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COUNSEL FEES AND OTHER EXPENSES OF LITIGATION AS AN ELEMENT OF DAMAGES†

BY CHARLES T. McCORMICK*

1. HISTORY AND SCOPE OF COSTS AWARDED AT COMMON LAW.

ACCORDING to Pollock and Maitland it is probable that before the time of Edward I, in many actions for damages, "a successful plaintiff might often under the name of 'damages' obtain a compensation which would cover the costs of litigation as well as all other harm that he had sustained."¹ This rule allowing plaintiff his "costs" was broadened in 1275 by the Statute of Gloucester to cover also actions for the recovery of land, then an all-important type of litigation. A series of statutes, beginning in the reign of Henry VIII and ending in that of Anne,² extended finally the same advantage to successful defendants. Thus, in the common law courts, the rule became established in England long before the American Revolution that except in some cases where the plaintiff recovers only trivial damages, the party who wins a law suit is entitled to recover from the losing adversary the "costs" of the litigation.

These "costs" under the English system included not merely the fees which the party has had to pay to the officers of the court at the different stages of the litigation, but likewise the fees

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†This article will form the basis of a chapter in an elementary textbook on Damages, which will be published by the West Publishing Company, St. Paul, Minn.

¹2 Pollock and Maitland, *History of English Law*, 2nd ed., 597, quoted in an illuminating recent article by Professor A. L. Goodhart, *Costs* (1929) 38 *Yale L. J.* 849 (describes the English system of costs and compares it with the American).

²See 3 *Blackstone Commentaries* 400.

which he has had to pay to his own lawyers,³ both attorney or solicitor and counsel or barrister,⁴ within certain limits. "Costs" also included certain other expenses of preparing his case for trial. This extensive indemnity for counsel fees and other expenses as "costs" continues to-day in England under the practice instituted by the Judiciary Act of 1875, but it is governed by rules of court and not by statute, and instead of the automatic allowance of costs to the prevailing party the awarding of costs is within the discretion of the court.⁵

The English system of costs, in its general outline, seems to have been transplanted in this country before the Revolution and the classical English rules by which costs are awarded in actions at law to the successful party except in trivial recoveries remains the usual rule in most of the states today. It was, however, apparently customary in each state to incorporate in the local statutes detailed provisions setting out the allowable charges for attorney's and counsel fees and the other items of expense for which recovery was given under the head of costs. However, the attorney's fees which were thus prescribed were rigidly limited in amount though, under the conditions then obtaining, doubtless they were a substantial contribution toward the fees actually paid by the client. In Virginia, for example, it was enacted that in county court actions there should be taxed as costs an attorney's fee of "fifteen shillings or one hundred and fifty pounds of tobacco."⁶ But the principle of full compensation for expenses of litigation never became fully a part of the American tradition, for these statutes fixing the scale of taxable attorneys' fees have nowhere in this country been revised to keep pace with the fall in the value of money.⁷ Consequently, we find to-day that where

³Goodhart, *Costs*, (1929) 38 *Yale L. J.* 849, 856-59. A detailed description of the items allowed at the present time is given in *The Annual Practice*, 1930, appendix, note 1742 et seq.

⁴The attorneys or solicitors deal directly with the client and handle all his legal business except that in the superior courts. The actual trial of cases is conducted by barristers or counsel who also may be consulted by the solicitors for opinions on difficult matters of law and may be called in to advise in the drafting of important documents. Goodhart, *Costs*, (1929) 38 *Yale L. J.* 849, 856, n. 38.

⁵Order lxxv, r. 1, *The Annual Practice*, 1930, 1337; Goodhart, *Costs*, (1929) 38 *Yale L. J.* 849, note 4, 860.

⁶Virginia, *Laws Feb. 1745*, ch. 6, sec. 14, 5 *Henning, Stat. at L.* 344.

⁷The evaluation of the fee-bill in South Carolina, as an example, may be traced by examining the Acts of 1694, 2 *Cooper, Stat. at L.* 86, 92; 1736, 3 *Cooper, Stat. at L.* 418; 1791, 5 *Cooper, Stat. at L.* 154; and 1827, 6 *Cooper, Stat. at L.* 332. In the earliest statute, the plain-

attorneys' fees are included at all in the regular taxable costs, the sums allowed are merely nominal and wholly inadequate to compensate the counsel to whom they are allowed and whose charges therefore must be almost entirely borne from the pocket of the party employing him. For example, in the federal courts, a docket fee of twenty dollars is allowed as costs to the attorney for the prevailing party,⁸ and in Pennsylvania for the prosecution of a suit to judgment an attorney's fee of three dollars is awarded.⁹ In New Hampshire, counsel fees may be taxed in the sum of one dollar.¹⁰

The form of indemnity for this expense is thus retained in some states but the reality has vanished, for the doctrine is firmly established in this country that taxable costs are the outside limit of indemnity for expenses of the present litigation.

2. RECOVERY OF ATTORNEY'S FEES AND OTHER EXPENSES OF LITIGATION DENIED IN ACTIONS AT LAW.

We shall see that sometimes actual expenses including counsel fees, in addition to the costs taxed by the court, of another *previous* litigation may be recovered.¹¹ The rule, however, is universal in this country that in actions for debt or damages, or for the recovery of land or chattels, i.e. actions which under the older system would have been at law rather than in equity, admiralty, or probate, the successful party cannot recover counsel fees, expenses of witnesses, travel cost, or any other outlay incident to preparing and trying his case, except to the limited ex-

tiff's attorney received sixteen shillings for his services up to and including the filing of the declaration, and under the latest the corresponding fees amounted to eight dollars. The Virginia fifteen shilling statute of 1745, 5 Henning, Stat. at L. 344 was still followed in Kentucky seventy-five years later, see Rankin v. McDowell, (1820) 2 A. K. Marsh (Ky.) 621.

⁸28 U.S.C.A. sec. 572, Mason's U. S. Code tit. 28, sec. 572. This provision has remained practically unchanged since 1853 (Act of Feb. 26, 1853, ch. lxxx, 10 Stat. at L. 161). In 1793 the Congress had fixed the scale of compensation for parties' "travel and attendance, and for attorneys' and counsellors' fees," except in admiralty, at the sums allowed in the courts of the respective states, Act of March 1, 1793 ch. xx, 1 Stat. at L. 333. The act was temporary and whether it was later made permanent is doubtful. Its subsequent history is recounted in Hathaway v. Roach, (1846) 2 Woodb. & M. 63, 11 Fed. Cas. No. 6213.

⁹Pennsylvania, Statutes, West 1920, sec. 10702, originally enacted in 1821.

¹⁰Jaques v. Manchester Coal & Ice Co., (1916) 78 N. H. 248, 100 Atl. 47.

¹¹See secs. 7-10, post, pages 630-636.

tent that these items are included, under statutory authorization, in the taxable costs,¹² or are specifically made recoverable by statute in special types of cases,¹³ or are recoverable by virtue of a contract by a party to pay them.¹⁴

Attorney's fees and other legal expenses may be considered in measuring exemplary damages in some states,¹⁵ and thus indirectly enter into the jury's award, but it is not even in such cases recovered as an item of compensation to which the plaintiff is entitled.

3. THE ALLOWANCE OF COUNSEL FEES AND OTHER EXPENSES FROM A COMMON FUND

The earlier sections of this article have dealt with the extent to which the common law courts will give an award of expenses of litigation against an adversary merely because he has resisted a proper claim or has prosecuted an improper one. To be distinguished from these cases are cases which involve a different situation not ordinarily presented in the simple contentious litigation typical of the common law courts. Under the English system, where a fund or estate needed to be distributed among a number

¹²Denying counsel fees: *O. S. Stanley Co. v. Rogers*, (1923) 25 Ariz. 308, 216 Pac. 1072; *St. Peter's Church v. Beach*, 1857) 26 Conn. 355; *United Power Co. v. Matheny*, (1909) 81 Ohio St. 204, 90 N. E. 154, 28 L. R. A. (N.S.) 761; *Corinth Bank & Trust Co. v. Security N. Bank*, (1923) 148 Tenn. 136, 252 S. W. 1001; see *Decennial Digests, Costs, Key No. 172*, and *Damages, Key Nos. 71 and 72*.

Denying other expenses: *Parke v. McDaniels*, (1865) 37 Vt. 594; *Good v. Mylin*, (1848) 8 Pa. St. 51, 49 Am. Dec. 493; *Boardman v. Marshalltown Gro. Co.*, (1898) 105 Iowa 445, 75 N. W. 343.

¹³See, post, sec. 6, pages 626-630.

¹⁴The most common example of such contracts is the attorney's fee clause customarily included in promissory notes in some states whereby the maker promises to pay an attorney's fee in case the note on default is placed in an attorney's hands. Occasionally a similar promise is inserted in other types of contracts. In most states such contracts are held valid if not so excessive as to be penal. *Vingard v. Republic Iron & Steel Co.*, (1921) 205 Ala. 269, 87 So. 552; *McClain v. Continental Supply Co.*, (1917) 66 Okla. 225, 168 Pac. 815; *Colley v. Summers Parrott Hardware Co.*, (1916) 119 Va. 439, 89 S. E. 906, Ann. Cas. 1917D 375. A minority of jurisdictions, however, regard them as penal and invalid regardless of reasonableness. *Security Finance Co. v. Hendry*, (1925) 189 N. C. 549, 127 S. E. 629; *Ralston v. Stone*, (1925) 113 Or. 506, 232 Pac. 631; *First N. Bank of Pineville v. Sanders*, (1916) 77 W. Va. 716, 88 S. E. 187. See *Decennial Digests, Bills and Notes, Key No. 110*, and *2 Williston, Contracts 786*.

¹⁵*Marshall v. Bitner*, (1850) 17 Ala. 832; *Craney v. Donovan*, (1917) 92 Conn. 236, 102 Atl. 640; *Titus v. Corkins*, (1879) 21 Kan. 722. See the present writer's article on "Some Phases of the Doctrine of Exemplary Damages," (1930) 8 N. C. L. Rev. 129, 148.

of claimants—who might be disputing among themselves but might also have a common interest in protecting the fund against outsiders—such a situation was usually dealt with by tribunals other than common law courts. Among the principal judicial agencies to whom this function of distributing or administering such funds was delegated were courts of equity, courts having probate jurisdiction, and courts of bankruptcy. Despite the modern amalgamation of courts, the distinctions in procedure between the simple common law types of litigation (chiefly actions for damages and for the recovery of specific property) and the functions which are distributive in the sense above indicated still remain. In such distributive proceedings it frequently happens that some party to the proceedings (usually himself one of the claimants to a share in the fund or estate) is especially active in bringing into the hands of the court for administration the entire estate, or in increasing the estate by establishing claims to additional money or property, or in protecting the estate from the claims of outsiders, or in defeating unfounded or excessive claims of particular distributees. In all types of such administrative proceedings the principle is well established that where one of the parties has thus by active litigation created, increased or protected a common fund which is in the hands of the court for distribution and which other claimants will share, such party is equitably entitled to be reimbursed out of the fund itself for his reasonable counsel fees and other expenses.¹⁶ Obviously, also, similar rea-

¹⁶A leading case is *Internal Improvement Fund v. Greenough*, (1881) 105 U. S. 527, 26 L. Ed. 1157. In that case the title to several millions of acres of Florida land was vested in trustees to secure the payment of the bonds of a railway company. Vose, one of the bondholders, on behalf of all the bondholders, brought a suit in which he alleged that the trustees had fraudulently disposed of a large part of the land at nominal prices and in which he sought and secured the setting aside of some of the fraudulent conveyances, and the removal of the trustees and the administration of the property by the court so as to realize a substantial sum of money for the bondholders. On appeal the court approved the allowance from the fund to Vose of his counsel fees and certain expenditures incurred in the prosecution of the suit amounting to about \$55,000, and said, "It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution."

In *Drain v. Wilson*, (1921) 117 Wash. 34, 200 Pac. 581, the plain-

sonable expenses of the officer of the court who administers the fund, such as a receiver in equity,¹⁷ trustee in bankruptcy,¹⁸ or executor or administrator,¹⁹ will likewise be allowed from the funds. This applies also to the mere custodian or possessor, not judicially appointed, who is forced to litigate to protect the fund or property, such as a pledgee,²⁰ garnishee,²¹ or one who by interpleader proceedings brings the fund into court for distribution among rival claimants.²²

4. MAY A COURT OF EQUITY ALLOW COUNSEL FEES AND EXPENSES AGAINST ONE WHO ASSERTS A GROUNDLESS CLAIM OR DEFENCE?

The allowance of expenses of litigation out of a common fund as a recompense for protecting the fund has habituated the courts of equity to the practice of awarding counsel fees and similar outlays, and it might have been expected that in this country in equity suits the English practice of making such allowance to the successful party, regardless of the existence of a fund, in the

tiffs were four of the heirs at law of a decedent who had previously instituted proceedings against the administrator to compel him to account for certain moneys owed by him to the decedent as part of the estate. This suit was successful, but the later discovery of a will disclosed that only two of the plaintiffs had any interest in the estate. Nevertheless, the court held that the plaintiffs were entitled to recover a reasonable counsel fee from the estate which had been augmented by their activity.

The principle is frequently applied to suits by minority stockholders to remedy wrongs done or threatened to the corporation or to recover corporate property where the officers and directors have acted wrongfully or have refused to protect the interests of the corporation. *Decatur Mineral Lands Co. v. Palm*, (1896) 113 Ala. 531, 21 So. 315, 59 Am. St. Rep. 140.

In bankruptcy cases by express statutory authorization, certain allowances for counsel fees or expenses are made to the petitioning creditors who by instituting the proceedings cause the estate to be impounded, to creditors who recover property for the estate, and to creditors who successfully oppose a composition. 11 U. S. C. A., sec. 104 (b), (2), (3), (4), Mason's U. S. Code, tit. 11, sec. 104 (b), (2), (3), (4).

An elaborate collection of decisions on the allowance of counsel fees from the fund is presented in a note in 49 A. L. R. 1149.

¹⁷*Johnston v. Stephens*, (1924) 206 Ky. 83, 266 S. W. 881.

¹⁸*In re Union Dredging Co.*, (D. C. Del. 1915) 225 Fed. 188.

¹⁹*Harrison v. Perea*, (1897) 168 U. S. 325, 18 Sup. Ct. 129, 42 L. Ed. 483.

²⁰*Bank of Picher v. Harris*, (1924) 100 Okla. 256, 229 Pac. 137, 40 A. L. R. 254; and see *Decennial Digests*, Pledges, Key No. 27.

²¹*National Fire Ins. Co. v. McEvoy Furniture Co.*, (Tex. Civ. App. 1917) 192 S. W. 270, and see *Decennial Digests*, Garnishment, Key No. 191.

court's discretion, would be generally followed. This liberal and enlightened practice is indeed adopted by statute in New Jersey.²³ It is fairly well settled that the general rule in equity cases, apart from the common fund cases, is similar to that which obtains at law,—that statutory costs mark the outside limit of recovery for expenses of litigation.²⁴

An interesting and important recent decision in the circuit court of appeals for the eighth circuit in which a learned and vigorous opinion was written by Booth, Circuit Judge, reviews historically the powers and practice of the federal courts of equity in regard to costs, and concludes that in chancery suits, though not in actions at law, the court has the discretionary power to allow costs "beyond the statutory scale, as between solicitor and client," including counsel fees and expenses, and that this discretion is properly exercised against a party who has vexatiously instituted groundless litigation against a pledgee attacking the pledgor's title to the property and the validity of the debt due the pledgee.²⁵ The decision may be the benchmark of a new and salutary doctrine in

²²McNamara v. Provident Sav. Life Assur. Soc., (C.C.A. 5th Cir. 1902) 52 C. C. A. 530, 114 Fed. 910 and cases collected in Decennial Digests, Interpleader, Key No. 35.

²³1 New Jersey, Comp. St., 1910, title, Chancery, sec. 91, "In any cause, matter or proceeding in the court of chancery the chancellor may make such allowances by way of counsel fee to the party or parties obtaining the order or decree as shall seem to him to be reasonable and proper, and shall direct which of the parties shall pay such allowances; or, where such allowances are ordered to be paid out of property or funds, shall specify and direct the property or funds liable therefor. The chancellor may provide for the inclusion of such allowances in the taxable costs, or may provide for their collection in such other manner as is agreeable to the practice of the court. Such allowances shall be in lieu of any allowance for counsel fees now provided for by statute. In uncontested foreclosure causes, the allowance for counsel fees shall not exceed five per centum of the amount decreed for principal and interest, and shall be regulated by the chancellor from time to time by a general rule; but in contested foreclosure causes, counsel fees may be allowed to any party as herein provided for in other causes, matters or proceedings in the court of chancery." *Moffatt v. Neimitz*, (1928) 102 N. J. Eq. 112, 139 Atl. 798.

²⁴*Patterson v. Northern Trust Co.*, (1919) 286 Ill. 564, 122 N. E. 55 (Solicitor's fee of trustee, for defending frivolous suit of one of the beneficiaries, allowed to be charged against the share of the complaining beneficiary but the motion that it be taxed as costs against the beneficiary denied in the absence of statutory authority); *Parker v. Mecklenberg Realty & Ins. Co.*, (1928) 195 N. C. 644, 143 S. E. 254 (In suit to cancel notes and deed of trust for fraud, and for damages, counsel fees not to be taxed as costs).

²⁵*Guardian Trust Co. v. Kansas City So. Ry. Co.*, (C.C.A. 8th Cir. 1928) 28 F. (2d) 233.

the federal courts that in equity the chancellor, even in cases where no common fund is involved, may in his discretion award counsel fees and expenses as costs against the losing party, at least where the litigation has been groundless and vexatious. This decision has, however, been reversed by the Supreme Court of the United States,²⁶ which did not pass upon this question which remains an open one in the federal courts.

5. THE ALLOWANCE OF COUNSEL FEES AND EXPENSES IN SUITS FOR DIVORCE OR SEPARATION.

In most states the court has the power, in a suit for divorce or judicial separation, to make an order requiring the husband to pay the reasonable counsel fees incurred or to be incurred by the wife in the prosecution or defense of the suit.²⁷ The practice derives from the husband's duty to support the wife. Consequently, the allowance may be made though the wife is unsuccessful in the suit.²⁸ The impecunious husband has no corresponding right to such allowance from the wife.²⁹ The conditions upon the making of such allowance for "suit-money" to the wife in divorce litigation vary from state to state. Statutes frequently regulate the matter.

The special nature of the marital relation and the husband's duty to support explain the allowance of such expenses in this narrow class of cases, which have little bearing upon the general topic of counsel fees and suit expenses as an element of recovery.

6. STATUTORY PROVISIONS FOR THE RECOVERY OF ATTORNEYS' FEES IN SPECIAL CLASSES OF LITIGATION.

We have seen that in all the states provision for the recovery of attorneys' fees as part of the costs of the litigation in which the fees were incurred is either entirely lacking or is in the arrested development stage where amounts fixed by early statutes are now entirely inadequate and trivial as compared with the

²⁶(1930) 281 U. S. 1, 50 Sup. Ct. 194, 74 L. Ed. 659.

²⁷Jensen v. Jensen, (Neb. 1930) 229 N. W. 770; Richard v. Richard, (1930) 142 Okla. 302, 286 Pac. 900; Ortman v. Ortman, (1919) 203 Ala. 167, 82 So. 417; Walker v. Walker, (1923) 190 Cal. 575, 213 Pac. 967; Cason v. Cason, (1924) 158 Ga. 395, 123 S. E. 713; Crane v. Crane, (1916) 128 Md. 214, 97 Atl. 535; Smiley v. Smiley, (1925) 136 Wash. 241, 239 Pac. 551 (travel expense of wife); and cases cited Decennial Digests, Divorce, Key No. 221.

²⁸Towson v. Towson, (1919) 49 App. D. C. 45, 258 Fed. 517.

²⁹State v. Superior Court, (1922) 121 Wash. 359, 207 Pac. 227, (Wash. 1923) 211 Pac. 767, 24 A. L. R. 488.

actual prevailing scale of charges by lawyers. Among the few instances where any very widely applicable provisions are made for the allowance of counsel fees are the statute of New Jersey, already referred to, which makes it discretionary with the chancellor in equity cases to allow a reasonable counsel fee to a party who is successful in securing an order or decree,³⁰ and the provisions in the city code of Baltimore which in actions on contract, express or implied, brought under the speedy judgments procedure, enable the successful party in case of dispute and trial to recover a reasonable counsel fee, not less than twenty-five nor more than one hundred dollars,³¹ and finally the section of the Georgia Code which permits the jury to allow the plaintiff his expenses of litigation in any case where "the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense."³²

In many, if not most of the jurisdictions of this country while such general provisions for the recovery of counsel fees are lacking, isolated statutes have been passed setting up certain special classes of cases wherein the allowance of attorneys' fees is provided for. Thus, under acts of Congress, reasonable attorneys' fees are allowed to the successful claimant in actions to enforce orders of the Interstate Commerce Commission against carriers for the payment of money,³³ and the same allowance may be made to the "prevailing party" in actions for the infringement of the copyright law³⁴ and to one who successfully sues for injury caused by violating the anti-trust laws.³⁵

The legislatures of the states have quite generally adopted such special attorney's fees statutes. The classes of cases most commonly singled out are cases of claims against carriers for freight, overcharges, wages, killing of stock, setting fires, and the like,³⁶ and claims against life and fire insurance companies

³⁰See note 23, *supra*.

³¹Maryland, Laws 1898, ch. 123, sec. 315, p. 394, amended by Laws 1908, ch. 644, p. 608 (applied in *Hammond v. American Express Co.*, (1908) 107 *Mr.* 295, 313, 68 *Atl.* 496; and *Mutual Life Ins. Co. v. Murray*, (1909) 111 *Md.* 600, 608, 75 *Atl.* 348.

³²Georgia Code, 1910, sec. 4392.

³³49 U. S. C. A. sec. 16 (2), *Mason's U. S. Code*, tit. 49, sec. 16 (2) held constitutional in *Meeker v. Lehigh Valley Ry. Co.*, (1914) 236 U. S. 412, 35 *Sup. Ct.* 328, 59 *L. Ed.* 644, *Ann. Cas.* 1916B 691.

³⁴17 U. S. C. A. sec. 40, *Mason's U. S. Code*, tit. 17, sec. 40.

³⁵15 U. S. C. A., sec. 15 (*Clayton Act*), *Mason's U. S. Code*, tit. 15, sec. 15.

³⁶See the statutes discussed in *Missouri, K. & T. Ry. Co. v. Cade*, (1914) 233 U. S. 642, 34 *Sup. Ct.* 678, 58 *L. Ed.* 1135; *Atlantic Coast*

upon policies of insurance.³⁷ Other classes of cases sometimes selected are election contests,³⁸ actions for slander,³⁹ eminent domain proceedings,⁴⁰ suits against non-residents,⁴¹ wage claims,⁴² and suits by laborers and material men to enforce mechanics' liens.⁴³ Often a liability for an attorney's fee is imposed as an additional penalty for violation of statutes, as in cases of violation of laws requiring railways to fence their right-of-way⁴⁴ or to keep them free of combustible material,⁴⁵ cases of failure to pay taxes,⁴⁶ or special assessments⁴⁷ promptly, violations of stat-

Line Ry. Co. v. Coachman, (1910) 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047; Smith v. Chicago, St. P. M. & O. Ry. Co., (1916) 99 Neb. 719, 157 N. W. 622; Missouri K. & T. Ry. Co. v. Simson, (1902) 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 768, 91 Am. St. Rep. 248.

³⁷See statutes discussed in Fidelity Mutual Life Ins. Co. v. Mettler, (1902) 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; Arkansas Ins. Co. v. McManus, (1908) 86 Ark. 115, 110 S. W. 797; Fillis v. Liverpool L. & G. Ins. Co., (1903) 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89; Harp v. Fireman's Fund Ins. Co., (1908) 130 Ga. 726, 61 S. E. 704, 14 Ann. Cas. 299; British Am. Assur. Co. v. Bradford, (1898) 60 Kan. 85, 55 Pac. 335; Keller v. Home Life Ins. Co. (1906) 198 Mo. 440, 95 S. W. 903; Johnson v. St. P. F. & M. Ins. Co., (1920) 104 Neb. 831, 178 N. W. 926; Union C. L. Ins. Co. v. Chowning, (1894) 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; Hartford Fire Ins. Co. v. Wilson Co., (C.C.A. 5th Cir. 1925) 4 F. (2d) 835.

³⁸Doty v. Reece, (1917) 53 Mont. 404, 164 Pac. 542.

³⁹Skrocki v. Stahl, (1910) 14 Cal. App. 1, 110 Pac. 957.

⁴⁰Gano v. Minneapolis & St. L. Ry. Co., (1901) 114 Iowa 713, 87 N. W. 714, 55 L. R. A. 263, 89 Am. St. Rep. 393, affirmed without opinion, (1903) 190 U. S. 557, 23 Sup. Ct. 854, 47 L. Ed. 1183; Sacramento v. Swanston, (1915) 29 Cal. App. 212, 115 Pac. 101.

⁴¹Williams v. Sapieba, (Tex Civ. App. 1900) 59 S. W. 947.

⁴²Vogel v. Pekoc, (1895) 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491. But such statutes have been held unconstitutional in some instances. Lorensen v. Webb, (1916) 11 Miss. 89, 71 So. 273; C. R. I. & P. Ry. Co. v. Mashore, (1908) 21 Okla. 275, 96 Pac. 630, 17 Ann. Cas. 277; Hocking Valley Coal Co. v. Rosser, (1895) 53 Ohio St. 12, 41 N. E. 263, 29 L. R. A. 386, 53 Am. St. Rep. 622.

⁴³Duckwall v. Jones, (1900) 156 Ind. 682, 58 N. E. 1055, (1901) 60 N. E. 797; Title Guaranty & T. Co. v. Wrenn, (1899) 35 Or. 62, 56 Pac. 271, 76 Am. St. Rep. 454. Many such statutes have been held invalid as for example, in Union Terminal Co. v. Turner Construction Co., (C.C.A. 5th Cir. 1918) 159 C. C. A. 585, 247 Fed. 727 where a Florida statute was decided to be unconstitutional. The decisions are collected in a note to the case last mentioned, "Validity of statutory provisions for attorneys' fees," in 11 A. L. R. 884, 906, 908.

⁴⁴Peoria, D. & E. Ry. Co. v. Duggan, (1884) 109 Ill. 537, 50 Am. Rep. 619; Hindman v. Oregon Short Line Ry. Co., (1918) 32 Idaho 133, 178 Pac. 837.

⁴⁵Cleveland v. C. C. & St. L. Ry. Co., (1900) 200 Ill. 633, 66 N. E. 389.

⁴⁶U. S. Electric P. & L. Co. v. State, (1894) 79 Md. 63, 28 Atl. 768.

⁴⁷Engbretson v. Gay, (1910) 158 Cal. 30, 109 Pac. 880, 28 L. R. A. (N.S.) 1062, Ann. Cas. 1912A 690.

utes regulating railway rates,⁴⁸ and failure to furnish cars to shippers as required by statute.⁴⁹ Such imposition of liability for attorneys' fees as a penalty is upheld almost uniformly, but statutes not based on the penalty theory have, in some instances, been successfully challenged as denying due process or equal protection of the laws. It is argued that statutes which allow attorneys' fees only to plaintiffs and not to defendants are subject to these objections for that reason alone, and many cases, particularly the earlier ones, have so held,⁵⁰ but this view has not generally prevailed.⁵¹ Most of the statutes which have been sustained are of this unilateral type. Only where the court has determined that attorney's fee statutes unreasonably single out and discriminate against a certain group of debtors they will, in most jurisdictions, be stricken down. Thus a statute in Texas which allowed attorneys' fees in actions on labor, freight, and damage claims of fifty dollars or less against railway corporations was held invalid by the Supreme Court of the United States,⁵² but when the legislature subsequently amended the act to apply to "any person or corporation doing business in this state" it was sustained as a "police regulation designed to promote the prompt payment of small claims and to discourage unnecessary litigation in respect to them."⁵³ The court said:

"If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and

⁴⁸St. Louis Iron Mountain & S. Ry. Co. v. Williams, (1919) 251 U. S. 63, 40 Sup. Ct. 71, 64 L. Ed. 139.

⁴⁹See Atchison T. & S. F. Ry. Co. v. Vosburg, (1915) 238 U. S. 56, 35 Sup. Ct. 675, 59 L. Ed. 1199, L. R. A. 1915E 953 where such a statute was held invalid because the attorney's fee provision was not reciprocal.

⁵⁰Chicago, R. I. & P. Ry. Co. v. Mashore, (1908) 21 Okla. 275, 96 Pac. 630, 17 Ann. Cas. 277; Davidson v. Jennings, (1900) 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am. St. Rep. 49.

⁵¹See the cases cited in the earlier notes in this section, in all of which unless otherwise indicated in the note, the court sustained the validity of the particular statutes.

⁵²Gulf C. & S. F. Ry. Co. v. Ellis, (1897) 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666.

⁵³Missouri K. & T. Ry. Co. v. Cade, (1914) 233 U. S. 642, 34 Sup. Ct. 678, 58 L. Ed. 1135. The Vosburg Case, (1915) 238 U. S. 56, 35 Sup. Ct. 675, 59 L. Ed. 1199, L. R. A. 1915E 953, holds invalid a law which imposes an attorney's fee upon a railway for refusal to furnish cars promptly but fails to impose such a fee upon a shipper who is required by the same law to use the car promptly. The court distinguished the Cade Case on the ground that the distinction there between plaintiff and defendant was a legitimate one while the distinction in the liabilities of shipper and carrier for violation of the reciprocal obligations to furnish and use cars, was not.

not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. Actor and reus differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs. . . . The allowance is confined to a reasonable attorney's fee, not exceeding twenty dollars, where an attorney is actually employed; the amount to be determined by the court or jury trying the case. Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit.' So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle."

These state statutes sometimes expressly provide that the attorneys' fees shall be allowed as "costs."⁵⁴ If not thus denominated, usually they are construed as constituting part of the amount involved for jurisdictional purposes. Even when attorneys' fees are allowed as "costs" by a state statute, they may still be recoverable in an action in the federal court though, of course, ordinary costs in that court would be limited to those embraced in the federal costs statutes.⁵⁵

7. FEES AND EXPENSES OF A PREVIOUS LITIGATION

For the expense incurred in the *present* litigation we have found that our law generally gives the successful party no recompense beyond the taxable costs which ordinarily include only a portion of his expense. This is the case, however wrongful the suit or groundless the defense.⁵⁶ On the other hand, where the present defendant has by his wrongful conduct, be it tort or breach of

⁵⁴Conner v. Conn. F. Ins. Co., (D.C. Fla. 1923) 292 Fed. 767; editorial note, (1924) 10 Va. L. Rev. 464; State v. Barrs, (1924) 87 Fla. 168, 99 So. 668.

⁵⁵Business Men's Assur. Co. of America v. Campbell, (C.C.A. 8th Cir. 1927) 18 F. (2d) 223.

⁵⁶Corinth Bank & Trust Co. v. Security N. Bank, (1923) 148 Tenn. 136, 252 S. W. 1001; Decennial Digests, Damages, Key No. 71, 72. But compare the Georgia statute cited in note 32 supra.

contract,⁵⁷ caused the present plaintiff to defend or prosecute *previous* legal proceedings the law reverses its restrictive attitude and allows the plaintiff to recover all the expense, including counsel fees, reasonably incurred by him in the prior litigation.⁵⁸

8. WHERE THE PREVIOUS LITIGATION IS DUE TO DEFENDANT'S TORT.

Fraud is a frequent source of liability for expenses of litigation. A life insurance company's agents secured premium notes from plaintiff by fraudulent statements falsely describing the policy to be issued, and the company transferred the notes to a good-faith holder who sued on the notes. Plaintiff, having substantial grounds for believing that the transferee had conspired with the company to perpetrate the fraud, defended that suit and lost. He was allowed to recover the attorney's fee and expenses incurred in that defense.⁵⁹ A similar liability was imposed on one who fraudulently procured the plaintiff bank to issue a draft in return for his own check drawn without funds, for the expenses incurred by the bank in settling with a bona fide holder from whom defendant secured cash for the draft.⁶⁰ Where a seller of land falsely states that he has a good title, the purchaser may, if he discovers the falsity before "closing the trade," recover the expense of having the title examined.⁶¹ Where the purchaser has accepted a deed, and has contracted to build a house, he may recover from the seller the cost of reasonably but unsuccessfully resisting a suit by the contractor for his failure to carry out the contract.⁶² The fraudulent seller who falsely claimed to have title, in a recent New Jersey case, has even been held liable—and it seems correctly—for the attorneys' fees and expenses incurred by the buyer in suing the seller himself for specific performance which suit was defeated by the seller's want of title.⁶³

⁵⁷Am. Law Inst. Restatement, Contracts, sec. 325.

⁵⁸See cases cited in the notes to the three following sections and Decennial Digests, Damages, Key No. 73.

⁵⁹McOsker v. Federal Ins. Co., (1924) 115 Kan. 626, 224 Pac. 53. Compare *Indiana v. Life Ins. Co.*, (1919) 186 Ky. 81, 215 S. W. 949.

⁶⁰Hutchinson First N. Bank v. Williams, (1901) 62 Kan. 431, 63 Pac. 744.

⁶¹Rabinowitz v. Marcus, (1923) 100 Conn. 86, 123 Atl. 21.

⁶²Curtley v. Security Savings Society, (1907) 46 Wash. 50, 89 Pac. 180.

⁶³Feldmesser v. Lemberger, (1925) 101 N. J. L. 184, 127 Atl. 815, 41 A. L. R. 1153. The court held that the decree as to costs in the chancery suit for specific performance was not determinative of the present claim for reimbursement of expense of that litigation.

This case is to be compared, however, with a recent Minnesota decision⁶⁴ which involved these facts: A husband had procured a certificate of fraternal benefit insurance on his life payable to his wife. The children fraudulently induced him to have issued a new certificate in their favor, excluding the wife. The wife sued the insurer which interpleaded the children and in that suit the later certificate was cancelled and judgment given for the wife on the earlier one. The wife now brings a new suit against the children for the expense of the earlier suit. The decision denies a recovery on the ground that such recovery of expense is allowed only where the previous litigation is with third persons and not where the real contest was with the present defendant. It is submitted, however, that the true test is whether the present defendant has been guilty of some wrongful conduct and the present plaintiff has been involved thereby in some litigation other than a mere suit by the present plaintiff to secure redress for such conduct.⁶⁵ Thus if the previous suit in the New Jersey case had been one for rescission and damages for the fraud, instead of for specific performance of the contract, no new action would have lain for the expense of the previous suit. In this light, the Minnesota case is correctly decided if, as the court suggests, the previous suit was really one for redress for the defendant's fraud, although one remains doubtful whether, but for defendant's fraud, any action as against the third party, the insurance association, would have become necessary.

Breaches of official duty may likewise subject the victim to the necessity of engaging in litigation, for the expense of which he may recover from the officer. Thus, violations of the civil service law by wrongfully removing a city treasurer from office, forcing him to undergo the expense of suing for reinstatement, rendered the council members who participated in the wrongful removal liable for such expense.⁶⁶ A constable who accepted irresponsible sureties on forthcoming bonds given by defendants in replevin was held liable for the plaintiff's expense in bringing the replevin action and in a subsequent fruitless action on the bonds.⁶⁷

⁶⁴Stickney v. Goward, (1925) 161 Minn. 457, 201 N. W. 630, 39 A. L. R. 1216.

⁶⁵As to which, see note 68, herein.

⁶⁶Stiles v. Morse, (1919) 233 Mass. 174, 123 N. E. 614, 4 A. L. R. 1465. A similar holding was made in behalf of one who had been wrongfully demoted. Ashton v. Wolstenholme, (1922) 243 Mass. 193, 137 N. E. 376.

Obviously, a party who wins a law suit cannot escape the rule that expenses of litigation beyond taxable costs are not recoverable, by merely instituting a new suit for such expense in the first case.⁶⁸ In about one-half the states, however, a successful defendant against whom a civil litigation, though unaccompanied by interference with person or property, has been instituted maliciously and without probable cause, may bring an action for malicious prosecution⁶⁹ and recover expenses and counsel fees incurred in defense of the previous action.⁷⁰ England⁷¹ and the other states limit the action to cases of malicious criminal prosecution and to civil suits where the person was arrested, property seized as by attachment or the like or where other special injury was sustained.⁷² Under the latter view, while of course all reasonable expenses and counsel fees in cases of malicious criminal prosecution would be recoverable,⁷³ in actions for malicious civil litigation seemingly only those expenses and counsel fees reasonably necessary to secure the release of person or property, and not those incurred in the general defense of the action would be recoverable.⁷⁴

Where defendants by defaming plaintiff's title to land and setting up false claims thereto have forced plaintiff to sue them to remove the cloud from his title, he may recover in his subsequent action for slander of title the expense of the prior suit notwithstanding his recovery of the usual costs in the previous action.⁷⁵

⁶⁷*Stern v. Knowlton*, (1903) 184 Mass. 29, 67 N. E. 869.

⁶⁸*Marvin v. Prentice*, (1884) 94 N. Y. 295 (Grantor sues in equity for a reconveyance on ground that the deed, in form absolute, was intended as security for a loan, and he is successful; *held*, he cannot in a new suit recover the expense and counsel fees incurred in the first.)

⁶⁹*Peerson v. Ashcraft Cotton Mills*, (1917) 201 Ala. 348, 78 So. 204, L. R. A. 1918D 540; *Teesdale v. Liebschwager*, (1919) 42 S. D. 323, 174 N. W. 620, and decisions cited in these opinions.

⁷⁰*Kolka v. Jones*, (1897) 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

⁷¹*Quartz Hill Cons. Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674, 690.

⁷²*Supreme Lodge v. Muverzagt*, (1892) 76 Md. 140, 24 Atl. 323; *White v. International Text Book Co.*, (1912) 156 Iowa 210, 136 N. W. 121, 42 L. R. A. (N.S.) 346; *Jerome v. Shaw*, (1916) 172 N. C. 862, 90 S. E. 764, L. R. A. 1917B 749.

⁷³*Wren v. Rehfeld*, (1916) 37 S. D. 201, 157 N. W. 323; *McIntosh v. Wales*, (1913) 21 Wyo. 397, 134 Pac. 274, Ann. Cas. 1916 C 273; *Wheeler v. Hanson*, (1894) 161 Mass. 370, 37 N. E. 382 (expense of procuring sureties on bail bond and counsel fees).

⁷⁴*Gretn v. Levy*, (1885) 37 La. Ann. 182.

9. WHERE THE DEFENDANT HAS SUBJECTED THE PLAINTIFF TO
THE PRIOR LITIGATION BY HIS BREACH OF
CONTRACT OR ASSUMED DUTY.

Where land is conveyed with covenants of title and the grantee is subjected to litigation with owners of adverse interests, who establish their claims, the grantor who has covenanted against the existence of such flaws in the title or who has warranted to defend the title against such claims is liable not only for the defect of title but for the grantee's reasonable and necessary expense incurred in the prior litigation, including costs and counsel fees.⁷⁶ It is usually held that to recover such expense, the covenantor must have been notified to assume the defense of the prior action and have declined to do so.⁷⁷ The minority view, which does not require the grantee thus to relinquish control of his fight for the land, in order to secure reimbursement for expenses of litigation,⁷⁸ seems preferable. A like liability for counsel fees and expense of suit is imposed on the landlord when the tenant reasonably attempts to defend his possession against a paramount title,⁷⁹ or even when the landlord himself breaches the covenant for quiet enjoyment by harassing the tenant by a groundless eviction suit.⁸⁰

A similar situation arises in cases where goods are sold with a warranty of title express or implied, the buyer becomes involved in litigation with third persons who successfully establish a paramount claim, and the seller is required to reimburse the buyer for the expense of the litigation.⁸¹ The same result would seem

⁷⁵*Chesebro v. Powers*, (1889) 78 Mich. 472, 44 N. W. 290. But compare *Toop v. Palmer*, (1922) 108 Neb. 850, 189 N. W. 394.

⁷⁶*Seitz v. People's Savings Bank*, (1905) 140 Mich. 106, 103 N. W. 545; *Culver v. Jennings*, (1911) 157 N. C. 565, 72 S. E. 1005; *Rennie v. Gibson*, (1919) 75 Okla. 282, 183 Pac. 483; *Estep v. Bailey*, (1919) 94 Or. 59, 185 Pac. 227; *Van Cott v. Jacklin*, (1924) 63 Utah 412, 226 Pac. 460; *Decennial Digests, Covenants, Key No. 132*.

⁷⁷*Wiggins v. Pender*, (1903) 132 N. C. 628, 44 S. E. 362, 61 L. R. A. 772; *Smith v. Boynton Land & Lumber Co.*, (1917) 131 Ark. 22, 198 S. W. 107; *Wilson v. McGoward*, (1921) 192 Ky. 565, 234 S. W. 17; *Smith v. Gaines*, (1923) 210 Ala. 245, 97 So. 739.

⁷⁸*Richmond v. Ames*, (1895) 164 Mass. 467, 41 N. E. 671 (dictum).

⁷⁹*Ralph v. Crouch*, (1867) L. R. 3 Ex. 44; *Handy v. Street*, (1913) 169 Mo. App. 593, 155 S. W. 43; *Decennial Digests, Landlord and Tenant, Key No. 180*.

⁸⁰*Levitzky v. Canning*, (1867) 33 Cal. 299. Compare *Heitzel v. Weber*, (1926) 118 Okla. 82, 246 Pac. 839, where a state court held that counsel fees in a previous suit in the United States court, which suit was instituted in violation of an injunction issued by the state court, were not recoverable.

⁸¹*Edwards v. Beard*, (1924) 211 Ala. 251, 100 So. 101; *St. Anthony*

to follow where the buyer has sold again and, reasonably relying on the seller's warranty of title or quality, makes a similar warranty to the sub-buyer and becomes involved in litigation with the sub-buyer for breach of warranty. But in the early Massachusetts case of *Reggio v. Braggiotti*⁸² where the seller guaranteed the article sold to be genuine opium and the buyer re-sold it as such and was forced to defend a suit by the second buyer for breach of warranty, the first buyer was allowed to recover (in addition to the value of the opium agreed to be sold) reimbursement only for the court costs of the previous suit and not for counsel fees. Shaw, C. J., said:

"But the counsel fees cannot be allowed. These are expenses incurred by the party for his own satisfaction, and they vary so much with the character and distinction of the counsel, that it would be dangerous to permit him to impose such a charge upon an opponent; and the law measures the expenses incurred in the management of a suit by the taxable costs."

These reasons are obviously untenable and would operate to deny all recovery of counsel fees in previous litigation. Other reasons offered in a subsequent decision⁸³ explaining the earlier case were that the plaintiff should never recover for expense of suit where the previous action was based upon the present plaintiff's own breach of contract or tort,⁸⁴ and the further reason that the original buyer might thus be subjected to a cumulative liability for reimbursement on an infinite succession of breach-of-warranty suits by successive sub-buyers. These seem insufficient reasons to deny redress to one who has by reasonable reliance on the seller's warranty justifiably incurred expense to defend the title or quality of the goods.⁸⁵

Co. v. Dawson, (1910) 20 N. D. 18, 126 N. W. 1013; Ann. Cas. 1912B 1337; Decennial Digests, Sales, Key No. 442.

⁸²(1851) 7 Cush. (Mass.) 166, 170.

⁸³*Inhabitants of Westfield v. Mayo*, (1877) 122 Mass. 100, 23 Am. Rep. 292.

⁸⁴This restriction was applied—and its inequity thus made apparent—in *Beacon M. Car Co. v. Shadman*, (1917) 226 Mass. 570, 116 N. E. 559. In that case the present plaintiff, a motor storage company, had delivered an automobile to the defendant, the owner's daughter. The owner sued the present plaintiff for conversion and recovered. The court denied recovery of counsel fees because the plaintiff's delivery of the automobile to the defendant *at the latter's request* was the plaintiff's "own wrongful act."

⁸⁵*Reggio v. Braggiotti*, (1851) 7 Cush. (Mass.) 166, 170, is disapproved in 1 Sedgwick, Damages, 9th ed., sec. 349, and 2 Williston, Sales, 2nd ed., 615-a, note 87. A recent case of warrant of quality, allowing recovery by the buyer of expense of litigation is *Abounader v. Strohmeyer & Arpe Co.*, (1926) 207 App. Div. 43, 215 N. Y. S. 702.

Situations often arise when one person, A, is rendered liable to a third person under circumstances which impose upon another person, B, a legal duty to indemnify A against the judgment and also the expense of litigation.⁸⁶ A frequent instance is the situation which arises when a contractor, or any other person, digs a hole or places a dangerous obstruction in a city street. The city's duty to use care to maintain safe streets renders it liable to any person who is injured by the hole or obstruction, but the active wrong-doer is liable over to the city and this liability includes costs and expenses.⁸⁷ Analogous are the cases where a master has been held liable to a third person for a tort committed by his servant in the scope of the employment but in violation of orders, and conversely where the third person has sued the servant who has injured him while obeying the master's orders. In these varied situations where A is liable to the third person, but as between A and B, B is primarily responsible for the claim, it is usually said that while B must reimburse A for the judgment paid to the third person with interest, he could be held liable for A's outlay for costs, expenses and counsel fees only if A has notified B to come in and defend.⁸⁸ This requirement is of doubtful justice, and it has usually been announced in cases where the question was not involved, as the notice had been given.

10. CONTRACTS TO REIMBURSE FOR EXPENSES AND COUNSEL FEES AND BONDS GIVEN IN THE COURSE OF LITIGATION

Obviously, if one party agrees, on sufficient consideration, to reimburse another for counsel fees and expenses incurred in some litigation, no difficulty arises in enforcing the promise. The question of interpretation may occur—was the agreement intended to have this effect? Such questions of interpretation frequently have arisen in connection with actions upon bonds given, as required by statute or rule, by the applicant who seeks the issuance of some summary writ such as attachment or the making of some emergency order before final hearing, such as the appointment of a receiver or the granting of a preliminary injunction. Generaliza-

⁸⁶See Decennial Digests, Indemnity, Key No. 9 (2).

⁸⁷*Inhabitants of Westfield v. Mayo*, (1877) 122 Mass. 100, 23 Am. Rep. 292; *Waterbury v. Waterbury Traction Co.*, (1901) 74 Conn. 152, 50 Atl. 3; *Astoria v. Astoria Ry. Co.*, (1913) 67 Or. 538, 136 Pac. 645, 49 L. R. A. (N.S.) 404.

⁸⁸*Baltimore, etc., Ry. Co. v. Howard County*, (1910) 113 Md. 404, 77 Atl. 930.

tions about the extent of liability for counsel fees and expenses upon these attachment bonds, bonds for injunction and the like, are unprofitable as their terms and interpretation vary from state to state under the diverse provisions of the local statutes. Usually such bonds contain covenants to pay "all damages" in case it shall be determined that the writ or order was wrongfully granted. Occasionally the courts deny recovery of counsel fees altogether on such bonds,⁸⁹ but the more usual attitude is to include in the damages awarded the expense incurred in resisting and securing the dissolution of the wrongful writ or order, but not the expense and fees of the general defense of the main action.⁹⁰

11. WHAT FEES AND EXPENSES ARE RECOVERABLE. REQUIREMENT OF REASONABLENESS.

Expenses of litigation, including counsel fees, are subject to the limitation which obtains wherever plaintiff seeks recovery of expenses of any sort on the ground that they have been incurred by reason of defendant's actionable conduct—the restriction that the outlay must be of such an amount and made under such circumstances as that a reasonable man would have incurred it.⁹¹ Consequently, if the present plaintiff has undergone expense in contesting the previous litigation when he was without reasonable grounds to believe that he had a defense, the expense of making the contest should not be recoverable.⁹² Likewise, if the present

⁸⁹*Oelrichs v. Spain*, (1872) 15 Wall. (U.S.) 211, 21 L. Ed. 43 (injunction bond); *Midgett v. Vann*, (1911) 158 N. C. 128, 73 S. E. 801; *Chillicothe Bank v. McSwain*, (1912) 93 S. C. 30, 75 S. E. 1106, Ann. Cas. 1914D 809, and note (attachment).

⁹⁰Injunction bonds: *Bartholomae Brewing Co. v. Modzelewski*, (1915) 269 Ill. 539, 109 N. E. 1058; *C. H. Albers Comm'n. Co. v. Spencer*, (1911) 236 Mo. 608, 631, 139 S. W. 321, Ann. Cas. 1912D 705; but the entire expense of defending the suit may be allowed where the sole purpose of the suit is to procure the temporary injunction, see *Prager's Paris Fashion v. Seidenbach*, (1925) 113 Okla. 271, 242 Pac. 260; *Decennial Digest, Injunctions, Key No. 252*.

Attachment bonds: *Tyngs American Surety Co.*, (1903) 174 N. Y. 166, 66 N. E. 668; *Plymouth Gold Mining Co. v. United States, F. & G. Co.*, (1906) 35 Mont. 23, 88 Pac. 565, 10 Ann. Cas. 951; 1 *Sedgwick, Damages*, 9th ed., sec. 257.

⁹¹*Cleland v. McLaurin*, (1925) 40 Idaho 371, 232 Pac. 571, 573. "The expense of litigation can be recovered only if necessarily incurred and reasonable in amount, and allegations to that effect are necessary in the pleading. There are no such allegations in the complaint. The trial court had before it neither pleading nor evidence of the necessity or reasonableness of the alleged expense. For the above reasons we conclude that the court erred in awarding damages."

⁹²*Indiana Nat'l Life Ins. Co. v. Butler*, (1919) 186 Ky. 81, 215

plaintiff has in the previous litigation employed several counsel where one was sufficient to the task in hand, he can recover only the reasonable expense of employing one.⁹³

Other items of expense of litigation must likewise have been prudently incurred to be recoverable. They may include such expenditures as travel expense of witnesses, telegrams,⁹⁴ and cost of securing bonds necessary in the course of litigation.⁹⁵ Sometimes the plaintiff's own necessary traveling expense is allowed,⁹⁶ as seemingly it should be; but the courts, fearful of over-exploitation, have balked at allowing to plaintiff the value of his own time necessarily consumed in the preparation for and attendance on the trial of the previous litigation,⁹⁷ except as an element of damages in actions for malicious prosecution.⁹⁸

12. CRITICISM OF THE PRESENT STATE OF THE LAW AS TO RECOVERY OF COUNSEL FEES AND EXPENSES OF LITIGATION

Under our law, counsel fees and expenses of suit are, in the main, not recoverable but must be borne by the person who incurs them. As respects counsel fees this is, as we have seen, a de-

S. W. 949 (semble); *Gallo v. Brooklyn Savings Bank*, (1908) 129 App. Div. 698, 114 N. Y. S. 78, reversed without touching this point, (1910) 199 N. Y. 222, 92 N. E. 633.

⁹³*Massena Savings Bank v. Garside*, (1911) 151 Iowa 168, 130 N. W. 918.

⁹⁴*Hutchinson First Nat'l Bank v. Williams*, (1901) 62 Kan. 431, 63 Pac. 744.

⁹⁵*Wheeler v. Hanson*, (1894) 161 Mass. 370, 37 N. E. 382.

⁹⁶*Prager's Paris Fashion v. Seidenbach*, (1925) 113 Okla. 271, 242 Pac. 260 (corporation allowed to recover for the expense of its manager for travel to attend trial, but denying recovery for his loss of time on the ground that he was to be considered as if he were the corporation itself and hence a party).

⁹⁷*Bartram v. Ohio & B. S. R. Co.*, (1910) 141 Ky. 100, 132 S. W. 188 (injunction bond); *Prager's Paris Fashion Case*, (1925) 113 Okla. 271, 242 Pac. 260; *Midgett v. Vann*, (1911) 158 N. C. 128, 73 S. E. 801. Compare *Trustees v. Greenough*, (1881) 105 U. S. 527, 26 L. Ed. 1157, where the court in awarding counsel fees and other expenses of litigation to a complainant who had by his prosecution of suits against the trustees of a fund, preserved the fund for the benefit of numerous bondholders, refused to allow the complainant any compensation for his own services, or reimbursement for his railroad fares and hotel bills incurred in the litigation, and said: "It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support."

⁹⁸*Helfer v. Hamburg Quarry Co.*, (1921) 208 Mo. App. 58, 233 S. W. 275; contra: *Osborn v. Moore*, (1857) 12 La. Ann. 714.

parture from the English practice—a divergence that has widened with the gradual fall in the value of money since colonial times—which has rendered the statutory taxable fees inadequate. The chief exceptions or qualifications of the rule are: (1) the allowance of taxable costs which cover a fractional part of such fees and expenses; and (2) the allowance of counsel fees and expenses (a) from an estate or fund impounded in court for its creation, preservation, or administration, (b) in suits for divorce or judicial separation, (c) under local statutes allowing attorneys' fees in certain narrowly restricted classes of suits, (d) in actions for wanton wrongs, attorneys' fees are allowed in some states as exemplary damages, and (e) the recovery of counsel fees and expenses of a previous litigation which plaintiff has incurred as a result of defendant's wrongful conduct.

Is the present rule denying reimbursement, except within these narrow limits, to the successful litigant for his necessary outlay a desirable one? These are the arguments usually advanced in its support. First, these elements of injury are too "remote."⁹⁹ Second, counsel fees would be exorbitant if they could be charged to the adversary, and difficulties of administration would arise in scaling the charges down to a reasonable amount.¹⁰⁰ Third, compensation is given only for wrongful conduct and it is not (except where an unfounded suit is brought maliciously) wrongful to bring a suit or defend one, at least where the litigant has a reasonable doubt as to his claims which are being litigated.¹⁰¹ Fourth, it is undesirable to discourage the "submission of rights to

⁹⁹"Now the expenses of litigation are never damages sued for in any case when the action is brought for the wrong itself, not even if the tort be wanton or malicious. They are not the 'natural and proximate consequences of the wrongful act,' which is the universal rule, but are remote, future and contingent," Ellsworth, J., in *St. Peter's Church v. Beach*, (1857) 26 Conn. 355, 366.

¹⁰⁰"There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or in an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary," Swayne, J. in *Oelrich v. Spain*, (1872) 15 Wall. (U.S.) 211, 21 L. Ed. 43.

¹⁰¹See *St. Peter's Church v. Beach*, (1857) 26 Conn. 355; *Satterthwaite, Increasing Costs to be Paid by Losing Party*, (1923) 46 N. J. L. J. 133.

judicial determination" by subjecting the loser to heavy damage by reason of such submission.¹⁰² Finally, Sedgwick asserts,¹⁰³ in the form of a reason, what may be intended as a suggestion that the rule has no rational basis, as follows: "The true foundation of the rule we take to be that the common law has arbitrarily fixed taxable costs as the limit of remuneration for expenses of litigation."

On the other side may be noted these considerations. The objection of "remotenes" taken literally seems fallacious, for the expenses of a previous litigation seem no nearer or more direct results of the tort or breach of contract which caused the previous suit than are the expenses of the present suit, the results of the unfounded contest of the losing party. Nevertheless, the objection suggests this germ of truth, that entire completeness of com-

¹⁰²In *Straus v. Victor Talking Machine Co.*, (C.C.A. 2nd Cir. 1924) 297 Fed. 791, 799, the court in denying recovery of an attorney's fee for plaintiff incurred in the successful defense of a previous action brought by the present defendant, (see *supra*, note 68) said: "In *Wetmore v. Mellinger*, (1884) 64 Iowa 741, 18 N. W. 870, 52 Am. Rep. 465, the court, in deciding that an action will not lie for the institution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of property and no special injury sustained, well expressed the outstanding thought here controlling:

"The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts.

"Never was it more necessary than now to preserve unimpaired this right so vital to the public welfare and so thoroughly a part of our theory of government. New economic problems increasingly arising in a constantly developing nation require solution, and hence lead to legislation. The statutes thus enacted to meet these problems can rarely, if ever, be so certain and detailed in expression that their meaning or extent can be ascertained without judicial determination. The difficulty which attends their construction is best shown by the wide variance in the opinions of the courts and the constant resort to the Supreme Court for authoritative decision. It is thus not strange that lawyers and laymen may differ as to the meaning of such statutes, and it would be a negation of the principle and right of free access to the courts to hold that the submission of rights to judicial determination involved a dangerous gamble which might subject the loser to heavy damage."

And in *Stringfield v. Hirsch*, (1895) 94 Tenn. 425, 29 S. W. 609, the court said:

"It is not sound public policy to place a penalty on the right to litigate, that the defeated party must pay the fees of counsel for his successful opponent in any case, and, especially, since it throws wide the doors of temptation to the opposing party and his counsel, to swell the fees to undue proportions."

¹⁰³1 Sedgwick, *Damages*, 9th ed., sec. 230.

compensation is an impracticable ideal. The web of events connects every wrongful act with too many varied losses and injuries for the law to protect against them all. The law selects certain risks of loss and injury and requires the wrongdoers to bear these; others such as the loss of a business opportunity by a creditor when his debtor fails to pay a note, the law finds it more expedient to pass over. The essential question here, as always in such problems of delimitation of interests to be protected, is one of expediency or public good.¹⁰⁴ The second objection listed above which points to the difficulties of administering a rule of reimbursement for counsel fees is a legitimate consideration to be weighed in the scales of expediency. Undoubtedly, a jury is a poor tribunal to which to delegate the delicate and exacting duty of scaling down according to some fairly uniform practice the charge for fees and expenses. The judge, or in metropolitan courts a referee or master specializing in this function, as in England, ought to handle the matter. It will, as in England, add to the time and expense of the judicial process. However, the recovery of every element of compensation requires time and expense for its administration, and this must be balanced against the considerations making for its allowance. Is the good to be gained by allowing it sufficient to outweigh the trouble and expense?

The third and fourth objections furnish the most persuasive support for the existing rule—the desire that parties whose rights are doubtful and disputed shall feel free to submit them to the courts. In other words, the desire that proper litigation in general shall be encouraged by dividing a part of the hazard rather than discouraged by threatening the prospective litigant with the entire cost to both sides of a contemplated contest if he shall lose. Certainly, it may be supposed that in England a party may hesitate longer to bring a doubtful suit or interpose a doubtful defense when the possibility of paying not only his own but his adversary's lawyers' fees stares him in the face. He might look more favorably upon compromise, arbitration, or even surrender.¹⁰⁵

The present rule in this country, however, grew up under frontier conditions when court week was the dramatic spectacle of the country-side, and where everyone, except the unfortunate litigants themselves, looked upon the battles of the court room as

¹⁰⁴Compare Green, *Proximate Cause*, ch. 1, sec. 2, *Is the Interest Protected?* and sec. 3, *The Limits of Protection*.

¹⁰⁵See Prof. Goodhart's description of how the English practice works, in his article, *Costs*, (1929) 38 *Yale L. J.* 849, 876.

by no means wholly undesirable. "Fair play" demanded a cleared circle and no interference when two inflamed citizens exchanged blows upon the courthouse square. Fines for first fighting were few; fights were many. "Fair play," in the court room, seemed to demand that no unnecessary burdens be heaped on the loser.¹⁰⁶ Otherwise, the risk might be too heavy for litigants to bear.

The problem of the court-house to-day has become one of congestion instead of scarcity in the transition from frontier to the crowded city-civilization of the twentieth century. There seem to be strong a priori reasons for believing that a rule which made the loser bear a greater part of his adversary's expenses of suit would encourage compromises and diminish litigation,¹⁰⁷ but confident conclusions about the matter must await further research. A preliminary survey and comparison of the practices which obtain in all the principal foreign countries in this respect might shed some light upon the question.¹⁰⁸ The problem of apportion-

¹⁰⁶"The parties in these cases should be encouraged to appeal to the court on equal terms. The defendant should not be punished by being compelled to pay not only his own counsel but such as the plaintiff may please to select to advocate his claims against the defendant, but each should be left to conduct his own case, and in his own way, and at his own expense beyond what the statute allows in a bill of costs to the prevailing party," *St. Peter's Church v. Beach*, (1857) 26 Conn. 355, 366, 367.

¹⁰⁷In the first report of the judicial council of Massachusetts a change in the system of costs was recommended, and the Council said:

"There is more litigation in Massachusetts than there ought to be. For the population there is more than twice as much as there is in England and Wales. The reason for the difference between the two jurisdictions is to be found, to a large extent, at any rate, in the matter of costs.

"In England the costs which the unsuccessful party has to pay consist (in substance) in the expense he has wrongfully made the other party incur; in other words, the unsuccessful party in England has to pay his opponent's lawyer's bill as well as his own. The possibility of having to pay the lawyer's bills of both parties to the action makes a plaintiff think twice before he sues out a writ and a defendant think twice before he defends an action which ought not to be defended, and that is a direct deterrent on the number of cases put or kept in suit.

"In Massachusetts costs are nominal. Where costs are nominal the plaintiff may win, but not to the full extent of his damage, while the defendant is sure to be a loser to some extent, for if he is successful in the action he has to pay his own lawyer's bill. This is a direct incentive to litigation.

"The Council is of opinion that the adoption of the principle of more substantial costs would tend to diminish the amount of litigation in Massachusetts, and they know of nothing else which can be done which can so effectively bring that about," (1925) 11 Mass. L. Q. 63.

ing between victor and loser the expense of litigation is an important one and illustrates the difficulty of determining whether a particular procedural rule operates beneficially or hurtfully. A study in England of how far prospective litigants are influenced in suing or withholding action by the fear of having counsel fees assessed, a similar study of the effect of the New Jersey equity rule allowing counsel fees,¹⁰⁹ and experimentation by some state by adopting the English practice—one or all of these may be essential before we can declare with any assurance that a change would actually lessen the flow of lawsuits. On the whole, however, a practice which compensates with fair completeness one who has been forced to sue or defend to vindicate his rights, for expenses of the suit or defense, seems most harmonious with the standards which allow compensation generally for expense to which one party by his wrong exposes another, seems most adapted to satisfy the reasonable expectations of men, and appears most likely to lessen litigation.

¹⁰⁸A cursory investigation indicates that wide diversity in the practice would be revealed. The Roman procedure seems to have empowered the judge under some circumstances to assess one party's "extra-judicial" costs, such as counsel fees, against the other party. Engelmann, *A History of Continental Civil Procedure*, 403. Germany retains this practice, Hubbell, *Legal Directory*, (1929) 1433, as does Czechoslovakia, see *Martindale's American Law Directory* (1930), supplement of foreign laws. Seemingly, France and Japan do not award extra-judicial costs, Hubbell, *Legal Directory*, 1420, 1450.

¹⁰⁹See *supra*, note 23.