

REVISED LAWS

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1905

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its next session shall likewise select and certify an equal number of new names, which shall be added by such clerk to the names in the original list. If such list is not made and delivered at the annual meeting in January, it may be so made and delivered at any regular or special meeting thereafter. (673, 675)

See § 5264 Note 1.

CHAPTER 79

COSTS AND DISBURSEMENTS

4337. Agreement as to fees of attorney—Costs defined—A party shall have an unrestricted right to agree with his attorney as to his compensation for services, and the measure and mode thereof; but certain sums may be allowed to the prevailing party for expenses in an action, which are termed costs. (5497)

1. Definition—The term "costs" as used in our statutes generally includes disbursements (23-71; 16-249, 221; 84-267, 87+846). The costs of the statute are commonly termed statutory costs (32-205, 20+142).

2. Right to costs statutory—46-162, 48+770; 23-372; 16-249, 221; 34-1, 24+458.

3. An incident of the judgment—Costs are a mere incident of the judgment and go as a matter of course with every judgment in an action of a legal nature without special directions and regardless of the regularity or correctness of the judgment (66-74, 68+770). A judgment is not affected by the taxation of costs until they are entered in it (16-38, 24).

4. Legislative control—29-425, 13+673; 34-216, 25+347; 63-384, 65+652.

5. Application to special proceedings—16-249, 221; 23-372; 46-162, 48+770.

6. When court without jurisdiction—17-41, 23; 30-206, 14+897; 66-74, 68+770.

7. Stipulation as to costs—18-26, 10; 30-156, 14+794.

8. Belong to party not attorney—78-408, 80+953, 81+210.

9. When nominal damages recovered—36-122, 30+438; 37-537, 35+379; 43-459, 45+866; 65-540, 68+181.

10. Contract with attorney—21-412.

11. Liability of state—The state is liable for costs and disbursements in civil actions brought by it, but not in criminal prosecutions (104+289). It is not liable in actions brought against it (104+816).

4338. Costs in district court—In actions commenced in the district court, costs shall be allowed as follows:

To plaintiff: (1) Upon a judgment in his favor of one hundred dollars or more in an action for the recovery of money only, when no issue of fact or law is joined, five dollars; when issue is joined, ten dollars. (2) In all other actions, except as otherwise specially provided, ten dollars.

To defendant: (1) Upon discontinuance or dismissal, five dollars. (2) When judgment is rendered in his favor on the merits, ten dollars. (5498)

1. Who prevailing party—No general rule can be laid down as to who is the prevailing party (See 18-26, 10; 14-286, 214; 63-238, 65+457; 79-377, 82+669; 86-168, 90+376).

2. On dismissal—On dismissal for failure to prove a cause of action defendant is entitled to only five dollars costs (44-406, 46+850. See 51-153, 53+199). Where there is a regular trial and findings of fact and conclusions of law are made on which a judgment of dismissal is entered for defendant he is entitled to ten dollars costs (61-373, 63+1024).

3. Several parties—In an action for tort against several defendants on a verdict in favor of some of them but against others those succeeding are entitled to costs. Where several defendants who appear by the same attorney unite in the same answer and there is one trial as to all, they are entitled jointly to statutory costs and not severally (14-286, 214). Where several defendants in good faith appear by separate attorneys and interpose separate defences by separate answers each is entitled, on a recovery in his favor, to separate costs, whether the action is on contract or for tort (57-167, 58+989; 59-258, 61+139).

4. On new trial—When a new trial is ordered, nothing being said about the costs of the first trial, such costs are recoverable by the party who ultimately succeeds (6-508, 353; 4-553, 435. See 66-74, 68+770). Neither statute nor rule of court requires the payment of costs as a condition of granting a new trial (75-349, 77+988). The failure of plaintiff to pay costs awarded against him in a former action is ground for a stay of proceedings (6-53, 14).

5. Two actions tried together—76-48, 78+881.

07 4339 200
4339. In actions for services—Double costs—Whenever any person, having employed another to perform any labor or service, shall neglect or refuse for thirty days after the same is due and payment demanded to pay the agreed price, or the reasonable value if there be no agreement, and the same shall be recovered by action, there shall be allowed to the plaintiff, and included in his judgment, in addition to his disbursements, five dollars costs if the judgment be recovered in a justice court, and double costs if recovered in any other court or on appeal. (5499; '95 c. 109)

Recoverable by assignee of laborer (55-150, 56+590).

07 4340 186
4340. Disbursements—Taxation and allowance—In every action in a district court, the prevailing party shall be allowed his disbursements necessarily paid or incurred: Provided, that in actions for the recovery of money only, of which a justice has jurisdiction, the plaintiff, if he recover no more than fifty dollars, shall not recover any disbursements; if he recover less than fifty dollars, he shall pay the defendant's costs and disbursements, which shall be taxed and allowed by the clerk upon notice as in other cases, and shall be deducted by the clerk from the amount of plaintiff's recovery. In case such amount exceeds plaintiff's recovery, he shall enter judgment against plaintiff and in favor of defendant for the amount of such excess. (5500)

1. **Defined—**Disbursements are the expenses necessarily paid or incurred by the prevailing party (84-267, 87+846).

2. **Witness fees—**Where witnesses attend and are sworn, though not subpoenaed, their fees may be taxed (16-329, 291). The fees of witnesses in attendance, but not sworn, are taxable if their attendance was secured under a reasonable belief that their testimony would or might be necessary or material (57-167, 58+989; 76-48, 78+881; 76-319, 79+170). If a party acts in good faith when requesting or compelling the attendance of his witnesses, the mere fact that their testimony is immaterial or inadmissible will not deprive him of the right to tax their fees. Bad faith in such a case will not be presumed on the taxation of costs before the clerk (81-224, 83+983; 82-112, 84+732; 93-316, 101+308. See 104+713). If a cause is set for trial on a particular day and the interval is short and the witnesses live at a considerable distance a party may keep them in attendance. But if a considerable time is to elapse before the day of trial and the witnesses live but a short distance from the place of trial a party cannot charge for them on days when they are not needed (2-67, 55). An attorney in a cause is not entitled to a fee for attending as a witness. A party to the action is entitled to fees as a witness only when he appears solely as a witness for other parties (14-286, 214). The fees of a party's own witnesses should not be taxed against him (12-216, 137; 10-220, 175).

3. **Miscellaneous disbursements—**The expense of procuring necessary documentary evidence is taxable as a general rule (2-67, 55; 24-450; 14-286, 214). The fees of notaries in taking depositions for use on the trial are taxable (24-450). The expense of procuring a copy of the stenographer's notes for use on a motion for a new trial may be taxed if a new trial is granted with the costs of the motion (27-280, 6+791, 7+144; 51-249, 53+547, 653). Where there were three trials in a cause, each resulting in a verdict for plaintiff, who had paid the jury fee in each trial, it was held proper to tax all the fees on the entry of judgment on the last verdict (66-281, 68+1080). Fees of the sheriff for serving a subpoena are taxable although the witness could not be found (23-458). When the same persons are defendants in different actions and incur a joint expense for documentary evidence necessary for their defence in several actions, and use the same in such actions, they may charge such expense as a disbursement in either action, at their election, provided such charge is made on one action only (14-286, 214). Fees of sheriff on execution under a prior judgment (23-458).

4. **When justice has jurisdiction—**Where the damages claimed exceed the jurisdiction of a justice of the peace a successful plaintiff is entitled to his costs and disbursements although he recovers fifty dollars or less (20-418, 370; 36-122, 30+438; 57-37, 58+868. See 8-451, 401; 28-156, 9+635).

4341. Several actions—Costs, how allowed—When several actions are brought on one instrument, or for the same cause of action, against several parties who might have been joined as defendants in the same action, costs shall be allowed to the plaintiff in but one of such actions, to be selected by him, if at the commencement of such action the defendants in the other actions were openly within the state; but plaintiff's disbursements may be allowed as provided in § 4340. (5501)

4342. In equitable actions—Several defendants—In equitable actions, costs may be allowed or not, and, if allowed, may be apportioned between

the parties on the same or adverse sides, in the discretion of the court. When there are several defendants not united in interest, and making separate defences by separate answers, and plaintiff fails to recover judgment against all, the court may award costs to such defendants as have judgment in their favor, or any of them. (5502)

Costs discretionary (19-383, 329). Disbursements a matter of right (32-205, 20+142).

4343. In action on judgment—Costs shall not be allowed to plaintiff in an action upon a domestic judgment between the same parties, unless such action was brought with previous leave of the court for cause shown; but this shall not apply to an action upon the judgment of a justice brought in another county, or in the same county where the summons was not served upon all the defendants, or in case of the death of a party, or the death, resignation, incapacity to act, or removal from the county of the justice, or the loss of his docket. (5503)

41-552, 43+483.

4344. Interest on verdict, etc.—When the judgment is for the recovery of money, interest from the time of the verdict or report, until judgment is finally entered, shall be computed by the clerk and added thereto. (5504)

72-266, 75+380; 90-336, 96+915.

4345. Taxation—Objections and appeal—Costs and disbursements shall be taxed and allowed in the first instance by the clerk, upon two days' notice by either party, and inserted in the judgment. The disbursements shall be stated in detail and verified by affidavit, which shall be filed, and a copy of such statement and affidavit shall be served with the notice. The party objecting to any item shall specify in writing the ground thereof, and in case of appeal the same shall be certified to the court by the clerk; and the appeal shall be heard upon eight days' notice, and determined upon the objections so certified, and no other. (5505)

1. Time—Ordinarily costs are taxed before the entry of judgment but this is not indispensable. Costs properly constitute a part of the judgment, and, unless they are waived or released by the prevailing party, he is entitled to have them included in the judgment as of right. A judgment is not perfected until the costs are inserted (45-517, 48+404). And hence the time to appeal does not run against the defeated party until they are properly taxed and included in the judgment (37-461, 35+270; 81-228, 83+836). But as respects the lien or validity of a judgment the omission to include costs or the insertion therein of costs taxed without notice is an irregularity merely. A party may enter and docket his judgment so as to secure a lien without waiting to give notice of taxation of costs, and, on a re-taxation, the record may be amended, and, if the costs are reduced, the amount of such reduction may be indorsed on the execution if previously issued (37-461, 35+270; 16-38, 24; 45-517, 48+404).

2. Notice—If a party has appeared he is entitled to notice although he is in default for want of an answer (61-534, 63+1111). A judgment for costs entered without notice or on insufficient notice is merely irregular and subject to correction on motion (52-6, 53+1016; 64-46, 65+931).

3. Affidavit of disbursements—A party must show by his affidavit that disbursements claimed are properly taxed. The affidavit should state the number of days' attendance of each witness and the dates (2-67, 55). If he claims traveling fees for witnesses his affidavit should state the place of residence of each witness, the number of miles they respectively traveled as such witnesses for the purpose of going from such place of residence to the place of trial and returning therefrom (35-297, 28+921; 54-32, 55+815). If witnesses are in attendance but not sworn an affidavit merely stating that they were "necessary and material" is insufficient. The affidavit must show the necessity of having them in attendance. It may be made after objection is raised (32-53, 19+81; 76-319, 79+170; 104+713).

4. Specification of objections—17-32, 16; 76-48, 78+881; 14-286, 214; 82-112, 84+732).

5. Appeal to district court—When costs are allowable in the discretion of the court the court exercises its discretion in that regard when it affirms on appeal the taxation of such costs by the clerk (8-451, 401). Where the clerk improperly taxes costs which are only taxable on application to the court the irregularity is cured by the subsequent affirmation of the taxation by the court on appeal (23-458). In passing on the propriety of disbursements the court is not confined to the affidavits presented but may act on its own knowledge of the proceedings (57-443, 451, 59+534)—See Rule 44, District Court.

4346. On motion, demurrer, etc.—Costs may be allowed on motion, demurrer, or appeal from taxation of costs, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute, or directed to abide the event of the action. (5506)

Costs allowed a party on motion may be included in the costs allowed on entry of final judgment (24-450; 80-146, 83+1118). On motion for new trial (26-104, 1+824; 6-508, 353; 4-553, 435). On motion to open a judgment (37-128, 33+546). Held imposed as terms and not as costs under this section (77-543, 80+700).

4347. Against guardian of infant plaintiff—When costs or disbursements are adjudged against an infant plaintiff, the guardian by whom he appears in the action shall be responsible for them, and judgment therefor may be entered against both infant and guardian. (5507)

4348. To defendant after tender—Whenever, in an action on contract, express or implied, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for the plaintiff the amount so tendered, and the allegation is found true, the defendant shall be entitled to costs and disbursements. (5508)

4349. Chargeable on estate or fund—In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or person expressly authorized by statute, costs and disbursements may be recovered as in an action by and against a person prosecuting or defending in his own right. But the same shall be made chargeable only upon the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in the action; but no costs or disbursements are recoverable against an executor or administrator unless it appears that the demand was first presented to him, verified by oath, and payment demanded. (5509)

Liability of administrator (29-295, 13+131).

4350. Relator entitled to, and liable for, costs—Whenever an action or proceeding is instituted in the name of the state on the relation or petition of any citizen, such relator or petitioner is entitled to, and liable for, costs and disbursements in the same cases and to the same extent as if such action or proceeding had been instituted in his own name. (5510)

67-51, 69+609, 908.

4351. On appeal from justice—In civil actions tried before a justice of the peace, if the plaintiff appeals from a judgment in his favor, and does not recover in the appellate court a greater sum as damages than in the former trial, the defendant shall be entitled to costs and disbursements; if the defendant appeals, and the amount of plaintiff's recovery before the justice is reduced one-half or more, the defendant shall be entitled to costs and disbursements. In all other cases of appeal from the judgment of a justice in such actions, the successful party shall be entitled to costs and disbursements. In comparing the sums recovered by the two judgments, the interest accrued on plaintiff's demand after the first judgment shall not be considered. (5511, 5512)

27-29, 6+407; 29-86, 12+146; 51-341, 53+644; 55-157, 56+592; 78-520, 81+520; 80-438, 83+383; 81-381, 84+124.

4352. In criminal proceedings—In all criminal actions, upon conviction of defendant, in addition to the punishment prescribed and as a part of the sentence, the court may adjudge that defendant shall pay the whole or any part of the disbursements of the prosecution; and payment thereof may be enforced in the same manner as the sentence, or by execution against property. When collected, such disbursements shall be paid into the treasury of the county where conviction was had, but this shall not interfere with the payment of officers', witnesses', or jurors' fees. (5513, 5514)

68-509, 71+687; 84-267, 87+846; 90-348, 97+101.

4353. Supreme court—Costs and disbursements—Costs in the supreme court may be allowed, in the discretion of the court, as follows:

1. To the prevailing party, upon a judgment in his favor on the merits, not exceeding twenty-five dollars.

2. Upon dismissal, not exceeding ten dollars.

In all cases the prevailing party shall be allowed his disbursements necessarily paid or incurred. (5515, 5516)

1. **Statutory**—49-57, 87, 51+629, 52+26. See 46-162, 48+770.

2. **No costs to defeated party**—49-57, 88, 51+629, 52+26.

3. **Who is prevailing party**—When the court reverses, overrules or modifies the judgment or order from which the appeal is taken the appellant is the prevailing party and entitled to costs in the absence of special circumstances rendering the appeal improper (2-323, 277; 1-401, 289; 1-134, 110; 8-202, 172; 30-132, 14+578; 46-548, 49+323, 646). Where several plaintiffs or defendants join in an appeal and the judgment or order is modified as to some of the appellants and affirmed as to others, the respondent is entitled to costs and disbursements against those as to whom it is affirmed and those as to whom it is modified are entitled to costs and disbursements against the respondent (30-132, 14+578). When judgment is in favor of some and against other parties (49-57, 86, 51+629, 52+26).

4. **Several prevailing parties**—Where there are several prevailing parties each is entitled to costs except where several appear by the same attorney or attorneys, in which case but one bill can be allowed (51-364, 53+653, 1017).

5. **Appeal from judgment and order**—47-399, 50+360.

6. **Bastardy proceedings**—73-101, 75+893.

7. **Violations of city ordinances**—50-128, 52+387, 531.

8. **Discretionary—When not allowed**—Costs are not a matter of right but rest in the discretion of the court. They are not allowed if the appeal was improper under the circumstances. They have been withheld where a case was improperly set down for oral argument in violation of Rule 15 (63-110, 65+257; 79-464, 82+1118; 74-337, 77+231; 74-402, 77+220; 73-368, 76+47; 78-520, 81+520; 80-331, 83+189; 84-372, 87+940; 72-332, 75+591; 86-155, 90+382); where paper book and brief were not filed three days before the argument as required by Rule 9 (61-63, 63+245; 65-347, 68+47); where the amount involved was small and the prevailing party secured a reversal mainly by having induced the court to exclude competent evidence (61-109, 63+252); where an order overruling a demurrer was reversed but admissions were made at the argument showing a liability (62-141, 64+148; 63-110, 65+257); where an order sustaining a demurrer was reversed but there was little merit in the cause of action set up in the complaint (61-528, 63+1114); where an order denying a new trial was affirmed but with directions to the lower court to allow the complaint to be amended to conform to the facts proved, there having been no application for leave to amend on the trial, although objection to the variance was made by the defendant (64-505, 67+637); where there was no substantial error in the judgment (1-134, 110); where an order overruling a demurrer was reversed but it was considered that the demurrer was unnecessary for the protection of any of defendant's substantial rights (62-3, 63+1038); where the court was of the opinion that the litigation was needless and would prove fruitless (62-372, 64+927); where the case went off on an important question of practice not only new but difficult (28-381, 10+209); where the only question involved was the right to costs in the court below and each party improperly proceeded with the appeal instead of applying promptly to have it dismissed (60-501, 62+1133); where the amount involved was less than ten dollars and no important questions were involved (74-20, 76+949; 62-372, 64+927; 40-415, 42+289); where the only error in the judgment was the inclusion of certain trifling costs (76-319, 79+170); where an order was affirmed on grounds not urged by respondent (84-353, 87+944; 47-250, 50+77); where the decision went off on a point not clearly made by the appellant and was probably not considered by the trial court (80-488, 83+446); where the appellant failed to call the attention of the trial court to the fact that the damages assessed by the court were more than authorized by the complaint (72-76, 74+1024); where the defeated party was justified in relying on a former decision of the court (41-25, 42+548); where the appeal was on a trifling question of pleading (89-442, 95+306).

9. **Disbursements allowable**—The appellant, if the prevailing party, is entitled to tax disbursements for certifying and printing such matter as is reasonably necessary to present his assignments of error, although he does not prevail on all of them (88-485, 93+896). Where a bill of exceptions or case is prepared for and used on a motion for a new trial which is granted, with costs of motion, the expense of preparing the same is not taxable as a disbursement in the supreme court on an appeal from the order granting a new trial. But where a bill of exceptions or case is prepared exclusively for use on appeal and is in fact so used the expenses incurred may be taxed in the supreme court (51-249, 53+547, 653; 27-280, 6+791, 7+144; 92-415, 100+104, 362). When several cases, involving precisely the same question, are briefed and argued together as one and by the same counsel, on records differing merely in names, dates and amounts, counsel for appellant is bound to ask the court to dispense with the paper book in each

case and the expense for printing only one will be allowed (56-424, 57+1066, 59+191; 88-4, 92+464). The expense of printing unnecessary and immaterial matter will not be allowed (88-485, 93+896; 4-552, 434; 46-548, 49+323, 646; 45-471, 48+1, 526; 65-439, 68+72). Unless papers are printed as required by rule of court the cost of printing them cannot be recovered (5-522, 416). Objection that an excessive price was paid for printing the paper book will not be considered in the absence of an affidavit (45-471, 48+1, 526). If a brief contains improper reflections on the trial court the expense of printing will not be allowed (66-49, 68+462). 1903 c. 239 authorized the taxation by a prevailing appellant of such reasonable sum as may have been paid to a surety company for an appeal bond (92-415, 100+104, 362. See § 4528).

4354. Additional allowance—Costs, when paid—In an action for the recovery of money only, the court, if of opinion that the appeal was taken merely for delay, may allow plaintiff, in addition to costs and disbursements, not more than three per cent. of the judgment in the trial court. Except when otherwise ordered by the court, the losing party shall pay the costs and disbursements before he shall be entitled to a remittitur, or to proceed further in the trial court: Provided that, if it shall appear to the satisfaction of the court that he is unable to pay such costs in full, it shall grant a remittitur upon payment of the clerk's fees only, and thereupon he may proceed in the trial court. (5517)

Appeal for delay (40-394, 42+87; 55-414, 57+141; 51-343, 53+645; 57-140, 58+872). Payment as condition of remittitur (72-1, 80+366).

4355. Security for costs—When an action is begun in the district court by a plaintiff who is committed for a crime, or is a non-resident or a foreign corporation, or when such action is brought into the district court on appeal by defendant, such plaintiff shall file a bond to the clerk, before service of summons, or in case of appeal within five days after perfecting the same, in the sum of at least seventy-five dollars, conditioned for the payment of all costs and disbursements that may be adjudged against him. If, after the commencement of the action or the taking of an appeal, all parties plaintiff therein become non-residents, or the sureties on the bond remove from the state or become insolvent, the court, on motion, may require such bond, or an additional bond, to be filed, conditioned as aforesaid; but this section shall not apply to any action brought for the recovery of wages or claims for personal services. (5518; '99 c. 186)

4356. Neglect to file security—Prosecution of bond—Whenever any party shall commence an action without filing a bond, or fail to provide an additional bond when so required, the court, on motion of defendant, may order a stay of all proceedings in such action, or a dismissal thereof at the cost of the attorney commencing the same. Whenever judgment is entered against any party who has given security as required, and the costs and disbursements adjudged against him remain unpaid in whole or in part for ten days, such bond may be put in suit and prosecuted to final judgment. (5519, 5520)

43-295, 45+444.

CHAPTER 80

APPEALS IN CIVIL ACTIONS

4357. Appeal from district court—A judgment or order in a civil action in a district court may be removed to the supreme court by appeal, as provided in this chapter, and not otherwise. (6132)

Application to special proceedings (12-388, 269; 24-313; 35-404, 29+161; 91-404, 98+98; 27-14, 6+401).

4358. Title of action on appeal—The party appealing shall be known as the appellant, and the adverse party as the respondent; but the title of the action shall not be changed in consequence of the appeal. (6133)

4359. Notice of appeal—Service—Effect—An appeal shall be made by the service of a notice in writing on the adverse party, and on the clerk with