aggrieved by the refusal to enter satisfaction,[53] the refusal must be willful, and not based on an honest contention that the judgment has not been paid,[54] and the failure to enter satisfaction must be due to the creditor's own fault or neglect, not to that of an officer over whom he has no control.[55] The action is justified where there has not been a formal entry of satisfaction,[56] although it will not be supported by an allegation of payment before entry of judgment.[57] The form of action may be either debt or assumpsit.[58]

If the statute awards damages instead of a fixed penalty, the jury are at liberty to consider all the circumstances by which the debtor suffered vexation and inconvenience,[59] but it is not necessary to plead or prove actual damage resulting from the refusal to enter satisfaction.[60] The remedy thus provided is exclusive;[61] but in the absence of such a statute an action for damages will lie for the same purpose.[62]

Action on the case. In some jurisdictions an action on the case for failure to satisfy a judgment

40. Ill.—Dibble v. Briggs, 28 Ill. 48. Pa.—Reynolds v. Barnes, 76 Pa. 427.

41. Mich.—Whitney v. McConnell, 30 Mich. 421. N.Y.—Hamlin v. Boughton, 4 Cow. 65.

42. Ark.—State v. Martin, 20 Ark. 629. Pa.—Coyne v. Souther, 61 Pa. 455. 34 C.J. p 731 note 66.

Judgment at law

An order of entry of satisfaction of judgment, on application therefor, has the qualities of a judgment at law.—Herrick v. Wallace, 236 P. 471, 114 Or. 530.

43. N.Y.—Mandeville v. Reynolds, 68 N.Y. 528.

44. Minn.—Woodford v. Reynolds, 30 N.W. 757, 36 Minn. 155. 34 C.J. p 731 note 68.

45. Miss.—Long v. Shackleford, 25 Miss. 559.

46. Neb.—Broadwater v. Foxworthy, 77 N.W. 1103, 57 Neb. 406.

47. Or.—**Corpus juris cited in** Herrick v. Wallace, 236 P. 471, 473, 114 Or. 530. 34 C.J. p 731 note 71.

48. N.J.—Lawrence v. Dickey, 12 N. J.Law 368.

49. Mo.—Rosenberger v. Jones, 48 Mo.App. 606.

50. N.Y.—Briggs v. Thompson, 20 Johns. 294. 34 C.J. p 731 note 74.

51. Wis.—Johnson v. Huber, 93 N. W. 826, 117 Wis. 58. 34 C.J. p 731 note 75.

52. Pa.—Marston v. Tryon, 17 Phila. 245, affirmed 108 Pa. 270. 34 C.J. p 731 note 76.

53. Pa.—Henry v. Sims, 1 Whart. 187—Pierce v. Potter, 7 Watts 475.

54. Wis.—Johnson v. Huber, 93 N. W. 826, 117 Wis. 58.

55. Pa.—Bratton v. Leyrer, 12 Pa. Co. 651.

56. Pa.—Allen v. Conrad, 51 Pa. 487. 34 C.J. p 731 note 80.

57. Pa.—Lee v. Conrad, 1 Whart. 168—Braddee v. Brownfield, 4 Watts 474.

58. Pa.—Allen v. Conrad, 51 Pa. 487. 34 C.J. p 731 note 82.

59. Pa.—Allen v. Conrad, supra.

60. Pa.—Henry v. Sims, 1 Whart. 187. 34 C.J. p 731 note 84.

61. Pa.—Oberholtzer v. Hunsberger, 1 Mona. 543.

62. N.D.—**Corpus Juris cited in** Peterson v. First & Security State Bank of Crosby, 236 N.W. 722, 724, 61 N.D. 1. 34 C.J. p 731 note 86.

Proof as to amount

Damages could not be allowed for failure to satisfy judgments of record without proof as to amount of damages.—Taylor v. Heiny, 232 N.W. 695, 210 Iowa 1320.

is authorized and regulated by statute.[63] The declaration may describe the judgment as being for a certain sum "with costs," without specifying the amount of costs,[64] but a variance between the amount of the judgment alleged and the amount proved is fatal.[65]

§ 583. —— Effect

Ordinarily a satisfaction of a judgment, entered of record by the act of the parties, is prima facie evidence that the creditor has received payment of the amount of the judgment or its equivalent, and operates as an extinguishment of the debt.

A satisfaction of a judgment, entered of record by the act of the parties, is prima facie evidence that the creditor has received payment of the amount of the judgment or its equivalent,[66] and operates as an extinguishment of the debt[67] and a bar to further proceedings which continue on the theory that the judgment remains a subsisting obligation,[68] except where the satisfaction was procured by fraud[69] or duress,[70] or without consideration,[71] or on a condition which has not been performed,[72] or was entered by the clerk without authority to do so.[73] Thus, unless the case comes within such exceptions, no action lies on a satisfied judgment,[74] and no further execution may issue, even with the consent of the parties,[75] until the satisfaction is vacated and a new execution awarded by an order of the court in which the judgment was rendered.[76] It has been held that the entry cannot be impeached or inquired into collaterally.[77] Parties to an action cannot defeat a master's fees included in a decree by filing satisfaction papers, where the master is not represented or consenting in any way thereto.[78]

Entry without notice. An entry of payment or satisfaction of a final judgment or decree, made at a term subsequent to its rendition, is not binding on a party in interest, nor is it evidence against him, when made without notice to him.[79]

Entry of satisfaction as to one of two judgment debtors. While it has been held that the entry of satisfaction of judgment as to one of two judgment debtors satisfies judgment as to both,[80] regardless of intent,[81] it has also been held that the filing of an instrument purporting to satisfy judgment against only one of two judgment debtors does not operate to satisfy the judgment as to the debtor not released by its terms.[82]

§ 584. —— Vacation or Correction

a. Power of court or clerk
b. Grounds
c. Proceedings
d. Effect

a. Power of Court or Clerk

A court of law, by virtue of its control over its own records, has inherent power on proper application to vacate an entry of satisfaction, or to reverse an erroneous entry and make a correct entry nunc pro tunc.

63. Del.—Silver v. Rhodes, 2 Del. 369—Hendrixen v. Huey, 2 Del. 301.
Grounds of action in actions on case generally see Case, Action on, § 5.

64. Del.—Silver v. Rhodes, 2 Del. 369.

65. Del.—Lofland v. Cade, 8 Del. 222—Silver v. Rhodes, 2 Del. 369.

66. Pa.—City Deposit Bank & Trust Co. v. Zoppa, 9 A.2d 361, 336 Pa. 379—Bean v. Cement Nat. Bank of Siegfried, 3 A.2d 1003, 134 Pa.Super. 281.
34 C.J. p 732 note 90.
Not conclusive
Satisfaction of judgment, such as judgment entered on collateral judgment note, is not conclusive of payment of primary obligation.—Winters v. Wolfskill, 190 A. 395, 126 Pa. Super. 168.

67. Ind.—Kennedy v. Eder, 139 N.E. 372, 79 Ind.App. 644.
Ohio.—Gholson v., Savin, 31 N.E.2d 858, 137 Ohio St. 551, 139 A.L.R. 75.
Pa.—Bean v. Cement Nat. Bank of Siegfried, 3 A.2d 1003, 134 Pa. Super. 281.
34 C.J. p 732 note 91.
Intention of parties is controlling.—Winters v. Wolfskill, 190 A. 395, 126 Pa.Super. 168.
Judgment of condemnation
Recorded satisfaction of judgment of condemnation reciting payment in full for property condemned, although satisfaction had obviously been altered, required finding that full payment for land taken had been made, in absence of proof that any alteration was made after execution of satisfaction almost twenty years before petition to vacate judgment was filed.—Village of Palatine v. Dahle, 53 N.E.2d 608, 385 Ill. 621.

68. Ky.—Brown v. Vancleave, 6 S.W. 25, 86 Ky. 331, 9 Ky.L. 593.
Md.—Shriver v. Carlin & Fulton Co., 141 A. 434, 155 Md. 51, 58 A.L.R. 767.

69. Ind.—Kennedy v. Eder, 139 N.E. 372, 79 Ind.App. 644.
34 C.J. p 732 note 93.

70. U.S.—Becker Steel Co. of America v. Cummings, D.C.N.Y., 16 F. Supp. 601.

71. Mo.—Boynton v. Boynton, 172 S. W. 1175, 186 Mo.App. 713.

72. N.Y.—Anderson v. Nicholas, 27 N.Y.Super. 630.

73. Ill.—Seymour v. Haines, 104 Ill. 557.

74. Neb.—Ebel v. Stringer, 102 N.W. 466, 73 Neb. 249.
34 C.J. p 732 note 98.

75. Tenn.—Trevathan v. Caldwell, 4 Heisk. 535—Bynum v. Murrell, 8 Humphr. 701.

76. Or.—Snipes v. Beezley, 5 Or. 420.
34 C.J. p 732 note 1.

77. Md.—Tabler v. Castle, 22 Md. 94.
34 C.J. p 732 note 5.

78. Ill.—German-American Sav. Loan & Bldg. Ass'n v. Trainor, 127 N.E. 719, 293 Ill. 483.

79. Ala.—Armstrong v. Harper, 65 Ala. 523.

80. Ark.—Biggs v. Davis, 43 S.W.2d 724, 184 Ark. 834.
Mo.—Weston v. Clark, 37 Mo. 568.
Pa.—McShea v. McKenna, 95 Pa.Super. 338.

81. Ark.—Biggs v. Davis, 43 S.W. 2d 724, 184 Ark. 834.

82. Cal.—Bank of America, Nat. Trust & Savings Ass'n v. Duer, 117 P.2d 405, 47 Cal.App.2d 100—Sun Realty Co. v. Rosenstein, 290 P. 1053, 107 Cal.App. 484.

A court of law, by virtue of its control over its own records,[83] has inherent[84] power on proper application to vacate an entry of satisfaction,[85] or to reverse an erroneous entry and make a correct entry nunc pro tunc;[86] and it is not necessary to resort to equity in order to obtain relief.[87]

A court of equity has jurisdiction to vacate an entry of satisfaction,[88] but it sometimes declines to exercise jurisdiction on the ground that an adequate remedy at law exists.[89]

Authority of clerk. Since the duties of a clerk are ministerial and not judicial, he has no authority to vacate an entry of satisfaction of a judgment,[90] this being a judicial act.[91]

b. Grounds

The court will vacate or set aside an entry of satisfaction of a judgment for proper cause where the rights of third persons have not intervened. The entry of satisfaction may be vacated on such grounds as mistake, fraud, duress, undue influence, and the lack or failure of consideration therefor.

The court will vacate or set aside an entry of satisfaction for proper cause[92] where the rights of third persons have not intervened.[93] Particularly the court will vacate an entry of satisfaction of a judgment in pursuance of an agreement of the parties to that effect,[94] or where it was entered by mistake of the clerk or plaintiff,[95] or procured by misrepresentation, fraud,[96] duress,[97] or undue influence,[98] or where it appears to have been irregularly or improperly entered[99] or that it will operate to the

83. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
34 C.J. p 732 note 8.

County courts
Statute requiring county courts to keep record showing dates of judgment and satisfaction thereof vested such courts with all powers necessary to proper and complete exercise of supervision and control, including power to purge record of error.—Commonwealth, for Use and Benefit of Bates v. Hall, supra.

A municipal court has been held to be without power to vacate a satisfaction piece.—People v. Fitzpatrick, 71 N.Y.S. 191, 35 Misc. 456.

84. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
34 C.J. p 732 note 9.

85. Ill.—Benik v. Benik, 5 N.E.2d 620, 287 Ill.App. 631.
Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
Md.—Legum v. Farmers Nat. Bank of Annapolis, 24 A.2d 281, 180 Md. 356.
Mo.—Kelley v. Kelley, App., 290 S.W. 624.
Utah.—George Thatcher Corp. v. Bullen, 153 P.2d 655, 107 Utah 310.
34 C.J. p 732 note 10.

86. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
34 C.J. p 733 note 11.

87. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
Md.—Legum v. Farmers Nat. Bank of Annapolis, 24 A.2d 281, 180 Md. 356.
34 C.J. p 733 note 12.

88. S.D.—Plano Mfg. Co. v. Thompson, 112 N.W. 149, 21 S.D. 300, 11 L.R.A.,N.S., 396, 130 Am.S.R. 722.
34 C.J. p 733 note 13.

89. Ill.—Hubbard v. National Stamping & Electric Works, 213 Ill.App. 235.
Mo.—Boynton v. Boynton, 172 S.W. 1175, 186 Mo.App. 713.

90. Ill.—Hughes v. Streeter, 24 Ill. 647, 76 Am.D. 777.

91. Ill.—Hughes v. Streeter, supra.
Okl.—Lambert v. Hill, 73 P.2d 124, 181 Okl. 225.

92. U.S.—Becker Steel Co. of America v. Cummings, D.C.N.Y., 16 F. Supp. 601.
Cal.—Brochier v. Brochier, 112 P.2d 602, 17 Cal.2d 822.

Satisfaction of judgment may be avoided for any cause rendering it inequitable for defendant to avail himself of the entry of satisfaction.—Knaak v. Brown, 212 N.W. 431, 115 Neb. 260, 51 A.L.R. 237.

93. U.S.—Becker Steel Co. of America v. Cummings, D.C.N.Y., 16 F. Supp. 601.

94. Ky.—**Corpus Juris quoted in** Commonwealth for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
N.Y.—Berdell v. Parkhurst, 6 N.Y.St. 12.

95. Cal.—Kinnison v. Guaranty Liquidating Corporation, 115 P.2d 450, 18 Cal.2d 256.
Ky.—**Corpus Juris quoted in** Commonwealth for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
Md.—Legum v. Farmers Nat. Bank of Annapolis, 24 A.2d 281, 180 Md. 356.
Pa.—Personal Finance Co. v. Stafford, Com.Pl., 28 Erie Co. 143.
34 C.J. p 733 note 21.

96. Ill.—Paul v. Shukes, 56 N.E.2d 141, 323 Ill.App. 527—Benik v. Benik, 5 N.E.2d 620, 287 Ill.App. 631.
Ky.—**Corpus Corpus quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
Neb.—Marshall v. Rowe, 230 N.W. 446, 119 Neb. 591.
34 C.J. p 733 note 22.

Constructive fraud
Creditor, basing settlement of judgment for less than face amount thereof on debtor's ability to pay and on representation that there had been full disclosure regarding indemnity insurance, could have settlement vacated on subsequent discovery of undisclosed insurance, failure to disclose such insurance constituting, in equity, constructive fraud.—Hernig v. Harris, 175 A. 169, 117 N.J.Eq. 146.

Evidence held sufficient to show fraud
Mo.—Hunter v. Wabash R. Co., 140 S.W. 930, 160 Mo.App. 601.
Wis.—Simon v. Lecker, 285 N.W. 406, 231 Wis. 106.

Evidence held insufficient to show fraud
Mo.—Kelley v. Kelley, App., 290 S. W. 624.
S.D.—Murdy v. Murdy, 276 N.W. 728, 65 S.D. 586.
34 C.J. p 733 note 22 [c].

97. U.S.—Becker Steel Co. of America v. Cummings, D.C.N.Y., 16 F. Supp. 601.
Ind.—Stewart v. Armel, 62 Ind. 593.
Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.

98. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
N.Y.—Bergheim v. Hofstatter, 276 N. Y.S. 188, 243 App.Div. 568.
34 C.J. p 733 note 24.

99. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
34 C.J. p 733 note 25.

disadvantage of a third person having a lien on the judgment or entitled to be protected or secured by it.[1]

Likewise, the court will vacate an entry of satisfaction where there has been a lack or failure of consideration therefor,[2] or where there has been a failure to perform the conditions of a settlement between the parties on which the satisfaction was based.[3] Further, the court may vacate the entry where there was a want of authority under the circumstances to make it,[4] as, for instance, where an unauthorized entry of satisfaction is made by plaintiff's attorney,[5] the clerk of the court,[6] sheriff,[7] or one of two joint judgment creditors.[8] Also a false or mistaken entry of a credit may be ordered corrected or vacated.[9]

Void or irregular sale. Where property is sold under execution on a judgment and bought in by the judgment creditor, or the proceeds collected from the purchaser, and satisfaction entered, but the sale proves to be invalid or is afterward vacated, the entry of satisfaction will be stricken off on the application of the creditor.[10]

Absence of leviable interest in property sold. Where the execution, judgment, and sale are all regular, but defendant has no interest in the property sold, according to some authorities, plaintiff may have such apparent satisfaction vacated,[11] under the power of the court to correct its own records,[12] provided plaintiff acts within a reasonable time[13] and the rights of third persons more deserving of protection have not intervened.[14] A directly contrary view, however, has been taken by other authorities,[15] based on the doctrine that there is no warranty of title in execution sales,[16] and it has been held that a mistake by the judgment creditor who purchases land under an execution as to the

Order without notice

(1) Where satisfaction of a judgment is entered on motion of defendant without notice to the judgment creditor, the latter has his remedy by motion to set aside the order and entry of satisfaction.—Thomas v. Rock Island Gold & Silver Mining Co., 54 Cal. 578.

(3) An order of satisfaction of judgment on stipulation of judgment debtor and strangers to suit, without notice to judgment creditor or his attorneys may be set aside.—Shank v. Lippman, 227 N.W. 710, 249 Mich. 22.

1. Ill.—Paul v. Shukes, 56 N.E.2d 141, 323 Ill.App. 527.
Pa.—Peckville Nat. Bank v. Anthracite Trust Co., 17 Pa.Dist. & Co. 15, 32 Lack.Jur. 138.
34 C.J. p 734 note 26.

2. Cal.—Argue v. Wilson, 40 P.2d 297, 3 Cal.App.2d 645.
Mo.—Kelley v. Kelley, App., 290 S. W. 624.
Neb.—Knaak v. Brown, 212 N.W. 431, 115 Neb. 260, 51 A.L.R. 237.
Pa.—Steelton Finance Co. v. Kireta, Com.Pl., 46 Dauph.Co. 426.
S.D.—Smith v. Blackford, 228 N.W. 466, 56 S.D. 360.
Utah.—George Thatcher Corp. v. Bullen, 153 P.2d 655, 107 Utah 310.
34 C.J. p 734 note 27.

Attachment set aside

Satisfaction by assignee of mortgage of its judgment against guarantor on notes did not constitute irrevocable payment of notes, preventing subsequent foreclosure suit and was properly vacated where bankruptcy court set aside attachment under which judgment was satisfied. —Smith v. Blackford, 228 N.W. 466, 56 S.D. 360.

Evidence held sufficient to show lack of consideration

Okl.—Owens v. Lynch, 297 P. 223, 147 Okl. 298.
Wis.—Simon v. Lecker, 285 N.W. 406, 231 Wis. 106.

Evidence held insufficient to show lack of consideration

S.D.—Murdy v. Murdy, 276 N.W. 728, 65 S.D. 536.

3. Md.—Waters v. Engle, 53 Md. 179.
Pa.—Steelton Finance Co. v. Kireta, Com.Pl., 46 Dauph.Co. 426.
34 C.J. p 734 note 28.

4. Mo.—Ekonomou v. Greek Orthodox Church St. Nicholas, App., 280 S.W. 57.
34 C.J. p 734 note 29.

Unconstitutional statute

A satisfaction of judgment entered pursuant to an unconstitutional statute will be stricken off.—Bridesburg Bldg. Ass'n v. Bailey, 40 Pa. Dist. & Co. 211—Second Nat. Bank to Use of Security-Peoples Trust Co. v. Jiuliante, Pa.Com.Pl., 19 Erie Co. 518.

5. La.—People's Homestead & Savings Ass'n v. Worley, 185 So. 880, 191 La. 453.
N.D.—Business Service Collection Bureau v. Yegen, 269 N.W. 46, 67 N.D. 51.
34 C.J. p 734 note 30.
Authority of attorney to give satisfaction see Attorney and Client § 99.

Presumption of authority held not rebutted

Pa.—Trostle v. Harbaugh, 16 Pa.Dist. & Co. 18.

6. Ala.—Aicardi v. Robbins, 41 Ala. 541, 94 Am.D. 614.
34 C.J. p 734 note 31.

7. Ala.—Cook v. Bloodgood, 7 Ala. 683.
Okl.—U. S. Fidelity & Guaranty Co. v. Collier, 24 P.2d 651, 165 Okl. 35.

8. Cal.—Haggin v. Clark, 61 Cal. 1.
Mich.—Potter v. Hunt, 36 N.W. 58, 68 Mich. 242.

9. Ind.—Brunner v. Brennan, 49 Ind. 98.
Iowa.—Indiana State Bank v. Harrow, 26 Iowa 426.

10. Ky.—**Corpus Juris quoted in** Lucas' Adm'r v. Stanley, 300 S.W. 889, 890, 222 Ky. 374.
34 C.J. p 734 note 40.

11. Minn.—Ridgway v. Mirkovich, 260 N.W. 303, 194 Minn. 216.
Wis.—Hermance v. Braun, 285 N.W. 733, 231 Wis. 357.
34 C.J. p 735 note 41.

Subsequent foreclosure of mortgage.

It has been held that execution sale and resulting satisfaction of judgment could not be vacated on ground of mistake because realty mortgage, subject to which property was purchased at execution sale, was thereafter foreclosed and property lost to purchaser at execution sale because of failure to exercise right of redemption.—Ridgway v. Mirkovich, 260 N.W. 303, 194 Minn. 216.

12. Vt.—Tudor v. Taylor, 26 Vt. 444.

13. Wis.—Hermance v. Braun, 285 N.W. 733, 231 Wis. 357.

14. Wis.—Hermance v. Braun, supra.

15. Ohio.—Vattier v. Lytle, 6 Ohio 477.
34 C.J. p 735 note 43.

16. Pa.—Freeman v. Caldwell, 10 Watts 9.
34 C.J. p 735 note 44.

extent of the debtor's interest is not ground for setting aside the satisfaction after the sale and issuance of the sheriff's deed.[17] Some statutes provide that the sale and satisfaction may be set aside when the judgment on which the execution issued was not a lien on the property sold,[18] as where property sold is a homestead;[19] and, independently of statute, a satisfaction may be vacated where it resulted from the sale of a homestead.[20]

c. Proceedings

(1) In general
(2) Parties and notice
(3) Hearing and determination

(1) In General

An application to set aside a satisfaction of judgment ordinarily is made by motion in the original action for an order canceling the entry or return of satisfaction, and directing execution to issue for so much of the judgment as remains unpaid.

While a satisfaction of a judgment may be set aside by an action[21] or suit in equity[22] brought for that purpose, and sometimes scire facias[23] or an action on the judgment[24] is deemed an appropriate remedy, yet ordinarily the application to set aside is by motion in the original action for an order canceling the entry or return of satisfaction, and directing execution to issue for as much of the judgment as remains unpaid.[25] A motion to set aside the satisfaction is properly made in the court in which the judgment is of record;[26] but, except in some jurisdictions,[27] an action or suit for this purpose may be brought in another court.[28]

Time of application. The application must be seasonably made, so as to clear plaintiff of any imputation of laches[29] and to be within the time limited by statute therefor.[30]

(2) Parties and Notice

Proceedings to vacate an entry of satisfaction may be maintained by a party to the record, or by an assignee of the judgment. Notice of application to strike off a satisfaction must be given to parties interested unless they have appeared.

Proceedings to vacate an entry of satisfaction may be maintained by a party to the record,[31] or by an assignee of the judgment,[32] but not by a

17. Or.—Poppleton v. Bryan, 58 P. 767, 36 Or. 69.
34 C.J. p 735 note 45.

18. Iowa.—Holtzinger v. Edwards, 1 N.W. 600, 51 Iowa 383.

19. Iowa.—Jones v. Blumenstein, 42 N.W. 321, 77 Iowa 361.

20. Ill.—Hubbell v. Canady, 58 Ill. 425.
34 C.J. p 735 note 48.

21. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
34 C.J. p 735 note 53.

Exclusion of testimony held erroneous

In action to annul judgment settlement, exclusion of testimony concerning attorney's false representations as to debtor's residence and financial responsibility was held erroneous.—Deutsch v. Roy, 250 N.Y.S. 664, 232 App.Div. 543, followed in 250 N.Y.S. 669, 232 App.Div. 549.

22. Cal.—Kinnison v. Guaranty Liquidating Corporation, 115 P.2d 450, 18 Cal.2d 108.
Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
Mo.—Kelley v. Kelley, App., 290 S. W. 624.
34 C.J. p 735 note 54.

Conditions precedent

Creditor settling judgment for less than amount due by reason of concealment of debtor's assets need not return, or offer to return, amount accepted to maintain bill to vacate settlement.—Hernig v. Harris, 175 A. 169, 117 N.J.Eq. 146.

Pleading

Execution creditor, suing debtor in equity on loss of property purchased to correct record showing credit on judgment, was not required to plead that judgment was still in force.—Lucas' Adm'r v. Stanley, 300 S.W. 889, 222 Ky. 374.

23. Conn.—Cowles v. Bacon, 21 Conn. 451, 56 Am.D. 371.
34 C.J. p 735 note 55.

24. Iowa.—Darrow v. Darrow, 43 Iowa 411.
34 C.J. p 735 note 56.

25. Cal.—Kinnison v. Guaranty Liquidating Corporation, 115 P.2d 450, 18 Cal.2d 256—Argue v. Wilson, 40 P.2d 297, 3 Cal.App.2d 645.
Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
Md.—Legum v. Farmers Nat. Bank of Annapolis, 24 A.2d 281, 180 Md. 356.
Mo.—Kelley v. Kelley, App., 290 S. W. 624.
Neb.—Knaak v. Brown, 212 N.W. 431, 115 Neb. 260, 51 A.L.R. 237.
34 C.J. p 736 note 57.

26. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
Neb.—Marshall v. Rowe, 230 N.W. 446, 119 Neb. 591.
34 C.J. p 736 note 64.

27. Ill.—Burney v. Hunter, 32 Ill. App. 441.

28. U.S.—Miller v. Williams, Va., 258 F. 216, 169 C.C.A. 284.
Iowa.—Darrow v. Darrow, 43 Iowa 411.

29. Md.—Wilmer v. Brice, 46 A. 322, 91 Md. 71.
Pa.—City Deposit Bank & Trust Co. v. Zoppa, 9 A.2d 361, 336 Pa. 379—Bridesburg Bldg. Ass'n v. Bailey, 40 Pa.Dist. & Co. 211—First Nat. Bank & Trust Co. for Use of, v. Bornstein, Com.Pl., 22 West.Co. 229.
34 C.J. p 736 note 67.

30. Pa.—Bell v. Gluckman, 39 Pa. Dist. & Co. 165—Niessen v. Loewe, 30 Pa.Dist. & Co. 605.
Wash.—Seattle v. Krutz, 139 P. 498, 78 Wash. 553.
34 C.J. p 736 note 68.

31. Cal.—Clark v. Johnston, 193 P. 864, 49 Cal.App. 315.
34 C.J. p 737 note 73.

Attorney

(1) Where satisfaction of amount due under mechanic's lien decree was executed by plaintiff and filed in office of clerk of superior court, plaintiff's attorney, not being a party to suit, was without standing to present petition that satisfaction should be set aside.—Paul v. Shukes, 56 N. E.2d 141, 323 Ill.App. 527.

(2) Motion by attorney to vacate where satisfaction is in fraud of his lien see Attorney and Client § 231.b (2).

32. Cal.—Brown v. Brown, 8 P.2d 580, 117 Cal.App.2d 205.
34 C.J. p 737 note 74.

stranger to the record,[33] except where he was the real party in interest and the satisfaction was a fraud on him.[34] All parties affected by the judgment or claiming under or in relation to it must be made parties to the proceeding to set aside.[35] Also notice of an application to strike off a satisfaction must be given to the parties interested[36] unless they have appeared.[37]

(3) Hearing and Determination

A motion to vacate an entry of satisfaction of judgment may be determined on affidavits or depositions, unless the evidence is conflicting on material questions of fact. Where the evidence is conflicting, the party seeking relief should be remitted to an action, a court of equity, or an issue should be directed for a jury.

A motion to vacate an entry of satisfaction may be heard and determined on affidavits[38] or depositions,[39] if the court in the exercise of its discretion chooses to do so.[40] Where, however, the evidence is conflicting on the material questions of fact arising on the motion, the party seeking relief should be remitted to an action,[41] or to a court of equity,[42] or an issue should be directed for a jury.[43]

Regardless of the mode of procedure pursued, to vacate an entry of a satisfaction of a judgment, the remedy sought is governed by equitable rules,[44] involving the exercise of sound discretion by the court,[45] the ultimate question being whether it is inequitable to set aside, or refuse to set aside, the entry of satisfaction.[46] The entry of satisfaction will not be vacated because of any matters antedating the judgment or affecting the original transaction,[47] or where the rights of third persons are prejudiced,[48] such as a bona fide purchaser of property

33. Pa.—Appeal of Long, 19 A. 806, 134 Pa. 641.
34 C.J. p 737 note 76.

34. Cal.—Clark v. Johnston, 193 P. 864, 49 Cal.App. 315.
34 C.J. p 737 note 77.

35. Cal.—Kinnison v. Guaranty Liquidating Corporation, 115 P.2d 450, 18 Cal.2d 256.
Tenn.—Blackburn v. Clarke, 3 S.W. 505, 85 Tenn. 506.
34 C.J. p 737 note 78.

All judgment defendants

In a suit to set aside satisfaction of a judgment, all the judgment defendants are necessary parties, because if one was not joined the satisfaction would remain valid as to him and hence would operate as release as to all, and plaintiff's decree would thus be a nullity.—Humberd v. Kerr, 8 Baxt., Tenn., 291.

36. Cal.—Thompson v. Cook, 127 P. 2d 909, 20 Cal.2d 564—Spencer v. Barnes, 43 P.2d 847, 6 Cal.App.2d 35—Brown v. Brown, 3 P.2d 580, 117 Cal.App. 205.
Ky.—Commonwealth, for Use and Benefit of Bates, v. Hall, 64 S.W. 2d 585, 251 Ky. 280.
34 C.J. p 737 note 79.

Assignee

To set aside second assignee's satisfaction of judgment, on ground that judgment had been previously assigned to another, notice must be given second assignee.—Brown v. Brown, 3 P.2d 580, 117 Cal.App. 205.

Attorney

(1) It has been held that, where an attorney is retained, service of notice of a motion to vacate a satisfaction must be made on him, and not on the party, although he was only constituted attorney to confess judgment.—Wardell v. Eden, 2 Johns. Cas., N.Y., 121, Col. & C.Cas. 137.

(2) Service of notice of motion to set aside satisfaction of judgment and issue execution on attorney not shown to be judgment debtor's attorney of record was not notice to judgment debtor.—Spencer v. Barnes, 43 P.2d 847, 6 Cal.App.2d 35.

(3) Testimony that certain person said he was attorney for defendant and another and had appeared in proceeding before court in pending action as attorney for such parties has been held not competent to show that he was defendant's attorney on whom notice of motion to set aside satisfaction of judgment against defendant might be served.—Spencer v. Barnes, supra.

Opportunity to answer and be heard

Where assignee of rights of plaintiff in mechanic's lien proceeding filed petition to set aside satisfaction of judgment in the proceeding, court, in passing on another petition to set aside the satisfaction, should not have considered assignee's petition until defendant had had opportunity to answer and be heard concerning merits thereof.—Paul v. Shukes, 56 N.E.2d 141, 323 Ill.App. 527.

37. Cal.—Spencer v. Barnes, 43 P.2d 847, 6 Cal.App.2d 35.
Tenn.—Wilburn v. McCollom, 7 Heisk. 267.

38. N.D.—Acme Harvester Co. v. Magill, 106 N.W. 563, 15 N.D. 116.
34 C.J. p 736 note 58.

39. Cal.—Haggin v. Clark, 61 Cal. 1.

40. N.Y.—Concklin v. Taylor, 68 N. Y. 221.

41. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
34 C.J. p 736 note 61.

42. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
N.Y.—Greenfield v. Stern, 214 N.Y.S. 37, 126 Misc. 561.
34 C.J. p 736 note 62.

43. Ky.—**Corpus Juris quoted in** Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 586, 251 Ky. 280.
34 C.J. p 736 note 63.

44. Neb.—Marshall v. Rowe, 230 N. W. 446, 119 Neb. 591.
Okl.—Lambert v. Hill, 73 P.2d 124, 181 Okl. 225.
Pa.—City Deposit Bank & Trust Co. v. Zoppa, 9 A.2d 361, 336 Pa. 379—Steelton Finance Co. v. Kireta, Com.Pl., 46 Dauph.Co. 426.
S.D.—Plano Mfg. Co. v. Thompson, 112 N.W. 149, 21 S.D. 300, 11 L.R.A.,N.S., 396, 130 Am.S.R. 722.
Utah.—George Thatcher Corp. v. Bullen, 162 P.2d 421.
Wis.—**Corpus Juris cited in** Hermance v. Braun, 285 N.W. 733, 734, 231 Wis. 357.

45. Okl.—Lambert v. Hill, 73 P.2d 124, 181 Okl. 225.
Pa.—Steelton Finance Co. v. Kireta, Com.Pl., 46 Dauph.Co. 426.

Discretion held not abused

Cal.—Coviello v. Moco Fruit Co., 109 P.2d 765, 42 Cal.App.2d 637.

46. Neb.—Marshall v. Rowe, 230 N. W. 446, 119 Neb. 591.
Okl.—Lambert v. Hill, 73 P.2d 124, 181 Okl. 225.
Wis.—Hermance v. Braun, 285 N.W. 733, 231 Wis. 357.
34 C.J. p 734 note 37.

47. Pa.—Appeal of Read, 17 A. 621, 126 Pa. 415.
34 C.J. p 734 note 38.

48. Neb.—Knaak v. Brown, 212 N. W. 431, 115 Neb. 260, 51 A.L.R. 237.

Intervener, not having changed position in reliance on entry of satisfaction, could not prevent vacation of entry and reinstatement of decree of foreclosure.—Knaak v. Brown, supra.

who became such while the judgment appeared by the record to be satisfied and discharged.[49] The entry of satisfaction will not be set aside where it would be futile.[50]

An order denying a motion to vacate a satisfaction of judgment has been held to bar further attack on the validity of the satisfaction.[51]

Conditions of relief. As a condition to vacation of satisfaction, plaintiff will usually be required to place defendant in statu quo,[52] but plaintiff is not required to restore what in any event he would be entitled to retain,[53] it being sufficient to credit such sums on the judgment.[54]

Order. The court will direct the entry of an order vacating the satisfaction of judgment where proper cause is shown.[55]

Review. It has been held that the decision of the court on a summary motion to strike off an improper satisfaction is the decision of a matter of fact, which is not subject to review on writ of error,[56] and can be reviewed only by proceedings in the nature of a writ of certiorari.[57]

Costs. In an action to set aside a satisfaction, plaintiff has been held entitled only to statutory costs.[58] An assignee with notice of prior equities, who enters satisfaction, will be charged with the costs of a motion to vacate the entry of satisfaction.[59] The allowance of disbursements is not authorized by some statutes.[60]

d. Effect

When an entry of satisfaction is vacated the judgment is again in force.

When an entry of satisfaction is vacated, the judgment is again in force.[61]

XVIII. ENFORCEMENT OF JUDGMENTS

§ 585. In General

As a general rule, a party recovering judgment has the right to proceed to enforce it, and the court rendering judgment has inherent power to enforce it and to make such orders and issue such process as may be necessary to render it effective.

As a general rule, a party recovering a judgment has a right to proceed to enforce it.[62] Although it has been held that the judicial function of the court ceases when the judgment becomes final and that the duty of enforcement devolves on the executive department,[63] the generally accepted rule is that every court has inherent power to enforce its judgments and decrees,[64] and to make such or-

49. Neb.—Knaak v. Brown, supra.
34 C.J. p 734 note 39.

50. Cal.—Lidberg v. E. T. Leiter & Son, 2 P.2d 526, 116 Cal.App. 312.

51. Or.—Herrick v. Wallace, 236 P. 471, 114 Or. 520.

52. Md.—Legum v. Farmers Nat. Bank of Annapolis, 24 A.2d 281, 180 Md. 356.
S.D.—Lovely v. Wangsness, 264 N.W. 195, 64 S.D. 43.
34 C.J. p 735 note 50.

Where the status quo ante cannot be restored, it is error for the court having jurisdiction of the suit to sustain a motion to set aside the satisfaction and cancellation and restore the judgment to its original force.—Davis v. McCullers, 97 So. 8, 132 Miss. 572.

53. Cal.—Gilson Quartz Mining Co. v. Gilson, 47 Cal. 597.
34 C.J. p 735 note 51.

54. Neb.—Grunden v. Skiles, 145 N. W. 341, 95 Neb. 124—Fox v. State, 88 N.W. 176, 63 Neb. 185.

55. Wis.—Simon v. Lecker, 285 N.W. 406, 231 Wis. 106.

Order held not entirely erroneous
Wis.—Simon v. Lecker, 285 N.W. 406, 231 Wis. 106.

56. Pa.—Appeal of Long, 19 A. 806, 134 Pa. 641—Murphy v. Flood, 2 Grant 411.

57. Pa.—Rand v. King, 19 A. 806, 134 Pa. 641.
34 C.J. p 737 note 72.

58. N.D.—Business Service Collection Bureau v. Yegen, 269 N.W. 46, 67 N.D. 51.

59. Cal.—Cramer v. Tittle, 21 P. 750, 79 Cal. 332.

60. N.Y.—Concklin v. Taylor, 68 N. Y. 221.

61. Ind.—Kennedy v. Eder, 139 N.E. 372, 79 Ind.App. 644.
34 C.J. p 737 note 82.

62. Pa.—Randall v. Fenton Storage Co., 182 A. 767, 121 Pa.Super. 62.

All means given by law
As long as judgment debt remains unsatisfied, all means given by law to enforce it are open to creditor.—Edwards v. Perrault, 129 So. 619, 170 La. 1011.

Erroneous decree may be enforced
Ark.—Griffin v. Mitchell, 127 S.W.2d 640, 197 Ark. 1175.

Election
Plaintiff recovering separate unequal judgments against corporation and its officer for malicious prosecution was entitled to elect to proceed on judgment most favorable to him, regardless of whether defendants were joint tort-feasors.—Randall v. Fenton Storage Co., 182 A. 767, 121 Pa.Super. 62.

Pendency of appeal
In action by landowner for oil royalties where oil company admitted that royalty owner had unencumbered title, previous objections to which had been removed by judgment from which no suspensive appeal had been taken, oil company could not resist payment of royalties on ground that time for a devolutive appeal had not expired and that, if such appeal were taken, the judgment might be reversed.—Irion v. Standard Oil Co. of Louisiana, 6 So. 2d 143, 199 La. 363.

63. Ohio.—Long & Allstatter Co. v. Willis, 3 N.E.2d 910, 52 Ohio App. 299, appeal dismissed Willis v. Long & Allstatter Co., 2 N.E.2d 600, 131 Ohio St. 287.
Loss of court's jurisdiction by final disposition of cause generally see Courts § 94.

64. U.S.—Florida Guaranteed Securities v. McAllister, D.C.Fla., 47 F. 2d 762.
Ala.—Jones v. City of Opelika, 4 So. 2d 509, 242 Ala. 24, followed in 4 So.2d 513, second case, 242 Ala. 28 and 4 So.2d 514, 242 Ala. 29.

ders[65] and issue such process[66] as may be necessary to render them effective, and this power is not affected by the fact that the decree is final.[67] This power lies in the court itself to be exercised without the aid of a fact-finding body.[68] The rule with reference to the court's loss of jurisdiction over its judgments after the expiration of the term, as discussed supra § 230, merely bars the court's right to alter, modify, or change them but does not preclude their enforcement as originally rendered.[69]

Ordinarily it is not necessary that a judgment be served on any party to the cause after it is entered or filed;[70] but under some statutes a judgment other than a judgment for money or for the possession or sale of property is enforceable by service of a certified copy;[71] and, as discussed infra § 586, where it is sought to enforce the judgment by contempt proceedings, a copy of the judgment should first be served on defendant. A joint and several judgment may be enforced by the judgment creditor against either or both of the judgment debtors.[72]

It has been held that a judgment may not be enforced in favor of a person other than the one in whose favor it is rendered unless it has been transferred in writing to such person.[73]

§ 586. Enforcement at Law

a. In general
b. Auxiliary remedies

a. In General

Proceedings for the enforcement of a judgment are governed by the law of the jurisdiction in which they are brought and by the law in force at the time such proceedings are had; and the usual method of enforcement, where the judgment is for a sum of money, is by execution.

Proceedings for the enforcement of a judgment are governed by the law of the state or country in which they are brought,[74] and by the law in force at the time such proceedings are had.[75] As such laws refer only to the remedy, all judgments and decrees are taken subject to such changes, before execution thereof, as the legislature may make in the procedure for their enforcement.[76] Jurisdiction to enforce a judgment does not exist in another court of equal rank with that in which the judgment originated, unless authorized by statute;[77]

Ark.—Husband v. Crockett, 115 S.W. 2d 882, 195 Ark. 1031.
Cal.—**Corpus Juris quoted in** Security Trust & Savings Bank v. Southern Pac. R. Co., 45 P.2d 268, 270, 6 Cal.App.2d 585.
Ga.—Lewis v. Grovas, 9 S.E.2d 282, 62 Ga.App. 625.
Idaho.—Oatman v. Hampton, 256 P. 529, 43 Idaho 675.
Ky.—Commonwealth ex rel. Attorney General v. Furste, 157 S.W.2d 59, 288 Ky. 631.
Mass.—Commonwealth v. Town of Hudson, 52 N.E.2d 566, 315 Mass. 335.
Okl.—Wolfe v. Smith, 148 P.2d 161, 194 Okl. 201.
Pa.—Commissioners of Sinking Fund of City of Philadelphia v. City of Philadelphia, 188 A. 314, 324 Pa. 129, 113 A.L.R. 202.
Tex.—Grand International Brotherhood of Locomotive Engineers v. Marshall, Civ.App., 157 S.W.2d 676—Porter v. Tolbert, Civ.App., 116 S.W.2d 1158—Burrage v. Hunt Production Co., Civ.App., 114 S.W.2d 1228, error dismissed—Hunt Production Co. v. Burrage, Civ.App., 104 S.W.2d 84, error dismissed.
34 C.J. p 737 note 83.

65. Ala.—Jones v. City of Opelika, 4 So.2d 509, 242 Ala. 24, followed in 4 So.2d 513, second case, 242 Ala. 28 and 4 So.2d 514, 242 Ala. 29.
Ark.—Husband v. Crockett, 115 S.W. 2d 882, 195 Ark. 1031.
Cal.—**Corpus Juris quoted in** Security Trust & Savings Bank v. Southern Pac. R. Co., 45 P.2d 268, 270, 6 Cal.App.2d 585.
Ind.—Dissette v. Dissette, 196 N.E. 684, 208 Ind. 567.
Tex.—International Brotherhood of Locomotive Engineers v. Marshall, Civ.App., 157 S.W.2d 676—Porter v. Tolbert, Civ.App., 116 S.W.2d 1158.
34 C.J. p 737 note 84.

66. Cal.—**Corpus Juris quoted in** Security Trust & Savings Bank v. Southern Pac. R. Co., 45 P.2d 268, 270, 6 Cal.App.2d 585.
Ind.—Dissette v. Dissette, 196 N.E. 684, 208 Ind. 567.
Tex.—International Brotherhood of Locomotive Engineers v. Marshall, Civ.App., 157 S.W.2d 676.
34 C.J. p 738 note 85.
The express power of a court of record to enforce its judgments by proper process should not be abridged by courts in absence of express or necessarily implied statutory authority.—Wolfe v. Smith, 148 P.2d 161, 194 Okl. 201.

67. Cal.—**Corpus Juris quoted in** Security Trust & Savings Bank v. Southern Pac. R. Co., 45 P.2d 268, 270, 6 Cal.App.2d 585.
Wash.—De Stoop v. Department of Labor and Industries of Washington, 84 P.2d 706, 197 Wash. 140.
34 C.J. p 738 note 86.

68. Tex.—Burrage v. Hunt Production Co., Civ.App., 114 S.W.2d 1228, error dismissed.

69. Ky.—Lincoln Building & Loan Ass'n v. Humphreys, 118 S.W.2d 736, 274 Ky. 359.

70. Wash.—Western Security Co. v. Lafleur, 49 P. 1061, 17 Wash. 406.
Notice of entry see supra § 112.

71. Mont.—Nepstad v. East Chicago Oil Ass'n, 29 P.2d 643, 96 Mont. 183.
Directing codefendant to pay defendant
Judgment directing codefendant to pay royalty moneys over to defendant is enforceable by service of certified copy of judgment and not by general execution.—Nepstad v. East Chicago Oil Ass'n, supra.

72. Kan.—Sloan v. Sheridan, 168 P. 2d 545, 161 Kan. 425.
Okl.—Tucker v. Gautier, 164 P.2d 613.

73. Ga.—Franklin v. Mobley, for Use of Patrick, App., 36 S.E.2d 173—Arnold v. Citizens' & Southern Nat. Bank, 170 S.E. 316, 47 Ga.App. 254.
Mode and sufficiency of assignment of judgment see supra §§ 515–518.

74. Ark.—Husband v. Crockett, 115 S.W.2d 882, 195 Ark. 1031.
34 C.J. p 738 note 90.
What law governs validity of judgment see supra § 14.

75. Cal.—Weldon v. Rogers, 90 P. 1062, 151 Cal. 432.
34 C.J. p 738 note 91.

76. Ill.—Williams v. Waldo, 4 Ill. 264.

77. Pa.—Commonwealth v. Shecter, 95 A. 468, 250 Pa. 282.
Jurisdictions of courts generally

and, where a judgment is recovered in one capacity, proceedings to enforce it must be brought in the same capacity.[78]

Where the judgment is for the payment of money, the usual process of execution will ordinarily be the appropriate method of collecting it,[79] unless the right to issue this process has been limited or deferred by an agreement of the parties;[80] but the right to enforce the judgment by execution is subject to the condition that the judgment must be final, and that the amount, if uncertain, must be ascertained in a proper proceeding before the writ may issue, as discussed in Executions § 6. If the judgment is rendered in pursuance of an agreement of the parties which directs a particular mode of satisfying it, it cannot be enforced in any way inconsistent with the agreement.[81] While service of notice on defendant is necessary in an independent action to enforce a judgment, no service is required when the proceeding is in the form of a motion to enforce.[82] A demurrer to a petition to enforce a void judgment is properly sustained.[83]

Time for enforcement. Generally, a judgment may and should be enforced within the time limited by statute, if any,[84] and an exception to the limitation period must be found in the statutes themselves and cognate sections.[85] Under some statutes, a procedure is established whereby action may be taken to enforce a judgment notwithstanding the lapse of the normal period of limitations.[86] Such procedure is regarded as a subsequent step in an action already commenced and not a separate proceeding.[87] It has been held that the question whether or not a dormant judgment shall be enforced is a matter within the sound discretion of the trial court.[88]

b. Auxiliary Remedies

In addition to the remedy by writ of execution various other collateral or auxiliary remedies for the enforcement of judgments are recognized or established by statute in various jurisdictions.

In addition to the remedy by writ of execution, various other collateral or auxiliary remedies for the enforcement of judgments are recognized or established by statute in various jurisdictions,[89] such as attachment, as discussed in Attachment § 12, garnishment, as discussed in Garnishment §§ 5, 12, and supplementary proceedings as considered in Executions §§ 345–402. However, a court of one state cannot give effect to the judgment of a court of another state by enforcing any of the collateral remedies provided in the state where the judgment was rendered,[90] or by enforcing remedies provided by

over judgments of another court see Courts § 496.

78. N.Y.—Rodee v. Ogdensburg, 148 N.Y.S. 826, 86 Misc. 229, modified on other grounds 151 N.Y.S. 349, 165 App.Div. 651.

79. Va.—Buchanan v. Buchanan, 197 S.E. 426, 170 Va. 458, 116 A.L.R. 688.
34 C.J. p 738 note 95.
Enforcement of judgment by execution generally see Executions §§ 1–122.

Only method

It has been held that district court on its law side can enforce judgment only by execution through its ministerial officers.—McNary v. Guaranty Trust Co. of New York, D.C.Ohio, 6 F.Supp. 616.

Interest in partnership property

Holder of judgment against a partner individually may by proper procedure reach judgment debtor's interest in partnership property without resorting to statute making judgment against partnership on service of summons on individual partner enforceable against partnership property.—J. C. H. Service Stations v. Patrikes, 46 N.Y.S.2d 238, 181 Misc. 401.

80. Ind.—Root v. Burton, 17 N.E. 194, 115 Ind. 495.
34 C.J. p 738 note 96.

81. N.Y.—Potter v. Rossiter, 95 N.Y.S. 1037, 109 App.Div. 32.
34 C.J. p 738 note 99.

82. Tex.—Burrage v. Hunt Production Co., Civ.App., 114 S.W.2d 1228, error dismissed.

83. Ga.—Thompson v. Allen, 128 S.E. 773, 160 Ga. 535.

84. Cal.—Pacific Gas & Electric Co. v. Elks Duck Club, 103 P.2d 1030, 39 Cal.App.2d 562.
Time to sue and limitations in action on judgment generally see infra § 854.
Limitations in suit in equity to enforce judgment see infra § 537.

85. Va.—Barley v. Duncan, 13 S.E. 2d 293, 177 Va. 202.

86. Cal.—Pacific Gas & Electric Co. v. Elks Duck Club, 103 P.2d 1030, 39 Cal.App.2d 562—Tolle v. Doak, 55 P.2d 542, 12 Cal.App.2d 195—Palace Hotel Co. v. Crist, 45 P.2d 415, 6 Cal.App.2d 690.

Discretion of court

Judgment creditor was not entitled as matter of right to order for issuance of writ of execution on showing that prior execution was issued within five years after judgment, where twenty-one years had elapsed since judgment was rendered; refusing to issue execution was not abuse of discretion under circumstances.—Williams v. Goodin, 61 P.2d 507, 17 Cal.App.2d 62.

87. Cal.—Faias v. Superior Court in and for Alameda County, 24 P.2d 567, 133 Cal.App. 525.

Not action or special proceeding

Procedure authorized by statute for enforcement of judgment after five years constitutes neither "action" nor "special proceeding" of civil nature, but is mere subsequent step in action or special proceeding already commenced which is governed so far as time within which step may be taken is concerned, by provisions of statute specially relating thereto.—Tolle v. Doak, 55 P.2d 542, 12 Cal.App.2d 195.

88. Cal.—Bank of America N. T. & S. A. v. Katz, 113 P.2d 759, 45 Cal.App.2d 138—Williams v. Goodin, 61 P.2d 507, 17 Cal.App.2d 62—Faias v. Superior Court in and for Alameda County, 24 P.2d 567, 133 Cal.App. 525.
Dormant judgments generally see supra § 532.

89. N.Y.—Mills v. Thursby, 2 Abb. Pr. 432, 12 How.Pr. 385.
34 C.J. p 669 note 96, p 738 note 1.
Enforcement by mandamus see the C.J.S. title Mandamus § 97, also 38 C.J. p 638 note 3–p 639 note 15, p 641 notes 55–63.

90. Vt.—Sullivan County Prob.

statute in the state where enforcement is sought, where such remedies are limited by statute to domestic judgments.[91]

Contempt proceedings. As a general rule, as discussed in Contempt § 13, mere nonpayment of a money judgment or decree does not constitute contempt of court, and payment cannot be enforced by proceedings and imprisonment for contempt. Where, however, a judgment requires of a party the performance of any act other than the payment of money or delivery of real or personal property, a performance of such act may be enforced by proceedings as for contempt;[92] but, as in contempt cases generally, as considered in Contempt § 57, an application to punish for contempt is addressed to the discretion of the court,[93] and, under some circumstances, should be denied.[94]

§ 587. Enforcement in Equity

Although it is presumed ordinarily that the court which renders a judgment is competent to enforce it without the aid of equity, the rule is subject to numerous exceptions under which the power of a court of equity may properly be invoked where the legal remedy is unavailing.

Ordinarily it is presumed that the court which renders a judgment is competent to enforce it, and equity cannot be invoked to obtain satisfaction.[95] This rule, however, is subject to numerous exceptions under which the power of a court of equity may properly be invoked,[96] as where the object is to reach equitable interests in land, not subject to execution,[97] or other property of defendant which cannot be made available in the ordinary way,[98] or, except in some jurisdictions,[99] where the judgment debtor is dead and recourse cannot be had against his estate without the aid of chancery.[1]

Before equity will grant relief, it must first appear that complainant has recovered a judgment at law,[2] and that he has no adequate remedy at law,[3] or that his legal remedy has been lost without any fault or laches on his part,[4] or has been exhausted without avail.[5] On such a proceeding the regularity of the judgment will not be inquired into,[6] although the nature of the original cause of action may be investigated if its character would have any influence on the action of a court of equity in the premises.[7] Complainant must of course show himself equitably entitled to the relief which he asks,[8] and his petition will be defeated by anything showing that it would be unjust or unfair to grant it.[9]

Jurisdiction. In order to sustain a bill in equity for the enforcement of a judgment at law, it is necessary that defendant should be subject to the jurisdiction of the court,[10] or, if he is a nonresident,

Judge v. Hibbard, 44 Vt. 597, 8 Am. R. 396.
34 C.J. p 739 note 5.
Enforcement of foreign judgments generally see infra § 892.

91. N.Y.—Wood v. Wood, 28 N.Y.S. 154, 7 Misc. 579, 31 Abb.N.Cas. 235.
34 C.J. p 739 note 6.

92. Tex.—**Corpus Juris quoted in** Kimbrough v. State, Civ.App., 139 S.W.2d 165, 168.
34 C.J. p 739 note 8.

93. N.Y.—Cochrane v. Ingersoll, 73 N.Y. 613, dismissing appeal 13 Hun 368.
34 C.J. p 739 note 10.

94. N.Y.—Potter v. Rossiter, 95 N.Y.S. 1037, 109 App.Div. 32.
34 C.J. p 739 note 11.

95. Ala.—Henderson v. Hall, 32 So. 840, 134 Ala. 455, 63 L.R.A. 673.
34 C.J. p 739 note 12.

96. U.S.—McClaskey v. Harbison-Walker Refractories Co., D.C.Pa., 46 F.Supp. 937, reversed on other grounds, C.C.A., 138 F.2d 493.
Fla.—**Corpus Juris cited in** Smith v. Pattishall, 176 So. 563, 574, 127 Fla. 474, 129 Fla. 498.
Tex.—Hunt Production Co. v. Burrage, Civ.App., 104 S.W.2d 84, error dismissed.
34 C.J. p 739 note 13.
Creditors' suits see Creditors' Suits §§ 1–87.
Enforcement of lien see supra § 511.

97. Miss.—Ferguson v. Crowson, 25 Miss. 430.
34 C.J. p 739 note 14.

98. Ky.—Slaughter v. Mattingly, 159 S.W. 980, 155 Ky. 407.
34 C.J. p 739 note 15.

99. Ark.—Branch v. Horner, 28 Ark. 341.
34 C.J. p 739 note 16.

1. Mo.—King v. Hayes, 9 S.W.2d 538, 223 Mo.App. 138.
34 C.J. p 739 note 17.

2. Iowa.—Ware v. Delahaye, 64 N.W. 640, 95 Iowa 667.
34 C.J. p 739 note 18.
Recovery of judgment as condition precedent to creditors' suit see Creditors' Suits § 42.

3. Iowa.—Mudge v. Livermore, 123 N.W. 199, 148 Iowa 472.
34 C.J. p 739 note 19.

4. S.C.—Solomons v. Shaw, 25 S.C. 112.

5. Ky.—Hartford Fire Ins. Co. v. Green, 138 S.W.2d 933, 282 Ky. 466—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.
34 C.J. p 740 note 21.

6. Ga.—Schley v. Dixon, 24 Ga. 273, 71 Am.D. 121.
34 C.J. p 740 note 22.

7. U.S.—Hassall v. Wilcox, Tex., 9 S.Ct. 590, 130 U.S. 493, 32 L.Ed. 1001.
34 C.J. p 740 note 23.

8. U.S.—Rhodes v. Farmer, Miss., 17 How. 464, 15 L.Ed. 152.
34 C.J. p 740 note 24.

Evidence held insufficient
In an equitable action to enforce satisfaction of judgment, evidence was held not to warrant judgment against judgment debtor's sales agent on theory that it owed judgment debtor certain sum.—Rowan County Lumber Co. v. Kautz, 56 S.W.2d 1, 246 Ky. 732.

Where city complied with decree requiring it to maintain a certain flow over a weir to compensate for water diverted, fact that it thereafter increased diversion did not deprive it of benefits of decree, but rendered it liable for excess diversion.—Adirondack Power & Light Corporation v. City of Little Falls, 265 N.Y.S. 567, 148 Misc. 191.

9. Va.—Snead v. Atkinson, 92 S.E. 835, 121 Va. 182.
34 C.J. p 740 note 25.

10. Ky.—Hartford Fire Ins. Co. v. Green, 138 S.W.2d 933, 282 Ky. 466.
34 C.J. p 740 note 26.

that the particular property sought to be subjected to the judgment should be found within the state.[11] Under some statutes, where a court of equity has once acquired jurisdiction, it may decree the sale of land in any county.[12]

Limitations. Equity will not entertain a bill to enforce a judgment after the statute of limitations has run against the judgment at law.[13] Conversely, equity may entertain a bill or petition to enforce a judgment prior to the expiration of the time limited by the statute.[14]

Process and parties. The proceeding in equity is an action independent of that in which the judgment was rendered, and further process is necessary.[15] An assignee of a judgment may file a bill to enforce it,[16] or he may file a motion for a decree over against defendant.[17] All persons having interests in the particular property sought to be subjected should be joined as parties.[18]

Pleadings and evidence. In some jurisdictions the bill or petition must allege that plaintiff has recovered a judgment against defendant,[19] that execution has issued, directed to the county in which the judgment was rendered or in which defendant resided and was placed in the hands of an officer authorized to execute it,[20] who has made a return of no property found.[21] The bill must set forth fully the judgment on which it is based,[22] but pleading the judgment in general terms,[23] or alleging, in pleading a judgment of a court of general jurisdiction, that it was recovered in a named court, in a designated action,[24] or equivalent averments,[25] have been held sufficient. The bill should also allege the assignment of the judgment, if any, to complainant;[26] show the liability of respondent to satisfy it;[27] and negative the existence of an adequate remedy at law.[28] The evidence must clearly establish complainant's right to the relief prayed.[29]

Decree and relief. If the proceeding is merely to enforce the lien of the judgment, a personal decree for the payment of its amount will not be proper;[30] but otherwise the decree may be for the aggregate amount of the original judgment with interest and costs,[31] although this relief may not be given against defendants who are joined merely as claiming under alleged fraudulent conveyances from the judgment defendant.[32] The decree should generally give the debtor time to redeem from the sale ordered, although this is not indispensable;[33] but it should not undertake to adjust equities or settle partnership accounts between defendants.[34] Com-

11. Ky.—Trabue v. Conners, 1 S.W. 470, 84 Ky. 283, 8 Ky.L. 288—De Wolf v. Mallett, 3 Dana. 214.

12. W.Va.—Laidley v. Reynolds, 52 S.E. 405, 58 W.Va. 418.

13. Minn.—Dole v. Wilson, 40 N.W. 161, 39 Minn. 330.
34 C.J. p 740 note 29.

14. Tenn.—Williams v. Cantrell, 124 S.W.2d 29, 22 Tenn.App. 443.

15. Ky.—Dameron v. Osenton, 12 Ky.Op. 723.

16. Tenn.—Williams v. Cantrell, 124 S.W.2d 29, 22 Tenn.App. 443.

Prior assignee

Assignee of judgment, who was entitled to priority over second assignee, was a necessary party to suit to enforce judgment brought by second assignee.—Wappler v. Woodbury Co., 158 N.E. 56, 246 N.Y. 152.

17. Tenn.—Williams v. Cantrell, 124 S.W.2d 29, 22 Tenn.App. 443.

18. Ky.—Garrison v. Clark, 152 S.W. 581, 151 Ky. 565.
34 C.J. p 740 note 31.

19. Ky.—Hartford Fire Ins. Co. v. Green, 138 S.W.2d 933, 282 Ky. 466—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.

20. Ky.—Hartford Fire Ins. Co. v. Green, 138 S.W.2d 933, 282 Ky. 466—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.

Petition held sufficiently specific to disclose that judgment was rendered in county wherein execution was issued.—Dade Park Jockey Club v. Commonwealth, by Auditor of Public Accounts, 69 S.W.2d 363, 253 Ky. 314.

21. Ky.—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.

Allegations held sufficient

A bill in equity seeking to enforce a judgment and set aside alleged fraudulent transfers on property need not allege facts showing excuse for delay in filing the bill after the elapse of ten years from the date of the last execution, it being sufficient simply to allege that the judgment remains unsatisfied.—Fleming v. Fowlkes & Myatt Co., 85 So. 690, 204 Ala. 284.

Valid return

Statute requiring bill to enforce judgment lien to state that writ of fieri facias has been returned "no property found" contemplates valid return.—Lopinsky v. Preferred Realty Co., 163 S.E. 1, 111 W.Va. 553.

22. Ind.—Brookshire v. Lomax, 20 Ind. 512.
W.Va.—Dickinson v. Chesapeake & O. R. Co., 7 W.Va. 390.

23. Ky.—Hartford Fire Ins. Co. v. Green, 138 S.W.2d 933, 282 Ky. 466—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.

24. Cal.—Blake v. Blake, 260 P. 937, 86 Cal.App. 377.

25. Cal.—Blake v. Blake, supra.

26. Ky.—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223.
34 C.J. p 740 note 33.

27. N.Y.—Smith v. Ballantyne, 10 Paige 101.

28. U.S.—Knox v. Smith, Tenn., 4 How. 298, 11 L.Ed. 983.

29. Ill.—Turner v. Jenkins, 79 Ill. 228.

30. Ky.—Peck v. Trail, 65 S.W.2d 83, 251 Ky. 377—Shaw v. McKnight-Keaton Grocery Co., 21 S.W.2d 269, 231 Ky. 223—Smith v. Belmont, 11 Bush 390—Farmer v. Porch, 12 Ky.Op. 633, 5 Ky.L. 933.
34 C.J. p 740 note 37.
Enforcement of lien generally see supra § 511.

31. W.Va.—Douglass v. McCoy, 24 W.Va. 722.
34 C.J. p 741 note 38.

32. Ala.—Lang v. Brown, 21 Ala. 179, 56 Am.D. 244.
Fla.—Roper v. Hackney, 15 Fla. 323.

33. Va.—Crawford v. Weller, 23 Gratt. 835, 64 Va. 835.

34. W.Va.—Kent v. Chapman, 18 W.Va. 485.

plainant cannot, by a petition to enforce a judgment in his favor dismissing an action for an injunction and an accounting and awarding him costs, have an issue adjudicated where he failed to ask for any affirmative relief and none was granted him by the judgment.[35]

§ 588. Scire Facias to Enforce

Scire facias may be used as a process for obtaining the enforcement of a judgment when authorized by statute or in special cases.

Scire facias may be employed as a process for obtaining the enforcement of the judgment when authorized by statute, or in special cases,[36] as where the judgment includes installments of a debt subsequently to accrue,[37] or where it embodies an express condition or is to be released on performance of an act in pais.[38] In a proper case, the writ is available to the assignee of a judgment.[39]

Since scire facias is a judicial, and not an original, writ, it should issue from, and be returned to, the court which rendered judgment and has possession of the record.[40] Generally issues which were or might have been raised prior to entry of judgment will not be considered on scire facias thereon;[41] but this rule is inapplicable if the invalidity of the judgment clearly appears from the record.[42] The question whether or not a judgment is void on its face may be properly considered on a motion to dismiss and quash service of the writ;[43] but the question whether or not the allegations of the writ comply with statutory regulations thereto should be raised by demurrer and not on motion to quash.[44] Scire facias is of course not available in jurisdictions where it has been abolished by statute.[45]

Scire facias addressed to the devisees of a judgment debtor is in the nature of a proceeding in rem.[46] The writ must allege that the debtor was dead at the time it was issued, that he left a will under which the addressees succeeded to his realty as his sole devisees, and describe the realty.[47]

§ 589. Scire Facias to Obtain New Execution

Scire facias to obtain new execution is discussed in Executions § 85, and scire facias to revive a dormant judgment supra § 548.

Examine Pocket Parts for later cases.

§ 590. Proceedings to Make Parties

Joint debtors not originally summoned may be made liable to a judgment by being summoned in accordance with statutes providing therefor, or by means of scire facias, where the common-law practice prevails, requiring them to show cause why the judgment should not be effective against them.

Where judgment has been recovered against one or more of several persons jointly indebted on a contract, the others not having been served, it is sometimes provided by statute that the judgment may be made effective against those defendants not originally served, by summoning them afterward to show cause why they should not be bound by the judgment.[48] Such proceeding is not an action on the judgment,[49] or one to enforce such judgment;[50] nor, strictly speaking, is it an action on the original liability.[51] It is a statutory proceeding based partly on the former judgment and partly on the original

35. Ind.—Wagner v. McFadden, 31 N.E.2d 628, 218 Ind. 400.

36. Tenn.—**Corpus Juris cited in** Williams v. Cantrell, 124 S.W.2d 29, 32, 22 Tenn.App. 443.
34 C.J. p 741 note 44.
Necessity of scire facias or other proceedings before issuing execution after:
Death of party see Executions § 65.
Lapse of time see Executions § 59.
Scire facias generally see the C.J.S. title Scire Facias §§ 1–20, also 56 C.J. p 866 note 1 et seq.
Scire facias to revive judgment see supra § 548.

37. Ky.—Outen v. Mitchels, 1 Bibb 360.
34 C.J. p 741 note 45.

38. Pa.—Templeton v. Shakley, 107 Pa. 370—Montelius v. Montelius, 5 Pa.L.J. 88.

39. Tenn.—Williams v. Cantrell, 124 S.W.2d 29, 22 Tenn.App. 443.

40. U.S.—Green v. Langnes, C.C.A. Wash., 82 F.2d 926.
34 C.J. p 741 note 47.
Jurisdiction and authority to issue writ generally see the C.J.S. title Scire Facias § 8, also 56 C.J. p 871 notes 72–78.

41. Del.—Woods v. Spoturno, 183 A. 319, 7 W.W.Harr. 295, reversed on other grounds Spoturno v. Woods, 192 A. 689, 8 W.W.Harr. 378.
Pa.—Calvey Motor Co. v. Brogan, 33 Luz.Leg.Reg. 272.

42. Del.—Woods v. Spoturno, 183 A. 319, 7 W.W.Harr. 295, reversed on other grounds Spoturno v. Woods, 192 A. 689, 8 W.W.Harr. 378.

43. Del.—Woods v. Spoturno, 183 A. 319, 7 W.W.Harr. 295, reversed on other grounds Spoturno v. Woods, 192 A. 689, 8 W.W.Harr. 378.

44. Del.—Woods v. Spoturno, 183 A. 319, 7 W.W.Harr. 295, reversed on other grounds Spoturno v. Woods, 192 A. 689, 8 W.W.Harr. 378.

45. Idaho.—Bashor v. Beloit, 119 P. 55, 20 Idaho 592.

46. D.C.—Waters v. Taylor, 284 F. 639, 52 App.D.C. 135.

47. D.C.—Waters v. Taylor, supra.

48. Cal.—Carson v. Lampton, 73 P. 2d 629, 23 Cal.App.2d 535.
34 C.J. p 741 note 50—33 C.J. p 1123 notes 84, 85.
Subsequent proceeding to charge partners not served see the C.J.S. title Partnership § 235, also 47 C. J. p 1013 notes 32–38.

49. N.Y.—Hofferberth v. Nash, 120 N.Y.S. 317, 117 App.Div. 284, affirmed 84 N.E. 400, 191 N.Y. 446.
33 C.J. p 1123 note 87.
Action on statutory joint judgment see supra § 33.

50. N.Y.—Morey v. Tracey, 92 N.Y. 581.
33 C.J. p 1124 note 88.

51. Wis.—Dill v. White, 9 N.W. 404, 52 Wis. 456.
33 C.J. p 1124 note 89.

liability.[52] While the statutory proceeding to bind the absent debtor has been held to be exclusive,[53] it has also been held to be merely cumulative, and not exclusive of other remedies,[54] and that, therefore, a second action may be maintained against all the defendants to the original action, on the original cause of action;[55] such second action is not an action on the original judgment.[56] Such statutes frequently contain provisions limiting the time within which the new parties may be summoned.[57]

Joint debtors not originally summoned may also be made liable to the judgment in those states where the common-law practice prevails by means of a scire facias requiring them to show cause why they should not be so bound.[58] This writ is also an appropriate common-law process for making a person a party defendant to the judgment, who, since its rendition, has become chargeable to an execution thereon, or in some way accountable for the assets of the original defendant, as in the case of subsequent purchasers, heirs, and devisees.[59] Where a scire facias issues to make one a party to a judgment, the trial as to him should be conducted as if no judgment has been rendered against his codefendant, and such defendant has a right to make every defense which he might have made had he been served with summons and a hearing had as to him at the same time that the cause was heard as to his codefendant.[60]

§ 591. Scire Facias on Justice's Transcript

Where a transcript of a justice's judgment is entered in a court of record for purposes of lien and execution, a scire facias either to revive it or to obtain an execution against lands must issue from the superior court.

Where a transcript of a justice's judgment is entered in a court of record for purposes of lien and execution as discussed supra § 129, a scire facias either to revive it or to obtain an execution against lands must issue from the superior court.[61] In such a proceeding the merits and the validity of the justice's judgment cannot be inquired into, if want of jurisdiction is not apparent.[62] The writ should be correctly entitled in the names of the parties to the original judgment,[63] and should show the rendition of a valid judgment by the justice,[64] the amount due on it,[65] the issue and return of execution on it, if any,[66] and that the transcript was duly certified by the justice[67] and filed or recorded in the superior court.[68] If the scire facias appears on its face to be valid, a motion to quash it will be overruled.[69]

Defendant may deny the existence of the judgment or transcript,[70] allege its alteration in a material particular,[71] or deny its filing in the superior court.[72] The allegation that he has lands within the county which are subject to execution must be proved,[73] unless he appears and suffers judgment by nil dicit.[74] The issue and return of execution from the justice's court is provable by producing the original execution or a certified or sworn copy.[75]

52. Cal.—Cooper v. Burch, 74 P. 37, 140 Cal. 548.
N.Y.—Hofferberth v. Nash, 102 N.Y. S. 317, 117 App.Div. 284, affirmed 84 N.E. 400, 191 N.Y. 446.

53. Cal.—Cooper v. Burch, 74 P. 37, 140 Cal. 548—Tay v. Hawley, 39 Cal. 93.

54. N.Y.—Lane v. Salter, 51 N.Y. 1.
33 C.J. p 1124 note 92.

55. N.Y.—Oneida County Bank v. Bonney, 4 N.E. 332, 101 N.Y. 173.
33 C.J. p 1124 note 93.

56. N.Y.—Dean v. Eldridge, 29 How. Pr. 218.

57. Cal.—Christina v. Baker, 82 P. 2d 722, 28 Cal.App.2d 412—Carson v. Lampton, 73 P.2d 639, 23 Cal. App.2d 535.

58. Mont.—Kleinschmidt v. Freeman, 2 P. 275, 4 Mont. 400.
34 C.J. p 741 note 51.

59. Tenn.—Carney v. Carney, 200 S. W. 517, 138 Tenn. 647.
34 C.J. p 742 note 52.

60. Ill.—Lasman v. Harts, 112 Ill. App. 82.
Evidence held insufficient to sustain judgment against party.—Armstrong v. Quill, 153 Ill.App. 81.

61. Ind.—Miller v. Shearer, 6 Ind. 50.
34 C.J. p 742 note 54.

62. Del.—Hill v. Brown, 4 Del. 519.
34 C.J. p 742 note 55.

63. Ind.—Codding v. Moore, 5 Blackf. 601.
34 C.J. p 742 note 56.

64. Ind.—Roller v. Custer, 6 Blackf. 433.
34 C.J. p 742 note 57.

65. Ind.—Orput v. Hardy, 6 Blackf. 456.

66. Ind.—Shiel v. Ferriter, 7 Blackf. 574.
34 C.J. p 742 note 59.

67. Ind.—Nevils v. Campbell, 7 Blackf. 325.

68. Ind.—Nowland v. Jackson, 1 Ind. 162.
34 C.J. p 742 note 61.

69. Ind.—Hoover v. Davenport, 5 Blackf. 230.

70. Ind.—Scott v. Williams, 7 Blackf. 370.

71. Ind.—Roller v. Custer, 6 Blackf. 433.

72. Ind.—Bennett v. Jones, 7 Blackf. 110.

73. Ind.—Shiel v. Ferriter, 7 Blackf. 574—Roller v. Custer, 6 Blackf. 433.

74. Ind.—Groves v. McCabe, 8 Blackf. 88.

75. Ind.—Henkle v. German, 6 Blackf. 423.

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